RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN WATER ACT

Rapanos v. United States,
126 S. Ct. 2208 (2006)

In the noted case, a plurality of the United States Supreme Court remanded to the United States Court of Appeals for the Sixth Circuit petitioners Rapanos' and Carabells' consolidated cases for further consideration under the Supreme Court's interpretation of "waters of the United States." This recent development will only discuss Justice Scalia's plurality opinion.

The United States brought civil enforcement proceedings against petitioner John Rapanos for discharging fill into wetlands. Rapanos v. United States, 126 S. Ct. 2208 (2006). Both the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit held that the wetlands fell under federal Clean Water Act (CWA) jurisdiction. Similarly, petitioners Carabells were denied a permit to deposit fill materials into wetlands. *Id.* at 2208. After filing suit to contest this denial, the Carabells received judgments from the district court and the Sixth Circuit holding that their wetland property fell under federal CWA jurisdiction because it was "adjacent" to navigable waters. The Supreme Court granted certiorari and consolidated the *Rapanos* and *Carabells* cases to determine whether the four subject wetlands, "which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute[d] 'waters of the United States'" under the CWA, and if so, whether the CWA is constitutional. *Id.* at 2220.

In April 1989, Rapanos backfilled fifty-four acres of wetlands. *Id.* at 2214. While the soil on his land periodically became saturated, the nearest body of navigable water was eleven to twenty miles away. Rapanos deposited the fill at three locations across his property. Each location drained into either man-made drains or surface flows that reached rivers or streams that then emptied into rivers. After learning of the backfilling, U.S. regulators notified Rapanos that he had deposited fill onto wetlands that constituted "waters of the United States" under 33 U.S.C. § 1362(7) (2000) and thus were illegally backfilled in the absence of a permit. The Carabells sought a permit to deposit fill material into wetlands positioned one mile from a lake. The wetlands were bordered

by a four-foot wide man-made impermeable berm that separated them from a man-made ditch. The berm, however, did not block occasional overflow from the wetlands into the ditch. This ditch emptied into a drain that connected to a creek which, in turn, emptied into the lake. The Sixth Circuit eventually found that both petitioners could not legally deposit fill into their wetlands because they constituted "waters of the United States" under the CWA. *Id.*

The CWA provides that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Further, "the discharge of a pollutant" includes "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The CWA defines the term "pollutants" to include "dredged spoil, . . . rock, [and] sand." *Id.* § 1362(6). "Navigable waters" are "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Thus, in response to Rapanos filling wetlands and the Carabells seeking to fill wetlands, the United States asserted that such activity was unlawful in the absence of a permit from the Army Corps of Engineers (Corps) because such activity involved "navigable waters." *Id.* § 1344(a), (d).

The Plurality began addressing the CWA meaning of "navigable waters" by analyzing the historical interpretation of the phrase. Relying on *The Daniel Ball*, 77 U.S. 557, 563 (1871), the Plurality noted that prior to the CWA, "navigable waters of the United States" referred to water that was "navigable in fact." *Rapanos*, 126 S. Ct. at 2220. But, from the passing of the CWA to the case at hand, the Corps gradually expanded the scope of the phrase. By 2004, the Corps had expanded the traditional definition to include, inter alia, interstate wetlands, intrastate lakes, rivers, streams, mudflats, and prairie potholes. 33 C.F.R. § 328.3(a)(1) (2004). Additionally, the regulations included tributaries and wetlands adjacent to the aforementioned waters. *Id.* § 328.3(a)(7). The regulations defined "adjacent" as "bordering, contiguous [to], or neighboring" and expressly included wetlands separated from U.S. waters by man-made barriers, natural berms, dunes and similar structures. *Id.* § 328.3(c). In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985), the Supreme Court upheld the Corps' regulations by holding that "the waters of the United States" include wetlands that "abut" traditional navigable waters.

Following *Riverside Bayview*, the Corps further expanded the meaning of "navigable waters" to include "ephemeral streams" and "drainage ditches" with a perceptible "ordinary high water mark." 33 C.F.R. § 328.3(e). However, the Supreme Court reigned in the Corps' interpretation in *Solid Waste Agency of Northern Cook County*

(*SWANCC*), 531 U.S. 159, 167 (2001), by holding that "nonnavigable, isolated, intrastate waters" that do not "actually abut[] on a navigable waterway" do not constitute "waters of the United States." Still, the Corps did not amend their regulations regarding the meaning of "waters of the United States," and lower courts continued to broadly interpret the phrase. *Rapanos*, 126 S. Ct. at 2217.

After reviewing the historical interpretation of "waters of the United States," the Plurality went on to review (1) the CWA's use of the phrase "waters of the United States," (2) the dictionary definition of "water," (3) the commonsense use of "water," (4) the traditional understanding of the aforementioned phrase, (5) the CWA's categorization of "point source" pollutions (including channels/conduits) as distinct from "navigable waters," (6) the CWA's stated policy, (7) canons of construction, and (8) limitations on Congress's commerce power.

First, the CWA specifically defines "navigable waters" as "the waters of the United States" and provides for state jurisdiction over particular types of navigable waters. 33 U.S.C. §§ 1362(7), 1344(g)(1). Thereby, the Plurality determined that the CWA definition of "navigable waters" is narrower than the traditional definition (navigable in fact). Furthermore, the CWA text would not use "the" before "waters" if it was purely referring to water in a general form. Following *Webster's New International Dictionary*, "the waters" refers to "streams and bodies forming geographical features such as oceans, rivers [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." *Rapanos*, 126 S. Ct. at 2225 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)). Thus, the Plurality concluded that "the waters" only refers to "relatively permanent, standing or flowing bodies of water." *Id.* at 2220-21. Without further support, the Plurality stated that this dictionary definition matches the commonsense interpretation of "the waters." *Id.* at 2222.

The Plurality then found that the CWA's inclusion of the traditional phrase "navigable waters" adds support to an interpretation that excludes non-permanent bodies of water. *Id.* As stated in *SWANCC*, "it is one thing to give a word limited effect and quite another to give it no effect whatever." 531 U.S. at 172. In conjunction with the Plurality's earlier statement that "navigable waters" goes beyond the traditional interpretation, the term thus is not so altered as to include "ephemeral waters." *Rapanos*, 126 S. ct. at 2222.

Next, the Plurality highlighted the fact that the CWA individually defines "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A).

Because "point source" includes ditches, channels, and conduits, there would be no need to expressly state that adding point source pollutants to navigable waters constitutes a discharge, if ditches and conduits were in fact "navigable waters." *Rapanos*, 126 S. Ct. at 2223.

Further, the Plurality asserted that a broad interpretation of "navigable waters" would violate the stated policy of the CWA to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.* at 2223 (quoting 33 U.S.C. § 1251(b)). Under the United States' position, the Corps has the rights to control an expansive amount of land. Thus, the Plurality concluded that Congress could not have intended for "waters of the United States" to be interpreted broadly. *Id.* at 2224.

According to the Plurality's application of the canons of construction, the Corps' interpretation of the CWA is incorrect because ambiguous terms are to be interpreted as to least impinge upon states' rights. Also, the ambiguity around the meaning of "waters of the United States" necessitates a narrowed interpretation to avert constitutional invalidation. *Id.* Thereby, the Plurality held that the "only plausible interpretation" of the "waters of the United States" encompasses only "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers [and] lakes.'" *Id.* at 2225 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954) ("[C]hannels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall" are expressly not included in the Plurality's interpretation of "waters of the United States.")).

After expounding upon the definition of "waters of the United States," the Plurality continued on to define when a wetland is "adjacent" to a "water of the United States," and thus, is under CWA jurisdiction. *Id.* at 2226. First, the Plurality acknowledged the ambiguity in determining when a water body begins and ends. *Id.* at 2225. Because of this difficulty, the Supreme Court previously reasoned in *Riverside Bayview* that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [CWA]." *Id.* (quoting *Riverside Bayview Homes*, 474 U.S. at 134). Later, the Supreme Court refined this definition and labeled the beginning and ending of wetlands and navigable waters as a "nexus" that

is necessitated out of ambiguity and not ecological considerations. *Id.* at 2226 (citing *SWANCC*, 531 U.S. at 167, 171). Following *SWANCC*, the Plurality thus held in *Rapanos* that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are adjacent to such waters and covered by the [CWA]." *Id.* Because this case dealt strictly with the deposit of fill into wetlands, the Plurality stressed that the decision will not significantly lessen CWA jurisdiction over the permitting process for contaminants that do flow downstream.

Because the plurality found that the Sixth Circuit improperly interpreted the meaning of the "waters of the United States," both petitioner Rapanos' and the Carabells' claims were remanded for consideration under the Supreme Court's holding. However, Justice Kennedy's concurrence rejected the plurality's "continuous surface connection" text and remanded, advocating a "significant nexus" test, instead. Thus, the Sixth Circuit and other courts will have to determine which test to adopt.

Gina Schilmoeller

S.D. Warren Co. v.
Maine Board of Environmental Protection,
126 S. Ct. 1843 (2006)

The United States Supreme Court found that releases from hydroelectric dams raise the potential of discharge, thus requiring the operator to obtain state certifications under section 401 of the Clean Water Act (CWA) so that water protection laws will not be violated. The petitioner, S.D. Warren Company (Warren) sought to renew federal licenses for five of its hydroelectric dams. Although Warren maintained that dams do not create discharges subject to section 401, Warren applied to the Maine Department of Environmental Protection (DEP) for section 401 state water quality certifications, but filed its application under protest. The Federal Energy Regulatory Commission (FERC) licensed the five dams subject to DEP's conditions. Warren exhausted its administrative remedies and filed suit in state court, challenging DEP's requirement that Warren obtain state water quality certifications under CWA section 404. The state court agreed with the administrative decision that dams result in discharges, and the Supreme Judicial Court of Maine affirmed.

Over thirty years ago, Congress enacted a provision of the CWA that requires a license for activity that could cause a discharge into navigable waters. To garner a license, the potential discharger must obtain certification from the state where the discharge may originate, stating that it will not violate certain water quality standards. Under the CWA, this certification shall set forth effluent limitations, monitoring requirements, other state law requirements, and this certification can be a condition on any federal license or permit subject to these provisions of the CWA. FERC requires a section 401 certification before granting a license under the Federal Power Act.

The key to interpreting whether a section 401 certification is required turns on the interpretation of the word "discharge." The CWA does not provide a definition for discharge, but provides that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1847 (2006) (citing 33 U.S.C. § 1362(16) (2000)). Because discharge is not defined in the CWA, the Court assumed the definition was broader and defined discharge according to "its ordinary or natural meaning." *Id.* (citing FDIC v. Meyer, 510 U.S. 471, 476 (1994)).

First, the Court looked at the ordinary meaning of "discharge," which according to *Webster's New International Dictionary* means "flowing or issuing out." *Id.* All members of the Court accepted this definition of discharge in the case *PUD No. 1 of Jefferson City v. Washington Department of Ecology*. *Id.* at 1848 (citing 511 U.S. 700 (1994)). The Supreme Court has not been the only entity to accept the ordinary meaning of discharge; agencies like FERC and the United States Environmental Protection Agency (EPA) have accepted the plain meaning. *Id.* However, since neither EPA nor FERC has formally set out the definition of discharge, the Court did not defer to the agencies' definition. *Id.* Despite this, looking at EPA's and FERC's usage of discharge does confirm the Court's everyday understanding of the term. *Id.* at 1849.

Then, the Court refuted Warren's arguments to not apply the ordinary meaning of the term "discharge" to CWA section 401. Warren first argued that the interpretive canon, *nosciture a sociis*, which means that words grouped together are assumed to have a related meaning, applied to CWA section 502(16). *Id.* (citing Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990)). Warren claimed that since the term "discharge," standing alone, requires the addition of something to the water that is being discharged, and since nothing has been added to the

water when it is released from the dams, the water flowing through the turbines does not qualify as a discharge into the water. *Id.* The Court did not accept Warren's argument because pairing a broad statutory term with a more narrow term does not shrink the meaning of the broad term. *Id.*

Next, Warren argued that the Court should follow the precedent established by *South Florida Water Management District v. Miccosukee Tribe* and reject the plain meaning of "discharge." *Id.* at 1850 (citing 541 U.S. 95 (2004)). The Court, however, did not accept that argument because *Miccosukee* dealt with CWA section 402, not section 401. *Id.* CWA section 402 is different because section 402 established the National Pollutant Discharge Elimination System, which requires a permit for the "'discharge of any pollutant' into the navigable waters of the United States." *Id.* (citing 33 U.S.C. § 1342(a)). The triggering statutory language in section 402 is not "discharge" alone, but is "discharge of a pollutant," which has a narrower meaning because it requires the "addition" of a pollutant into the water. *Id.* (citing 33 U.S.C. § 1362(12)).

Finally, Warren argued that the legislative history of the Act requires abandonment of the ordinary definition of discharge. *Id.* at 1851. The Court dismissed this argument because Warren's characterization of legislative intent was merely speculative. *Id.*

Looking at the broad intent of the CWA as a whole, the Court found further support for applying the plain meaning of the word discharge to section 401. Congress intended the CWA to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." *Id.* at 1852 (quoting 33 U.S.C. § 1251(a)). "State certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . . ." *Id.* at 1853. Applying the ordinary meaning of the word discharge falls within the intent of Congress to give states authority to curb a broad range of pollution. *Id.*

Here the Supreme Court refused to stray from the ordinary meaning of the word discharge, thus finding that "discharge" under CWA section 401 includes water that is released from a hydroelectric dam. Warren failed to convince the Court that a specialized definition of "discharge," apart from its ordinary meaning, should be applied to CWA section 401. Furthermore, the Court looked at the general intent of Congress in enacting the CWA and found that Congress intended to give the states broad authority to enforce against a large range of pollution. Following this intent, the Court concluded that under CWA section 401

hydroelectric dam operators are required to have state certification that water protection laws will not be violated.

Kate Iannuzzi

Friends of the Earth, Inc. v. Environmental Protection Agency, 446 F.3d 140 (D.C. Cir. 2006)

In *Friends of the Earth, Inc. v. Environmental Protection Agency*, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision that the Environmental Protection Agency (EPA) could disregard the plain meaning of the term "daily." 446 F.3d 140, 142 (D.C. Cir. 2006). The D.C. Circuit held that the EPA could not interpret the word "daily" in the Clean Water Act (CWA) to mean anything other than every day.

Under the CWA, states are required to establish a total maximum daily load (TMDL) "for those pollutants which the Administrator identifies . . . as suitable for such calculation," for bodies of water that do not meet the applicable water quality standards. *Id.* at 143. The load is "established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between the effluent limitations and water quality." *Id.* The EPA issued, and has not amended, a 1978 regulation stating that all pollutants can be included in the calculation of TMDLs. The EPA approves the TMDLs, which are then "incorporated into permits allocating effluent discharges among all pollutions sources, including point sources and non-point sources." *Id.* Under the plan, the body of water will meet its water quality standards if the pollutions loads are below the TMDLs.

The Anacostia River flows "from Maryland through the northeast and southeast quadrants of Washington, D.C." *Id.* The river does not meet the water quality standards set under the CWA. The river "contains many biochemical pollutants that consume oxygen," so the level of dissolved oxygen in the river is below the water quality standard and has endangered the river's aquatic life. *Id.* In addition, "the river is murkier than the applicable turbidity standard," which has stunted plant growth and impaired recreational use. *Id.* The noted case arose from these two violations of "the Anacostia's key water quality standards." *Id.* In order to remedy the violations, "EPA approved one TMDL limiting the annual discharge of oxygen-depleting pollutants, and a second limiting the seasonal discharge of pollutants contributing to turbidity." *Id.*

Friends of the Earth argued that the CWA required establishing "'total maximum daily loads,' not seasonal or annual loads." *Id.* However, the district court held that there is nothing in the CWA, which requires "EPA to calculate only daily TMDLs." *Id.* at 144. The district court affirmed EPA's approval of the TMDLs, stating that the approval was not arbitrary or capricious.

Since the EPA implements the CWA, a court reviews the agency's interpretation of the phrase "total maximum daily load" deferentially as outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). Applying "*Chevron* deference," if Congress has unambiguously addressed the question at issue, then the court has to follow Congress's resolution of the issue. *Id.* at 842-43. However, if Congress is silent or ambiguous on the issue, the agency's interpretation of the statute is controlling unless the interpretation is ambiguous, capricious, or contrary to the statute.

The CWA requires states to establish TMDLs for waters that do not achieve the water quality standards. *Friends of the Earth*, 446 F.3d at 144. In addition, the EPA has stated that TMDLs can be calculated for all pollutants. Therefore, the D.C. Circuit determined that nothing in the language of the CWA allows the EPA to approve TMDLs with "total 'seasonal' or 'annual' loads." *Id.*

Furthermore, the D.C. Circuit concluded that the word daily is not ambiguous and means every day. The D.C. Circuit stated that Congress could have provided for seasonal or annual loads if that was their intent, but Congress had specifically used the word "daily" instead of "seasonal" or "annual" in the phrase "total maximum daily loads."

Next, the D.C. Circuit rejected EPA's argument that the Court has to read the phrase "total maximum daily loads" in context. In the statute, TMDLs are "established at a level necessary to implement the applicable water quality standards." *Id.* at 145. Therefore, the EPA argued that since Congress elaborated on the method for establishing a TMDL, it indicated that Congress did not use "daily" as the exclusive method for creating a TMDL. However, the Court stated that the statute, as written, establishes two conditions. The two conditions are "daily loads" and "applicable water quality standards." The D.C. Circuit concluded that when a statute has two requirements, the EPA could not disregard one.

Next, the EPA argued that it could not regulate some pollutants using daily load regulations. Some pollutants do not have an immediate effect on water quality but, instead, cause environmental damage over a longer period. Therefore, the EPA argued for a "more flexible understanding of 'daily'" since some bodies of water can "tolerate large

one-day discharges of certain pollutants without violating water quality standards or causing undue environmental harm, so long as seasonal or annual discharges remain relatively low." *Id.*

However, the D.C. Circuit stated that the EPA should address the argument to Congress. Since Congress has clearly determined the period covered by "total maximum load" by using the word "daily," the EPA cannot argue that its preferred method is better policy in order to evade congressional intent. In addition, the D.C. Circuit stated that the EPA would have a better argument if the agency had evidence that there was a conflict between the "daily load limits" and implementation of "the applicable water quality standards" for some pollutants.

Furthermore, the D.C. Circuit concluded that the EPA had created the problem of calculating daily loads for all pollutants. Under the CWA, the state only has to establish TMDLs for "'suitable' pollutants." *Id.* at 146. Even though the 1978 EPA regulation stated that TMDLs could be calculated for all pollutants, at oral argument, the EPA acknowledged that nothing prevented the agency from changing its position on the matter. The D.C. Circuit stated that EPA could change its 1978 regulation so that not all pollutants are suitable for TMDL calculations, rather than interpreting "daily" to mean something other than every day.

The D.C. Circuit also rejected EPA's argument that the D.C. Circuit should adopt the United States Court of Appeals for the Second Circuit's reading of "daily" from *Natural Resources Defense Council, Inc. v. Muszynski*. 268 F.3d 91 (2d Cir. 2001). In *Muszynski*, the Second Circuit held that "daily" does not mean every day, and effective regulation of some pollutants may occur best at some other periodic measurement. *Id.* at 99. However, the D.C. Circuit rejected the Second Circuit's reasoning and stated that an agency must meet an exceptionally high burden in order to show that a literal interpretation of a statute is absurd. *Friends of the Earth*, 446 F.3d at 146. To avoid the literal interpretation of the CWA, the EPA has to show that either, "as a matter of historical fact," Congress did not mean what it said, or "as a matter of logic and statutory structure," Congress could not have meant what it said. The EPA did not make either of these showings since it conceded that establishing daily loads is sensible for many pollutants and, therefore, logical for Congress to require daily loads.

The D.C. Circuit next rejected arguments by the intervenor, District of Columbia Water and Sewer Authority (WASA). *Id.* at 147. In older municipalities, there is a "combined sewer system" so that the same pipes carry storm water and sewage to the same treatment plants. *Id.* at 146. In a heavy storm, the system overflows, spilling raw sewage "into

nearby waters, including the Anacostia River." *Id.* Congress tried to address the combined sewer problem by amending the CWA so that a permit issued for discharges "from a municipal combined storm and sanitary sewer" has to meet the requirements of the "Combined Sewer Overflow Control Policy [CSO Policy]." *Id.* Congress made the CSO Policy flexible and site specific so that states could tailor pollution controls to local situations. WASA argued that the D.C. Circuit had to interpret the word "daily" in light of the tension created by the "CSO Policy's flexible approach, and the rigid mandate imposed by daily loads." *Id.* at 147.

The D.C. Circuit rejected WASA's argument based on three reasons. First, the D.C. Circuit stated that it could only use the legislative history from the 92d Congress to interpret the word "daily." In general, courts should give little weight to "post-enactment legislative history" in interpreting the congressional intent for the Congress that enacted the legislation. *Id.* Second, the D.C. Circuit stated that there is only tension between the flexibility of the CSO Policy and the rigidity of daily loads if the daily loads are "set so low that any storm-event discharge would violate them." *Id.* There was no evidence in the record to support this assumption. Finally, even if the record supported the assumption, the D.C. Circuit stated that "nothing in the CSO Policy" allowed the Court to interpret "daily" to mean something besides every day . The CSO Policy stated that following the policy must "result in compliance with the requirements of the CWA," and one requirement for the CWA is the establishment of "daily loads for waters failing to meet water quality standards." *Id.*

The D.C. Circuit was correct in its determination that the word "daily," as used in the calculation of "total maximum daily loads," means every day. The total maximum daily loads are set for bodies of water that fail to meet the applicable water quality standards. Since the water quality in the bodies of water has already failed to meet applicable standards, setting seasonal or annual limits on discharges of pollutants would not accomplish the goal of achieving the applicable water quality standards.

In addition, the plain meaning of the statute requires calculating daily loads. The word "daily" unambiguously means every day and requires calculating TMDLs every day. Therefore, applying "*Chevron* deference," because Congress has unambiguously addressed the issue, the EPA cannot offer its own interpretation of the meaning of "daily."

Finally, the D.C. Circuit was correct in its decision that the EPA could have specifically fixed the problem of classifying all pollutants as

suitable for daily calculation. The EPA could have changed the 1978 regulation subjecting all pollutants to a daily calculation, the EPA can change the 1978 regulation. The EPA has the authority to deem some pollutants as being suitable for calculation using a seasonal or annual load limit. In addition, since the EPA issued the 1978 regulation, the EPA could have easily changed the 1978 regulation. Congress did not specifically address which pollutants were suitable for daily calculations in the CWA, so the EPA could address this issue with its own interpretation.

Congress enacted the CWA for the purpose of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc., 484 U.S. 49, 52 (1987). The D.C. Circuit was correct in interpreting "daily" to mean every day since giving a different meaning to "daily" would thwart Congress's purpose in enacting the CWA.

Shirley Y. Ng

II. CLEAN WATER ACT AND OIL POLLUTION ACT

United States v. Chevron Pipe Line Co.,
437 F. Supp. 2d 605 (N.D. Tex. 2006)

In late August of 2000, a six-inch pipeline operated by Chevron and located near Snyder, Texas, failed and discharged approximately 3,000 barrels, 126,000 gallons of crude oil. This oil migrated to an unnamed channel or tributary of Ennis Creek which, according to all sources, is an "intermittent" stream, meaning a stream that is generally dry in the absence of significant rainfall. The spilled oil spread from the original site approximately 100 feet up gradient and 500 feet down gradient. Chevron attempted to remedy the situation by performing cleanup in the spill area, including soil excavation and groundwater remediation. At the time the noted case was decided debate remained as to the completion of this cleanup. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006).

The United States sought to impose civil fines upon Chevron for the spill. Chevron responded by moving for summary judgment, arguing that that the United States District Court for the Northern District of Texas lacked the subject matter jurisdiction to impose fines under the Clean Water Act (CWA) as amended by Oil Pollution Act (OPA) because the OPA requires "navigable waters" to impose liability. The OPA holds a party strictly liable for discharging oil into "navigable water or

adjoining shorelines." 33 U.S.C. § 2702(a) (2000). The OPA uninstructively defines "navigable waters" as "the waters of the United States, including the territorial sea." *Id.* § 2701(21). The CWA is equally ambiguous, defining "navigable waters" as "waters of the United States." *Id.* § 1362(7).

Chevron's argument can be distilled to the assertion that "it seems self evident that the Clean Water Act does not apply in the absence of water." *Chevron Pipe Line*, 437 F. Supp. 2d at 610 (quoting Def. Br. 7.). Though that statement is an oversimplification, the district court ultimately agreed with the tenets of Chevron's argument and granted its motion for summary judgment.

In evaluating whether it has subject matter jurisdiction, a court will generally hear evidence to determine if the case falls under its authority; however, if the issues of fact are as important to the subject matter jurisdiction as the claim on the merits, the court assumes jurisdiction and proceeds on the merits. *Id.* at 608 n.5 (citing Montez v. Dep't of Navy, 392 F.3d 147, 150 (5th Cir. 2004)). Finding the basis of jurisdiction and the merits to be intertwined, the *Chevron Pipe Line* court accordingly proceeded to hear the merits of the case. Chevron maintained that the channel or tributary where the spill pooled contained no flowing surface water from August through early October of 2000, and therefore, did not qualify as a "navigable water" at the time of the spill. The United States asserted that "during times of flow," there is unbroken surface water linking the dry channel/tributary to Ennis Creek which ultimately leads to the Brazos River. *Id.* at 611. The United States claimed that the regulatory definition of tributaries promulgated under the CWA covers tributaries, whether or not they are navigable, because the CWA governs the "geographical reach" of programs that prevent or eliminate pollution from U.S. waters. *Id.* at 610. 40 C.F.R. section 300.5(d) (2004) provides the regulatory definition of "navigable waters" stating that this "definition covers all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'"

The United States further argued that Chevron was trying to restrict the term "navigable waters" to mean waters that are "navigable-in-fact," when Congress intended the term to encompass all tributaries, even intermittent ones, that feed a navigable stream. *Id.* at 610. The court found that neither party disputed that, at best, the unnamed channel is navigable-in-fact only sporadically, that is, when there are sufficient rains. The Supreme Court has held that such sporadic commercial viability can prevent a stream from being deemed navigable-in-fact. *Id.* at 611 (citing United States v. Oregon, 295 U.S. 1, 23 (1935)). In

essence, Chevron argued for an isolated look at a particular waterway, rather than the broad and interconnected definition applied by the United States.

Since the United States Supreme Court issued its Byzantine decision in *Rapanos v. United States*, lower courts, academics, and the environmental community alike have waited to see how the decision would affect application of the Clean Water Act. Rapanos v. United States, 126 S. Ct. 2208 (2006) (Kennedy, J., concurring, Stevens, J., dissenting). The court in the noted case seemed to be as bewildered by the *Rapanos* decision as the rest of the legal community and, instead, decided to deal more specifically with *In re Needham*, a United States Court of Appeals for the Fifth Circuit decision that predated the *Rapanos* decision, and which the Supreme Court cited in *Rapanos*. *In re* Needham, 354 F.3d 340 (5th Cir. 2003). Although the United States argued that *Needham* was merely dicta, the *Chevron Pipe Line* court found it to be to be on point; *Needham* addressed "navigable-in-fact" waterways in finding for the United States under the OPA on that particular set of facts of an oil spill. However, in *Needham*, the Fifth Circuit also mentioned that the definition of "navigable water" put forward by the United States, that is, its broad regulatory definition found at 40 C.F.R. section 300.5(d) (2004), would be "unsustainable in certain circumstances." *Chevron Pipe Line*, 437 F. Supp. 2d at 611 (citing *Needham*, 354 F.3d at 344-45). The *Chevron Pipe Line* court found the facts of the noted case to fall under those "certain circumstances."

The *Chevron Pipe Line* court made special note of the fact that in his *Rapanos* dissent, Justice Stevens stated that *Needham* narrowly construed "waters of the United States" as used in the OPA. *Id.* at 611 (citing *Rapanos* at 2257). Regarding the OPA, the Fifth Circuit, in *Needham*, further stated in a footnote that "the CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *Chevron Pipe Line*, 437 F. Supp. 2d at 612 (quoting *Needham*, 354 F.3d at 345). With the CWA and the OPA thus limited, the Fifth Circuit in *Needham* went on to say that "the proper inquiry is whether . . . the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* (citing *Needham*, 354 F.3d at 346 (quoting Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001))).

What remains initially unclear is whether *Needham* and *Chevron Pipe Line*, which are both OPA cases, narrow the definition of "navigable

waters" for all CWA cases or merely CWA cases affected by OPA. The *Chevron Pipe Line* court's discussion of *Rapanos* indicates that it intends the former approach.

The *Chevron Pipe Line* court asserted that the Supreme Court Plurality in *Rapanos* "has stated that intermittent and ephemeral streams-streams whose flow is coming and going at intervals-are not covered." *Id.* (citing *Rapanos*, 126 S. Ct. at 2209 (Scalia, J., plurality)). The *Chevron Pipe Line* court further described *Rapanos*' plurality opinion as taking the constructivist viewpoint and applying a plain meaning to "waters of the United States" in the CWA. *Id.* at 613. That is, the definition encompasses "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features,'" not "channels through which water flows intermittently or ephemerally." *Id.* at 612 (citing *Rapanos*, 126 S. Ct. at 2224-25 (Scalia, J., plurality)). However, the *Chevron Pipe Line* court pointed out that the Supreme Court failed to reach a majority in *Rapanos* regarding the jurisdictional boundary of the CWA and that "regulated entities will now have to feel their way on case-by-case basis." *Id.* at 613 (citing *Rapanos*, 126 S. Ct. at 2236).

Justice Kennedy in his *Rapanos* concurrence suggested a "significant nexus" test, stating that "with the need to give the term 'navigable' some meaning . . . jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable water in the traditional sense." *Id.* (citing *Rapanos*, 126 S. Ct. at 2240 (Kennedy, J., concurring)).

It is evident that the *Chevron Pipe Line* court felt on much safer ground dispensing with this case on Fifth Circuit precedence, rather than on the disorder left by the Supreme Court in *Rapanos*; the court admitted that Kennedy's test "leaves no guidance on how to implement its vague, subjective centerpiece." *Id.* at 613. The court plainly asked "what is 'significant' and how is a 'nexus' determined?" *Id.*

The only concrete concept really left for the *Chevron Pipe Line* court to address was the term "navigable." The court held accordingly, "as a matter of law in this circuit, the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow." *Id.*

As previously stated, Chevron's spill occurred in an "intermittent stream," and the court found the appropriate inquiry according to the Fifth Circuit was whether "the site of the farthest traverse of the spill, is *navigable-in-fact* or adjacent to an open body of navigable water." *Id.* at

612. In ruling on summary judgment, the court examined whether there was a genuine issue of material fact in light of the Fifth Circuit inquiry. The court found that the dry channel was itself not "a navigable water of the United States." The court further stated that if the unnamed tributary/channel of Ennis Creek is not itself "a navigable water of the United States," then the United States had to prove that the spilled crude in fact reached such a waterway, and that evidence had to prove that there was "more than speculation that such an event could occur." *Id.* at 615. The court found that the United States failed to produce conclusive evidence and merely provided statistical rainfall data. The court admonished the United States, maintaining "it should not be too onerous a task for the United States to come forward with some actual, concrete evidence at the summary judgment stage." *Id.* at 615 n.14. Since the United States failed to provide such evidence, the court granted Chevron's motion for summary judgment, holding that discharged oil did not reach navigable waters of the United States and adjoining shorelines, as required by OPA.

The *Chevron Pipe Line* court noted that according to Scalia's *Rapanos* Plurality "navigable waters" "includes, at bare minimum, the ordinary presence of water." *Id.* at 614 (citing *Rapanos*, 126 S. Ct. at 2220-21). Such choice selections from *Rapanos* (and similar statements from *Needham*), as well as the court's evidentiary requirement, imply that the noted case would have resulted differently if the United States brought suit after sufficient rains. That is, the noted case implied that intermittent streams may be regulated intermittently. Is this a logical manner of regulation? The CWA has traditionally regulated most waters, other than groundwater, that could affect navigable bodies of water. The CWA's traditional approach is based on knowledge of the manner in which waterways actually work, rather than the literal, consistent presence of water. If *Chevron Pipe Line* is upheld, EPA will lose the important ability to act prospectively in many CWA cases but will be limited to redressing, rather than preventing, injury in those circumstances.

Amber F. Gosney

III. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515 (3d Cir. 2005)

Appellants E.I. DuPont de Nemours & Co. (DuPont) appealed to the United States Court of Appeals for the Third Circuit from two decisions, from the United States District Court for the District of New Jersey, denying DuPont's claims against the United States for cleanup costs DuPont incurred under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2000). DuPont owned fifteen facilities in a number of states, including New Jersey. All of the sites were contaminated with hazardous waste, and all were owned or operated at one point by the United States, which was responsible for at least some of the contamination. The district court separated one of the facilities as a test case and decided it separately. The district court held that because DuPont had not been sued under sections 106 or 107 of CERCLA or engaged in a settlement under section 113 of CERCLA, DuPont could not recover any of the costs incurred in its voluntary cleanups. E.I. DuPont de Nemours & Co. v. United States, 297 F. Supp. 2d 740, 758 (D.N.J. 2003). In the following decision, the district court reached the same conclusion regarding the other fourteen sites because there was no evidence of prior judicial or administrative actions under sections 106 or 107 or settlements under section 113. E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 527 (3d Cir. 2005) (citing E.I. DuPont de Nemours & Co. v. United States, No. 97-497, slip op. at 4-5 (D.N.J. Mar. 1, 2004)). On appeal, in a two-to-one decision, the Third Circuit affirmed the district court and held that a Potential Responsible Party (PRP) such as DuPont could not seek a contribution from another PRP for any voluntary cleanup costs. *Id.* at 518.

The Third Circuit initially stayed DuPont's appeal while the United States Supreme Court decided *Cooper Industries v. Aviall Services, Inc.*, 543 U.S. 157 (2004). The Third Circuit interpreted the Supreme Court's holding in *Cooper Industries* to mean that section 113(f)(1) of CERCLA mandated "a pre-existing civil action (either pending or completed) against the PRP under [section] 106 or [section] 107 *before* the PRP could seek contribution from other PRPs." *DuPont*, 460 F.3d at 523 (citing *Cooper Industries*, 443 U.S. at 166 (emphasis in original)). In other words, a PRP had to be sued or judged liable under sections 106 or 107 in order to seek a contribution from another PRP under section

113(f)(1). While the Supreme Court did not answer whether a PRP might seek cost recovery under section 107, the Third Circuit did note multiple courts of appeals decisions, including the court's own decision in *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997), that a section 107 recovery action was only available for an innocent party. *DuPont*, 460 F.3d at 522 n.6. Therefore, a PRP-owner, such as DuPont, would seemingly not be eligible for cost recovery under section 107 of CERCLA.

Shortly after the *New Castle* decision, the Third Circuit held in *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997), that a PRP could not utilize the implied cause of action for a contribution that existed in section 113 prior to the 1986 Superfund Amendments Reauthorization Act (SARA) amendments to CERCLA. *DuPont*, 460 F.3d at 522 (citing *Reading*, 115 F.3d. at 1119). For the Third Circuit in *Reading*, when Congress passed section 113, specifically section 113(f), it "acted to codify existing federal common law and to replace the judicially crafted measure with an express statutory remedy." 115 F.3d at 1119. In short, according to the Third Circuit, section 113 constituted the only means for a contributory action for a PRP. Thus, the Supreme Court's holding in *Cooper Industries*, that section 113 required a pending or completed civil action before a PRP could engage in a contributory action, combined with the Third Circuit's decisions in *Reading* and *New Castle*, meant that CERCLA provided no mechanism for a PRP that had engaged in a voluntary cleanup to recover from other PRPs.

After the *Cooper Industries* decision in 2004, DuPont decided to challenge the Third Circuit's precedent, particularly the *Reading* case. First, DuPont argued that *Cooper Industries* called into doubt at least part of the *Reading* decision. Specifically, DuPont pointed to language in *Reading* that the so-called savings clause in section 113(f)(1) allowed a contribution action without a preexisting civil action, something that would contradict the Supreme Court's holding in *Cooper Industries*. The majority responded by stating its language in *Reading* was not "necessarily incorrect," as section 113(f)(3)(B) referred to contribution actions when the PRP had settled its liability. *DuPont*, 460 F.3d at 532. Because DuPont had neither been sued nor had settled its liability, it could not recover any of the costs incurred from its voluntary cleanups.

DuPont also challenged *Reading* and *New Castle* as those decisions were "in direct opposition to CERCLA's broad remedial purpose." *Id.* at 533. DuPont argued that taken together, *Reading* and *New Castle* meant that a PRP that voluntarily cleaned up a polluted site had no way to recover some of the costs from other PRPs. Requiring a PRP to settle or

wait to be sued would cause delays, would potentially increase costs, and would discourage PRPs from taking the initiative clean hazardous sites.

The *DuPont* majority looked to CERCLA's legislative history, acknowledging that "without [a] doubt CERCLA's drafters intended that the statute encourage responsible parties to clean up hazardous waste sites and bear the costs of doing so." *Id.* at 534 (citing Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 676 (3d Cir 2003)). Notwithstanding CERCLA's purpose of cleaning hazardous sites, the majority stated that "Congress' [sic] position on voluntary cleanups [wa]s less clear." *Id.* The majority next cited language from the legislative history that Congress "want[ed] to induce those who know where these sites are to remedy the sites themselves." *Id.* at 534-35 (citing 126 CONG. REC. H9441 (daily ed. Sept. 23, 1980)). Nevertheless, the *DuPont* majority focused on CERCLA's embrace of common law principles such as joint and several liability. Allowing a PRP to engage in a voluntary cleanup and then sue other PRPs ran contrary to the common law standard of calculating contributions "among jointly and severally liable tortfeasors . . . follow[ing] a determination of liability to a common plaintiff who suffered an injury." *Id.* at 535. Because the common law favored adjudication before apportionment, and because Congress never provided any express contribution right for volunteering PRPs, the majority refused to find a contribution remedy for DuPont. *Id.*

The majority did recognize the possibility that allowing volunteering PRPs to recover costs without first being sued or settling "would be a better way to protect health and the environment." *Id.* at 542. Despite such an acknowledgment, the court expressed its doubts, observing that requiring PRPs to be sued or settle "would pressure PRPs to settle with some government regarding their own liability for polluting a site, if they wanted to obtain contribution from others also responsible for polluting that site." *Id.* at 543 (quoting Elementis Chems., Inc. v. TH Agric. & Nutrition, L.L.C., 373 F. Supp. 2d 257, 272 (S.D.N.Y. 2005)). That uncertainty led the majority to focus on the lack of express language of CERCLA allowing a contribution remedy for a volunteering PRP. The logic of denying or allowing a volunteering PRP any contribution remedy constituted a policy determination, which the majority held was a matter for Congress. *Id.*

Circuit Judge Sloviter dissented, taking a different view of the effect of *Cooper Industries* on *Reading* and *New Castle*. For the dissent, Third Circuit precedent assumed that volunteering PRPs like DuPont would be able to recoup their costs under section 113(f). The Supreme Court's decision in *Cooper Industries*, however, foreclosed recovery under

section 113(f). Because "[v]oluntary cleanups are vital to fulfilling CERCLA's purpose," the Third Circuit's decisions in *Reading* and *New Castle*, which denied cost recovery under section 107, had been abrogated by *Cooper Industries*. *DuPont*, 460 F.3d at 549 (Sloviter, J., dissenting). Also, the dissent noted that panels of the United States Courts of Appeals for the Second and Eighth Circuits unanimously held that section 107 did allow a volunteering PRP to recover from other PRPs without first having to settle or be sued. *See* Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90 (2d Cir. 2005); Atl. Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006). The effect of the majority's decision might mean that "parties will be reluctant to engage in voluntary cleanups for fear that they may not be able to obtain contribution [and] [s]pills that could be most efficaciously dealt with if cleaned up immediately will remain untouched while parties attempt to settle with the Government." *DuPont*, 460 F.3d at 550 (Sloviter, J., dissenting).

Because the Third Circuit's decision in *DuPont* created a circuit split, it may be necessary for the Supreme Court to decide the issue. For the time being, PRPs in the Third Circuit should either settle with the government or wait to be sued before engaging in any voluntary cleanups of polluted sites under CERCLA if they expect to recover from other PRPs under a contribution action.

Todd Campbell

Atlanta Gas Light Co. v. UGI Utilities, Inc., 463 F.3d 1201 (11th Cir. 2006)

In *Atlanta Gas Light Co. v. UGI Utilities, Inc.*, the United States Court of Appeals for the Eleventh Circuit held that corporate parents of a polluting facility could not be held liable as an "operator" for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 463 F.3d 1201, 1206-08 (11th Cir. 2006). The Eleventh Circuit also held that, with respect to liability insurance policies, routine spills and leaks did not constitute "accidents." *Id.* at 1209. In a contribution action for cleanup costs brought by previous owners of the facility against its parent corporations and insurer, the United States District Court for the Middle District of Florida granted summary judgment in favor of defendant parent corporations, and the subsidiary plaintiff appealed. *Id.* at 1203. On appeal, the Eleventh Circuit upheld the district court's grant of summary judgment. *Id.* at 1206-08, 1210.

This suit originated when the City of St. Augustine (City) purchased a site on which a manufactured gas plant previously operated. *Id.* at 1202. The site in question was formerly owned by a series of corporations, the most recent being Atlanta Gas Light Company (AGLC). The City discovered environmental contamination at the site when it began redevelopment plans. The Environmental Protection Agency (EPA) designated both the City and AGLC as responsible parties under CERCLA. The EPA designated AGLC because it was the most recent predecessor in ownership of the site that was polluted by a process of heating raw materials to produce gas. The process produced by-products that leaked into the ground throughout the gas plant's history, beginning in 1886. The EPA ordered both parties to investigate and clean up the polluted site. Upon completion, AGLC filed suit seeking contribution from its parent corporations and their predecessors.

AGLC named three corporate defendants in its contribution action. *Id.* at 1203. AGLC's theory of defendant UGI Utilities' (UGI) liability was based on the argument that UGI directed operations at the plant from 1887 to 1928. *Id.* at 1202. St. Augustine Gas and Electric Light Company (St. Augustine) originally operated the plant, beginning in 1887. Although UGI was only a minor shareholder during this time, its involvement in St. Augustine's operations was somewhat extensive. *Id.* at 1202-05. UGI nominated plant superintendents, provided services, and maintained UGI senior executives in many St. Augustine board and officer positions. *Id.* at 1205. The second defendant, CenterPoint Energy Resources Corporation's (CenterPoint) predecessor became involved with the facility in 1928. *Id.* at 1206. After acquiring all stock in St. Augustine, CenterPoint's predecessor replaced all St. Augustine officers with its own executives, and later entered into a "management" contract with St. Augustine. Finally, defendant Century Indemnity (Century) provided St. Augustine with liability insurance at various points from 1940 to 1947. *Id.* at 1208. AGLC's argument against Century was that it provided liability insurance coverage to AGLC's predecessor during the time when the environmental damage giving rise to CERCLA liability occurred. AGLC's claims against UGI and CenterPoint sought contribution from the corporations as "operators" under CERCLA. *Id.* at 1204.

The district court held that, with respect to UGI and CenterPoint, AGLC failed to advance sufficient evidence for a jury to conclude that either defendant was responsible as an "operator" under CERCLA. *Id.* at 1203. Liability for cleanup costs may be imposed upon a parent as either an "owner" or "operator" of a facility owned by its subsidiary. 42 U.S.C.

§ 9607(a) (2000). CERCLA provides that "any person may seek contribution from any other person which is liable or potentially liable under section 9607(a) of this title." *Id.* § 9613(f)(1). Using the test adopted by the Supreme Court in *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998), the district court determined there was insufficient evidence that the utility defendants' relationships with the plant gave rise to an "operator" status. *Atlanta Gas Light Co.*, 463 F. 3d at 1203.

The district court then dismissed AGLC's claims against Century. The district court held that two of the policies were issued to AGLC's predecessor and contained "no-assignment" clauses, thus providing no coverage for AGLC. The district court further held that, although one of the later policies covered AGLC for one year, AGLC failed to produce evidence that the leaks leading to the environmental harm occurred during this period.

The Eleventh Circuit upheld the district court's grant of summary judgment. *Id.* at 1206-08, 1210. Applying the standard recognized in *Bestfoods*, the Eleventh Circuit first noted a more common situation giving rise to a claim of contribution against a corporate parent. *Id.* at 1204. In a situation where a subsidiary is held liable for cleanup costs as an owner of a polluting facility, a court may pierce the corporate veil and impose liability on the subsidiaries' parent as an owner. *Bestfoods*, 524 U.S. at 60. AGLC's argument, the Eleventh Circuit noted, was somewhat different in that it did not ask that the court pierce the corporate veil and hold either UGI or CenterPoint liable as corporate owners. *Atlanta Gas Light Co.*, 463 F.3d at 1204. Rather, AGLC sought to impose liability on defendants as operators. The Supreme Court in *Bestfoods* held that a corporate parent's involvement rises to the level of operator under CERCLA if that parent "manage[s], direct[s], or conduct[s] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." 524 U.S. at 66-67. Thus, to hold either UGI or CenterPoint liable as an operator, AGLC had to provide sufficient proof of the extent and nature of each defendants' involvement in the management and operation of the gas plant.

With respect to UGI's involvement, the Eleventh Circuit held that AGLC failed to demonstrate UGI's active management of the plant, but rather proved only that UGI acted as a general advisor. *Atlanta Gas Light Co.*, 463 F.3d at 1205-06. Addressing the management contract between UGI and St. Augustine, the Eleventh Circuit found that the contract merely provided a means for St. Augustine to access UGI's resources, advice, and network. UGI, the Eleventh Circuit held, acted as

an advisor or consultant under the terms of the management agreement, not as a manager for purposes of fulfilling the "operator" test advanced by the *Bestfoods* court. Citing *Bestfoods*, the Eleventh Circuit held that the fact that UGI executives occupied many board positions at St. Augustine was not sufficient to justify the imposition of liability on UGI as a parent operator. In *Bestfoods*, the Supreme Court placed a great deal of emphasis on corporate norms and expectations in analyzing whether a relationship of a parent gives rise to operator status. 524 U.S. at 72. The Supreme Court stated, "[A]cts of direct operation that give rise to parental liability must necessarily be distinguished from the interference that stems from the normal relationship between parent and subsidiary. Again norms of corporate behavior (undisturbed by any CERCLA provision) are crucial reference points." *Id.* at 71-72. Thus, the Eleventh Circuit noted that evidence of overlapping board memberships alone was insufficient to impose liability, as such occurrences are not abnormal in the corporate setting. *Atlanta Gas Light Co.*, 463 F.3d at 1206.

Next the Eleventh Circuit addressed evidence advanced by AGLC regarding CenterPoint's liability. First, the Court reiterated that the existence of overlapping officers between St. Augustine and CenterPoint did not alone give rise to liability under CERCLA. *Id.* at 1207. The Eleventh Circuit held that the management contracts between St. Augustine and CenterPoint did not demonstrate an agreement to manage the plant in its operating capacity, but instead contemplated consultation services with respect to general engineering work. The *Bestfoods* standard, in contrast, requires that the consultation, management, or operation be *related to the pollution* causing operations of the plant. 524 U.S. at 66-67 (emphasis added). The Eleventh Circuit noted that the CenterPoint "management" contract was similar to the UGI contract, in that it did not give rise to an actual managerial relationship with St. Augustine. *Atlanta Gas Light Co.*, 463 F.3d at 1207-08. Thus, the Eleventh Circuit held that AGLC's evidence was insufficient proof to give rise to liability.

Finally, the Eleventh Circuit turned to AGLC's claims against Century. *Id.* at 1208. At the outset, the court noted that the terms of the insurance policy Century issued to AGLC's predecessor required that the injury be caused by an "accident." AGLC was thus required to advance evidence of such an accident. The district court held that AGLC offered no evidence that any of the environmental harm occurred during the time Century provided coverage. The Eleventh Circuit agreed with the district court's holding that AGLC advanced little evidence regarding spills or

leakage during the period of coverage. The Eleventh Circuit then went a step further and held that "accident" did not contemplate routine spills or leaks, as the term "accident" referred to unintended or unexpected events. *Id.* at 1209. Because the industry was generally aware of their occurrence and had "ample incentive . . . to detect, minimize and prevent such leakages in order to profit from the recovered byproducts," the Eleventh Circuit held that the leaks and spills did not fulfill the definition of accident required by the insurance policy. *Id.*

Marne Jones

IV. ENDANGERED SPECIES ACT

Center for Biological Diversity v. United States Fish & Wildlife Service, 450 F.3d 930 (9th Cir. 2006)

In *Center for Biological Diversity v. United States Fish & Wildlife Service*, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the Central District of California, ruling in favor of the United States Fish and Wildlife Service (Service) and CEMEX, Inc. (CEMEX), a cement company. 450 F.3d 930, 944 (9th Cir. 2006). The main issue addressed by the court was whether the Service was required by the Endangered Species Act (ESA) to "complete formal designation of critical habitat for an endangered fish species listed over thirty-five years ago." *Id.* at 932. The court also addressed the issue of whether the Service had a duty to ensure compliance with all federal and state laws before issuing an Incidental Take Statement (ITS). *Id.* at 941.

In 1970, the Service listed the unarmored three-spine stickleback as an endangered species under the ESA. *Id.* at 932-33. The stickleback, a small scaleless freshwater fish, is predominately found in Southern California—Santa Barbara, Los Angeles, and San Diego—areas where there is plenty of vegetation and a gentle flow of water. *Id.* at 933.

In 1980, the Service proposed to designate three stream zones of the Santa Clara watershed as a critical habitat for the stickleback. However, the Service never completed the designation.

In 1990, the Bureau of Land Management (BLM) awarded a contract to CEMEX allowing them to mine fifty-six million tons of sand and gravel from Soledad Canyon in Los Angeles County. The mining would not take place within the stickleback's habitat; however, it would involve pumping water from the Santa Clara River. The pumping could

cause parts of the river to periodically run dry. This might aggravate an already existing problem whereby portions of the river occasionally dry out, trapping the stickleback in isolated pools. Due to the project's potential impact on the stickleback, the BLM consulted with the Service and submitted a biological assessment under the ESA in 1996.

After reviewing the project's potential impact, the Service issued a biological opinion in 1998 concluding that the project was "not likely to jeopardize the continued existence of the stickleback." The opinion also included an ITS "which if followed, [would] exempt[] the [Service and CEMEX] from the prohibition on takings found in Section 9 of the ESA." *Id.* (quoting Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 790 (9th Cir. 2005)). CEMEX is only required to minimize incidental takings of the stickleback by using "reasonable and prudent measures."

In 2002, the Center for Biological Diversity (CBD) filed suit against the Service, claiming that the Service's failure to complete designation of critical habitat for the stickleback violated the ESA. *Id.* at 933-34. CBD later amended its complaint and claimed that when the Service issued the ITS to CEMEX, it violated the ESA and its own regulations. Subsequently, the Service published a finding (Finding) stating that critical habitat should not be designated for the stickleback. *Id.*; *see also* Designation of Critical Habitat for the Unarmored Threespine Stickleback, 67 Fed. Reg. 58,580, 58,581 (Sept. 17, 2002) (to be codified at 50 C.F.R. pt. 17). On the same day, CBD moved for summary judgment. *Ctr. for Biological Diversity*, 450 F.3d at 934. The Service also moved for summary judgment, and CBD amended its complaint once again, this time claiming the Service's finding was arbitrary and capricious.

The district court granted summary judgment for the Service and CEMEX, finding CBD's original claim moot, rejecting the other claims, and holding that the Service had properly exercised its discretion to deny designation of critical habitat and had not violated the ESA by issuing the ITS. *Id.* Furthermore, the district court struck several exhibits offered by CBD which were not part of the administrative record.

On appeal, CBD made three arguments challenging the Service's Finding. First, CBD claimed the Service did not follow the ESA's requirement that designations of critical habitat be made "to the maximum extent prudent and determinable." Second, CBD claimed the Service's Finding was arbitrary and capricious because the Service did not provide a rational connection between the facts and its decision.

Third, CBD claimed the Finding was invalid because no period of notice and comment was provided.

First, the Ninth Circuit considered CBD's claim that the Service was required to designate the critical habitat for the stickleback. The court looked at the statutory language and determined that when a species is listed as endangered, a mandatory designation of critical habitat is called for because the ESA uses the word "shall." *Id.* at 934-35. *See* 16 U.S.C. § 15(a)(3)(A) (2000). However, the ESA further says the Service "may . . . revise such designation." *Id.* The court found that the use of the word "may" meant that revisions were not mandatory but rather were discretionary. *Ctr. for Biological Diversity*, 450 F.3d at 935. The court found that the mandatory language was adopted as part of a 1982 amendment to the statute, and the stickleback was listed as endangered in 1970. Therefore, the court determined that critical habitat designations for the stickleback are governed by the procedures for critical habitat revisions and are thus discretionary.

The court also rejected CBD's argument that once the Service proposed the designation in 1980, it was required to complete the designation "to the maximum extent prudent and determinable." *Id.*; *see* 16 U.S.C. § 15(a)(3)(A). The court found such interpretation would render the word "may" useless in the ESA because any proposals pending at the time of the 1982 Amendments would no longer be discretionary, but rather, would have to be completed if prudent and determinable. *Ctr. for Biological Diversity*, 450 F.3d at 936.

Further, the court rejected CBD's argument that the Service was required to complete designation because they failed to make a final decision on the proposal by 1983, a year after the Amendments were enacted. The court found that agency delay does not turn a discretionary duty into a mandatory duty.

Finding that the Service had discretion to choose whether to designate critical habitat for the stickleback, the court then addressed CBD's second challenge that the Finding was arbitrary and capricious. First, the court addressed CEMEX's claim that CBD lacked standing under the APA to challenge the Finding. Under the APA, review is not allowed if the "agency action is committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2) (2000). Once the Service proposed a critical habitat, by statute, it had four choices on how to act. *Ctr. for Biological Diversity*, 450 F.3d at 936-37; *see* 16 U.S.C. § 1533(b)(6)(A)(i). The court determined that although the Service had some choice, it still was required to choose one of the four courses of action; therefore the action was not "committed to agency discretion by law." *Ctr. for Biological*

Diversity, 450 F.3d at 937. Consequently, the review provision of the APA applied, and CBD had standing to challenge the Finding.

Turning to the merits of the claim, the court stated the principle that in order for an agency action to be arbitrary and capricious, the agency must have "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* (quoting Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001)). CBD argued that the Service failed to state a rational connection between its finding that a critical habitat was a high priority for the stickleback and its eventual decision not to designate a critical habitat. The Service's stated rationale was that it reviewed its four available options and could not justify three of them. Only after reviewing the existing protections for the stickleback and finding the protections would not be altered, the Service chose the fourth course of action, not designating the critical habitat. *Id.* at 937-38. The court reviewed this stated rationale in conjunction with Congress's decision to allow discretion when the Service designates critical habitat for species listed as endangered prior to 1982, and the court found that the Finding was not arbitrary and capricious. *Id.* at 938.

CBD's argument did not stop there, however. CBD further argued that the Service could only refuse designation if "the benefits of such exclusion outweigh the benefits of specifying such area." *Id.*; *see* 16 U.S.C. § 1533(b)(2). The court easily refused this argument on the basis that section 1533(b)(2) applies to mandatory designations and not to discretionary designations, such as the one regarding the stickleback. *Ctr. for Biological Diversity*, 450 F.3d at 938.

CBD also argued that because the Service did not provide opportunity for notice and comment, the Finding should be set aside. *Id.* at 939. The court found that regarding critical habitat revisions, the ESA specifically requires notice and comment for only two of the available actions in § 1533(b)(6)(A)(i). *Id.*; *see* 16 U.S.C. § 1533(b)(6)(A)(i)(III)-(IV). Because the action the Service took—finding a revision should not be made—was not among the two actions requiring notice and comment, the court inferred Congress did not intend to require notice and declined to set aside the Finding. *Ctr. for Biological Diversity*, 450 F.3d at 939.

The court then turned to CBD's claim that the ITS was improperly issued because the Service did not ensure that its action would not violate any federal or state law. *Id.* at 939-40. After finding CBD had standing

under the APA and that its challenge was ripe for review, the court turned to the merits of the claim.

CBD claimed that the Service could not issue an ITS for the project because California law protects the stickleback by prohibiting any taking of the fish, whether incidental or not. *Id.* at 941. However, the court noted that the ESA *requires* the Service to issue an ITS once it is satisfied that an agency's action will not threaten the continued existence of an endangered species. *Id.* at 942; *see* 16 U.S.C. § 1536(b)(4). There is no language within in the ESA requiring compliance with all state and federal laws prior to issuing a biological opinion or an ITS. *Ctr. for Biological Diversity*, 450 F.3d at 942. The court, therefore, deferred to the agency interpretation of the regulations and found the Service did not have a duty to comply with federal and state law before issuing the ITS. *Id.* at 943.

Finally, the court upheld the district court's decision to strike exhibits offered by CBD that were not in the administrative record. The court stated the rule that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id.* (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973)). The court found that the CBD's purpose in offering the documents that were not in the administrative record was to provide "a new rationalization . . . for attacking an agency's decision." *Id.* at 944 (quoting Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996)). Since this is an impermissible use of extrinsic documents, the court held that the district court properly excluded the documents.

In summary, the court held the Service has discretion to designate critical habitat for endangered species listed prior to 1982. The Service's decision not to designate critical habitat for the stickleback was not arbitrary and capricious. The Service does not have a duty to comply with state and federal laws before issuing an ITS. Also, the district court properly excluded exhibits "offered to establish a new rationale for attacking the Service's decision." *Id.*

The court reached its decision by continually pointing to the statutory language and refusing any interpretations that lead to an absurd result. This case provides an important lesson in the difference between mandatory and discretionary designations of critical habitat. However, a greater lesson is that great deference is given to the Service's interpretation of the ESA where designation is discretionary.

Maria Henderson

V. NATIONAL ENVIRONMENTAL POLICY ACT

Utah Environmental Congress v. Bosworth, 443 F.3d 732 (10th Cir. 2006)

In 2004, the United States Forest Service (Forest Service) approved a project designed to combat a beetle infestation in the spruce trees in Utah's Fishlake National Forest. Utah Envtl. Cong. v. Bosworth, 443 F.3d 732, 735 (10th Cir. 2006). The timber-thinning project was approved pursuant to a categorical exclusion in the National Environmental Policy Act (NEPA). NEPA's categorical exclusions allow minor projects to be implemented quickly as long as they are determined to have no significant effect on the environment. The Utah Environmental Congress (UEC) brought suit claiming that the project's approval violated several environmental regulations.

The Seven Mile Spruce Beetle Management Project (Project) sits entirely in Fishlake National Forest and is governed by the Fishlake Forest Plan (Forest Plan). *See* U.S. DEP'T OF AGRIC., FOREST SERVICE REGION 4, LAND AND RESOURCE MANAGEMENT PLAN FOR THE FISHLAKE NATIONAL FOREST, http://www.fs.fed.us/r4/dixie/projects/FParea/LiveDocs/Fishlake.pdf (last visited Mar. 24, 2006). The Project involves cutting down selected dying, dead, matured, or diseased beetle-infested spruce trees in Fishlake National Forest. *Utah Envtl. Cong.*, 443 F.3d at 738. The goal of the Project is to harvest a small number of infested trees in an attempt to prevent the infestation from spreading to other healthy trees in the forest. According to the Forest Service, eliminating these particular trees will help protect the mature healthy trees, preserve the wildlife habitat, and reduce the risk of wildfire.

Two environmental statutes are involved in this case: NEPA and the National Forest Management Act (NFMA). *Id.* at 735-37. NEPA requires federal agencies such as the Forest Service to analyze environmental consequences before approving and implementing projects that may affect the environment. *Id.* at 735-36. Before beginning the Project, NEPA requires the Forest Service to prepare one of the following: (1) an environmental impact statement, (2) an environmental assessment, or (3) a categorical exclusion. *Id.* at 736. In this case, the Forest Service chose to implement the Project pursuant to a categorical exclusion. *Id.* at 735, 38. Categorical exclusions apply to actions which are predetermined not to "individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4 (2003). In its handbook, the Forest Service lists twenty-four categories falling under the categorical exclusion exception including "small

acreage timber-thinning and harvesting." *See* U.S. DEPT. OF AGRIC., FOREST SERVICE ENVIRONMENTAL POLICY AND PROCEDURES HANDBOOK, FSH 1909.15 ch. 30, §§ 31.12, 31.2 (1992). However, if "extraordinary circumstances" exist such that "a normally excluded action may have a significant environmental effect," the proposed action is excluded from categorical exclusion. *See* 40 C.F.R. § 1508.4.

The NFMA requires the Forest Service to develop a land and resource management plan for each unit of the National Forest System. *See* 16 U.S.C. § 1604(a), (e), (g)(3)(B) (2000). Each unit is managed according to two levels: (1) programmatic and (2) project. *Utah Envtl. Cong.*, 443 F.3d at 736. The programmatic level involves creating forest-wide planning goals accounting for several interests including plant and wildlife diversity and preservation, outdoor recreation, timber, and watershed. *Id.* at 737. The project level permits the Forest Service to implement a forest plan by approving or disapproving specific projects which it may do through use of an environmental impact statement, an environmental assessment, or a categorical exclusion.

In November 2000, the Forest Service amended its regulations, formerly known as the 1982 planning rules, and replaced them with the 2000 planning rules. Because the 2000 planning rules were not immediately promulgated, they contained a transition provision which provided that beginning on November 9, 2000, until the promulgation of the new final rule, the Forest Service should consider "the best available science in implementing a forest plan." *See* 36 C.F.R. § 219.35 (a), (d) (2001). For all projects proposed after November 9, 2000, the transition period standard applied. *Utah Envtl. Cong.*, 443 F.3d at 737.

The Forest Service ultimately approved the Project under Category 14, a more recent categorical exclusion adopted by the Department of Agriculture. *Id.* at 738. The Forest Service District Manager also concluded that no "extraordinary circumstances" existed that were related to the proposed action. After the Forest Service authorized the Project, the UEC filed suit in district court, alleging violations of NEPA, NFMA, and the Administrative Procedures Act (APA). *Id.* at 735. The United States District Court for the District of Utah held for the Forest Service on all claims. *Id.* at 739. The district court concluded that the Forest Service did not act arbitrarily in applying Category 14, the Forest Service adequately monitored the management indicator species in accordance with the forest plan, and the 2000 planning rules were applicable to the project.

The UEC appealed the district court's approval of the project asserting three errors: (1) the Forest Service acted arbitrarily and

capriciously by failing to consider the cumulative impact of the project on fish and wildlife; (2) the district court improperly used the 2000 transition period standard, and not the 1982 planning rules, to evaluate the Project; and (3) the Forest Service failed to collect adequate data for management indicator species in violation of the forest plan and NEPA. *Id.* at 739-40.

The United States Court of Appeals for the Tenth Circuit found against the UEC on all claims. *Id.* at 741, 753. As to the UEC's claim that the Forest Service acted arbitrarily and capriciously by failing to consider the cumulative impact of the project on fish and wildlife, the court stated that the Project was eligible for approval under Category 14 specifically because it was predetermined to have no significant effect on the environment. *Id.* at 741. The Forest Service is not required to perform a cumulative effects analysis for projects approved under this category, therefore, the Forest Service was not arbitrary or capricious for not doing so. In addition, the court found that under the facts specific to the case, there were no "extraordinary circumstances" which would prevent the Forest Service from approving the project pursuant to Category 14. *Id.* at 744.

The court next found against the UEC's second claim that the 1982 planning rules, and not the 2000 transition period standard, were applicable to the Project's approval. *Id.* at 747. The court noted that Category 14 was not created until 2003 and the Forest Service did not begin a proposal under Category 14 until April 2004. The court determined that because the agency action arose from a categorical exclusion not developed until 2003, the 2000 transition period standards, and not the 1982 planning rules, were applicable to the Project. *Id.* at 747-48.

Finally, the court addressed the UEC's third argument that the Forest Service failed to collect adequate data for management indicator species in violation of the Forest Plan and NEPA. *Id.* at 749. The court found that neither the Forest Service regulations nor the Forest Plan required the Forest Service to monitor management indicator species as a condition precedent to the approval of a categorically excluded project. Because there was no monitoring obligation, there was no requirement that the Forest Service conform with the monitoring program set forth in the Forest Plan before it approved the Project.

This case will likely have little legal impact in the environmental world. All three of the UEC's claims were weak in this case. A clear reading of NEPA, NFMA, and the APA suggest that the Forest Service used the exclusion under Category 14 in clear conformity with the

wording of the statutes. The UEC's arguments, if successful, would have completely undercut the entire purpose behind categorical exclusions which is to allow the quick implementation of minor projects that are considered to have no significant impact on the environment.

Most courts would likely agree with the Tenth Circuit's analysis of the case at bar and find against the UEC as well. Because this case presents a simple straightforward application of the law to the facts, it seems very unlikely that it will change the current method that categorical exclusions such as the one at issue are applied by the Forest Service. One potential favorable impact of this case would be to deter environmental organizations from bringing claims against federal organizations such as the Forest Service for simple adherence to the statutory law which governs their agency actions.

Melissa LeGrand

VI. NATIONAL ENVIRONMENTAL POLICY ACT AND NATIONAL HISTORIC PRESERVATION ACT

Coliseum Square Ass'n, Inc., v. Alphonso Jackson, Acting Secretary, United States Department of Housing & Urban Development, 465 F.3d 215 (5th Cir. 2006)

In *Coliseum Square*, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Eastern District of Louisiana to dismiss the plaintiffs' environmental and historic preservation claims. 465 F.3d 215 (5th Cir. 2006). The dispute involved a New Orleans housing redevelopment project and millions of dollars in public funding.

In 1996, the United States Department of Housing and Urban Development (HUD) granted $25 million to the St. Thomas Housing Development revitalization project through the HOPE IV program. The Housing Authority of New Orleans (HANO) completed an initial National Historic Preservation Act (NHPA) "Section 106 Review," which studied possible impacts of the project on neighboring historic and archaeological sites. HANO, the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (a federal agency), signed a Memorandum of Agreement (MOA) for the project. HUD did not participate in the MOA. Demolition began in October 2000, at which time about 800 mostly minority and low-income families were displaced from the St. Thomas housing project. *Id.* at 226; *see also*

Appellants' Original Brief Filed on Behalf of Coliseum Square Ass'n, Inc., Smart Growth for Louisiana, Louisiana Landmarks Society, Inc., Historic Magazine Row Ass'n, and The Urban Conservancy at 1-2, *Coliseum Square*, No. 04-30522 (5th Cir. Nov. 29, 2004) [hereinafter *Brief*]. HUD adopted the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) prepared by HANO in May 2001. Because HUD concluded that the project would not have a significant impact on the human environment, the agency did not produce a full Environmental Impact Statement (EIS).

Later in 2001, the developers, Historic Restorations, Inc., announced that Wal-Mart would be filling a newly added retail space. 465 F.3d at 226-27. In November 2001 and April 2002, the New Orleans City Council approved zoning changes for the project allowing a 200,000 square-foot Super Wal-Mart retail center. *Id.* at 233. The City Council also created a highly controversial Tax Increment Financing District to help fund the project. The SHPO then asked to reopen the NHPA review, and HUD undertook an additional study in consultation with signatories of the original MOA. As a result, HUD expanded the Area of Potential Effects (APE). *Id.* at 226-27.

In July 2002, plaintiff community organizations filed suit to halt the project, invalidate the existing MOA, EA and FONSI, and mandate preparation of a new or revised MOA and EA. *Id.* at 227. At that time, over $10 million in HUD funds had been spent, about 800 families had been displaced, and 116 properties listed in the National Register had been demolished. *Brief*, *supra*, at 1-2. In response, HUD reopened its NEPA process, but work on the project continued. After additional investigations, a proposed EA and FONSI went through public comment, an amended MOA was signed by the previous parties and HUD, and new EA and FONSI were issued on February 20, 2003. Plaintiff's case was dismissed as moot, and plaintiffs filed a new complaint based on the revised MOA, EA, and FONSI. The district court granted HUD's motion for summary judgment, and plaintiffs appealed.

The Fifth Circuit reviewed briefs regarding whether the case had been mooted by significant completion of the project or Hurricane Katrina. *Coliseum Square*, 465 F.3d at 227. The court found that a significant portion of the project had been completed and the Wal-Mart shopping center had been open for almost two years. HANO and HUD, however, still planned further construction of mixed-income housing units, affordable housing for the elderly, market rate housing units, small-scale commercial ventures, and construction or rehabilitation of affordable housing. HANO indicated that Hurricane Katrina may have

impacted the plans, but that it intended to finish the project. The court found that the case was not moot and that the relief sought by the plaintiffs could, if granted, eliminate or alleviate their expressed environmental and historic preservation concerns.

A. National Environmental Policy Act (NEPA)

NEPA imposes procedures on federal agencies to analyze the environmental impacts of their actions and proposed actions. The Council of Environmental Quality (CEQ) issues regulations interpreting NEPA. *Id.* at 224. According to CEQ guidelines, an agency should prepare a detailed EIS when its project will have significant direct or indirect impacts on the quality of the human environment. 42 U.S.C. § 4332(2)(C) (2000). The EIS should include analysis of the environmental impact, adverse environmental effects, alternatives, short-term versus long-term uses, and irreversible commitments of resources. *Id.* § 4332(2). CEQ guidelines, however, allow the agency to prepare a more limited EA that should briefly provide evidence determining whether or not an EIS is required. 40 C.F.R. § 1508.9(a) (2004). If an agency determines that an EIS is not necessary, it must issue a FONSI, which should explain why the project will not have a significant environmental impact. *Id.* §§ 1501.4(e), 1508.13. NEPA procedures do not require a particular result. If an agency follows procedure, the court may reverse its decisions only if the agency's interpretation or application of the relevant statute is arbitrary, capricious, in abuse of its discretion or clearly contrary to law. 465 F.3d at 228.

The plaintiffs argued first that the federal regulations required HUD to produce an EIS based on the increased level of noise and the number of residences affected. Second, plaintiffs argued that HUD acted arbitrarily, capriciously, or in abuse of its discretion because it knew or should have known that the reasonably foreseeable effects of the project would have a significant environmental impact.

1. Requirement To Produce an EIS Based on Noise Levels and Affected Residences

HUD regulations require preparation of an EIS when projects create an unacceptable noise exposure. 24 C.F.R. § 51.104(b)(2) (2004). HUD relied on a September 2002 noise survey which indicated an acceptable level of noise. Plaintiffs contend that the study did not comply with HUD's own Noise Guidebook. The court found that HUD's failure to comply with its own guidelines in promulgating the study was not

sufficient to invalidate the EA. Because the guidebook had not been developed pursuant to a specific statutory grant, the agency was not bound by it and could analyze impacts by other methods. *Coliseum Square*, 465 F.3d at 229.

The plaintiffs further argued that HUD used a study purposely and improperly designed to skew the results, bringing them within acceptable limits. An earlier study conducted for HANO by Citywide Testing (Citywide) showed unacceptable noise levels. Plaintiffs argued that HUD conducted a second, skewed study to avoid reliance on this unfavorable study, and then purposely left the Citywide study out of the administrative record in order to avoid producing an EIS. *Brief*, *supra*, at 14-18. Plaintiffs argued that the study did not include the name of the investigators who conducted it, and although the first page states the length as thirty-one pages, only ten pages are included in the public record. *Id.* at 16. Further, plaintiffs claim that investigators took a disproportionately high number of measurements at quiet times and fewer measurements at busier times. For example, absolutely no noise measurements were taken during the heavy traffic time between 7:40 a.m. and 12:06 p.m. *Coliseum Square*, 465 F.3d at 230; *Brief*, *supra*, at 17.

The court found that the plaintiffs' argument reflected only a disagreement with HUD over which report to use, and did not demonstrate bad or improper motives. 465 F.3d at 230. The Citywide survey methods also did not comply with HUD regulations or the noise guidebook, and the results of the study did not amount to persuasive evidence that noise levels required an EIS. The court found that HUD was not arbitrary, capricious, or contrary to law for relying solely on the second study to determine acceptable project noise levels. *Id.* at 230-31.

CEQ regulations require preparation of an EIS when a project will "remove, demolish, convert, or substantially rehabilitate 2,500 or more existing housing units . . . or . . . result in the construction or installation of 2,500 or more housing units." *Id.* at 231 (quoting 24 C.F.R. § 50.42(b)(2)). Plaintiffs argued that this regulation should be read expansively and cumulatively to achieve a total 2500 unit trigger because "logical parts of a composite . . . shall be evaluated together." 24 C.F.R. § 50.21; *see Brief*, *supra*, at 19. The St. Thomas project involves demolition or rehabilitation of 1510 units and construction or installation of 1282 units. The plaintiffs contended that these added together exceed 2500 units, mandating an EIS. HUD, however, argued that the regulation established two categories: "demolition and rehabilitation," etc. versus "construction and installation." Neither sum exceeded the 2500 unit

trigger, so no EIS was required. The court found that the agency's interpretation of the statute was not unreasonable, and that HUD's decision not to produce an EIS based on noise and number of units affected was in accordance with law. *Coliseum Square*, 465 F.3d at 231.

2. Imputed Knowledge of Significant Environmental Impacts

The plaintiffs contended that HUD knew or should have known of significant environmental impacts related to: environmental justice (Executive Order 12898), zoning, businesses occupying historic buildings, historic properties and landmarks, toxic and hazardous waste, lead contamination, traffic, cumulative impacts, mitigation of effects on historic properties, evaluation of project costs and benefits, and consideration of context and intensity. *Brief*, *supra*, at 20-61. The court found that Executive Order 12898 did not create a private cause of action, so related agency decisions should be reviewed, along with the other allegations, under the "arbitrary and capricious" standard. 465 F.3d at 232.

The plaintiffs argued that HUD relied on flawed or insufficient studies or otherwise failed to properly consider these issues. *See Brief*, *supra*, at 19-59. The plaintiffs also argued that environmental issues were not studied until after the lawsuit was filed and the NEPA process reopened, and that the studies were conducted to justify a decision already made rather than to honestly investigate and mitigate environmental effects. *Id.* at 20-21. The plaintiff's arguments were each mentioned in the court's decision. The Fifth Circuit found in each instance that while the plaintiffs disagreed with HUD's final findings on these issues, their challenges were based primarily on assumptions or allegations insufficient to demonstrate that HUD had acted arbitrarily, capriciously, or contrary to law. 465 F.3d at 241. This Article will summarize only the plaintiffs' arguments regarding environmental justice, the controversial nature, and weighing the impacts of the project.

a. Environmental Justice

Plaintiffs argued that the environmental justice effects should have warranted a full EIS. *Brief*, *supra*, at 21-25. The EA states, "Conditions of the St. Thomas Public Housing Development prior to the undertaking produced adverse environmental conditions . . . The project affords the residents the opportunity to benefit from a healthy and safe environment." *Id.* at 21 (citing to the administrative record, Item 24(e), AR00008). An Environmental Justice Study, dated September 2002,

stated that the minority and low-income residents and the surrounding community would experience net benefits. *Id.* at 21-25. The plaintiffs contend, however, that the study did not address the fate of the 800 displaced families or interview a single former resident. The plaintiffs argued that only 197 public and low-income units would be available to the 800 families, so that less than twenty-five percent of the minority and low-income residents had any hope of returning to their neighborhood. *Id.* at 22. The St. Thomas Master Plan, created in 1994, called for HUD to restrict demolition and carefully phase development to maintain morale in the community, but instead the residents were all displaced and dispersed to other low-income housing facilities throughout the city. The plaintiffs contended that these issues demonstrated a disproportionate negative effect on the former residents, and therefore HUD's finding of no impact was arbitrary and capricious. *Id.* at 23-25.

The Fifth Circuit found that plaintiffs did not offer evidence sufficient to show that HUD's reliance on the environmental justice study was arbitrary or capricious. *Coliseum Square*, 465 F.3d at 233.

b. Controversial Nature

Plaintiffs also contended that an EIS was required because certain aspects of the project were highly controversial, and regulations require considering a project's "highly controversial" nature when evaluating the intensity of its impact. *Id.* at 233-34 (citing 40 C.F.R. § 1508.27(b)). Although the original EA stated that the project conformed with local zoning regulations, significant zoning changes had not yet been approved by the City Council. *Brief*, *supra*, at 25-26. The related Tax Increment Financing District would help fund the ongoing project (465 F.3d at 233) and was described in the administrative record as one of the most controversial issues the City Council had faced in years. *Brief*, *supra*, at 26 (citing the administrative record, AR05139). Also, the plaintiffs argued that HUD had downplayed the negative impact the new Wal-Mart would have on neighboring small businesses, especially those occupying historic buildings. *Coliseum Square*, 465 F.3d at 234-35; *Brief*, *supra*, at 28-34.

The Fifth Circuit found that the controversy reflected public opposition to Wal-Mart occupying the retail space, not the project as a whole. 465 F.3d at 234. The court explained that factors for consideration, such as the controversial nature of a project, are not categorical rules that require a finding of impacts, but rather elements that need to be addressed. A factor-by-factor analysis is acceptable. "Controversial" should relate to the size, nature, or effect of the project,

not a particular use. The court found that HUD had sufficiently evaluated these factors. *Id.* at 230-34.

c. Weighing Impacts

The plaintiffs argued that HUD had improperly weighed "beneficial" and "adverse" impacts in finding no significant impacts. *Brief*, *supra*, at 49 (citing the February 2003 EA/FONSI [AR00003]). CEQ regulations state that impacts may be both beneficial and adverse, and that significant impacts exist even if the agency believes they will produce a net benefit. 40 C.F.R. § 1508.27(b)(1). In an EA, the impacts should be added, not subtracted, in determining whether further analysis in the form of a full EIS is required. See *Brief*, *supra*, at 50-51 for further support of this principle.

The Fifth Circuit found that HUD had not based its decision of no impact on evidence of a net positive impact. HUD had indicated that "when the overall benefits of the project are weighed against the temporary inconveniences of construction and any 'partial long term market disruption,'" the project "'provides a very positive net benefit to the community.'" 465 F.3d at 239. However, the Fifth Circuit found that HUD had not based its finding of no impact on net benefits, but had relied on a factor-by-factor analysis in reaching its determination. *Id.*

B. National Historic Preservation Act (NHPA)

Four national historic landmarks lie within the St. Thomas Housing Project's Area of Potential Effect (APE). In addition, many other historic properties lie in or near the project site. *Id.* at 241.

The NHPA, 16 U.S.C. §§ 470-470x-6, requires federal agencies to take responsibility for their impacts on historic resources. *Id.* at 224. Like NEPA, NHPA is largely procedural, mandating a "Section 106 Review" but requiring no particular outcome. NHPA does not require preservation of historic sites, but requires agencies to consider effects and minimize harm to the extent possible. The Section 106 Review process should include consultation with affected communities and individuals, the State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation (ACHP) (the federal agency responsible for promulgating NHPA regulations). *Id.* at 225. If an agency finds that its project will significantly impact historic resources, it must consult with the SHPO, ACHP, and other parties to develop alternatives or mitigate adverse effects. *See* 36 C.F.R. §§ 800.5(a), 800.6(a). The consulting parties may agree with the agency on a method

of mitigating adverse effects in a MOA. 36 C.F.R. § 800.6(b)(1)-(4). National landmarks, as opposed to other historic resources, are subject to a more stringent duty to minimize harm under NHPA section 110(f). *Coliseum Square*, 465 F.3d at 242.

Plaintiffs argued that HUD's Section 106 Review was defective and that HUD failed to minimize harmful effects to the national landmarks in the APE. *Brief*, *supra*, at 61-73.

1. The Section 106 Review Process

HUD found that the St. Thomas project would have adverse effects on historic properties and conducted a Section 106 Review. As a result, HUD produced an MOA in consultation with the SHPO, ACHP and other required signatories. HUD did not sign the original MOA, and therefore could have failed the NHPA requirement that the agency be a signatory to the mitigation agreement. However, HUD reopened the NEPA review and produced an amending MOA in September 2002. The final MOA included the additional areas of an enlarged APE, more historic properties, and additional mitigation provisions. Plaintiffs argued that this MOA's effect was limited to the additional areas and provisions, and that HUD, therefore, failed to consider the adverse effects of the entire project. *Coliseum Square*, 465 F.3d at 242. The Court found that the second MOA was plainly intended to incorporate the effects and provisions related to the entire project. Therefore HUD did not act arbitrarily or capriciously in relying on the second MOA as proof of its compliance with the Section 106 Review. *Id.* at 242-43.

2. Harmful Effects to National Landmarks

A National Park Service (NPS) employee visited the APE to evaluate nearby national landmarks. He determined that the project would not adversely affect the four national historic landmarks in the APE: The Garden District, The Vieux Carre (a.k.a. the French Quarter), St. Alphonsus Church, and St. Mary's Assumption Church. His findings were included in an opinion letter issued by the NPS to HUD. HUD relied on this letter in determining that the project would have no adverse effects on national historic landmarks. In October 2002, the SHPO, ACHP and other consulting parties objected to this determination, and the National Park Service informed HUD that it was reexamining the conclusions. NPS informed HUD that it could not find any documentation supporting the letter, whose author had since retired. In mid-December, NPS withdrew its request for more time to review the

project, adding that HUD had appropriately sought and relied upon NPS' comments. In February 2003, the SHPO and ACHP signed an amended MOA covering the historic properties evaluated in the Section 106 Review. *Id.* at 243.

Plaintiffs argued that HUD's finding that the project would have no significant impacts on national landmarks was arbitrary and capricious. Plaintiffs contended that HUD relied on the NPS opinion letter though HUD knew that the findings were unsupported and incorrect. *Brief*, *supra*, at 71. The court found that the NPS did not withdraw its opinion letter, and HUD's reliance on the NPS comments reasonably supported its finding of no significant impacts. 465 F.3d at 244.

Plaintiffs also argued that HUD was required to allow consulting parties to review the finding of no impacts on the national landmarks under 36 C.F.R. section 800.5(c). The court, however, found that section 800.5(c) is mandated only where there is a finding of no adverse effect for *any* property in the APE. HUD determined an adverse effect to the other historic properties and completed a relevant MOA. Plaintiffs argued that HUD found no adverse effects to the national landmarks in the APE, triggering a separate section 800.5(c) review as related to those properties so that interested parties would be consulted. HUD, however, interpreted these regulations such that no separate consultation regarding the national landmarks was required. The Fifth Circuit found that this interpretation was reasonable and that HUD was not in violation of NHPA.

C. Ripeness, Mootness and "Capable of Repetition Yet Evading Review"

The plaintiffs presented several procedural claims against HUD and the district court's handling of the case. This Part summarizes the plaintiffs' claims that the district court erred in its rulings on ripeness and mootness of previous claims against the first EA, FONSI, and MOA. *Brief*, *supra*, at 73-79.

When the original petition was filed, the district court first ruled that the claims were premature because HUD immediately reopened its NEPA and NHPA review processes. The same court later ruled that the claims were moot when HUD adopted a revised EA, FONSI, and MOA. 465 F.3d at 245-47; *Brief*, *supra*, at 79. In the meantime, the court did not grant injunctive relief to stop work on the project infrastructure. The plaintiffs argued that the district court erred in not applying the "capable of repetition, yet evading review" exception to the mootness doctrine. 465 F.3d at 246.

The Fifth Circuit stated that this exception applies where (1) the action is too short to be litigated before it ceases and (2) the plaintiff may reasonably expect to be subject to the same action. *Id.* (citing Benavides v. Housing Auth. of San Antonio, Tex., 238 F.3d 667, 671 (5th Cir. 2001)). The plaintiffs argued that HUD is likely to avoid review of future projects by simply reopening NEPA and NHPA review when challenged. However, the Fifth Circuit found that it was appropriate to allow an agency to reconsider challenged NEPA and NHPA decisions. HUD took corrective action and, though they again produced a FONSI, plaintiffs had not proven that the first FONSI still caused the alleged harms. Challenges to the original MOA and FONSI were properly considered moot. *Id.* at 246-47.

D. Conclusion

The Fifth Circuit found that the plaintiffs failed to prove that HUD had acted arbitrarily, capriciously, or in violation of law. Regulations regarding noise levels and the number of affected residences did not trigger an automatic EIS for the St. Thomas project. HUD was reasonable in relying on its studies and evidence supporting its FONSI on the environment. HUD could rely on its signature to the second MOA to show compliance with the entire Section 106 Review. HUD's reliance on a NPS opinion letter reasonably supported its conclusion of no adverse impacts to National Historic Landmarks. Although the plaintiff community organizations disagreed with HUD's various conclusions regarding the impact of the St. Thomas project on the environment and historic resources, they did not show failed methodology or insufficient evaluations. Further, the district court did not err in its determinations regarding ripeness and mootness, since the plaintiffs had no reasonable expectation of the same harm occurring, and it was appropriate to allow HUD to reconsider its prior NEPA and NHPA compliance. The district court's grant of summary judgment for the defendant was affirmed.

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