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I. CLEAN WATER ACT

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

In the noted case, a United States Supreme Court plurality remanded to the United States Court of Appeals for the Sixth Circuit for further consideration of the Supreme Court’s interpretation of “navigable waters” under the Clean Water Act (CWA). *Rapanos v. United States*, 126 S. Ct. 2208, 2235 (2006). However, because the noted case had a 4-1-4 decision, lower courts are unclear as to what the Supreme Court’s interpretation of “navigable waters” under the CWA actually was. This recent development will discuss Justice Kennedy’s concurring opinion and Justice Stevens’ dissenting opinion. Justice Scalia’s plurality opinion held that to be “navigable waters,” wetlands must have a “continuous surface connection” to a “relatively permanent, standing or flowing body of water” so that “there is no clear demarcation between waters and wetlands.” *Id.* at 2226-27. For further analysis of the plurality opinion, please see Gina Schilmoeller, Recent Development, *Rapanos v. United States*, 20 TUL. ENVTL. L.J. 236 (2006).

1. Background

The CWA regulates “the discharge of any pollutant by any person” into navigable waters unless the person obtains a discharge permit. 33 U.S.C. §§ 1311(a), 1342(a) (2000). Congress defined “pollutants” as including dredge and fill materials. *Id.* § 1362(6) (defining “rock, sand, [and] cellar dirt,” and fill materials, as “pollutants”). Congress defined “navigable waters” as “the waters of the United States, including the territorial seas.” *Id.* § 1362(7). Congress delegated to the United States Army Corps of Engineers (Corps) authority to further define “navigable waters” related to dredging and filling. *Id.* § 1344. The Corps included wetlands adjacent to traditionally navigable waters in its definition of “navigable waters.” Permits for Activities in Navigable or Ocean Waters, 40 Fed. Reg. 31,320, 31,320 (July 25, 1975). Thus, to fill or dredge wetlands adjacent to traditionally navigable waters, one must obtain a CWA permit.

The noted case is a consolidation of two Michigan cases, one against John and Judith Rapanos, and their wholly owned companies (Rapanos), and the other against June and Keith Carabell and Harvey and Frances Gordenker (Carabells) (collectively petitioners). *Rapanos*, 126 S. Ct. at 2219. The United States brought civil and criminal action against Rapanos for filling three wetlands sites in violation of the CWA. Although the Rapanos’ wetlands were not themselves adjacent to traditionally navigable waters, the Rapanos’ wetlands were adjacent to drains, which then emptied into traditionally navigable waters, including rivers, lakes, and bays.

The Carabells wanted to build condominiums on their wetlands, so they applied to the Michigan Department of Environmental Quality (Michigan Department) for a filling permit. *Carabell v. U.S. Army Corps of Eng’rs*, 391 F.3d 704, 705-06 (6th Cir. 2004). The Michigan Department denied the Carabells’ permit, in part, because the Carabells’ wetlands were separated from a man-made ditch by a four-foot-wide man-made berm. *Rapanos*, 126 S. Ct. at 2219. The ditch connected to a drain, which emptied into a creek, which then emptied into a lake. The berm blocked the Carabells’ wetlands from emptying into the ditch, but there were occasional overflows from the ditch into the drain. *Carabell*, 391 F.3d at 705. The Court consolidated the petitioners’ cases to determine whether petitioners’ wetlands, “which lie near ditches or man-made drains that eventually empty into traditionally navigable waters, constitute[d] ‘waters of the United States’” under the CWA. *Rapanos*, 126 S. Ct. at 2219.

2. Justice Kennedy's Concurrence

Justice Kennedy's concurrence, joined by no one, agreed with the plurality in that petitioners' cases should be remanded. However, Justice Kennedy wholly rejected the plurality's reasoning and interpretation, stating they were "inconsistent with [the CWA's] text, structure, and purpose." *Id.* at 2246. Instead, Justice Kennedy's concurrence held that wetlands that have a "significant nexus" with traditionally navigable waters should be regulated under the CWA. *Id.* at 2252.

After a short description of the CWA's legislative history and purpose, Justice Kennedy defined what wetlands, the "waters" at issue, actually are. *Id.* at 2237-38. Justice Kennedy emphasized that wetlands require (1) a prevalence of plant species; (2) "hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time . . . to become anaerobic, or lacking in oxygen"; and (3) "wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season."

After giving a background of petitioners' cases, Justice Kennedy analyzed the two Supreme Court cases that previously construed "navigable waters" under the CWA. *Id.* at 2240. The Court first construed "navigable waters" in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In *Riverside Bayview*, the Court found that the Corps' regulations, which allowed CWA regulation of wetlands that directly abutted traditionally navigable water, were entitled to deference. *Id.* at 131. The Corps determined that wetlands perform important functions such as "filter[ing] and purify[ing] water draining into adjacent bodies of water . . . and slow[ing] the flow of surface runoff into lakes, rivers, and streams and thus prevent[ing] flooding and erosion." *Id.* at 134 (internal citations omitted). Thus, the Court held that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands . . . may be defined as waters under the [Clean Water] Act." *Id.* at 134.

Justice Kennedy next analyzed *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). In *SWANCC*, the Court held that abandoned sand and gravel pits, which were not connected to any other waters, were not regulable under the CWA. *Id.* at 171. The Corps thought the sand and gravel pits were regulable because migratory birds used the pits as habitats. *Id.* at 164-65. However, the Court distinguished *SWANCC* and *Riverside Bayview*, commenting that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Clean

Water] Act in *Riverside Bayview Homes*.” *Id.* at 167. Because the migratory birds’ use of the sand and gravel pits had no nexus to other waters, the Corps was not entitled to deference. *Id.* at 172.

After analyzing pertinent precedent, Justice Kennedy proceeded to criticize the plurality’s holding that the term “navigable waters,” as it pertains to wetlands, should only include wetlands with a continuous surface connection to permanent standing water or continuously flowing water. *Rapanos*, 126 S. Ct. at 2242. According to Justice Kennedy, this requirement “makes little practical sense in a statute concerned with downstream water quality.” *Id.*

First, Justice Kennedy analyzed the “continuously flowing” element of the plurality’s test. According to Justice Kennedy, “continuously flowing” would mean that “[t]he merest trickle, if continuous, would count as ‘water’ subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not.” For example, Scalia’s test would mean that the CWA could not regulate the Los Angeles River. Even though rivers are traditionally navigable waters, the Los Angeles River does not continuously flow and usually “looks more like a dry roadway than a river.” Moreover, Justice Kennedy found that nothing in the CWA suggests Congress wanted to exclude irregular waterways from CWA regulation. *Id.* at 2243.

Justice Kennedy also criticized the second element of the plurality’s test, that a wetland adjacent to a traditionally navigable water must have a “continuous surface connection.” *Id.* at 2244. Although the plurality based the “continuous surface connection” element on *Riverside Bayview*, Justice Kennedy noted that this element is inconsistent with *Riverside Bayview*. In *Riverside Bayview*, Justice Kennedy noted the Court “deemed it irrelevant whether the ‘moisture creating the wetlands . . . [found] its source in the adjacent bodies of water.’” *Id.* at 2244 (internal citations omitted). Furthermore, Justice Kennedy explained that in *Riverside Bayview*, the Court found that the wetlands may be adjacent even if the wetlands “are not significantly intertwined with the ecosystem of adjacent waterways.” *Id.* (internal citations omitted). Justice Kennedy also noted that *SWANCC* did not support the “continuous surface connection” element because *SWANCC* only analyzed isolated ponds, and had nothing to do with adjacent waters. *Id.* at 2244-45.

Justice Kennedy next emphasized why the Corps is entitled to *some* deference when it seeks to regulate intrastate wetlands under 33 U.S.C. § 1344. *Rapanos*, 126 S. Ct. at 2244. When Congress enacted the CWA, Congress specifically included fill materials as pollutants, in part because filling and dredging affects downstream water quality. *Id.*

(citing 33 U.S.C. §§ 1311(a), 1362(6), (12)). However, according to Justice Kennedy, the plurality asserted that the CWA should not regulate dredge or fill material that merely affects downstream water quality (i.e., dredge or fill material that is not emitted specifically into a traditionally navigable waters). *Id.* at 2245. According to the plurality, fill material has no downstream effect because fill material “does not normally wash downstream,” and thus will not enter the navigable waters to which the wetlands were attached. *Id.* (citing *Rapanos*, 126 S. Ct. at 2228 (Scalia, J., plurality)). However, Justice Kennedy rejected the plurality’s argument, since Scalia’s theory that fill material does not wash downstream was not empirically sound; silt used to fill and dredge could significantly affect ecosystems. *Id.* at 2245. Moreover, Justice Kennedy noted that wetlands filter and purify downstream water and wetlands slow the flow of surface runoff, which prevents flooding and erosion. Thus, Justice Kennedy concluded, wetlands do have significant downstream effects that prevent pollution.

Justice Kennedy next criticized the plurality, claiming the “continuous surface connection” with a “continuously flowing water” test created more federalism and Commerce Clause issues than it resolved. *Id.* at 2246. According to Justice Kennedy, a wetland could be next to, but not physically connect with, a traditionally navigable water, and under the plurality’s test, the CWA could not regulate the wetland. However, the wetland would prevent erosion, prevent flooding, and purify the traditionally navigable water. *Id.* at 2246-47. Similarly, Justice Kennedy noted that the plurality’s test would allow the CWA to regulate a wetland connected to a small intrastate river or stream (waters which, traditionally, are nonnavigable). Thus, he concluded, not only is the plurality overinclusive by encompassing traditionally nonnavigable waters, like an intrastate stream, but the plurality is underinclusive, since it ignores wetlands’ downstream, “aggregate effects” on national water quality. *Id.* (quoting *Wickard v. Filburn*, 317 U.S. 111 (1942)).

Instead of adopting Justice Scalia’s “continuous surface connection” test, Justice Kennedy adopted a “significant nexus” test, a phrase he borrowed from *SWANCC*. *Id.* at 2248. Because “wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage,” the plurality’s test makes little sense. Instead, Justice Kennedy concluded, the test should be whether the wetlands “significantly affect the chemical, physical, and biological integrity” of traditionally defined navigable waters. Thus, according to Justice Kennedy, the Corps should not be able to regulate wetlands whose “effects on water quality are speculative or

insubstantial.” Moreover, Justice Kennedy asserted his “significant nexus” test “does not raise federalism or Commerce Clause concerns sufficient to support a presumption against [the test’s] adoption.” *Id.* at 2249. Unlike the plurality’s test, the “significant nexus test” would “prevent[] problematic applications of the” CWA. *Id.* at 2250. Thus, although Justice Kennedy wholly rejected the plurality’s reasoning and interpretation, Justice Kennedy remanded petitioners’ cases for further consideration under the “significant nexus” test. *Id.* at 2252.

3. Justice Stevens’ Dissent

Justice Stevens, with whom Justices Souter, Ginsburg, and Breyer joined, dissented, arguing that the Corps should receive administrative deference. According to Justice Kennedy, Congress charged the Corps with defining “navigable waters” under the CWA, and the Corps used their specialized knowledge to determine that petitioners’ wetlands fell within Congress’s intent of navigable waters. Justice Stevens noted that wetlands offer “nesting, spawning, rearing and resting sites for aquatic or land species; serve as valuable storage areas for storm and flood waters; and provide significant water purification functions.” *Id.* at 2257 (internal citations omitted). These various services “are integral to the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* (internal citations omitted). Moreover, Justice Stevens explained that well before Congress enacted the CWA, the Court held in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941), that Congress could regulate wetlands and other watersheds under the Commerce Clause. *Id.* at 2262. In *Atkinson*, Justice Stevens noted, the Court stated, ““There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries.”” *Id.* (quoting 313 U.S. at 525).

After restating *Rapanos*’ and *Carabell’s* facts, Justice Stevens analyzed *Riverside Bayview*, arguing that *Riverside Bayview* controlled the cases at hand, and that the plurality misread *Riverside Bayview*. *Id.* at 2255-56. According to Justice Stevens, although the wetlands in *Riverside Bayview* abutted a navigable water, the Court framed *Riversides Bayview’s* question presented as whether the CWA “authorize[d] the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water *and their tributaries*.” *Id.* at 2255 (internal citations omitted). Thus, Justice Stevens noted that in *Riverside Bayview*, the Court was not concerned merely with wetlands’ adjacency to navigable

waters, but also with wetlands' adjacency to navigable waters' tributaries (i.e., drains).

Moreover, Justice Stevens explained that in *Riverside Bayview*, the Court recognized the practical difficulties in differentiating between land and water, and deferred to the Corps to allow them to define adjacent wetlands as "waters." Thus, Justice Stevens found that because of the "congressional concern for protection of water quality and aquatic ecosystems," the Court determined the Corps' regulations in *Riverside Bayview* were not arbitrary or capricious, and thus entitled to deference. *Id.* (internal citations omitted). Similarly, Justice Stevens found that the *Riverside Bayview* Court never stated or implied that "adjacent" meant having a "continuous surface connection," as the plurality read it; rather, the Court defined "adjacent" as "'form[ing] the border of or [being] in reasonable proximity to other waters.'" *Id.* at 2255 (quoting *Riverside Bayview*, 474 U.S. at 134).

The dissent agreed with Kennedy's dislike for the plurality's "continuous surface connection" test. Like Justice Kennedy, Justice Stevens was entirely unsure of where Justice Scalia found his "continuous surface connection" test, since both found the test to be inconsistent with *Riverside Bayview*. *Id.* at 2259. Both Justice Kennedy and Justice Stevens found the plurality's test to have federalism and Commerce Clause issues, because the test is overinclusive and underinclusive in the waters it regulates. *Id.* at 2259-60. Justice Stevens also criticized the plurality's strict adherence to very traditional definitions of navigable waters, claiming that doing so was against Congress's intent in enacting the CWA. *Id.* at 2260. Since the CWA was meant to be a complete rewriting of existing water pollution legislation, Justice Stevens concluded that strict definitions should not apply. *Id.* at 2262 (internal citations omitted).

However, Justice Stevens disagreed with Justice Kennedy's judicially-created "significant nexus" test. *Id.* at 2264. Although Justice Kennedy distilled the "significant nexus" test from *SWANCC*, the Court used the phrase exactly once: "'It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [CWA] in *Riverside Bayview*.'" *Id.* (quoting *SWANCC*, 531 U.S. at 167).

However, according to Justice Stevens, the "significant nexus" test is almost meaningless because it "will probably not do much to diminish the number of wetlands covered by the [Clean Water] Act in the long run." Nearly all wetlands that the Corps would seek to regulate would have more than a *de minimis* effect downstream, so Justice Stevens concluded that the "significant nexus" test would not exclude any

wetlands the dissent and the Corps would regulate. Instead, Justice Stevens noted, Justice Kennedy's "significant nexus" test would create "additional work for all concerned parties"—developers would have no clear guidance as to whether they needed a permit, and the Corps would have to make case-by-case decisions. *Id.* at 2264-65.

Justice Stevens ended his dissent by remarking on the "unusual feature of the Court's judgments in these cases":

In these cases, . . . while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.

Id. at 2265.

4. Lower Courts' Reaction to *Rapanos*

When dealing with a Supreme Court case with no majority opinion, lower courts usually apply *Marks v. United States*, 430 U.S. 188 (1977). *Marks* held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the 'holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193 (internal citations omitted). However, because *Rapanos* was a 4-1-4 opinion in which Justice Kennedy's concurrence wholly rejected the plurality decision, lower courts have since split on what the "position taken by those Members who concurred . . . on the narrowest grounds" actually is.

Lower courts have split into three main camps. The United States Courts of Appeals for the Seventh and Ninth Circuits have both adopted Justice Kennedy's concurrence, arguing that most Members of the Court would agree with Kennedy's concurrence. *See United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (adopting Justice Kennedy's concurrence because it could be read most narrowly); *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029-30 (9th Cir. 2006) (adopting the concurrence because the plurality would be more likely to agree with the concurrence over the dissent). The United States District Court for the Northern District of Texas, however, adopted the plurality's approach because it was closest to the United States Court of Appeals for the Fifth Circuit's line of precedent. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

Lastly, the United States Court of Appeals for the First Circuit and the United States District Court for the Middle District of Florida have followed Justice Stevens' dissent: they have allowed parties to use either the plurality's test or Justice Kennedy's "significant nexus" test. *United States v. Johnson*, 467 F.3d 56, 59-60 (1st Cir. 2006); *United States v. Evans*, No. 3-05CR159, slip op., at 19 (M.D. Fla. Aug. 22, 2006).

Thus, because *Rapanos*' split opinion resolved little, the issue of whether wetlands not directly abutting traditionally navigable waters constituted "waters of the United States" will likely have to return to the Supreme Court.

Rina Eisenberg

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Pakootas v. Teck Cominco Metals, Ltd.,
452 F.3d 1066 (9th Cir. 2006)

In *Pakootas v. Teck Cominco*, the United States Court of Appeals for the Ninth Circuit held that because Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability is triggered by an actual or threatened release of hazardous substances, and because the release of hazardous substances at issue took place within the United States, the imposition of CERCLA liability on a Canadian corporation for pollution within the United States was not an extraterritorial application of CERCLA. 452 F.3d 1066, 1068-69 (9th Cir. 2006). Furthermore, the Ninth Circuit held that under section 9607(a)(3) of CERCLA, a party may be liable for the disposal of its own hazardous waste, even if it did not arrange for that disposal with "any other party or entity." *Id.* at 1082.

Plaintiffs Joseph A. Pakootas and Donald R. Michel are members of the Confederated Tribes of the Colville Reservation in north central Washington state. The Colville Reservation is situated along Lake Roosevelt, a reservoir on the Upper Columbia River approximately fifteen miles south of the U.S.-Canada border. Neil Craik, *Transboundary Pollution, Unilateralism, and the Limits of Extraterritorial Jurisdiction: The Second Trail Smelter Dispute*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* 109, 113 (Rebecca M. Bratspies & Russell A. Miller eds., 2006). In 1999 the Colville Tribes petitioned the Environmental Protection Agency (EPA) to conduct an assessment of hazardous substance contamination in the Upper Columbia River under section 9605 of CERCLA. *Pakootas*,

452 F.3d at 1069. The EPA's study, concluded in 2003, revealed the presence of heavy metals such as arsenic, cadmium, copper, lead, mercury, and zinc, as well as slag, a by-product of smelting furnaces that releases those same heavy metals into the environment during decay. *Id.* at 1069-70. The EPA concluded that the site was eligible for listing on the National Priorities List (NPL) and identified Teck Cominco, owner and operator of a lead-zinc smelter in Trail, British Columbia, Canada, as the potential responsible party. *Id.* at 1070. The Trail smelter, located approximately ten river miles north of the U.S.-Canada border, discharged up to 145,000 tons of slag annually into the Columbia River for approximately ninety years. *In re* Upper Columbia River Site, Docket No. CERCLA-10-2004-0018, at 3 (E. Pa. Dec. 11, 2003) (Unilateral Administrative Order (UAO) for Remedial Investigation/Feasibility Study Dec. 11, 2003), *available at* <http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement> [hereinafter UAO].

Teck Cominco American, a wholly owned U.S. subsidiary of Teck Cominco, approached the EPA about negotiating an agreement whereby it would conduct a limited, independent human health study of the site, and the EPA would delay listing the site on the NPL. *Pakootas*, 452 F.3d at 1070. On December 11, 2003, after eleven months of unsuccessful negotiations, the EPA issued a Unilateral Administrative Order for Remedial Investigation/Feasibility Study (RI/FS). According to plaintiffs, Teck Cominco never complied with the UAO, and the EPA never took actions to enforce it. *Id.* at 1068, 1073. This failure to enforce, as the plaintiffs saw it, was likely due to the immediate commencement of diplomatic discussions between the United States and Canada concerning the UAO.

In January 2004, the Canadian Embassy issued a diplomatic note to the United States Department of State protesting the issuance of the UAO. In that note, the Canadian government argued that this was an improper extraterritorial application of CERCLA that threatened to upset the current protocol concerning the resolution of transboundary pollution incidents between the United States and Canada. Diplomatic Note from Canadian Embassy to the Dep't of State (Jan. 2, 2004), *available at* <http://www.teckcominco.com/articles/roosevelt/motion-attach-c-040102.pdf>. Canada proposed that instead of proceeding under CERCLA, the two countries enter into a Memorandum of Understanding (MOU) whereby the Canadian government would be allowed to participate in an EPA-conducted RI/FS at the same level as the state of Washington and the Colville Tribes. Letter from Paul Cellucci, Ambassador of the U.S. in Ottawa, Can., to Michael Leavitt, Adm'r of

the EPA, at 2 (June 15, 2004), *available at* <http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/docs/15JUN2004USAmbCelluccitoLeavitt.pdf>. Furthermore, the United States and Canada would allocate the cost of clean-up and remediation to all “responsible polluting parties.” The United States agreed to allow Canada a consultative role, but insisted that the process proceed under CERCLA because CERCLA provided the United States with the authority to undertake the investigation and cleanup. Letter from Terry A. Breese, Dir., Office of Canadian Affairs, U.S. Dep’t of State, to Bruce Levy, Dir., U.S. Transboundary Div., Foreign Affairs Can., at 1 (Sept. 14, 2004), *available at* http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/docs/09-17-04_USGReplytoCanada.pdf. Canada, however, unequivocally opposed the use of CERCLA, instead insisting that the countries address the situation outside its ambit. Letter from Bruce Levy, Dir. U.S. Transboundary Div., Foreign Affairs Can., to Terry A. Breese, Dir. Office of Canadian Affairs, U.S. Dep’t of State, at 1-2 (Nov. 23, 2004), *available at* <http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/docs/23NOV2004LevytoBreeseCanadianProposedMOU2004.pdf>. In any event, an agreement was not reached (nor did the parties appear to be close to one) more than one year after the issuance of the UAO, and plaintiffs brought suit. *Pakootas*, 452 F.3d at 1068.

The United States District Court for the Eastern District of Washington assumed that this case involved the extraterritorial application of CERCLA and held that extraterritorial application was appropriate here. *Pakootas v. Teck Cominco Metals, Ltd. (Pakootas II)*, No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *28 (E.D. Wash. Nov. 8, 2004). The district court based its holding on findings that “CERCLA affirmatively expresses a clear intent by Congress to remedy ‘domestic conditions’ within the territorial jurisdiction of the U.S.,” and the “well-established principle that the presumption [against extraterritorial application of CERCLA] is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.”

On appeal, Teck Cominco argued that the district court erred in failing to dismiss its complaint because the application of CERCLA to Teck Cominco’s activities in Canada would be an impermissible extraterritorial application of U.S. law. *Pakootas*, 452 F.3d at 1071-72. Unlike the district court, the Ninth Circuit did not assume that the application of CERCLA here was per se extraterritorial. *See id.* at 1073. The Ninth Circuit found that since CERCLA is a liability statute rather

than a regulatory statute, *id.* at 1073, the EPA is not regulating the discharge of slag by Teck Cominco at its facility in Canada. *Id.* at 1079. Instead, the EPA is assigning liability to Teck Cominco for a release of hazardous materials; therefore, the case would turn not on where Teck Cominco was located, but rather where the release and “facility” were located.

CERCLA liability attaches to a party when a release or threatened release of hazardous substances occurs from a “facility” as defined by CERCLA. *Id.* at 1073-74 (internal citations omitted). The Ninth Circuit structured its analysis around these elements, beginning with the question of whether the EPA was attempting to apply CERCLA to a facility outside of U.S. jurisdiction. CERCLA defines a facility as “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” *Id.* at 1074 (internal citations omitted). In its UAO, the EPA defined the facility as “the Site,” describing it as the “extent of contamination *in the United States* associated with the Upper Columbia River.” The slag has come to be located at the Site, so the Site is a facility under section 9601(9)(A). Since the UAO limits the defined facility to that portion of the Upper Columbia River in the United States, the Ninth Circuit found that this was not an extraterritorial application of CERCLA to a facility abroad.

The second element under CERCLA is that there must be a release or threatened release of a hazardous substance from the facility into the environment. The Ninth Circuit turned its focus to whether or not there was in fact a release in this case. *Id.* at 1074-75. A release is defined under CERCLA “as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” *Id.* at 1075 (internal citations omitted). CERCLA liability only attaches if there is a release from a CERCLA facility. The EPA’s UAO described the facility as the Upper Columbia River in the United States; therefore, the release must have occurred from that portion of the Upper Columbia River in the United States into the environment (i.e., areas around the Upper Columbia River including Lake Roosevelt, the banks of the Upper Columbia River, and the air). Ninth Circuit precedent establishes that the passive migration of hazardous substances into the environment from where hazardous substances have come to be located is a release under CERCLA. As a result, the Ninth Circuit held that the leaching of hazardous substances from the slag at the Site was a CERCLA release, and the release was entirely domestic.

The final element of CERCLA liability is that the party held liable must be a “covered person” under section 9607(a). On this point Teck Cominco argued that it was not a “covered person” because it disposed of the slag itself and had not arranged for disposal of a hazardous substance by any other party or entity as required by section 9607(a)(3). Teck Cominco further argued that if it could be held to be a “covered person,” this was still an extraterritorial application of CERCLA because liability would be based on Teck Cominco’s arranging for disposal in Canada.

Teck Cominco relied on a recent United States Supreme Court case, *Small v. United States*, 544 U.S. 385 (2005), where the Court held that the term “any court” does not include foreign courts. *Pakootas*, 452 F.3d at 1076. By extrapolation, the term “any person” similarly could not include foreign persons.

The Ninth Circuit found that the Supreme Court’s decision in *Small* was based in part on *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), which provided two benchmarks for determining whether a term such as “any person” would apply to foreign persons: (1) the state must have jurisdiction over the party, and (2) the legislature must intend for the term to apply. *Pakootas*, 452 F.3d at 1076. Since the district court correctly found that it had personal jurisdiction over Teck Cominco based on Teck Cominco’s “allegedly tortious act aimed at the state of Washington,” the Ninth Circuit found the first *Palmer* benchmark was satisfied. The Ninth Circuit found the second *Palmer* benchmark was satisfied, as well, because the legislature intended to hold parties responsible for hazardous waste sites that release or threaten release of hazardous substances into the environment of the United States. *Id.* at 1077. Therefore, the Ninth Circuit noted, Teck Cominco is the type of “person” to which CERCLA was intended to apply. Similarly, the Ninth Circuit stated “[t]he location where a party arranged for disposal of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially, because CERCLA imposes liability for releases . . . of hazardous substances, and not merely for disposal . . . of such substances.” *Id.* at 1078. While the disposal of slag occurred in Canada, the release occurred in the United States. Because the court found that CERCLA liability can properly attach to a foreign corporation or person for a release in the United States, the imposition of CERCLA liability against Teck Cominco here is not an improper extraterritorial application of CERCLA.

The Ninth Circuit declined to endorse Teck Cominco’s argument that it could not be held liable as an arranger under CERCLA because it disposed of the slag itself. *Id.* at 1081. Teck Cominco’s proposed

statutory interpretation would leave a “gaping and illogical hole” in CERCLA’s coverage because generators of hazardous waste could dispose of the hazardous wastes themselves and stay outside of CERCLA’s coverage. The Ninth Circuit noted it was unlikely that Congress intended this incongruous result.

The Ninth Circuit’s reasoning seems somewhat circular at times. Rather than evaluate whether the EPA correctly defined the release and facility under CERCLA, the Ninth Circuit assumed the EPA’s definitions were correct and proceeded from there. The problem with this approach is that the EPA naturally defined these terms so that “releases” and “facilities” were located within the United States. Thus, a court, when using the EPA’s definitions, would always find a domestic application of CERCLA. The district court’s approach to the question was equally unsettling—they simply assumed that this was an extraterritorial application without evaluating the facts. *Pakootas II*, 2004 U.S. Dist. LEXIS 23041, at *16. According to the district court:

To find there is not an extraterritorial application of CERCLA in this case would require reliance on a legal fiction that the “releases” of hazardous substances into the Upper Columbia River site and Lake Roosevelt are wholly separable from the discharge of those substances into the Columbia River at the Trail [S]melter.

Id. at *15-16. The Ninth Circuit correctly dismissed this incorrect assumption by the district court, pointing out that this distinction between the disposal and release of hazardous wastes is the difference between the Resource Conservation and Recovery Act (RCRA) and CERCLA. *Pakootas*, 452 F.3d at 1079. However, the distinction between the disposal of the slag into the Upper Columbia River in Canada and its “release” into the environment once it crosses the U.S. border is a tenuous one, at best. The result under the Ninth Circuit’s interpretation is that anytime a pollutant crosses an international border, a release has occurred. This, as the Canadian government pointed out, could result in the imposition of similar civil liability against U.S. companies in Canada—a position to which the United States would almost certainly be opposed. Diplomatic Note, *supra*, at 1.

This was not the first time the Trail smelter has been a source of controversy between the United States and Canada. In 1941 an arbitration panel was asked to determine whether Canada bore any responsibility for damage in the state of Washington caused by air pollution from the smelter. This dispute between private parties in Washington and British Columbia devolved into a dispute between states because the dispute could not be heard in British Columbia under the

local action rule, and Washington did not yet have a long arm statute capable of reaching the parties operating the Trail smelter. Stephen C. McCaffrey, *Of Paradoxes, Precedents, and Progeny: The Trail Smelter Arbitration 65 Years Later*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* 113 (Rebecca M. Bratspies and Russell A. Miller eds., 2006). The arbitration panel found:

[U]nder the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Int'l Joint Comm'n Trib., *Trail Smelter Arbitral Tribunal Decision*, 35 AM. J. INT'L L. 684, 716 (1941). This statement by the tribunal is often cited as one of the central tenets of international environmental law with regard to transboundary pollution. McCaffrey, *supra*, at 39.

There is also a bilateral agreement between the United States and Canada concerning the water quality of boundary waters that governs how disputes between the two states should be handled. Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Great Britain, *proclaimed* May 13, 1910, 36 Stat. 2448 [hereinafter Boundary Water Treaty]. The Ninth Circuit did not consider international environmental law or any international agreements in its opinion, but instead focused solely on whether this was an extraterritorial application of CERCLA. Teck Cominco intends to appeal this decision to the United States Supreme Court. If the Court grants *certiorari*, it should consider not just whether this is an extraterritorial application of CERCLA, but whether the United States has violated international law or the Boundary Waters Treaty. Because of the implications this case has on disputes between the United States and Canada all along their common border, as well as environmental disputes along the U.S.-Mexico border, the international law aspect of this case must be given full consideration by the Supreme Court.

Brandy Parker

III. FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Mortellite v. Novartis Crop Protection, Inc.,
460 F.3d 483 (3d Cir. 2006)

In *Mortellite v. Novartis Crop Protection, Inc.*, the United States Court of Appeals for the Third Circuit vacated the decision of the United States District Court for the District of New Jersey, which dismissed plaintiffs' claims as preempted by Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 460 F.3d 483, 494 (3d Cir. 2006). The Third Circuit remanded to the district court to determine to what extent FIFRA preempts plaintiffs' claims of negligent misrepresentation, fraud, and statutory fraud based on written misrepresentations and to what extent FIFRA preempts plaintiffs' claims for failure to warn. *Id.* at 494. In addition, the Third Circuit affirmed the district court's dismissal of the claims of some plaintiffs who had signed settlement agreements.

In 1997, plaintiff blueberry farmers (farmers) began using a new insecticide, Diazinon AG 600 (AG 600). Novartis manufactured and marketed it as safer and more effective than previous similar insecticides. However, after the blueberry farmers' tanks mixed the new insecticide AG 600 with fungicides, a common practice, the plants were systematically injured with blotches, depressions, plant spotting, and some plants even died. *Id.* at 486-87.

AG 600 included an additional surfactant not found in other previous similar insecticides used by the blueberry farmers when tank mixing. After damage to the 1997 crop, the farmers hired a plant pathologist who confirmed that AG 600 could cause plant damage when mixed with farmers' fungicides. In response to these findings, Novartis explored "goodwill" settlement agreements with the farmers, entering into agreements with thirteen of the fifteen farmers. As part of the settlement agreements, each of the farmers who settled signed a release form.

The following year, in 1998, the farmers experienced continued damage to their crops from the 1997 use of AG 600. However, this time Novartis declined to compensate the farmers for their loss, and the farmers filed suit, seeking damages based on claims of "strict products liability, negligence, negligent misrepresentation, fraud, breach of express warranty, and breach of the New Jersey Consumer Fraud Act." The thirteen farmers who settled with Novartis also brought additional claims, seeking damages for breach of the covenant of good faith and fair dealing and for fraudulent inducement. The district court found that FIFRA preempted all of the farmers' claims except those for fraudulent

inducement and breach of the covenant of good faith and fair dealing. *Mortellite v. Novartis Crop Protection, Inc.*, 278 F.Supp.2d 390, 400-01 (D.N.J. 2003). The claims for fraudulent inducement were dismissed for seven of the thirteen farmers who settled. However, the district court found that genuine issues of material fact existed with respect to the other six farmers who settled. *Id.* at 402.

The principal issue before the Third Circuit in the noted case is whether the farmers' claims for defective design, defective manufacture, negligent testing, negligent representation, and fraud were preempted by FIFRA, under the Supreme Court's recent holding in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005). *Mortellite*, 460 F.3d at 486. FIFRA requires pesticide manufacturers to submit a proposed label to the Environmental Protection Agency (EPA). *Id.* at 488 (citing 7 U.S.C. § 136a(c)(1)(C), (F) (2001)). The EPA will register the pesticide if the label meets the requirements of FIFRA's misbranding prohibition. *Id.* (citing 7 U.S.C. § 136(q)(1)(A), (F), (G)). A pesticide would be deemed misbranded if the label has false or misleading information, lack of adequate use instructions, or fails to state necessary warnings. Prior to the decision in *Bates*, a majority of circuits applied the "inducement test," which would find a label claim preempted by FIFRA "if a judgment against [the defendant] would induce [the defendant] to alter its product label." *Mortellite*, 278 F. Supp. 2d at 398.

The *Bates* Court overruled the inducement test and replaced it with a specific two-part test for determining whether FIFRA preempts either a state statute or a common law claim. *Bates*, 544 U.S. at 444. First, under the *Bates* test, it must be determined whether a requirement for labeling is created by the state statute or common law claim. Secondly, this requirement must be either in addition to, or impose different requirements than, those of FIFRA.

The Third Circuit first applied the *Bates* test to the farmers' strict liability, negligent testing, and breach of express warranty claims, ultimately concluding that these claims were not preempted by FIFRA. *Mortellite*, 460 F.3d at 489. Because these causes of action were similar to those of *Bates*, the Third Circuit relied heavily on the analysis in *Bates*. *Id.* at 489-90. The Third Circuit, like the Supreme Court, reasoned that the aforementioned common law rules do not require specific labels. *Id.* at 490. While a verdict against an insecticide manufacturer may persuade the manufacturer to change its label, the Third Circuit found that the manufacturer is not required to actually do so. Thus, these claims failed to meet the first prong of the *Bates* test, and the Third Circuit vacated the district court's dismissal of these causes of action.

Next, the Third Circuit examined the farmers' claim for breach of the New Jersey Consumer Fraud Act, as well as their claims for negligent misrepresentation and fraud. *Id.* at 490-91. The basis of these claims was oral misrepresentations made to the farmers by Novartis representatives. In *Bates*, the Supreme Court held that these types of claims based on oral misrepresentations were not preempted by FIFRA, reasoning that any oral representation made by a sales agent would not constitute a label requirement. 544 U.S. at 444. The Third Circuit agreed. *Mortellite*, 460 F.3d at 490. On the other hand, the farmers also had negligent misrepresentation, fraud, and breach of the New Jersey Consumer Fraud Act claims based on written representations. In *Bates*, the Court held that causes of action that indirectly induce a manufacturer to change a pesticide label are not preempted under FIFRA. 544 U.S. at 444 n.17. Therefore, the Third Circuit concluded that FIFRA could only preempt written misrepresentations which qualified as labels under FIFRA. *Mortellite*, 460 F.3d at 491. Because the issue of whether written representations, such as information in marketing brochures, would be preempted under FIFRA was not fully briefed, the Third Circuit remanded the issue to the district court.

The final issue of FIFRA preemption involved the farmers' failure-to-warn claims. The Third Circuit determined that this claim would create a labeling requirement and therefore met the first prong of the *Bates* test, but again noted that FIFRA will only preempt claims that create additional or different labeling requirements. Because this issue of whether the failure-to-warn claims would create additional or different requirements from that of FIFRA was not fully briefed, the Third Circuit remanded this issue as well.

Next, the Third Circuit addressed the dismissal of the claims of seven of the thirteen settling farmers who could not establish reasonable reliance, a necessary element to prove fraudulent inducement, on Novartis representatives' statements. Proving equitable fraud requires a showing of: "1) a material misrepresentation of a presently existing or past fact, 2) reasonable reliance on the misrepresentation by the plaintiff, and 3) resulting damages to the plaintiff." *Id.* at 492. The farmers relied on a theory of indirect reliance, which the Third Circuit noted also requires a showing of reasonable reliance. Because the seven of the thirteen settling farmers could not show their reliance on third party statements was reasonable, the Third Circuit affirmed the district court's summary judgment dismissal. *Id.* at 492-93.

Further, the Third Circuit found that the farmers failed to prove an essential element of indirect reliance, which requires a showing of

reliance on a fraudulent statement by either “the defendant’s agent directly to the victims, or by the defendant to a third person with the intention that the victim hear it.” *Id.* at 493. The Third Circuit also rejected the farmers’ argument that representations made to the plant pathologist they hired were made as part of a principal/agent relationship. Because the plant pathologist maintained to the farmers that each individual farmer had to negotiate his or her own settlement, the Third Circuit held the plant pathologist was an independent person, and thus, any statements made to the plant pathologist could not support a theory of indirect reliance.

Finally, the Third Circuit dismissed the farmers’ claims on behalf of John Doe blueberry farmer plaintiffs. *Id.* at 494. The farmers listed John Doe plaintiffs in the Third Amended Complaint. However, the Third Circuit pointed out that no evidence of the citizenship of the fictitious farmers was presented. If the citizenship of a John Doe plaintiff cannot be truthfully alleged, a John Doe plaintiff can ruin diversity jurisdiction. *See Kiser v. Gen. Elec. Corp.*, 831 F.2d 423, 426 n.6 (3d Cir. 1987). Therefore, to maintain diversity jurisdiction, the Third Circuit dismissed the claims of the fictitious farmers. *Mortellite*, 460 F.3d at 494.

In this decision, the Third Circuit demonstrates a well-reasoned application of the newly formed *Bates* test. The application of the *Bates* test resulted in a more practical understanding of FIFRA preemption. Based on the Third Circuit’s application, it appears that the possibility for successful FIFRA suits implicating labeling has greatly increased from application of the previously employed inducement test.

Elizabeth Roché

IV. FEDERAL TORT CLAIMS ACT AND CLEAN WATER ACT

Abreu v. United States,
468 F.3d 20 (1st Cir. 2006)

In the noted case, an American weapons training facility came under fire for exposing individuals to hazardous substances. The facility, operated by the United States Navy (Navy), is located on Vieques Island, just off the coast in Puerto Rico. The Navy acquired the land more than sixty years ago, and initially conducted a wide range of training exercises, including naval gunfire and weapons detonation. *Abreu v. United States*, 468 F.3d 20, 23 (1st Cir. 2006).

In the 1970s, however, the government of Puerto Rico became increasingly aware of adverse environmental impacts on Vieques Island.

Id. at 23-24. The government of Puerto Rico initiated litigation to contest the facility activities. This litigation forced the Navy to comply with the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2000). *Abreu*, 468 F.3d at 23-24.

Although this suit arose under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674 (2000), the plaintiffs relied in part on alleged violations of the CWA. The plaintiffs, who lived on Vieques Island, alleged that the previous military activity exposed them to hazardous substances such as napalm and depleted uranium. *Abreu*, 468 F.3d at 24. Under the CWA, the plaintiffs argued that the Navy should have obtained a National Pollutant Discharge Elimination System (NPDES) permit before engaging in training exercises involving either ships or the shore. *Id.* at 28.

Procedurally, since the plaintiffs alleged “continuing violations” under FTCA the United States District Court for the District of Puerto Rico did not recognize the two-year FTCA statute of limitations at 28 U.S.C. § 2401(b). *Id.* at 24. Instead, the district court dismissed the claim for lack of subject matter jurisdiction. On appeal, the United States Court of Appeals for the First Circuit affirmed. *Id.* at 23.

Before considering the permit requirements imposed by the CWA, the First Circuit discussed the scope of the discretionary function exception under the FTCA. *Id.* at 25. This exception precludes the waiver of sovereign immunity if the challenged action involved the exercise of discretion. *Id.* (citing 28 U.S.C. § 2680(a)). When the exception applies, the United States will be immune from suit. However, the exception is not triggered when the action in question conflicts with federal law. *Id.* at 23.

To determine the scope of the exception, the First Circuit discussed *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). *Id.* at 25. This challenge against the Federal Aviation Administration (FAA) allowed the United States Supreme Court to explain the congressional intent behind the discretionary function exception. *See Varig Airlines*, 467 U.S. at 814. The Supreme Court noted that the legislature created the exception to prevent any judicial second-guessing that could arise in the guise of a tort suit. The exception can thus immunize select government activities from lawsuits filed by private individuals. *Abreu*, 468 F.3d at 25. Because the naval activities in question entailed a discretionary balancing of concerns of secrecy and national security with safety and public health, the First Circuit concluded that these activities would generally be protected by the exception. *Id.* at 26.

The First Circuit noted that the exception does not apply, however, when the government action conflicts with a mandatory federal law. Here, the plaintiffs argued that because the Navy violated the CWA, the training exercises should be precluded from the discretionary exception shield. The First Circuit again returned to *Varig Airlines* precedent, noting that the exception extended to government employees complying with mandatory policy directives. *Id.* at 26 (citing *Varig Airlines*, 467 U.S. at 820). In essence, the employee actions reflect the policy choices of the government agency in question.

The First Circuit then cited *Berkovitz v. United States*, 486 U.S. 531, 544 (1988), to distinguish a case in which the exception would not apply. In *Berkovitz*, an employee failed to comply with a directive from a government agency. 486 U.S. at 533. Here, an employee violated mandatory Food and Drug Administration (FDA) requirements by licensing a vaccine. After recognizing that a failure to perform a duty imposed by federal law, the Court held that the discretionary function exception did not apply. *Id.* at 544.

The First Circuit conceded that, in contrast to the previous cases discussed, *Abreu* did not involve a statute that regulated the government agency implicated in the lawsuit. *Abreu*, 468 F.3d at 27. In the cases discussed by the Supreme Court, the complaints concerned the exercise of agency discretion under the very statutes that granted authority. In contrast, the *Abreu* plaintiffs did not allege that the Navy's authority arose under any particular statute. Rather, the complaint challenged the Navy's discretion in conducting military training exercises in violation of the CWA. *Id.* at 28. The complaint thus became more attenuated because, as the First Circuit noted, the plaintiffs' challenge could not invoke specific violations of statutory authority. Moreover, the First Circuit noted that the Navy is not a traditional regulatory authority analogous to the FAA or FDA. *Id.* at 27-28. Because *Abreu* involved alleged violations of the CWA, the defendant is not the regulating agency.

Next, the First Circuit discussed whether the naval activities violated the CWA. *Id.* at 28. Specifically, the plaintiffs argued that before conducting the harmful military operations, the Navy should have first obtained a NPDES permit. *Id.* at 18-19. The plaintiffs contended that the failure to secure a permit thus violated a federal law and precluded the use of the discretionary function exception. *Id.* at 26, 28.

In the portion of the opinion discussing the CWA, the First Circuit concluded that the Navy did have the requisite NPDES permit. *Id.* at 28. The First Circuit based its holding on *United States v. Zenon-*

Encarnacion, 387 F.3d 60, 63-64 (1st Cir. 2004). Unlike the previous cases involving regulatory agencies, *Zenon* concerned an expired NPDES permit issued to the Navy. In *Zenon*, although the permit expired, the First Circuit concluded that the permit continued in spite of its expiration because the Navy has previously applied to the Environmental Protection Agency for a new permit. 387 F.3d at 63. In *Zenon*, the First Circuit thus concluded that a NPDES permit remained in effect until the Navy formally withdrew its renewal application. Although the application had not yet been renewed, the NPDES permit was nonetheless still in effect. *Abreu*, 468 F.3d at 28-29. Absent a permit violation, the Navy did not violate the CWA. *Id.* at 29. As such, the Navy was shielded from liability under the discretionary function exception of the FTCA. As a result, the First Circuit affirmed the district court decision to dismiss the case.

The First Circuit declined to issue a broad expansion of the FTCA discretionary function exception but nonetheless achieved that result. It distinguished the Navy following federal statutes imposed by other federal agencies from regulatory agencies following authority-granting statutes that define their powers. In doing so, the First Circuit endorsed a loose permit requirement; the application for a permit is treated as the acquisition of that permit. With this loose requirement, the discretionary function shield might be used in ways not intended by Congress.

Brad Embree

V. FEDERAL TORT CLAIMS ACT AND THE FLOOD CONTROL ACT OF 1928

In re Katrina Canal Breaches Consolidated Litigation,
471 F. Supp. 2d 684 (E.D. La. 2007)
(pertaining to *Robinson v. United States*, No. 06-2268)

1. Introduction

Federal District Judge Stanwood R. Duval, Jr., denied defendant United States of America's (Government) motion to dismiss a lawsuit brought by six plaintiffs living in New Orleans East, St. Bernard Parish, and the Lower Ninth Ward of Louisiana. *In re Katrina Canal Breaches Consol. Litigation*, 471 F. Supp. 2d 684 (E.D. La. 2007). The plaintiffs filed suit pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680 (2000), for damages arising from flooding that inundated plaintiffs' homes and property as a consequence of Hurricane Katrina. *Id.* at 686-87. Plaintiffs alleged that the negligence of the Government

and the United States Army Corps of Engineers (Corps or Army Corps) in designing, constructing, operating, and maintaining the Mississippi River Gulf Outlet (MRGO) was the cause-in-fact of the devastating flooding that destroyed plaintiffs' homes and property, and that these damages were the foreseeable consequence of defective conditions known by the Army Corps for decades. *Id.* at 687. While the doctrine of sovereign immunity prevents the Government from being sued without its consent, the FTCA waives this immunity for cases like the plaintiffs' which seek compensation for negligence in the conduct of government activities. *See* 28 U.S.C. § 2674. The Government moved to dismiss pursuant to Rule 12(b)(1) of the *Federal Rules of Civil Procedure* for lack of subject matter jurisdiction based on the Flood Control Act of 1928 (FCA), *see* 33 U.S.C. § 702c (2000) ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."), and exceptions found in the FTCA, at 28 U.S.C. § 2680. *Katrina Canal Breaches*, 471 F. Supp. 2d at 686-87.

2. Applicable Standard for Rule 12(b)(1) Motions to Dismiss

Because the Government moved to dismiss under Rule 12(b)(1), Judge Duval analyzed the motion's legal propriety under the general rule that, in cases where a jurisdictional challenge is also a challenge to the existence of a federal cause of action, the district court must find that jurisdiction exists and must deal with the motion to dismiss as a direct attack on the merits of the plaintiff's case either under Rules 12(b)(6) or 56. *Id.* at 687-89 (citing *Montez v. Dep't of the Navy*, 392 F.3d 147, 149-50 (5th Cir. 2004) (finding that the general rule also applied to cases where the federal cause of action comes under the FTCA)). Following the court's instructions in *Montez*, Judge Duval's first step was to examine the causes of action alleged by plaintiffs and to determine whether the Government's defenses called into question the existence of a cause of action.

3. Does Section 702c of the FCA Mandate Dismissal as a Matter of Law?

First, the court framed the issues presented by the Government's FCA immunity challenge, namely "whether the MRGO is a flood control project and whether waters that flow through the MRGO are floodwaters" and "whether section 702 [of the FCA] immunizes the Government if the damages would have occurred, in whole or in part, as the result of waters caused by negligent acts in constructing and

maintaining the MRGO regardless of the existence of flood control project(s).” *Id.* at 690. Plaintiffs’ argument centered on a) the fact that MRGO was not a flood control project but an aid to navigation and b) the fact that the damages they sought were solely for the defalcations of the Army Corps with respect to the MRGO, not any flood control project, making section 702c immunity inapplicable. The Government took a wholesale approach to immunity, arguing that section 702c immunizes the Government for damages caused by floodwaters of any kind. Buttressing this argument, the Government claimed that certain levees constructed in conjunction with the MRGO constituted flood control projects that are similarly immune. The Government also made the alternative argument that immunity should arise since the damages to plaintiffs were indisputably caused by floodwaters that federal works failed to control.

The court found that nothing in the history of the FCA supported the Government’s approach to immunity. Judge Duval looked specifically to the United States Court of Appeals for the Fifth Circuit for its examination in *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971), of “the history of [section] 702c immunity in the context of damages allegedly caused by the negligence of the United States in the construction of the MRGO” with respect to the flooding that occurred as a consequence of Hurricane Betsy. *Katrina Canal Breaches*, 471 F. Supp. 2d at 690-91. The court also cited the findings made by the district court in *Graci*, which found the MRGO was not a flood project and that section 702c did not bar suits against the United States for floodwater damage resulting from the Government’s negligence unconnected with flood control projects. *Id.* (citing *Graci v. United States*, 301 F. Supp. 947 (E.D. La. 1969)). Judge Duval also highlighted the fact that the Fifth Circuit, in an opinion written by Judge Minor Wisdom, affirmed the trial court’s decision, finding it would have been unreasonable to conclude that the United States could be immune to liability for the negligent acts of its employees unconnected with flood control projects.

Judge Duval carefully examined the United States Supreme Court’s decision in *Central Green Co. v. United States*, 531 U.S. 425 (2001), to determine whether it supported the Government’s immunity arguments. *Katrina Canal Breaches*, 471 F. Supp. 2d at 692-93. *Central Green* presented a similar factual situation; plaintiffs alleged that the United States negligently designed and maintained a canal which caused subsurface flooding resulting in damage to a pistachio farm. *Id.* (citing *Central Green*, 531 U.S. at 427, 432, 436). Although the canal was part of a larger federal flood control project, the Supreme Court found that it

had been in error to dismiss plaintiffs' suit because the nature of the waters which damaged plaintiffs could not be determined. Specifically, it was unclear to the Court whether the damages caused were the result of actual floodwaters or routine use of the canal. To determine whether section 702c immunity attaches, the Supreme Court instructed that the "courts should consider the character of the waters that cause the relevant damage rather than the relation between the damage and a flood control project." *Id.* (quoting *Central Green*, 541 U.S. at 437). The Supreme Court could not uphold dismissal by taking judicial notice that the canal was in fact a flood control project. *Id.* at 694.

Judge Duval determined that *Central Green* required the court "to identify *the cause of the damage* rather than base a decision on the mere fact that a flood control project was involved." The Government recommended that the court dismiss the case on immunity grounds by taking judicial notice of the existence of the Lake Pontchartrain and Vicinity Flood Control Project (LVP) to find that all of the projects in the area are flood control projects and, therefore, that all damages were caused by flood waters). But in doing so, the court would have violated the command of the Supreme Court in *Central Green*, and ignored plaintiffs' pleadings, which clearly sought damages, not for the failure of the levees or flood projects, but for "the effects of the waters in the MRGO" that "could not have been controlled by any flood control project." The "serious questions" remaining "as to the relationship between the MRGO and LVP," according to the court, prevented any further legal determinations from being made. Returning to *Graci*, the court said: "[I]t is not clear that as a matter of law, should plaintiffs prove their allegations as to damages caused by MRGO and not the failure of the flood control projects, that [section] 702c will prevent a recovery for the damages caused by MRGO." *Id.* at 695 (citing *Graci*, 301 F. Supp. at 956). Applying the rationale of *Montez*, the court determined that "the viability of the cause of action against the United States [was] inextricably tied to the basis for" the Government's claims of lack of jurisdiction. Therefore, as a matter of law, section 702c did not mandate a dismissal since the underlying factual issues as to the court's lack of jurisdiction were also determinative of the federal cause of action. As such, the court found the Rule 12(b)(1) motion to be "legally inappropriate," and, treating the Government's motion as one brought under Rule 12(b)(6), the court denied the motion because of the underlying factual disputes.

4. Do the Exceptions to the FTCA Mandate a Dismissal as Matter of Law?

Second, the court considered “due care” and “discretionary function” exceptions found in the FTCA, *see* 28 U.S.C. § 2680, and raised by the Government in its motion to dismiss. Plaintiffs brought the case pursuant to the FTCA, alleging that the Army Corps did not exercise due care during the MRGO project’s investigation, planning, design, construction, maintenance, and operational phases. Plaintiffs further alleged that the Army Corps violated federal laws in the construction of the MRGO. Specifically, plaintiffs complained that the River and Harbor Act of 1945 (RHA) and the Fish and Wildlife Coordination Act of 1946 (FWCA) required the Army Corps to coordinate and consult with the Department of the Interior, Fish and Wildlife Services, and the former Louisiana Department of Wild Life and Fisheries with regard to the planning and construction of the MRGO. Further, plaintiffs alleged that the Army Corps’ errors are also in contravention to the Corps’ internal engineering policies. *Id.* at 696.

In response, the Government contended that the due care exception barred plaintiffs’ claims since the MRGO is a result of “the execution by the Army Corps of various Congressional mandates concerning this navigational aid.” The Government argued that it had complied with all statutory requirements and that the actions taken by the Army Corps involved “making judgments or choices” that implicated policies not subject to suit under the FTCA. Judge Duval went on to analyze whether the exceptions raised by the Government actually constituted a challenge to the existence of a federal cause of action.

The court entered into a long examination of the “discretionary function” exception, including the two-step process established by the Supreme Court for determining whether the discretionary function exception applies to a plaintiff’s allegations. *Id.* at 697 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). Because the plaintiffs alleged that the Army Corps did not adhere to the specific course of action prescribed by the RHA and FWCA, the court found the first prong of the *Berkovitz* test had not been met since such adherence is a statutory mandate, not a matter of choice for the Army Corps. With respect to the allegation that the Army Corps did not exercise due care in the construction and maintenance of the MRGO, the court reached the second prong of the *Berkovitz* test, which considers whether the government actor is acting in contravention of its own regulations and standards or exercising a policy choice. Nevertheless, the court found

that substantial fact questions precluded dismissal, stating that “it is impossible, and improper under *Montez*, to find on this record that all actions taken either were not in contravention of the relevant regulations and policies of the Army Corps and/or that all decisions made by the Army Corps were policy decisions.” *Id.* at 699.

Judge Duval also considered whether plaintiffs’ allegations would fit into the Supreme Court’s discretionary function exception analysis in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). In *Indian Towing*, the Supreme Court held that once the government undertook to maintain lighthouse service, “the failure to maintain the lighthouse in good condition subjected the government to suit under the FICA.” *Id.* at 69. However, Judge Duvall found that questions of fact existed as to whether the Army Corps’ decisions with respect to the MRGO were actually policy based or whether they fell within the purview of *Indian Towing*. *Katrina Canal Breaches*, 471 F. Supp. 2d at 700, 704. Therefore, the court could not find as a matter of law that the exceptions to the FTCA required dismissal of the plaintiffs’ case. Instead, the court concluded that plaintiffs’ allegations concerning the Army Corps’ violations of the FWCA, the inability of the record to characterize the Army Corps’ decisions as being grounded in policy, and whether there were nonpolicy-based decision that failed to comport with the Army Corps’ standard engineering practices raised issues that were “inextricably tied to the gravamen of plaintiffs’ cause of action and are not subject to Rule 12(b)(1) treatment.” *Id.* at 705.

5. Conclusion

The district court correctly analyzed the case in finding that the Government’s motion to dismiss pursuant to Rule 12(b)(1) was legally improper under the Fifth Circuit’s jurisprudence in *Montez* since the underlying factual disputes are determinative of both jurisdiction and the existence of a cause of action. The court also correctly found that the factual disputes in this case did not warrant dismissal under the Rule 12(b)(6) and Rule 56 standard. *Id.* at 695. As the parties proceed to trial, it will be interesting to watch the developments that will unfold after full discovery has been complete. If the plaintiffs do succeed on the merits of their case, this case will have important precedential value in jurisdictions throughout the country that are subject to flooding that is wholly, or partially, unrelated to flood control projects.

Kathryn Wasik

VI. NATIONAL ENVIRONMENTAL POLICY ACT

*Holy Cross Neighborhood Ass'n v.
U.S. Army Corps of Engineers,*
455 F. Supp. 2d 532 (E.D. La. 2006)

Plaintiffs, residents of a New Orleans neighborhood that borders the Inner Harbor Navigational Canal (known locally as the Industrial Canal) to the east and two local environmental nonprofit organizations, sought declaratory judgment and injunctive relief to enjoin the United States Army Corps of Engineers (Corps) from dredging, stirring up, releasing, and disposing of hazardous waste-contaminated sediments in connection with its plan to modernize the Industrial Canal's existing lock (Project). *Holy Cross Neighborhood Ass'n v. U.S. Army Corps of Eng'rs*, 455 F. Supp. 2d 532, 535-36 (E.D. La. 2006). Plaintiffs argued that the Corps' environmental impact statement (EIS) for the Project, completed in 1997, was insufficient because it failed to account for significant adverse affects the Project will have on the environment, the economy, and the safety and welfare of the communities surrounding the Industrial Canal. *Id.* at 536. The United States District Court for the Eastern District of Louisiana *held* that because the Corps had not considered changes as a result of Hurricane Katrina, the EIS thus failed to take the requisite "hard look" at the environmental impacts and consequences of the Project. *Id.* at 540.

The Industrial Canal lies east of downtown New Orleans and connects the Gulf Intracoastal Highway and the Mississippi River-Gulf Outlet (MR GO, also known locally as "Mr. Go") with the Mississippi River and Lake Pontchartrain in southeast Louisiana. *Id.* at 534. Navigation traffic passes through the canal by means of a lock. Because of the lock's relatively small capacity, as well as heavy vehicular traffic on three nearby bridges that forces closing of the lock during rush hours, long navigational delays are common. The Corps had long considered an undertaking to enlarge the lock in order to alleviate these delays. In 1997, the Corps completed an EIS for such a project and, the following year, it adopted a "new lock" plan that proposed to build a longer, deeper, and wider lock. *Id.* at 535.

The National Environmental Policy Act (NEPA) requires a federal agency to prepare an EIS as part of any "major Federal actions significantly affecting the quality of the human environment." *Id.* at 538 (quoting 42 U.S.C. § 4332(2)(C) (2000)). The EIS must address, inter alia: "(1) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided should the

proposal be implemented, and (3) alternatives to the proposed action.” *Id.* (citing 42 U.S.C. § 4332(2)). NEPA thus “ensures that federal agencies ‘carefully consider detailed information concerning significant environmental impacts,’ and at the same time ‘guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.’” *Id.* at 537 (quoting *Sabine River Auth. v. U.S. Dep’t of Interior*, 951 F.2d 669, 676 (5th Cir. 1992)). NEPA is a

procedural statute that demands that the decision to go forward with a federal project which significantly affects the environment be an environmentally conscious one. [NEPA] does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after taking a “hard look at environmental consequences.”

Id. at 537-38 (quoting *Sabine River*, 951 F.2d at 676).

In the noted case, the Corps asked the court not to consider several exhibits submitted by Plaintiffs in support of their motion for summary judgment. *Id.* at 538. These exhibits consisted of contractor reports, deposition testimony, and responses to requests for admission demonstrating that the Corps was aware of contamination of the canal’s sediment, as well as a declaration by a geologist that summarized the Corps’ sediment disposal plan, opined on its sufficiency, and described the impacts of Hurricane Katrina. The Corps argued that these materials were unnecessary and cumulative, and that the court should not look beyond the administrative record.

The court rejected this request, however, explaining that “NEPA imposes a duty on federal agencies to compile a comprehensive analysis of the potential environmental impacts of its proposed action, and review of whether the agency’s analysis has satisfied this duty often requires a court to look at evidence outside the administrative record.” *Id.* (quoting *Sierra Club v. Peterson*, 185 F.3d 349, 370 (5th Cir. 1999)). The court found that these extra-record materials, especially the geologist’s declaration, were of particular importance because they shed light on the “real issue” of the case: namely, that the circumstances considered by the Corps in preparing its 1997 EIS had “drastically changed” as a result of Hurricane Katrina in 2005. *Id.* at 539. According to the court, in post-Katrina New Orleans, “priorities are shifting from the transportation needs of the community to the restoration of basic infrastructure.”

The court pointed to the Corps’ plan to dispose of the contaminated sediments in confined disposal sites as a “stark example of this changed world.” These confined disposal sites are “engineered structure[s]

designed to provide required storage volume and to meet required effluent solids standards for dredged material.” The Project was designed to dispose of sediment at the confined disposal area for the MR GO. Prior to Katrina, this area was protected by a series of berms, hurricane protection levees, and confinement dikes. After the storm, however, seventeen breaches were found along the levee that borders the MR GO. This levee was the main protection for the area that includes these disposal sites and many of the breaches were “catastrophic.” The geologist’s declaration surmised that, “if the Corps had disposed of contaminated sediments in [these sites] prior to Hurricane Katrina, those sediments could have been resuspended by flood waters and redistributed in wetlands causing widespread environmental contamination.” *Id.* (quoting Pl.’s ex. H, declaration of Barry Kohl).

The Corps argued that in 1997 it “could not have considered the impacts of Hurricane Katrina” eight years later. The court responded that, regardless of these unforeseen events, the EIS was insufficient because it “[did] not adequately address the risks of flooding and hurricanes in general.” The court pointed to the fact that, “[o]f the thousands of pages in the administrative record, only a few paragraphs mention hurricane protection and flood control.” Because the Corps had not specified how long it expected the disposal facilities to last, nor had it specified its plans for the level of a storm event that the facilities would be able to withstand, there was thus “no way to know what environmental impacts these facilities will have on the ecosystem.”

The court also noted that the Corps itself had recently taken actions which seemed to question the conclusions it reached in the EIS. *Id.* at 540. The Corps had adopted alternative dredging and disposal methods for a new maintenance project in the same waters of the Industrial Canal to alleviate shoaling that occurred following Hurricanes Katrina and Rita. For that project, the Corps intended to use an “‘environmental clamshell bucket dredge designed to minimize re-suspension of sediment during the dredging operation’ and [would] dispose of the contaminated sediment into a ‘Louisiana Department of Environmental Quality-permitted Type I landfill’ rather than at a confined disposal site.”

Although the court recognized that its standard of review in this case was “‘a narrow one,’” and that it was “‘not empowered to substitute its judgment for that of the agency,’” the court nonetheless found that this was “not a case of conflicting evidence, nor one in which the Court seeks to substitute its own judgment for that of the Corps.” *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971)). According to the court, “Hurricane Katrina has exposed the

inadequacies of the EIS and raised questions about the importance and priority of the whole Project.” The court expressed concern that “the EIS does not consider the reasonable dredging and disposal alternatives that the Corps has recently adopted for maintenance dredging of the same waters,” and noted that the “purpose of NEPA will not be served if the Corps moves forward with the Industrial Canal Project according to a plan devised almost a decade ago.” The court thus held that the Corps had “failed to take a ‘hard look’ at the environmental impacts and consequences of dredging and disposing of the canal’s contaminated sediment,” and ordered the Corps to “revisit the Project in light of recent catastrophic events.” “Without further study and planning,” the court concluded, “the Project cannot be considered ‘environmentally conscious.’” *Id.* (quoting *Sabine River Auth.*, 951 F.2d at 676).

By ordering the Corps to revisit its EIS, the Eastern District of Louisiana has reemphasized the force of NEPA’s commands. Hurricanes Katrina and Rita brought many changes to the environment, economy, infrastructure, and demographics of southeast Louisiana and the entire Gulf Coast region. These changes may have significant effects on many government projects that were proposed prior to the storms. An “environmentally conscious” decision made before the storms is not necessarily an environmentally conscious decision now. This is not to say that such projects are no longer viable or beneficial. NEPA requires, however, that the government take a second “hard look” at the potential environmental consequences of its actions in light of these new circumstances that the region faces.

Matthew D. Fraser

Louisiana Crawfish Producers Ass’n—West v. Rowan,
463 F.3d 352 (5th Cir. 2006)

In *Louisiana Crawfish Producers Ass’n—West v. Rowan*, the United States Court of Appeals for the Fifth Circuit affirmed the lower court’s ruling on the adequacy of an environmental assessment (EA) conducted by the Army Corps of Engineers (Corps) pursuant to the National Environmental Policy Act (NEPA). In upholding the United States District Court for the Western District of Louisiana’s decision, the Fifth Circuit found that the Corps’ EA properly considered alternatives and cumulative impacts, and therefore the Corps’ finding of no significant impact (FONSI) was appropriate. *La. Crawfish Producers Ass’n—West v. Rowan*, 463 F.3d 352, 356-60 (5th Cir. 2006).

In the early 1980s, the Corps began a study of Louisiana's Atchafalaya Basin (Basin), a network of swamps that drains approximately forty percent of the continental United States. *Id.* at 355. To ensure the flow of water through the Basin, as well as the maintenance and restoration of historical overflow conditions, the Corps developed a plan to divide the area into thirteen management units. Buffalo Cove, one of these management units, was set up as an experimental area where procedures and practices could be improved and refined. In the Buffalo Cove area, the Corps utilized a series of pipelines that formed a series of spoilbanks to retain both water and sediment in the region; however, in creating these banks, the Corps greatly reduced the public's access to this area of the Basin. From 1999 to 2003, the Corps performed an EA on the Buffalo Cove unit, and this report detailed the Corps' techniques on sediment management and water flow. The EA was made available for public comment in July of 2003; 134 comments were submitted, 32 of which opposed the EA. In March of 2004, a FONSI was issued.

The Louisiana Crawfish Producers Association—West (LCPA), a nonprofit organization of commercial fisherman, brought suit seeking an injunction of the project and claimed that (1) the Corps' EA improperly disregarded an alternative proposed by the LCPA, and that the (2) the FONSI was in error. The Corps was granted summary judgment in the district court, and the LCPA appealed to the Fifth Circuit.

In order to address the adequacy of the Corps' EA, the Fifth Circuit first examined the Corps' broad duty under NEPA: "Our task is thus to determine whether the agency 'adequately considered the values set forth in NEPA and the potential environmental effects of the project before reaching a decision on whether an environmental impact statement was necessary.'" *Id.* at 355 (citing *Sierra Club v. Hassell*, 636 F.2d 1095, 1097 (5th Cir. 1981)). NEPA requires all federal agencies to perform an Environmental Impact Statement (EIS), a lengthy and detailed environmental report, for "every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment." *Id.* at 356 (citing 42 U.S.C. § 4332(2) (2000)). However, to determine whether an EIS is necessary, an agency can first perform an EA to gauge the impact of the federal action; that EA will either (1) mandate the production of an EIS or (2) contain a FONSI, such that no further study is needed. Thus, the EA is a "rough cut, low-budget environmental impact statement designed to show whether a full-fledged environmental statement—which is very costly and time-consuming to prepare and has been the kiss of death to many a federal

project—is necessary.” *Id.* at 356 (quoting *Sabine River Auth. v. U.S. Dep’t of Interior*, 951 F.2d 669, 677 (5th Cir. 1992)).

Turning to the Corps’ EA for Buffalo Cove, the Fifth Circuit held that, contrary to the LCPA’s assertions, the Corps’ EA did not, in fact, justify production of a more comprehensive EIS. First, the court scrutinized the Corps’ examination of alternatives in the EA. *Id.* at 356-57. NEPA requires that federal agencies consider alternatives to the proposed action. The Corps’ EA for Buffalo Cove set out three alternatives for the area: a no-action plan (where the Corps took no action at all), a plan designed in the early 1980s, or the plan the Corps ultimately adopted. In their appeal, the LCPA argued that the Corps failed to consider the LCPA’s proposed alternative. In particular, the LCPA called for the reopening of historic bayous along with the enforcement of permits controlling the laying down of pipelines in the region. The Fifth Circuit held that the Corps had no such responsibility to consider the LCPA’s alternative. The court noted that a federal agency is not required to consider all alternatives, regardless of their merit, in the EA; rather, the decision to exclude the LCPA’s alternative from their consideration was within the reasonable limits of the Corps’ discretion. Thus, even though the alternatives might be considered viable and reasonable, federal agencies like the Corps are free to reject these proposals and may decline to include them in the EA so long as there has been appropriate evaluation.

Moreover, the court emphasized that, even if the Corps was required to consider the LCPA’s proposal in the EA, the Corps still had presented justifiable reasons for rejecting that plan. The Corps pointed out to the court that by reopening historic bayous, the LCPA plan would allow for excessive sedimentation, a result expressly counter to the goals of the Corps’ project. Thus, the court held that the Corps’ refusal to consider the LCPA’s alternative was neither arbitrary nor capricious. *Id.* at 357.

Next, the LCPA argued the Corps failed to consider the cumulative impacts of the Buffalo Cove project on the surrounding areas. *Id.* at 357-58. Federal agencies must examine cumulative impacts, defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *Id.* at 357 (quoting 40 C.F.R. § 1508.7 (2006)). The court highlighted the term “reasonably foreseeable” and recited prior jurisprudence that defined this term as “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” *Id.* at 358 (quoting *City of Shoreacres v. Waterworth*, 420

F.3d 440, 453 (5th Cir. 2005)). The court then commented that the Corps' EA did indeed contain a detailed and "lengthy" discussion of the cumulative impacts of the Buffalo Cove project:

The EA discussed past actions, including the effects of hurricanes and floods, as well as the import of flood control measures and further construction in the area. As to present and planned actions, the cumulative impacts portion of the EA discussed tandem efforts undertaken in areas where the Corps cannot construct its own projects, as well as the effect of planned excavation and fill placement. This discussion adequately addresses the cumulative impact of the proposed action.

Id.

Additionally, the court held that because the Buffalo Cove was to be a pilot project, "future projects in the Atchafalaya Basin have yet to be developed." The court found that the LCPA failed to present any evidence that the project as a whole had been sufficiently developed; without a more complete picture of the whole Atchafalaya Basin project, the court was hesitant to issue any ruling on the cumulative impact beyond the Buffalo Cove area. Consequently, the LCPA's claims about the future cumulative impacts in the Basin were too speculative to warrant the Corps' attention in the EA.

The LCPA's third argument centered on the Corps' use of an "out-of-date" EIS. Because the Corps utilized a 1982 EIS in preparing the EA at issue, the LCPA contended that the information in this EIS was obsolete, and therefore the findings in the EA were necessarily flawed. Yet the court found there to be no case law that bars use of an EIS simply due to the passage of time. Rather, the court found that, since the LCPA failed to demonstrate any significant new circumstances in the area, the Corps was free to rely on the 1982 EIS in preparing the EA.

Finally, the LCPA claimed that the Corps failed to recognize the intensity of the impacts resulting from the Buffalo Cove project. *Id.* at 359. Federal regulations provide for a list of ten factors to consider when gauging the intensity of a project. *See* 40 C.F.R. § 1508.27(b) (2006). After listing the factors, the court explained that LCPA failed to show that the impact of the project was so severe as to place it within the meaning of the regulation. For instance, the project was not likely to adversely affect the black bear, nor was there significant evidence of controversy over the project between federal agencies. In short, the LCPA did not prove that the impact of the Buffalo Cove project was so intense as to bring it within the ambit of the federal regulations. *La. Crawfish*, 463 F.3d at 359-60.

By siding with the Corps and finding that their EA was indeed adequate, the Fifth Circuit has continued to follow their own precedent in narrowly reading the provisions of NEPA. Specifically, the court found that the Corps has broad discretion in rejecting alternatives to a proposed action, and that the Corps need only consider “reasonably foreseeable” consequences in addressing cumulative impacts. Thus, the court reinforced its prior decisions in defining the scope of alternatives and cumulative impacts that a federal agency must consider when following EA and EIS procedures as set out in NEPA and its accompanying regulations.

Carson Strickland

VII. NATIONAL HISTORIC PRESERVATION ACT

Business & Residents Alliance of E. Harlem v. Jackson,
430 F.3d 584 (2d Cir. 2005)

Appellants Business and Residents Alliance of East Harlem and others appealed to the United States Court of Appeals for the Second Circuit, a decision of the United States District Court for the Southern District of New York denying plaintiffs’ motion for a preliminary injunction and granting defendants’ motion for summary judgment. *Bus. & Residents Alliance of E. Harlem v. Jackson*, 430 F.3d at 584 (2d Cir. 2005). In 1993, “Congress authorized the United States Department of Housing and Urban Development (HUD) to designate up to six urban empowerment zones” to “promote the ‘[r]evitalization of economically distressed areas through expanded business and employment opportunities.’” *Id.* at 586 (citing the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993); H.R. REP. NO. 103-111, at 791 (1993), as reprinted in 1993 U.S.C.C.A.N. 378, 1021). Each of these empowerment zones would receive tax incentives, as well as up to \$100 million in federal block grants from the United States Department of Health and Human Services (HHS), the purpose of which was to “stimulate economic and social renewal.” Local governments could nominate areas to be zones, so long as the applications included a “strategic plan” providing detailed information as to the proposed zone, its activities, process, funding, baselines, methods, and benchmarks. *Id.* at 586-87.

The New York City Empowerment Zone (Zone), encompassing certain sections of Upper Manhattan and the South Bronx, was designated an urban empowerment zone and received two \$50 million

grants from HHS, one in 1994 and one in 1995. *Id.* at 587. The State of New York established the Empire State Development Corporation (ESDC), the recipient of the grants, and provided \$100 million in state funds for the project. New York City volunteered another \$100 million, bringing the total to \$300 million. The state and city were to pay the funds over a ten-year period. The ESDC then created the New York Empowerment Zone Corporation (NYEZC) to review and monitor the empowerment zone project. Residents of Upper Manhattan created the Upper Manhattan Empowerment Zone Development Corporation (UMEZDC), and the residents of the South Bronx created the Bronx Overall Economic Development Corporation (BOEDC). The purpose of the UMEZDC and the BOEDC was to develop initiatives and administer funds for their respective areas of the Zone. Pursuant to a Memorandum of Agreement and a Memorandum of Understanding amongst the parties, the ESDC was responsible for disbursing the federal and state funds, and the New York City Department of Business Services was responsible for disbursing the local funds. *Id.* at 588.

In 1996, defendant-appellee Tiago Holdings, LLC (Tiago) proposed building the East River Plaza in East Harlem, within the boundaries of the New York City Empowerment Zone. The plans called for a 50,000 square foot retail shopping complex within the boundaries of the UMEZDC. It required that Tiago demolish the buildings already on the property, including the Washburn Wire Factory. The New York State Office of Parks, Recreation and Historic Preservation (New York Office of Parks) was called in to conduct a historic resource review. The New York Office of Parks found no negative impacts on historic buildings or sites in the area, a conclusion confirmed by the National Park Service of the United States Department of the Interior.

Tiago was allowed to proceed and requested a \$15 million loan from the UMEZDC toward the estimated \$160 million needed for the project. *Id.* at 589. The funds were to be disbursed equally from the federal, local, and state funds, including \$5 million of federal block grant money.

On February 10, 2003, after Tiago had started demolition of the on-site buildings, the plaintiffs contacted the UMEZDC for the first time to request that HUD review the impacts on the historic resources of the area pursuant to section 106 of the National Historic Preservation Act (NHPA). 16 U.S.C. § 470f (2000). Plaintiffs based their request on the fact that federal block grant money was being utilized yet that no section 106 review had taken place. Plaintiffs filed suit seeking three remedies: a declaratory judgment that HUD conduct a section 106 review, an

injunction enjoining the demolition of the Washburn Wire Factory until HUD completed a section 106 review, and legal fees and costs. Defendants opposed plaintiff's motions and filed a cross-motion to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*.

The district court denied plaintiff's motion for a preliminary injunction on August 19, 2003, after which Tiago completed the demolition of the Washburn Wire Factory was completed. On June 11, 2004, the district court converted defendants' motion to dismiss into a motion for summary judgment which it granted, citing insufficient federal involvement or control over the project to require a section 106 review. The plaintiff then appealed. *Id.* at 589.

The Second Circuit reviewed the summary judgment de novo, "construing the record in the light most favorable to the non-moving party." *Id.* at 590. As there were no genuine issues of material fact, the court reviewed only whether the district court applied the law correctly. The Second Circuit first noted that the Circuit had not previously visited the question of whether the plaintiffs had a private right of action pursuant to the NHPA under these circumstances. However, the court chose to decide this case without visiting that issue.

The NHPA requires that each federal agency review its activities for potentially negative impact on historic sites and take responsibility for those impacts. The Advisory Council on Historic Preservation (ACHP) was established to administer the Act and ensure that Congress reached its goals. In reviewing whether the NHPA required a section 106 review under these circumstances, the Second Circuit noted that the NHPA is primarily procedural, referred to as a "stop, look, and listen" provision, ensuring that a federal agency consider potentially negative impacts on historic sites prior to approving funds or granting licenses. *Id.* at 591. Plaintiffs argued that the \$5 million of federal block grant money that would be used in building the East River Plaza mandated a section 106 review, because the East River Plaza was an "undertaking" under section 301. Undertaking is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those carried out with Federal financial assistance." *Id.* (citing 16 U.S.C. § 470w(7)(B) (2000)). The court noted that section 301 does not clearly indicate whether this meant that *all* projects funded by federal monies were undertakings or whether undertakings consisted only of those projects that received funding "under the direct or indirect supervision of a [f]ederal agency." The court went on to note that the regulations promulgated by the ACHP were no more forthcoming as to

the definition of an undertaking. However, the court decided that it had no need to review this question, as it could determine the validity of the summary judgment without doing so.

The Second Circuit determined that even if it assumed that the East River Plaza was an undertaking under section 301, this did not ensure a section 106 review, because section 106 applies only to federal agencies “‘having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking,’ or ‘any Federal department or independent agency having authority to license any undertaking.’” *Id.* at 591 (quoting *Sheridan Kalorama*, 49 F.3d at 755). Thus, the court decided that a section 106 review was unnecessary unless it could be determined that either HUD or HHA had jurisdiction or licensing authority over the East River Plaza project. *Id.* at 592. Plaintiffs made no claim that HUD or HHS had the authority to license the project. Instead, plaintiffs alleged that HUD and/or HHS had indirect jurisdiction over the project based on the \$5 million in federal block grant monies. Thus, the court was called on to determine the meaning of “direct or indirect jurisdiction,” because it was defined by neither the NHPA nor the ACHP regulations.

In reviewing the NHPA for clues, the court noted that section 106 allows federal agency to approval funding for a project only after taking into account the possible negative ramifications for historic sites. Thus, the court reasoned, the federal agency must have some kind of control over the disbursement or expenditure of the monies to have jurisdiction. If the agency has no such control, then it cannot “effectuate the results of the Section 106 review by making a resultant funding decision.” The court noted that the section 106 review would thus become an “empty exercise.”

Because the federal funds had already been granted to the NYEZC, neither HUD nor HHS had any further control over the spending of the funds. The state and local agencies were entirely responsible for the decisions to fund particular projects. Further, the HUD officer responsible for ensuring compliance with the purposes of the Zone and its overall strategic plan submitted a sworn affidavit that HUD played no part in approving the funding of the Tiago project. Additionally, the Memorandum of Agreement between HUD, New York State, and New York City granted HUD no such authority. *Id.* at 593. Finally, neither HUD nor HHS may block the funding for a specific project, and ESDC is not required to notify HHS of the reasons it draws funds from the block grants.

Plaintiffs then argued that HUD still had jurisdiction because it could revoke the entire empowerment zone designation and, thus, the block grant. However, the court noted that pursuant to both 26 U.S.C. § 1391(d)(2) and the Memorandum of Agreement, HUD could only do this in certain narrowly-limited situations, which included when the state or local government (1) changed the boundaries, (2) substantially failed to comply with the Zone's strategic plan, or (3) "failed to make progress in achieving" the Zone's benchmarks. A section 106 review of the project would not have triggered any of these situations. There was no change in the boundaries of the Zone, and a section 106 review would not have changed them. Additionally, pursuant to 26 U.S.C. § 1391(f), the strategic plan of the Zone included issues relative to local community and economic concerns. The plaintiffs did not contend that the East River Plaza project would deviate from these concerns. Rather, state and local businesses approved the project to promote potential job creation and physical revitalization within the area. The court noted that historic assessment and preservation were not considerations under 26 U.S.C. § 1391(f) and a section 106 review could not bring about de-designation of the Zone. *Bus. & Residents Alliance of E. Harlem*, 430 F.3d at 594. Thus, the Second Circuit held that neither HUD nor HHS had sufficient jurisdiction to trigger a section 106 review. *Id.*

Finally, the plaintiffs argued that even if there was insufficient control for HUD or HHS to have jurisdiction, the review should be triggered by the HHS block grant regulations. Pursuant to 45 C.F.R. § 96.30(a) (2006), states must "[e]xcept where otherwise required by Federal law or regulation, . . . obligate and expend block grant funds in accordance with the laws and procedures applicable to the obligation and expenditure of its own funds." *Bus. & Residents Alliance at E. Harlem*, 430 F.3d at 594. Plaintiffs further argued that when HHS granted money to the NYEDZ and the UMEZDC, that money was regulated by 45 C.F.R. § 96.31(b)(2). As sub-grantees, NYEZD and UMEZDC were required to expend the funds "in accordance 'with applicable laws and regulations.'" Further, NYEZD and UMEZDC were also required to ensure that Tioga did so when they granted the money for the East River Plaza project. The court determined that this fact assumed the conclusion that a section 106 review was mandated by federal law. However, the court had already determined that this was not so. Thus, the defendant did not violate federal law when they did not conduct a section 106 review, and, consequently, did not violate HHS funding regulations. The ACHP, in its letter-brief to the court, concurred with the

court's conclusion that a section 106 review was not mandated by the NHPA.

In New York, economic redevelopment zone project funding does not trigger a section 106 review under the NHPA. However, the court has left some questions open to review in future cases. New York courts may still be called upon to define an undertaking under section 301 or determine whether individual citizens have a private right of action under the NHPA rather than the Administrative Procedure Act.

Lena Giangrosso

VIII. TOXIC TORT DAMAGES

In re The Exxon Valdez,
472 F.3d 600 (9th Cir. 2006)

In 1989, the oil supertanker EXXON VALDEZ (VALDEZ) ran aground along the Alaskan coast, causing the largest oil spill in American history. *Amerada Hess Pipeline Corp. v. F.E.R.C.*, 117 F.3d 596, 603 (D.C. Cir. 1997). Several factors caused the spill, including the ship's nighttime voyage, the icy waters through which the ship was navigating, and the complications involved with steering a ship as big as the VALDEZ. Perhaps most important, the Court implied that the fact that the ship's captain was a known alcoholic contributed to the spill. *See Baker v. Hazelwood*, 270 F.3d 1215, 1222-23 (9th Cir. 2001). These factors proved fatal for the voyage—the ship ran aground on Bligh Reef, and the tanker released eleven million gallons of oil into Prince William Sound. *See id.* at 1223.

Unsurprisingly, the spill resulted in extensive litigation, especially during the damages phase. *See, e.g., In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006); *Baker*, 270 F.3d at 1215. In the noted case, the United States Court of Appeals for the Ninth Circuit considered whether the award against Exxon for \$4.5 billion in punitive damages was constitutional. *See Valdez*, 472 F.3d at 601-02. This was the Ninth Circuit's third review of the punitive damage award. *Id.* at 601. The court had delayed resolution of this issue because of intervening United States Supreme Court decisions. On two previous occasions, the Supreme Court handed down decisions that added a new wrinkle to the determination of constitutional punitive awards, just after the *Valdez* district court had made its own determination about the award against Exxon. Thus, the Supreme Court decisions forced the Ninth Circuit

twice to remand the award in light of the evolving Supreme Court jurisprudence.

The Supreme Court's involvement with punitive damages is relatively new. *See id.* at 603. At the time of the VALDEZ accident, the Supreme Court had not overturned a single punitive damage award on the basis that the award was too large to comport with due process. However, the Court's noninvolvement ended in the early 1990s, most notably in *TXO Production Corp. v. Alliance Resources Corp.* *Id.* at 604 (discussing 509 U.S. 443 (1993)). In *TXO*, the Court held that a punitive award of \$10 million was not "grossly excessive" enough to violate due process, and thus the Court upheld the amount. *Id.* (quoting *TXO Prod. Corp.*, 509 U.S. at 462). The Court did not explain further what sorts of punitive awards might be "grossly excessive." One year after *TXO*, the jury in *Valdez* entered its verdict for punitive damages against Exxon—a staggering \$5 billion.

As the parties began preparations for appeal, the Supreme Court struck again in *BMW of North America, Inc. v. Gore.* *Id.* at 605 (discussing 517 U.S. 559 (1996)). Here, the Court made its first real attempt to guide courts and juries in determining what sort of punitive award is proper. *Id.* Due process, the Court felt, dictated that courts review punitive awards to assure the amount accorded with "fair notice to the defendant of the consequences of his conduct." *Id.* at 605 (citing *BMW of N. Am., Inc.*, 517 U.S. at 575). In other words, courts had to ensure that a defendant's conduct was harmful enough that he should expect the specific punitive award that was levied against him. *See id.* The Court described three factors for reviewing punitive awards: (1) the reprehensibility of the offending party's conduct, (2) the "disparity between the actual or potential harm . . . flowing from that conduct" and the punitives awarded by the jury, and (3) the difference between the punitives and the civil or criminal penalties authorized by the state for that conduct. *Id.* at 605-06. The Supreme Court indicated that the first factor, reprehensibility, was the most important indicator. *Id.* at 605. However, despite establishing these factors for review, the Court refused to establish a mathematical line that punitives could not cross; thus, review remained flexible, yet inexact.

Time passed as the parties in *Valdez* litigated other issues at the appellate level, and the Ninth Circuit did not initially look at the \$5 billion award until 2001. *See id.* at 607. However, the court quickly decided to remand the award because the \$5 billion was awarded before the district court considered its propriety in light of *BMW.* *See id.* at 608. Upon the first remand, the lower court felt that the \$5 billion would

comport with the *BMW* factors, but nevertheless reduced the award to \$4 billion. *Id.* at 609. The complications, however, continued. Exxon again appealed this decision, and the Supreme Court made another ruling in *State Farm v. Campbell*. *Id.* at 609-10 (discussing 538 U.S. 408 (2003)).

In *State Farm*, the Supreme Court spoke more authoritatively than before regarding review of punitive damage awards. *See id.* at 610. The Court honed each of the *BMW* factors. As to reprehensibility, the Court instructed lower courts to consider five subfactors:

- (1) whether the harm caused was physical as opposed to economic;
- (2) whether the conduct causing the plaintiff's harm showed "indifference to or a reckless disregard of the health or safety of others";
- (3) whether the "target of the conduct" was financially vulnerable;
- (4) whether the defendant's conduct involved repeated actions as opposed to an isolated incident; and
- (5) whether the harm caused was the result of "intentional malice, trickery, deceit, or mere accident."

Id. at 610 (citing *State Farm*, 538 U.S. at 419). As to the ratio between actual damages suffered and the punitive award, the Court still refused a mathematical bright-line rule, but did note that single-digit ratios were better suited to due process requirements than the double-digit kind. However, the Court recognized that higher ratios might still comport with due process when the offending party's conduct was especially harmful but the actual damages flowing from that conduct remained relatively low. Finally, as to the comparison between punitives and civil or criminal penalties assessed by the state, the Court actually minimized this factor's relevance in the larger determination. *Id.* at 611. The Court did not explain in depth why this factor was of so little importance other than to say that in *State Farm* specifically, the punitive award dwarfed the civil penalties, and the criminal responsibility of State Farm was simply a "remote possibility." *Id.* (quoting *State Farm*, 538 U.S. at 428).

The Ninth Circuit first remanded *Valdez* before *State Farm*, so in 2003, the court again remanded the \$4 billion award in light of the intervening precedent. For the third time, the lower court examined the punitive award. This time, the court increased the award to \$4.5 billion because that represented the highest single-digit ratio, 9:1, between punitives and the actual harm suffered as a result of the oil spill. Finally, in 2006, the award came before the Ninth Circuit in the noted case. After many years and many decisions by other courts, the Ninth Circuit had to decide the following: considering the reprehensibility of Exxon's conduct, and considering the 9:1 ratio the district court used in its last decision, was the punitive award of \$4.5 billion too excessive to satisfy

the due process rights afforded to Exxon under the Constitution? *See id.* The long-awaited answer was “yes.” *See id.* at 625.

The Ninth Circuit relied, in structure and reasoning, on *BMW* and *State Farm*. *See id.* at 613. The analysis followed the three *BMW* factors and the *State Farm* additions, but the court asserted its flexibility in applying each. The Ninth Circuit began with reprehensibility, “the most important guidepost,” and its five subfactors. First, the court felt that although the oil spill caused no physical harm, the spill did cause more than just economic harm because of the emotional toll it took on the people in the region. *See id.* at 614. The court also considered the fact that the ship’s captain was an alcoholic. *See id.* at 615. Though the spill itself was an accident, Exxon’s decision to leave an alcoholic at the helm of an oil supertanker was deliberate and thus “Exxon’s reprehensibility goes considerably beyond the mere careless imposition of economic harm.”

Second, the court felt that Exxon displayed a reckless abandon for the health and safety of others. Again, the court focused on Exxon’s decision to leave an alcoholic in charge of the vessel. *See id.* at 615-16. The court also considered the potential harm to the crew and rescuers even though they were not plaintiffs to the lawsuit. *See id.* at 616.

Third, the court felt that the target of the spill was not vulnerable because, in fact, there was no real “target” of Exxon’s actions, just victims of an accident. *See id.* at 617. Fourth, the court decided that the conduct was repetitive, even though the specific action that caused the spill was the ship’s grounding, a one-time event. However, instead of focusing on the grounding, the Ninth Circuit focused on Exxon’s repeated choice to leave the alcoholic captain in command. Fifth, the court decided that Exxon did not engage in intentional malice or trickery. *See id.* at 618. Although Exxon left the captain in place, it never intended to harm the plaintiffs.

Having gone through the five factors, the Ninth Circuit began to form an opinion about Exxon’s reprehensibility, but not before it considered a sixth factor, mitigation of reprehensibility. The Supreme Court did not consider this factor in *State Farm*, but the Ninth Circuit had considered mitigation in its first *Valdez* decision in 2001. The Ninth Circuit took into account that Exxon promptly set up a system of voluntary payments and undertook cleanup efforts after the spill. Considering all six factors together, the court settled upon a mid-range finding of reprehensibility—on one hand, Exxon over and over again left an alcoholic in charge of the VALDEZ, but on the other, Exxon did not act with intent and also acted quickly to mitigate the damage.

Next, the court moved on to the second *BMW* factor, the ratio of punitives to actual harm caused by the spill. The biggest problem for the court with this issue was what number it would use to represent the harm the plaintiffs suffered. *See id.* at 619. The district court used a figure of \$513 million, based on the compensatory damages verdict plus additional judgments by the court and settlements Exxon entered into with certain plaintiffs.

On appeal, Exxon argued that the \$513 million should be reduced by payments voluntarily made shortly after the spill and by the settlements Exxon engaged in. Exxon based this argument on language from the Ninth Circuit's 2001 opinion, which stated that if voluntary payments and settlements are included in the actual harm calculation, then this would generally have a negative effect on parties' incentive to settle. Thus, in Exxon's view, total harm should have been approximately \$20 million, representing the district court's finding less the more than \$490 million Exxon had already paid. Accordingly, punitive damages should not exceed roughly \$180 million per the 9:1 maximum ratio from *State Farm*. Fortunately for the plaintiffs, the court rejected Exxon's position. *See id.* at 620. The Ninth Circuit noted, "A defendant cannot buy full immunity from punitive damages by paying the likely amount of compensatory damages before judgment." *Id.* at 621. The Ninth Circuit distanced itself from the language in the 2001 opinion by noting that this "generally" would have a negative effect, one that would not arise in every case. *See id.* at 620. The Ninth Circuit, however, did allow an offset of \$9 million for an overpayment to one plaintiff, and thus settled on an amount of \$504.1 million in actual damages. *See id.* at 623.

Having determined the actual harm figure, the Ninth Circuit now was left with deciding what ratio to punitive damages was proper. The Ninth Circuit was moved by the *State Farm* suggestion that few awards above a single-digit ratio would pass constitutional muster. Furthermore, the Ninth Circuit reasoned that *State Farm* seemed to reserve high single-digit awards for cases involving especially harmful conduct that had not manifested itself in large economic damages. For the Ninth Circuit, these notions strongly suggested that the ratio in this case, 9:1, was too high. To get a sense of what ratio was proper, the Ninth Circuit looked to its own jurisprudence. The Ninth Circuit had reserved high single-digit awards for intentional acts, such as racism or threats of violence. *See id.* at 623-24. Here, the Ninth Circuit concluded, Exxon's actions were not intentional, and Exxon had made prompt efforts to mitigate the harm. *Id.* at 624. Thus, the Ninth Circuit concluded that any ratio above 5:1 would violate due process in this case.

Finally, the Ninth Circuit considered *BMW's* final factor, comparable legislative penalties. Rather than actually comparing amounts, the Ninth Circuit simply noted that state and federal penalties against Exxon could have been extremely high. Thus, these serious legislative penalties lent support to a substantial punitive damages award against Exxon.

Having made its way through the multifactor test for punitive awards, the Ninth Circuit overturned the district court's award of \$4.5 billion. *Id.* at 625. Exxon's decision to leave an alcoholic in command of a supertanker was reckless, but the sanctions warranted by this conduct were not of the highest level possible. Thus, the Ninth Circuit reduced the award to a 5:1 ratio and awarded \$2.5 billion in punitive damages. Furthermore, the Ninth Circuit declined to remand the case to the district level for a third time. The Ninth Circuit felt that its *de novo* review in the case was sufficient to forego another remand, and "[i]t was time for this protracted litigation to end."

With the Ninth Circuit's decision, the final phase of litigation in one of the worst environmental disasters in American history may be complete. The Ninth Circuit's opinion was thorough and well-reasoned. However, it is not abundantly clear that its final reduction from \$4.5 billion to \$2.5 billion was warranted. The dissent pointed out that the Ninth Circuit considered mitigation of reprehensibility, although the Supreme Court made no mention of that factor. *See id.* at 628 (Browning, J., dissenting). Also, the dissent questioned the majority's decision overturning the district court's award, even though the decision was already in line with Supreme Court guideposts, and moreover those guideposts were discretionary, not mandatory. *See id.* at 633. Perhaps the court tried to find a middle ground so that this litigation could finally come to a close—but will it? In early 2007, the Supreme Court once again showed its willingness to define the constitutional limits of punitive damage awards. *See Philip Morris v. Williams*, 127 S. Ct. 1057 (2007). The parties in *Valdez* may view this as a signal that an appeal to the high court would be heard.

Philip Watson

IX. RECENT LEGISLATION

The California Global Warming Solutions Act of 2006,
California Assembly Bill 32

Since World War II, California has been battling the stifling effects of smog in Los Angeles. *See* Cal. Air Res. Bd., California's Air Quality History Key Events, <http://www.arb.ca.gov/html/brochure/history.htm> (last visited Feb. 3, 2007). California has been the country's most egregious polluter, primarily the product of vehicular emissions. *See* Ann Carlson & Tim Malloy, *Special Edition: California's AB 1493: Trendsetting or Setting Ourselves Up To Fail?*, 21 UCLA J. ENVTL. L. & POL'Y 97, 102 (2003) (symposium comments of Ann Carlson). With the creation of the Bureau of Smoke Control in the State's health department in 1945, California began its mission of improving air quality for its citizens. *See id.* Ever since the state began regulating air quality in the 1960s, California has been the national laboratory of clean air regulation that has spurred historic changes in federal air pollutant control. *See id.* Notably, "California advocated [] adoption of the catalytic converter, a now-ubiquitous device bolted underneath vehicles that breaks down most toxins before they hit the air" in the 1960s and 1970s. Sholnn Freeman, *States Adopt California's Greenhouse Gas Limits*, WASH. POST, Jan. 3, 2006, at D1. California air quality regulation was the impetus for engineering and technological innovations that resulted in the development of today's gas-electric hybrid cars. *See id.* This Article will analyze the most recent pioneering legislation signed into law in California that is designed to tackle what many believe to be the most serious environmental problem facing the world today—global warming.

1. Global Warming and the Global Community

In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) ratified an instrument designed to reduce global emissions of greenhouse gases (GHGs), which have been identified as the key contributing factors to an overall rise in air and ocean temperatures throughout the world. *See* BUREAU OF OCEANS & INT'L ENVTL. & SCIENTIFIC AFFAIRS, THE KYOTO PROTOCOL ON CLIMATE CHANGE: FACT SHEET (1998), *available at* http://www.state.gov/www/global/oes/fs_kyoto_climate_980115.html. The Kyoto Protocol, "calls for developed nations to reduce their current emissions of six key greenhouse gases by an average of five percent below 1990 levels by 2012." *From the Hill: United States Signs Kyoto Protocol on Climate Change*, ISSUES SCI. & TECH. (Winter 1998-99), *available at*

<http://www.issues.org/15.2/hill.htm>. Although the Clinton administration signed the document on November 12, 1998, it maintained the position that the President “would not submit the protocol to the Senate for ratification until key developing countries agreed to take significant steps to address climate change, a key Senate condition.” *Id.* Since that time, President Bush pulled out of the 160-nation Kyoto Protocol citing potential negative impacts to U.S. economy. *See California Shows Washington the Way*, CHINA DAILY, Sept. 1, 2006, available at http://www.chinadaily.com.ch/cndy/2006-09/01/content_678956.htm.

Because the federal government has not taken any meaningful steps towards addressing this problem of global importance, states have recently enacted wide-ranging measures to do their part to mitigate the impacts of global warming.

2. The Science

On February 5, 2007, the Intergovernmental Panel on Climate Change (IPCC), established by the United Nations in 1998 to assess the risk of human-induced climate change, released their fourth assessment report outlining the physical science basis for their findings. *See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS—SUMMARY FOR POLICYMAKERS (2007)*, available at <http://www.ipcc.ch/SPM2feb07.pdf>. The IPCC stated that there is an “overwhelming probability that human activities are warming the planet at a dangerous rate, with consequences that could soon take decades or centuries to reverse.” Juliet Eilperin, *Humans Faulted for Global Warming: International Panel of Climate Scientists Sound Dire Alarm*, WASH. POST, Feb. 3, 2007, at A1. The scientists comprising the IPCC warned that it is “very likely” that hot days, heat waves, and heavy precipitation will occur with greater frequency in the near future, and “‘likely’ that future tropical hurricanes and typhoons” will occur with greater intensity. Their summary “represents the definitive international scientific and political consensus on climate science.”

3. Legal Battles

As recently as April 2007, Justice Stevens issued the majority decision in a landmark Supreme Court case in which twelve states, three cities, an American territory, and numerous environmental organizations sought review of an order of the U.S. Environmental Protection Agency (EPA) refusing to regulate GHG emissions from motor vehicles.

Massachusetts v. EPA, 127 S. Ct. 1438, 1439 (2007); see Erica Rancilio, Note, *Massachusetts v. EPA: The D.C. Circuit Stretches Precedent and Ignores Statutory Standard to Uphold EPA's Unlawful Rulemaking Petition Denial*, 20 TUL. ENVTL. L.J. 207 (2006). Petitioners sought the Supreme Court writ of certiorari, asking Court to answer “two questions concerning the meaning of §202(a)(1) of the Clean Air Act: “whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.” *Massachusetts*, 127 S. Ct. at 1446. In refusing to regulate motor vehicle GHG emission, EPA primarily relied upon a 2001 National Research Council report on climate change science that concluded that “a causal linkage” between GHG emissions and global warming “cannot be unequivocally established.” See *Massachusetts v. EPA*, 415 F.3d 50, 57 (D.C. Cir. 2005) (citing NAT'L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE, at 17). However, the essence of the legal battle in this case came down to issues of standing to sue, nature and extent of statutory discretion of the EPA Administrator, and whether the Administrator's exercise of that discretion in refusing to regulate amounted to abuse under the Administrative Procedure Act. The relevant portions of §202(a)(1) state: “the Administrator [of the EPA] shall by regulation prescribe ... standards applicable to the emission of any air pollutant from ... new motor vehicles ... which *in his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” *Id.* at 67 (Tatel, J., dissenting) (citing 42 U.S.C. 7521(a)(1) (2000) (emphasis added).

At the Circuit Court level, Judge Randolph of the D.C. Circuit concluded that the Administrator's judgment regarding whether GHGs may “reasonably be anticipated to endanger public health or welfare” need not be based solely on scientific evidence, “but may also be informed by the sort of policy judgments that motivate congressional action.” *Massachusetts*, 127 S. Ct. at 1451 (citing 42 U.S.C. § 7521(a)(1)). In a 5-4 opinion, the Supreme Court disagreed with this interpretation of the law, simply stating that “[t]here is no reason, much less a compelling reason, to accept EPA's invitation to read ambiguity into a clear statute.” *Id.* at 1461. Thus, “because greenhouse gases fit well within the Clean Air Act's capacious definition of ‘air pollutant,’ [the Court held] that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.” *Id.* at 1462.

Furthermore, the Court concluded that, under the clear terms of the Clean Air Act, the EPA can avoid taking further action only if it

determines that GHGs do not contribute to climate change or “if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” *Id.* Instead of complying with this clear statutory command, the Court concluded that the EPA offered only a list of reasons not to regulate. In concluding his opinion, Justice Stevens stated that, “contrary to Justice Scalia’s apparent belief” that the EPA would prefer not to regulate greenhouse gases because of some residual uncertainty is “irrelevant.” *Id.* at 1463. The statutory question remains whether sufficient information exists to make an endangerment finding. *Id.* Therefore, since the EPA offered no reasoned explanation for its refusal to decide whether GHGs cause or contribute to climate change, their action was arbitrary, capricious, or otherwise not in accordance with the law, and the refusal to regulate was set aside. *Id.* In a final note before reversing the judgment of the D.C. Circuit and remanding the case, the Court was careful to note that they “need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy reasons can inform EPA’s actions in the event that it makes such a finding,” citing the Court’s unwavering policy of affording *Chevron* deference to agency decision making. *Id.* They reiterated that they held “only that EPA must ground its reasons for action or inaction in the statute.” *Id.*

Following this pioneering decision by the Supreme Court, and on the heels of the IPCC’s most recent findings, the legislature must affect the changes to national environmental policy necessary to ensure the United States is taking action. Though the Court stopped short of compelling the EPA to regulate new motor vehicles, the holdings in *Massachusetts v. EPA* are certain to have a profound impact on the entire auto industry in the United States and may be a catalyst for widespread use of cleaner, more fuel efficient vehicles in the very near future.

4. The Act

Considering the significant hurdles lawmakers face in creating and implementing laws and regulations to address the issue of global warming, and in light of California’s pioneering history of air pollutant regulation, Governor Arnold Schwarzenegger signed California Assembly Bill 32 on September 27, 2006, establishing a “first-in-the-world comprehensive program of regulatory and market mechanisms to achieve real, quantifiable, cost-effective reductions of greenhouse gases.” Press Release, Office of the Governor of the State of Cal., Gov. Schwarzenegger Signs Landmark Legislation To Reduce Greenhouse Gas Emissions (Sept. 27, 2006), available at <http://gov.ca.gov/index.php?/>

print-version/press-release/4111. The California Global Warming Solutions Act of 2006 (Act) requires the California Air Resources Board (CARB) to develop regulations and market mechanisms, most likely in the form of a cap and trade system, that will “ultimately reduce California’s [GHG] emissions by 25 percent by 2020. Mandatory caps will begin in 2012 for significant sources and ratchet down to meet the 2020 goals.” The twenty-five percent reduction would reduce GHG emissions to 1990 levels, a goal nearly identical to that which was set by the UNFCCC in Kyoto in 1992. *See From the Hill: United States Signs Kyoto Protocol on Climate Change, supra* p. 125, at 29.

5. The Facts

The Act requires CARB to “[e]stablish a statewide GHG emissions cap for 2020, based on 1990 emissions by January 1, 2008.” Cal. Air Res. Bd., AB 32 Fact Sheet—California Global Warming Solutions Act of 2006 (Sept. 25, 2006), *available at* <http://www.arb.ca.gov/cc/factsheets/ab32factsheet.pdf>. CARB is also required to “[a]dopt mandatory reporting rules for significant source of greenhouse gases” by the same date. By 2009, CARB must “adopt a plan . . . indicating how emission reductions will be achieved from significant GHG sources via regulations, market mechanisms, and other actions.” Such regulations are “to achieve the maximum technologically feasible and cost-effective reductions in GHGs, including provisions for using both market mechanisms and alternative compliance mechanisms,” i.e., cap and trade. Lastly, “prior to imposing any mandates or authorizing market mechanisms,” the Act requires CARB to “evaluate several factors, including but not limited to: impacts on California’s economy, the environment, and public health; equity between regulated entities, electricity reliability, conformance with other environmental laws, and to ensure that the rules do not disproportionately impact low-income communities.” The bill also includes a safety valve, providing the Governor the ability to “suspend the emissions caps for up to one year in the case of an emergency or significant economic harm.” Press Release, Office of the Gov. of the State of Cal., *supra*.

6. The Politics

According to their stated findings included in the Act, the California legislature recognizes global warming will have detrimental effects on some of California’s largest industries, including agriculture, wine, tourism, skiing, recreation and commercial fishing, and forestry.

See CAL. HEALTH & SAFETY CODE § 38501(b) (West 2007). Furthermore, the legislature recognizes that “California has long been a national and international leader on energy conservation and environmental stewardship efforts . . . [and] will continue this tradition of environmental leadership by placing California at the forefront of national and international efforts to reduce emissions of greenhouse gases.” *Id.* § 38501(c). However, the true political force behind this landmark legislative act can be found in section (d), where the legislature states that “[n]ational and international actions are necessary to fully address the issues of global warming . . . [and] action[s] taken by California . . . will have far-reaching effects by encouraging other states, the federal government, and other countries to act.” *Id.* § 38501(d).

Politically speaking, the Act is a response to the complacency the federal government has demonstrated with regard to climate issues. See Patrice Hill, *Blair, Schwarzenegger Propose Alliance To Curb Global Warming*, WASH. TIMES, Aug. 1, 2006, at A07. In August 2006, Governor Schwarzenegger met with British Prime Minister Tony Blair to discuss “banding together to curb global warming, bypassing the rest of the United States in what would be a trans-Atlantic market for rights to produce greenhouse gases.” *Id.*

Previously, California has taken steps to spur federal movement on climate change mitigation with regard to motor vehicle emissions. On July 22, 2002, the California Legislature passed Assembly Bill 1493 (Pavley), directing CARB to develop and implement GHG limits for vehicles beginning in model year 2009. See Carlson & Malloy, *supra*, p. 122 at 97. Although Congress kept for itself the authority to regulate air emissions from automobiles in the (CAA) of 1967, there is a specific provision that deals only with California. *Id.* at 102 (comments of Ann Carlson). According to a California law professor, “California has the right to establish its own emissions standards for automobiles . . . as long as those standards are at least as stringent as the federal standards, and they have been.” *Id.* Thus, California could not prescribe regulations mandated by AB 1493 without that waiver in federal law. *Id.* Accordingly, “California is the only state in the country that arguably, at least, can regulate greenhouse gas emissions from automobile tailpipes.” *Id.* The California rule, approved by CARB in 2004, requires a thirty percent reduction in GHGs emitted from motor vehicles in the state by 2016. Freeman, *supra*, at D1.

Nevertheless, before any of California’s GHG regulations could go into effect, EPA must issue a waiver under the CAA. Consequently, “[i]f California is permitted to impose the new regulations, the federal CAA

allows other states with poor air quality to adopt California's rules after agency approval." Thus, the Supreme Court decision on the authority of EPA to regulate GHG emissions from motor vehicles can be viewed as the zenith of a climate change mitigation "campaign" that was intended not only to affect positive change in air quality in the State of California, but also to affect changes nationwide, as states would then be empowered to adopt California's new rules in lieu of more lenient federal emissions standards. In fact, on January 30, 2007, Massachusetts, Oregon, Connecticut, and five other states adopted California's tough GHG rules, thereby supplementing federal exhaust pollutant standards already in place. California's bold initiatives to curb GHG emissions within the state have spread infectiously to other states, republics, and commonwealths that share the concern that the planet is suffering and in dire need of relief. But these are just a few of the impacts California's global warming solutions and vehicular emissions regulations programs have made on domestic policy and the American entrepreneurial business sector.

7. The Impacts

With the change of party control in the United States House and Senate in the 2006 congressional elections, Senator Barbara Boxer (D-Cal.) has assumed the top position on the Senate Environment and Public Works Committee. Darren Samuelsohn, *CLIMATE: Sen. Boxer Says Calif. Level GHG Bill Not Likely To Fly in Congress*, ENV'T & ENERGY DAILY, Dec. 6, 2006, available at <http://www.lexiscom> (follow "News" link; then follow "News Most Recent Two Years" link; then key in title). She has already planned an aggressive schedule that includes hearings on the California Global Warming Solutions Act of 2006. With this sort of state legislature precedent, the foundations for congressional debate on a national plan to address global warming are already in place.

On January 16, 2007, a federal judge in Fresno, California, postponed trial of an auto industry lawsuit against California's clean cars global warming standards (AB 1493) pending the Supreme Court decision in *Massachusetts v. EPA*. Judy Lin, *State Pollution Trial Is Delayed*, SACRAMENTO BEE, Jan. 16, 2007, at A3. By granting a stay, U.S. District Judge Anthony Ishii put the fate of California's global warming vehicular pollution law in the hands of the Supreme Court, which found in favor of the states. Although the auto, energy and agriculture industries in California have stood in staunch opposition to the new GHG measures, state officials and businesses alike see great

opportunities for climate control, economic development, and restoration of the natural environment.

8. The Economic Vision

Taking a page from the cap-and-trade market mechanisms utilized by signatories to the Kyoto Protocol, Governor Schwarzenegger, in a July 2006 speech, emphasized the need for a trading scheme as part of CARB's directive to create market mechanisms that help provide industries flexibility and enough time to comply with emissions reduction targets. *California Governor Backs Trading in GHG Legislation*, INSIDE GREEN BUS., July 14, 2006, http://insidegreenbusiness.com/index.php/IGB/show/California_governor_backs_trading_in_ghg_legislation/. Thus, "[i]mplementing an emissions trading scheme in California 'will allow companies that reduce pollution faster than the law requires [to] sell those credits to others who need more time to catch up,' Schwarzenegger said." This "carbon-trading framework . . . will operate much like a stock exchange, allowing California businesses to identify the most cost-effective ways to meet the statewide emissions caps." Natural Res. Def. Council, *Dispatches 2007: The Vote Heard Round the World: California Enacts Toughest Global Warming Law in All the Land*, ONEARTH, Jan. 1, 2007, at 42, available at <http://www.nrdc.org/onearth/07/wm/dispatches/asp>. In other words, the "cap-and-trade approach will enable California businesses to buy and sell carbon emission credits in a global marketplace." In fact, Governor Schwarzenegger met with New York Governor George Pataki to discuss plans to cooperate on GHG emissions programs. Accordingly, "California businesses may one day trade carbon emissions with utilities operating in Northeast and Mid-Atlantic states, from Maine to Maryland, under the Regional Greenhouse Gas Initiative, a cap-and-trade system that will go into effect in 2009." The California trading system could also connect with the "European Union's carbon trading system, through which [twenty-five] member nations could buy and sell emissions credits with participating U.S. businesses."

9. The Future

Although some critics claim such mandatory reductions could harm the state financially, a closer reading of the bill reveals real benefits for the climate, economy, and natural environment. *Ecosystem Restoration: The Life-Giving Key to CO₂ Reduction and Economic Progress*, BUS. WIRE, Aug. 31, 2006, available at <http://www.lexis.com> (follow "News"

link, then follow “News Most Recent Two Years,” then key in title). “Specifically, the new law supports atmospheric CO₂ reductions via eco-restoration projects like growing new forests and other forms of plant life.” California eco-restoration firms are launching a pilot series of commercial scale phytoplankton restoration projects to revive failing ocean life and produce millions of tons of tradable low-cost GHG emission offset credits. Restoring these tiny ocean plants, sometimes referred to as “ocean forest,” to 1980 levels of health and activity will generate billions of tons of CO₂-sequestering biomass and feed the entire marine ecosystem from the bottom up. Specifically, with the advent of a Kyoto-like cap-and-trade system, California eco-restoration firms can engage in large-scale environmental restoration projects that are entirely funded through the trading of carbon credits on the emissions trading market. California’s entrepreneurial innovation in environmental technology is likely to help form a more resilient foundation for the evolving National debate on climate change mitigation.

10. Analysis

According to the California Legislature, “[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California.” CAL. HEALTH & SAFETY CODE § 38501(a) (West 2007). This legislative finding holds true for the rest of the United States and, the world. As the scientific basis for dangerous anthropogenic interference with global climate strengthens and the world becomes more aware of the perils, tough choices akin to those made by the California legislature in enacting the California Global Warming Solutions Act of 2006 will no longer fade into the periphery of lawmakers’ agendas. The science is sound, the threat is real, and the United States is falling behind the rest of the world in terms of facing the problem and, more importantly, doing its part in contributing to a solution.

The State of California has been the practice field for environmental protection and regulation. Others have followed California’s plans to protect public health and the environment, and the federal government often eventually succumbs to the overwhelming pressure of change.

California has led the way for the nation to follow, because “[d]iscernable human influences now extend to other aspects of climate, including ocean warming, continental-average temperatures, temperature extremes and wind patterns.” INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra*, at 10. The Supreme Court has determined that the

federal government cannot continue to ignore the problem, but must face the fact that permitting GHG emissions to remain unregulated is in contravention of the law.

J. Benjamin Winburn

*The Pets Evacuation and Transportation Standards Act,
Public Law 109-308*
(codified as amended at 42 U.S.C. § 5196b)

On August 29, 2005, Hurricane Katrina made landfall on the Gulf Coast. CNN NEWS, CNN REPORTS: KATRINA STATE OF EMERGENCY 18-20 (2005). The storm brought with it 140 mile-per-hour winds and twenty-five-foot storm surges. When the Seventeenth Street, London Avenue and Industrial Canal levees breached, water flooded the city quickly, downing everything in its path. *See id.* at 21-24. With most of the city uninhabitable, the city government ordered the mass evacuation of all remaining residents. *Id.* at 11. Rescuers ordered people to leave their pets behind. Press Release, Humane Soc’y of the U.S., With Hurricane Season upon Us, Congress Passes Landmark Bill To Leave No Pet Behind (Aug. 4, 2006) [hereinafter With Hurricane Season], *available at* http://www.hsus.org/press_and_publications/press_releases/with_hurricane_season_upon.html. Some refused to part with their pets and elected to stay behind, putting themselves in serious danger. Others reluctantly parted with their animals, hoping someone else would rescue them. As midnight on August 29 approached, abandoned dogs could be heard barking all over the city. CNN News, *supra*, at 26. One reporter described seeing dogs wrapped in electrical lines being electrocuted alive. At least 250,000 animals were left behind when Hurricanes Katrina and Rita hit. Bestfriends.org, Louisiana Pet Evacuation Bill Becomes Law, <http://network.bestfriends.org/News/PostDetail.aspx?np=5239&g=gfa3c167-0062-4e91-6552-f6faf6fae37970> (last visited Mar. 29, 2007). Tens of thousands of domestic and wild animals perished from drowning, starvation, and disease. Humane Soc’y of the U.S., Katrina One Year Later: Great Gains, New Goals in Disaster Preparedness (Aug. 25, 2006), http://www.hsus.org/hsus_field (follow “HSUS Disaster Center”; then “Disasters Latest News”; then “Katrina One Year Later . . .”) [hereinafter One Year Later]. Only a fraction of the more than 10,000 animals rescued were reunited with their owners. LouisianaPetBill.org, *supra*. In the days after the storm, the Humane Society of the United States, the Louisiana Society for the Prevention of Cruelty to Animals (SPCA), and several other groups joined forces to

save those animals left behind. Press Release, Humane Soc’y of the U.S., One Year After Katrina, Pets Factor into Disaster Planning (Aug. 25, 2006), http://www.hsus.org/press_and_publications/press_releases/one-year-after-katrina-pets.html). Rescuers and volunteers entered the city and searched for pets. They left food for some and captured others. The rescued animals were taken to the Lamar Dixon Expo Center in Gonzales, Louisiana, which was at the time the world’s largest animal shelter. More than 8000 animals passed through the Expo Center before it closed in October 2005. An overflow center was created at Dixon Correctional Institution where inmates were trained to care for the animals. The Humane Society spent close to \$6.3 million of donated funds to care for those animals that were rescued. One Year Later, *supra*.

In the face of tragedy, a movement began. With the Humane Society acting as a relentless lobbyist, the legal and political landscape began to change. House Representatives Tom Lantos (D-Ca.) and Chris Shays (R-Conn.) advanced a federal bill that could transform the current policy on how animals factored into emergency planning. With Hurricane Season, *supra*. The Pets Evacuation Transportation Standards (PETS) Act is an amendment to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Staffords Act) (P.L. 109-308). In introducing the legislation, Representative Shays recognized that in disaster situations such as Katrina, “when given a choice between their own personal safety or abandoning their household pets, a significant number of people will choose to risk their lives in order to remain with their pets.” Website of Congressman Christopher Shays, Pets Evacuation and Transportation Standards Act (PETS Act), <http://www.house.gov/shays/news/2005/september/PETS.pdf> (last visited Feb. 23, 2007). In addition to safety concerns, Representative Shays noted that there are health concerns associated with abandoning pets in a disaster area. According to Shays, the PETS Act would require state and local authorities to incorporate household pets and service animals into emergency preparedness plans when introducing these plans to the Federal Emergency Management Agency (FEMA). The House passed the PETS Act on May 22, 2006 by a vote of 349 to 24. With Hurricane Season, *supra* pp. 148-49.

In the Senate, Senators Ted Stevens (R-Alaska) and Frank Lautenberg (D-N.J.) introduced a slightly amended version of the Act. *Id.* The more expansive Senate measure “grant[ed] [FEMA] the authority to assist in developing [these] plans, authorize[d] financial help to states to create emergency shelters for people with their animals, and allow[ed] the provision of essential assistance for individuals with

household pets and service animals, and the animals themselves, following a major disaster.” Humane Soc’y of the U.S., *Never Again: The Pets Evacuation and Transportation Standards Act* (Aug. 25, 2006), http://www.hsus.org/hsus_field (Follow “HSUS disaster center”; then “Disasters Latest News”; then “Never Again . . .”). On August 3, 2006, the Senate unanimously passed its version of the PETS Act, and on September 20, 2006, the House concurred in the Senate amendment.

On October 6, 2006, President Bush signed the PETS Act into law, making it Public Law 109-308. Codified as amended at 42 U.S.C. § 5196 (2006). The PETS Act amends the Stafford Act, requiring the Director to “ensure that [state and local emergency preparedness] plans take into account the needs of individuals with household pets and service animals prior to, during, and following a major disaster or emergency.” 42 U.S.C. § 5196 (2006). Now, under the Emergency Preparedness Measures of 42 U.S.C. § 5196, the Director may consider “plans that take into account the needs of individuals with pets and service animals.” In addition, 42 U.S.C. § 5196, “[t]he Director may make financial contributions . . . to the States and local authorities for animal emergency preparedness purposes, including the procurement, construction, leasing, or renovating of emergency shelter facilities and materials that will accommodate people with pets and service animals.” 42 U.S.C. § 5196. Finally, the bill revised the Essential Assistance section of 42 U.S.C. § 5170b so federal agencies must provide “rescue, care, [and] shelter . . . to individuals with household pets and service animals; and to such pets and animals,” when ordered to give essential assistance to save lives during a disaster.

In sum, the PETS Act extends the emergency preparedness plans already in place to individuals with household pets and service animals and the animals themselves. The amendments ensure that these individuals and their animals receive consideration when emergency and evacuation plans are being constructed and assistance when disaster strikes.

Public comment on the newly passed PETS Act has been overwhelmingly positive. Wayne Pacelle, the Humane Society President and CEO, stated, “The House and Senate have taken an important step in ensuring that Americans will never again be forced to make an impossibly difficult choice: leave their animal behind while they flee a disaster or take their chances by staying in a disaster-stricken area with their pet.” With Hurricane Season, *supra*. Currently, sixty-three percent of American households own pets, with a total of more than 358 million pets. The importance of including these pets in emergency preparedness

plans is evident at the state level as well. Never Again, *supra*. As of August 2006, laws have been passed in Florida, Hawaii, Louisiana, Maine, New Hampshire, New Jersey, and Vermont addressing the needs of animals in disasters such as Katrina. Similar laws are currently pending in California, Illinois, and New York. In addition, at the federal level, a recent Department of Homeland Security memo instructed the states to incorporate animals in security planning. In addition, the Department of Transportation has been actively seeking out carriers with pet transportation capabilities. Finally, the United States Coast Guard is revising its rescue guidelines so that animals are included in their mission. Never Again, *supra*.

Hurricane Katrina and its effects exposed the deficiencies in our emergency preparedness plans. The PETS Act promises to revive the current emergency plans in place to account for those who have no voice but who are considered an important part of the majority of American households today.

Jennifer Griep