RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. THE NATIONAL ENVIRONMENTAL PROTECTION ACT

Pacific Rivers Council v. U.S. Forest Service, 668 F.3d 609 (9th Cir. 2012)

In *Pacific Rivers Council v. United States Forest Service*, the United States Court of Appeals for the Ninth Circuit considered whether the United States Forest Service's (Forest Service) Forest Plan for forestland of the Sierra Nevada Mountains was inconsistent with the National Environmental Protection Act (NEPA). 668 F.3d 609 (9th Cir. 2012). At issue was whether the Forest Service's 2004 Environmental Impact Statement (EIS) sufficiently analyzed the Forest Plan's environmental impacts on fish and amphibians. The Ninth Circuit held that the 2004 EIS' analysis of fish did not comply with NEPA, but its analysis of amphibians did. *Id.* at 612.

The Sierra Nevada Mountains are a 400-mile mountain range in Central California. *Id.* at 612-13. They are home to several national forests and parks, including Yosemite National Park, the Lake Tahoe Basin, and Mt. Whitney. *Id.* at 613. The National Forest Management Act authorizes the Forest Service to coordinate the uses of 11.5 million acres of this land, including "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." *Id.* at 612-13 (quoting 16 U.S.C. § 1604(e)(1) (2006)). Pursuant to this authority, the Forest Service adopted the Sierra Nevada Forest Plan. *Id.* at 613.

In the 1990s, the Forest Service took significant steps towards improving the ecological health of the forestland of the Sierra Nevada Mountains. *Id.* In November 1998, the Forest Service gave notice of intent to publish an EIS, citing the need to "improve national forest management direction for five broad problems: (1) conservation of old-forest ecosystems, (2) conservation of aquatic, riparian, and meadow ecosystems, (3) increased risk of fire and fuels buildup, (4) introduction of noxious weeds, and (5) sustaining hardwood forests." *Id.* The final EIS was issued in January 2001, reflecting these goals. *Id.*

Less than a year later, under the newly elected Bush Administration, the Chief of the Forest Service set out to reevaluate the framework provided by the 2001 EIS. *Id.* at 612. The Forest Service appointed an Amendment Review Team, and in 2004 the Forest Service issued a new EIS. *Id.* at 613-14. The 2004 EIS proposed significantly more logging of the forestland, more land would be open to logging, more trees could be harvested, and more logging roads could be built. *Id.* at 614-16. Additionally, the 2004 EIS proposed a reduction on grazing restrictions for commercial and recreational livestock. *Id.* at 616. For example, under the 2001 framework, grazing was prohibited in certain areas during the Yosemite Toad's breeding and rearing seasons. *Id.* Under the 2004 framework, these restrictions were significantly reduced. *Id.*

The Pacific Rivers Council (PRC) is a citizens group with over 750 members who use the Sierra Nevada forestland for recreational activities, such as fishing, hiking, cross-country skiing, nature photography, and boating. *Id.* at 619. The group filed suit in the United States District Court for the Eastern District of California, alleging that the 2004 framework violated NEPA and the Administrative Procedure Act (APA). *Id.* at 612. In 2008, the district court granted a summary judgment for the Forest Service, leading to this appeal. Pac. Rivers Council v. U.S. Forest Serv., No. 2:05-cv-00953-MCE-GGH, 2008 WL 4291209 (E.D. Cal. Sept. 18, 2008), *aff'd in part*, *rev'd in part*, *Pac. Rivers Council*, 668 F.3d 609.

The Ninth Circuit first considered whether the PRC had standing to bring the challenge. *Pac. Rivers Council*, 668 F.3d at 617-18. Standing under Article III of the Constitution requires an injury in fact, fairly traceable to the conduct of the defendant, that is capable of being redressed by a favorable decision. Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). The Forest Service argued that the harm alleged by the PRC was neither concrete and particularized nor actual or imminent, and so it was not an injury in fact because the PRC challenged the Forest Plan generally rather than a specific project and did not identify which specific part of the vast forestland their members use. *Pac. Rivers Council*, 668 F.3d at 618. The Forest Service's position relied on *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), in which the Supreme Court held that a citizens group did not have standing when it challenged the Forest Service's nationwide exemption from NEPA's EIS requirement for sales of salvaged timber on land comprising 250 acres or less. In *Summers*, the Court reasoned that there was too remote a possibility the group would encounter land affected by the regulations, given the breadth of the nationwide regulations and the relatively small tracts of land exempted. *Id.* at 495-96.

Here, however, the Ninth Circuit distinguished the PRC's challenge from that of *Summers*. *Pac. Rivers Council*, 668 F.3d at 619. Many members of the PRC live in the Sierra Nevada Mountains, including its Chairman, Bob Anderson, who lives in South Lake Tahoe. *Id.* Mr. Anderson and the members of the PRC fish, hike, cross-country ski, take nature photographs, and boat in the Sierra Nevada Mountains. *Id.* The court found it significant that the Pacific Rivers Council identified specific activities taking place in the specific forestlands that were the subject of the suit. *Id.* Given the fact that the 2004 framework calls for the harvesting of 4.6 billion board feet of green timber and 1.8 billion board feet of salvage timber in the next twenty years, taking place in each of the Sierra Nevada Mountains' eleven national forests, the effect of the 2004 framework will likely be visible from great distances and PRC members will likely encounter the affected areas. *Id.* at 619-20. Therefore, the injury in fact alleged is both concrete and particularized and actual and imminent. *See id.* at 621.

Having conferred standing, the court turned to the merits of the plaintiffs' claims. A court can overturn an agency's decision when the decision is "arbitrary and capricious," such as if the agency relied on factors Congress did not intend, failed to consider significant factors, or

the decision is so implausible that it cannot be attributed to a difference in viewpoint. *Id.* at 617. (quoting Lands Council v. McNair (Lands Council II), 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). NEPA requires that federal agencies consider all the significant environmental impacts of their actions and inform the public of their considerations. *Id.* at 621 (quoting Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002)). It is a reporting obligation, not a substantive law requiring parties to take environmental friendly measures. *Id.* (citing *Kern*, 284 F.3d at 1066). As the Supreme Court stated in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), NEPA simply requires federal agencies to take a "hard look" at the environmental consequences of their actions, including the foreseeable direct and indirect impact of the actions. *Pac. Rivers Council*, 668 F.3d at 621 (quoting N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 975 (9th Cir. 2006)) (citing Or. Natural Res. Council Fund v. Brong, 492 F.3d 1120, 1133 (9th Cir. 2007)).

The PRC alleged that the Forest Service had not taken a "hard look" at the impact of the proposed actions on fish and amphibians. *Id.* As to fish, the 2001 EIS contained sixty-four pages of detailed analysis on the impact of the proposed actions on individual species of fish. *Id.* The 2004 EIS, however, contained no analysis whatsoever; it simply incorporated by reference the section on fish from the 2001 EIS. *Id.* at 621-22. The court found it troubling that the 2004 EIS amended the Forest Plan so significantly yet contained no new analysis of how the proposed actions would affect fish. *See id.* at 622. The Forest Service contended that the 2004 EIS was a broad, programmatic statement of environmental impacts, not the kind of site-specific EIS that generally calls for an assessment of the effects on individual species. *Id.*

The court looked to its decision in *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, to decide on the required level of analysis. In *Kern*, the court stated that the scope of the analysis should match the significance of the actions proposed. *See id.* at 1072. Regardless of whether the EIS is programmatic or site-specific, the EIS should analyze environmental impacts as soon as "reasonably possible." *Id.* (citing Save Our Ecosystems v. Clark, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984)). Under this standard, the Forest Service failed to take a "hard look" as to fish in the 2004 EIS. *Pac. Rivers Council*, 668 F.3d at 624-25. Changes to the surrounding environment, such as by increased harvesting of timber and cattle grazing, can have a significant impact on fish, especially threatened and endangered species. *Id.* at 625-26. That is why the 2001 EIS devoted sixty-four detailed pages to the proposed action's

environmental impact on fish. *See id.* at 627. By merely incorporating the 2001 section on fish into the 2004 EIS, without any independent analysis reflecting the impacts of the significant changes to the proposed action, the Forest Service did not meet their responsibility under NEPA. *Id.*

As to amphibians, the 2004 EIS did contain extensive analysis on the environmental impact of the proposed actions. *Id.* at 629. It identified six specific species of amphibians and stated how the 2004 framework would affect the species differently than the 2001 framework. *Id.* It stated that the proposed action would benefit these species in some ways. For example, increased logging rather than prescribed burning, the 2001 framework's solution to reducing the risk of wildfires, would help preserve the Foothill Yellow-legged Frog's habitat. *Id.* Additionally, the 2004 EIS identified possible risks, such as the possibility that the frogs, which are known to seek shelter under vehicles, may be crushed by loggers' trucks. *Id.* In short, the 2004 EIS did for amphibians what it failed to do for fish. It took a "hard look" at the environmental consequences of the proposed action as to amphibians, and the court found that the section met the requirements of NEPA. *Id.* at 630-31.

The dissent argued that the majority was not sufficiently deferential to the Forest Service. *Id.* at 631 (Smith, J., dissenting). It stated that the court was bound to a deferential "arbitrary and capricious" standard of review. *Id.* In relying instead on the "reasonably possible" pronouncement of *Kern*, the court created an unclear standard of review that calls for too much judicial intervention into what is rightfully the province of the agency. *Id.* Additionally, the dissent argued that the majority ignored the distinction between programmatic and site-specific EISs. *Id.* The 2004 EIS was a programmatic EIS, and under NEPA regulations and Ninth Circuit precedent, a programmatic EIS requires less detail. *Id.* The dissent concluded that if the majority had not made these two errors, it would have found that the 2004 EIS met the requirements of NEPA. *See id.*

The Sierra Nevada Mountains are home to some of the nation's most beautiful and well-preserved forestland, and the court's decision ensures that the Forest Service must truly take a "hard look" before embarking on its proposed action. Additionally, by relying on the "reasonably possible" standard of *Kern*, the Ninth Circuit establishes an interesting new standard for analyzing agency action. Rather than simply looking to whether the EIS is programmatic or site-specific, the court will require analysis that is proportional to the significance of the action

proposed. Under this standard, fewer environmental risks will go unanalyzed, and fewer environmental impacts will escape public scrutiny.

Brendan Conroy

II. THE RESOURCE CONSERVATION AND RECOVERY ACT

Ass'n Concerned over Resources & Nature, Inc. v. Tennessee Aluminum Processors, Inc.,
No. 1:10-00084, 2011 WL 1357690
(M.D. Tenn. Apr. 11, 2011)

In *Ass'n Concerned over Resources & Nature, Inc. v. Tennessee Aluminum Processors, Inc.*, the United States District Court for the Middle District of Tennessee considered whether environmental plaintiffs must allege ongoing violations of the Resource Conservation and Recovery Act (RCRA) and to what extent RCRA distinguishes between maintaining an "open dump" and "open dumping." No. 1:10-00084, 2011 WL 1357690 (M.D. Tenn. Apr. 11, 2011). The plaintiff's claims arose from the defendant's alleged improper disposal of aluminum slag waste at its facility in Mount Pleasant, Tennessee. *Id.* at *1. Finding that the complaint alleged sufficient factual allegations to state a claim and that issues of fact remained as to the presence of ongoing violations and whether the defendant's maintaining an "open dump" at its facility constituted "open dumping," the court concluded that the defendant's motion to dismiss should be denied. *Id.* at *16, *19.

A. Statutory and Factual Background

Finding that "[the] disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment," Congress enacted RCRA to promote improved solid waste management techniques, prohibit future open dumping, facilitate the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health, and reduce or eliminate the generation of hazardous waste wherever feasible. 42 U.S.C. §§ 6901(b)(2), 6902(a)(1), 6902(a)(3), 6902(b) (2006). RCRA subchapter III (also known as subtitle C) directs the EPA Administrator to develop and promulgate criteria for identifying and then listing hazardous wastes subject to federal regulation. *Id.* § 6921(a). Facilities that do not comply with federal regulations are prohibited "open dumps."

Id. § 6945(a). Citizens may sue to enforce compliance with the federal regulations. *Id.* § 6972.

The plaintiff, a nonprofit corporation whose mission is to educate the public about the threats to the environment and public health in Mount Pleasant, Tennessee, brought suit to correct alleged improper disposal of aluminum slag waste at the defendant's Mount Pleasant facility. *Tenn. Aluminum*, 2011 WL 1357690, at *1. In or about 1983, the defendant began disposing aluminum dross waste in slag waste stockpiles. *Id.* On August 16, 1989, the defendant and the Tennessee Department of Health and Environment, Division of Water Pollution Control (DWPC), Office of Water Management, entered into an Agreed Order requiring the defendant to prevent rainwater from contacting the stockpile and to design and implement a remedial action plan to eliminate future unlawful discharges of pollutants into Tennessee waters. *Id.* at *2. The plaintiff alleged that despite this and subsequent removal orders from the Tennessee Department of Environment and Conservation (TDEC), the defendant's waste stockpile still contained approximately 120,000 cubic yards of slag waste as late as 2001. *Id.* The solid waste in the slag waste stockpile contained "aluminum, ammonia, chlorides, lead, and manganese," in addition to other constituents. *Id.*

On October 8, 2003, the defendant and TDEC entered into a subsequent Agreed Order issued by the Tennessee Solid Waste Disposal Control Board, which required the defendant to remove the slag waste stockpile at a rate of 24,000 tons of stockpiled material per year and pay a civil penalty of $100,000. *Id.* Unsatisfied with the defendant's compliance status with the Agreed Order, the plaintiff issued a notice of intent to file citizen suit on June 2, 2010. *Id.* The plaintiff's claims alleged violations of both the Clean Water Act and RCRA. *Id.* The court's treatment of the RCRA claims are addressed here. The matter came before the court after the defendant filed a motion to dismiss for failure to state a claim for relief. *Id.* at *1.

B. The Court's Decision

The court considered two issues central to the RCRA claim: (1) whether the plaintiff had alleged a continuing violation actionable under RCRA and (2) whether RCRA distinguishes between maintaining an open dump and open dumping. *Id.* The court ultimately denied the defendant's motion to dismiss, holding that the plaintiff had alleged an ongoing violation and that an issue of fact remained as to whether the defendant's "maintaining an 'open dump'" at its facility constituted open dumping. *Id.* at *14-16, *19.

The court first considered whether the plaintiff had alleged sufficient facts to make out a claim for "continuous," and not "wholly past," RCRA violations. *Id.* at *14. The defendant asserted that the plaintiff's claims were based on "wholly past violations" and argued that whatever effects resulted from the defendant's past conduct were not cognizable under RCRA. *Id.* The plaintiff responded with citations to its notice and complaint, which asserted that "the aluminum processing waste pile on the [defendant's] property has discharged and is discharging pollutants into surface waters." *Id.* at *4.

The court's analysis relied primarily on its previous decision in *Crigler v. Richardson*. No. 3:08-0681, 2010 WL 2265675 (M.D. Tenn. June 3, 2010) (ruling on motion to dismiss). The court noted that the *Crigler* plaintiffs alleged that the defendants had improperly disposed of construction debris and cement waste at a site that discharged pollutants and chemicals into a stream and pond immediately downgrade of the site and onto the plaintiffs' private property. *Tenn. Aluminum*, 2011 WL 1357690, at *14 (quoting *Crigler*, 2010 WL 2265675, at *1). The *Crigler* court acknowledged that under United States Court of Appeals for the Sixth Circuit jurisprudence, citizen plaintiffs lack standing when they assert "wholly past" violations of an effluent standard (or federal regulatory criteria). *Crigler*, 2010 WL 2265675, at *7 (citing Ailor v. City of Maynardville, Tenn., 368 F.3d 587 (6th Cir. 2004)). *Ailor* instructs that plaintiffs must allege sufficient facts that evidence "continuous or intermittent violations" of the standard to demonstrate standing. *Ailor*, 368 F.3d at 598-99 (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987)).

Applying Sixth Circuit precedent as a guide, the *Crigler* court reexamined the plaintiffs' complaint and found two distinct allegations of ongoing violations: (1) the defendants continue to dump materials and debris (pollutants) into the water ("active dumping" issue), and (2) materials and debris that have been previously dumped into the water "continue to release harmful substances" into the water ("previous dumping" issue). Crigler v. Richardson, No. 3:08-681, 2010 WL 2696506, at *2 (M.D. Tenn. July 7, 2010) (order denying plaintiff's motion for reconsideration). The *Crigler* court concluded that the "active dumping" claim was not "facially plausible" because the plaintiffs had only alleged "cursory and vague allegations that 'all defendants' continue to pollute." *Tenn. Aluminum*, 2011 WL 1357690, at *15 (quoting *Crigler*, 2010 WL 2696506, at *4). Regarding the "previous dumping" issue, the *Crigler* court explained that some courts merely require that pollution deposited in a water of the United States remain in those

waters; other courts hold that once a polluter ceases his active pollution, the violation is wholly past. *Id.* (quoting *Crigler*, 2010 WL 2696506, at *5).

In this case, Judge William J. Haynes, Jr. accepted the plaintiff's allegations of active and ongoing discharge of contaminated leachate as true. *Id.* at *16. Because this matter came before the court on a motion to dismiss, the court correctly credited the plaintiff's factual allegations and rejected the defendant's assertion that the plaintiff's complaint only alleged "wholly past" violations. *Id.*

The court next examined whether RCRA distinguishes between maintaining an "open dump" and "open dumping." *Id.* at *18. The defendant contended that the plaintiff's claim that the aluminum slag waste pile is an "open dump" under 42 U.S.C. § 6944 must fail because citizens may only assert a claim against "open dumping" under 42 U.S.C. § 6945. *Id.* The court found the United States Court of Appeals for the Second Circuit's decision in *South Road Associates v. International Business Machines Corp.*, 216 F.3d 251 (2d Cir. 2000), instructive. In *South Road*, the Second Circuit noted, "Because we see no functional difference between 'open dump' and 'open dumping,' and because the statutory and regulatory schemes do not appear to differentiate between the two in any meaningful way, we treat the two as the same." *Id.* at 255 n.3. Acknowledging that 42 U.S.C. § 6945's wording and the statutory provisions implicated by it do "not say whether an ongoing violation of the open-dumping provisions requires ongoing conduct," the court went on to hold that the defendant's past actions of depositing waste constituted a "historical act" that did not constitute a violation under 42 U.S.C. § 6945(a). *Id.* at 256-57.

Ultimately, Judge Haynes ruled that the plaintiff's complaint alleged sufficient facts to state a claim and that the defendant's motion to dismiss must fail. *Tenn. Aluminum*, 2011 WL 1357690, at *19. The court buttressed its decision with the plaintiff's allegation that the defendant "violated and is violating . . . 42 U.S.C. § 6945(a), by maintaining an 'open dump' for land disposal of solid waste at the [Tennessee Aluminum Processors] facility." *Id.* Whether the defendant is "maintaining an 'open dump'" at its facility was deemed an open fact question. *Id.*

C. Conclusion

The court's decision provides important guidance to prospective environmental plaintiffs contemplating actions under RCRA's citizen suit provision. By refusing to grant the defendant's motion to dismiss, the court ensured that environmental plaintiffs who plead sufficient facts to

make out a claim for continuing RCRA regulatory violations will survive facial attack, thereby granting these plaintiffs the necessary time and discovery tools to pursue meritorious claims. Ultimately, the court correctly foreswore a more burdensome pleading requirement and protected future citizen plaintiffs' access to environmental justice.

Matthew Cardosi

III. THE ENDANGERED SPECIES ACT

Greater Yellowstone Coalition, Inc. v. Servheen,
665 F.3d 1015 (9th Cir. 2011)

In *Greater Yellowstone Coalition, Inc. v. Servheen*, the United States Court of Appeals for the Ninth Circuit ruled that the Greater Yellowstone Area (GYA) grizzly bear population should remain on the Endangered Species Act's (ESA) threatened species list for the time being, but left open the possibility for a delisting determination in the future. 665 F.3d 1015 (9th Cir. 2011). In reaching its conclusion, the Ninth Circuit affirmed in part and reversed in part the District Court for the District of Montana judgment, holding that (1) the United States Fish and Wildlife Service (Service) did not articulate a rational connection between the data before it and its conclusion that whitebark pine declines were not likely to threaten the GYA grizzly population, and (2) the Service could rationally conclude that the regulatory mechanisms described in the Service's delisting rule are adequate to protect a recovered GYA grizzly population. *Id.* at 1026, 1032. This case is significant because the speculative impact of climate change on the GYA grizzly's food source was a decisive factor in the Ninth Circuit's decision to vacate the Service's delisting rule. *Id.* at 1024-25. Now, the GYA grizzly is the only wildlife species, after the polar bear, to earn protection in recognition of harm caused by global warming. Carol J. Williams & Julie Cart, *Court Restores Federal Protections for Yellowstone Grizzly Bears*, L.A. TIMES (Nov. 22, 2011), http://articles.latimes.com/2011/nov/22/nation/la-na-1123-yellowstone-grizzlies-20111123.

A. Background

Prior to European settlement, an estimated 50,000 grizzly bears roamed the western terrain of the continental United States. *Grizzly Bear Recovery*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/mountain-prairie/species/mammals/grizzly/index.htm (last visited Apr. 5, 2012). However, during the nineteenth and early twentieth centuries a

combination of efforts to eradicate the grizzly including hunting, trapping, and poisoning, coupled with habitat destruction associated with western expansion, devastated the grizzly population and forced the bears to inhabit increasingly remote and rugged terrain. *Greater Yellowstone Coal.*, 665 F.3d at 1019. Of the "37 grizzly populations present in 1922, 31 were extirpated by 1975." *Grizzly Bear Recovery*, *supra*. At that time, the estimated population size of the GYA grizzly ranged from 136 to 312 individual bears. Removing the Yellowstone Distinct Population Segment of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 14,866, 14,869 (Mar. 29, 2007) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule]. Due to this steep population decline and in consideration of other devastating factors including destruction of habitat, high mortality resulting from human-bear conflict, and the genetic isolation of the population, the Service declared the grizzly population of the lower forty-eight states "threatened" under the ESA in 1975. *See* Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31,734 (July 28, 1975).

As required by the ESA, in 1982, the Service formulated a Grizzly Bear Recovery Plan (Recovery Plan) to "foster viable, self-sustaining grizzly populations in areas known to have been occupied by grizzlies." *Greater Yellowstone Coal.*, 665 F.3d at 1020. Additionally in 1993, the Service revised the Recovery Plan by delineating the grizzly bear population to six "Recovery Zones," including the Greater Yellowstone Area, and created unique "conservation strategies" for each zone. *Id.*; *see also Grizzly Bear Recovery*, *supra*. These protections proved successful: "[T]he GYA's grizzly population increased at an average rate of 4.2% to 7.6% per year between 1983 and 2002 and expanded its range by 48% between the 1970s and 2000." *Greater Yellowstone Coal.*, 665 F.3d at 1020.

Pursuant to these findings, the Service published its final rule removing the Yellowstone distinct population of grizzly bears from the federal list of endangered and threatened wildlife (Final Rule) on March 29, 2007. *See* Final Rule, 72 Fed. Reg. 14,866. In the Final Rule, the Service determined that the GYA grizzly was eligible for delisting because none of the ESA's preclusive five factors existed. *Greater Yellowstone Coal.*, 665 F.3d at 1030; *see* 16 U.S.C. § 1533(a)(1)(A)-(E) (2006); Factors for Listing, Delisting, or Reclassifying a Species, 50 C.F.R. § 424.11(c) (2011). "Delisting requires a determination that none of the . . . five factors threatens or endangers the species." *Greater Yellowstone Coal.*, 665 F.3d at 1024 (citing 50 C.F.R. § 424.11(d)). The

Final Rule classified the GYA grizzly population as a recovered "Yellowstone Distinct Population Segment" no longer in need of the ESA's protections. Final Rule, 72 Fed. Reg. at 14,866. The Greater Yellowstone Coalition quickly responded by filing a lawsuit on November 13, 2007, in the district court challenging the Final Rule as arbitrary, capricious, and unlawful under the ESA. *Greater Yellowstone Coal.*, 665 F.3d at 1023.

B. The Court's Decision

On appeal, the Ninth Circuit addressed two issues concerning the Service's compliance with the ESA in formulating its Final Rule: (1) whether the Service articulated a rational connection between the data before it and the conclusion that declines in whitebark pine, a staple of the GYA grizzly diet, were not likely to threaten GYA grizzly population under 16 U.S.C. § 1533(a)(1)(E) (Factor E issue) and (2) whether the Service could conclude that adequate regulatory mechanisms existed to protect a recovered GYA grizzly population after delisting under § 1533(a)(1)(D) (Factor D issue). *Greater Yellowstone Coal.*, 665 F.3d at 1024. Before analyzing each issue, the court noted that the Administrative Procedure Act provides a highly deferential standard of review for issues involving an agency's compliance with the ESA. *Id.* at 1023 (citing 5 U.S.C. § 706(2)(A) (2006)). The court stated that its job was "simply to ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Id.* (quoting Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007)) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

1. The Factor E Issue

In its decision, the Ninth Circuit rejected the Service's conclusion that food shortages caused by whitebark pine declines were "not a threat" to the GYA grizzly population and thus were not "other natural or man-made factors affecting [the GYA grizzly's] existence" under Factor E of the ESA. *Id.* at 1024, 1026 (quoting Final Rule, 72 Fed. Reg. at 14,929) (citing Final Rule, 72 Fed. Reg. at 14,932). The court rejected the argument that the Service "simply does not yet know what impact whitebark pine declines may have on the [GYA] grizzly" to support its decision to delist. *Id.* at 1028-30. Moreover, while "scientific uncertainty generally calls for deference to agency expertise," the Service cannot "simply invoke 'scientific uncertainty' to justify its action." *Id.* at

1028 (citing Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008) (en banc)). The court rationalized that the Service's own evidence established a sufficient relationship between reduced whitebark pine seed availability due to climate change, increased grizzly mortality, and reduced grizzly reproduction to support the conclusion that the continued decline of the whitebark pine population throughout the GYA would negatively affect the grizzly bear population. *Id.* at 1026.

The court also criticized the Service's reliance on "'adaptive management' to justify its decision to delist the [GYA] grizzly despite the scientific uncertainty." *Id.* at 1028 & n.5 (quoting Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,242, 35,252 (June 1, 2000)). "Adaptive management" is defined as "a structured process for learning by doing" and "a method for examining alternative strategies for meeting measureable biological goals and objectives, and then, if necessary, adjusting future conservation management actions according to what is learned." Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. at 35,252. In the court's view, the argument that the Service could petition to relist the grizzly "if the desired population and habitat standards . . . cannot be met," *see* Final Rule, 72 Fed. Reg. at 14,925, simply did not provide a "reasonable justification for delisting," especially "given the ESA's 'policy of institutionalized caution.'" *Greater Yellowstone Coal.*, 665 F.3d at 1029-30 (quoting Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1167 (9th Cir. 2010)). "For adaptive management of a potential threat to suffice as a basis for a delisting determination," the court said, "we believe that more specific management responses, tied to more specific triggering criteria, are required." *Id.* at 1029 (citing Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 341 (E.D. Cal. 2007)).

2. The Factor D Issue

While the Ninth Circuit's Factor E holding was sufficient to approve the district court's judgment vacating the Final Rule, the court nevertheless reversed the district court's holding on the Factor D issue. *See* Greater Yellowstone Coal., Inc. v. Servheen, 672 F. Supp. 2d 1105, 1118 (D. Mont. 2009), *aff'd in part*, *rev'd in part*, 665 F.3d 1015 (9th Cir. 2011) (explaining that the "guidelines, monitoring, and promises, or good intentions for future action[s]" that the Service cited were insufficient to rise to the level of "adequate regulatory mechanisms"

because there was "no way to enforce them or to ensure that they [would] occur"). The Ninth Circuit found adequate the Service's "regulatory mechanisms" in the Final Rule's "Strategy" because those standards were incorporated into the National Park Superintendents' Compendia (NPSC) and National Forest Plans (NFPs). *Greater Yellowstone Coal.*, 665 F.3d at 1031-32. The court theorized that because the Forest and Park Services are legally bound to uphold the standards within the NPSC and NFPs, the "Strategy" standards incorporated into both the NPSC and NFPs were, therefore, legally enforceable. *Id.* Further, the combination of these legally enforceable standards coupled with "a wide range of other rules, regulations, and laws, both state and federal," convinced the court that the Service could "rationally conclude that the regulatory framework described in the [Final] Rule is sufficient to sustain a recovered [GYA] grizzly bear population." *Id.*

C. Conclusion

The Ninth Circuit's decision makes clear that climate change is a very real threat to the survival of the GYA grizzly. Moreover, even though the Ninth Circuit's ruling left open the door for the eventual delisting of the GYA grizzly, it also set a strong precedent that will affect the federal government's policy considerations in the future. The Ninth Circuit's decision not to defer to agency expertise, even in light of scientific uncertainty, serves as a wake-up call for the federal government to factor in the potential effects of climate change on their decision to delist threatened or endangered species in the years to come.

Dana Ellen Gambro

IV. THE CLEAN WATER ACT

United States v. Donovan, 661 F.3d 174 (3d Cir. 2011)

In *United States v. Donovan*, the United States Court of Appeals for the Third Circuit joined the Courts of Appeals for the First and Eighth Circuits when it held that property is considered "wetlands" subject to regulation under the Clean Water Act (CWA) if it meets either of the tests laid out in *Rapanos v. United States*. 661 F.3d 174, 176 (3d Cir. 2011) (citing Rapanos v. United States, 547 U.S. 715 (2006)). In 1996, the United States brought an enforcement proceeding against David Donovan under the CWA seeking to force him to remove fill material he had deposited on his land in Delaware and to pay a fine. *Id.* at 176. In

2002, the United States District Court for the District of Delaware held that Donovan's land was subject to CWA jurisdiction and on December 21, 2006, the district court entered a final judgment against Donovan, enjoining the defendant to restore a portion of the wetlands on his property and assessing a civil penalty of $256,000. *Id.*; United States v. Donovan, 466 F. Supp. 2d 595, 600 (D. Del. 2006). Donovan appealed to the Third Circuit, and the case was subsequently remanded to further develop the record and to apply the Supreme Court's *Rapanos* ruling to this case. *Donovan*, 661 F.3d at 176-77. "In *Rapanos*, the Supreme Court, in a 4-1-4 opinion[,] . . . described two new tests for determining whether property is 'wetlands' covered by the CWA." *Id.* at 176 n.1. On remand, the district court referred the case to a magistrate judge. On a motion for summary judgment by the United States, the district court subsequently upheld the magistrate judge's ruling that "federal authority can be asserted over wetlands that meet either *Rapanos* test" and that the wetlands at issue satisfied both tests in this case for jurisdiction under the CWA. *Id.* at 177-78. On appeal, Donovan challenged the legal standard used for determining CWA jurisdiction and the district court's application of the summary judgment standard (not discussed here).

After reviewing the procedural and factual history of the case, the Third Circuit analyzed the requirements of the CWA and its applicability to wetlands. *Id.* at 178-80. The CWA makes it unlawful for any person to discharge any pollutant. 33 U.S.C. § 1311(a) (2006). The statutory definition of "discharge of a pollutant" includes "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The term "navigable waters" is defined as the "waters of the United States." *Id.* § 1362(7). While the EPA has authority to issue discharge permits for certain point source discharges under § 1342, the Army Corps of Engineers (Corps) has authority to issue permits for the discharge into navigable waters of dredged or fill material. *Id.* § 1344(a). "The Corps has interpreted this to mean that its regulatory jurisdiction extends over, *inter alia*, traditional navigable waters, their tributaries, and wetlands which are adjacent to any of the above." *Donovan*, 661 F.3d at 178 (citing 33 C.F.R. § 328.3(a) (2011)). The Corps' regulations, specifically 33 C.F.R. § 328, define the term "waters of the United States" for the purpose of the Corps' jurisdictional limits of the authority under the CWA and define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). The term "adjacent" is defined as

"bordering, contiguous, or neighboring." *Id.* § 328.3(c). Finally, the term "adjacent wetlands" includes "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." *Id.*

In the noted case, the Third Circuit next reviewed a few of the Supreme Court's rulings on the Corps' jurisdiction over wetlands under the CWA. *Donovan*, 661 F.3d at 178-79. In *United States v. Riverside Bayview Homes, Inc.*, the Court held that wetlands adjacent to "waters of the United States" are within the Corps' CWA jurisdiction and thus the landowner was required to get a permit to fill the wetlands. 474 U.S. 121, 139 (1985). In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Court limited the reach of the Corps' jurisdiction. 531 U.S. 159 (2001). The Court held that "nonnavigable, isolated, intrastate waters," which are not adjacent to bodies of open water, such as the abandoned sand and gravel pit at issue in that case, are not within the CWA jurisdiction of the Corps. *Id.* at 168, 171. Finally, the Third Circuit turned to "[t]he Supreme Court's most recent exposition on the breadth of the Corps' jurisdiction under the CWA . . . in *Rapanos*." *Donovan*, 661 F.3d at 179 (citing *Rapanos*, 547 U.S. 715). The Third Circuit discussed the holding in *Rapanos* and the split amongst the Justices. *Rapanos* concerned four wetlands in Michigan which lie near ditches or man-made drains that eventually empty into navigable waters. 547 U.S. at 729. The Supreme Court, in a 4-1-4 split, vacated the United States Court of Appeals for the Sixth Circuit's judgment that the Corps had jurisdiction over the wetlands, and remanded for further proceedings. *Donovan*, 661 F.3d at 179. The four dissenting Justices took a more expansive view of the reach of the CWA and "stated that the Court should have deferred to . . . the Corps' reasonable interpretation of its jurisdiction." *Id.* (citing *Rapanos*, 547 U.S. at 796 (Stevens, J., dissenting)). Justice Scalia, writing the plurality opinion, stated:

> [T]he phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes," [and] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Rapanos, 547 U.S. at 739 (plurality opinion) (fourth alteration in original) (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1950)). The plurality opinion concluded that wetlands "only fall within the scope of the CWA if they have 'a continuous surface connection to bodies'" of water that are considered "waters of the United

States" themselves. *Donovan*, 661 F.3d at 179 (quoting *Rapanos*, 547 U.S. at 742).

The Third Circuit then reviewed Justice Kennedy's concurring opinion from *Rapanos*. *Id.* at 180. Justice Kennedy agreed with "the plurality's conclusion that the Corps' jurisdiction was more limited than the dissenters believed and that the case should be remanded, [but] Justice Kennedy disagreed with the plurality's jurisdictional test." *Id.* (citing *Rapanos*, 547 U.S. at 779, 780 (Kennedy, J., concurring)). Justice Kennedy outlined a test which requires the wetland to have a "significant nexus" with waters of the United States, which means that the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 779, 780. Given the apparent uncertainty of which test to apply, the Third Circuit noted that Justice Stevens pointed out, in his dissenting opinion, that all four of the dissenting Justices would find jurisdiction for the Corps under either the plurality's or Justice Kennedy's test, and therefore would have affirmed the lower court's ruling. *Donovan*, 661 F.3d at 180 (citing *Rapanos*, 547 U.S. at 810 & n.14 (Stevens, J., dissenting)).

The Third Circuit next turned to Donovan's argument that the district court erred in applying *Rapanos* because *Rapanos* fails to provide any governing standard, and thus pre-*Rapanos* case law should govern CWA jurisdiction. *Id.* The Third Circuit noted that, despite a split on how to interpret *Rapanos*, no court of appeals has followed the interpretation Donovan argued for. The United States Courts of Appeals for the Seventh and Eleventh Circuits have both concluded that Kennedy's "significant nexus" test is the applicable standard. *Id.* (citing United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006); United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir. 2007)). Those conclusions were based on the Supreme Court's decision in *Marks v. United States*, which directed 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 181 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)). Thus, the Seventh and Eleventh Circuits consider Kennedy's opinion controlling because it is the least restrictive of federal jurisdiction. *Id.* (citing *Gerke*, 464 F.3d at 724-25; *Robison*, 505 F.3d at 1221-22).

The Third Circuit next noted that the First and Eighth Circuits have held that *Marks* does not provide guidance on *Rapanos*, because neither the plurality opinion nor Kennedy's concurrence relied on narrower grounds than the other. *Id.* (citing United States v. Johnson, 467 F.3d 56, 62-64 (1st Cir. 2006); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009)). In *Johnson*, the First Circuit reasoned that "narrowest grounds" may not necessarily mean the least restrictive of federal jurisdiction, but may instead mean the most restrictive of federal jurisdiction. 467 F.3d at 63. Additionally, there may be some scenarios where the continuous connection test finds jurisdiction but the significant nexus test does not, and vice versa. *Donovan*, 661 F.3d at 181 (citing *Johnson*, 467 F.3d at 64). Instead of deciding which test prevails, the First Circuit followed the instructions of Justice Stevens in *Rapanos* in looking to see if either test is satisfied and thus ensuring that a majority of the Court would support a finding of jurisdiction. *Id.* The Third Circuit held, "[A] strict application of *Marks* is not a workable framework for determining the governing standard established by *Rapanos*" and that the First Circuit's approach is correct in that "each of the plurality's test and Justice Kennedy's test should be used to determine the Corps' jurisdiction under the CWA." *Id.* at 182. The Third Circuit thus reasoned that the votes of dissent, if combined with votes from plurality or concurring opinions, could establish a majority view on a relevant issue. *Id.* (citing United States v. Richardson, 658 F.3d 333, 340 (3d Cir. 2011); Horn v. Thoratec Corp., 376 F.3d 163, 176 & n.18 (3d Cir. 2004); Student Pub. Interest Research Grp. of N.J., Inc. v. AT & T Bell Labs., 842 F.2d 1436, 1451 (3d Cir. 1988)). The Third Circuit thus recognized a mandate provided by the dissenters to find CWA jurisdiction under either test. *Id.* at 183.

After reviewing the standard of appeal for a motion for summary judgment, the Third Circuit held that the two expert reports submitted by the Government were sufficient to satisfy the initial burden of proof under both *Rapanos* tests. *Id.* at 185. The court held that Donovan had not provided sufficient evidence in opposition to the Government's reports to show that there was a genuine issue for trial. *Id.* at 186-87. The court, however, did not rule on whether Donovan's evidence was sufficient to raise a genuine issue regarding the plurality's continuous connection test because Donovan had clearly not provided sufficient evidence to raise an issue regarding Kennedy's significant nexus test. *Id.* at 187. The court noted, "Nothing in Donovan's affidavit speaks to the effect his wetlands have on the chemical, physical, and biological integrity of downstream waters." *Id.* Thus, because one of the two tests

was clearly satisfied by the Government's evidence, the Third Circuit declined to rule on the other test.

"[T]he confusion over CWA jurisdiction appears likely to continue until the Supreme Court or Congress revisit the issue." Russell Prugh, *Third Circuit Weighs in on Clean Water Act Jurisdiction Under* Rapanos, MARTEN L. (Dec. 6, 2011), http://www.martenlaw.com/newsletter/20111206-clean-water-act-jurisdiction. While some circuits have followed Kennedy's significant nexus test, the Third Circuit has followed others in the more expansive approach of following either the significant nexus test or the continuous connection test. Absent clear guidance from the Supreme Court, the more expansive approach may be more appropriate since all four dissenters would have upheld CWA jurisdiction in that case.

Kirk Tracy

V. ENVIRONMENTAL STANDING IN MARYLAND

Patuxent Riverkeeper v. Maryland Department of the Environment, 29 A.3d 584 (Md. 2011)

A. Introduction

People in the Chesapeake Bay area have a reason to be optimistic. In addition to the Environmental Protection Agency's region-wide pollution diet, which aims to curb pollution entering the Chesapeake Bay, the Maryland General Assembly passed a new standing law in 2009. MD. CODE ANN., ENVIR. § 5-204(f) (West 2011); *Chesapeake Bay TMDL,* EPA, http://www.epa.gov/chesapeakebaytmdl/ (last visited Apr. 5, 2012). No longer will environmental organizations suing under Maryland environmental laws be required to meet the old standing test, which required plaintiffs to own "property either adjacent to or within 'sight or sound' range of the property that [was] the subject of [the plaintiff's] complaint." DEP'T OF LEGISLATIVE SERVS., MD. GEN. ASSEMB., FISCAL AND POLICY NOTE, H.B. 1569, at 3 (2009) (second alteration in original) (internal quotation marks omitted), *available at* http://mlis.state.md.us/2009rs/fnotes/bil_0009/hb1569.pdf. Instead, the new standing law mirrors federal standing requirements, a message to the judiciary that environmental plaintiffs should have an easier time being able to argue the merits of their complaint. *See id.* In a case of first impression before Maryland's highest court, the Court of Appeals of Maryland gave full force to the recently passed law, ruling that the

Patuxent Riverkeeper (Riverkeeper) had standing to sue in a nontidal wetland permit case. Patuxent Riverkeeper v. Md. Dep't of the Env't, 29 A.3d 584, 593-94 (Md. 2011).

B. Factual Background

In March 2010, the Maryland Department of the Environment (MDE) issued a nontidal wetland permit in Prince George's County, Maryland, the county just east of the District of Columbia. *Id.* at 594 (Harrell, J., dissenting). The permit allowed a developer to fill less than one acre of nontidal wetland and to place several culverts on streams to accommodate an access road. *Id.* Essentially, the permit was issued to help facilitate the development of a 550,000 square foot commercial retail building. *Id.* The development, though, was next to the Western Branch, a tributary of the Patuxent River. *See id.* at 590 n.10 (majority opinion) (citing *Final TMDLs Approved by EPA*, MDE, http://www.mde.state.md.us/programs/Water/TMDL/ApprovedFinalTMDLs/Pages/Programs/WaterPrograms/TMDL/approvedfinaltmdl/tmdl_westernbranch.aspx (last visited Sept. 26, 2011)). Riverkeeper, in comments to the MDE, challenged the permit arguing the site's developer did not demonstrate that the access road had "no practicable alternative that would avoid or result in [a] less adverse impact on nontidal wetlands." *Id.* at 585 (internal quotation marks omitted).

Riverkeeper, for a variety of reasons, claimed it had standing to challenge the permit. First, Riverkeeper's sole focus is protecting, restoring, and advocating for clean water in the Patuxent and its tributaries. *Id.* at 584 n.1 (quoting Affidavit of Frederick Tutman, Chief Exec. Officer, Patuxent Riverkeeper). Next, one of its members, David Linthicum, was on the Patuxent River every other day. *Id.* at 591 (quoting Affidavit of David Linthicum, Member, Patuxent Riverkeeper). Specifically, he visited and would continue to visit the Western Branch every few months. *Id.* (quoting Affidavit of David Linthicum, *supra*). In his visits to the Western Branch over the past ten years, Mr. Linthicum would "wade in the water to clear out branches for the purpose of waterway maintenance and navigation." *Id.* (quoting Affidavit of David Linthicum, *supra*). Additionally, Mr. Linthicum sold maps of the Patuxent River and Western Branch, which he charted and diagramed. *Id.* at 592 (quoting Patuxent Riverkeeper v. Md. Dep't of the Env't, No. CAL10-11819, 2010 WL 6599778 (Md. Cir. Ct. Dec. 1, 2010), *rev'd*, 29 A.3d 584 (Md. 2011)). While Mr. Linthicum never went to the river at or near the permitted culverts or project area, he sometimes would paddle as close as 8.5 miles downstream from the wetlands impacted by the

commercial retail building. *Id.* at 591 (quoting Affidavit of David Linthicum, *supra*).

Mr. Linthicum claimed that the permit would affect his interests. "The health of the Western Branch, including the area where I most often paddle, wade, and clear trees and other blockages, will suffer as a direct result of the impacts to the connected streams and tributaries just a few miles upstream at [the commercial retail building]." *Id.* (quoting Affidavit of David Linthicum, *supra*). Because the permits allowed for altering the river's flow rate, the Patuxent River's tributaries could be harmed. *Id.* (quoting Affidavit of David Linthicum, *supra*). Also, the loss of wetlands, particularly those in the headwaters of the Patuxent, which act like sponges to absorb pollution, could lead to the death of other tributary areas that do not have space for the excess pollution. *Id.* at 592 (quoting Affidavit of David Linthicum, *supra*). Finally, the headwaters of the Patuxent were altered because of the road crossing and culverts, which could cause damage to the rest of the river. *Id.* (quoting Affidavit of David Linthicum, *supra*).

C. Legal Background on Standing in Maryland

Before the enactment of the new standing law, Maryland essentially went with an "if you can see it, then you can be harmed by it" test. For instance, the Maryland Court of Special Appeals, the state's intermediate-level court, found that in order to have standing a "property owner must be in 'sight or sound' range of the property" that is at issue. Comm. for Responsible Dev. on 25th St. v. Mayor & City Council of Balt., 767 A.2d 906, 920 (Md. Ct. Spec. App. 2001) (quoting Md.-Nat'l Capital Park & Planning Comm'n v. City of Rockville, 305 A.2d 122, 127 (Md. 1973)) (citing Wier v. Witney Land Co., 263 A.2d 833, 839 (Md. 1970)). However, the General Assembly broadened the scope of standing with the passage of a standing law in 2009, allowing MDE permit challenges to be analyzed under federal standing jurisprudence. MD. CODE ANN., ENVIR. § 5-204(f); H.B. 1569, 2009 Leg. (Md. 2009).

To satisfy the case or controversy language in Article III of the United States Constitution, the plaintiff must prove three standing elements. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); *see also* Steven G. Davison, *Standing To Sue in Citizen Suits Against Air and Water Polluters Under* Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 17 TUL. ENVTL. L.J. 63 (2003). First, the plaintiff must suffer an injury in fact "that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Laidlaw*, 528 U.S. at 180 (citing Lujan v.

Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Next, the plaintiff's injury must be fairly traceable to the defendant's actions. *Id.* (citing *Lujan*, 504 U.S. at 560-61). Finally, the injury must likely be redressable by the court. *Id.* at 181 (citing *Lujan*, 504 U.S. at 560-61).

Under the first prong, harm to economic, aesthetic, or recreational interests all qualify as harm that can be an "injury in fact." *Id.* at 183-84. The plaintiff must have a reasonable concern that the defendant's actions will injure the plaintiff's interest, and this concern must be more than just a generalized complaint or a conclusory allegation. *Id.* (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990)); *see* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000) (stating that a plaintiff does not have to wait for the harm to occur before bringing suit because this standard "would eliminate the claims of those who are directly threatened but not yet engulfed" by an illegal action). A great amount of harm is not necessary to satisfy this inquiry; an "identifiable trifle" will suffice. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)). In order to satisfy the actual or imminent prong of injury in fact, the plaintiff must show concrete plans to return to the area that will be affected by the plaintiff's action, not an intention to someday return to the area. *Lujan*, 504 U.S. at 564.

Under the second prong of the standing inquiry, the proximate cause prong, a specific nexus must exist between the injury alleged and the plaintiff's actions. For instance, the Court in *Lujan* held that a plaintiff "must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Id.* at 566 (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 887-89). Notably though, the Court did not define what they meant by affected area. Davison, *supra*, at 63.

The extent of the affected area depends on the facts of each case before the court. For instance, in *Laidlaw*, the Court held the plaintiff had standing even though the plaintiff did not get any closer than forty miles from the permitted facility. 528 U.S. at 183. However, the plaintiff did not come nearer to the facility out of fear that the closer water contained harmful pollutants. *Id.* Importantly though, distance is not a determinative factor for the "area affected" inquiry.

> We do not impose a mileage or tributary limit for plaintiffs . . . . [P]laintiffs may produce water samples showing the presence of a pollutant of the type discharged by the defendant upstream or rely on expert testimony suggesting that pollution upstream contributes to a perceivable effect in the water that the plaintiffs use. At some point, however, we can no longer

> assume that an injury is fairly traceable to a defendant's conduct solely on the basis of the observation that water runs downstream. Under such circumstances, a plaintiff must produce some proof . . . .

Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 362 (5th Cir. 1996) (denying standing to a plaintiff who used water three tributaries and eighteen miles downstream from the permitted refinery); *see* Friends of the Earth v. Gaston Copper Recycling Corp., 629 F.3d 387, 397 (4th Cir. 2011) (finding that a plaintiff had standing when the plaintiff was 16.5 miles from the permitted discharge). *But see* Pollack v. U.S. Dep't of Justice, 577 F.3d 736, 741-43 (7th Cir. 2009) (denying standing when the plaintiff was thirteen miles from the discharge of a bullet range because it was "unclear if any pollution from bullets discharged into Lake Michigan will travel the thirteen miles").

Finally, under the third prong of the standing inquiry, the aggrieved party must show that a judicial decision will likely relieve the party's injury. The plaintiff must show that the permitted activity is "diminishing or threaten[s] to diminish" the plaintiff's enjoyment of an affected area. Ctr. for Biological Diversity v. Lueckel, 417 F.3d 532, 537 (6th Cir. 2005) (citing Sierra Club v. Robertson, 28 F.3d 753, 759 (8th Cir. 1994)).

D. The Court's Decision

Here, the court considered the issue of whether Riverkeeper met Maryland's new federal standing requirements. In a 5-2 decision, the Court of Appeals of Maryland ruled in favor of Riverkeeper, finding that it had standing to challenge the issuance of the MDE nontidal wetland permit. *Riverkeeper*, 29 A.3d at 594.

The court stated that Riverkeeper had a reasonable concern that the permitted action of diverting an upriver stream could result in future harm to the Western Branch's ecology. *Id.* at 593. Restating the circuit court's finding, the court of appeals said Riverkeeper member Mr. Linthicum "had adequately asserted demonstrable aesthetic, recreational, and economic interests in the Western Branch as an avid paddler and mapmaker." *Id.*

Briefly addressing the second prong of federal standing requirements, the court held that Riverkeeper sufficiently established a nexus between the permit's issuance and the alleged harm to Mr. Linthicum. *Id.* In establishing the nexus, the court gave weight to the scientific articles that Mr. Linthicum consulted and his experience as a clean water advocate in the Patuxent. *Id.* Specifically, the articles and

experience showed that stream crossings, like the one permitted, at headwaters and wetlands could negatively affect the downstream Western Branch. *Id.*

Finally, under the third prong, the court held that a judicial ruling would relieve the party's injury. The court gave weight to the statement of Riverkeeper CEO Frederick Tutman, who said that the harm would be eliminated by rescinding the permit, or by including more intensive mitigation efforts in the permit. *Id.* at 593-94. Thus, the court ruled that Riverkeeper had standing.

In a much more lengthy analysis, the dissent, in an opinion written by Judge Harrell, did not believe the majority correctly applied the facts of the case to the federal standing requirements. *Id.* at 594-603 (Harrell, J., dissenting). The dissent opined that the majority diluted the standing requirements of injury in fact and traceability. *Id.* at 594. Looking towards what the decision told future environmental plaintiffs, the dissent stated, "This unacceptable precedent instructs organizational plaintiffs . . . that they need only have a member who has aesthetic, recreational, or economic interests in the environment generally, rather than requiring a showing that these interests have a genuine nexus to, and will be harmed by, the permitted activity." *Id.*

The dissent proposed a three-part test to determine whether a plaintiff was within the affected area: "consider the type and source of the pollutant, the amount of the pollutant, and the distance from the person's allegedly impacted activities to the discharge." *Id.* at 596. Under the first part of this test, the dissent distinguished some of the cases relied upon by the majority, which involved discharging toxic materials, to the discharge of nutrients and sediments in this case. *Id.* at 597. The dissent also stated that the source of the pollutant should be limited to MDE's jurisdiction. *Id.* at 598. In other words, the source of the pollutant in the standing analysis should be limited to the pollution directly caused because of the permit, not the stormwater runoff associated with the commercial building development. *See id.*

Under the second part, the dissent believed the amount of the released pollutant was minimal. Specifically, Judge Harrell compared the minor amount of permitted activity, less than one acre of wetland fill alteration and routing streams through culverts, to the expansive 70,000 acre watershed Riverkeeper sought to protect. *Id.* Additionally, the dissent found it important that Mr. Linthicum did not visually observe any of the pollution. *Id.*

Under the third part of the dissent's test, Judge Harrell concluded that Mr. Linthicum was not in the affected area of the MDE permit. *Id.*

at 598-99. In finding this, the dissent compared the relatively small size of the permit and the fact that no toxic chemical was discharged with the fact that Mr. Linthicum only traveled within 8.5 miles of the impact site. *Id.* at 599; *see also Crown Cent. Petroleum*, 95 F.3d at 362.

The dissent also took issue with the fact that Riverkeeper did not provide sufficient evidence to satisfy the traceability prong of the federal standing analysis. *Riverkeeper*, 29 A.3d at 600. Because the watershed is so large, the prospective harm Mr. Linthicum complained of could actually have come from other sources, like agriculture and waste water treatment plants. *Id.* Mr. Linthicum's contentions only spoke to his general "concerns . . . caused by cumulative urbanization in the upland areas of the watershed," not to his concerns of the permit at issue. *Id.* The dissent was looking for "a more concrete and particularized showing of how the nutrients, sediments, or pollutants, after they inevitably flow downstream, acted, or will act, to harm [Mr. Linthicum's] particular interests." *Id.* at 602; *see Crown Cent. Petroleum*, 95 F.3d at 362. According to the dissent, Mr. Linthicum's disregard for the available information on the permit at issue spoke to the vagueness and unreasonableness of his "fears." *Riverkeeper*, 29 A.3d at 602-03.

E. Conclusion

In 2009, the Maryland General Assembly passed legislation broadening the scope of standing to allow plaintiffs to have a better chance of enforcing Maryland environmental laws. The court's ruling in *Riverkeeper* gave full force to the spirit of the law and set quite a low standing bar for future environmental lawsuits. The United States Court of Appeals for the Fifth Circuit stated in *Crown Central Petroleum* that a plaintiff must come forward with some proof when the causation between an alleged harm and an environmental permit is less clear.

At the end of the day, because of the scientific nature of Riverkeeper's claim, the harm to Mr. Linthicum's interest because of the nontidal wetland permit is not exactly clear, and it may never be clear. The direct effects of the permit were relatively small and Mr. Linthicum never came within five miles of the permitted activity. At the same time though, the nature of a river is that all things placed in a river will eventually make their way downstream. As the Supreme Court stated in *SCRAP*, an identifiable trifle of harm will suffice. As a case of first impression, the court's ruling in *Riverkeeper* allows plaintiffs to argue the merits of their case, with a minimal showing of harm to their interest. This was the legislature's intent when passing the standing law: broader enforcement of Maryland environmental statutes. People in the

Chesapeake Bay area should be optimistic about the Court's holding and what it means for future environmental law enforcement.

Wesley Rosenfeld

VI. ENFORCEMENT OF FOREIGN MONEY JUDGMENTS—*CHEVRON* IN ECUADOR

Chevron Corp. v. Naranjo,
667 F.3d 232 (2d Cir. 2012)

In *Chevron Corp. v. Naranjo*, the United States Court of Appeals for the Second Circuit considered whether to uphold a global antienforcement injunction against Ecuadorian plaintiffs attempting to enforce an allegedly fraudulent judgment entered by an Ecuadorian court against Chevron. 667 F.3d 232, 234 (2d Cir. 2012). The Second Circuit reversed the United States District Court for the Southern District of New York decision granting the injunction, vacated the injunction, and remanded to the district court with instructions to dismiss Chevron's claim for declaratory and injunctive relief in its entirety. *Id.* With this decision, the Second Circuit enabled the possible enforcement of a historically large judgment and moved forward two decades of litigation involving one of the most well-known instances of environmental pollution in the world.

The factual and procedural backgrounds preceding this case are expansive and span fifty years and twenty years, respectively. *See, e.g.*, Chevron Corp. v. Berlinger, 629 F.3d 297, 300-06 (2d Cir. 2011); Aguinda v. Texaco, Inc., 303 F.3d 470, 473-76 (2d Cir. 2002); Jota v. Texaco Inc., 157 F.3d 153, 155-58 (2d Cir. 1998); Aquinda v. Texaco, Inc., 945 F. Supp. 625, 626-27 (S.D.N.Y. 1996), *vacated*, *Jota*, 157 F.3d 153. Thus, only the important facts relative to the Second Circuit's decision are summarized below. Texaco explored for and extracted oil in the Lago Agrio region of the Ecuadorian Amazon, beginning operations in 1964. *Chevron*, 667 F.3d at 235 (citing *Jota*, 157 F.3d at 155). Texaco ended operations in 1992, and the next year the Ecuadorian plaintiffs filed suit in the Southern District of New York alleging environmental, health, and other tort claims related to the extraction operations. *Id.* For years, Texaco sought to dismiss the complaint based on arguments that Ecuador was the proper forum for the suit. *Aguinda*, 303 F.3d at 474. The district court and Second Circuit agreed, and dismissed the suit based on forum non conveniens. *Id.* at 480.

After the suit in New York was dismissed, the Ecuadorian plaintiffs filed suit in a trial court in Ecuador. *Chevron*, 667 F.3d at 235-36. Additionally, Texaco was acquired by Chevron in 2001. *Id.* at 235 n.2. After several more years of litigation, on February 14, 2011, the Ecuadorian trial court found Chevron liable for $8.6 billion in damages and a conditional $8.6 billion in punitive damages if Chevron failed to apologize within fourteen days of the decision. *Id.* at 236. Chevron never apologized, and the final judgment totaled $17.2 billion. *Id.* Chevron sought to enjoin enforcement of this award anywhere in the world by filing an injunction in the Southern District of New York. *Id.* at 234. Chevron alleged that the Ecuadorian plaintiffs and their lawyers obtained the judgment through various fraudulent, corrupt, unethical, and illegal means, including unduly influencing the selection of an independent expert and by controlling the results of the independent expert's environmental assessment. *Id.* at 236 (citing *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 289 (S.D.N.Y. 2010)). Chevron also alleged that the lead attorney in the case, American Steven Donziger, and his team used intimidation and illegally exercised political pressure on the Ecuadorian judicial process. *Id.*

Both parties appealed the Ecuadorian trial court's decision. *Id.* at 237. However, the Ecuadorian intermediate court upheld the decision on January 3, 2012. *Id.* Chevron had the right to appeal the intermediate court's decision to the National Court of Justice, Ecuador's highest court, but the National Court would only review questions of law. *Id.* Chevron could also apply for a stay from the intermediate court pending a final appeal to the National Court. *Id.* With no stay yet in force, the Ecuadorian plaintiffs could seek to enforce the judgment anywhere in the world where Chevron has assets; however, Chevron no longer has any assets in Ecuador. *Ecuador: Chevron Will Not Apologize for Pollution, Even to Save $8.5 Billion*, N.Y. TIMES, Feb. 4, 2012, at A7. Before the Ecuadorian plaintiffs could file suit to enforce the judgment outside of the country, Chevron filed suit in the Southern District of New York seeking an injunction to prevent the enforcement of the judgment anywhere outside of Ecuador. *Chevron*, 667 F.3d at 238. On March 7, 2011, Judge Lewis A. Kaplan granted the global injunction, and the Ecuadorian plaintiffs appealed shortly thereafter. *Id.* at 234 (citing Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011)).

On appeal, the Ecuadorian plaintiffs and their lawyers made dozens of arguments to overturn the injunction, but the court needed to decide just one important threshold issue: whether Chevron's injunction could be properly granted under New York's Uniform Foreign Country Money-

Judgments Recognition Act (Recognition Act). *Id.* at 239; *see* N.Y. C.P.L.R. 5301-5309 (2011). Holding that the Recognition Act did not allow for an anticipatory global antienforcement injunction such as the one sought here, the court dismissed the claim in its entirety, without discussing the other potential arguments rendered moot by the dismissal of the case. *Chevron*, 667 F.3d at 239.

The Second Circuit first examined the necessary findings to overturn a preliminary injunction granted by a trial judge. The court stated that "a district court commits reversible error in awarding a preliminary injunction not only by misapplying the standard governing their provision—that a party must show irreparable harm, likelihood of success on the merits, and so forth—but also if the district court's ruling 'misapprehend[s] the law.'" *Id.* (quoting Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d Cir. 1996)) (citing UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc., 660 F.3d 643, 648 (2d Cir. 2011)). The Second Circuit found that the district court's acceptance of Chevron's theory of relief under the Recognition Act was a reversible legal misapprehension. *Id.*

The court first noted that New York was traditionally a generous forum in which to enforce judgments for money damages rendered by foreign courts and that the state legislature adopted the Recognition Act in accordance with that tradition. *Id.* (quoting Galliano, S.A. v. Stallion, Inc., 930 N.E.2d 756, 758 (2010)). Moreover, the court found that the Recognition Act presumes enforceability and generally provides for the enforcement of foreign judgments, not a bar to enforcement. *Id.* The Recognition Act does contain two relevant exceptions from the presumption that a holder of a foreign judgment can obtain enforcement in New York. One exception requires a court not to enforce an award if "the judgment was rendered under a system which does not provide impartial tribunals or . . . due process of law." *Id.* at 239-40 (quoting N.Y. C.P.L.R. 5304(a)(1)). The other exception allows a court to decline enforcement if "the judgment was obtained by fraud." *Id.* at 240 (quoting N.Y. C.P.L.R. 5304(b)(3)). However, the Second Circuit held that the Recognition Act, including its exceptions, does not provide "an affirmative cause of action to declare foreign judgments void and enjoin their enforcement." *Id.* The court held that the Recognition Act simply does not authorize a court to declare a foreign judgment unenforceable on the preemptive suit of a potential judgment-debtor. *Id.* Chevron filed this antisuit injunction before the Ecuadorian plaintiffs attempted to enforce their judgment in New York, or anywhere else in the world. Chevron attempted to file an affirmative cause of action which had no

legal grounding in the Recognition Act. *Id.* at 241. Therefore, the court held that Chevron had no legal basis for the injunction sought here. *Id.* at 242.

Additionally, the court cited international comity concerns as a reason to deny the broad injunctive remedy sought by Chevron. The Second Circuit saw grave problems with allowing a United States district court to attempt to preclude courts from every other nation from even considering the effect of a judgment. *Id.* at 242-44. But, the court did not need to reach a conclusion based on international comity because the statutory scheme in the Recognition Act does not provide for the injunction sought by Chevron. *Id.* at 244.

Finally, the Second Circuit addressed Chevron's argument that the Declaratory Judgment Act (DJA), 28 U.S.C. §§ 2201-2202 (2006), authorized the type of injunction sought under New York's Recognition Act. *Chevron*, 667 F.3d at 244. The court dismissed the argument by reviewing the purpose of the DJA. The DJA gives a district court the ability to "declare the legal rights . . . of any interested party seeking such declaration." *Id.* (quoting 28 U.S.C. § 2201(a)). However, the Second Circuit held that the DJA does not create an independent cause of action. *Id.* at 244-45 (quoting Davis v. United States, 499 F.3d 590, 594 (6th Cir. 2007)). Thus, where the Recognition Act does not provide the legal basis for the action, the DJA does not expand or create that cause of action either. *Id.* at 245. The court concluded that such speculative declaratory relief, where no enforcement action has yet commenced, cannot be upheld. *Id.* at 246. After addressing and dismissing all of Chevron's arguments for the validity of the injunction, the Second Circuit reversed the district court and vacated the injunction with instructions to the district court to dismiss the claim for injunctive and declaratory relief under the Recognition Act in its entirety. *Id.* at 247.

The litigation surrounding this case is still likely to continue for years, but the Second Circuit has made an important holding concerning the ability of foreign plaintiffs to enforce judgments in the United States. While United States courts have not yet ruled on the validity of the Ecuadorian award, the Second Circuit has precluded defendants from filing a preemptive antienforcement injunction to prevent the enforcement of a foreign award.

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