

RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

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I. CLEAN WATER ACT

Utility Air Regulatory Group v. EPA,
134 S. Ct. 2427 (2014)

In *Utility Air Regulatory Group v. EPA*, the United States Supreme Court determined that where the Environmental Protection Agency’s (EPA) interpretation of the Clean Air Act (CAA) as written by Congress would produce absurd results, the agency must reconsider its interpretation, rather than construct its own version of the law. However, the Supreme Court also concluded that the EPA may increase the scope of its regulation when doing so would enhance, rather than disturb, the statutory scheme. 134 S. Ct. 2427 (2014).

A. Background

The CAA regulates air pollutant emissions from stationary and mobile sources. 42 U.S.C. § 7408(a)(1)(B) (2012). Inter alia, the CAA

authorizes the EPA to establish National Ambient Air Quality Standards (NAAQS) to regulate emissions of certain air pollutants. *Id.* § 7409. States implement the NAAQS through their own state implementation plans (SIP). *Id.* § 7410. With respect to each NAAQS, states designate geographic areas as “attainment,” “non-attainment,” or “unclassifiable.” *Id.* § 7407(d)(1)(A). Stationary sources that emit pollutants in areas designated as attainment or unclassifiable are regulated by permit under the Prevention of Significant Deterioration (PSD) program. *Id.* §§ 7470-7492. Because every area of the country has been designated for at least one NAAQS pollutant and because the EPA applies PSD regulations to sources located in such areas for *any* NAAQS pollutant, *all* stationary sources are potentially subject to PSD review. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2435.

The PSD program applies to “major emitting facilities” and requires these facilities to obtain a PSD permit before construction or modification. 42 U.S.C. §§ 7475(a)(1), 7479(2)(C). The PSD program defines a “major emitting facility” as any stationary source with the potential to emit 250 tons per year of “any air pollutant” or 100 tons per year for specific types of sources. *Id.* § 7479(1). This major emitting facility must not cause or contribute to the violation of any applicable air-quality standard, and it must comply with emissions limitations that reflect the “best available control technology” (BACT) for “each pollutant subject to regulation under [the CAA].” *Id.* § 7475(a)(3)-(4).

In addition to the PSD program regulating stationary sources, Title V of the CAA requires any “major source” to obtain a comprehensive operating permit comprising all of a facility’s obligations under the CAA. *Id.* § 7661a(a). Title V permits include all emissions limitations and standards, as well as inspection, entry, monitoring, certification, and reporting standards. *Id.* § 7661c(a)-(c). A “major source” is ultimately defined as a “stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.” *Id.* § 7602(j). Thus, defining what exactly constitutes an “air pollutant” becomes a focal concern when determining what sources are to be regulated under PSD and Title V permitting programs.

In 2007, the United States Supreme Court’s holding in *Massachusetts v. EPA* enabled the EPA to count greenhouse gases (GHGs) among those air pollutants subject to regulation. The Court determined that Title II of the CAA authorized the EPA to regulate GHG emissions from new motor vehicle sources. 549 U.S. 497, 528-29 (2007). Accordingly, the EPA set standards to regulate GHG emissions from new motor vehicles. However, because GHGs are now regulated pollutants

under the CAA, the EPA determined that they must be regulated by any provision of the CAA that monitors or limits air pollutants. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,408 (July 30, 2008) (codified at 40 C.F.R. ch. 1). Particularly, the EPA determined that its regulation of GHG emissions from new motor vehicles triggered regulation of GHGs in the PSD and Title V permit programs because these programs monitor air pollutants. *Id.* at 44,418, 44,420, 44,510. Accordingly, the EPA issued a rule (Triggering Rule) reflecting its interpretation that GHG motor vehicle emission regulations trigger the regulation of GHGs emitted by new and modified stationary sources subject to PSD and Title V permits. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (codified at 40 C.F.R. pts. 50-51, 70-71).

Because GHGs are emitted in such high quantities, the regulation of GHGs according to the standards already set forth in the CAA would expand the scope of the PSD and Title V programs to sources not originally intended for regulation: e.g., small businesses, schools, and even some residential developments. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (codified at 40 C.F.R. pts. 51-52, 70-71). The EPA resolved this overburden by effecting a “Tailoring Rule” that adopted a “phase in” approach of regulating GHGs. Under Phase 1 of the Tailoring Rule, PSD or Title V requirements would “apply to sources’ GHG emissions only if the sources are subject to PSD or Title V anyway due to their non-GHG pollutants.” *Id.* at 31,516. Phase 2 of the Tailoring Rule altered the statutory requirements of the PSD and Title V programs by including a new threshold of 100,000 tons per year of GHGs, thus narrowing the regulatory scope of these programs once GHGs were included in the list of regulated pollutants. This rewrite of statutorily mandated thresholds triggering PSD and Title V permits has been called “one of the most brazen power grabs ever attempted by an administrative agency.” Brief for State Petitioners at 9, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (No. 12-1146), 2013 WL 6492283.

Several states and various industry groups challenged the EPA’s Triggering Rule and Tailoring Rule. Reasoning that the “EPA has long interpreted the phrase ‘any air pollutant’ in both [PSD and Title V] provisions to mean any air pollutant that is regulated under the CAA,” the United States Court of Appeals for the District of Columbia Circuit determined that the EPA was compelled by the statute to include GHGs as a regulated air pollutant in PSD permitting requirements. *Coal. for*

Responsible Regulation, Inc. v. EPA, 684 F. 3d 102, 115, 133-34 (D.C. Cir. 2012) (per curiam). Further, the D.C. Circuit determined that sources already subject to PSD permits must install BACT for greenhouse gasses. *Id.* at 137. The D.C. Circuit denied rehearing en banc, and the Supreme Court granted six petitions for certiorari.

B. Court's Holding

In *Utility Air Regulatory Group*, the United States Supreme Court considered two questions: (1) “whether EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source’s potential to emit greenhouse gases” and (2) “whether EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants (an ‘anyway’ source) may be required to limit its greenhouse-gas emissions by employing the ‘best available control technology’ for greenhouse gases.” 134 S. Ct. at 2438.

Considering first whether the EPA must interpret “air pollutant” in the broadest possible sense across the whole of the CAA, the Court disagreed with the court of appeals holding that the EPA was compelled by the language of the statute to give the broadest possible meaning to the term “air pollutant” in the PSD and Title V provisions. The Court reasoned that “where the term ‘air pollutant’ appears in the Act’s operative provisions, EPA has routinely given it a narrower, context-appropriate meaning.” *Id.* at 2439. The Court cited to numerous examples of where the EPA had more narrowly interpreted the term “air pollutant” as limited to air pollutants regulated as relevant to that statute part, rather than considering any and all air pollutants. *Id.* at 2439-41. Further, the Court determined that the holding in *Massachusetts* did not require that the EPA regulate GHGs in a way that is inconsistent with the statutory scheme, but simply deemed that GHGs may be considered for regulation under the Act’s operative provisions. *Id.* at 2441 (citing *Massachusetts v. EPA*, 549 U.S. 497, 532, 535 (2007)).

The Court then considered whether, in the alternative, the EPA’s construction of the statute resulting in the Triggering Rule was permissible under the *Chevron* doctrine. According to the *Chevron* doctrine, where the text of an agency-administered statute is ambiguous, Congress empowers the agency to resolve the ambiguity. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Reviewing the EPA’s interpretation of the CAA in this matter, the Court emphasized that the *Chevron* doctrine also commands that the agency’s interpretation be reasonable and does not supersede the bounds of

authority granted by Congress. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2439. The Court held that “an agency interpretation that is ‘inconsistent with the design and structure of the statute as a whole’ does not merit deference.” *Id.* at 2442 (quoting *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013)). The Court ruled that the EPA’s GHG-inclusive interpretation of PSD and Title V triggers would be inconsistent with the CAA’s structure and design and would excessively expand upon the EPA’s regulatory authority without clear congressional authorization or intent. *Id.* at 2444.

Considering next the EPA’s attempt to limit the effective scope of the Triggering Rule, the Court deemed the Tailoring Rule a forbidden rewrite of statutory thresholds. *Id.* at 2445. The Court ruled, “An agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.” The *Chevron* doctrine only affords agencies discretion where there is “statutory silence or ambiguity” and must “give effect to the unambiguously expressed intent of Congress.” *Id.* (quoting *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007)). Congress gave precise numerical thresholds to the statute, and because the EPA effectively “replaced” those numbers in regards to GHGs with “others of its own choosing, it went well beyond the ‘bounds of its statutory authority.’” *Id.* (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)). The Court agreed that the Trigger Rule would place excessive demands on limited government resources. *Id.* at 2444. However, the Court also held the Tailoring Rule impermissible under *Chevron*, reasoning that where the EPA “need[s] to rewrite clear provisions of the statute” in order to rationalize their interpretation, it “should have [been] alerted . . . that it had taken a wrong interpretive turn.” *Id.* at 2446. The Court ruled that both the Triggering Rule and Tailoring Rule failed the *Chevron* doctrine, holding, “Agencies are not free to ‘adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.’” *Id.* at 2446 (quoting *Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *16 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting)).

Turning to the second question—whether the EPA’s decision to require limiting GHGs through BACT for sources already subject to the PSD program—the Court found the EPA’s interpretation of the statute permissible under *Chevron*. The BACT provision of the PSD program states that BACT is required for “each pollutant subject to regulation under [the CAA].” 42 U.S.C. § 7475(a)(4). The Court found that the more specific phrasing of the BACT provision suggested that Congress

has been clear and definite that each pollutant—GHGs included—are to be regulated by BACT. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2448. The Court reasoned that even if the text were not clear, the EPA's interpretation would still be reasonable because it only "moderately increas[ed] the demands EPA (or a state permitting authority) can make of entities already subject to its regulation." *Id.* Because the EPA had previously established pollutant-specific numeric thresholds below which a facility's emissions of a pollutant are considered de minimis, the Court allowed the EPA to establish an appropriate de minimis threshold below which BACT is not required for a source's GHG emissions. The Court held that the EPA may require only those already regulated sources to comply with GHG BACT if and when the source emits more than that de minimis amount of GHGs. *Id.* at 2449.

C. Analysis

In a separate opinion concurring in part and dissenting in part, Justice Alito raised concerns that the BACT analysis is "fundamentally incompatible with the regulation of [GHG] emissions . . ." *Id.* at 2456 (Alito, J., concurring in part and dissenting in part). BACT looks to the effects of regulated pollutants—now including GHGs—in the area where the emitting source is located, and "the [CAA] demands that the impact of these gasses in the area surrounding a site must be monitored, explored at a public hearing, and considered as part of the permitting process." *Id.* at 2456-57. The problem is that the effects of GHGs have been determined to be global, rather than local. In 2011, the EPA attempted to resolve the "impact analysis" issue in its guidance document addressing PSD and Title V permitting. *See* EPA, EPA-457/B-11-001, PSD AND TITLE V PERMITTING GUIDANCE FOR GREENHOUSE GASES 38-44 (2011). However, the EPA's efforts to expand the BACT environmental impact analysis to include GHGs reflect an incomprehensible new standard, which Justice Alito predicts will result in "arbitrary and inconsistent decisionmaking." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2458.

Yet the EPA's guidance document appears to have anticipated the same concerns raised by Justice Alito. The EPA's guidance document recognized that "the environmental impacts analysis has not been a pivotal consideration when making BACT determinations in most cases." PSD AND TITLE V PERMITTING GUIDANCE FOR GREENHOUSE GASES at 40. Instead, the EPA suggests "applicants and permitting authorities focus on direct economic impacts (i.e., cost effectiveness as measured in annualized cost per tons of pollutant removed by that control) as the

reason for not selecting the top-ranked control option as BACT.” *Id.* This approach places more weight on economic considerations when selecting among available technology, rather than on the potentially impossible environmental impact consideration the BACT analysis traditionally requires. The shifting of this consideration from environmental to economic impacts provides the permitting authorities the opportunity to give weight to feasible considerations when making their permitting decisions, rather than having to make unreasonable estimations without any genuine basis of reference. These economic considerations are grounded in the market reality of current technology costs and are likely the greatest concern for these affected emitting sources. Further, the EPA’s guidance document recognizes that current technology costs are likely prohibitive, but notes that evolving technology may lower costs and thus warrant greater consideration in the future. *Id.* at 43.

It would appear that the EPA is aware of the “growing pains” that incorporating GHGs into its PSD program will bear. However, as the Supreme Court decision in *Massachusetts* reflects, the public has demanded the regulation of GHGs in order to address global warming concerns. This is the EPA’s first attempt at broadening its established PSD and Title V regulatory scheme for major source facilities. The Court’s decision in *Utility Air Regulatory Group* to allow GHG to be incorporated into BACT analysis for “anyway sources” affords the EPA the opportunity to discover what works and does not work by first removing the bar from GHG regulation. The Court in *Utility Air Regulatory Group* gave the EPA the opportunity to begin successfully regulating GHGs without unreasonably expanding the scope of the EPA’s regulatory power.

Bethanne M. Sonne

II. ENDANGERED SPECIES ACT

Aransas Project v. Shaw,
756 F.3d 801 (5th Cir. 2014) (per curiam)

In *Aransas Project v. Shaw*, a three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed the district court’s decision that ruled in favor of The Aransas Project (TAP), a nonprofit environmental corporation whose immediate goal is to protect the critical winter habitat of the endangered whooping crane that borders San Antonio Bay, Texas. 756 F.3d 801, 805-06 (5th Cir. 2014) (per curiam).

The circuit court found that “[t]he district court either misunderstood the relevant liability test or misapplied proximate cause when it held the state defendants responsible for remote, attenuated, and fortuitous events following their issuance of water permits.” *Id.* at 817. According to the circuit court, even if the district court had correctly applied proximate cause analysis, the district court abused its discretion in granting an injunction that required the Texas Commission on Environmental Quality (TCEQ) to apply for an Incidental Take Permit (ITP) in coordination with a Habitat Conservation Plan (HCP). *Id.* at 806. Furthermore, because the circuit court found no proximate cause after applying the “correct” test for causation, it did not reach the anticommandeering issue of whether state licensure and water permitting can ever constitute a take under the Endangered Species Act (ESA). *Id.* at 817 n.9. Specifically, the circuit court noted, “To be clear, this is not to suggest that there is binding authority for holding state officials liable under the ESA for licensing third parties who take an endangered species.” *Id.*

Although the circuit court also addressed issues of standing, the *Burford* abstention doctrine, and evidentiary rulings, *id.* at 807-16, this Recent Development will focus on the court’s conclusion that the TCEQ is not liable under the ESA for “takes” of whooping cranes and that even if the TCEQ should be held liable, the district court abused its discretion in granting an injunction. *Id.* at 824.

A. Background

As the tallest bird in North America, the whooping crane “stands five feet tall and has a wingspan of more than eight feet.” *Id.* at 806. The world’s sole wild whooping crane population, the Aransas-Wood Buffalo (AWB) flock, inhabits the Aransas National Wildlife Refuge (ANWR), Texas, in the winter and migrates to its breeding grounds in Wood Buffalo National Park, Canada, for the summer. *Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 722 & n.3 (S.D. Tex. 2013). Unfortunately, despite the birds’ seemingly resilient stature and nature, the AWB flock consists of a mere 300 birds today. *Id.* at 722.

Although many would consider a species with a single wild population of 300 individuals to be near extinction, those with knowledge of the whooping cranes’ history recognize the AWB flock as “an international symbol of conservation success.” *Id.* at 756. In fact, in 1941, the AWB flock consisted of no more than fifteen total individuals. However, after recovery efforts, the annual growth rate of the population averaged 4.5% per year over the past seven decades. Canadian Wildlife Serv. & U.S. Fish & Wildlife Serv., *International Recovery Plan*,

Whooping Crane, U.S. FISH & WILDLIFE SERV. 19 (Mar. 2007), <http://www.fws.gov/uploadedFiles/WHCR%20RP%20Final%207-21-2006.pdf> [hereinafter *Recovery Plan*]. Yet, despite evidence “showing steadily increasing flocks in the Refuge,” *Aransas Project*, 756 F.3d at 824, TAP and whooping crane enthusiasts remain concerned about the proper level of freshwater inflows into the ANWR needed to sustain and recover AWB flock numbers. *See id.* at 820. After the release of the 2008-2009 report that concluded that at least twenty-three whooping cranes died that winter at the ANWR, *Aransas Project*, 930 F. Supp. 2d. at 724, TAP filed a lawsuit against the TCEQ, alleging that the TCEQ violated section 9 of the ESA “by failing to properly manage freshwater inflows into the San Antonio and Guadalupe bays during the 2008-2009 winter, causing an unlawful ‘take’ of AWB cranes.” *Id.* at 725.

1. Legal Background

In 1973, Congress passed the ESA with the purpose to protect and recover critically imperiled species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b) (2012). The ESA provides for the listing of endangered or threatened species and the designation of their critical habitat. *See id.* § 1533(a). In regard to protecting listed species, section 9 of the ESA prohibits “takes” of any member of a listed endangered species, which is defined as acts that “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” a listed species. *Id.* § 1532(19). The term *harm* encompasses “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering,” and the term *harass* is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3(c) (2013). In an important move, Congress decided that the ESA’s prohibition against “takes” shall apply to all “persons,” including “any officer, employee, agent, department, or instrumentality . . . of any State.” 16 U.S.C. § 1532(13).

In 1995, the Supreme Court of the United States addressed the proper standard for proving causation under section 9 of the ESA, finding that “Congress intended ‘take’ to apply broadly to cover indirect as well as purposeful actions.” *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995). In regard to proximate causation, the Supreme Court reasoned that in adopting an ITP exception to the ESA’s prohibition against “takes,” it is “clear that Congress had in

mind foreseeable rather than merely accidental effects on listed species.” *Id.* at 700. Elaborating on the majority’s opinion, Justice O’Connor wrote a separate concurrence in which she explained that proximate cause has “‘functionally equivalent’ alternative characterizations in terms of foreseeability and duty. [It] depends to a great extent on considerations of the fairness of imposing liability of remote consequences. The task of determining whether proximate cause exists in the limitless fact patterns sure to arise is best left to lower courts.” *Id.* at 713 (O’Connor, J., concurring) (citing *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1877); *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 102 (N.Y. 1928); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 546 (1994)). Lastly, the Supreme Court recognized that “[i]n the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree.” *Id.* at 708 (majority opinion).

2. Procedural Background

On March 11, 2013, the United States District Court for the Southern District of Texas issued its opinion in *Aransas Project* and held that the TCEQ is liable under section 9 of the ESA for the “takes” of whooping cranes and must apply for a HCP that could lead to an ITP. 930 F. Supp. 2d at 788-89 (citing 16 U.S.C. § 1538(a)(b)(B)-(C), (g)). The court based the holdings on its findings of fact, which were directly adopted from TAP’s proposed findings of fact, as follows:

In summary, the Court finds that the actions, inactions and refusal to act by the TCEQ defendants proximately caused an unlawful “take” of at least twenty-three (23) Whooping Cranes in the 2008-2009 winter in violation of the ESA. TAP has established that during the winter of 2008-2009: (1) the TCEQ defendants diverted freshwater flow, caused higher salinity in the San Antonio Bay ecosystem; (2) higher salinities resulted in decreased freshwater availability, along with decreased blue crab and wolfberry abundance; (3) Whooping Cranes require freshwater, wolfberry and blue crab to survive; (4) the AWB flock suffered increased mortality as a direct result of diverted freshwater, leading to the deaths of at least twenty-three (23) cranes in total; (5) TCEQ defendants’ water management practices altered the salinity of San Antonio Bay and the designated critical habitat of the AWB flock; and (6) TCEQ defendants have failed to insure the survival of the critical habitat of the AWB. . . . The Court reiterates that TAP has successfully demonstrated causation.

Id. at 780. Additionally, as a matter of law, the court avoided an in-depth analysis of proximate causation and foreseeability under section 9 of the

ESA by concluding that “[p]roximate causation exists where a defendant government agency authorized the activity that caused the take.” *Id.* at 786 (citing *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 148 F.3d 1231, 1258 (11th Cir. 1998)). Ultimately, by holding the TCEQ liable under section 9 of the ESA for “takes” of whooping cranes, the district court broadened the scope of the ESA to hold state officials and regulatory agencies liable for licensing the third parties who subsequently “take” endangered species. *See id.* at 726-27 (citing *Strahan v. Coxe*, 127 F.3d 155, 158 (1st Cir. 1997)).

In regard to the district court’s grant of injunctive relief, the district court determined that “the ESA has been interpreted to provide for a relaxed standard in granting equitable relief: ‘When an injunction is sought under the ESA, the traditional balancing of equities is abandoned in favor of an almost absolute presumption in favor of the endangered species.’” *Id.* at 775 (quoting *Defenders of Wildlife v. Adm’r, EPA*, 688 F. Supp. 1334, 1355 (D. Minn. 1988), *aff’d in part, rev’d in part on other grounds*, 822 F.2d 1294 (8th Cir. 1989)). With the “relaxed standard” in mind, the court discussed the TCEQ’s power to manage and affect freshwater inflows into the San Antonio Bay and rejected the TCEQ’s argument that it does not have the authority to control permitted water right users’ actions in its findings of fact. *Id.* at 781. Next, the court found “by a preponderance of the evidence that there is a reasonably certain threat of imminent harm to the Whooping Crane that supports injunctive relief against the TCEQ defendants,” *id.* at 781-82, and that as a matter of law, a court must issue an injunction in such a situation. *Id.* at 784 (citing *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000)). As such, the court found it appropriate to order the TCEQ to apply for a HCP that could lead to an ITP. *Id.* at 787 (citing 16 U.S.C. § 1539(a)).

B. The Court’s Decision

One year after the district court’s opinion in *Aransas Project*, the Fifth Circuit reversed the district court’s decision and held that the TCEQ cannot be held liable for a section 9 “take” under the ESA. *Aransas Project*, 756 F.3d at 824 (reasoning that the link between the TCEQ’s management of water permits and the whooping cranes’ deaths was too remote to establish proximate cause and foreseeability). Next, the circuit court held that even if the TCEQ should be held liable, the district court abused its discretion in granting an injunction.

1. Proximate Cause and Foreseeability

The “principal liability issue” addressed by the circuit court in *Aransas Project* was “whether the actions of TCEQ in administering licenses to take water from the Guadalupe and San Antonio rivers for human, manufacturing and agricultural use foreseeably and proximately caused the deaths of whooping cranes in the winter of 2008-2009.” *Id.* at 816-17. The circuit court cleared the air on the proximate cause issue by concluding that the “district court either misunderstood the relevant liability test or misapplied proximate cause when it held” the TCEQ liable under the ESA for the effects of its water permit management and the lack of freshwater inflows into the San Antonio Bay, Texas, in the winter of 2008-2009. *Id.* at 817. Although the standard of review for a district court’s finding of proximate cause is for clear error, the circuit court confirmed that a district court’s use of an incorrect test for causation is not binding on the appellate court. *Id.* at 819 (citing *Bertucci Contracting Corp. v. M/V Antwerpen*, 465 F.3d 254, 259 (5th Cir. 2006); *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 196 (5th Cir. 1998)).

In laying out the appropriate proximate cause analysis, the circuit court distinguished the facts at hand from other cases that have held the state liable under the ESA for regulatory acts that contributed to “takes” of an endangered species. *See id.* at 819-20. The circuit court found that in the other cases, the licensed actions *directly* resulted in a “take” of an endangered species, e.g., by licensing the use of gillnets in which endangered right whales get caught or by permitting the removal of trees in which endangered birds make their home. *Id.* (citing *Strahan*, 127 F.3d at 165; *Sierra Club v. Yeutter*, 926 F.2d 429, 432-33 (5th Cir. 1991)). However, the circuit court emphasized that in the case at hand, there is a long chain of causation between the TCEQ’s management of water permits and the “takes” of whooping cranes. The chain of causation laid out by the court is as follows: less freshwater inflows increased the San Antonio Bay’s salinity, which caused a decrease in the blue crab and wolfberry populations in the ANWR, which then caused at least two whooping cranes to die of emaciation. *Id.* at 820.

According to the court, each link in the chain of causation is based on “modeling and estimation,” and “the district court’s opinion does not establish that the state could have reasonably anticipated the synergy among the links on the chain in 2008-2009.” *Id.* at 820-21. Additionally, the circuit court found that the *Recovery Plan*, which discussed issues relating to freshwater inflows, salinity, drought, and blue crab

populations, did not establish foreseeability because it did not specifically predict that a lack of freshwater inflows would result in abnormal crane deaths in the winter of 2008-2009. *Id.* at 821 (“The state defendants had no reason to anticipate a significant die-off because of decreased freshwater inflows only one year after this report issued.”). Lastly, the court mentioned a “number of contingencies” that were uncontrollable factors and contributors in the chain of causation resulting in the whooping cranes’ deaths. *Id.* at 822. These factors included third-party decisions to use water, unpredictable weather conditions, and intricacies of food webs. *Id.* at 822-23. In sum, the circuit court categorized the whooping cranes’ deaths in the winter of 2008-2009 as an “unusual die-off of cranes” attributed to “multiple, natural, independent, unpredictable, and interrelated forces affecting the cranes’ estuary environment.” *Id.* at 823.

2. Injunction

According to the circuit court, the district court made three errors in granting an injunction: (1) “the relief is based on its failure properly to apply proximate cause and foreseeability to the circumstances in this case”; (2) “the court erred in claiming a ‘relaxed’ standard for granting injunctive relief”; and (3) “it erred, under the proper standard, in finding a real and immediate threat of future injury to cranes.” *Id.* at 823.

Regarding the first error, the circuit court simply confirmed that vacating the district court’s grant of injunctive relief is in accordance with the circuit court’s decision to reverse the TCEQ’s liability under the ESA. *Id.* (“No further discussion of this error is required.”). However, regarding the second error, the circuit court explained that in all cases, a court’s power to order injunctive relief must rest on “whether plaintiffs have established by a preponderance of the evidence, that there is ‘a reasonably certain threat of imminent harm to a protected species.’” *Id.* at 824 (quoting *Defenders of Wildlife*, 204 F.3d at 925). To the extent that there is a “relaxed” standard for granting injunctive relief under the ESA, the circuit court clarified that to be true “only insofar as the balance of equities will lean more heavily in favor of protecting wildlife than it would in the absence of the ESA.” *Id.* at 823. Lastly, the circuit court found that the third error lies in the district court’s focus on the whooping cranes’ injuries in 2008-2009 and the lack of explanation in finding a real and immediate *future* harm to the cranes. *Id.* at 823-24. According to the circuit court, the latest evidence actually shows a steady increase in the AWB flock numbers. *Id.* at 824.

C. *Analysis*

Although the circuit court's opinion in *Aransas Project* was an overall loss for TAP in regard to its goal to protect the critical winter habitat of the endangered whooping crane, the opinion may be interpreted as a win for TAP in terms of future ESA "taking" claims. For a factual win, the circuit court concluded that the district court's finding of twenty-three whooping crane deaths in the winter of 2008-2009 is not clearly erroneous. *Id.* at 815 (recognizing, however, that "there may be some doubt as to the 2008-2009 mortality numbers"). The circuit court rejected the intervener defendant's arguments against the district court's finding of fact because "that doubt hardly leaves [the court] with a 'firm conviction' that a mistake has been made." *Id.* Such a conclusion by the circuit court is significant to future ESA "taking" claims because it is typically difficult for plaintiffs to prove harm to a listed endangered species under section 9 of the ESA due to scientific estimation and natural fluctuation of species' population counts. However, even if the circuit court had not recognized the district court's finding of twenty-three whooping crane deaths, TAP had the indisputable evidence of four whooping crane carcasses with a specified cause of deaths to reinforce its taking claim in the case at hand.

Secondly, for a causal win, the circuit court recognized the district court's finding of but-for causation between the TCEQ's management of water permits and the deaths of twenty-three whooping cranes. *Id.* at 820. The circuit court's recognition of the district court's finding of but-for causation is significant because a plaintiff must only establish proof of proximate cause after proving but-for causation to succeed in a section 9 "taking" claim, and after such lengthy litigation and detailed discussion of the whooping cranes' cause of deaths in the case at hand, it is doubtful that a subsequent court in a similar fact pattern will be able to find (for the second time around) that the TCEQ could not anticipate the chain of causation. Because the litigation raises awareness of the notion that a drought can occur in Southern Texas on any given year and result in the deaths of whooping cranes in the ANWR, it will be difficult for a future court to rely on the argument that the *Recovery Report* does not predict the occurrence of a drought in that year. According to the circuit court, the TCEQ was aware that Southern Texas is particularly susceptible to droughts, that whooping cranes inhabit the ANWR in the winter, and that freshwater inflows affect salinity, blue crab populations, and ultimately whooping cranes' survival. Therefore, in terms of proximate causation analysis, the TCEQ could reasonably foresee that the issuance and scope

of its water permits would likely result in the deaths of whooping cranes in the ANWR during a year of drought.

Samantha N. Skains

III. ENVIRONMENTAL LITIGATION

Louisiana Legislation To Block Coastal Land Loss Lawsuit

On July 24, 2013, the Southeast Louisiana Flood Protection Authority-East (SLFPA-E) filed a lawsuit against ninety-seven oil and gas companies, claiming the actions of these companies resulted in the destruction of Louisiana's coastal wetlands and contributed to the rising costs of flooding and flood protection. Eleven months later, the Louisiana legislature passed S.B. 469, a bill intended to effectively "kill" that lawsuit by removing SLFPA-E's authority to take legal action. Along with potentially absolving the oil and gas industry from liability for the destruction of Louisiana's wetlands (for the moment), S.B. 469 could bring unintended consequences upon other suits filed for damages resulting from the 2010 DEEPWATER HORIZON oil spill.

A. *Background*

1. The Flood Protection Authority

In the wake of Hurricane Katrina, Louisiana voters amended the state constitution to allow for the creation of an independent political subdivision charged with providing flood protection for St. Bernard, Jefferson, and Orleans Parishes. Bob Marshall, *What Are the Key Issues in Lawsuit Against Oil & Gas Companies for Coastal Loss?*, LENS (July 26, 2013, 9:49 AM), <http://thelensnola.org/2013/07/26/explainer-what-are-the-legal-political-issues-in-lawsuit-against-oil-gas-companies-for-coastal-loss/>. The authorizing legislation for the SLFPA-E created a nine-member board of commissioners and required a majority of that board to work in fields related to flood protection. Each member is nominated by a committee consisting of representatives from the engineering schools at Louisiana State University, Tulane University, the University of New Orleans and Southern University, professional engineering organizations, and the Public Affairs Research Council. The governor then appoints the nominees to the board. These board members serve four-year terms, with three seats coming open every year.

2. Coastal Land Loss and the SLFPA-E Lawsuit

Over the last seventy years, Louisiana lost nearly 1,900 square miles of coastal wetlands to erosion and subsidence. Devin Lowell, Comment, *Ensuring Consistency: Louisiana Coastal Restoration Through the Lens of the RAM Terminal and the Mid-Barataria Sediment Diversion*, 27 TUL. ENVTL. L.J. 299, 301 (2014) (citing Mark Schleifstein, *Louisiana Is Losing a Football Field of Wetlands an Hour*, *New U.S. Geological Survey Study Says*, NOLA.COM (June 2, 2011, 1:00 PM), http://www.nola.com/environment/index.ssf/2011/06/louisiana_is_losing_a_football.html). Though the channelizing of the Mississippi River and the efforts of the U.S. Army Corps of Engineers after the Great Flood of 1927 instigated this coastal land loss, the operations of the shipping and oil & gas industries accelerated it to the current crisis levels. *Id.* at 301-02 (referencing U.S. Army Corps of Eng'rs, *WaterMarks, Summer 1999: The Cost of Doing Nothing*, COASTAL WETLANDS, PLANNING, PROT., & RESTORATION ACT 5, https://lacoast.gov/new/Data/WaterMarks/watermarks_1999-summer.pdf). Canals and levees dredged by the oil & gas industry potentially caused up to 50% of the total land lost in coastal Louisiana since 1932. Marshall, *supra*. Along with the communities that exist on this disappearing coast, the loss of Louisiana's wetlands also threatens the state's "first line of defense" against flooding. Louisiana's coastal wetlands provide a natural barrier to storm surge and a sink that traps and retains floodwaters. *See* Lowell, *supra*, at 303 (citing *Wetland Importance*, GULF RESTORATION NETWORK, <http://www.healthygulf.org/our-work/wetlands/wetland-importance> (last visited Oct. 13, 2014)). The state's own Coastal Protection and Restoration Authority estimates the annual costs of flooding to increase tenfold if coastal land loss continues at its current rate.

In 2013, the SLFPA-E board voted unanimously to file a lawsuit against ninety-seven oil companies for their involvement in the destruction of Louisiana's coastal wetlands, claiming that the destruction of the wetlands made it harder and more expensive to protect New Orleans against flooding. *See* Mark Schleifstein, *Historic Lawsuit Seeks Billions in Damages from Oil, Gas, Pipeline Industries for Wetlands Losses*, NOLA.COM, http://www.nola.com/environment/index.ssf/2013/07/historic_east_bank_levee_autho.html (last updated July 24, 2013, 4:13 PM).

This lawsuit relies primarily on three legal theories: that these companies (1) violated the federal Rivers and Harbors Act of 1889, which prohibits actions that impair the effectiveness of flood protection

levees, (2) failed to fulfill lease obligations to restore land where canals were dredged, and (3) violated the natural servitude of drain, a provision of Louisiana law that prohibits one person from increasing the flow of water onto someone else's property. The lawsuit asks for injunctive relief in the form of wetland restoration projects performed by the defendants or, in the alternative, monetary damages to defray the costs of wetland restoration and flood protection now required to protect the coast. Since the filing, both Louisiana Governor Bobby Jindal and the oil & gas industry in the state have vigorously opposed the lawsuit. This vigorous opposition culminated almost a year later in S.B. 469, a bill intended to "kill" the lawsuit and prevent future actions like it.

B. The Law To Kill the Suit and Subsequent Developments

1. S.B. 469

In response to the SLFPA-E lawsuit, the Louisiana legislature passed S.B. 469, later signed by Governor Bobby Jindal as Act No. 544. S.B. 469, 2014 Sess. (La. 2014). This law amends the state's Coastal Zone Management Act (CZMA) to prevent political subdivisions from claiming a cause of action related to any activity authorized by the CZMA, which includes oil & gas-related activities. In relevant part, it reads:

(O)(1) Except as provided in this Subpart, no state or local governmental entity shall have, nor may pursue, any right or cause of action arising from any activity subject to permitting under R.S. 49:214.21 et seq., 33 U.S.C. 1344 or 33 U.S.C. 408 in the coastal area as defined by R.S. 49:214.2, or arising from or related to any use as defined by R.S. 49:214.23(13), regardless of the date such use or activity occurred.

The cited provisions of law refer to the state coastal use permitting requirement and federal Clean Water Act § 404 permitting.

The Louisiana House amendments clarified that they intended S.B. 469 to apply retroactively to the SLFPA-E lawsuit: "Section 2. The provisions of this Act shall be applicable to all claims existing or actions pending on the Act's effective date and all claims arising or actions filed on or after that date."

If there existed any doubt that legislators specifically targeted the SLFPA-E lawsuit with S.B. 469, section 1, part 5 (the savings clause) dispels that: "Nothing in this Section shall alter the rights of any governmental entity, except a local or regional flood protection authority, for claims related to sixteenth section school lands or claims for damage to property owned or leased by such governmental entity." Since the

passage of S.B. 469, SLPFA-E filed a motion for partial summary judgment on the lawsuit, asking a federal judge to rule on the constitutionality of S.B. 469 and its applicability to the causes of action the lawsuit is based on. *See* Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment Regarding Louisiana Act 544 at 2, Bd. of Comm'rs of SLPFA-E v. Tenn. Gas Pipeline Co., 2:13-cv-05410, 2014 WL 4684442 (E.D. La. filed Aug. 6, 2014).

2. Subsequent Developments

The passage of S.B. 469 and its amendments to Louisiana's CZMA brings up at least three pressing questions: (1) does the law in fact "kill" the SLPFA-E lawsuit against ninety-seven oil companies, (2) does the law create any unintended consequences regarding other lawsuits filed by "local governmental entities," and (3) does this controversy create any nonlegal repercussions for SLPFA-E and Louisiana's flood protection system?

Prior to the passage of S.B. 469, a letter from Professor Robert Verchick at Loyola University New Orleans College of Law, addressed to Governor Jindal's executive counsel, questioned the applicability of the new law to the suit in question. Verchick posits that S.B. 469

applies only to "local government entities," a term with a specific legal meaning that does not include regional flood protection authorities or the levee districts that make up SLFPAE. And, in the one place SB469 does mention regional flood protection authorities, the bill fails to include levee districts. The SLFPAE lawsuit is filed on behalf of the East Jefferson Levee District, the Orleans Levee District, and the Lake Borgne Basin Levee District as entities distinct from SLFPAE itself.

Letter from Robert R.M. Verchick, Gauthier-St. Martin Eminent Scholar Chair in Envtl. Law, Loyola Univ. New Orleans Coll. of Law, to Thomas Enright, Jr., Exec. Counsel, Office of the Governor, NOLA.COM (June 2, 2014), <http://media.nola.com/politics/other/Verchick%20letter.pdf>.

By Verchick's reckoning, the wording of S.B. 469 includes (and omits) specific legal terms that prevent it from applying to the SLFPA-E lawsuit. The plaintiffs have since adopted such reasoning in their Motion for Partial Summary Judgment. The motion claims that throughout Louisiana law, the term "local governmental entity" specifically means bodies like city and parish governments and does not contemplate a political subdivision such as the levee districts or SLFPA-E. *See* Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment Regarding Louisiana Act 544, *supra*, at 11-19. In discussing the savings clause, SLPFA-E claims, "While SLFPA-E is excepted from

this savings clause, the distinct Levee Districts are not, and therefore their claims for damage to the levee systems and flood control structures are within the scope of the savings clause and not prohibited by Act 544.” *Id.* at 34.

Both Professor Verchick’s letter and SLFPA-E’s motion also challenge the constitutionality of S.B. 469. According to SLFPA-E, if S.B. 469 indeed applies to them and to the levee districts, then the law violates the Louisiana Constitution’s

- (1) prohibition against violating the separation of powers (La. Const. Art. II, § 2);
- (2) prohibition of improper special or local laws (La. Const. Art. III, § 12(A)(3));
- (3) requirement to advertise any otherwise proper special or local laws (La. Const. Art. III, § 13(A));
- (4) mandate to protect, conserve, and replenish the state’s environment under the constitutional public trust doctrine (La. Const. Art. IX, § 1); and
- (5) requirement to comply with specific public-notice-related procedural safeguards in processing and passing legislation (La. Const. Art. III, § 15(A), (C), and (D)).

See Memorandum in Support of Plaintiff’s Motion for Partial Summary Judgment Regarding Louisiana Act 544, *supra*, at 2. So in addition to potentially failing to kill the SLFPA-E lawsuit, the legislature may have passed S.B. 469 in open violation of the state’s constitution.

Beyond the questionable constitutionality and applicability of S.B. 469, the law may have unintentionally given the oil & gas industry a tool to fight other lawsuits for damages related to oil spills—in particular, litigation related to the DEEPWATER HORIZON oil spill of 2010. Another memorandum drafted by Professor Verchick and signed by other legal scholars from across the country protested that S.B. 469’s wording “actually poses a new and significant risk to local and state government claims under the Oil Pollution Act of 1990 (OPA).” Memorandum from Robert R.M. Verchick et al., SB 469 Poses Litigation Risk for Local Government Oil Pollution Act Claims in Louisiana, Specifically Including Those Arising from BP’s Macondo Spill, L., SCI. & PUB. HEALTH, LA. ST. U. (May 31, 2014), http://biotech.law.lsu.edu/blog/BP-Claims-Memo_Signatories.pdf. The memo argues that the sweeping language of S.B. 469 creates a risk that courts will interpret it to apply to claims for economic and natural resource damages arising under the OPA, thus preventing local political subdivisions from recovering in the event of an oil spill like DEEPWATER HORIZON. Professor Verchick and others worry that S.B. 469 presents a significant litigation risk to suits like that filed by the State of Louisiana and a myriad of its political subdivisions against British Petroleum (BP) in MDL-2179, the

multidistrict litigation regarding damage claims arising from the DEEPWATER HORIZON spill.

Aside from the legal consequences (or lack thereof) of S.B. 469, the fight by politicians against the SLFPA-E lawsuit also made some waves in the makeup of SLFPA-E itself. After the board unanimously voted to proceed with the lawsuit, the Jindal administration announced the governor would veto any nominees who supported the suit. Bob Marshall, *Future of Coastal Loss Lawsuit Could Rest in Hands of Board's Nominating Committee*, LENS (July 16, 2014, 2:50 PM), <http://thelensnola.org/2014/07/16/future-of-coastal-loss-lawsuit-could-rest-in-hands-of-boards-nominating-committee/>. By threatening to veto any nominee for the board who supports the suit, the governor replaced four board members who voted for the suit with nominees who oppose the suit. At the most recent meeting of the SLFPA-E board, they voted 5-4 to proceed with the suit—but that margin could potentially flip after another round of board nominations and appointments.

C. Analysis

In an attempt to defeat a lawsuit they found politically distasteful, the Louisiana legislature passed a possibly unconstitutional law that not only could fail to accomplish its aims, but might also imperil other, more favorable litigations against BP and others responsible for oil spill damages. The failure to heed several warnings issued by legal scholars and SLFPA-E itself smacks of irresponsibility in the drafting of the legislation, let alone in the wisdom of using retroactive legislation to defeat a single lawsuit. The consequences of this legislation will play out for a while yet to come and be felt in coastal Louisiana, potentially, for generations.

Devin Lowell

IV. LAND USE

Esplanade Ridge Civic Ass'n v. City of New Orleans,
2013-1062 (La. App. 4 Cir. 2/12/14); 136 So. 3d 166

In *Esplanade Ridge Civic Ass'n v. City of New Orleans*, the Louisiana Fourth Circuit Court of Appeal affirmed the district court's ruling that the City of New Orleans' Board of Zoning Adjustments (BZA) properly granted a variance allowing for the construction of a multiunit building complex where half of the units would house formerly

homeless people and would allow for on-site supportive social services. 2013-1062 (La. App. 4 Cir 2/12/14); 136 So. 3d 166, 168. The court held that (1) the BZA had authority to hear the appeal of a decision letter and did not abuse its discretion by granting a zoning variance and that (2) the zoning variance was a reasonable accommodation under the Fair Housing Act (FHA). *Id.* at 172.

A. Factual and Procedural Background

The Esplanade Ridge Civic Association (ERCA) is a nonprofit corporation that promotes redevelopment of the area of New Orleans “from North Rampart Street to North Broad Street and from Orleans Avenue to St. Bernard Avenue.” *Id.* at 168. Several members of the ERCA live in the immediate vicinity of 2535 Esplanade Avenue, which is zoned as RM-3 multiple-family residential under the city’s Comprehensive Zoning Ordinance (CZO).

GCHP Esplanade, LLC (GCHP) proposed to renovate a forty-unit residential complex where twenty of the units, set aside for formerly homeless people, would include on-site supportive services via a case management office. Low-income individuals would occupy the other twenty units. *Id.* at 170. After GCHP applied to the BZA for a setback waiver in January 2011, the Director of Safety and Permits of the City of New Orleans (Director) denied the application, citing noncompliance with the city’s CZO. *Id.* at 168. Particularly, the Director cited the existence of the case management office as violating the RM-3 multiple-family designation. GCHP then appealed the Director’s decision to the BZA.

In November 2011, the BZA overturned the Director’s decision, finding that the Director’s decision failed to take into account the GCHP’s request for a reasonable accommodation under the FHA. In December 2011, the BZA granted GCHP’s request for a reasonable accommodation under the FHA, which allowed GCHP to operate a case management office and to provide fewer parking spots at the property. The ERCA appealed this decision to the district court under LA. REV. STAT. ANN. 33:4727. *Esplanade Ridge*, 136 So. 3d at 168-69.

The district court found that the BZA properly designated the property as multifamily housing under the CZO and that the FHA required the BZA to make a reasonable accommodation to GCHP in order to offer equal opportunity housing to the handicapped community. *Id.* at 169. The district court found that the BZA’s decision did not warrant reversal given the BZA’s attempt to comply with the FHA. The ERCA appealed this decision to the Fourth Circuit.

B. The Court's Decision

The City Planning Commission of New Orleans consists of nine members appointed by the mayor and approved by the City Council. *Id.* at 170. Attached to the City Planning Commission is the BZA, which consists of seven members appointed by the mayor and approved by the City Council. The BZA has the authority to hear appeals from applicants who have been refused building permits as a result of a conflict with the CZO. The BZA may vary zoning regulation applications as long as harmony with the ordinance's general purpose is maintained. *Id.* at 169. Specifically, LA. REV. STAT. ANN. 34:4727(C)(3)(c) requires the following of the BZA:

In passing upon appeals, where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance, to vary or modify the application of any of the regulations or provisions of the ordinance relating to the use, construction, or alteration of buildings or structures or the use of land so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

Under LA. REV. STAT. ANN. 33:4727(E), the district court may review the BZA's decisions. Further, the district court may receive additional evidence and take additional testimony as part of its consideration of an appeal of a BZA decision whenever the district court sees fit. The court must determine whether the BZA exceeded its jurisdiction or whether the evidence establishes a legal and substantial basis for the BZA's decision. The decision of the BZA is afforded a rebuttable presumption of validity. The district court must overturn a decision of the BZA if the BZA acted arbitrarily, capriciously, or unreasonably under the circumstances.

The court of appeal will review questions of law under the *de novo* standard of review. Further, the appeals court should not consider whether the district court manifestly erred in its findings, but whether the BZA acted arbitrarily, capriciously, or with any prejudicial lack of discretion.

In this case, the court found that the purpose of the CZO district within which the property is located is to provide for a variety of dwelling types in a medium-density setting while preserving the neighborhood's character by limiting the uses and the number of signs. *Id.* at 170. Further, the court found that buildings containing between ten and fifty apartments, where an apartment is defined as a dwelling unit with culinary facilities designed as a living quarters for a family, were

permitted within the district. Accessory facilities, such as an office, laundry room, dining room, and coin-operated laundry facilities, were also permitted as part of a multiapartment building.

The ERCA argued that the proposed construction on the property would be a residential care center, not allowed in an RM-3 district. *Id.* at 171. A residential care center is defined under New Orleans CZO section 2.2(151) as:

A building other than an apartment hotel, hotel, small or large group home, rooming house, tourist home, motel or motor lodge, providing temporary lodging and board and a special program of specialized care and counseling on a full-time basis for fifteen (15) or more individuals who are displaced from their normal living environment, where such building is operated under the auspices of an entity which is designated as educational, religious, eleemosynary, public or nonprofit by the Federal Internal Revenue Service and is licensed by the State of Louisiana.

Id. at 170. The City of New Orleans argued that the project would constitute a multiunit apartment building, based primarily on the interpretation that the apartments were permanent rather than temporary. *Id.* at 171. Further, the City of New Orleans asserted that the ERCA's characterization of the project as consisting of twenty apartments and twenty "supportive housing units" is inaccurate because the CZO does not define "supportive housing unit." Further, the CZO defines an apartment as a living unit that includes its own culinary facilities; by this definition, each unit in the project has its own culinary facilities.

The court noted that where a zoning law is subject to more than one reasonable interpretation, the interpretation leading to the less restrictive use of the property should be applied. The court found that the project was not a residential care center because all of the project's apartments were permanent rather than temporary. Further, the court did not find the BZA's decision debatable.

Significantly, the court also noted that GCHP had requested from the BZA a reasonable accommodation under the FHA. *Id.* at 171-72. The FHA bans all state laws permitting any action that would be a discriminatory housing practice. *Id.* at 172. The FHA also requires reasonable accommodations to be made where necessary to afford disabled persons equal opportunity to use and enjoy a dwelling. In addition to the court's finding that the BZA's finding was not debatable, it further held that permitting the project constituted a reasonable accommodation under the FHA because it provided housing for low-income and formerly homeless individuals. Thus, the court affirmed the

district court's ruling that the BZA properly granted a variance allowing for the construction of the apartment complex.

C. Analysis

Considering that the purpose of the CZO district within which the property is located is to provide for a variety of dwelling types in a medium-density setting while preserving the neighborhood's character, the Fourth Circuit did not have to apply the FHA accommodations provision. Despite containing several additional parking spots and a small office providing supportive services to twenty residents, this forty-unit apartment project clearly fits within the purpose of this particular CZO district. It provides a variety of dwelling types in a medium-density setting and is well within the ten- to fifty-apartment range stated in the RM-3 zone. Before reaching its FHA application analysis, the Fourth Circuit had already held that BZA decisions are afforded a rebuttable presumption of validity. As the ERCA could not prove that the BZA had acted arbitrarily or capriciously, the Fourth Circuit could have affirmed the district court's decision upon this finding without applying the FHA accommodations provision.

Garreth DeVoe

Wallach v. Town of Dryden,
No. 04875, 2014 WL 2921399 (N.Y. June 30, 2014)

On June 30, 2014, the New York State Court of Appeals, in a consolidated court decision, affirmed two lower court decisions that two towns in New York, Dryden and Middlefield, may adopt local zoning laws in order to ban oil and gas production activities within the towns' municipal boundaries. *Wallach v. Town of Dryden*, No. 04875, 2014 WL 2921399, at *5 (N.Y. June 30, 2014). In both suits, the court found that the Municipal Home Rule Law (Home Rule) authority is not preempted by the statewide Oil, Gas and Solution Mining Law's (OGSML) supersession clause.

A. Background

1. Legal Background

The question that arises in this case is whether state law preempts local law. The relevant laws are discussed below.

a. Local Law

Under New York's Constitution, the Home Rule provision states, in pertinent part, "[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law." N.Y. CONST. art IX, § 2(b)(3)(c)(i)-(ii). In order "[t]o implement this constitutional mandate, the State Legislature enacted the Municipal Home Rule Law." *Wallach*, 2014 WL 2921399, at *5. The Home Rule grants local New York governments broad powers to pass various laws and give localities greater control of the "protection and enhancement of [their] physical and visual environment," and for the "government, protection, order, conduct, safety, health, and well-being of persons or property therein." N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(11)-(12) (2014). Further, the New York legislature also implemented Town Law § 261, which allowed towns to pass zoning laws to promote "the health, safety, morals or the general welfare of the community." N.Y. TOWN LAW § 261 (2014). According to Town Law, the legislature found and determined that regulation of land by localities is "[a]mong the most important powers and duties granted . . . to a town government." N.Y. TOWN LAW § 272-a(1)(b). However, "as a political subdivision of the State, a town may not enact ordinances that conflict with the State Constitution or any general law," and "a local law promulgated under a municipality's home rule authority must yield to an inconsistent state law." *Wallach*, 2014 WL 2921399, at *6. Courts do not "lightly presume" preemption of a local law passed under a locality's Home Rule authority when the law's primary function is to regulate land use. *Id.* Courts will only preempt the local Home Rule when there is a "clear expression of legislative intent to preempt local control over land use." *Id.* (citing *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 682 (1996)).

b. Statewide Law

Under New York's Environmental Conservation Law (ECL), New York's fundamental concern for its residents is quality of life. N.Y. ENVTL. CONSERV. LAW § 1-0101(1) (2014). The policy of New York is "to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being." *Id.* The supersession clause of the OGSML, in title 23 of the ECL, states, in pertinent part, that the

OGSML “supersede[s] all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.” *Id.* § 23-0303(2). The OGSML has four main purposes. The first purpose is “to regulate the development, production and utilization of natural resources of oil and gas properties [in New York] in such a manner as will prevent waste.” *Id.* § 23-0301. Second, OGSML “authorize[s] and . . . provide[s] for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had.” *Id.* OGSML protects the “correlative rights of all owners and the rights of all persons including landowners and the general public.” *Id.* Finally, OGSML regulates “the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.” *Id.*

c. Case Law

In *Frew Run Gravel v. Town of Carroll*, 518 N.E.2d 920, 921 (N.Y. 1987), the court contemplated whether the Town of Carroll’s zoning ordinance that forbid sand and gravel operations was preempted by the Mined Land Reclamation Law’s (MLRL) supersession clause. The MLRL states, in pertinent part:

“For the purposes stated herein, this title shall supersede all other state and *local laws relating to the extractive mining industry*; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.”

Wallach, 2014 WL 2921399, at *6 (quoting N.Y. ENVTL. CONSERV. LAW § 23-2703(2)) (emphasis added). The zoning ordinance was challenged by a company who wanted to operate a sand and gravel mine out of Carroll. *Frew Run Gravel*, 519 N.E.2d at 921. The company argued the supersession clause of the MLRL preempts local zoning laws enacted by the town. *Id.* at 921-22. The court held that the MLRL preempted the zoning law because the zoning law “relates not to the extractive mining industry but to an entirely different subject matter and purpose [for] the use of land in the Town of Carroll.” *Id.* at 922. The court analyzed three factors to determine whether the supersession clause in the MLRL preempted local zoning laws, which established the *Frew Run Gravel* three-part test. *Id.* at 922-23. The court determined that (1) the plain language of the MLRL did not pertain to the preemption of local zoning

laws, and that zoning laws only regulate the use of the land, not standards and operations of mining; (2) the legislative history reflected that the purpose of the MLRL was to advance the “mining industry by the adoption of standard and uniform restrictions and regulations to replace the existing” locality’s piecemealed system of laws, and was meant to stop localities from regulating the operation and practice of mining, not to prevent localities from regulating land use; and (3) that the statutory scheme’s purpose of the MLRLs supersession clause was to prevent towns from implementing laws that regulated the process of mining, *not* from enacting local zoning laws that restricted the location of mines and/or their operations. *Id.* at 923.

2. Factual Background

a. Matter of Wallach v. Town of Dryden

Dryden, a town in New York, implemented “a comprehensive plan and zoning ordinance” in order to preserve the character of the town. *Wallach*, 2014 WL 2921399, at *4. Until 2006, Dryden had been free from the oil and gas industry. Dryden, however, is located within the Marcellus Shale region, which caught the attention of the natural gas industry. The Marcellus Shale region stores natural gas “found in shale deposits buried thousands of feet below the surface and can be extracted through the combined use of horizontal drilling and hydrofracking.” *Id.*

Hydrofracking, also called hydraulic fracking, is the process of “inject[ing] . . . large amounts of pressurized fluids (water and chemicals) to stimulate or fracture the shale formations, causing the release of the natural gas.” *Id.* (citing *Natural Gas from Shale: Questions and Answers*, U.S. DEP’T ENERGY (2013), http://www.energy.gov/sites/prod/files/2013/04/f0/complete_brochure.pdf).

The predecessors of Norse Energy Corp. USA (Norse) began acquiring oil and gas leases in 2006 from Dryden landowners to explore and develop natural gas resources. The Town Board initially believed the “catch-all” provision of the town’s zoning ordinance prohibited this type of activity. However, the Town Board voted, clarified, and amended Dryden’s zoning ordinances after holding public hearings to review scientific studies. The Town Board’s amendment unanimously decided specific activities were banned by the “catch-all provision of its zoning ordinance that precluded any uses not specifically allowed.” *Id.* The ban forbid “all oil and gas exploration, extraction and storage activities” and “invalidate[d] any oil and gas permit issued by a state or federal agency.” *Id.* The purpose of this ban was to protect Dryden’s “rural environment”

and the “health, safety and general welfare of the community [from] the deposit of toxins into the air, soil, water, environment, and in the bodies of the residents.” *Id.*

Norse looked to article 78 of the New York Civil Practice Laws and Rules, which provides an appeal process from New York agency decisions, to challenge the Town Board’s administrative decision. They challenged Dryden’s amended zoning and brought both a hybrid article 78 proceeding and a declaratory judgment action. The Town of Dryden moved for summary judgment arguing that the Home Rule allowed Dryden to amend zoning laws in the above described manner. The New York Supreme Court ruled in favor of Dryden and granted its motion on summary judgment, but did not allow Dryden to invalidate federal or state permits. The appellate division affirmed the lower court’s decision. The court of appeals “granted Norse leave to appeal.” *Id.*

b. *Cooperstown Holstein Corp. v. Town of Middlefield*

Middlefield, another town in New York, has two main principal industries, agriculture and tourism. *Id.* at *5. Middleton’s “land use is regulated by a master plan and zoning ordinance” and, like Dryden, had historically been free from the natural gas industry. *Id.* In 2007, Cooperstown Holstein Corporation (CHC), entered into two leases with a local landowner “to explore the possibility of developing natural gas resources through hydrofracking.” *Id.* Middleton’s position, however, was that its local zoning laws prohibited this activity. Despite this position, Middleton, like Dryden, conducted a detailed review of its zoning laws, commissioned a study to determine the impacts of hydrofracking and conducted public meetings. Again, like in Dryden, the Town Board came to a unanimous vote to “amend[] its master plan to adopt a zoning provision classifying a range of heavy industrial uses, including oil, gas and solution mining and drilling, as prohibited uses.” *Id.* The Town Board explained that the area was internationally known for a wide array of aesthetic and outdoor activities and concluded that “industrialization, such as hydrofracking, would ‘eliminate many of these features,’” which would “‘irreversibly overwhelm the rural character of the Town.’” *Id.*

CHC brought suit against Middleton to set aside Middleton’s zoning law and argued that its local zoning law was preempted by the supersession clause in the OGSML. Both parties moved for summary judgment. The “Supreme Court denied CHC’s motion and granted Middlefield’s cross-motion to dismiss the complaint,” holding Middleton’s zoning laws legal. *Id.* The court of appeals affirmed and

“granted CHC leave to appeal.” *Id.* Both Norse and CHC appealed the court of appeal’s decisions that affirmed the lower courts’ holdings.

B. Court’s Decision

The court held that the question of whether the supersession clause in the OGSML allows state and federal law to preempt local zoning law must be determined by the consideration of the following three factors laid out in *Frew Run Gravel*: “(1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history.” *Id.* at *6. The court of appeals affirmed the lower courts’ determination that both Dryden and Middlefield “acted within their home rule authority in adopting the challenged zoning laws.” *Id.* at *10.

First, the court analyzed the plain language of the OGSML’s supersession clause to determine whether it preempts local zoning laws. *Id.* at *7. The court noted this factor as the most important because “the text of the statutory provision ‘is the clearest indicator of legislative intent.’” *Id.* (citing *In re DaimlerChrysler Corp. v. Spitzer*, 860 N.E.2d 705, 708 (N.Y. 2006)). The court determined that the distinctions made in *Frew Run Gravel* apply in the present case. The supersession clause in the MLRL has the same effect as the supersession clause in the OGSML. The plain language reading of the New York Environmental Conservation Law § 23-0303(2) “is most naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries.” *Id.* at *7. The court determined that the plain language reading of the supersession clause in the OGSML, like the plain reading of the supersession clause of the MLRL in *Frew Run Gravel*, merely directs land use in general and not the “procedures or operations of the oil and gas industries” and thus does not preempt local zoning laws banning oil and gas industries from engaging in hydraulic fracking or any other type of drilling. *Id.*

The second factor the court analyzed was the statutory scheme of the OGSML. The court analyzed the OGSML’s “role in the statutory framework as a whole.” *Id.* at *8. The court looked at the four purposes of the OGSML, which are (1) “to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste;” (2) “to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had;” (3) to ensure the “correlative rights of all owners and the rights of all persons including landowners and the general public;” and (4) to control “the

underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.” *Id.* at *8-9 (citing N.Y. ENVTL. CONSERV. LAW § 23-0301). Because of the OGSML’s purpose, the court held that the supersession clause merely prohibited localities from enacting local conflicting laws that regulate the oil and gas industry’s “technical operations” while allowing localities to enact local zoning laws that prohibit activities like fracking altogether. *Id.* at *9.

The last factor the court analyzed was the OGSML’s legislative history. The court explored the legal history that led to the adoption of the OGSML. The OGSML was enacted during a time when government regulation on oil and gas pools was necessary to prevent “waste caused by unchecked, unspaced and inefficient drilling.” *Id.* at *9-10. The court determined that the OGSML was adopted because the Department of Environmental Conservation was not equipped to efficiently regulate the oil and gas industry due to the mass increase of drilling. *Id.* at *10. Nothing in the legislative history suggests that the OGSML was meant to preempt local zoning laws because the OGSML does not mention zoning laws, and legislative history makes it clear that the OGSML was meant to deal with preventing waste in the oil and gas industry. *Id.* The court held that both towns acted within their Home Rule authority in adopting zoning ordinances, respectively.

C. Analysis

This case highlights the struggle New York town governments have with state governments over the control and regulation of the oil and gas industry. This case may be a tool used by local municipalities to prevent the oil and gas industry from entering their towns to engage in oil and gas production that harm the town’s natural environment. The court’s decision may potentially help protect New York localities from keeping the oil and gas industry at bay by enacting local zoning ordinances that forbid activities like hydrofracking because it is inconsistent with the town’s land use regulations.

Vanessa Graf

V. WATER

*Environmental Law Foundation v. State Water
Resources Control Board*, No. 34-2010-80000583
(Cal. Super. Ct. July 15, 2014)

In *Environmental Law Foundation v. State Water Resources Control Board*, the Superior Court of California, County of Sacramento, held that a county violates its public trust duties when it neglects to consider whether groundwater extraction adversely affects a hydrologically connected navigable waterway before issuing a well-drilling permit. No. 34-2010-80000583, at 1, 7 (Cal. Super. Ct. July 15, 2014).

A. *Factual and Procedural Background*

The Scott River is a navigable waterway that has long been used for boating and fishing. *Id.* at 3. Groundwater pumped from nearby water wells is hydrologically interconnected to the river. Groundwater extraction has caused decreased flows in the Scott River over the past two decades, leaving the river dewatered during the summer and early fall. As a result, fish populations have been injured and the river's suitability for navigation and recreation has been reduced. *Id.* at 3-4.

Siskiyou County is responsible for issuing groundwater well permits for the Scott River. *Id.* at 4. Given this duty, Environmental Law Foundation (ELF) alleges, Siskiyou County is responsible for the Scott River's reduced flows because when the county issues well-drilling permits, it does not consider the effect of groundwater pumping on the Scott River.

"In 2010, ELF filed a complaint against the California State Water Resources Control Board (Water Board) and Siskiyou County" for improperly managing groundwater in the Scott River subbasin. Jordan Browning, *Unearthing Subterranean Water Rights: The Environmental Law Foundation's Efforts To Extend California's Public Trust Doctrine*, 34 ENVIRONS 231, 233 (2011). ELF sought (1) a judicial declaration that the Water Board has public trust authority to regulate groundwater "hydrologically connected" to the Scott River, (2) a judicial declaration that Siskiyou County violated the public trust by issuing well-drilling permits for groundwater extraction without analyzing the potential impact of these decisions on the Scott River, and (3) a writ or injunction preventing Siskiyou County from issuing permits for groundwater extraction until it complies with its public trust duties. *Id.* at 240.

Siskiyou County's answer to the petition asserted that the public trust doctrine does not protect groundwater, authorize the Water Board to

regulate groundwater, or require Siskiyou County to regulate groundwater. *Envtl. Law Found.*, No. 34-2010-80000583, at 2. ELF and Siskiyou County filed cross-motions for judgment on the pleadings, seeking a ruling on these defenses. The Superior Court of California, County of Sacramento, heard the cross-motions on May 16, 2014, and on July 14, 2014, and granted ELF's motion and denied Siskiyou County's. *Id.* at 1, 15.

The reach of the decision is limited to the issue of whether the public trust doctrine protects groundwater hydrologically interconnected with navigable waterways and whether Siskiyou County must regulate such water. *See id.* at 2-3. The decision did not address the Water Board's authority to regulate groundwater. *Id.* at 3. And ELF must still prove the facts and merits of its case against Siskiyou County. *Id.* at 2-3.

B. *The Court's Decision*

Accepting as true all factual allegations in the pleading, the court held that the public trust doctrine obligates Siskiyou County to consider whether groundwater extraction will adversely affect navigable waterways before issuing permits for well drilling. *Id.* at 7.

1. The Public Trust Doctrine Applies When Groundwater Extraction Adversely Impacts a Navigable Waterway

The court summarily dismissed the idea that the separation of powers doctrine prevents courts from applying common law public trust principles by merely referencing the doctrine's pedigree. *Id.* at 14. The principle traces its roots to Roman law and was applied by the United States Supreme Court in 1892 and by the Supreme Court of California in 1884. *Id.* at 5, 14.

The court began by describing the contours of California's public trust doctrine. The doctrine designates states as trustees of all natural resources within navigable waterways—that is, waterways “capable of being used for recreational boating for at least part of the year”—within their borders. *Id.* at 5-7. As the United States Supreme Court wrote in *Illinois Central Railroad v. Illinois*, “It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” 146 U.S. 387, 453 (1892). The state has “fiduciary-like obligations” to ensure Californians' continued use of navigable waterways for navigation, commerce, fishing, and other public needs as they change over time, such as hunting and

other forms of recreation. *Envtl. Law Found.*, No. 34-2010-80000583, at 6-7. The obligation to preserve public trust uses of navigable waterways is limited to the extent it is infeasible. *Id.* at 6. However, the state is “obligat[ed] . . . to *consider* the public trust when allocating water resources.” *Id.* at 6 (citing *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 446 (1983)).

In addition to navigable tributaries, the state is obligated to consider the nonnavigable tributaries of navigable waterways when allocating water resources. *Id.* at 7-10. Several Supreme Court of California cases have held that the effect of activities in nonnavigable tributaries on interconnected navigable waterways implicate the state’s public trust obligations. *See id.* at 7-8. One turn-of-the-twentieth-century decision saw the removal of a dam that reduced the flow of water from a nonnavigable tributary to a navigable river, *People v. Russ*, 132 Cal. 102 (1901). Another saw a mining company enjoined from dumping excavated terrain into a nonnavigable stream that flowed into and thereby raised the bed of the navigable Sacramento River, *People v. Gold Run D. & M. Co.*, 66 Cal. 138 (1884). In a case more recent and factually analogous, *National Audubon Society v. Superior Court*, the Supreme Court of California held that the diversion of water from streams flowing into the navigable Mono Lake imperiled its “scenic beauty” and “ecological values.” 33 Cal. 3d at 424-25 (1983). Extrapolating from these cases, the court held that, like extraction of surface streams, “extraction of underground water . . . decreas[es] the flow of navigable waters harming public trust uses.” *Envtl. Law Found.*, No. 34-2010-80000583, at 8.

The court qualified its holding by explaining that groundwater itself is not protected by the public trust doctrine, because only navigable waters are protected, and groundwater is not navigable. *Id.* at 8-9. “Rather, the public trust doctrine applies if extraction of groundwater adversely impacts a navigable waterway to which the public trust doctrine does apply.” *Id.* at 9. The holding stems not from a normative inquiry, the court explained in a dictum, but from strictly applying the precedent set in *National Audubon Society*. *Id.* at 10 n.8. Although narrower than the holding sought by ELF, the court’s articulation of the public trust’s reach was broad enough to withstand Siskiyou County’s arguments that water must be diverted from a surface stream rather than extracted from the ground in order to trigger the state’s public trust duty. *See id.* at 10. The court explained, “If pumping groundwater impairs the public’s right to use a navigable waterway for trust purposes, there is no

sound reason in law or policy why the public trust doctrine should not apply.” *Id.*

2. Counties Must Consider Whether Well Drilling Will Adversely Impact Navigable Water Before Permitting Well Drilling

The court rejected Siskiyou County’s alternative arguments for the proposition that even if the public trust doctrine applies to extraction of groundwater in the Scott River Basin, the doctrine does not obligate Siskiyou County to regulate groundwater. *Id.* at 11.

The state’s duties to consider the public trust extends to counties, which “‘share[] responsibility’ for administering the public trust.” *Id.* at 12 (quoting *Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.*, 166 Cal. App. 4th 1349, 1370 n.19 (1st Dist. Ct. App. 2008)). Like the state, which must consider the public trust when it uses its discretion to appropriate water, the county, “as a legal subdivision of the State, . . . has an affirmative duty to consider the public trust when it issues permits to appropriate groundwater.” *Id.* at 13. This duty is nondiscretionary.

The county unsuccessfully argued that the California State Legislature gave it discretion to decide whether to regulate groundwater. The California Water Code authorizes local agencies such as Siskiyou County to adopt groundwater management plans, but if they do institute a plan, they must comply with certain substantive and procedural requirements. The county reasoned that by explicitly providing counties a choice as to whether to adopt a groundwater management plan, and imposing substantive and procedural requirements on those who opt to adopt one, the legislature implicitly abrogated counties’ public trust duties. Referring to this logic as a “big leap,” the court explained that there is no evidence of the legislature’s intent to preclude the county from applying the public trust doctrine where necessary. *Id.* at 11-12. The obligation to investigate whether well drilling will adversely impact navigable water and protect public trust uses when feasible does not conflict with Siskiyou County’s discretion to determine whether or not to establish a groundwater management plan. *Id.* at 12.

The county also unsuccessfully argued that requiring it to consider the public trust before appropriating water would violate the separation of powers doctrine. The legislature has the authority to remove from public trust resources it determines are no longer useful for trust purposes. *Id.* at 14. The county selected from a case that stands for this proposition a dictum which states that “[t]he administration of the trust by the state is committed to the Legislature,” as authority that requiring the county to make public trust determinations constitutes a breach of

separation of powers. *Id.* at 13 (quoting *Beach v. Mansell*, 3 Cal. 3d 464, 482 n.17 (1970)). The court explained, however, that the cases cited by the county are inapplicable to Scott River because it has not been released from the public trust. *Id.* at 14.

C. Analysis

Although the holding is a straightforward application of the public trust doctrine as it has developed in California, the holding is significant because it requires that California counties consider depletion of nearby aquifers when permitting groundwater extraction. This unprecedented holding may be integral for California in its efforts to escape its unprecedented drought.

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