

RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I.	ALIEN TORT CLAIMS ACT	245
	<i>Flores v. Southern Peru Copper Corp.</i> , 343 F.3d 140 (2d Cir. 2003).....	245
II.	CLEAN AIR ACT	248
	<i>Clean Air Markets Group v. Pataki</i> , 338 F.3d 82 (2d Cir. 2003)	248
III.	CLEAN WATER ACT.....	251
	<i>United States v. Deaton</i> , 332 F.3d 698 (4th Cir. 2003).....	251
	<i>United States v. Rapanos</i> , 339 F.3d 447 (6th Cir. 2003).....	254
	<i>Treacy v. Newdunn</i> , 344 F.3d 407 (4th Cir. 2003)	257
IV.	ENDANGERED SPECIES ACT.....	259
	<i>Turtle Island Restoration Network v. National Marine Fisheries Service</i> , 340 F.3d 969 (9th Cir. 2003).....	259
V.	SURFACE MINING CONTROL AND RECLAMATION ACT	263
	<i>Surface Mining Control and Reclamation Act Citizens Coal Council v. Norton</i> , 330 F.3d 478 (D.C. Cir. 2003)	263

I. ALIEN TORT CLAIMS ACT

Flores v. Southern Peru Copper Corp.,
343 F.3d 140 (2d Cir. 2003)

In the instant case, the United States Court of Appeals for the Second Circuit declined to apply the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000), to an international claim against a U.S. company for *intranational* pollution. Residents of Ilo, Peru, brought suit against Southern Peru Copper Corporation (SPCC) for polluting in and around Ilo with its copper mining, refining, and smelting operations. The plaintiffs, Peruvian residents, alleged that the pollution from SPCC’s facilities caused severe lung disease and thus violated the customary international law norms of “right to life” and “right to health.” The Peruvian residents argued that these violations of the law of nations

allowed them to base jurisdiction of their claim on the ATCA. The Second Circuit disagreed: it held that the “right to life” and the “right to health” were not “clear and unambiguous” rules of customary international law and that there was no customary international law rule against *intranational* pollution.

In 1960, SPCC began operating copper mining, refining, and smelting activities in and around Ilo, Peru. SPCC was a U.S. corporation with its headquarters in Arizona and its principal place of business in Peru. On an annual basis, the Peruvian government conducted reviews of the impact of SPCC’s activities and found that they caused significant environmental damage. SPCC paid fines and restitution to farmers in the area, and also implemented modifications to its operations in order to abate pollution and reduce environmental damage. Of most concern to the Peruvian residents were SPCC’s emissions of sulfur dioxide and fine particles of heavy metals into the air and water, which the Peruvians claimed were the cause of their respiratory illnesses and deaths.

In December 2000, Peruvian residents and representatives of deceased residents brought an action against SPCC in the United States District Court for the Southern District of New York. The district court found that the plaintiffs failed to state a claim under the ATCA because they had not shown a violation of customary international law. *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 515 (S.D.N.Y. 2002). In the alternative, if the plaintiffs had shown a violation of customary international law, the lower court concluded it would have dismissed the case on the ground of *forum non conveniens*. *Id.* at 544.

The Court of Appeals for the Second Circuit, upon *de novo* review, affirmed the district court’s grant of a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Like the lower court, the Second Circuit acknowledged the binding effect of its own decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized a claim under the ATCA for violations of customary international law. The court explored the definition of “customary international law” and found it to be “rules that States *universally* abide by, or accede to, out of a sense of *legal obligation* and *mutual concern*.” *Flores*, 343 F.3d at 154 (emphasis added). The court then looked at the international sources which evidence customary international law and assist in determining whether a rule is part of customary international law. It concluded that only “clear and unambiguous” rules which arise out of legal obligation and mutual concern form customary international law.

The court distinguished this framework for determining rules of customary international law from the “shockingly egregious” standard that the Peruvian residents urged the court to apply in reviewing an ATCA claim. The Peruvians initially requested that the court conduct a factual inquiry into whether SPCC’s alleged misconduct or tort was so “shockingly egregious” as to warrant a claim under international law. Although the Peruvians did not raise the argument in their appellate brief, the Second Circuit chose to clarify that the “shockingly egregious” standard was inapposite for ATCA interpretation purposes because it would undermine the basic notions of customary international law already established by the court.

In analyzing the Peruvians’ claim, the court held that the “right to life” and the “right to health” were not “clear and unambiguous” rules of customary international law. The Peruvian residents relied upon broad principles listed in international conventions such as the Universal Declaration of Human Rights; the International Covenant on Economic, Social, and Cultural Rights; and the Rio Declaration on Environment and Development in asserting their claim. The court found that these principles were too amorphous to be enforced and, thus, too indeterminate to be rules of customary international law.

The Second Circuit went on to address the Peruvians’ implicit claim that customary international law prohibited *intranational* pollution. The court examined various types of evidence that the Peruvians presented to determine whether *intranational* pollution was of international concern. First, the court looked at treaties, conventions, and covenants, recognizing that this type of evidence was generally indicative of customary international law since they create legal obligations among States. The court noted a treaty has more evidentiary weight than another if more States ratified the treaty and follow the principles in the treaty at a higher degree. Likewise, a self-executing treaty carried more weight than a treaty that requires specific implementing language by Congress to give its provisions effect in domestic law. The only treaty ratified by the United States that the Peruvians relied on was nonself-executing and quickly dismissed by the court as not suggesting a prohibition on *intranational* pollution.

Next, the court looked at the evidentiary value of several resolutions of the United Nations General Assembly and found them to be improper sources of customary international law as the United Nations is not a law-making body and any resolutions would not be legally binding. Similarly, the court determined that multinational declarations of principles generally were poor sources of customary international law

because they were merely aspirational and had no binding effect on countries. Other types of evidence that the court found had low probative value of customary international law were decisions of multinational tribunals and affidavits by international law scholars.

Therefore, after failing to find sufficient evidence that customary international law prohibits *intranational* pollution, the Second Circuit affirmed the district court's grant of the motion to dismiss.

Jenifer Liu

II. CLEAN AIR ACT

Clean Air Markets Group v. Pataki, 338 F.3d 82 (2d Cir. 2003)

In *Clean Air Markets Group v. Pataki*, the United States Court of Appeals for the Second Circuit upheld the United States District Court for the Northern District of New York's decision that section 66-k of New York's Air Pollution Mitigation Law is preempted by the Clean Air Act. In making this determination, the Second Circuit declined to review the district court's conclusion that section 66-k violates the Commerce Clause of the Constitution.

Acid deposition resulting from sulfur dioxide (SO₂) has been a major problem in the Adirondack region of New York due to the calcium-poor soils and the igneous rocks that are indigenous to this area. As a result of the acid deposition, the Adirondack region has suffered substantial harm to its aquatic life and other natural resources. Much of the acid deposition in the Adirondack region of New York results, not from SO₂ emissions in New York, but from SO₂ emissions from fourteen different "upwind" states. These states include New Jersey, Pennsylvania, Maryland, Delaware, Virginia, North Carolina, Tennessee, West Virginia, Ohio, Michigan, Illinois, Kentucky, Indiana, and Wisconsin.

The purpose of Title IV of the Clean Air Act Amendments of 1990 is to "reduc[e] the adverse effects of acid deposition through reductions in annual emissions of sulfur dioxide" by implementing a "cap-and-trade" system in order to reduce SO₂ emissions. 42 U.S.C. § 7651(b) (2000). Under this system, each electricity-generating utility is allotted a certain number of emission allowances each year, with each allowance authorizing the release of one ton of SO₂. The number of allowances allocated is reduced each year. Title IV provides that the sale of unneeded allowances is permitted to "any other person who holds such

allowances,” thus creating a financial incentive for utilities to reduce SO₂ emissions. 42 U.S.C. § 7651b(b).

The New York Legislature first addressed the problem of acid deposition in the Adirondack region in 2000 by passing the state’s Air Pollution Mitigation Law, N.Y. Pub. Serv. L. § 66-k. The Second Circuit explained that under this statute, the New York State Public Service Commission must assess “an equal air pollution mitigation offset” upon any New York utility whose SO₂ allowances are sold or traded to one of the fourteen upwind states, regardless of whether or not the allowances were sold directly to a utility in an upwind state or are subsequently transferred. N.Y. Pub. Serv. L. § 66-k(2). The only way for a New York utility to avoid this restriction is to attach a restrictive covenant to an allowance that is sold that prohibits its subsequent transfer to any of the fourteen upwind states.

Clean Air Markets Group (CAMG), an association of electricity generation companies, SO₂ emissions allowance brokers, mining companies, and trade associations filed an action on November 15, 2000, against New York’s Governor George Pataki, and the commissioners of the New York Public Service Commission. The purpose of the action was to prevent the enforcement of New York Public Service Law, section 66-k. CAMG contended that section 66-k was preempted by Title IV of the Clean Air Act Amendments of 1990 and that it violates the Commerce Clause of the United States Constitution. The district court granted CAMG’s motion for summary judgment on April 9, 2002, and permanently enjoined the defendants from enforcing section 66-k. The district court concluded that section 66-k was preempted by Title IV because it “actually conflicts with” Title IV by creating “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in passing the Act. *Clean Air Market Group v. Pataki*, 194 F. Supp. 2d 147, 158 (N.D.N.Y. 2002) (quoting *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)). As to CAMG’s second argument, the district court concluded that section 66-k “is a constitutionally invalid protectionist measure” because “[its] explicit restriction on the transfer of SO₂ allowances to [utilities] in Upwind States erects . . . a barrier against the movement of interstate trade.” *Id.* at 161.

In this appeal, the defendants argued that section 66-k supports the ultimate purpose of Title IV by helping to protect natural resources and therefore it is not an “obstacle to the accomplishment and execution of the full purposes and objectives of [Title IV],” as determined by the district court. *CAMG*, 194 F. Supp. 2d at 158 (quoting *Hillsborough*

County, 471 U.S. at 713). The Second Circuit dismissed the defendants' claim, saying that there was no doubt that section 66-k interferes with the method selected by Congress for regulating SO₂ emissions. The court, relying on the legislative history of Title IV and regulations adopted by the Environmental Protection Agency (EPA), said that Congress intended to allow utilities the opportunity to reallocate total emissions reductions obligations among themselves in the most cost-effective way that they can do so.

In reaching its decision, the Second Circuit referred to the legislative history of the allowance trading system. Initially, the Second Circuit explained, the House of Representatives passed a bill that would have put geographic restrictions on the transfer of allowances by requiring that both the transferring utility and the receiving utility be located in the same region. H. Rep. No. 101-490, at 372 (1989). However, the bill then passed the Senate with no geographic restrictions and was signed by the President with no geographic restrictions on the allowance trading system. The court explained further that the resulting bill states clearly that allowances "may be transferred . . . [to] any other person who holds such allowances," anywhere in the United States. Pub. L. No. 101-549, 104 Stat. 2399, 2590-91 (codified at 42 U.S.C. § 7651b(b)).

The court, acknowledging that federal regulations have the same preemptive weight as federal statutes, relied on the adopted regulations of the EPA to further emphasize that section 66-k was preempted by Title IV. Specifically, the court pointed to 40 C.F.R. § 72.72(a), which expressly states that state programs for granting "acid rain permits" pursuant to Title V of the Clean Air Act Amendments "shall not restrict or interfere with allowance trading." The Second Circuit then determined that section 66-k interferes with the ability of New York utilities to effectuate transfers of allowances, although it did not technically limit the authority to transfer those allowances. The court, quoting *International Paper Co. v. Ouellette*, stated that because section 66-k required that a restrictive covenant be attached to every allowance so that a New York utility will not be assessed pursuant to section 66-k, "section 66-k impermissibly 'interferes with the methods by which [Title IV] was designed to reach [the] goal' of decreasing SO₂ emissions, and therefore it 'stands as an obstacle' to the execution of Title IV's objectives." *CAMG*, 338 F.3d at 89 (quoting 479 U.S. 481, 494 (1987)).

The defendants further argued that even if section 66-k is an obstacle to executing Title IV's objectives, it does not "actually conflict" with federal law since it is expressly permitted by 42 U.S.C. § 7416 (a

savings clause preserving state authority) and by 42 U.S.C. § 7651b(f) (a clause relating to allowance trading systems with regards to utility rates and charges). The Second Circuit, agreeing with the district court, determined that these arguments had no merit. The court found that 42 U.S.C. § 7416's language permits this type of legislation and that 42 U.S.C. § 7651b(f) does not save section 66-k from preemption since section 66-k does not regulate utility rates and charges.

In its holding, the Second Circuit determined that section 66-k is preempted by Title IV of the Clean Air Act Amendments of 1990 because it creates an obstacle to the execution of "the full purposes and objectives" of Title IV and it is not otherwise authorized by federal law. The court went on to determine that section 66-k violates the Supremacy Clause of the United States Constitution; however, the court did not express any view on the aptness of the district court's conclusion of the latter point.

Jeffrey Steiner

III. CLEAN WATER ACT

United States v. Deaton,
332 F.3d 698 (4th Cir. 2003)

The United States Court of Appeals for the Fourth Circuit recently held that the United States Army Corps of Engineers (Corps) has jurisdiction under the Clean Water Act (CWA) to regulate pollution of nonnavigable waters which could affect navigable waterways. The case stemmed from a prolonged legal dispute between the Corps and two individuals, James and Rebecca Deaton (the defendants). The defendants purchased a piece of land with the intention of developing a small residential subdivision. The land contained wetlands, and runoff from the land drained into a roadside ditch that ran alongside the property. The ditch drained into a culvert, which in turn drained into a creek. This creek is a tributary of the Wicomico River, which drains into the Chesapeake Bay. The land that the defendants purchased had severe drainage problems and, as a result, a local agency denied the defendants' application for a sewage disposal permit. Shortly thereafter, the defendants decided to dig a drainage ditch across the property. When the Corps learned about the ditching project, the agency initiated regulatory action.

In 1990, the Corps issued a work-stop order on the project, stating that the defendants were filling a wetland without a permit in violation of

§ 404 of the Clean Water Act. See 33 U.S.C. § 1344(a) (2000). Five years later, when negotiations between the agency and the defendants broke down, the Corps filed a civil complaint against the defendants in federal court. The district court held that the ditching project did not constitute a discharge of a pollutant, and thus granted summary judgment for the defendants. The Corps appealed, and the Fourth Circuit reversed and remanded the case for further proceedings. Shortly after the remand, the defendants filed a motion to reconsider whether the Corps had jurisdiction over the case. The defendants argued that the Supreme Court's recent decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), provided new guidance for analyzing the jurisdiction of the Corps under the CWA. In 2002, the district court denied the defendants' motion to reconsider, and the defendants appealed to the Fourth Circuit.

The defendants made two basic arguments as to why the Corps had no jurisdiction to regulate the activities stemming from the ditching project: (1) that the CWA and the regulations enacted under it cannot be read to grant the Corps jurisdiction to regulate pollution of a roadside ditch; and, alternatively, (2) if the CWA could be read so broadly, it exceeded the constitutional authority of Congress under the Commerce Clause. After the Fourth Circuit stated that it would review the district court's denial of the defendants' motion to reconsider *de novo*, it proceeded to consider the defendants' Commerce Clause argument.

The court began by citing the regulation that the Corps argued granted it jurisdiction over the roadside ditch. Under the Clean Water Act, the Corps is authorized to issue permits for the discharge of fill material into "navigable waters." 33 U.S.C. § 1344(a). The act defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). The Corps' regulations define "waters of the United States" to include navigable waters, meaning, (1) "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," 33 C.F.R. § 328.3(a)(1) (2003); (2) tributaries of covered waters, including traditional navigable waters, 33 C.F.R. § 328.3(a)(5); and (3) wetlands adjacent to covered waters, including tributaries, 33 C.F.R. § 328.3(a)(7). The Corps asserted jurisdiction over the defendants' wetlands because they were adjacent to the roadside ditch, which was a tributary of the Wicomico River. The defendants' constitutional argument was taken from the Supreme Court's language in SWANCC, in which the Court stated that when "an administrative interpretation of a statute invokes the outer limits of Congress' power," the interpretation is not entitled to deference under *Chevron U.S.A., Inc.*

v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), unless Congress gave “clear indication that it intended that result.” *SWANCC*, 531 U.S. at 172. The defendants argued that the Commerce Clause did not empower Congress to delegate the authority necessary to enact the regulations cited by the Corps in interpreting the meaning of “navigable waters.” The defendants argued that the Commerce Clause limited Congress’s power in enacting the CWA to protecting and encouraging navigation and the flow of commerce, and thus the Corps was only permitted to enact regulations that gave the agency jurisdiction over traditional navigable waterways. The Fourth Circuit relied on several Commerce Clause cases, including *United States v. Lopez*, 514 U.S. 549 (1995) and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) to demonstrate that the Commerce Clause granted Congress the power to regulate interstate channels to prevent their “immoral and injurious use.” *Camminetti v. United States*, 242 U.S. 470, 491 (1917). The court concluded that

Congress’s authority over the channels of commerce is thus broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters for injurious purposes. . . . The power over navigable waters also carries with it the authority to regulate non-navigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters.

Deaton, 332 F.3d at 707. Thus, Congress had the authority under the Commerce Clause to delegate power to the Corps to enact regulations granting the agency jurisdiction over not only navigable waterways, but also nonnavigable tributaries of those waterways, including the roadside ditch at issue in the instant case.

The Fourth Circuit next considered the defendants’ argument that the Corps’ interpretation of the regulation was unreasonable. The defendants argued that the ditch was not a tributary because water had to pass through several other intervening nonnavigable waterways before emptying into the navigable Wicomico River. The court stated that the defendants’ argument implicated *Chevron’s* two-step analysis. The court, applying the first step of *Chevron*, had to determine whether Congress had spoken clearly on the precise question at issue. The court stated that since Congress defined “navigable waters” as “waters of the United States” in the CWA, it indicated an intent to “regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of the term.” *Deaton*, 332 F.3d at 709 (citing *United States v. Riverside Bayview, Inc.*, 474 U.S. 121 (1985)). Thus, the court stated that Congress’s use of the term “water of the United States” was

sufficiently ambiguous to constitute a delegation from Congress to the Corps under *Chevron*.

The court next had to look at the regulation at issue to determine whether it was ambiguous. The parties disagreed as to whether the term “tributary” was ambiguous. The defendants argued that the word’s plain meaning was a nonnavigable waterway that emptied directly into a navigable waterway. Since the roadside ditch did not meet this definition, the defendants argued that the Corps was without jurisdiction. The court cited several conflicting definitions from a dictionary to support its conclusion that the regulation was ambiguous. Since the term was ambiguous, the court next had to determine whether the agency’s interpretation was clearly erroneous, and thus not entitled to deference under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The court found that the agency had consistently interpreted the word “tributary” to include all tributaries, meaning all streams that eventually flowed into navigable waters. The court stated that this interpretation was consistent with a dictionary definition of a “tributary,” which defined the term as “providing with or serving as a channel for supplies or additional matter.” *Deaton*, 332 F.3d at 710. The court concluded that the agency’s interpretation was therefore not clearly erroneous.

The court then proceeded to the second step of *Chevron*, in which it had to determine whether the Corps’ interpretation of the CWA was based upon a reasonable construction of the statute. The court accepted the Corps’ argument that there was a substantial nexus between a navigable waterway and its nonnavigable tributaries, and that pollution from the tributaries could have a significant effect on the navigable waters. Since this was a reasonable interpretation of the CWA, the court concluded that the Corps had jurisdiction over the roadside ditch and the adjacent wetlands.

Josh Borsellino

United States v. Rapanos,
339 F.3d 447 (6th Cir. 2003)

John Rapanos owned 175 acres in Williams Township, Bay County, Michigan. The property contained forested wetlands and cleared meadow areas, and was between eleven and twenty miles from the nearest navigable-in-fact water. In 1988, in an effort to sell the property to a developer, Rapanos began making plans to clear the trees and fill in the wetlands. The Michigan Department of Natural Resources, after

reviewing Rapanos' plans, informed Rapanos that he would need a permit for the work, and recommended that he hire a consultant in the field. Rapanos hired a consultant, who informed him that between forty-nine and fifty-nine percent of the property contained wetlands. Rapanos then instructed the consultant to destroy all paper evidence of the wetlands on his property, and began filling the wetlands with earth and sand, despite warnings from both the Michigan Department of Natural Resources and the United States Environmental Protection Agency. After investigation, Rapanos was charged with violating the Clean Water Act by knowingly discharging pollutants into "waters of the United States" without a permit. Rapanos admitted to the destruction of wetlands, but argued that his property was not subject to the Clean Water Act because the wetlands were not part of the "waters of the United States."

Rapanos was found guilty, and after losing an initial appeal regarding a line of questioning by the prosecution, was sentenced to three years of probation and a \$185,000 fine. The conviction was once again affirmed by the appeals court, but remanded for resentencing. The United States Supreme Court granted certiorari and remanded for reconsideration in light of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001). The appeals court remanded to the district court, which found that the wetlands on Rapanos' property lay outside the jurisdiction of the Clean Water Act and dismissed the charges.

The court of appeals reviewed this decision *de novo*. The issues on appeal were whether the district court was correct in its interpretation and application of *Solid Waste*, and whether the jury instructions were correct in light of the Supreme Court's holding in *Solid Waste*.

Under the Clean Water Act, "navigable waters" are defined as "waters of the United States, including territorial seas." In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985), the Supreme Court noted that it was Congress's intent to "define waters covered by the Act broadly," and that the term could encompass not only navigable-in-fact waters, but also the wetlands adjacent to those waters. *Solid Waste* limited the meaning of "waters of the United States" by finding that the Migratory Bird Rule promulgated by the Army Corps of Engineers exceeded the Clean Water Act's limits; the Migratory Bird Rule sought to bring all waters which served as habitat for migratory birds into federal jurisdiction.

Rapanos argued that *Solid Waste* limited the reach of the Clean Water Act to those wetlands which are "directly adjacent" to navigable

waters. The court rejected this argument, and noted that the circumstances of this case were closer to *Riverside* than to *Solid Waste*. The court also found the United States Court of Appeals for the Fourth Circuit's decision in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), based on facts similar to those at issue here, persuasive. The Fourth Circuit held that the "statutory term 'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered within the range suggested by *Solid Waste*." *Id.* at 709-10. The court also noted the Fourth Circuit's discussion of the "nexus between a navigable waterway and its nonnavigable tributaries"

This nexus, in light of the 'breadth of congressional concern for protection of water quality and aquatic ecosystems,' is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act.

Id. at 712. The court found that *Solid Waste* required a "significant nexus between the wetlands and 'navigable waters'" and such a nexus was present under the facts of this case.

The court then turned to the issue of the jury instructions and reviewed them for plain error. The inquiry consisted of four analyses:

(1) whether an error occurred in the district court; (2) if error occurred, whether the error was plain; (3) if the error was plain, whether the plain error affected substantial rights; and (4) 'even if all three factors exist, . . . whether the plain error affecting substantial rights seriously affected the fairness, integrity or public reputation of judicial proceedings.

United States v. Jones, 108 F.3d 668, 670 (6th Cir. 1997). The court's analysis ended with part 1, finding that there was no error in the district court due to the limited nature of the holding in *Solid Waste*. The court noted that even if error could be found in that the instruction may have "permitted the jury to find that the wetlands at issue were covered because the 'affect commerce' language somehow permits an inference like that rejected in *Solid Waste*, there is no indication that such an error affected substantial rights in this case."

Erin Houck

Treacy v. Newdunn,
344 F.3d 407 (4th Cir. 2003)

The instant case is a civil enforcement action alleging violations of the Clean Water Act (CWA) by Newdunn Associates, Orion Associates, and Northwest Contractors (collectively Newdunn) that began in the summer of 2001 when Newdunn began ditching and draining wetlands without obtaining a permit from the Army Corps of Engineers (Corps) or the Virginia State Water Control Board (Board). The Board based its action on the Virginia Nontidal Wetlands Resources Act of 2000 (Virginia Act) and its claim in state court, while the Corps brought its CWA action in federal district court. The cases were consolidated after Newdunn removed the Board's action to federal court, and the district court held in favor of Newdunn on the grounds that the Corps lacked jurisdiction over Newdunn's wetlands under the CWA, and that the jurisdictional reach of Virginia law was merely coextensive with federal law. The United States Court of Appeals for the Fourth Circuit reversed.

The CWA defines "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) (2002). Thirty-eight acres of the forty-three comprising Newdunn's property unquestionably fit this definition. Originally, these wetlands had a natural hydrologic connection to a navigable waterway-in-fact; currently there is a connection achieved through natural streams and constructed ditches that support an occasional flow of surface water. Relying on *Solid Waste Agency of Northern Cook County (SWANCC) v. United States*, 531 U.S. 159 (2001), a Supreme Court ruling that invalidated the Corps' exercise of jurisdiction under the Migratory Bird Rule, Newdunn gambled that the Corps lacked jurisdiction over its property and began to fill its wetlands. The Corps thereafter brought its action alleging violations of sections 301 and 404 of the CWA. For its part, the Board issued an Emergency Special Order under Virginia law to halt Newdunn's actions. Newdunn ignored the order, and the Board filed suit.

The district court held that neither the Corps nor the Board had jurisdiction to challenge Newdunn's activities. The court found the Corps' regulations were invalid because they exceeded Congress's grant of authority to the Corps under the CWA; the Board failed to prove it had independent regulatory authority, therefore its authority was presumed

coextensive with that of the Corps. The Fourth Circuit reviewed the statutory interpretation and subject matter jurisdiction questions *de novo*.

The Fourth Circuit first considered whether it had jurisdiction over the state law claim under the doctrine of federal question jurisdiction. After holding that Virginia's decision to adopt the Corps' definition of wetlands could not create a federal question, the court went on to analyze whether or not the State Water Control Board could assert jurisdiction over Newdunn's property. The court noted the broad definitions, lacking in jurisdictional limitations, used by the Virginia Legislature. By including wetlands as part of its definition of state waters, Virginia specifically rejected language that would make its jurisdiction coextensive with that of the federal government under the CWA. Regardless of any overlap between state and federal requirements, the question of the Board's regulatory authority remained one of state law. Because the state had clearly extended its authority beyond its federal mandate, the Fourth Circuit held that there was no basis for deciding that the issue of the Board's jurisdictional limits turned upon federal law. The court remanded this claim to the Virginia state court from which it was originally removed.

The court next considered the Corps' CWA civil enforcement action. Under § 404(a) of the CWA, the Corps has authority to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (2000). The Corps' jurisdiction is limited by the statutory definition of navigable waters; however, the Supreme Court in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ruled that the Corps has the power to regulate wetlands, which are not navigable-in-fact, if they are adjacent to other waters. In *Riverside*, the Corps argued that wetlands in close proximity to navigable waters could function inextricably as part of the aquatic environment and the Supreme Court upheld their exercise of jurisdiction. More recently, in *SWANCC*, the Court held that for wetlands to be regulated under the CWA they must be "inseparably bound up with the 'waters' of the United States." 531 U.S. at 167. Therefore, the Corps is unable to regulate isolated waters that lack a connection to navigable waters.

Similarly, in *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997), the Fourth Circuit held that a CWA interpretation giving the Corps jurisdiction over purely intrastate waters could not be maintained on the grounds that there was a potential effect on interstate commerce. However, nonnavigable tributaries are regulable because any contamination introduced into them will eventually turn up in

Congressionally protected waters. In the instant case, because the Corps' authority over wetlands adjacent to tributaries of navigable waters is well established, its jurisdiction is permissible.

Man-made ditches may also be characterized as tributaries because the effect of pollution is the same, regardless of the path the water takes. The Fourth Circuit previously came to this conclusion in *United States v. Deaton*, 332 F.3d 698, 704-05 (4th Cir. 2003). In the instant case, the government exhaustively documented the connection between the Newdunn property and navigable waters. The court concluded that to distinguish between man-made and natural tributaries, especially in light of the extensive modification of waterways nationwide, would dispatch one of the CWA's chief goals. There was no question that Newdunn's property is connected at times to navigable waters by the flow of surface water through both man-made and natural tributaries. This fact provided a sufficient nexus to permit the Corps to exercise jurisdiction pursuant to the CWA; therefore, the decision of the district court was reversed.

The Fourth Circuit's decision in this case further clarifies the extent of federal jurisdiction under the Clean Water Act. By remanding the state claim back to state court, the Fourth Circuit clearly delineated the boundaries between federal and state law claims. The court's inclusion of man-made structures into the definition of tributary further solidifies its prior holding in *Deaton*. The defining principles and goals of the CWA were examined and considered along with the Corps' arguments, and the court came to the conclusion that federal jurisdiction is permissible in this instance.

Lynn Farmer

IV. ENDANGERED SPECIES ACT

*Turtle Island Restoration Network v.
National Marine Fisheries Service,*
340 F.3d 969 (9th Cir. 2003)

In this case, the plaintiff challenged the defendant's issuance of fishing permits to longline vessels in California, claiming that such issuance violated the consultation and take provisions of the Endangered Species Act (ESA). The United States Court of Appeals for the Ninth Circuit, in a decision that may have a noticeable impact on the U.S. high seas fishing industry, held that the issuance of such permits by the National Marine Fisheries Service (Fisheries Service) under the High Seas Fishing Compliance Act (Compliance Act), 16 U.S.C. §§ 5501-

5509 (2000), constitutes agency action, which pursuant to the ESA requires consultation to assess the potential impact on endangered species.

The vessels of concern in this case engaged in longline fishing in the Pacific Ocean and landed their catch in California. The majority of such fishing had primarily occurred in Hawaii until 1999, when a Hawaii district court issued a preliminary injunction which restricted longline fishing under the Hawaii Fishery Management Plan. Pursuant to ESA requirements, the Fisheries Service issued a biological opinion stating that the continuation of the Hawaii Fishery Management Plan (Plan) would jeopardize the continued existence of several protected species of sea turtles. Consequently, revisions to the Plan were implemented which eliminated the Hawaii-based longline swordfish industry, which in turn contributed to the relocation of many of the boats from Hawaii to California.

On July 6, 2000, the Center for Biological Diversity and the Turtle Island Restoration Network (collectively, the Center) sent a sixty-day-notice-of-intent-to-sue letter to the Secretary of Commerce, claiming that the Fisheries Service had committed violations of section 7 of the ESA by failing to initiate and complete consultations regarding the continued existence of threatened and endangered species of longline fishing by U.S. vessels under permits issued by the Fisheries Service. The Center additionally asserted that the Fisheries Service failed to comply with section 9 of the ESA by granting permits to private parties that resulted in the "take" of threatened and endangered species, including the leatherback, loggerhead, olive ridley and green sea turtles, as well as the short-tailed albatross. The Center argued that a governmental body under whose authority an actor commits a taking of threatened or endangered species can also be held responsible for the taking under section 9. The Fisheries Service replied to the Center's letter, stating that under its interpretation of the Compliance Act, the agency lacked discretion in issuing permits to impose conditions furthering the conservation of protected species, thus the consultation provisions of the ESA were not implicated. The Fisheries Service added that it was developing a fishery management plan for high seas migratory species and an ESA consultation would be done during that administrative process to consider the impact of California's longline fleet on threatened and endangered species. The Fisheries Service also stated that it would investigate any take of protected species by fishermen engaged in high seas fishing.

After sixty days, the Center initiated suit against the Fisheries Service in the Northern District of California asserting the claims detailed in its notice letter. The district court granted summary judgment in favor of the Fisheries Service and held that the agency lacked discretion in issuing permits to impose conditions furthering the conservation of protected species. The court found that nothing in the Compliance Act provided the Secretary with the authority to place such conditions on permits, and it therefore concluded that because the agency had no discretion to condition permits for the benefit of listed species, it could not be held liable under section 9 of the ESA for any take of such species by individual fishing vessels.

On appeal, the Ninth Circuit initially addressed the issue of statutory construction. The court, reviewing the lower court's decision *de novo*, began with the task of interpreting the Compliance Act, stating that the purpose of the Compliance Act was "to implement the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas [(the Agreement)]," as well as to establish a system of permitting, reporting, and regulation for U.S. vessels fishing on the high seas. 16 U.S.C. § 5501 (2000). The court noted that the Compliance Act requires U.S. vessels to obtain permits in order to engage in fishing operations on the high seas, and that it authorizes the Secretary of Commerce to promulgate regulations to implement the Compliance Act. Turning to the ESA, the court focused on the Act's stated purpose of preventing the extinction of various fish and wildlife, and noted that the responsibility for enforcement lies with the Secretaries of Commerce and the Interior, who in turn delegated said responsibility to the Fisheries Service and Fish and Wildlife Service (FWS). The court stated that section 7(a)(2) of the ESA imposes a procedural duty on federal agencies to consult with either the Fisheries Service or FWS before engaging in a discretionary action which may affect listed species. 16 U.S.C. § 1536(a)(2). When the acting agency is the Fisheries Service or FWS, the obligation to conduct this consultation is not relieved; instead, the agency must consult with its own agency to fulfill the statutory mandate.

Turning to the case at hand, the court determined that the Fisheries Service's issuance of permits to boats to allow fishing on the high seas clearly constituted agency action sufficient to trigger protections of the ESA. The court relied on the regulatory definition of "agency action" which encompasses "all activities or programs of any kind authorized, funded or carried out in whole or in part, by Federal agencies in the United States or on the high seas." 50 C.F.R. § 402.02 (2003). The court

emphasized language stating that examples include, but are not limited to, the promulgation of regulations and the issuance of licenses. The court also considered the implementing regulations, promulgated by the Fisheries Service and FWS, which state that section 7 of the ESA applies to all action in which there is “discretionary Federal involvement or control.” 50 C.F.R. § 402.03. Determining that where there is no agency discretion to act, the ESA is inapplicable, the court turned to the finding of the district court. The district court found that despite the fact that there was “some” discretion to act, it was not sufficient to trigger the ESA because there was nothing in the Compliance Act providing the Secretary with authority to place conditions on permits that inure to the benefit of protected species.

The Ninth Circuit reasoned that the appropriate question was not whether the Service must condition permits to benefit protected species, but whether the statutory language of the Compliance Act confers sufficient discretion to the Service so that it could condition permits to benefit such species. The court cited settled rules of statutory interpretation, including the mandate to give effect, if possible, to every clause and word of a statute rather than emasculate an entire statute, and that words of a statute must be read in their context and with a view to their place in the overall statutory scheme. Applying these elements, the court noted that in the Compliance Act, Congress used the phrase “including but not limited to,” with regard to conditions and restrictions that the Secretary shall establish on each permit issued under the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. 16 U.S.C. § 5503(d). The use of such language therefore established that the examples given are not exhaustive. According to the *Chevron* doctrine, if the intent of Congress is clear then no further interpretation is required. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). The court held that the Compliance Act was not ambiguous and Congress’s intent was clear from the plain language of the statute, thus the interpretation provided by the Fisheries Service was not entitled to *Chevron* deference because it was contrary to the unambiguous language of the statute. The court stated that the Fisheries Service’s interpretation effectively omitted the “including but not limited to” language as well as the express intent of the statute: to comply with international conservation measures. The plain language of the Compliance Act, the court found, provided the Fisheries Service with ample discretion to protect listed species. The Compliance Act is the implementing legislation for the Agreement, reasoned the court, and it

defines the term “international conservation and management measures” to mean “measures to conserve or manage one or more species of living marine resources.” 16 U.S.C. § 5502(5). The court noted that one such measure is the Inter-American Convention for the Protection and Conservation of Sea Turtles, which provides for the protection, conservation and recovery of turtles and their habitat.

Distinguishing its decisions in *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) and *Environmental Protection Information Center v. Simpson Timber Company*, 255 F.3d 1073 (9th Cir. 2001), the court noted that those cases differed factually from the instant case because they involved situations in which the agency action complained of had been completed and there was no ongoing activity which would invoke the consultation requirements of the ESA. The court instead relied on its decision in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), where it held that the Forest Service was obligated to consult with the Fisheries Service regarding the listing of Chinook salmon because Land Resource Management Plans had an ongoing and lasting effect after adoption and thus constituted ongoing agency action. The court noted the similarity to the instant case because the issuance of permits also has an ongoing and lasting effect and constituted agency action which was likely to adversely affect listed species.

Having analyzed the applicable statutes, interpretations and case law, the court concluded that the Compliance Act vested the Fisheries Service with substantial discretion to condition permits to inure to the benefit of listed species. Therefore, the court held that the ESA required the Fisheries Service to conduct consultation to assess the potential impact on protected species.

Elizabeth Piercy

V. SURFACE MINING CONTROL AND RECLAMATION ACT

Surface Mining Control and Reclamation Act
Citizens Coal Council v. Norton,
330 F.3d 478 (D.C. Cir. 2003)

An organization, the Citizens Coal Council (CCC), whose members used parks and other areas protected by the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (2000), (SMCRA), brought an action claiming the Department of Interior’s (DOI’s) promulgation of a rule interpreting SMCRA was arbitrary and capricious under the Administrative Procedure Act. The rule, found at 30 C.F.R. § 761.200

(2003), provides that SMCRA allows subsidence to occur within zones where SMCRA has specifically banned “surface coal mining operations.” The United States District Court for the District of Columbia agreed with the plaintiff and found the rule to be arbitrary and capricious, and remanded the regulation back to the DOI without instruction.

Both sides appealed the district court’s decision. The CCC wanted the court to impose a regulation requiring the DOI to include subsidence in SMCRA’s prohibition on surface mining activity within certain protected zones. Conversely, the DOI wanted its initial regulation upheld. The United States Court of Appeals for the District of Columbia Circuit sided with the DOI and reversed the district court’s holding that the rule promulgated was arbitrary and capricious. The D.C. Circuit found that, although the DOI’s interpretation may not be the “most natural” one, it was “reasonable” and thus satisfied the *Chevron* doctrine because Congress had not spoken clearly on this issue.

The challenged rule is based on a reading of two provisions in SMCRA: (1) section 701(28)(A) and (2) section 522(e). The relevant portion of the first provision, section 701(28) defines “surface coal mining operations” as “activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine.” 30 U.S.C. § 1291(28)(A). In section 522(e) of SMCRA, “surface coal mining operations” are prohibited (with some limited exceptions) in certain protected areas such as natural parks, natural forests, public parks, and historic sites, within 100 feet of roads and cemeteries, and within 300 feet from residences and public buildings. 30 U.S.C. § 1272(e). Neither of the two provisions specifically refers to subsidence.

Section 516, the provision dealing with granting state and federal mining permits, does explicitly mention “subsidence.” 30 U.S.C. § 1266. The DOI relied on this clear reference for its argument that Congress unequivocally stated subsidence when it wanted to include it.

The D.C. Circuit began its analysis by explaining the two steps of the *Chevron* doctrine. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1987). First, if Congress has unambiguously spoken, then the court must give effect to that statement. Although the district court had determined that “Congress had expressed its intent clearly,” the circuit court disagreed, finding that section 701(28) does not “unambiguously include subsidence,” and thus, the first step of *Chevron* was not controlling here. Second, *Chevron*

provides if Congress is silent or ambiguous on the issue, the court must defer to the agency interpretation so long as the agency has acted reasonably. The D.C. Circuit concluded that *Chevron* deference must be accorded to the DOI here because it acted reasonably in its promulgation of the rule.

The district court relied on the statutory text, purpose, structure, and legislative history in finding that Congress had unambiguously meant to include subsidence. The district court also relied on a 1988 D.C. Circuit case which proclaimed that the “most natural reading” of section 701(28) was that it included subsidence. The D.C. Circuit stated, however, that it need not reverse its earlier proclamation in order to reverse the district court. This “more natural” interpretation by CCC did not mean the DOI’s contrary interpretation was unreasonable.

The D.C. Circuit then proceeded through the textual and legislative history arguments. One textual argument offered by the DOI was that the term “operations” in section 701(28) suggested some kind of human activity and as such did not include subsidence. The CCC countered that when the entire phrase, “surface operations and surface impacts incident to an underground coal mine,” was read as a whole, the meaning was clear. The circuit court did not find the DOI’s argument to be particularly compelling.

Another more important textual argument offered by DOI was that the oft used phrase in section 701(28) of SMRCRA, “such activities,” refers only to the first portion of the phrase in the beginning of section 701(28)(A): “*activities* conducted on the surface of lands in connection with a surface coal mine” and therefore does not refer to the remainder of the phrase, “*or* subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine.” The district court accused the DOI of misconstruing this language. The circuit court, however, refused to decide which interpretation was “more natural” because of its conclusion that Congress had not spoken unambiguously; as such, the case implicated only the second step of *Chevron*.

Both sides also argued that the legislative history of SMCRA supported their position. The CCC cited several relevant passages from Senate and House Reports. In concluding that the legislative history and purpose of SMCRA required subsidence to be included in section 701(28), the district court relied particularly on a portion of the Senate Report, which stated that

“surface coal mining operations” is so defined to include not only traditionally regarded coal surface mining activities but also surface

operations incident to underground coal mining, and exploration activities. The effect of this definition is that coal surface mining and surface impacts of underground coal mining are subject to regulation under this Act.

S. REP. No. 95-128, at 98 (1977). The DOI argued that the legislative history showed only that Congress meant to include subsidence in section 516. It cited the same House Report that CCC had for its proposition. Ultimately, the D.C. Circuit found the legislative history inclusive.

In 1992, Congress passed an amendment to SMCRA, which provided a remedy for property owners who suffered damage due to subsidence. It was suggested by DOI that this proved Congress was aware that section 522(e) did not prohibit subsidence. The CCC countered that this amendment did not bar its interpretation because it went beyond the scope of protection offered under section 522(e). For example, subsidence damage occurring more than 300 feet away from a protected structure was not covered by section 522(e), but it would be covered under the 1992 amendment. The D.C. Circuit thought that the DOI's argument was a "more plausible" one, and it cited this as a further example of the agency's reasonableness in promulgating this rule. The CCC's petition for rehearing en banc was denied.

Robert M. Bastress III