RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

Alaska Department of Environmental Conservation v. Environmental Protection Agency, 124 S. Ct. 983 (2004)

In a five-four decision, the United States Supreme Court upheld the Environmental Protection Agency's (EPA) authority under the Clean Air Act's (Act or CAA) Prevention of Significant Deterioration (PSD) provision to issue stop construction orders to a facility for a state's violation of the Act in the permitting process. The Court found that the issuance of such an order was authorized by the two enforcement provisions of the Act and therefore, was not arbitrary and capricious. Finally, the Court held that the EPA was not relegated to enforcing the Act through state administrative and judicial processes but instead, is authorized by Congress to issue orders to states and facilities.

Congress enacted the PSD requirements in its 1977 Amendments to the Act. The goal of this program is to protect human health in areas that meet national ambient air quality standards and in areas that are unclassifiable with respect to attainment because of a lack of data. Under the program, PSD permits are required for modifications to "major emitting facilities" that will result in an increase in pollutant emissions. The permit requires that a facility control the release of pollutants using the best available control technology (BACT) in its modification. BACT allows a permitting authority to take "into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7477 (2002).

States may enact their own PSD programs as part of their State Implementation Plans with approval from the EPA. The Act confers enforcement authority over states' plans to the EPA in two separate sections. Section 113(a) of the Act, 42 U.S.C. § 7413(a), authorizes the EPA to act when a state fails to comply with requirements of the Act. More specifically, section 113(a)(5) authorizes the Administrator to "issue an order prohibiting the construction or modification of any major stationary source" when she "finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources." Section 167 of the Act, 42 U.S.C. § 7477, relates specifically to the PSD program and requires the Administrator to "take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part."

In this case, the EPA used its authority under these two sections to issue a stop construction order to Teck Cominco Alaska, Inc.'s (Cominco) facility in Alaska that had obtained the required PSD permit from the Alaska Department of Environmental Conservation (ADEC), the state's permitting authority. Cominco operates a zinc concentrate mine in northwest Alaska, an area that is subject to PSD requirements because it meets the national air quality standards for nitrogen oxide. In 1996, the company wanted to increase the facility's production and applied to the ADEC for a PSD permit to cover the increased nitrogen oxide emissions that would result from the increased use of its generators. The EPA has approved Alaska's PSD program as part of Alaska's State Implementation Program and the language in the state's statute almost mirrors that of the federal statute. The State of Alaska has delegated permitting authority to the ADEC. The ADEC proposed using selective catalytic reduction as BACT for Cominco's project. Cominco instead proposed to add a seventh generator to the existing six and offered to apply Low NOx, an alternative control technology, as BACT project. Selective catalytic reduction decreases nitrogen oxide emissions by ninety percent while Low NOx only decreases emissions by thirty percent.

The ADEC issued a first draft PSD permit on May 4, 1999, and included Low NOx as BACT project reasoning that if applied to all of the generators, the technology would "achieve a similar maximum [nitrogen oxide] reduction as the most stringent controls." The Department of the Interior, followed by the EPA, commented that Low NOx was not BACT project, selective catalytic reduction was. The

ADEC issued a second draft permit on September 1, 1999 that again listed Low NOx as BACT and ultimately issued a final permit including Low NOx on December 10, 1999. The EPA's comments throughout the process focused on the fact that selective catalytic reduction is BACT project and that the choice of the less stringent Low NOx must be supported in the ADEC's record; ADEC has to show why the more superior technology was not "economically or technologically feasible."

In the final permit, the ADEC justified its Low NOx decision by stating that it "support[s] Cominco's Red Dog Mine Production Rate Increase Project and its contribution to the region"; the ADEC did not supply any required economic or technological information. On December 10, 1999, the same day that the ADEC issued the permit, the EPA issued an order to the ADEC under its section 113 and 167 enforcement powers "prohibiting ADEC from issuing a PSD permit to Cominco 'unless ADEC satisfactorily documents why [selective catalytic reduction] is not BACT [project].'" The EPA later withdrew this order because the permit was already issued at the time the order was given. On February 8, 2000, the EPA issued a second order under the same enforcement powers "prohibiting Cominco from beginning 'construction or modification activities.'"

The State of Alaska and Cominco filed a petition for review of the orders in the United States Court of Appeals for the Ninth Circuit asserting that the court had jurisdiction pursuant to section 307 of the Act which allows appellate court review of final agency action. In July 2002, the Ninth Circuit held that the "EPA had authority under §§ 113(a)(5) and 167 to issue the contested orders, and that the Agency had properly exercised its discretion in doing so." The Supreme Court granted certiorari "to resolve an important question of federal law, the scope of EPA's authority under §§ 113(a)(5) and 167 [of the Act]."

The Court affirmed the Ninth Circuit's decision, and in doing so, reinforced the EPA's "encompassing supervisory responsibility" "to ensur[e] that a state permitting authority's BACT determination is reasonable in light of the statutory guidelines." Alaska, and the dissent, argued that only the permitting authority should be able to make a BACT determination and the Act only authorizes EPA enforcement action when *no* BACT determination is made. The majority rejected this argument and held that the EPA's authority under sections 113(a)(5) and 167 extends to a state's unreasonable BACT determinations, thus requiring states to make "a determination of BACT faithful to the statute's definition." The EPA itself conceded that it may not issue an order "if the state agency has given 'a reasoned justification basis of its [BACT]

decision.'" The Court found that precluding the EPA from acting when a BACT determination is unreasonable would be contrary to the Act because Congress "vested EPA with explicit and sweeping authority to enforce CAA 'requirements' relating to the construction and modification of sources under the PSD program, including BACT."

Alaska also argued that even if the EPA deems a state's BACT determination unreasonable, the EPA should only be able to enforce a requirement "through state administrative and judicial process." The majority quickly dismissed this argument reasoning that "[i]t would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court."

Finally, Alaska claimed that the EPA acted arbitrarily and capriciously in its issuance of orders to the State and to the facility. The Court looked at the ADEC's administrative record and found that the EPA did not act arbitrarily and capriciously because there was "no reasoned explanation for ADEC's retreat from" its original position that selective catalytic reduction was BACT project. Under the statutory definition of BACT, selective catalytic reduction has to be chosen "absent 'technological considerations, or energy, environmental, or economic impacts justifying a conclusion that [selective catalytic reduction] was not achievable in this case.'" The ADEC did not provide any such reasoning in the PSD permit or the related administrative record. Both the Court and the EPA noted that the ADEC only has to support its BACT determination with economic or technological reasoning to validate Cominco's PSD permit.

Tara McBrien

Sierra Club v. EPA, 356 F.3d 296 (D.C. Cir. 2004)

The United States Court of Appeals for the District of Columbia Circuit recently handed down a decision that will affect the Environmental Protection Agency's (EPA) administration of the Clean Air Act (CAA). The decision defined the EPA's authority to grant conditional approval of a State Implementation Plan (SIP).

The CAA prescribes that each state must adopt and submit for approval to the EPA a SIP that provides for implementation, maintenance, and enforcement of the National Ambient Air Quality Standards (NAAQS) in an air quality region. The NAAQS determine the maximum permissible concentration of air pollutants in different areas in

order to protect the public health and welfare. The District of Columbia and counties in both Maryland and Virginia comprise the Washington, D.C. Metropolitan air quality area (D.C. area). In 1991, the EPA identified the D.C. area as a "serious" nonattainment area for ozone. If a state is within an ozone nonattainment area, its SIP must include, along with the general requirements, additional statutory elements depending on the severity of the ozone problem. This case clarifies both when the EPA can conditionally approve a SIP and the statutory requirements for a serious or severe nonattainment area.

The D.C. Circuit Court first examined whether the EPA could grant a conditional approval of the SIPs based on commitment letters submitted by the states. Section 110(k)(4) of the CAA, 42 U.S.C. § 7410(k)(4), grants the EPA conditional approval authority stating an "administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures." The EPA contended that "all the states need do to qualify for conditional approval is to *commit to adopt* specific enforceable measures by a date certain; they do not need to tell EPA what those measures are—or even know what they are." Applying the *Chevron* framework, the court found the EPA's interpretation of the statute to be contrary to Congress's clear legislative intent. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The court stated the statutory language unambiguously "requires that the States commit to adopt specific enforceable measures" and that the commitment letters submitted by the D.C. area states "failed to identify specific measures that States committed to adopt."

A 1994 opinion by the court held that the EPA's construction of the CAA's conditional approval provision was inconsistent with the statute. *Natural Resources Defense Council v. EPA*, 22 F.3d 1125 (D.C. Cir.1994). Although the two cases are factually distinguishable, they are not legally distinguishable. In *NRDC*, the D.C. Circuit Court explained that "the purpose of the conditional approval provision is not to permit *states* more time to *identify* control measures, but rather to give EPA the opportunity *to determine* whether a SIP, 'although not approvable in its present form, can be made so by *adopting specific EPA-required changes* within the prescribed conditional period.'" *See NRDC*, 22 F.3d at 1134. In the instant case, the court held that the EPA cannot "grant conditional approval of nothing more than the States' promise to do next year what the Clean Air Act requires them to have already done."

The court then examined the EPA's interpretation of the CAA's SIP requirements for a serious or severe nonattainment area. CAA

§ 182(c)(2)(A), 42 U.S.C. § 7511a(c)(2)(A), requires that a SIP for a serious or severe nonattainment area must demonstrate it will provide for attainment of the NAAQS. The demonstration "must be based on photochemical grid modeling or any other analytical method determined by the Administrator . . . to be at least as effective." *Id.* The D.C. area states' demonstration began with a photochemical grid model that predicted ozone concentrations would exceed the NAAQS when applying the SIP's control strategy. Concerned about reliability and uncertainty, the EPA adjusted the model's calculations. The model then predicted NAAQS attainment for two out of three modeled days. Discounting the one nonattainment day, the EPA reasoned that the "base-year data used to model that day was too anomalous to demonstrate nonattainment." The petitioners alleged that "the SIPs did not demonstrate attainment without EPA's adjustments, [and] the demonstration was not 'based on' photochemical grid modeling within the meaning of § 182(c)(2)(A)."

The court considered "whether the results obtained by adjusting the model . . . [could] still reasonably be described as 'based on' that model." Basing its analysis on *Chevron*, the court noted that "when the statute 'is silent or ambiguous' we must defer to a reasonable construction by the agency charged with its implementation." The court determined that attainment demonstrations do not have to rest solely on grid modeling. The court held that the primary basis for the attainment demonstration was photochemical modeling and reasoned that the EPA's "adjustments appear well-suited to that end, as they do no more than correct for the model's over-prediction of ozone levels as compared to actual observations, and for its reliance on a base day that appears to be a statistical outlier."

In addition, the petitioners argued that the EPA's application of supplemental adjustments to the model was arbitrary and capricious. In order to refute the petitioners' claim, the EPA had to demonstrate that it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted). The court concluded that the EPA met this burden and "that the model 'systematically overpredict[ed] ozone concentration' in comparison to actual observed results, and that it overweighed conditions on a single day that were 'not likely to occur often enough to be a major causative factor for nonattainment.'" The court noted "[t]he adjustments were

necessary to ensure consistency with real-world observations and thus to ensure reliable prognostications about the future."

The petitioners also challenged the EPA's approval of the rate-of-progress (ROP) plans. In serious and severe nonattainment areas, the SIP must include "ROP plans that demonstrate an average reduction of baseline emissions of 3% per year for each consecutive three-year period from 1996 to the attainment deadline." *See* 42 U.S.C. § 7511a(c)(2)(B), (d). Computer models were available from the EPA to facilitate developing the ROP plans. The petitioners alleged that because the D.C. area plans relied on an outdated emissions model, the agency's approval of those plans was arbitrary and capricious. The most recent version of the computer model was available only one month before the states submitted the plans. Under the CAA, states are required to develop a plan using the latest available model. *See* 42 U.S.C. § 7502(c)(3). The EPA's policy "was not to 'require states that have already submitted SIPs or will submit SIPs shortly after MOBILE6's [the latest computer model's] release to revise these SIPs simply because a new . . . emissions model is now available.'" *See* 40 C.F.R. § 51.112(a)(1). The court rejected the petitioners' claim stating that "[t]o require states to revise completed plans every time a new model is announced would lead to significant costs and potentially endless delays in the approval processes."

The petitioners' final argument contended that the EPA should maintain the original submission deadlines regardless of the D.C. area's reclassification from "serious" to "severe" nonattainment. Under the CAA, "the Administrator may adjust any applicable deadline (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions." *See* 42 U.S.C. § 7511a(i). The EPA claimed that "extending the SIP and ROP deadlines to one year from the date of reclassification . . . would 'assure consistency among' all of the 'required submissions,' including the severe area." The court held that the EPA's rationale was reasonable. The petitioners' argument was indistinguishable from an argument previously rejected by the court. *Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002).

The D.C. circuit court vacated and remanded the EPA's conditional approval of the D.C. area SIPs, denied review of the statutory elements contained in a serious or severe nonattainment area, and denied review of EPA's extension of the SIP and ROP deadlines upon reclassification of the D.C. area.

Genifer M. Tarkowski

United States v. Ohio Edison Co., 276 F. Supp. 2d 829 (S.D. Ohio 2003)

The Environmental Protection Agency (EPA, or the Agency), and the states of Connecticut, New Jersey, and New York, brought suit against the Ohio Edison Company (Ohio Edison) alleging that the utility had violated the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (2002). The complaint alleged that Ohio Edison illegally "modif[ied]" its Sammis Station coal-fired electric generating plant in violation of the Act's New Source Review provisions when it undertook eleven separate construction projects between 1984 and 1998, replacing major plant components in order to increase both the reliability and operating life of the plant at a total cost of $136.4 million, without first receiving pre-construction permits as required by the Act and installing pollution control technology required for "new" sources. The United States District Court for the Southern District of Ohio agreed with the Agency's view that the construction projects were "modifications" within the plain meaning of the Act, and rejected the utilities' defense that the projects fell within the CAA's exemptions for "routine maintenance and repair." The court upheld the Agency's view that the determination of what is "routine" must be evaluated on a facility, rather than an industry, level in order to preserve the meaning of the Act.

The 1970 Clean Air Act established New Source Performance Standards (NSPS) that require all new major stationary sources of pollutants to install pollution controls based on state-of-the-art technology. 42 U.S.C. § 7411(a)(1). Although the Act largely left the regulation of existing sources of emissions to the National Ambient Air Quality Standards (NAAQS) (that the EPA had been ordered to establish) and the State Implementation Plans (SIPs) (that the states had been directed to create), the "new source" standards applied not only to the construction of new facilities, but also to the "modification" of existing facilities. 42 U.S.C. § 7411(a)(2). "Modification" was defined as "any physical change in . . . a stationary source which increases the amount of any air pollutant emitted by such sources." 42 U.S.C. § 7411(a)(4).

In 1977, the CAA was amended to require any "new source" to obtain permits prior to any construction, and to install state-of-the-art pollution control technology. These New Source Review (NSR) requirements included the Prevention of Significant Deterioration (PSD) (for areas in compliance with NAAQS) and Non-Attainment New Source Review Requirements (NNSR) (for areas that were out of compliance). The NSR provisions apply to both new and "modified" sources, retaining

the very broad definition of modification in the CAA. 42 U.S.C. §§ 7475, 7503.

The Sammis Station plant was built before 1970 and therefore was originally only subject to pollution control requirements included in SIPs. The eleven construction projects at issue in *Ohio Edison* were extensive, and the court held that the construction at the Sammis' units were clearly "modifications" under the plain language of the CAA covering "any physical change." Any modification triggers permitting requirements as well as the duty to install pollution control equipment. 42 U.S.C. §§ 7475(a), 7479(2)(C), 7503(a).

However, in order to avoid the application of the law to any minor repair activity at plants, the EPA created a regulatory exemption for "routine maintenance, repair and replacement." 40 C.F.R. § 52.21(b)(2)(iii)(a). Because there was no question that Ohio Edison's construction projects were "repair" projects, the issue was whether the projects constituted "routine" repairs, or were instead plant "modifications" triggering New Source requirements.

There is no regulatory definition of "routine." Ohio Edison argued that its construction projects qualified for the exemption. The utility argued that "routine" should be measured by projects performed on plants by the coal-fired electric industry as a whole, rather than at a particular plant. The EPA countered with its case-by-case regulatory interpretation, arguing that no activities of the utility industry are categorically exempt, and that in each case the Agency considers the "nature, extent, purpose, frequency, and cost" of the project.

In analyzing the two approaches, the court first noted that under the *Chevron* test, an agency interpretation of the statute it administers is due considerable deference, so long as it is not at odds with the clear language of the statute. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-42 (1984). In this instance, the statutory definition of "modification" had not even created the exception for routine maintenance, so the EPA approach was giving the industry more leeway than the statute required. The court also noted that other courts that had interpreted the "routine" maintenance exemption accepted the EPA approach as reasonable. In particular, the United States Court of Appeals for the Seventh Circuit, the only appellate court to consider the issue, specifically accepted the EPA's case-by-case approach in *Wisconsin Electric Power Co. v. Reilly* (*WEPCO*), 893 F.2d 901 (7th Cir. 1990). The *WEPCO* court emphasized the Agency view that projects intended to extend the life of a facility were generally modifications, rather than routine repair or maintenance. They rejected the industry argument that

all repairs extend the life of a plant, pointing out that most routine repairs are considered in the original projection of a plant's operating life. However, the *WEPCO* court did not explicitly reject the "routine in the industry" approach, since it held that the utility's projects there were not routine within the industry.

The Ohio district court specifically rejected Ohio Edison's approach, stating that if the broad industry definition of "routine" were accepted, the regulation "would be in direct conflict with the superceding statute" since any repair or maintenance regularly done by the industry would be exempt, allowing for any efforts to extend the life of coal-burning plants. The court further noted that the utility's interpretation of the regulation would effectively read "routine" out of the regulation, allowing any repair or maintenance. In effect, the exemption would swallow the rule.

The court next considered the application of the EPA's case-by-case factors to Ohio Edison's construction projects. The court pointed to a number of factors in considering the "nature and extent" of the activities. First, internal Ohio Edison and industry group publications described the changes as intended to extend the life of the plants up to thirty years. Second, the utilities treated the construction as nonroutine in nature. The company's budgeting and accounting practices pointed to the difference. Ohio Edison maintenance and staff are budgeted as operation and management and counted as an expense. All of these projects were funded using the capital improvement budget and capitalized for accounting and tax purposes. The court also noted that rather than being "routine" for the facility, these projects were all being carried out for the first time in the life of the plant. Finally, the cost of the activities ($136 million) pointed to their nonroutine nature.

For modifications to trigger NSR requirements they must also "result in a significant net emissions increase." 40 C.F.R. § 52.21(b)(2)(i). The court quickly disposed of the utility's argument that actual pre-construction emissions should be compared to actual post-construction emissions, noting that this approach was inconsistent with the plain statutory requirement in the 1977 Amendments for PSD/NSR that require a pre-construction evaluation of whether the change "would result" in a significant net emissions increase. 42 U.S.C. § 7475(a)(1). The court also noted that the utility approach was inconsistent with the statute since the point of the PSD requirements is to prevent new construction that will result in an increase in emissions; the construction needs to be completed and the modifications operated before the utility will know if the construction resulted in a net increase in emissions.

The court than adopted the EPA's approach to measuring emissions increases by calculating actual yearly emissions prior to construction, and than calculating the actual projected emissions after construction. That projection does not include increased emissions from increased power demand that is exogenous, but does consider increased hours of use from greater availability of the plant brought about by increased efficiency and reduced "outage" time, a major aim of the construction projects.

Although the current Bush Administration was in the process of issuing final regulations altering the EPA's interpretation of NSR requirements in a manner that could bring the Ohio Edison modifications within the exemption, this case established that it might still be possible for the Justice Department and the EPA to continue enforcement actions that predate the regulatory change. Just as importantly, it could point to problems for the Administration as those regulatory changes are challenged by northeastern states and environmental organizations. Although the Administration did not adopt the "industry wide" interpretation of "routine" maintenance, its more liberalized approach could be invalid as inconsistent with the Clean Air Act if it is too broad. As the court pointed out in *Ohio Edison*, the interpretation of "routine" can not be so broad as to conflict with the clear statutory language requiring NSR compliance in conjunction with only a modification.

William F. Russell

II. CLEAN WATER ACT

No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 (2d Cir. 2003)

On December 9, 2003, the United States Court of Appeals for the Second Circuit held that a citizen can sue New York City for spraying pesticides "over lakes, streams, ponds, or marshes" under the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, even if the City complies with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 7 U.S.C. §§ 136-136y.

A mosquito-borne viral strain of encephalitis known as the West Nile Virus infected several residents of Queens, New York, in 1999. In response, New York City "deployed trucks and helicopters to spray" three types of pesticides to control the mosquito population: malathion, resmethrin, and sumithrin. The three pesticides used by the City are regulated under FIFRA. The City "did not seek or obtain" a CWA permit for its discharge of pesticides into a navigable waterway.

The Clean Water Act is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C § 1251(a). The discharge of a pollutant into navigable waters requires that the polluter obtain a discharge permit from the EPA or a delegated state authority. 33 U.S.C. § 1311(a). The discharge of any pollutant without a permit is strictly prohibited. 33 U.S.C. § 1342. Navigable waters encompass "non-navigable tributaries of navigable waterways, including small streams." Thus, the discharge of a pollutant into "lakes, streams, ponds, or marshes" is prohibited unless the polluter obtains a discharge permit or finds another exception. Citizens may enforce the CWA through the Act's citizen suit provision. The CWA provides that "[a]ny citizen may commence a civil action on his own behalf . . . against any person . . . alleged to be in violation of . . . an effluent standard or limitation" under the CWA. 33 U.S.C. § 1365(a).

FIFRA regulates "the marketing and use of pesticides, fungicides, rodenticides, and other designated classes of chemicals." Before any of these chemicals can be sold in the United States, they must be registered with the EPA. Registration is only possible when the EPA finds that the chemical, "when used in accordance with widespread and commonly recognized practice . . . will not generally cause unreasonably adverse effects on the environment." 7 U.S.C. § 136(a)(5)(D). After registration, the EPA "issues a 'label' for each [chemical], indicating . . . [how] it may be used." Enforcement of FIFRA "may only be brought by specified agencies of federal and state government." There is no citizen suit provision within FIFRA.

The plaintiffs filed suit in the United States District Court for the Southern District of New York alleging that New York City's spraying program discharged "pollutant[s] into a navigable waterway . . . without a [CWA] permit" and sought an "an injunction to terminate the spraying." The district court denied the injunction and the Second Circuit upheld the denial. The plaintiffs produced evidence showing that the defendants sprayed pesticides "over lakes, streams, ponds, or marshes." The defendants introduced evidence indicating that "those doing the aerial spraying were instructed to turn off the spraying when they were within 300 feet of a body of water and those involved in the ground spraying were directed to cease spraying when they came within 100 feet of water." *No Spray Coalition v. City of New York*, 2002 U.S. Dist. LEXIS 22936, at *3 (S.D.N.Y Nov. 26, 2002). The parties then filed cross motions for summary judgment. The district court did not rule on whether the spraying of pesticides in compliance with FIFRA could violate the CWA. Rather, the district court granted the defendant's

motion for summary judgment by concluding that "allowing citizen enforcement suits under CWA to bar acts that did violate FIFRA . . . 'would do violence to the intent of Congress not to provide a private right of action for FIFRA violations.'" The court noted that "these two regulatory schemes were before Congress at the same time" and that the "deliberate decision not to provide a private right of [enforcement] action under FIFRA" is circumvented if a plaintiff uses the CWA.

The district court further concluded that a citizen suit under the CWA could only be brought if the complained of CWA violation also "constituted a substantial violation of FIFRA." Because the label for the pesticides "indicated that it was to be used for 'residential and recreational areas where adult mosquitoes are present in annoying numbers in vegetation surrounding parks, woodlands, swamps, marshes, overgrown areas and golf courses,'" there was no substantive violation of FIFRA because the EPA "clearly anticipated their use over protected waters." *No Spray Coalition v. City of New York*, 2002 U.S. Dist. LEXIS 22936, at *2, *5 n.1 (S.D.N.Y. Nov. 26, 2002).

The Second Circuit disagreed. The court first noted that "with regard to the availability of a citizen enforcement suit, each statute stands on its own, and means what it says." Therefore, citizens cannot enforce "obligations created by FIFRA," as there is no citizen suit provision, but citizens can enforce "obligations created by the CWA" because there is a citizen suit provision. The court then noted that the district court "cautioned that canons of statutory construction discourage 'reading . . . in' remedies to a statute that omits them." The Second Circuit correctly pointed out that the district court's reading would "eliminate from [the] CWA a remedy which it expressly provides, merely because another related statute does not similarly provide such a remedy." Such a reading eviscerates the citizen suit provision. If a defendant's action falls under two related regulatory regimes, a citizen could not sue to vindicate the rights expressly given by Congress if only one of those regimes contains a citizen suit provision. The court found "no basis for this interpretation in the statutes." Accordingly, the Second Circuit concluded by holding that a citizen can maintain a suit under the CWA even if the defendant's action complied with FIFRA and vacated the judgment of the district court. However, the Second Circuit declined to rule on whether "spraying in substantial compliance with FIFRA must be deemed to comply with [the] CWA."

Korey A. Nelson

III. ENERGY POLICY AND CONSERVATION ACT

Natural Resources Defense Council v. Abraham, 355 F.3d 179 (2d Cir. 2004)

Beginning in January 2006, central air conditioners manufactured for sale in the United States will face tougher efficiency standards. On January 13, 2004, the United States Court of Appeals for the Second Circuit found that the Department of Energy (DOE) air conditioner rules initially published in the Federal Register on January 22, 2001, and promulgated under authority granted by the Energy Policy and Conservation Act (EPCA), are covered under the antibacksliding provisions of the EPCA and its later amendments. Hence, these rules are currently effective and are forcing the air conditioner industry, which has vigorously opposed the new rules, to make the necessary changes in time for the 2006 deadline. Jeffrey Ball, *Air Conditioners Get New Rules on Energy Use*, WALL ST. J., Mar. 18, 2004, at D1.

The background leading into the controversy of this case requires a brief explanation of the EPCA and its subsequent amendments in 1978 and 1987. Congress responded to the energy crisis precipitated by the oil embargo of the early seventies by enacting the EPCA, codified at 42 U.S.C. §§ 6201-6422 (2000), in 1975. The EPCA was enacted to address consumer energy consumption, and in particular, commonly used consumer appliances. 42 U.S.C. §§ 6921-6929. The EPCA lists contained over a dozen appliances, including central air conditioning units, "that Congress determined contributed significantly to domestic energy demand." *See* 42 U.S.C. §§ 6922(a)(12).

In 1978, Congress enacted several amendments to the EPCA, called the National Energy Conservation Policy Act (NECPA), to speed up the process of introducing energy efficient appliances. The NECPA replaced voluntary standards with mandated efficiency standards set by the DOE. The DOE was instructed to develop mandatory standards under its rulemaking authority that were "technologically feasible and economically justified." 42 U.S.C. § 6295(a), (c).

In response to additional delays in DOE rulemaking with respect to setting standards under the EPCA and the NEPCA, Congress enacted the National Appliance Energy Conservation Act (NAECA) in 1987. Instead of relying on the DOE to set appliance efficiency standards, Congress provided a set of efficiency standards in the NAECA. However, under the NAECA, Congress allowed the DOE to amend the standards within a certain timeframe following the enactment of the NAECA. The DOE could only amend the statutory standards if the new standards were

"designed to achieve the maximum improvement in energy efficiency . . . which the Secretary determines is technologically feasible and economically justified." 42 U.S.C. § 6295(o)(2)(A).

In the 1987 amendments, Congress added an antibacksliding provision that prohibits the DOE from promulgating standards under the NAECA that are less energy efficient than the existing standards set out by Congress or by previous DOE rulemaking procedures. The provision states that "[t]he Secretary may not prescribe any amended standard which increases the maximum allowable energy use, . . . or decreases the minimum required energy efficiency, of a covered product." 42 U.S.C. § 6295(o)(1). The DOE's interpretation of this provision lies the heart of this case.

On January 22, 2001, following notice and comment, the DOE promulgated a set of amended central air conditioner efficiency standards. These efficiency standards—expressed in terms of a "Seasonal Energy Efficiency Ratio," (SEER)—were for central air conditioners and central air conditioners with heat pumps. The January 22, 2001, rule stated that its effective date was February 21, 2001. The rule further stated that manufacturers had until January of 2006 to comply with the new efficiency standards.

Shortly after the January 22 rule became final, the Air Conditioning and Refrigeration Institute (ARI) filed a suit seeking review of the rule in the United States Court of Appeals for the Fourth Circuit. The DOE subsequently issued a rule on May 23, 2002, that offered DOE's interpretation of 42 U.S.C. § 6295(o)(1), withdrew the January 22, 2001, rule, and adopted the lower efficiency standards endorsed by the ARI.

In June 2001, the petitioners in this case, consumer and environmental advocacy groups and several states, filed suit in the United States District Court for the Southern District of New York requesting review of the DOE's rules delaying the new efficiency standards. The case was dismissed after the district court determined that it did not have subject-matter jurisdiction. *New York v. Abraham*, 199 F. Supp. 2d 145 (S.D.N.Y. 2002). After the May 23, 2002, rule was promulgated, the petitioners filed suit in the United States Court of Appeals for the Second Circuit. The petitioners claimed: (1) the district court incorrectly concluded that it lacked subject matter jurisdiction; (2) that 42 U.S.C. § 6295(o)(1) (or section 325(o)(1) of the Act) prevents backsliding, and therefore prevented the DOE from suspending and withdrawing the January 22, 2001, standards; (3) that the subsequent February 2, 2001, and the April 20, 2001, rules were invalid because they were promulgated absent notice and comment as required by the

Administrative Procedure Act (APA); (4) that the new standards under the May 23, 2002, rule were not supported by substantial evidence that they are designed to meet the requirements of the EPCA and its amendments; and (5) that the DOE's replacement standards violated the National Environmental Policy Act (NEPA).

Addressing the jurisdiction issue first, the Second Circuit found, absent specific instances enumerated in the EPCA, the jurisdiction to review rulemaking is with the court of appeals. The court noted that section 6306(b)(1) grants appellate courts jurisdiction to hear cases arising under the EPCA. The court rejected the petitioners' claim that the district court has general federal question jurisdiction under 28 U.S.C. § 1331. While general federal question jurisdiction serves as a "default" rule, the court, relying on *Florida Power & Light v. Lorian*, 470 U.S. 729, 737 (1985), found that the EPCA's statutory scheme, the applicable legislative intent, and the traditional allocation of authority all support the conclusion that jurisdiction in this case belongs with the circuit court.

The court next addressed the application of the antibacksliding provision, 42 U.S.C. § 6295(o)(1). The court rejected the DOE's assertion that the triggering event for the antibacksliding provision was the "effective" date of the new rule. The court stated that allowing the triggering event to be the effective date would permit the DOE to suspend indefinitely the application of new standards. It reasoned that this would defeat the purpose of the antibacksliding provision. The court, after reviewing the entire statutory scheme of the EPCA and its amendments, concluded that the triggering event for § 6295 is the date the rule is published in the Federal Register. Therefore, the antibacksliding rule was triggered on January 22, 2001, with respect to the central air conditioning efficiency standards. Hence, all rules promulgated thereafter would have to meet or exceed the efficiency levels of the January 22, 2001, rule. Accordingly, the May 23, 2002, replacement standards were void because they essentially constituted backsliding under § 6295(o)(1). Additionally, the post January 22, 2001, rules suspending the effective date of the January 22, 2001, rule were also invalid.

The court also rejected the DOE's argument that its interpretation of the antibacksliding provision was entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837 (1984) (finding that an agency's construction of a statute must be given deference if Congress has not spoken clearly on the issue, and if the agency's interpretation is based on a permissible construction of the statute). The court concluded that the statutory language, on its face,

indicates that Congress has spoken clearly on the issue. Therefore, the remaining analysis under the two-prong *Chevron* test was not necessary. The court also concluded that the DOE did not have inherent power to reconsider the final rules.

Mustafa Paul Ostrander

IV. FEDERAL ADVISORY COMMITTEE ACT

Colorado Environmental Coalition v. Wenker, 353 F.3d 1221 (10th Cir. 2004)

The facts of *Colorado Environmental Coalition v. Wenker* arose when Secretary of the Interior, Gale Norton, made allegedly biased appointments to three Colorado Resource Advisory Councils in 2001. Resource Advisory Councils (RACs) are groups whose members advise the Bureau of Land Management (BLM) and the Secretary of the Interior regarding federal land use policy. The Federal Land Policy and Management Act (FLPMA) of 1976, 43 U.S.C.§§ 1701-1785 (2000), requires that the members of such advisory councils be "representative of the various major citizens' interests concerning the problems relating to land use planning." 43 U.S.C. § 1739(a). BLM regulations define three distinct groups of interests that must be represented: (1) people with interests in the use of the land (2) environmental groups, archeological groups, and wild horse and burro interest groups and (3) state, county, and local public officers, representatives of local Indian tribes, and academia. 43 C.F.R. § 1784.6-1(c).

Public notice of the fourteen vacancies on the Colorado RACs was given via a publication in the Federal Register and a press release calling for nominations. Each application for the vacancies was required to include letters of recommendation from the interest groups that supported the nominee. By the closing date, the BLM had received fifty applications from the public, all of which included the required letters of recommendation. However, approximately two weeks after the closing date, Colorado Governor Bill Owens submitted a letter containing thirteen nominations for the RAC vacancies that included no letters of reference or other documentation in support of the nominees. Only three of these individuals later submitted letters of reference to the BLM. On September 25, 2001, the BLM announced that Secretary Norton had filled the fourteen vacancies—only one appointee was selected from the pool of fifty public applicants, while all thirteen of Governor Owens's nominations received appointments to the RACs.

The Colorado Environmental Coalition and the Colorado Mountain Club, two Colorado environmental organization, and two of the individuals who had publicly applied for the appointments sought declaratory and injunctive relief in the United States District Court for the District of Colorado. They alleged that the Secretary of the Interior did not adhere to the procedural requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 § 4, and of the BLM regulations. FACA, a generally applicable law for all federal advisory committees, mandates that advisory committees be "fairly balanced in terms of the points of view represented and the functions to be performed" and that they "not be inappropriately influenced by the appointing authority or by any special interest." 5 U.S.C. app. 2 § 5(b)(2)-(3). The plaintiffs claimed that ten of the appointments were made without letters of reference, thirteen of the appointments were made in response to "inappropriate influence" by Governor Owens, and the appointments did not satisfy the "fairly balanced representation" requirement. The district court dismissed the case, holding that the plaintiffs had no standing because they suffered no injury-in-fact and that FACA and the BLM regulations provided no meaningful standard of review. The plaintiffs appealed, seeking a reversal of the dismissal.

The United States Court of Appeals for the Tenth Circuit held that the plaintiffs' only justiciable claim was that the appointments did not meet the "fair membership balance" requirement included in both FACA and the BLM regulations. The Tenth Circuit also held that only the two individual plaintiffs, and not the two environmental organizations, had standing to bring the claim.

The Tenth Circuit found that the letter of reference requirement mandated by BLM regulation 43 C.F.R. § 1784 was not reviewable by the court because the regulation provided no meaningful standard of review. The court relied on the Supreme Court decision *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), for its reasoning that when the nature of an agency regulation is for the benefit of the agency's transaction of business, rather than for the procedural benefits of third parties, the agency is not required to adhere to that regulation. The Tenth Circuit concluded that the letter of reference requirement was for the benefit of the agency because it simply furthered the ease of the agency's inquiry into the applicant's background. The Secretary of the Interior maintained discretion as to the final decision after the background inquiry. The court further found that the plaintiffs were not prejudiced by the lack of letters of reference for ten of the nominees, because eliminating those nominees from consideration would

have only minimally increased the plaintiffs statistical chances of obtaining the appointment.

Similarly, the Tenth Circuit found that the inappropriate influence claim was not justiciable because FACA did not provide a meaningful standard of review. FACA provides that "the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest." 5. U.S.C. app. 2 § 5(b)(3). The court stated that the plaintiffs' claim that the Governor will have inappropriate influence over the RACs due to the selection of a large portion of his nominees was not justiciable because it was too hypothetical to provide a standard for review. The court noted that the issue of the number of appointees backed by the Governor's interest would be considered in the "fair membership balance" inquiry.

The "fair membership balance" claim was reviewable because the BLM regulations did provide "law to apply." The Tenth Circuit relied on *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), in which the Supreme Court considered a statute prohibiting the Secretary of Transportation from providing funding to highways through public parks when a "feasible and prudent alternative" was available. In *Overton Park*, even though the "feasible and prudent alternative" standard was not well-defined by the statute and required a balancing of interests, the Court found that there was "law to apply." The BLM regulation at issue in the present case provided a more concrete standard than the "feasible and prudent alternative" standard of *Overton Park* because it actually lists three distinct subgroups that must be represented to achieve the necessary "fair balance." In addition, the BLM regulations provide three specific models as to how the membership may be distributed amongst the three subgroups. Therefore, the Tenth Circuit found that a "fair membership balance" standard existed in the regulations.

Lastly, the Tenth Circuit addressed the standing of the plaintiffs. In addition to meeting the traditional standing requirements, the plaintiffs were required to meet the heightened standing requirements of the Administrative Procedure Act: final agency action and an injury within the zone of interests protected by the statute (here FACA and the BLM regulations). The court found that the individual plaintiffs had a personal interest in "a right to a fair chance to be appointed to a RAC." At the pleading stage, the plaintiffs had sufficiently shown that they may have been injured by the domination of the Governor's influence in the selection of the appointments. In contrast, the court found that the two environmental organizations did not have standing because the BLM

regulations afforded them no interest which was injured. The environmental organizations had no possibility of obtaining appointments to the RACs and, as special interest groups, they could have no influence further than the letters of recommendations in the appointment process.

Clare Bienvenu

V. NATIONAL ENVIRONMENTAL POLICY ACT

Lee v. United States Air Force, 354 F.3d 1229 (10th Cir. 2004)

The appellants in this case are ranchers and livestock raising associations who brought suit against the United States Air Force (U.S. Air Force) alleging violations of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f. The appellants claimed that the U.S. Air Force violated NEPA by permitting the German Air Force to station thirty fighter aircrafts at Holloman Air Force Base in addition to the twelve already there.

In 1992, the United States and Germany commenced negotiations to launch the German Air Force (GAF) training program. The United States selected Holloman, New Mexico, as the site for the beddown of up to forty-two German Air Force Tornado PA-200 aircrafts. The appellants argued that the U.S. Air Force neglected to assess the environmental impact of its proposed action and consider reasonable alternatives.

The United States Court of Appeals for the Tenth Circuit began its analysis by noting that it does not defer to the district court's decision when reviewing agency actions. Under the Administrative Procedure Act (APA), 5 U.S.C. § 704, a reviewing court has discretion to set aside agency actions, findings, and conclusions it finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court applied this standard in accordance with the APA and did not find any administrative determinations to set aside for substantial procedural or substantive reasons.

NEPA details the procedures by which federal agencies must examine the environmental consequences of their projected actions. Before executing a proposed action, federal agencies are required to conduct an environmental assessment (EA). The EA must be followed by either: (1) a finding of no significant impact (FONSI) that concludes that the proposed action will not significantly affect the environment; (2) when a FONSI cannot be issued, federal agencies must develop an

environmental impact statement (EIS) in which they look at the potential environmental impacts of their proposed action on the human environment. The EIS must discuss the variations on the proposed actions and offer alternatives to the proposed actions.

NEPA's reporting requirements are intended to hold federal agencies accountable for their activities by making them scrutinize the environmental impacts of their actions. NEPA's requirement that the agencies make pertinent information available to the public is intended to facilitate an exchange of ideas and assure the public that the agency has considered environmental issues in its administrative process.

NEPA does not set standards or authorize specific results. Further, under NEPA, agencies are not obligated to place environmental concerns before other valid concerns. The procedural requirements of NEPA allow courts to review agencies' compliance with NEPA to make sure that the agency has contemplated and revealed the environmental impact of its actions and that its decision is not arbitrary and capricious.

In its analysis of the NEPA claims, the court first considered the appellants' argument that agencies must prepare an environmental impact statement (EIS) in which they explore the environmental impact of the proposed action and consider alternatives to the proposed action. The court rejected this argument, stating that an EIS is not necessary if an EA is prepared and it results in a FONSI.

NEPA requires an EIS to include an examination of alternatives to the proposed action. The appellants claimed that this requirement was not met because the EIS did not discuss alternate air force bases for the German Air Force expansion. The U.S. Air Force maintained that the Holloman Air Force base was the only reasonable option. The court deferred to the U.S. Air Force by noting that NEPA does not compel agencies to analyze the environmental consequences of options that are too remote, uncertain, impractical, or ineffective. NEPA allows agencies to reject such alternatives in good faith.

With respect to economic impacts, the court decided that the EIS's treatment of the land valuation issue did not violate NEPA. In spite of the fact that the EIS did not discuss the documentation used for the valuation, the court found that agencies need only gather and furnish information on "reasonably foreseeable significant adverse impacts" that are essential for choosing from alternatives when the costs for obtaining the information is reasonable.

The court next addressed the noise impacts. Citing *Custer County Ass'n v. Garvey*, the court noted that agencies are allowed to use their own experts provided that their decisions are not arbitrary and capricious.

256 F.3d 1024, 1035 (10th Cir. 2001). The court found that the noise analysis in the EIS was adequate since the U.S. Air Force used three different well-known and accepted noise metrics to gauge the noise impact of the proposed action. The methods used by the appellees were not found arbitrary and capricious because they were recognized by the Federal Aviation Administration and Air National Guard. In light of this finding, the court deemed the contradictory extra-record affidavits produced by the appellants unnecessary and affirmed the district court's decision to strike the affidavits.

The appellants further challenged the EIS by asserting that the effects of aerial refueling were not considered in the noise impact analysis. The court disagreed, noting that the EIS named aerial refueling training as part of the GAF training regimen. Since the EIS noise impact methodology was upheld previously, the court rejected the appellants' challenge to the effects of aerial refueling.

The Tenth Circuit next stated that the U.S. Air Force used the "best available scientific information" when developing the EIS. *Custer County*, 256 F.3d at 1034. The court dismissed the appellants argument that the studies relied on in the EIS were outdated and insufficient. The court noted that the EIS was based on studies of various animals over the span of thirty-six years and found that such coverage left no reason to question the accuracy of the studies.

The appellants additionally claimed that the EIS was deficient because it did not address the environmental and economic impacts of forest fires caused by aircraft accidents. The court rejected this claim, stating that a supplemental EIS to address these impacts was unnecessary. The court found that the U.S. Air Force properly addressed the risk of accidents in its EIS by acknowledging the risk, explaining its method for calculating the risk, and publishing the results of the calculations. Furthermore, the court added that the mere occurrence of accidents after publication of the EIS is not indicative of error on the part of the agency and does not necessitate a supplemental EIS.

Finally the court dismissed the appellants' claim in regard to standing. The appellants argued that the U.S. Air Force's Agreement with the GAF was an international agreement and should have been submitted to the Secretary of State for approval pursuant to the Case-Zablocki Act, 1 U.S.C. § 1126(c). The court noted that the appellants failed to cite authority for their belief that NEPA required the reviewing court to determine whether an agency has a "legal basis" for its actions. Additionally, the court affirmed the district court by holding that the appellants did not have standing to challenge the U.S. Air Force under the

Case-Zablocki Act since the act does not create a private right of action. The court pointed out that the appellants could not show that they had suffered an injury falling within the "zone of interests" protected by the Act. In conclusion the court held that the appellants did not have standing under the Case-Zablocki Act as the Act is only intended to organize the relations of Congress and the President during negotiations with foreign entities.

Ugochi Ikpeoha

VI. RESOURCE CONSERVATION AND RECOVERY ACT

Holy Cross v. United States Army Corps of Engineers, 2003 WL 22533671

In *Holy Cross v. United States Army Corps of Engineers*, the United States District Court for the Eastern District of Louisiana held that the United States Army Corps of Engineers (Corps) is not immune from citizen suits, but instead must be held to the same standard as any other defendant. The plaintiffs, Holy Cross Neighborhood Association, the Gulf Restoration Network, and the Louisiana Environmental Action Network, sued the Corps to enjoin it from "dredging, stirring up, releasing, and disposing allegedly hazardous waste-contaminated sediments" from the Inner Harbor Navigational Canal (the Industrial Canal) as part of the Industrial Canal Lock Replacement Project (Project) under the National Environmental Policy Act (NEPA) and the Resource Conservation and Recovery Act (RCRA). The Corps moved to dismiss the RCRA claim for failure to state a claim and lack of subject matter jurisdiction. The United States District Court for the Eastern District of Louisiana denied the Corps's motion to dismiss, and in the same motion granted the plaintiffs' motion for summary judgment on standing.

The Industrial Canal runs through New Orleans, Louisiana, near the historic Holy Cross neighborhood. The Canal uses a lock that the Corps first constructed in the 1920s. In the 1950s, anticipating a future need to replace the lock, Congress provided for and approved the lock replacement at a time to be determined by the Corps. In 1998, the Corps announced its plan to replace the current lock, which is 75 feet wide by 640 feet long by 31.5 feet deep, with a much larger lock measuring 110 feet wide by 1200 feet long by 36 feet deep. The new lock requires dredging the Industrial Canal as part of the construction plan.

Using the citizen suit provision of RCRA section 7002, the plaintiffs alleged that the Corps's planned dredging of the Industrial

Canal contributes "to the past or present handling, storage, treatment, transportation, or disposal of any solid and hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a) (1988). In its motion to dismiss, the Corps argued that the plaintiffs' complaint lacked subject matter jurisdiction because the complaint contemplated future events, i.e., the dredging, for which Congress did not waive sovereign immunity. Furthermore, the Corps alleged that the complaint failed to state a claim because it did not meet the notice pleading requirements of Rule 8 of the Federal Rules of Civil Procedure.

In analyzing the issues, the court broke the arguments into three subject areas: dredging, siting of the disposal facility, and maintenance of the Industrial Canal. As part of the dredging analysis, the court summarized the Corps's arguments into two points. First, the Corps claimed that Congress only waived sovereign immunity for suits arising out of "past or present, not future, actions." Therefore, the Corps argued, until the dredging begins, it is not contributing to past or present handling of solid or hazardous waste. Rejecting this argument, the court "agree[d] with plaintiffs that the purpose of RCRA would hardly be satisfied if parties could not bring suit until damage had occurred or offensive conduct had commenced." The court, citing the United States Court of Appeals for the Third Circuit, noted that "RCRA is a remedial statute, which should be liberally construed." *United States v. Price*, 688 F.2d 204, 211, 213-14 (3d Cir. 1982). Because sections 7002 and 7003 of RCRA contain "identical language, the citizen suit provision [should be interpreted] analogously with [section 7003] which details the requirements that must be met in order for the Environmental Protection Agency to bring a RCRA suit." Then, drawing on United States Court of Appeals for the Fifth Circuit case law and EPA guidance defining "contribute," the court concluded that "though [RCRA] refers to past or present acts, [its] primary purpose is to 'reduce the generation of hazardous waste and to ensure [its] proper treatment, storage, and disposal . . . , so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). Therefore, the Corps is not immune from a RCRA section 7002 citizen suit for future dredging.

Additionally, the plaintiffs do not have to wait until dredging begins to bring suit. Quoting from *United States v. Waste Industries*, the court noted that "[i]t is not necessary to 'prove that an emergency exists to prevail under [RCRA], only that circumstances may present an imminent and substantial endangerment.'" 734 F.2d 159, 168 (4th Cir. 1984).

Accepting all of the plaintiffs' claims as true, as is required under Federal Rule of Civil Procedure 12(b)(6), the court concluded that the plaintiffs "sufficiently stated a cause of action under RCRA."

Next, the court analyzed the Corps's argument that the complaint constituted a prohibited collateral attack on the siting of a hazardous waste disposal facility, which is prohibited by RCRA section 7002. However, the court held that as "there was no permitting or other administrative processes to which this lawsuit would be collateral, . . . [the lawsuit] does not constitute a collateral attack and is not prohibited by the exclusion contained in the RCRA."

Finally, the court addressed whether the plaintiffs' allegations concerning the Corps's maintenance of the Industrial Canal met Rule 8 notice pleading requirements under the Federal Rules of Civil Procedure. Specifically, the Corps argued that the plaintiffs failed to allege facts showing how the Corps is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste presenting an imminent and substantial endangerment to health and the environment. Citing to numerous allegations in the complaint including the presence of "toxins, such as Polycyclic Aromatic Hydrocarbons, at levels exceed[ing] standards for non-industrial and industrial sites" in the Industrial Canal, the court concluded that the plaintiffs' complaint satisfied notice pleading requirements "by putting the [Corps] on notice that the RCRA claim rests on the management of and plan to dredge the Industrial Canal."

For these reasons, the court denied the Corps's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The most significant aspect of this order is that it put the government, in this case the Corps, on notice that it is held to the same standard as any other defendant under the RCRA section 7002 citizen suit provision. Thus, in this case, the Corps cannot publish an adequate Final Environmental Impact Statement to the public and the executive agencies without adequately determining the nature and extent of the contamination of the Industrial Canal sediments before dredging.

M. Nicole Adame

VII. WILDERNESS ACT

Wilderness Society v. United States Fish and Wildlife Service, 353 F.3d 1051 (9th Cir. 2004)

The issue in this case was whether a government program to restock salmon hatcheries constituted an unlawful "commercial enterprise" under the Wilderness Act. Despite the fact that the restocking would cause little to no noticeable effect on the Kenai Wilderness Area, the United States Court of Appeals for the Ninth Circuit held that the United States Fish and Wildlife Services (USFWS) salmon enhancement program violated the Wilderness Act, 16 U.S.C. §§ 1131-1136 (2000), because it constituted a commercial enterprise in violation of the Act's clear language. The dispute arose in Alaska's Kenai Wilderness when the USFWS approved a program that would introduce six million hatchery-raised sockeye salmon fry per year into Tustumena Lake, an area designated by Congress as wilderness.

In 1964, Congress enacted the Wilderness Act in an effort to preserve public lands in their natural form, free from any sign of man's presence. Under the Act, the Secretary of the Interior recommends suitable federal lands to the President for preservation as wilderness. The President in turn makes a recommendation to Congress, which then has the power to designate the lands as wilderness. A wilderness designation carries significant ramifications because it renders the land unusable for any purpose except preservation. In wilderness areas, absolutely no commercial activity is permitted to disturb the land. This is a marked difference from other federal lands, such as national forests, which often permit activities such as mining and logging.

In 1980, the Alaska National Interest Lands Conservation Act (ANILCA) set aside 1.35 million acres of wildlife refuge, including Tustumena Lake, as the Kenai Wilderness. The Alaska Department of Fish and Game (ADF&G) had been collecting salmon eggs in Tustumena Lake for research purposes and to help stock the lake with sockeye salmon since 1974. In 1989, the ADF&G and the USFWS agreed to increase the stocking program to enhance commercial fishing operations in the area. As part of the agreement, a contract was entered into with a local aquaculture company, the Cook Inlet Aquaculture Association (CIAA), to run the hatchery program. The Association is a private, nonprofit corporation which funds its operations through a two percent

tax on the value of the annual salmon harvest, and by selling surplus, hatchery-raised salmon.

In 1995, the CIAA submitted a draft environmental assessment (EA) to comply with the National Environmental Policy Act (NEPA). Several years later, a final EA was issued, accompanied by a USFWS finding that the proposed enhancement program would have no significant impact on the natural environment. Additionally, the Kenai Refuge Manager conducted a Wilderness Act consistency review in 1997; the consistency review agreed with the United States Department of the Interior's Regional Solicitor's office's conclusion that the enhancement project did not conflict significantly with the purpose of the Act by either altering the natural conditions of the area, or by constituting a commercial enterprise. Relying on the various findings, the USFSW issued a special use permit to the CIAA to allow the project to proceed. In response, the Wilderness Society and the Alaska Center for the Environment filed suit, arguing that the enhancement project violated the Wilderness Act.

The Ninth Circuit first addressed the level of deference to be accorded the USFWS decision. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), the Supreme Court articulated a two-step test for judicial review of administrative decisions. If the intent of Congress is clear from the statute, both an agency and a court must adhere to it. On the other hand, if a statute is silent or ambiguous, a court must defer to an agency's interpretation, as long as it is a permissible construction of the statute. If an agency's decision is not a permissible construction, it is deemed arbitrary and capricious.

Section 4(c) of the Wilderness Act states that "there shall be no commercial enterprise . . . within any wilderness area." 16 U.S.C. § 1133(c). Hence, if the restocking program constituted a commercial enterprise, the USFWS's approval of it would violate the Act. Applying the first step of the *Chevron* analysis, the Ninth Circuit considered the meaning of "commercial enterprise," concluding that it is a "project or undertaking of or relating to commerce." The court also determined that the Wilderness Act's purpose was to preserve wilderness lands so that they remained untrammeled by man. Accordingly, the enhancement project did not further the purposes of the act. Because the language of the Wilderness Act was clear on its face, the Ninth Circuit held that it owed no deference to the USFWS's interpretation.

The court observed that although the enhancement project had a benign purpose of improving fishermen's catches and presented little

visible detriment to the Kenai Wilderness, it nevertheless did nothing to further the purposes of the Wilderness Act. Noting that the Supreme Court had not given explicit guidance on how to assess a commercial enterprise when "faced with activities involving mixed purposes and effects," the Ninth Circuit turned to *Sierra Club v. Lyng*, 662 F. Supp. 40 (D.D.C. 1987), for guidance. In *Lyng*, the court rejected a Forest Service initiative to reduce bug and disease infestations using an extensive tree-cutting and chemical-spraying campaign in a wilderness area. The court concluded that the purpose and effect of the program was simply to protect commercial timber and private interests and, as such, the Secretary of Agriculture was required to prove that the program was consistent with wilderness values for the actions to be permitted.

Relying on *Lying*, the Ninth Circuit determined that "as a general rule both the purpose and the effect of challenged activities must be carefully assessed in deciding whether a project is a 'commercial activity' within the wilderness that is prohibited by the Wilderness Act." Although the enhancement project was not as destructive to the wilderness as building a McDonald's restaurant on the shores of Tustumena Lake, the primary purpose of the enhancement project was to advance commercial interests. Similarly, the primary effect of the project was to assist the commercial fishermen in the area, with the insignificant secondary effect of benefiting sport fishermen. As such, neither the purpose, nor the effect of the project matched the congressional mandate articulated in the Wilderness Act.

The Ninth Circuit also rejected the notion that its opinion would be different if it had determined that the language of the Wilderness Act was ambiguous, and had proceeded under the second step in the *Chevron* analysis. Citing *United States v. Mead Corp.*, 533 U.S. 218 (2001), the court reasoned that an agency is not entitled to heightened deference unless it can show that "it has the general power to 'make rules carrying the force of law' and that the challenged action was taken 'in the exercise of that authority.'" In this case, none of the documents (the EA, special use permit, Solicitor's opinion, etc.) issued by the USFWS carried the force of law. Accordingly, even if the term "commercial enterprise" were considered ambiguous, the enhancement project would still be prohibited in the Kenai Wilderness.

Mathew Blackwelder