RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

Engine Manufacturers Ass'n v. South Coast Air Quality Management District, 124 S. Ct. 1756 (2004)

In *Engine Manufacturers Ass'n*, the United States Supreme Court reversed and remanded a decision of the United States Court of Appeals for the Ninth Circuit holding that section 209 of the Clean Air Act (CAA), 42 U.S.C. § 7543 (2000), did not preempt six Fleet Rules (Fleet Rules) enacted by the South Coast Air Quality Management District (District). The District had enacted the Fleet Rules to regulate vehicle purchases by various fleet operators that did not comply with stringent emissions requirements. The Supreme Court held that the Fleet Rules were preempted by section 209 of the CAA, rejecting the District's argument that the Fleet Rules were not preempted because they dealt with the purchase of vehicles rather than their manufacture or sale. However, in reaching its decision on the preemption issue, the Supreme Court did not hold that the CAA wholly preempted the Fleet Rules, but instead instructed the lower courts to address several questions not previously raised at trial, on appeal, or in the petition for certiorari.

The Los Angeles area has long been known as a primary example of the urban smog problem. This reputation is a result of the high concentration of pollutants in the region's air that result from its unique geography, heavy reliance on automotive transportation, and wide variety of pollution sources. The District is the California subdivision responsible for the control of air pollution in the South Coast Air Basin (Basin), which includes all of Orange County and the nondesert portions of Los Angeles, Riverside, and San Bernardino Counties. Between June and October 2000, the District enacted six Fleet Rules that prohibited various public and private fleet vehicle operators from leasing or purchasing vehicles that did not comply with certain emissions specifications established by the California Air Resources Board, a statewide regulatory body on air pollution.

In August 2000, petitioner Engine Manufacturers Association sued the District, claiming that the six Fleet Rules were invalid because they were preempted by section 209 of the CAA. This provision prohibits states from adopting or attempting to enforce any state or local standard that relates to the control of emissions from new motor vehicles or new motor vehicle engines. *See* CAA § 209(a), 42 U.S.C. § 7543(a). The United States District Court for the Central District of California upheld the Fleet Rules, ruling that the CAA did not preempt the local legislation.

The district court reasoned that section 209 of the CAA did not preempt because the Fleet Rules were outside the definition of "standards" in that provision, and because they regulated only the purchase of vehicles that were otherwise certified for sale in California. The Ninth Circuit affirmed the decision and the Supreme Court granted certiorari.

The principle issue before the Supreme Court was whether the Fleet Rules escaped preemption under section 209 of the CAA because they addressed the purchase of vehicles, rather than their manufacture or sale. Engine Manufacturers Ass'n and Western States Petroleum Ass'n (collectively petitioners) argued that, in accordance with the holdings of the lower courts, the meaning of "standard" in section 209 is a limited production mandate requiring manufacturers to ensure that their vehicles meet certain emissions requirements. *See Engine Mfrs. Ass'n*, 124 S. Ct. at 1761. The Supreme Court found this argument flawed, and stated that the standards specified in section 209 are separate and distinct from the enforcement mechanisms explicitly provided for in other parts of the CAA. *Id.* For the purpose of this analysis, the Court relied on the principle that the statutory construction is based on the ordinary meaning of the language used by Congress. *Id.* (citing Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)). According to the Court's reading, the provisions following section 202 of the CAA serve to enforce the emission criteria "standards" that are set forth in section 202. *See* CAA §§ 202-206, 42 U.S.C. §§ 7521-7525. For this reason, the Supreme Court ruled that "standard" was not a production requirement as argued by the petitioners.

In its opinion, the Supreme Court cited the enforcement sections of the CAA to make its case that the purchase and sale distinction raised by the petitioners was flawed. Section 203 of the CAA forbids manufacturers from selling a new motor vehicle not covered by a "certificate of conformity." CAA § 203(a), 42 U.S.C. § 7522(a). Section 206 allows the manufacturers to obtain this certificate of conformity by demonstrating to EPA that their vehicles or engines are in compliance with the section 202 standards. *See* CAA § 206, 42 U.S.C. § 7525. The provisions in sections 204 and 205 create procedures by which manufacturers and dealers subject to the CAA can be fined through civil or administrative actions. *See* CAA §§ 204-205, 42 U.S.C. §§ 7523-7524. According to the Supreme Court, these sections of the CAA demonstrate that the definition of standard put forward by petitioners—that "standard" is a production mandate—is a flawed attempt to group together several provisions of the CAA that are functionally distinct.

In addition, the Supreme Court cited the use of the term "standards" in section 246 of the CAA, which requires state-adopted and federally approved restrictions on the purchase of fleet vehicles to meet clean air standards, to support its ruling. *See* CAA § 246, 42 U.S.C. § 7586. The Court stated that this section of the CAA demonstrated that Congress had contemplated enforcing emissions standards with the use of vehicle purchase requirements in sections other than section 209. *See Engine Mfrs. Ass'n*, 124 S. Ct. at 1762; *see also* CAA §§ 241-250, 42 U.S.C. §§ 7581-7590. On this issue, the district court had reasoned that it made no sense to conclude that the CAA would authorize purchasing restrictions in one situation and prohibit them as an adoption of a standard on the other hand. *See Engine Mfrs. Ass'n*, 124 S. Ct. at 1762. The Supreme Court invalidated the district court's conclusion, reasoning that Congress's prescription of detailed requirements for such purchasing programs is inconsistent with unconstrained state authority to enact programs that ignore those requirements.

According to the Court, the purchase and sales restriction distinction argued by the District and adopted by the lower courts as support for preemption makes no sense within the context of the CAA. *See id.* "The manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them." *Id.* Based on this reasoning, the Court declined to read a purchase and sales restriction distinction into section 209 and reversed the district court's decision. In reaching this decision the Court also emphasized the "carefully calibrated regulatory scheme" of the CAA as set up by Congress. *Id.* at 1752. The CAA was designed to provide uniformity in the regulation of air pollution across the United States and allowing one state or political subdivision to enact rules differing from the federal laws would decrease the uniformity of law across state lines and hinder the CAA's effectiveness.

Although the Supreme Court invalidated the Fleet Rules as preempted by the CAA, Justice Souter's dissent demonstrated a strong disagreement with the majority's holding. The dissent stressed that the Basin is the only region in the United States designated as being in "extreme nonattainment" in terms of ozone, and that the District should be able to enact this type of legislation to address air pollution problems. The Court's holding, according to the dissent, "prohibits one of the most polluted regions in the United States from requiring private fleet operators to buy clean engines that are readily available on the commercial market." *Id.* at 1765. The dissent disagreed with the majority's preemption analysis and their interpretation of section 209 of

the CAA, and offered two interpretive principles in support of its own reading on preemption.

First, the dissent argued that there is a presumption against federal preemption of state legislation, particularly where Congress has legislated in a field that the states have traditionally occupied. *See id.* The dissent emphasized "'the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). In support of a presumption against preemption of the Fleet Rules, the dissent looked to the CAA's declaration of purpose, which gives the primary responsibility for air pollution control at its source to the state and local governments. *See id.*; *see also* 42 U.S.C. § 7401(a)(3). The dissent argued that this presumption against preemption of state law applies both to the inquiry of whether Congress intended to preempt, as well as to the scope of the intended preemption of state legislation. *See Engine Mfrs. Ass'n*, 124 S. Ct. at 1766 (citing *Medtronic*, 518 U.S. at 485).

Second, the dissent looked to the legislative history of the statute to support its conclusion that "Congress's purpose in passing it was to stop States from imposing regulatory requirements that directly limited what manufacturers could *sell*." *Id.* (emphasis added). In examining the hearings and briefings before the 1967 Amendments to the CAA, the dissent argued that in creating these provisions, Congress was responding to the automobile industry's fear that states would restrict vehicle manufacturers from selling engines that did not meet requirements specified by the state. *See id.* According to this interpretation, in these provisions Congress was addressing restrictions on vehicle sales by manufacturers, but not requirements on purchasing such as those specified in the Fleet Rules.

According to the dissent, section 209 of the CAA gives full force to a presumption against preemption of the Fleet Rules, as well as an interpretation of the CAA as a means to protect the automobile industry against states barring the *sale* of vehicles due to idiosyncratic state emissions requirements. *See id.* The dissent interpreted section 202 of the Act to regulate vehicles solely before their sale, and section 203 to regulate what manufacturers could produce for sale. *See id.* Most importantly, these provisions leave out any discussion of vehicle purchasers, effectively leaving purchasers unregulated by the CAA. *See id.* ("Section 209(a) simply does not speak to regulations that govern a vehicle buyer's choice between various commercially available options."). In light of this "permissible reading of the 1967

amendments," section 209(a) has no preemptive effect on the provisions of the CAA regarding vehicle purchase. *Id.* For this reason, the dissent argued that the CAA does not preempt the Fleet Rules, and that the Fleet Rules should be upheld.

The dissent also noted that the Fleet Rules contain a section providing that purchasers of the vehicles at issue may only be required to purchase vehicles meeting the specified requirements if such vehicles are "commercially available." The dissent argued that this commercial availability proviso was an integral part of the preemption analysis, and influenced the validity of the Fleet Rules under the CAA. This argument, based on notions of practicality and legislative purpose, claimed that because fleet owners are free to purchase any vehicles if the required vehicles are not commercially available, the CAA should not preempt the Fleet Rules.

In reaching its opinion in *Engine Mfrs. Ass'n*, the majority focused on the section 209's language, interpreting that language as being categorically absent of any exceptions for vehicle standards imposed through purchase restrictions rather than as restrictions placed directly upon manufacturers. The dissent's presumptions against preemption did not influence the majority, which argued that these presumptions—even if applied to the analysis—in no way affected its outcome. Despite its ruling that the CAA preempts the Fleet Rules, however, the majority left open several issues for the lower courts to resolve on remand. These included whether some of the Fleet Rules could be viewed as internal purchasing decisions by the state (which would affect the preemption analysis) and whether section 209 preempted the Fleet Rules above and beyond new vehicle purchases.

Joshua Fields

Weiler v. Chatham Forest Products, Inc.,
370 F.3d 339 (2d Cir. 2004)

The United States Court of Appeals for the Second Circuit recently reversed a district court decision which held that section 304(a)(3) of the Clean Air Act (CAA), 42 U.S.C. § 7604(a)(3) (2000), permitted a plaintiffs' citizen group to sue in federal court to challenge a state environmental agency's determination that a defendant does not need a "major" source operating permit to proceed with construction of a proposed facility. This case stemmed from a decision by the New York Department of Environmental Conservation (NYDEC) to issue a "synthetic minor" source operating permit to Chatham Forest Products,

Inc. (Chatham) for a strand board manufacturing facility, instead of a "major" source operating permit pursuant to New York's State Implementation Plan. Under the CAA, any entity proposing to construct a major emitting source of pollutants must obtain a permit prior to construction. CAA §§ 165(a), 172(c)(5), 42 U.S.C. §§ 7475(a), 7502(c)(5). The CAA defines a major emitting facility as "any stationary facility . . . which directly emits, or has the potential to emit" pollutants in excess of the standards set by the Environmental Protection Agency (EPA). CAA § 302(j), 42 U.S.C. § 7602(j). In clarifying this language, the court, relying on *National Mining Ass'n v. EPA*, 59 F.3d 1351, 1363-65 (D.C. Cir. 1995), stated, "[A] proposed facility that is physically capable of emitting major levels of the relevant pollutants is to be considered a major emitting facility under the Act unless there are legally and practicably enforceable mechanisms in place to make certain that the emissions remain below the relevant levels." However, the CAA delegates primary responsibility for enforcement of the provisions to the states. *See* N.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316, 320 (2d Cir. 2003). As a result, the EPA does not issue major source construction permits, but delegates this duty to the state. This is accomplished through a State Implementation Plan (SIP). New York's SIP allows a facility that has capacity to emit major levels of a particular pollutant to avoid the stringent requirements of a "major source" permit and qualify as a minor emitting facility if the facility agrees to cap its pollution output. When a facility does agree to cap its pollution output, it can be granted a "synthetic minor" source permit.

In the present case, the NYDEC approved Chatham as a "synthetic minor" source because it determined that the mechanisms in place to limit the pollution output of the facility were effective and enforceable. The plaintiffs, a group of citizens who live and work in the vicinity of the proposed facility, complained that the facility was required to be permitted as a major emitting facility because the control mechanisms that Chatham proposed were neither effective nor enforceable. The plaintiffs further alleged that since the geographic area of the proposed facility was located within a nonattainment zone for several pollutants that the Chatham facility must be permitted as a "major" source. The plaintiffs brought suit in the United States District Court for the Northern District of New York under section 304(a)(3) of the CAA, which allows "any person" to "commence a civil action on his own behalf" against "any person who proposes to construct" any new major emitting facility without a permit required under the CAA. CAA § 304(a)(3), 42 U.S.C. § 7604(a)(3). The trial court held that this section did not allow a private

litigant to sue in federal court to challenge the NYDEC's decision to issue a "synthetic minor" source permit instead of a "major" source permit and thus, the plaintiffs had not stated a cause of action.

The Second Circuit began its discussion by noting that its review of the district court's decision would be de novo. The court then looked at the language of the statutory provision in question, CAA § 304(a)(3), 42 U.S.C. § 7604(a)(3), and the allegations by the plaintiffs that "the proposed factory [would] be a major emitting facility within the meaning of the Act and that Chatham ha[d] not obtained the permits required . . . for [a] major emitting facilit[y]," concluding that if the plaintiffs' allegations were proven, they appeared to suffice to state a cause of action under the language of the statute. Since at this stage of the litigation the court was required to hold the plaintiffs' allegations as true, the court stated that it was difficult to ascertain in what respect the trial court found no cause of action had existed.

Chatham's major contention was that the structure of the CAA barred citizen suits brought under section 304(a)(3) that challenged a state environmental agency's determination that a proposed facility was not a "major" source of pollution. In arguing that citizen suits are structurally prevented by the act, Chatham claimed that (1) Congress had provided other avenues of enforcement making citizen suits under section 304(a)(3) unnecessary; (2) that Congress had intended to give a major role to states in carrying out the mandates of the Act and federal judicial review of state's decisions would undermine that intent; and (3) by approving New York's SIP, the EPA had insulated Chatham from attack by citizens for claims of improper enforcement mechanisms imposed by the NYDEC. The court then moved to a discussion of why these contentions failed.

The court first recognized the importance of citizen suits in enforcement of the CAA's regulatory scheme. It explained that "citizen suit provisions were designed not only to 'motivate government agencies' to take action themselves, but also to make citizens partners in the enforcement of the Act's provisions." *See* Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985). The court further recognized that Congress had the power to prevent citizen suits through the use of administrative proceedings or court action; however, since Congress had not explicitly precluded citizen suits pursuant to section 304(a)(3), it was doubtful that Congress had intended such a prohibition.

The court then moved to an analysis of Chatham's arguments. First, it recognized that other mechanisms of enforcement existed to challenge the NYDEC's determination, namely actions against the NYDEC instead

of the facility. These actions included an article 78 administrative proceeding in New York state court, encouraging the EPA to take action on its own against the NYDEC, and suit by a third party against the NYDEC for failure to comply with its SIP pursuant to section 304(a)(1). The court also noted that section 304(a)(1) would also allow a third party to bring suit against private entities operating facilities that have violated the CAA's standards. However, the court stated that congressional intent to allow suits under section 304(a)(3) are not abolished simply because alternative methods existed.

The court stated that the alternatives listed by Chatham were not really adequate substitutes for a section 304(a)(3) citizen suit pursuant to the CAA. It noted that even though New York had provided state review for the NYDEC decision, Congress had not mandated it and the state action may not have provided all of the remedies and awards that were available in a section 304(a)(3) suit. In addressing Chatham's contention that a section 304(a)(1) suit against the NYDEC was available, the court again stated that the relief was not the same as under the section 304(a)(3) suit because notice would be required (sixty days to both the EPA, the state, and the private party) and suit could only be brought by the plaintiffs after a facility had been built and was operating. The court recognized Congress's intent to provide for preconstruction actions in holding that a postconstruction right is not adequate. In addressing Chatham's final contention on available alternatives—that the EPA may take action against the facility if the Act is violated—the court explained that "viewing such an enforcement mechanism as a substitute for a citizen's suit would undermine the very purpose of the citizen's right to sue." *Weiler*, 370 F.3d at 345.

Chatham's next claim, that Congress intended states to play a significant role in the implementation of the CAA and thus foreclosed citizen suits under section 304(a)(3), was met with apprehension by the court. The court recognized that if Chatham's argument was correct, a section 304(a)(1) citizen suit would also be prohibited; however, even Chatham admitted that a section 304(a)(1) suit was still available. The court also questioned how judicial oversight of state action could undermine state authority under the CAA, since Congress had required both state agencies and private entities to meet the CAA's requirements and provided citizens with a mechanism to ensure that both comply. In a footnote, the court intimated that, like in a section 304(a)(1) suit, the plaintiffs may need to exhaust administrative remedies and state judicial remedies before proceeding in federal court; however since the issue was not before the court, it refused to definitively rule on this question.

Chatham's final contention, that the EPA insulated private entities from section 304(a)(3) suits when it approved New York's SIP, was also met with trepidation. Chatham argued that once the EPA approved the SIP, any private entity operating under a state permit was immune from a citizen suit. The court found this argument to be a policy rationale that simply was not supported by congressional enactment.

The court concluded by returning to the basic premise that the plain language of the CAA did not foreclose citizen suits in this situation. As the court made clear, "a state determination that a prospective source of air pollution is not a major emitting facility does not prevent a private the plaintiff from bringing a suit seeking to enjoin the construction of the facility pursuant to section 304(a)(3) of the Act." *Id.* at 346.

Loyd Bourgeois

II. CLEAN WATER ACT

American Canoe Ass'n v. District of Columbia Water & Sewer Authority, 2004 WL 2091485 (D.C. Cir. Sept. 17, 2004)

In *American Canoe Ass'n*, the United States District Court for the District of Columbia granted the defendant's motion for summary judgment holding the District's Water and Sewer Authority (WASA) had no obligation under its National Pollutant Discharge Elimination System (NPDES) permit to install and maintain carbon filters in sewer vents located along National Park Service property. 306 F. Supp. 2d 30, 32 (D.D.C. 2004). In September 2004, the United States Court of Appeals for the District of Columbia dismissed the plaintiffs' appeal to overturn the lower court's ruling, and upheld the decision that odor control could not be enforced by means of a citizen suit under the Clean Water Act (CWA).

The American Canoe Association, the Potomac Conservancy, and the Canoe Cruisers Association of Greater Washington brought a citizen suit under section 505 of the CWA, alleging WASA violated its NPDES permit issued by the Environmental Protection Agency (EPA). The plaintiffs charged the NPDES permit required WASA to fulfill its obligation to the National Park Service (Park Service) to install odor-controlling carbon filters on sewer vents on the sewer line running through the Chesapeake and Ohio Canal National Park. According to the plaintiffs, without carbon odor-filters the vents emit hydrogen sulfide,

which adversely affects the health and environmental interests of the groups' members.

First, the district court established that the plaintiffs satisfied notice requirements by alleging an ongoing violation under the CWA and properly identifying the Maintenance and Operation Clause (M&O Clause) as the specific permit provision alleged to be violated. WASA argued this suit was barred by the general five-year statute of limitations in 28 U.S.C. § 2462 (2000). WASA stated that if the violation occurred at all it occurred before 1987, thus the plaintiffs' 1999 suit should be barred. The court rejected WASA's argument and relied on *United States v. Reaves*, 923 F. Supp. 1530, 1533 (M.D. Fla. 1996), to find that the five-year statute of limitations period is not tolled when the defendant exhibits an ongoing violation.

Second, the district court found the plaintiffs satisfied the standing requirement by bringing suit under a particular CWA provision and alleging that WASA violated a specific permit provision. WASA argued the plaintiffs did not have standing to sue under the CWA because their odor claim is not relevant to the CWA goal of regulating water quality. WASA argued that a complaint about odor, an air emission, does not fall into the "zone of interests" intended to be protected by the CWA. The court was not persuaded by WASA's argument observing, instead, that the determination of whether a claim is within the zone of interests protected by a statute is not evaluated against the overall purpose of the Act, but rather in reference to the particular provision of law a plaintiff relies upon. The district court found the plaintiffs had standing to enforce a violation of the NPDES permit because they alleged a specific violation of the CWA under sections 1342 and 1365(a)(1). The plaintiffs did not lack standing because odor (and not a deterioration of water quality) was the suffered injury. The district court, supported by a body of persuasive authority, held that a citizen suit may be brought to enforce *all* permit provisions, not simply those regulating the quality of water. *See* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152 (4th Cir. 2000); Northwest Envtl. Advocates v. City of Portland, 56 F.3d 979, 986 (9th Cir. 1995); Conn. Fund for Env't v. Raymark Indus., Inc., 631 F. Supp. 1283, 1285 (D. Conn. 1986).

The district court next addressed the issue of whether WASA had an obligation under the M&O Clause of its 1997 NPDES permit to operate and maintain carbon filters. The boilerplate M&O Clause of the permit required WASA to "properly operate, inspect and maintain all facilities and systems of treatment and control." The court found this language was ambiguous, neither requiring the WASA to maintain carbon filters,

nor excusing them from not maintaining the filters. Therefore, the court referred to extrinsic evidence in order to interpret the M&O Clause.

The plaintiffs' argument that the WASA had an obligation to install odor-controlling filters rested almost entirely on extrinsic evidence because nothing in the 1997 NPDES permit mentioned carbon filters, hydrogen sulfide, or odor controls. The plaintiffs demonstrated that the WASA did in fact have a duty to install carbon filters under the Park Service permits. The plaintiffs argued that because the WASA's predecessor needed the Park Service's permission to construct, maintain, and operate the District of Columbia-based portions of the sewer system, odor control by carbon filter was a necessary precondition of the NPDES permit. The plaintiffs argued that odor control was an implied condition of the NPDES permit, and thus enforceable through the M&O Clause.

The district court stated that the Park Service permits showed the WASA had a duty to install filters. However, because the plaintiffs brought suit under the CWA to enforce an NPDES permit provision, they had the burden of proving not only that WASA had an obligation to operate and maintain filters, but that the obligation was enforceable through the NPDES permit. It found nothing in the record to suggest that the NPDES permit incorporated the Park Service obligation to install odor-controlling filters. Further, the district court stated that the plaintiffs provided no proof showing that either WASA or the Park Service intended that the Park Service permit requirements were enforceable through the NPDES permit. Rather, it discussed an EPA guidance document indicating the M&O clause common to all NPDES permits does not generally enforce "implied conditions," but only requires permitees to comply with express permit provisions. It also acknowledged additional EPA documents indicating that the agency abstains from regulating odor, indicating that the regulation is more appropriately left to the state common law of nuisance. The district court found, as a matter of law, that there was no connection between the NPDES permit and the Park Service requirement that the WASA maintain carbon filters. Therefore, because the plaintiffs failed to prove a legal obligation violated by the WASA under the CWA, the WASA had no obligation under its NPDES permit to install or maintain carbon filters.

Meaghan Sullivan

Citizens Coal Council v. EPA,
385 F.3d 969 (6th Cir. 2004)

In *Citizens Coal Council*, the United States Court of Appeals for the Sixth Circuit invalidated the final rule that the Environmental Protection Agency (EPA) promulgated on January 23, 2002, to regulate two new categories of coal mining point sources under the Clean Water Act.

A. Clean Water Act

Congress enacted the Clean Water Act (CWA) to restore and maintain the integrity of the nation's waters. CWA § 101, 33 U.S.C. § 1251 (2000). To achieve these goals, the CWA includes both technology-based limits and water-quality-based limits. The EPA determines the technology-based limits, which require facilities to install various forms of technology to reduce the amount of pollution they generate. The states develop the water quality standards to ensure that the water pollution level does not exceed the level established to protect the body of water's intended use.

The CWA enforces the technology-based regulations through "effluent limitation guidelines." CWA § 301, 33 U.S.C. § 1311(b). Section 304 of the CWA requires the EPA to identify specific control measures and practices available to each category and class of point sources. CWA § 304, 33 U.S.C. § 1314(b)(2)(A). Then the EPA must determine the degree of effluent reduction attainable for three levels of technology: best practicable control technology (BPT), best available technology economically feasible (BAT), and best conventional pollutant control technology (BCT). CWA § 304, 33 U.S.C. § 1314(b)(4)(A). Finally, the EPA must identify the factors it will consider when it makes these determinations. CWA § 304, 33 U.S.C. § 1314(b)(1)(B), (b)(2)(B), (b)(4)(B).

Section 301 of the CWA further requires point sources that discharge toxic and nonconventional pollutants to apply BAT to meet the BAT effluent limitations. CWA § 301, 33 U.S.C. § 1311(b)(2)(A). Likewise, point sources that discharge conventional pollutants must apply BCT technology to meet BCT effluent limitations. *Id.* § 301, 33 U.S.C. § 1311(b)(2)(E). These obligations are enforced by issuing National Pollutant Discharge Elimination System (NPDES) permits, which are required for all point source discharges. *Id.* § 301, 33 U.S.C. § 1311(a). To determine the NPDES permit limits, the EPA puts each polluter into an appropriate point source category and subcategory. *See Citizens Coal Council*, 385 F.3d at 973. The EPA then determines the

appropriate technology level for each polluter. *Id.* Finally, the EPA limits the allowable discharge of various pollutants. To set effluent limits in individual permits, the EPA imports limitation standards from CWA section 304(b) and applies the numeric limitation in the NPDES permit. *Id.*

The EPA created the Coal Mining Point Source Category as one of its industry categories. In 1985, the EPA amended the effluent limitation guidelines and created four subcategories. 50 Fed. Reg. 41,296 (1985). The EPA did not include a category for coal mining operations that sought to remine previously mined, but later abandoned sites. Therefore, the regulations for mining virgin land applied. This imposed a great potential liability on anyone who took over this abandoned land, and in many cases this meant that discharges of untreated pollution that could otherwise have been treated continued. Congress responded to this disincentive by passing the "Rahall Amendment," which was codified as section 301(p) of the CWA. CWA § 301, 33 U.S.C. § 1311(p).

This amendment sought to encourage the remining of abandoned sites by exempting certain remining operations from effluent limitations, thereby making the remining economically feasible. *Citizens Coal Council*, 385 F.3d at 974. Under the amendment, modified permits included site-specific numerical limits "for pre-existing discharges of iron, manganese, and pH based on the Administrator's 'best professional judgment.'" However, the Administrator could not issue a permit that would allow discharges to exceed the preexisting levels. Applicants for remining permits were also required to present evidence that the remaining operations would potentially improve the water quality, and that the permits complied with state water quality standards.

B. EPA's Final Rule

EPA's Final Rule created two new subcategories under the Coal Mining Point Source Category and promulgated regulations for both.

1. Coal Remining Subcategory

These regulations apply to "preexisting discharges" at "coal remining operations." Under the regulations, each applicant must create a site-specific Pollution Abatement Plan and submit it to the federal or state agency that issues the NPDES permits. *Id.* The Pollution Abatement Plans must contain "best management practices," and the plans must "reduce the pollution load from pre-existing discharges." *See* 40 C.F.R. § 434.72(a) (2004). They must also contain design and

construction specifications, maintenance schedules, monitoring and inspection criteria, and the expected performance of best management practices. *Id.* Under the Final Rule, these plans satisfy the BPT, BAT, or BCT for remining operators. *Id.* § 434.74.

The Final Rule also sets effluent limitations for four pollutants: total iron, total manganese, net acidity, and total suspended solids. For each of these pollutants, the effluent limitation is the baseline loading—the condition that exists when remining commences. *Id.* § 434.72(b)(1).

2. Western Alkaline Coal Mining Subcategory

This subcategory regulates alkaline mine drainage in "western coal mining operations." *Id.* § 434.81. The Final Rule does not set uniform standards for drainage; rather, operators must submit "a site-specific Sediment Control Plan . . . designed to prevent an increase in the average annual sediment yield from pre-mined undisturbed conditions." *Id.* § 434.82(a). Each Sediment Control Plan must identify best management practices, as well as describe design and construction specifications, maintenance schedules and inspection criteria. *Id.* The Sediment Control Plans do not contain numerical sediment limitations. Instead, operators must use watershed models to demonstrate that sediment yields will not exceed the premined conditions. *Id.* § 434.82(b). The operator's only other obligation is to use the best management practices described in the Sediment Control Plan. *Id.* § 434.82(c). These plans constitute BPT, BAT, and BCT. *Id.* § 434.84.

C. The Court's Analysis

The court reviewed the Final Rule under the Administrative Procedure Act's arbitrary and capricious standard. The plaintiffs argued that the coal remining regulations were inconsistent with section 301(p) of the Rahall Amendment for four reasons. First, the definition of "coal remining operation" in the Final Rule differed from the definition in the Amendment. Second, the Final Rule added total suspended solids to the list of pollutants that would receive relaxed standards. Third, the Amendment required numerical limits and the Final Rule had none. Finally, the Final Rule applied different standards to preexisting discharges than would apply to remining discharges. *Citizens Coal Council*, 385 F.3d at 977-78.

The plaintiffs also offered four challenges to the Western Alkaline Coal Mining Rule. They first argued that best management practices are not appropriate effluent limitations because they are not numeric criteria.

Second, the Administrator did not show that it was infeasible to apply the existing effluent limitations. Third, they alleged the subcategory was irrational and overbroad. Finally, the plaintiffs argued that the subcategory was inconsistent with the CWA and the Surface Mining Control & Reclamation Act (SMCRA).

The EPA first argued that the amendment did not limit its authority to issue the regulations. It further argued that it was a reasonable exercise of its authority to require "best management practices" in lieu of numeric effluent limitations. Finally, the agency argued that that court must affirm its decision to apply strict regulations to commingled waste streams because it relied on the existing regulation in promulgating the Final Rule. As to the Western Alkaline Coal Mining Subcategory, the EPA first argued that numeric limitations were infeasible. Secondly, it argued that it relied on scientific information to support the creation of the subcategory, and so it was not arbitrary and capricious. Finally, the agency argued that setting effluent limitations at premined background levels was consistent with the CWA and the SMCRA.

The court first considered whether section 304 of the CWA allowed the EPA to create subcategories under the Coal Mining Point Source Category and whether it authorized the EPA to promulgate regulations that conflicted with the Rahall Amendment. It reviewed the EPA's construction of the statute under *Chevron* (*Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)) and concluded that neither the CWA nor the Amendment addressed whether the Administrator could create additional subcategories. The court further determined that the Amendment was an opt-out for reminers, and that it did not address the EPA's authority to promulgate regulations that exceed its provisions. The court stated that because the amendment was an opt-out rather than a regulatory scheme, it was irrelevant that the EPA's regulations were inconsistent with its provisions. Therefore, the EPA's reading of the CWA was reasonable under *Chevron*.

1. Coal Remining Subcategory

The Sixth Circuit then considered whether the EPA's regulations for the Coal Remining Subcategory were valid. Under the CWA, effluent limitations are created and implemented in a five-step process. First, the EPA must identify "the control measures and practices" that are available to the various classes of point sources. CWA § 304, 33 U.S.C. § 1314(b)(3). Second, it must identify the factors it will consider in deciding which of these measures apply. CWA § 304, 33 U.S.C. § 1314(b)(1)(B), (b)(2)(B), (b)(4)(B). Then, the EPA must apply the

control measures to each of the three levels of technology—BPT, BAT, and BCT. Third, the EPA must determine "the degree of effluent reduction attainable through the application of the three technology levels." CWA § 304, 33 U.S.C. § 1314(b)(1)(A), (b)(2)(A), (b)(4)(A). These three steps occur pursuant to CWA section 304(b). Fourth, these guidelines become law under section 301(b). CWA § 301, 33 U.S.C. § 1311(b). Finally, these limitations are incorporated into individual NPDES permits. CWA § 402, U.S.C. § 1342(a)(1).

The court determined that under the CWA, "the EPA should have first identified the technological tools available to coal reminers and then determined the amount of effluent reduction attainable." *Citizens Coal Council*, 385 F.3d at 981. Instead, the EPA started with the pollution level it desired and worked backward to define the technology as site-specific plans. The court concluded that the EPA had shirked its duty "to determine the degree of effluent reduction attainable," because the Final Rule defines the reduction as zero "without ever exploring the prospect of accomplishing more." *Id.* It acknowledged that there are circumstances where the reduction attainable might actually be zero, but stated that it was arbitrary and capricious for the EPA to set levels that maintained the status quo rather than reduced pollution. *Id.* The court held that "where the EPA fails to determine how much reduction in pollution is possible, and to do so by reference to the amounts of pollutants," it deviates from the statutory commands of the CWA. *Id.* at 981-82. It further noted that using background conditions results in different effluent limitations for each site and that "the CWA disallows plant-by-plant regulations." *Id.* at 982. Therefore, it struck down the coal remining regulations.

The Sixth Circuit noted an additional problem with the EPA's Final Rule: there was no evidence in the record that the EPA considered each of the factors enumerated in the CWA, factors such as the age of the equipment and facilities involved, the engineering aspects of applying various types of control techniques, process changes, and other nonwater quality environmental impact. *See id.*; CWA § 304, U.S.C. § 1314(b)(1)(B), (b)(2)(B), (b)(4)(B). The court therefore struck down the EPA's decision to use Pollution Abatement Plans with best management practices as BPT, BCT, and BAT for the Coal Remining Subcategory.

Finally, the court considered whether the EPA could apply different standards to preexisting discharges that were commingled with wastes from active mining operations. It held that because the Rahall Amendment is only an opt-out, rather than a regulatory scheme, it does

not prevent the EPA from applying this commingling rule. Because no other provision of the CWA prohibited it, the court deferred to the EPA's construction of the statute.

2. Western Alkaline Coal Mining Subcategory

The Sixth Circuit applied the same reasoning to determine that these regulations were invalid. First, by adopting nonnumeric effluent limits, the EPA shirked its duty because it failed to determine the amount of effluent reduction attainable. Secondly, the EPA abused its discretion because it did not consider the factors enumerated in the CWA when it decided what control measures would become BPT, BAT, and BCT. Therefore, the court struck down the Western Alkaline Coal Mining regulations.

Karen Bishop

Florida Public Interest Research Group
Citizen Lobby, Inc. v. EPA,
2004 WL 2212023 (11th Cir. Oct. 4, 2004)

In the instant suit, the plaintiffs, consisting of various environmental groups, sued the Environmental Protection Agency (EPA) under the citizen suit provision of the Clean Water Act (CWA), CWA § 505, 33 U.S.C. § 1365(a)(2) (2000), to force the agency's review of Florida's Impaired Waters Rule, FLA. ADMIN. CODE ANN. r. 62-303.100 to -.700, under the EPA's unambiguous requirement to review any new or revised water quality standard for compliance with the CWA.

The plaintiffs claimed that the substantive import of the so-called "Impaired Waters Rule," despite its language to the contrary, was to effectively change Florida's water quality standards. Specifically, the plaintiffs alleged that the Impaired Waters Rule changed, or added to, the nutrient standard provided by Florida's Surface Water Quality Standards, FLA. ADMIN. CODE ANN. r. 62-302.200 to -.800, by its adoption of specific nutrient concentrations to be used for assessing nutrient impairment and by providing specific numeric criteria for nutrient concentrations, neither of which existed in the Florida Surface Water Quality Standards.

Florida's Surface Water Quality Standards were adopted as part of the concerted effort of the state and federal government to effectuate the purpose of section 101 of the CWA, 33 U.S.C. § 1251, "to restore and maintain the integrity of the nation's waters." Under the CWA, each state

is responsible for establishing water quality standards for all of its water bodies. This responsibility includes (1) designating the use for each intrastate waterbody and (2) setting the criteria for the permitting of those uses, using either numeric or narrative form. *See* 40 C.F.R. §§ 131.2, 131.3(b) (2004).

Florida's Surface Water Quality Standards contain the maximum levels of pollutants that a water body can contain before becoming unsafe and state that "in no case shall nutrient concentrations of a body of water be altered so as to cause imbalance in natural populations of flora and fauna." FLA. STAT. § 403.021(11).

While the state is responsible for establishing the water quality standards, the CWA requires the EPA to review and approve or disapprove any standards adopted by the state. 40 C.F.R. § 131.5(a). In making its review, the agency is guided by several considerations, including:

> Whether the state has adopted criteria that protect the designated water uses; [w]hether the State has followed its legal procedures for revising or adopting standards; [and w]hether the State standards which do not include the uses in section 101(a)(2) of the [CWA] are based upon appropriate technical and scientific data and analyses . . . .

Id.

Furthermore, any such water quality standard is required to comply with the EPA's antidegradation policy, which prevents the state from adopting any measure that contributes to the degradation of a water body. *See* CWA § 303, 33 U.S.C. § 1313(d)(4)(B).

While the EPA provided substantial guidance to the Florida Department of Environmental Protection (FDEP) during the early stages of drafting the Impaired Waters Rule, it did not conduct a thorough review of the final version of the rule. On August 28, 2002, the FDEP applied the Impaired Waters Rule, necessitating the review of twenty-two percent of Florida's water bodies and the removal of over 100 water bodies from the Impaired Waters List. Florida submitted its updated list known as the "Group One" update to the EPA for review, per CWA mandate, CWA § 303, 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d).

The EPA reviewed the Group One update to Florida's Impaired Waters List, announcing its use of a standard of reasonableness in determining whether the application of the Impaired Waters Rule was a reasonable approach in identifying impaired waters. In its review, the EPA merely looked to see whether the methodology which Florida used to test the water bodies was reasonable, and approved all water bodies placed on the Group One list under that methodology. For those

methodologies that it did not agree with, such as removal from the Impaired Water list due to size of sample, the EPA conducted a random sample to determine if the methodology failed to "reasonably identify impaired waters." In certain cases, however, the EPA did took a closer look and moved waters back to the Impaired Waters list, based on its own independent review.

In total, the FDEP removed 100 water bodies from the impaired water list, exempting those water bodies from the procedures used to clean up impaired waters dictated by the CWA. As a result, the plaintiffs brought the instant suit in the United States District Court for the Northern District of Florida. They claimed that the EPA "failed to perform any act or duty [under the Act] which is not discretionary with the administrator"—the obligation to review new or revised water quality standards being one of those duties. *See* 33 U.S.C. § 1365(a)(2); Miccosukee Tribe of Indians v. United States, 105 F.3d 599, 602 (11th Cir. 1997). The substance of the plaintiffs' claim was that the import of the Impaired Waters Rule was to revise Florida's Surface Water Quality Standards, thus triggering nondiscretionary review by the EPA.

On May 29, 2003, the district court granted summary judgment to the EPA, holding that the Impaired Waters Rule did not revise the existing water quality standards, and therefore the agency had no nondiscretionary duty to review the rule. On appeal, the plaintiffs argued that the district court erred in determining that the Impaired Waters Rule had not revised the Florida Surface Water Quality Standards.

In its review of the justiciability of the plaintiffs' claims, the United States Court of Appeals for the Eleventh Circuit determined that: (1) the plaintiffs had suffered an injury in fact, (2) the injury was traceable to the conduct of the defendants, (3) the injury was one that could be redressed by judicial action, and (4) the case still presented a live controversy because the EPA's review of the Impaired Waters list was not the comprehensive review contemplated by the CWA.

The Eleventh Circuit next addressed the plaintiffs' claim that the district court erred in determining that the adoption of the Impaired Waters Rule failed to revise the Florida Surface Water Quality Standards. It concluded that the district court erred by failing to conduct a thorough review of the effect of the Impaired Waters Rule on the water quality standards, and remanded the rule for further review.

The court relied heavily upon its decision in *Miccosukee*, in which the Miccosukee Tribe claimed that the EPA was required to review the Everglades Forever Act, FLA. STAT. ANN. § 373.4592, because it changed state water quality standards. *See* 105 F.3d at 603. There, the court held

that the district court erroneously granted summary judgment based on its inappropriate reliance on the state of Florida's representations that the Everglades Forever Act did not change water quality standards, stating, "In the absence of action by the [EPA]. . . the district court should have conducted its own factual findings." *Id.* Thus, the district court could not rely on Florida's representations, had to conduct its own inquiry into the effect of the Everglades Forever Act.

The Eleventh Circuit applied the same rationale in the instant case, rejecting the district court's acceptance of the language in the Impaired Waters Rule that stated it was not a revision of Florida's water quality standards. The court took this rationale further, stating that it was improper for the district court to rely on Florida's failure to follow formal rulemaking procedures in adopting the Impaired Waters Act as evidence that rule was not intended to revise Florida water quality standards.

Because water bodies that would have remained on the list were removed from the list, and thus removed from the cleanup regulations of the CWA, the court concluded that the Impaired Water Rules had the effect of revising Florida's water quality standards by establishing new means of measuring water quality. The court of appeals explained:

> To undertake that analysis [whether the Impaired Waters Rule had the effect of loosening water quality standards] it is necessary to determine whether there were water bodies that were equally polluted both before and after the Impaired Waters Rule took effect, but that were classified differently depending on whether or not the Rule was used.

While the court noted that several bodies of water included in the 1998 Impaired Waters list were "de-listed" in the Group One update, it could not determine whether this was due to the methodology contained in the Impaired Waters Rule, and accordingly remanded for the district court to determine whether as applied, the Impaired Waters Rule was an effective change to Florida's existing water quality standards.

Jessica Hart

III. ENDANGERED SPECIES ACT

Cetacean Community v. Bush, 2004 WL 2348373 (9th Cir. 2004)

In *Cetacean Community*, the United States Court of Appeals for the Ninth Circuit affirmed a district court's ruling that the cetacean community of whales, dolphins, and porpoises (Cetaceans) lacked standing to sue under the Endangered Species Act (ESA), the Marine

Mammal Protection Act (MMPA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA). The court held that the ESA's citizen-suit provision only authorized persons to sue for alleged violations of the Act, and that animals were not authorized to sue in their own names to protect themselves.

The United States Navy uses Surveillance Towed Array Sensor System Low Frequency Active Sonar (SURTASS LFAS) to detect quiet submarines at long range. The technology consists of active components in the form of low frequency underwater transmitters, as well as passive components in the form of hydrophones that detect loud sonar noises, or "pings," returning as echoes. These pings can travel hundreds of miles through the water. The regulations for the Navy's use of the SURTASS LFAS system describes the potential for harmful effects on marine life caused by underwater noise. In particular, the regulations warn that "intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration, and other functions" which could contribute to "minor to severe hemorrhag[ing]" in marine mammals. *Cetacean Cmty.*, 2004 WL 2348373, at *1 (citing 67 Fed. Reg. 46,778).

In September 2002, the Cetaceans, through their attorney, instituted an action in the United States District Court for the District of Hawaii against the President of the United States as well as the Secretary of Defense. They claimed that the Navy's use of the SURTASS LFAS system harmed them by causing tissue damage and other serious injuries and by disrupting biologically important behaviors including feeding and mating. In their action, the Cetaceans sought to compel regulatory review of the Navy's use of the SURTASS LFAS system during threat and wartime conditions. They also sought an injunction ordering the President and Secretary of Defense to consult with the National Marine Fisheries Service under the ESA, 16 U.S.C. § 1536(a) (2000), to apply for a letter of authorization under the MMPA, 16 U.S.C. § 1371(a)(2), and to prepare an environmental impact statement under NEPA, 42 U.S.C. § 4332(2)(C) (2000). Finally, they sought an injunction banning the use of the SURTASS LFAS system until the President and Secretary of Defense comply with what the Cetaceans claimed were statutory requirements. The district court, in granting the defendants' motion to dismiss, held that the Cetaceans lacked standing under the ESA, the MMPA, NEPA, and the APA, 5 U.S.C. § 702 (2000).

The Ninth Circuit, upon de novo review, affirmed the district court's grant of dismissal of the claim under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The court first addressed its

decision in *Palila v. Hawaii Department of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (*Palila IV*). There, in a suit for enforcement of the ESA, the court had written that an endangered member of the honeycreeper family—the Hawaiian Palila bird—"ha[d] legal status and wing[ed] its way into federal court as a plaintiff in its own right" and further that the Palila had "earned the right to be capitalized since it [was] a party to those proceedings." *Cetacean Cmty.*, 2004 WL 2348373, at *2 (quoting *Palila IV*, 852 F.2d at 1107). The Cetaceans based their standing to sue under the ESA on these earlier statements by the court in *Palila IV*. The government argued that these earlier statements were nonbinding dicta. The Ninth Circuit noted that at least two other district courts, relying on language in *Palila IV*, had since held that the ESA grants standing to animals. Seeking to clarify its earlier statements, the court explained that by the time *Palila IV* was decided, the case had already been the subject of three published opinions. Because standing of most of the parties in *Palila I-IV* had been clearly established, the court had not been obliged to consider whether the Palila had standing nor was the court specifically asked to consider whether the Palila had standing. In this context, the Ninth Circuit declared that its earlier statements in *Palila IV* were mere "rhetorical flourishes" which were not intended as "a statement of law, binding on future panels, that animals having standing to bring suit in their own name under the ESA." *Id.* at *3. Because the court had not definitively ruled on the issue of whether animals had standing to sue in their own name, it next addressed that question as a matter of first impression in the Ninth Circuit.

The court noted that the issue of standing involves two distinct inquiries. First, a federal court must determine whether a plaintiff had suffered sufficient injury to satisfy the "case or controversy" requirement of Article III of the Constitution. Second, if a plaintiff has suffered sufficient injury to satisfy Article III, the court must determine whether a statute has conferred "standing" on that plaintiff. The Ninth Circuit noted that where it is arguable whether a plaintiff has suffered sufficient injury to satisfy Article III, the Supreme Court has at times insisted as a matter of "prudence" that Congress make its intention clear before a court will construe a statute so as to confer standing on a particular plaintiff. *See id.* at *4 (citing Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

Addressing the first prong of the standing inquiry, the court declared, "we see no reason why Article III prevents Congress from

authorizing a suit in the name of an animal, any more than it prevents suits brought against artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents." *Id.* at *5. Finding that nothing within the text of Article III specifically precluding a suit in the name of an animal, the Ninth Circuit turned to the second prong of the standing inquiry.

The court first addressed the issue of statutory standing in the context of the APA. Section 10(a) of the APA provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The Supreme Court has construed section 10(a) to grant standing to all parties "arguably within the zone of interests" protected by the substantive statute whose duties the plaintiff was seeking to enforce. The Ninth Circuit noted the Supreme Court's broad application of the "zone of interests" where Justice White has instructed that a court should deny standing only "if the plaintiff's interests are so marginally related to an inconsistent with the purposes implicit in the [underlying] statute that it cannot be reasonably assumed that Congress intended to permit suit." *Cetacean Cmty.*, 2004 WL 2348373, at *6 (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)). The Ninth Circuit next turned to consider whether Congress had granted standing to the Cetaceans under the ESA, MMPA, and NEPA, read either on their own or through the Supreme Court's gloss of section 10(a) of the APA.

Considering the Cetacean's standing under the ESA, the Ninth Circuit noted that the statute's citizen-suit provision states that "any person" may "commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation." 16 U.S.C. § 1540(g)(1)(A). After a lengthy discussion of the statutory definition of "person," the court found that the ESA does not authorize animals to sue in their own names to protect themselves. The court declared that "there is no hint in the definition of 'person' . . . that the 'person' authorized to bring suit to protect an endangered or threatened species can be an animal that is itself endangered or threatened." *Cetacean Cmty.*, 2004 WL 2348373, at *7. The court further explained that the result would be the same if it read the ESA through section 10(a) of the APA because standing under the ESA was broader than under the APA's "zone of interests" test and like the ESA, the APA limited standing to "persons."

Turning next to the MMPA, the court noted that the statute provided for a moratorium on the "taking" of marine mammals without a permit and further prohibits "incidental, but not intentional" takings without a letter of authorization. The court explained that under the MMPA, standing to seek judicial review is limited to permit applicants and to parties opposed to such a permit. However, the court noted that the statute was silent as to the standing of a would-be-party, such as the Cetaceans, who seek to compel someone to apply for a letter of authorization, or for a permit. Absent a clear direction from Congress in either the MMPA or the APA, the court held that animals did not have standing to enforce the permit requirement of the MMPA.

The court next considered the Cetacean's asserted standing under NEPA. It noted that, like the MMPA, no provision of NEPA explicitly granted a person or entity standing to enforce the statute, but judicial enforcement of NEPA rights was available through the APA. The Ninth Circuit explained that under a broad reading of NEPA, it had previously recognized standing for individuals who sue to require the preparation of an environmental impact statement when they contend that a challenged federal action will adversely affect the environment. The court concluded, however, that it found no basis in either the NEPA or the APA to grant to animals that are part of the environment to bring suit on their own behalf.

Finally, the court addressed the Cetacean's argument of associational standing. The Cetaceans claimed that even if individual Cetaceans did not have standing, their group had standing as an "association" under the APA. The court noted that a generic requirement for associational standing is that the association's members have standing to sue in their own right. Because it found that individual animals did not have standing to sue under the ESA, MMPA, NEPA, and the APA, the Ninth Circuit rejected the Cetacean's argument that it had standing as an "association" under the APA.

Randy Boyer

Gifford Pinchot Task Force v. United States Fish & Wildlife Service,
378 F.3d 1059 (9th Cir. 2004)

In the instant case, the United States Court of Appeals for the Ninth Circuit determined whether the Fish and Wildlife Service's (FWS) regulation defining "destruction or adverse modification" of critical habitat was valid. In the mid-1990s, the federal government adopted a

comprehensive forest management plan, the Northwest Forest Plan (NFP), for the entire range of the threatened Northern spotted owl. The NFP allocated the spotted owl's forests into late successional reserves, matrix lands, and adaptive management areas, with different harvesting rules applied to each area. The NFP's biological opinion found no jeopardy or adverse modification, but because the NFP covered such a wide range of forest land, the NFP biological opinion deferred the consideration of unique impacts and incidental take authorizations to future biological opinions (BiOps) that would address specific projects.

After the approval of the NFP, the FWS issued over 298 BiOps for spotted owls in the lands covered by the NFP. Various environmental organizations brought suit against the FWS in the United States District Court for the Western District of Washington challenging six BiOps that authorized specific timber harvests and incidental takes of the spotted owl. The six specific BiOps at the subject of the litigation all authorized the removal, modification, or degradation of various acreage amounts of critical habitat and incidental take of various numbers of spotted owls.

The environmental organizations set forth two claims: (1) the six BiOps did not accurately determine whether the proposed actions were likely to jeopardize the continued existence of the spotted owl species, and (2) the BiOps inadequately analyzed whether the spotted owl's critical habitat would be "adversely modified," because the FWS's regulation defined "adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for *both* the *survival* and *recovery* of a listed species." 50 C.F.R. § 402.02 (2004) (emphasis added). However, the district court granted summary judgment to the FWS, and the environmental organizations appealed. The Ninth Circuit affirmed in part and reversed in part, concluding that the FWS employed appropriate methods to conduct its jeopardy analysis in the BiOps, but that the "critical habitat analysis in the . . . BiOps was fatally flawed because it relied on an unlawful regulatory definition of 'adverse modification.'" Gifford Pinchot Task Force v. United States Fish & Wildlife Serv., 378 F.3d 1059, 1077 (9th Cir. 2004).

In their first claim, that the FWS did not accurately conduct its jeopardy analysis, the environmental appellants made three arguments. First, appellants contended that the FWS may not use the habitat proxy approach to predict jeopardy. The Ninth Circuit rejected this argument, finding that "an agency's scientific methodology is owed substantial deference." *Id.* at 1066. The Ninth Circuit also referred to its previous holding in *Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754, 761 (9th Cir. 1996), where it deferred to the

agency's expertise and allowed the agency to use proxy habitat modeling to evaluate species population as long as it "reasonably ensures" that the "proxy results mirror reality." *Gifford Pinchot*, 378 F.3d at 1066. The Ninth Circuit concluded "that the habitat models used here reasonably ensure that owl population projections from the habitat proxy are accurate." *Id.*

Second, appellants contended that the FWS could not substitute the NFP for independent jeopardy analysis. Instead of assessing whether the separate projects comply with the NFP, the FWS relied on the habitat allocation of the NFP as its primary justification for the "no jeopardy" determination in each of the BiOps. The FWS primarily relied on the NFP's "late successional reserves" habitat allocation that allows for less timber harvesting and provides for stable and well-distributed owl populations. Appellants argued that the NFP BiOps did not authorize incidental takes, since it indicated that the "NFP would be adjusted based on information developed through future section 7 consultations" and that "future specific BiOps would consider [incidental takes]." *Id.* at 1067. Therefore, appellants claimed that it was a "shell game" for the FWS to have had the specified BiOps rely on compliance with the NFP to find "no jeopardy." *Id.* However, the Ninth Circuit rejected appellants' arguments, ruling:

> It is undisputed that the NFP was developed on sound scientific analysis as an effective method to conserve the spotted owl, and that the associated BiOps implement this method. Moreover, the . . . BiOps at issue in their jeopardy analyses did not rely solely on the NFP, but conducted independent analysis of site-specific data. We have previously approved programmatic environmental analysis supplemented by later project-specific environmental analysis.

Id. at 1067-68. The Ninth Circuit concluded that the "NFP is a unique land-management plan that has already been approved by this court, and we are hesitant to fault the agency for relying on it in the context of this case." *Id.* at 1068.

Third, appellants contended that the BiOps' jeopardy analysis was flawed because (1) they "did not discuss the current status of the spotted owl in terms of population size, variability, and stability or the status and distribution of the listed species"; (2) their environmental baselines were inadequate because they did not account for past incidental takes; and (3) their cumulative effects sections lacked detail and did "not explain how changes in the environmental baseline, combined with other potential actions, justif[ied] the cumulative effects analysis." *Id.* The Ninth Circuit also rejected these claims finding that "these arguments

attack reliance on habitat and the NFP for jeopardy determinations." *Id.* Because the Ninth Circuit rejected appellants' direct challenge to the FWS's reliance on the NFP for its jeopardy analysis in the BiOps, it also rejected appellants' indirect challenges. Therefore, the Ninth Circuit rejected appellants' entire first claim that the FWS had not accurately conducted its jeopardy analysis in the BiOps and affirmed the district court's grant of summary judgment to the FWS on the jeopardy issue.

In their second claim that the six BiOps inadequately analyzed whether the spotted owl's critical habitat would be "adversely modified" by the various timber harvest projects, the appellants made one primary argument: the FWS's regulation defining "adverse modification" was unlawful. The regulation defined "adverse modification" as

> a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02. Appellants argued that this definition "sets the bar too high because the adverse modification threshold is not triggered by a proposed action until there is an appreciable diminishment of the value of critical habitat for *both survival* and *recovery*." *Gifford Pinchot*, 378 F.3d at 1069 (emphasis added). The Ninth Circuit agreed with appellants, finding that it would be impossible to ever trigger the adverse modification standard, because less critical habitat is needed to ensure a species survival as opposed to recovery. The Ninth Circuit stated:

> The FWS could authorize the complete elimination of critical habitat necessary only for recovery, and so long as the smaller amount of critical habitat necessary for survival is not appreciably diminished, then no "destruction or adverse modification," as defined by the regulation has taken place. This cannot be right. If the FWS follows its own regulation, then it is obligated to be indifferent to, if not to ignore, the recovery goal of critical habitat.

Id. at 1069-70. The Ninth Circuit determined the FWS's regulation contradicted Congress's express purpose of the Endangered Species Act (ESA), and therefore, the FWS's interpretation was owed no deference under the *Chevron* test. *See id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

"The ESA was enacted not to merely forestall the extinction of species (i.e. promote a species' survival), but to allow a species to recover to the point where it may be delisted." *Id.* at 1070. The ESA defines "conservation" (i.e., recovery) as all methods that can be employed to

"bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." 16 U.S.C. § 1532(3) (2000). The ESA also defines critical habitat as including "the specific areas . . . occupied by the species . . . which are . . . essential to the conservation of the species" and the "specific areas outside the geographical area occupied by the species . . . that . . . are essential for the conservation of the species." *Id.* § 1532(5)(A). Thus, "it is clear that Congress intended that conservation and survival be two different (though complementary) goals of the ESA" and the "purpose of establishing critical habitat is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery." *Gifford Pinchot*, 378 F.3d at 1070.

Moreover, Congress, by its own language, said that "destruction or adverse modification could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival." *Id.* Additionally, the Ninth Circuit cited *Sierra Club v. United States Fish & Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), where the United States Court of Appeals for the Fifth Circuit concluded that "conservation is a much broader concept than mere survival" and that the FWS's regulatory definition "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits." *Id.* at 1070 (quoting *Sierra Club*, 245 F.3d at 441-42). Therefore, "[t]o define 'destruction or adverse modification' of critical habitat to occur only when there is appreciable diminishment of the value of the critical habitat for both survival and conservation fails to provide protection of habitat when necessary only for species' recovery." *Id.*

The Ninth Circuit also rejected the FWS's argument that this error was harmless. The doctrine of "harmless error" may be employed only "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." *Id.* at 1071 (quoting Buschmann v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982)). When an agency is operating under a regulation that a court holds is impermissible, the court must presume that the FWS followed the adverse modification regulation unless rebutted by evidence in the record. The Ninth Circuit relied "only . . . on what the agency said in the record to determine what the agency decided and why" to determine whether the FWS indeed followed the regulation. *Id.* at 1072 n.9. However, when the Ninth Circuit looked at what the FWS said in the six BiOps, it determined that four of the BiOps made no mention of, or

discussed, "recovery" and two simply described "recovery" without adequately evaluating the impact of the actions on "recovery." *Id.* at 1072-74. Therefore, the court concluded that the FWS did not show that its erroneous regulatory definition of "adverse modification" was harmless.

Finally, appellants argued that the BiOps' critical habitat analysis impermissibly relied at the NFP's late successional reserves (LSRs) to compensate for the loss of critical habitat. The Ninth Circuit agreed with appellants, holding that the "agency's finding that loss of critical habitat was not 'adverse modification' because of the existence of suitable external habitat is arbitrary and capricious and is contrary to law." *Id.* at 1076. The Ninth Circuit supported its holding by stating:

> [T]he plain language of the ESA requires that the adverse modification inquiry examine a given project's effect on critical habitat, that is, the land specifically designated by the Secretary of Interior for that purpose. The purpose of designating "critical habitat" is to set aside certain areas as "essential" for the survival and recovery of the threatened species. To create critical habitat, there is extensive study, detailed analysis, and ultimately notice and comment rulemaking . . . . If we allow the survival and recovery benefits derived from a parallel habitat conservation project (the NFP and its LSRs) that is not designated critical habitat to stand in for the loss of designated critical habitat in the adverse modification analysis, we would impair Congress's unmistakable aim that critical habitat analysis focus on the actual critical habitat. We would also be approving a transition away from ESA protections to mere compliance with the broader but perhaps less rigorous NFP.

Id. at 1075-76 (citations omitted). The Ninth Circuit concluded that LSRs are no substitute for designated critical habitat, and even if the spotted owl has suitable alternative habitat in the form of LSRs, those LSRs have no bearing on whether there is adverse modification of actual spotted owl critical habitat.

The Ninth Circuit affirmed the district court's grant of summary judgment to the FWS on the issue of jeopardy analysis, but reversed the judgment of the district court on the issue of critical habitat analysis. The Ninth Circuit then remanded, directing the district court to grant summary judgment to the appellants on the critical habitat inquiry.

Rebecca Judd

IV. LOUISIANA CONSTITUTION

Avenal v. State, 2004 WL 2365216 (La. Oct. 19, 2004)

In October 2004, the Supreme Court of Louisiana decided an appeal asking the question of whether fishermen holding oyster leases suffered a compensable taking as a result of the State of Louisiana's Caervarnon Freshwater Diversion Structure. Avenal v. State, 2004 WL 2365216 (La. Oct. 19, 2004). After a major flood in 1927, the United States Army Corps of Engineers (Corps) expanded the existing levee system in order to prevent future floods of that degree. However, the expanded levees created new and different problems, those of increased salinity in naturally freshwater areas and the lack of nutrient-rich sediment deposits in wetlands. These sediments allowed grasses to grow in the marsh, and without these plants, the soil was not held into place and the land then turned into open water. The change in salinity created problems with existing oyster farms in areas that have a mix of saltwater and freshwater, a mix that is necessary for oyster cultivation.

These problems were noticed in the 1950s and, after an investigation into the condition of oyster farming and the wetlands, a decision was made that introducing fresh water into the affected areas to "reestablish natural patterns of salinity and alluviation . . . would provide the most effective method of restoring fish and wildlife production." *Avenal*, 2004 WL 2365216, at *3. The Corps suggested Caervarnon, in the Breton Sound Basin, as one of the sites of a freshwater-diversion structure. A memorandum by the United States Fish and Wildlife Service stated that the pollution resulting from this diversion would not be a problem in Caervarnon, as there was not an oyster industry present.

Finally in 1982, the state announced its intent to the Corps to participate in the Caervarnon project and construction began in 1988, after an environmental impact study suggested Caervarnon as one of the three best areas in the state to set up a freshwater diversion system. By this time, however, a number of oyster fisheries had been created in the Caervarnon area due to the increased salinity caused by coastal erosion. These oyster fisheries were located on land that is owned by the state and leased by private farmers. In 1989, with the Caervarnon project set to come online in the next couple of years, the state began to insert "hold harmless" clauses into the leases. The state anticipated some of these oyster beds might become unproductive due to the project and sought to indemnify themselves against possible claims of loss.

These "hold harmless" clauses stated in large part that the lessee would agree to hold the State of Louisiana "free and harmless from any claims for loss or damages to rights arising from this lease, from diversions of fresh water or sediment . . . taken for the purpose of management, preservation, enhancement, creation or restoration of coastal wetlands." *Id.* at *15. The possible damages included oyster disease, damage to oyster beds, or decreased oyster production.

The Caervarnon project went online on April 12, 1991. In March 1994, oyster farmers in the Breton Sound area whose farms were subsequently damaged filed a class action suit in the 25th Judicial District Court in Plaquemines Parish. Their claim asserted that approximately 204 oyster leases had been damaged or destroyed due to the impact of the Caervarnon project on the waters of the upper Breton Sound. In the state court suit, the trial court found for the plaintiffs and the jury awarded $21,345 per damaged acre to the four main plaintiffs. In addition, the court awarded $1 billion to the remaining class members who were similarly situated to Avenal, a private oyster farmer and one of the four main plaintiffs. This decision was based on the court's finding that "the state has taken actions which have taken or damaged the [plaintiff's] right to property." *Id.* at *10. On appeal, the Louisiana Court of Appeal for the Fourth Circuit affirmed the lower court's judgment. Subsequently, the Department of Natural Resources (DNR) appealed to the Supreme Court of Louisiana and the court reversed, finding that there had been no compensable taking from the plaintiffs.

A majority of the court's opinion discussed the "hold harmless" clauses in the lease agreements between the state and the private lessees. The laws of Louisiana grant ownership of all water bottoms and beds in the state to the State of Louisiana. A state statute grants the power to lease water bottoms for oyster cultivation and harvesting to the Department of Wildlife and Fisheries (DWF). *See* LA. REV. STAT. ANN. § 41:1225 (2004). The laws of the state allow the Secretary of the DWF to "make such stipulation in the leases made by him as he deems necessary and proper to develop the [oyster] industry" as long as those clauses meet the requirements of the statute. *Avenal*, 2004 WL 2365216, at *13.

In all but twelve of the leases in issue in this case, a "hold harmless" clause was present in the lease. The leases that did not include this clause were signed before 1989, when the state began inserting it in all oyster bed leases. The Supreme Court found that these clauses were in accordance with legislation in 1995 that required the state to be held harmless regarding coastal restoration. The clause was also upheld

because the Court did not consider it to be an unlawful unilateral change in the lease, as it did not affect the rights of the lessees against third parties, only those between lessor and lessee.

In addition, the Court stated that the "public trust" doctrine allowed the DWF to insert these clauses into the leases. This doctrine, included in the Louisiana Constitution, provides that: "the natural resources of the state, including the air and water . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy." LA. CONST. art. IX, § 1. Due to the "alarming rate" at which the coastline of the state is disappearing, the coastal diversion project at Caervarnon fit perfectly into what the Constitution had set out as part of the public trust. The Court explained that the "State simply cannot allow coastal erosion to continue; the redistribution of existing productive oyster beds to other areas must be tolerated under the public trust doctrine in furtherance of this goal." *Avenal*, 2004 WL 2365216, at *23. For all of these reasons, the Court upheld the clauses as valid and held that these "hold harmless" clauses prevented all of the lease holders who signed leases after 1989 from holding the state liable for losses to their oyster farms.

The remaining issue involved those oyster farmers who signed leases before 1989, the year that the "hold harmless" clause became part of the oyster bed lease. The Constitution of Louisiana requires compensation be paid to an owner if the state or its political subdivisions take or damage his property. *See* LA. CONST. art. I, § 4. However, the problem became complicated by the prescription laws of the state. If this were deemed to be a taking, the prescription would have been three years from the point that the Caervarnon project went online, but if this were considered damage to property, the prescription only runs two years from the time of acceptance. Because the suit was filed more than two, but less than three years after Caervarnon began, this distinction was of great importance to the remaining twelve lessees.

For the takings claim, although the state owns the land on which the oyster farms are located, the plaintiffs claimed that what was taken from them was their right to harvest oysters at a profitable level if the Caervarnon project continued to run. The court dismissed this claim, concluding that the state does not guarantee a profitable or successful oyster lease to every lessee, merely the right to set up an oyster farm on the land leased. Likewise, there is no guarantee that the waters in the leased area will maintain a certain salinity that will allow for the productive growth of oysters.

The court determined that this was not a takings claim, but a damage claim. The project did not deprive the lessees of the use of their property, but "may have damaged their property rights in their oyster beds and the profits generated by the oysters that grow upon them." *Avenal*, 2004 WL 2365216, at *31. This damage, nevertheless, could not be compensated due to the prescription laws. Because the Caervarnon project was completed and accepted in 1991, the plaintiffs' claims had prescribed in 1993, a year before this suit was filed. The court went on to say that if the plaintiffs who did not have "hold harmless" clauses had filed suit in the two year period following the acceptance of the Caervarnon project, they might have had a valid claim of damage against the state. However, this was not the case and as a result, the court reversed the lower courts' holdings and dismissed all of the plaintiffs' claims against the state.

Megan Cole

V. NATIONAL ENVIRONMENTAL POLICY ACT

Pennaco Energy v. United States Department of Interior, 377 F.3d 1147 (10th Cir. 2004)

In August 1999, forty-nine tracts of land in the Powder River Basin in Wyoming were nominated to be included in the next available oil and gas lease sale. It is undisputed that the purpose of the lease was extraction of coal bed methane (CBM). As the agency responsible for leasing tracts for oil and gas development, the Bureau of Land Management (BLM) is required to comply with the process prescribed by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (2000), which allows a federal agency to take a "hard look" at the environmental consequences of major federal action.

An environmental impact statement (EIS) is the procedural manner for complying with NEPA. This document analyzes the alternatives to the proposed action, including a "no action" alternative. However, an agency does not have to complete an EIS if the agency instead performs an environmental assessment (EA) and makes a finding of no significant impact (FONSI). The BLM's proposed lease of the forty-nine tracts of land was just such a major federal action that required compliance with NEPA and an environmental analysis.

The Department of the Interior (DOI) manages the public lands of the United States pursuant to the Federal Land Policy and Management Act (FLPMA). The Secretary of the Interior is charged with

"manag[ing] the public lands under principles of multiple use and sustained yield, in accordance with the land use plans . . . when they are available." 43 U.S.C. § 1732(a) (1986). In the context of federal oil and gas resources, the DOI issues a resource management plan (RMP) for the tract of land, which typically describes the land use plan for the tract, including allowable uses and goals for the resource uses.

On September 28, 1999, in preparation for leasing the forty-nine tracts of land for the oil and gas lease sale, the BLM's acting field manager of the Buffalo Field Office, Richard Zander, prepared an Interim Documentation of Land Use Conformance and NEPA Adequacy worksheets which allowed Zander to consider and determine if new NEPA compliance documents were required or if the agency could rely upon already existing NEPA documents.

Ultimately, Zander concluded that two preexisting NEPA analyses satisfied the NEPA requirements, and no new environmental reviews would be needed. Zander specifically relied upon the Buffalo Resource Management Plan EIS (Buffalo RMP EIS) and the Wyodak Coal Bed Methane Project Draft EIS (Wyodak DEIS). The Buffalo RMP EIS encompassed the three tracts at issue in this litigation which are situated within the Buffalo Resource Area. It considered the impacts of conventional oil and gas development, while the Wyodak DEIS addressed a more specific type of oil and gas development—CBM development. Having decided that these documents fulfilled the NEPA requirements, Zander concluded that the proposed oil and gas leases conformed to the Buffalo RMP and no further environmental analyses were required. Pennaco Energy, Inc., successfully bid on the leases at a competitive sale held by the BLM on February 1, 2000.

The Wyoming Outdoor Council (WOC) and the Powder River Basin Resource Council (PRBRC) filed a formal complaint with the BLM contesting its decision to complete the oil and gas lease sale. The groups challenged the BLM's decision not to consider the impacts of CBM development differently from that of conventional oil and gas development claiming that NEPA required the preparation of a new EIS before the completion of the oil and gas lease sale. After the BLM announced its disagreement with the claim that CBM development was any different from conventional methods of oil and gas development the BLM dismissed the protest, stating, "The BLM has taken a 'hard look' at the environmental effects and, through its NEPA analyses, has ensured that it is fully informed regarding the environmental consequences of the action." *Pennaco*, 377 F.3d at 1153.

After the BLM dismissed its protest, WOC and PRBRC appealed the BLM decision to the Interior Board of Land Appeals (IBLA). The IBLA initially dismissed the appeal as to forty-six of the forty-nine tracts, but held out the appeal for three of the tracts—the tracts at issue here. Concluding that reliance upon the Buffalo RMP EIS was inadequate because that EIS did not consider the varying environmental impacts of CBM extraction and development the IBLA reversed the BLM decision on those tracts and remanded for the completion of further environmental analyses.

Pennaco Energy appealed the IBLA's decision to the United States District Court for the District of Wyoming. The district court reversed the IBLA's decision and reinstated the BLM's decision to lease the parcels based on the existing NEPA documents. The district court concluded that "[t]he IBLA's opinion arbitrarily and capriciously elevates form over substance by separating the [Buffalo RMP EIS and Wyodak DEIS] and refusing to consider them together." Pennaco Energy v. U.S. Dep't of Interior, 266 F. Supp. 2d 1323, 1330 (D. Wyo. 2003). On appeal to the United States Court of Appeals for the Tenth Circuit, a three-judge panel held (1) that the IBLA decision was final agency action under the Administrative Procedure Act (APA) and thus subject to judicial review, and (2) the decision was not arbitrary or capricious; thus the court reversed and remanded the district court's opinion.

The court's decision began with a determination of whether the IBLA's decision to reverse the BLM's leasing decision was reviewable by the court. Pennaco Energy formulated its claim on the basis of section 704 of the APA, which provides that an agency action is "subject to judicial review" when it is either: (1) "made reviewable by statute" or (2) a "final agency action for which there is no other adequate remedy in a court." Not having cited a statute that specifically made the IBLA's decision reviewable, the court was left to determine whether the IBLA decision was reviewable pursuant to the second APA provision, that it was final agency action. The court found that the IBLA decision was the "definitive statement of its position" that the preexisting NEPA analyses were "not adequate," and that "[d]efinite legal consequences flowed" from that decision, specifically that any development of the tracts for CBM extraction by Pennaco was delayed until further analyses were completed. Consequently, the court found that the IBLA's decision was sufficient to qualify as "final agency action" and thus reviewable. The court noted that its standard of review under the APA is "arbitrary, capricious, otherwise not in accordance with law, or not supported by substantial evidence." *Pennaco*, 377 F.3d at 1156.

The court summarized the narrow question before it as "whether the IBLA acted arbitrarily and capriciously in deciding that the leases at issue should not have been issued before additional NEPA documentation was prepared." *Id.* In considering this question the court considered the entire administrative record, looking not only to sources specifically referred to by the IBLA, but any source on the record. In accordance with precedent of agency action review the court specifically reserved its analysis of the record to those bases considered by the IBLA—the effect of CBM extraction and development on water quantity and air quality.

The court began its analysis by noting the existence of a number of documents that directly acknowledged the difference between CBM extraction and development and conventional oil and gas development. A December 2000 affidavit by Zander stated that the CBM extraction process fell within the range of impacts created by conventional oil and gas development. However, the court also identified an internal BLM memorandum by Zander that contradicted the affidavit, stating that CBM development was a "non-traditional type of oil and gas activity" that "was not considered" in the Buffalo RMP EIS. Additionally, the court noted the BLM's budget request for 2002 included information asserting that preexisting NEPA analyses were insufficient to address the potential environmental impacts of CBM development. Finally, the court identified a statement to Congress by the BLM assistant secretary, Tom Fulton, which addressed the CBM development in the Powder River Basin in Wyoming. The statement notes that the rapid development of this type of extraction was unexpected and thus needed a new EIS to adjudge the environmental impacts. This EIS was scheduled, at the time, for completion in May 2002.

The court, in considering the impacts of CBM development on water quantity, noted at the outset that the Buffalo RMP EIS states that the CBM extraction would "have little effect on regional groundwater systems." *Id.* at 1158. However, the court addressed a number of sources in the administrative record that contradicted this exact conclusion and found that CBM development in fact involves extracting a significant amount of water out of the ground and bringing it to the surface, thus affecting the quantity of groundwater. An EA for two counties in Wyoming documented this increased amount of water extraction related to CBM development and the concurrent increase in the threat of flooding and erosion due to the waterflow on the surface. Again, the court looked to Fulton's statement to Congress, specifically a portion in which he acknowledges the increased production of surface

water in the CMB extraction process and the need to "find innovative solutions to address the surface water issues and the potential impacts to the entire land and water system." *Id.*

Additionally, the court considered a number of newspaper articles that covered the concerns associated with CBM production, including the water extraction issue. Finally, the court looked to Zander's affidavit and observed that even though the affidavit concluded there were no additional distinct issues to contend with for CBM extraction, no such conclusion was made in any NEPA documentation. Thus, the court affirmed IBLA's decision that there was enough evidence on the record to support the conclusion that there were unique environmental consequences for water quantity in CBM extraction and development that were not adequately addressed by the Buffalo RMP EIS to require further analysis.

In considering the potential impacts on air quality resulting from CBM extraction, the court looked to the Buffalo RMP Draft EIS and the Wyodak DEIS. The Buffalo RMP Draft EIS stated that conventional oil and gas development would have similar effects on air quality as if no development took place. The Wyodak DEIS, on the other hand, indicated that CBM extraction would cause an increase in emissions, including formaldehyde, a known carcinogen.

Pennaco Energy claimed that any problems associated with the Buffalo RMP EIS its for lack of addressing environmental impacts were cured when it was taken together with the Wyodak DEIS. The problem, the court pointed out, is that the Wyodak DEIS is procedurally different from the Buffalo RMP EIS; the Wyodak DEIS is a "post-leasing analysis." Consequently, in considering alternatives to the plan, the Wyodak DEIS never considered pre-leasing alternatives, including not leasing the tracts at all—the no action alternative. Any curtailments on the development underlying the Wyodak DEIS would have to be something less than no development at all, reduced to "stipulations contained in [the developers'] leases." Thus, the IBLA's decision that the Wyodak DEIS did not sufficiently supplement the Buffalo RMP EIS was not arbitrary or capricious.

In a final plea for relief, Pennaco Energy analogized its position to that in *Park County Resource Council v. United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987), where the United States Court of Appeals for the Tenth Circuit denied a challenge to a BLM grant of a lease prior to the completion of an EIS. The court distinguished *Park County* by pointing out that there, it had found the BLM's decision not to prepare an EIS to be "not unreasonable," whereas here, the

question before the court was whether the IBLA's decision to reverse the BLM leasing decision was arbitrary or capricious. Thus, in the instant case the only question confronting the court was whether the IBLA's decision was arbitrary or capricious, not whether the IBLA could have or should have come to a different conclusion. Additionally, in *Park County*, the BLM, before issuing the lease, had completed an extensive EA which resulted in the issuance of a FONSI. Here, in the development of the Pennaco Energy tracts, no such analysis was completed; the BLM merely relied on the Buffalo RMP EIS and the Wyodak DEIS. The court thus concluded that the IBLA's decision was neither arbitrary nor capricious.

Meagan Gillette

VI. RESOURCE CONSERVATION & RECOVERY ACT

Safe Air for Everyone v. Meyer, 373 F.3d 1035 (9th Cir. 2004)

In *Safe Air for Everyone*, the United States Court of Appeals for the Ninth Circuit held that the defendant-appellees did not violate the Resource Conservation and Recovery Act (RCRA), RCRA §§ 1004(27), 2002(a)(1)(B), 42 U.S.C. §§ 6903(27), 6972(a)(1)(B) (2002), when burning grass left residue after the harvest of Kentucky bluegrass. In reaching this conclusion, the court considered the definition of "solid waste" as it is used in RCRA, as well as legislative history of the Act. The court determined that grass residue does not fall under RCRA's meaning of "solid waste," and granted summary judgment for the defendants.

Safe Air for Everyone (Safe Air) is an environmental nonprofit organization consisting of citizens from Idaho, Washington, and Montana. The defendant–appellees (Growers) are commercial farmers of Kentucky bluegrass—a medium-textured turf frequently used in sports grounds. Safe Air filed a complaint in 2002 seeking to enjoin Growers from burning their fields to reduce crop remnants. This practice—called open air burning—releases high concentrations of pollutants from crop remnants that are harmful to area residents.

Kentucky bluegrass is commercially harvested for its seed, which takes approximately one year and a few months to develop. By this time, the bluegrass is approximately fifteen to thirty-six inches tall. It is cut close to the ground, then "combed" to separate the seed from the straw. The seed is packaged for sale while straw and stubble are left littered

over the field. To prepare for the next planting, farmers clear the land by burning these remnants. This cycle of growing and burning can continue for several years.

The citizen suit provision of RCRA allows individuals to take action against any entity associated with the handling, treatment, transportation, or disposal of solid or hazardous waste. RCRA § 7002, 42 U.S.C. § 6972(a)(1)(B). Under this authority, Safe Air filed a complaint in the United States District Court for the District of Idaho on May 31, 2002. The complaint alleged that the open field burning practiced by Growers violated RCRA. In an unpublished opinion, the district court dismissed the claim, ruling that grass residue does not constitute solid waste under the statute. The Ninth Circuit held that the district court had dismissed Safe Air's claim prematurely and granted review to determine the scope of "solid waste" as defined under RCRA.

The court first examined Congress's overriding purpose in enacting RCRA, which was "to insure the safe management of . . . waste." *See* Am. Mining Cong. v. EPA, 824 F.2d 1177, 1179 (D.C. Cir. 1987). Congressional hearings about the Act also often addressed a need to reduce waste and provide for safe disposal. Satisfied that RCRA was being properly cited, the Ninth Circuit then looked at its applicability to the immediate cause of action. The court noted that RCRA applies only to hazardous and solid waste, and that an initial determination of what constitutes such waste must be found.

The court looked at definitions included within the Act itself. RCRA defines solid waste using "discarded material" in its description. *See* RCRA § 1004, 42 U.S.C. § 6903(27). The court held that this term was equally vague, and recalled its own precedent in which it required that, when construing a statute, words not defined were given their ordinary and natural meaning. It noted that *The New Shorter Oxford English Dictionary* defines discard to mean "cast aside, reject, abandon."

The Ninth Circuit also looked to the holdings of its sister circuits. In *American Mining Congress*, the United States Court of Appeals for the District of Columbia determined that materials "destined for beneficial reuse or recycling in a continuous process by the generating industry itself" were *not* "discarded material" within the meaning of RCRA. 824 F.2d at 1186. In a later case, the court expanded on this definition, saying that in order for material to be part of a continuing process, it must be actively reused. Am. Mining Cong. v. EPA, 907 F.2d 1179 (D.C. Cir. 1990).

The Ninth Circuit found these cases persuasive, and incorporated them into its own test. Three criteria were evaluated to determine if the

grass residue was "solid waste" within the meaning of RCRA: (1) whether the material is destined for beneficial reuse in a continuing process, (2) whether the materials are *actively* reused, and (3) whether materials are reused by the original owner. Testimony presented by the Growers suggested that the grass residue was being beneficially reused. Most significantly, grass residue increases absorption of nutrients into the ground, and facilitates future open burning—this in turn helps increase sunlight absorption and reduces the number of insects attracted to the field. The court acknowledged the benefits as legitimate, though it also acknowledged Safe Air's claim that the primary benefit was the removal of waste. The Ninth Circuit pointed out that RCRA does not address the relative weight of "incidental benefits." Benefits, no matter how significant, are still benefits, and the court determined that the Growers' ability to benefit even a small amount excluded the residue from classification as discarded material. Applying the test fashioned earlier, the court held that each factor was met.

To reinforce its decision, the Ninth Circuit looked at the legislative history of RCRA. The court specifically noted that Congress had affirmatively declared that reusable agricultural products were not of concern in the purview of RCRA. *See* H.R. REP. NO. 94-1491, at 3 (1976). This final look at the record convinced the court that open field burning of grass residue was not the sort of action RCRA was meant to regulate.

In a dissenting opinion, Judge Paez found that there were genuine issues of triable fact that should have precluded a grant of summary judgment. He particularly focused on the main purpose of open burning. The Growers conceded that burning is necessary to *remove* grass and straw and to maintain seed production. Because this removal is within the plain meaning of "discard," the dissent argued that the case should have been remanded for further proceedings.

The Ninth Circuit held that Kentucky bluegrass—primarily because it is part of a continuing process—does not fall under RCRA's classification of solid waste. The court found that no issue of material fact had been brought before it, and summary judgment was granted to the defendant-appellee, growers of Kentucky bluegrass.

Kavita Gupta