RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

Environmental Defense v. Duke Energy Corp., 127 S. Ct. 1423 (2007)

In the noted case, the United States Supreme Court remanded the case to the United States Court of Appeals for the Fourth Circuit for consideration of whether the EPA has been retroactively targeting twenty years of accepted practice with respect to the Supreme Court's interpretation of "modification." Environmental Defense v. Duke Energy Corp., 127 S. Ct. 1423, 1437 (2007). With a unanimous decision, there is no question about the Supreme Court's interpretation of the word "modification" as it appears in the Prevention of Significant Deterioration (PSD) section of the Clean Air Act (CAA) and its regulations governing the New Source Performance Standards (NSPS). This Recent Development will discuss the majority opinion reported by Justice Souter and Justice Thomas's opinion concurring in part.

Unanimously, the Supreme Court of the United States held that despite the fact that the word "modification" is present in both the PSD and the NSPS, they do not need to be interpreted congruently. *Id.* at 1435.

The CAA Amendments of 1970 directed the EPA to devise National Ambient Air Quality Standards (NAAQS) limiting various pollutants requiring among other things, the promulgation of standards regulating emissions from both newly constructed and modified sources of pollution at power plants (84 Stat. 392). Congress defined "modification" in the NSPS portion of the statute as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4) (2000). Since 1971, the EPA has promulgated NSPS regulations that defined "modification" in almost the same terms as the statute. Further, in 1975, the EPA added to the definition of "modification" by adding a regulation which referenced increases in "hourly emissions rate[s]." 40 C.F.R. §§ 60.14(h)-(j) (1987).

Despite the EPA's efforts to control air pollutants, the NSPS program was not completely effective, so Congress enacted the PSD program in 1977. The PSD program required a permit before a "major emitting facility" could be "constructed" in an area that was already covered by the scheme. 42 U.S.C. § 7475(a). The term "construction," was clarified to include "the modification of any source or facility, as defined in the NSPS statutory definition of modification." *Id.* § 7479(2)(C). Despite the definitional reference that seems to make the term "modification" identical, the EPA's promulgated regulations interpret the term one way for NSPS and another for PSD. The NSPS regulations require a source to use the best available pollution-limiting technology when a "modification" would increase the kilograms per hour output of pollutants. 40 C.F.R. § 60.14(a) (1987). However, the 1980 PSD regulations require a permit for a "modification" only when there is a "major modification" and when it would increase the actual emission of a pollutant above the actual recorded average of the previous two years. *Id.* §§ 51.166(b)(2)(i) (1987), 51.166(b)(21)(ii).

The noted case arose out of an action by Duke Energy Corp. (Duke) to replace or redesign some of its coal-fired electric generating units. *Envtl. Def.*, 127 S. Ct. at 1431. The United States filed this enforcement action, citing that among other things, Duke violated the EPA's PSD regulations by performing work on the generating units without a permit. *Id.* at 1430. Various environmental groups intervened charging similar violations. *Id.* In the trial court, Duke moved for summary judgment,

inter alia, arguing that none of its projects was a "major modification" and thus, a PSD permit was not required. *Id.* Duke further argued that a PSD permit was not required because none of the changes caused an increase in the hourly emissions rates. *Id.* at 1431. Agreeing with Duke, the district court entered summary judgment for Duke on all claims. *Id.*

The Fourth Circuit affirmed the district court's decision, stating that Congress intended to create identical statutory definitions of "modification" for both the NSPS and PSD regulations. The Fourth Circuit explained that because of the identical definitions, the EPA was affirmatively mandated to interpret the term identically under both regulations. The court referenced *Rowan v. United States*, 452 U.S. 247 (1981), which held that the different interpretations of the word "wages" could not be adopted and stated that *Rowan* created an "'irrebuttable' presumption that PSD regulations must contain the same conditions for 'modification' as the NSPS regulations, including an increase in the hourly rate of emissions." *Envtl. Def.*, 127 S. Ct. at 1431 (quoting United States v. Duke Energy Corp., 411 F.3d 539, 550 (4th Cir. 2005)). Finally, the court rejected the argument that its interpretation of "modification" invalidated the PSD regulations. The court reasoned that because the PSD regulations can be interpreted to require an increase in the hourly emissions rate as an element of a major "modification." *Id.* at 1432.

At issue in the present case is whether the improvements made by Duke constituted "modification" under the PSD regulations of the CAA. The Supreme Court held that the EPA was not required to interpret the term "modification" congruently in each of its regulations. *Id.* at 1436. The Court first looked to statutory construction and noted that the basic principles of statutory construction are "not so rigid." *Id.* at 1435. The Court noted that although courts in general tend to presume that the same term has the same meaning when it occurs in the same statute, there is no "effectively irrebuttable presumption" that they are the same. *Id.* at 1433. The Court reiterated reasoning from a previous case, *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427 (1932), and stated that the "natural presumption that identical words used in different part of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably warrant the conclusion that they were employed in different parts of the act with different intent." *Id.* at 1432. Thus, "a given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Id.*

The Court analyzed *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), in which the issue was whether the term "employees" in section 704(a) of title VII of the Civil Rights Act of 1964 covered former employees. *Envtl. Def.*, 127 S. Ct. at 1433. Despite the fact that "employee" was defined in the Act, the term could still be seen as consistent with either current or past employees. In *Robinson*, the Court found that "each section [of Title VII] must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute. *Robinson*, 519 U.S. at 343-44.

The Court further analyzed whether *Rowan* could be viewed as compatible with *Robinson*. *Envtl. Def.*, 127 S. Ct. at 1433. The Court revisited *Rowan* and noted that they held that "wages" held the same meaning under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) because there was a displayed congressional intent that they be interpreted identically. *Id.* However, the Court, in *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), refused to require uniformity in identical statutory terms.

The Court found that despite the presence of the same term "modification" in both sections and the reference to the NSPS definition of "modification," there was no legislative history that would suggest a congressional intent to interpret the terms equivocally. *Id.* The Court reasoned that "the cross-reference alone is certainly no unambiguous congressional code for eliminating the customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term, where it occurs." *Envtl. Def.*, 127 S. Ct. at 1433. The Court stated that "absent an iron rule to ignore the reasons for regulating PSD and NSPS 'modifications' differently, EPA's construction need do no more than fall within the limits of what is reasonable, as set by the Act's common definition." *Id.* at 1434. Thus, because the EPA's construction of PSD and NSPS limits was reasonable under the Act's common definition, the Court has no authority to overturn the EPA's reasonable interpretation. *Id.*

Additionally, the Court looked at the Fourth Circuit's interpretation of the term "modification" and found that in essence the court was invalidating the PSD regulations. *Id.* at 1435. The Court reasoned that if the Fourth Circuit's holding was allowed to stand, that it would violate the constraints on judicial review of EPA regulation for validity. *Id.* The Court correctly stated that any challenges to the validity of EPA regulations are limited to the United States Court of Appeals for the District of Columbia within sixty days of EPA rulemaking, which had lapsed. Finally, the Court addressed Duke's claim that the EPA has been

inconsistent in its positions and is not retroactively targeting twenty years of accepted practice. *Id.* at 1436. The Court determined that this claim had not been examined by the lower courts and to the extent that it was not procedurally foreclosed, it would be addressed on remand. *Id.*

Despite the unanimous 9-0 majority decision for Environment Defense, Justice Thomas wrote an opinion concurring with the majority in part and disagreeing with the majority's statement that the statutory cross-reference does not mandate a singular regulatory construction. *Id.* at 1437. Justice Thomas stated that the cross-reference created a strong presumption that "the same words, when repeated, carry the same meaning." *Id.* He went on to conclude that the majority has the burden of stating why the general presumption doesn't control the outcome here and they have not done so here. *Id.* at 1437-38.

This case marks an important development in the interpretation of congruent terms in related statutes. It enables the EPA to regulate air pollutants in the best way they see fit, instead of being forced to abide by one strict regulation scheme. However, this case seems to indicate that the EPA has carte blanche when determining emissions regulations provided that the reasons behind the regulations are reasonable.

Lindsay Carr

Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

In *Massachusetts v. EPA*, the United States Supreme Court held that Massachusetts suffered an injury to its interests as a sovereign entity sufficient to afford Petitioners standing; the Clean Air Act's (CAA) broad definition of "air pollutant" authorizes the Environmental Protection Agency (EPA) to regulate global climate change; and the EPA unlawfully declined to regulate greenhouse gas emissions from new motor vehicles based on political concerns rather than the feasibility of making an endangerment finding under section 202 of the CAA. 127 S. Ct. 1438 (2007).

In 1999, the International Center for Technology Assessment (ICTA) and environmental groups petitioned the EPA to regulate greenhouse gas emissions from new motor vehicles under section 202 of the CAA. INT'L CTR. FOR TECH. ASSESSMENT, PETITION FOR RULEMAKING AND COLLATERAL RELIEF SEEKING THE REGULATION OF GREENHOUSE GAS EMISSIONS FROM NEW MOTOR VEHICLES UNDER SECTION 202 OF THE CLEAN AIR ACT (Oct. 20, 1999). Section 202(a)(1) of the CAA states that the EPA Administrator "shall by regulation

prescribe" standards for air pollutants emitted from new motor vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2000).

After receiving 50,000 comments on ICTA's section 202 rulemaking petition and commissioning its own study on the uncertainties in global climate change science, the EPA declined to regulate motor vehicle emissions for their contribution to global warming. *Massachusetts*, 127 S. Ct. at 1449-50. In its petition denial, the EPA argued that the CAA does not authorize the agency to regulate greenhouse gases for their contribution to global warming. *Id.* at 1450. The EPA also argued that section 202 does not require the agency to judge whether greenhouse gases endanger the public before deciding whether to regulate under the statute. *Id.* at 1451. Instead, the EPA reasoned that scientific uncertainty and the political effects of global warming regulation counseled against regulating greenhouse gas emissions from new motor vehicles at that time. Twelve states, three cities, one American territory, and numerous environmental groups sought judicial review of the EPA's section 202 petition denial in the United States Court of Appeals for the District of Columbia. Massachusetts v. EPA, 415 F.3d 50, 53 (D.C. Cir. 2005), *vacated and remanded*, 127 S. Ct. 1438 (2007). The D.C. Circuit split three ways, but a majority upheld EPA's rulemaking petition denial. Twelve states, four localities, and thirteen public interest groups (Petitioners) petitioned for certiorari, and "the unusual importance of the underlying issue persuaded [the United States Supreme Court] to grant the writ." *Massachusetts*, 127 S. Ct. at 1446-47.

The Supreme Court began by addressing the issue of Petitioners' standing to bring a suit against the EPA. *Id.* at 1452. Article III of the United States Constitution authorizes federal courts to adjudicate "cases and controversies." U.S. CONST. art. III, § 2.

A petitioner must traditionally establish all of the elements of standing—an injury in fact that is fairly traceable to the defendant and likely to be redressed by a favorable decision-to meet Article III's "cases and controversies" requirement. *Id.* at 1453 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). However, courts relax the imminence and redressability requirements for standing when Congress grants parties a procedural right to judicial review in a statute. Because section 307(b)(1) of the CAA grants judicial review of EPA rulemaking petition denials, the Court found that Congress intended to create a

procedural right to judicial review when a traditional standing injury may not exist.

The Court framed the standing issue by focusing on Massachusetts' interests as a quasi-sovereign entity within a federal framework and subject to injury by surrounding states. *Id.* at 1454. The court was primarily concerned with the loss of coastal land that Massachusetts has and will continue to suffer due to global warming. *Id.* at 1456. By acknowledging a sovereign's interests in being free from harm, the Court hearkened back to its early common law jurisprudence on transboundary pollution disputes between neighboring states. *Id.* at 1454. The Court noted that a state relinquishes its own rights to mitigate the harms of global warming to the federal government under the CAA. *Id.* "Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted." *Id.*

From this framework, the Court determined that Massachusetts has suffered an injury in fact that is directly traceable to the EPA, and is likely to be redressed with greenhouse gas regulation. The Court noted that the EPA conceded that human activity has been linked to the global warming effects that put Massachusetts' coastal territory at risk. *Id.* at 1457. However, the EPA refused to take action to mitigate the human activity and protect Massachusetts' interests. *Id.* at 1454-55. Because the federal government chose to leave Massachusetts vulnerable to a serious risk of land loss and other deleterious effects, the Court found that Petitioners established a concrete and sufficiently imminent injury that is traceable to the EPA. Additionally, the Court found redressability because a favorable decision would likely prompt the EPA to regulate new motor vehicle emissions under section 202 of the CAA. *Id.* at 1455. The Court rejected the EPA's argument that such regulations would have such an insignificant effect on global warming that they could not possibly redress plaintiff's injury. *Id.* at 1457. The Court held that EPA action need not remedy global warming; it was sufficient that reductions would slow the pace of global emissions increases. *Id.* at 1458 (citing Larson v. Valente, 456 U.S. 228, 243 n.15 (1982)).

After establishing federal jurisdiction over Petitioner's claims, the Court then turned to the two statutory issues in the case. The Court noted that review of rulemaking petition denials is "extremely limited" and "highly deferential." *Id.* at 1459 (quoting Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir.

1989)). However, a reviewing court may overturn a rulemaking petition denial found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." CAA § 307(d)(9), 42 U.S.C. § 7607(d)(9) (2000). On the merits, the Court rejected the EPA's arguments that the agency is not authorized to regulate greenhouse gases under the CAA, and, in the alternative, can decline to act under section 202 when executive policies warrant forbearance. *Massachusetts*, 127 S. Ct. at 1459-60, 1463.

The EPA's petition denial argued that global warming's political history counseled against addressing the issue until the agency received an express directive from Congress to do so. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)). Because the EPA assumed that Congress did not intend the EPA to regulate global climate change under the CAA, it concluded that greenhouse gases cannot be considered "air pollutants" under the act for their contributions to global warming.

While not expressly invoking *Chevron* deference, the Court began its statutory analysis by holding that the CAA definition of "air pollutant," while broad, is not ambiguous. *Massachusetts*, 127 S. Ct. at 1460; *see* Chevron Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (holding that courts must defer to an agency's reasonable statutory interpretations when the statute is ambiguous . . . "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect"). The CAA authorizes, and at times mandates, regulation of air pollutants, which are defined as "any physical, chemical, . . . substance . . . emitted into . . . the ambient air [which acts as a pollutant agent]." CAA § 302(g), 42 U.S.C. § 7602(g). In rejecting the EPA's argument, the Court reasoned that the CAA's simple definition of "air pollutant" was intended to grant the EPA a sufficiently broad authority to address scientific advances in the field of air pollution and maintain the CAA's predominance over all air quality issues. *Massachusetts*, 127 S. Ct. at 1460. The Court reiterated that broad statutory language, properly interpreted to incorporate action not expressly contemplated by Congress, does not amount to ambiguity; and instead demonstrates breadth. *Id.* at 1460-62 (citing Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)). Additionally, the Court found that subsequent congressional action on global warming did not evince an intent to limit the EPA's authority to regulate greenhouse gases as an air pollutant under the CAA. *Id.* at 1460-61. Because greenhouse gases are

a physical chemical substance emitted into ambient air, the Court held that the EPA has authority under the CAA to regulate greenhouse gases as air pollutants under the plain language of the statute. *Id.* at 1462.

Next, the Court rejected the EPA's argument that the agency may refuse to regulate under section 202 when it is faced with a contentious political climate and scientific uncertainty. *Id.* at 1463. The EPA contended that the statutory language "in the Administrator's judgment" grants the agency complete discretion to make or withhold that initial judgment on which the statutory mandate "shall regulate" is conditioned. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003); CAA § 202, 42 U.S.C. 7521. This interpretation would essentially give the agency complete discretion over whether to regulate, despite the mandatory language in section 202. The Court rejected the EPA's interpretation, and held that the EPA's initial judgment about the appropriateness of regulation "must relate to whether an air pollutant' cause[s], or contribute[s] to, air pollution that may reasonably be anticipated to endanger public health or welfare.'" *Massachusetts*, 127 S. Ct. at 1462 (quoting 42 U.S.C. § 7521(a)(1)). The Court reasoned that under section 202's clear terms, the EPA may only avoid regulating if it judges that greenhouse gases do not cause or contribute to global warming *or* offers a reasonable explanation for refusing to make the threshold judgment. On this basis, the Court held that executive foreign policy did not absolve the EPA of its duty to make a scientific finding. *Id.* at 1463. The Court noted, "while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Id.* The Court also determined that the EPA improperly relied on scientific uncertainty to deny the rulemaking petition. The Court reiterated that the EPA must have a statutory basis for denying a rulemaking petition under section 202 of the CAA. On these grounds, the Court held that the EPA may only rely on scientific uncertainty if it is "so profound" that the EPA *cannot* make a reasonable judgment as to whether greenhouse gases cause or contribute to global warming. The Court then reversed the decision below, and remanded to the EPA to ground its response to the 202 rulemaking petition in the text of the statute.

Chief Justice Roberts and Justice Scalia wrote dissenting opinions, which were joined by Justice Alito and Justice Thomas. Chief Justice Roberts took issue with the fact that the Majority framed its standing argument in terms of Massachusetts' rights as a quasi-sovereign entity. *Id.* at 1464-66 (Roberts, C.J., dissenting). The Chief Justice would have taken a narrow approach to the issue, set aside the procedural injury that

occurs when the federal government ignores a congressional mandate, and applied the most stringent standing requirements yet to befall Supreme Court jurisprudence. *See id.* at 1467-71 (Roberts, C.J., dissenting) (requiring Massachusetts to elaborate on its argument that global climate change leads to increased sea levels, and increased sea levels resulting from global climate change have swallowed Massachusetts' territory; arguing loss of coastal land is only a "possible future injury"; and requiring a showing that a reduction in greenhouse gas emission from new motor vehicles alone will preserve Massachusetts' coastal property). Justice Scalia agreed with Chief Justice Roberts that Petitioners did not establish standing, but addressed the merits because the Majority did so. *Id.* at 1471 (Scalia, J., dissenting). Justice Scalia would frame the issue on the merits as whether the EPA properly deferred a decision to regulate greenhouse gas emissions from new motor vehicles, rather than whether the EPA properly denied a rulemaking petition requesting regulation of such emissions. *Id.* at 1473 (Scalia, J., dissenting). Additionally, Justice Scalia would have deferred to the EPA's interpretation of what constitutes an "air pollutant" and what underlies an agency's "judgment" under the CAA. *Id.* at 1473-74 (Scalia, J., dissenting). On these grounds, Justice Scalia would have upheld the EPA's decision-making based on the agency's political concerns and its desire for unequivocal proof that greenhouse gas emissions cause global climate change. *Id.* at 1474-75 (Scalia, J., dissenting).

Environmentalists celebrate *Massachusetts* as one of the most important Supreme Court decisions in recent decades, despite the fact that the EPA is not likely to regulate greenhouse gas under the CAA any time soon. While suffering from the same agency foot-dragging maladies that have stretched this case out for eight years, *Massachusetts* has helped create a common-sense discourse about global warming that has changed the way the United States government talks and thinks about global warming.

Since *Massachusetts*, the EPA has declined to move with any expediency or purpose towards greenhouse gas emissions regulation. In June 2007, Stephen Johnson, EPA Administrator, told the House Special Committee on Energy Independence and Global Warming that the statutory term "endangerment" is a "legal term of art," and that the agency will need until late 2008 to understand and comply with the Supreme Court's directives. EPA Wordplay: What Does "Endanger" Mean? (Warming Law, Changing the Climate in the Courts) (June 12, 2007), http://warminglaw.typepad.com/my_weblog/2007/06/index.html.

In August 2007, the EPA issued an air permit to a coal-fired power plant, and declined to place any control requirements on CO_2 emissions from the plant. In doing so, the EPA determined that CO_2 is not "subject to regulation" such that control is required, because the EPA has not *yet* regulated it. Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct Permit No. PSD-OU-0002-0.400 at 5-6, United States Environmental Protection Agency Region 8 (Aug. 30, 2007), *available at* http://www.epa.gov/region8/air/permitting/ResponseToComments.pdf. The EPA has also been slow to address California's request for a preemption waiver under the CAA, so that the state can impose its own greenhouse gas emission regulation while the EPA continues to deny and decry the need for immediate action.

Although *Massachusetts* has not been the "action-forcing" decision some hoped for, its legal and political implications have affected and will continue to affect how the U.S. federal government operates. By acknowledging a state's standing to sue when the federal government has primary authority to mitigate harm to a state and refuses to do so, the Supreme Court has opened the door to states challenging federal agency inaction. Agency inaction is at the heart of *Massachusetts* and many other controversial and politicized issues. By granting Massachusetts standing based on its rights as a quasi-sovereign entity, the Supreme Court has provided state governments, and therefore state citizens, a venue to challenge agency inaction in the future. *Massachusetts* is an important case for administrative law, as well. Prior to *Massachusetts*, it was unclear whether courts had the authority to review an agency's decision to *deny* a rulemaking petition when the agency had no statutory duty to make a final decision on the petition in the first place. However, the Supreme Court adopted the Circuit Court positions on this matter, and agreed that judges can review rulemaking petition denials but that review should be very deferential. While not expressly doing so, *Massachusetts* also addresses a question of statutory interpretation that has been decided different ways in different Circuits. Courts have had difficulty interpreting statutes that combine both discretionary language (like "in his judgment") and mandatory language (such as "shall regulate"). In *Massachusetts*, the Supreme Court essentially addressed this split by holding that any decision to withhold the exercise of discretion, the judgment, must be rooted in the language of the statute.

Perhaps the most important effect of *Massachusetts* is the way the opinion changed how the U.S. federal government talks about global warming. Prior to *Massachusetts*, the EPA and President Bush

repeatedly denied that human activity caused global warming. Now that the Supreme Court has stated that even *they* can see how humans cause global warming, the executive branch cannot continue its unilateral position without looking foolish. Moreover, *Massachusetts* has vindicated the individuals, industries, organizations, and state and local governments that have been pushing for global warming regulation all along. This political momentum has already led to major changes in the U.S. global warming policy, and will continue on until the 110th Congress takes action.

Erica L. Rancilio

National Parks & Conservation Ass'n v. TVA,
502 F.3d 1316 (11th Cir. 2007)

National Parks Conservation Association and the Sierra Club appealed the dismissal of their Clean Air Act (CAA) citizen suit against the Tennessee Valley Authority (TVA). Nat'l Parks & Conservation Ass'n v. TVA, 502 F.3d 1316, 1318 (11th Cir. 2007). The key issue was whether the TVA's work from 1982-1983 on one unit, Unit 5, of a coal-fired power plant in Colbert County, Tennessee, lacked the necessary construction permits and whether anything could be done about it.

The controversy over Unit 5 began in 1999 when the EPA charged the TVA with illegally modifying Unit 5 (among others) in violation of the New Source Review Programs. *Id.* at 1319. After administrative proceedings, the EPA found the TVA had violated the CAA and ordered it to come into compliance. However, the United States Court of Appeals for the Eleventh Circuit refused to enforce the order on the grounds that the administrative proceedings were unconstitutional. Afterwards, the EPA stopped prosecuting the TVA for the alleged violations. National Parks and Sierra Club then began pursuing citizens' suits over the CAA violations that the EPA was no longer pursuing.

National Parks' suit concerning Colbert Unit 5 alleged that the TVA illegally modified Unit 5 by failing to comply with the New Source Performance Review, including "failing to obtain construction permits, failing to perform air quality analysis and install emission controls, failing to obtain offsets, and operating the Unit as illegally modified." *Id.* at 1320. National Parks also alleged that Unit 5's emissions exceed the EPA limitations and violated the CAA's New Source Performance Standards. The key assumption underlying National Parks allegations was that Unit 5 underwent a major modification in 1982-1983.

The United States District Court for the Northern District of Alabama dismissed National Parks' case in three orders. First, the district court denied National Parks' motion for partial summary judgment on the issue whether the work on Unit 5 was a modification. Second, the district court granted the TVA partial summary judgment by holding that the New Source Review claims were barred by the statute of limitations and the concurrent remedy doctrine. Third, the district court dismissed the New Source Performance Standards claim for insufficient pre-suit notice, finding the notice given to be insufficiently specific. The district court never decided the issue of whether the 1982-1983 work was a major modification, just that there were disputed factual issues.

Since the appealed orders were summary judgment orders and a dismissal, the 11th circuit panel assumed that the 1982-1983 work was a sufficiently major modification to trigger the CAA New Source Review Program and Standards. *Id.* at 1321. The dismissal of the New Source Review claims was based on a statute of limitations bar for civil penalties and a bar on equitable remedies based on the concurrent remedy doctrine, which bars equitable relief when the statute of limitations bars the legal claims. National Parks was not contesting the dismissal of the civil penalties because the civil penalties were already barred on sovereign immunity grounds.

The panel began its analysis by looking to see if the statute of limitations barred the legal claims. *Id.* at 1322. The statute of limitations in question is the general federal statute of limitations, which begins running when the claim first accrues. *See* 28 U.S.C. § 2462 (2000). Because the TVA had completed the work more than five years ago, National Parks had advanced several theories as to why the statute of limitations did not bar the suit. *Nat'l Parks*, 502 F.3d at 1322. First, National Parks claimed the TVA's CAA violations were continuing violations. Ordinarily, the statute of limitations begins running on the date a violation first occurs. Under the continuing violations doctrine the statute of limitations is tolled while a violation continues to occur. The panel reasoned that the important distinction in this case was between the continuation of a violation and the present consequences of a violation. The panel agreed with a line of cases that found that preconstruction permit violations occurred at the time of construction. The panel based its reasoning on two section of the CAA. The relevant part of the CAA states, "No major emitting facility . . . may be constructed . . . unless a permit has been issued. . . ." 42 U.S.C. § 7475(a)(1) (2000). The panel also looked at the citizen suit provision National Parks used to bring suit. *Nat'l Parks*, 502 F.3d at 1322 (citing 42 U.S.C. § 7604(a)(3)). That

section permits suit "against any person who *proposes to construct or constructs* any new or modified major emitting facility without a permit." *Id.* (emphasis added). The panel reasoned that operation was not a basis of New Source Review violation under either section of the statute. *Id.*

Furthermore, the panel found it significant that regulation of construction and regulation of operation were in separate sections of the statute. The panel rejected the line of cases that had held preconstruction requirement violations as continuing violations by saying that only *United States v. Duke Energy* offered a rationale. *Id.* at 1323 (citing United States v. Duke Energy, 278 F. Supp. 2d 619 (M.D.N.C. 2003)). The panel distinguished *Duke Energy* by noting that North Carolina integrated construction and operating permits and Alabama used separate construction and operating permit systems in 1982-1983. Also, the operating permit was not conditioned on compliance with preconstruction requirements.

National Parks also advanced the theory that the TVA's continuing failure to operate with Best Available Control Technology (BACT) emissions limitations meant that the statute of limitations had not run. Because Unit 5 never went through the preconstruction permitting process, the TVA never determined BACT. *Id.* at 1324. The TVA thus violates the CAA when it operates Unit 5 without BACT. National Parks also pointed out that the Alabama State Implementation Plan stated that modified sources "shall apply" BACT. In addition, National Parks pointed to a recent decision of the United States Court of Appeals for the Sixth Circuit that Tennessee regulations created an ongoing obligation to install BACT and operation was a continuing violation. Nat'l Parks Conservation Ass'n v. TVA, 480 F.3d 410, 418-19 (6th Cir. 2007). The panel distinguished this case by pointing out that Alabama, not Tennessee regulations applied and that the obligation to apply BACT was a condition for approval of the modification, and not an operating condition. *Nat'l Parks*, 502 F.3d at 1325. The Alabama regulations lacked a way to make a BACT determination outside the preconstruction process and the BACT determination process applied to "each proposed emissions unit." The Tennessee regulations allowed for a construction permit to be issued at a later date. The Sixth Circuit case used the possible issuance of a proper construction permit after construction to create a continuing obligation to operate with BACT. The panel reasoned that the Alabama regulations' lack of such a provision meant that Unit 5 was not under a continuing obligation.

National Parks' third theory of a continuing violation was the TVA's failure to obtain an "Air Permit" that specifies BACT after the revision of

Alabama's regulations in 1985. *Id.* at 1326. Those regulations combined operation and construction permitting into one system. Under the 1985 regulations a source modification required an Air Permit before construction and the source could not operate legally until the Air Permit was obtained. *Id.* (citing ALA. ADMIN. CODE R. 335-3-14-.01(1)(a), (c) (2006)). However, the panel reasoned that this requirement was not significant since it did not apply retroactively to all construction and operating permits that converted into Air Permits in 1985. According to the panel, the TVA had the correct permits at all times, and never violated any of its operational requirements. Having rejected all three of National Parks' arguments, the panel concluded that Unit 5's emissions were just a "current ill effect" of its past violation and not a continuing violation. As such, the preconstruction violations were barred by the statute of limitations.

Having established that the statute of limitations barred legal relief, the panel next determined that equitable remedies were barred under the concurrent remedy doctrine. *Id.* at 1327. National Parks once again had three arguments against application of the concurrent remedy doctrine that did not persuade the panel. First, National Parks relied on an exception to the concurrent remedy doctrine whereby claims brought by the federal government in its sovereign capacity were not barred. National Parks attempted to apply this exception to citizen suits since plaintiffs in citizen suits act as "'private attorneys general' to enforce environmental regulations for the public benefit." *Id.* The panel rejected this argument using the statutory language of the CAA citizen suit provisions that plaintiffs commenced the civil actions "on [their] own behalf." *Id.* (citing 42 U.S.C. § 7604(a)).

Next, National Parks argued that they did not seek "concurrent" remedies. National Parks relied on a case that held that separate legal and equitable claims were not concurrent because legal and equitable remedies had "different goals and effects." *Id.* (citing United States v. Cinergy Corp., 397 F. Supp. 2d 1025, 1032 (S.D. Ind. 2005)). The panel though the distinction was not a meaningful one. The panel reasoned that remedies were concurrent because "an action at law or equity could be brought on the same facts." *Id.* (quoting United States v. Tellwride, 146 F.3d 1241, 1248 n.12 (11th Cir. 1998)).

National Parks' final argument against application of the concurrent remedies doctrine was that they were only claiming equitable relief. *Id.* at 1328. National Parks pointed out that they had no legal claim, not even a time-barred legal claim, because of the TVA's sovereign immunity. The panel based its rejection of National Parks' argument on the

inclusion of civil penalties in the operative complaint and sovereign immunity not rendering the statute of limitations superfluous. The panel stated that the TVA could raise multiple defenses that did not invalidate each other.

The panel next dismissed National Parks' claim of a violation of New Source Performance Standards on a failure of pre suit notification. National Parks argued both that no notice was required and that they complied with the notice requirements. National Parks based its argument that no notice was required on a "hybrid complaint" theory. *Id.* at 1329. This theory states that when suits requiring notice are related to suits that do require notice, neither claim requires notice. *Id.* (citing Dague v. City of Burlington, 935 F.2d 1343, 1351-52 (2d Cir. 1991)). Although the New Source Performance Standards violation claim would have required notice if it stood alone, National Parks argued that it brought that claim with the New Source Review claims, which did not require notice. The panel distinguished this case from precedent cases excusing notice requirements on the basis that the plaintiffs had given notice in the precedent cases, but had not waited the required time period.

The second issue was whether National Parks' notice was sufficiently specific to be considered notice. The panel observed that the notice identified the unit, dated the violations as beginning from 1983, and identified the subpart of the governing regulation. National Parks argued that even without its notice letter, the TVA should have known about the alleged violations by the EPA action. The panel concluded the notice was inadequate because it did not provide enough detail to "give the alleged violator the opportunity to correct the problem before a lawsuit is filed." *Id.* at 1330. National Parks' letter had alleged that Unit 5 violated all the requirements of Subpart (d). *Id.* (citing 40 C.F.R. §§ 60.40a-60.49a (2006)). This regulation sets standards for several pollutants and National Parks eventually discovered Unit 5 only violated the standards for emission of one pollutant. The panel pointed to similar Clean Water Act provisions that require differentiation of one pollutant from another. The panel also reasoned that alleging a failure every day did not identify specific activities that violated the CAA and it gave little guidance to the TVA for identifying the violations of which it was accused. Finally, the panel said that the involvement with the EPA's administrative action could not substitute for specificity in the letter.

The last issue was the district court's denial of National Parks' motion for partial summary judgment as to whether the 1982-1983 work was a major modification. *Id.* at 1330. The panel refused to review the

order since it dismissed National Parks' claims. Also, the panel claimed it lacked jurisdiction to review the denial of a motion for partial summary judgment because it was not an appealable final judgment.

The effect of this case will be to expand the ability of a hostile court to throw out citizen suits on the basis of lack of notification. This case's lesson for environmental plaintiffs that are making broad claims in citizen suits is the need to exhaustively list every day, every violation, every subpart and every pollutant in its precitizen suit notices.

Emon O. Mahony

NRDC v. EPA,
489 F.3d 1250 (D.C. Cir. 2007)

The National Resource Defense Council (NRDC) petitioned the United States Court of Appeals for the District of Columbia arguing that two rules recently promulgated by the Environmental Protection Agency (EPA) violated the Clean Air Act (CAA). The first rule, Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 70 Fed. Reg. 55,568 (Sept. 22, 2005) (CISWI Rule), was promulgated under CAA section 129 (42 U.S.C. § 7429 (2000)). The CISWI Rule was challenged by four environmental organizations: the NRDC, the Sierra Club, the Environmental Integrity Project, and the Louisiana Environmental Action Network. These environmental petitioners argued that the CISWI Rule too narrowly defined "commercial or industrial waste" such that the term contradicted the plain language of CAA section 129. This definition is important, the environmental petitioners argued, because it is necessary in defining a "solid waste incineration unit." By narrowly defining "commercial or industrial waste," the EPA effectively shrunk the number of "solid waste incineration units" subject to the emission requirements of the CISWI Rule, instead classifying them as boilers. NRDC v. EPA, 489 F.3d 1250, 1253-54 (D.C. Cir. 2007).

The second rule at issue in *NRDC*, the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters, 69 Fed. Reg. 55,218 (Sept. 13, 2004), *as amended on recons.*, 70 Fed. Reg. 76,918 (Dec. 28, 2005) (Boilers Rule), was promulgated under CAA section 112 (42 U.S.C. § 7412). The above-mentioned environmental petitioners challenged the standards set in the Boilers Rule, as well as the methodology in reaching those standards. The Boilers Rule also was challenged by municipal-based

industry petitioners, namely six of American Municipal Power-Ohio, Inc.'s members, who argued that "EPA failed to comply with the requirements of the Regulatory Flexibility Act, 5 U.S.C. § 601, and that the [Boilers Rule] standards as applied to small municipal utilities are unlawful." *NRDC*, 489 F.3d at 1253-54.

The D.C. Circuit first examined the CISWI Rule, reviewing the environmental petitioners' argument that the EPA's definition of "commercial or industrial waste" conflicted with the language of CAA section 129. The D.C. Circuit moved directly into an analysis under *Chevron U.S.A., Inc. v. NRDC*, first determining whether Congress had spoken on the issue, and then only if the CAA was silent or ambiguous, deferring to a permissible interpretation of the statute. *Id.* at 1257 (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). The D.C. Circuit held that the EPA's CISWI Rule failed *Chevron*'s first step. CAA section 129 defines "solid waste incineration unit" as "a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels)." 42 U.S.C. § 7429(g)(1). The CISWI Rule promulgated by the EPA, however, defined the material that comes out of those units—commercial or industrial waste—only to include "solid waste . . . that is combusted at any commercial or industrial facility using controlled flame combustion in an enclosed, distinct operating unit: (1) whose design does not provide for energy recovery (as defined in this subpart); or (2) operated without energy recovery." 70 Fed. Reg. at 55,572. The EPA defined the term "energy recovery" as "the process of recovering thermal energy from combustion for useful purposes such as steam generation or process heating." *NRDC*, 489 F.3d at 1257. By narrowing the definition for "commercial or industrial waste" to exempt facilities that provide for any sort of energy recovery, the EPA effectively reduced the number of waste units to which section 129 of the CAA applied. If a commercial or industrial incinerator had any sort of thermal recovery component, CAA section 129 would not apply under the EPA's rule. Because the CAA defined "solid waste incineration unit" more broadly to include *any* unit that combusts *any* solid waste material from commercial or industrial establishments, the D.C. Circuit held that the EPA's CISWI Rule violated the plain language of the CAA. *Id.*

The EPA asserted several arguments to justify the CISWI Rule, but the D.C. Circuit rejected them all. The EPA's principal argument was that the CAA did not define the term "commercial or industrial waste"; therefore, the term was ambiguous and the EPA could promulgate its

own definition. The D.C. Circuit disagreed, stating that "the lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous." *Id.* at 1258 (citing Goldstein v. SEC, 451 F.3d 873, 878 (D.C. Cir. 2006)). The court explained that the term was not ambiguous because of the clear definition of "solid waste incineration unit" in the CAA, which provides clear meaning as to what constitutes "commercial and industrial waste." *Id.*

The EPA next argued that the legislative history of CAA section 129 demonstrated that the term "any" has a narrower meaning in the Act than the term carries in common usage, and therefore provided the EPA the discretion to exempt thermal energy recovery facilities from the emission requirements of the CISWI Rule. The D.C. Circuit disagreed, noting that the EPA's evidence—"the isolated remarks of a few senators"—could not overcome the clear language of the statute. In fact, the court took the opposite position of the EPA and gave "an expansive reading to 'any' to increase the number of CISWI units subject to section 129's emission standards." *Id.* at 1258-60.

The EPA next argued that their CISWI Rule reasonably distinguished between incinerators, the primary purpose of which is to destroy materials, and boilers, which operate to recover heat. While the court acknowledged that such a distinction may be reasonable, the argument failed in this context because that distinction conflicts with the distinction made by Congress in CAA section 129 ("any facility which combusts any solid waste material"). *Id.* at 1260.

Lastly, the EPA argued that the CAA separates facilities subject to section 129's requirements from those subject to section 112's requirements, and that Congress left discretion in the hands of the EPA to draw the line and ensure that facilities are on one side of the line only. The D.C. Circuit again cited the "straightforward" directive of CAA section 129, which directs the EPA to use section 129's definition of "solid waste incineration unit" to make this distinction. In other words, Congress conferred no discretion to the EPA in this area. *Id.* at 1260-61.

The D.C. Circuit next examined the Boilers Rule. The court declined to reach the merits of the arguments presented by the environmental and municipal petitioners, agreeing instead with the EPA's oral argument that if the CISWI Rule was overturned, the EPA must revise the Boilers Rule as well. By striking down the CISWI Rule, the D.C. Circuit effectively shifted thousands of units that the EPA had placed under the Boilers Rule and put them back under the CISWI Rule, ruling that under the CAA even units with some thermal energy recovery function were incinerators, not boilers. Because of the significant

increase in the number of incinerator facilities, and the corresponding decrease in the number of boiler facilities, the court required the EPA to reconsider emissions standards for both. *Id.* at 1261. Accordingly, the D.C. Circuit vacated and remanded the Boilers Rule, as well as the CISWI Rule, in their entirety. The court acknowledged that this decision created a standardless zone, albeit a temporary one, and therefore permitted any party to "file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards." *Id.* at 1262 (citing Cement Kiln Recycling Coal v. EPA, 255 F.3d 855, 872 (D.C. Cir. 1998)).

Judge Randolph concurred in the judgment of the court, offering a separate opinion to articulate the merits of the decision not only to remand, but also to vacate. Judge Randolph argued that in non-APA § 706(2) cases such as this one, the court should not simply remand, but also vacate. Judge Randolph strongly suggested that in this particular case the court also should "entertain a motion for a stay of the mandate while the agency [takes] corrective action," thereby providing a hint to environmental petitioners as to how to deal with the potentially standardless interim period once the court's decision takes effect. *Id.* Judge Randolph reasoned that if the court simply remands then the unlawful agency action remains in place, and the agency has no incentive to move quickly and resolve the matter. The complained of injury continues to inflict harm, and the plaintiffs, the victors in the case, have the burden of bringing a mandamus petition to make it stop. Plus, a simple remand is not subject to further judicial review, while a decision to vacate in this case opens the issue for appeal to the United States Supreme Court. *Id.* at 1263-64.

Judge Rodgers, on the other hand, concurred in the judgment, but dissented as to the remedy, arguing that the court should simply remand the two rules because it was better to leave in place some environmental protections, even if inadequate, rather than no protection at all. *Id.* at 1266. Rebutting Judge Randolph's arguments, Judge Rodgers argued a stay of mandate is supposed to be for no more than ninety days, yet the agency response may take years. *Id.* at 1265 (citing D.C. Cir. R. 41(a)(2)). Therefore, the court should not rely on a stay to fix the problem of a standardless interim period for incinerator and boiler emissions. Judge Rodgers argued further that the EPA had not suggested that its response would be prompt, no party had made any mention of appealing the decision, and the environmental petitioners themselves argued only for a remand precisely because of the potentially large gap of

time in which emissions from incinerators and boilers may go unregulated. *Id.*

Somewhat surprisingly, both the deadline to request a rehearing and the deadline to request a stay expired in July 2007 with neither party making a request. Consequently, the D.C. Circuit's decision to vacate the two rules took effect when those deadlines expired. *Id.*, Judgment, No. 04-1385, *available at* www.epa.gov/ttn/atw/129/ciwi/boilers_mandate-07_30_07.pdf. Industry members affected by the CISWI and Boilers Rule are now in a standardless zone, waiting for the EPA to go through its rulemaking procedure to comply with the CAA. It is unclear when new standards will arrive, but as Judge Rogers suggested in his dissent, it may take years.

Armand M. Perry

II. CLEAN WATER ACT

United States v. Cooper, 482 F.3d 658 (4th Cir. 2007)

Defendant D.J. Cooper appealed to the United States Court of Appeals for the Fourth Circuit from his conviction by a jury on nine counts of knowingly discharging a pollutant into waters of the United States in violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (2000), commonly known as the Clean Water Act (CWA). Cooper operated a sewage lagoon that served as the only method of human waste disposal at his trailer park in Bedford County, Virginia, from 1967 until October 2004 when he was indicted on charges related to this case. The lagoon treats the waste via a process that mixes the sewage with a chlorine solution. The solution then flows from the lagoon, down a channel and into a small creek which is a tributary of Sandy Creek, which is in turn, a tributary of the Roanoke River, an interstate water. As a result, the small creek into which the lagoon discharges is a water of the United States because it is a tributary of an interstate water. As such, Cooper was required to maintain a permit pursuant to the Virginia Pollution Discharge Elimination System program approved by the U.S. Environmental Protection Agency (EPA), which regulated and authorized discharge of pollutants other than dredge and fill material into state and federal waters.

Cooper maintained a series of permits beginning in 1997 until his final permit expired on March 7, 2002. Cooper had a contentious relationship with the Virginia Department of Environmental Quality

(DEQ), the agency that regulated his permits leading up to his criminal conviction. The DEQ issued over 300 citations to Cooper and fined him a total of $7000 for violations of CWA standards between 1993 and 2002. After his permit expired in 2002, Cooper continued to operate the lagoon despite being fined $10,000, and receiving Notices of Violation and inspection reports from the DEQ stating that he was discharging illegally. In 2003, the U.S. EPA's Criminal Investigation Division began investigating the discharges from Cooper's lagoon. On October 21, 2004, Cooper was indicted on thirteen felony counts of knowingly discharging a pollutant into waters of the United States without a permit in violation of the CWA. After a three-day trial, the jury found Cooper guilty on nine counts and the court sentenced him to twenty-seven months in prison and issued a fine of $270,000.

Cooper appealed contending, inter alia, that the district court should have granted an acquittal for lack of sufficient evidence because the government failed to prove that Cooper knew that he was discharging pollutants into waters of the United States. The Fourth Circuit found that the district court did not err in denying Cooper's motion, and thus affirmed the judgment of the district court that the CWA does not require the government to prove that Cooper had knowledge that the waters he affected were waters of the United States.

Cooper claimed that the district court erred in denying his motion for a judgment of acquittal for lack of sufficient evidence because the government failed to establish that Cooper knew that the waters he was affecting "were a tributary of a navigable water, or adjacent to a navigable water, or had a significant nexus to a navigable water." United States v. Cooper, 482 F.3d 658, 664 (4th Cir. 2007). The underlying basis for his claim was that pursuant to the CWA the government had to prove that Cooper was "aware of the facts that establish the federal government's jurisdiction over the water for purposes of the CWA." *Id.* The Fourth Circuit rejected this argument by concluding that the creek's status as a "water of the United States" was a jurisdictional fact which required that the government merely establish the objective nature of the creek's status, not the defendant's knowledge of that jurisdictional fact. The court first discussed the scope and application of jurisdictional elements, and then explored the three reasons that supported its conclusion.

The court noted that Congress includes jurisdictional elements in federal legislation so that it has a basis for its power to regulate the conduct at issue. In support of this notion, the court cited the Supreme Court decision in *United States v. Yermain*, which stated that the

"primary purpose [of a jurisdictional element] is to identify the factor that makes the [conduct] an appropriate subject for federal concern." 468 U.S. 63, 68 (1984). In the instant case, Cooper was convicted of knowingly discharging a pollutant without a permit into waters of the United States as defined by the CWA. The court notes that the "waters of the United States" as mentioned in the CWA is a "classic jurisdiction element" that serves to place Congress in a position to enact the statute.

Next, the court addressed the general applicability of jurisdictional elements as they relate to criminal mens rea requirements. In doing so, the court followed *United States v. Feola*, which stated that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." *Cooper*, 482 F.3d at 664 (quoting United States v. Feola, 420 U.S. 671, 677 n.9 (1975)). This supports the court's position that it is "well-settled" that mens rea requirements usually do not apply to jurisdictional elements of crimes. *Id.* Thus, the court concluded that since Congress legislates under the awareness that jurisdictional elements serve to establish federal jurisdiction, Congress does not intend that jurisdictional hooks pose as statutory elements that require defendants to form the appropriate mens rea to act illegally. However, *Feola* also notes that in exceptional circumstances, Congress may intend that an element be both jurisdictional and substantive. Thus, the court explored the language of the CWA to determine whether Congress intended that "waters of the United States" serve as more than just a jurisdictional hook.

The court noted that the language of the CWA "offers every reason to conclude that the term waters of the United States as it operates in this case is 'nothing more than the jurisdictional peg on which Congress based federal jurisdiction.'" *Id.* at 665 (citing United States v. LeFaivre, 507 F.2d 1288, 1297 n.14 (4th Cir. 1974)). Section 1319(c)(2)(A) of the CWA prohibits a person from "knowingly" violating section 1311. *Id.* at 666. The court explored the provisions concerning the discharge of pollutants into waters of the United States to determine whether Congress intended "knowingly" to extend to section 1311 and the subsequent provisions that it invokes—sections 1362(12) and 1362(7). Read as a whole, section 1311 and subsequent provisions prohibit the discharge of any pollutant into navigable waters of the United States. The court concluded that the statutory "string of provisions hardly compels" the reading that knowingly was to extend to waters of the United States. The court further noted that Congress would have spoken more clearly if it intended to overcome the well-understood construction

that mens rea requirements do not extend to jurisdictional elements. Moreover, the court concluded that attaching a mens rea requirement to the jurisdictional element would undermine the statute since the purpose of the CWA is to protect the nation's waters. The court found that it would be unlikely that Congress would intend for culpability to hinge on a defendant's awareness of "the jurisdictional nexus" of the statute that he violated.

The third part of the court's analysis focused on precedent. The court examined other circuit decisions regarding the scope of "knowingly" as it pertains to the CWA. Of the four other circuits that have dealt with this issue, three decided that "knowingly" does not extend to the jurisdictional element "waters of the United States," and one chose not to directly deal with the issue. *Id.* at 668 (citing United States v. Sinskey, 119 F.3d 712, 715 (8th Cir. 1997); United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996); United States v. Hopkins, 53 F.3d 533, 541 (2d Cir. 1995); United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993)).

In conclusion, the court found that "waters of the United States" in the CWA was "nothing more than" a jurisdictional element based on the language of the statute, congressional intent and precedent. Because this issue was dispositive, the court affirmed the district court's decision which held that the government was not required to prove that Cooper knew that the creek into which he was discharging was a water of the United States.

Because the majority of the circuits that have dealt with this issue have decided it the same way, this Fourth Circuit decision does not run afoul of precedent. Furthermore, it is a sound decision because it follows well settled constructions of mens rea requirements as they relate to jurisdictional elements of federal statutes. As noted by the court, this treatment of a jurisdictional element in an environmental protection statute suggests that the same stringent rules for other criminal violations apply to environmental harms as well.

Jeannice Williams

III. GLOBAL WARMING/EMISSIONS STANDARDS

California v. General Motors, No. C06-05755 MJJ, slip op. (N.D. Cal. Sept. 17, 2007)

The State of California filed suit against several auto manufacturers for creating and contributing to global warming, which the state alleged

is a public nuisance that is "harming California, its environment, its economy, and the general health and well being of its citizens." Second Amended Complaint at 1, California v. General Motors, No. C06-05755 MJJ, slip op. (N.D. Cal. Sept. 17, 2007). According to the complaint, global warming has caused coastline loss, increased ozone pollution in urban areas, increased the threat of wildfires, and has cost the state millions of dollars. California asserted two causes of action, one under federal common law and one under California law, both based on a theory of product liability. Because defendant automakers produce vehicles responsible for twenty percent of carbon dioxide emissions in the United States and thirty percent of such emissions in California, the State argued that defendants were liable for damages. California v. General Motors, No. C06-05755 MJJ, slip op., at 2.

The defendants moved to dismiss on four grounds: (1) the complaint raised nonjusticiable issues reserved for the political branches of government, (2) the complaint failed to state a valid nuisance claim under federal common law, (3) the complaint failed to state a valid nuisance claim under California law, and (4) the nuisance claim under California law was preempted by federal law. The court, citing a long chronology of congressional and executive actions on climate change, agreed that California's complaint was a nonjusticiable political question and dismissed on that ground. *Id.* at 16.

In *Baker v. Carr*, the United States Supreme Court listed six factors that indicate a nonjusticiable political question. If any of the factors are "inextricable" from the complaint, then it implicates a nonjusticiable political question. These factors are:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government, (5) an unusual need for unquestioning adherence to a political decision already made, or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 6 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)). The court found that California's complaint implicated the first three *Baker* factors, and that the third factor was the most relevant in determining that California's claim was a nonjusticiable political question. *Id.* at 6.

In considering the third *Baker* factor, whether deciding the case would require making a policy decision, the court relied heavily on *Connecticut v. AEP Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). In *AEP*, a group of states and conservation organizations sued several power generators, alleged to be the five largest emitters of carbon dioxide in the United States. The *AEP* plaintiffs sued under federal common law, seeking abatement of the public nuisance of global warming. *Id.* at 266. The *AEP* court dismissed the complaint because the political branches had explicitly refused to limit carbon dioxide emissions in the manner that the plaintiffs sought to "impose by judicial fiat." *Id.* at 274.

California argued that the present case was distinguishable from *AEP*, noting that here the State was asking for damages rather than an injunction. The court thought this distinction was irrelevant, because the court would still have to "make an initial decision as to what is unreasonable in the context of carbon dioxide emissions" which would require creating a "quotient or standard." *California*, No. C06-05755 MJJ, slip op., at 8.

California also argued that the Supreme Court's recent decision in *Massachusetts v. EPA* supported the state's claim. In *Massachusetts*, the Supreme Court acknowledged that greenhouse gasses are unquestionably agents of air pollution, which cause "serious and well-recognized" harms. 127 S. Ct. 1438, 1442 (2007). The Court further recognized that states have an interest in protecting their citizens and resources from environmental harms, citing *Georgia v. Tennessee Copper*, a case that was based on a public nuisance claim. *Id.* at 1454. California argued that, as in *Tennessee Copper*, it could seek to protect its resources and citizens from an environmental public nuisance, and that for the same reasons that the EPA cannot refuse to regulate carbon dioxide under *Massachusetts*, the district court here could not refuse to address the issue. *California*, No. C06-05755 MJJ, slip op., at 12.

However, the court read *Massachusetts* as underscoring "the conclusion that policy decisions concerning the authority and standards for carbon dioxide emissions lie with the political branches of government, and not with the courts." *Id.* at 10. States have given up to the federal government their sovereign prerogatives to do such things as force reductions of greenhouse gas emissions in other states and nations. Instead, under *Massachusetts*, a state has special standing to "exercise its procedural right to advance its interests through administrative channels and, if necessary, to challenge the rejection of its rulemaking petition as arbitrary and capricious." *Id.* at 11 (citing 42 U.S.C. § 7607 (2000) (internal punctuation omitted)). California therefore can petition the

federal government to take action against auto emissions, but cannot act on its own regarding emissions outside of its borders.

The court also thought that California's claim implicated the first *Baker* factor of whether an issue is constitutionally committed to the political branches, since the claim involved interstate commerce and foreign affairs. *Id.* at 13. The Constitution gives Congress the power to regulate interstate commerce, while the conduct of foreign relations are committed exclusively to the political branches. *Id.* (citing *Baker*, 369 U.S. at 211). The court thought that recognizing California's common law nuisance claim "would likely have commerce implications in other States by potentially exposing automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce within those States." *Id.* at 14.

Finally, the court thought that California's claim invoked the second *Baker* factor because of a lack of discoverable standards by which to resolve California's claims. California cited a number of trans-state boundary nuisance cases to support its argument that there are existing legal standards for deciding its claim. The court found that the cited cases were distinguishable because the plaintiffs sought injunction or abatement, while here California was seeking damages; and because none of the previous cases implicated such a number and complexity of national and international policy issues. *Id.* at 15. In particular, the earlier nuisance cases involved pollution from particular identifiable sources. According to the court, "this is a critical distinction because the limited application of federal common law nuisance claims has been recognized as a means for a State to seek abatement of pollution originating within the boundaries of another state." California, on the other hand, sought damages for emissions that occurred wherever the defendants' products were operated, both inside and outside California. The court could not identify a "manageable method" of identifying which particular sources were the cause of the damage suffered by California, since "there are multiple worldwide sources of atmospheric warming across myriad industries and multiple countries." *Id.*

Because the court held that California's claim was nonjusticiable as a political question, the court did not reach the issue of whether there is a federal common law claim for nuisance that would authorize damages for creating and contributing to global warming. Neither did the court reach the state law claim, dismissing the claim without prejudice for refiling in state court. *Id.* at 16. California has not filed an appeal in this case as of this writing. For now, California can regulate emissions within

its borders, but is helpless to address the negative effects of trans-boundary carbon dioxide emissions. Instead, it must wait for the EPA to issue new regulations of greenhouse gasses.

Heather Heilman

IV. NATIONAL ENVIRONMENTAL PROTECTION ACT

Northern Cheyenne Tribe v. Norton, 503 F.3d 836 (9th Cir. 2007)

The United States Court of Appeals for the Ninth Circuit upheld the district court's partial injunction proscribing coal bed methane (CBM) development on ninety-three percent of the Powder River Resource Area (PRRA) in Montana and Wyoming. Northern Cheyenne Tribe v. Norton, 503 F.3d 836 (9th Cir. 2007). "CBM is a natural gas . . . trapped in coal seams by groundwater." *Id.* at 839. The process of extracting CBM from the ground can lead to aesthetic harm due to the large equipment involved, along with groundwater pollution, and lowering of the water table. In response to a growing scarcity of natural gas, interest in developing CBM has increased in recent years.

At the district court level, a partial injunction was issued in response to a deficient final environmental impact statement (EIS) issued by the Bureau of Land Management (BLM) analyzing the development of CBM resources in the PRRA. *Id.* at 840. The district court held that the final EIS was deficient under the National Environmental Policy Act (NEPA) in that it failed to consider a "phased development" alternative. The district court held that aside from this specific omission, the final EIS was otherwise compliant with NEPA. A partial injunction issued on BLM's terms, under which phased development would proceed while BLM analyzed its efficacy and completed a supplemental EIS. On appeal, the Northern Cheyenne Tribe (NCT), along with Native Action (a Montana-based non-profit) sought a full injunction of CBM development in the PRRA. *Id.* at 842.

The majority rejected NCT's argument that the district court was obligated to enjoin all CBM development because a valid EIS was never issued. *Id.* at 842, 846. NCT's theory was that the partial injunction was inconsistent with NEPA regulations proscribing agencies from taking major federal action pending the completion of an EIS, when doing so would limit available alternatives. *Id.* (citing 40 C.F.R. § 1506.1(c)(3) (1978)). The majority rejected this theory, holding that traditional standards in equity for injunctive relief apply to NEPA violations. *Id.* at

842 (citing High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004)). Under these standards there is no requirement mandating an automatic blanket injunction.

The majority recognized the district court's broad latitude in designing equitable relief in a manner that "balance[s] the equities between the parties and give[s] due regard to the public interest." *Id.* at 843 (quoting Idaho Watersheds Project v. Hahn, 307 F.3d 815, 833 (9th Cir. 2000)). Based on this theory, the majority held that not only was the district court free to issue a partial injunction, but that a failure to do so would violate Supreme Court precedent mandating a consideration of the effect on each party when issuing equitable relief. *Id.* (citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987)). Implicit in the majority's reasoning was the belief that a full injunction would cause undue economic harm to CBM developers.

The majority held that NCT suffered no *irreparable* harm under the partial injunction. Because the partial injunction implemented the phased development alternative, the majority reasoned that the only deficiency in the final EIS had been rectified. Further, the majority noted that the district court's decision accounted for "the public interest in clean energy development as well as the prevention of environmental harms." In sum, the majority reasoned that since a more comprehensive injunction would have led to increased harm to CBM developers with no corresponding benefit for the NCT, the district court was well within their discretion in designing equitable relief.

The majority's review of the district court's balancing excluded consideration of the possible cultural harm CBM development presented for the NCT. *Id.* at 844. The NCT argued that the EIS contained only a superficial examination of the potential disruption of important cultural sites in the PRRA and was therefore inadequate. The majority reasoned that since no actual development was possible without an additional EIA being issued for each drilling lease, the partial injunction could have no effect on NCT cultural sites. Therefore, NCT's claim was not ripe until "a specific 'final agency action' has an actual or immediately threatened effect." *Id.* at 846 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 894 (1990)).

On the broader issue of whether a presumption of irreparable harm is necessary in environmental cases, the majority affirmed that "the environment can be fully protected without [such a] presumption." *Id.* at 844 (quoting *Amoco*, 480 U.S. at 544). The majority cited *Amoco* for the proposition "that a presumption of irreparable harm 'is contrary to traditional equitable principals.'" *Id.* (quoting *Amoco*, 480 U.S. at 544).

In *Amoco*, the Supreme Court allowed oil exploration to continue pending administrative review of compliance with the Alaska National Interest Lands Conservation Act. The Supreme Court reasoned that since "injury to subsistence resources from exploration was not at all probable" and because the oil company had already committed seventy million dollars to exploration, an injunction was inappropriate. *Id.* (quoting *Amoco*, 480 U.S. at 544). In addition, the majority noted that the court in *High Sierra Hikers* held that a partial injunction was appropriate under NEPA if the potential harms on both sides of the issue were sufficiently accounted for. *Id.* (citing *High Sierra Hikers*, 390 F.3d at 642-43). The majority held that these cases demonstrate a presumption of irreparable harm is unnecessary in environmental cases, and that such a presumption would be at odds with traditional equitable principles.

In addition to the NEPA claim, NCT argued that the district court erred in dismissing its claim under the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 (2000). NCT argued that the NHPA requires BLM to consult with NCT prior to issuing leases because some portions of the PRRA contained sites of cultural importance. *Northern Cheyenne Tribe*, 2007 WL 2595476, at 844. As with NCT's NEPA claim, the majority held that the issue was unripe until BLM took action that would actually affect the NCT cultural sites. *Id.* at 846.

Chief Judge Schroeder dissented, arguing that the partial injunction failed to maintain the status quo pending BLM's compliance with NEPA. *Id.* at 846 (Schroeder, C.J., dissenting). His argument focused on the logical inconsistency of permitting BLM to implement the same alternative that BLM failed to include in the EIS. Schroeder argued that under the majority approach, major new activities, such as "mining, road construction, and water usage affecting precious underground aquifers" could take place without first satisfying NEPA. Schroeder reasoned that the central purpose of NEPA is to ensure consideration of all alternatives prior to major government action, and that a partial injunction was contrary to this purpose. *Id.* at 847.

Schroeder attacked the majority's decision for ignoring fundamental injunction principles that stress maintaining the status quo and avoiding undue stress to the parties. *Id.* at 847. Schroeder noted that as a consequence of the district court's failure to preserve the status quo, a motions panel of the court was forced to grant an emergency motion enjoining all projects, drilling and new construction pending the Ninth Circuit's appellate decision. He emphasized that if the district court had adhered to established injunction principals as applied to NEPA, this emergency motion would not have been necessary.

Schroeder further argued that the majority misapplied *High Sierra Hikers* because that case permitted activities already taking place to continue while only proscribing new activities. Schroeder explains that in *High Sierra Hikers*, the court "enjoined issuance of new commercial packstock special-use permits, while allowing packstock operators to continue to use the special-use permits that already had been issued." Contrary to the majority's assertion, Schroeder argues that *High Sierra Hikers* emphasizes the importance of maintaining the status quo when dealing with NEPA.

The Ninth's Circuit's decision sets a problematic precedent in terms of enforcing NEPA. By allowing BLM to proceed with an alternative the agency failed to address in its initial EIS, the court permitted BLM to take action without fully complying with the statute. Although there is a strong argument that no actual harm transpired as a consequence of the deficient EIS, the possibility existed that irreparable harm could have resulted from CBM development in the PRRA. Even more troubling, the possibility now exists that agencies can take significant action affecting the environment without first completing a proper EIS, so long as a EIS is pending.

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V. STANDING

Louisiana Environmental Action Network v. McDaniel, No. Civ. A. 06-4161, slip op. (E.D. La. Sept. 5, 2007)

In *Louisiana Environmental Action Network v. McDaniel*, the United States District Court for the Eastern District of Louisiana granted the defendants motions for summary judgment because the Louisiana Environmental Action Network and the Sierra Club, nonprofit environmental organizations, could not demonstrate that they suffered an injury sufficient for standing to bring a lawsuit. After the devastation of Hurricanes Katrina and Rita, the Louisiana Department of Environmental Quality (LDEQ) issued emergency orders to change the existing state regulations for disposal of waste at certain landfills in the affected areas. These orders allowed temporary regulations to govern "emergency areas" and contained a sixty-day automatic expiration clause. Because of the expiration clause, the LDEQ constantly renewed the orders and modified their terms and the parishes the orders applied too. No. Civ. A. 06-4161, slip op. (E.D. La. Sept. 5, 2007).

On July 13, 2007, LDEQ adopted the current orders, the "11th Katrina Order" and the "8th Rita Order." *See* Eleventh Amended Declaration of Emergency and Administrative Order (2007) (11th Katrina Order), http://www.deq.louisiana.gov/portal/portals/0/news/pdf/HurricaneKatrina11thAmeDecAdmOrder070307.pdf; Eighth Amended Declaration of Emergency and Administrative Order (2007) (8th Rita Order), http://www.deq.louisiana.gov/portal/portals/0/news/pdf/Hurrican Rita8thAmeDecAdmOrder071307.pdf. The two current orders were different from the initial emergency orders in that the named six landfills that were authorized to operate under the order, unlike the previous orders that required landfills in emergency areas to apply to LDEQ for authorization to operate under the temporary regulations. The current order also expanded the definition of construction and demolition (C & D) or Type III landfills, which are subject to less restrictive safety, reporting, and monitoring requirements than municipal solid waste or Type II landfills. Included in the expanded definition of C & D were materials excluded under the state regulations governing solid waste disposal: furniture, carpet, and painted or stained lumber from demolished buildings; the incidental admixture of construction and demolition debris with asbestos-contaminated waste; and yard waste and other vegetative matter. The current orders authorized two landfills covered by the 8th Rita Order to discharge pollutants into state waters without a permit. Under the orders, disposal of asbestos-contaminated material were still subject to federal and state emissions standards for hazardous air pollutant and white goods and putrescible waste were not permitted to be disposed of in a C & D landfill.

The Louisiana Environmental Action Network (LEAN) and the Sierra Club alleged that their members "use, or live in, areas affected by the landfills covered by the emergency orders." *La. Envtl. Action Network*, No. Civ. A. 06-4161, slip op., at 2. Further, they alleged that the emergency orders permit the disposal of waste in a manner that endangers the public health, welfare, and environment. The plaintiff's claim is that the hurricane orders violated the Supremacy Clause of the United State Constitution because they conflict with and/or are preempted by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (2000), the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2000), and the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671.

The district court looked to Article III of the Constitution, acknowledging that federal judicial power is limited to justiciable cases or controversies. U.S. CONST. art. III. Because standing is an essential

part of the case or controversy requirement, the court stated that "a case is properly before a federal court only when the plaintiff has standing to sue." *La. Envtl. Action Network*, No. Civ. A. 06-4161, slip op., at 3. In order to demonstrate that an association has standing, the court found three elements that organizational plaintiff's must establish: (1) individual members must have suffered an injury which is concrete, particularized, and actual or imminent; (2) the injury must be traceable to the defendant's conduct; and (3) it must be likely that the harm will be remedied by a favorable decision.

The court first looked to whether the plaintiffs had met their burden of demonstrating an injury from the current orders by reviewing affidavits submitted by members of LEAN and the Sierra Club. *Id.* at 4. After reviewing the affidavits, the Court determined that the plaintiffs had not demonstrated that the organization's members had suffered concrete and particularize injuries from the orders for several reasons. First, the court found that the affiants did not have any personal knowledge of the harmful conditions at the landfills. The affiants stated they "understand" and/or "believe" that the orders allowed activities that are inconsistent with the federal statutes, but the affiants did not state that they had any personal knowledge that harmful activities were actually occurring. Further, the affidavits did not state that plaintiff's had any personal knowledge that the landfills were in fact not meeting safety requirements. The plaintiffs never alleged that they were personally exposed to any pollution.

The court reasoned that without knowledge the plaintiffs could not establish injury. The district court found that the "[p]laintiffs have not alleged facts from which the Court may infer that they were injured by past violations of the RCRA, CWA, or CAA at any landfills covered under the current hurricane orders." *Id.* Even at oral argument, the court could not find any evidence that the plaintiffs were injured by the hurricane orders because the plaintiffs stated that they did not know what the landfills were doing.

The district court looked at Fifth Circuit case law to support its decision that the plaintiff's had not demonstrated any injury from the orders or the landfills. The court found that affidavits are to be made on personal knowledge and must "set forth such facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* at 5 (citing Thomas v. Atmost Energy Corp., 223 F. App'x 369, 373 (5th Cir. 2007) (quoting FED. R. CIV. P. 56(e)). Further, the plaintiff's affidavits could not

demonstrate personal knowledge because, "mere understanding or belief is insufficient to establish the requisite personal knowledge." *Id.*

The district court also rejected the plaintiff's argument that their aesthetic and recreational interests in the areas surrounding the landfills were impaired by the waste disposal activities. Although aesthetic and recreational interest in the environment are protectable interests, the court noted that the plaintiffs must still establish that some activity has caused a concrete and particularized injury to occur. The court found that the plaintiff's had not demonstrated an injury that is, "a result of activities at covered landfills in violation of RCRA, CWA, and CAA." *Id.*

The court found that the type of claim that the plaintiff asserted, created complexities with the insufficiency of the injury allegation. In this case, the plaintiffs asserted that the hurricane orders permit pollution which is forbidden by the federal regulations. And the LDEQ responded to the plaintiff's claim by arguing that there is no conflict between the state and federal regulations. But, the court could not find, in an affidavit or the record, where the plaintiff had "personally observed the challenged types of dumping or discharge of pollutants at any of the facilities now covered by the current orders." *Id.*

The district court also looked at the United States Court of Appeals for the Seventh Circuit to determine whether the plaintiff's had demonstrated sufficient injury to meet the standing doctrine requirements. The court noted that in *Texas Independent Producers and Royalty Owners Ass'n v. EPA*, a factually similar case, the Seventh Circuit concluded "that plaintiff's failed to establish the injury element of standing because they provided no evidence of discharge of any pollutants in violation of the statute. That is, the plaintiffs did not demonstrate the very conduct that they alleged gave rise to their injuries." *Id.* at 6; *see* Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964, 975 (7th Cir. 2005). The court also relied on the fact that the Seventh Circuit found that "[r]epeating conclusory allegations of a complaint is not enough" to establish standing. *Id.* at 6 (quoting 410 F.3d at 972) (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990)) (clarifying that conclusory allegations set forth in an affidavit are no better than conclusory allegations in a complaint, and that the former cannot save the latter).

In this case, the court concluded that the plaintiff's affidavits also amounted to conclusory statements. The plaintiff's had not presented any evidence and the court refused to presume the facts missing in the affidavits. The court found that the plaintiff's had the burden to establishing the elements of standing and "their affidavits fail[ed] to

demonstrate a concrete injury because they have not shown harm from activities at the still-covered landfills that violate the RCRA, CWA, or CAA." *La. Envtl. Action Network*, No. Civ. A. 06-4161, slip op., at 6.

Finally, the court distinguished the plaintiff's claims from other cases where courts found standing when plaintiff's alleged aesthetic and recreational harms resulting from violations of a federal discharge permit. The injury element of standing was proved in two cases where the plaintiffs demonstrated evidence of violations of federal regulations, and in another case where the plaintiffs alleged in their affidavits that they were personally familiar with the defendant's violation of federal environmental regulations. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 184 (2000); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 157 (4th Cir. 2000); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 556 (5th Cir. 1996). The court found that the plaintiffs in this case did not present any evidence along these lines, but only focused on the possibility that they would be harmed if a violation occurred.

District courts may refuse to hear a case where the plaintiff alleges aesthetic and recreational harms resulting from violations of a federal environmental regulation, because courts do not have jurisdiction if the plaintiff's fail to establish standing. To ensure that a district court will hear the claim for its merits, plaintiffs must allege facts with particularity that will establish a concrete injury to a protectable interest.

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