RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. COASTAL ZONE MANAGEMENT ACT

NRDC v. Winter, 527 F. Supp. 2d 1216 (C.D. Cal. 2008)

The United States Court of Appeals for the Ninth Circuit remanded the noted case to the United States District Court of Central California, instructing the court to consider the effect of executive measures by President George W. Bush and the Council on Environmental Quality (CEQ) on its prior orders granting environmental protection groups a preliminary injunction and denying the Department of the Navy an immediate vacatur, or partial stay, pending appeal. NRDC v. Winter, 527 F. Supp. 2d 1216, 1219 (C.D. Cal. 2008).

I. Factual Background/Prior Precedent

The series of court decisions preceding the controversy in the noted case was set into motion when the Natural Resources Defense Council (NRDC) and other environmental protection organizations brought suit against the United States Navy for its use of mid-frequency active (MFA) sonar in planned training missions off the coast of southern California. *Id.* at 1220. The Navy became interested in MFA sonar because of its effectiveness in the detection of modern submarines. The Navy began its own analysis of the environmental impacts of using the sonar. First, it conducted an Environmental Assessment (EA), which concluded that the use of this sonar would cause injury, including hearing loss and possible death, to a substantial number of marine mammals. Despite these statistics, the Navy determined that the use of the sonar during its training exercises would not cause a significant environmental impact. *Id.* at 1221. Thus, the Navy concluded that the National Environmental Policy Act (NEPA) did not mandate the preparation of an Environmental Impact Statement (EIS). It also decided that the harm to natural resources on the California coastal zone would be trivial. Relying on this finding, the Navy submitted a "consistency determination" to the California Coastal Commission (CCC), but it failed to take into account the actual exercises utilizing the MFA sonar. Subsequently, the Navy rejected mitigation procedures that the CCC later concluded were essential for compliance with the California Coastal Management Program (CCMP). *Id.* at 1221-22.

Based upon these actions, NRDC sought declaratory and injunctive relief on March 22, 2007. It alleged that the Navy was in violation of NEPA, the Endangered Species Act (ESA), the Administrative Procedure Act (APA) and the Coastal Zone Management Act (CZMA). In June 2007, NRDC moved for a preliminary injunction seeking to prevent the Navy from using the MFA sonar until certain mitigation measures were adopted to prevent harm to marine life. The district court granted this request, finding that NRDC had demonstrated a likelihood of success on its NEPA, CZMA and APA claims. The Navy's failure to prepare an EIS in contradiction to its own scientific findings was particularly damaging. However, a Ninth Circuit panel granted the Navy an emergency stay of the injunction pending appeal in August 2007. *Id.* at 1222 (citing Natural Res. Def. Council v. Winter, 502 F.3d 859, 865 (9th Cir. 2007)). Consequently, another Ninth Circuit panel remanded to the district court, holding that if certain mitigation measures were implemented the Navy could continue its training exercises. *Id.* (citing Natural Res. Def.

Council v. Winter, 508 F.3d 885, 887 (9th Cir. 2007)). The district court was ordered to issue an amended injunction setting forth such mitigation measures.

As part of this process, NRDC suggested to the court several broad mitigation procedures which were in great contrast to the Navy's proposal to maintain the status quo. *Id.* at 1222-23. The district court rejected both plans and instead chose to tailor its own measures, which it set forth in its January 3, 2008 order. The Navy immediately sought a stay pending appeal. *Id.* at 1223. In response to the motion, the district court issued a modified injunction to reiterate its January 3rd order. The Navy filed a notice of appeal the following day, which the district court quickly denied three days later. The next day, President Bush issued a memorandum stating that CZMA compliance "would 'undermine the Navy's ability to conduct realistic training exercises,'" concluding that "the exercises 'are in the paramount interest of the United States' and exempted the Navy from compliance." *Id.* at 1223-24 n.8 (quoting Memorandum from President George W. Bush for Sec. of Def. & Sec. of Com., Presidential Exemption from the Coastal Zone Management Act, 44 WEEKLY COMP. PRES. DOC. 79 (Jan. 15, 2008)). On the same day, CEQ approved "alternative arrangements" for the Navy to meet compliance with NEPA. Citing its own regulation as its authority, CEQ found that "emergency circumstances" existed which necessitated these special arrangements. *Id.* (citing 40 C.F.R. § 1506.11 (2007)). Specifically, CEQ decided that national security issues compelled the use of MFA sonar in order to protect American lives. *Id.* (citing Letter from CEQ to Donald C. Winter, Secretary of the Navy (Jan. 23, 2007)). Basing its authority on both of these executive actions, the Navy requested that the Ninth Circuit vacate or stay the injunction, claiming that the legal foundations supporting it—specifically NRDC's likelihood of success on the merits—were no longer viable. On January 16, 2008, the Ninth Circuit remanded again to the district court in the noted case to consider whether or not to vacate or stay its injunction.

II. The Court's Decision

A. NEPA

The court first considered whether CEQ's decision to allow alternative arrangements to NEPA requirements compelled it to vacate or stay the injunction. *Id.* at 1224. It consulted 40 C.F.R. § 1506.11 to determine CEQ's authority in finding that emergency circumstances existed. The analysis began with a general discussion concerning the

policy reasons for promulgating procedural CEQ regulations. The purported "goals of the regulations as a whole were to 'make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives.'" *Id.* at 1225 (quoting Exec. Order No. 11,991 § 1, 3 C.F.R. 124 (1978) (amending subsection (h) of section (3) of Exec. Order No. 11,514)). The current regulations detail the procedures for drafting an EIS, "as well as for referral of interagency disagreements." The court then noted that "emergency circumstances" were not defined in any of the regulatory or statutory provisions.

The court began the rest of its analysis by declaring that no "emergency circumstances" existed for the activity at issue. *Id.* at 1225-26. The first factor which the court cited for its conclusion was that CEQ's interpretation of its regulation was not entitled to deference. It began with the well-established principle that "if the statute is silent or ambiguous with respect to the specific issue" courts should give deference to an agency's reasonable interpretation. *Id.* at 1226 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)). However, deference should not be afforded if "an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Id.* (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). The issue presented in the noted case was whether deference should be granted to CEQ's broad interpretation of "emergency circumstances." *Id.* at 1226-27. Therefore, the court focused on the plain meaning of the regulation and the agency intent at the time of promulgation regarding to what "emergency circumstances" referred. *Id.* at 1227.

To determine the plain meaning of the statute, the court focused on the significance of the word "emergency." It considered both a dictionary definition and the California Environmental Quality Act (CEQA) definition, a statute which is based on NEPA. Both definitions corresponded with NRDC's claim that the plain reading of the regulation revealed that its "'manifest purpose'" was to "'permit the government to take immediate remedial measures in response to urgent and unforeseen circumstances not of the agency's own making.'" *Id.* (citation omitted). The court then rejected the Navy's claim that the sonar training exercises were comparable to actions in other cases where CEQ had given "alternative arrangements" to military departments. The crucial difference to the court was that those cases had involved "circumstances

of great urgency." The court specifically addressed one case in particular to highlight its reasoning. *Id.* (citing Valley Citizens for a Safe Env't v. Vest, Civ. A. No. 91-30077-F, slip op. (D. Mass. May 30, 1991)). In *Valley Citizens*, CEQ made a determination of emergency circumstances allowing alternative arrangements in the place of a supplemental EIS (SEIS) for the transport of planes out of an air force base to supply military equipment and personnel for the Gulf War. *Valley Citizens*, slip op., at 6-7. The court concluded that *Valley Citizens* was "markedly different" than the noted case. *Winter*, 527 F. Supp. 2d at 1228. CEQ and the Navy in the noted case failed to "identify any changed circumstances. . .that would justify invocation of 40 C.F.R. § 1506.11." *Id.* Instead, the court found that the emergency situation was caused by the Navy itself when it failed to comply with NEPA provisions and refused to produce an EIS.

After considering the plain meaning of the regulation, the court went on to discuss the agency's initial intent in promulgating the regulation. NRDC offered a declaration by Nicolas Yost, CEQ's general counsel from 1977 to 1981, who had helped to draft some of the regulations. *Id.* at 1228-29. The court rejected his declaration, reasoning that his statements were unreliable because they were made almost thirty years after promulgation of the regulations. *Id.* at 1229. Nevertheless, even absent support from Mr. Yost's declaration, the court found that the regulation's limited history supported a narrow interpretation of "emergency circumstances." The proposed version of 40 C.F.R. § 1506.11 initially mandated agencies "proposing to take" emergency actions to confer with CEQ regarding alternative arrangements. *Id.* (citing 43 Fed. Reg. 25,243 (June 9, 1978)). However, the final regulation contained the phrase "to take" as a replacement for "proposing to take." CEQ explained that the change was made to emphasize that agencies might not have time for a consultation in emergency circumstances. The court found this change indicative of the notion that "emergency circumstances" referred to "sudden, unanticipated events, not the unfavorable consequences of protracted litigation." *Id.* at 1224. Therefore, the court held that CEQ's interpretation was "'plainly erroneous and inconsistent'" and thus not entitled to deference.

The court additionally found that there were other principles of statutory construction that prevented acceptance of a broad interpretation of "emergency circumstances." *Id.* at 1230. The court reasoned that such a reading was contrary to NEPA. It agreed with NRDC that it was telling that NEPA failed to contain a national security exemption. *Id.* (citing San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1035

(9th Cir. 2006)). The court stated that "it was axiomatic that there exists a presumption against reading an exemption into a statute where Congress has not authorized one." *Id.* The court was unwilling to allow CEQ to interpret such exemptions when Congress had not done so expressly. Further, to do so would be in direct conflict with NEPA's mandate that "agencies comply with their NEPA duties 'to the fullest extent possible.'" *Id.* at 1231 (citing 42 U.S.C. § 4332 (2000)). Allowing such a result would be ultra vires under NEPA. The court reasoned that CEQ's interpretation would, in essence, allow agencies to bypass NEPA by crafting their activities as "emergencies." *Id.* at 1231-32. This would allow a narrow exception to the requirements of NEPA to become the rule.

The court next expressed its constitutional concerns over CEQ's broad interpretation. The major issue to the court was that CEQ, in making its own alternatives to NEPA compliance, was circumventing the court's order denying the Navy a stay of its injunction. *Id.* at 1232. Such a separation of powers issue was disturbing, but the court stated that it "must endeavor to avoid a finding of unconstitutionality." *Id.* (citing Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1476 (9th Cir. 1994)). The court could avoid such a finding by rejecting CEQ's broad interpretation of 40 C.F.R. § 1506.11.

B. CZMA

Next, the court moved on to consider the effect of President Bush's exemption of CZMA on the injunction. The CZMA provision utilized by the President allowed him to exempt activity from compliance with the CCMP if, after a court found activity failed to comply with the plan, the President found such activity to be in the "paramount interest" of the United States. *Id.* at 1233 (citing 16 U.S.C. § 1456(c)(1)(B) (2000)). The President had complied with the statute's requirement of abstention until a court decision on whether or not the activity complied with CCMP. *Id.* at 1233.

The problem arose when the court considered the constitutionality of the exemption as applied to the Navy's sonar activity. NRDC argued that the President acted in violation of Article III of the United States Constitution by using his power to circumvent the court's decision to grant NRDC's injunction. The Navy countered that the President had accepted the court's decision, but had changed the applicable law because he felt that it was in the "paramount interest" of the country. *Id.* at 1234. The court would not question the President's determination that a "paramount interest" was involved because such a determination was not

reviewable by the court. *Id.* (citing Kasza v. Browner, 133 F.3d 1159, 1173-74 (9th Cir. 1998)).

The inquiry began with the declaration that "the decision of an Article III court is subject to the review only of a higher court." The executive branch could not be delegated the power to review decisions of courts. *Id.* (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (Scalia, J.)). However, Congress was possessed with the power to change a law even if it had an effect on a pending action. *Id.* (citing *Plaut*, 514 U.S. at 214).

The inquiry was presented precisely as, "[d]id the President's exemption effectively change or amend the underlying law, or [did] it either direct the result or constitute a review of the [c]ourt's decision in [the] case?" *Id.* at 1235. If President Bush's exemption was a change to the law, then the act was constitutional. However, if he had directed a result or reviewed the court's decision, that action was unconstitutional under Article III. The court considered several cases set forth by the Navy to support their claim that the President had acted constitutionally. It first examined *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), which dealt with the Federal Water Pollution Control Act's (FWPCA) presidential exemption. In *Romero-Barcelo*, the Supreme Court had to determine whether the district court possessed the power to issue a remedy other than an injunction when the Navy dumped materials without first obtaining a permit. *Id.* at 319. The Court held that the FWPCA allowed the district court to make an exception to granting an injunction because to do so would be consistent with the presidential exemption of noncompliance in special circumstances. *Id.* The court in the noted case found *Romero-Barcelo* distinguishable because it did not involve an action of the President, and therefore the exemption was not being judged for constitutionality. *Winter*, 527 F. Supp. 2d at 1235-36 (citing *Romero-Barcelo*, 456 U.S. at 319).

The court also considered a Ninth Circuit case which dealt with the President's decision to exempt certain documents owned by the Environmental Protection Agency (EPA) from disclosure under the Resource Conservation and Recovery Act (RCRA). *Kasza*, 133 F.3d at 1173. In *Kasza*, the President decided that the documents that were supposed to be disclosed were classified. However, the plaintiff in that case failed to bring a constitutional argument, and the Ninth Circuit held that a provision in RCRA allowed the President to exempt compliance with any RCRA "requirement." *Id.* This case was also unpersuasive to the court. The court in the noted case chose to focus on two important facets of the President's action in exempting the Navy from CZMA

requirements. First was the timing of the exemption. The court found it suspicious that the President chose to act only after the court refused the Navy's stay. The Navy argued that was because it did not need the exemption until it was prohibited from conducting its training activities. The court found this to be the "inter-branch equivalent of forum shopping." The exemption was not an amendment to the underlying law, but rather an action to "strip the [c]ourt of its ability to provide effective relief." *Id.* at 1237. The second important factor was "the absence of any considerations other than those already weighed by the [c]ourt." *Id.* at 1237. It appeared to the court that the President had come in after the issuance of the injunction and had made his own assessments. The court's decision was purely advisory.

The court next recognized that deference is normally granted to the Executive Branch for issues involving national security. *Id.* (citing Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988)). It elaborated further that "deference must be tempered, however, by '[t]he established principle of every free people . . . that the law shall alone govern; and to it the military must always yield.'" *Id.* (quoting Dow v. Johnson, 100 U.S. 158, 169 (1880)). Such principles were instrumental in the court's decision. It "deferred to the Navy's representations of the interests of national security, while avoiding using deference to create a judicial exemption from the nation's environmental laws."

Following this in-depth analysis, the court concluded that it did not have to make a determination regarding the constitutionality of President Bush's action. The court was justified in denying the Navy's stay because it had failed to comply with NEPA. The Navy was required to implement the mitigation measures that the court set out in its January 3rd order. Until the Navy complied with these measures, it was prohibited from carrying out its MFA sonar training. *Id.* at 1238.

C. Equitable Relief

The only issue left for the court to address was whether an injunction was still warranted or whether the court should grant the Navy's application for a stay. Therefore, the court had to address four factors, (1) whether the Navy had shown a likelihood of success on the merits; (2) whether the Navy would suffer irreparable injury absent a stay; (3) whether NRDC would experience measurable injury if a stay is granted; and (4) public interest considerations. *Id.* at 1238 (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). Here, the court found that the factors weighed against a stay. First, the Navy failed to comply with NEPA. Therefore, it could not show that it would be likely to succeed on

the merits of an appeal. Second, there was no evidence that the Navy would be irreparably injured by implementing the mitigation measures mandated in the injunction. Third, there was evidence that NRDC would be harmed substantially because it was likely that the Navy would finish its training exercises before relief could be granted. Finally, the public interest in the case favored an injunction. If a stay were granted, marine life would be affected; if the injunction stood, the Navy could continue to carry out its training, so long as it utilized the mitigation measures. Further, any other balancing of hardships weighed in favor of NRDC. As such, the court denied the Navy's request for a stay. *Winter*, 527 F. Supp. 2d at 1238-39.

III. Conclusion

During a time of increased fear about national security, the court's opinion provides strong language to support the notion that our environmental laws should not bow down to military interests at any cost. The court refused to accept the contention that CEQ or the President was acting in any way other than to review the court's decision to grant NRDC an injunction. Much of this language will be considered dicta, as the court noted that it had an obligation not to decide questions of constitutionality if possible. It may well be that in cases where the danger to natural resources is not as extreme as in *Winter* courts may give these executive actions more deference. For the time being, however, this case represents a victory for those wishing to protect not only our national security, but also our natural resources.

Catherine Adair

II. ENERGY POLICY AND CONSERVATION ACT

Center for Biological Diversity v. National Highway Traffic Safety Administration, 508 F.3d 508 (9th Cir. 2007)

Eleven states, the District of Columbia, the City of New York, and four private interest groups, including the named Center for Biological Diversity (collectively, petitioners) challenged a National Highway Traffic Safety Administration (NHTSA) rule establishing Corporate Average Fuel Economy (CAFE) standards for model years 2008–2011. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 513 (9th Cir. 2007). Petitioners asserted that the rule was

arbitrary and capricious because the NHTSA (1) failed to include critical alternative fuel benefits, (2) failed to set CAFE standards for the interim period consistent with the agency's authorizing statute, and (3) failed to close the "SUV loophole" that allows SUVs, minivans, and light trucks to qualify for lower fuel economy standards under an expansive definition of truck. *Id.* at 513-14. Petitioners further asserted that the agency was in violation of the National Environmental Policy Act (NEPA) for its failure to issue an environmental impact statement regarding the new CAFE standards. *Id.* at 514. The United States Court of Appeals for the Ninth Circuit held that the NHTSA rule was arbitrary and capricious and that the agency violated NEPA.

The court began by laying out the broad goals of the governing statutes, the Energy Policy and Conservation Act of 1975 (EPCA) and NEPA. *Id.* at 514-15, 517-18. The court began its analysis with the petitioner's arbitrary and capriciousness claim. The purpose of the EPCA as intuited from the statutory history was to develop fuel standards that would reduce fuel consumption. *Id.* at 514-15. In furtherance of this goal, the act required NHTSA to establish minimum fuel economy standards for automobiles. The statute designated a 27.5-mile-per-gallon limit for passenger vehicles, but required NHTSA to promulgate a standard for nonpassenger trucks at the maximum feasible standard achievable by the manufacturers in a model year. *Id.* at 515. Vehicles weighing over 10,000 pounds were exempt from the fuel economy standards. Light trucks, SUVs, and minivans have historically been classified as nonpassenger vehicles under NHTSA definitions, or the "S.U.V. loophole."

The court then examined the historical effectiveness of the CAFE standard, noting that prior to the consumer demand boom for SUV and minivans, average fuel economy had increased. *Id.* at 516. The court noted, however, that because of the SUV loophole and growing demand for the vehicle type, average fuel economy had dropped. *Id.* at 516-17. The court noted further that as indicated by petitioner's evidence, the primary purpose of these vehicles was for passenger transportation. *See id.* at 517.

From these facts, the court analyzed whether the final rule violated the clear intent of Congress in enacting EPCA. *Id.* at 530. The court rejected petitioner's initial claim that the marginal cost-benefit analysis employed by the NHTSA was prohibited. The court noted that the statute gave the agency latitude in determining what the maximum feasible level for light trucks would be and that prior case history supported the economic factors relied upon by NHTSA. However, the

court noted that the process could not insulate the result from review and that the standards set must be within the purpose of the statute—to conserve fuel.

The court next addressed the issue of NHTSA refusal to assign adequate value to the cost of greenhouse emission reduction. *Id.* at 531. NHTSA argued that nonmonetized factors would have no result on the final standard. The court, however, noted that the value of a benefit would greatly affect the balancing employed and the "most significant benefit" of reducing greenhouse emissions was given zero value. Thus, the court concluded the analysis was not within the purposes of the EPCA and was arbitrary and capricious. *Id.* at 533-35. The court remanded the rule to NHTSA for the development of new CAFE standards that adequately considered the benefit of green house emission reduction.

Additionally, the court held that the NHTSA refusal to draft new definitions for passenger vehicles was arbitrary and capricious. *Id.* at 540. Initially, NHTSA had noted that the definition had become obsolete and failed to properly distinguish between passenger and nonpassenger vehicles. However, in the final rule NHTSA refused to issue a new definition. NHTSA failed to provide adequate reasoning as to why a transitioned change was not possible. Additionally, the court found the NHTSA argument for a standard based upon manufactured purpose rather than consumer use inadequate because the agency failed to address its own finding that many light trucks were intended by the *manufacturer* to transport passengers.

Finally, the court turned to NHTSA obligations under NEPA. *Id.* at 545-56. NHTSA argued that it did not have the statutory authority to consider additional factors in its environmental assessment (EA) because of the constraints of EPCA. The court quickly pointed out that this defense was counter to the wide discretion NHTSA had claimed as protection from judicial review. The court chastised the agency noting that it could not have the discretion point "both ways." The agency had argued that under the ruling from *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), it did not have to consider climate change because the agency lacked the authority to address the crisis. The court, however, rejected this argument, noting that the crisis at issue was the emission of greenhouse gases and that these emissions could be directly affected by more stringent fuel economy standards. *Id.* at 546-47.

Moving forward the court then addressed the sufficiency of the environmental assessment and the Finding of No Significant Impact issued by NHTSA. *Id.* at 548. The court focused upon the NHTSA

evaluation of cumulative impacts. The EA, the court noted, failed to address the environmental effects of the incremental release of CO[$_2$], did not actually address the environmental effects of these emissions, and did not place those effects in the context of the CAFE rulemaking. *Id.* at 549. As a result of these deficiencies the court ruled that the EA was inadequate and on remand the NHTSA was required to prepare a full environmental impact statement. *Id.* at 552-54.

The court's decision is in line with recent cases such as *Massachusetts v. E.P.A.*, 127 S. Ct. 1438 (2007), and *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007). These cases represent a movement to require agencies to recognize the climate crisis and to recognize avoidance measures as legitimate benefits that must be factored into agency cost-benefit analysis.

David L. Curry, Jr.

III. FOREST SERVICE DECISION MAKING AND APPEALS REFORM ACT

Summers v. Earth Island Institute,
128 S. Ct. 1118 (2008)

I. Introduction

The United States Supreme Court recently granted an appeal from the United States Forest Service involving the issue of whether certain new regulations were valid and in accordance with the Forest Service Decisionmaking and Appeals Reform Act (ARA). Summers v. Earth Island Inst., 128 S. Ct. 1118 (2008); Earth Island Inst. v. Ruthenbeck, 490 F.3d 687 (9th Cir. 2007). Also at issue on appeal is whether the environmental organizations had standing to challenge the Forest Service regulations. The two challenged regulations exempted logging projects that did not require an Environmental Impact Statement (EIS) or an environmental assessment (EA) under the National Environmental Policy Act (NEPA) from the notice, comment and administrative appeals process. *Ruthenbeck*, 490 F.3d at 691-92. The Ninth Circuit Court of Appeals heard the case below, *Earth Island Institute v. Ruthenbeck*, which was decided in favor of the environmental organizations on the two challenged regulations. *Id.* at 690.

In *Ruthenbeck*, which is the focus of this Recent Development, the government was appealing from a district court judgment that enjoined the new regulations that applied to the administrative review procedure because the regulations were "manifestly contrary to the governing

statute." Earth Island Institute v. Pengilly, 376 F. Supp. 2d 994 (E.D. Cal. 2005). Initially, the Forest Service promulgated these new regulations pursuant to the ARA and many environmental organizations challenged these regulations in United States District Court for the Eastern District of California in *Pengilly*. In that case, the district court held that the four challenged regulations were valid in accordance with the ARA. However, on appeal from the environmental groups, the Ninth Circuit reversed the district court and held that the challenged regulations were invalid as contrary to the ARA. *Ruthenbeck*, 490 F.3d at 690-91.

The Ninth Circuit decision in *Ruthenbeck* as well as the recent decision from the Supreme Court granting the appeal, regardless of the outcome, highlights the important environmental concerns with public participation in small logging sales that do not require an EIS or an EA under NEPA. The Forest Service was essentially trying to circumvent these types of agency decisions from the administrative appeals process and the Ninth Circuit allowed the public back into the process in accordance with the ARA.

II. Background

The challengers in *Ruthenbeck* were all nonprofit environmental organizations, including the Earth Island Institute, Sequoia Forestkeeper, Heartwood, Inc., the Center for Biological Diversity, and the Sierra Club. *Id.* at 691. Jim Bensman, an employee of one of the environmental groups, submitted an affidavit to establish standing. Bensman's affidavit stated that he had visited all of the National Forests at issue for over twenty-five years and planned to return to California and Oregon in 2004 to visit again. In order to establish an identifiable harm, Bensman asserted that his biological and recreational interests were harmed when "development occur[ed] in violation of law or policy." *Id.* at 691. In addition, Bensman asserted a procedural injury stating that if he had the option to appeal certain Forest Service projects which were excluded, he would exercise his right of appeal.

Prior to 1992, the United States Forest Service provided a public appeals process for agency decisions which were documented in a "decision memo, decision notice or record of decision." 54 Fed. Reg. 3342 (Jan. 23, 1989); Heartwood, Inc. v. U.S. Forest Serv., 316 F.3d 694, 696 (7th Cir. 2003) (internal quotations omitted) (citation omitted). In March 1992, the Forest Service proposed new regulations which essentially eliminated the previous appeals process for "all decisions except those approving forest plans or amendments or revisions to forest

plans." This proposal would have eliminated many administrative requirements previously available to the public:

> [The proposal] would have replaced post-decision administrative appeals with pre-decision notice and comment procedures for proposed projects on which the Forest Service had completed an Environmental Assessment (EA) and a finding of no significant impact (FONSI), in accordance with applicable provisions of the National Environmental Policy Act of 1969 (NEPA).

This new proposal essentially excluded those projects that the Forest Service determined were environmentally insignificant from the normal notice, comment and appeal process.

Due to significant protest from environmental groups about the loss of the public appeals process, Congress stepped in and enacted the ARA. The ARA, for the purposes of this case, required the Forest Service to establish an administrative appeals process that provided a notice and comment opportunity for the public. The ARA provides in significant part:

> [T]he Secretary of Agriculture, acting through the Chief of the Forest Service, *shall establish* a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 and shall modify the procedure for appeals of decisions concerning such projects.

Forest Service Decision Making and Appeal Reform Act, Pub. L. No. 102-381, 106 Stat. 1419 (codified with some differences in language at 16 U.S.C. § 1612(a) (emphasis added)).

After environmental groups challenged many of the regulations which had been promulgated under the newly codified ARA, the Forest Service reinstated the previous notice, comment, and appeals process that was available prior to 1992. *Ruthenbeck*, 490 F.3d at 691-92. Yet, the Forest Service only reinstated this previous appeals process as an interim measure until the agency was able to issue a final regulation implementing the ARA. *Id.* at 692.

On June 5, 2003, the Forest Service issued a final rule that outlined the documentation necessary under NEPA for fire management activities. *Id.* This new rule concerning fire management activities created a new category of Forest Service projects which involved "fire rehabilitation activities on less than 4,200 acres." Significantly, this rule excluded this new category of fire rehabilitation projects from EA and EIS analysis and also exempted these activities from notice, comment, and appeal procedures. Further, on July 29, 2003, salvage timber sales of

up to 250 acres were designated as categorically excluded from notice, comment, and appeal procedures.

Barely a month after the new rules concerning fire rehabilitation projects and salvage timber sales were issued, the Forest Service issued a decision memo on the "Burnt Ridge Project" (BRP) that approved the logging and subsequent sale of 238 acres of previously burned forest area located within Sequoia National Forest. However, the decision memo which approved the BRP expressly stated that "this project is not subject to appeal because it involves projects or activities which are categorically excluded from documentation in an [EIS] or [EA]" (internal quotations omitted). In order to exclude the BRP from the notice, comment, and appeal procedures that were provided in the ARA, the Forest Service applied the two regulations that were challenged in *Ruthenbeck*: 36 C.F.R. §§ 215.12(f) and 215.4(a). In response to the BRP decision memo, the challengers filed this action and the Forest Service consequently withdrew the BRP pursuant to a settlement agreement.

Later, the environmental groups filed suit against the Forest Service challenging the 2003 regulation that was applied in the BRP and facially challenging nine other provisions of the regulations. The district court invalidated five of the regulations, upheld the remaining four, and more importantly, issued a nationwide injunction against the application of the regulations that were invalidated. The Forest Service then appealed to the Ninth Circuit.

III. Decision and Analysis

On appeal, the Ninth Circuit held that the plaintiffs had standing because they had suffered a cognizable injury. *Id.* at 693-94. However, the Court did not uphold the challengers' standing based on aesthetic injuries, stating that even though aesthetic and environmental interests generally are cognizable injuries, a person's "'some day" intentions to return to an area do not support a finding of 'actual or imminent injury' unless the affiant has 'specific plans' to return to the area." Instead, the court relied on the plaintiffs' procedural injury argument and stated that the ARA is a "procedural" statute, which raises a procedural injury within the "zone of interests" that Congress intended to protect. *Id.* at 693-94. In support of their decision to uphold standing upon a procedural injury, the Court cited *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514 (9th Cir. 1992), which held that "because NEPA is essentially a procedural statute designed to ensure that environmental issues are given proper consideration in the decisionmaking process, injury alleged to have occurred as a result of

violating this procedural right confers standing" (internal citations omitted) (quoting Trs. for Alaska v. Hodel, 806 F.2d 1378, 1380 (9th Cir. 1987)).

The court concluded the standing discussion by holding that the challengers suffered a procedural injury because they were not allowed to appeal the BRP decision, or any other like project, due to the Forest Service regulation that excluded projects such as the BRP from notice, comment, and appeal procedures. However, the court only upheld standing on the two regulations pertaining to the BRP. The other regulations on appeal were dismissed for ripeness because there was no project "specifically referenced in the complaint" that addressed the other regulations. *Id.* at 696. After establishing that the plaintiffs had standing, the court moved on to the validity of the two remaining regulations.

The Forest Service argued that the two regulations which essentially excluded the notice, comment, and appeal procedures from any agency decisions that did not require an EA or EIS, were a "reasonable interpretation of ambiguous portions of the ARA." However, the environmental groups argued that "the plain language of the statute requires an administrative notice, comment, and appeal process." The groups also argued that the legislative history of the ARA indicates that the two regulations at issue were "manifestly contrary" to the ARA because the statute was created in response to the Forest Services' initial proposal to eliminate the notice, comment, and appeal procedures. In response to these arguments, the Court proceeded to conduct a *Chevron* analysis to determine the validity of these two regulations. Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

The court determined, according to *Chevron*, that both regulations were in conflict with the plain meaning of the ARA. *Ruthenbeck*, 490 F.3d at 697. In support, the Court noted that Congress had spoken directly to the issue concerning the two regulations by highlighting language in the ARA that the Chief of the Forest Service "*shall* establish a notice and comment process for proposed actions of the Forest Service . . . and *shall* modify the procedure for appeals of decisions concerning such projects." *Id.* at 697. The court held that both statutes conflicted with the plain language of the ARA because "[t]he statutory language does not refer to NEPA" and "[t]he statute does not provide for any exclusions or exemptions from its requirement that the Forest Service provide notice, comment, and an administrative appeal for decisions implementing Forest Plans."

The court went even further in its *Chevron* analysis, stating that even if the statute were ambiguous, the two regulations would still be invalid because they failed the second step of *Chevron*, which states that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 697-98 (citing *Chevron*, 467 U.S. at 842-43 (internal quotations omitted)). The Forest Service, in contrast, argued that the Secretary's reasonable interpretation was entitled to *Chevron* deference as a reasonable construction of the ARA. *Id.* at 698. Plaintiffs responded that the legislative history of the ARA indicated that not only were timber sales intended to be subject to notice, comment, and appeal procedures, but also many other agency decisions implementing forest plans such as "oil leasing, mining, and off-road vehicle use." In support of their argument, challengers cited a conference report letter from Representative Richardson, who stated that "the agency's recent proposal to eliminate appeals of timber sales, oil and gas leases, and other project level activities is a slap in the face of democratic values." *Id.* at 698 (internal citation omitted).

The court agreed with the environmental groups and stated that "[a]t a minimum, the categorical exclusion of timber sales from administrative notice, comment, and appeal is contrary to Congressional intent to provide such processes through the ARA." Further, the Court characterized the two challenged regulations as the "Forest Services' attempt to circumvent Congressional intent to preserve the administrative appeals process." The Court continued by stating that Congress would not have passed the ARA if they had intended to exclude the right of notice, comment, and appeal. Finally, the Court concluded that the Forest Service's attempt to exempt agency actions from notice, comment and appeal was "manifestly contrary to both the language and the purpose of the ARA." *Id.* at 698-99. In addition, the Court affirmed the district court's nationwide injunction based on language in the Administrative Procedure Act, which states that a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 699 (citing 5 U.S.C. § 706 (2000)).

IV. Conclusion

The decision in *Ruthenbeck* allows the public back into the administrative process for Forest Service decisionmaking. The Forest Service had attempted, through the two challenged regulations, to circumvent public participation in certain types of timber and logging

projects. However, the Forest Service ignored the ARA that Congress enacted to ensure public participation in these types of projects. Consequently, the Ninth Circuit correctly held that these two regulations were in direct violation of the ARA and that the public should be allowed to participate in this type of agency decision making. Now, the Supreme Court will hear the appeal from the Forest Service and determine whether these types of projects, which are not entitled to EA or EIS analysis, should involve the public in the form of a notice, comment, and appeal procedure. If the Supreme Court reverses the Ninth Circuit and validates these regulations, the public will be excluded at essentially every stage of the decisionmaking process for these types of logging projects.

C. Farris DeBoard

IV. "STATE CREATED DANGER" DOCTRINE

Lombardi v. Whitman,
485 F.3d 73 (2d Cir. 2007)

In *Lombardi*, Chief Judge Jacobs, writing for the United States Court of Appeals for the Second Circuit, held that the actions of federal administrators in making reassuring statements about the air quality in and around Ground Zero after the attacks of September 11th, 2001, when data neither supported nor contradicted such statements, did not amount to deliberate indifference that "shocks the conscience." Lombardi v. Whitman, 485 F.3d 73 (2d Cir. 2007). In upholding the decision by Judge Hellerstein of the United States District Court for the Southern District of New York to dismiss the case, the court ruled that five rescue workers from various government entities that worked at the Ground Zero site soon after the collapse of the World Trade Center towers had no substantive due process claim against the federal administrators. *Id.* at 77, 85 (referring to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). The court held that when government decision makers must balance competing interests in the face of an environmental emergency, such decisions are not shocking to the conscience "merely because they contemplate some likelihood of bodily harm." *Id.* at 85.

The facts of the case originate in one of the most infamous events in the history of the United States. On September 11, 2001, terrorists hijacked several commercial jet aircraft, crashing two of them into the twin World Trade Center towers in Lower Manhattan. The two

skyscrapers collapsed, resulting in catastrophic loss of life. In addition to this tragedy, the collapse of the buildings sent a wide variety of debris and dust into the air. This dust contained various materials that are hazardous to human health such as asbestos, lead, polychlorinated biphenyls (PCBs), and polycyclic aromatic hydrocarbons (PAHs). *Id.* at 75.

During the days and weeks that followed, several federal administrators made comments to the press, and the EPA released various press statements reassuring the public that the air in Lower Manhattan around Ground Zero was safe to breathe. *Id.* at 75-76 (citing EPA OFFICE OF THE INSPECTOR GEN., EPA'S RESPONSE TO THE WORLD TRADE CENTER COLLAPSE: CHALLENGES, SUCCESSES, AND AREAS FOR IMPROVEMENT, Report No. 2003-P-00012 (Aug. 21, 2003), *available at* http://www.epa.gov/oig/reports/2003/WTC_report_20030821.pdf [hereinafter OIG REPORT]). Director of the Environmental Protection Agency (EPA) Christine Todd Whitman was quoted in an EPA press release as saying that "the public in these areas is not being exposed to excessive levels of asbestos or other harmful substances . . . . I am glad to reassure the people of New York and Washington, D.C. that their air is safe to breath [sic]." *Id.* at 76 (citing OIG REPORT, *supra*, at 85). Several other statements released by the EPA between the time of the attack and October of 2001 gave similar reassuring statements. OIG REPORT, *supra*, at 9.

An official report made by the Office of the Inspector General (OIG) of the EPA later found that the data that was available at the time that these statements were made did not fully support the assurances made in the press release. *Id.* The OIG Report also stated that some of the asbestos readings which the EPA had collected were high enough to pose a significant health risk. *Id.* at 14. The report additionally found that the White House Council on Environmental Quality and the National Security Council influenced the EPA press statements and cleared them for release, sometimes editing out cautionary language or headings. *Id.* at 14-17.

In *Lombardi*, the plaintiffs alleged that their substantive due process rights had been violated when they relied on the statements made by the defendant officials and did not wear protective gear during their work at the Ground Zero site. *Lombardi*, 485 F.3d at 75. The plaintiffs brought the action under *Bivens*, 403 U.S. 388, claiming that they had been "deprived of a constitutional right by a federal agent acting under color of federal authority." *Id.* at 78 (quoting Thomas v. Ashcroft, 470 F.3d 491, 496 (2d Cir. 2006) (internal quotations omitted)). The claim alleged

that the defendants had violated the state created danger doctrine by issuing the statements on which the plaintiffs relied and this induced them to continue to work at Ground Zero without protective gear. *Id.* at 79-80. This behavior created a danger by exposing them to harmful amounts of the various toxic substances found at Ground Zero.

A *Bivens* action can be considered analogous to a United States Code civil action, where a federal agent can be held liable for actions taken under the color of law that violate a plaintiffs constitutional rights. *E.g.*, Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995); *see also Bivens*, 403 U.S. 388; 42 U.S.C. § 1983 (2000) (providing civil action for deprivation of rights).

The defendants in *Lombardi* offered a defense of qualified immunity as federal officials are entitled to when faced with a *Bivens* action. *Lombardi*, 485 F.3d at 78. There is a two-step analysis in analyzing a defense of qualified immunity in both *Bivens* and § 1983 actions: (1) did the official violate a constitutional right when reading the facts in a light most favorable to the party asserting injury, and (2) was the right clearly established so that a reasonable official would have known they were violating that right.

The Second Circuit began the heart of its analysis by looking at the substantive due process claim to see whether there was any violation of a constitutional right. The Fifth Amendment of the United States Constitution provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V. The court pointed out that "[t]his clause has been interpreted as a protection of the individual against arbitrary action of government," and that it has a procedural as well as a substantive component. *Lombardi*, 485 F.3d at 78 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (internal quotations omitted)). The substantive component serves to guard the individual against the exercise of government power that does not have a reasonable and legitimate governmental objective. *Id.* at 79.

As laid out by the Supreme Court in *DeShaney*, the government generally has no constitutional obligation to protect citizens from private harm. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). Government actors cannot be held liable for a substantive due process violation simply because they failed to warn a person of, or protect a person from, some potential harm. *Lombardi*, 485 F.3d at 79. For a government actor to violate a person's substantive due process rights they must do an affirmative act and the action taken must be so egregious that it shocks the contemporary conscience. *Id.*

However, many circuits, including the Second Circuit, have interpreted an exception to the Supreme Court's ruling in *DeShaney* and recognized a state-created danger doctrine. The state created danger doctrine holds that government officials may be liable for damages if their direct actions create an opportunity for a victim to be harmed or increase the risk that such harm will occur.

The Second Circuit pointed out that state created danger cases usually involve harm that comes about from the actions of third parties after action has been taken by a government agent. *Id.* at 80. In the Second Circuit, these cases all involved situations where law enforcement officers enhanced or created the opportunity for a criminal act. The court pointed to several cases where police officers created situations where they knew a crime would occur.

In comparing these cases with the matter before them, the court noted in *Lombardi* that the administrators acted after the terrorist act had been committed. The court characterized the plaintiff's complaint as putting environmental conditions in the place of a wrongdoing third party. This characterization almost insinuates that third-party harm after the government agent action might be a requirement for a true claim under the state-created danger doctrine, but the court stopped short of making this claim.

The court looked for more analogous applications of the state created danger doctrine from sister circuits. The court found some examples that supported the plaintiff's theory that a government actor may be liable when they intentionally misrepresent a situation and create a false sense of security in a victim. *Id.* at 81. Liability would still be contingent on whether foreseeable bodily harm occurred and whether the conduct of the government official shocks the conscience. *Id.*

Because the case before it stemmed from a motion to dismiss, the Second Circuit took the allegations in the complaint as true. *Id.* at 78. However, they noted that they thought that there were serious causation problems with the plaintiff's case; namely, proving that they heard the statements or read the press releases made by the administrators and that this was the reason they did not wear protective gear while working at Ground Zero. *Id.* at 81 n.5.

Granting the plaintiffs causation, the court turned to whether the administrators conduct shocked the conscience. *Id.* at 81-82. The court stated that the shocks the conscience standard is above that of a negligence standard. Further, conduct that is done with intent to injure, which is not justifiable by government interest, is the type of conduct that will most likely meet the threshold.

The Supreme Court has recognized that actions taken with deliberate indifference to harm may be sufficient to shock the conscience in substantive due process cases. However, the Second Circuit was quick to qualify the deliberate indifference standard by pointing out that deliberate indifference that shocks the conscience in one situation may not do so in another. They emphasized the fact that the conscience must recognize competing interests when attempting to choose between two undesirable outcomes. *Id.* at 83.

The Second Circuit used this principle of weighing competing interests as the cornerstone in the rest of its analysis. In doing so, the court began by downplaying the notion that deliberate indifference usually reaches a conscience shocking level when the government official has time to think and calculate, as opposed to situations where decisions are made in haste. The plaintiffs asserted that the administrators in this case had the requisite time to think and calculate their decision and so were deliberately indifferent when they made misleading statements. The court dismissed this characterization and instead focused on the pull of competing obligations. The court asserted that government officials in previous cases recognizing state-created danger did not have to balance competing interests.

The plaintiffs offered two district court cases in which government officials had time to contemplate their actions and in which they intentionally gave misleading information that lead to harm. In the first case, the United States Post Office employees who contracted anthrax brought a substantive due process claim under the state-created danger doctrine after supervisors falsely indicated that there workspace was safe. The D.C. Circuit found that the action of the supervisors did shock the conscience, even though they found the defendants had qualified immunity on other grounds. The Second Circuit distinguished this case on the grounds that the competing interest of keeping one post office open did not compare with restoring an entire community. *Id.* at 83-84.

The other case plaintiffs brought posed a more direct and interesting comparison. A group of residents of Lower Manhattan had also brought a suit alleging an almost identical claim to the plaintiffs in *Lombardi* with the principle difference being that they did not work at Ground Zero but lived and worked in the community surrounding the site. *Id.* at 84. In *Benzman v. Whitman*, No. 04 Civ. 1888 (DAB), slip op. (S.D.N.Y. Feb. 2, 2006), Judge Batts, also of the Southern District of New York, found that the same statements made by Whitman at issue in *Lombardi* rose to the level of "shocks the conscience." *Lombardi*, 485 F.3d at 84 (citing *Benzman*, No. 04 Civ. 1888 (DAB), slip op., at 18).

Judge Batts looked to the mandate of the EPA to protect the human health and the environment and that "[a]s head of the EPA, Whitman knew of this mandate." *Id.* (citing *Benzman*, No. 04 Civ. 1888 (DAB), slip op. at 18). Citing the responsibility that Whitman had regarding this mandate, Judge Batts said that the reassuring statements were, without question, conscience shocking. The Judge further asserted that "[n]o reasonable person would have thought that telling thousands of people that it was safe to return to Lower Manhattan, while knowing that such a return could pose long-term health risks and other dire consequences, was conduct sanctioned by our laws." *Benzman*, No. 04 Civ. 1888 (DAB), slip op. at 20.

The Second Circuit rejected the view that the analysis should rely on the EPA's mandate. *Lombardi*, 485 F.3d at 84. For the due process claim, the court returned the focus to the other substantial governmental interests at stake. While the court left open the possibility that the actions taken by the defendants did not comply with the statutes that they are charged to enforce, it went on to counsel against due process liability encumbering agency action. The court noted, "If anything, the importance of the EPA's mission counsels against broad constitutional liability." *Id.* Citing the § 1983 case *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), the court states that there is a presumption that government agencies base their decision making on rational processes, considering "competing social, political, and economic forces." *Id.*

At the end of its opinion, the court emphasized that government decisions cannot be held conscience shocking "merely because they contemplate some likelihood of bodily harm." *Id.* at 85. The court stated that there could be other risks of bodily harm that the government must weigh against when making decisions and that calculation of the magnitude of those risks is difficult. *Id.* In the end, even if the defendants made a poor decision that lead to unfortunate injury of the plaintiffs, they did so in a reasonable furtherance of a legitimate government objective. *Id.* Thus, the actions did not shock the conscience, there was no constitutional violation and the defendants were entitled to qualified immunity. *Id.*

The court's decision in this case is justifiable, while perhaps not palpable to many. Applying the state-created danger doctrine to an environmental context was novel. However, as in this case, it is doubtful that such claims will be recognized. One large hurdle is that the Supreme Court has never recognized the state-created danger exception to *DeShaney*, nor have all the Circuits. Another obstacle is that situations in which administrators are put in these types of decision making

positions are rare and they will usually have the pull of competing government interests as they did in this case.

Despite the decision of the Second Circuit, Whitman and other witnesses were called in front of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee on June 27, 2007 to answer questions surrounding the statements and press releases at issue in *Lombardi* and *Benzman*, as well as EPA's general response. *U.S. Environmental Protection Agency's Response to Air Quality Issues Arising from the Terrorist Attacks of September 11th, 2001: Were there Substantive Due Process Violations? Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, H. Comm. on the Judiciary*, 110th Cong. (2007), *available at* http://judiciary.house.gov/media/pdfs/printers/110th/36342.pdf.. At this hearing, Whitman defended her actions and those of the agency, pointing out that the City of New York was in charge of most of the operations surrounding the cleanup and recovery, and that by all accounts, the EPA had done an unprecedented job of monitoring environmental conditions in a situation no one had ever faced before. *Id.* However, many of those on the House panel seemed skeptical of Whitman's responses and answers. It is unclear whether there will be any real resolution as to whether the actions taken by the EPA in releasing the statements were the right or legal thing to do.

Richard H. Fabiani II

V. REAL ID ACT

Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007)

I. Background

On May 11, 2005, Congress passed the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (REAL ID Act), "[a]n Act Making Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, and for other purposes." REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). One of the "other purposes" for which Congress passed the Act, found deeply embedded in the Act at section 102, included amending the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 in order to grant the Secretary of the Department of Homeland Security

(Secretary) the "authority" in his "sole discretion" to waive compliance with other federal laws in order "to ensure expeditious construction of the barriers and roads." REAL ID Act of 2005, § 102(c)(1), 119 Stat. at 306.

To ensure that the Secretary could exercise his "authority" in his "sole discretion," Congress made any waivers the Secretary instituted reviewable only if a claimant could stake a constitutional claim. *Id.* § 102(c)(2)(A), 119 Stat. at 306. Furthermore, Congress mandated that any such constitutional claim must be filed within sixty days of the Secretary's exercise of the waiver authority. *Id.* § 102(c)(2)(B), 119 Stat. at 306. In order to waive any statute for the purpose of "ensur[ing] expeditious construction of the barriers and roads," the Secretary needed only publish his decision in the Federal Register. *Id.* § 102(c)(1), 119 Stat. at 306. The Secretary had occasion to exercise this authority in late 2007. *See* Notice of Determination, 72 Fed. Reg. 60870, 60870 (Oct. 26, 2007) (waiving twenty statutes in order to build a fence along the Arizona-Mexico border).

In September 2007, the Army Corps of Engineers began to construct border fencing, a road, and other drainage structures within the San Pedro Riparian National Conservation Area (SPRNCA) at the behest of the Department of Homeland Security (DHS) for the purpose of securing the border along Mexico in Arizona. Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 121 (D.D.C. 2007). SPRNCA, under the management of the Bureau of Land Management (BLM), had been described by some environmental groups as "a unique and invaluable environmental resource" and "one of the most biologically diverse areas of the United States." *Id.* at 121 (internal quotation marks omitted).

BLM granted DHS a perpetual right of way in order to construct the border fence; however, prior to doing so, BLM conducted an Environmental Assessment (EA), finding the construction of the border fence would have no significant impact when coupled with mitigation measures. *Id.* Construction of the fence along the border would require "excavation on up to 225 acres of the SPRNCA's 58,000 acres, and the proposed fence segments [would] cover approximately 9,938 feet at the border when completed." *Id.* at 121 n.1.

In order to halt construction of the fence, both the Defenders of Wildlife and the Sierra Club (collectively Defenders), two environmental organizations, protested the decision of no significant impact directly with BLM. *Id.* at 121. When the Defender's appeal to BLM failed, the Defenders filed suit in the United States District Court for the District of Columbia in October 2007, alleging that BLM inadequately assessed the

environmental impacts of the fence construction project and that NEPA required that an Environmental Impact Statement be completed. *Id.* Furthermore, the Defenders alleged that BLM's grant of the right-of-way to DHS violated the Arizona-Idaho Conservation Act of 1988 because BLM failed to manage the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area" by permitting the perpetual right-of-way. *Id.* The Defenders sought immediate emergency injunctive relief from the D.C. district court in order to stop construction of the fence, which the court granted, and construction of the fence ceased until the Secretary exercised his authority under the REAL ID Act. *Id.* at 121-22.

In late October 2007, after the Defenders successfully, albeit temporarily, halted further construction, the Secretary found that

> approximately 4.75 miles west of the Naco, Arizona Port of Entry to the western boundary of the San Pedro Riparian National Conservation Area (SPRNCA) in southeastern Arizona . . . is an area of high illegal entry. There is presently a need to construct fixed and mobile barriers . . . and roads in the vicinity of the border of the United States.

Notice of Determination, 72 Fed. Reg. 60,870, 60,870 (Oct. 26, 2007). Consequently, the Secretary exercised his authority "to ensure expeditious construction of the barriers and roads," REAL ID Act of 2005, § 102(c)(1), 119 Stat. at 306, by waiving the National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the Clean Air Act, the Archaeological Resources Protection Act, the Safe Drinking Water Act, the Noise Control Act, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Federal Land Policy and Management Act, the Fish and Wildlife Coordination Act, the Archaeological and Historical Preservation Act, the Antiquities Act, the Historic Sites, Buildings, and Antiquities Act, the Arizona-Idaho Conservation Act, the Farmland Protection Policy Act, and the Administrative Procedure Act. Notice of Determination, 72 Fed. Reg. at 60,870.

II. The Arguments

Pursuant to the limited claims available under the REAL ID Act, *see* REAL ID Act of 2005, § 102(c)(2)(A), 119 Stat. at 306, the Defenders

amended their complaint to stake a constitutional claim, asserting that the broad grant of the REAL ID waiver to the Secretary was an impermissible delegation of legislative authority to the Executive Branch, thereby violating the separation of powers principles embedded in the structure of the Constitution. *Defenders of Wildlife*, 527 F. Supp. 2d at 123. More specifically analogizing to *Clinton v. City of New York*, 524 U.S. 417 (1998), the Defenders argued that the REAL ID Act was a de facto grant of power to the Secretary to repeal any law of the United States, allowing him, in his sole discretion, to circumvent the legislative process. *Defenders of Wildlife*, 527 F. Supp. 2d at 123-24. More generally, the Defenders claimed that the REAL ID Act waiver provision violated the nondelegation doctrine by granting legislative authority to the Secretary without guidance to rein his exercise of the waiver. *Id.* at 126. Finally, the Defenders argued that, even though waivers in general might be permissible in other federal statutes, the REAL ID waiver was unprecedented in scope and failed to provide the limitations embedded in other available federal law waivers. *Id.* at 128.

The Secretary, on the other hand, contended that the REAL ID Act provided an intelligible principle by which the Secretary could exercise the authority Congress had delegated. *Id.* at 123. Furthermore, the Secretary argued that Congress had considerable latitude to delegate authority related to matters involving immigration policy, foreign affairs, and national security, which were already the appropriate domain of the Executive Branch. *Id.*

III. D.C. District Court's Analysis

The D.C. district court began its analysis of the arguments by turning to the Defenders' analogy to the United States Supreme Court's decision in *Clinton*. *Id.* at 123-24. In *Clinton*, the Court struck down the Line Item Veto Act because it permitted the President to eliminate congressional spending items, thereby circumventing the legislative process, by allowing presidential amendment of congressional acts without reconsideration by the legislative branch. 524 U.S. at 448-49. The D.C. district court disagreed with the Defenders' analogy to *Clinton*, however, on the basis that "the REAL ID Act [was] not equivalent to the partial repeal or amendment" available to the President in the Line Item Veto Act. *Defenders of Wildlife*, 527 F. Supp. 2d at 124.

Rather, the D.C. district court noted that unlike the Line Item Veto Act, which gave the President unilateral power to cancel congressional spending items and circumvent the Presentment process of Article V of the Constitution, the REAL ID Act granted "no authority [to the

Secretary] to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part." *Id.* at 124. The D.C. district court reasoned that, despite the authority to suspend the effects of the statutes in certain instances, the laws themselves nonetheless held "the same legal force and effect as [they] had when [they] [were] passed by both houses of Congress and presented to the President." *Id.* In effect, the D.C. court noted that to validate the Defenders argument, that the waiver constituted a partial repeal and therefore impermissible, would also render constitutionally impermissible numerous waivers available in other federal statutes. *Id.* at 124-25.

Furthermore, the D.C. district court stated that, unlike in other Supreme Court decisions, where the Court found delegations of power to be nonlegislative in nature and therefore did not supplant congressional policy with executive policy, the Court in *Clinton* found the Line Item Veto Act impermissibly did so. *Id.* at 125-26. On the other hand, the D.C. district court found that with the REAL ID Act, Congress explicitly intended for the Secretary to waive laws in the interest of national security, thereby effectuating congressional intent, rather than asking the Secretary to substitute executive policy. *See id.* at 125. Likewise, the D.C. district court found *Clinton* to be inapplicable because the REAL ID Act related to foreign affairs and immigration, "another area in which the Executive Branch ha[d] traditionally exercised a large degree of discretion," whereas the Line Item Veto Act promoted largely domestic policy, where the President lacked such broad discretion. *Id.* at 125-26. Finally, to bolster its conclusion that reasoning in *Clinton* did not apply to the REAL ID Act, the D.C. district court examined now Chief Justice Roberts's concurring opinion in a United States Court of Appeals for the District of Columbia Circuit, wherein Roberts validated one waiver provision because it resembled waivers the President could permissibly make, rather than resembling the far-reaching line item veto in *Clinton*. *Id.* at 126 (citations omitted).

The D.C. district court then turned to the Defender's more general argument that the REAL ID Act waiver violated the separation of powers principle because Congress failed to provide an intelligible principle. *Id.* at 126-27. The D.C. court recognized that Congress validly had the power to delegate legislative authority to the Executive Branch, so long as Congress provided the executive entity "an intelligible principle to which the [entity] . . . [wa]s directed to conform." *Id.* at 127 (internal quotation marks omitted) (citations omitted). In construing the intelligible principle provided to the Secretary by Congress, the D.C. district court pointed to the requirement that the Secretary determine the

necessity of the waiver for building roads and fences promptly and efficiently. *Id.* at 127. Likewise, the D.C. district court noted the specific congressional direction that the waiver may only be exercised in connection to building roads and barriers in areas near the nation's borders in order to deter illegal admission into the United States. *Id.*

The D.C. district court found that these directives from Congress met the guidance necessary to afford an intelligible principle equivalent to that required in Supreme Court jurisprudence. *Id.* Drawing on the Supreme Court's most recent opinion on the matter in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), the D.C. district court described the specificity of the intelligible principle to require only a "clearly delineated" "general policy." *Defenders of Wildlife*, 527 F. Supp. 2d at 127. Thus, the D.C. district court held the intelligible principle of determining the necessity of building barriers and roads in the vicinity of the border for the purpose of enhancing the nation's security of the REAL ID Act to be sufficient, as at least one other United States district court had previously. *Id.* at 127-28.

Finally, the D.C. district court analyzed the Defenders' argument that the waiver was unprecedented in its scope, and therefore unlike other waivers available in other federal statutes. *Id.* at 128. The D.C. district court rejected the broad characterization of the waiver because the REAL ID Act required the Secretary to limit his exercise of the waiver to situations requiring "expeditious completion of the border fences . . . in areas of high illegal entry." *Id.* (internal quotation marks omitted) (citation omitted). Furthermore, the D.C. district court noted it had no authority to "strike down an otherwise permissible delegation simply because of its broad scope." *Id.* Returning again to the nondelegation doctrine, the D.C. district court found the intelligible principle to be the measure for assessing permissibility of legislative delegation to the other branches, and therefore it concluded it could not "invalidate the waiver provision merely because of the unlimited number of statutes that could potentially be encompassed by the Secretary's exercise of his waiver power." *Id.* at 128-29.

Ultimately, the D.C. district court concluded its analysis by returning full circle to its *Clinton* analysis, affirming that the congressional delegation of legislative authority may be even broader in the matters of foreign affairs, a traditional domain of the Executive Branch. *Id.* at 129. Thus, the D.C. district court upheld the constitutional validity of the waiver, concluding that the waiver provision of the REAL ID Act did not circumvent the Presentment process required by Article V,

did not violate the nondelegation doctrine, and did not grant an impermissibly broad power to the Secretary. *See id.*

IV. Conclusion

While the claim that Congress legislates for the collective good of the nation has become more and more suspect with the rise of lobbies as a virtuoso industry, if this premise is nonetheless taken as true, the REAL ID Act still presents an overly broad delegation of authority to an entity of the Executive Branch, namely DHS, which is the single most intrusive governmental arm in the lives of the American public in a post-911 world. The slippery slope of displacing the operation of nearly all of the nation's environmental statutes can only lead to nullifying other statutes in the supposed name of national security. In reality, any connection of the suspension of the laws to this justifiable cause may be tenuous at best, thereby rendering the intelligible principle the court claimed to recognize only fictionally discernible.

Furthermore, though Congress supposedly has effectively limited the waiver provision to matters which permit the efficacious building of fences and roads at our nation's borders, failing to allow the nation's citizenry broader review of the exercise of the waiver can only lead to underhanded waivers justified under the guise of national security, permitting a chosen few to profit while our natural and constructed environments suffer. *See id.* at 127-28.

Congress has the capacity to act quickly when the need arises and certainly can act more quickly than the agencies, which undoubtedly heard the call to fortify the nation's borders in 2005 when the REAL ID Act was passed. However, they failed to implement appropriate environmental protections and mitigate environmental damages in the two years between the passage of the REAL ID Act and the construction of the fence along the Mexican border in Arizona. The solution is not to permit the impermissibly broad waiver, but rather to grease the bureaucratic wheels of agencies that make decisions regarding environmental assessments and let them know ahead of time to put measures in place, rather than eliminating the application of the laws meant to safeguard both nature and humanity. Because there is no real check on the Secretary's power and because he may capitalize on the fears of domestic invasion to render any and all laws null under the auspices of securing the nation's borders, while lining pockets of private interests, all in the name of national security, the United States Court of Appeals of the District of Columbia should reverse the D.C. district court decision and permit government agencies to continue to comply with the

environmental statutes, whose only purposes are to preserve and protect the natural and constructed environments.

Valerie R. Auger

VI. CERCLA

United States v. ExxonMobil Corp.,
No. 07-00060, slip op. (D.N.H. Dec. 20, 2007)

In the noted case, the United States District Court for the District of New Hampshire held that a nonsettling potentially responsible party (PRP) of a contaminated site enjoys a right to intervene in a federal lawsuit involving a consent decree between the government and settling PRPs of the same site. United States v. ExxonMobil Corp., No. 07-00060, slip op. (D.N.H. Dec. 20, 2007). This right exists because such consent decrees adversely impact the nonsettling PRP's right to seek contribution for cleanup costs from participants in the settlement agreement. Although the federal courts are deeply split as to whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) confers such a right of intervention, this first voice on the issue from First Circuit jurisdiction found that a nonsettling PRP's right to seek contribution from other PRPs constitutes a legally protectable interest sufficient to grant the nonsettling PRP "an opportunity to speak its piece." *Id.* at 5.

Pursuant to 42 U.S.C. §§ 9606-9607 (2000); CERCLA §§ 106-107, the plaintiffs in the noted case, the United States of America and the State of New Hampshire, brought suit against the defendants, various public and private entities listed as *de minimus* contributors at the Beede Waste Oil Superfund site (Beede) in Plaistow, New Hampshire, for injunctive relief and reimbursement of response costs. *Id.* at 1. The plaintiffs and defendants entered into settlement negotiations that bred a consent decree lodged with the court on April 16, 2007. Brodie Mountain Ski Area, Inc. and J.W. Kelly's Enterprises, Inc. (Brodie and Kelley) were not invited to the settlement negotiations and were thus nonparticipants in the consent decree. Brodie and Kelly also were named as highly-ranked contributors in a separate lawsuit related to the cleanup efforts at Beede in which they face joint and several liability. *Id.* (citing United States v. Davenport Realty Trust, No. 07-10 PB (D.N.H. filed Jan. 8, 2007)). Because CERCLA specifically exempts from contribution claims all PRPs who resolve their liability through settlement, Brodie and Kelly alleged "that the proposed [c]onsent [d]ecree is fundamentally

unfair in its make-up and in its effects on [their] financial liability for the remaining response costs." *ExxonMobil*, No. 07-00060, slip op. at 1. Brodie and Kelly sought to intervene as a matter of right pursuant to FED. R. CIV. P. 24(a)(2) and 42 U.S.C. § 9613(i) (2000); CERCLA § 113(i), which both provide (with very little real variation in language) that one may intervene as a matter of right if one satisfies four requirements:

> (1) the party's motion must be timely; (2) the party must assert an interest relating to the property or transaction which is the subject of the action; (3) the party must be so situated that without intervention the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the party's interest must not be adequately represented by other parties.

Id. at 2 (citing Arizona v. Motorola, Inc., 139 F.R.D. 141, 144 (D. Ariz. 1991) and United States v. Union Elec. Co., 64 F.3d 1152, 1158 (8th Cir. 1995)). The standards differ in one respect only: under CERCLA, the burden of proving the fourth element—that no existing party adequately represents the moving party's interests—is on the State, whereas under FED. R. CIV. P. 24(a)(2), that same burden falls to the moving party seeking to intervene. *Id.* (citing *Union Elec.*, 64 F.3d at 1158).

The court began its analysis by determining that Brodie and Kelly's Motion to Intervene was timely. *ExxonMobil*, No. 07-00060, slip op. at 2. Although Brodie and Kelly's substantive objections to the consent decree and their attendant Motion to Remand were premature because the defendants had not yet moved for entry of the decree, the court found that, considering the totality of the circumstances, Brodie and Kelly's filing of their Motion to Intervene on June 6, 2007 was done in a timely manner after Plaintiff's lodging of the consent decree with the court on April 16, 2007 and their publishing of notice in the Federal Register soon thereafter. *Id.* (citing United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1181-82 (3d Cir. 1994) and *Union Elec.*, 64 F.3d at 1158-59).

The court likewise found quickly that Brodie and Kelly met the third and fourth elements required by both FED. R. CIV. P. 24(a)(2) and CERCLA § 113(i), impairment and adequate representation of interest. *Id.* at 4-5. As discussed above, CERCLA § 113(f)(2) provides that settlement "could bar or reduce the monetary value of the contribution claims of the prospective intervenors against the settling PRPs." *Id.* at 4 (quoting *Union Elec.*, 64 F.3d at 1167 (citing Mille Lacs Band of Chippewa Indians v. Minnesota, 989 f.2d 994, 998 (8th Cir. 1993))). In addition to this statutory impairment, Brodie and Kelly challenged the fairness with which the EPA ranked PRPs by level of contribution of contamination, thus excluding Brodie and Kelly from the instant

settlement negotiations to which only lower-ranked *de minimus* contributors were invited. *ExxonMobil*, No. 07-00060, slip op. at 4. Because of this exclusion and subsequent classification as a nonsettling PRP, entry of the consent decree would extinguish Brodie and Kelly's ability to recoup "excessive allocation of liability." Regarding adequate representation, the court found simply that because the plaintiffs "crafted and put forward," and the defendants are willing parties to, the very consent decree that Brodie and Kelly oppose as unfair, it is "axiomatic" that neither side could adequately represent Brodie and Kelly's interests. Thus, the interests of the parties to the action were "inherently at odds" with those of Brodie and Kelly. *Id.* at 5.

As mentioned at the beginning of this Recent Development, the noted opinion (and the attendant split among federal courts) hinges on "[w]hether an interest in contribution claims is sufficiently protectable, rather than excessively 'speculative' or 'contingent,' to support intervention in an action under CERCLA." *Id.* at 3 (quoting *Union Elec.*, 64 F.3d at 1162). When a party seeks to intervene, success requires an interest that is "direct . . . recognized, substantial, and legally protectable;" not "'wholly remote and speculative, [but] the intervention may be based on an interest that is contingent upon the outcome of the litigation.'" *Id.* at 3 (quoting *Union Elec.*, 64 F.3d at 1162). The court began its treatment of the second element required by both FED. R. CIV. P. 24(a)(2) and CERCLA § 113(i) by reviewing the decisions of those courts that have denied intervention and by analyzing the reasoning behind those denials. The court found that "[f]or those courts that have ruled against intervention by nonsettling PRPs, the legislative history and intent of CERCLA has been a guiding force." *Id.* (citing United States v. Vasi, Nos. 90-1167, 1168 (N.D. Ohio Mar. 6, 1991); Arizona v. Motorola, Inc., 139 F.R.D. 141, 145 (D. Ariz. 1991)). In denying the right to intervene, these courts consistently cite the "risk of disproportionate liability" inherent in CERCLA's treatment of PRPs. *Id.* (citing *Motorola*, 139 F.R.D. at 145; *Vasi*, Nos. 90-1167, 1168). This risk is such that, because of CERCLA's joint and several liability, a nonsettling PRP often must pay cleanup costs far beyond its proportionate contribution to contamination when settling PRPs settle below their own proportionate contributions. *See Motorola*, 139 F.R.D. at 145. In fact, the risk of disproportionate liability has been found to be "an integral part of the statutory plan." *Exxon Mobil*, No. 07-0060, slip op. at 3 (quoting United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 (1st Cir. 1990)). Also, denying courts "point to CERCLA § 122(d)(2), the thirty day period for public comment, as support for the proposition that § 113(i) was not

intended 'to be used as a vehicle to hamper the settlement process.'" *Id.* (citing *Vasi*, Nos. 90-1167, 1168, at 4. The analytical thrust of a denying court is that the supposed overall purpose and statutory scheme of CERCLA is to "foster *early* settlement" and *early* cleanup. *Id.* at 3 (emphasis added). This may be so, but such an argument is one of timeliness, not interest; as such the proper question would be "whether existing parties may be prejudiced by the delay in moving to intervene, not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change." *Union Elec.*, 64 F.3d at 1159 (citing *Mills Lac*, 989 F.2d at 998-99). And because these denying courts—by confusing prejudice to parties with delay of the process as a whole—have characterized the contribution interest of nonsettling PRPs as nondirect, contingent, and remote from the outset of the their analyses, they "have avoided the more fact-intensive inquiry into the nature of a putative intervenor's contribution claim and how such a claim would be affected by the proposed consent decree." *ExxonMobil*, No. 07-00060, slip op. at 3. The court rejected judicial speculation of legislative intent and policy and instead employed unambiguous interpretation of the "plain meaning" of CERCLA language when it chose to follow the United States Court of Appeals for the Eighth Circuit's *United States v. Union Elec. Co.* opinion. *Id.* at 4. The District of New Hampshire found that CERCLA § 113(i) is clearly unequivocal in its allowance of intervention by all persons who meet the requirements of the statute. Simply put, the contribution interest, and the threat by a consent decree of its extinguishment, is "substantial and legally protectable [because] CERCLA § 113(f)(1) itself provides for legal protection of the interest in the primary litigation by providing for contribution claims." *Id.* (quoting *Union Elec.*, 64 F.3d at 1166). That threat of total extinguishment "creates a direct and immediate interest on the part of nonsettling PRPs." *Id.* (quoting *Union Elec.*, 64 F.3d at 1167).

Finally, the court was quick to clarify once more that Brodie and Kelly were free to intervene for the "limited purpose of objecting to entry and approval of the [c]onsent [d]ecree" only. *Id.* at 6. The court also cautioned that its grant of leave to intervene in no way implied success of subjective opposition to the consent decree on the merits. *Id.* at 5. CERCLA explicitly granted Brodie and Kelly "a seat at the table" to defend their interest in contribution claims, but the statute in no way granted them "veto power over the final settlement." *Id.* The court's opinion is laudable for its refusal to speculate about legislative intent and policy in the face of plain statutory language with very plain meaning.

The opinion confirms only the latitude that PRPs have been statutorily granted, and nothing more.

Matthew P. Weaver

VII. GLOBAL WARMING

Comer v. Murphy Oil USA, Inc.,
No. 05-436 (S.D. Miss. Aug. 30, 2007)

Plaintiff Ned Comer brought a class action in the Southern District of Mississippi against eight named oil companies, thirty-one coal named coal or energy companies, and four chemical companies for damages caused by alleged unjust enrichment, civil conspiracy and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment which significantly increased global warming. Third Amended Complaint, *Comer v. Murphy Oil USA, Inc.*, No. 05-436 (S.D. Miss. Aug. 30, 2007). The plaintiffs sought compensation under two theories of damages. First, the defendants' tortious behavior increased the intensity of Hurricane Katrina and caused or exacerbated plaintiff's personal injuries, loss of property, and business interruption. *Id.* Second, the defendants' ongoing emissions of greenhouse gases (the defendants are the largest oil, coal, gas and halocarbon producers and emitters in the United States) increase storm and flood risk to the plaintiffs' property, decreasing the plaintiffs' property values and increasing the plaintiffs' insurance premiums (as risk modelers use global warming statistics to calculate risk and premiums). *Id.*; *see also* Opposition to the Motion To Dismiss Filed by Defendant Xcel Energy, Inc., *Comer*, No. 05-436, at 41 (S.D. Miss., filed Aug. 30, 2006).

On a motion to dismiss brought by thirteen of the "coal company" defendants, Judge Louis Guirola, Jr., of the Southern District of Mississippi ruled that the plaintiffs lacked standing to assert their claims and accordingly dismissed the plaintiffs' claims against all defendants. Trial of Hearing on Defendants' Motion To Dismiss, No. 05-436, at 41 (S.D. Miss. Aug. 30, 2007). Previously, insurance defendants were dismissed without prejudice from the case on the grounds that the plaintiffs should seek recovery from the insurers through actions against each insurance company individually. Order, Comer v. Murphy Oil USA, Inc., No. 05-436, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006). Alternatively, the court ruled that the claims raised nonjusticiable political questions that could only be addressed by the legislative or

executive branches of government. Hearing, *Comer*, No. 05-436, at 36-40. Finally, the court noted that discovery in the case would be time consuming and expensive, and that it would be imprudent to allow such discovery before the standing issue could be reviewed by the Fifth Circuit. *Id.* at 40-41.

Functionally, Judge Guirola conflated standing and justiciability. In *Massachusetts v. E.P.A.*, 127 S. Ct. 1438 (2007), the standing analysis focused on the first and third prongs of the *Lujan* analysis: "To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Id.* at 1453 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). The Supreme Court analyzed whether the plaintiff states had suffered or would suffer an actual injury and whether the remedy they sought could redress that injury, while stipulating that the injury was fairly traceable to the EPA. *Id.* at 1453-58. But in *Comer*, Judge Guirola dismissed based on the second "traceability" prong of the *Lujan* test. He appears to have accepted that the plaintiffs have suffered actual injuries and that monetary damages would redress that injury. Trial of Hearing on Defendants' Motion To Dismiss, *Comer*, No. 05-436, at 35-36. In dismissing the case, he reasoned that "all of us are responsible for the emission of CO_2 and ultimately greenhouse gases which cause global warming. . . . I do not think that under our system of jurisprudence that is attributable or traceable to these individual defendants but is instead . . . attributable to a larger group that are not before this court." *Id.* at 36. In other words, the court determined that, because the number of greenhouse gas emitters are so numerous, it would be impossible to apportion fault amongst the *Comer* defendants, and therefore the injury is not fairly traceable to those defendants.

Judge Guirola then addressed the political question doctrine, discussing at length the actions taken by various states and international groups to try to address greenhouse gas emissions and other global warming causes and effects. *Id.* at 36-39. The court stated that Congress must pass legislation to set the standards by which courts and juries may measure reasonable conduct. *Id.* at 39. The court pointed out that there is an absence of legislation and judicial precedent applicable to this matter. *See id.* at 35, 37.

Judge Guirola's political question analysis implies that it is the court's job to tell the jury what reasonable conduct is when it comes to carbon emissions. But traditionally the standard of conduct of a

"reasonable man" may be: "(a) established by a legislative enactment or administrative regulation which so provides, or (b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or (c) established by judicial decision, or (d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision." RESTATEMENT (SECOND) OF TORTS § 285 (1965, updated 2007). In other words, in the absence of legislation or judicial decision, the standard should be that the jury determines "reasonableness" within a specific set of facts to resolve a specific controversy.

The plaintiffs filed an appeal with the United States Court of Appeals for the Fifth Circuit on September 17, 2007, and have argued that, in the absence of relevant Federal legislation, it is up to the trier of fact to determine both: (1) what portion of damages can be fairly traceable to the Comer defendants and (2) whether the defendants' behavior was "reasonable conduct" in light of the specific facts and circumstances of this case. Brief of Plaintiffs-Appellants, Comer v. Murphy Oil USA, Inc., No. 07-60756 (5th Cir. Dec. 3, 2007).

Machelle Lee