RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

Natural Resources Defense Council v. EPA, 529 F.3d 1077 (D.C. Cir. 2008)

In *Natural Resources Defense Council v. EPA*, environmental organizations, including the Natural Resources Defense Council and Louisiana Environmental Action Network, petitioned the United States Court of Appeals for the District of Columbia Circuit, for review of an order issued by the Environmental Protection Agency (EPA). 529 F.3d 1077, 1078 (D.C. Cir. 2008). The order at issue left unchanged the EPA's technology review rulemaking under the Clean Air Act (CAA) for emissions from facilities that used or produced synthetic organic chemicals after the agency conducted the subsequent health risk-based review.

The court commenced the opinion with a discussion of section 112 of the CAA, a summary on the Act's legislative history, and the procedure for carrying out the section. *Id.* at 1079. Section 112 of the CAA regulates hazardous air pollutants and accordingly applies to facilities that use or produce the synthetic organic chemicals which are at the center of this case. In 1990, Congress adopted a new regulatory approach for hazardous air pollutants under section 12 which involves two stages of regulation, each with different standards. *Id.* at 1079-80. At the first stage of regulation, the EPA is required to consider the best available technology to control emissions for each category of major sources that emits one or more of the listed hazardous air pollutants. *Id.* at 1079 (citing 42 U.S.C. § 7412(d)(2)-(3) (2000)). This is known as the technology-based approach. At the second stage of regulation, known as the "risk-based" or "health-based" stage, the EPA is required to review any residual health risks of a pollutant and set a standard based upon a medical assessment of those health risks. *Id.* at 1080 (citing 42 U.S.C. § 7412(f)).

Relevant to the instant case, in 1994, the EPA promulgated the first stage, technology-based emissions standard for U.S. facilities that produce or use synthetic organic chemicals. Subsequently, in 1999, the agency commenced the second health risk-based stage to determine whether the technology-based standards should be revised because it was determined that these emissions pose lifetime excess cancer risks of greater than one in one million. In 2006, the EPA gave notice of proposed rulemaking in which it listed two options for standards. *Id.* (citing 71 Fed. Reg. 34,422, 34,438 (June 14, 2006)). One option would have imposed stricter emissions standards, while the other option, which the agency elected, was a reaffirmation of the original, technology-only-based standard. *Id.* (citing 71 Fed. Reg. 76,603 (Dec. 21, 2006)). The EPA reasoned that under the original technology-based standard, no individual would face an excess lifetime cancer risk of greater than 100 in one million, which it regarded in accordance with precedent as "presumptively acceptable." Additionally, pursuant to section 112, the EPA concluded that in light of the technological developments over the past eight years, no revision was necessary.

Petitioners challenged the EPA's order, arguing that it was improper based upon the statutory construction of subsections 112(f)(2)(A) and 112(d)(6) of the CAA, and that the EPA's health-based risk analysis was arbitrary and capricious. The court rejected all of the petitioners' arguments and denied the petition for review.

First, petitioners argued that subsection 112(f)(2)(A) requires the EPA to revise emissions standards for facilities that use or produce synthetic organic chemicals to reduce lifetime excess cancer risk to one in one million, rather than to 100 in one million as the EPA did in its order. *Id.* at 1081. The relevant provision states:

> If Congress does not act on any recommendation submitted under paragraph (1), the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to subsection (d) of this section, promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into all consideration cost, energy, safety, and other relevant factors, an adverse environmental effect. Emissions standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such source category.

Id. (quoting 42 U.S.C. § 7412(f)(2)(A)). Petitioners argued that the third sentence of subsection 112(f)(2)(A) expressly supports their position that the EPA was required to reduce the risk to one in one million. The court rejected the petitioners' argument because the third sentence, which requires the Administrator to "promulgate standards," fails to include directions for the substantive content of those standards. The court also noted that Congress deliberately drafted the sentence to be ambiguous. Instead, the court stated that the standard set in the second sentence, "provide an ample margin of safety to protect public health," applies to the third sentence. *Id.* at 1082. Additionally, the court cited a reference in subsection 112(f)(2)(B) to the EPA's *Benzene* rulemaking as the applicable standard for "ample margin of safety" in sentence two of 112(f)(2)(A). *Id.* (citing 54 Fed. Reg. 38,044). The *Benzene* rulemaking states that the "ample margin" is met so long as the maximum excess risk is 100-in-one million, while the one-in-one million standard is just an "aspirational goal."

The petitioners challenged the court's above findings, arguing that (1) the *Benzene* rulemaking only applies to regulations involving Benzene, (2) the *Benzene* rulemaking only applies to noncarcinogens, (3) the third sentence is rendered meaningless by the application of the *Benzene* rulemaking standard, (4) the EPA did not promulgate standards because it readopted the initial standards, and (5) the EPA unlawfully considered cost while setting the standards. *Id.* at 1082-83. The court quickly dismissed each of these challenges based upon the express language of subsection 112(f)(2)(A) and the *Benzene* rulemaking. *Id.* at 1083. Ultimately, the court found that the EPA's interpretation of subsection 112(f)(2) is at least reasonable and accordingly it was upheld.

Second, the petitioners argued that the EPA failed to uphold subsection 112(d)(6) because the agency did not completely recalculate the maximum achievable control technology for facilities that use or produce synthetic organic chemicals, and it improperly considered costs when it decided not to revise the standards. *Id.* at 1084. Subsection 112(d)(6) states "[t]he Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emissions standards promulgated under this section no less often than every 8 years." The petitioners argued that the statute requires the EPA to completely recalculate the maximum achievable control technology rather than, as the agency did, just rely on previous analysis. The court rejected the argument, reasoning that there is no such obligation under the statute, especially in light of the fact that the petitioners failed to identify any post-1994 technological innovations that the EPA failed to consider. Additionally, the petitioners argued that the EPA improperly considered cost as a factor in the decision to not revise the standards. The court circumvented this argument by stating that it was not required to even decide the issue because the petitioners failed to challenge the core requirement of subsection 112(d)(6), "significant developments in practices, processes and control technologies," so it was irrelevant whether the EPA considered costs in its determination.

Third, the petitioners argued that the EPA's analysis of the health-based risks from facilities that use or produce synthetic organic chemicals was arbitrary and capricious, largely because the agency relied upon flawed data. *Id.* at 1084-85. The petitioners asserted that the EPA's use of data supplied by the American Chemistry Council, rather than using the agency's own data, was improper. However, the court rejected this argument based upon section 114 of the CAA which states that the EPA "may," rather than "shall," require the owner of an emissions source

to collect data. *Id.* at 1085 (citing 42 U.S.C. § 7414(a)). Additionally, the petitioners asserted that the industry-supplied data was flawed, specifically that questionnaires were incomplete and that the data will understate health risk because high emissions sources have an incentive to withhold data. Again, the court rejected their argument, reasoning that although there were gaps in the data, 44% of high and low emitting sources provided responses and the EPA used "environmentally protective defaults" to fill the missing information. Also, the petitioners argued that the emissions data was unreliable because it was from 1999. The court quickly disposed of this argument too, reasoning that the petitioners did not assert that emissions actually increased over the period between 1999 and 2006 and this was the time span necessary in order for the EPA to properly prepare the rulemaking order. The court summarized its position stating that just because the EPA could have used better data did not mean that its analysis rose to the level of arbitrary and capricious, especially in light of the deference given to the EPA in data collection decisions. *Id.* at 1086 (citing Sierra Club v. EPA, 167 F.3d 658, 662 (D.C. Cir. 1999)). For the foregoing reasons, the court held that the petition for review was denied. *Id.* at 1087.

The court's decision in *Natural Resources Defense Council v. EPA* is indicative of the difficulty private petitioners face when challenging the EPA's rulemaking under the CAA. Despite express language in the Act supporting the petitioner's positions in this case, the court appeared almost desperate to uphold the agency's order when it manipulated arguably unambiguous language in the relevant sections of the Act by referencing subsections in the Act and federal regulations that did not speak to the actual CAA issues in the case.

Alexis Butler

Sierra Club v. EPA,
536 F.3d 673 (D.C. Cir. 2008)

Until 1990, regulators and industry members seeking emission limits and monitoring requirements for stationary sources of air pollution were forced to search for rules scattered throughout a hodgepodge of state implementation plans, national hazardous air pollutant standards, and new source performance standards. Sierra Club v. EPA, 536 F.3d 673, 674 (D.C. Cir. 2008). Then, Congress created a national permit program, including emissions limits and monitoring requirements, under Title V of the Clean Air Act (CAA). The Environmental Protection

Agency (EPA), state, and local permitting authorities administer the program together, but the EPA serves a supervisory role and may set compliance standards and minimum requirements. State and local authorities may create their own permit programs, which are subject to the EPA's approval. Each permit must include terms and monitoring requirements to assure compliance.

These requirements, designed to ensure compliance, have sparked endless debate amongst environmental groups, industry, and administrators. 40 C.F.R. § 70.6(c)(1) (2008), a provision that closely tracks the language of the CAA, requires that "[a]ll . . . permits shall contain . . . monitoring . . . requirements sufficient to assure compliance with the terms and conditions of the permit." 536 F.3d at 675 (quoting 40 C.F.R. § 70.6(c)(1)). Additionally, each permit must identify "all monitoring . . . required under applicable monitoring an testing requirements." 40 C.F.R. § 70.6(a)(3)(i)(A). Permitting authorities also must add monitoring requirements to present a more representative picture of the source's compliance where periodic testing is not required. If the emission standard is periodic and already able to ensure compliance, it must be included by the permitting authority.

The statute is constructed to ensure that permits issued by state and local permitting authorities ensure compliance, but does not address the issue of a permit requiring periodic testing that fails to ensure compliance. The EPA addressed this issue in a 1998 guidance document interpreting the statute to allow local and state authorities to supplement the EPA-set complaint requirements. *Id.* at 676. Industry groups protested, claiming that this greatly expanded the scope of permitting requirements of § 70.6(a)(3)(i)(B), without allowing for adequate notice and comment. The United States Court of Appeals for the District of Columbia Circuit agreed in *Appalachian Power Co. v. EPA*, and dismissed the guidance. 208 F.3d 1015, 1028 (D.C. Cir. 2000).

The EPA instead found authority for local and state permitting authorities to issue their own monitoring requirements in § 70.6(c)(1). *Sierra Club*, 536 F.3d at 675. In 2004, the EPA created a rule stating that nothing in Part 70 authorized permitting authorities to supplement inadequate monitoring requirements. *Id.* at 676. The EPA decided to take an "unprogramatic" strategy, identified inadequate periodic monitoring requirements, and issued rulemakings to ensure compliance rather than address problems with each individual permit. The D.C. Circuit also vacated this rule due to lack of notice and comment, upon which the EPA began notice and comment proceedings and adopted it as a rule. *Id.* (citing 71 Fed. Reg. 75,422 (Dec. 15, 2006)). The Sierra Club

and several other environmental groups petitioned to challenge the rule before the D.C. Circuit, arguing that it was arbitrary and capricious, while several industry groups sided with the EPA. *Id.* at 677.

The D.C. Circuit subjected the EPA's rule to analysis under *Chevron v. NRDC*. *Id.* (citing Chevron v. NRDC, 467 U.S. 837 (1984)). The court decided that, under step one of *Chevron*, Title VII of the CAA "unambiguously precludes the EPA's interpretation in the 2006 rule." The D.C. Circuit went on to clarify that the clear purpose of CAA Title VII is to allow the EPA and local regulatory authorities to create permits with monitoring requirements that ensure compliance through supplementation of additional, more rigorous requirements. The court noted that the EPA has two ways to ensure that permits have adequate monitoring requirements. The EPA chose to allow local permitting authorities, with the EPA's permission, to supplement monitoring requirements on a case-by-case basis. In the 2006 ruling, the EPA switched tracks and prohibited this kind of review and modification of permits. This switch, combined with the fact that permits must be renewed every five years, meant that possibly thousands of permits would be issued by the EPA while it conducted the new approach. *Id.* at 678. The court found that because Title V requires every permit to have adequate monitoring requirements, the new approach would allow permits with inadequate monitoring requirements, which is strictly prohibited by Title V. *Id.* at 677-78.

The argument the EPA and industry groups made for the rulemaking approach was that the CAA bars permitting authorities from adding monitoring requirements to a permit, because monitoring requirements must conform to § 7661(c)(b), the section authorizing the EPA to issue the requirements. *Id.* at 678. The EPA argued that the "each permit" requirement in § 7661c(c) was not as sweeping as the environmental groups believed, and that it actually barred state and local authorities from adding monitoring requirements. Section 7661c(c) requires that monitoring requirements conform to regulation under § 7661c(b), which authorizes the EPA to create monitoring requirements. Taken together, the EPA and industry groups claimed, the statute meant that only the EPA can promulgate monitoring requirements.

The United States Court of Appeals for the Ninth Circuit refused to interpret the statute as looking at permits as a whole, pointing to the usage of the word "each" in § 7661c(c) as applying the statute to each permit individually and not as part of a group. The court agreed that § 7661c(c) and § 7661c(b) gave authority to create monitoring requirements to the EPA, but not solely to the EPA. The court stated

that, had the EPA used this authority before permits were issued, or if the EPA issued updated adequate monitoring requirements, those monitoring requirements would bind state and local permitting authorities. However, the court maintained that the statute read that if monitoring requirements were insufficient to assure compliance, then some entity must fix them if the EPA did not. The EPA and industry groups also contended that the creation of new monitoring requirements by state and local permitting authorities would undermine the judicial review provision of the CAA by allowing state and local authorities to create new emissions standards. *Id.* at 679. The EPA and industry groups also claimed that there was no need for such supplementation by local permitting authorities because new requirements could be passed through local legislation. The court dismissed these claims because they similarly ignored CAA's "each permit" language. The EPA and industry groups also claimed that *Appalachian Power* did not allow state and local authorities to supplement monitoring requirements. The court disagreed, reasoning that *Appalachian Power* was decided on procedural grounds, and there was no examination of whether supplementation by permitting authorities was authorized under the CAA.

Sierra Club and other environmental groups also sought review of the monitoring requirements of Part 70, independent of the 2006 rule, arguing that the requirements must be vacated as well if the requirement prevented permitting authorities from supplementing inadequate monitoring requirements. The court stated that Part 70 could be read to uphold the right of permitting authorities to supplement inadequate requirements under the *Chevron* doctrine, and thus must be upheld. With the court's dismissal of the 2006 rule, the EPA's interpretation of Part 70 was no longer controlling. *Id.* at 679-80. Part 70 itself, the court explained, was reasonably read to supplement inadequate monitoring requirements. *Id.* at 680. The court went on to explain that the purpose of § 70.61(c)(1) is to ensure that all permits have adequate monitoring requirements even when § 70.6(a)(3)(i)(A) and § 70.6(a)(3)(i)(B) do not apply. This reading affirmed the Ninth Circuit's interpretation of the CAA: to permit authorities to supplement inadequate requirements to ensure compliance.

Judge Kavenaugh dissented, claiming that the majority ignored the fact that state and local permitting authorities do not add monitoring requirements to permits when they are issued, because a permit is an index of preexisting monitoring requirements. *Id.* at 681. The question in this case was whether or not the EPA or state and local authorities get to determine whether or not the monitoring requirements are adequate.

Instead, the dissent argued, changes to the monitoring requirements should be made under the processes set aside for revising the monitoring requirements except when there are no periodic monitoring requirements set forth in the preexisting monitoring requirements. *Id.* at 681-82. Because § 7661c(c) says the EPA can create procedures "for determining compliance and for monitoring," Judge Kavenaugh believed the plain language authorized the EPA to dictate the scope of an adequate monitoring requirement, while the overall statutory scheme seemed to indicate that the permitting process is not the place to make decisions about monitoring requirements. *Id.* at 682. According to the dissent, the majority ignored the overarching question of whether the EPA must allow state and local permitting authorities to add periodic monitoring requirements, but instead focused narrowly on the fact that some preexisting monitoring requirements may not assure compliance.

In its decision, the D.C. Circuit effectively resolved the issue of what happens when the EPA determines that a monitoring requirement is not adequate to ensure compliance for a permit without periodic monitoring requirements and fails to act on it. In such an instance, state and local permitting authorities may add supplementary monitoring requirements to ensure compliance. Judge Kavenaugh's dissent correctly pointed out that this is a very narrow problem—only a small percentage of stationary source permits fit into such a category. However, both the majority and dissent agreed that the larger issue remains unresolved: how are regulatory agencies to deal with stationary sources with periodic monitoring requirements that do not assure compliance?

E. Kenneth Walley, Jr.

II. CLEAN WATER ACT

EPA Health Services Industry Study: Management and Disposal of Unused Pharmaceuticals

The Environmental Protection Agency (EPA) is currently considering whether to impose the first national standards for how much drug waste may be released into waterways by the medical services industry. Pursuant to § 304(m) of the Clean Water Act (CWA), the EPA establishes national effluent limitations guidelines and standards to reduce discharges of pollutants from industries to surface waters and publicly owned treatment works (POTWs), such as sewage treatment facilities. In August 2008, the EPA released the interim technical report

Health Services Industry Study: Management and Disposal of Unused Pharmaceuticals. OFFICE OF SCI. & TECH., EPA, HEALTH SERVICES INDUSTRY STUDY: MANAGEMENT AND DISPOSAL OF UNUSED PHARMACEUTICALS (EPA-821-R-013) (Aug. 2008) [hereinafter PHARMACEUTICAL STUDY], *available at* http://www.epa.gov/guide/304m/2008/hsi-tech-study-200809.pdf. The EPA stated:

> The Agency is concerned about the detection of pharmaceutical and personal care products in our water. EPA has been actively working with federal agencies and state and local partners to better understand the implications of emerging contaminants such as pharmaceuticals, endocrine disrupting chemicals, and personal care products detected in drinking water, wastewater, surface water and ground water. We continue to evaluate routes of exposure, levels of exposure, and potential effects on public health and aquatic life.

Office of Sci. & Tech., EPA, Summary: Unused Pharmaceuticals in the Health Care Industry: Interim Report (Aug. 2008), *available at* http://www.epa.gov/guide/304m/2008/his-PRELIM-study-200808.pdf [hereinafter Summary].

The subject of medical waste's effects upon water quality has been documented by the Associated Press, whose studies reveal the country's 5,700 hospitals and 45,000 long-term care homes generate approximately 250 million pounds of pharmaceuticals and contaminated packaging. *See* Jeff Donn et al., *Health Facilities Flush Estimated 250M Pounds of Drugs a Year*, USA TODAY, Sept. 14, 2008, *available at* http://www.usatoday.com/news/health/2008-09-14-drugs-flush-water_N.htm. The EPA's report validates the press's concerns. The EPA acknowledged a tradition of disposing of unused pharmaceuticals by pouring them down sinks or flushing them down toilets. PHARMACEUTICAL STUDY, *supra*, at 4-21. Moreover, this has been the traditional method advised by public health agencies for disposing of unused medications. *Id.*; SUMMARY, *supra*, at 2. While the EPA does not define "pharmaceutical waste," it determined the relevant scope to include unused, expired, and discontinued medications, increases and decreases in dosage, as well as residents hospitalized, transferred, or deceased before finishing prescriptions. PHARMACEUTICAL STUDY, *supra*, at 3-1 to 3-2. The EPA has also identified samples distributed by pharmaceutical companies as other contributors to the excess of pharmaceutical waste being disposed into public water systems. *Id.* at 5-4.

The EPA explained that "[t]he major environmental concerns resulting from the disposal of pharmaceuticals in wastewater include the potential that POTWs may not effectively remove them through

treatment and the possible effects on aquatic life and human health." *Id.* at 3-2. The EPA attributed this new finding to advancements in "analytical methods," allowing the agency to detect lower concentrations of chemicals in the aquatic environment. *Id.* at 3-1. These new methods have been utilized over the past ten years in studies "suggest[ing] detection of pharmaceutical compounds in treated wastewater effluent, streams, lakes, seawater, and groundwater, as well as in sediments and fish tissue." *Id.* Findings of pharmaceutical contamination in natural water bodies were also confirmed in a 1999-2000 study by the United States Geological Survey. Of the 139 streams tested in the United States, pharmaceutical compounds were detected in eighty percent of the waters. The EPA acknowledged that while there is much statistical data about the health effects of pharmaceuticals in the therapeutic doses provided for medication, the agency remained uncertain about their effects on public health and aquatic life at the levels observed in drinking and surface water. *Id.* at 3-2. However, the EPA stated several specific concerns as being the possibility of hormone disruption, antibiotic resistance, and "synergistic effects from the mixtures of various pharmaceutical compounds present in water." Moreover, the EPA specified that certain contaminants of concern such as selective serotonin reuptake inhibitors, antibiotics, and hormones may more directly impact aquatic life. *Id.* at 3-2 to 3-3.

The EPA stipulated that the two major pathways in which pharmaceutical compounds enter wastewater are (1) excretion of partially metabolized pharmaceutical active ingredients and (2) the disposal of unused expired medications down drains. *Id.* at 3-1. However, the focus of the EPA's study was exclusively limited to the latter, specifically hospitals and long-term care facilities. SUMMARY, *supra*, at 1. The EPA observed that this "practice . . . can be controlled through implementation of best management practices (BMPs) including waste minimization." PHARMACEUTICAL STUDY, *supra*, at 3-1.

At the present date, the EPA has not addressed any specific pharmaceuticals or effluent standards which may likely become enforceable law. However, the EPA suggested throughout its report that health care facilities should consider the issue within the context of the Resource Conservation and Recovery Act (RCRA). *Id.* at 5-7. Under RCRA, the EPA regulates the generation, storage, transportation, treatment, disposal, and storage of "hazardous waste." 42 U.S.C. § 6972 (2000). Currently, approximately five percent of pharmaceuticals on the market are listed as "hazardous." SUMMARY, *supra*, at 4. Examples

include nitroglycerin, warfarin, and chemotherapy agents. The EPA has stated its intention to expand this list:

> EPA is considering amending its hazardous waste regulations to add hazardous pharmaceutical wastes to the universal waste system to facilitate the disposal of pharmaceutical waste. In addition, the inclusion of hazardous pharmaceutical wastes in the universal waste rule may encourage health care facilities to manage all their pharmaceutical wastes as universal wastes, even wastes that are not regulated as hazardous but which nonetheless pose hazards.

Id. at 4. The EPA further explains:

> RCRA's definition of hazardous waste includes both "listed" and "characteristic" wastes. Thus, a pharmaceutical waste may be considered hazardous because: 1) the pharmaceutical or its sole active ingredient is specifically listed in 40 CFR Part 261.33(e) or (f) . . . and/or 2) the waste exhibits one or more characteristic[s] of hazardous waste (ignitability, corrosivity, reactivity, or toxicity as defined in 40 CFR Parts 261.21-24, respectively). Common pharmaceuticals that are RCRA hazardous wastes when disposed of include epinephrine, nitroglycerin, warfarin, nicotine, and some chemotherapy agents.

PHARMACEUTICAL STUDY, *supra*, at 4-2 to 4-3.

The significance of determining waste water to be "hazardous" based upon not a set list, but rather an expansive list of hazardous "characteristics" may provide a significant tool for potential RCRA plaintiffs against hospitals or long-term care facilities. *Id.* at 5-6 to 5-7. The EPA explained that while a pharmaceutical may not be specifically defined as "hazardous" in the expanded list of pharmaceuticals, waste water may still very well qualify as "hazardous" due to the chemical reactions occurring between several different pharmaceuticals as they are poured down drains or flushed into sewer systems. *Id.* at 5-7. In other words, "hazardous" may very well refer to the cumulative impact of a given health care facility's waste rather than the presence of a specific pharmaceutical. Such a shift stands to affect large hospitals and long-term care facilities the most, which are already struggling with administrative costs and a fractured Medicare system. Given these considerations, it is not surprising the EPA recommended health service facilities to begin considering all pharmaceutical wastes as RCRA-listed "hazardous."

Erich Webb Bailey

III. NATIONAL ENVIRONMENTAL POLICY ACT

Food & Water Watch, Inc. v. U.S. Army Corps of Engineers, 570 F. Supp. 2d 177 (D. Mass. 2008)

In the noted case, the United States District Court for the District of Massachusetts denied the plaintiff's request for a preliminary injunction against the issuance of a permit by the United States Army Corps of Engineers (Corps) to the Massachusetts Biological Laboratories (MBL). *Food & Water Watch, Inc. v. U.S. Army Corps of Engr's*, 570 F. Supp. 2d 177, 181 (D. Mass. 2008). MBL originally requested the permit to conduct research on "holding and conditioning hatchery fish to respond to an acoustic signal at feeding time" and to "improve stock enhancement efforts." *Id.* at 181-82. To conduct this research, MBL received funding from the National Oceanic and Atmospheric Administration. *Id.* at 181.

MBL planned to place an "aquadome" thirty-two feet in diameter and sixteen feet tall on the Buzzards Bay seafloor, off the coast of Cape Cod. *Id.* at 182. Inside the aquadome, MBL would place up to 5000 laboratory-raised and -tagged black sea bass conditioned to feed upon hearing an acoustic signal. After an initial acclimation period of three to four weeks, the aquadome would be adjusted so that the fish could swim in and out of the caged area. At this stage of the research, the sound-triggered feedings would be reduced to only three per week. Researchers would monitor the number of fish that continued to return to the aquadome to feed. Local fishermen would also be advised of the project and would notify researchers of any tagged fish caught outside the aquadome. The project's stated goal was to find better ways to raise stock fish by allowing them to swim freely a majority of the time and have them return only in response to the acoustic sound.

Pursuant to the Rivers and Harbors Act, 33 U.S.C. § 403 (2000), MBL was required to apply for a permit from the Corps because MBL intended to place a structure within the navigable waters of the United States. MBL submitted a permit application on February 5, 2008, and on February 26, 2008, the Corps issued a public statement outlining the details of the proposed project and soliciting any public opinion. At the end of the comment period, the Corps and MBL issued a list of all received comments and responses to each entity that submitted a concern, including the plaintiff. *Id.* at 183. Food and Water Watch, Inc. (FWW) then submitted another letter again summarizing its "significant concerns with the permitting process." Despite FWW's repeated concerns, the Corps issued a permit to MBL at the end of May 2008 after

an environmental assessment (EA) was completed on the project and there was a finding of no significant impact (FONSI).

Following the Corps' issuance of the permit to MBL, FWW filed for a preliminary injunction to force the Corps to rescind or suspend the permit. To argue successfully for a preliminary injunction, the plaintiff must show it has a likelihood of prevailing on the merits and that not issuing the injunction will result in irreparable harm. In this case, the court first examined FWW's likelihood of prevailing on the merits. *Id.* at 184-85. The applicable standard of review is articulated in the Administrative Procedure Act, which states that review of a federal agency's decisions must be upheld unless the decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 185 (citing 5 U.S.C. § 706(2)(A) (2000)). Therefore, to show that FWW could succeed on the merits, the court was required to find that the Corps' decision to issue a FONSI and the permit to continue with the project was arbitrary, capricious, or an abuse of discretion.

Under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (2000), and Council on Environmental Quality regulations, a federal agency must conduct an EA to determine whether an environmental impact statement (EIS) is required before issuing any permits. *Food & Water Watch*, 570 F. Supp. 2d at 184. An EIS is required only if the EA shows that there will be a significant impact on the quality of the human environment. In this case, an EA was performed that listed the proposed project, the need for the project, any alternatives, and any anticipated effects on the environment. *Id.* at 185. FWW asserted that in this case an EIS was required because the EA was not properly performed. *Id.* at 184-85. To determine the validity of the EA, the court used the four-part test set forth in *Coalition of Sensible Transportation, Inc. v. Dole*. *Id.* (citing Coal. of Sensible Transp., Inc. v. Dole, 826 F.2d 60, 66-67 (D.C. Cir. 1987)). The test is prescribed as follows: (1) Did the agency accurately identify the environmental concern? (2) Once the concerns have been identified, did the agency take a "hard look" at the potential problems? (3) Can the agency make a convincing case for its finding of FONSI? (4) If an EIS is required, it can only be avoided if changes are made to the project which significantly reduce the effects of the problems. *Id.* at 185.

FWW asserted that although the Corps did identify the environmental concerns in their EA, it did not fully consider the potential effects on the environment. *Id.* at 186. FWW contended that the Corps simply mimicked the answers of MBL rather than conducting its own independent research. However, basing its decision on *Carcieri v.*

Kempthorne, the court found that the Corps' reliance on MBL's information was not forbidden so long as other research was conducted. *Id.* at 186 (citing Carcieri v. Kempthorne, 497 F.3d 15, 46 (1st Cir. 2007)). In this case, the court found there was sufficient evidence to show that the Corps did consult other independent organizations in determining the environmental effects of the aquadome. *Id.* at 187.

Additionally, FWW suggested that the Corps could not convincingly back up its finding of a FONSI and should require an EIS because there were going to be several significant environmental impacts. FWW argued that the impact would be significant for three reasons: it would take place in an ecologically critical area; it was "highly controversial"; and it involved highly uncertain, unknown, or unique risks. The court first looked at the argument that it was an ecologically critical area. The plaintiff claimed that the essential fish habitat and juvenile fish would be negatively impacted by the high amount of waste that would be contained in a small area. However, the court accepted the Corps and MBL's showing that because the experiment had a short duration and was contained in a limited area, it would not have any significant effect. *Id.* at 188.

Next, the court considered whether this project was highly controversial, concluding that it was not. *Id.* at 188-89. The court pronounced that mere opposition by one organization to a project did not make the project controversial. *Id.* at 188.

Lastly, the court considered whether the project contained uncertain or unknown risks. *Id.* at 189. In this case, the court found that while this project was distinguishable from all previously related studies, it was not so different as to create highly uncertain effects.

FWW also claimed that the EA was deficient because it did not fully explore alternatives to this project. The court quickly dismissed this argument, finding that despite poor organization in the EA, the Corps discussed several alternatives to the proposed aquadome. *Id.* at 189-90.

The plaintiffs also maintained that the preliminary injunction should be ordered because the Corps failed to publicly circulate the EA and a draft of the FONSI before final approval. *Id.* at 190. The CEQ requires that a draft of the FONSI be circulated to the public, prior to the decision as to whether or not to prepare an EIS, if the project is unprecedented. *Id.* (citing 40 C.F.R. § 1501.4(e)(2)(ii) (2006)). FWW claimed the project was unprecedented for two reasons. *Id.* at 191. First, FWW claimed it was unparalleled because there had never been such a project involving finfish in this area. However, the Corps confirmed that permits were previously issued in similar projects in the surroundings

areas. The court found this argument convincing and agreed that the project was not unprecedented in that respect.

Second, the plaintiffs stated that the project was without precedent because there had not been previous experiments in training fish to respond to human cues while in the wild. The Corps responded to this argument with scientific evidence showing that while this was unprecedented, it was not likely that the wild fish would respond to the human cues, nor would the fish be affected by the actions or feedings of the tagged fish, because it is not a schooling fish.

Following the court's reasoning on the above arguments, Judge Saris found that FWW had little chance of success on the merits in this case. The court then turned to the other consideration in a preliminary injunction proceeding: irreparable harm if the injunction is denied. FWW attempted to show that irreparable harm would occur if the aquadome was placed on the seafloor through several of its aforementioned arguments. *Id.* at 191-92. Namely, the aquadome would cause damage to the juvenile fish living in the area and that the wild fish would be harmed due to conditioning to human cues. *Id.* at 192. Additionally, the plaintiffs asserted that the release of the tagged sea bass into the free waters could cause genetic harm to the wild fish. The court found flaws with each of these arguments as previously discussed. FWW presented no scientific evidence to prove that juvenile fish were living in the area, and all of FWW's own studies showing harm to the wild fish population were significantly distinguishable from the case at hand.

Furthermore, FWW argued that the irreparable harm in this case was not actually to the physical environment but to the protections provided by NEPA. *Id.* at 194. The plaintiffs asserted that if permits were issued without a full assessment of the potential harms, the purpose of NEPA and other federal agencies would be negated. In response to this argument, the court reasserted its previous findings that the Corps did a thorough investigation of the negative effects of the project and did not negate the purpose of NEPA. Following these findings, the court declared that no irreparable harm would occur if this injunction was not granted.

The court continued to discuss the balancing that must occur in cases where preliminary injunctions are in question. The balancing act must weigh the harm done to the defendant if the injunction is issued and the harm done to the environment or plaintiff if the injunction is not issued. In the case at hand, the court found that issuing an injunction at this point would be very harmful to the defendants as they had already

prepared the fish for placement in the aquadome. Additionally, because federal funding was being used to finance this project, the court found that any delay or recreation of the project due to an injunction would burden the taxpayers greatly. If the project were not allowed to proceed at the current time, the court reasoned, it would be necessary to release the fish and the whole project would have to be repeated and funded again. The court found that the issuance of a preliminary injunction at this time would create a great hardship for the defendants, and, as previously stated, the plaintiff offered little scientific evidence in support of any harm to the environment; therefore, the injunction was denied.

This ruling, while proper in this case, could prove to create a problematic precedent in future cases. The court's finding that an agency may rely almost solely on the information provided by the permit seeker could become a major concern if those organizations seeking permits skew the environmental evidence in their direction. Additionally, the court's reliance on economic principles to determine whether a preliminary injunction should be ordered could prove to be risky. While there was little scientific evidence to support a finding of significant environmental harm in this case, future cases may provide stronger evidence with more funds at stake. The court should not allow the protections of the law to be negated simply because it would be more expensive to conduct further investigation.

Christy D. Hardegree

Greater Yellowstone Coalition v. Kempthorne,
Nos. 07-2111(EGS), 07-2112(EGS), 2008 WL 4191133
(D.D.C. Sept. 15, 2008)

In *Greater Yellowstone Coalition v. Kempthorne*, the United States District Court for the District of Columbia Circuit evaluated a challenge to National Park Service (NPS) regulations regarding over-snow vehicle (OSV) use in the Yellowstone and Grand Teton National Parks and John D. Rockefeller Jr. Memorial Parkway (collectively referred to as "the parks"). Nos. 07-2111(EGS), 07-2112(EGS), 2008 WL 4191133, at *1 (D.D.C. Sept. 15, 2008). The two plaintiffs in this consolidated action were the Greater Yellowstone Coalition, an alliance of environmental conservation organizations including the Sierra Club, Winter Wildlands Alliance, and Natural Resources Defense Council, and the National Parks Conservation Association (collectively referred to as "GYC"). In November 2007, GYC sued NPS in connection with its 2007 Winter Use

Plan (WUP), which established daily limits on the number of snowmobiles and snowcoaches entering Yellowstone. *Id.* at *2.

GYC claimed the WUP, its supporting year 2007 Final Environmental Impact Statement (2007 FEIS), and the year 2007 Record of Decision (2007 ROD) in which the plan was published contained substantive and procedural defects regarding the WUP's impacts on the parks' natural soundscapes, air quality, and wildlife. Specifically, GYC alleged the WUP, 2007 FEIS, and 2007 ROD violated the Administrative Procedure Act (APA), National Environmental Policy Act (NEPA), Organic Act (the Act), Yellowstone Enabling Act, two Executive Orders, and the NPS Snowmobile Regulation. *Id.* at *2, 4. After a hearing on the parties' cross-motions for summary judgment and a full review of the administrative record, the United States District Court for the District of Columbia granted GYC's summary judgment motion, denied NPS's motion, and vacated and remanded the WUP, 2007 FEIS, and 2007 ROD back to the agency for reconsideration. *Id.* at *1.

The present case represents the latest in a series of challenges to NPS's winter management plans. In 2000, various environmental groups protested an NPS year 2000 Record of Decision (2000 ROD), which concluded that then-existing levels of snowmobile use in the parks damaged park resources in violation of the Organic Act. The groups also attacked a year 2000 Final Environmental Impact Statement (2000 FEIS) which found that present conditions constituted an "impairment" of natural resources under the Organic Act. *Id.* at *1, 9. In 2001, the NPS under the Clinton Administration responded by issuing a final rule that called for the eventual phase-out of personal snowmobiles in the parks (phase-out rule), and suggested future winter access via a snowcoach mass transit system. *Id.* at *1. The phase-out rule was not published until the day after President George W. Bush assumed office, however, and the new administration immediately stayed the phase-out rule pending review.

Following litigation instituted by snowmobile manufacturers and enthusiasts, in 2003 NPS replaced the Clinton Administration's phase-out rule with a dramatically increased limit of 950 snowmobiles per day in Yellowstone. Environmental groups again sued NPS, which caused it to issue a "Temporary Winter Use Plan" (Temporary Plan) reducing the daily limit to 720 snowmobiles. The Temporary Plan imposed "best available technology" (BAT) standards for noise and emissions on every snowmobile entering the parks. The Temporary Plan was employed for three winter seasons, from 2004 through 2007. During the 2007/2008 winter season, the long-term WUP at issue in this case took effect.

The long-term WUP represents one of seven alternative plans analyzed in the 2007 FEIS. *Id.* at *2. The alternative plans spanned from a "no action" alternative which would have terminated OSV use in the parks, to an "expanded recreational use" plan which would have permitted a daily limit of 1025 snowmobiles. The selected WUP permits 540 recreational snowmobiles and eighty-three snowcoaches per day in Yellowstone. As in the Temporary Plan, every snowmobile entering the parks must meet BAT standards. The WUP also calls for continuation of the Temporary Plan's "Adaptive Management Program," which evaluates whether objectives pertaining to soundscapes, air quality, and the protection of wildlife are being attained.

The D.C. District Court first established the case's analytical framework under the APA and NEPA. *Id.* at *3. The court found the final rule implementing the WUP was reviewable under NEPA. *Id.* at *4. Accordingly, the court stated, the 2007 FEIS associated with the plan must specifically "[s]tate *how* alternatives considered in it and decisions based on it will or will not achieve the requirements of [NEPA] and other environmental laws and policies." *Id.* at *3 (quoting 40 C.F.R. § 1502.2(d) (2000) (emphasis added)). In addition, the court warned that its analysis of whether the plan, the 2007 FEIS, and 2007 ROD should be set aside under the APA's arbitrary and capricious standard would be heightened because the challenged action represented an administrative "about-face." *See id.* at *3; La. Pub. Serv. Comm'n v. FERC, 184 F.3d 892, 897 (D.C. Cir. 1999) ("For [an] agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious.")).

The court then set forth the specific statutory mandates governing NPS's administration of the parks. *Greater Yellowstone Coalition*, 2008 WL 4191133, at *4. It stated that when the NPS was created in 1916, it was statutorily charged with the duty of maintaining the two fundamental purposes of the national park system as established by the Organic Act: (1) conservation of scenery, natural and historic objects, and wildlife, and (2) enjoyment "in such manner and by such means as will leave [the national parks] unimpaired for the enjoyment of future generations." *Id.* at *4-5 (quoting 16 U.S.C. § 1 (2000)). Similarly, the court noted, the Yellowstone Enabling Act required NPS to protect Yellowstone's "wonders" and "natural condition." *Id.* at *5 (citing 16 U.S.C. § 22). In addition, two Executive Orders explicitly addressed snowmobile use in the parks: the first required the agency to promulgate regulations designating certain areas for the use of off-road vehicles, and the second instructed the agency to close such areas if it were determined that, due

to the use of off-road vehicles, wildlife, habitat, or historic areas would suffer "considerable adverse effects." *Id.* at *5 (citing Exec. Order No. 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972); Exec. Order No. 11989, 42 Fed. Reg. 26,959 (May 24, 1977)). Accordingly, NPS's snowmobile regulation restricted snowmobile use to designated areas and to instances where their use maintained the parks' natural values and park management goals and did not disrupt wildlife or damage park resources. *Id.* (citing 36 C.F.R. § 2.18(c) (2000)).

The court began its analysis by assessing the scope of the Organic Act's "conservation mandate" as applied to NPS. Namely, while under the Organic Act, NPS retains management discretion to balance its conservation and enjoyment goals, both Congress and the courts have interpreted the Organic Act to mean that when a conflict arises between those two goals, conservation should dominate. NPS argued the 2007 FEIS demonstrated that the conservation mandate was not triggered because the impacts of snowmobiling under the WUP were "acceptable" and therefore no "conflict" existed between conservation and use. *Id.* at *6. Even if the conservation mandate were triggered, NPS further contended, snowmobile use in the parks was akin to removing a tree from a battlefield to restore a scenic vista in that both constituted "unavoidable and appropriate" adverse impacts to the environment, which are permitted by the Organic Act. GYC countered that removing a natural resource like a tree from a battlefield to clear a strategic vista was not at all comparable to recreational snowmobile use. GYC asserted NPS had not described *how* recreational snowmobiling was "necessary and appropriate to fulfill the purposes of the park" as required by NEPA, nor had it developed "ways to avoid or to minimize to the greatest extent practicable, adverse impacts on park resources and values.'" *Id.* (quoting National Park Service 2006 Management Policies § 1.4.3).

The D.C. District Court rejected NPS's arguments and concluded the Organic Act's conservation mandate applied to NPS. First, the court noted that NPS's own Adaptive Management thresholds for air and sound pollution were exceeded numerous times even under the Temporary Plan where actual snowmobile use only averaged 260-290 per day. Further, the 2007 ROD conceded that, while the Temporary Plan was in place, field monitoring indicated a possible problem with benzene and formaldehyde exposure for employees. *Id.* at *22. The court agreed with GYC that permitting the daily use of up to 540 snowmobiles under the WUP would essentially double the harms admittedly caused under the Temporary Plan, irrespective of how NPS defined "conflict." *Id.* at *6-7. The court further agreed with plaintiffs that under the Organic Act,

"enjoyment" is qualified in a way that conservation is not, because it is permitted only "in a manner that will allow future generations to enjoy [the parks] as well." *Id.* at *7. Accordingly, the court concluded, while NPS may use its discretion to balance the often competing policies of conservation and visitor enjoyment, that discretion must be exercised in a manner that best fulfills its conservation purpose and "genuinely seeks to minimize adverse impacts on park resources and values." NPS erred by attempting to "circumvent this limitation through conclusory declarations that certain adverse impacts are acceptable, without explaining *why* those impacts are necessary and appropriate to fulfill the purposes of the park." *Id.* (emphasis added).

The D.C. District Court reached this conclusion by closely examining the 2007 FEIS and 2007 ROD, which included NPS's impact and nonimpairment determinations regarding soundscapes, air quality, and wildlife. Because the Organic Act prohibits uses that impair park resources and values, the court noted that the definition of "impairment" under the Organic Act is an impact that "would harm the integrity of park resources and values." *Id.* at *8-9. Further, the court clarified that the Organic Act also disallowed uses that caused "unacceptable impacts," which, according to NPS policy documents, were those uses that would contradict the park's purposes or values, impair the park's future natural resources, create an unhealthy environment for humans, or "unreasonably interfere with" natural soundscapes, air quality, and wildlife. *Id.* at *9. The court explained that the relationship between appropriate use, unacceptable impacts, and impairment was illustrated by an NPS graph indicating that "unacceptable impacts" are greater than acceptable impacts but less than impairment. *Id.* at *9-10.

Following review of the complete administrative record, the court found that other than NPS's "unhelpful" graph, NPS failed to provide any quantitative standard or qualitative analysis in support of its conclusion that the WUP's adverse impacts were "acceptable." *Id.* at *10. In particular, the court found NPS failed to demonstrate "*how* increasing snowmobile usage over current conditions, where adaptive management thresholds are already being exceeded, complies with the conservation mandate of the Organic Act." *Id.* at *24 (emphasis added). First, in violation of the APA, NPS failed to provide a rational explanation for the source of the 540 snowmobile limit, and second, the 2007 FEIS did not provide the decision maker with a clear analysis of the alternatives that NEPA requires. *Id.* at *25.

In the court's view, NPS merely repeated its definition of unacceptable impacts in the context of the WUP's impacts on natural

resources, but never demonstrated *why* it concluded those impacts were "acceptable." Considering NPS's evaluation of the seven alternatives, for example, the court noted the 2000 FEIS had concluded that then-existing snowmobile use, which averaged about 795 per day, impaired the parks' soundscapes, air quality, and wildlife. *Id.* at *9. The 2007 FEIS found "no new evidence contradicting the finding that historically unlimited snowmobile . . . use impaired park resources and values." Given these findings, the court was incredulous that the 2007 FEIS determined that "*none* of the seven alternatives studied would constitute impairment or unacceptable impacts," even the alternative which would allow 1025 snowmobiles per day. *Id.* at *9. Moreover, the 2007 FEIS indicated that all seven alternatives resulted in the same determination of "negligible to moderate" impacts on wildlife. *Id.* at *18. The court reasoned that it "defie[d] logic that zero snowmobiles (Alternative 2) and 1025 snowmobiles . . . could possibly produce the same impacts on . . . animals in the park."

The court pointed out additional failings, including the fact that the 2007 FEIS used park-wide metrics that diluted the plan's impacts on soundscapes and air quality. *Id.* at *25. Second, NPS's own data showed the WUP would actually increase air pollution, overtop use levels suggested by NPS biologists to protect wildlife, and cause major adverse impacts to Yellowstone's natural soundscape. Further, NPS's own scientists heavily criticized the model upon which the WUP was largely based, stating that because it did not accurately reflect data taken from field monitoring, it could not realistically reflect or calculate harm from OSV use. *Id.* at *13. Namely, while the model underestimated OSV sound levels at eight out of twelve monitoring sites as compared to field measurements, it *never* overestimated sound levels. It also underestimated the duration of audible use levels at seven of the twelve monitoring sites but overestimated audibility at only one site. An NPS scientist indicated that "given the political reality, we will not be spending much time on [improving modeling techniques]." The court concluded that the differences between the data actually monitored and that used in the model raised serious doubts about the validity of NPS's impact determinations, and, consequently, the WUP itself, since the plan was heavily based on modeled data.

The D.C. District Court ultimately held that the WUP, as codified by the Final Rule and explained in the 2007 ROD, was arbitrary, capricious, and contrary to the law. *Id.* at *24. This result is unsurprising given the likelihood that even a layperson could identify some of the most blatant discrepancies in NPS's studies. Common sense tells us, for

example, that if the use of 260-290 snowmobiles under the Temporary Plan harmed the environment, then there was something awry with NPS's conclusion that 540 snowmobiles per day under the WUP constituted an "acceptable impact" on the environment. The ongoing difficulty with environmental regulation is, however, that agencies more often than not promulgate regulations based on environmental science so complex that it can only be fully understood by the agency's own scientists. And, as seen in *GYC v. Kempthorne*, an executive agency may ignore its own scientist's findings and bend to political pressure. In that case, a bad environmental law based on politics rather than science will stand unless an environmental watchdog group has both the interest and resources to challenge it.

Sandra Sutak

IV. RELIGIOUS FREEDOM RESTORATION ACT

Navajo Nation v. U.S. Forest Service,
535 F.3d 1058 (9th Cir. 2008)

The plaintiff Navajo Nation appealed to the United States Court of Appeals for the Ninth Circuit from a district court decision granting summary judgment to the defendant United States Forest Service (USFS). The Ninth Circuit reversed and found for Navajo Nation, holding that USFS's approval of the use of snowmaking from recycled sewage effluent at the Snowbowl ski area, located on USFS land on the San Francisco Mountains in northern Arizona, constituted a "substantial burden" upon Native American religious practices under the Religious Freedom Restoration Act (RFRA). Navajo Nation v. U.S. Forest Serv. (*Navajo Nation I*), 479 F.3d 1024, 1043 (9th Cir. 2007). Upon an en banc rehearing, the Ninth Circuit dealt primarily with the RFRA claim. Additionally, the court addressed a claim that USFS violated the National Environmental Policy Act (NEPA) by failing to assess adequately the health impacts of incidental human ingestion of snow made from recycled wastewater and an alleged error in the district court's granting of summary judgment to USFS concerning the National Historic Preservation Act (NHPA). Navajo Nation v. U.S. Forest Serv. (*Navajo Nation II*), 535 F.3d 1058, 1066 (9th Cir. 2008).

To determine whether making snow from recycled sewage constituted a violation of RFRA, the Ninth Circuit looked to the statute's language. *Id.* at 1068. RFRA states in relevant part that the government "shall not substantially burden a person's exercise of religion" unless the

burden is in "furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. *Id.* (quoting 42 U.S.C. § 2000bb-1 (2000)). The court noted that USFS did not challenge the district court's findings that the Navajo, Hopi, Hualapai, and Havasupai's religious beliefs and activities concerning the San Francisco Peaks (Peaks) were sincere and constituted an "exercise of religion" as defined by NEPA. Therefore, the crux of the case was whether USFS sanctioned use of reclaimed sewage effluent to make snow on the Snowbowl ski facility would "substantially burden" the Native Americans' exercise of religion.

Turning again to RFRA's language, the Ninth Circuit established that the congressionally mandated purpose of RFRA is to "restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* (citing 42 U.S.C. § 2000bb(b)(1)). The majority looked to *Sherbert*, 374 U.S. 398 (1963), and *Yoder*, 406 U.S. 205 (1972), to conduct a detailed analysis of what constituted a "substantial burden" under RFRA, stating that "the same cases that set forth the compelling interest test also define what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test." *Id.* at 1069. *Sherbert* dealt with a Seventh-day Adventist, Sherbert, whose employer fired her for her refusal to work on Saturday, her faith's day of rest. *Id.* (citing *Sherbert*, 374 U.S. at 399. The Adventist was denied unemployment benefits after a finding that she failed to accept work without good cause. The United States Supreme Court ruled that under the Free Exercise Clause of the Constitution, unemployment benefits could not be conditionally denied to Sherbert because she exercised her faith. Denying unemployment benefits in such a case would unconstitutionally force Sherbert to choose between receiving government benefits or following the precepts of her religion. *Yoder*, the other case that the majority believed Congress restored through RFRA's passage, concerned the conviction of Amish parents for failing to enroll their child in high school. *Id.* (citing *Yoder*, 406 U.S. at 207-08). The family believed their child's attendance in public school was "contrary to the Amish religion and way of life." The Supreme Court reversed the conviction, reasoning that the mandatory criminal sanction posed a "substantial burden" upon the practice of their faith. The threat of criminal conviction compelled the family to act at odds with its fundamental religious tenets.

These two cases formed the narrow scope of "substantial burden" the majority adopted in *Navajo Nation II*. Following the holdings in

Sherbert and *Yoder*, the court only recognized a "substantial burden" upon the practice of religion in situations that mirror these two cases. *Id.* at 1069-70. Thus, such a burden exists only if an individual is forced to choose between the tenets of his or her religion and receiving a governmental benefit (*Sherbert*) or if an individual is affirmatively coerced to act against his or her religious beliefs under the threat of civil or criminal sanctions (*Yoder*). *Id.* at 1070. Applying these standards, the majority found that there was no "substantial burden" on the Native Americans' use of the Peaks for religious practices. Accordingly, it held the use of sewage effluent for snowmaking on a small portion of the mountains did not fall within the burdens established under the *Sherbert*/*Yoder* framework, which was reinstated by Congress in NEPA. The court also declined to allow for a more expansive standard of "substantial burden" due to the Congressional reinstatement of these earlier cases. *Id.* at 1075.

However, the court noted, the proposed upgrades to the Snowbowl skiing facility would not be devoid of impact to Native American religious practices, despite a guarantee from USFS to maintain unfettered access to the Peaks for religious practitioners. *Id.* at 1070. The majority noted that "the presence of recycled wastewater on the Peaks is offensive to the [appellee's] religious sensibilities . . . it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain." *Id.* While the court recognized this, it cited to Supreme Court precedent prohibiting the finding of a "substantial burden" due to diminishment of spiritual fulfillment. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, Indian tribes challenged USFS's approval of a logging road through a sacred area in California. 485 U.S. 439, 442 (1988). Akin to the present case, the tribes alleged that the logging road would interfere with their free exercise of religion. *Id.* at 442-43. The Supreme Court rejected this contention, stating that diminishing the land's sacredness was not a heavy enough burden to violate the Free Exercise Clause. *Id.* at 447-49. In noted case, the Ninth Circuit adhered to Supreme Court precedent, giving particular weight to language from *Lyng* which stated that "[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, its land." *Navajo Nation II*, 535 F.3d at 1072 (quoting *Lyng*, 485 U.S. at 451-53). This rationale enabled the court to reject the Navajo Nation's claims that snowmaking with sewage effluent would interfere with their faith.

In this en banc rehearing, the Navajo Nation also challenged the district court's grant of summary judgment in favor of USFS on its NEPA claims. *Id.* at 1079. The claim raised on appeal was that the Final Environmental Impact Statement (FEIS) submitted by USFS failed to adequately address the health risks posed by incidental human ingestion of snow made from reclaimed sewage effluent. The majority waived the claim from the appeal, stating that the Navajo Nation's failure to present this specific claim before the district court, and failure to appeal the district court's denial to amend the complaint, barred the claim from this action. With regard to the NHPA claim, the Ninth Circuit adopted the district court's decision and upheld summary judgment for USFS. *Id.* at 1080.

The three-judge dissent found that the en banc holding misstated the law under RFRA and mischaracterized the 'very nature' of religion. *Id.* at 1081. The dissent found that the majority was wrong for six reasons, in looking to *Sherbert* and *Yoder* for the ultimate definition of 'substantial burden' under RCRA. First, the dissenting opinion looked to the plain and ordinary meaning of "substantial burden," which did not hinge on the presence of a penalty or deprivation of a government benefit, as established under the test cases. *Id.* at 1086. Using a dictionary derived definition, the dissenting opinion stated that RFRA prohibits government action that "hinders or oppresses" the exercise of religion "to a considerable degree." *Id.* at 1086. This burden upon religion is not limited to certain causes that impact the exercise of religion, as seen in *Sherbert* and *Yoder*, but rather RFRA prohibits actions that affect the exercise of religion, regardless of the impact occurs. *Id.* at 1087. Second, the dissent found that only the "compelling interest test" of *Sherbert* and *Yoder* was restored by Congress, and not the definition of any other terms used in those cases. Third, the dissent noted that there is no use of the term "substantial burden" in any of the pre-RFRA cases, and therefore, there was no "substantial burden" test used to trigger a compelling interest review of government action. *Id.* at 1088. Next, the dissent stated that the majority's approach was in conflict with the purpose of RFRA, namely to restore judicial scrutiny "in all cases where free exercise of religion is substantially burdened." *Id.* (citing 42 U.S.C. § 2000bb(b)). Here, the right created by RFRA was for the free exercise of religion, not for the governmental employment insurance or freedom from prosecution, as argued by the majority in *Sherbert* and *Yoder*. *Id.* at 1090. Finally, the minority took issue with the holding, and reasoned that it conflicted with the Ninth Circuit's RFRA and Religious Land Use and Institutionalized Persons Act (RLUIPA)

precedents. *Id.* at 1091-93. Specifically, precedent in both areas defined "substantial burden" as an action that is "oppressive" to a "significantly great" extent. *Id.* at 1093. Importantly, this definition hinges on the effect of the action, not the mechanism.

Although the majority did not find a "substantial burden," and thus failed to address whether a "compelling governmental interest" powers the decision to allow snowmaking on the Peaks, the dissent failed to attribute such an interest to the improvement of a ski facility in Arizona. *Id.* at 1107. Finally, the dissent looked to Rule 8(a) of the Federal Rules of Civil Procedure to address the en banc panel's dismissal of Navajo Nation's NEPA claims. The dissent found that there was a "short and plain statement of the claim" which should allow for its admittance. *Id.* at 1109. USFS failed to address the impact of human ingestion of reclaimed wastewater snow, despite the absolute prohibition on drinking water of that quality. *Id.* at 1110.

Because the Ninth Circuit decided this case differently upon an en banc rehearing, it is clearly a controversial issue. Given that the outcome affects the religious livelihood of numerous Indian tribes, it is highly possible that it will be appealed to the Supreme Court.

Jordan A. Lesser

V. ROADLESS AREA CONSERVATION RULE

Wilderness Workshop v. United States Bureau of Land Management,
531 F.3d 1220 (10th Cir. 2008)

A recent decision by the United States Court of Appeals for the Tenth Circuit allowed a private company to traverse specially protected "roadless" areas in our national forests with construction vehicles on temporary but established roadways, despite the Roadless Rule's prohibition against even temporary roads in these specially designated areas. In *Wilderness Workshop v. United States Bureau of Land Management*, several environmental interest groups challenged a Bureau of Land Management (BLM) decision that permitted a private company to "construct, operate, and maintain" a natural gas pipeline within protected areas of our national forests. 531 F.3d 1220, 1222 (10th Cir. 2008). The plaintiffs' challenge rested on two claims: first, that the BLM decision violated the Roadless Area Conservation Rule (Roadless Rule), and second, that the decision violated the National Environmental Policy Act (NEPA). *Id.* at 1223. After being denied a preliminary

injunction at the district court level, the plaintiffs filed this interlocutory appeal, again seeking to enjoin the construction of the pipeline. *Id.* at 1222.

The pipeline at the center of this controversy is the proposed Bull Mountain Pipeline: a buried steel pipe, twenty inches in diameter, which will lie beneath 8.33 miles of Inventoried Roadless Areas (IRAs) in Colorado's national forests. *Id.* at 1222-23. Its purpose is to transport natural gas from production wells within the forest to a compressor station located on private land, so that natural gas can be channeled into the national energy market. *Id.* at 1223. The pipeline was proposed by SG Interests I, Ltd. (SG), a private company that applied to the BLM and the United States Forest Service (USFS) for authorization to build and maintain the pipeline. *Id.* at 1222. After an analysis of the environmental impact of the pipeline was completed, that authorization was granted, along with several related rights to enable the construction and continued maintenance of the pipeline. SG was granted "a 30-year, 50-foot right-of-way" running parallel to the pipeline for approximately 10 miles, 7.7 miles of which would be on National Forest System lands. *Id.* at 1222-23. SG was also granted temporary use permits, which included a construction right-of-way allowing motorized construction equipment vehicles to traverse forest lands within 100 feet of the pipeline's path. *Id.* at 1223. The USFS also authorized SG to construct and/or use "temporary roads needed for access to the pipeline construction."

SG estimated that construction of the pipeline will take three years. When construction is complete, SG will purportedly "rehabilitate[] and revegetate[]" the 100-foot construction right-of-way, but the 50-foot right-of-way along the pipeline's path will remain cleared of trees during its 30 year term. After the pipeline is completed, "surface patrols" will be done either on foot or on horseback. No motorized vehicles will be allowed except to perform emergency repairs, which will require prior authorization from the USFS and/or BLM, and will be determined on a case-by-case basis.

In determining whether to grant these various rights, the USFS and the BLM "engaged in a lengthy period of environmental analysis." *Id.* at 1222. The agencies considered the environmental impact these actions would have on the forests, and the possible alternatives to the pipeline, and in November 2007, issued a final environmental impact statement. On January 8, 2008, the BLM and the USFS issued a Record of Decision (ROD) authorizing the pipeline, the 50-foot permanent right-of-way, the

100-foot construction right-of-way, and the temporary use permits described above. It is this ROD that the plaintiffs challenged.

In the instant case, the Tenth Circuit Court of Appeals reviewed the district court's denial of the plaintiff's motion for preliminary injunction. The standard of review on appeal required a finding of abuse of discretion to overturn the lower court's ruling. *Id.* at 1223. The plaintiffs were required to prove four elements to justify issuance of a preliminary injunction: "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Id.* at 1224. The court's opinion focused almost exclusively on the first element, analyzing whether the facts of this case supported a "substantial likelihood" that the BLM and/or the USFS violated the Roadless Rule or NEPA in authorizing this pipeline's construction and the rights attendant to it.

The court first considered plaintiff's first claim: that the authorization of the Bull Mountain Pipeline violated the Roadless Rule. The plaintiffs asserted that the construction of the pipeline violated the Roadless Rule, as it permitted motorized construction equipment to traverse protected areas and establish temporary roads leading to the pipeline. This establishment of roads, the plaintiffs argued, clearly violated the rule.

In addressing this claim, the court first looked to the background and purpose of the Roadless Rule. The Roadless Rule was promulgated and passed with the intent "to protect the remaining roadless areas within the National Forest System." The rule broadly prohibited the construction of roads on lands designated as "inventoried roadless areas" (IRAs) within the National Forest System. *Id.* at 1225. The rule provided two express exceptions to this prohibition and permitted road construction only when an appropriate official had determined that (1) a road was necessary to protect the public health and welfare (for example, to aid in the prevention of flood or fire) or (2) a road was needed to enable compliance with relevant environmental laws, including CERCLA, the Clean Water Act, or the Oil Pollution Act.

The proposed pipeline and its right-of-way are admittedly within such an "inventoried roadless area"—the record shows that it will span 8.33 miles of IRA. *Id.* at 1223. Thus, the legality of the pipeline hinged on whether its construction would include the construction of roads. More specifically, its legality hinged on precisely what is meant by the term "roads" as used in the Roadless Rule. *Id.* at 1225. The Roadless

Rule defines "road" as "[a] motor vehicle travelway over 50 inches wide, unless designated and managed as a trail." To the plaintiffs, this definition encompassed the pathways contemplated by the pipeline construction plan: cleared paths (presumably at least 50 inches wide) over which motorized construction vehicles would travel to and from the construction sites during the three years of construction. The ROD, however, concluded that the construction of the pipeline within IRAs could be accomplished "without road construction." *Id.* at 1226. This conclusion apparently rested on the ROD's interpretation of the term "travelway" within the definition of "road." The ROD used a narrow conception of "travelway," and apparently took it to mean only those thoroughfares used for general transportation purposes. Under this view, the Roadless Rule only prohibited the construction of roads intended for general travel, rather than those used for specific authorized purposes like construction of a pipeline. The ROD explained that the sole purpose of the pipeline-related paths would be to accommodate the construction vehicles and to transport supplies and equipment necessary to the construction process. According to the ROD, these would be "construction zones," not "roads."

The court found that the ROD's interpretation of "roads" was acceptable, and that the construction paths contemplated by SG's construction plan were thus not in violation of the Roadless Rule. The court reasoned that although the Roadless Rule defined "road," it did not define "travelway," nor was there a commonly accepted definition for that term. *Id.* at 1226-27. Because the term "travelway" was ambiguous, the ROD's narrow view of a travelway as a general transportation route was acceptable. As the court noted, "a reviewing court must give substantial deference to an agency's interpretation of its own regulations." *Id.* at 1227 (internal quotations omitted). This reasoning supported the ROD's assertion that the pipeline could be constructed within the IRAs without the construction of new roads. Therefore, the court concluded, the ROD's authorization of the proposed pipeline was not in violation of the Roadless Rule.

The court then turned to the plaintiff's second contention: that the pipeline violated NEPA "by failing to consider the impacts of future natural gas development [i.e., the installation of additional gas wells] as a connected action." *Id.* at 1228. NEPA requires all federal agencies to explore the environmental impacts of proposed major federal actions, and to summarize those impacts in an environmental impact statement (EIS). In preparing this EIS, the agency must also consider "connected actions," meaning actions which are so closely tied to the proposed

action that they warrant consideration in the same EIS. NEPA provides that actions are "connected" if they: "(i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." *Id.* at 1228 (citing 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2006)).

In essence, the plaintiffs argued that the Bull Mountain Pipeline plan both expected and encouraged new gas wells being opened in the same area in the future. Thus, the ROD was not merely approving a single pipeline, but was also opening the door to increased development within these IRAs in the future.

The defendants maintained that future gas wells were not "connected actions" within the meaning of NEPA, because the opening of future wells was not certain, and was in no way guaranteed by the opening of the Bull Mountain Pipeline. *Id.* at 1229. The ROD acknowledged that development of the Bull Mountain Pipeline "may result in 55-60 [natural gas] wells over 10 years," but added that "[t]hose estimates are speculative and are dependent on market conditions and other factors."

The court agreed with the defendants, finding that although the Bull Mountain Pipeline made future wells more likely, and although the pipeline may not be economically successful without these future wells, the pipeline project did not *ensure* the development of additional wells. Furthermore, the two actions were not interdependent: the pipeline could exist and serve its purpose without any additional wells, and likewise, additional wells could arise absent the development of this pipeline. Therefore, such wells were not required considerations under the "connected actions" provision of NEPA. The court thus concluded that the approval of the Bull Mountain Pipeline did not violate NEPA by failing to consider additional wells as "connected actions."

Based on its analysis of the ROD's compliance with NEPA and the Roadless Rule, the court determined that the plaintiffs had not proven the first element required to obtain a preliminary injunction, i.e., a substantial likelihood of success on the merits. The court then briefly considered the remaining three prongs. *Id.* at 1231.

The second element that must be proven to obtain a preliminary injunction is that the movant will suffer irreparable harm if the injunction is denied. *Id.* at 1224. This, the court stated, had been proven by the plaintiffs. *Id.* at 1231. The third element requires proof that this irreparable harm will outweigh the harm that will be suffered by the

opposing party if the injunction issues. *Id.* at 1224. The court judged that the harms here would be "equally balanced," with the plaintiffs' environmental damage on the one hand, and the injury to the public interest in natural gas production, as well as the economic injury to SG, on the other hand. *Id.* at 1231. Lastly, the fourth element that must be proven for an injunction to issue is that the issuance of an injunction "will not adversely affect the public interest." *Id.* at 1224. This factor, the court said, was also a draw.

The court ultimately concluded that the district court did not abuse its discretion in denying the motion for a preliminary injunction. The first element needed for an injunction was not conclusively proven, as the plaintiffs' likelihood of success on the merits was doubtful in the eyes of the court. And although irreparable harm was likely without an injunction, the equally balanced harm that each party would suffer in either case weighed against issuing an injunction, especially in light of the discretion owed to the federal agencies involved.

This case is only the latest controversy surrounding the contentious Roadless Rule and its effect on the National Forest System. The issue in this case goes straight to the central purpose of the Roadless Rule, as the court struggles to determine what is and is not a "road." The decision here shows that the ambiguity in the Rule's definition of that term can lead to consequences that some might argue go against the spirit of the Roadless Rule. The judgment allows the defendants to legally construct and use the same kind of large, load-bearing motor vehicle travel ways that the Roadless Rule sought to exclude from these so-called "roadless" areas, based on a narrow interpretation of a term that was given a broad definition in the Rule itself. The results reached here rest at least partially on the shoulders of the BLM and the USFS, whose initial decisions in the ROD provided the foundation for the justification for these actions. For the Roadless Rule to prevent roads from being built in these designated roadless areas, the federal agencies that govern our forests must follow both the letter and the spirit of the Roadless Rule.

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