RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

Examining the Impact of the EPA's Decision To Reconsider California's Request for a Waiver Under the Clean Air Act

In a reversal of the President George W. Bush-era decision of the Environmental Protection Agency (EPA) to deny California's application for a waiver under the Clean Air Act (CAA), President Barack Obama signed a memorandum requesting that the Administrator of the EPA, Lisa P. Jackson, assess whether the denial of California's request for a waiver comports with the CAA. Memorandum on the State of California Request for Waiver Under 42 U.S.C. § 7543(b), the Clean Air Act, 45 WEEKLY COMP. PRES. DOC. 3 (Jan. 26, 2009). Under the CAA, the

EPA alone possesses the authority to adopt emissions standards for new motor vehicles. California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption, 74 Fed. Reg. 7040, 7040 (Feb. 12, 2009). A state can only adopt and enforce emissions standards if the EPA Administrator decides to waive the CAA's general prohibition on a state's ability to set its own emissions standards.

Section 209(b) of the CAA mandates that the EPA Administrator grant a state's waiver request if the EPA makes a determination that the state's standards "'will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.'" *Id.* at 7041 (quoting 42 U.S.C. § 7543(b)(1) (2006)). In other words, the Administrator must grant a state's waiver request unless the EPA concludes that (1) the state's determination with respect to the protectiveness of its standards is arbitrary and capricious, (2) the state does not need the standards to meet compelling and extraordinary conditions, or (3) the state's standards and enforcement procedures are not consistent with section 202(a) of the CAA. *Id.* (citing 42 U.S.C. § 7543(b)(A)-(C)).

For decades leading up to the EPA's March 6, 2008, final decision to deny California's waiver application under the CAA, the EPA had given deference to California on such waivers because of the air pollution challenges that plague the state. Memorandum on the State of California Request for Waiver Under 42 U.S.C. 7543(b), the Clean Air Act, *supra*. In denying California's waiver request, then-Administrator Stephen L. Johnson based his decision on the lack of "compelling and extraordinary conditions." California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008). In reaching this decision, the Administrator opined that the climate change issues cited by California as justification for its own greenhouse gas emissions standards were not sufficiently different from those facing the rest of the nation and thus did not warrant California having its own motor vehicle emissions program. *Id.* at 12,156-57. According to EPA Administrator Johnson, section 209(b)(1)(B) of the CAA was not intended to provide a means for the states to address global climate change issues, and in any event, the climate change issues cited by the California Air Resources Board (CARB) did not amount to compelling and extraordinary conditions as required under section 209(b)(1)(B). *Id.* at 12,156-57. In its letter dated January 21, 2009, CARB requested that the EPA reconsider its denial of the California waiver request by focusing

on whether California continues to need its own motor vehicle emissions program (rather than considering the need for a greenhouse gas emissions program separately). Letter from Mary D. Nichols, Chairman, Cal. Air Res. Bd., to Lisa P. Jackson, Administrator-Designate, EPA (Jan. 21, 2009), *available at* http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=EPA-HQ-OAR-2006-0173-7044.1. In addition, CARB asked the EPA to revisit its determination that California's climate challenges were not sufficiently different from the rest of the nation.

EPA Administrator Jackson welcomed President Obama's request to review the denial of the California waiver, stating, "It is imperative that we get this decision right, and base it on the best available science and a thorough understanding of the law." Press Release, EPA, EPA Revisits California Waiver Decision (Feb. 6, 2009), *available at* http://www.epa.gov/aging/press/epanews/2009/2009_0206_1.htm. If granted, the waiver will allow California to adopt the emissions standards CARB sets for passenger cars, light-duty trucks, and medium-duty passenger vehicles, beginning with vehicles in the model year 2009. California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption, 74 Fed. Reg. 7040, 7040 (Feb. 12, 2009). Administrator Jackson's article in the Federal Register served as public notice of the EPA's reconsideration of the California waiver and of the public hearing on the matter which was held on March 5, 2009, in Washington, D.C. *Id.* at 7041. According to President Obama's memorandum, once Administrator Jackson reaches a decision as to whether California's waiver should be granted in light of the CAA, then the EPA shall take the appropriate action. Memorandum on the State of California Request for Waiver Under 42 U.S.C. § 7543(b), the Clean Air Act, *supra*.

A decision by Administrator Jackson to grant California's waiver under the CAA would impact emissions standards far beyond the Golden State. If California is successful in limiting greenhouse gas emissions for new motor vehicles, then other states may follow suit by adopting emissions standards identical to those set by CARB in California. Provided the states' emissions standards are identical to those for which the EPA has granted a waiver and meet other statutory requirements, then these states can immediately adopt the new standards without the additional step of formally requesting a waiver from the EPA. Therefore, a decision by Administrator Jackson reversing the denial of California's waiver will have far reaching impacts outside of California and will

make it easier for states to regulate greenhouse gas emissions for new motor vehicles.

Victoria A. Gallo

II. CLEAN WATER ACT

National Cotton Council of America v. EPA, 553 F.3d 927 (6th Cir. 2009)

In *National Cotton Council of America v. EPA*, the United States Courts of Appeals for the Sixth Circuit vacated the Environmental Protection Agency's (EPA) final rule that pesticides applied according to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are exempt from the Clean Water Act's (CWA) permitting requirements. 553 F.3d 927, 929-30 (6th Cir. 2009). The court held that the EPA's final rule was not a reasonable interpretation of the CWA. *Id.* at 930.

Congress enacted the CWA to preserve the chemical, physical, and biological integrity of the waters of the United States in order to protect fish and wildlife and provide for recreation. To meet this goal, the CWA prohibits the discharge of any "pollutant" into navigable waters from any "point source" without an EPA-issued permit under the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. §§ 1311(a), 1342 (2006). In order to issue a permit, the EPA must first determine that the discharge of a pollutant under the proposed circumstances will not cause undue harm to water quality. *Id.* § 1342.

In addition to regulating the CWA, the EPA also regulates the labeling and sale of pesticides under FIFRA. 7 U.S.C. §§ 136-136(b) (2006). All pesticides sold in the United States must be registered with the EPA. *Nat'l Cotton Council*, 553 F.3d at 931. The EPA will only approve pesticides when it finds that the chemical "'will not generally cause unreasonably adverse effects on the environment.'" *Id.* (quoting No Spray Coal. v. City of New York, 351 F.3d 602, 604-05 (2d Cir. 2003)). Since 1977, pesticide labels issued under FIFRA have been required to contain a notice stating that the pesticide could not be discharged into waters unless in accordance with an NPDES permit. *Id.* at 931.

On November 27, 2007, the EPA issued a final rule which determined that pesticides applied in accordance with FIFRA are exempt from the CWA's NPDES permitting requirements. *Id.* at 929 (citing 71 Fed. Reg. 68,483 (Nov. 27, 2006)). The final rule states that pesticides do not require an NPDES permit if: (1) pesticides are applied directly to

waters of the United States in order to control pests; or (2) pesticides are applied above or near waters of the United States, where a portion of the pesticides will unavoidably be deposited into the waters, in order to control pests. *Id.* at 931-32 (citing 40 C.F.R. § 122.3(h) (2008)). Organizations representing environmental interest groups and industry interest groups filed petitions for review of the final rule, arguing that the EPA exceeded its authority in exempting FIFRA-compliant applications of pesticides from the NPDES permitting requirements. *Id.*

The EPA argued that the CWA as it applies to pesticides is ambiguous and that its determination that pesticides are exempt is reasonable. *Id.* at 934-35. The EPA further contended that Congress defined the term "pollutant" to mean one of sixteen specific items, and pesticides do not fit the definition of any of these items. Among these sixteen items are "chemical wastes" and "biological materials." *Id.* Although pesticides are either chemical or biological in nature, the EPA argued that pesticides are neither chemical wastes nor biological materials within the meaning of the CWA. According to the EPA, pesticides are not chemical wastes because pesticides are applied for a specific purpose and thus are not wastes in the ordinary definition of the word. *Id.* at 935. The EPA concluded that pesticides could not then be biological materials because to find otherwise would lead to the inconsistent result that biological pesticides are pollutants, but chemical pesticides are not. *Id.* at 931.

The EPA further argued that although pesticide residue and excess pesticide are pollutants because they are wastes, a permit is not required for pesticide applications that result in excess or residue pesticide because the CWA, according to the EPA's interpretation, only requires permits for discharges that are both pollutants and are from a point source at the time of discharge. The EPA contended that excess and residue pesticides are not discharged from a point source because at the moment of discharge there is only pesticide.

In determining whether the EPA exceeded its authority under the CWA in issuing its final rule, the court followed the two-part test outlined in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Under the *Chevron* test, the court must first determine whether the intent of Congress is clear as to the precise question at issue. *Id.* at 842. If the intent of Congress is clear, the analysis ends there, for the court must give effect to the unambiguously expressed intent of Congress. *Id.* at 842-43. If the statute is silent or ambiguous regarding the question at issue, the court then determines whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843.

The court noted that a word in a statute should be given its ordinary and common meaning, absent an indication that Congress intended otherwise. *Nat'l Cotton Council*, 553 F.3d at 935. The court defined waste as "'eliminated or discarded as no longer useful or required,'" *id.* (quoting THE NEW OXFORD AMERICAN DICTIONARY 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001)), or "'any useless or worthless byproduct of a process or the like,'" *id.* (quoting AMERICAN HERITAGE DICTIONARY 1447 (1979)), in accordance with the common meaning given in several dictionaries. Given this meaning, the Sixth Circuit stated that "chemical waste," for the purposes of the CWA, would include discarded chemicals, superfluous chemicals, or refuse or excess chemicals. *Id.* at 936-37. Thus, the court concluded that when a chemical pesticide is intentionally applied for a specific purpose, it is not a chemical waste and does not require an NPDES permit. *Id.* at 936.

However, the EPA admitted that excess pesticide and pesticide residue meet the common definition of waste. *Id.* at 935. The EPA instead defended its rule on the grounds that excess pesticide and residue are not discharged from a point source. The CWA defines a point source as "any discernable, confined, and discrete conveyance." 33 U.S.C. § 1362(14) (2006). The EPA argued that when the pesticide is discharged, it is a nonpollutant, and the excess pesticide and residue are not created until after they are already in the water. *Nat'l Cotton Council*, 553 F.3d at 938-39. Therefore, they are not pollutants at the time of discharge and thus do not require a permit, according to the EPA. The Sixth Circuit rejected this argument. *Id.* at 939-40. The court pointed out that "there is no requirement that the discharged chemical, or other substance, immediately cause harm to be considered as coming from a 'point source.' Rather, the requirement is that the discharge come from a 'discernable . . . conveyance,' . . . which is the case for pesticide applications." *Nat'l Cotton Council*, 553 F.3d at 939 (quoting 33 U.S.C. § 1362(14)). The court further stated that "injecting a temporal requirement" to the discharge of a pollutant is unsupported by the CWA and contrary to its purpose in general and the NPDES program in particular. The court added that if the EPA's interpretation of the CWA were allowed to stand, "discharges that are innocuous at the time they are made but extremely harmful at a later point would not be subject to the permitting program." This would go against Congress's directive that the EPA protect water quality and aquatic life.

The court then considered whether biological pesticides were "biological material" within the meaning of the CWA. The court defined "material" as "that which constitutes the substance of a thing." The court

said that the language was plain and unambiguous, and thus it was compelled to hold that matter of a biological nature, such as biological pesticides, were biological material and must comply with the CWA if it is discharged into water. The court pointed out that Congress could have used a more limiting term, such as "biological waste," if it had intended to restrict the meaning. According to the court, "[I]f we are to give meaning to the word 'waste' in 'chemical waste,' we must recognize Congress's intent to treat biological and chemical pesticides differently." *Id.* at 938. Thus, biological pesticides, regardless of whether or not it is excess pesticide or residue, is always subject to the NPDES requirements of the CWA. *Id.* at 937.

The Sixth Circuit thus vacated the EPA's final rule, holding that dischargers of both chemical and biological pesticide pollutants are subject to the CWA's NPDES permitting program. *Id.* at 940. This decision was only a small victory, however. The EPA and state authorities may also grant general permits that allow for the discharge of a specific pollutant or type of pollutant across an entire region. The court pointed out that "'once [the] EPA or a state agency issues such a [general] permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions.'" *Id.* at 931 (quoting S. Fla. Water Mgmt. Dist. v. Moccosukee Tribe of Indians, 541 U.S. 95, 108 n.* (2004)). At least two states have already issued general permits for pesticides.

Lynn Doiron

III. COASTAL ZONE MANAGEMENT ACT

Winter v. NRDC, 129 S. Ct. 365 (2008)

In *Winter v. NRDC*, the United States Supreme Court reversed the United States Court of Appeals for the Ninth Circuit's decision to uphold the district court's preliminary injunction of the United States Navy's training exercises conducted off the coast of Southern California. The training exercises are referred to collectively as SOCAL. Winter v. NRDC, 239 S. Ct. 365, 370 (2008). The Court found that the district court abused its discretion in imposing sonar shutdown and power-down requirements on the Navy, and it reversed and vacated those portions of the injunction. *Id.* at 382.

Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, delivered the opinion of the Court. *Id.* at 369. The Court began by

mapping out the complicated history of the case. *Id.* at 371-72. In February 2007, the Navy released its environmental assessment (EA) of fourteen SOCAL training exercises scheduled through 2009, as required by the National Environmental Policy Act (NEPA). *Id.* at 372. Because the EA concluded that the Navy's exercises would not have a significant impact on the environment, the Navy determined that NEPA did not require a more in-depth environmental impact statement (EIS) before the training sessions could be executed. Shortly after the release of the EA, the plaintiff National Resource Defense Council (NRDC), concerned that the Navy's use of mid-frequency active (MFA) sonar in the training exercises would cause serious harm to various species of marine mammals present in the SOCAL waters, sought a preliminary injunction of the training exercises based on alleged violations of NEPA, the Endangered Species Act (ESA), the Administrative Procedure Act (APA), and the Coastal Zone Management Act (CZMA). The United States District Court for the Central District of California granted the motion for a preliminary injunction and prohibited the Navy from using MFA sonar during its remaining training exercises. NRDC v. Winter, 2007 WL 2481037, at *10-11 (C.D. Cal. Aug. 7, 2007). On appeal, the Ninth Circuit agreed with the district court that preliminary injunctive relief was appropriate. The Ninth Circuit concluded, however, that a blanket injunction was overbroad and remanded the case to the district court to "narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training exercises." NRDC v. Winter, 508 F.3d 885, 887 (9th Cir. 2007).

On remand from the Ninth Circuit, the district court entered a preliminary injunction allowing the Navy to use MFA sonar only as long as it implemented a number of mitigation measures. NRDC v. Winter, 530 F. Supp. 2d 1110, 1118-21 (C.D. Cal. 2008). The Navy appealed, challenging two of the mitigation measures: (1) shutting down MFA sonar when a marine mammal is spotted within 2200 yards of a vessel and (2) powering down MFA sonar by six decibels during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water. NRDC v. Winter, 518 F.3d 658, 676 (9th Cir. 2008). The Navy also sought and received from the President an exemption from CZMA pursuant to 16 U.S.C. § 1456(c)(1)(B) (2006) and an authorization from the Council on Environmental Quality (CEQ) to implement alternative arrangements to the district court's injunction. In light of these actions, the Navy moved to vacate the district court's injunction with respect to the 2200-yard shutdown zone and the restrictions on training in surface

ducting conditions. NRDC v. Winter, 527 F. Supp. 2d 1216, 1238 (C.D. Cal. 2008), *aff'd*, 518 F.3d 658 (9th Cir. 2008). The district court refused to do so, and the Ninth Circuit affirmed.

The Court began its analysis with a brief summary of each party's argument on the first factor in the preliminary injunction inquiry: likelihood of success on the merits. Winter v. NRDC, 129 S. Ct. 365, 375 (2008). Without deciding on this issue, the Court moved on to the next factor: likelihood of the plaintiff suffering irreparable harm if the injunction is not ordered. The Court disagreed with both the district court and the Ninth Circuit's holdings that a plaintiff need only demonstrate a "possibility" of irreparable harm. Agreeing with the Navy's argument, the Court stated, "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375-76 (citing Mazurek v. Armstrong, 520 U.S. 968, 927 (1997)). The Court was unsure whether this incorrect standard affected the Ninth Circuit's analysis, however, because the Ninth Circuit affirmed the district court's conclusion of a "near certainty" of irreparable harm. *Id.* at 376. The Court did recognize, however, that the Navy challenged only two of six restrictions in the preliminary injunction and found that the district court's failure to reconsider the irreparable harm question in the context of the more narrow challenge was a significant error.

The Navy's forty-year history of conducting sonar-training exercises as part of SOCAL is another fact that the Court found pertinent to the likelihood of success and irreparable harm inquiries. The Court was not convinced that the Navy's failure to complete an EIS would violate NEPA. One of the reasons NEPA requires an EIS is to discover and prevent prospective environmental harms. Here, the Navy had forty years of experience conducting SOCAL that allowed it to discover and prevent harm.

Next, the Court moved on to balancing the competing claims of injury. In this discussion, the Court decided that even if the plaintiff had shown irreparable injury and a likelihood of success on the merits, the harm suffered by the plaintiffs was outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. *Id.* at 377. These factors alone required the denial of the requested injunctive relief. In coming to this conclusion, the Court stressed the great deference given to military authorities concerning the importance of a particular military interest. The Court was persuaded by the Navy's most senior officers' declarations that the threat imposed by enemy submarines is serious and

that the need for extensive sonar training to counter the threat is "mission critical." The Court proclaimed that it was not even a "close question" because the most serious possible injury to the plaintiffs would be "harm to an unknown number of the marine mammals that they study and observe." *Id.* at 378. In contrast, the Navy's deploying an inadequately trained antisubmarine force would jeopardize the safety of the fleet. The Court, in finding an abuse of discretion, held that neither the district court nor the Ninth Circuit took proper consideration of, or gave sufficient weight to, the views of top Navy advisors and relied instead on flawed reasoning about the Navy's training options when it upheld the challenged restrictions. *Id.* at 378-79.

Justice Breyer, with whom Justice Stevens joined in Part I, filed an opinion concurring in part and dissenting in part. *Id.* at 382. In Part I, Justice Breyer determined that the record did not provide enough support for the preliminary injunction. *Id.* at 383-84. The uncertainty of the harm caused by the Navy's activities and the seriousness of the harm to the Navy's ability to maintain an adequate defense led Justice Breyer to conclude that the injunction was inappropriate. *Id.* at 384. Justice Breyer found it particularly important that the district court disregarded, without explanation, the Navy's contentions, supported by multiple affidavits, that the two extra conditions would seriously interfere with its ability to conduct training exercises.

In Part II, Justice Breyer stated that the modified conditions imposed by the court of appeals in its February stay order "reflect[ed] the best equitable conditions that can be created in the short time available before the exercises are complete and the EIS is ready." *Id.* at 387. Justice Breyer would have modified the Ninth Circuit's order so that the provisional conditions would remain in place until the Navy's completion of an acceptable EIS. This order, imposed pending this Court's resolution of the case, modified the two mitigation conditions at issue. First, the Court order mandated that the Navy suspend sonar use in the 2200-yard shutdown zone when a marine mammal is detected there, *except* if sonar is being used at a "critical point in the exercise." In this case, the Navy must "power down [by an amount that] is proportional to the mammal's proximity to the sonar." Second, as to surface ducting, the Court's order required the Navy to stop sonar use when a marine mammal is detected within 500 meters, and the amount by which the Navy ship is otherwise required to power down is proportional to the mammal's proximity to the sonar source.

Justice Ginsberg, with whom Justice Souter joined, dissented and filed an opinion. Justice Ginsberg focused on the merits and stated that

the EIS is NEPA's "core requirement." *Id.* at 389 (citing Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 757 (2004)). The EIS requirement "'ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'" *Id.* at 389 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-52 (1989)). It also serves the purpose of providing information to the public and other agencies. *Id.* at 389-90. Justice Ginsburg found that the Navy's decision to publish the EIS after the completion of the exercises defeated those purposes. *Id.* at 390. Justice Ginsberg also found fault with the Navy's seeking relief from the executive branch rather than Congress, who did not have the authority to eliminate NEPA's command.

The dissent next discussed the inherent flexibility in equity jurisdiction. *Id.* at 391-92. It noted that "courts do not insist that litigants uniformly show a particular, predetermined quantum of probably success or injury," but have measured claims for relief "on a 'sliding scale,' sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high." *Id.* at 392 (citing 11A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.3, at 195 (2d ed. 1995)). Conducting a balancing of equities on both sides, Justice Ginsberg pointed out that the Navy's own EA predicted substantial harm to marine mammals. In light of this fact, along with the NRDC's "inevitable" success on the merits of its claim that NEPA required the Navy to prepare an EIS, the history of the litigation, and the public interest, Justice Ginsberg disagreed with the majority's opinion. *Id.* at 393. Her dissent would have affirmed the Ninth Circuit's judgment.

Because the Court deferred so heavily to the Navy's assertion of harm to its mission of providing national security, this case might provide precedent that will serve as a brick wall between environmentally concerned groups and a preliminary injunction seeking to modify or halt military training activities that cause harm to the environment. In coming to its conclusion, however, the Court also relied on a lack of evidence of sufficiently specific harm to specific species. If environmentally concerned plaintiffs in a particular case have more concrete, species-specific evidence of the dangers that military activities impose on the environment, courts may see the necessity of preliminary injunctions.

Natalie K. Mitchell

IV. ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT

Norton Construction Co. v. United States Army Corps of Engineers, 280 F. App'x 490 (6th Cir. 2008)

In *Norton Construction Co. v. United States Army Corps of Engineers*, the United States Court of Appeals for the Sixth Circuit affirmed the United States District Court for the Northern District of Ohio's finding that the United States Army Corps of Engineers (Corps) reasonably interpreted the Energy and Water Development Appropriations Act and therefore did not violate Norton Construction Company's constitutional rights. Norton Constr. Co. v. U.S. Army Corps of Eng'rs, 380 F. App'x 490, 492 (6th Cir. 2008).

The Corps maintains jurisdiction over wetlands and streams that fall within the Muskingum Watershed in Tuscarawas County, Ohio. Norton is an Ohio-based construction company involved in landfill construction. Norton sought to construct a landfill within the Muskingum Watershed. Under section 404 of the Clean Water Act (CWA), because construction of the landfill would require filling wetlands and streams within the jurisdiction of the Corps, Norton was required to obtain a permit from the Corps before construction could begin. *See* 33 U.S.C. § 1344 (2006). After the expiration of a temporary appropriations rider, the enactment of the Energy and Water Development and Appropriations Act of 2006 (EWDAA), and decisions from both the district court and the Sixth Circuit, the Corps finally disposed of Norton's application by determining that it was barred by section 103 of the EWDAA. *See* Pub. L. No. 109-103, 119 Stat. 2247 (2005). Norton then filed an amended complaint in the district court seeking injunctive relief; the court denied the requested relief, and Norton appealed. *Norton Constr.*, 380 F. App'x at 492.

The Sixth Circuit first identified the relevant issue in the case: the definition of the term "Muskingum Watershed" and, specifically, whether the definition of "Muskingum Watershed" adopted by the Corps was ambiguous. Norton argued that the term was "patently ambiguous" and the Corps' definition was overinclusive. The court held that the Corps' definition of the term was reasonable and that the end result would be the same whether or not *Chevron* deference was applied to the Corps' interpretation. *Id.* at 494-95 (citing Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984)).

Norton's second argument was that its Fifth and Fourteenth Amendment rights had been violated. The court first considered

Norton's claim that a violation of its equal protection rights had occurred. The court found that the dispute did not pertain to a fundamental right, and therefore section 103 of the EWDAA was merely subject to rational basis review. The court then articulated Norton's burden: "[I]n order to defeat a statute subject to rational basis review, Norton must negate 'every conceivable basis' that could support the statute." *Id.* at 495 (citing Hadix v. Johnson, 2000 FED App. 0351P, at 843 (6th Cir.)). Concluding that a rational relationship existed between the EWPAA and a legitimate state interest, the court held that Norton's equal protection rights were not violated. For the same reasons, the court concluded that Norton had not been deprived of substantive or procedural due process rights.

In response to Norton's conclusion that section 103 of the EWPAA was patently ambiguous and the Corps' interpretation was not entitled to deference, the court outlined three possible models of judicial statutory analysis: (1) if the statute was unambiguous, the court would apply the statute to the dispute at hand; (2) if the statute was ambiguous but the Corps' interpretation was reasonable, then the Corps' interpretation should be adopted; and (3) if the statute was ambiguous and the court found that it was either inappropriate to give deference to the Corps' interpretation, or the Corps' interpretation was unreasonable, then the court would interpret the statute. *Id.* at 492.

The district court looked to the statute's legislative intent and found that the Muskingum Watershed included "all waters that eventually flow into the Muskingum River." This broad interpretation lead to the inclusion of the area Norton intended to use as the landfill site. The Sixth Circuit, however, assumed the statute was ambiguous in order to consider the next issue: deference to the Corps' interpretation. *Id.* at 493.

In arguing that *Chevron* deference should not apply to the case, Norton first submitted that the substance of section 103 of the EWPAA should be ignored because Congress, in passing the EWPAA, neither repealed the CWA nor redefined the jurisdiction of the Corps. The court dismissed this argument without substantial discussion. The court stated that because the EWPAA was passed into law, and despite the existence of earlier statutes, its substance was not to be ignored. Next, Norton argued that *Chevron* deference was inapplicable to the Corps' determination because it did not apply to an agency's interpretation of its own jurisdiction. The court found some merit in this argument and even noted that "[s]ome courts have questioned whether an agency's determination of its own jurisdiction is entitled to *Chevron* deference . . .

and others have ruled that judicial review is de novo in such a circumstance." Recognizing that the Sixth Circuit had not addressed this issue, the court avoided deciding the question because the result would be the same whether or not its review was de novo: the court accepted the Corps' interpretation based on the agency's reasonable explanation for subjecting Norton's application to section 103 of the EWPAA. *Id.* at 494. Norton's final argument that *Chevron* deference should not apply was that the Corps' interpretation pushed the limit of congressional power and was an attempt to expand its own authority. The court distinguished the cases cited by Norton on federalism and Commerce Clause grounds and concluded that the Corps' action actually limited its own authority.

Norton's final argument was based on Equal Protection and Due Process grounds. The court first evaluated Norton's Equal Protection argument and determined that because Norton did not belong to a protected class and the dispute did not pertain to a fundamental right, rational basis review was the appropriate standard. *Id.* at 495. The court then articulated Norton's heavy burden of negating "every conceivable basis" that could support the statute. *Id.* (citing *Hadix*, 2000 FED App. 0351P, at 843). Similarly, the court concluded that Norton's due process argument failed because the procedure administered by the Corps was appropriate under rational basis review.

On its face, *Norton Construction* is a straightforward application of the rules of agency interpretation of a federal statute. The complexity of the case arose from the "ever-changing legal landscape" in which it was decided. Consistent with its efforts to "protect and preserve the integrity of the water supply against further degradation," Congress initially issued a temporary appropriations rider in order to bar the processing of landfill applications for areas within the Muskingum Watershed. *Id.* at 491; *see also* Energy and Water Development Appropriations Act of 2006, Pub. L. No. 109-102, 119 Stat. 2247 (2005). After this rider expired, Congress reenacted the prohibition by passing the Energy and Water Development Appropriations Act of 2006. It was this reenactment that sparked the litigation between Norton and the Corps. *Norton Constr.*, 280 F. App'x at 491. During the appellate stage of the litigation, Congress passed the Consolidated Appropriations Act of 2008. *Id.* at 495. This statute clearly defined the term "Muskingum River Watershed" and expressly deferred to the Corps' definition of the term. *Id.* at 496. Consequently, Norton was placed in a position that made victory unattainable. According to the court, if it were to apply the Consolidated Appropriations Act of 2008, then deference would be given to the Corps' determination of Norton's

application. Additionally, if the court avoided this statute's application, it would likely affirm the district court's judgment that the Corps' interpretation was reasonable. Thus, either way Norton would lose and the retroactivity of the statute would be deemed immaterial.

An interesting question, reserved for another case with the appropriate factual background, is "*Chevron's* applicability to an agency's determination of its own jurisdiction." *Id.* at 495. As the court noted, the United States Court of Appeals for the District of Columbia and the United States Court of Appeals for the Federal Circuit have decided the issue differently. *Id.* at 493. The D.C. Circuit questioned *Chevron*'s applicability to an agency determination of its own jurisdiction (*see* Otis Elevator Co. v. Sec'y of Labor, 921 F.2d 1285, 1288 (D.C. Cir. 1990)), while the Federal Circuit has concluded that de novo review is the appropriate standard when an agency attempts to determine its jurisdiction (*see* Bolton v. Merit Sys. Prot. Bd., 154 F.3d 1313, 1316 (Fed. Cir. 1998)).

Norton Construction is yet another example of the deference courts will give to agency determinations and interpretations. Instead of basing its decision solely on the precedent established by the United States Supreme Court in *Chevron*, the Sixth Circuit concluded that even in the event that *Chevron* deference did not apply to the dispute, the agency determination was reasonable. *Norton Constr.*, 280 F. App'x at 494. On these grounds alone, the court found the Corps' explanation supporting its definition of "Muskingum Watershed" was more persuasive than Norton's explanation for its definition of the same. The Corps centered its analysis on a historical perspective, while Norton cited congressional omission to support its definition. In the end, the Sixth Circuit found a way to defer to the agency's interpretation—even without *Chevron*.

Joshua Chesser

V. NATIONAL ENVIRONMENTAL POLICY ACT AND NATIONAL HISTORICAL PRESERVATION ACT

Lemon v. Geren, 514 F.3d 1312 (D.C. Cir. 2008)

The Defense Base Closure and Realignment Act of 1990 was intended to provide for the "timely closure and realignment of military installations inside the United States." Defense Base Closure and Realignment Act of 1990, § 2901(b) (codified as amended at 10 U.S.C. § 2687 note (2006)). Once the decision is made to close a base, the

Secretary of Defense determines whether any other federal department or agency can use the base. *Id.* § 2905(b)(5)(A). If there is no other federal use for the property, the Secretary can then arrange to take bids from eligible parties who prepare a development plan. *Id.* § 2905(b).

Fort Ritchie, a United States Army base located in northern Maryland, was selected for closure by the Defense Base Closure and Realignment Commission in 1995. Notice of Recommended Base Closures and Realignments, 60 Fed. Reg. 11,414, 11,436 (Mar. 1, 1995) (recommending closure of Fort Ritchie, among other bases); President's Message to Congress Transmitting Recommendations of the Defense Base Closure and Realignment Commission, H.R. DOC. NO. 104-96, at 1 (1995) (accepting closure recommendations). The Fort was initially established by the Buena Vista Ice Company in 1815 and became the southernmost ice plant in the United States. Corporate Offices Props. Trust (COPT), Fort Ritchie: Where Historic Preservation Is a Priority, http://www.fortritchie.com/clientuploads/historic_preservation.pdf (last visited Feb. 8, 2009). The State of Maryland purchased the Fort in 1926, developing a brigade training center for the Maryland National Guard. *Id.* During World War II, the federal government used Fort Ritchie as a War Department Military Intelligence Training Center for the training of intelligence troops. *Id.* After World War II, the Fort was acquired by the Army, which utilized the location for numerous activities over time, including support of the Alternate Joint Communications Center in Pennsylvania and headquarters for the U.S. Army Communications Command—Continental United States. *Id.* Pursuant to the decision made by the Defense Base Closure and Realignment Commission and President Clinton, the base finally ceased operations in September 1998, at which time the Army transferred operations to alternative military sites. Steve Blizard, Fort Ritchie Prepares To Close, ARMY NEWS SERVICE, July 28, 1998, http://www.fas.org/nuke/guide/usa/c3i/a1998 0728ritchie.html. For a video tour of Fort Ritchie following its closure and before its redevelopment, see Posting of pvasshep, Abandoned Military Base—Fort Ritchie (Oct. 23, 2006), http://www.youtube.com/ watch?v=pnSqIFCHK4g.

The responsibility to plan the reuse and redevelopment of Fort Ritchie was given to Washington County, Maryland. Lemon v. Geren (*Lemon II*), 514 F.3d 1312, 1313 (D.C. Cir. 2008). The plan that was initially selected in 1997 involved the construction of an office complex. The PenMar Development Corporation (PenMar) was set up by Maryland in order to coordinate the plan. *Id.* at 1313-14 (citing MD. CODE ANN. art. 83A, § 5-1201 to -1210 (West 1997)). The Secretary of

the Army joined with PenMar, the Maryland Historical Trust, and the Federal Advisory Council on Historic Preservation in order to prepare a plan that would comply with the National Historic Preservation Act (NHPA). *Id.* at 1314. The NHPA requires that, prior to any expenditure of federal funds, the acting agency has considered the effect of the action on any area that is eligible for inclusion in the National Registry of Historic Places. 16 U.S.C. § 470f (2006). This review also affords a chance for the Advisory Council on Historic Preservation to comment on the transfer. By complying with the NHPA, the parties hoped that they could minimize damage to the historic area of Fort Ritchie (encompassing about one-third of the Fort) and even encumber any future receivers of the property. *Lemon II*, 514 F.3d at 1314-15; Lemon v. Harvey (*Lemon I*), 448 F. Supp. 2d 97, 99 (D.D.C. 2006).

To comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2006), in 1998, the Secretary prepared an environmental impact statement (EIS) covering the environmental consequences of the different redevelopment plans. *Lemon II*, 514 F.3d at 1314. While NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environment," the United States Supreme Court has explained that changes occurring after the initial EIS may require the agency to prepare a revised EIS. 42 U.S.C. § 4332(2)(C); *Lemon II*, 514 F.3d at 1314 (citing Marsh v. Or. Nat'l Res. Council, 490 U.S. 360, 371, 374 (1989); City of Olmsted Falls v. FAA, 292 F.3d 261, 274 (D.C. Cir. 2002)).

The initial plan outlined by PenMar was scrapped, and PenMar instead sold Fort Ritchie to COPT. *Lemon II*, 514 F.3d at 1314. COPT, a publicly traded real estate investment trust, "proposed a new redevelopment plan that entailed more construction and commercial activity, including activity on historic grounds, than PenMar had proposed." *Id.* The new plan proposed by COPT was accepted in 2005, and the Army found unnecessary any further investigation into the environmental or historical impact of the COPT proposal. *Id.*

The plaintiffs, a group of residents who live near Fort Ritchie, brought suit against the Secretary of the Army, PenMar, and COPT. *Id.* at 1312, 1314. The plaintiffs' claims centered on the argument that the proposal by COPT "created additional NHPA and NEPA obligations on the Secretary before the property could be conveyed." *Id.* at 1314. The plaintiffs sought declaratory relief and an injunction to prevent the transfer of Fort Ritchie from the Army to PenMar. *Id.*

The United States District Court for the District of Columbia dismissed the plaintiffs' NEPA and NHPA claims, finding that the

plaintiffs lacked standing. *Lemon I*, 448 F. Supp. 2d at 104-06. The court explained that while NEPA's requirement of an EIS served to inform the public, the EIS did not become a binding, legal obligation on the proposing agency. *Id.* at 104 ("[W]ere a[n] [EIS] to confirm the plaintiffs' worst fears about the development at Fort Ritchie, the plaintiffs could receive no redress, from this Court, for their injuries—other than the succor that can be taken from having accurately foreseen them." (citing The Wilderness Soc. v. Norton, 434 F.3d 584, 592 (D.C. Cir. 2006))). In other words, the court explained, the preparation of a supplemental EIS would not "*force* defendants to alter their allegedly injurious course of action." *Id.* (emphasis added). Similarly, the plaintiffs lacked standing under the NHPA, because although the public was afforded an avenue to object to proposed plans, the district court found that this did not translate into the ability to sue for the enforcement of any terms of a plan. *Id.* The public could not be considered a party having standing to sue under a contractual theory, with the plaintiffs standing in the shoes of third-party beneficiaries of the agreement between the Army, PenMar, and COPT. *Id.* ("Granting the public a mechanism to object to the parties' activities does not indicate an intent to any member of the public to sue to enforce the other terms of the agreement on the parties." (citing SEC v. Prudential Sec., Inc., 136 F.3d 153, 159 (D.C. Cir. 1998))).

The United States Court of Appeals for the District of Columbia Circuit granted the plaintiffs' appeal to consider first, whether the plaintiffs had standing under NEPA and the NHPA, and second, whether the case had become moot during the interim period between the district court ruling and the appeal. *Lemon II*, 514 F.3d at 1312.

The D.C. Circuit first examined the plaintiffs' standing under NEPA. *Id.* at 1314. To show standing, the United States Constitution requires that a plaintiff show an injury in fact that was caused by the defendant and is capable of being redressed by a court. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Nat'l Parks Conservation Ass'n v. Manson, 414 F.3d 1, 4 (D.C. Cir. 2005)). Although the D.C. Circuit recognized that the district court had employed the correct standard for determining standing, the D.C. Circuit strongly disagreed with the district court's construing of the plaintiffs' NEPA claim. *Id.* at 1314-15. The D.C. Circuit explained that NEPA is not intended to "force" an agency to alter its course of action through the preparation of an EIS. *Id.* at 1315. Instead, "[t]he idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions . . . it may be persuaded to alter what it proposed." *Id.* (citing

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)). The D.C. Circuit noted that the claim in this lawsuit was analogous to any number of cases where plaintiffs advanced standing on the notion that they lived close to an area of federal action and would be impacted by environmental effects of such action. *Id.* (citing *Lujan*, 504 U.S. at 572-73; City of Dania Beach, Fla. v. FAA, 48 F.3d 1181, 1186 (D.C. Cir. 2007); City of Waukesha v. EPA, 320 F.3d 228, 235 (D.C. Cir. 2003)). The D.C. Circuit, in essence, found that the plaintiffs could validly assert standing because the failure of the defendants to follow the procedural requirements of NEPA may have prevented the defendants from exploring impacts and alternatives that could have otherwise caused them to alter their plans for Fort Ritchie. *Id.*

The D.C. Circuit's analysis of the NHPA claims followed a similar line of reasoning. The court flatly rejected the district court's attempt to couch the NHPA claim in terms of a contractual agreement. *Id.* ("The district court treated the claim as if plaintiffs were seeking to enforce a contract . . . . We do not believe this is a correct view of plaintiffs' complaint."). Instead, the D.C. Circuit explained that the plaintiffs were merely arguing that if the Secretary of the Army had reviewed the revised plans for redeveloping Fort Ritchie, he might have acted differently to ensure protection of its historic areas. *Id.* (citing Karst Envtl. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1294-95 (D.C. Cir. 2007); Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 55-56 (1st Cir. 2001); Pye v. United States, 269 F.3d 459, 468 (4th Cir. 2001)).

Finding standing under both NEPA and the NHPA, the D.C. Circuit turned to the question of whether the case had become moot before its rehearing before the D.C. Circuit hearing. This question arose because in the intervening period, the transfers from the Army to PenMar, and from PenMar to COPT, had been completed. *Id.* The D.C. Circuit did not find the case to be moot because the court retained the power to void the transfer, and a case only becomes moot when a court no longer retains the power to accord relief to the parties. *Id.* (citing Burlington N. R.R. v. Surface Transp. Bd., 75 F.3d 685, 688 (D.C. Cir. 1996)). As the D.C. Circuit forcefully proclaimed, "If unraveling the transfer is necessary after the . . . court decides the merits, it will be within the court's power to do so." *Id.* (citing Porter v. Lee, 328 U.S. 246, 251 (1946); Indus. Bank of Wash. v. Tobriner, 405 F.2d 1321, 1323 (D.C. Cir. 1968)).

The decision by the D.C. Circuit recognizes that the value of NEPA lies not in "forcing" an agency to change its path, but in the education of both the acting agency and the public at large. *Id.* at 1314-15. By simply educating the parties who are acting, and those parties who are affected

by an action, NEPA aims to encourage environmentally responsible activity. *See* 42 U.S.C. § 4332. The D.C. Circuit's decision goes further to impart a similar goal to the NHPA—this time, making sure that agencies are cognizant of the consequences of their actions upon historic areas. 16 U.S.C. § 470f. By clarifying NEPA and NHPA standing inquiries in a clear and concise opinion, the D.C. Circuit underlined the purposes reflected by the text of both statutes and reinforced the longstanding view of the Supreme Court, all of which do not "force" an agency to act in any certain manner, but instead encourage responsible action by attaching a paramount value to a thorough examination of the effects of agency activity.

Matthew Finkelstein

VI. NATIONAL INVASIVE SPECIES ACT

Fednav, Ltd. v. Chester,
2008 FED App. 0414P (6th Cir.)

1. Background

The presence of aquatic invasive species (AIS) in U.S. waters is a significant environmental and economic threat. Consequently, Congress passed the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA), later amended by the National Invasive Species Act of 1996 (NISA), to address the problem of AIS introduction through the ballast water of oceangoing vessels. 16 U.S.C. §§ 4701-4751 (2006). Regulations require all vessels entering U.S. waters and carrying ballast water from beyond the exclusive economic zone (EEZ) to adopt one of the following ballast water management practices: (1) carry out an exchange of the vessel's ballast water beyond the EEZ to achieve a minimum salinity level, (2) retain the ballast water onboard the vessel, or (3) use an alternative method approved by the United States Coast Guard. 33 C.F.R. § 151.1510(a) (2008). The Coast Guard has yet to approve any alternative methods for ballast water management. Fednav, Ltd. v. Chester, 2008 FED App. 0414P, at 611 (6th Cir.).

For oceangoing vessels entering U.S. waters that declare there is no ballast on board (NOBOB), the ballast water management requirements do not apply. *Id.* at 612. However, NOBOBs entering the Great Lakes are encouraged to voluntarily conduct an exchange of their ballast water beyond the EEZ or to use saltwater flushing in their ballast water tanks. Ballast Water Management for Vessels Entering the Great Lakes That Declare No Ballast Onboard, Coast Guard, 70 Fed. Reg. 51,831, 51,835

(Aug. 31, 2005). The absence of mandatory ballast water management requirements for NOBOBs is a notable loophole in the law, because even the Coast Guard recognizes that NOBOBs can spread AIS through the "residual ballast water and/or accumulated sediment" in their ballast water tanks during later exchanges in U.S. waters. *Id.* at 51,832.

In 2005, the State of Michigan enacted its own ballast water statute, consisting of two components: (1) a permit requirement and (2) a treatment requirement. MICH. COMP. LAWS ANN. § 324.3112(6) (2008). Pursuant to this statute, all oceangoing vessels engaging in port operations in Michigan must purchase a permit from the Michigan Department of Environmental Quality (MDEQ) for $75 plus a $150 annual fee, report information to the MDEQ, and either certify that ballast water will not be discharged in Michigan or comply with the treatment requirement. *Fednav*, 2008 FED App. 0414P, at 613. Vessels that intend to discharge ballast water in Michigan must adopt one of the following four treatment methods approved by the MDEQ: "(1) hypochlorite treatment, (2) chlorine dioxide treatment, (3) ultraviolet light radiation treatment preceded by suspended solids removal, or (4) deoxygenation treatment."

The Michigan ballast water statute prompted the plaintiffs in the noted case to file suit against Steven Chester, the MDEQ director, and Michael Cox, the Michigan Attorney General, on March 15, 2007, in the United States District Court for the Eastern District of Michigan. The plaintiffs were four shipping companies, three shipping associations, a port terminal, and a port association. *Id.* at 614-15. In the complaint, the plaintiffs claimed the Michigan ballast water statute was unconstitutional because it was preempted by federal law and violated the Commerce Clause and the Fourteenth Amendment's Due Process Clause. *Id.* at 613. The district court granted the defendants' motion to dismiss the complaint, which was joined by the following intervening defendants: the Natural Resources Defense Council, Michigan United Conservation Clubs, Alliance for the Great Lakes, and the National Wildlife Federation. *Id.* at 613-14. The plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit. *Id.* at 614.

2. The Court's Decision

The Sixth Circuit affirmed the district court's decision after de novo review, and held that: (1) only the plaintiff shipping companies and shipping associations had standing to challenge the permit requirement, while none of the other plaintiffs had standing to do so; (2) the permit requirement was not expressly or impliedly preempted by federal law;

(3) the permit requirement did not violate the Dormant Commerce Clause; and (4) the permit requirement did not violate the Fourteenth Amendment's Due Process Clause. *Id.* at 614-25.

a. Standing

A plaintiff has standing to file a lawsuit when it has suffered an injury in fact that is fairly traceable to the defendant and likely redressable by the court. *Id.* at 614 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Noting that standing determinations are "both plaintiff- and provision-specific," the Sixth Circuit conducted independent standing analyses for both the permit requirement and the treatment requirement of the Michigan ballast water statute. *Id.* at 614-15.

With respect to the permit requirement, the court found that the shipping companies had standing because they all had to purchase permits from the MDEQ and the permit costs represented an injury. *Id.* at 615. Under associational standing analysis, the court also found that the shipping associations had standing to bring these claims on behalf of their members because: (1) association members would have had standing "in their own right," (2) the interests the associations were pursuing in the case were "germane to its purpose," and (3) participation of association members in the lawsuit was not required. *Id.* (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)). However, the court determined that the port terminal and port association did not meet standing requirements to challenge the permit requirement. *Id.* at 616. Because the port terminal could only allege that vessels using its facilities would be burdened by the permit requirement, and not that the port terminal itself had suffered an injury, it lacked standing to challenge the requirement. Similarly, the port association also lacked standing, because it could only allege that its members had customers who were injured by the permit requirement.

Next, the court considered whether the shipping companies and shipping associations had standing to challenge the treatment requirement. The court noted that this requirement, which is applicable to "*all* oceangoing vessels that discharge ballast water in Michigan—NOBOB or not," could be burdensome because treatment costs could exceed a half-million dollars per vessel. *Id.* (citing MICH. COMP. LAWS ANN. § 324.3112(6) (2008)). However, the court stated that none of the plaintiffs alleged that they had been harmed by this requirement or even that they had spent any money to implement any of the approved treatment methods. Thus, there was no allegation of an injury. The court

also rejected the argument that the plaintiffs had standing because their vessels discharge ballast water in Michigan and would thus be subject to the treatment requirement. *Id.* at 616-17. Finally, the court rejected the notion that the plaintiffs had standing because they were challenging the whole ballast water regulatory scheme and noted that the plaintiffs could not use their standing with respect to the permit requirement to challenge the treatment requirement as well. *Id.* at 617-18 (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 n.5 (2006)).

b. Preemption

The court next considered whether the Michigan ballast water statute's permit requirement was preempted by federal law. *Id.* at 618. Federal preemption of state law can be either express or implied, and implied preemption consists of both field and conflict preemption. Considering each of these forms of preemption, the court found that federal law did not preempt the Michigan ballast water statute. *Id.* at 619. First, the court stated that express preemption did not exist here because "Congress did not expressly state in NANPCA or NISA that it intended to preempt state law." *Id.* at 619.

The court then considered the plaintiffs' argument that field preemption rendered the permit requirement unconstitutional. In its field preemption analysis, the court noted that it is first necessary to determine the relevant field at issue and then to determine whether the savings clause in NISA preserves the field for state regulation. Looking to the text of NISA, the court found that it involved two distinct fields: (1) the prevention of AIS introduction and (2) the control of AIS after its introduction. Concluding the Michigan ballast water statute addressed the field of prevention, the court next looked to NISA's savings clause. The court found that the savings clause only preserved state authority with respect to AIS control measures and said nothing about prevention. Consequently, the court stated that it was necessary to infer Congressional intent on the issue of AIS prevention by looking at NISA's remaining statutory text. *Id.* at 619-20.

In order to infer congressional intent as to whether state prevention measures were preempted by NISA, the court engaged in a careful textual review of the statute. *Id.* at 620. First, it noted that the statute suggests states will have a role in addressing the AIS problem. It was then necessary to determine whether expected state involvement is limited to control or includes prevention as well. The court analyzed statements in NISA regarding regional cooperation to address AIS in the Great Lakes and found that the statute inferred the involvement of states

with AIS prevention measures. The court found additional support for this conclusion in another section of NISA that invited state governors to submit state and local-level management plans for prevention and control programs to a task force. *Id.* at 620-21. Furthermore, NISA provided for potential federal funding of state management plans. *Id.* at 621. Accordingly, the court stated, "[N]ot only does NISA make clear that state ANS prevention measures are permissible; it actually expresses a conditional willingness to *pay* for them." Therefore, the court concluded, federal law did not preempt the field of AIS prevention measures. The court also rejected plaintiffs' claim that "certain aspects of maritime commerce are inherently federal and thus not subject to state regulation of any kind," finding no federal statute to support this argument, at least in this context. *Id.* at 622.

Finally, the court determined that conflict preemption could not be invoked as a means to defeat the permit requirement. *Id.* at 623. Conflict preemption occurs either when it is impossible to comply with both federal and state law or when state law prevents the achievement of federal legislative goals. *Id.* (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The court concluded it was not impossible to comply with both the permit requirement and NISA, because the permit requirement simply required the payment of fees and the reporting of information. Furthermore, the court concluded that Michigan's ballast water statute and NISA actually shared the same purpose: to prevent the introduction and dispersal of AIS. Thus, Michigan's ballast water statute did not frustrate the achievement of congressional goals.

c. Dormant Commerce Clause

The court next considered the plaintiffs' claim that the Michigan ballast water statute's permit requirement violated the "Dormant" Commerce Clause by burdening interstate commerce. State statutes that impose burdens evenhandedly and "[do] not 'favor in-state economic interests over out-of-state interests," *id.* at 623 (citing Brown-Forman Distillers Corp. v. N.Y. Liquor Auth., 476 U.S. 573, 579 (1986), are "'upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 623 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

The court noted that the permit requirement did not discriminate against out-of-state interests because the statute was applicable to all oceangoing vessels, including those from Michigan. *See id.* at 623. Furthermore, the court concluded that in light of the high environmental

and economic costs associated with AIS, even marginal success in relation to the AIS problem as a result of the permit requirement would create significant local benefits. *Id.* at 623-24. Such benefits contrasted with what the court determined to be the de minimis burden of the permit fees and reporting requirements. *Id.* at 624. Finally, the court noted that it would be absurd to consider the permit requirement a violation of the "Dormant" Commerce Clause when Congress "expressly contemplated" state involvement in AIS prevention when it passed NISA pursuant to its Commerce Clause power. *Id.* at 621, 625.

d. Due Process Clause

Finally, the Sixth Circuit considered plaintiffs' claim that the permit requirement violated the Fourteenth Amendment by depriving them of property without due process of law because the permit requirement applied to all oceangoing vessels, even those not discharging ballast water in Michigan. *Id.* at 624. The court noted that it was "undisputed that the permit requirement is subject only to rational-basis review," meaning that the requirement "'need only be rationally related to a legitimate government purpose' to be upheld." *Id.* at 624 (quoting Thompson v. Ashe, 2001 FED App. 0160P, at 407 (6th Cir.)). Accordingly, because Michigan has a legitimate interest in protecting its waters from AIS introduction via oceangoing vessels, and the permit requirement helps the MDEQ achieve compliance with the state's ballast water regulations, the permit requirement did not violate due process. *Id.* at 625.

3. Conclusion

While the outcome of the noted case is likely to be seen as a victory by environmentalists who would like to see states enact ballast water regulations that are tougher than the federal ballast water scheme, such an effect is not necessarily the ideal way to combat the AIS problem. One state's effort at stringent ballast water regulation can be thwarted by a neighboring state's lax regulation if the two states have connected waterways. After all, fish do not recognize state borders. Furthermore, if many states begin to follow the Michigan approach and enact ballast water statutes with varying permit and treatment requirements, there is a risk of a growing patchwork of obligations for shippers that undoubtedly will lead to increased costs. The problem of AIS is one that demands international cooperation and is well-suited for a uniform federal approach, albeit more stringent than that which is currently in effect. *See*

Jason A. Boothe, Comment, *Defending the Homeland: A Call to Action in the War Against Aquatic Invasive Species*, 21 TUL. ENVTL. L.J. 407 (2008).

Finally, it is worth mentioning that in the noted case, the court did not consider the plaintiffs' claims regarding the Michigan ballast water statute's treatment requirement, which has *much* higher compliance costs than the permit requirement. As the court noted, compliance with the treatment requirement could exceed a half-million dollars per vessel. *Fednav*, 2008 FED App. 0414P, at 616. While a court's preemption and Dormant Commerce Clause analyses may be similar in a case challenging the treatment requirement, and although it may be difficult to escape the notion that Congress expected state action on AIS issues when it enacted NISA, it is possible that a future case involving a challenge to the treatment requirement may be treated differently due to the significantly higher costs involved.

Jason A. Boothe

VII. RENEWABLE ENERGY TECHNOLOGY

The Federal Energy Regulatory Commission Issues Preliminary Permits for Hydrokinetic Projects on the Mississippi River, Order Issuing Preliminary Permit, FFP Project 24, LLC, 122 FERC ¶ 62,023 (Jan. 15, 2008)

1. Overview

On January 15, 2008, the Federal Energy Regulatory Commission (FERC) issued preliminary permits to the Free Flow Power Corporation (FFP) to study the potential use of hydrokinetic energy projects on the Mississippi River. Order Issuing Preliminary Permit, FFP Project 24, LLC, 122 FERC ¶ 62,023 (Jan. 15, 2008), *available at* http://elibrary.ferc.gov/idmws/search/fercgensearch.asp (search 2008 Docket No. P-12844) [hereinafter FFP Project 24 Order]. While the FERC had issued other hydrokinetic preliminary permits, this was the first of many issued for the Mississippi River within Louisiana. FERC, Issued and Valid Hydrokinetic Projects Preliminary Permits, http://www.ferc.gov/industries/hydropower/indus-act/hydrokinetics/permits-issued.asp (last visited Mar. 21, 2009). By May 28, 2008, the FERC had granted the FFP an additional thirty-one preliminary permits in the Louisiana portion of the Mississippi River. FERC, FEERC: Hydropower—Licensing—Preliminary Permits: Issued Preliminary Permits, http://www.ferc.gov/

industries/hydropower/gen-info/licensing/pre-permits.asp (last visited Mar. 21, 2009) [hereinafter Preliminary Permits]. The preliminary permit is not a license to construct and operate a hydrokinetic generator, but rather grants the applicant the right to study an area for the suitability of a project development prior to a formal license application. FERC, Hydropower—Licensing & Preliminary Permits, http://www.ferc.gov/industries/hydropower/gen-info/licensing/pre-permits.asp (last visited Mar. 21, 2009).

Renewable energy technologies offer the promise of environmentally friendly alternatives to fossil and nuclear-fueled energy generation to meet the growing demand for electricity. This is particularly important for a state like Louisiana that relies heavily on oil and natural gas. Energy Info. Admin., State Energy Profiles: Louisiana, http://tonto.eia.doe.gov/state/state_energy_profiles.cfm?sid=LA (last visited Mar. 25, 2009). An important emerging category of renewable energy technology is the hydrokinetic turbine, which can tap the energy of moving water but does not require dams or water diversion, as do more conventional hydroelectric facilities. Daniel Irvin, Chief Executive Officer, Free Flow Power corporation, Application for Preliminary Permit—Point Pleasant Project (July 24, 2007), *available at* http://elibrary.ferc.gov/idmws/search/fercgensearch.asp (search 2007 Docket No. P-12844) [hereinafter Point Pleasant Application]. Hydrokinetic turbines are deployed on the beds of waterways and are designed to generate electricity at a cost that competes with conventional forms of generation without disrupting the aquatic or marine environment, interfering with recreational and navigational uses of water resources, or being seen above the surface of the water.

While there are thousands of rivers in the United States, the Mississippi River is one of the largest available sources of river energy in North America. FFP, FFP Energy Projects, http://www.free-flow-power.com/index.php?id=11 (last visited Mar. 21, 2009). The FFP took the first step in tapping Mississippi's currents for electricity generation with the preliminary permits granted by the FERC.

2. Background

The FFP developed a hydrokinetic turbine to extract energy from currents in rivers and streams without building new dams. Point Pleasant Application, *supra*. The FFP's plan seeks to deploy turbines in arrays of multiple units spaced no less than fifty feet apart at each of the locations granted by the preliminary permits. Each location consists of between 900 and 5000 turbines configured in a series of matrices. FFP, *supra*.

Each matrix has an estimated footprint of six meters by six meters and will be moored to the river bottom using free standing pilings. In general, the FFP's facilities will use less than one percent of the area of the sites sought for development.

As the testing ground for in-stream hydrokinetic energy production, Louisiana is poised to realize significant environmental and economic benefits. Each turbine generator is estimated to avoid sixty tons of carbon dioxide per year, which equates to 63 tons of coal, 127 barrels of oil, or 780,000 cubic feet of natural gas. FFP, Benefits of FFP Turbines and Hydrokinetics, http://free-flow-power.com/index.php?id=32 (last visited Mar. 21, 2009). Furthermore, the project has no visual impact above the surface of the water. When developed, the FFP's projects will avoid twelve million tons of carbon dioxide annually, the equivalent of 12.5 million tons of coal, 25 million barrels of oil, and 250 billion cubic feet of natural gas.

3. FERC's Grant of the Preliminary Permit

Section 4(f) of the Federal Power Act (FPA) authorizes the FERC to issue preliminary permits for the purpose of enabling prospective hydropower lease applicants to complete a feasibility analysis and perform the acts required by the FPA on domestic navigable waters, defined, for purposes of the FPA, as those waters to which Congress's jurisdiction extends under the Commerce Power. 16 U.S.C. § 797(f) (2006). The purpose of a preliminary permit is to preserve the permit holder's right of first priority in applying for a license for the project that is being studied. *See, e.g.*, Order Granting in Part and Denying in Part Request for Rehearing, Mt. Hope Waterpower Project LLP, 116 FERC ¶ 61,232 (Sept. 8, 2006), *available at* http://elibrary.ferc.gov/idmws/search/fercgensearch.asp (search 2006 Docket No. P-12641) ("The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (*i.e.*, guaranteed first-to-file status) with respect to the filing of development applications for the affected site.").

Prior to 2007, the FERC had no guidelines particular to processing permits for hydrokinetic projects because the technology did not yet exist. FERC, Timeline of Commission Actions Related to Hydrokinetics, http://www.ferc.gov/industries/hydropower/indus-act/hydrokinetics.asp (last visited Mar. 21, 2008). In February 2007, the FERC issued a Notice of Inquiry and Interim Statement of Policy seeking input in the development of procedures for reviewing and issuing preliminary permits for hydrokinetic energy devices. *See* Preliminary Permits for

Wave, Current, and Instream New Technology Hydropower Projects, Notice of Inquiry and Interim Statement of Policy, 118 FERC ¶ 61,112 (Feb. 15, 2007), *available at* http://www.elibrary.ferc.gov/idmws/search/fercgensearch.asp (search 2007 Docket No. RM07-08). Based on the comments received from industry stakeholders, the FERC adopted a "strict scrutiny" approach to granting preliminary applications. Order Issuing Preliminary Permit, Reedsport OPT Wave Park, LLC, 118 FERC ¶ 61,118, *available at* http://elibrary.ferc.gov/idmws/search/fercgensearch.asp (search 2007 Docket No. P-12713) (Feb. 16, 2007) [hereinafter Reedsport Order].

The standard of review focuses on criteria to encourage competition and to incorporate sufficient public input and transparency in the feasibility process. To prevent site banking, the FERC determined that any new permits must be limited by boundaries. Permit issuance would also be predicated on the applicant's completion of public outreach and agency consultation reports, development of feasibility studies, and compliance with periodic deadlines for filing a notice of intent (NOI) to file a license application and a pre-application document (PAD). Furthermore, to ensure that permit holders are actively pursuing project exploration, the FERC scrutinizes the progress reports that permit holders are required to file on a semi-annual basis and reserves the right to cancel the permit.

The prefiling process begins with preparation of the NOI and PAD pursuant to FERC Regulations. 18 C.F.R. §§ 5.5-5.6 (2006). After the filing, notice of the application is published, and interested persons and agencies have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation. Reedsport Order, *supra*.

Upon receiving the FFP's first application on July 24, 2007, the FERC issued a public notice of the filing. FFP Project 24 Order, *supra*. No motions to intervene were filed. Comments were filed by the U.S. Department of the Interior (DOI) and the State of Louisiana. The DOI noted that the comments provided were intended to serve as a planning aid in the event an application for a license was pursued. Louisiana issued a letter of support for the FFP's proposal to study this new technology project.

Upon completing a review of the FFP's applications, the FERC issued thirty-two preliminary permits to the FFP between January 15, 2008, and May 28, 2008, to study hydrokinetic turbine installation on the bed of the Mississippi River in Louisiana. Preliminary Permits Spreadsheet, *supra*. The FERC granted the FFP a thirty-six-month

period to complete a feasibility analysis, satisfy a number of criteria, and obtain all necessary federal permits prior to commencing construction. FFP Project 24 Order, *supra*, at 4. Requirements include progress reports, an NOI to file a license application, and a PAD within forty-five days. While the preliminary permit grants the applicant authority to perform tests within the designated boundaries, it also requires the applicant to restore all test sites to their original condition in order "to prevent irreparable damage to the environment of the proposed project." *Id.* at 6.

The FFP is also obligated to file progress reports at the close of each six-month period from the permit's effective date. The FERC requires that each report describe, for that period, "the nature and timing of what the Permittee has done under the pre-filing requirements . . . and, where studies require access to and use of land not owned by the Permittee, the status of the Permittee's efforts to obtain permission."

Furthermore, maintaining its self-imposed "strict scrutiny" standard, the FFP Project 24 Order prohibits transferability of the permit, and maintains the right to cancel the permit "upon failure of the Permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown." If the FFP fails to satisfy the requirements in conformity with the FERC's rules and regulations, the permit's priority status will be lost, but not revoked.

4. Analysis

The FFP timely filed its application, met the FERC's standards, and complied with the periodic reporting and filing procedures. The FERC's orders issuing the preliminary permits to the FFP were appropriate. The FERC's findings, however, do not end the inquiry into the suitability of the project. While the environmental impact of hydrokinetic turbines may be less than that of conventional hydroelectric technology, uncertainty regarding its effects presents reason to proceed with caution when introducing this new activity to the marine environment. *See, e.g.*, Ecological Effects of Wave Energy Development in the Pacific Northwest: A Scientific Workshop—Workshop Summary 2-4, *available at* http://hmsc.oregonstate.edu/waveenergy/WEWSummary.pdf (last visited Mar. 25, 2009) (summarizing information currently known about impacts, as compiled by workshop attendees). More exacting standards are appropriate when facing such uncertainty. The FERC should be commended for its strict scrutiny during the permitting process.

Despite the environmental concerns with respect to FFP projects, the potential economic impact on Louisiana could be substantial. With global energy demand predicted to rise 53% by the year 2030, demand for new, cost-efficient and renewable energy sources will continue to increase. Envtl. Leader, IAE Predicts Global Energy Demand Up 53% by 2030, http://www.environmentalleader.com/2006/11/09/iae-predicts-global-energy-demand-up-53-by-2030 (last visited Mar. 25, 2009). Additionally, hydrokinetic power will "provide cost-effective, reliable energy to consumers, provide jobs in manufacturing, project construction, operations and maintenance, [and] encourage 'spin off' industries in magnetics, advanced materials and turbo-machinery" in Louisiana. FFP, Benefits of FFP Turbines and Hydrokinetics, *available at* http://free-flow-power.com/index.php?id=32 (last visited Mar. 21, 2009). The three billion dollars spent building the FFP projects could power 500,000 to 600,000 homes a year, or two nuclear power plants' worth of production. Autumn C. Giusti, Film Studio Has Sights Set on Green Recognition, NEW ORLEANS CITY BUS., Feb. 16, 2009, *available at* http://www.neworleanscitybusiness.com/viewstory.cfm?recID=32738.

5. Conclusion

The FERC's grant of preliminary permits for hydrokinetic projects on the Mississippi River represents a once-in-a-generation opportunity for Louisiana. While project completion is years away and there are many regulatory, environmental, and financial hurdles to overcome, Louisiana and the nation as a whole must continue to facilitate and pursue the development of hydrokinetic technologies.

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