RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

EPA Proposes To Find that Greenhouse Gases Endanger the Public Health and Welfare and that Motor Vehicle Emissions Cause or Contribute to the Threat of Climate Change—A First Step Toward a Regulatory Framework for Climate Change

In a break from policy under President George W. Bush, the United States Environmental Protection Agency (EPA), under the administration of President Barack Obama, this year issued a proposed finding that the mix of six "greenhouse gases in the atmosphere threaten[s] the public health and welfare of current and future generations." EPA Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1). In the same

notice, the EPA also proposed to find that "the combined emissions of [four of the greenhouse gases] from new motor vehicles and new motor vehicle engines are contributing to this mix of greenhouse gases in the atmosphere," and thus "to air pollution which is endangering public health and welfare." If the EPA does in fact make these findings, it will then be obligated to regulate greenhouse gases, at least from mobile sources, under the Clean Air Act. *See* Clean Air Act § 202(a)(1), 42 U.S.C.A. § 7521(a)(1) (1990) ("The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [her] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."). EPA Administrator Lisa P. Jackson stated that the proposed findings confirm the seriousness of climate change, but that a solution to the problem exists. Press Release, EPA, EPA Finds Greenhouse Gases Pose Threat to Public Health, Welfare/Proposed Finding Comes in Response to 2007 Supreme Court Ruling (Apr. 17, 2009), http://yosemite.epa.gov/opa/admpress.nsf/0/0EF7DF675805295D8525759B00566924.

A. The Proposed Findings

The EPA proposed to find that (1) under section 202(a) of the Clean Air Act, the mix of six long-lived greenhouse gases: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6), constitutes air pollution; and (2) the combined emissions of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons from new motor vehicles and their engines contribute to that air pollution which may reasonably be anticipated to endanger public health or welfare. Proposed Endangerment and Cause or Contribute Findings, 74 Fed. Reg. at 18,887-88. The proposed findings first laid out background information necessary to support the proposal, stating that greenhouse gases effectively trap some of the heat on the earth that would otherwise escape into space and that, "once emitted, remain in the atmosphere for decades to centuries." *Id.* at 18,888. Notably, the proposal states that "[t]he heating effect caused by the *human-induced* buildup of greenhouse gases in the atmosphere is very likely the cause of *most* of the observed global warming over the last [fifty] years." *Id.* (emphasis added). The proposal also asserts that the domestic transportation sector is a significant contributor to overall greenhouse gas emissions.

The EPA must satisfy a two-step test before it may issue standards to regulate greenhouse gas emissions: the EPA must decide, first, whether the particular air pollution under consideration "may reasonably be anticipated to endanger public health or welfare," and second, whether emissions of particular air pollutants cause or contribute to that air pollution. While the EPA is proposing these "endangerment" and "cause or contribute" findings, it will move separately to develop regulatory standards. *Id.* at 18,888-89. The proposal summarized EPA's authority and duty to make these findings. In 1999, several organizations filed a petition for rulemaking seeking regulation of greenhouse gases under section 202(a) of the Clean Air Act. The EPA concluded that it lacked the authority under the Clean Air Act to regulate greenhouse gases and denied that petition in 2003. *Id.* at 18,889. The United States Supreme Court reversed that decision, holding that greenhouse gases are air pollutants under the Clean Air Act and that the EPA's grounds for denying the petition were improper based on the statutory text. *Id.* (citing Massachusetts v. EPA, 549 U.S. 497 (2007)). The Court held that the EPA's decision whether to grant the petition must be grounded in the statutory language, and that it could "avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Id.* (quoting *Massachusetts*, 549 U.S. at 533).

The proposal next summarized the legal framework for the findings. It looked to the language of the statute, finding first that, because the EPA is required to protect the public health, it must act to *prevent* harm and consider both current and future risks. *Id.* at 18,890. Second, the EPA must exercise judgment "by weighing risks, assessing potential harms, and making reasonable projections of future trends and possibilities," which necessarily means exercising reasoned decision making while avoiding speculative "crystal ball inquiries." Third, the EPA must consider cumulative impacts. Fourth, the EPA must take environmental justice concerns into account and consider risks to all parts of our population. Thus, "when severe risks to the public health and welfare are involved, the [EPA] need not wait [to act] as evidence continues to accumulate." Furthermore, the legislative history indicates that Congress intended the language to:

> (1) emphasize[] the preventive or precautionary nature of the [Clean Air Act]; (2) authorize[] the [EPA] to reasonably project into the future and weigh risks; (3) assure[] the consideration of the cumulative impact of all sources; (4) instruct[] that the health of susceptible individuals, as well as

> healthy adults, should be part of the analysis; and (5) indicate[] an awareness of the uncertainties and limitations in information available to the [EPA].

Id. at 18,891 (citing H.R. REP. NO. 95-294, at 49-50 (1977); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976)). Finally, the proposal noted that the definitions for "air pollutant" and "welfare" are very broad, and that when considering public health, the EPA looks to morbidity and mortality. *Id.* at 18,893-94.

1. Proposed Endangerment Finding

The proposal began the endangerment finding section by stating that it utilized the best scientific information available. *Id.* at 18,894. The EPA synthesized the best available scientific assessments, mainly from the Intergovernmental Panel on Climate Change (IPCC) and the U.S. Climate Change Science Program (CCSP), into a technical support document. Furthermore, the EPA decided to consider the relevant timeframe "over which greenhouse gases may influence the climate," a broad range of effects beyond only those attributable to greenhouse gas emissions from section 202(a) of the Clean Air Act, and risks and impacts in the global context. Finally, the EPA did not consider potential public or private behavior aimed at ameliorating the effects of climate change because that is a separate matter from "[d]etermining whether there are adverse public health and welfare impacts due to the existence of air pollution."

The proposal then sought to define the air pollution at issue as the "combined mix of six key directly-emitted and long-lived greenhouse gases which together constitute the root cause of human-induced climate change." *Id.* at 18,895. The proposal found that the greenhouse gases share common properties: they live in the atmosphere for several hundred to several thousand years, they become globally well mixed in the atmosphere regardless of where the emissions occur, and they trap heat that would otherwise escape to space. The proposal stated that carbon dioxide is the most important greenhouse gas at issue, but that the combination of the other five gases results in a heating effect approximately 40% as large as the human-induced carbon dioxide effect. It also states that treating the air pollution as a *mix* of the gases is consistent with other provisions in the Clean Air Act, because cumulative impacts are more directly related to the mix of the gases and causality is much easier to determine that on a gas-by-gas basis.

Turning to the levels of the greenhouse gases in the atmosphere, the proposal found that the concentrations of greenhouse gases in the atmosphere are currently at elevated levels because of human emissions. Current carbon dioxide emissions are at 386 parts per million, increasing at a rate of approximately two parts per million per year. Similarly, methane and nitrous oxide concentrations have increased dramatically from preindustrial levels. And while the concentration levels for hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride are currently low, they are increasing rapidly. The current atmospheric concentrations of the greenhouse gases are "well above" the natural levels over the last 650,000 years, primarily as a result of human activities, and are projected to continue rising. *Id.* at 18,896.

The proposal then found compelling the scientific evidence that the elevated levels of greenhouse gases in the atmosphere are the root cause of observed climate change to date, different from historic causes of climate change, such as cyclical changes in Earth's orbit. The net effect of the increased concentration levels has been one of warming. In a major departure from prior policy, the proposal found that observed warming "is now *unequivocal*," evidenced by increases in global average temperatures, melting of snow and ice, and rising sea levels. *Id.* (emphasis added). Model simulations can account for the observed level of warming only when both natural and anthropogenic causes are taken into account. Thus, the proposal reasoned, the definition of air pollution as the mix of the greenhouse gases identifies the fundamental driver of climate change, and can be associated with all current and future risks of climate change.

Finally, the proposal turned to the endangerment finding itself, finding that "current and projected levels of the mix of the six greenhouse gases endanger the public health and welfare of current and future generations." *Id.* at 18,898. Turning first to evidence of currently observed climatic and related effects, the proposal stated that those effects "can adversely affect and pose risks to both public health and welfare." The proposal also considered future effects, stating that the EPA believes "risks to the public health and welfare will [likely] grow over time so that future generations will be especially vulnerable," potentially including catastrophic harms. *Id.* at 18,899. Surface temperatures have risen globally, and are projected to rise to between 1.8 to 4.0°C (3.2 to 7.2°F) by the end of the century. *Id.* at 18,898-901. Likewise, precipitation has greatly increased globally and domestically over the last century, and is expected to continue increasing. Sea levels have also risen dramatically, especially along the Atlantic and Gulf

coasts, and are expected to rise between 0.18 and 0.59 meters above 1990 levels by the end of the century. Notably, changes in extreme temperatures have also been observed, including an increasing frequency in hot days and nights and a decreasing frequency of cold days and nights. Atlantic hurricanes have increased in frequency and power, and storm events, flooding, and tropical storms and hurricanes are all expected to increase in frequency and intensity in the United States over the next century. Beyond just climatic changes, "water resources, agriculture, land resources, and biodiversity" are also being affected. *Id.* at 18,899. Water availability is expected to decrease as water storage capacity is disrupted, and rising sea levels could cause salt water to intrude into coastal ground aquifers, further reducing freshwater availability. And a report found that the number and frequency of forest fires and insect outbreaks are increasing, stream flow and stream temperatures are increasing in the United States, the western part of the country is experiencing reduced snowpack and earlier peaks in spring runoff, crop and weed growth is being stimulated, and the composition and structure of arid, polar, aquatic, coastal, and other ecosystems are changing as a result of migration of plant and animal species. Alarmingly, "most areas of the [United States] are expected to warm by more than the global average." *Id.* at 18,900.

The proposal then found that all the current and projected effects from climate change as a result of increased concentrations of greenhouse gases in the atmosphere "pose serious risks to public health" and are expected to increase over time. *Id.* at 18,901. While the ambient concentrations of the greenhouse gases do not themselves cause adverse health effects, they do lead to adverse health effects via climate change. For example, severe heat waves are expected to intensify in magnitude and duration, leading to increases in mortality and morbidity, especially among at-risk segments of the population. And while modest temperature increase in the short run may actually produce some health benefits, the balance of risks weighs toward public health endangerment. The risks of respiratory infection, asthma, and premature death increase as a result of regional ozone pollution levels rising, even with the EPA's National Ambient Air Quality Standards (NAAQS) already in place to deal with ozone problems; climate change will only exacerbate the challenges the NAAQS programs already face. Other potential adverse health effects include increases in the spread of food and water-borne pathogens, especially among susceptible populations, and possibly lead to an increase in the growth and distribution of certain airborne allergens. Notably, the impacts from climate change will be further "compounded

by population growth and an aging population." The adverse public health effects are very likely to affect the more vulnerable segments of our population, including the elderly, the very young, the disabled, those living alone, immigrants, indigenous populations, and those in geographically vulnerable locations such as the Gulf Coast. *Id.* at 18,901-02.

The proposal next found that climate change is having, and will continue to have, an adverse effect on public welfare, distinct from public health, and defined as "including, but not limited to, 'effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.'" *Id.* at 18,902 (quoting Clean Air Act § 302(h), 42 U.S.C.A. § 7602(h) (1990)). These effects will include increased constraints on "already over-allocated water resources . . . , increasing competition among agricultural, municipal, industrial, and ecological uses." Similarly, water quality, navigation, recreation, hydropower generation, water transfers, and water pollution will all be effected. Changes will occur in crop production and lifecycles, and livestock production is expected to be reduced. Ecosystems will face increased challenges from forest fires, insect outbreaks, tree mortality, precipitation, nitrogen deposition, and ozone pollution. Coastal communities will face increases in sea level, shoreline erosion, compromised freshwater sources, increasingly intense storms and hurricanes, and threats to coastal habitats and dependent species. Ocean acidification is expected to continue, affecting biological production and ecosystems. Climate change will also likely affect and interact with energy use, energy production, and physical and institutional infrastructures. Ecosystems in the United States are also very likely to fundamentally rearrange, including some species shifting to higher elevations. *Id.* at 18,903.

The last parts of the endangerment finding section discussed the international effects of climate change, as well as the inherent uncertainties associated with projecting risks and impacts of climate change. While the potential adverse effects from climate change around the world support the proposed finding, they are not necessary to reach the same conclusion. *Id.* at 18,903. Even so, many areas of the world are expected to experience greater impacts than those in the United States, especially the Arctic region, Africa (especially the sub-Saharan region), small islands, and Asian mega deltas. Climate change is likely to affect the health of millions of people, food production in poorer regions of the world, coastal and island communities, and ecosystems and species

around the world. Additionally, climate change impacts may raise economic, humanitarian, trade, and national securities for the United States. And while there are many inherent uncertainties associated with climate change models and projections, including the inability to attribute any one event to climate change, the unknown precise magnitudes and rates of future climate change, and the possibility that risks may be either greater or lesser than projected, the EPA has been charged with the duty "to consider uncertainties and extrapolate from limited data." *Id.* at 18,891. Based on the scientific evidence, the EPA believes there is "compelling evidence of human-induced climate change, and that serious risks and potential impacts to public health and welfare have been clearly identified, even if they cannot always be quantified with" absolute certainty. *Id.* at 18,904. In another major change in rhetoric, the EPA stated that this is not even a close case, because the magnitude and probability of climate change both present "an enormous problem." Thus, the EPA proposed to find that the greenhouse gases responsible for climate change "endanger public health and welfare within the meaning of the Clean Air Act."

2. Proposed Cause or Contribute Finding

The "cause or contribute" section discussed the air pollutant(s) that may cause or contribute to the air pollution as defined in the endangerment proposal. *Id.* at 18,904-09. Essentially, air pollution is the cumulative concentration of greenhouse gases in the atmosphere, while air pollutants are the emissions that contribute to that air pollution. The EPA found that the source categories, new motor vehicles and their engines, emit four of the greenhouse gases defined in the air pollutant: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. The EPA proposed to define a single air pollutant as the collection of six greenhouse gases, an approach consistent with that of climate scientists and policymakers. *Id.* at 18,904 (citing the United States' and other Parties' obligation to report annual emissions of the six greenhouse gases in CO_2-equivalent units under the United Nations Framework Convention on Climate Change). The approach is also consistent with prior EPA practice of treating "a class of substances with similar impacts on the environment as a single pollutant (e.g., particulate matter, volatile organic compounds)," because the gases share common properties regarding their effects. *Id.* at 18,904-05. The proposal stated that while new motor vehicles and their engines emit only four of the six greenhouse gases at issue, it is consistent to have a source category that emits only a subset of a class of substances that together constitute an air pollutant. *Id.* at

18,905 ("For example, a source may emit only 20 of the possible 200 plus chemicals that meet the definition of volatile organic compound (VOC) in the regulations, but that source is evaluated based on its emissions of 'VOCs,' and not its emissions of the 20 chemicals by name."). Furthermore, the EPA stated that by defining the air pollutant as the collection of greenhouse gases, it would then have the authority to regulate either "the emissions of the group as a whole, and/or . . . emissions of individual greenhouse gases, as constituents of the class." And even if the EPA defined *each* greenhouse gas as a pollutant, it could still "set separate standards, a group standard, or some combination of those."

Turning to the "cause or contribute" finding itself, the proposal found that total greenhouse gas emissions in the United States increased by approximately 15% between 1990 and 2006, mostly from the energy generation and transportation sectors. In that same time, total global greenhouse gas emissions increased approximately 26%. In 2005, the United States was responsible for 18% of global greenhouse gas emissions, ranking only behind China at 19%.

The EPA looked at the mobile sources, as determined by section 202(a)(1) of the Clean Air Act, that emit four of the six greenhouse gases, including passenger cars, light-duty trucks, motorcycles, buses, and medium/heavy-duty trucks. *Id.* at 18,905-06 (quoting Clean Air Act § 202(a)(1), 42 U.S.C.A. § 7521(a)(1) (1990)). The EPA also determined that "the logical starting point for any contribution analysis is a comparison of the emissions of the air pollutant from the section 202(a) category to the total, global emissions of the six greenhouse gases," as opposed to several other, narrower approaches. *Id.* at 18,906. Furthermore, the "cause or contribute" analysis is based on current emissions, rather than future projected emissions, which are more uncertain.

The EPA found that the source categories under section 202(a) of the Clean Air Act were collectively the second largest contributor to greenhouse gas emissions in the United States as of 2006. Shockingly, if United States "section 202(a) source category greenhouse gas emissions [alone] were ranked against total greenhouse gas emissions for entire countries, [they] would rank behind only China, the [United States] as a whole, Russia and India, and would rank ahead of Japan, Brazil, Germany and every other country in the world." *Id.* at 18,906-07. The EPA thus proposed to find that emissions of the greenhouse gases from new motor vehicles and their engines "contribute to the air pollution previously discussed." *Id.* at 18,907. The proposal also stated that while emissions from the source categories contribute significantly as

compared to overall global emissions, and while the global aspects of climate change support the proposed finding, the EPA is placing "significant weight" on the fact that the emissions from source categories contribute to 24% of total greenhouse gas emissions in the United States. *Id.* at 18,906.

Last, the proposal considered the contribution from each of the four greenhouse gases individually. *Id.* at 18,907-09. The EPA found that carbon dioxide emissions grew from new motor vehicles and their engines by 32% between 1990 and 2006. *Id.* at 18,907. If the EPA were to consider carbon dioxide on its own, the EPA would find that the gas contributes to the defined air pollution, primarily because it comprises 94% of emissions from section 202(a) source categories. *Id.* at 18,907-08. Conversely, methane emissions from the same source categories decreased by 58% between 1990 and 2006, comprising just 0.11% of greenhouse gas emissions from the source categories in 2006. *Id.* at 18,908. Even so, the EPA would still find that methane contributes to the air pollution because its high potency still causes measurable adverse effects. Similarly, nitrous oxide emissions from source categories decreased by 27% between 1990 and 2006. However, nitrous oxide emissions from the source categories accounted for 8% of nitrous oxide emissions in the United States in 2006, second only to agricultural soil management, a fact the EPA relied on to state that it would find that nitrous oxide emissions from new motor vehicles and their engines contribute to the air pollution. And hydrofluorocarbons emissions increased by 270% between 1995 and 2006 from motor vehicles. Source categories were the single largest domestic contributor to hydrofluorocarbon emissions in 2006. The EPA found that source category emissions of hydrofluorocarbons would also contribute to pollution because, as a whole, those gases contribute to pollution. *Id.* at 18,908-09.

B. Conclusion

The proposed "endangerment" and "cause or contribute" findings represent a significant first step toward regulation meant to prevent, and guard against the effects of, climate change. While President Obama and EPA Administrator Lisa Jackson have stated their preference to address climate change through legislation first, attempts in Congress to address the problem have thus far stalled. Because a finding of endangerment and causation or contribution would obligate the EPA to act and set standards, the threat of this proposal being finalized may provide an incentive for Congress to act quickly and pass at least some form of

climate change legislation. Additionally, the early stages of a regulatory framework in this country to deal with climate change may provide the United States with some needed credibility as world leaders prepare to meet in Copenhagen this December to draft a successor to the Kyoto Protocol. While the proposed findings are a small step, they represent a step in the right direction.

David Tynan

II. CLEAN WATER ACT

Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District, 556 F.3d 603 (7th Cir. 2009)

In *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, the United States Court of Appeals for the Seventh Circuit assessed a thoroughly litigated citizens' suit against the Milwaukee Metropolitan Sewerage District (MMSD) under the Clean Water Act (CWA). 556 F.3d 603 (7th Cir. 2009). The case concerned sanitary sewerage overflows (SSOs), or instances of untreated sewage that escaped wastewater treatment by being discharged into the environment before it reached a treatment facility. The plaintiffs, Friends of Milwaukee's Rivers (Friends), alleged that SSOs that occurred from 1995 to 2001 were violations of MMSD's CWA permit as well as the CWA. *Id.* at 605. Friends sought declaratory judgment and injunctive relief, as well as civil penalties, costs and fees from MMSD under the citizens' suit provision of the CWA. The State of Wisconsin (State) also filed suit against MMSD the same day.

The State and MMSD reached a settlement (the 2002 Stipulation) shortly thereafter. It provided for substantial improvements by MMSD, including, for example, a twenty-five percent increase in wastewater storage capacity, reduced infiltration and technology improvements. MMSD subsequently moved to dismiss Friends' suit on res judicata grounds, arguing that "the State had commenced and diligently prosecuted judicial and administrative enforcement actions." *Id.* at 606. The United States District Court for the Eastern District of Wisconsin agreed, dismissing the suit as barred by the CWA and res judicata.

On appeal, the Seventh Circuit reversed the district court's finding that the CWA barred Friends' suit. It noted that courts lack subject matter jurisdiction over citizens' suits where the State has commenced administrative or judicial enforcement actions under the CWA. Here,

however, the State had not filed suit before Friends filed its citizens' suit. Therefore, the CWA did not bar Friends' suit.

The Seventh Circuit then addressed Friends' appeal of the district court's finding of res judicata. The Seventh Circuit agreed that two out of the three requirements were satisfied: (1) there was identity of the causes of action in the two suits, and (2) there had been prior litigation resulting in a final judgment on the merits by a court with jurisdiction. The Seventh Circuit could not find sufficient evidence from the record to satisfy the third element of a res judicata claim: that Friends were in privity with the State for purposes of the two actions. In order to satisfy this prong, "the State's subsequently-filed government action must be a diligent prosecution." In this case, this finding would also imply that "the 2002 Stipulation . . . is capable of requiring compliance with the [CWA] and is in good faith calculated to do so." The Seventh Circuit declined to take the parties' statements regarding whether a "diligent prosecution" had occurred, and engaged in a substantive analysis of the 2002 Stipulation. It remanded the issue to the district court because it was concerned that the 2002 Stipulation may not result in MMSD's compliance with the CWA.

The district court heard testimony from both parties' experts before reaching its conclusion. *Id.* at 607-08. MMSD's expert, James T. Smullen, testified that capacity increases from the 2002 Stipulation would be more than enough to capture SSOs in the future. *Id.* at 608. Not surprisingly, plaintiffs' experts, Dr. Bruce A. Bell and Charles G. Burney, an employee of the Wisconsin Department of Natural Resources (WDNR), disagreed with Smullen's findings. The district court found Friends' experts less convincing, however, once the experts revealed that they did not use mathematic modeling to determine how the system would respond to storms and neglected to address other key facts.

In addition to expert testimony, Friends sought to introduce new evidence. First, Friends introduced evidence of two additional SSOs that had occurred in 2006, after they filed the original lawsuit. The district court admitted and considered this evidence. Friends then attempted to introduce a letter from an employee of the United States Environmental Protection Agency (EPA). The district court rejected this evidence on two grounds: first, that it was hearsay that did not qualify for an exception under Federal Rule of Evidence 803(8) (Rule 803(8)), which admitted public records; and second, even if it did fall under Rule 803(8), the district court noted that the letter was "not sufficiently reliable or trustworthy to overcome the rule against admission of hearsay evidence."

After addressing these issues, the district court determined that the 2002 Stipulation was a "diligent prosecution," which satisfied the need for privity among parties. It therefore dismissed Friends' suit on res judicata grounds. *Id.* at 609.

Friends appealed the district court's dismissal and denial of its motions. On appeal, the Seventh Circuit addressed two issues. First, whether the district court violated the Court's mandate issued when Friends first appealed by not admitting evidence and giving improper weight to the 2006 poststipulation violations of the CWA and poststipulation enforcement actions. Second, whether the district court incorrectly refused to admit and consider the EPA's letter to the WDNR. The Seventh Circuit noted that de novo review of res judicata claims is generally appropriate, but, because the district court held an evidentiary hearing to assess the credibility of the parties' witnesses, the clear error standard is appropriate on review. Thus, the Seventh Circuit looked to whether the district court's findings that the State's prosecution of MMSD's violations of the CWA was diligent and the weight it gave to the parties' experts were clearly erroneous.

Before addressing these issues, the Seventh Circuit first noted the unique situation in which it found itself. *Id.* at 610. No cases existed directly addressing the admissibility and probative value of poststipulation evidence on the issue of privity and diligent prosecution. The Seventh Circuit noted that, as a general rule, considering poststipulation evidence is not advised. *Id.* at 611. The admission of poststipulation poses several concerns. These include the need for finality in law and the corresponding possibility that a citizens' suit may go on indefinitely as long as new problems arise, the difficulty courts may have in determining the relevance of this evidence, the potential for interference with other government enforcement actions that consider poststipulation evidence, and the potential that this process may undermine parties' confidence in the binding nature of a settlement. Nonetheless, the Seventh Circuit found that MMSD's 2006 poststipulation violations were relevant, noting that this could provide valuable information regarding the effectiveness of the 2002 Stipulation. *Id.* at 612. Despite admitting this evidence in the case at bar, the Seventh Circuit refrained from providing guidance on the issue in a broader sense. It warned that the probative value and admissibility of poststipulation evidence should be evaluated on a case-by-case basis and district courts should be granted broad discretion in making this decision.

The Seventh Circuit then elucidated its "diligent prosecution" inquiry. *Id.* at 610. This inquiry is relevant because, without a diligent

prosecution, MMSD's res judicata claim would be groundless. The Seventh Circuit noted that the focus of the inquiry is whether a party's actions in reaching an agreement are calculated to eliminate the cause of the violations. This aim, in turn, is evaluated as of the time the agreement or judgment is executed and is based on the parties' then-existing information. Diligence does not require perfect foresight or a successful verdict from the State. *Id.* at 610-11. It exists when a citizens' representative, acting in good faith, obtained a judgment sufficient to redress injuries existing at the time and to prevent foreseeable future violations. *Id.* at 611. What happens later is irrelevant.

Returning to the issues presented, the Seventh Circuit first addressed Friends' contention that the district court failed to adequately weigh the poststipulation evidence it offered. Friends argued that the 2006 SSOs prove that the 2002 Stipulation would not have resulted in compliance with the CWA. The Seventh Circuit disagreed for three reasons. It first noted that it was unsurprising that SSOs occurred due to the same causes addressed by the 2002 Stipulation because MMSD had not yet completed the Stipulation's projects. Next, the Seventh Circuit found that, since an SSO caused by a storm that was bigger than the sewage system was designed to handle would not necessarily imply that MMSD had violated its permit, such an SSO would not correspondingly prove that the 2002 Stipulation was not capable of complying with the permit. Third, an SSO caused by independent events, such as a broken pump, would not imply that the 2002 Stipulation was not a diligent prosecution, either. *Id.* at 612-13.

The Seventh Circuit then explained that in light of the three aforementioned considerations as well as the practical difficulties of considering poststipulation evidence, the proponent of the poststipulation evidence has the burden of establishing a proper foundation and that significant weight should be given to such evidence. *Id.* at 613. The Seventh Circuit gave some deference to the judgment of the State in its lawsuit against MMSD. But in order to demonstrate a significant evidentiary weight, Friends needed to show that the SSO was a violation of the MMSD permit, would not have been prevented by the 2002 Stipulation's projects and resulted from the same causes that the 2002 Stipulation addressed. This evidence must also satisfy other applicable evidentiary requirements.

Friends failed to fulfill their burden to show that the 2006 SSOs were indicative of the 2002 Stipulation's failure, the Seventh Circuit opined. Friends could offer no quantitative evidence or hydraulic modeling to further their contention that the poststipulation SSOs were

proof that the 2002 Stipulation was not diligently prosecuted. WDNR employee Charles Burney neglected to fully analyze the implications of and improvements from the 2002 Stipulation, so his testimony was unpersuasive. *Id.* at 614. Conversely, MMSD provided models which showed that the poststipulation SSOs would have been prevented by the improvements required by the 2002 Stipulation. *Id.* at 613. The district court found these models persuasive, and held that Friends could not rebut their assertions. Therefore, the Seventh Circuit held, the district court did not abuse its discretion by considering the poststipulation SSOs, and was not clearly erroneous in refusing to give them decisive weight. The Seventh Circuit refused to second-guess the district court's analysis, noting that it was not the trier of fact.

The Seventh Circuit addressed the district court's evidentiary rulings last. *Id.* at 615. Friends contended that the district court erred by refusing to admit a letter from the EPA, and that it was a public record under Rule 803(8)(A). The Seventh Circuit reviewed the district court's decision on the letter's admissibility for an abuse of discretion, noting that it would only reverse the district court if it determined that there was no evidence upon which the trial judge could have rationally based his decision. *Id.* at 616. The Seventh Circuit quickly affirmed the district court's ruling, noting that it was reasonable. Counsel for the EPA admitted that the letter was not stating an opinion of the EPA, but was merely repeating an assertion made by the WDNR. As a final nail in Friends' coffin, the Seventh Circuit noted that, even if the district court's ruling were an abuse of discretion, "it would have been harmless."

Chris Bergen

III. CIVIL RIGHTS ACT

Rosemere Neighborhood Ass'n v. EPA, 581 F.3d 1169 (9th Cir. 2009)

In *Rosemere Neighborhood Ass'n v. EPA*, the United States Court of Appeals for the Ninth Circuit reviewed actions taken by the EPA and ultimately held that the organization has a duty to respond in a timely and efficient manner to civil rights and environmental justice claims. Rosemere Neighborhood Ass'n v. EPA (*Rosemere III*), 581 F.3d 1169 (9th Cir. 2009), *rev'd*, Rosemere Neighborhood Ass'n v. EPA (*Rosemere I*), No. C05-54430B, 2005 WL 3348919 (W.D. Wash. Dec. 7, 2005).

The Rosemere Neighborhood Association (Rosemere) is a nonprofit community organization in Clark County, Washington, dedicated to,

among other things, environmental protection and justice in the community. *Rosemere III*, 581 F.3d at 1171. The neighborhood is populated by low-income racial minorities and is characterized by "high rates of crime and unemployment." Rosemere Neighborhood Ass'n v. EPA (*Rosemere II*), No. C07-5080BHS, 2007 WL 2220257, at *1 (W.D. Wash. Aug. 1, 2007).

In February 2003, Rosemere filed a Title VI complaint under the Civil Rights Act of 1964 against the Environmental Protection Agency (EPA) Office of Civil Rights (OCR), alleging that the City of Vancouver failed to properly utilize EPA funds to address lingering environmental problems in the community, namely, storm water and septic system management. *Rosemere I*, 2005 WL 3348919, at *2. Specifically, Rosemere argued that the city used EPA funding to improve affluent areas and neglected the disadvantaged neighborhoods. Soon thereafter, the city opened an investigation into the operations of Rosemere, an action never taken against any community in the city, which ultimately led to the revocation of Rosemere's status as an official neighborhood association. Brief of Petitioner-Appellant at 24, *Rosemere I*, 2005 WL 3348919, at *2. As a result, Rosemere suffered great monetary damage and could no longer apply for certain community support grants. *Id.* at *13.

In December 2003, Rosemere filed a second Title VI complaint with the OCR, alleging that the city retaliated to the original complaint by revoking its status as an official neighborhood association. *Rosemere II*, 2007 WL 2220257, at *1. In the eighteen months that followed, OCR failed to take any action on the matter, ostensibly because of "severely limited office resources and a substantial volume of competing programmatic demands." Rosemere Neighborhood Ass'n v. EPA (*Rosemere III*), 581 F.3d 1169, 1171 (9th Cir. 2009). Rosemere then filed an action in the United States District Court for the Western District of Washington, seeking to compel the OCR either to accept or reject the retaliation complaint arguing that the consistent failure by EPA to respond to complaints within twenty days constituted a violation of the Civil Rights Act. *Id.* (citing 40 C.F.R. pt. 7.120(d)(1)(i) (2003)). EPA moved to dismiss the action as moot, a motion granted by the district court. *Rosemere I*, 2005 WL 2248919, at *2. The court concluded that the delay was nothing "more than an isolated instance of untimeliness and oversight," and that there was no evidence that the EPA's failure to act was a "practice" that the EPA might resume in the future. *Id.* at *2.

On appeal, the Ninth Circuit cited EPA's "consistent pattern of delay" and ruled that the claims were not moot and should be reviewed.

Rosemere III, 581 F.3d at 1175. The court recognized that the EPA's behavior was typical of the response it gives to those who appeal to OCR to remedy civil rights violations. Additionally, the Ninth Circuit relied heavily on an amicus brief filed by the Center for Race, Poverty & the Environment which stressed the importance of such administrative complaints filed under the Administrative Procedure Act (APA). The amicus brief explained that the APA is the only recourse for those seeking to redress disparate impact discrimination following the United States Supreme Court's 2001 ruling in *Alexander v. Sandoval*, which effectively "stripped victims of disparate impact discrimination of the right to bring action in federal court." Brief for Center on Race, Poverty & the Environment as Amicus Curiae Supporting Respondents, *Rosemere III*, 581 F.3d 1169 (citing Alexander v. Sandoval, 532 U.S. 275 (2001)). The brief added:

> Because complainants who may bear disparate environmental burdens are prevented from bringing disparate impact claims in federal court, the Title VI administrative complaint is vital to the continued enforcement of civil rights law and the struggle for environmental justice. If federal agencies such as EPA are allowed to abdicate their responsibility to adhere to the law, victims of discrimination will be precluded from any legal remedy for their harm.

Thus, the court found the EPA's failure to process a single complaint from 2006 or 2007 on time in accordance with its regulatory deadlines constituted a violation of its statutory duties. *Rosemere III*, 581 F.3d at 1175.

While this case does not establish any new duties on the part of the EPA, it does reinforce their responsibility to manage complaints in a timely and efficient fashion. In response to the Ninth Circuit's ruling, EPA Administrator Lisa Jackson ordered the agency staff to reform and speed up the process for resolving Title VI claims. In a statement to InsideEPA.com, Jackson said in response to the ruling, "These delays are indefensible and unacceptable. What may have been acceptable under a previous administration is certainly not acceptable under this one." Dawn Reeves, *Jackson Orders Agency Reforms To Speed Civil Rights Claim Reviews,* WATER POL'Y REP. (EPA, Wash., D.C.), Sept. 28, 2009, at 26, http://crag.org/wp-content/uploads/2009/09/9-28-09-inside-epa-story.pdf. Jackson, who has publicly reaffirmed that environmental justice is a key component of her agenda at the EPA, added that she directed staff "in the strongest terms, to review and reform the Title VI process so that complainants receive timely responses and decisions. By reforming and revitalizing the Title VI program, and expeditiously resolving pending

complaints, EPA will advance its mission of protecting human health and the environment." *Id.*

The Ninth Circuit ruling in *Rosemere Neighborhood Ass'n v. EPA* establishes persuasive precedent well beyond its jurisdiction. The EPA can no longer avoid action in areas that qualify as environmental justice communities, and perhaps disadvantaged communities in general, by simply being unresponsive to OCR complaints. The ruling should help continue the progression of bringing justice to areas where civil rights and environmental impacts have historically been ignored.

Ernesto Cerimele

IV. ENDANGERED SPECIES ACT

Trout Unlimited v. Lohn, 559 F. 3d 946 (9th Cir. 2009)

In *Trout Unlimited v. Lohn*, the United States Court of Appeals for the Ninth Circuit held that the National Marine Fisheries Service (NMFS) may group natural and hatchery-spawned fish into a single evolutionarily significant unit (ESU). Trout Unlimited v. Lohn, 559 F. 3d 946, 959 (9th Cir. 2009). The Ninth Circuit also held that the NMFS may distinguish between natural and hatchery fish when determining the necessary level of protection for a particular ESU. *Id.* at 962. In an action challenging the NMFS's decision to downlist a population of Upper Columbia River steelhead from endangered to threatened under the Endangered Species Act (ESA), the United States District Court for the Western District of Washington granted summary judgment in favor of each side on certain claims, and the government and intervenors appealed. *Id.* at 953. On appeal, the Ninth Circuit reversed in part and affirmed in part. *Id.* at 959, 962.

Human development has threatened Pacific salmon and steelhead populations for decades. *Id.* at 948. To solve the problem of dwindling salmon and steelhead populations, various groups implemented hatchery programs throughout the Pacific Northwest to artificially increase salmon and steelhead numbers available for fishing and to prevent natural salmon and steelhead from becoming extinct. Hatchery programs, however, can also sometimes threaten natural fish with, inter alia, interbreeding and competition for prey and habitat. *Id.* at 948-49.

Congress enacted the ESA in 1973 to "prevent animal and plant species endangerment and extinction caused by man's influence on ecosystems, and to return the species to the point where they are viable

components of their ecosystems." *Id.* at 949 (quoting H.R. REP. NO. 95-1625, at 5 (1978)). The ESA requires the NMFS to (1) decide whether a population of fish is a species or a distinct population segment, (2) decide whether to list the species or distinct population segment as endangered or threatened, and (3) accord the species or distinct population segment various legal protections if a species or distinct population segment is listed. In 1991, the NMFS defined distinct population segment as an ESU that is (1) substantially reproductively isolated from other population units, and (2) an important component in the evolutionary legacy of the species. *Id.* at 950.

In 1993, the NMFS issued an Interim Hatchery Policy, which stated that, absent exceptional circumstances, it would only list natural fish as endangered or threatened under the ESA, even if it found them to be in the same ESU as hatchery fish. *Id.* at 950-51. In 2001, however, the United States District Court for the District of Oregon held that the NMFS must list the *entire* species, subspecies, or distinct population segment, which includes both natural and hatchery fish. *Id.* at 951.

The NMFS subsequently revised the Interim Hatchery Policy and eliminated the distinction between natural and hatchery fish for listing purposes. This new hatchery policy, called the 2005 Hatchery Listing Policy, also "requires NMFS to consider the status of the ESU *as a whole*, rather than the status of only the natural fish within the ESU when determining whether an ESU should be listed as endangered or threatened." *Id.* at 952 (citing Policy on the Consideration of Hatchery-Origin Fish, 70 Fed. Reg. 37,204, 37,215). Even though the 2005 Hatchery Listing Policy required the NMFS to consider the status of the ESU as a whole when making listing determinations, it allowed the NMFS to place primary importance on the viability of natural fish. It allowed the NMFS to consider the hatchery fish in the context of their contributions to the natural population and use discretion to provide for the taking of certain hatchery fish, even if the NMFS listed the ESU as a whole as threatened or endangered.

In 2004, the NMFS added six hatchery stocks to the Upper Columbia River steelhead ESU. *Id.* at 953. Trout Unlimited petitioned NMFS to split natural and hatchery steelhead into separate ESUs. NMFS rejected the petition and, partly because the ESU contained hatchery fish as well as natural fish, downlisted the Upper Columbia River steelhead from endangered to threatened. Trout Unlimited and other environmental organizations brought this suit to challenge both NMFS's rejection of Trout Unlimited petition and the downlisting of the steelhead from endangered to threatened. As part of its second claim,

Trout Unlimited argued that the 2005 Hatchery Listing Policy impermissibly requires that the NMFS consider the entire ESU when it makes listing decisions, as opposed to just the natural components of the ESU.

The Building Industry Association of Washington (the Building Industry) intervened and challenged the NMFS decision on opposite grounds. The Building Industry argued that the ESA does not allow the NMFS to make any distinctions between hatchery fish and natural fish once they are part of the same ESU. In particular, the Building Industry challenged the NMFS's policy of assessing hatchery fish in the context of their contribution to the natural population and the decision to prohibit the take of only natural fish.

The district court granted summary judgment (1) to NMFS on Trout Unlimited's claim that NMFS impermissibly included natural fish and hatchery fish as part of the same ESU, (2) to Trout Unlimited on its claim that the 2005 Hatchery Listing Policy and the downlisting of the Upper Columbia River steelhead violated the ESA, (3) to NMFS on the Building Industry's challenge to the NMFS's policy of assessing hatchery fish in the context of their contributions to the natural population, and (4) to NMFS on the Building Industry's claim that NMFS's decision to prohibit the take of only natural fish violated the ESA. The government and the Building Industry appealed.

The Ninth Circuit first determined whether the 2005 Hatchery Listing Policy was entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and would only be overturned if it was arbitrary or capricious. *Chevron*, 467 U.S. at 954. The court concluded that *Chevron* deference was appropriate because "Congress delegated authority to the NMFS to make rules carrying the force of law" and the 2005 Hatchery Listing Policy went through a formal notice-and-comment process. *Id.* (citing 16 U.S.C. § 1533(h) (2006)). The court held, therefore, that unless the NMFS's decision to put natural and hatchery fish into one ESU and to downlist the Upper Columbia River steelhead to threatened was arbitrary or capricious, it was entitled to deference. *Id.* at 955.

Upon determining the appropriate level of deference, the court considered whether the NMFS inappropriately rejected Trout Unlimited's petition to split natural and hatchery fish into separate ESUs. Trout Unlimited argued that one ESU for both natural and hatchery fish was contrary to the best available science because hatchery fish pose threats to natural fish. The court disagreed and noted the differences between the decision to compose an ESU and the decision to list an ESU. The

court noted that under the 2005 Hatchery Listing Policy, the composition of an ESU concerns only the neutral task of defining a species, while the listing decision takes into account the impacts of hatchery fish on natural fish populations. The court determined that the ESA requires the NMFS to consider the effects of hatchery fish on natural fish populations, but does not mandate that NMFS consider the effects at the definitional stage. *Id.* at 956. The court held that the NMFS's decision to consider impacts at the listing stage was an acceptable construction of the ESA, and was therefore entitled to *Chevron* deference. The court reviewed the NMFS's expert testimony regarding the denial of Trout Unlimited's petitions, and held that Trout Unlimited and the NMFS were "engaged in a good faith disagreement that is supported by science on both sides." Accordingly, the court affirmed the district court's conclusion that the denial of Trout Unlimited's petition to split natural and hatchery fish into separate ESUs was not arbitrary or capricious.

The court then determined whether the NMFS's listing policies violated the ESA because the NMFS based listing decisions on the status of the entire ESU rather than the status of only the natural fish within the ESU. Trout Unlimited argued that the NMFS acted arbitrarily and capriciously when it based listing decisions on an entire ESU because the ESA's central purpose is to protect natural populations. *Id.* at 957. While the Ninth Circuit agreed that the ESA's primary goal is to protect natural populations, it held that the 2005 Hatchery Listing Policy is consistent with the plain language of the ESA and the goal of protecting natural populations. The court noted that the ESA requires the NMFS to determine whether a particular *species* is threatened or endangered. Because the ESA defines species as "any subspecies of fish or wildlife or plants, and any distinct population segment," the court held that the 2005 Hatchery Listing Policy, which conducts a status review of an entire species, complies with the ESA. The court also noted that the 2005 Hatchery Listing Policy "mandates a . . . complex evaluation process that considers both the positive and negative effects of hatchery fish on the viability of natural populations." *Id.* at 957-58. Therefore, the court held that the review of the status of the entire ESU is consistent with the ESA's purpose of protecting natural populations because the review takes into account the positive and negative impacts of hatchery fish on natural populations. *Id.* at 957. Accordingly, the Ninth Circuit reversed the district court's grant of summary judgment to Trout Unlimited on its claim that the 2005 Hatchery Listing Policy and the downlisting of the Upper Columbia River steelhead violated the ESA. *Id.* at 959.

The Ninth Circuit next turned to the Building Industry's argument that the NMFS impermissibly *distinguished* between natural and hatchery fish. The Building Industry argued that considering hatchery and natural fish separately during the listing process violates the ESA because (1) the ESA requires listing determination be made upon a species as a whole and does not reference "natural populations," (2) the legislative history of the definition of "species" eliminated the MDFS's ability to distinguish among members of a species that "swim side-by-side in the same streams," and (3) the 2005 Hatchery Listing Policy is flawed for the same reason the Interim Listing Policy was flawed: distinguishing between members of the same ESU is arbitrary or capricious because the NMFS may consider listing only an entire species, subspecies, or distinct population segment of a species. *Id.* at 960.

The Ninth Circuit rejected all three arguments. First, the court noted that while the provisions of the ESA that the Building Industry relied upon required the NMFS to conduct status reviews of ESUs, they do not provide how the NMFS should conduct its reviews. Second, the court determined that the legislative history does not establish the clear intent of Congress because the Building Industry did not cite anything that addressed how biological distinctions affect the process by which the NMFS makes its listing decisions. The legislative history that the Building Industry cited noted only the smallest group that could be listed, an ESU. However, the court noted that no party to the suit claimed that the NMFS listed something smaller than an ESU. Finally, the court rejected the Building Industry's third claim, holding that "once NMFS determines that hatchery and naturally spawned salmon belong to the same ESU, it may not list the naturally spawned portion to the exclusion of the hatchery portion of the ESU." *Id.* at 960-61. The court noted that in this case, the NMFS listed the entire ESU, including natural and hatchery fish. *Id.* at 961. The court held that this was reasonable and in accord with the statutory text because the NMFS undertook a comprehensive review of the ESU. Accordingly, the Ninth Circuit affirmed the district court's ruling that the NMFS permissibly distinguished between hatchery and naturally spawned salmon during the status review.

The Building Industry also argued that the NMFS may not distinguish between natural and hatchery fish when issuing protective regulations under the ESA. The Building Industry asserted that the NMFS must view hatchery fish and natural fish equally, and if one portion of an ESU is protected from taking, then all portions must be

protected. The Ninth Circuit rejected this argument, noting that nothing in the text or history of the ESA mandates equal treatment for all members of an ESU. *Id.* at 962. The Ninth Circuit also noted that the NMFS did consider the ESU as a whole when it allowed for the taking of hatchery fish because the selective taking of hatchery fish can enable the remaining portions to flourish. Accordingly, the Ninth Circuit affirmed the district court's holding that the protective regulations distinguishing between natural and hatchery fish was proper.

In summary, the Ninth Circuit's decision allowed the NMFS to consider natural and hatchery fish as part of the same ESU, but to distinguish between natural and hatchery fish when determining the level of protection that should be accorded to the fish. This decision also allows the NMFS to consider the impact of hatchery fish on a natural population when it makes listing determinations. The Ninth Circuit appropriately balanced the concerns of environmentalists with the desire of sportsmen to fish for salmon. This decision protects ideological environmental interests because the NMFS can afford different levels of protection to natural and hatchery fish and because the NMFS must consider the adverse impacts of hatchery fish when it lists an ESU as endangered or threatened. This decision also protects the interests of sportsmen and builders because the NMFS must group hatchery fish and natural fish into the same ESU, which means that the fish populations will likely increase and, as happened in this case, the NMFS may afford a less stringent listing standard because the population numbers as a whole are greater. Accordingly, the Ninth Circuit's decision strikes an appropriate balance between two competing interests and upholds the ultimate goal of the ESA to protect animals from endangerment or extinction.

Andrea Zeiter

Greater Yellowstone Coalition, Inc. v. Servheen,
No. CV 07-134-DWM, 2009 WL 3775085 (D. Mont. Sept. 21, 2009)

In *Greater Yellowstone Coalition, Inc. v. Servheen*, the United States District Court for the District of Montana vacated the U.S. Fish and Wildlife Service's (Service) 2007 delisting of the Greater Yellowstone Area grizzly bear from the threatened species list under the Endangered Species Act (ESA), and remanded the matter to the agency, reinstating the bear's ESA protections. No. CV 07-134- DWM, 2009 WL 3775085, at *1 (D. Mont. Sept. 21, 2009). That decision was based primarily on

two conclusions. First, that the agency's Final Rule, which delisted the grizzly population, failed to demonstrate that plans for managing the grizzlies after delisting were adequate regulatory mechanisms to protect the bear. *Id.* at *9. Second, that the agency failed to adequately consider the expected decline in whitebark pine seeds, a vital grizzly food source. *Id.* at *10-11. The plaintiff, the Greater Yellowstone Coalition (the Coalition), put forth two additional claims, which were both denied but were apparently unnecessary for obtaining a judgment in their favor. These claims alleged: (1) that the agency inappropriately based its delisting decision on a low population size and considered translocation of foreign bears to maintain genetic diversity and (2) that the agency failed to assess whether the bears are recovered across a significant portion of their range. *Id.* at *12, *14. The court's judgment, in a written opinion by Judge Donald Molloy, found that "harm to the grizzly bear is likely to occur if the [population] is delisted." *Id.* at *18. Judge Molloy's opinion offers insight on the bounds of a judiciary's ability to overturn an agency decision or statutory interpretation, and references an agency's failure to consider concerns over climate change—a minor aspect of the decision that seems to have taken main stage in media coverage with accompanying commentary on judicial activism and political divides.

Reviewing the Service's decision for indications that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," Judge Molloy initially considered the relationship between the agency's decision as compared to the "best available data" in the administrative record to see whether the bear could be deemed no longer "endangered nor threatened." *Id.* at *4 (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (1966)). He first analyzed the adequacy of the agency's regulatory mechanisms, which had to "maintain a population at a recovered level sufficient to prevent the need for future relisting" without the protections of the ESA. *Id.* at *5. Continuously citing as support the rule that "the ESA does not permit agencies to rely on plans for future action or on unenforceable efforts," Judge Molloy discredited as "legally unenforceable" the agency's discussion of various federal and state laws, as well as its Conservation Strategy, Forest Plan amendments, and state management plans listed in the Final Rule. *Id.*

The Service presented the Conservation Strategy in the Final Rule as "the plan which will guide management and monitoring of the Yellowstone grizzly bear population and its habitat after delisting." *Id.* at *6. Mention of federal and state laws in the Final Rule and Conservation Strategy was apparently summarized in brief, concluding without analysis or reason that such laws would sufficiently protect the

Yellowstone grizzlies. Without an analysis of how the laws would protect the bears, Judge Molloy refused to find a "rational connection between the facts found and the choice made."

Additionally, while the Conservation Strategy claimed to have established certain standards and monitoring requirements, there was no explanation of how those standards would be maintained, or how the monitoring would be enforced. *Id.* at *6-7. All that the Service put forth was a "promise of future, unenforceable actions," which could not be considered regulatory mechanisms after *Oregon Natural Resources Council v. Daley*. *Id.* at *7 (citing *Or. Nat. Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998). Likewise, the Conservative Strategy promised that a Biology and Monitoring Review would commence upon derivation from certain established standards; but without a required agency action in response to such derivations, the biological reviews were considered mere promises of future actions. *Id.* at *7-8. Most telling of all, the court found that the Conservation Strategy could not regulate anything in actuality, since it explicitly stated that it "cannot legally compel any of the [state] signatories to implement management policies." *Id.* at *7. Such shortfalls led the court to conclude that the Conservation Strategy could not be considered a "regulatory mechanism to maintain the grizzly bear population." *Id.* at *6.

The court similarly regarded the proposed amendments to forest plans and development of state management plans as failing to meet the requirements of an adequate regulatory mechanism. *Id.* at *8. The guidelines for managing grizzlies in those plans were deemed discretionary, and thus legally unenforceable.

> The majority of the regulatory mechanisms relied upon by the Service—the Conservation Strategy, Forest Plan amendments, and state plans—depend on guidelines, monitoring, and promises, or good intentions for future action. Such provisions are not adequate regulatory mechanisms when there is no way to enforce them or to ensure that they will occur. . . . The [Fish and Wildlife] Service did not comply with the ESA in its consideration of the adequacy of existing regulatory mechanisms for purposes of delisting.

Id. at *9.

The court saw the second major flaw in the Service's delisting decision as a failure to adequately consider the likelihood of decline in whitebark pine, and its negative impact on the grizzly population. *Id.* at *9-10. The court reviewed the agency's conclusion that best available science had shown that the bears would adjust to any declines in whitebark with a high degree of deference. Indeed, a court will defer to

the agency's conclusions when they involve a high level of technical and scientific expertise, as long as those conclusions are reasonable (i.e., rationally connected with the best available science). In applying that standard of review, the court found that "[w]hile the Final Rule emphasizes that grizzly bears will be able to adapt to the decline of whitebark pines, the record contains scant evidence for this proposition." *Id.* at *11. Judge Molloy went so far as to emphasize that most of the science cited in the Final Rule "directly contradicts" the Service's conclusions that the bears would not be negatively affected by the availability of whitebark pine nuts. The best available science, cited in the administrative record, seemed to anticipate a decline in whitebark due to impacts of global warming, forest fires, the mountain pine beetle epidemic, and infection by white pine blister rust. *Id.* at *10. While the Final Rule concluded that a decrease in whitebark would not affect the bear population because the animal would adapt by foraging other food sources as a replacement, the record presented a clear connection between whitebark and grizzly survival rates. *Id.* at *11.

Further, in reaction to the Service's argument that the recent decrease in whitebark pines has unexpectedly been accompanied by an *increase* in the number of grizzly bears, the court responded that such a rationale was problematic for two reasons. First, and most importantly, the Service did not actually present this logic until the litigation commenced, and so the agency had not considered it as part of the basis for delisting. The court thus could not consider the agency's perspective on the phenomenon as support for its reasoning. Second, there were various studies in the administrative record indicating that such a trend in short-term population growth would actually camouflage the problem of habitat destruction. Therefore, "[t]he science relied on by the Service does not support its conclusion that declines in the availability of whitebark pine will not negatively affect grizzly bears."

Upon finding in favor of the Coalition on its first two claims, Judge Molloy thereafter reasoned that the remaining arguments would be held in favor of the Fish and Wildlife Service. *See id.* at *14, *17. Although the final two arguments would not prove vital to the court's ultimate decision to vacate and remand the delisting decision, the analysis of those claims sheds light on judicial deference to agency scientific conclusions and legal interpretations. The Coalition asserted that the agency incorrectly based its decision to delist on an unacceptably low grizzly population size and translocation of foreign bears into the Yellowstone area to maintain genetic diversity. *Id.* at *12. Further, the Service failed to properly assess whether the grizzly is recovered across a "significant

portion of its range." *Id.* at *14. But Judge Molloy found that the agency presented a reasonable explanation for coming to those conclusions, and held in favor of the Service on both counts. *See id.* at *14, *17.

As to the first count, wherein the Coalition argued that the Service violated the ESA when it used an unacceptably small population size and translocation techniques as bases for its decision to delist the grizzly, Judge Molloy held that the Service's conclusion was consistent with the studies in the administrative record. *Id.* at *12. Namely, the Service found that genetic diversity is not a present concern, and problems associated with translocation would not alone lead to a showing that the Yellowstone grizzly is "likely to become an endangered species within the foreseeable future." *Id.* at *13. The science relied upon by the agency provided that it is "unlikely that genetic factors will have a substantial effect on the viability of the Yellowstone grizzly over the next several decades," and that the grizzlies can avoid negative genetic impacts in the near future with four hundred bears. *Id.* at *12. Because the plaintiff did not show reasons for the agency not to rely upon such evidence as the "best available science," the court deferred to the agency's expertise and reasonable explanation for its conclusions. Even though the plaintiff argued that natural connectivity would be necessary, the studies explicitly stated that it was not essential. *Id.* at *13-14. Thus, maintaining the bear's population at its current size of five hundred, and introducing bears from outside populations to maintain genetic diversity was consistent with the conclusions put forth in the referenced scientific studies. Ultimately, the court determined that mere "concerns about long-term genetic diversity do not warrant a continued threatened listing" for the Yellowstone grizzly. *Id.* at *14.

Interestingly, the plaintiffs asserted one final effort to convince the court of the Service's alleged faulty translocation management technique. The Coalition claimed that the existence of such a plan itself "demonstrates the [Yellowstone grizzly] is not adequately recovered because artificial addition of bears is needed to maintain the population in the future." *Id.* at *13. In other words, because the Final Rule admits the bear population is not self-sustaining, a delisting should not be granted. Perhaps if not for reliance on a district court case reversed by the Ninth Circuit while this case was pending (*Trout Unlimited v. Lohn*), Judge Molloy might not have dismissed the argument so summarily. *Id.* at *13 (citing Trout Unlimited v. Lohn, 559 F.3d 946 (9th Cir. 2009)). Indeed, because the plaintiff's argument relied entirely on the reversed holding in that case, Judge Molloy could not support such a conclusion, and held consistent with the Ninth Circuit's review of the case—that "the

Service here conducted its analysis regarding grizzly bear translocation in a thoughtful, comprehensive manner that balanced the agency's concerns and goals regarding genetic diversity." *Id.* (quoting *Trout Unlimited*, 559 F.3d at 959) (internal quotations omitted).

The plaintiff presented a final argument that the Service failed to consider the bears' historic range (the majority of which the bears no longer occupy) in evaluating whether the grizzly population is "recovered across a significant portion of its range," a phrase provided in the ESA's definition of "threatened species." *Id.* at *14 (citing 16 U.S.C. § 1532(20) (1988)) ("The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."). Judge Molloy recognized the ambiguity of the phrase, yet deferred to the agency's interpretation as reasoned and rationally connected to the facts (the traditional doctrine of judicial deference to an agency's interpretation of its own statutory mandate, established in *Chevron v. Natural Resources Defense Council*). *Id.* (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984)).

In its Final Rule, the Service analyzed what would be deemed suitable and unsuitable habitat for the Yellowstone grizzly. *Id.* at *16-17. The Service excluded most of the bear's historic range from the analysis, and defined a "significant portion" of the Yellowstone grizzly range as approximately the area where the bruins currently live. Indeed, they found that "suitable habitat is that which is contiguous with current habitat so as to allow bears to re-colonize it," and "lack of occupancy in unsuitable habitat will not impact whether this population is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." *Id.* But the Coalition argued that the Service should have considered the grizzly's historic range in its determination of what was significant. *Id.* at *16. Because such an argument was rejected in the Ninth Circuit's 2001 decision in *Defenders of Wildlife v. Norton*, the court similarly rejected it here. *Id.* at *16-17 (citing Defenders of Wildlife v. Norton, 258 F.3d 1136, 1141 (9th Cir. 2001)). Further, because the Yellowstone grizzly is considered a discrete segment of the entire grizzly species, "it would be nonsensical to require the Service to consider the grizzlies' historic range throughout the United States as significant in relation to the Yellowstone grizzly bear." *Id.* at *16.

Although the court nearly discredited the Service's definition of "significant portion of range" based on the Yellowstone grizzlies' boundaries, "potentially render[ing] the statutory phrase superfluous," the

Service's reasoning included an area outside the grizzlies' current range for future expansion. *Id.* at *17 (citing *Defenders of Wildlife*, 258 F.3d at 1142) (internal quotations omitted). Because the agency offered what the court considered to be a reasonable interpretation of the ambiguous phrase "significant portion of its range," Judge Molloy deferred to that interpretation and entered judgment in favor of the Service on the final count of the complaint.

Finding in favor of the agency on the last two counts was not fatal to the Coalition's complaint, however. Indeed, while it may be sufficient to conclude that the bear's population *should* be maintained at a certain number, it is most certainly insufficient for the agency to be incapable of proving that the regulatory mechanisms in place could adequately assure that the population *will* be maintained, as required by the ESA's delisting factors. *See* 16 U.S.C. § 1533(a)(1)(D) (2006) (noting that "the inadequacy of existing regulatory mechanisms" is one of five factors the agency must consider in determining whether to delist a species). Establishing conclusions on the status of the bear's genetic diversity, population size, and range area was performed with enough reason to pass judicial review standards regarding agency interpretation and decisions. But a lack of enforceable mechanisms if numbers decline prevented the Final Rule from being strong enough to pass the more stringent test of judicial review: that the Rule would adequately "maintain the grizzly bear population" absent protection from the ESA. *See id.* at *6.

That Judge Molloy found room for reversal in this situation warrants attention—notably because, given the deferential standard of judicial review, it is in narrow circumstances that a court deems an agency's decision irrational.[1] Indeed, judicial review is so deferential

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1. *See* Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) ("Under the arbitrary and capricious standard the scope of review is a narrow one. A reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. The agency must articulate a rational connection between the facts found and the choice made. While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." (internal quotations omitted)); Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996) (finding that the standard of review in evaluating agency decisions is "exceedingly deferential"); Bd. of County Comm'rs of County of Adams v. Isaac, 18 F.3d 1492, 1497 (10th Cir. 1994) ("This court will determine whether the agency considered all the relevant factors and whether there was clear error of judgment, but may not substitute its own judgment for the agency's. The agency must establish a rational relationship between its factual findings and its conclusion. An agency acted arbitrarily and capriciously if it relied on factors deemed irrelevant by Congress, failed to consider

when an agency must employ its expertise, that the agency's reasoning must be completely absent or, in this case, backward, for the court to reverse its action. *See, e.g.*, Nat'l Home Builders v. Defenders of Wildlife, 551 U.S. 644, 645 (2007) ("This Court will not vacate an agency's decision under the arbitrary and capricious standard unless the agency 'relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))).

The attention brought to this case, however, has been more targeted to the court's fleeting reference to the effects of global climate change on the grizzly's survival.[2] While the Judge's opinion concentrates heavily on the apparent unenforceability of the Final Rule, media coverage highlights the role climate change played in his decision to remand, most likely to spark political debate and frontline a controversial issue of current national fascination. This case exemplifies the attention directed to an agency accused (even if only in passing) of failure to consider the effects of global warming, and provides warning that public commentary is drawn heavily toward governmental attention—or inattention—to this phenomenon. Some commentators make reference to "judicial activism" at play in the opinion,[3] and others note its reliance on strong scientific evidence that the bear's continued existence is still reliant upon protections of the ESA.[4] Regardless what aspect of the decision the public draws its attention to, the case warrants attention from the legal and agency communities as a reminder that courts are willing and able to remand an agency decision that is based on conclusions that are disconnected with the studies and facts the agency relied upon. A

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important aspects of the problem, presented an implausible explanation or one contrary to the evidence. . . . [T]his court will not defer to irrational agency judgments.").

2. *See, e.g.*, Matthew Brown, *Citing Climate Change, Federal Judge Says Grizzlies Still Threatened*, ABC NEWS, Sept. 21, 2009, http://abcnews.go.com/Technology/JustOneThing/wireStory?id=8630978.

3. Associated Press, *Judge: Yellowstone Grizzlies Need Help Again: He cites warming, less food to restore Endangered Species Act listing*, MSNBC, Sept. 21, 2009, http://www.msnbc.msn.com/id/32957048/ns/us_news-environment/ ("Wyoming U.S. Rep. Cynthia Lummis called Molloy's ruling an 'abuse' of the Endangered Species Act. 'Subverting the Endangered Species Act through judicial activism under the auspice of judicial activism would be laughable if the impacts weren't so dire for Wyoming's public land users.'").

4. Press Release, Nat'l Res. Def. Council, Yellowstone Grizzlies Back on Endangered Species List (Sept. 21, 2009), http://www.nrdc.org/media/2009/090921.asp.

"rational connection" may be all that is needed to uphold an agency decision. Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974). But when that reasoned path is not evident, as here, the court is obligated to remand for reconsideration.

Claire Yancey