RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. HYDROFRACKING—NEPA AND RIPENESS FOR REVIEW

New York v. United States Army Corps of Engineers, No. 11-CV-2599, 2012 WL 4336701 (E.D.N.Y. Sept. 24, 2012)

The U.S. District Court for the Eastern District of New York dismissed a lawsuit brought by the state of New York and environmental groups against the U.S. Army Corps of Engineers, other federal agencies, and the Delaware River Basin Commission challenging proposed natural gas drilling in the Delaware River Basin (Basin). Judge Nicholas Garaufis, stating that the lawsuit was filed too early and that the plaintiffs' concerns were speculative, dismissed the lawsuit for lack of subject-matter jurisdiction. New York v. U.S. Army Corps of Eng'rs, No. 11-CV-2599, 2012 WL 4336701 (E.D.N.Y. Sept. 24, 2012).

A. Statutory and Factual Background

Plaintiffs brought three suits in the Eastern District of New York over the defendants' belief that they were not required to comply with the National Environmental Policy Act (NEPA) while drafting regulations that would allow natural gas drilling in the Basin. *Id.* at *1. The lawsuits were consolidated, and a motion to dismiss was granted, which allowed for development plans of natural gas drilling in the Basin to continue without a full environmental review of hydraulic fracturing's effect on the water resources.

1. The Delaware River Basin Commission

The Delaware River Basin Commission (DRBC) is a congressionally approved product of the Delaware River Basin Compact (Compact), an agreement between the United States, New York, Pennsylvania, New Jersey, and Delaware. The DRBC is responsible for creating a comprehensive plan for the development and use of the Basin's water resources. *Id.* at *2. The Compact manages the Basin's water resources and has the authority to establish standards for projects or facilities that affect them. *Id.* at *1. The DRBC must approve any project "having a substantial effect on the water resources of the [B]asin" before the project can move forward and only approves a project after evaluating whether the project "substantially impair[s] or conflict[s] with the comprehensive plan." *Id.* at *2 (quoting Delaware River Basin Compact, Pub. L. No. 87-328, § 3.8, 75 Stat. 688, 694 (1961) (internal quotation mark omitted)). The DRBC also has the authority to make regulations in order to enforce the Compact, including regulatory authority to "control, prevent, or abate water pollution." *See* Delaware River Basin Compact § 15.1(k), 75 Stat. at 715.

Whether the DRBC is a federal agency or a federal-interstate agency was debated between the parties. The Compact establishes that the DRBC is created as an agency of the governments of the respective signatory parties, but the DRBC is only considered a federal agency as to certain provisions of federal laws and not to others. *New York*, 2012 WL 4336701, at *1 (citing Delaware River Basin Compact §§ 2.1, 15.1(i)-(m), 75 Stat. at 691, 714-15). The DRBC consists of the governors of the signatory states and one federal member—the Division Engineer of the North Atlantic Division of the U.S. Army Corps of Engineers. *Id.* (citing DRBC Memorandum at 2, *New York*, 2012 WL 4336701 (No. 11-CV-2599)); *see also* Delaware River Basin Compact § 2.2, 75 Stat. at 691; Act of June 12, 1997, Pub. L. No. 105-18, § 3001(a), 111 Stat. 158, 176.

Congress specified that employees of the DRBC are not federal employees and that the Compact is not deemed to enlarge the authority of any federal agency other than the DRBC. *New York*, 2012 WL 4336701, at *1 (citing Delaware River Basin Compact § 15.1(n)-(o)).

2. National Environmental Policy Act

NEPA, as it pertains to this case, has two intentions: "[I]t imposes on federal agencies 'the obligation to consider every significant aspect of the environmental impact of a proposed action,' and it 'ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.'" *New York*, 2012 WL 4336701, at *2 (citing Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983)). Federal agencies must prepare an environmental impact statement (EIS) to accompany a major federal action. *Id.*; 40 C.F.R. § 1502.3 (2011). A major federal action includes "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; [and] new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a).

NEPA is implemented through regulations established by the Council on Environmental Quality (CEQ). *New York*, 2012 WL 4336701, at *2. The regulations ask agencies to commence preparation of an EIS when the agency is developing or is presented with a proposal for a major federal action. 40 C.F.R. § 1502.5; *see id.* § 1502.3. During informal rulemaking, the EIS will normally accompany the proposed rule. *New York*, 2012 WL 4336701, at *2.

The law implementing the Compact is silent as to the applicability of NEPA to the DRBC; however, the DRBC has incorporated NEPA analysis into its regulations in the past. *Id.* at *3. The DRBC abandoned its practice of conducting NEPA analyses in 1980, relying on the federal government to conduct the analyses, and in 1997 repealed the regulations it passed that mandated NEPA analyses for its operations.

3. Natural Gas Development

The Basin is situated partially above the Marcellus Shale Formation, which is a sizeable area of marine sedimentary rock containing largely untapped natural gas. In order to extract the natural gas, companies need to drill horizontally and use hydraulic fracturing (hydrofracking) in order to release the gas. Hydrofracking is a method of extraction that "pump[s] millions of gallons [of] water, sand, and

chemicals under high pressure deep underground." *Id.* at *3 (internal quotation mark omitted). The chemicals added to the water are dangerous for human consumption and when the water is drawn out, it often contains brine liquid that in turn contains toxic and radioactive compounds. *Id.* at *4. After the water and brine are drawn out, the gas is pumped out and can be used for energy production. Hydrofracking within the Basin would affect the Basin's water resources by requiring large amounts of fresh water from the Basin's rivers and aquifers, which would need to be treated or disposed of after use, and by potentially releasing pollutants into the ground and surface water. *Id.* at *3. Due to the effects on the water resources, the DRBC needs to approve natural gas development projects in the Basin.

4. Procedural Background

In May 2010, the DRBC started developing draft regulations for natural gas extraction and deferred consideration of any application until such regulations are adopted, thus creating a moratorium on natural gas exploration in the Basin. In December 2010, the DRBC voted to release draft regulations of natural gas extraction for public comment. In April 2011, New York Attorney General Eric Schneiderman submitted comments to the DRBC, requesting that the DRBC perform a NEPA analysis with its draft regulations and that one of the federal defendants perform an EIS. In November 2011, the DRBC released revised draft regulations; however, two commissioners indicated that they would vote against the adoption of the regulations, and the consideration of the regulations stalled.

B. The Court's Decision

1. Sovereign Immunity

The court held that federal defendants are not immune from suit. *Id.* at *6-7. The federal defendants argued that they are protected from the lawsuit by sovereign immunity because the plaintiffs did not allege an Administrative Procedure Act (APA) claim under 5 U.S.C. § 702. *Id.* at *6. In order to sue an agency of the United States, parties must identify an applicable waiver of immunity. Plaintiffs contended that the waiver in § 702 is a general waiver for all actions seeking equitable, nonmonetary relief against an agency of the United States and that they can invoke the waiver even if they are not seeking relief under the APA.

Following the reasoning of the D.C. Circuit Court in *Trudeau v. FTC*, the court found that the plain language of the waiver and the

legislative history clearly applies the waiver to any equitable action, regardless of whether the APA provides the cause of action or not. *Id.* at *6-7 (citing Trudeau v. FTC, 456 F.3d 178, 186-87 (D.C. Cir. 2006) (additional citations omitted)).

2. Standing

The defendants challenged plaintiffs' standing to bring suit. *Id.* at *7. Plaintiffs must show three things for constitutional standing: first, an injury-in-fact that is actual or imminent, and concrete and particularized; second, a fairly traceable causal connection between the action of the defendant and the injury-in-fact; and third, a likelihood that a favorable decision will redress plaintiffs' injury. *Id.* (citing Lujan v. Defenders of Wildlife, 505 U.S. 555, 560-61 (1992)). Plaintiffs can show standing to enforce procedural rights without meeting all the standards, but they must show a concrete interest affected by the breach of the procedural right. *Id.* (citing *Lujan*, 505 U.S. at 572 n.7).

The court first considered the interests of New York, finding that New York had proprietary interests that related to the health of the Upper Delaware River, a proprietary interest in protecting its budget, and a quasi-sovereign interest in the health of its residents. *Id.* at *8. New York asserted an interest in maintaining the status quo in the Upper Delaware River and in preventing increases in ozone concentrations in New York, which would affect the health of New York citizens and cause a rise in the New York budget due to increased hospital visits.

The court next found the NGO plaintiffs had concrete interests through their members and thus had standing to sue on their own right; however, the court found that the NGO plaintiffs did not have injuries-in-fact. *Id.* at *9-12. Courts have held that "plaintiffs have . . . standing to challenge agencies' violations of NEPA when an agency has taken an action without an EIS and the action has created a risk of injury." *Id.* at *10. The United States Court of Appeals for the Second Circuit has also recognized standing based on increased risk or possible increased risk, but only when the government had issued a final order, regulation, plan, denial, or statute. *Id.* at *11. Here, plaintiffs could show an injury-in-fact through showing the increased risk of "uninformed decision-making that will create an increased risk in the invasion of a concrete interest"; however, the DRBC would need to have "done something [to] affect[] legal rights or obligations . . . in a way that made an invasion of plaintiffs interests more likely, or refused to do something that allowed an already existing invasion to continue." The court found that with only a draft of the regulations for the proposed natural gas development before it, it had

"no way of judging reliably how probable it is that the regulation will be enacted, and thus no way of judging whether [the] risks that natural gas development may create are more than conjecture." *Id.* at *12.

3. Ripeness

The court considered arguments as to ripeness and held that because there is no present injury-in-fact, the plaintiffs had not alleged a constitutionally ripe claim. *Id.* at *13. However, the court continued its analysis in order to answer the question of whether plaintiffs' claims would better be heard then or in the future. Plaintiffs argued that their claims were not subject to a prudential ripeness test and that prudential ripeness is not relevant to NEPA challenges. *Id.* at *14. The court disagreed, finding that the language in *Ohio Forestry Ass'n v. Sierra Club* that plaintiffs relied on was dicta and that it need not be followed. The court noted that the Supreme Court would not intend to repeal prudential ripeness case law for NEPA cases in dicta.

The court held that the plaintiffs' claims were not fit for judicial review. Their harms were too speculative and relied on a chain of events that may never have materialized. The court opined that final regulations may never be released or that the content may change and affect the parties involved in different ways.

The court finally held that delay in bringing suit would not impose any hardship on the plaintiffs because their challenge only affected the internal operations of the defendants. *Id.* at *15. Additionally, the moratorium ensured that there was no practical effect from failing to consider the environmental impact under NEPA. Plaintiffs will need to wait at least until the DRBC ends the moratorium for their suit to be ripe.

C. Analysis and Conclusion

The court's decision only delays the day of reckoning. While the ruling presents a setback, it also leaves the door open for legal action on the merits of the case at a later date. A challenge to natural gas development in the Basin will be ripe if and when the DRBC issues its final regulations. Judge Garaufis noted that if the DRBC adopts regulations that permit natural gas development in the Basin without performing an EIS, courts will be required to address multiple difficult issues. *Id.* at *15. These issues include:

> (1) whether NEPA can be enforced through a cause of action other than the APA; (2) whether the DRBC is a federal agency; (3) and whether, even if not, the presence of a federal officer on the DRBC, and the support and

> assistance federal agencies give to the DRBC, are sufficient to "federalize" the DRBC's actions.

If the federal member of the DRBC votes for or concurs in the hypothetical regulations, a court would be required to consider "(4) whether either a vote for or concurrence in a DRBC regulation is a 'major federal action' under NEPA; and (5) whether either a vote or a concurrence is a 'final action' under the APA."

Judge Garaufis essentially invited plaintiffs in a future case to seek a temporary restraining order. He noted that the "courts will be available if and when the DRBC adopts final regulations . . . and are more than capable of preliminarily enjoining any development . . . before the courts have evaluated whether the DRBC and the Federal Defendants are obligated to follow NEPA in this instance." *Id.* at *12.

Brittany Dunton

II. COAL ASH SPILL—COMMON LAW TORT CLAIMS

In re Tennessee Valley Authority Ash Spill Litigation,
No. 3:09-CV-009, 2012 WL 3647704 (E.D. Tenn. Aug. 23, 2012)

In *In re Tennessee Valley Authority Ash Spill Litigation* (*TVA II*), the United States District Court for the Eastern District of Tennessee considered whether the Tennessee Valley Authority (TVA) could be held liable for the failure of a dam under claims of "negligence, negligence per se, recklessness, strict liability, trespass, private nuisance, and public nuisance." No. 3:09-CV-009, 2012 WL 3647704, at *2 (E.D. Tenn. Aug. 23, 2012). The plaintiffs' claims arose when a dike supporting a coal ash impoundment both owned and operated by the TVA in Kingston, Tennessee broke on December 22, 2008, spilling 5.4 million cubic yards of ash over three hundred acres. *Id.* at *1, *6, *21. After dismissing the claims of recklessness, strict liability, and public nuisance, the court presiding over Phase I of the trial found that the TVA's conduct caused the dam failure and concluded that in Phase II, plaintiffs may proceed with their own individual claims of negligence, trespass, and private nuisance, but not negligence per se. *Id.* at *62.

A. Litigation History

In a consolidated litigation involving sixty cases and more than eight hundred plaintiffs, the court began its analysis by reviewing the prior holdings relevant to the claims. *Id.* at *1. In *Mays v. Tennessee*

Valley Authority, the court held that the TVA, as a governmental agency, may be sued in tort, provided the tort is not barred by the discretionary function doctrine. 699 F. Supp. 2d 991, 1004, 1009 (E.D. Tenn. 2010); *see also* 16 U.S.C. § 831c (2006) (listing the corporate responsibilities of the TVA). The discretionary function doctrine protects the TVA from liability if the challenged conduct was discretionary conduct—conduct grounded in considerations of public policy—that involved a permissible exercise of policy judgment. *See Mays*, 699 F. Supp. 2d at 1004, 1016, 1019, 1022.

In *In re Tennessee Valley Authority Spill Litigation* (*TVA I*), the court articulated the burden of the plaintiff to establish liability against the TVA for the ash spill. 787 F. Supp. 2d 703, 716 (E.D. Tenn. 2011). To meet their burden, the plaintiffs needed to identify the TVA's specific decisions or conduct, show it to be a nondiscretionary act, and describe how that decision or conduct caused the dike failure. *TVA II*, 2012 WL 3647704, at *2 (quoting *TVA I*, 787 F. Supp. 2d at 716). The court held that the TVA could be liable for "'negligent failure to inform or train TVA personnel in the applicable policies and procedures for coal ash operations and management; negligent or inadequate performance by TVA personnel of TVA's policies and procedures; negligence in the construction and implementation of approved design and construction plans; and negligent maintenance.'" *Id.* (alteration omitted) (quoting *TVA I*, 787 F. Supp. 2d at 725). The court also denied the plaintiffs' motion for class certification. *See* Mays v. TVA, 274 F.R.D. 614 (E.D. Tenn. 2011). Moreover, the *TVA I* court dismissed on summary judgment the plaintiffs' emotional distress, personal injury, and inverse condemnation claims, but allowed claims of property damage, trespass, and nuisance to proceed. 805 F. Supp. 2d 468, 495 (E.D. Tenn. 2011).

The court then bifurcated the trial into two phases: Phase I—binding on all parties—to address issues of duty, breach, and dike failure causation; *and* Phase II, to hold individualized hearings to determine plaintiff-specific causation and the extent of each plaintiff's damages. *TVA II*, 2012 WL 3647704, at *3. The method of Phase II was to be determined at the end of Phase I, and Phase II would not be binding on all parties. At the conclusion of Phase I, the plaintiffs' post-trial submissions did not include claims against the TVA under recklessness, strict liability, and public nuisance. Therefore, the *TVA II* court determined that plaintiffs had abandoned those claims and only addressed the claims of negligence, negligence per se, private nuisance, and trespass. *Id.* at *3-4.

B. The Court's Decision

The *TVA II* court considered two main issues: (1) whether the TVA was negligent in the construction, operation, and maintenance of the coal ash impoundment and (2) whether the TVA's negligent conduct, even if deemed negligent, was protected under the discretionary function doctrine. *Id.* at *4-5.

Plaintiffs' claims of negligence per se, based on violations of federal and Tennessee environmental laws, were dismissed for lack of cause. *Id.* at *58-61. The court held that the federal Resource Conservation and Recovery Act and the Clean Water Act do not provide private causes of action for damages and dismissed those claims. *Id.* at *59 (citing Ailor v. City of Maynardville, Tenn., 368 F.3d 587, 601 (6th Cir. 2004)). Similarly, the court also dismissed all claims predicated on the violation of state environmental laws, citing *Ergon, Inc. v. Amoco Oil Co.*, 966 F. Supp. 577, 584-86 (W.D. Tenn. 1997), where the district court determined that such laws could not sustain private causes of action for the same reason. *TVA II*, 2012 WL 3647704, at *60-61.

The court concluded that the ultimate failure of the dike was caused by the TVA's placement of the North Dike, design of the North Dike, decision to continue operating the plant as a wet coal ash facility, and the choice to continue to build up the coal ash stack. *Id.* at *4. The court ruled that the TVA improperly constructed an initial dike, which in turn led to construction of the North Dike over unstable materials and conditions. The court found that the failure of the TVA to train its staff in its mandatory policies and procedures, in conjunction with the staff's negligent performance of such protocol, was nondiscretionary conduct that contributed to the dike's failure. *Id.* at *5.

C. Legal Conclusions: Negligence

The court first isolated the issue of causation—an element of common law negligence in Tennessee—as the pertinent threshold issue. *Id.* at *32. It stated the three-prong test used to evaluate proximate cause: (1) the conduct must be a "substantial factor" in bringing about the harm, (2) there must be no policy or rule protecting the wrongdoer from liability, and (3) the harm must have been reasonably foreseeable or able to be anticipated by the average person. *Id.* at *33 (citing McClenahan v. Cooley, 806 S.W.2d 767, 774 (Tenn. 1991)).

The plaintiffs argued that multiple factors caused the dike failure, including the TVA's failure to follow its own design and construction when locating, configuring, and constructing Dike C and the North Dike;

the TVA's failure to apply recommended repairs and fixes; the TVA's failure to train its staff in applicable procedures; violation of Tennessee Department of Environment and Conservation (TDEC) permit requirements; negligent performance by TVA personnel of applicable policies; and the TVA's failure to properly maintain the Kingston plant. Plaintiffs claimed that these factors developed into increased water pressure and erosion in the North Dike, causing the failure. *Id.* at *34. The TVA imprudently argued that failure of the dike was caused by slime layers specific to the area of the North Dike construction. Correspondingly, the court ruled:

> [T]he factual causes of the failure of North Dike were TVA's negligent implementation of location and configuration decisions involving the location and configuration of perimeter Dike C and North Dike, conduct which placed North Dike over the Swan Pond slack water embayment, TVA's design of North Dike and the related structures at the KIF plant, TVA's decision to continue operating the KIF plant as a wet coal ash storage facility, and TVA's decision to continue building up the ash stack contained by North Dike.

The court found that because the construction of Dike C and other dredge cells were not made according to the TVA's design and construction plans, the North Dike was constructed on top of previous wet coal ash, and in a location with unique conditions. *Id.* at *35-36. The TVA's chosen location undermined the foundation of the North Dike. The court also held that the TVA's failure to train and inform TVA personnel in the appropriate policies and procedures for site management and the negligent performance of said employees "were also substantial contributing causes." *Id.* at *34.

After receiving a permit to operate a landfill from the TDEC, the TVA failed to comply with the permit's requirements, specifically, not to make physical alterations without seeking an amended permit. *Id.* at *36. The TVA's continued dredging of the impoundment created slime layers around the North Dike. These slime layers were weaker than the dike construction, which in turn led to the dike breach. *Id.* at *37. The court found by a preponderance of evidence that the landslide was initiated by a foundational failure, of which the location and configuration of the Dike were "a substantial cause and a necessary antecedent." *Id.* at *38.

The plaintiffs also argued that the TVA was negligent in its surface maintenance of the plant. *Id.* at *40-41. The court found that the TVA inspectors "were negligent in noting, recording, and addressing" the safety conditions of the dikes in October of 2008. *Id.* at *42. There were

no records or reports of any repairs, because the practice at the plant was not to report or record daily erosion repairs.

The court also found that the TVA violated the "engineering standard of care and that it substantially contributed" to the incident. *Id.* at *45. TVA personnel were not properly informed nor trained in the mandatory policies, procedures, and practices, and to the extent personnel were trained, the procedures were negligently performed. The court found "little evidence that TVA inspectors and personnel were aware that TVA had mandatory policies, procedures, and practices." Specifically, the evidence demonstrated that the October 2008 inspection was insufficiently short; the personnel were not provided, or aware of, any of the criteria, procedures, or rules for dike inspections; and the employees did not review any design drawings or permits. *Id.* at *46-47. The court highlighted a finding in a report by a law firm retained to evaluate the TVA's coal ash disposal practices and facilities that "TVA 'engineers conducted annual inspections, but did not follow-up on the recommendations until the next annual inspection, often repeating the same recommendations year after year.'" *Id.* at *48 (citation omitted).

The TVA's groundwater level monitoring policies were also troubling to the court. *Id.* at *49. The court found that TVA management did not interpret any of the water level data or compare it to any models. *Id.* at *49-50. However, the court found that the water level readings were within the historical range and that plaintiffs failed to show that the water levels in the North Dike would have continued to increase until the time of dam failure. *Id.* at *44-45.

D. Discretionary Function Doctrine

The court held that "the discretionary function doctrine does not shield TVA from liability for TVA's negligent implementation of [the decision to locate the plant in the area and the design of the plant] and TVA's failure to construct" the dikes and cells in accordance with the TVA's plans, which resulted in the location of the North Dike in the geologically unique area it was constructed. *Id.* at *52. Because "[n]egligent failure to follow design drawings and plans involves no discretionary function or duty," *id.* (citations omitted), the court concluded "that TVA's decision and conduct in locating North Dike . . . is not protected by the discretionary function doctrine." *Id.* at *53.

The TVA argued that the "hiring, training, and assignment of TVA employees" is protected by the discretionary function doctrine, relying on prior case law. The court agreed, but clarified that allegations of the TVA's actionable decisions included more than just hiring, training, and

assignment of employees. *Id.* at *54. The court noted, "[N]egligent failure to perform a policy decision—such as a failure to provide information and training to employees and/or inspectors for carrying out pre-determined policies and procedures for coal ash operation and management—would not involve the same policy judgments as the actual creation of those policies and procedures." *Id.* (quoting *TVA I*, 787 F. Supp. 2d at 718 (additional citation omitted) (internal quotation marks omitted). But the court determined that the plaintiffs' arguments regarding the scope and substance of the TVA's policies were barred by the discretionary function doctrine. *Id.* at *56. Finally, the court concluded, with regard to inspections, that the TVA's violation of the engineering standard of care was not protected by the discretionary function doctrine.

E. Conclusion

The TVA has already purchased over 180 affected properties and settled more than 200 claims stemming from the catastrophic spill. James B. Kelleher, *2008 Tennessee Coal Ash Spill: Judge Rules Against Tennessee Valley Authority*, HUFFINGTON POST (Aug. 23, 2012), http://www.huffingtonpost.com/2012/08/24/2008-tennessee-coal-ash-spill_n_1826490.html. It has also donated $43 million to the Roane County Economic Development Foundation so the affected area can rebuild.

Upon Phase II, the TVA will be liable to any plaintiff who can prove the elements of negligence, trespass, or private nuisance. *TVA II*, 2012 WL 3647704, at *62. By reducing the potential claims that could be brought against TVA in a binding Phase I trial, yet still allowing recovery with individualized cases not settled, the Honorable Judge Thomas Varlan preserved judicial economy and clarified the role of governmental accountability in disasters, while still giving each plaintiff his day in court.

David Hynes

III. LEGISLATIVE ACTION—USE OF ALTERNATIVE FUELS BY THE MILITARY

House Bill 4310 and Senate Bill 3254

A. Introduction

In February 2012, President Obama submitted his proposed budget to Congress and officially started the process of financing the federal government for the next fiscal year. Along the way, as the budgets for the federal agencies that collectively oversee the nation's environmental regulations are reviewed and approved, a host of environmental programs will be addressed. Because changes to any of them could have a significant impact on the environment, it is not surprising that the environmental community is engaged in the process. Yet the budget may end up affecting the environment the most in an area many environmentalists would least suspect, and recent developments in defense appropriations warrant their attention.

For a host of reasons, the military has accelerated its efforts in recent years to increase its use of alternative sources of energy. As the federal government's single largest consumer of energy, the United States Department of Defense (DoD or Department) on its own is capable of having a significant effect on greenhouse gas (GHG) emissions. *See* DEF. SCIENCE BD., U.S. DEP'T OF DEF., REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON DOD ENERGY STRATEGY: MORE FIGHT-LESS FUEL 11 (2008). But even more promising is the military's proven track record of advancing technological innovation. In its effort towards diversifying its own energy supply, the DoD can serve as a developer, demonstrator, and purchaser of clean energy technologies, which can help coordinate research, increase the knowledge base, drive markets, and yield new technologies. MATT HOURIHAN & MATTHEW STEPP, LEAN, MEAN AND CLEAN: ENERGY INNOVATION AND THE DEPARTMENT OF DEFENSE 7 (2011). All of this, of course, costs money, and the military's role in advancing alternative fuel sources is dependent on congressional appropriations. And though the budget process is still ongoing, both the House of Representatives and the Senate Armed Services Committee have passed measures that would rein in military investment in alternative energy sources. Should they become law, the biofuel industry would lose an important part of its market and face a potential setback in its growth.

B. Background

Our climate is changing, caused in part by the burning of fossil fuels, and if left unmitigated, the impacts are "likely to exceed the capacity of natural, managed and human systems to adapt." INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2007: SYNTHESIS REPORT 37, 65 (2007) (emphasis omitted); *see also* P.H. Gleick et al., Climate Change and the Integrity of Science, 328 SCIENCE 689, 689 (2010) (affirming the mainstream scientific conclusions about climate change, among them that "[t]he planet is warming due to increased concentrations of heat-trapping gases in our atmosphere" and that most of this increase can be attributed to human activities, especially the burning of fossil fuels and deforestation). Yet, as of this writing, Congress has failed to enact comprehensive legislation to address climate change. *See* Lieberman-Warner Climate Security Act of 2007, S. 2191, 110th Cong. (2007) (proposing a cap and trade bill that would set limits on carbon emissions and establish a carbon-trade market that was not enacted); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong (2009) (proposing a cap and trade bill that was passed by the House of Representatives but was never voted on by the Senate); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009) (proposing a cap and trade bill that was not enacted). But while serious efforts to mitigate climate change and transform the nation's energy use have been thwarted in Congress by politics and economics, another American institution has aggressively, though indirectly, taken up the cause: the United States Military.

Though the DoD has recognized climate change as a national security issue, *see* U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 85 (2010), mitigating the effects of climate change has not been the motivation for the department's increased interest in alternative fuel sources. Instead, many of the military's energy innovations and initiatives that have great potential to "combat" climate change arose from the lessons it learned in the last decade of actual combat. The wars in Iraq and Afghanistan have highlighted the true costs the military pays for energy, in terms both of price and of strategic, operational, and tactical consequences. In 2010, U.S. military operations required five billion gallons of fuel at a cost of $13.2 billion, a 225% increase from the cost in 1997. DEP'T OF DEF., ENERGY FOR THE WARFIGHTER: OPERATIONAL ENERGY STRATEGY 1, 4 (2011). Last year, the Department consumed 116.8 million barrels of fuel at a cost of $17.2 billion. U.S. DEP'T OF DEF., ENERGY INVESTMENTS FOR MILITARY OPERATIONS: FOR

FY 2013, at 3 (2012). Given the volatile nature of the oil market, these types of expenditures are hard to predict and accurately budget for. For example, a ten-dollar increase in the cost of oil per barrel equates to a $1.3 billion increase to DoD's fuel costs. CNA, POWERING AMERICA'S DEFENSE: ENERGY AND THE RISKS TO NATIONAL SECURITY 11 (2009) (citing *Hearing Before the Subcomms. on Terrorism, Unconventional Threats & Capabilities & Readiness of the H. Armed Services Comm.*, 109th Cong. (2006) (statement of John Young and Philip Grone)). Additionally—and far more unfortunately—these costs may also include a human toll. From 2003 to 2007, more than 3000 soldiers and contractors were wounded or killed in action from attacks on fuel and water convoys. *See* ARMY ENVTL. POLICY INST., SUSTAIN THE MISSION PROJECT: CASUALTY FACTORS FOR FUEL AND WATER RESUPPLY CONVOYS FINAL TECHNICAL REPORT 3 (2009). According to the report, the Army can expect one casualty for every twenty-four fuel convoys in Afghanistan. *Id.* at i. The Pentagon simply realized that these costs were too high and that investing in alternative sources, along with increasing efficiency, could reduce them.

In 2011, the Department began to address this issue when it released a comprehensive strategy to guide its operational use of energy resources. Recognizing the increased risks and costs a continued reliance on petroleum would present to the armed forces and the disconnect between the DoD's current energy consumption and the nation's security interests, the strategy outlines how the Department will transform its use of energy. U.S. DEP'T OF DEF., ENERGY FOR THE WARFIGHTER: OPERATIONAL ENERGY STRATEGY 1 (2011). One of the specific measures provided is to expand energy supply through diversifying sources, giving the military "more options" with "less risk." By developing and deploying alternative sources of fuel, the military can decrease its dependence on petroleum, increase operational readiness, stabilize costs, and be better positioned to further the nation's interests. Other benefits however, such as contributing to the national goals of reducing reliance on fossil fuels, cutting GHG emissions and stimulating civilian sector innovation, can all directly aid in mitigating the effects of climate change. A clear example of this strategy in action can be seen in the United States Navy's increased interest in biofuels.

C. United States Navy's Recent Actions

As part of its effort to decrease reliance on foreign oil, the Navy plans to deploy a Carrier Strike Group composed of ships and aircraft powered solely by alternative sources of energy by 2016. Great Green

Fleet, ENERGY, ENVIRONMENT, & CLIMATE CHANGE, U.S. NAVY, http://greenfleet.dodlive.mil/energy/great-green-fleet (last visited Oct. 17, 2012). To move this vision of a "Great Green Fleet" towards a reality, the Navy recently spent $12 million on 450,000 gallons of advanced biofuel to evaluate its operational performance during a multinational maritime exercise. Though expensive at $26 per gallon, the Navy successfully demonstrated that these fuel sources can serve as "drop-in" replacements for conventional ship and aviation fuels.

To help bring down costs, the Navy is increasing its efforts to promote growth in the U.S. biofuel industry. One such effort is the Advanced Drop-In Biofuel Production project, a joint venture between the Navy and the Departments of Energy and Agriculture, which provides federal dollars to match private investment in the construction and retrofitting of commercial-scale biofuel refineries. According to the DoD, "These plants will have the capability to produce ready, drop-in replacement advanced biofuels meeting military specification at a price competitive with petroleum in geographically diverse locations for ready market access . . . ." DEP'T OF DEF., ENERGY INVESTMENTS FOR MILITARY OPERATIONS: FOR FISCAL YEAR 2013, at 44 (2012).

These initiatives demonstrate the Navy's commitment to alternative fuel sources and present a cross-section of the energy reforms taking place throughout the military. They also need to be funded. The Navy has budgeted $11.1 million for Fiscal Year 2013 to promote the development and use of alternative fuels. *Id.* at 27. To support the Great Green Fleet initiative, the Navy has budgeted $70 million over the next five years for the procurement of alternative fuels for future demonstrations. In addition, the DoD has budgeted $90 million for its Defense Production Act (DPA) Title III program, $70 million of which is to be allocated for the Advanced Drop-In Biofuel Production project. *Id.* at 44. These budget items, however, are only requests and are subject to the budget process. Like all appropriations, they must be authorized by Congress.

D. Recent Congressional Action

In June 2012, the House of Representatives passed its bill authorizing defense appropriations for Fiscal Year 2013. One of its many provisions addresses the DoD's expanding use of alternative fuels and placed limits on their procurement. Specifically, House Bill 4310 prohibits "the production or purchase of any alternative fuel if the cost . . . exceeds the cost of producing or purchasing a traditional fossil fuel that would be used for the same purpose as the alternative fuel."

H.R. 4310, 112th Cong. § 314(a) (2012). After sending the bill to the Senate for markup, the Senate Armed Services Committee agreed with the limitation and specifically addressed the Navy's Great Green Fleet demonstration. "[G]iven the pressure placed on current and future defense budgets," the committee expressed its concern "about the use of operation and maintenance funds to pay significantly higher costs for biofuels" used for research and development. S. REP. NO. 112-173, at 80 (2012). Accordingly, the committee added language that would only authorize expenditures for alternative fuel purchases for testing purposes. Moreover, in apparent response to the Navy's pledged investment in the biofuels industry, the Senate Armed Services Committee recommended a new provision to "prohibit the Department of Defense from entering into a contract to plan, design, or construct a biofuel refinery or any other facility or infrastructure used to refine biofuels," unless Congress explicitly permits otherwise. *Id.* at 277. In close votes, both provisions made it out of committee but the full Senate is not expected to vote on its version of the Defense Authorization Act, S. 3254, until November. *Id.* at 474.

E. Analysis

Congress's recent actions could have significant implications for the biofuel industry. To be clear, neither the House nor the Senate Armed Services Committee are suggesting an outright prohibition on military purchases of biofuel. But the language offered by both would curtail the DoD's ability to make such purchases on a large scale. By limiting procurement to only research and development purposes, the military will no doubt have fewer funds available for alternative fuel sources. In effect, this provision denies the biofuel industry the full buying power of the military procurement process and the associated benefits that it would provide. Moreover, if the Senate Armed Services Committee's recommendations regarding biofuel refineries are approved by the Senate at large and become law, the Navy would need explicit approval from Congress to go forward with its Advanced Drop-In Biofuel Production project. Of course, Congress may give the Navy its blessing in the future. And, of course, it may not. What remains is a level of uncertainty.

Consider, for example, Senator McCain's view that

> defense funds should not be used to invigorate a commercial industry that cannot provide an affordable product without heavy government subsidies. This is not a core defense need and should be left to the Department of

> Energy, which received over $4 billion last year for energy research and development and related programs, or to the private sector to take the lead.

Id. at 479-80. Putting aside for a moment the fact that the Navy's biofuel project is part of a larger effort made in concert with the Department of Energy and the private sector, the biofuel industry is not likely to attract private investment without a firm expectation of a buyer in the market. Consider also that the Renewable Fuel Standards volumetric mandates, which are controlled by Congress and require a minimum volume of renewable fuel production each year, excludes jet fuel, further reducing the incentives for the private sector to produce more alternatives. U.S. DEP'T OF DEF., OPPORTUNITIES FOR DOD USE OF ALTERNATIVE AND RENEWABLE FUELS, at iv (2011). In one breath, Congress is telling the military it cannot buy alternative fuels until private sector development makes them cost comparable to traditional petroleum. In the next breath, Congress is denying the military the opportunity to provide the incentives to the private sector that can make them more comparable.

F. Conclusion

Congress is right to be concerned about tightening budgets and limited resources, and it should certainly exercise its discretion over military spending. But it should not ignore the price of the status quo. At $26 a gallon, biofuel is certainly not cheap. The military, however, has identified some ways to make it cheaper. If successful, these efforts could not only lead to a Great Green Fleet but to commercial scale production, decreased petroleum consumption, and fewer GHG emissions. But success will be less likely if Congress limits defense spending on alternative fuels. As the budget process moves towards completion, the defense community is watching Congress and waiting to see what the final National Defense Authorization Act contains. With so much at stake for alternative fuel sources, the environmental community may want to focus its attention there as well.

Rick Eisenstat

IV. GLOBAL WARMING—PUBLIC NUISANCE CLAIMS

Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012)

On September 21, 2012, the United States Court of Appeals for the Ninth Circuit affirmed the lower court's dismissal in *Native Village of*

Kivalina v. Exxonmobil Corp. (*Kivalina II*), 696 F.3d 849 (9th Cir. 2012). The suit was brought by a tribe of Native Alaskans against twenty-two oil, energy, and utility companies for damages resulting from global warming. *Id.* at 853 & n.1. The Ninth Circuit's decision dashed the hope of many that the federal common law public nuisance cause of action might still be used to sue greenhouse gas emitters for monetary damages, even after *American Electric Power Co. v. Connecticut* (*AEP*), 131 S. Ct. 2527, 2532 (2011), rejected public nuisance claims under federal common law where the plaintiffs sought injunctive relief against greenhouse gas emissions.

A. Factual and Procedural Background

The Native Village of Kivalina is a 400-member tribe of Inupiat Native Alaskans who live on the tip of a barrier reef, seventy miles above the Arctic Circle. *Kivalina II*, 696 F.3d at 853. The tribe's incorporated city, Kiva, was also named as a plaintiff. The plaintiffs claimed they were being forced to relocate their village because of the effects of climate change, specifically, the decrease in sea ice formation along the coastline of their reef. This sea ice has long protected the village from erosion due to storms, but in recent years, as the ice has begun to decrease in amount and to attach to the coastline later and break up earlier, sea storms have threatened to wipe out the village. The plaintiffs attribute the decrease in sea ice to the rising temperature of the planet, which causes seawater to rise and melt ice caps and glaciers. *Id.* at 853-54. The tribe claimed that the defendants, as substantial contributors to global warming, caused the loss of their public right to use and enjoy their property, *id.* at 854, and that it would cost $95 to $400 million to relocate their village. Native Village of Kivalina v. ExxonMobil Corp. (*Kivalina I*), 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009). The plaintiffs also alleged that the defendants "act[ed] in concert to create, contribute to, and maintain global warming and . . . conspir[ed] to mislead the public about the science of global warming." *Kivalina II*, 696 F.3d at 854. Because the success of these claims was dependent on the success of the public nuisance claims, the court dismissed them, too, without discussing their merits. *Id.* at 858.

The United States District Court for the Northern District of California agreed with the *Kivalina* defendants both that the case raised a nonjusticiable political question and that the tribe and the city lacked standing; it therefore granted the defendants' motion to dismiss for lack of subject-matter jurisdiction. *Kivalina I*, 663 F. Supp. 2d at 883. In ruling on the first issue, the district court reasoned that there were no judicially discoverable and manageable standards that would enable it to

render a ruling that was "principled, rational, and based upon reasoned distinctions." *Id.* at 874-75 (quoting Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005) (internal quotation marks omitted)). The court explained that in order to determine whether the defendants' emissions constituted an objectively unreasonable interference with the plaintiffs' rights, it would have to undertake an assessment of the costs and benefits of various forms of energy production. It reasoned further that the case would require it to make an "initial policy determination of a kind clearly for nonjudicial discretion," because it would have to determine acceptable levels of emissions and the question of who should bear the cost of global warming. *Id.* at 876-77 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962) (internal quotation mark omitted)).

On the issue of standing, the district court reasoned that the tribe could not show a "substantial likelihood" that the defendants' conduct caused its injuries, that the "seed" of its injury could be traced to the defendants, or that it was within close enough geographic proximity to the discharges of greenhouse gases. *Kivalina II*, 696 F.3d at 854 (citing *Kivalina I*, 663 F. Supp. 2d at 878-82).

B. The Court's Decision

As the Supreme Court did in *AEP*, the Ninth Circuit, in an opinion written by Circuit Judge Sidney R. Thomas, based its resolution of the appeal not on the political-question or standing issues, but rather on the "arcane and rarely invoked" theory of displacement. R. Trent Taylor, *The Death of Environmental Common Law?: The Ninth Circuit's Decision in* Native Village of Kivalina v. ExxonMobil Corp., MONDAQ (Oct. 8, 2012), http://www.mondaq.com/unitedstates/x/200182/Environmental+Law/The+Death+Of+Environmental+Common+Law+The+Ninth+Circuits+Decision+In+Native+Village+Of+Kivalina+v+ExxonMobil+Corp.
The legal phenomenon of displacement occurs when a federal statute "speak[s] directly to [the] question at issue" and thereby "displaces" a cause of action under federal common law. *Kivalina II*, 696 F.3d at 856 (alterations in original) (quoting Am. Elec. Power Co. v. Connecticut (*AEP*), 131 S. Ct. 2527, 2537 (2011) (internal quotation mark omitted)). One question left open by *AEP* was whether the Clean Air Act displaces federal common law suits that ask for damages rather than injunctive relief. In *Kivalina II*, the Ninth Circuit answered this question in the affirmative by briefly referencing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 484 (2008), and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 4 (1981). *Kivalina II*, 696 F.3d at 857. It found that these cases "instruct[] that the type of remedy asserted is not

relevant to the applicability of the doctrine of displacement." Because it therefore viewed *AEP* as standing on all fours with *Kivalina*, the circuit court followed *AEP*'s holding that "Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources [in the Clean Air Act] and has therefore displaced federal common law." *Id.* at 856 (citing *AEP*, 131 S. Ct. at 2530, 2537).

In a lengthy concurrence, Judge Philip M. Pro, District Judge for the United States District of Nevada sitting by designation, explored the Supreme Court precedent on the theory of displacement much more deeply than did Judge Thomas. *Id.* at 858-69 (Pro, J., concurring). Judge Pro agreed that *Middlesex* stands for the rule that "where a federal common law nuisance claim for injunctive relief is displaced, a federal common law nuisance claim for damages . . . likewise is displaced." *Id.* at 862. But whereas Judge Thomas also supported his opinion with *Exxon Shipping* by lifting one sentence from the Court's opinion in that case—where the Court noted that it had "rejected similar attempts to sever remedies from their causes of action," *id.* at 857 (quoting *Exxon Shipping*, 554 U.S. at 489 (internal quotation marks omitted))—Judge Pro acknowledged that *Exxon Shipping* actually supported the Village of Kivalina's position on the displacement issue. *Id.* at 862-63 (Pro, J., concurring).

In *Exxon Shipping*, a case arising out of the EXXON VALDEZ oil spill, the Court upheld an award of punitive damages under federal maritime common law, despite the defendants' argument that the Clean Water Act's penalty provisions had displaced such a remedy. *Id.* at 862 (citing *Exxon Shipping*, 554 U.S. at 488-89). The Supreme Court wrote the sentence that Judge Thomas cited in response to the defendants' attempt to distinguish compensatory damages under federal maritime common law, to which it had stipulated, from punitive damages under the same law, which it contested. *Id.* at 863. The Court did not write it "in the context of examining whether one form of damages[, a monetary award,] ought to be severed from another form of damages[, injunctive relief]." In the end, however, Judge Pro concluded that, notwithstanding *Exxon Shipping*, Supreme Court precedent taken as a whole endorses the position that if federal common law has been displaced, it is displaced as to both injunctive and monetary relief. *Id.* at 865-66 (citing City of Milwaukee v. Illinois, 451 U.S. 304 (1981); Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); Am. Elec. Power Co. v. Connecticut (*AEP*), 131 S. Ct. 2527 (2011)).

Judge Pro also addressed the issue of standing, which the majority opinion did not reach. He agreed with the district court that the tribe

lacked standing because it did not allege facts showing that its injuries were traceable to the defendants. *Id.* at 868. Judge Pro distinguished the plaintiffs from Massachusetts in *Massachusetts v. EPA*, in which the Supreme Court concluded that the state had special standing to seek judicial relief on behalf of its citizens. *Id.* at 869 (distinguishing 549 U.S. 497, 516-20 (2007)). In his view, the court should not countenance a suit by a private plaintiff who arbitrarily singles out certain greenhouse gas emitters from among "all the greenhouse gas emitters throughout history" to hold liable for potentially enormous damages. *Id.* at 868-69.

C. Analysis

It is likely that other federal circuits will follow the Ninth Circuit's ruling that the federal common law is unavailable to plaintiffs seeking monetary damages for greenhouse gas emissions. However, such plaintiffs may have a last but perhaps feeble hope in state tort law. Several state courts have recently dismissed suits for injunctive relief on the basis of the political question doctrine. Dustin Till, *Climate Change Lawsuits Get Chilly Reception*, MARTEN L. (June 19, 2012), http://www.martenlaw.com/newsletter/20120619-climate-change-lawsuits (citing Chernaik v. Kitzhaber, No. 16-11-09273 (Or. Cir. Ct. Apr. 5, 2012); Kanuk v. Alaska Dep't of Natural Res., No. 3AN-11-0747CI (Alaska Super. Ct. Mar. 16, 2012); Stivak v. Washington, 11-2-16008-4 SEA (Wash. Super. Ct. Feb. 29, 2012)). The prospects for suits seeking damages under state tort law, however, do not appear quite as bleak. Neither the *AEP* Court nor the *Kivalina* majority opinion ruled on whether the plaintiffs in each case had standing or on whether the case presented a nonjusticiable political question. *See AEP*, 131 S. Ct. at 2535 (holding four-to-four that the plaintiffs have standing). Plaintiffs in future state law cases may therefore be able to survive motions to dismiss based on these issues.

Additional encouragement for climate change plaintiffs has come out of the United States Court of Appeals for the Fifth Circuit. In an opinion that was later withdrawn, the Fifth Circuit held that the public and private nuisance, trespass, and negligence claims in a state-law suit alleging that the defendants' contribution to global warming exacerbated damages from Hurricane Katrina did not pose a nonjusticiable political question. Comer v. Murphy Oil USA, 585 F.3d 855, 860 (2009), *reh'g en banc granted*, 598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (2010). The court also held that the plaintiffs had standing. After the circuit court granted the defendants' motion to rehear the case en banc, however, so many judges recused themselves that there was no quorum to hear the

case or to reinstate the panel decision, and the district court's decision stood. Till, *supra*. Even Judge Pro, with his firm belief that the Kivalina tribe did not have standing, offered the tribe the seemingly contrary consolation that "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Kivalina II*, 696 F.3d at 866 (citing *AEP*, 131 S. Ct. at 2540).

Preemption, however, is a legal theory that may very well thwart future attempts to hold greenhouse gas emitters liable for damages under state common law. At least one attorney from the industry side believes that *Kivalina II*'s holding regarding displacement "cannot help but strengthen the preemption defense as well." Taylor, *supra*. But there is a glimmer of hope there, too: whereas defendants claiming displacement must only show that a statute "speak[s] directly to [the] question at issue," *Kivalina II*, 696 F.3d at 856 (alterations in original) (quoting *AEP*, 131 S. Ct. at 2537 (internal quotation mark omitted)), a defendant claiming preemption must make the more difficult showing of "a clear and manifest [congressional] purpose" to preempt state law. *AEP*, 131 S. Ct. at 2537 (alteration in original) (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981) (internal quotation mark omitted)). Though their success is far from certain, public nuisance suits under state law may still be worth a try.

Casey Desselles

V. CLEAN WATER ACT—EPA AUTHORITY OVER DISCHARGE PERMITS

Mingo Logan Coal Co. v. U.S. Environmental Protection Agency, 850 F. Supp. 2d 133 (D.D.C. 2012)

A. Introduction

In *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, the United States District Court for the District of Columbia narrowed the scope of the U.S. Environmental Protection Agency's (EPA) authority when it held that the EPA could not veto a discharge permit after it was issued. 850 F. Supp. 2d 133 (D.D.C. 2012). Mingo Logan Coal Company (Logan), a coal mine operator, brought an action against the EPA alleging that the EPA lacked authority to modify or revoke its discharge permit once it was issued by the U.S. Army Corps of Engineers (Corps) under section 404(a) of the Clean Water Act (CWA), 33 U.S.C.

§ 1344(a) (2006). The court relied mainly on the legislative history and the purpose of the CWA to determine that the EPA acted outside the scope of its authority.

On January 22, 2007, the Corps issued a permit to Logan pursuant to section 404 of the CWA, which authorized the company to discharge fill material from its coal mine, Spruce No. 1, into the nearby streams of Pigeonroost Branch and Oldhouse Branch. *Mingo Logan*, 850 F. Supp. 2d at 136. Nearly four years later, the EPA published a Final Determination purporting to withdraw the specification of the two streams as disposal sites. *Id.* at 137. In effect, the Final Determination would have invalidated the previously issued permit for those sites. This attempt to withdraw the specification of discharge sites after a permit was issued was unprecedented in the history of the CWA and was of first impression for the court. *Id.* at 134. Plaintiffs alleged a violation of section 404(c) of the CWA and further, that the EPA's action was arbitrary and capricious and not in accordance with the law. *Id.* at 134, 138 (citations omitted).

B. The Court's Decision

The CWA vests the full authority to issue permits for discharges into navigable waters with the Corps. Section 404(a) provides, "The Secretary may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Section 404(b) provides, "[E]ach such disposal site shall be specified for each such permit by the Secretary [of the Army]." *Id.* § 1344(b). The statute does give the EPA the opportunity to disrupt the process and prohibit the specification of an area as a disposal site if it determines that the discharge would have certain "unacceptable" environmental consequences. The EPA's interpretation of how far its authority to prohibit specifications extends was at issue in this case.

The D.C. District Court analyzed the agency's interpretation of its authority as delegated by the CWA by following a two-step procedure set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984): first, the court must determine whether Congress has spoken directly to the precise question at issue, and if the court concludes that the statute is either silent or ambiguous, the second step of review is determining whether the interpretation proffered by the agency is based on a permissible construction of the statute. *Mingo Logan*, 850 F. Supp. 2d at 138-39 (citing *Chevron*, 467 U.S. at 842-43). Under step two, an agency's interpretation of a statute that is administered is

generally entitled to substantial deference. *Id.* at 139 (citing *Chevron*, 467 U.S. at 844).

1. Step One of the *Chevron* Analysis

In step one of the *Chevron* analysis, the court looked at the wording in the CWA to determine whether it speaks to the issue at hand. The court started with the specific provision from which the EPA claimed its authority is derived:

> The [EPA] Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge . . . will have an unacceptable adverse effect . . . . Before making such determination, the Administrator shall consult with the Secretary [of the Interior].

33 U.S.C. § 1344(c).

The EPA argued that the wording "whenever he determines" grants the EPA permission to withdraw its assent to a disposal site at any time, even after the permit is issued. *Mingo Logan*, 850 F. Supp. 2d at 139. The court rejected this argument and stated that the provision did not go so far as to confer the express authority to undermine an existing permit—just the authority to withdraw a specification, at most. *Id.* at 140. Because Congress distinguishes between permits and specifications everywhere else in the statute, if Congress meant to include the authority to withdraw a *permit* as well, it would have specifically mentioned permits in the provision. *See id.* at 141. Contrary to the EPA's argument, the court held that this provision does not give the EPA any role in connection with permits.

Next, the court turned to the CWA as a whole and in particular to section 404(p), where it concluded that that section expressly provides that discharges made pursuant to a permit are lawful. *Id.* at 142 (citing 33 U.S.C. § 1344(p); Natural Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 111 (D.C. Cir 1987)). Therefore, because Congress allows a permittee to act pursuant to a valid permit, it would not make sense to allow a permittee to rely fully on a permit that could be revoked. *See Mingo Logan*, 850 F. Supp. 2d at 143-44. Allowing revocation of a permit negates the legal protection that Congress declared a permit would provide. *Id.* at 144. The court determined that the review of the statute in its entirety suggests that the EPA's action is invalid.

Having no legislative history that seemed to specifically delegate or prohibit the EPA's actions, the court relied on the statements of Senator Edmund Muskie that were presented as evidence by the EPA and Logan. *Id.* at 145 (citing *Senate Consideration of the Report of the Conference Comm.: Hearing on S.2770*, 93d Cong. (Oct. 4, 1972)). The court interpreted his language "prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect [certain resources]" as expressly stating that the EPA's 404(c) veto authority will be exercised prior to the issuance of a permit. *Id.* at 144-47. Further, the court cited another D.C. district court case that held, "[I]f a responsibility involving the permitting process has not been delegated to the EPA by Congress, that function is vested in the Corps as the permitting authority." Nat'l Mining Ass'n v. Jackson, 816 F. Supp. 2d 37, 44 (D.D.C. 2011). Therefore, because the EPA's responsibilities are limited to those that are specifically assigned, and because the authority to issue a postpermit veto is not specifically assigned, that authority must not exist. *Mingo Logan*, 850 F. Supp. 2d at 146-47. Ultimately, the court concluded that it is "clear from the forward looking language" in the legislative history that Congress anticipated that the EPA would act *before* a permit is issued and, indeed, not unnecessarily slow down the process while doing so. *Id.* at 147.

Next, the court analyzed the case law presented by the EPA and quickly denied its relevance. The EPA referred to three main cases that provided a basis for its argument. *Id.* (citing City of Alma v. United States, 744 F. Supp. 1546 (S.D. Ga. 1990); Russo Dev. Corp. v. Reilly, No. 87-3916, 1990 WL 130997 (D.N.J. Mar. 16, 1990); Hoosier Envtl. Council, Inc. v. U.S. Army Corps of Eng'rs, 105 F. Supp. 2d 953 (S.D. Ind. 2000)). The court promptly distinguished the case law from the case at bar because in each of those cases, the court's statements regarding the EPA's power to withdraw a specification after a permit is issued were mere dicta, rather than statements about actual issues in the case that received a thorough analysis. In each case, the Corps had not issued a valid section 404 permit that the EPA wanted to veto. The courts did not "squarely consider whether EPA actually would have had the authority to exercise its 404(c) authority after a permit had been issued because that was not the situation before [them]." *Id.* at 148. Here, the court concluded that because each case presented a different question than the one at issue, the authority could not be relied upon.

At the conclusion of step one of the *Chevron* analysis, the court made it known that it believed the EPA's position was inconsistent with the CWA as a whole and that its action could be deemed unlawful, but

decided to continue to step two because there was some ambiguous wording in section 404(c).

2. Step Two of the *Chevron* Analysis

Before analyzing whether the EPA's interpretation of the CWA was reasonable, the court made note that when more than one agency is tasked with administering the statute, the determination of how much deference the court owes to any one of those agencies is not straightforward. Here, the court was concerned because the Corps' and the EPA's authority overlaps significantly in section 404 of the CWA. Because of the significant overlap in section 404(c), the court decided that it would allot a lower level of deference to the EPA's decision in order to follow the court's reasoning in *Collins v. National Transportation Safety Board*. *Mingo Logan*, 850 F. Supp. 2d at 149-50 (citing 351 F.3d 1246, 1252 (D.C. Cir. 2003)). It decided to award only some level of deference, which is less than was given in *Chevron* but still a "non-trivial boost."

With a lower level of deference in mind, the court ultimately held that the EPA's interpretation was unreasonable. The court labeled the EPA's distinction between revoking a permit and withdrawing a specification as "illogical and impractical." *Id.* at 152. The EPA claimed that it was not revoking a permit but rather just withdrawing a specification. This argument failed because the EPA itself admitted that a withdrawal of the specification nullified the permit. Further, the court emphasized that the permit system was implemented in order to provide certainty and finality with regard to the actions a company may take. To affirm the notion that a permit could later be revoked would derail this intention. The court noted that the EPA has itself given voice to the importance of finality and acknowledged that the CWA vests final authority in the Corps. *Id.* (citing U.S. DEP'T OF DEF. & U.S. ENVTL. PROT. AGENCY, MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY (1992), *available at* http://water.epa.gov/lawregs/guidance/wetlands/dispmoa.cfm). The portion of the *Memorandum of Agreement* that addresses the EPA's exercise of its 404(c) veto authority "expressly contemplates that the agency would act before the Corps issues a permit." *Id.* at 153.

Based on the aforementioned reasons, the court concluded that the EPA's interpretation of section 404(c), which extends its veto authority indefinitely after a permit has been issued, is not reasonable.

C. Analysis

This is the first time that the EPA has tried to invoke CWA section 404(c) to modify or annul a permit that has already been duly issued by the Corps. Had the EPA's action stood, all section 404 permits would be subject to a unilateral EPA veto even after issuance, regardless of any action taken by the Corps. The court's decision limits the EPA's claim of extensive power and instead directs the EPA to exercise its authority during the permitting process, before the Corps has made its decision to issue a permit. Thereafter, the Corps alone will control the administration and enforcement of the issued permit. It comes as no surprise that the court denied the EPA such blanket authority, because doing so would undermine the reliability of valid permits issued pursuant to the CWA. It would stifle economic investment by developers and make the existence of a CWA section 404 permit insignificant.

However, there is a chance that this decision might not stand. On May 11, 2012, the EPA appealed Judge Jackson's ruling to the United States Court of Appeals for the District of Columbia Circuit. If the decision is reversed on appeal, as the court noted, the EPA's authority to veto an issued permit could cause consternation and anxiety for members of the business community because it threatens the finality of their wetland and stream permits.

If Judge Jackson's decision stands, it will provide more certainty in the section 404 permitting process. In turn, the EPA might consider specifications more carefully before issuing the permits. Although the decision narrows the EPA's authority, it is not a huge win for industry because it does not affect companies seeking *new* CWA section 404 permits. In fact, the decision might even make it more difficult for developers to obtain permits because the EPA will be more meticulous and reluctant in approving specification of sites.

Amanda Tarsa

VI. STATE LEGISLATIVE ACTION—WITHDRAWALS FROM LAKE ERIE

Ohio House Bill 473

On June 4, 2012, Ohio Governor John Kasich signed into law Ohio House Bill 473—the first permitting program for water withdrawals from the Ohio River and Lake Erie watersheds. Aaron Marshall, *Gov. John Kasich Signs Lake Erie Water Usage Bill over Objections of Critics*, CLEVELAND.COM (June 4, 2012, 10:00 PM), http://www.cleve

land.com/open/index.ssf/2012/06/kasich_signs_lake_erie_water_u.html. According to the Ohio Department of Natural Resources, the bill aims to protect Lake Erie and its tributaries by creating special rules for streams designated as high quality, along with setting "environmentally responsible" regulations for water withdrawal past certain thresholds. The law, therefore, "strik[es] a balance between environmental and economic concerns." OHIO DEP'T OF NATURAL RES., HB 473 SUMMARY & KEY PROVISIONS, http://www.ohiodnr.com/Portals/0/Blog/HB473.pdf (last visited Nov. 13, 2012). The Act was established under Ohio statute in order to completely fulfill requirements set by the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact), OHIO REV. CODE ANN. § 1501.32 (West 2012).

The Compact was modified to only apply to the Ohio River watershed. The new section added by House Bill 473 directly addresses water withdrawals out of Lake Erie and sets specific requirements for new or increased water withdrawal. Once a certain amount of water is withdrawn, the owner of the facility must apply for and receive a permit from the chief of the Division of Soil and Water Resources (DSWR). OHIO REV. CODE ANN. § 1522.11. More specifically, the owner/operator of such a facility must obtain a permit if any one of three capacity criteria are met: first, if the facility withdraws (either new or additional withdrawals) at least 2.5 million gallons per day (averaged over time, discussed below) from either Lake Erie or a recognized navigation channel; second, if the facility withdraws at least 1 million gallons per day (averaged over time) from "any river or stream or from ground water in the Lake Erie watershed"; and third, if the facility withdraws at least 100,000 gallons per day (not averaged over time—a strict per-day limit) from "any river or stream in the Lake Erie watershed that is a high quality water." *Id.* § 1522.12(A)(3)(a). The applicant for such a permit must include key information in an application, including "[t]he environmentally sound and economically feasible water conservation measures to be undertaken by the applicant," as well as alternative means that the facility can use to satisfy its water needs if a permit is not granted. *Id.* § 1522.12(C)(3)(h).

Specifically addressing the question of streams and rivers designated as high quality water, the law applies to the entire watershed upstream of any high quality river, stream, or segment, as long as the directors of both the Department of Natural Resources and the Department of Environmental Protection "determine that the proposed withdrawal or consumptive use would cause the high quality water to lose its designation as a high quality water." *Id.* § 1522.12(A)(3)(b).

Otherwise, the protection applies only to either 1000 feet upstream of the high quality segment, or "at a point beginning two times the length of the . . . [designated] segment [of] high quality water, whichever is greater."

The chief of the DSWR issues the permit based on the decision-making criteria delineated in the Compact. The criteria include that all water withdrawn (except that actually consumed) must be returned to the source watershed; the water use "will result in no significant individual or cumulative adverse impacts to the quantity or quality" of neither the Lake Erie watershed, nor any ecosystem dependent on the watershed; the water use must be done in an environmentally sound way (including the consideration of economic feasibility); and the use will be implemented in compliance with all other laws. Great Lakes-St. Lawrence River Basin Water Resources Compact § 4.11 (2005), *available at* http://cglg.org/projects/water/CompactImplementation.asp. Finally, the Compact stipulates a reasonable use standard, under which the proposed use is permissible if it "provides for efficient use of the water"; balances between "economic development, social development and environmental protection" of the area; considers other water withdrawals from interconnected sources, as well as the interconnected sources' "quantity, quality, and reliability and safe yield"; will have reasonable adverse impacts "under foreseeable conditions"; and proposes to mitigate such impacts.

In implementing these exact provisions of the Compact into the Ohio code, the law specifically states that the chief of DSWR

> shall require that a withdrawal or consumptive use will be implemented so as to ensure that the withdrawal or consumptive use will result in no significant individual or cumulative adverse impacts on the quantity or quality of the waters and water dependent natural resources of the great lakes basin considered as a whole or of the Lake Erie source watershed considered as a whole.

OHIO REV. CODE ANN. § 1522.13(B). Additionally, the director must use the best available scientific methods, consider long-term inflows and outflows of the watershed, and consider any water withdrawn that will not return to the watershed.

Certain parties are exempt from the requirement to obtain a permit for withdrawal and consumptive use. First, any facility, or proposed facility, with a capacity lower than the three mentioned in section 1522.12 (2.5 million, 1 million, and 100,000 gallons, respectively). *Id.* § 1522.14(A). Second, the facilities whose ninety-day average for water withdrawals falls below the section 1522.12 thresholds. *Id.*

§ 1522.14(B)(1). However, for high-quality water, the withdrawal is averaged over a forty-five day period for water designated as high quality, "when the withdrawals are made at a point where the area of the watershed of the river or stream is less than one hundred square miles but greater than fifty square miles." *Id.* § 1522.14(B)(2). When the area is less than fifty square miles, an immediate permit is required before 100,000 gallons per day is withdrawn—this is not an average over a certain amount of days but instead a strict per-day requirement. There are further exceptions for baseline facilities that have not increased capacity, for electric generating facilities that increase consumptive use of water "due to a requirement imposed by a federal regulation that is unrelated to an increase in production at the facility," and for various other facilities and circumstances. *Id.* § 1522.14(C)-(M).

Section 21 of the law gives legal rights to any "person who is or will be aggrieved or adversely affected," which is defined as "a person with a direct economic or property interest that is or will be adversely affected by an order or rule issued or adopted by the chief of [DSWR] under this [law]." *Id.* § 1522.21 (first internal quotation marks omitted). Before the chief issues a final permit, there will be a proposed order signifying the intent to issue a final order. Any person who is or will be aggrieved or adversely affected can send a written objection to the chief, after which the chief must "conduct an adjudication hearing with respect to the proposed order." The applicant for the proposed or final order will be a party in any proceeding concerning the proposed permit. If a final order is issued over the aggrieved party's objection, the party may appeal to the court of common pleas in whatever county the facility is located. However, the filing of an appeal does not automatically suspend the order. "[T]he court may suspend or stay the order, pending an immediate hearing on the appeal." Once the court finds the order to be lawful and reasonable, or not, "[t]he judgment of the court is final unless reversed, vacated, or modified on appeal." Importantly, no attorney's fees shall be "awarded to any party to an administrative or legal proceeding under this section."

The law passed by Ohio is a step in the right direction towards maintaining and protecting an infinitely valuable natural resource. The positive aspects are that consideration of cumulative impacts is required, that high quality streams enjoy added protection, and that there are strong rules for high-quality stream watersheds that are less than fifty square miles in size. However, the law falls short in many ways. The threshold limits for withdrawal and use are not caps or limits on the amount of water that can be used, but merely regulatory thresholds for when an

owner must seek a permit. Therefore, the law gives no concrete protection to Lake Erie withdrawals, outside of the chief's discretion to grant permits. Additionally, because only those persons with a direct economic or property interest can appeal a permit decision, the law restricts the rights of anyone who uses the Lake Erie watershed for recreational use, including boaters, anglers, and swimmers. Furthermore, by measuring water withdrawals based on a ninety-day average, instead of per-day measures, facilities will be able to withdraw extraordinary amounts of water in a short amount of time and still come within their limits on a ninety-day average. The cumulative effect of this short-term water grab across separately owned facilities could be devastating at certain times of the year when short-term consumption is high for any given reason. And finally, because no attorney's fees will ever be awarded in the case of a party appealing a permit decision, plaintiffs will be at a disadvantage when bringing suit against industrial defendants who will have ample resources to draw out the process. This could make it prohibitively expensive for the plaintiffs to continue after a certain point, because even if the plaintiffs win, they will have to absorb their attorney's fees.

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