RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. ENVIRONMENTAL ACTIVISM

Institute of Cetacean Research v. Sea Shepherd Conservation Society, 708 F.3d 1099 (9th Cir. 2013)

Sea Shepherd Conservation Society (Sea Shepherd) is a Washington-based international conservation organization founded in

1977 with the mission of preserving marine wildlife around the globe. *Who We Are*, SEA SHEPHERD, http://www.seashepherd.org/who-we-are/ (last visited Mar. 15, 2013). Sea Shepherd claims to use direct-action tactics to "expose and confront illegal activities" on the ocean. These aggressive tactics captivated audiences across America when Animal Planet featured the organization's actions on the television show *Whale Wars*. One of Sea Shepherd's targets is the Japanese Institute of Cetacean Research (Cetacean), which operates whaling vessels in the Antarctic Southern Ocean using a Japanese permit issued under the authority of the International Convention for the Regulation of Whaling (ICRW). Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y (*Cetacean II*), 708 F.3d 1099, 1101 (9th Cir. 2013). Sea Shepherd, among others, argues that Cetacean is a government-sponsored whale poaching group under the guise of a research organization. *Ninth Circuit Court of Appeals Hands Down Ruling in Favor of Japanese Whale Poachers*, SEA SHEPHERD, http://www.seashepherd.org/news-and-media/2013/02/27/ninth-circuit-court-of-appeals-hands-down-ruling-in-favor-of-japanese-whale-poachers-1491 (last visited Mar. 15, 2013).

The United States, which signed the ICRW in 1946 and ratified it in 1948, acts as the depository nation for nations wishing to adhere to the Convention. *Membership and Contracting Governments*, INT'L WHALING COMM'N, http://www.iwc.int/members (last visited Mar. 15, 2013); *see also* International Convention for the Regulation of Whaling art. X, Dec. 2, 1946, 161 U.N.T.S. 72 (codified at 16 U.S.C. § 916). Under the ICRW, the contracting nations may grant special permits to their nationals that allow the killing, taking, and treating of whales for purposes of scientific research. International Convention for the Regulation of Whaling, *supra*, art. VIII. There is no limit to the number of permits one nation may grant, or to the number of whales that can be killed through the exercise of a special permit.

A. Factual and Procedural Background

In 2012, Cetacean appealed the district court denial of its request for an injunction against Sea Shepherd and the dismissal of its claim that Sea Shepherd's actions amount to piracy. *Cetacean II*, 708 F.3d at 1101. Cetacean sued under the Alien Tort Statute based on claims for piracy under the United Nations Convention on the Law of the Sea (UNCLOS) and sought a preliminary injunction under three international agreements: the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), the UNCLOS, and the Convention on the International Regulations for

Preventing Collisions at Sea (COLREGS). *Id.* at 1101, 1103. Sea Shepherd protests whale hunting by ramming whaling vessels, throwing glass containers of acid, smoke bombs, and flares with hooks onto the vessels, dragging metal-reinforced ropes in the water to damage the propellers and rudders of the vessels, and pointing high-powered lasers at the vessels. *Id.* at 1101. The United States District Court for the Western District of Washington denied the whalers' motion for preliminary injunction to require the protesters' boats to stay 800 meters away in large part because no nation had intervened or condemned the actions of the whalers or Sea Shepherd with anything more than words. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y (*Cetacean I*), 860 F. Supp. 2d 1216, 1246 (W.D. Wash. 2012).

B. The Court's Decision

On appeal, the United States Court of Appeals for the Ninth Circuit reviewed the district court's dismissal of Cetacean's claims of piracy against Sea Shepherd and the denial of the preliminary injunction sought by Cetacean. *Cetacean II*, 708 F.3d at 1101-06. The Ninth Circuit overturned the district court on both issues, holding that Sea Shepherd's actions amounted to piracy and that Cetacean was entitled to a preliminary injunction. *Id.* at 1102, 1106. The court issued a preliminary injunction on December 17, 2012, prohibiting Sea Shepherd from coming within 500 yards of Cetacean when it is operating on the open sea. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 702 F.3d 573, 573 (9th Cir. 2012).

1. Piracy

The Ninth Circuit held that Sea Shepherd's actions amount to piracy as it is defined in the UNCLOS and the High Seas Convention. *Cetacean II*, 708 F.3d at 1101. The court, citing the UNCLOS, defined piracy as "illegal acts of *violence* or detention, or any act of depredation, committed for *private ends* by the crew or passengers of a private ship . . . and directed . . . on the high seas, against another ship . . . or against persons or property on board such ship." The Ninth Circuit held that "private" is to be understood broadly as the antonym of "public" and includes acts "not taken on behalf of a state." *Id.* at 1101-02. The court expressly included personal, moral, or philosophical goals, "such as Sea Shepherd's professed environmental goals" in the scope of private ends, relying heavily on a Belgian court's holding that environmental activism is a private end. *Id.* at 1102.

In interpreting "violence," the Ninth Circuit chastised the district court for being "off-base" when it held that actions only constitute violence when they are aimed at people, not ships. The Ninth Circuit pointed to the UNCLOS, which expressly prohibits violence against other *ships*, persons, or *property*, as support for the proposition that violence could be aimed at an inanimate object. Furthermore, the Ninth Circuit also noted that Sea Shepherd's actions endangered Cetacean's crew and therefore constituted violence under either definition. The court held that the district court erred in dismissing Cetacean's piracy claims because Sea Shepherd was engaging in acts of violence for private ends, the definition of piracy under the UNCLOS and the High Seas Convention.

2. Preliminary Injunction

After determining that Sea Shepherd's tactics constitute piracy, the Ninth Circuit analyzed whether the district court erred in denying Cetacean's request for a preliminary injunction using a four-factor analysis: (1) likelihood of success on the merits, (2) irreparable harm in the absence of relief, (3) balance of equities, and (4) the public interest. *Id.* at 1103. Under the SUA Convention, the first agreement under which Cetacean sought an injunction, acts that "endanger, or attempt to endanger, the safe navigation of a ship" are prohibited. *Id.* at 1103 (citing SUA Convention art. 3, Mar. 10, 1988, 1678 U.N.T.S. 222). The Ninth Circuit held that Cetacean was likely to succeed on the merits of its SUA Convention claim, despite the fact that Sea Shepherd had not yet harmed any of Cetacean's vessels or crewmembers, because the SUA Convention prohibits the creation of dangerous conditions, regardless of whether or not the conditions cause actual injury. The Ninth Circuit rejected Sea Shepherd's argument that its actions were merely symbolic and employed safely by pointing to Sea Shepherd's use of metal reinforced ropes, which the court held were of the same symbolic significance as normal ropes, but capable of causing far more damage. The second agreement under which Cetacean sought an injunction was the UNCLOS. The Ninth Circuit reiterated its holding that Sea Shepherd's actions constitute piracy under the UNCLOS in holding that Cetacean was likely to succeed on the merits of its UNCLOS claim. The court also held that the appellants were likely to succeed on the merits of their COLREGS claim, because the COLREGS contain universal rules and norms for the safe navigation of ships, which Sea Shepherd violates when it operates its vessels "dangerously close to Cetacean's ships." *Id.* at 1103-04.

The Ninth Circuit overturned the district court's holding that irreparable harm was unlikely, because Sea Shepherd's actions could possibly lead to the immobilization of Cetacean's ships in the frigid waters of the Southern Ocean. *Id.* at 1104. The court pointed to the fact that Sea Shepherd paints its ships with the names and flags of the vessels it has sunk, operates its vessels in a way that is likely to cause collisions, and throws hazardous objects that pose an obvious threat to anyone they hit. The court upheld the district court's holding that the balance of the equities was in Cetacean's favor because Sea Shepherd could not point to any hardship it would suffer if an injunction was granted.

The Ninth Circuit addressed the public interest in granting Cetacean's request for an injunction. The court reasoned that Cetacean's whaling activity is permitted under the Whaling Convention, which when combined with the Marine Mammal Protection Act—which also permits whaling with a Whaling Convention permit—constitute the definition of the United States' congressional policy on whaling activities. The court further highlighted the public interest in safe navigation on the high seas as shown in the SUA Convention, the UNCLOS, and the COLREGS, all of which, the court held, Sea Shepherd was violating. The Ninth Circuit rejected the district court's interpretation of the public interest in keeping the U.S. courts out of international political controversies by stating that enjoining Sea Shepherd's piracy does not endorse a certain policy on whaling; it only sends the message that piracy in the Southern Ocean will not be tolerated by U.S. courts.

3. Unclean Hands Doctrine

To conclude its analysis, the Ninth Circuit overturned the district court's holding that Cetacean's request for an injunction should be denied based on the unclean hands doctrine. *Id.* at 1105-06. The district court held that Cetacean's hands were unclean because it sought relief in a U.S. court after an Australian court issued an injunction that prohibited its actions, which showed Cetacean's disrespect for the judgment of a domestic court. *Cetacean I*, 860 F. Supp. 2d 1216, 1245-46 (W.D. Wash. 2012). The district court reasoned that Cetacean believed it could violate an Australian injunction without any consequence, but that Sea Shepherd should be placed in contempt of court for violating a U.S. injunction. The Ninth Circuit rejected this holding based on the fact that neither the United States nor Japan recognize Australia's jurisdiction over the Southern Ocean under which Australia issued the injunction against Cetacean. *Cetacean II*, 708 F.3d at 1105. Moreover, the court reasoned that Cetacean's right to safe navigation and freedom from piracy flows

automatically from customary international law and treaties and therefore, Cetacean did not have dirty hands in acquiring the rights it now asserts, a requirement of the unclean hands doctrine. *Id.* at 1105-06. The Ninth Circuit held that the district court erred both in dismissing Cetacean's piracy claims against Sea Shepherd and in denying Cetacean's request for an injunction. *Id.* at 1106. In reaching its conclusions, the Ninth Circuit found the district judge's errors to be so significant that it transferred the case to another district judge.

C. Analysis

In overturning the district court's denial of a preliminary injunction and dismissal of piracy claims, the Ninth Circuit restricted the direct action tactics of environmental organizations operating on the world's oceans. The court did not attempt to analyze the validity of Cetacean's actions. Instead, the court focused on the actions of U.S.-based Sea Shepherd in order to avoid taking a stance on the workability of the ICRW. As a result, the court's holding should only be cited for its requirements that direct action tactics be safe and not pose a threat of collision, immobilization, or bodily harm to any other ship or crew on the high seas. It should not be used to support or contest Sea Shepherd's conservation goals or Cetacean's whaling activities.

A noteworthy detail of the Ninth Circuit's ruling is that it held that environmental goals are considered private ends. The court relied on Belgian courts to reach this conclusion and held that the history of piracy law defines "acts taken for private ends as those not taken on behalf of a state." *Id.* at 1102 (citations omitted). This definition may confuse environmental activist groups that are constantly denied standing because their interests are for the general good of the public, and they are not personally injured. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972). However, here, the Ninth Circuit is relying on piracy law, international law, and maritime law, which prohibit aggressive action against another vessel that is not state-sponsored, such as an act of war. *Cetacean II*, 708 F.3d at 1101-03.

In response to the Ninth Circuit's holding, Sea Shepherd is seeking to have the case reviewed by the Ninth Circuit en banc. It is unlikely that the Ninth Circuit will condone Sea Shepherd's actions, but the court may take the road of the district court and refuse to use injunctive power to enforce international law. *See Cetacean I*, 860 F. Supp. at 1246.

Katie S. Cordes

II. ENDANGERED SPECIES ACT—BIOLOGICAL OPINIONS AND NONENFORCEABLE CONSERVATION MEASURES

Center for Biological Diversity v. U.S. Bureau of Land Management, 698 F.3d 1101 (9th Cir. 2012)

The United States Court of Appeals for the Ninth Circuit held that approvals for the western interstate Ruby Pipeline Project (Project) related to the Endangered Species Act were invalid due to their reliance on beneficial effects of conservation action plan (CAP) measures. Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101 (9th Cir. 2012).

A. Factual Background

The Project involves the construction of a 42-inch-diameter natural gas pipeline that extends over 678 miles from Wyoming to Oregon. *Id.* at 1106. The right of way for the Project covers approximately 2291 acres of federal land and affects the habitat of endangered and threatened fish species, including 209 rivers and streams. In January 2009, Ruby Pipeline L.L.C. (Ruby) filed an application with the Federal Energy Regulatory Commission (FERC) to seek authorization for the Project. *Id.* at 1108. The Biological Opinion issued by the Fish and Wildlife Service (FWS) concluded that the Project "would adversely affect" nine of the threatened or endangered species and their designated critical habitats. The species include the Lahontan Cutthroat Trout, Warner Sucker, Lost River Sucker, Shortnose Sucker, Modoc Sucker, Colorado Pikeminnow, Humpback Chub, Razorback Sucker, and Bonytail Chub. Nonetheless, the FWS concluded that the Project "would not jeopardize these species or adversely modify their critical habitat." *Id.* at 1106 (internal quotation marks omitted). In its Biological Opinion, the FWS took into consideration voluntary conservation measures that Ruby had indicated it would facilitate, which the Biological Opinion identified as "reasonably certain to occur." *Id.* at 1109. These voluntary actions were explored in an Endangered Species Conservation Action Plan (CAP). Even though the Project was known to have an adverse effect on the nine listed species, the FWS concluded in its Biological Opinion that the Project was "not likely to jeopardize the continued existence" of the affected species or their critical habitat. Along with the Biological Opinion, the FWS issued an Incidental Take Statement that authorized the potential destruction of the Lahontan Cutthroat Trout, Warner Sucker, Modoc Sucker, Lost River Sucker, and Shortnose Sucker as long as

certain terms and conditions were met. The plaintiffs brought claims that the Biological Opinion and the Incidental Take Statement were arbitrary and capricious because:

> (1) the Biological Opinion's "no jeopardy" and "no adverse modification" determinations relied on protective measures set forth in a conservation plan not enforceable under the ESA; (2) the Biological Opinion did not take into account the potential impacts of withdrawing 337.8 million gallons of groundwater from sixty-four wells along the pipeline; (3) the Incidental Take Statement miscalculated the number of fish to be killed, by using a "dry-ditch construction method" for water crossings; and (4) the Incidental Take Statement placed no limit on the number of "eggs and fry" of threatened Lahontan cutthroat trout to be taken during construction.

Id. at 1106.

B. Legal Background

Under section 7 of the Endangered Species Act, a federal agency must "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2) (2006). To comply with this requirement, there are specific procedural duties that federal agencies must follow. These legal requirements include the preparation of a "biological assessment" to determine whether a listed species or critical habitat "are likely to be adversely affected" by the proposed action before any "major construction activities." 50 C.F.R. § 402.12(a)-(b) (2012). If the major construction activity being vetted falls under the "are likely to be adversely affected" category, then the action agency must formally consult with the appropriate wildlife agency, which was the FWS in this case. *Ctr. for Biological Diversity*, 698 F.3d at 1107 (citing 50 C.F.R. § 402.14). This must be done before undertaking the major construction activity. When formal consultation takes place, the FWS must "[f]ormulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4). If a conclusion is reached that jeopardy or adverse modification is likely to occur, and the project applicant moves forward anyway, it may be subject to penalties. *Ctr. for Biological Diversity*, 698 F.3d at 1107 (citing Bennett v. Spear, 520 U.S. 154, 170 (1997)). Any project applicant or federal agency could be subject to substantial civil and criminal

penalties. If instead, the FWS concludes that no jeopardy or adverse modification is likely and only a "incidental take" will occur, then the FWS will issue with its biological opinion an incidental take statement authorizing the action. *Id.* at 1107-08.

C. The Court's Decision

The Court primarily dealt with the ESA's "no jeopardy" conclusion. *Id.* at 1106. The Court agreed with two of the plaintiff's arbitrary and capricious arguments because the "no jeopardy" and "no adverse modification" determinations in the Biological Opinion relied on the CAP that the Court determined was not enforceable under the ESA. The Biological Opinion was also held to be arbitrary and capricious because the Biological Opinion did not consider the impacts of withdrawing 338 million gallons of groundwater from 64 wells along the pipeline.

The Court came to the conclusion that the CAP voluntary actions should have been part of the proposed action, which would have made the actions enforceable under the ESA. *Id.* at 1117. Because the voluntary actions were currently only found in the CAP in their present state, they were not enforceable under the ESA. Thus, the FWS had no way to penalize Ruby if it did not abide by its CAP commitments. *Id.* at 1113. Because the CAP wasn't part of the proposed action, the FWS "should not have treated its anticipated benefits as background cumulative effects and used them as a basis for determining the likely effects of the Project. Doing so rendered the [CAP] unenforceable under the ESA, depriving FWS of the power to ensure that the measures were actually carried out." Several consequences were laid out by the Court, such as that the FWS could not reopen the consultation process when promised conservation measures are not taken. Also, the possibility of criminal penalties and the exposure to citizen suits would also be absent. The Court then described how conservation agreements can be included in the consultation process:

> [A] conservation agreement entered into by the action agency to mitigate the impact of a contemplated action on listed species must be enforceable *under the ESA* to factor into the FWS's "biological opinion as to whether [an] action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4). Congress did not contemplate leaving the federal government's protection of endangered and threatened species to mechanisms other than those specified by the ESA, the statute designed to accomplish that protection. Rather, it entrusted the federal government's protection of listed species

> and critical habitat to the Act's own provisions, and to the FWS, the agency with the expertise and resources devoted to that purpose.

Id. at 1117.

The Court went on to agree with the plaintiffs' second argument regarding the failure of the FWS to address the effects that the withdrawal of groundwater by Ruby would have on listed species. *Id.* at 1123. The Court found that both groundwater and surface water were both part of the same hydrologic cycle and that the depletion of one would have an effect on the other. Agreeing with both of these arguments, the Court concluded that the Biological Opinion was invalid. *Id.* at 1128. Because of this, the Court vacated the Biological Opinion and remanded the case. The FWS must revise the Biological Opinion to address impacts of groundwater withdrawals on listed fish and critical habitat as well as categorize and treat the CAP voluntary actions as interrelated actions under the ESA only.

D. Conclusion

This case clarifies what conservation measures can be included in a jeopardy assessment by holding that the proposed measures must be enforceable under the ESA. This ruling "insure[s] that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species" by requiring CAP plans to be enforceable under the ESA as opposed to voluntary. *See* 16 U.S.C. § 1536(a)(2) (2006). Taking voluntary actions as a given does not "insure" protection of species and critical habitat. Dedicated to Daniella Farias.

Richard M. Walker

III. MIGRATORY BIRD TREATY ACT—COMMERCIAL ACTIVITIES

United States v. CITGO Petroleum Corp.,
No. C-06-563, 2012 WL 3866857 (S.D. Tex. Sept. 5, 2012)

On September 5, 2012, the United States District Court for the Southern District of Texas, Corpus Christi Division, denied CITGO Petroleum Corporation and Citgo Refining and Chemicals Company, L.P.'s (CITGO) motion to vacate conviction. United States v. CITGO Petroleum Corp., No. C-06-563, 2012 WL 3866857, at *1 (S.D. Tex.

Sept. 5, 2012). Years earlier, in a 2007 bench trial, CITGO was convicted of three counts of "unlawfully taking and aiding and abetting the taking of migratory birds," a strict liability class B misdemeanor under the Migratory Bird Treaty Act (MBTA). This decision reinforced the power of the MBTA to protect fowl from a variety of nonhunting, commercial activities wherein migratory birds could be unintentionally killed or trapped. *See id.* at *2-3.

A. Factual and Procedural Background

The MBTA serves to protect "migratory bird species that are native to the United States or its territories." 16 U.S.C. § 703(b)(1) (2006). In relevant part, the MBTA criminalizes the hunting, taking, capturing, killing, possessing, or pursuit of migratory birds "by any means or in any manner," or the attempt to do the same, without proper permitting. *Id.* § 703(a). As punishment for violations, the MBTA creates three classes of crimes: (1) a strict liability Class B misdemeanor, (2) a felony for a knowing sale, and (3) a Class A misdemeanor for the placement of bait for the purpose of aiding in taking migratory birds. *CITGO Petroleum Corp.*, 2012 WL 3866857, at *1 (citing 16 U.S.C. § 707).

In this case, CITGO was convicted of three Class B misdemeanors for the unlawful taking and aiding and abetting the taking of migratory birds. At trial, the Government presented evidence that a variety of migratory birds had flown into, and become trapped in, open-top petroleum refinery tanks owned and maintained by CITGO. As the birds flew into the tanks, they would become trapped in the oil and perish. Because the waterfowl were eventually found in the CITGO tanks, the Government construed the deaths as the unlawful taking of migratory birds, as contemplated within the MBTA. The trial court agreed. In response, CITGO filed a motion to vacate conviction on the grounds that the Government's indictment failed to properly state an offense, pursuant to Federal Rule of Criminal Procedure 12. Under Rule 12, "at any time while the case is pending, the court may hear a claim that the indictment or information fails . . . to state an offense." *Id.* (quoting FED. R. CRIM. P. 12(b)(3)(B) (internal quotation marks omitted)). This opinion results.

B. The Court's Decision

Senior District Judge John D. Rainey of the Southern District of Texas, Corpus Christi Division, ultimately denied CITGO's motion to vacate conviction. *CITGO Petroleum Corp.*, 2012 WL 3866857, at *1. In doing so, the court rejected CITGO's argument that the MBTA does

not implicate "commercial activities in which migratory birds are unintentionally killed as a result of activity completely unrelated to hunting, trapping, or poaching," such as the oil refinery operations in which CITGO was engaged. *Id.* at *2. CITGO argued that because its refinery tanks were not operated for the purpose of hunting or trapping migratory birds, they were outside the scope of the MTBA, and thus, the indictment failed to state an offense. In response, the Government cited the "by any means or in any manner" clause in the MTBA, arguing that it indicated that any trapping or killing of birds, even if unintentional or not done through hunting or poaching, would serve as a violation of the MTBA. *Id.* (quoting 16 U.S.C. § 703(a) (internal quotation mark omitted)).

In issuing its decision, the court was forced to weigh two competing lines of judicial interpretation regarding the scope and intent of the MTBA. *Id.* at *2-3. The court noted that while "[a] number of courts have determined that the MTBA is limited in its intended scope to the types of activities engaged in by hunters and poachers and does not extend to other acts that indirectly or unintentionally cause the death of protected birds," "[a]n almost equal number of courts" have held the opposite, extending the MTBA to a much wider variety of conduct. *Id.* at *2. Muddying the waters is the lack of a clear decision by the United States Court of Appeals for the Fifth Circuit addressing the specific purview of the MTBA—that is, whether the MTBA applies solely to hunters and poachers or to a broader range of individuals and companies. *See id.* at *4. In many ways, the Southern District of Texas bypassed this question by instead focusing on the nature of the offense that the MTBA creates.

The court noted that the Fifth Circuit has held that violations of the MTBA, under section 703, are strict liability offenses, meaning that an individual or corporation need not specifically intend to kill or trap migratory birds to be found guilty. Congress has also repeatedly reinforced this notion of strict liability for misdemeanor MTBA offenses. *Id.* (citing United States v. Morgan, 311 F.3d 611, 651 (5th Cir. 2002)). CITGO argued that in this case, "to hold it strictly liable under the MTBA and extend the statute 'to reach other activities that indirectly result in the deaths of covered birds would yield absurd results.'" However, the court here ultimately assigned strict liability to CITGO based on the quality and illegality of its activity that caused the birds' deaths—the refining process that used open-air waste oil tanks. *See id.* at *6.

The two CITGO tanks at issue in this case were both without protective roofing or netting, causing the waste oil to be open to the outside air and to migratory fowl. *Id.* at *7. In a separate jury trial, CITGO was also found guilty of Clean Air Act (CAA) violations due to its failure to install protective roofing on the waste tanks. *Id.* at *1. In addition to the relevant CAA provisions, the Texas Administrative Code mandates that open-top storage tanks containing oil film or accumulation be covered so as to "render [them] harmless to birds" and warns that "an operator who . . . does not take protective measures necessary to prevent harm to birds . . . may incur liability." *Id.* at *6-7 (quoting 16 TEX. ADMIN. CODE § 3.22 (1991)). Though the court acknowledged that the Fifth Circuit has yet to decide "whether oil companies can be held liable under the MTBA when migratory birds are killed as a result of their operations," it differentiated between the legal actions of oil companies and CITGO's illegal actions in this case. *Id.* at *5-6.

In approaching CITGO's motion to vacate conviction, the court adopted the reasoning of the United States Court of Appeals for the Tenth Circuit, as embodied in *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010). *See id.* at *5. In *Apollo*, migratory birds died as the result of nesting in the defendant-oil companies' drilling equipment, and Apollo Energies and the other defendants were convicted under the MBTA. The Tenth Circuit held that because "due process requires that criminal defendants have adequate notice that their conduct is a violation of the law, 'a strict liability interpretation of the MBTA . . . satisfies due process only if defendants proximately caused the harm to protected birds.'" *Id.* (quoting *Apollo*, 611 F.3d at 686). In *Citgo Petroleum Corp.*, the court found that CITGO's illegal acts—the failure to cover oil tanks—directly resulted in the death of migratory birds. *Id.* at *7. Additionally, the court held that the birds' deaths were reasonably foreseeable, given the evidence presented at trial and the fact that "CITGO was aware [of the bird deaths] for years and did nothing to stop it." *Id.* at *8. CITGO's motion to vacate conviction was therefore denied.

C. Analysis and Conclusion

The Southern District of Texas's denial in *United States v. CITGO Petroleum Corp.* serves as a limited victory for the enforcement powers of the MBTA. This decision enforces the notion that the MBTA may apply to commercial activities that result in the death or trapping of migratory birds, beyond simple hunting or poaching. However, it is unclear that this enlargement of the MBTA's purview extends beyond

already illegal actions—such as CITGO's failure to cover the waste oil tanks.

Charell Arnold

IV. CLEAN AIR ACT ENFORCEMENT—IMPLICATIONS OF THE OBAMACARE DECISION

National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012)

The Clean Air Act (CAA) was created to combat deteriorating air quality in many parts of the nation, a problem traceable to the failure of states to maintain a regulatory scheme that could keep ahead of growing industry and an accompanying increase in pollution. *See* 42 U.S.C. § 7401 (2006). In approaching this large-scale problem, the CAA designated states as the primary actors in the implementation of the broad new environmental regulatory scheme, while the federal government, through the Environmental Protection Agency (EPA), would receive authority to oversee and enforce regulations. *Id.* §§ 7410, 7413. The form of "cooperative federalism" taken on by the CAA has been criticized for leaving the federal government without the necessary tools to implement needed improvements in interstate air pollution regulation, and conversely, it is often criticized for granting the federal government excessive authority over states. *See, e.g.*, Kay M. Crider, Note, *Interstate Air Pollution: Over a Decade of Ineffective Regulation*, 64 CHI.-KENT L. REV. 619 (1988); Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans—Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 344 (2004).

In the CAA, Congress created National Ambient Air Quality Standards (NAAQS). 42 U.S.C. § 7409. The EPA was tasked with establishing air quality standards, while the states were given discretion in designing plans to meet these standards. *Id.* §§ 7409-7410. The 1990 amendments to the CAA established controversial sanction provisions that allow the federal government to withhold highway funding for states that fail to comply with NAAQS and/or to impose an emissions reduction offset ratio of 2:1 for new sources in nonattainment areas. *Id.* § 7509(b)(1)-(2). The power to withhold highway funding for noncompliance with the CAA remains controversial, and the debate has changed in light of the recent *Sebelius* decision.

The United States Supreme Court's recent decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012),

has changed the debate on the constitutionality of the 2010 Patient Protection and Affordable Care Act (ACA). The ACA proposed a Medicaid expansion program that would have required states to cover a significantly larger portion of citizens under their Medicaid programs, or else lose potentially all Medicaid funding. *Id.* at 2662 (explaining that coverage will extend to all individuals who are under age sixty-five and have incomes below 133% of the federal poverty line) (citing 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2006)). Twenty-six states and the National Federation of Independent Business brought suit in federal court alleging that the Medicaid expansion constituted an abuse of Congress's spending power. *Id.* at 2572. In *Sebelius*, the Supreme Court held that the "threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 2605.

The holding in *Sebelius* has raised new questions over EPA's authority to withhold highway funding for states failing to comply with the CAA. The Supreme Court rejected the provisions in the ACA granting the Secretary of Health and Human Services the authority to declare that "further [Medicaid] payments will not be made to [a] State" that in the opinion of the Secretary, is not in compliance with federal Medicaid mandates. *Id.* at 2604 (quoting 42 U.S.C. § 1396c (internal quotation marks omitted)). In finding that the threatened penalty exceeded Congress's authority, the Court held that the "financial 'inducement' Congress has chosen is much more than 'relatively minor encouragement'—it is a gun to the head." *Id.* (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987)).

The Court distinguished the facts in the *Sebelius* case from those in *South Dakota v. Dole*, in which the Court reviewed legislation that would allow states to withhold highway funding for states choosing not to implement a twenty-one-year-old alcohol consumption age. The Court held that the threatened withholding in *Dole* amounted to "less than half of one percent of South Dakota's budget," while the threatened loss of Medicaid funding would account for "10 percent of a State's overall budget." *Id.* at 2604-05. The Court observed that Medicaid comprises the largest source of federal funding to states by far, accounting for 42.3% of all federal outlays to states and 21.86% of all state expenditures. *Id.* at 2662, 2664. The Court stated, "The States are far less reliant on federal funding for any other program [than they are on Medicaid funding]." *Id.* at 2663. The Court further observed, "[E]ven in States with less than average federal Medicaid funding, that funding is at least twice the size of federal education funding [the next largest source

of federal spending after Medicaid] as a percentage of state expenditures." *Id.* at 2664.

This holding implicates the CAA because it provides states with new authority for challenging congressional power. If the Affordable Care Act is unduly coercive because it threatens to withdraw large amounts of Medicaid funds, then by analogy, the CAA might be found coercive for threatening the withdrawal of large amounts of highway funds.

The Court went to great lengths to establish the unique size of the sanction in *Sebelius* by describing the ACA's conditions as "quite unlike anything that we have seen in a prior spending-power case." The Court also commented, "If the anticoercion rule does not apply in this case, then there is no such rule."). *Id.* at 2662. The Court distinguished Medicaid funds from other major programs, saying, "In Arizona . . . although federal Medicaid expenditures are equal to 33% of all state expenditures, federal education funds amount to only 9.8% of all state expenditures." *Id.* at 2663-64.

The problem with *Sebelius* is that it suggests Congress clearly exceeded its power with the Affordable Care Act, but the exact point at which federal power impinges upon state autonomy by becoming unduly coercive remains ambiguous and may leave fertile ground for litigation. Some have criticized the *Sebelius* holding for leaving a helplessly ambiguous standard for determining coercive federal action. As Professor Erin Ryan states, the "I-know-it-when-I-see-it reasoning" used in the *Sebelius* decision "won't do when assessing the labyrinthine political dimensions of intergovernmental bargaining." Erin Ryan, *Spending Power Bargaining After ObamaCare*, ENVTL. L. PROF BLOG (July 20, 2012), http://lawprofessors.typepad.com/environmental_law/2012/07/Spending-power-bargaining-after-obamacare.html.

However, the decision seems to make clear that while true coercion can exist, a ruling that a federal funding condition is unduly coercive requires a finding that the condition is *uniquely* severe and would have a devastating economic effect. As Professor Jonathan Adler observes: "For many states, federal highway funds represent the lion's share of their transportation budget. As a consequence, threatening to take highway funds may strike some courts as unduly coercive under [*Sebelius*]." Jonathan Adler, *Could the Health Care Decision Hobble the Clean Air Act?*, PERCOLATOR (July 23, 2012), http://perc.org/blog/could-health-care-decision-hobble-clean-air-act. However, the Federal Government spent $275 billion on Medicaid in 2011, versus $40 billion on highway funding. Brad Plumer, *How the Supreme Court's Health Care Ruling*

Could Weaken the Clean Air Act, WASH. POST WONKBLOG (July 27, 2012, 1:36 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/27/how-the-supreme-courts-health-care-ruling-could-weaken-the-clean-air-act/. Although federal outlays for highway funding are by no means insubstantial, the vast discrepancy between the massive amount set aside for Medicaid and the relatively small amount allotted for highway funding matters a great deal when analyzing coercive funding conditions under *Sebelius*.

It remains to be seen how the *Sebelius* decision will be used to challenge the sanction provisions of the Clean Air Act. While it may be used to challenge the provisions as unduly coercive, there is a significant difference in the nature of the threatened funds in each instance. Furthermore, there are other significant factors not discussed here. However, on the issue of coercivity, it seems more likely than not that the CAA's sanction provisions will not be overturned because of the *Sebelius* holding.

Joe Spivey

V. ENDANGERED SPECIES ACT

In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litigation, 709 F.3d 1 (D.C. Cir. 2013)

After the Center for Biological Diversity petitioned the Secretary of the Interior in 2005 to list the polar bear under the Endangered Species Act (ESA), the United States Fish and Wildlife Service (FWS) undertook a three-year rulemaking process. *In re* Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litig., 709 F.3d 1, 2 (D.C. Cir. 2013). In 2008, the "FWS found that, due to the effects of global climate change, the polar bear is likely to become an endangered species and face the threat of extinction within the foreseeable future." *Id.* (citing Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. 28,212 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17) [hereinafter Listing Rule]). Due to its findings, the agency concluded that it should list the polar bear as a threatened species.

Industry groups and environmental organizations alike "challenged the Listing Rule as either overly restrictive or insufficiently protective of the polar bear." These challenges were consolidated as a Multidistrict Litigation case in the United States District Court for the District of

Columbia, and after a hearing, the district court rejected the plaintiffs' arguments and granted summary judgment to the FWS. The plaintiffs appealed, contending the Listing Rule is arbitrary and capricious under the Administrative Procedure Act.

The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court's holdings under the rule set forth in *Motor Vehicle Manufacturers Ass'n of U.S. v. State Farm Mutual Automobile Insurance Co.*, which dictates that the appellate court's task in a case like this one is a "narrow" one. *Id.* at 3 (quoting 463 U.S. 29, 43 (1983) (internal quotation marks omitted)). The court summarized, "Appellants have neither pointed to mistakes in the agency's reasoning nor adduced any data or studies that the agency overlooked." The court reasoned that appellants did not challenge the agency's findings on climate science or polar bear biology, but rather simply argued "that FWS misinterpreted and misapplied the record before it." The court also pointed to the traditional rule of giving deference to an agency's opinion, which applies especially "where the issues 'require[] a high level of technical expertise.'" *Id.* (alteration in original) (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 377 (1989)). The court agreed with the court below that the "Appellants' challenges 'amount to nothing more than competing views about policy and science.'" *Id.* (quoting *In re* Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig., 794 F. Supp. 2d 65, 69 (D.D.C. 2011)).

The court's opinion first details the history and purpose of the ESA. *Id.* at 3-4. The court also explained the extensive three-year rulemaking process at issue in this case, which incorporated expertise from the United States Geological Survey (USGS), the Intergovernmental Panel on Climate Change, and other experts. *Id.* at 4-6. Next, the court detailed the procedural history of the lower court, explaining the motions for summary judgment brought by both sides and noting that the lower court was "simply not persuaded that [FWS's] decision to list the polar bear as a threatened species under the ESA was arbitrary and capricious." *Id.* at 6-7 (alteration in original) (quoting *In re Polar Bear*, 794 F. Supp. 2d at 81 (internal quotation marks omitted)).

On appeal, the court announced it would uphold the agency action unless it was found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 8 (quoting 5 U.S.C. § 706(2)(A) (2006) (internal quotation marks omitted)). Under this standard, the court explained that it would need to determine "whether the agency 'considered the factors relevant to its decision and articulated a rational connection between the facts found and the choice made.'" *Id.*

(quoting Keating v. FERC, 569 F.3d 427, 433 (D.C. Cir. 2009)). The court explained that the decision would only be overturned if the agency

> relied on factors which Congress ha[d] 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.

Id. (quoting Am. Wildlands v. Kempthorne, 530 F.3d 991, 997-98 (D.C. Cir. 2008) (internal quotation mark omitted)). Additionally, the court noted that it would "review the administrative action directly, according no particular deference to the judgment of the District Court." *Id.* (quoting Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 814 (D.C. Cir. 2002) (internal quotation mark omitted)).

The court found that the FWS based the Listing Rule on a "three-part thesis: the polar bear is dependent upon sea ice for its survival; sea ice is declining; and climatic changes have and will continue to dramatically reduce the extent and quality of Arctic sea ice to a degree sufficiently grave to jeopardize polar bear populations." *Id.* (citing Listing Rule, 73 Fed. Reg. 28,212 (May 15, 2008)). The court found that the fact that the polar bear is threatened within the meaning of the ESA was "reasonable and adequately supported by the record." It found the Listing Rule to be a "product of FWS's careful and comprehensive study and analysis . . . amply supported by data and well within the mainstream on climate science and polar bear biology."

The Court addressed Appellants' seven contentions in order:

> (1) FWS failed to adequately explain each step in its decisionmaking process, particularly in linking habitat loss to a risk of future extinction; (2) FWS erred by issuing a single, range-wide determination; (3) FWS relied on defective population models; (4) FWS misapplied the term "likely" when it determined that the species was likely to become endangered; (5) FWS erred in selecting a period of 45 years as the "foreseeable future"; (6) FWS failed to "take into account" Canada's polar bear conservation efforts; and (7) FWS violated Section 4(i) of the ESA by failing to give an adequate response to the comments submitted by the State of Alaska regarding the listing decision.

Id. at 7-8. The court found that (1) the FWS "carefully and clearly explained how this particular habitat loss leaves this particular species likely to become endangered," *id.* at 10, and that the Listing Rule provided "'a discernible path' of decisionmaking" that "firmly 'articulate[d] a rational connection between the facts found and the choice made,'" *id.* (citing Am. Radio Relay League, Inc. v. FCC, 524

F.3d 227, 241 (D.C. Cir. 2008); Keating v. FERC, 569 F.3d 427, 433 (D.C. Cir. 2009)); (2) the agency's decision to make a single, range-wide determination was not inconsistent with other policies, *id.* at 12; (3) it was clear that the FWS's reliance on the USGS population models was limited and "not central to FWS's listing decision," *id.* at 14; (4) the agency did not misapply the statutory term "likely" as that term is commonly understood, *id.* at 15; (5) the agency relied on climate projections to sufficiently support its definition of foreseeability; *id.* at 16; (6) the FWS considered the benefits to polar bears from continued importation of polar bear trophies from Canada, *id.* at 17; and finally, (7) the FWS's interpretation of section 4(i) of the ESA was justified, given that it responded to comments from the State of Alaska with a forty-five-page letter, *id.* at 17-19. For these reasons, the court upheld the judgment of the district court and the Listing Rule itself. *Id.* at 19.

The analysis provided by the court was consistent with traditional administrative decisions. Having relied on peer review, multiple opportunities for public comment, and other agencies' expertise, the FWS took appropriate measures to make its rulemaking decision to list the polar bear as threatened. Given that the standard of review for reviewing agency decisions is so narrow and deferential, it is unsurprising that the court did not overturn the FWS's decision that was the result of an extensive three-year rulemaking process.

Rachel Bleshman

VI. CLEAN WATER ACT–ADDITION OF A POLLUTANT

Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., 133 S. Ct. 710 (2013)

In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the United States Supreme Court reaffirmed the unitary waters theory in regards to what constitutes an addition of a pollutant under the Clean Water Act (CWA). 133 S. Ct. 710 (2013). The Los Angeles County Flood Control District (District) manages a "'municipal separate storm sewer system' (MS4)—a drainage system that collects, transports, and discharges storm water." *Id.* at 712. National Pollutant Discharge Elimination System (NPDES) permits are required for discharges of pollutants. *See* 33 U.S.C. § 1311(a) (2006). Discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The District

has an NPDES permit regulating its discharges of storm water into navigable waters. *L.A. Cnty. Flood Control Dist.*, 133 S. Ct. at 712. The Natural Resources Defense Council (NRDC) and Santa Monica Baykeeper (Baykeeper) filed suit against the District, alleging NPDES permit violations based on water quality measurements at monitoring stations. These monitoring stations were "located in 'concrete channels' constructed for flood-control purposes." *Id.* (quoting Natural Res. Def. Council, Inc. v. County of L.A., 673 F.3d 880, 900 (9th Cir. 2011)). The Supreme Court held that there was no addition of a pollutant requiring an NPDES permit because water flowing from concrete channels into the same river does not constitute an addition. *Id.* at 713.

A. Background

The United States District Court for the Central District of California granted summary judgment in favor of the District, basing its holding on the multitude of other sources that discharge pollutants upstream of the monitoring stations. *Id.* at 712. The district court reasoned that the record was inadequate due to the existence of the other sources of discharges and could not lead to the conclusion that the District was violating its NPDES permit. The United States Court of Appeals for the Ninth Circuit reversed the district court, holding that the district did violate the NPDES permit. The court of appeals reasoned that "a discharge of pollutants occurred under the CWA when the polluted water detected at the monitoring stations 'flowed out of the concrete channels' and entered downstream portions of the waterways lacking concrete linings." *Id.* (quoting *Natural Res. Def. Council*, 673 F.3d at 900). Because the District maintains control over the "concrete-lined portions of the river," the District was responsible for any discharges from the concrete channels.

The Supreme Court had already addressed additions of pollutants in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). In *Miccosukee*, an Indian tribe and environmental organization brought suit against a regional water management district for failure to obtain an NPDES permit. *Id.* at 99. A canal, known as C-11, collected groundwater and rainwater in the area. *Id.* at 100. When the collected water rose above a set level, water would be pumped out of the canal and emptied into a reservoir sixty feet away. The Government argued that no NPDES permit was required based on the unitary waters theory. *Id.* at 105-06. The unitary waters theory is the notion that "all the water bodies that fall within the [CWA's] definition of 'navigable waters' . . . should be viewed unitarily for purposes of NPDES

permitting requirements." Consequently, no NPDES permit would be required "when water from one navigable water body is discharged, unaltered, into another navigable water body." *Id.* at 106. The Court acknowledged several problems that could arise with the adoption of this theory. *Id.* at 107. For instance, the unitary waters approach could potentially conflict with other NPDES provisions. The CWA "protects individual water bodies as well as the 'waters of the United States' as a whole." However, to require an NPDES permit in these situations would create major feasibility and efficiency issues. *Id.* at 108. Regardless of these potential problems, the Court did not expressly adopt or reject the unitary waters theory because it was not raised before the court of appeals. *Id.* at 109. Furthermore, the Court held that the record was insufficient to determine whether the canal and reservoir were meaningfully distinct water bodies. *Id.* at 112. If the district court were to find the canal and reservoir were not meaningfully distinct water bodies, no NPDES permit would be required. The Court also left the question of the unitary waters theory open on remand.

Since the *Miccosukee* case, however, several circuit courts have struck down the unitary waters theory. *See* Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77, 81 (2d Cir. 2006). But, since that time, the EPA has issued a regulation stating that water transfers are not subject to regulation under the NPDES permitting system. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (to be codified at 40 C.F.R. pt. 122). This rule was then upheld under *Chevron* deference by the United States Court of Appeals for the Eleventh Circuit in *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210, 1213, 1228 (11th Cir. 2009). The Supreme Court, therefore, provides greater guidance on the validity of the unitary waters approach in *Los Angeles County Flood Control District*.

B. Court's Decision

The Supreme Court granted certiorari on a single question: "Under the CWA, does a 'discharge of pollutants' occur when polluted water 'flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river,' and then 'into a lower portion of the same river'?" L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, 133 S. Ct. 710, 712-13 (2013). The Court, as well as all parties to the suit, agreed the answer to this question is no. *Id.* at 713.

The Court formally adopted the unitary waters approach in *Los Angeles County Flood Control District*. Justice Ginsburg reasoned, "Under a common understanding of the meaning of the word 'add,' no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." She then quoted the Webster's dictionary definition of "add" and reiterated the ladle-of-soup analogy proffered by the United States Court of Appeals for the Second Circuit, which is often used to justify the unitary waters approach: "[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* (quoting S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 109-10 (2004) (internal quotation marks omitted)). Following *Miccosukee*, Justice Ginsburg concluded that "no discharge of pollutants occurs when water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another." Therefore, "[T]he flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA." Finally, while all parties agreed that outflow from the concrete channels did not constitute a CWA discharge, the NRDC argued that the water quality violations at the monitoring station, by themselves, were a violation of the District's NPDES permit. *Id.* at 713-14. The Court refused to address this question because the issue was not granted certiorari. *Id.* at 714.

C. Analysis and Conclusion

This case marks the first time the Supreme Court has expressly recognized the unitary waters theory. While the Court recognized the potential viability of the theory in *Miccosukee*, it was not formally adopted. This case, therefore, provides the EPA with stronger support for its water transfers rule, which is still being debated. It remains unclear, however, what constitutes "meaningfully distinct water bodies." Furthermore, the central issue for future CWA violations, the NRDC's alternative liability proposal, still remains open.

Rebecca Silk

VII. AEP AGREES TO MOVE AWAY FROM COAL IN MODIFIED CONSENT DECREE

Third Joint Modification to Consent Decree, United States v. American Electric Power Service Corp., No. 2:99-cv-01182 (S.D. Ohio Feb. 22, 2013)

In *United States v. American Electric Power Service Corp.*, the United States District Court for the Southern District of Ohio approved a modified consent decree in which American Electric Power (AEP) agreed to retrofit, repower, refuel, or retire three coal-fired power plants. Third Joint Modification to Consent Decree, No. 2:99-cv-01182 (S.D. Ohio Feb. 22, 2013) [hereinafter Modified Consent Decree]. The modified consent decree revises a 2007 consent decree that required AEP to install $4.6 billion worth of pollution controls, pay a $15 million fine, and invest $60 million in air pollution reduction projects. Consent Decree at 41, para. 119, United States v. Am. Elec. Power Serv. Corp., No. 2:99-cv-01182 (S.D. Ohio Oct. 9, 2007), *available at* http://www.epa.gov/compliance/resources/decrees/civil/caa/americanelectricpower-cd.pdf; *American Electric Power Service Corporation Information Sheet*, U.S. ENVTL. PROT. AGENCY (last updated Aug. 1, 2012), http://www.epa.gov/compliance/resources/cases/civil/caa/americanelectricpower1007.html.

A. Litigation History

In 1999, the federal government, joined by eight eastern states and fourteen environmental groups, filed complaints against AEP in two separate suits, alleging violations of the New Source Review requirements of the Clean Air Act (CAA). Consent Decree, *supra*, at 1-2. Specifically, the suits accused AEP of making major modifications to its coal-fired plants without obtaining necessary permits and without installing controls to reduce sulfur dioxide (SO_2), nitrogen oxides (NO_x), and particulate matter (PM) emissions. *Id.* at 2. That lawsuit eventually settled eight years later in 2007, resulting in the largest single environmental settlement in history. Press Release, U.S. Announces Largest Single Environmental Settlement in History—Historic Pollutant Reductions Will Save $32 Billion in Health Costs Annually (Oct. 9, 2007), http://yosemite.epa.gov/opa/Press%20Releases%20By%20Date?OpenView (EPA press releases listed by date). Although AEP never admitted to any violation of the CAA, the company did agree to annual SO_2 and NO_x emissions limits for sixteen of its coal-fired power plants in

Indiana, Kentucky, Ohio, Virginia, and West Virginia. Press Release, Am. Elec. Power, AEP Reaches Settlement Agreement in NSR Case (Oct. 9, 2007), *available at* https://www.aep.com/newsroom/news releases/Default.aspx?id=1411. Through the settlement, AEP agreed to cut 813,000 tons of air pollutants annually at an estimated cost of more than $4.6 billion. Press Release, Envtl. Prot. Agency, *supra*.

As another part of the settlement, AEP agreed to fund $36 million worth of federally directed "Environmental Mitigation Projects," including $2 million to the National Park Service for restoration of land, watersheds, and vegetation and at least $10 million to the acquisition and restoration of ecologically significant areas in Indiana, Kentucky, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia. Consent Decree, *supra*, app. A, at 1-3. In addition, AEP was responsible for $24 million to be apportioned to the plaintiff-states for energy efficiency and/or pollution reduction projects. *Id.* at 43-44, paras. 127-128. Finally, AEP committed to annual reporting requirements of SO_2 and NO_x emissions, as well as to the installation of pollution control measures at its coal-fired plants. *Id.* app. B, at 1-4.

B. The Modified Decree

The new settlement, initiated by AEP, had both the company and environmentalists claiming victory. Michal Conger, *Environmentalists Claim Victory Against Coal in EPA Settlement*, WASH. EXAMINER (Feb. 26, 2013), http://www.washingtonexaminer.com/environmentalists-claim-victory-against-coal-in-epa-settlement/article/2522620. AEP secured permission to switch from the previously agreed-upon Flue Gas Desulfurization System (FGD) pollution control measure to the Dry Sorbent Injection (DSI) method of reducing SO_2 emissions. Modified Consent Decree, *supra*, at 7-8, para. 9. DSI systems may, however, be less effective than FGD systems, but they come in at one-fifth of the cost, thus saving AEP significant amounts of money. Conger, *supra*.

In exchange for the less expensive DSI systems, AEP agreed to tougher annual SO_2 emissions limitations at all plants that had committed to the FGD systems under the 2007 decree. Modified Consent Decree, *supra*, at 6, para. 8. The annual tonnage of SO_2 allowed was decreased from 260,000 tons to 145,000 tons, beginning in 2016. This limit decreases each year, and by 2029, the annual limit must reach 94,000 tons per year (down from 174,000 tons under the 2007 decree).

More importantly, however, AEP also agreed to retrofit, retire, repower, or refuel five of its coal-fired plants. *Id.* at 7-8, para. 9. According to the modified consent decree, to "refuel" means to modify a

generating unit "such that the modified unit generates electricity solely through the combustion of natural gas rather than coal." *Id.* at 5, para. 6. To "retrofit" means that each unit must install and continuously operate an FGD and a Selective Catalytic Reduction System (SCR) for the reduction of NO_x emissions. *Id.* at 5, para. 7. To "re-power" means to either replace "an existing pulverized coal boiler through the construction of a new circulating fluidized bed ('CFB') boiler," or equivalent, or to remove and replace components, "such that the modified or replaced [u]nit generates electricity through the use of new combined cycle combustion turbine technology fueled by natural gas." Consent Decree, *supra*, at 17-18, para. 54. Finally, to "retire" means that AEP will "permanently shut down and cease to operate the [u]nit" and "comply with any state and/or federal requirements applicable to that [u]nit." *Id.* at 18, para. 55. As can be seen, all of these options impose either strict limitations on the burning of coal or a complete switch to cleaner-burning natural gas.

In particular, the settlement agreement directs AEP to retrofit, retire, repower, or refuel five of its coal-burning units. Big Sandy 2, a coal-fired unit at an eastern Kentucky plant, must retrofit, retire, repower, or refuel by December 31, 2015. Modified Consent Decree, *supra*, at 7, para. 9. AEP, however, had previously requested in December 2012 to retire the Big Sandy Plant, so it is difficult for environmentalists to claim this part of the settlement as a victory. Conger, *supra*. Muskingum River Unit 5, a coal-fired unit at a plant in Ohio, must cease burning coal and retire by December 15, 2015, or cease burning coal and refuel by December 31, 2015. Modified Consent Decree, *supra*, at 7, para. 9. This plant was also already scheduled to be retired as part of AEP's plan to comply with EPA's Mercury and Air Toxics Standards. Conger, *supra*. The first Rockport Unit, part of a coal-fired plant in Indiana, must install DSI technology by April 16, 2015, and retrofit, retire, repower, or refuel by December 31, 2025. Modified Consent Decree, *supra*, at 7, para. 9. The second Rockport Unit must also install DSI technology by April 16, 2015, and retrofit, retire, repower, or refuel by December 31, 2028. *Id.* at 7-8, para. 9. Finally, Tanners Creek Unit 4, part of a coal-fired plant in Indiana, must retire or refuel by June 1, 2015. *Id.* at 8, para. 9.

Moreover, AEP consented to fund additional environmental mitigation projects. *Id.* at 10-13, paras. 15-17. From 2013 to 2019, AEP must implement various renewable energy projects, depending on the availability of the renewable energy production tax credit. *Id.* at 11, para. 16. If, during the period from 2013 to 2015, the tax credit is available for at least 2.2 cents per kilowatt/hour for new wind electricity production,

then Indiana Michigan Power Company (I&M) (an AEP subsidiary) must secure 200 megawatts (MW) "of new wind energy capacity from facilities located in Indiana or Michigan . . . within two years after enactment." If the tax credit does not become available until 2016 to 2019, then I&M "will use commercially reasonable efforts to secure 200 MW of new wind energy capacity from facilities located in Indiana or Michigan . . . within two years after enactment." If, instead, the tax credit is not available from 2013 to 2019, then I&M will be relieved of its duty to fund new wind energy projects, but rather will provide $2.5 million in funding as directed by the plaintiffs. *Id.* at 12, para. 9. This money will be used "for projects in Indiana that include diesel retrofits, health and safety home repairs, solar water heaters, outdoor wood boilers, land acquisition projects, and small renewable energy projects (less than 0.5 MW) located on customer premises that are eligible for net metering or similar interconnection arrangements on or before December 31, 2014." Significantly, AEP will not have approval rights over these projects or the amount of funding requested, as long as the total payment does not exceed $2.5 million.

In addition to these mitigation projects, the eight states involved in the settlement secured at least $4.8 million per year for no less than five years for mitigation projects, of which AEP shall not have approval rights. *Id.* at 12-13, para. 17. This amount increases to $6.0 million per year in 2013. If a state does not utilize the maximum amount in a given year, the difference will carry over to the following year. *Id.* at 13, para. 17.

The modified consent decree also institutes penalties for any violation of the agreement. *Id.* at 14, para. 19. If AEP fails to comply with the plant-wide annual tonnage limitation for SO_2 at the Rockport plant, the company must pay $40,000 per excess ton and surrender SO_2 allowances (under the EPA-administered SO_2 trading scheme) in "an amount equal to two times the number of tons by which the limitation was exceeded." Additionally, if AEP fails to fund a plaintiff's mitigation project, the company must pay $1,000 per day per violation during the first thirty days, and $5,000 per day per violation thereafter. Finally, if AEP fails to implement the plaintiffs' renewable energy projects, the company must pay $10,000 per day per violation for the first thirty days and $32,500 per day per violation thereafter.

Lastly, AEP must write an Annual Report to Plaintiffs detailing the progress of the commitments it made in the settlement. Particularly, beginning in March 2017, AEP must report the actual tons of SO_2 emitted from Units 1 and 2 at the Rockport Plant, in addition to the daily

average SO_2 emissions from the plant. *Id.* at 14, para. 20. Beginning in March 2014, AEP must include a written report detailing the progress of implementing the renewable energy projects until completion of the projects. Similarly, beginning on March 31, 2013, AEP must include a written report detailing progress on the mitigation projects until March 31, 2015. *Id.* at 14-15, para. 20. Finally, by March 31, 2015, AEP must notify plaintiffs of its intent to retire or retrofit the Muskingum River 5 Unit. *Id.* at 15, para. 20. AEP must notify plaintiffs of its intent to retrofit, retire, repower, or refuel the first and second Rockport Units, by March 31, 2024, and March 31, 2027, respectively.

C. Conclusion

While both AEP and environmentalists claimed victory after signing the modified consent decree, it appears that the environmentalists might have carried the day. AEP was able to secure less expensive (and perhaps less effective) emissions control technology, but the company also made significant concessions. In particular, the company must begin retiring or refueling its coal-fired plants and start using cleaner-burning natural gas at many of its facilities. Additionally, AEP must fund both renewable energy projects in the Midwest and projects among the eight plaintiff-states at the expense of millions of dollars. Failure to do so comes with hefty fines that would only add to the expensive control measures agreed to both in the 2007 decree and the modified consent decree. AEP may have won a short-term victory with the less expensive control technology, but environmentalists have secured the long-term victory as AEP's coal plants will continue to be phased out.

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