RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. PLASTIC POLLUTION

Cosmetic Microplastic Legislation in New York and California

New York and California are considering legislation to ban microplastics in cosmetics. Two bills have been recently introduced in the New York State Assembly concerning cosmetic microbeads—Bills No. 8652 and 8744. Bill No. 8652 (first New York bill) was introduced

by Assembly Members Michelle Schimel and Steve Englebright on January 30, 2014. Assemb. B. No. 8652, 2014 Leg., Reg. Sess. (N.Y. 2014). In pertinent part it reads, "No person, firm, partnership, association, limited liability company or corporation shall sell or offer for sale any personal care products or cosmetics containing microbeads within New York State." *Id.* § 1.1. The bill also grants the New York State Department of Environmental Conservation (DEC) the authority to promulgate "such rules and regulations as it shall deem necessary to implement [the prohibition]." *See id.* § 1.2. When it comes to enforcement, the proposed bill provides for injunctive relief and a civil penalty of up to $1000 per day "during which such violation continues." *Id.* § 3.4. For second violations, the fine increases to a maximum of $2500 per day.

"Microbeads" are defined by the bill as "micro polymer particles, less than five millimeters in diameter, that [are] made of synthetic or semi-synthetic polymeric materials such as, but not limited to, polyethylene (PE), polypropylene (PP), polyethylene terephthalate (PET), polymethyl methacrylate (PMMA), or a combination of such polymers." *Id.* § 2.7. "Personal care products" are defined as

> consumer products manufactured for use in personal hygiene and beautification. Personal care products shall include, but are not limited to, antibacterial soaps, hand soaps, bar soaps, liquid soaps, body washes, lotions, moisturizers, facial and body cleaners, facial masks, exfoliating facial scrubs, sunscreens, acne treatment products, shampoos, conditioners, toothpastes, shaving creams and gels, and foot care products.

Id. § 2.8. "Cosmetics" are defined as

> consumer products manufactured for use in beautification. Cosmetics shall include, but are not limited to, lip gloss, lipstick, lip balm, lip liner, eye shadow, eye liner, mascara, blush, foundation, concealer, powder, primer, blemish cover sticks, bronzer, skin lightening cream, and hair and makeup remover products.

Id. § 2.9. If passed, the bill would take effect "one year and six months" later. *Id.* § 4.

Bill No. 8744 (second New York bill) was introduced less than two weeks later, on February 11, 2014. Assemb. B. No. 8744, 2014 Leg., Reg. Sess. (N.Y. 2014). This bill was sponsored by Assembly Member Robert Sweeney and others, but was also cosponsored by the original sponsor of the first New York bill, Assembly Member Michelle Schimel. This new bill differs from the previous bill in several ways. The immediate difference is the addition of a preamble, which spells out legislative intent. *Id.* § 1. This serves to explain the risk posed by plastic

microbeads and the necessity of legislation. The legislative intent contains the findings of the legislature that mircrobeads

> pose a serious threat to New York's environment. Microbeads have been documented to collect harmful pollutants, already present in the environment, and harm fish and other aquatic organisms that form the base of the aquatic food chain . . . . Research has suggested that the majority of these microbeads are entering water bodies through disposal down household drains following [use]. Without significant and costly improvements to the majority of New York's sewage treatment facilities, microbeads . . . will continue to pollute New York's waters.

The prohibition has also been updated to ban manufacture—not just sale. *See id.* § 2.2. The bill states, "No person shall produce, manufacture, sell or offer for sale any personal cosmetic product which contains intentionally-added microbeads." "Personal cosmetic product" has an updated and more broad definition, labeling any "article intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance" as well as "article[s] intended for use as a component of any such article." Unlike the original bill, however, an exemption is provided for prescription products.

Just like the prohibition and definition sections, the enforcement sections have been updated as well. The penalty has been increased to $2500 maximum per day for each violation and $5000 maximum per day for second violations, while the injunctive relief provision remains unchanged. *See id.* § 3.4. A jurisdiction clause has been added, vesting sole authority for enforcement with the state. *Id.* § 2.2. But, like the original bill, the second New York bill authorizes the DEC to promulgate regulations and guidance for enforcement. If passed, the bill will take effect December 31, 2015. *Id.* § 4.

The California Assembly Bill, No. 1699, was introduced in the California Legislature by Assembly Member Richard Bloom on February 13, 2014, two days after the second New York bill was introduced. *See* Assemb. B. No. 1699, 2013-2014 Leg., Reg. Sess. (Cal. 2014). Like the second iteration of the New York bill, the California bill starts with a declaration of legislative findings. *Id.* § 1(a). The bill states, "Microplastics in personal care products are not recoverable through ordinary wastewater treatment" and therefore find their way into the environment where they "attract other pollutants commonly present in the environment . . . including [dichlorodiphenyltrichloroethane (DDT), dichlorodiphenyldichloroethylene (DDE), polychlorinated biphenyls

(PCBs)] and flame-retardants." *Id.* § 1(e), (g). These pollutants "transfer to fish tissue during digestion and bioaccumulate." *Id.* § 1(i). Additionally, "[t]here are many biodegradable, natural alternatives to microplastics that are economically feasible . . . , as evidenced by their current use in some consumer personal care products." *Id.* § 1(k).

But the similarities stop there. The California bill's prohibition is far weaker. While the bill mandates that "a person in the course of doing business shall not sell or offer for promotional purposes in this state any cleaning products, personal care products, or both containing microplastic," there is no prohibition on manufacture like there is in the second New York bill. *See id.* § 2. Further, the California bill specifies two exemptions. *Id.* § 3. Microplastics that constitute "less than 1 part per million (ppm) by weight" are not prohibited. Nor does the prohibition apply to any products "designed for a use where it is unlikely that the product will pass or probably will pass into any wastewater treatment system or water of the state."

The jurisdictional and enforcement provisions of the California bill are also different than the second New York bill, but in this case the differences make the California bill stronger. While the penalty is identical ($2500 per day of violation maximum), guidelines are established for fixing the exact penalty in each specific case. *See id.* § 4(b). These metrics include "[t]he nature and extent of the violation," "[t]he deterrent effect," "economic effect," and "[a]ny other factor that justice may require." And, unlike the second New York bill, the California bill does not vest sole enforcement power with the state. *See id.* § 4(c). Not only does the bill empower a "city attorney of a city having a population in excess of 750,000 persons" or any other city attorney "with the consent of the district attorney" to enforce the statute, but the bill also contains a citizen suit provision. This citizen suit provision allows for actions to "be brought by a person in the public interest," as long as a notice of violation has been issued more than sixty days prior and "[n]either the Attorney general, a district attorney, a city attorney, nor a prosecutor has commenced and is diligently prosecuting an action against the violation." *Id.* § 4(d). In addition, the bill provides for "reasonable attorney and expert witness fees[] to any prevailing or substantially prevailing party, unless the court determines the award is inappropriate." *Id.* § 4(e).

It can safely be said that the second New York bill is simply a better written piece of legislation than the first New York bill. The clear statement of legislative intent and more expansive vocabulary helps expand the scope of the bill and protect the bill from potential legal

challenges, should it become law. But when it comes to comparing the second New York bill and the California bill, it is hard to pick a winner from an environmental protection viewpoint. While the New York bill is more forceful in its prohibition language, it vests sole enforcement authority with the state. The California provision contains a citizen suit provision modeled on the citizen suit provisions contained in the Clean Water Act—a provision that has become an invaluable tool in maintaining the integrity of the nation's waters.

But the question of which bill is "better" may be largely academic. New York and California both contain significant portions of the consumer market. It could easily be argued that any national cosmetic company would find it easier and more economical to simply comply with the strictest provisions of both statutes, instead of maintaining three separate logistical chains for three different regulatory schemes. This throws the significance of the New York and California bills into sharp relief. Should either or both of these bills become law, the environmental benefits will likely extend far beyond the state in which the bill was passed. These bills could mean greater environmental protection for waterways throughout the United States and perhaps beyond.

Tyler Gibson

II. CLEAN AIR ACT

Mississippi v. EPA, Nos. 08-1200, 08-1202 to -1204, 08-1206, 2013 WL 6486930 (D.C. Cir. Dec. 11, 2013) (per curiam)

A. Background

In *Mississippi v. EPA*, multiple states, industries, and environmental groups challenged the Environmental Protection Agency's (EPA) new ozone standards, although the United States Court of Appeals for the District of Columbia Circuit did not allow the case to move forward until the EPA opted not to review the final rule in September 2011. Nos. 08-1200, 08-1202 to 1204, 08-1206, 2013 WL 6486930, at *1, *3 (D.C. Cir. Dec. 11, 2013) (per curiam). Mississippi and multiple industries challenged the primary and secondary ozone standards for being "too protective," while, conversely, other states, the District of Columbia, New York City, and environmental groups challenged the standards for "not [being] protective enough." *Id.* at *3. The court denied all of the challengers' claims, except the environmental groups' claim regarding the secondary standard, which it remanded to the EPA for further review. *Id.* at *23.

1. Legal Background

The EPA Administrator must publish and revise primary and secondary National Ambient Air Quality Standards (NAAQS) for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A) (2006); *Mississippi*, 2013 WL 6486930, at *1. Primary NAAQS are air standards that "allow[] an adequate margin of safety [and] are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). On the other hand, secondary NAAQS are air standards that are "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." *Id.* § 7409(b)(2). The distinction between primary and secondary NAAQS is primary NAAQS serve to "protect the public *health*," while secondary NAAQS "protect the public *welfare*," which includes not only effects on health, but effects on all aspects of the environment, economy, and personal well-being. *Id.* §§ 7409(b)(1)-(2), 7602(h) (emphasis added). Ozone is an air pollutant at ground level, and forms when nitrogen oxides (NO_x) and volatile organic compounds (VOCs) from stationary and mobile sources react in sunlight. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,437 (Mar. 27, 2008) [hereinafter 2008 Final Rule]; *Mississippi*, 2013 WL 6486930, at *1.

2. Factual Background

The EPA issued the 2008 Final Rule after almost eight years of revising the ozone primary and secondary NAAQS. *Mississippi*, 2013 WL 6486930, at *2. The EPA decided the standing primary standard of 0.08 parts per million (ppm) was inadequate after evaluating new evidence consisting of "new clinical studies, including human exposure studies, showing respiratory effects at ozone levels below 0.08 ppm . . . [,] new epidemiological evidence suggesting associations between 'serious morbidity outcomes' and ozone exposures at levels below 0.08 ppm, as well as risk assessments estimating the effects of various levels of ozone on the population." *Id.* (citing 2008 Final Rule, 73 Fed. Reg. at 16,446, 16,449-51, 16,470-72). Evidence revealed ozone exposure contributed to "decreased lung function[,] respiratory symptoms . . . [,] increased asthma medication use, emergency department visits, and hospital admissions." *Id.* at *1 (citing National Ambient Air Quality Standards for Ozone, 72 Fed. Reg. 37,818, 37,827-29, 37,832 (July 11, 2007) [hereinafter 2007 Proposed Rule]). Likewise, the EPA found the

secondary standard at 0.08 ppm was inadequate after new evidence showed the current standard "would cause significant effects on vegetation and sensitive ecosystems." *Id.* at *3 (citing 2008 Final Rule, 73 Fed. Reg. at 16,496-97). These effects include "a broad array of effects on trees, vegetation, and crops and . . . indirect[] effect[s on] other ecosystem components such as soil, water, and wildlife." *Id.* at *1 (citing 2007 Proposed Rule, 72 Fed. Reg. at 37,883). Ultimately, the EPA decided to lower both primary and secondary NAAQS from 0.08 ppm to 0.075 ppm. *Id.* at *2.

B. Court's Decision

Acknowledging the EPA's role as "Goldilocks" caught between Mississippi and industries wanting looser standards and other states and environmental groups wanting stricter standards, the court noted that it could not "demand that EPA get things 'just right.'" *Id.* at *9. Instead, the appropriate standard under 42 U.S.C. § 7607(d)(9)(A) required the court to "overturn any EPA action that [was] arbitrary, capricious, an abuse of discretion, or contrary to law." *Mississippi*, 2013 WL 6486930, at *10. Ultimately, the D.C. Circuit denied all of the claims except for the environmental groups' claim about the secondary standard, which the court remanded for the EPA to reconsider. *Id.* at *23.

1. Mississippi's Challenge

In striking down Mississippi's three arguments that the primary and secondary standards were too restrictive, the court's main contention was "it [was] not [their] job to referee battles among experts; [their job was] only to evaluate the rationality of EPA's decision." *Id.* at *9. First, the court rejected Mississippi's argument that the EPA had to explain what primary standard was "'requisite' to protect the public health" in terms of both present and past rule revisions. *Id.* at *4-5. The court "declin[ed] Mississippi's invitation to enter that funhouse" because 42 U.S.C. § 7409(b)(1) only requires the court to see if the current standard is requisite, "not ask why the prior [standard] once was 'requisite' but is no longer up to the task." *Mississippi*, 2013 WL 6486930, at *5. Second, the court held that the EPA presented a reasonable analysis of available human exposure studies, epidemiological evidence, expert recommendations, and comments to conclude a new primary standard was necessary to protect public health. *Id.* at *5-7. Although the court acknowledged people may disagree with the EPA's analysis, it reiterated

that disagreements are left to the experts and the court would "not second-guess EPA's interpretation of . . . this evidence." *Id.* at *6.

Third, the court found the EPA's decision rationally derived from available science, despite Mississippi's claim that EPA relied on "distorted science." *Id.* at *4, *8-9. Under the Clean Air Act, the EPA's air quality criteria must "accurately reflect the latest scientific knowledge," and then the EPA must set standards from this information. *Id.* at *7 (quoting 42 U.S.C. §§ 7408(a)(2), 7409(b)(1)). But according to the court, the term "accurately reflect" does not mean, nor guarantee, accuracy in the science behind the air quality criteria or translating it to a standard. *Id.* at *8. Rather, the air quality criteria just "'provide the scientific basis for promulgation of air quality standards.'" *Id.* (quoting Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1136-37 (D.C. Cir. 1980)). Therefore, even though Mississippi picked out a study cited by the EPA that drew a different conclusion than the EPA regarding the effects of ozone exposure, the EPA may draw different conclusions through its own analysis. The court's only job is to evaluate whether the EPA arrived at its conclusions, and the rule, rationally. *Id.* at *8-9. Finding that Mississippi's challenge failed under all three arguments when analyzed for the primary standard, the court also rejected the challengers' arguments for the secondary standard because the EPA's decision was rational. *Id.* at *9.

2. Environmental Groups' Challenge

While the court quickly dealt with Mississippi's challenge, the environmental groups' claims that the primary and secondary standards were not restrictive enough required the court to dissect its arguments regarding each standard separately. First, starting with the primary standard, the environmental groups argued the EPA failed to derive a rational standard that protected public health because of how the EPA interpreted human exposure studies, epidemiological studies, and risk assessments. *Id.* at *10-13. The court set the tone for its evaluation of the first argument by prefacing it with the standard at hand: although the EPA must "weigh the entire record," *id.* at *10 (quoting Achernar Broad. Co. v FCC, 62 F.3d 1441, 1446 (D.C. Cir. 1995)), there is "no single piece of evidence [that] is dispositive," because the question is whether there is substantial evidence overall to support the EPA's decision. *Id.* (citing Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 122 (D.C. Cir. 2012)). The EPA opted to treat health effects resulting from ozone exposure below 0.075 ppm as "inconclusive" because of the lack of available data from clinical studies, uncertainty about causal

relationships at lower levels in epidemiological studies, and remarks from experts. *Id.* at *11-13. After reminding the challengers of "the impossibility of eliminating all risk of health effects from 'non-threshold' pollutants like ozone," the court found that the EPA made a rational choice in setting the primary standard at 0.075 ppm in light of the known and unknown factors it was balancing. *Id.* at *12, *14.

Second, the court found the EPA set the primary standard while keeping an "adequate margin of safety" in mind, despite the environmental groups' argument that the standard did not create any margin. *Id.* at *14-15. The court noted that determining an "adequate margin of safety" does not require the EPA to "identify[] a 'safe level' and then apply[] an additional margin of safety;" rather, it only requires that the EPA's record completely explain and support its decisions regarding the margin. *Id.* at *14 (alterations in original) (quoting Am. Trucking Ass'n v. EPA, 283 F.3d 355, 368 (D.C. Cir. 2002)). Because the EPA determined ozone exposure of 0.08 ppm was the threshold at which healthy populations were adversely affected, the court held setting the standard lower to 0.075 ppm represented an "adequate margin of safety" to account for the more sensitive populations considered in the record. *Id.* at *15. Third, the environmental groups claimed that the EPA violated the Clean Air Act by failing to explain why its primary standard did not follow the Clean Air Scientific Advisory Committee's (CASAC) recommended standard. Under 42 U.S.C. § 7607(d)(3), the EPA must explain why a rule is "differ[ent] in any important respect from any of [CASAC's] recommendations." *Mississippi*, 2013 WL 6486930, at *16 (quoting 42 U.S.C. § 7607(d)(3)). But, the court said to mandate a response from the EPA over departures from CASAC recommendations, CASAC must first "exercise[] scientific judgment" and "be precise about the basis of its recommendations." *Id.* at *19-20. Finding CASAC failed to exercise any discernable scientific judgment in unanimously recommending a primary standard "no higher than 0.070 ppm," the court held that the EPA's general answer and acknowledgement of CASAC's recommendation sufficed under the Clean Air Act. *Id.* at *18-20.

Although the environmental groups' three arguments regarding the primary standard failed, the court agreed with the challengers' assertion that the EPA failed to set an appropriate secondary standard by relying on its statutory interpretation from *American Farm Bureau Federation v. EPA*, 559 F.3d 512 (D.C. Cir. 2009). *Mississippi*, 2013 WL 6486930, at *20. The EPA decided to use the "8-hour" primary standard when it set the secondary standard, even though a "cumulative seasonal" secondary standard was recommended, because "a [seasonal] standard would be

unlikely to provide additional protection in any areas beyond that likely to be provided by the revised primary standard." *Id.* at *20-21 (alteration in original) (quoting 2008 Final Rule, 73 Fed. Reg. at 16,499-500 (Mar. 27, 2008)). The court found this explanation inadequate and said that the "EPA must expressly 'determine what level of . . . protection is requisite to protect the public welfare' and explain why [it] is so." *Id.* at *22 (quoting *Am. Farm Bureau*, 559 F.3d at 530). Even though the EPA argued that the primary and the desired "21 ppm-hours seasonal" secondary standards offered about the same level of environmental protection, the court stated that the EPA failed to note why it did not consider other seasonal standards that may offer more or equivalent protection to the primary standard. *Id.* at *23. Ultimately, the court chose to remand the ozone secondary standard instead of vacating it, leaving the current standard in place until the EPA either explains or reissues the rule.

C. Analysis

The court's opinion was fairly persuasive and well-reasoned, except for its analysis of the environmental groups' third argument regarding the primary standard. The court spent several pages attempting to rationalize why it wanted to defer to the EPA's failure to follow statutory procedure, ultimately concluding the perceived lack of scientific judgment on CASAC's part excused the EPA's behavior. *Id.* at *18-20. "[H]ad CASAC acknowledged uncertainty in the scientific evidence but explained that, based on its expert scientific judgment, it nonetheless believed adverse health effects were likely to occur at 0.070 ppm level," then the EPA would have had to address the fact that its final standard was higher than CASAC recommended. *Id.* at *19. Even though CASAC acknowledged there was uncertainty in the science and noted data showing that "adverse health effects may occur at levels lower than 0.060 ppm," this was apparently not enough to logically suggest that based on its expert scientific judgment, CASAC's higher recommended standard of 0.070 ppm may lead to adverse health effects. *See* Letter from Dr. Rogene Henderson, Chair, CASAC, to Stephen L. Johnson, EPA Adm'r 3, 5 (Oct. 24, 2006) (on file with author). In the future, CASAC and potentially other advisory groups to the EPA will be bound by this stringent standard, which seems to require expert panels to carefully and deliberately state the obvious in order to hold the EPA to its statutory duty. While there is value in placing standards on advisory groups, the court appears to purposely overlook the EPA's failure to address the deviation and instead opts to nitpick the EPA's advisory

committee's unanimous recommendation to find an out for the EPA's omission.

Lauren Kasparek

Oklahoma Department of Environmental Quality v. EPA,
740 F.3d 185 (D.C. Cir. 2014)

The United States Court of Appeals for the District of Columbia Circuit held invalid the EPA's federal implementation plan (FIP) and Indian Country New Source Review Rule (Indian Country NSR Rule) in relation to nonreservation Indian country because primary regulatory authority under the Clean Air Act (CAA) lies with states, and nonreservation lands are therefore subject to the relevant state implementation plan (SIP) whenever a tribal implementation plan (TIP) does not apply. Okla. Dep't of Envtl. Quality v. EPA, 740 F.3d 185, 195 (D.C. Cir. 2014).

A. Background

Under the CAA, the Environmental Protection Agency (EPA) may "treat Indian tribes as States" for the purposes of "management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(1)-(2) (2006). The EPA issued the Tribal Authority Rule in 1998, under which it interpreted "other areas" over which a tribe has or may have jurisdiction pursuant to the CAA as consistent with the federal criminal code's definition of "Indian Country." *Okla. Dep't of Envtl. Quality*, 740 F.3d at 188. Thus, under the EPA's Tribal Authority Rule, Indian tribes may regulate as states over reservation lands and nonreservation lands, which include "dependent Indian communities" and "Indian allotments."

The extent of tribal authority is subject to two limitations, however. First, tribal authority over nonreservation lands is limited by the requirement that a tribe must first demonstrate its jurisdiction over such lands pursuant to federal Indian law. Second, the CAA reserves the EPA authority to directly administer the CAA "[i]n any case in which the [EPA] determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible." 42 U.S.C. § 7601(d)(4). In 2011, the EPA issued a rule to implement a FIP, which included the Indian Country NSR Rule, pursuant to § 7601(d)(4). *Okla. Dep't of Envtl. Quality*, 740 F.3d at 188. The rule applied to all Indian country in

the United States except that already subject to an EPA-approved TIP or a SIP that the EPA expressly approved for application to Indian country. The EPA found the FIP necessary to fill a "regulatory gap" that it perceived was created by a "general lack of state authority to regulate air quality in Indian country and the failure of many tribes to implement NSR programs of their own."

Oklahoma challenged the Indian Country NSR rule's application to nonreservation tribal lands. *Id.* at 189. First, Oklahoma argued that the EPA lacked authority to regulate these lands because under the CAA "each state's SIP applies to all non-reservation Indian country within its geographic borders except where a tribe has demonstrated its inherent jurisdiction." Second, Oklahoma argued that the EPA lacked authority for implementing the FIP because the EPA "may establish a FIP only upon finding that a specific jurisdiction's plan is inadequate." The EPA objected to Oklahoma's challenge both on the merits and on three preliminary grounds: standing, timeliness, and forfeiture.

B. Court's Decision

The D.C. Circuit held that the EPA's FIP and Indian Country NSR Rule were invalid as applied to nonreservation Indian country because states have primary regulatory authority under the CAA and a SIP therefore applies to nonreservation lands not subject to a TIP. *Id.* at 189, 195. Because its holding was consistent with Oklahoma's first contention, the court did not reach Oklahoma's second contention that the FIP was invalid because the EPA could not implement a FIP without first finding that an existing SIP or TIP was inadequate. *Id.* at 189.

1. Preliminary Objections

Before reaching the merits, the court considered and rejected each of the EPA's preliminary objections. *Id.* at 189-91. First, the EPA argued that Oklahoma lacked standing because the state's own actions were the cause of its alleged injury and it could redress the injury through its own actions as well. *Id.* at 189-90. Oklahoma claimed that the EPA's rule caused its injury by "'divest[ing] [it] of regulatory authority over areas otherwise within [its] purview,' to wit, non-reservation Indian country." *Id.* at 189. The EPA contended that Oklahoma should merely have requested EPA approval of its regulatory regime under the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA). The SAFETEA provides that the EPA "shall approve" state administrative authority over Indian country "without any further demonstration

of authority by the State," where the EPA has already approved the state's authority to regulate state lands that are not Indian country. *Id.* at 190. The court pointed out that EPA's arguments "stopped short . . . of stating that Oklahoma would be entitled to approval without conditions of an application under the SAFETEA." Because the EPA's proposed alternative remedy was therefore not necessarily guaranteed, the court held that the injury was not self-inflicted and Oklahoma therefore had standing to contest the Indian Country NSR Rule.

Second, the EPA argued that Oklahoma's claim was not timely because the EPA's Tribal Authority Rule, issued in 1998, had already established that SIPs did not apply to nonreservation Indian country, and Oklahoma should therefore have raised its objection to that prior-issued rule rather than to the FIP and corresponding Indian Country NSR Rule. *Id.* at 190-91. The court disagreed. *Id.* at 191. The Tribal Authority Rule states in its preamble that the "EPA is the appropriate entity to be implementing CAA programs prior to tribal primacy . . . . EPA will not and cannot 'grandfather' any state authority over Indian country where no explicit demonstration and approval of such authority has been made." *Id.* (quoting Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7258 (Feb. 12, 1998). The court noted that while this passage from the Tribal Authority Rule referred to "Indian country" generally, the EPA included the passage in response to a comment that "states have historically regulated non-[Indian] CAA-related activities on fee lands within reservation boundaries." Because the passage was added in response to a comment about "lands within reservation boundaries," the limitation on state authority in "Indian country" could be reasonably read as applying only to reservation lands, thus "leaving state authority over non-reservation Indian country intact." The court reasoned that the Indian Country NSR Rule was a new rule because it expressly stated that SIPs were "presumptively inapplicable" not only within reservation boundaries, but in nonreservation Indian country as well. Thus, Oklahoma's challenge to the Indian Country NSR Rule was timely.

Finally, EPA objected to Oklahoma's ability to bring the challenge by alleging forfeiture of its claim that nonreservation Indian lands are presumptively covered by Oklahoma's SIP. The EPA argued that by failing to raise the legal argument used as the basis for this claim during the public comment period for the Indian Country NSR Rule, Oklahoma forfeited its ability to raise the claim on appeal. Again, the court rejected the EPA's objection, but on different grounds. *Id.* at 192. The court noted that the forfeiture rule's purpose is to prevent "unfair surprise" to

an agency by a claimant raising an objection for the first time on appeal. Where an agency has made a "key assumption" in promulgating a rule, the agency has a "preexisting 'duty to examine [it] as part of its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule.'" *Id.* (quoting Appalachian Power Co. v. EPA, 135 F.3d 791, 818 (D.C. Cir. 1998)). Thus, forfeiture based on unfair surprise is inapplicable where an agency has made such a key assumption, because the agency has an obligation to explain the assumption whether or not a comment has been made. The EPA's basis for issuing the Indian Country NSR Rule was its perception of a regulatory gap over nonreservation Indian country not subject to a TIP. According to the court, the EPA's finding of a regulatory gap was based upon a "key assumption" that SIPs are inapplicable to nonreservation Indian country. Therefore, the court held that Oklahoma had not forfeited its claim.

2. Decision on the Merits

In its consideration of the merits of the case, the court held that a state's SIP presumptively applies to nonreservation Indian country not covered by a TIP. The EPA argued that, contrary to Oklahoma's interpretation, the CAA and prior case law do not "establish a presumption of state jurisdiction over Indian country," but rather, like federal Indian common law, the CAA shows congressional intent that "CAA regulatory jurisdiction in Indian country" belongs to either the EPA or a tribe, and case law allows for such an interpretation. *Id.* at 194. Oklahoma argued that (1) the CAA affords primary regulatory jurisdiction to either a tribe or a state and (2) a tribe must demonstrate its authority over nonreservation Indian country in order to exercise CAA regulatory jurisdiction over such lands, and the EPA must demonstrate tribal authority when regulating in place of a tribe. Therefore, because "neither a tribe nor the EPA has demonstrated tribal jurisdiction over all non-reservation Indian country," the court concluded, Oklahoma has regulatory jurisdiction over such nonreservation lands, and its EPA-approved SIP therefore applies.

First, the court held that under the CAA, jurisdiction "must lie either with a state or with a tribe." *Id.* at 193. Under the CAA, a state has "primary responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C. § 7407(a). This primary responsibility of the state yields only for reservation lands or nonreservation lands over which tribal jurisdiction has been demonstrated. *Okla. Dep't of Envtl. Quality*, 740 F.3d at 193-94. The court pointed to its holding in *Michigan v. EPA* that CAA jurisdiction

"must either lie with the state or with the tribe." *Id.* at 194 (quoting Michigan v. EPA, 268 F.3d 1075, 1086 (D.C. Cir. 2001)). The EPA argued that *Michigan* was not controlling here because the court's state-or-tribe holding there applied only to areas whose status as Indian country was yet unclear, and the "EPA's authority over areas that unquestionably *are* Indian country was not questioned." The court dismissed the EPA's argument as "irrelevant" because the proposition that "either a state has jurisdiction or a tribe has jurisdiction" still applies.

Second, the court held that the EPA must demonstrate tribal authority over nonreservation Indian country when regulating such lands pursuant to § 7601(d) because the provision "unambiguously confers no 'inherent or underlying EPA authority, but rather a role for the EPA if the tribe, for whatever reason, does not promulgate a [TIP].'" *Id.* at 194-95 (quoting *Michigan*, 268 F.3d at 1083). The court interpreted § 7601(d) to afford the EPA authority merely to act on behalf of a tribe. *Id.* at 195. The court reasoned that when the EPA "regulate[s] in the shoes of a tribe" it must be "subject to the same limitations as the tribe itself." Therefore, the EPA is subject to the same requirements as tribes and must establish tribal authority over nonreservation lands prior to exercising CAA jurisdiction. Because the EPA failed to demonstrate tribal authority "over all non-reservation Indian country," the court concluded that the state's primary authority to regulate under the CAA afforded Oklahoma regulatory jurisdiction over nonreservation lands within its geographic boundaries. *Id.* at 194-95. Those lands were therefore subject to and regulated by Oklahoma's EPA-approved SIP. *Id.* at 194.

C. Analysis

This case clarifies jurisdictional authority to regulate nonreservation Indian country under the CAA. A SIP governs all areas within that state's geographic boundaries except Indian reservation lands and nonreservation lands over which tribal authority has been established by either an Indian tribe or the EPA. The court left unanswered the question of how tribal authority over such lands may or must be demonstrated. Because the court held that the primary regulatory authority lies with the state, a tribe presumably must demonstrate its authority over nonreservation lands to the state prior to submitting a TIP for the EPA's approval. Because the court held that the EPA has no more authority than a tribe in these matters, the EPA's authority to issue a FIP covering nonreservation lands is presumably also only as extensive as its ability to demonstrate tribal authority over such lands to the satisfaction of the state. Though the court's analysis is not unreasonable, its conclusion is

not so clearly beyond contestation so as to wholly excuse its incongruous practical implications.

Julie Carter

III. PUBLIC LANDS

Southern Utah Wilderness Alliance v. Burke,
No. 2:12CV257DAK, 2013 WL 5916815 (D. Utah Nov. 4, 2013)

Southern Utah Wilderness Alliance and various other environmental groups (collectively SUWA) brought suit before Judge Kimball in the United States District Court for the District of Utah raising seven claims regarding the Bureau of Land Management's (BLM) issuance of the 2008 Richfield Resource Management Plan (RMP) and Travel Plan. S. Utah Wilderness Alliance v. Burke, No. 2:12CV257DAK, 2013 WL 5916815, at *1 (D. Utah Nov. 4, 2013). The court affirmed the BLM's decision for three of these claims. *Id.* at *19. For the remaining four claims, the court, at least in part, reversed, holding that (1) "the BLM[] failed to apply the minimization criteria in its preparation of the Travel Plan;" (2) "the BLM generally complied with prioritizing [Areas of Critical Environmental Concern (ACECs)], with the specific exception of the proposed Henry Mountains ACEC" where the court stated that the decision was arbitrary and capricious because it appeared to have been "based on political concerns" and not on a proper application of the relevant standards; (3) "the BLM generally complied with the [Wild and Scenic Rivers Act] in its implementation of eligibility criteria and its determinations of eligible and suitable rivers, with the specific exceptions of Happy Canyon and Buck and Pasture Canyons spring areas"; and (4) "the BLM violated the [National Historic Preservation Act (NHPA)] by failing to take into account the impact of [off-highway vehicle (OHV)] routes on archeological sites." *Id.* at *14, *19.

This Recent Development will focus on the court's holding that the BLM violated the NHPA.

A. Background

1. Procedural Background

Under the Federal Land Policy and Management Act (FLPMA), the BLM must "develop, maintain, and, when appropriate, revise land use plans . . . us[ing] . . . the principles of multiple use and sustained yield." 43 U.S.C. § 1712(a), (c)(1) (2006). Pursuant to this directive, the BLM

issued the 2008 Richfield RMP and Travel Plan, which governed 2.1 million acres of BLM land within the Richfield Field Office planning area. *See S. Utah Wilderness Alliance*, 2013 WL 5916815, at *1. The RMP classified areas for OHV use as open, limited, or closed. *Id.* at *2. In open designation areas, OHV use can occur throughout the area; in limited designation areas, OHV use can occur on designated routes; and in closed designation areas, OHV use is prohibited. Prior to the 2008 RMP, most of the Richfield planning area was designated as open to OHV use. The 2008 RMP designated 9980 acres as open, 209,900 acres as closed, and 1.9 million acres as limited. Within the limited area, 4277 miles of routes were designated, which included many user-created routes from the prior open designation. Additionally, the RMP allowed vehicles to be driven and parked within 50 feet of designated routes and within 150 feet of routes that led to existing campsites. Those route designations make up the Travel Plan.

During the public comment period on the RMP and Travel Plan, "Colorado Plateau Archaeological Alliance commented that improper OHV use 'constitutes perhaps the greatest single threat to the long-term preservation of cultural resources in the [Richfield Field Office].'" Plaintiffs' Opening Brief at 19, *S. Utah Wilderness Alliance*, 2013 WL 5916815 (No. 2:12CV257DAK) (citation omitted).

2. Legal Background

The NHPA "imposes procedural not substantive requirements" on agencies, requiring them to "consider the effects of their actions and programs on historic properties and sacred sites before implementation." *S. Utah Wilderness Alliance*, 2013 WL 5916815, at *7 (citing Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999)). Under section 106 of the NHPA, federal agencies cannot approve any federal "undertaking" without considering the impacts of the undertaking on properties that are included or eligible for inclusion in the National Register of Historic Places. 16 U.S.C. §§ 470f, 470w(7) (2012). It was undisputed that the BLM's approval of the Travel Plan was an undertaking. *S. Utah Wilderness Alliance*, 2013 WL 5916815, at *7. Because the approval was an undertaking, the NHPA's implementing regulations required the BLM to "[r]eview existing information on historic properties within [that] area" and "take the steps necessary to identify historic properties within the area of potential effects." *Id.* (quoting 36 C.F.R. § 800.4(a)(1), (b) (2013)). Additionally, the regulations required the BLM "to determine whether the travel plan would have an 'adverse effect' on cultural resources." *Id.* (citing 36

C.F.R. § 800.5(a)). This determination was to be made in consultation with the State Historic Preservation Office (SHPO) and Native American tribes.

When determining whether a proposed undertaking will have an adverse effect on cultural resources, the NHPA requires the agency to make "a reasonable and good faith effort." 36 C.F.R. § 800.4(b)(1). This requirement can be met through "background research, consultation, oral history interviews, [and] sample field investigation." Additionally, three types of surveys are used to help identify the presence of cultural resources. *S. Utah Wilderness Alliance*, 2013 WL 5916815, at *7 (citing BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, BLM MANUAL § 8110 (2004) [hereinafter BLM MANUAL]). These range from a Class I survey, which is basically a review of existing information by the agency, to the more common Class III survey, which is an "on-the-ground intensive survey of the entire subject area 'intended to locate and record all historic properties' and 'provides managers and cultural resource specialists with a complete record of cultural properties.'" *Id.* (citing BLM MANUAL, *supra*, § 8110.2.21).

In deciding which type of survey to perform for the Richfield RMP, the BLM relied on an instruction memorandum that "suggests that a Class I survey will suffice when a transportation plan proposes to maintain the status quo, but that a Class III inventory should be used when a plan authorizes new roads or increased traffic on existing roads." *Id.* at *8 (quoting Mont. Wilderness Ass'n v. Connell, 725 F.3d 988, 1006 (9th Cir. 2013)). This memorandum further states:

> "[P]roposed designations that will not change or will reduce OHV use are unlikely to adversely affect historic properties and will require less intensive identification efforts." However, "[w]here there is a reasonable expectation that a proposed designation will shift, concentrate, or expand travel into areas where historic properties are likely to be adversely affected, Class III inventory and compliance with section 106 [of the NHPA], focused on areas where adverse effects are likely to occur, is required prior to designation."

Id. (quoting *Mont. Wilderness Ass'n*, 725 F.3d at 1006).

In *Montana Wilderness Ass'n v. Connell*, a factually similar case to the case at hand, the United States Court of Appeals for the Ninth Circuit held under the NHPA "that BLM failed to make a reasonable effort to identify historical and cultural resources" where the BLM relied primarily on Class I surveys in issuing an RMP for the Upper Missouri River Breaks National Monument in Montana. 725 F.3d at 992, 1007, 1009. The court cited multiple reasons for its decision, most importantly

that (1) only 16% of the land was surveyed beyond Class I and only 8% was subject to a Class III survey; (2) the designated routes had not been previously surveyed and were therefore most similar to new routes rather than existing routes; (3) even if the routes were existing, their designation from open to limited would "*concentrate* pre-RMP traffic on the remaining designated roads, airstrips and camping areas" and therefore require a Class III survey; and (4) promises of future surveys in conjunction with site-specific decisions do not substitute for the more intensive surveys before the RMP is issued. *Id.* at 1008-09.

B. Court's Decision

SUWA challenged the BLM's Richfield RMP and Travel Plan for violating the NHPA, specifically arguing that the BLM violated the implementing "regulations [of the NHPA] by failing to make a 'reasonable and good faith effort' to identify cultural resources and, consequently, making an unsupported 'no adverse impacts' determination." *S. Utah Wilderness Alliance*, 2013 WL 5916815, at *7. To support this view, SUWA cited "the wealth of archeological resources within the Richfield planning area" and the fact that the BLM acknowledged that "the [Richfield Field Office] has little or no data as to the nature, diversity or distribution of cultural resources on roughly 95 to 99% of the land it manages." Plaintiffs' Opening Brief at 18, *S. Utah Wilderness Alliance*, 2013 WL 5916815 (No. 2:12CV257DAK).

For the Richfield RMP, the BLM claimed to rely on the instruction memorandum outlined above and performed only Class I surveys for the entire area, with the exception of four parts that were designated as open to cross-country OHV travel. *S. Utah Wilderness Alliance*, 2013 WL 5916815, at *8. To rely on the memorandum and only perform Class I surveys in areas that went from open designations to limited, the BLM argued that Class III surveys were not necessary because limiting previously open areas to routes meant that "adverse effects on the[] fewer remaining routes were unlikely."

Disagreeing with this reasoning, the court noted how limiting OHV use to designated routes would concentrate travel and "likely impact cultural resources on the remaining routes." Moreover, "[t]he instruction manual suggests that an on-the-ground Class III survey should have been conducted for the designated routes in the limited OHV use area because the designation of fewer routes will shift, concentrate, or expand travel into areas where historic properties exist." The court found extensive support for this in *Montana Wilderness Ass'n*. *Id.* at *8-9.

The BLM tried several other arguments, each of which failed to persuade the court. First, the court found that promises of "intensive surveys . . . would not alleviate the 'threat to historic sites . . . posed by existing authorized uses.'" *Id.* at *9 (quoting *Mont. Wilderness Ass'n*, 725 F.3d at 1009). Additionally, the BLM attempted to argue that its agreement with the Utah SHPO, which satisfied requirements of its own regulations, satisfied section 106 of the NHPA. Judge Kimball found this argument unconvincing, stating that consultation with the Utah SHPO satisfies that specific procedural requirement but "does not satisfy the other procedural requirements of NHPA. There is nothing in the NHPA or Section 106 that excuses the BLM's failure to comply with the other procedures based on a concurrence from the SHPO."

In the end, the court held that the BLM's reliance on a Class I survey for limited designation areas, rather than Class III surveys of designated routes, failed to meet the requirements of the NHPA. The court found that the BLM's Class I survey did not demonstrate a "reasonable and good faith inventory." This made "the BLM's finding that there were likely no adverse affects as a result of the road and trail designations in the limited OHV use area . . . arbitrary and capricious." The court remanded the Travel Plan "to the BLM to conduct a Class III survey of the designated routes in the limited OHV use area."

C. Analysis

The court's decision will potentially help protect cultural resources found throughout the Richfield planning area while promoting the declaration of policy behind the NHPA, preserving the "historical and cultural foundations of the Nation." 16 U.S.C. § 470(b)(2). In short, the BLM has work to do to comply with the agency directive to "administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations." Exec. Order 11,593, 36 Fed. Reg. 8921 (May 13, 1971), *reprinted in* 16 U.S.C. § 470. Rather than argue about the burden imposed on the agency by having to perform Class III surveys of all of the routes in the Travel Plan, *see* Federal Defendant's Motion To Reconsider at 2-3, *S. Utah Wilderness Alliance*, 2013 WL 5916815 (No. 2:12CV257DAK), the BLM should use the court's decision as an opportunity to reevaluate the way it creates Travel Plans and generally administers the land under its control. The NHPA has a clearly defined procedure and purpose. By only performing a Class I survey of the entire area, the BLM failed to meet the procedural

requirements and failed to meet its stewardship duty. Judge Kimball's decision will hopefully help set them on the right route moving forward.

Lucas Henry

IV. ENDANGERED SPECIES

National Parks Conservation Ass'n v. Jewell, No. 09-00115 (D.D.C. Feb. 20, 2014)

In *National Parks Conservation Ass'n v. Jewell,* the United States District Court for the District of Columbia heard a challenge to the "Stream Buffer Zone Rule" (SBZ Rule) that governed the operation of coal mining activities near and through streams. No. 09-00115, slip op. at 1 (D.C.C. Feb. 20, 2014). The environmental group National Parks Conservation Association (NPCA) brought the case against the Secretary of the United States Department of the Interior, the Director of the Office of Surface Mining Reclamation and Enforcement (OSM), and the Administrator of the United States Environmental Protection Agency. *Id.* at 1-2. The National Mining Association (NMA) intervened as a defendant in the case. *Id.* at 2.

The case involved a law governing a controversial surface coal mining drilling technique commonly used in the Appalachian region. *Id.* at 3; Manuel Quiñones, *Court Strikes Down Bush-Era Stream Rule*, GREENWIRE (Feb. 21, 2014), http://www.eenews.net/stories/1059994937. The technique required miners to remove rock from the earth's surface and place the broken rock, known as "spoil," in other regions. *Nat'l Parks Conservation Ass'n*, No. 09-00115, slip op. at 5. The spoil was commonly disposed of in valleys adjacent to the mined areas, thus creating "valley fill." The creation of valley fill is "associated with downstream effects on surface-water chemistry and macroinvertebrate communities" due to the valley streams running through the spoil.

As part of its case, NPCA alleged violations of procedural and environmental statutes. *Id.* at 2. However, the court focused its analysis on section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2) (2012). *See Nat'l Parks Conservation Ass'n*, No. 09-00115, slip op. at 8-10. Under the ESA, the court held in favor of NPCA, thereby vacating the SBZ Rule. *Id.* at 21.

A. Background

1. Legal Background

Section 7(a)(2) of the ESA requires federal agencies to consult with the appropriate wildlife agency, the United States Fish and Wildlife Service (Service) or the National Marine Fisheries Service (NMFS), in an effort "to 'insure that any action authorized, funded, or carried out by [an] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species' or adversely modify a species' critical habitat." *Id.* at 4 (quoting 16 U.S.C. § 1536(a)(2)). If a federal agency's proposed action "'may affect listed species or critical habitat,' the agency must initiate formal consultation with the Service or [NMFS]." *Id.* (quoting 50 C.F.R § 402.14(a) (2013)). The "may affect" threshold is low: "[a]ny possible effect, whether beneficial, benign, adverse, or of an underdetermined character, triggers the formal consultation requirement." *Id.* at 5 (quoting Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,949-50 (June 3, 1986)). Following the consultation process, the Service or NMFS issues a biological opinion, advising the agency on whether the listed species or habitat is in jeopardy and, if so, whether any "reasonable and prudent alternatives" exist to avoid those situations. *Id.* at 5-6 (citing 50 C.F.R. § 402.14(h)(3)).

2. Factual Background

On March 21, 1995, the OSM requested formal consultation regarding its existing surface coal mining and reclamation operations that were adopted pursuant to the Surface Mining Control and Reclamation Act (SMCRA) and its implementing regulations. *Id.* at 6. In conclusion of its consultation, the Service in the 1996 Biological Opinion stated:

> [S]urface coal mining and reclamation operations conducted in accordance with properly implemented Federal and State regulatory programs under SMCRA are not likely to jeopardize the continued existence of listed or proposed species, and are not likely to result in the destruction or adverse modification of designated or proposed critical habitats.

On December 12, 2008, twelve years after the 1996 Biological Opinion, the OSM published the SBZ Rule, 30 C.F.R. §§ 816.57(a), 817.57(a). *See Nat'l Parks Conservation Ass'n*, No. 09-00115, slip op. at 1. The OSM created the SBZ Rule as part of the regulatory program under SMCRA. *Id.* at 4. SMCRA aimed to "establish a nationwide program to protect society and the environment from the adverse effects

of surface coal mining operations." *Id.* at 3 (quoting 30 U.S.C. § 1202(a) (2012)). However, SMCRA did not require a buffer zone around valley fill streams. *Id.* at 4. In regulating under the statute, OSM required that a 100-foot buffer zone around streams be applied to all surface coal mining operations around valley fill streams. Nonetheless, OSM allowed certain variances for "the disposal of excess spoil within the buffer zone under certain circumstances."

The SBZ Rule revised the rule on stream buffer zones first published in 1983 (1983 Rule). *Id.* at 1. It established different criteria than those in the 1983 Rule for obtaining a waiver of the stream buffer zone requirement. *Id.* at 6-7. In its evaluation of the Rule's potential effects, OSM relied on the 1996 Biological Opinion. *Id.* at 7. OSM determined that the SBZ Rule would not have an affect on listed species or critical habitat and thus "did not initiate consultation with the Service." NPCA challenged OSM's determination and its failure to seek consultation from the proper federal agency, as required by the ESA. *Id.* at 8.

B. Court's Decision

The court held that OSM's failure to seek consultation on the SBZ Rule violated the ESA. *Id.* at 14. The court believed the record clearly established that "the [SBZ] Rule 'may affect' threatened or endangered species or critical habitats." *Id.* at 10. It recognized that coal "mining operations affect the habitat and species residing in their paths." The court also noted that the SBZ Rule's criteria differed from the 1983 Rule for "mining activities in the stream buffer zone in and through streams." *Id.* at 11. The court reasoned that "the [SBZ] Rule may lead to more, or at least, different sorts of, incursions into the stream buffer zone than the 1983 Rule, thereby potentially affecting listed species or critical habitat."

OSM acknowledged the differing standards between the SBZ Rule and the 1983 Rule. *Id.* at 12. It combated the differences with evidence that the changes would result in "positive effects." However, the court believed that the perceived positive effect OSM expected was irrelevant. *See id.* at 13. What mattered was "the potential for different effects on species and the environment." Because the SBZ Rule established different standards for allowing mining activities within the stream buffer zone than the 1983 Rule, the potential for a different effect overrode the potential positive effect.

Belied with evidence that "habitats within stream buffer zones are home to threatened and endangered species and that mining operations affect the environment, water quality, and all living biota," the court

found that OSM's "no effect" determination was "not a rational conclusion." The court stated, "[T]he [SBZ] Rule 'may affect' threatened and endangered species and critical habitat" and thus required OSM "to initiate consultation on the 2008 Rule." *Id.* at 14. OSM's failure to initiate such consultation violated section 7(a)(2) of the ESA.

The court also agreed with NPCA that OSM's decision to avoid consultation on the SBZ Rule by relying on the 1996 Biological Opinion was arbitrary and capricious. *Id.* at 15, 17. "OSM's 'no effect' determination [resulted from] OSM's reliance on the 1996 Biological Opinion." *Id.* at 14. In forming the 1996 Biological Opinion, the Service believed that compliance with specifically listed regulations in the opinion "would ensure the continuation and approval of mining operations" and not jeopardize threatened or endangered species or adversely modify critical habitat. Therefore, when creating the SBZ Rule, OSM reasoned that the Rule would have no effect because it did not alter any of the protective provisions. The court stated that the 1996 Biological Opinion "quite obviously" did not and could not consider the effects the SBZ Rule could have on threatened and endangered species and critical habitats and that therefore OSM's reliance on the 1996 Biological Opinion was arbitrary and capricious. *Id.* at 15. In drawing its conclusion, the court pointed to post-1996 studies demonstrating the impacts of coal mining on streams and aquatic life. *Id.* at 17.

Ultimately, the court decided that vacatur of the SBZ Rule was the proper remedy. *Id.* at 21. Because the court set the SBZ Rule aside, NPCA's remaining claims that challenged the promulgation of that Rule were moot.

C. Analysis

The court's decision sets aside a controversial rule that affected numerous communities in the Appalachian region. For many years, coal mining companies and environmentalists have battled over mountaintop-removal mining's regulation and its potential effects. It is unlikely this outcome will largely impact regulations going forward; however, the result provides some closure to a lengthy battle in Appalachia.

Spence Dabbs

Pepin v. Division of Fisheries & Wildlife, 467 Mass. 210 (2014)

In *Pepin v. Division of Fisheries & Wildlife*, the Supreme Judicial Court of Massachusetts decided that the Division of Fisheries & Wildlife's (Division) regulations pertaining to "priority habitats" were valid under the Massachusetts Endangered Species Act (MESA). 467 Mass. 210, 212 (2014). These regulations require the Division to map out certain areas of priority habitats in order to assess whether or not proposed construction and development will pose a threat to any state-listed species. *Id.* at 224. Petitioners challenged the validity of the regulations that delineated priority habitats because they do not afford landowners the same procedural protections given for significant habitats. *Id.* at 222. Petitioners claimed that because MESA provides procedural protections for assignments of significant habitats, there is a legislative intent to apply these protections to all areas in which development is restricted because of at-risk species' habitats. The court found that MESA is unambiguous and should be read as a whole and that the regulations pertaining to priority habitats fall in line with the purpose of MESA. *See id.* at 215-16.

A. Background

MESA was enacted in 1990 to conserve plants, animals, and their habitats in Massachusetts. *Id.* at 215. It designates three categories of at-risk species: endangered, threatened, and of special concern. MASS. GEN. LAWS ch. 131A, § 1 (2013). After a public hearing, the Division director must designate certain areas that are important to conserve endangered or threatened species as areas of "significant habitat." *Id.* ch. 131A, § 4. Property located in areas of significant habitat cannot be altered without a permit granted by the Division after a finding that the alteration "will not reduce the viability of the significant habitat to support the endangered or threatened species." *Id.* ch. 131A, § 5(a)(vi).

Under MESA, the power to designate habitats of special significance does not explicitly apply to species of special concern. But in the same section that compels the Division to designate certain areas as significant habitat, the Division is also afforded the power to adopt any regulations necessary to implement provisions of chapter 131A. *Id.* ch. 131A, § 4.

In addition to the Division's power to designate species and habitats and review activities taking place in those habitats, MESA also prohibits any person to "take" at-risk species. *Id.* ch. 131A, § 2. This generally

means that no person can harm at-risk species or plants, or disturb their habitats. *See id.* ch. 131A, §§ 1-2.

To implement this take provision for all at-risk species, including species of special concern, the Division created a new type of categorization of habitats, called priority habitats. Through regulations, the Division has the power to identify specific geographic areas that will "serve as conservation protection zones that are critical to ensuring the long term viability and protection of the species." 321 MASS. CODE REG. § 10.26 (2012). After a conservation plan for priority habitats has gone through the required procedure, any activities proposed to take place in those areas are subject to Division review through a permitting process.

In this case, petitioners brought suit to challenge the validity of these regulations that gave the Division the authority to designate priority habitats that are critical to protect species of special concern. *Pepin*, 467 Mass. at 222. Petitioners own about thirty-six acres of land on which they want to construct a home. *Id.* at 211. Their land is delineated as priority habitat for the eastern box turtle, a species of special concern in Massachusetts. In 2006, the Division denied the petitioners' permit application for construction because the project could have resulted in a taking of the eastern box turtle. *Id.* at 213. Petitioners submitted a revised petition, and the Division approved it with certain conditions.

In September 2008, petitioners requested that the Division reassess their land's delineation as priority habitat. After a site visit, the status remained unchanged; the inspector found that the land was "ideal habitat" for the turtle. Petitioners then requested an adjudicatory hearing. First, petitioners challenged the validity of how the Division designates priority habitats and asserted that landowners in priority habitats should be afforded the same procedural protections as landowners in significant habitats. *Id.* at 213-14. Second, petitioners challenged that the criteria for determining priority habitats were not properly applied to their property during the site visit. *Id.* at 214.

The Division moved for a directed decision for the second challenge, which the magistrate granted. The petitioners appealed to the superior court, where they also sought relief for the first claim of the validity of the delineation of priority habitats. Both claims were found in favor of the Division, and the petitioners appealed again. *Id.* at 214-15.

At the Supreme Judicial Court of Massachusetts, Hampden, the petitioners argued that the regulations pertaining to the establishment of priority habitats exceeded the statutory authority granted to the Division under MESA and did not offer the same protections to landowners that are located in significant habitats. *Id.* at 221. Because procedural

protections are afforded to landowners in significant habitats, it was the legislative intent of MESA to also afford these protections to landowners in priority habitats. *Id.* at 222. Additionally, they argued that the directed decision in favor of the Division's application of priority habitat mapping of the petitioners' property was improper. *Id.* at 221. With no hearing, they were deprived of their right to cross-examine the Division's witness. *Id.* at 226-27.

The Division argued that these regulations are a reasonable way of implementing MESA's scheme and, specifically, the take provision. *Id.* at 222. The Division also said that priority habitats are not the same as significant habitats and therefore do not deserve the same procedural protections. *Id.* at 222-23.

B. Court's Decision

With regard to both challenges, the Supreme Judicial Court of Massachusetts found in favor of the Division. *Id.* at 212. First, the court looked to the MESA statute as a whole and determined that as long as the regulation carries out the scheme or design of the act, the regulations are consistent with that act. *Id.* at 223. Regulations do not have to be supported by a particular section of an act in order to be valid. *Id.* at 222. MESA establishes a scheme to prohibit takes of all at-risk species in Massachusetts. *Id.* at 223. These regulations that enable the Division to designate priority habitats in order to prevent takes effectuates the scheme of MESA.

The court gives deference to the Division's opinion to implement regulations that are rationally related to the goals of that statute. Even though MESA has procedures for designating and regulating areas that contain endangered and threatened species, this "does not preclude the division from enacting regulations to address the more general problem of preventing takes of all State-listed species in a manner that is more tailored to individual projects and habitats." *Id.* at 224. Priority habitat regulations are in the spirit of the act in that they allow the Division to preempt otherwise irreparable harm to habitats of all at-risk species. The mapping procedure provides information to landowners and the Division about development that could interfere with these at-risk species.

In response to the petitioners' argument that the same procedural protections should be afforded to landowners within priority habitats and significant habitats, the court found that because the burdens on landowners are different, the procedural protections can also be different. *Id.* at 226. MESA states that no person shall alter significant habitats. *Id.* at 225. But for priority habitats, if a person wants to alter the land,

they are not necessarily barred from doing so. The review process for the alternation of land is different in that the Division may still offer the permit with mitigation conditions if the proposed alteration may result in a take. Although still rigorous, the priority habitat scheme is more flexible than for significant habitats. Because the burdens of applying for permits that will alter the habitats are different, priority and significant habitats do not require comparable procedural protections. *Id.* at 226.

With regard to the second challenge, where the petitioners argued that they were not afforded the right to cross-examine the Division's inspector, the court found that the petitioners were not entitled to a hearing. *Id.* at 227. Regulations contemplate that parties can submit motions to the presiding officer without a hearing if the petitioner has not met his burden of introducing proper evidence. *See* 801 MASS. CODE REG. § 1.02(7)(c) (2012). The court held that the directed decision in favor of the Division's judgment to maintain the petitioners' property as priority habitat was proper because the petitioners' testimony "presented insufficient evidence that the division deviated from its guidelines in delineating the priority habitat for the eastern box turtle." *Pepin*, 467 Mass. at 228. The Division's sightings and reports of the box turtle in this area were determined to be credible, while the petitioners' testimony was no more than allegations containing no evidence. *Id.* at 229.

C. Analysis

This decision sheds light on the future of state endangered species acts and agencies' latitude to write regulations to support and expand these acts. Here, MESA goes above and beyond the federal Endangered Species Act, and the state's Division of Fisheries & Wildlife's regulations take protection for at-risk species a step further. At every stage of the procedural history, Massachusetts courts deferred to the agency's interpretation of the statute and logically concluded that the regulations that placed an extra level of protection on at-risk species were in the spirit of MESA.

Renee Orenstein

V. WATER

Florida Wildlife Federation v. McCarthy,
No. 4:08CV324-RH/CAS, 2014 WL 51360 (N.D. Fla. Jan. 7, 2014)

On January 7, 2014, the United States District Court for the Northern District of Florida released the Environmental Protection Agency (EPA) from its obligation under a consent decree to issue numeric nutrient water quality criteria for certain Florida waters after the EPA approved nonnumeric criteria adopted by the state. Fla. Wildlife Fed'n v. McCarthy, No. 08CV324-RH/CAS, 2014 WL 51360, at *1 (N.D. Fla. Jan. 7, 2014).

A. Background

1. Legal Background

The Clean Water Act (CWA) was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). Under the Act's cooperative federalism model, states bear the primary responsibility for preventing and reducing pollution. *Id.* § 1251(b). States are thus in charge of adopting their own water quality standards to meet their obligations under the CWA, subject to ultimate approval by the EPA.

One way the CWA achieves its objectives is by requiring states to designate appropriate "uses" for their navigable waters and to set "water quality criteria" that ensure waters are capable of such uses. *Id.* § 1313(c)(2)(A). The use and related water quality criteria comprise a "standard," which must "protect the public health or welfare, enhance the quality of water and serve the purposes of" the CWA. Water quality standards may include either numeric criteria or narrative criteria to gauge compliance. *Id.* § 1313(c)(2)(B). In either event, if the EPA "determines that a revised or new standard is necessary" because a current standard is not "consistent with" the CWA, the agency has a nondiscretionary duty to "promptly prepare and publish proposed regulations setting forth a revised or new [standard]." *Id.* § 1313(c)(4).

2. Factual and Procedural Background

In 2008, the Florida Wildlife Federation, the Sierra Club, and a number of local environmental organizations (collectively FWF) brought a citizen's suit under the CWA against the EPA and its Administrator. *Fla. Wildlife Federation*, 2014 WL 51360, at *1-2. FWF claimed the EPA had a nondiscretionary duty to adopt new water quality standards

for Florida because a document it issued in 1998 amounted to "a determination that Florida's narrative nutrient standard was inadequate." *Id.* at *2. Although the EPA originally denied the 1998 document constituted such a determination (as did intervening state and industry parties), the agency of its own volition made an express determination on January 14, 2009, that Florida's narrative nutrient standards were inadequate to meet the CWA's requirements. The EPA was thus required to promptly propose and adopt new standards for the state, unless Florida adopted compliant standards beforehand. *Id.* at *3.

Following its determination, the EPA moved for entry of a consent decree with the FWF on August 25, 2009, requiring the agency "to propose and adopt, in two phases, numeric nutrient criteria for Florida waters." The first phase required the EPA to propose a rule establishing numeric water quality criteria for lakes and flowing waters by January 14, 2010, and to adopt such rules by October 15, 2010. The second phase gave the EPA another year to adopt numeric nutrient criteria for coastal and estuarine waters, with a proposal due by January 14, 2011, and final adoption by October 15, 2011. The consent decree relieved the EPA of either obligation if the state of Florida proposed its own numeric criteria approved by the EPA before the deadlines.

On November 14, 2010, the EPA finally adopted rules for phase one. *Id.* at *4. Following litigation that invalidated part of the rules, the valid rules finally took effect on January 6, 2013; the two invalidated parts were remanded to the EPA for further consideration. Before deadlines for the EPA to adopt new rules for the invalidated portions in August 2013 and phase two rules in September 2013, the EPA approved nutrient criteria rules adopted by the Florida Department of Environmental Protection (FDEP). Some of FDEP's rules included numeric criteria, freeing the EPA from its obligations under the consent decree to adopt its own numeric criteria. Other rules, however, utilized narrative criteria with quantitative components. The EPA moved to modify the consent decree to free itself of the obligation to adopt numeric criteria for waters for which FDEP had adopted narrative criteria. *Id.* at *5. FWF simultaneously moved to have the consent decree enforced with regard to waters affected by the nonnumeric criteria. *Id.* at *1.

C. Court's Decision

1. Modification of the Consent Decree

The district court first held that modification of the consent decree was proper under Federal Rule of Civil Procedure 60(b) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *Fla. Wildlife Fed'n*, 2014 WL 51360, at *5-6. The United States Supreme Court in *Rufo* noted the need for "the ability of a district court to modify a decree in response to changed circumstances" in institutional-reform litigation such as the case at issue. *Rufo*, 502 U.S. at 380. The district court looked to the Eleventh Circuit's two-part test for applying *Rufo*, requiring first "a significant change either in factual conditions or in law and, second, that the proposed modification is suitably tailored to the changed circumstance." *Fla. Wildlife Fed'n*, 2014 WL 51360, at *6 (quoting Sierra Club v. Meiburg, 296 F.3d 1021, 1033 (11th Cir. 2002) (citation omitted) (internal quotation marks omitted)). The district court noted that a party seeking modification of a consent decree faces a "high hurdle to clear [with] the wind in its face," *id.* (quoting *Sierra Club*, 296 F.3d at 1034), because there is "a strong public policy against judicial rewriting of consent decrees." *Id.*; Reynolds v. Roberts, 202 F.3d 1303, 1312 (11th Cir. 2000).

Applying the test, the district court held that modification was proper under the circumstances. *Fla. Wildlife Fed'n*, 2014 WL 51360, at *6. First, adoption of new nutrient criteria rules by FDEP was "a significant change in the factual conditions." This was especially so because "appropriate numeric nutrient criteria for streams had [previously] proven elusive" and was now at a point where both FDEP and the EPA believed the criteria would satisfy the CWA. Second, the proposed modification to the consent decree was "suitably tailored to . . . the changed circumstances." The EPA sought to remove from the decree only those obligations obviated by FDEP's rules. Thus, as required by Rule 60(b), the court concluded, "[A]pplying the affected provisions of the consent decree prospectively is no longer equitable." *Id.* at *7. The EPA's motion to modify the consent decree was granted. *Id.* at *9.

2. Enforcement of the Consent Decree

The court next addressed two grounds on which FWF sought enforcement of the portion of the decree left unresolved by modification. *Id.* at *8. FWF first claimed that for streams still subject to the consent decree, the standards for all Florida waters adopted by FDEP (and approved by the EPA) did not contain the required numeric criteria, only

numeric thresholds. The consent decree required "[n]umeric water quality criteria for nutrients" that "consist of numeric values that EPA determines are protective of the designated uses of waters." Because the failure of a stream to meet numeric thresholds automatically makes the waterway "impaired" until a site-specific study shows otherwise, the court held that the numeric thresholds satisfied the consent decree's requirements. *Id.* (citing FLA. ADMIN. CODE ANN. r. 62-303.390(2)(e) (2013)). Indeed, the court believed FDEP's rule was an improvement over what the consent decree required because the rule's rebuttable presumption of impairment "allows a site-specific analysis to properly classify a water body based on the actual effects on flora and fauna." The EPA's mooted proposed rule utilized numeric nutrient criteria, but only used those criteria to measure water quality impairment; adverse effects on flora and fauna had no bearing on the classification.

The second issue related to a disagreement over whether or not the FDEP rules covered intermittent streams. The court was convinced that such streams were covered. Regardless, the issue would not otherwise have been a valid basis for enforcing the decree because the FWF failed to raise this issue under the procedures provided by the consent decree itself. *Id.* at *9. Consequently, the court denied FWF's motion to enforce the consent decree on both grounds.

C. Analysis

Although the court lamented that the case was "the latest chapter in a long-running dispute over nutrient criteria for Florida waters," *id.* at *1, it is likely one of the last. Barring a successful appeal, Florida's new criteria will in all likelihood replace the federal rules adopted under phase one of the consent decree and replace the rules proposed under phase two. The state rules will not become effective, however, until the EPA withdraws the federal standards and adopts the state standards through a notice and comment rulemaking. While the Florida Wildlife Federation and its partners could challenge the rulemaking under the Administrative Procedure Act, they did not previously challenge the EPA's conclusion that FDEP's proposed rules met the requirements of the CWA, and it seems unlikely they will be able to prevent the state rules from going into effect. *See* Lester Sotsky & Jeremy Karpatkin, *Court Paves Way for EPA To Withdraw Proposed Federal Nutrient Criteria for Florida*, ARNOLD & PORTER, LLP (Jan. 2014), http://www.arnoldporter.com/public_document.cfm?id=23260&key=12A0.

David G. Samuels

Edwards Aquifer Authority v. Bragg,
No. 04-11-00018-CV, 2013 WL 5989430
(Tex. App. Nov. 13, 2013)

On November 13, 2013, the Fourth Court of Appeals for Texas affirmed the lower court's grant of summary judgment finding a regulatory taking related to a groundwater withdrawal permitting action, but reversed and remanded the determination of damages. *Edwards Aquifer Auth. v. Bragg*, No. 04-11-00018-CV, 2013 WL 5989430, at *1 (Tex. App. Nov. 13, 2013). Plaintiff pecan growers brought suit against a South Central Texas water conservation and reclamation district and its general manager seeking damages for an alleged taking of property—the water in an aquifer beneath their pecan orchards—through a permitting action that implemented legislation that regulated withdrawals from the aquifer. *Id.* at *1-3. The *Bragg* decision is the first to apply a controversial Supreme Court of Texas decision providing that landowners hold property rights to groundwater in place such that a regulatory action affecting such rights could potentially result in a compensable taking. *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012), *reh'g denied* (June 8, 2012).

A. Background

The Edwards Aquifer (Aquifer), which serves as the primary source of water for South Central Texas, "is an underground layer of porous, water-bearing rock, 300-700 feet thick, and five to forty miles wide at the surface, that stretches in an arced curve from Brackettville, 120 miles west of San Antonio, to Austin." Edwards Aquifer Auth. v. Chem. Lime, Ltd., 291 S.W.3d 392, 394 (Tex. 2009). The Texas Legislature enacted the Edwards Aquifer Authority Act (Act) "to manage the aquifer and to sustain the diverse economic and social interests dependent on the aquifer" in 1993, though the Act did not become effective until 1996. *Bragg*, 2013 WL 5989430, at *2-3. The Act created the Edwards Aquifer Authority (Authority) and empowered it "to implement a comprehensive regulatory scheme to control and manage the use of the Edwards Aquifer, and regulate groundwater withdrawals from the aquifer." *Id.* at *2. The Act provided that the Authority could grant an initial regular permit (IRP) to property owners who could demonstrate historical beneficial use of water withdrawn from the Aquifer during the period from June 1, 1972, until May 31, 1993. Under the Act, a property holder is entitled to a permit "to withdraw an amount of water equal to the user's maximum beneficial use of water without waste during any one calendar year of the

historical period, unless the aggregate total of such use" exceeds the aquifer-wide cap. The Act provided for an aquifer-wide cap of 450,000 acre-feet for each year through 2007 and 400,000 for all subsequent years.

Glenn and JoLynn Bragg own two parcels situated over the Aquifer that they use as commercial pecan orchards: (1) the sixty-acre Home Place orchard purchased in 1979 and (2) the forty-two-acre D'Hanis orchard purchased in 1983. *Id.* at *1. The Braggs installed Aquifer wells for purposes of irrigating the pecan trees on the Home Place property in 1980 and on the D'Hanis property in 1995. Pecan trees require more water as they mature. The Braggs applied for IRPs based on their 1996 usage level of groundwater from the Aquifer—228.85 acre-feet for the Home Place orchard and 193.12 acre-feet for the D'Hanis orchard. *Id.* at *3. The Authority granted a permit for the Home Place orchard in 2005 in the amount of 120.2 acre-feet and denied the permit application for the D'Hanis orchard in 2004, relying on the Braggs' withdrawals, or lack thereof, of Aquifer water in the designated historical period of 1972-1993. *Id.* at *3, *9.

The Braggs sued the Authority and its general manager in state court, alleging a "taking of their property and for violation of their federal civil rights." *Id.* at *3. The suit subsequently was removed to federal court, and the civil rights claims were dismissed. Following remand back to state court, both parties moved for summary judgment. The court granted summary judgment to the Braggs, concluding that the permitting action resulted in a regulatory taking. A bench trial followed, where the court held that the permitting actions did not result in categorical takings, but did result in regulatory takings, and that the Braggs claims were not time-barred. The Braggs were awarded $597,500 and $134,918.40 in compensation for the Home Place and D'Hanis orchards, respectively. The Authority appealed asserting that (1) the Authority was not a proper party to the suit, (2) the claims were time-barred by the statute of limitations, (3) no compensation was owed to the Braggs, (4) the calculation of compensation was incorrect, (5) the permitting action did not result in a taking, and (6) it should be entitled to attorney's fees if it prevailed. *Id.* at *1. The Braggs cross-appealed, contending error by the trial court in (1) the determination of compensation and (2) the conclusion that the permitting action did not result in a categorical taking.

B. Court's Decision

The court agreed with the lower court's determinations that the implementation of the Act resulted in a compensable regulatory taking, but reversed and remanded on the issue of the calculation of damages. *Id.* at *29. The court held that the Authority was the proper defendant. *Id.* at *8. Additionally, the court held that the Braggs' claims were not time-barred, because the ten-year statute of limitations did not accrue until the final permitting action was taken by the Authority in 2004 and 2005 for the D'Hanis and Home Place orchards, respectively. *Id.* at *14.

The opinion focused on analyzing whether the implementation of the Act resulted in a taking and, if so, how compensation should be determined. *See id.* at *14-29. Relying on *Edwards Aquifer Authority v. Day*, the court made its determination that the implementation of the Act resulted in a regulatory taking by utilizing the "ad hoc, factual inquiry . . . governed by the standards set forth by the United States Supreme Court in *Penn Central Transportation Co. v. New York City*." *Bragg*, 2013 WL 5989430, at *15, *22. *Penn Central* outlined three factors to guide this inquiry: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations" of the claimant, and (3) the "character of the governmental action." *Id.* at *16 (quoting *Penn Central*, 438 U.S. 104, 124 (1978)). The court found that the first factor, which "considers the diminution in the value of their properties brought on by the regulation in question," weighed "heavily in favor of a finding of a compensable taking of both orchards" after noting that pecan orchards were the highest and best use of both properties and evaluating the Braggs' total investment in the properties, the increased cost of leasing water under the permitting scheme for irrigation after the permitting actions, and their inability to produce a commercially viable crop after the permitting actions. *Id.* at *16-18. The court also noted that the Braggs had taken significant steps to alter their operations to attempt to produce commercially viable crops without success, including reducing water consumption at both orchards, thinning trees and cutting off limbs and tree tops at both orchards, and reducing the number of trees at the D'Hanis orchard by 30%. *Id.* at *17-18. The Braggs estimated that they would need approximately 600 acre-feet of water annually for both orchards, compared to the 120.2 acre-feet that they were granted. *Id.* at *17. After evaluating all of these facts, the court reasoned that the impacts of the regulation were not "merely an incidental diminution in value" and forced "the Braggs to purchase or lease what they had prior to

the regulation-an unrestricted right to the use of the water beneath their land." *Id.* at *18.

The court found that the second *Penn Central* factor—the impact on the claimant's investment-backed expectations—also weighed heavily in favor of finding a taking. *Id.* at *21. "The purpose of the investment-backed expectation requirement is to assess whether the landowner has taken legitimate risks with the reasonable expectation of being able to use the property, which, in fairness and justice, would entitle him or her to compensation." *Id.* at *19. The court evaluated the timing of the Braggs' investment in both properties in relation to the Act, noting that no regulation existed at the time of their purchase of the properties and that groundwater withdrawals at the time were governed by the common law rule of capture. *See id.* at *19-20. The court also evaluated Mr. Bragg's qualifications related to pecan growing, finding that his extensive understanding of pecan crops contributed to the reasonableness of their expectations. *Id.* at *20-21.

Contrary to the first two factors, the court found that the third factor weighed heavily against a finding of a compensable taking, focusing on the importance of the Act's stated purpose of "protect[ing] terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state." *Id.* at *21. In addition to evaluating the three *Penn Central* factors, courts "are to consider 'surrounding circumstances' and other 'relevant circumstances.'" *Id.* at *22. The court discussed the agricultural nature of the Braggs' business and its dependence on water, the fact that the Braggs' source of water is either subsurface or rain, the unpredictability of rain in the area, and the sensitivity of crop yield and quality to a lack of sufficient water. The court found that these considerations also weighed in favor of finding a taking for both properties and ultimately held that the implementation of the Act resulted in compensable regulatory takings for both properties.

On the issue of compensation, the court held that the diminution in value should be measured as of the date of implementation of the Act—when the permitting action took place in 2004 and 2005 for the D'Hanis and Home Place orchards, respectively. *Id.* at *23. The court held that computation should reflect the value of the property actually taken and with respect to the specific use of the parcel, here the "unlimited use of water to irrigate a commercial-grade pecan orchard, and that 'property' should be valued with reference to the value of the commercial-grade pecan orchards immediately before and immediately after the provisions of the Act were implemented." *Id.* at *28.

C. Analysis

The court appropriately followed *Day* and analyzed the question of whether the permitting action constituted a compensable regulatory taking according to the well-established *Penn Central* factors. However, in discussing the issue of compensation and evaluating the first two *Penn Central* factors related to economic impact and investment-backed expectations, the court's framing of the regulatory action as a taking of plaintiff's right to unlimited withdrawal of water for beneficial use from the Aquifer arguably presupposes a factual inaccuracy—that the Edwards Aquifer is an unlimited resource. *See* Dave Owen, *Bragg, Takings, and the Economics of Limited Resources*, ENVTL. L. PROF BLOG (Aug. 29, 2013), http://lawprofessors.typepad.com/environmental_law. While the plaintiff's right to withdraw water from the Aquifer was unlimited prior to the Act, the supply of water in the Aquifer was, at the time of the Act, and continues to be under considerable strain from competing uses with demand exceeding supply. *Day*, 369 S.W.3d at 840. The court's assumption is not consistent with reality, and it skews the weights of the first two *Penn Central* factors in favor of the Braggs and overestimates the diminution in value of their property. And while the law of property and takings related to groundwater has its roots in a time where "the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible," technology and knowledge of these "occult" phenomena has since advanced. *Day*, 369 S.W.3d at 825 (quoting Frazier v. Brown, 12 Ohio St. 294 (1861)). Would the *Penn Central* factors have weighed as heavily in favor of the Braggs had the property taken been framed by the court as an unlimited right to withdraw water from an oversubscribed and diminishing resource?

The ecological and economic realities indicate that as population and demands on water resources continue to increase, the need for rational regulation of the use of these valuable resources will increase as well. This ruling undermines the ability of the Texas Legislature and conservation and reclamation districts in the state to promulgate and enforce rational groundwater regulations. Only time and future decisions in related cases will determine the extent to which groundwater regulation is affected.

David Gallichio

State of Emergency Declared in California

On January 17, 2014, the Governor of California, Jerry Brown, proclaimed a state of emergency in California and issued a plan of action for Californians in an effort to alleviate the stress placed upon them by the water shortage. Press Release, *Governor Brown Declares Drought State of Emergency*, OFFICE OF THE GOVERNOR, CAL. (Jan. 17, 2014), http://gov.ca.gov/news.php?id=18368. This proclamation was prompted by the ongoing drought in much of the West, which has created great hardship for many, from the agricultural industry to municipal governments trying to secure a steady source of water for their citizens.

California has been struggling with the issue of water scarcity for most of its history, from Spanish rule until today, and the population needing the precious resource has continued to grow rapidly, placing even more stress on the water supply. *See* Sandra K. Davis, *The Politics of Water Scarcity in the Western States*, 38 SOC. SCI. J. 527, 527-28 (2001). These struggles, combined with the many interested parties vying for control of the state's water resources, have given rise to a confusing and uncomprehensive set of water laws that have left Californian families and businesses alike unsatisfied. *See* Carolyn Lochhead, *California's Drought-Prone Pattern Forcing Farmers To Adapt*, S.F. CHRON. (Mar. 8, 2014, 10:00 PM), http://www.sfgate.com/science/article/California-s-drought-prone-pattern-forcing-5300681.php.

However, it is not just the lack of a comprehensive legal regime for the state that has led to the current state of emergency, because climate change has greatly exacerbated the state's water concerns and has confirmed the age-old axiom that water truly is more precious than gold in the West. The drought has resulted in a massive uptick in fires across the state and has the potential to worsen health conditions in some areas via an increase in cases of the respiratory disease known as valley fever. Rebecca Plevin, *In California, Researchers Uncertain If Drought Will Increase Valley Fever Risk*, VALLEY PUB. RADIO (Feb. 21, 2014), https://www.vfce.arizona.edu/resources/inthenews/InCaliforniaResearchersUncertainIfDroughtWillIncreaseValleyFeverRisk.pdf; Bill Chapel, *California's Governor Declares Drought State of Emergency*, NAT'L PUB. RADIO (Jan. 17, 2014, 8:27 PM), http://www.npr.org/blogs/thetwo-way/2014/01/17/263529525/california-s-governor-declares-drought-state-of-emergency.

Agriculture alone in California generates nearly forty-five billion dollars a year. *State Fact Sheets: California*, U.S. DEP'T OF AGRIC., http://www.ers.usda.gov/data-products/state-fact-sheets/state-

data.aspx?StateFIPS=06&StateName=California (last updated Feb. 20, 2014). Beyond being an economic goldmine for the state, California's agriculture industry is one of the biggest suppliers of food in the world. *See California Agricultural Production Statistics*, CAL. DEP'T OF FOOD & AGRIC., http://www.cdfa.ca.gov/statistics (last visited Mar. 25, 2014). Any major disruption to this industry could cause shortages and price increases on foodstuffs across the country and even internationally. Whether it is needed for providing crops with essential nutrients to survive and grow or for giving life to the cattle herds of California's Central Valley, water literally makes or breaks California's expansive agriculture industry.

Governor Brown's proclamation itself contains both an explanation of why California is in a state of emergency and a set of orders issued by the Governor to help alleviate the effects of the drought. Press Release, *Governor Brown Declares Drought State of Emergency*, *supra*. The proclamation is grounded in section 8558(b) of the California Government Code, which sets forth the requirements and conditions that must be met before a governor may declare a state of emergency. Regarding the current state of California, Governor Brown makes clear that while the state has been experiencing record dryness, that 2014 is slated to be the driest year ever and that the lack of snowpack in California's mountains is an alarming indication of the dry conditions. Governor Brown also cites the economic effects of the drought and specifically the impact on agriculture indicating that as crop production decreases, unemployment will increase as fewer jobs will be available for harvesting and caring for farmland.

After making clear exactly why California is in a state of emergency, the proclamation sets out detailed orders for coping with the drought. Generally, these orders focus on conserving water and ensuring that communities whose access to water is limited have greater access to water resources. The first order sets forth the requirement that all state agencies will initiate a statewide water conservation campaign in an effort to spread awareness of the drought and to specifically ask Californians to reduce their water consumption by 20%. Additionally, the second order requires all water suppliers and municipalities to implement their contingency plans for water shortage in an effort to avoid even lower water levels later in the year that could result in harsh restrictions on the communities in question. The third order set forth by Governor Brown requires that all state agencies institute water-use reduction plans for state facilities, which will include, among other things, conservation actions.

The proclamation's orders focus heavily on the actions of the State Water Resources Control Board (Water Board) to provide for immediate conservation and for future water resources planning. The Water Board is ordered to help streamline the water transfer process between the state and the federal government and to notify water rights holders that their rights may be diminished due to the drought. Also regarding water transfers, the Water Board is ordered by the proclamation to make water immediately available and to consider retooling transfer limitations in order to make the process faster and easier in a time where people need water as soon as possible. Specifically relating to drinking water, the state's Drinking Water Program is tasked with determining which communities face the highest risk of running out of drinking water and with providing both technical and financial help in ensuring that those communities do not lose their water altogether.

The California Department of Water Resources (DWR) also plays a large role in the proclamation and will be heavily involved in the management of the state of emergency, especially with regards to groundwater. Through the proclamation, DWR has been charged with evaluating the status of both groundwater basins and agricultural land and reporting what it learns to the public. It is also DWR's task to ensure that newly constructed wells are monitored through groundwater reporting logs and that the drillers of those new wells submit those logs to DWR. Outside of these groundwater-related duties, the Governor has tasked DWR with protecting the water supply in the Sacramento River Delta and with developing an updated system for seasonal climate forecasting to create better models that will more accurately predict the weather conditions in this time of drought.

Governor Brown also included several items in the proclamation that will have broad potential to alleviate stress on communities from the drought and to help combat their effects. One of these items was ordering the California Department of Forestry and Fire Protection to hire more seasonal firefighters to help combat fires, which have grown more frequent and more intense as a result of the dry conditions. Additionally, the proclamation charges the state's Drought Task Force with several key duties for handling the very real effects of the drought occurring now. These duties include developing a plan for providing food and assistance to communities that feel the impacts of the drought in the form of high levels of unemployment as well as providing a service of daily monitoring of drought impacts and constant reporting to Governor Brown of those impacts if they worsen.

Governor Brown's proclamation has made waves across the country, even garnering attention from President Obama and the White House. Following Governor Brown's proclamation, the President made a visit to Fresno, California, a city that sits in the middle of the agricultural juggernaut that is the Central Valley. Carla Marinucci, *California Drought: Obama Wades into Water Wars in Visit*, S.F. GATE (Feb. 14, 2014), http://www.sfgate.com/politics/article/California-drought-Obama-wades-into-water-wars-5234727.php. This sort of attention has been key in making the nation aware of the impacts of climate change, as well as for drumming up federal monetary assistance for California. Normitsu Onishi & Coral Davenport, *Obama Announces Aid for Drought-Stricken California*, N.Y. TIMES (Feb. 14, 2014), http://www.nytimes.com/2014/02/15/us/politics/obama-to-announce-aid-for-drought-racked-california.html. Although 2014 is off to another dry start, as the previous several years have been, scientists are predicting a wet El Niño season on the horizon that could dramatically reduce the current stress on the state's water supply. Elizabeth Landau & Sean Morris, *El Nino May Bring Good Weather News—Depending on Where You Are*, CNN (Mar. 6, 2014), http://www.cnn.com/2014/03/06/us/el-nino-weather/. Though the alleviation of the drought is paramount, Californians should be concerned that decision makers could stop their pursuit of real reform when the aquifers and streams become somewhat recharged as a result of a wet season. Ultimately, it will be up to Californians across the state to keep the pressure on their leaders to ensure that the measures laid out in Governor Brown's proclamation continue to be followed and that progress continues to be achieved.

Governor Brown's proclamation of a state of emergency in California due to the drought has measures that, if followed, should help ensure that Californians are able to sustainably access water at a safe rate until the normal river and aquifer levels are achieved. Additionally, the proclamation has had the effect of creating a dialogue about water scarcity that has reached beyond the borders of California to the White House. However, regardless of how much rain the state ends up getting this year, this drought and its effects should act as a catalyst for fundamental change in California.

Cody Phillips

VI. BANKRUPTCY

In re Energytec, Inc., 739 F.3d 215 (5th Cir. 2013)

In the noted case, the United States Court of Appeals for the Fifth Circuit held that according to Texas law certain rights associated with a gas pipeline—specifically, the right to receive a transportation fee based on gas volume moving through the pipe and consent of the transportation fee receiver prior to an assignment of interests in the property—were covenants running with the land. *In re* Energytec, Inc., 739 F.3d 215, 224-25 (5th Cir. 2013). In 1999, Newco Energy, Inc. (Newco) acquired an interest to the pipeline as a party to a sales agreement that conveyed the pipeline to Producers Pipeline Corporation (Producers). *Id.* at 217. Newco's interests included a "transportation fee" based off of the amount of gas flowing through the pipelines that was to "run with the land" as well as a condition that required Newco's consent before any conveyance of the pipeline. The agreement also gave Newco the ability to secure payment of the transportation fee via a security interest and lien on the pipeline system.

A dispute arose with Newco for the Producer's nonpayment of transportation fees shortly after Producer's conveyed their interest in the pipeline to Energytec, Inc. (Energytec) in a 2005 settlement. As part of the agreement, Energytec expressly assumed the obligation to pay transport fees to Newco, which it did until December 2009 after filing for bankruptcy. As part of a bankruptcy proceeding, Energytec attempted to convey its interest in the pipeline to Red Water Resources, Inc. (Red Water) and requested that the sale be "free and clear of any liens, claims, or encumbrances." *Id.* at 218. Newco immediately objected to such a sale and argued that its interest in the pipeline including transportation fees and right to consent to sale were interests that ran with the land and therefore the sale could not be completed free and clear of their interests.

The bankruptcy court approved the sale to Red Water but reserved Newco's objection to the sale for later determination. The bankruptcy court later ruled that Newco's interests did not run with the land and that the sale to Red Water could, in fact, be completed free and clear of any interests. The bankruptcy court did not address Newco's right to consent, and the district court affirmed the ruling of the bankruptcy court. Newco appealed the case to the Fifth Circuit, arguing that their interests were covenants running with the land and therefore the sale should not have been free and clear.

The Fifth Circuit reviewed the decision of the district court de novo and ultimately vacated the ruling of the district court, finding that Newco's interests were covenants that ran with the landed. *Id.* at 218, 224-25. The court's analysis in this case is divided into three distinct sections: (1) whether the appeal was moot for failure to obtain a stay, (2) whether Newco's interests were covenants running with the land, and (3) whether Newco could be compelled to accept payment as compensation for their interests in the pipeline in order to effectuate a free and clear sale. *Id.* at 218, 221, 225.

First, the court addressed the case specific question of whether the appeal was moot for a failure to obtain a stay. *Id.* at 218-19. The court reasoned that 11 U.S.C. § 363(m), which requires a stay in order to modify or invalidate a sale in a bankruptcy, was not applicable in this case because Newco was not trying to invalidate the sale, rather Newco was relying on the sale. *In re Energytec*, 739 F.3d at 218-21. Furthermore, the court noted that all parties were aware of the unresolved issues involving Newco's claims of interest in the pipeline and therefore the sale was consummated without the assumption of a free and clear sale. *Id.* at 219-21.

To further clarify their position, the Fifth Circuit noted a few cases from other jurisdictions where a stay was required when the challenged provision was "integral to the sale." *Id.* at 220. According to the court, Red Water never attempted to withdraw its bid or change the purchase price, which indicated that "Red Water [had] decided to proceed in the face of whatever legal and financial risk it perceived." *Id.* at 219. Therefore, the challenged provisions could not be integral to the sale. The court also analyzed two cases that were factually similar to the case at hand where courts had ruled that a stay was not required where issues of interests had been reserved for later determinations, like in the present situation. The court concluded that "[r]equiring a stay before [they could] review a decision entered a year after a sale that was not originally free and clear of a particular claim does not follow from the text of Section 363(m) nor satisfy its purposes." *Id.* at 221.

The second issue that the Fifth Circuit addressed in this case was whether Newco's interests were covenants running with the land. The court followed the precedent of the Texas Supreme Court in *Inwood North Homeowners' Ass'n, Inc. v. Harris* and applied a four-point test to determine when a covenant runs with the land. The court specified that a covenant will be considered to run with the land when it "[1] touches and concerns the land; [2] relates to a thing in existence or specifically binds the parties and their assigns; [3] is intended by the original parties to run

with the land; and [4] when the successor to the burden has notice." *In re Energytec*, 739 F.3d at 221 (quoting Inwood N. Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 635 (Tex. 1987)). In addition to the four-part test, the court stated that there must also be privity between the parties at the time of the agreement containing the covenants. *Id.* (citing Ehler v. B.T. Suppenas Ltd., 74 S.W.3d 515, 521 (Tex. App.—Amarillo 2002)).

Three of these five factors were uncontested, and two remained to be analyzed. The court reasoned that the original parties intended the covenants to run with the land as evidenced by the 1999 agreement between the Producers and Newco, which explicitly stated the interest would run with the land. The agreement was also the piece of evidence that signified the parties' intent to bind themselves and their assigns and to "burden a thing in existence—the pipeline." Finally, the court found that the successor, Energytec, had notice of the burden because Energytec expressly agreed to honor Newco's interests. *Id.* at 221-22. The two remaining issues included whether the covenant touched and concerned the land and whether privity existed between the original parties.

The court addressed an ambiguous Texas law on privity first. Here, the court divided the discussion of privity into two sections—vertical and horizontal privity. *Id.* at 222. The court found that vertical privity, or the succession of ownership of the burdened property, was satisfied because there was a clear chain of ownership succession from Mescalaro to the Producers to Energytec. Next, in the discussion of horizontal privity, the court noted its uncertainty as to whether horizontal privity was even a requirement; however, the court found privity fulfilled in this case regardless. *Id.* at 223. For horizontal privity to exist, the court reasoned that there must be "simultaneous existing interests" or "mutual privity" between original parties to the agreement. *Id.* at 222. The court rejected the case example that Energytec presented in its appeal and distinguished Energytec and Newco's current situation—unlike in the stated case, there was an actual conveyance of land in the Energytec agreement. *Id.* at 222-23. The court further reasoned that just because the conveyance to Newco and the conveyances to other parties were contained in the same instrument, that horizontal privity was not destroyed. *Id.* at 223.

Next, the court addressed the last of the five necessary elements to determine if the covenants ran with the land—whether the interest touched and concerned real property. Energytec argued that the "obligation to pay transportation costs was unrelated to the use of the land" and in arguing relied on *El Paso Refinery v. TRMI Holdings, Inc. In re Energytec*, 739 F.3d at 224. *El Paso Refinery* required that a

covenant make a direct impact on the land itself that will affect the owner's interest in or use of the property. Energytec argued that a covenant did not exist because the "impact" was merely gas moving through the pipeline that did not have any direct impact on the land and additionally that payment of the fee can easily be circumvented by nonuse of the pipeline. *Id.* at 225.

The Fifth Circuit rejected Energytec's argument and considered several tests that had been used previously by the Texas Supreme Court to justify its decision. One test evaluated whether the covenant "affected the nature, quality, or value of the thing demised, independently of collateral circumstances, or if it affected the mode of enjoying it." *Id.* at 223-24 (quoting Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 911 (Tex. 1982)). A different test analyzed the covenants impact on the value of the land in question. After considering these tests and the arguments advanced by both parties, the Fifth Circuit concluded that the "land" in question here *was* the pipeline, and that the fee was for the use of that real property. *Id.* at 224. This fee for usage coupled with the limitation of assignment of the property impacted not only the value of the property but also the owner's interest in the pipeline as burdens on the property. The court also refuted Energytec's argument regarding circumvention of the pipeline fee, comparing it to an overriding royalty interest when stating that Newco's rights would merely become dormant, not expired in the event of nonuse. *Id.* at 225. Therefore, Newco's rights are continuously burdening any actual use of the property and thus qualified as a covenant running with the land. Each of Newco's interests were found to affect the value of the property as perceived by prospective buyers as well as the owner's own interest in the pipeline.

The final of the three main issues addressed in the Fifth Circuit's opinion was whether Newco could be compelled to accept money as satisfaction of their interests in the pipeline. Energytec relied on 11 U.S.C. § 363(f)(5) to contend that even if Newco's interests ran with the land, they could still sell the land free and clear of any interest because Newco could be compelled to accept money to compensate for their loss of interest in the pipeline. *In re Energytec*, 739 F.3d at 225. Here, the Fifth Circuit decided to remand this issue because the lower courts had not yet addressed the topic as they had found Newco's interests to not run with the land, ending the analysis. In conclusion, the Fifth Circuit held that Newco's interest—a transportation fee for using the pipeline and a consent to assignment—were covenants running with the land after applying a four part test in addition to a privity analysis and remanded

the question of compelled compensation of Newco's interest back to the lower courts. *Id.* at 226.

This case has important implications for future bankruptcy sales cases, especially those involving oil and gas pipelines. Bankruptcy sales generally allow for the sale of real property free and clear of certain interests and liens. But covenants running with the land are likely not affected by a sale in bankruptcy. This makes the determination of whether a covenant runs with the land an important determination. In concluding that the transportation fee and consent right are covenants running with the land, the Fifth Circuit has potentially widened the possibility that similar fees for the use of oil and gas pipelines can live on after a bankruptcy, further complicating many sales of oil and gas assets in a bankruptcy proceedings.

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