RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

Sierra Club v. EPA, 774 F.3d 383 (7th Cir. 2014)

The United States Court of Appeals for the Seventh Circuit recently considered whether the Environmental Protection Agency's (EPA) determination that three geographic areas were in attainment of the 1997 National Ambient Air Quality Standards (NAAQs) for ozone under the Clean Air Act (CAA) was arbitrary and capricious. Sierra Club v. EPA, 774 F.3d 383, 385, 399 (7th Cir. 2014). The court ultimately came to a number of findings: (1) the Sierra Club has standing to bring suit, (2) the drop in ozone levels for all three areas was "reasonably attributable" to "permanent and enforceable reductions," (3) the EPA may rely on actual emissions data rather than on a source's permitted operating level, and (4) the EPA's reliance on the cap and trade program for nitrogen oxides (NO_x) as a factor in determining permanent and enforceable ozone reductions is reasonable. *Id.* at 392, 394, 397, 399. Accordingly, the Sierra Club's petition for review was denied. *Id.* at 399.

A. Background

1. Legal Background

Under the CAA's Criteria Pollutant Program, the EPA Administrator is charged "with identifying air pollutants that endanger public health and welfare and with formulating [NAAQS] that specify the maximum permissible concentration of those pollutants in the ambient air." *Id.* at 386 (citing 42 U.S.C. §§ 7408-7409 (2012)). The EPA then designates areas as being in attainment, in nonattainment, or unclassifiable for each listed pollutant. 42 U.S.C. § 7407(d)(1)(A). To redesignate an area to attainment, the state governor must submit a request for redesignation and meet five criteria: (1) the area has come into attainment, (2) the applicable implementation plan was approved, (3) "the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from the applicable implementation plan and applicable federal air pollutant control regulations," (4) a maintenance plan for the area is approved, and (5) the state has met all requirements applicable to the area. *Sierra Club*, 774 F.3d at 387; 42 U.S.C. § 7407(d)(3)(D). At issue in this case is whether criteria number three, improvement due to permanent and enforceable reductions, was met in the three areas concerned.

2. Procedural Background

This case concerns the redesignations of three separate areas, Milwaukee-Racine, Greater Chicago, and the Illinois portion of St. Louis, from moderate nonattainment to attainment designations for the 1997 eight-hour ozone standard. *Sierra Club*, 774 F.3d at 387. On July 31, 2012, the EPA published final approval for Wisconsin's request to redesignate the Milwaukee-Racine area and decided not to redesignate the Sheboygan County area due to data from 2012 indicating the area was again in violation. EPA Designation of Air Quality Planning Purposes, 40 C.F.R. § 81.350 (2014); *id.* § 52.2571. The EPA approved Illinois' request to redesignate the Greater Chicago area on August 13, 2012. *Id.* §§ 81.14, 52.720. Illinois also submitted a request for the redesignation of the St. Louis area, which was approved by the EPA on June 12, 2012. *Id.* §§ 81.18, 52.722.

B. Court's Decision

The Seventh Circuit first determined that the Sierra Club had standing to bring suit. *Sierra Club*, 774 F.3d at 392-93. Concerning the merits of the case, the court held that the EPA did not act arbitrarily and

capriciously when it redesignated the Milwaukee-Racine, Greater Chicago, and St. Louis areas. *Id.* at 399.

1. Preliminary Objection: Standing

Before reaching the merits of the case, the court considered the EPA's allegation that the Sierra Club did not have standing due to their allegations being speculative hypothetical events. *Id.* at 389. The plaintiff must show that there is a reasonable probability, not a certainty, that plaintiff will suffer a tangible harm unless relief is obtained. *Id.* at 390. "[A]bstract psychic harm or a one-day-I'll-be-hurt allegation" is insufficient. *Id.* (quoting MainStreet Org. of Realtors v. Calumet City, Illinois, 505 F.3d 742, 745 (7th Cir. 2007)). The Sierra Club argued that it had standing because by redesignating the areas to attainment, the areas became subject to fewer regulations (areas with an attainment designation have less stringent rules than areas designated as nonattainable) than when designated as nonattainment, and with less incentive to behave, sources within the areas were more likely to pollute. *Id.* at 392.

The court agreed with the Sierra Club's contentions. Unlike similar cases, that the attainment rules are less stringent is certain, whereas the effect of those less stringent rules is speculative. However, the Sierra Club provided evidence of additional violations of nonattainment ozone standards in the St. Louis area and the Sheboygan County area before the less stringent rules were introduced. *Id.* at 390. These violations occurred before the attainment rules were put in place, and "[i]f impermissible pollution increases occurred even while the more stringent nonattainment standards governed . . . then ozone levels above 0.084 ppm are even more likely now that the regulations have been relaxed." *Id.* Last, the court noted that "powerful incentives" can create standing in and of themselves. *Id.* at 392. The Sierra Club's petition directly involves incentives for major pollution sources as the areas' designation affects how stringent ozone standards are. Therefore, the court held that the Sierra Club had standing to bring suit.

2. Determining Whether the EPA's Redesignations of the Milwaukee-Racine, Greater Chicago, and St. Louis Areas Was Arbitrary and Capricious

On the merits of the case, the court held that the EPA's redesignations of the Milwaukee-Racine, Greater Chicago, and St. Louis areas to attainment were not arbitrary and capricious. *Id.* at 399. An

EPA action is upheld if "the agency's path may be reasonably discerned." *Id.* at 393 (quoting Mt. Sinai Hosp. Med. Ctr. v. Shalala, 196 F.3d 703, 708 (7th Cir. 1999)). The EPA action is arbitrary and capricious if the agency relied on factors that

> Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

North Carolina v. EPA, 531 F.3d 896, 906 (D.C. Cir. 2008) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983)). The Sierra Club argued that the EPA failed to demonstrate the improvement in air quality was due to permanent and enforceable standards. *Sierra Club*, 774 F.3d at 387. Specifically, the EPA identified a correlation between a drop in ozone rates and federal and state laws, but EPA's analysis was too imprecise to identify causation and should have taken other possible effects into account. *Id.* at 394.

The EPA countered that it proved causation through its listing of all the measures determined to show a permanent and enforceable change in air quality in each redesignation action. *Id.* at 395. Further, for almost every measure listed, the EPA also estimated the percentage impact each measure had on the overall ozone deduction. The EPA last noted that it would be impossible to conduct a more sophisticated analysis and, nevertheless, it is not required by the CAA. The court found in favor of the EPA, holding that the CAA does not require absolute certainty to prove causation; drops in ozone must only be reasonably attributed to permanent and enforceable standards. *Id.* at 396. Here, the EPA's analysis and findings were reasonably attributable to permanent and enforceable drops in ozone pollution.

Next, the court held that using data of actual emissions from power plants, instead of using those power plants' permitted operating levels, to determine emissions levels was appropriate. The court agreed with the EPA that using actual emissions data for power plants was long-standing practice and policy because "assuming that all sources would be operating at maximum capacity at once would result in a gross overestimation of emissions levels." *Id.* (citation omitted). "The Calcagni Memo expressly instructs EPA to 'assume that sources are operating at permitted levels . . . unless evidence is presented that such an assumption is unrealistic.'" *Id.* (quoting Memorandum from John Calcagni, Dir. of Air Quality Mgmt. Div., EPA, to Directors, EPA (Sept. 4, 1992) [hereinafter Calcagni Memo]). Further, the superseding Berry

Memo expressly allows the use of actual emissions for ozone pollution projections. *Id.* at 396-97 (citing Memorandum from D. Kent Berry, Acting Dir. of Air Quality Mgmt. Div., EPA, to Directors, EPA (Nov. 30, 1993). In short, the EPA "articulated a rational basis for its conclusion . . . that using maximum allowable emissions levels for power plants would have been unrealistic," under both the Calcagni Memo and Berry Memo. *Id.* at 397.

Last, the court found that the EPA's reliance on the NO_x State Implementation Program (SIP) Call trading program (a cap and trade program developed to lower interstate transport of air pollution) as a factor for redesignating the areas was appropriate. *Id.* at 398. The Sierra Club argued that this program aims to reduce pollution of an entire region, not specific areas, and thus the effects in any one specific area cannot be permanent and enforceable. *Id.* at 397. Once more, the court agreed with the EPA's reasoning that the NO_x SIP Call has had proven effects in lowering emissions. It found that the benefits of this program are typically static and predictable and the program was only one of many reasons for redesignating the areas. *Id.* at 398. Ultimately, the court found that the EPA's designations were not arbitrary and capricious and denied the Sierra Club's petition for review. *Id.* at 399.

C. Analysis

This case clarifies the issue of standing concerning whether this particular type of injury is a speculative allegation. The court correctly took into consideration the fact that the lower standards were already certain and that the areas will still violate the nonattainment standard regulations. The court's decision concerning the merits of the case were also persuasive and well-reasoned. Because the CAA gives no insight into how to determine whether a factor has caused permanent and enforceable reductions, the EPA created and correctly applied its own guidance. However, Sheboygan County and the Greater Chicago areas' continuing violations were not adequately addressed and should be taken into greater consideration when redesignating the area.

Andrea Storer

II. CLEAN WATER ACT

Alaska Community Action on Toxics v. Aurora Energy Services, LLC, 765 F.3d 1169 (9th Cir. 2014)

In *Alaska Community Action of Toxics v. Aurora Energy Services, LLC*, the United States Court of Appeals for the Ninth Circuit reversed and remanded a decision by the United States District Court for the District of Alaska, which held in part that a coal export facility's nonstormwater discharges were covered by its general stormwater permit under the Clean Water Act's (CWA or Act) "permit shield" defense. 765 F.3d 1169, 1174 (9th Cir. 2014).

A. Procedural and Factual Background

The CWA was enacted by Congress to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC, 940 F. Supp. 2d 1005, 1007 (D. Alaska 2013) (quoting 33 U.S.C. § 1251 (2012)). In order to accomplish this goal, "the CWA prohibits 'the discharge of any pollutant by any person' to navigable waters 'except in compliance' with other provisions of the CWA, including the National Pollution Discharge Elimination System ('NPDES') permitting requirements." *Id.* (quoting 33 U.S.C. § 1311(a)). The term "discharge of a pollutant" is defined by the Act as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The term "point source" is then defined by the Act as "any discernible, confined and discrete conveyance." *Id.* § 1362(14). Under section 402 of the CWA, a discharger may obtain "a permit for the discharge of any pollutant, or combination of pollutants" as long as those discharges comport with a number of other CWA provisions. *Id.* § 1342(a). An NPDES permit under section 402 will "place limits on the type and quantity of pollutants that can be released into the Nation's Waters." *Alaska Cmty. Action on Toxics*, 940 F. Supp. 2d at 1007 (quoting S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004)).

In *Alaska Community Action on Toxics*, two environmental groups, the Alaska Community Action on Toxics and the Alaska Chapter of the Sierra Club, brought an action under the CWA in the United States District Court for the District of Alaska against a coal-loading facility "located on the northwest shore of Resurrection Bay in Seward, Alaska" (Seward Facility). "The Facility's purpose is to receive coal by railcar from the Usibelli Mine located near Healy, Alaska, and to transfer that

coal onto ships for delivery to out-of-state markets." *Id.* at 1008. The Seward Facility originally obtained an individual NPDES permit for stormwater discharges in 1984. In 2001, based on advice from the United States Environmental Protection Agency (EPA), the Seward Facility switched from its individual stormwater permit to a "Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities" (General Permit). *Id.* at 1010. As the district court explained, "The Seward Facility's General Permit is a general, non-facility-specific permit that authorizes stormwater discharges for a variety of industrial operations." *Id.* at 1015. In addition to authorizing stormwater discharges, the Seward Facility's General Permit "also authorizes several specified categories of 'non-stormwater discharges,' which are primarily unpolluted discharges and discharges associated with emergency services activities." *Id.* The plaintiffs brought three separate claims under the Act for discharges into Resurrection Bay (Bay) that they contended were not authorized under the General Stormwater Permit. *Id.* at 1008-09. The plaintiffs alleged that

> (1) coal falls into the Bay, either directly or as coal dust, during the over-water transfer of coal from the stockpiles to the ship holds; (2) coal dust generated at the stockpiles, and other land-based areas of the Facility, migrate to the Bay as airborne dust; and (3) coal-contaminated snow is intentionally plowed into the Bay and into a pond and wetlands north of the Facility.

Id. at 1009. The parties filed cross motions for summary judgment on all of the plaintiffs' claims. *Id.* at 1011. The defendants argued "that each of the alleged discharges is either covered by their existing permit, subject to the protections of the CWA's permit shield provision, not regulated by the CWA, or [was] unproven by [p]laintiffs." *Id.* at 1013.

With regard to the first claim, "discharge[s] [of] coal from the over-water conveyor and ship loading area," the defendants argued that these discharges were either covered by its General Permit or that the CWA's "permit shield" defense was applicable to these discharges. *Id.* at 1014. As to whether or not the discharges in question were covered by the General Permit, the district court concluded that the "[d]efendants' permit does not expressly allow non-stormwater discharges of coal into the Bay." *Id.* at 1015. The district court thus moved to an analysis of the discharges under the CWA permit shield defense. The permit shield defense arises out of section 402(k) of the CWA, which states that "'[c]ompliance with a permit issued pursuant to this section shall be deemed compliance'" with a list of enumerated sections of the CWA. *Id.* at 1014 (quoting 33 U.S.C. § 1342(k) (2012)). Citing *Piney Run*

Preservation Ass'n v. County Commissioners of Carroll County as the "seminal case addressing the scope of the CWA's permit shield provision," the district court concluded that the CWA permit shield provision applies to "'pollutants that are not listed in [the] permit as long as [the party] only discharges pollutants that have been adequately disclosed to the permitting authority.'" *Id.* (internal punctuation omitted) (quoting Piney Run Pres. Ass'n v. Cnty. Comm'r of Carroll Cnty., Md., 268 F.3d 255, 268 (4th Cir. 2001)).

Under *Piney Run*, a discharger will be shielded from liability for discharges not mentioned in a permit if it was complying with its existing permit and "the discharges were adequately disclosed to, and reasonably anticipated by, the permitting authority during the permitting process." *Id.* at 1015 (citing *Piney Run*, 268 F.3d at 268). Section 2.1.2.10 of the defendants' General Permit required the Seward Facility to "eliminate non-stormwater discharges not authorized by an NPDES permit." *Id.* at 1016. The permit then referred to a list, found in section 1.1.3 of the General Permit, of nonstormwater discharges which were expressly authorized by the permit, "none of which include[d] coal." *Id.* The plaintiffs argued that this list of nonstormwater discharges was an exhaustive list and that provision of section 2.1.2.10 prohibited any additional nonstormwater discharges. In considering the scope of different categories of general permits, the district court explained:

> The General Permit sets forth requirements generally applicable to all industrial categories covered by the Permit and, in a series of sub-sections, sets forth specific requirements, restrictions, and authorizations applicable to specific industries. Each industrial category is given a "sector" designation. The Seward Facility is designated as Sector AD. Sector AD is a catch-all category encompassing facilities that do not otherwise fit within the General Permit's specific categories.

Id. at 1017. The district court reasoned that because other sectors, such as "timber products" covered under sector A, allowed for additional nonstormwater discharges apart from those listed in section 1.1.3, section 1.1.3 could thus not be an exhaustive list. The district court explained further that because section 1.1.3 was not an exhaustive list, the coal discharges at the Seward Facility were "not 'specifically barred' by any permit provisions." *Id.* at 1018.

After determining that the discharges in question were not specifically barred by the General Permit, the district court then reasoned that the discharges at issue had been "adequately disclosed" to the EPA and that the EPA "reasonably anticipated" the discharges such that the Seward Facility could avail itself of the permit shield defense. *Id.* at

1019-22. The district court noted that when the Seward Facility renewed its permit in 2009, it was required to prepare a prevention plan with measures to "control the amount of coal that enters the Bay." *Id.* at 1019. The measures required by the prevention plan, the district court concluded, made it clear that the nonstormwater "discharges were 'adequately disclosed' to the agency 'during the permitting process.'" *Id.* at 1020 (quoting *Piney Run*, 268 F.3d at 269). The district court further concluded that the agency had "reasonably anticipated" the nonstormwater discharges at issue because both the EPA and the Alaska Department of Environmental Conservation conducted a site-specific inspection that "focused substantially on non-stormwater discharges." Additionally, an EPA dive inspection from 1987 found that coal "[was] covering the ocean floor beneath the conveyer [sic] and dock," indicating further that the EPA had anticipated such discharges. *Id.* at 1021. In granting the defendants' motion for summary judgment on the plaintiffs' first claim, the district court concluded that because the discharges were disclosed to the agency and because the agency "reasonably contemplated" them, the nonstormwater discharges in question were thus protected under the Act's permit shield provision. *Id.* at 1022.

The district court granted the defendants' motion for summary judgment on the plaintiffs' second claim finding that the wind-blown coal did not constitute a point source under the CWA. *Id.* at 1026-27. Lastly, with regard to the plaintiffs' third claim, related to discharges of coal-contaminated snow, the district court made a number of findings. *Id.* at 1027-29. First, the district court granted summary judgment to the defendants with regard to discharges resulting from contaminated snow falling off, or through the cracks of, the docks at the Seward Facility, reasoning that they were covered by the CWA permit shield provision and that the plaintiffs failed to support this claim with evidence. *Id.* at 1027-28. The district court refused to resolve the issue on summary judgment for either party as to whether snow plowed into the bay from the Seward Facility constituted a violation of the CWA, reasoning that "material issues of fact exist[ed] as to whether Defendants" were actually involved in such activity. *Id.* at 1029. Finally, the district court granted summary judgment to the defendants on the claim that the Seward Facility plowed "coal-contaminated snow into a pond and wetlands north of the Facility" because the plaintiffs failed to present sufficient evidence on this claim. *Id.*

B. The Court's Decision

The Ninth Circuit reversed the district court's decision holding that the express terms of the defendants' General Permit prohibited the nonstormwater discharges in question. *Alaska Cmty. Action of Toxics*, 765 F.3d at 1174. The court reviewed "'[t]he district court's interpretation of unambiguous terms of [an] NPDES permit'" de novo. *Id.* at 1172 (quoting Russian River Watershed Prot. Comm. v. City of Santa Rosa, 142 F.3d 1136, 1141 (9th Cir. 1998)). The court determined, "The sole issue on appeal [was] whether defendants' alleged non-stormwater discharge of coal from the Seward Facility's conveyor system and ship loading area into Resurrection Bay [was] covered by the General Permit." Without entering into a permit shield analysis, the court concluded that the language in section 2.1.2.10 of the General Permit "prohibit[ed] defendants' non-stormwater discharge of coal." *Id.* The court found that although other sectors, like the timber products sector, "specify additional categories of non-stormwater discharge that are authorized or prohibited," the section governing the Seward Facility, sector AD, did not include such additional authorizations. *Id.* at 1173. The court noted, "With the possible exception of additional monitoring or reporting requirements that may be imposed, Sector AD facilities are governed only by the permit's general provisions." *Id.* The defendants also argued that because other sectors of the general permit explicitly prohibited certain nonstormwater discharges, these prohibitions "would be surplusage if Part 2.1.2.10 already prohibited all non-stormwater discharges not listed in Part 1.1.3." *Id.* In response, the court found that the language in 2.1.2.10 was clear in prohibiting the discharges in question and that the referral to list 1.1.3, which did not include the defendants' coal discharges, was a clear indication by the EPA that such discharges were not authorized. Importantly, the court noted that had it gone into a permit shield analysis, which had previously only been applied in the context of individual permits, the result would have been the same. *Id.* at 1173. The court thus refrained from deciding whether the permit shield analysis applied to the issue in this case involving a general permit. *Id.* at 1173-74.

C. Analysis

The Ninth Circuit's decision serves as an important limit on those nonstormwater discharges that will be authorized under general stormwater permits. Allowing greater leeway with regard to the nonstormwater discharges that are authorized under a general stormwater

permit would frustrate the purpose of the Act. Such leeway would contradict other permitting regimes under the CWA, such as individual permits granted under section 402. It is important, however, that permitting agencies include strong prohibitory language in their general permits, such as the language found in the Seward Facility's permit, so that nonstormwater discharges are unambiguously barred by the General Permit.

William Lindsey

III. KEYSTONE XL PIPELINE

Thompson v. Heineman,
289 Neb. 798, 802 (2015)

In *Thompson v. Heineman*, the Supreme Court of Nebraska determined that Legislative Bill 1161 (L.B. 1161) was unconstitutional. 289 Neb. 798, 802 (2015). L.B. 1161 established procedures for seeking state approval of "major oil pipeline" plans. Prior to L.B. 1161, Nebraska's Public Service Commission (PSC) was the constitutionally established body exclusively tasked with the regulation of common carriers. NEB. CONST. art. IV, § 20. L.B. 1161 provided major oil pipeline carriers the option of bypassing the PSC's regulatory mandates in favor of seeking direct approval of pipeline plans from the governor. Leg. Neb. 1161, 102d Leg., 2d Sess. (Neb. 2012). With a 4-3 ruling against the law, the court deemed it unconstitutional. *Thompson*, 289 Neb. at 802. However, L.B. 1161 remains in effect by default due to Nebraska's constitutional article V, section 2, which requires a supermajority to strike down legislation. NEB. CONST. art. V, § 2.

A. Background

1. Legislative History

In 2011, Nebraska's legislature passed the Major Oil Pipeline Siting Act (MOPSA). L.B. 1, 2012 Neb. Laws, 1st Spec. Sess., § 2. MOPSA required all major oil pipeline carriers to gain approval from the PSC in order to exercise eminent domain to build an oil pipeline. *Id.* § 1. With the stated objective of protecting the property rights of Nebraskans and the state's natural resources, MOPSA required the PSC to consider a variety of environmental, economic and social factors before approving of any plan. *Id.* § 8 (codified at NEB. REV. STAT. § 57-1407 (2015)). However, this law contained a significant exception for major oil carriers

that submitted an application to the United States Department of State "pursuant to Executive Order 13337" before MOPSA came into existence. *Id.* § 3(3). Executive Order 13,337 delegates to the United States Secretary of State the power to process applications for presidential permits for facilities such as oil pipelines. Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004). When MOPSA was enacted, TransCanada's Keystone XL pipeline was the only plan to which this exception applied, and indeed TransCanada was the only carrier seeking to build such a pipeline across Nebraska. *Thompson*, 289 Neb. at 805, 808.

In January 2012, the President of the United States denied TransCanada's application, leaving TransCanada ineligible for the exception. *Id.* at 806. In response, the legislature passed L.B. 1161. L.B. 1161 eliminated MOPSA's exemption, replacing it with two options for seeking approval of oil pipeline plans. Leg. Neb. 1161, 102d Leg., 2d Sess. (Neb. 2012). Under L.B. 1161, major oil carriers could either go through the standing PSC procedures, or they could undergo a review process by the Department of Environmental Quality (DEQ), which would then write a report to the governor who would have the power to approve or deny the plan. If seeking approval through the PSC, the carrier had to fund the review. If a carrier went through the governor, the DEQ supplied the initial funding which the carrier had to reimburse.

2. Procedural History

TransCanada chose to seek approval from the governor and in April 2012 submitted a route plan to the DEQ. *Thompson*, 289 Neb. at 805, 809. On January 3, 2013, the DEQ submitted its report to the governor who approved the plan on January 22. *Id.* at 810. In March 2013, the Nebraska landowners who are the plaintiffs in this case filed a complaint against the governor, the director of the DEQ, and the state treasurer. Among other constitutional claims, the complaint alleged that L.B. 1161 unconstitutionally delegated power to the governor that belonged exclusively to the PSC. They also alleged that the bill unlawfully used state money by covering the cost of the DEQ approval process.

The district court determined that while the landowners did not have traditional standing, they did have taxpayer standing. *Id.* at 811. The district court went on to rule that L.B. 1161 was unconstitutional solely on the basis that it unconstitutionally delegated power belonging exclusively to the PSC. *Id.* at 813. Both the state and the plaintiffs appealed.

B. The Court's Decision

On January 9, 2015, the Supreme Court of Nebraska agreed with the district court, holding that the plaintiffs had taxpayer standing and that L.B. 1161 unconstitutionally divested the PSC of its power. *Id.* at 802.

1. Standing

The court began its analysis by addressing the threshold question of the plaintiffs' standing. *Id.* at 814. Noting that while traditional standing requires that a plaintiff seeking relief show an injury in fact, the court recognized two taxpayer exceptions to that rule, both of which applied to the plaintiffs in this case. First, taxpayers may challenge the illegal use of public funds without showing any particularized injury. Second, taxpayers may raise issues that are matters of great public concern without an injury in fact. *Id.*

The court focused particular attention on the issue of taxpayer standing for matters of great public concern. *Id.* at 815-27. The court emphasized the importance of taxpayer standing in such circumstances, asserting that instances arise in which an individual citizen's interest in public policy far outweighs any injury in fact that the individual might prove through traditional standing. *Id.* at 816-17. Furthermore, without such standing, policy may go unchallenged when limited by the injury in fact requirement. *Id.* at 823. Indeed, "without an exception for matters of great public concern, elected representatives could flout constitutional violations with impunity." *Id.* Analogizing the case at hand to several others, the court determined that the landowners in this case raised an issue of great public concern, because the legislation implicates all citizens' interest in their form of government.

The state argued that by granting such an exception, the court would be effectively eliminating all standing requirements. *Id.* at 824. The court countered that the exception is limited; not every "[l]egislative misstep" would be a matter of great public concern. *Id.* However, "[i]f the exercise of eminent domain over private property and the constitutional requirements for the organization of state government do not raise matters of great public concern, then no issue could." *Id.*

2. The Constitutionality of L.B. 1161

The court ruled in favor of the plaintiffs only after a detailed discussion of the state's assignments of error. *Id.* at 830-36. The state alleged first that because the landowners made a facial challenge to the

law, they are required to demonstrate that it would be unconstitutional in all circumstances. *Id.* at 830. The state contended that there were three instances in which the law would be constitutional. First, the state claimed that only interstate carriers are common carriers subject to the PSC's control, and that if the court read the law as applying only to inter-state carriers, it would be constitutional. Second, private pipeline carriers could seek the governor's approval without violating the constitution. Finally, the state claimed that even if the PSC has exclusive control over pipeline carriers, it does not have control over routing decisions.

As to the first contention, the state pointed to several statutes distinguishing inter-state carriers from intrastate carriers and argued that these distinctions reveal the legislature's implicit intent to limit the definition of common carrier. *Id.* at 836-37. However, the court states, "[U]nless the Legislature enacts legislation to specifically restrict the PSC's authority and retains control over that class of common carriers, it cannot constitutionally deprive the PSC of its regulatory powers." *Id.* at 833. After reviewing circumstances in which the legislature did explicitly limit the power of the PSC, the court concluded that this was not such a case.

Next, the state argued that the law would be facially constitutional if private carriers were seeking approval for a pipeline. *Id.* at 841. However, the court concluded that the right to exercise eminent domain is the essential feature distinguishing a common carrier from a private one. Eminent domain may only be exercised for a public purpose. Any carrier granted such a right would thereby be a common carrier for purposes of PSC regulation.

Finally, the court quickly refuted the state's claim that the PSC has no authority to review a pipeline's route. *Id.* at 845-46. The court noted that this contention is clearly contrary to case law. *Id.* at 845. In fact, the Nebraska Supreme Court once said, "[U]nder the Constitution, [the PSC] has original jurisdiction and sole power to grant, deny, amend, revoke, or transfer common carrier certificates of convenience and necessity." *Id.* at 846 (quoting State v. Ramsey, 37 N.W.2d 502, 507 (Neb. 1949)). As the court points out, the challenged law itself acknowledges the PSC's authority to do so. *Id.* at 846. Accordingly, no matter how liberally the court reads the law, with deference to the legislature firmly in mind, the court finds that L.B. 1161 is unconstitutional.

C. Analysis

Remarkably, the Nebraska Supreme Court's lengthy, detailed exploration of the constitutionality of L.B. 1161 is little more than dicta.

Despite issuing an opinion composed entirely of reasons to uphold the district court's ruling, the court ultimately vacated it. *Id.* at 848. This is the default result of Nebraska's unusual constitutional provision requiring a supermajority to overturn legislation. Certainly this is a confounding result when, as the court points out, none of the justices on the court argued that the law was constitutional. *Id.* at 847. Instead, the dissenting justices reached an impasse on the issue of standing and refused to consider the merits of the case.

In its concluding remarks, the court made a frank attempt to assert neutrality and preempt accusations of partisanship. *Id.* at 846. The court insisted:

> This appeal is not about the wisdom or necessity of constructing an oil pipeline but instead is limited to the issues of great public concern raised here: which entity has constitutional authority to determine a pipeline carrier's route and whether L.B. 1161 comports with the Nebraska Constitution's provisions controlling this issue.

Id. There was very little indication in the opinion itself of what a politically volatile issue the Keystone XL pipeline has become in recent years. As judges are wont to do, the Nebraska Supreme Court adroitly cloaked itself in neutrality. Yet, the fact that the court issued such a lengthy, combative opinion knowing that it would not achieve its ends seems like an exercise in futility if it is not read in part as a reflection of the political position of the majority.

Devin Johnson

IV. RENEWABLE ENERGY TAX INCENTIVES

Energy Credit: Internal Revenue Service Notice 2015-4

On January 13, 2015, the Internal Revenue Service (IRS) released Notice 2015-4. "This notice provides guidance on the performance and quality standards that small wind energy property must meet to qualify for the energy credit under § 48 of the [Internal Revenue] Code [(I.R.C.)]." I.R.S. Notice 2015-4, 2015-5 I.R.B. 337, 407-08.

A. Background

Combating climate change requires simultaneously using less energy and increasing the share of nonfossil energy. Michael B. Gerrard, *Introduction and Overview*, *in* THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES 1, 1 (Michael B. Gerrard ed., 2011). One way in which the U.S. government has tried to foster the creation and use of

renewable energy sources is through federal tax policy. "Tax incentives encourage clean energy by reducing the tax liability of businesses and consumers who engage in the qualifying activities." Roberta F. Mann & E. Margaret Rowe, *Taxation*, *in* THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES, *supra*, at 145. Specifically, the federal government encourages the private sector to develop and implement clean energy sources by reducing the tax cost of the activity. *Id.* at 146 ("In the renewable energy sector, the bulk of the tax incentives come in the form of either production tax credits (PTCs) or investment tax credits (ITCs)."). Both ITCs and PTCs reduce the taxable income of businesses. The PTC is an income tax credit based on the amount of kilowatt-hours of energy generated by the renewable energy project and sold by the taxpayer to an unrelated third party during the taxable year. 26 I.R.C. § 45(a) (2012). On the other hand, the ITC rewards investment in the physical equipment needed to generate renewable energy rather than the generation of renewable energy itself. In other words, taxpayers receive a corporate tax credit based on the investment cost of a qualifying project. *Id.* § 48(a)(1).

Under I.R.C. § 48, the IRS offers a 30% tax credit for qualified solar energy, qualified small wind energy, and qualified fuel cell property, *id.* § 48(a)(2)(A), (a)(3)(A), placed in service during the taxable year, *id.* § 48(a)(1). A "qualified small wind energy property" is defined as "property which uses a qualifying small wind turbine to generate electricity." *Id.* § 48(c)(4)(A). And a "qualifying small wind turbine" is defined as a wind turbine that has a nameplate capacity of 100 kilowatts or less. *Id.* § 48(c)(4)(B). Small wind energy projects must be placed into service prior to January 1, 2017, to qualify for the ITC. *Id.* § 48(c)(4)(C).

In order to qualify for the § 48 energy credit, the taxpayer must construct, reconstruct, or erect the property, or if acquired by the taxpayer, its original use begins with the taxpayer. *Id.* § 48(a)(3)(B)(i)-(ii). The property must also be depreciable or amortizable, *id.* § 48(a)(3)(C), and meet the performance and quality standards, *if any*, which have been prescribed by the Secretary of the Treasury, in effect at the time of acquisition of the property. *Id.* § 48(a)(3)(D)(i)-(ii).

B. Notice 2015-4

1. Performance and Quality Standards

The Secretary of the Treasury has the authority to place performance, safety, and quality standards on all energy property

qualifying for the ITC. *Id.* § 48(a)(3)(D)(i). The Secretary of the Treasury may prescribe performance and quality standards by promulgating a regulation after consulting with the Secretary of Energy. *Id.* Although no regulations have been issued to date the IRS has recently published Notice 2015-4 as guidance on the performance and quality standards for small wind energy property. "A notice is a public pronouncement that may contain guidance that involves substantive interpretations of the Internal Revenue Code." *Understanding IRS Guidance- A Brief Primer*, IRS (Jan. 23, 2015), http://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer. Notice 2015-4 constitutes the first guidance on the performance and quality standards of energy property. David Burton, *IRS Specifies Performance, Quality Standards For Small Wind Turbines*, N. AM. WIND POWER (Jan. 20, 2015), http://www.nawindpower.com/e107_plugins/content/content.php?content.13856. The IRS chose to impose performance and safety standards on only one category of energy property, small wind turbines.

Notice 2015-4 requires that small wind energy property meet the performance and quality standards set forth in either "(1) American Wind Energy Association Small Wind Turbine Performance and Safety Standard 9.1-2009 (AWEA); or (2) International Electrotechnical Commission 61400-1, 61400-12, and 61400-11 (IEC)." I.R.S. Notice 2015-4, 2015-5 I.R.B. 337, 407, § 3.01. The IEC is a not-for-profit, nongovernmental organization comprised of national committees that appoint experts from industry, government agencies, various associations, and academia to develop international standards for electrical, electronic, and related technologies. *Who We Are*, INT'L ELECTROTECHNICAL COMMISSION, http://www.iec.ch/about/profile/?ref=menu (last visited Feb. 8, 2015); *About the IEC Vision & Mission*, INT'L ELECTROTECHNICAL COMMISSION, http://www.iec.ch/about/?ref=menu (last visited Feb. 8, 2015). IEC 61400 is a class of IEC international standards covering wind turbines. 61400-1 covers design standards, *Wind Turbines—Part 1: Design Requirements*, INT'L ELECTROTECHNICAL COMMISSION (Aug. 31, 2005), http://webstore.iec.ch/Webstore/webstore.nsf/ArtNum_PK/34708!opendocument&preview=1 (subscription required), 61400-12 covers power performance standards, *Wind Turbines—Part 12-1: Power Performance Measurements of Electricity Producing Wind Turbines*, INT'L ELECTROTECHNICAL COMMISSION (Dec. 16, 2005), http://webstore.iec.ch/Webstore/webstore.nsf/ArtNum_PK/35360?OpenDocument (subscription required), and 61400-11 covers standards for acoustic noise measurements, *Wind Turbines—Part 11: Acoustic Noise Measurement Techniques*, INT'L ELECTROTECHNICAL COMMISSION (Nov. 11, 2012), http://

webstore.iec.ch/Webstore/webstore.nsf/ArtNum_PK/47109?OpenDocument (subscription required). The American Wind Energy Association (AWEA) is the national trade association for the U.S. wind industry that supports wind industry members and wind policy advocates in efforts to promote wind energy as a clean energy source for the country. AM. WIND ENERGY ASS'N, http://www.awea.org/About/landing.aspx?ItemNumber=5237&navItemNumber=633 (last visited Feb. 8, 2015). IEC's 61400 standards form the basis of AWEA Performance and Safety Standard 9.1-2009. AWEA departs from IEC standards in specific instances in order to address technical differences between small and large wind turbines and to present test results in a consumer-friendly format. *AWEA Small Turbine Performance and Safety Standard*, AM. WIND ENERGY ASS'N (2009), http://www.smallwindcertification.org/wp-content/uploads/2011/05/AWEA_2009-Small_Turbine_Standard1.pdf. Both AWEA and IEC standards evaluate wind turbines "in terms of safety, reliability, power performance, and acoustic characteristics." *Id.* at 1.

All "small wind energy property acquired or placed in service (in the case of property constructed, reconstructed, or erected by the taxpayer) after February 2, 2015" must comply with the guidance of Notice 2015-4. I.R.S. Notice 2015-4, 2015-5, I.R.B. 337, 408, § 5. Requiring that small wind turbines meet either AWEA or IEC performance and quality standards in order to qualify for section 48 energy credits forces manufacturers of small wind turbines to become compliant as quickly as possible. Those manufacturers who fail to certify their products cannot accommodate buyers interested in taking advantage of section 48 energy credits and will foreseeably lose business to those wind turbine manufacturers that have already become compliant.

2. Certification

Notice 2015-5 also enumerates the contents of a certification and defines eligible certifiers. *Id.* at 407, § 4.

The certification must include:

(a) The name and address of the manufacturer;
(b) The property name and model number;
(c) The name and address of the eligible certifier;
(d) The nameplate capacity of the wind turbine; and
(e) A signed and dated statement by the eligible certifier that the property complies with the performance and quality standards of AWEA or IEC.

Id. at 407, § 4.02.

A Notice 2015-4 certification must be issued by an eligible certifier, "a third party that is accredited by the American Association for Laboratory Accreditation or other similar accreditation body." *Id.* at 407, § 4.03. The use of a third-party certifier and identification of a set of quantifiable standards necessary for certification standardizes the process of certification.

After certification, manufacturers must make certification available to purchasers. The manufacturer may provide certification in any form that will allow taxpayers "to retain the certification for tax recording purposes." *Id.* at 407, § 4.01. For example, the manufacturer may provide a printable copy of the certification on their website. *Id.* at 407, § 4.04. Turbine manufacturers must retain documentation of the certification and, upon request by the IRS, make available for inspection such documentation, "including any test reports conforming to AWEA or IEC." *Id.*

Taxpayers may generally "rely on a manufacturer's certification that a small wind turbine meets the performance and quality standards of AWEA or IEC." *Id.* at 407, § 4.05. The exception to this general rule occurs when the IRS determines that a manufacturer's right to provide a certification on which future purchasers may rely must be withdrawn. After certification is withdrawn, the IRS will publish an announcement of the withdrawal. Any taxpayers who purchase turbines after this publication date may not rely on the manufacturer's certification, "even if the property is not installed or the credit is not claimed before the announcement of the withdrawal is published." *Id.* at 408, § 4.06. Certification will be withdrawn if an IRS investigation determines that a certified small wind turbine does not meet the performance and quality standards of AWEA or IEC, or if the manufacturer fails to maintain records of certification and make them available to the IRS when requested. *Id.* at 407, § 4.06. Erroneous certifications may lead to penalties imposed on manufacturers under § 7206 "for fraud and making false statements" and/or under § 6701 "for aiding and abetting an understatement of tax liability." *Id.* at 408, § 4.06. Even though taxpayers may generally rely on manufacturer's certification, taxpayers must be vigilant of any IRS announcements of withdrawal before purchasing turbines.

The taxpayer is not obligated to include the certification or any documentation in their tax return. *Id.* at 407, § 4.05. However, as stated under § 1.6001-1(a), taxpayers shall maintain all records necessary to establish that credits were in fact earned and for the amount claimed. *Id.* (referencing 26 C.F.R. § 1.6001-1(a)). Therefore, "a taxpayer claiming a

credit for a small wind turbine should retain the certification statement as part of the taxpayer's records." *Id.*

C. Analysis

Requiring that small wind turbines meet AWEA or IEC standards to qualify for the ITC will help create a standard method of assessment of small wind turbines. Certification of small wind turbines will also help "prevent unethical marketing claims, ensur[e] consumer protection and buil[d] credibility" in small wind technology. *Explore the Issues: Small Wind Industry Standards*, AM. WIND ENERGY ASS'N, http://www.awea.org/Issues/Content.aspx?ItemNumber=4651 (last visited Feb. 8, 2015). Increased consumer confidence may lead to mainstream acceptance of small wind technology and increased investment in wind as a form of renewable energy. Furthermore, as benchmarks of performance and quality requirements have entered the market place, small wind turbine manufacturers have an incentive to invest in research and development. New technologies and more efficient designs will help manufacturers differentiate their products from other certified turbines.

Carys Arvidson

V. TOXIC SUBSTANCES CONTROL ACT

Trumpeter Swan Society v. EPA,
774 F.3d 1037 (D.C. Cir. 2014)

In *Trumpeter Swan Society v. EPA*, the United States Court of Appeals for the District of Columbia affirmed dismissal of a complaint seeking review of the United States Environmental Protection Agency's (EPA) denial of a petition asking the agency to regulate spent lead bullets and shot under the Toxic Substances Control Act (TSCA). 774 F.3d 1037, 1038 (D.C. Cir. 2014). The appeals court based its decision on different grounds than the lower court.

A. TSCA Background

The TSCA gives the EPA authority to regulate "chemical substance[s]" that the agency has a "reasonable basis to conclude . . . present[] or will present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(a) (2012). Members of the public can petition the EPA to start a rulemaking proceeding. *Id.* § 2620(a). Within ninety days of filing, the EPA must grant or deny the petition. If the EPA

issues a denial, "the Administrator shall publish in the Federal Register the Administrator's reasons for such denial." *Id.* § 2620(b)(3).

If the agency denies the petition, the petitioner may file an action in a federal district court "to compel the Administrator to initiate a rulemaking proceeding as requested in the petition." *Id.* § 2620(b)(4)(A). The petitioner is then granted "an opportunity to have such petition considered by the court in a de novo proceeding." *Id.* § 2620(b)(4)(B). The petitioner has the burden of showing based on a preponderance of the evidence that "there is a reasonable basis to conclude that the issuance of such a rule or order is necessary to protect health or the environment against an unreasonable risk of injury." *Id.* § 2620(b)(4)(B)(ii). If the petitioner meets this burden, "the court shall order the Administrator to initiate the action requested by the petitioner." *Id.* § 2620(b)(4)(B).

B. Procedural Background

In August 2010, five environmental organizations asked the EPA to initiate a rulemaking to ban the "manufacture, processing and distribution in commerce of lead shot [and] bullets." CTR. FOR BIOLOGICAL DIVERSITY ET AL., PETITION TO THE ENVIRONMENTAL PROTECTION AGENCY TO BAN LEAD SHOT, BULLETS, AND FISHING SINKERS UNDER THE TOXIC SUBSTANCES CONTROL ACT 2 (2010).

The EPA denied the petition because of TSCA section 3(2)(B)(v), which exempts "any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code." 15 U.S.C. § 2602(2)(B)(v). Section 4181 imposes an 11% tax on, inter alia, shells and cartridges. 26 U.S.C. § 4181 (2012). The groups sought review of the denial in federal district court, but they filed after the statutorily imposed sixty-day deadline.

The petition at issue here—a second petition—was filed in March 2012 by two of the organizations that participated in the 2010 petition plus an additional ninety-nine organizations. *Trumpeter Swan Soc'y*, 774 F.3d at 1040. This second petition specifically focused on "spent lead ammunition" and asked the EPA to promulgate "regulations that adequately protect wildlife, human health and the environment against the unreasonable risk of injury from bullets and shot containing lead used in hunting and shooting sports, which have the potential to cause harmful lead exposure to wildlife and humans." CTR. FOR BIOLOGICAL DIVERSITY ET AL., PETITION TO THE ENVIRONMENTAL PROTECTION AGENCY TO REGULATE LEAD BULLETS AND SHOT UNDER THE TOXIC SUBSTANCES CONTROL ACT 4 (2012).

The EPA responded that the 2012 petition was not a "new petition cognizable under section 21" because two of the groups were similar and the petitions were similar in the relief they requested. Letter from James J. Jones, Acting Assistant Adm'r, EPA, to Jeff Miller, Ctr. for Biological Diversity, ENVTL. PROTECTION AGENCY 1 (Apr. 9, 2012), http://www.epa.gov/oppt/chemtest/pubs/response_4.9.12.pdf. The agency further explained that "even if the 2012 submission were considered to be a new or different petition cognizable under section 21 of TSCA," the agency "would deny it for the same reasons it denied the [earlier] petition." *Id.* at 2. The agency did not publish the denial in the *Federal Register*.

Seven of the environmental organizations (only one of which was involved with the 2010 petition) filed for timely judicial review. *Trumpeter Swan Soc'y*, 774 F.3d at 1040. The district court sided with the EPA, dismissing the complaint because the court lacked subject matter jurisdiction under the Federal Rule of Civil Procedure 12(b)(1). Transcript of Motion Hearing at 48, Trumpeter Swan Soc'y v. EPA, No. CA 12-929 (D.D.C. May 23, 2013).

The district court noted that the TSCA does not define "petition," and the statute does not address how the agency should handle successive, similar petitions. *Id.* at 63-66. Therefore, the court deferred to the EPA's interpretation of the statute and its decision to treat the second petition as a "petition for reconsideration." *Id.* at 73-74, 77.

The seven environmental groups appealed the district court's ruling, advancing two arguments: (1) that the EPA had no authority to declare that the petition was "not . . . cognizable under section 21" and (2) that the TSCA § 3(2)(B)(v) permits the EPA to regulate lead shot and spent lead bullets. The appeals court reviewed the district court's determination de novo. *Trumpeter Swan Soc'y*, 774 F.3d at 1040 (internal quotation marks omitted).

C. Court's Decision

The appeals court first addressed the EPA's interpretation of the TSCA's citizens' petition section. The court began their analysis with the cornerstone of administrative law, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*'s first step, a court "must give effect to the unambiguously expressed intent of Congress," if Congress has spoken directly regarding the exact issue. *Id.* at 842-43.

The appeals court found that Congress's intent was clear: as long as a "person" meets the TSCA's two requirements, they may submit a petition. Furthermore, the TSCA includes no statements that would

allow the EPA to declare that a petition is "not cognizable." The appeals court wrote that, "allowing EPA to do so would permit it to defeat TSCA's *unusually powerful* citizen-petition procedures." *Trumpeter Swan Soc'y*, 774 F.3d at 1041 (emphasis added). The court ruled that the EPA's actions denied a statute-granted right to the environmental organizations that joined only in the second petition and not the first. Furthermore, the EPA's ruling denied all environmental groups the right to "de novo judicial review that TSCA guarantees." *Id.*

The EPA defended its decision that the petition was noncognizable because any other reading of the TSCA "would render the [sixty-day limitations period in section 21] meaningless because any petitioner that failed to timely bring suit after the denial of an initial petition could resubmit the same or a nearly identical petition and seek review of the EPA's treatment of that petition." Brief for Defendants—Appellees at 16, *Trumpeter Swan Soc'y*, 774 F.3d 1037 (No. 13-5228). The court had two responses. First, the EPA disregarded the rights of the ninety-nine organizations that had not joined the first petition. Second, the EPA can, when confronted with successive petitions, deny the petitions relying on the same reasoning it did in the prior petition. *Trumpeter Swan Soc'y*, 774 F.3d at 1041-42. The court noted that res judicata would preclude the successive petitioners from challenging the second petition, if a court had previously affirmed the EPA's decision to deny.

The appeals court then moved to the petitioners' second argument—the merits—which concerned whether the TSCA allows regulation of spent shot and bullets. The appeals court noted the petitioners' emphasis on *spent* shot and bullets in this second petition. *Id.* at 1042.

The court found that the EPA "lacks statutory authority to regulate the type of spent bullets and shot identified in the environmental groups' petition." *Id.* The court reasoned that "bullets and shot can become '*spent*' only if they are first contained in a cartridge or shell and then fired from a weapon, [and] petitioners have identified no way in which the EPA could regulate *spent* bullets and shot without also regulating cartridges and shells—precisely what section 3(2)(B)(v) prohibits." The court cited a tax regulation concerning § 4181, which defines shells and cartridges as coming from firearms. *Id.* (citing 27 C.F.R. § 53.11).

The environmental organizations response to this is that they seek to regulate the lead contained *within* bullets and shot. *Id.* at 1043. The court found this argument unpersuasive, reiterating again that there is no way to regulate the lead within without also regulating the cartridges and shells.

The environmental groups next argued that "[n]o tax is imposed by section 4181 . . . on the sale of parts or accessories of . . . shells and cartridges *when sold separately*." *Id.* (quoting 27 C.F.R. § 53.61(b)(1)) (internal quotation marks omitted). The court did not address this argument because the petitioners had not argued—in their petition, their arguments to the district court, or in their briefs to the appellate court—that they wanted the EPA to regulate bullets and shot *sold separately*. The court cited *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1290 (D.C. Cir. 2004), for the general principle, "[C]laims not presented to the agency may not be made for the first time to a reviewing court." Ultimately, the appeals court affirmed the district court's decision to dismiss the complaint. *Trumpeter Swan Soc'y*, 774 F.3d at 1044.

On February 24, 2015, the United States Court of Appeals for the District of Columbia Circuit denied the environmental groups' petition for an en banc hearing. Matt Sharp, *DC Circ. Nixes Enviros' Bid To Revive EPA Ammo Suit*, LAW360 (Feb. 25, 2015, 3:19 PM), http://www.law360.com/articles/624905/dc-circ-nixes-enviros-bid-to-revive-epa-ammo-suit.

D. Analysis

This opinion emphasizes the strength of the TSCA citizen petition section. Furthermore, the appeals court dismissed both the EPA's interpretation of a statute the court found clear and the EPA's attempt to take a shortcut around a statute-granted right.

This decision also leaves open the possibility that lead in bullets could be regulated in the future, if petitioners can argue that the EPA can regulate shot and bullets sold separately. One of the attorneys for Center for Biological Diversity told Law360, "While we are disappointed that the court did not agree with us on the merits of our petition, we do think the opinion leaves open the possibility of future regulation of lead bullets and shot, and we plan on exploring those options." Juan C. Rodriguez, *DC Circ. Upholds EPA's Refusal To Regulate Spent Ammo*, LAW360.COM (Dec. 23, 2014, 4:36 PM), http://www.law360.com/articles/607347/dc-circ-upholds-epa-s-refusal-to-regulate-spent-ammo.

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