June 2005

The Supreme Court Modifies Homestead Claimants' Property Rights in BedRoc Ltd. v. United States

Liwen A. Mah

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38XS4W

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcerawlaw.berkeley.edu.
The Supreme Court Modifies Homestead Claimants’ Property Rights in *BedRoc Ltd. v. United States*

In *BedRoc Ltd. v. United States*, the United States Supreme Court held that land grants made under the Pittman Underground Water Act of 1919 ("Pittman Act")\(^1\) do not reserve sand and gravel rights to the United States government because Congress did not consider sand and gravel to be valuable minerals at the time that it passed the Act.\(^2\) The Court distinguished *BedRoc* from its earlier decision in *Watt v. Western Nuclear, Inc.*, which held that the United States reserved sand and gravel rights for land patented under the Stock-Raising Homestead Act of 1916 (SRHA),\(^3\) on the basis that the Pittman Act referred to "valuable minerals" while the SRHA reserved "all the coal and other minerals."\(^4\) The Court found that the qualifier "valuable" was a critical statutory distinction.\(^5\) As a result, the Court refined certain principles of statutory interpretation and determined that people claiming title to land patented under the Pittman Act have significantly different property rights compared to those with land patented under the SRHA.\(^6\)

Congress passed the Pittman Act and the SRHA to encourage settlement of the American West. The Pittman Act made settlers in Nevada who could provide evidence of successful irrigation of at least 20 acres eligible for a patent of up to 640 acres.\(^7\) The SRHA enabled homesteaders across several Western states to acquire a patent after residing on a piece of land for three years and making permanent

---

\(^1\) Pub. L. No. 60, 41 Stat. 293 (1919). The Pittman Act was implemented "to encourage the reclamation of certain arid lands in the State of Nevada." *Id.*


\(^3\) 64 Pub. L. No. 290, 39 Stat. 862 (1916). The SRHA was an act "to provide for stock raising homesteads" across the United States. Land was granted to homesteaders under the SRHA and the Pittman Act in the form of patents, "an instrument by which the government conveys a grant of public land to a private person." BLACK’S LAW DICTIONARY 919 (7th ed. 2000).


\(^5\) *BedRoc*, 541 U.S. at 340.

\(^6\) *Id.* at 178–81.

\(^7\) *Id.*
improvements towards stock-raising purposes. Both of these patent systems made "nonmineral" lands, which were more valuable for agricultural and grazing purposes than for minerals, open to the public for acquisition. The idea behind these patents was that the land would be settled for agricultural purposes, and meanwhile there would be opportunity to prospect minerals on those same lands.

Prior to the BedRoc lawsuit, the land at issue in BedRoc passed through a series of owners. In 1940, Newton and Mabel Butler received a land grant under the Pittman Act for the 560-acre piece of land north of Las Vegas. Sand and gravel were abundant on the Butlers' land, but at the time they owned the property there was no commercial market for the sand and gravel in Nevada. In 1993, Earl Williams acquired the Butler property, and by that time, the expansion of Las Vegas created a commercial market for sand and gravel. Williams then began to excavate and sell gravel from the property. Shortly thereafter, the Bureau of Land Management (BLM) served Williams with a trespass notice for this excavation. Williams challenged the action but it was upheld under a BLM ruling as well as in a subsequent hearing before the Interior Board of Land Appeals. In 1995, Williams sold the property to BedRoc Limited, LLC, a company that continued to remove sand and gravel from the property. The sale of sand and gravel by BedRoc was allowed under an interim agreement with the Department of Interior (DOI) that permitted the sale to continue until the dispute over its legality could be resolved in the courts. In 1999, BedRoc filed suit in District Court, seeking to quiet title to the sand and gravel on their property.

At the time, Western Nuclear was the leading case addressing sand and gravel mineral reservations. In Western Nuclear, the defendant mining company acquired a fee interest in a portion of land covered by a 1926 SRHA patent. The defendant obtained a permit from the State of Wyoming authorizing it to extract gravel from the land, and the gravel

---

9. Id. at 48.
10. Id. at 50.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id. 43 C.F.R § 9239.0-7 (1993) provides that it is "an act of trespass" to remove any "mineral materials" from public lands.
19. Id.
20. Id.
was used to pave the streets of a company town where the mine’s workers lived.\textsuperscript{22} Despite the permit, the defendant suffered fines for extracting the gravel following charges of unintentional trespass levied by the BLM.\textsuperscript{23} The defendant appealed this action, and the case eventually came before the Supreme Court.\textsuperscript{24} The Supreme Court held that gravel on lands patented under the SRHA was a mineral reserved to the United States.\textsuperscript{25} The Court based its holding on the ordinary definition of minerals, the homesteading purposes of the SRHA, the treatment of gravel under other federal statutes, and the rule of statutory construction that land grants are construed favorable to the government.\textsuperscript{26}

BedRoc’s suit to quiet title to the gravel progressed from the Nevada District Court to the Supreme Court. The District Court granted summary judgment in favor of the United States, holding that the sand and gravel were “valuable minerals” reserved to the United States under the Pittman Act.\textsuperscript{27} The Ninth Circuit affirmed this decision on appeal.\textsuperscript{28} The District Court and the Ninth Circuit both relied on (1) the legislative history of the Pittman Act and (2) the Supreme Court’s decision in \textit{Western Nuclear}.\textsuperscript{29} The Supreme Court granted certiorari, however, and reversed, holding that sand and gravel were not “valuable minerals” reserved to the United States under the Pittman Act.\textsuperscript{30}

The Supreme Court distinguished \textit{BedRoc} from \textit{Western Nuclear} and held that sand and gravel were not valuable minerals under the Pittman Act.\textsuperscript{31} Although the holding appeared to contradict \textit{Western Nuclear}, the Court explained that the SRHA and the Pittman Act treat sand and gravel reservations differently.\textsuperscript{32} In \textit{Western Nuclear}, the Court had to speculate about congressional intent because there was no modifier applied to “minerals.”\textsuperscript{33} In contrast, Congress applied the modifier “valuable” to sand and gravel in the Pittman Act. The Court’s primary interpretation in \textit{BedRoc} therefore focused on the “ordinary meaning” of the mineral reservation since Congress was dealing with “a practical subject in a practical way.”\textsuperscript{34} The Court observed that sand and gravel were commercially valueless in Nevada in 1919 when the Pittman Act was

\begin{itemize}
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 40–42.
\item \textsuperscript{25} Id. at 42–60.
\item \textsuperscript{26} Id.
\item \textsuperscript{28} Id. (quoting BedRoc Ltd. v. United States, 314 F.3d 1080 (9th Cir. 2002)).
\item \textsuperscript{29} Id. (quoting BedRoc Ltd. v. United States, 314 F.3d 1080, 1085–86 (9th Cir. 2002)).
\item \textsuperscript{30} Id. at 187.
\item \textsuperscript{31} Id. at 178.
\item \textsuperscript{32} BedRoc Ltd. v. United States, 541 U.S. 178, 183 (2004).
\item \textsuperscript{33} Id. at 187.
\item \textsuperscript{34} Id. at 184 (quoting Amoco Prod. Co. v. S. Ute Tribe, 536 U.S. 865, 873 (1999)).
\end{itemize}
enacted because the state was sparsely populated.\textsuperscript{35} Thus, even if sand and gravel were classified as \textit{minerals} they would not have been considered \textit{valuable} in 1919.\textsuperscript{36} Furthermore, the Pittman Act cross-referenced early twentieth century mining law under which sand and gravel would not have been considered a "valuable mineral deposit."\textsuperscript{37}

The Court declined to address the legislative history of the Pittman Act.\textsuperscript{38} It held that the text and the statutory context of the Pittman Act explicitly showed that Congress did not view sand and gravel as \textit{valuable} minerals reserved to the United States.\textsuperscript{39} Unlike \textit{Western Nuclear}, the \textit{BedRoc} Court did not find the Pittman Act ambiguous.\textsuperscript{40} The Court relied on the modifier "valuable" and thereby avoided an analysis of the legislative history, emphasizing in a footnote that "longstanding precedents... permit resort to legislative history only when necessary to interpret ambiguous statutory text."\textsuperscript{41} The \textit{BedRoc} interpretation of the Pittman Act thereby avoided legislative history analysis whereas the \textit{Western Nuclear} decision relied heavily on it.

Justice Thomas' concurrence proposed that the majority only placed such strong emphasis on the term "valuable" in order to avoid reversing its decision from \textit{Western Nuclear}.\textsuperscript{42} As the dissent also observed, Justice Thomas noted that the Pittman Act mentions "mineral" or "minerals" eight times, but it applies the modifier "valuable" only twice.\textsuperscript{43} Justice Thomas explained that common sense and the "statutory context" of the Pittman Act indicate that Congress did not intend to reserve the United States a right to sand and gravel.\textsuperscript{44} He agreed with the outcome of the majority decision, however, and noted the reluctance of the Supreme Court to overcome \textit{stare decisis} in cases involving contract and property rights.\textsuperscript{45}

Justice Stevens' dissent argued that the legislative intent of the Pittman Act must have been the same as that behind the SRHA, which was the very reason for upholding sand and gravel reservations for the United States in \textit{Western Nuclear}.\textsuperscript{46} Justice Stevens explained that it would have been unlikely for Congress to reserve sand and gravel in the

\begin{thebibliography}{99}
\bibitem{} Id. at 184-85.
\bibitem{} Id. at 186.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} Id. at 187-89. Justice Thomas wrote a concurrence in which he was joined by Justice Breyer.
\bibitem{} Id. at 187-90.
\bibitem{} Id.
\bibitem{} Id. at 187.
\bibitem{} BedRoc, 541 U.S. at 189-92. Justice Stevens wrote a dissent in which he was joined by Justice Souter and Justice Ginsberg.
\end{thebibliography}
millions of acres covered by the SRHA but not for the land in Nevada governed under the Pittman Act.47 Furthermore, he wrote that the legislative history in Western Nuclear required that a material have commercial value to be categorized as a mineral.48 As in Western Nuclear, he argued that legislative history demonstrated that Congress considered sand and gravel to be the type of minerals that should be reserved.49 Justice Stevens concluded with a critique of the majority opinion, stating that "[a] method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process."50 This statement implied that the majority may have desired a different outcome in BedRoc than in Western Nuclear, deliberately omitting legislative history to achieve the desired ends.

BedRoc removed much of the persuasive force from the principle of statutory construction that "land grants are construed favorably to the Government... and if there are doubts they are reserved for the Government, not against it."51 In Western Nuclear, the Court called this principle an "established rule" and concluded that "in view of the purposes of the SRHA and the treatment of gravel under other federal statutes... we would have to turn the principle of construction in favor of the sovereign on its head to conclude that gravel is not a mineral."52 In BedRoc, the Court turned its back on this principle. Perhaps the Court truly saw no ambiguity in the Pittman Act, and therefore did not need to apply this well-established method of statutory interpretation because gravel was clearly not valuable. On the other hand, it is arguable that the Pittman Act was ambiguous, and so by failing to mention the principle of favoring the sovereign, this method of interpreting land grants has been significantly weakened in favor of individual property rights. The Court could have addressed legislative history as it did in Western Nuclear to arrive at a conclusion that would reserve gravel to the United States. Instead, the Court relied on the text of the statute and ignored the established principle of statutory construction that would otherwise favor the government.

BedRoc may prove to have several legal implications. First, the decision disrupts certain expected property rights in Nevada. Second, following Western Nuclear, BedRoc effectively grants Nevada landowners more rights than anticipated, but also takes away the BLM and DOI's

47. Id. at 189.
48. Id. at 190.
52. Id. at 60.
anticipated property rights. In addition, *BedRoc* weakens the longstanding doctrine that land grants should be interpreted in favor of the government. By choosing to overlook legislative history, *BedRoc* introduces potentially important new law for statutory interpretation and patented property rights. The Supreme Court’s holding in *BedRoc* deflates the persuasive power of legislative history to favor private property rights over those of the federal government.

*Katherine Daniels Ryan*
Riverkeeper, Inc. v. United States Environmental Protection Agency:

Finally a Solution the Courts Can Live With ... Almost

In Riverkeeper, Inc. v. EPA, the Second Circuit revisited the Environmental Protection Agency's (EPA) decades-old problem of trying to devise effective regulations for reducing harm to aquatic life caused by power plant water intake. In the third sparring round between EPA, energy companies, and conservation advocates, EPA just might have finally generated regulations that the courts can enforce.

The Clean Water Act (CWA) amendments of 1972 include a specific provision, section 316(b), relating to cooling water intake structures. The statute requires EPA to promulgate regulations which "shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." Unfortunately, EPA's early attempts to comply with this mandate resulted in extensive litigation.

This prompted EPA to delay promulgation of the regulations until 2002 when more litigation forced the issuance of new regulations.

1. 358 F.3d 174 (2d Cir. 2004).
3. See Appalachian Power Co. v. Train, 566 F.2d 451 (4th Cir. 1977). In Train, the court rejected EPA's regulations because not enough technical information was included in them to provide the regulatees with sufficient notice of their obligations. Id. at 458-59. EPA indicated that inclusion of all the technical information necessary would make the regulations unmanageable and so published the technical data separately, but the court held that the regulations themselves must contain all necessary technical information; regulatees should not have to search for it. Id.
4. See Nat'l Pollutant Discharge Elimination Sys., 66 Fed. Reg. 65,256, (Dec. 18, 2001). EPA finally promulgated these regulations due to a consent decree mandating that it do so. See Cronin v. Browner, 898 F. Supp. 1052, 1064 (S.D.N.Y. 1995). In Cronin, an environmental group brought a citizen suit claiming that, absent regulations, industries were ignoring the "best available technology" requirements of sections 301 and 306 of the Clean Water Act. Id. at 1055. The court approved a consent decree requiring that the regulations be promulgated in a timely manner. Id. at 1064.
BACKGROUND

Many of the nation's industrial plants sit on water bodies such as rivers and streams because they provide a ready source of coolant for the plants' equipment. There are three basic types of cooling systems, each with varying water quantity needs. A "once-through" cooling system takes in river water, sends it through the facility once to absorb heat, then returns it directly to the river, at a much higher temperature. "Closed-cycle" cooling systems take in a set amount of water and continually recirculate it between heat-bearing machinery and reservoirs for cooling. New water is only added to these systems to compensate for evaporation, thus requiring far less water than "once-through" systems. Finally, "dry cooling" systems transfer heat via air drafts and use little or no water. The most environmentally damaging system, the "once-through," has been the most pervasives technology for decades.

Altogether, these plants allow a staggering amount of river water to flow through their systems at high velocities. The pressure created by...
moving such large amounts of water into these systems causes two problems. First, it impinges or traps large organisms, such as fish, against intake points resulting in serious injury or death. In addition, entrainment occurs when the pressure forces smaller organisms, such as eggs, larvae, and plankton, through the cooling system, also resulting in a high mortality rate. The extent of these problems is tremendous. “A single power plant might impinge a million adult fish in just a three-week period, or entrain some 3 to 4 billion smaller fish and shellfish in a year, destabilizing wildlife populations in the surrounding ecosystem.”

Congress, recognizing the devastating ecological impacts of impingement and entrainment, called on EPA to devise regulations to remedy this problem by including section 316(b) among its 1972 amendments to the CWA.

In 1977 the Fourth Circuit, in *Appalachian Power Co. v. Train*, struck down EPA’s first attempt at section 316(b) regulations on procedural grounds. The court found that EPA had failed to comply with the Administrative Procedure Act by relying on a development plan that was not published in the Federal Register as part of the regulations or made readily available during the notice and comment period. EPA had devised a plan of reducing impingement and entrainment that applied a technically complex process to each individual point-source, and EPA did not believe it was necessary to publicize the details because they would differ for each applicant. The court stated that “[w]hile we emphasize [that] we do not fault EPA for its point source by point source application, we are of opinion it is going to have to devise a less uncertain method of advising those affected of the conditions by which they are to be bound.”

In 1995, eighteen years after *Train* struck down EPA’s regulations, there were still no regulations governing intake devices. In *Cronin v. Browner*, the plaintiffs, a group of environmental organizations, brought suit under section 505 of the CWA, seeking to compel the EPA to heed

---

13. Id.
14. Id.
15. Id.
19. Id. at 457; See also Administrative Procedure Act, 5 U.S.C. § 552(a)(1) (2000).
22. Id.
its section 316(b) mandate and finally promulgate regulations to reduce impingement and entrainment on intake devices. Pursuant to a consent decree issued in that case, EPA agreed to issue the regulations in 2002.25

THE REGULATIONS EPA PROMULGATED

EPA plans to issue its rules concerning intake structures in three phases: Phase I regulates intake structures of new sources, while Phases II & III will regulate intake structures on existing sources.26 Riverkeeper involves only the Phase I regulations.

The system that EPA devised for regulating new facility intake systems has two tracks from which each facility may chose: Track I, the “fast track,” and Track II, which is the more flexible track although it is more administratively hefty for the regulatee.27 A facility that chooses to comply with Track I is subject to the following four rules:

1. the intake system must either withdraw fewer than 10 million gallons each day or reduce its intake to a level commensurate with a particular technology known as “closed-cycle” cooling,
2. the velocity of water moving through the intake point must be less than or equal to .5 feet per second,
3. the facility cannot withdraw a volume of water that is disproportionate to the size of the waterbody, and
4. the facility must “select and implement [additional] design and construction technologies or operational measures” to minimize impingement mortality and entrainment if the capacity, velocity, and proportionality standards are insufficient.28

A facility that chooses to take Track II must comply with identical proportional flow requirement, step (3), but it is not bound by the other specific requirements of Track I.29 Instead, Track II allows for technological innovation, stating that a facility may take any steps it chooses provided it can demonstrate “that the technologies employed will reduce the level of adverse environmental impact ... to a comparable level to that which’ would be achieved applying Track I’s capacity and velocity requirements.”30 Under the regulation, a reduction is

24. Id.
25. Id. at 1064.
28. Riverkeeper, 358 F.3d at 182; see also 40 C.F.R. §§ 125.84(h), (c) (2005).
29. Riverkeeper, 358 F.3d at 183; see 40 C.F.R. § 125.84(d) (2005).
30. Riverkeeper, 358 F.3d at 183, see 40 C.F.R. § 125.84(d) (2005).
"comparable" where a facility can show that either: (a) that the method employed will yield at least 90 percent of the reduction achieved in Track I, or (b) that the method will, via restoration measures, maintain a "substantially similar" level of fish and shellfish in the water body as Track I.  

The EPA regulations also contain a variance provision in the interest of fairness where compliance presents an undue hardship. This provision absolves a facility from complying with either Track I or II where the costs of compliance are so extreme as to outweigh the goals of the CWA.

**RIVERKEEPER, INC. V. EPA**

In *Riverkeeper, Inc. v. EPA*, the Second Circuit entertained motions to review EPA's water intake regulations from both Environmental Petitioners and Industry Petitioners. The Industry Petitioners sought review of Track I, "advanc[ing] eight challenges that have four themes: the Rule is insufficiently flexible, the Rule is too vague and malleable, the Rule contradicts the statute, and the Rule is unsupported by the record." The Environmental Petitioners sought review of Track II, claiming that: "Track II sets a lower standard than Track I (and therefore does not reflect the 'best technology available') and otherwise conflicts with the Clean Water Act, (2) the variance provision is precluded by statute, and (3) dry cooling is the best technology available."  

Although the court addressed each of the eight arguments presented by the Industry Petitioners, it found them to be hyper-technical and without merit, at one point referring to Industry Petitioners’ position as a

---

33. The court noted that:  
Where "compliance with [a] requirement . . . would result in compliance costs wholly out of proportion to the costs EPA considered in establishing the requirement at issue or would result in significant adverse impacts on" air quality, water resources, or local energy markets, the facility may comply with "less stringent" requirements than either Track I or II’s. *Riverkeeper*, 358 F.3d at 183 (citing 40 C.F.R. § 125.85 (2005)).  
35. There were two industry petitioners: Utility Water Act Group (UWAG) and the Manufacturers Intake Structure Coalition (MISC). *Id* at 183.  
36. *Id. See also id.* at 196-205 (outlining industry arguments).  
37. *Id.* at 183.
Accordingly, the court found that EPA was fully within its rights as an administrative agency in promulgating Track I, which it upheld.  

The court considered the Track II process, however, to be a more problematic issue. The Environmental Petitioners’ arguments against Track II broke down into four basic points. First, for EPA’s regulations to be consistent with Congressional intent, there must be national standards, not the case-by-case analysis under Track II. Moreover, the margin of error explicit in choosing Track II makes its requirements less stringent than Track I, which requires the best available technology. The court granted that EPA’s regulations must be consistent, and that national standards are the best way to achieve consistency. However, the court indicated, “Congress did not intend EPA to leave industry with only one means of reducing adverse environmental impact,” especially given the variable nature of the environments in which intake structures operate. The court stated that there must be some degree of leeway in EPA’s regulations to account for such differences; otherwise, they would effect an unfair result. Because of this variation, the court held that ten percent is an acceptable margin of error for EPA to allow, particularly in cases where a facility is exploring new and innovative intake solutions.

Second, the Environmental Petitioners argued that allowing facilities to employ “restoration measures” rather than demanding actual compliance is beyond the scope of EPA’s authority under section 316(b). The court agreed with the Petitioners on this point, noting the difference between the effects of restoration and the language of the CWA: “[r]estoration measures correct for the adverse environmental impacts of impingement and entrainment; they do not minimize those impacts in the first place.” The court also noted that plants employed

---

38. Id. at 201. Interestingly, the first and only court to cite the Riverkeeper opinion thus far is a court in the Southern District of New York that made reference to an Emerson quote that the Riverkeeper court used to dismiss the Industry Petitioners’ claims. See Lipton v. County of Orange, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004).
39. Riverkeeper, 358 F.3d at 205.
40. Id. at 188.
41. Id.
42. Id.
43. Id.
44. Id. at 188-89.
45. Id. at 188.
46. “Under this approach, it does not matter how many organisms a facility entrains or impinges provided it takes other steps that compensate for those losses in the ecosystem.” Id. at 189.
47. The court indicated that:

This [restoration provision] is plainly inconsistent with the statute’s text and Congress’s intent in passing the 1972 amendments. Section 316(b) instructs EPA to "minimize adverse environmental impact" by regulating the "location, design, construction, and capacity of cooling water intake structures." Reclaiming abandoned
restoration measures prior to the CWA, and it was dissatisfaction with such methods that resulted in the technology-based preventative measures presently in place. The court went on to point out that in 1982 Congress entertained proposed changes by EPA that "would allow [existing] dischargers to use measures equal in effect to the best technology available"—e.g. restoration measures, such as a fish hatchery—"to mitigate adverse effects." The failure of the proposed change to pass through Congress evinces EPA's lack of authority to employ such a program. Accordingly, the court held that EPA exceeded its authority in allowing the power plants to compensate for impingement and entrainment via restoration measures, and remanded the regulation to EPA for revision on that issue.

Next, the Environmental Petitioners argued that EPA exceeded its authority under the CWA in granting variances for new facilities because Congress only authorized variances for existing ones. Petitioners argued that because section 316(b) is silent concerning variances, the court should interpret that silence as an intentional omission by Congress. However, the court found EPA's argument on this point persuasive: section 316(b) is supposed to be construed as consistent with both section 301, which allows variances under certain circumstances, and section 306, which does not mention variances. Accordingly, section 316(b) is ambiguous because it does not explain how to comply with these two different standards—one allowing variance, and one disallowing variance—so EPA is within its discretion under Chevron to formulate its

---

48. "We think the EPA's own findings reveal that restoration measures are inconsistent with Congress's intent that the 'design' of intake structures be regulated directly, based on the best technology available, and without resort in the first instance to water quality measurements." Id. at 190.


51. Riverkeeper, 358 F.3d at 191.

52. Id. at 192. The language is clear that facilities may obtain variances in cases where data supports a finding that compliance with the regulations would result in extreme hardship, 40 C.F.R. § 125.85(a) (2005), but petitioners argued that this provision should apply only to existing facilities, not to new facilities built lacking the means to comply.

53. Id. at 193.

54. Id. The court construed the silence in Section 306 as an omission as well, thus necessitating reconciliatory analysis of the two seemingly disparate sections. Id.
own interpretation.\textsuperscript{55} The court found the agency’s interpretation to be reasonable, and therefore upheld EPA’s regulation granting variances under certain extreme circumstances.\textsuperscript{56}

Finally, the Environmental Petitioners argued that the dry cooling system is the best available technology and should be the standard, whereas EPA uses the closed-cycle system as the standard for best available technology in its regulations.\textsuperscript{57} The court noted that “if any entity has the ability to weigh the relative impact of two different environmental harms, it is the EPA.”\textsuperscript{58} The court further held that, given the costs involved and minimal difference in performance between the two technologies, EPA was within its discretion to determine that the closed-cycle system should be the benchmark for best available technology.\textsuperscript{59}

**ANALYSIS**

On eleven of the twelve arguments advanced among the petitioners, the court upheld the EPA regulations as valid. What, then, is the significance of the Riverkeeper decision? First, this is the only time a court has upheld any EPA regulation of an intake structure, and the court used some very strong language in support of EPA.\textsuperscript{60} Moreover, the court’s reaction to the points raised by the Industry Petitioners is equally indicative of its intent to provide EPA with as much leeway as possible in regulating intake structures. That the court took time to analyze each issue rather than focusing on the most important ones also suggests its desire to be very clear in its position concerning the EPA regulations.

\textsuperscript{55} Id.; Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (holding that courts shall give deference to an agency’s interpretation when congressional intent is unclear, so long as the agency’s interpretation is reasonable).

\textsuperscript{56} Riverkeeper, 358 F.3d at 194.

\textsuperscript{57} Id. EPA’s reasons for using the closed-cycle rather than the dry-cooling system to represent best available technology were as follows:

1. dry cooling costs more than ten times as much per year as closed-cycle wet cooling, but it is estimated to reduce water intake by only an additional 5 percent relative to once-through cooling;
2. dry cooling requires more energy and as a result yields more undesirable air emissions;
3. the costs of dry cooling would pose a barrier to entry for some facilities and discourage the construction of new facilities, which are generally better for the environment than existing facilities;
4. dry cooling is far less effective in warmer climates; and
5. dry cooling is not technically feasible for manufacturers and some types of power plants.

\textsuperscript{58} Id. (citations omitted).

\textsuperscript{59} Id. (citing BP Exploration & Oil v. EPA, 66 F.3d 784, 802 (6th Cir. 1995).

\textsuperscript{60} The Riverkeeper court was the first to address the new EPA regulations on impingement and entrainment. To date, no subsequent court has addressed this issue.
In addition, although the Second Circuit did not rule in favor of the Industry Petitioners, this case signals the court’s willingness to allow EPA to work flexibly with regulatees on fulfillment of the standards. By upholding the majority of Track II, the court recognized that compliance will mean taking different steps in different factual situations and granted EPA the ability to respond to such differences. In allowing EPA’s variance regulation, the court acknowledged that although industry should strive to meet the standards of the CWA, compliance may not always be possible and the law should provide accordingly.

Finally, the Second Circuit’s remand on the restoration issue illustrates the proposition that although EPA enjoys flexibility in its enforcement, its range of acceptable behavior has limits. EPA may not employ means outside of those permitted by the statute, and whatever means EPA chooses must achieve the end that the statute requires. The ruling that the specific language of a statute can limit an agency’s leeway may have implications beyond this case, because the interplay between statutory and regulatory law constitutes the bulk of environmental law. The message in this case is that regulators may interpret the language of a statute with some elasticity, but may not promulgate a rule from language that is not in the statute.\(^6\)

The regulations on intake structures have been a long time coming—thirty years, to be precise. Due to the specific nature of the problem they seek to remedy, pleasing everyone is a seemingly impossible task. The delicacy of the situation is evidenced by the fact that both environmental and industrial interests sought to overturn the regulations promulgated by EPA, one claiming the regulations are too strict, the other claiming that they are not strict enough. Although this is a relatively frequent occurrence especially when it comes to environmental regulations, the issue is particularly poignant in this case, where these regulations were decades in the making and where they address such a precise problem. Riverkeeper is the court’s acknowledgement of EPA’s uphill battle to find the best possible solution, and it also serves as a reminder that since EPA’s statutory task is to enforce the CWA, its regulatory activities must target that goal.

Reda M. Dennis-Parks
Eighth Circuit Affirms $151 Million Award against Nebraska for Violation of Interstate Compact

In *Entergy Arkansas, Inc. v. Nebraska*, the Eighth Circuit affirmed a stunning district court judgment of $151 million in damages against Nebraska for denying licenses to a low-level radioactive waste disposal site that Nebraska was required to host under the Central Interstate Low-Level Radioactive Waste Compact ("Compact"). Specifically, the Eighth Circuit upheld the district court ruling that Nebraska was not entitled to a jury trial, that the state had violated its duty of good faith under the Compact, and that monetary damages were the appropriate remedy for the violation.

Low-level radioactive waste (LLRW) consists of discarded items that have become contaminated with or exposed to radioactive material. The majority of LLRW is trash, protective clothing, and laboratory glassware that is used in a wide range of applications from nuclear power plants and manufacturing operations to hospitals and universities. Disposal of LLRW necessarily requires special precautions, and as a result few states have constructed their own facilities. To encourage states to develop regional LLRW facilities, Congress enacted the Low-Level Radioactive

---

Copyright © 2005 by the Regents of the University of California.


4. Id.

5. *Entergy III*, 226 F. Supp. 2d at 1088. Most of the waste that would have gone to the Nebraska facility would have been filters and plastics used for cleaning and maintenance of nuclear power plants. Id.

6. Normally, LLRW waste is buried underground. See, e.g., U.S. NUCLEAR REGULATORY COMM’N, supra note 3, at 26-27. Safe long-term burial of the wastes requires well-drained sites that are not prone to seismic activity or flooding, sites where waste barrels will not be surrounded by water into which radioactive molecules can leak, and sites that are not likely to be encroached upon by human developments. See 10 C.F.R. § 61.50 (2005). In 2002, only three facilities in the U.S. were available for LLRW disposal. They were sited in South Carolina, Washington and Utah. U.S. NUCLEAR REGULATORY COMM’N, supra note 3, at 26-27.
Waste Policy Act in 1980. Pursuant to this Act, Arkansas, Kansas, Louisiana, Nebraska and Oklahoma entered into the Compact, which was consented to by Congress and ratified in 1986. By entering into the Compact expeditiously, the states avoided both monetary fines and the loss of dumping privileges at the few waste sites existing at that time in the United States.

The Compact was implemented by a governing body (the "Commission"), made up of one representative from each state. The Commission was empowered to select a volunteer state to host a disposal facility, or to publicly seek and select an applicant to develop and operate a regional LLRW facility. When none of the member states submitted a proposal, the Commission solicited private applicants and selected U.S. Ecology, Inc. (USE) in 1987 to develop its first regional LLRW facility. Nebraska was subsequently chosen to host the site of this facility. USE applied to Nebraska's environmental and health departments for a license to build and operate the facility in 1990. That application was subjected to years of intense scrutiny, expensive study, and review. In 1998, it was ultimately denied.

The complex chain of funding that developed to pay for the extensive application process sparked the suit against Nebraska. State law required USE to pay both its own and Nebraska's costs related to the licensing process. However, given the magnitude of the project, the Commission advanced or covered most of these costs. The Commission raised the needed funds by securing prepayment from LLRW generators who would ultimately benefit from the disposal facility. When Nebraska

---

8. Entergy Ark., Inc. v. Nebraska (Entergy IV), 358 F.3d 528, 533–34 (8th Cir. 2004).
13. Id. at Art. V.
15. As none of the Compact’s member states volunteered to host the facility, Nebraska was selected as the LLRW site by vote of the Commission in December of 1987. Nebraska voted against its selection. Id. USE then had the task of identifying an appropriate site, and carefully studied three potential host counties in Nebraska before settling on Boyd County circa 1990. Entergy III, 226 F. Supp. 2d at 1089–90.
16. The Nebraska Department of Health and Human Services and Licensure (DOH) and the Department of Environmental Quality operated Nebraska’s Low-Level Radioactive Waste Program. Entergy IV, 358 F.3d at 535.
17. Id. at 536.
18. Id. at 537.
20. Entergy IV, 358 F.3d at 537.
denied USE’s application, those LLRW-generating companies, who had expended nearly 88 million dollars to fund the licensing review, sued Nebraska.\textsuperscript{21}

The case was appealed to the Eighth Circuit twice before a trial was held, as Nebraska tried to assert sovereign immunity under the Eleventh Amendment.\textsuperscript{22} The Eighth Circuit found that Nebraska had waived sovereign immunity as to any claim brought by the Commission by entering into the Compact,\textsuperscript{23} and that the language of the Compact allowed suit in federal court.\textsuperscript{24} During the eight week bench trial, the plaintiffs argued that by delaying license review, Nebraska had breached the good faith obligations described in the Compact and had tortiously conspired and interfered with the review process.\textsuperscript{25} Plaintiffs sought damages including interest for the money paid by the Commission as well as declaratory and injunctive relief.\textsuperscript{26}

The district court’s analysis culminated in a 110-page memorandum and order detailing its findings. The court held that Nebraska had significantly breached its duty of good faith in the licensing process.\textsuperscript{27} However, the court concluded that the equitable relief requested by the Commission to compel Nebraska’s granting of the necessary license was not feasible,\textsuperscript{28} and instead substituted monetary damages meant to cover the entire amount expended by the Commission in pursuing the license.\textsuperscript{29} Nebraska appealed this final decision of the district court on a number of grounds: error in the denial of a jury trial, error in evaluating its obligations under the Compact using a “good faith” standard, and error in awarding monetary damages plus interest.\textsuperscript{30}

In its decision, the Eighth Circuit carefully scrutinized the question of whether Nebraska had a Seventh Amendment right to a jury trial in a civil action.\textsuperscript{31} The court’s analysis followed a two part test developed by the Supreme Court.\textsuperscript{32} First, the court must decide whether the cause of

\textsuperscript{21} The generators also sued the Commission. However the Commission filed a cross claim and the district court restyled the Commission as a plaintiff. Id. at 538.
\textsuperscript{22} Entergy Ark., Inc., v. Nebraska (Entergy I), 210 F.3d 887 (8th Cir. 2000); Entergy Ark., Inc. v. Nebraska (Entergy II), 241 F.3d 979 (8th Cir. 2001).
\textsuperscript{23} Entergy II, 241 F.3d at 988.
\textsuperscript{24} Entergy I, 210 F.3d at 897.
\textsuperscript{25} Entergy II, 241 F.3d at 984.
\textsuperscript{26} Id.
\textsuperscript{28} The court found that granting an injunction to require Nebraska to complete the licensing process as originally requested would be problematic given the state’s “long-standing lack of professionalism and independence.” The court was also concerned that Nebraska’s withdrawal from the compact would limit the enforcement of injunctive relief. Id. at 1160-61.
\textsuperscript{29} Entergy III, 226 F. Supp. 2d at 1054.
\textsuperscript{30} Entergy Ark., Inc. v. Nebraska (Entergy IV), 358 F.3d 528, 540 (8th Cir. 2004).
\textsuperscript{31} Id. at 540-48.
action is one for which the right of jury has been preserved. This is decided by determining whether an analogous case would have merited a jury trial in eighteenth century England.33 Second, the court evaluates the remedy requested to ascertain whether it is legal or equitable in nature.34 In practice, the nature of the remedy sought is often the more persuasive prong of the analysis.35 Rather than viewing the Compact as an ordinary contract which normally would be examined by a jury under common law, the appellate court classified the dispute as a controversy between sovereign states.36 The Commission's status was viewed as closer to that of a sovereign than an ordinary litigant, due to its role as a stand-in for the member states of the Compact.37 Thus, the court considered the closest analog to be a dispute among colonies, which would have been settled by a king or royal council in the eighteenth century, rather than a jury.38 Viewing the case as a dispute among sovereign states meant that jury trial was not necessary.39

Likewise, the second prong of the test, which evaluates whether the relief sought is legal or equitable in nature, also indicated that a bench trial was appropriate. Only that relief which is "sought" is relevant to the analysis, as opposed to that which is ultimately granted, and the court considered the plaintiffs to have sought primarily equitable relief.40 If the trial had proceeded quickly, the compensatory damages the Commission sought for losses in the licensing process would have been considered tangential compared to the order for performance the plaintiffs sought.41 Thus, the court found the remedy requested by the Commission to be mainly "sweeping equitable and declaratory relief" intertwined with damages, and the perceived preference for equitable remedy controlled the decision not to grant a jury.42

33. Granfinanciera, 492 U.S. at 41–42.
34. Id. at 42.
36. Entergy IV, 358 F.3d at 541–43. The Compact was further distinguished from an ordinary contract and given more weight due to its enactment into federal law through ratification by Congress. See id. at 542.
37. Id. at 543. The Commission was explicitly authorized to participate in any judicial or administrative proceedings related to the Compact. Central Compact, supra note 10, at Art. IV(e). The court construed the Commission's charge to "require all party states . . . to perform their duties" by "appropriate action" in judicial or administrative fora as the power to sue those party states. See Entergy IV, 358 F.3d at 543; Central Compact, supra note 10, at Art. IV(m)(8). Further, since the Commission is controlled by one representative of each member state, and only acts on a majority vote of those representatives, the implied a role of the Commission closely related to member states' sovereign powers. See Entergy IV, 358 F.3d at 543.
38. Id. at 543.
39. Id. at 544.
40. Id. at 545.
41. Id.
42. Id.
The Eighth Circuit validated this reasoning even though the ultimate remedy consisted of damages and declarative relief only. Since Nebraska had acted in bad faith, and the licensing process had become "badly tainted," the district court held that injunctive relief would be unworkable. The monetary award was then considered equitable in nature. Citing the Restatement (Second) of Contracts, the court indicated that "compensatory damages for losses already incurred in the absence of an injunction" were the province of a court of equity in the case of non-performance of a contract, and so the large monetary award in this case was not inconsistent with the district court's decision to deny a jury trial.

A second matter of contention on appeal was the district court's grounding of liability in Nebraska's breach of an implied covenant of good faith. The Compact provided that parties had the right to rely on good faith performance from each other. The court interpreted this good faith clause as a separately enforceable and explicit covenant between the parties. Furthermore, the court found that the Commission had a vested power to initiate proceedings including the ability to enforce the good faith clause as an independent claim. The appeals court also found that the district court evaluated this claim under the appropriate standard of review, despite the competing fact that the Compact indicated that a state's membership in the Compact would be revoked only on behavior found to be arbitrary or capricious. Thus, the Commission's case against Nebraska became a simple case of proving a breach of good faith by a preponderance of the evidence. Adopting definitions of good and bad faith from the Restatement (Second) of Contracts, the court found ample evidence of bad faith in the fact that the Governor of Nebraska was staunchly opposed to the LLRW disposal site, that he appointed and directed subordinates to work to prevent it, that Nebraska filed and lost or settled a number of suits against the Commission, and that the final decision not to license the project was based on a mere pretext. In the court's analysis, good faith behavior was

43. Id. at 539-40.
44. Id. at 545.
45. Id. at 546.
47. Entergy IV, 358 F.3d at 546.
48. Id. at 547.
49. Id. at 548.
50. Id.
51. Id. at 547.
52. Id. at 535; Id. at 551 (reporting that in fact, the Nebraskan Governor elected in 1991 ran for office on a campaign platform whose main plank was keeping LLRW out of Nebraska).
53. Id. at 548–53 (noting that the decision to deny the license claimed to be based on a significantly simpler analysis than the two larger studies commissioned by Nebraska that concluded the site was fine for LLRW).
inconsistent with denying a license for a LLRW site "for reasons not related to the merits." 54

The last area of contention was the question of whether monetary damages were appropriate. The Eighth Circuit agreed with the lower court's holding that an earlier interlocutory appeal had settled that "the state's waiver of immunity [in joining the Compact] extended to the Commission's claim for damages..." 55 So, in reviewing the damage award, the court skipped over this question and focused its analysis on whether the district court was correct in concluding that equitable relief was unworkable. 56 Given the court's holding that Nebraska had a duty of good faith under the Compact and that Nebraska's breach of that duty had been pervasive and extreme, it held that the district court did not abuse its discretion by concluding that because a fair review of a LLRW license was not possible in Nebraska, no injunctive remedy was available. 57 Because of the lack of equitable relief, the court held Nebraska liable for compensatory damages for the entire cost of the eight years of the license review process. 58 The court followed Supreme Court precedent in awarding prejudgment interest as part of the remedy for breach of an interstate compact, something it considered valid even though the Compact was silent on the matter of whether either damages or interest should be paid. 59

A petition for rehearing en banc was denied, but a published dissent to the decision points out the sparse analysis on which the Eighth Circuit based its finding that the state had waived sovereign immunity to monetary damages awards. 60 The dissent notes that the question of whether the state's waiver of immunity in entering the Compact did actually extend from equitable relief to the payment of damages was not actually settled in the earlier decisions. 61 In fact, the earlier Eighth Circuit decision only acknowledged that Nebraska had submitted to a partial waiver of immunity, and only the question of whether Nebraska was subject to suit in federal court had been settled conclusively. 62 Further, the previous Eighth Circuit decision indicated that injunctive relief would

54. Id. at 553.
55. Id. at 538–39.
56. Id. at 554.
57. Id.
58. Id. at 555.
61. Id. at 689.
62. Id. (quoting Entergy Ark., Inc. v. Nebraska (Entergy I), 210 F.3d 887, 899 (8th Cir. 2000)).
be important because “money damages could well be barred by Nebraska’s sovereign immunity.” 63 This important question was not revisited in the later appeals, but treated as settled in the most recent decision. Finally, the dissent notes that protecting a state’s treasury from “financial ruin” is the core of the Eleventh Amendment immunity. 64 and that the Supreme Court has tended to interpret waivers of that immunity narrowly. 65 Unfortunately, these issues have been left unsettled by the Supreme Court, which denied certiorari. 66

Allowing this large monetary award to stand against Nebraska without requiring a careful analysis as to whether sovereign immunity was actually waived may encourage an increase in lucrative actions against states through the mechanism of interstate compacts. Given that the number of LLRW waste sites in the United States is no larger than it was when the LLRW Act was passed in 1986, clearly the system of LLRW Compacts has not achieved the desired result thus far. Perhaps, then, encouraging LLRW facility siting is the courts’ goal in awarding severe monetary damages for noncompliance with an interstate compact. It remains to be seen whether the threat of crippling financial penalties for rejecting LLRW facility licenses will finally lead to facility development. In the meantime, however, the consequences are clear. States may be less willing to enter into interstate compacts or contest decisions of a compact’s ruling body when the state’s treasury is at risk, even though such decisions may affect the health and safety of citizens. Given states’ resistance to building radioactive waste dumps within their borders, these issues left unsettled in the Eighth Circuit’s Entergy Arkansas, Inc. v. Nebraska ruling on interstate compacts and sovereign immunity will likely be revisited, and soon.

Erin C. Jones

---

63. Id. at 899.
65. See id. at 690.
Ninth Circuit Limits NAGPRA to Remains Linked with Presently Existing Tribes

In Bonnichsen v. United States, the Ninth Circuit examined an unresolved issue arising from the application of the Native American Graves Protection and Repatriation Act (NAGPRA) to ancient human remains. The court held that when neither the Department of Interior (DOI) nor Native American groups could establish any relationship between human remains and an existing indigenous tribe, the remains could not be considered "Native American." Consequently, NAGPRA did not apply to protect the remains and scientists could access them for research purposes. Three district court opinions preceded the Ninth Circuit decision in Bonnichsen. In each, a group of scientists challenged the government's interpretation of NAGPRA and argued for the return of archaeological remains they wished to study. The government appealed the last of these three decisions to the Ninth Circuit, where the scientists ultimately prevailed.

In July 1996, teenagers attending a boat race on the Columbia River near Kennewick, Washington discovered a skeleton, later nicknamed "Kennewick Man," on land under the control of the United States Army Corps of Engineers ("Corps"). The county coroner, puzzled about the age and identity of the skeleton, asked an anthropologist to assist in the examination of the bones. This anthropologist, Dr. James Chatters,
obtained a permit under the Archaeological Resources Protection Act \(^8\) to remove the remains from the Corps' property for study.\(^9\) Early hypotheses included ideas that the remains belonged either to an early European settler or to an American Indian.\(^10\) Chatters used the physical features and a stone projectile point embedded in the skeleton's hip to estimate the remains' age and geographical origin.\(^11\) When a radiocarbon test revealed that the bones were between 8,340 and 9,200 years old, the age and preservation quality of the skeleton attracted considerable attention from the scientific community.\(^12\)

Before scientists could analyze the remains, four Indian groups ("Tribal Claimants"),\(^13\) claimed "Kennewick Man" as their ancestor. They demanded the return of the remains for burial in keeping with indigenous religious and cultural practices.\(^14\) As required by NAGPRA, the Corps filed a newspaper notice stating that it planned to repatriate the remains to the Tribal Claimants.\(^15\) After the Corps published this notice, the scientists alerted the government of their protest of the intended repatriation.\(^16\)

Upon consideration of the Tribes' claim and the scientists' objections, the Corps agreed with the Tribal Claimants, reasoning that the age and location of the remains made them "Native American" for purposes of NAGPRA.\(^17\) The Corps then seized the remains from Dr. Chatters, halted testing, and decided to return "Kennewick Man" to the Tribes for burial.\(^18\) After the Corps published a Federal Register notice of reparation pursuant to NAGPRA, the scientists began this litigation to demand access to the remains for research purposes.\(^19\)

---

\(^9\) *Bonnichsen II*, 969 F. Supp. at 631.
\(^10\) *Bonnichsen*, 357 F.3d at 967. The meaning of "Native American" as intended by NAGPRA was an issue of much contention among the litigants. The court uses the terms "American Indian" and "Native American" interchangeably throughout its opinion.
\(^11\) *Id.*
\(^12\) *Id.*
\(^13\) Excavations in the United States have uncovered fewer than a dozen skulls that are 8,000 years or older. Unlike most finds from this period, ninety percent of Kennewick Man's skeleton was intact and in good condition. Scientists viewed Kennewick Man as a critical opportunity to learn more about a time in North American history not clearly understood.
\(^14\) *Bonnichsen*, 357 F.3d at 967. The Tribal Claimants include: the Confederated Tribes & Bands of the Yakama Indian Nation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Colville Reservation in Washington.
\(^15\) *Bonnichsen II*, 969 F. Supp. at 618.
\(^16\) *Id.*
\(^17\) *Bonnichsen II*, 969 F. Supp. at 641. Some of the facts the Corps relied on were later found to be incorrect.
\(^18\) *Bonnichsen*, 357 F.3d at 968.
\(^19\) *Id.*
Congress enacted NAGPRA in 1990 with the goal of respecting American Indian burial customs. NAGPRA gives district courts jurisdiction “over any action brought by any person alleging a violation” of the statute. Courts apply a two-step inquiry to determine if and how NAGPRA applies to remains or cultural artifacts. First, the court ascertains if the remains are “Native American” by means of a substantial connection to an existing American Indian tribe or group. If the remains do not meet this statutory definition, NAGPRA does not apply. The finding of a substantial connection triggers a second inquiry where the court must determine the closest tribal affiliation of the remains for repatriation. NAGPRA requires the publication of a notice before repatriation.

The District Court of Oregon’s three opinions trace the arguments and motions of the plaintiff scientists, the Corps, DOI, and the Tribal Claimants. In the first opinion, (hereinafter Bonnichsen I) the government moved to dismiss on ripeness grounds, for failure to exhaust administrative remedies, and for failure to state a claim of NAGPRA violations. The court denied the ripeness and exhaustion motions because the Corps had reached several final agency actions as indicated by the administrative record. The court also denied the government’s motion for failure to state a claim regarding NAGPRA’s constitutionality, finding it preferable to wait until later in the litigation to decide the merits of that claim. As if the court could foresee that the issue would reappear on its docket, it cited several assertions from the government that NAGPRA applies only to the remains of "Native

20. Bonnichsen, 357 F.3d at 973.
21. Id. at 971 (quoting 25 U.S.C. § 3013 (2000)). In interpreting this provision, the court held that Congress did not intend for only American Indians or Tribes to have standing to bring suit.
22. Id. at 972.
23. Id.
24. Id. at 974.
26. Another group of plaintiffs, the Asatru Folk Assembly, disputed the Corps and DOI contention that the remains were of an American Indian. The Asatru, a pre-Christian European religious group, claimed Kennewick Man as their European ancestor and supported the scientists' research goals. The Asatru abandoned their suit in 2000 due to a lack of resources. For more information on the Asatru's role in the litigation, see the Asatru Folk Assembly website, available at http://www.runestone.org/kmend.html (last visited April 10, 2005).
29. Id. at 620-21.
30. Id. at 626-27. The court notes that there is almost no case law about NAGPRA at all. Id. at 625.
In this early opinion, the court specified that if the remains could not be proven "Native American" under the first part of the two-step inquiry, NAGPRA would not apply.\(^3\)

In the second opinion (hereinafter *Bonnichsen II*), the government argued that the plaintiff scientists lacked standing to bring this claim because under the "zone of interests" rule, only plaintiffs seeking to enforce rights to repatriate remains or cultural objects can pursue a NAGPRA action.\(^3\) The court rejected this argument, holding that the plaintiffs had standing.\(^3\) The court reasoned that since the government's action directly impacted the plaintiffs by preventing them from studying the remains, the zone of interests rule did not apply.\(^3\) Further, the language in the enforcement section of NAGPRA allowed for broad jurisdiction, enabling courts to hear "any action" brought by "any person alleging a violation."\(^3\) Finally, the court concluded that the Corps had "made a hasty decision," vacated the Corps pronouncement that the remains belonged to a Native American, and ordered the Corps to undertake a more thorough review of the facts.\(^3\)

In the last case (hereinafter *Bonnichsen III*), the court enjoined the government from transferring the remains to the Tribal Claimants and ordered the government to allow the plaintiffs to study the remains of Kennewick Man.\(^3\) Finding that the age and discovery location within the U.S. were insufficient reasons for DOI to decide that Kennewick Man was Native American, the court rejected the government's and Tribal Claimants' argument that the court should follow *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*\(^3\) and defer to the Secretary of Interior's decision.\(^3\) The court found that DOI was not entitled to *Chevron*-style deference because the agency did not undertake a formal

---

31. *Id.* at 623.
32. *Id.*
33. *Bonnichsen v. United States (Bonnichsen II),* 969 F. Supp. 628, 636 (D. Or. 1997). The "zone of interests" rule denies standing to plaintiffs whose interests are only marginally related to or inconsistent with a statute's purposes.
34. *Id.* at 635–36.
35. *Id.* at 636
36. *Id.* at 637.
37. *Id.* at 641–42. The court noted that some Corps officials did not voice their concerns about the accuracy of the decision in the interests of advancing positive relations with Native Americans.
38. *Bonnichsen v. United States (Bonnichsen III),* 217 F. Supp. 2d 1116, 1167 (D. Or. 2002). By this stage in the litigation, the district court took the opportunity to comment on the Corps' misplacement of some of Kennewick Man's bones and the problems the Corps created by burying the discovery site under two million pounds of dirt. This latter action caused the court to declare that the Corps had violated the National Historic Preservation Act. *Id.* at 1124–25, 1131, 1167.
39. 467 U.S. 837, 866 (1984) (holding that courts should defer to an agency's reasonable statutory interpretation where Congress has delegated authority to that agency).
process of notice and comment rule-making or formal adjudication. The issues decided in *Bonnichsen III* formed the basis for the government’s appeal to the Ninth Circuit.

The Ninth Circuit affirmed the opinions and reasoning of the district court. The court focused on deciding whether or not Kennewick Man met the NAGPRA definition of “Native American.” The decision centered on grammatical detail in the statute. The language of NAGPRA defines “Native American” remains as those “of, or relating to, a tribe, people, or culture that *is indigenous* to the United States.” In comparison, the DOI regulations implementing NAGPRA defined the term as “a culture *indigenous* to the United States.”

The court interpreted the use of the present tense in the statutory definition as a requirement that necessitates a relationship between the remains and a tribe, culture, or people that is “*presently existing*.” The DOI regulation did not contain the present-tense construction of the statute, and so the court found it in conflict with NAGPRA and thus invalid. The court referenced the congressional purpose of NAGPRA to respect modern American Indian burial traditions as further justification for a “*presently existing*” connection. The court reasoned that the DOI regulations did not serve Congress’s intent to transfer only those remains with which a tribe can establish a specific lineal or cultural link because the regulations lacked the emphasis on “*presently existing*” tribes. The court found that the DOI regulations would recognize remains as “Native American” based solely on age and geography, a concept that it found irreconcilable with NAGPRA’s legislative history and statutory construction.

The Ninth Circuit affirmed the district court’s finding that the record reflected no evidence of an ancestral relationship between Kennewick Man and any of the Tribal Claimants. The court noted that the age of Kennewick Man’s remains made it “almost impossible” to demonstrate a linkage between the remains and any presently existing tribe. As none of the Tribal Claimants could establish a relationship, the Ninth Circuit

---

41. *Id.*
42. *Bonnichsen v. United States*, 357 F.3d 962, 967 (9th Cir. 2004).
43. *Id.* at 968.
44. *Id.* at 972.
46. *Id.* at 975 (quoting 43 C.F.R. § 10.2(d) (2005)) (emphasis in opinion).
47. *Id.* at 972 (emphasis added).
48. *Id.* at 975.
49. *Id.* at 973-74.
50. *Id.* at 974-75.
51. *Id.* at 974.
52. *Id.* The evidence examined included morphology and oral history. *Id.* at 978-79.
53. *Id.* at 977.
held that NAGPRA was inapplicable to Kennewick Man's remains. The plaintiffs were therefore free to study Kennewick Man's remains.\footnote{Id. at 974. With this finding, the court cut short its two-part inquiry regarding Kennewick Man's potential relationship to the Tribal Claimants. Had the record allowed the conclusion that Kennewick Man was Native American, the court would next have asked which Claimant should receive the repatriated remains.}

In its \textit{Bonnichsen} decision, the Ninth Circuit attempted to answer the question: who owns the ancient history of humanity? The plaintiff scientists viewed Kennewick Man as a historical and cultural resource "of national and international significance"\footnote{Bonnichsen v. United States (\textit{Bonnichsen I}), 969 F. Supp. 614, 618 (D. Or. 1997).} that could be the key to understanding humanity's past, while the Tribal Claimants thought of the bones as the remains of their ancestor, "the Ancient One," who deserved a proper burial.\footnote{Bonnichsen, 357 F.3d at 966.} The court faced the difficult task of applying a law to the differing values of anthropological research and religious adherence. Both sides may have lacked empathy for the other's interests, yet each represented complex views of culture and history and promoted unique and valuable attributes. Throughout the long litigation, both the scientists and the Tribes furthered the important debate over how Americans and the U.S. government should relate to the ancient and modern past.

Both the district court and the Ninth Circuit demonstrated sensitivity to tribal interest regarding human remains and burial artifacts. In recounting NAGPRA's legislative history, the district court noted that Native Americans have historically endured abuses such as vandalism of ancestors' burial sites, theft of their skeletons and funerary items, and the display of remains in public museums.\footnote{Bonnichsen v. United States (\textit{Bonnichsen II}), 969 F. Supp. 628, 649 (D. Or. 1997).} The court also observed the Corps' intention to foster a spirit of cooperation with the tribes in hopes of establishing better tribal-government relations on many issues.\footnote{Id. at 639.} Given the government's checkered history regarding its treatment of Native Americans, these positions could be seen as understandable, even laudatory. Yet DOI's first responsibility must be, as the court held, to Congress and to the laws it has authority to implement.

\textit{Bonnichsen} reveals the incompleteness of NAGPRA: in designing a statute to govern the transfer of remains to tribes, Congress wrote a law that does not apply to remains that are so old that proving a tie to a modern tribe is impossible for modern science. Neither the protection nor exploitation of historic, cultural, or environmental resources should rest on verb conjugations alone. If Congress agrees with the result in \textit{Bonnichsen}, clarifying the language of NAGPRA would allow future decisions regarding similarly situated remains to rest on stronger language than the tense of the word "is." In contrast, if \textit{Bonnichsen} is not
in keeping with congressional intent, an amendment is warranted. As testing and research on Kennewick Man have only just begun, it remains to be seen what answers his bones hold about the ancient history of North America. Just as likely, Kennewick Man will only leave science with more questions.

Jenna Musselman

---

59. As of this writing, Senator John McCain (R-AZ) introduced a bill that would add the words "or was" to NAGPRA's definition of "Native American." As amended, 25 U.S.C. § 3001(9) would read, "'Native American' means of, or relating to, a tribe, people, or culture that is or was indigenous to the United States." (emphasis added). See Native American Omnibus Act of 2005, S. 536, 109th Cong., available at http://www.govtrack.us/congress/bill.xpd?bill=s109-536 (last visited June 15, 2005). Scientists have opposed the bill, although it likely would not apply retroactively to Kennewick Man. See also Matthew Daly, Kennewick Man Scientists Protest Bill, Associated Press, Apr. 8, 2005, available at http://msnbc.msn.com/id/6145131/ (last visited June 15, 2005).
A Hard Look at a Noble Hawk:

Ninth Circuit Requires Explicit Response to Opposing Scientific Viewpoints in a Final EIS

In Center for Biological Diversity v. United States Forest Service,¹ the Ninth Circuit held that the Forest Service violated the National Environmental Policy Act (NEPA) and its implementing regulations by failing to disclose and address criticism of its own scientific reasoning.² Specifically, the court found the agency had deemed the Northern goshawk a “habitat generalist” and then, in a Final Environmental Impact Statement (EIS), effectively ignored commenting scientists’ protestations that this bird strongly prefers old-growth forest habitat.³ The decision forced the Forest Service to reopen environmental impact analysis of a management plan amendment for several national forests in the Southwestern United States. More importantly, it provided ammunition for environmentalists’ future attacks on EISs that do not meaningfully address scientific objections to the agency’s reasoning.

The Northern goshawk (Accipiter gentilis) is the largest species in the genus that comprises hawks and eagles.⁴ Advocates of biodiversity protection, concerned about the impact of ongoing and widespread logging in the region, have tried to secure listing of the Northern goshawk as a threatened or endangered species.⁵ Although these efforts have so far been unsuccessful, the Forest Service designated the Northern

¹. 349 F.3d 1157 (2003).
³. 349 F.3d at 1167-69.
⁵. Ctr. for Biological Diversity v. Badgley, 335 F.3d 1097 (9th Cir. 2003).
goshawk as a “sensitive species” in 1982, and the bird serves as a management indicator species for several specific national forests.

In 1992, the Forest Service published a notice of its intent to prepare an EIS for an amendment to the Southwest regional forest management plan, focusing on management guidelines for the Northern goshawk and one other species. A few weeks later, the Forest Service's Northern Goshawk Scientific Committee released a report which stated that the Northern goshawk is a “habitat generalist” and thus would thrive in a “mosaic” of varied forest types, conditions, and ages. This report served as the foundation for subsequent Forest Service determinations of goshawk habitat needs.

As the environmental review process for the management plan amendment proceeded, several entities submitted comments refuting the Forest Service's assertion that Northern goshawks are habitat generalists. The director of the Arizona Game and Fish Department objected to the generalist classification and attached a “review paper” summarizing contrary scientific evidence. Similarly, the Regional Director of the U.S. Fish and Wildlife Service submitted a letter that cited eight scientific studies, each concluding that Northern goshawks fare best in mature forests with dense canopy cover. The administrative record for the case includes the Forest Service's formal responses to these submissions: it argued that even if goshawks prefer mature forest, they are not “limited” to a particular forest type.

The Forest Service issued its draft EIS in August 1994. It described five possible alternatives for a management plan and stated that each was “not expected to have an [sic] significant adverse effect on goshawk

---


9. 349 F.3d at 1161.

10. Id.

11. Id.

12. Id. at 1161-62.
population viability." It included a vague, summary rejection of previous commenters’ objections:

A few commenters expressed concern that the proposed standards and guidelines for the... northern goshawk are grossly inadequate to protect the birds... [T]he guidelines have been developed over several years using the best information and scientific review available. This amendment will incorporate the current information in each Forest Plan. The standards and guidelines in Forest Plans can easily be updated through future amendments.

No reference to the federal and state agencies’ specific objections appeared in the draft EIS.

After it promulgated the draft EIS, the Forest Service received three additional comments harshly criticizing its characterization of the Northern goshawk as a habitat generalist. The Arizona Game and Fish Department and the New Mexico Department of Game and Fish, writing jointly, again referenced the scientific evidence for considering the Northern goshawk a habitat specialist rather than a generalist. They also expressed frustration that this issue was “not adequately addressed or evaluated in the [draft] EIS”, and recommended specific management guidelines that would more effectively preserve mature forest canopies for the goshawks’ benefit. In addition, scientist D.C. Crocker-Bedford submitted a letter challenging the classification of the Northern goshawk as a habitat generalist. Finally, the Southwest Center for Biological Diversity (CBD), together with the Sierra Club, called for more preservation of old-growth tree stands and better protection of the goshawk, citing several scientific articles that classified the goshawk as a specialist in old-growth or otherwise mature forests. These two groups would go on to become plaintiffs in the lawsuit challenging the final EIS.

The Forest Service issued a final EIS for the management plan amendments in October 1995. It elected to adopt Alternative G, which combined the previously advocated “mosaic” of vegetation types with an overall minimum of twenty percent old growth forest. Significantly, the

13. Id. at 1162.
14. Id. at 1163.
15. See id.
16. Id.
17. Id. Crocker-Bedford works for the Forest Service as a wildlife biologist, but wrote this letter in his individual capacity. He cited his own academic research and other studies indicating goshawks’ strong preference for older forest types, arguing that the Forest Service should impose a moratorium on all timber harvesting within old-growth ponderosa pine forests on the basis of the goshawks’ habitat predilections.
18. Id. at 1163-64. Between the filing of the complaint and the conclusion of this litigation, CBD dropped the “Southwest” from its name. Id. at 1164 n.7.
19. Id. at 1164.
20. Id.
final EIS responded to comments on the draft EIS only in the aggregate: it sorted the 418 total comments into three categories, and responded to each category as a whole. The Forest Service also attached, in an appendix, copies of selected comments, including the joint letter from the Arizona and New Mexico wildlife agencies — but it omitted the previously attached Review Paper that detailed state scientists’ objections. The Forest Service claimed that it had “conducted an extensive review” of the scientific citations, but did not specifically respond to the state agencies’ criticism, and stated that it was not reprinting the agencies’ full submission because of space constraints.\textsuperscript{21} It also declined to reprint the comments submitted by Crocker-Bedford and by the eventual plaintiffs.\textsuperscript{22} After accepting additional comments, the Forest Service in June 1996 issued a Record of Decision affirming the choice of alternative previously announced in the final EIS.\textsuperscript{23}

The Ninth Circuit reviewed \textit{de novo} the district court’s award of summary judgment for the defendants,\textsuperscript{24} and evaluated the Forest Service’s decision under a clause of the Administrative Procedure Act that forbids agency action “without observance of procedure required by law.”\textsuperscript{25} It applied the “rule of reason” standard to determine whether the decision met the minimum standards set forth by NEPA and the accompanying regulations promulgated by the Council on Environmental Quality (CEQ).\textsuperscript{26} This legal standard, previously adopted in \textit{Kern v. United States Bureau of Land Management}, requires the court to ascertain whether the EIS contained a “reasonably thorough discussion of the significant aspects of the probable environmental consequences.”\textsuperscript{27} The \textit{CBD} court emphasized that NEPA’s purely procedural nature makes agency adherence to proper procedure especially important,\textsuperscript{28} and that an agency must take a “hard look” at a proposed action’s environmental consequences in order to fulfill the NEPA mandate.\textsuperscript{29} The parties in this litigation did not dispute that highly critical scientific comments about the goshawk’s habitat preferences warranted a

\begin{itemize}
\item \textsuperscript{21} \textit{Id.} at 1165.
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.} (citing Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001)).
\item \textsuperscript{25} 349 F.3d at 1165; 5 U.S.C. § 706(2)(D) (2000).
\item \textsuperscript{26} 349 F.3d at 1166; \textit{see infra} note 28 and accompanying text.
\item \textsuperscript{27} \textit{Id.}; \textit{Kern v. Bureau of Land Mgmt.}, 284 F.3d 1062, 1071 (9th Cir. 2002). The \textit{CBD} court noted that this standard is very similar to the previous “arbitrary and capricious” standard. 349 F.3d at 1166, citing \textit{Neighbors of Cuddy Mountain v. United States Forest Serv.}, 137 F.3d 1372, 1376 (9th Cir. 1998) (evaluating adequacy of NEPA analysis under arbitrary and capricious standard).
\item \textsuperscript{28} \textit{See} 349 F.3d at 1166.
\item \textsuperscript{29} \textit{Id.}, citing Churchill County, 276 F.3d at 1072; \textit{Kern}, 284 F.3d at 1066. The Court refers to this case as \textit{Kern v. Oregon Natural Resources Council}, but the Natural Resources Council was a co-plaintiff; the correct title is \textit{Kern v. Bureau of Land Management}.  
\end{itemize}
Forest Service response. Their quarrel centered on whether the Forest Service's actions constituted a legally valid response. The Council on Environmental Quality has promulgated NEPA's accompanying regulations, one of which requires that the agency "shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement." This requirement "reflects the paramount Congressional desire to internalize opposing viewpoints into the decision-making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision."

The CBD court held that because the state agencies' research paper was wholly redacted from the final EIS, the agency failed to disclose and discuss a reasonable differing viewpoint at that crucial stage. It also rejected the agency's claim that it fulfilled the regulatory requirement by including and discussing an additional action alternative, namely a forest management scheme that would have preserved more old growth trees, in the final EIS. According to the court, the Forest Service failed to acknowledge, explain, and address the scientific critiques that provoked inclusion of that alternative. In sum, the court considered the information included in the final EIS insufficient to fulfill the spirit of the CEQ regulations and of NEPA itself.

Beyond its particular holding, this decision reiterates the requirement that agencies respond directly and explicitly to scientific criticism, a key component of NEPA's policy mandate. Under longstanding Ninth Circuit caselaw, "grudging, pro forma compliance" with NEPA "will not do." Nonetheless, agencies sometimes attempt to evade the full light of public scrutiny, as well as to save time and resources, by aggregating numerous commenters' input as a single "comment" and/or by providing only cursory responses. The CBD court in dicta stressed the regulatory requirement that an agency acknowledge and treat opposing views "in the final statement." It soundly rebuffed the Forest Service's attempts to rely on its summary rejection statement in the draft EIS, or on internal communications subsequent to the final EIS, as proof that it properly considered goshawk issues in making and

---

30. 40 C.F.R. § 1502.9(b) (2005).
31. 349 F.3d at 1167-8 (quoting California v. Block, 690 F.2d 753, 771 (9th Cir. 1982)).
32. 349 F.3d at 1168.
33. Id. at 1164, 1168.
34. California v. Block, 690 F.2d at 769 (quoting Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974)).
executing its forest plan. In the months since CBD was decided, several plaintiffs have cited this case in the course of arguing that other final EISs were insufficient.

CBD continues the Ninth Circuit tradition of strictly interpreting and enforcing NEPA, even amidst less stringent standards in other circuits. The court's specific holding, that an agency must explicitly respond to reasonable scientific criticism in the final environmental impact statement regardless of previous developments, may prove useful to future NEPA litigants. The decision also illustrates and reiterates the Ninth Circuit's overall tough stance on NEPA, including its intention of requiring agencies to comply fully with the letter and spirit of the CEQ regulations accompanying NEPA.

Amanda C. Goad

35. 349 F.3d at 1167.
37. See Antonio Rossman, NEPA: Not So Well at Twenty, 20 ENVTL. L. REF. 10174 (1990) (recounting historical trend toward narrowing of NEPA mandate, except in the Ninth Circuit); Jay E. Austin, et al., Environmental Law Institute, Judging NEPA: A "Hard Look" at Judicial Decision Making Under the National Environmental Policy Act (2004), at http://www.endangeredlaws.org/downloads/JudgingNEPA.pdf (tabulating outcomes of NEPA challenges by environmentalist plaintiffs and finding dramatically greater success rates before judges appointed by Democratic judges, while more and more such cases are being heard by less sympathetic Republican appointees).
Earth Island Institute v. United States Forest Service:

Salvage Logging Plans in Star Fire Region Undermine Sierra Nevada Framework

In *Earth Island Institute v. United States Forest Service*,¹ the Ninth Circuit reversed and remanded a district court decision allowing the Forest Service to log and sell timber from protected areas after a catastrophic fire in the Eldorado National Forest. These protected areas provide critical habitat for the California spotted owl. Earth Island Institute ("Earth Island") filed suit, claiming the Forest Service restoration plan violated both the National Environmental Policy Act (NEPA)² and the National Forest Management Act (NFMA).³ The District Court for the Eastern District of California rejected the request for a preliminary injunction to stop the logging, stating that Earth Island was unlikely to succeed on the merits of its claims. Earth Island appealed to the Ninth Circuit. The Ninth Circuit reversed the district court, stating that the Forest Service failed to comply with its own forest plan and that Earth Island demonstrated a likelihood of success on its claims.

---

¹. 351 F.3d 1291 (9th Cir. 2003).
In January 2001, the Forest Service completed a comprehensive forest plan called the Sierra Nevada Forest Plan (SNFP). The plan's purposes included protecting the California spotted owl, managing fire and fuels in a consistent manner, and restoring old-growth forest by controlling excessive logging and road-building within eleven national forests in the Sierra Nevada. The plan also contained guidelines for a fuel-reduction program that called for removing brush and small-diameter trees to decrease the risk of catastrophic wildfires. The SNFP designated Old Forest Emphasis Areas, which are important for old-growth forest species and include key habitat for the California spotted owl. Permissible logging activity in these areas included harvesting surface and ladder fuel and also in some instances small diameter trees.

Within the key habitat areas for the spotted owl, the SNFP created 300-acre Protected Activity Centers (PACs) around known or suspected nesting sites of the spotted owl. Each PAC was surrounded by 1,000-acre Home Range Core Areas (HRCAs) where owl foraging would most likely occur. Under the SNFP, PACs must be maintained unless the habitat becomes uninhabitable and surveys confirm that spotted owls no longer occupy the PAC. If the Forest Service determines a PAC to be unsuitable habitat, it must create a PAC in another area within the surrounding HRCA. The Forest Service established three PACs in the Eldorado National Forest.

Disaster struck two PACs when a catastrophic fire ripped through the Eldorado and Tahoe National Forests. Early morning on August 25, 2001, a fire was discovered on the south side of the Middle Fork American River. The fire, which allegedly began in slash piles left on...
the ground after nearby logging operations on private land, quickly spread.\textsuperscript{16} Twenty-three days later the fire was contained after consuming over 16,000 acres in the Eldorado and Tahoe National Forests.\textsuperscript{17} The Star Fire, as it was called, severely burned sections of old-growth forest and two owl nesting sites known as PC055 and PC075.\textsuperscript{18}

In June 2002, the Forest Service proposed a restoration project for the Eldorado, which included logging on a total of 1,714 acres.\textsuperscript{19} Revenue from the sale of dead trees, which lose commercial value if not logged within two years, would cover the cost of their removal and pay for future restoration work.\textsuperscript{20} The Forest Service decided to eliminate the two PACs from the forest network after determining that the amount of remaining live trees left insufficient suitable habitat for the California spotted owl\textsuperscript{21}—even though an owl pair had been spotted in the area. Dropping the PACs lifted the logging limitations in those areas.\textsuperscript{22}

Earth Island filed suit in federal district court and sought a preliminary injunction to postpone logging. Earth Island claimed that the proposed restoration plan violated both NEPA and NFMA.\textsuperscript{23} Giving great deference to the Forest Service’s use of its own methodology and experts, the district court determined that the plaintiffs were unlikely to succeed on the merits of their claims, and denied Earth Island’s motion for an injunction.\textsuperscript{24} Earth Island appealed to the Ninth Circuit.\textsuperscript{25}

\textbf{NEPA CLAIMS}

Earth Island made two NEPA challenges to the Forest Service’s restoration plans. The Ninth Circuit rejected one challenge but remanded the case for the second challenge.

First, Earth Island claimed that the scientific standard that the Forest Service used to estimate the level of tree mortality was questionable.\textsuperscript{26}

\begin{thebibliography}{99}
\bibitem{15} Slash piles are stacks of unusable organic material that are left on-site and later burned to ash and left to fertilize the soil or partially burned to increase the decay process. See Nix, supra note 8.
\bibitem{17} \textsc{Forest Serv., supra} note 14.
\bibitem{18} \textsc{Forest Serv., U.S. Dep’t of Agric., Record of Decision: Star Fire Restoration 4–5, 10, available at} www.fs.fed.us/r5/eldorado/documents/star/star_rod.pdf (June 19, 2002) [hereinafter Star Fire ROD].
\bibitem{19} \textit{Id.} at 16.
\bibitem{20} \textit{Id.} at 3.
\bibitem{21} \textit{Id.} at 10.
\bibitem{22} See Earth Island Inst. v. United States Forest Serv., 351 F.3d 1291, 1296–97 (9th Cir. 2003).
\bibitem{23} \textit{Id.} at 1297.
\bibitem{24} \textit{Id.}
\bibitem{25} \textit{Id.}
\bibitem{26} \textit{Id.} at 1300. The standard that the Forest Service used was developed by entomologist Sherri Smith and is known as the “Smith standard.” \textit{Id.} at 1295.
\end{thebibliography}
This method led the Forest Service to overestimate tree death, which in turn allowed the agency to eliminate the PAC designations, to remove owl habitat protections, and to permit more logging. Earth Island presented data on tree survival, taken a year after the fire that suggested that the trees the Smith standard categorized as dead had in fact survived.\textsuperscript{27} Judicial review of agency decisions is governed by the Administrative Procedure Act, which allows an agency action to be overturned when it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\textsuperscript{28} Due to the scientific expertise the analysis of such data requires, a court must defer\textsuperscript{29} and allow wide discretion to the agency in assessing scientific evidence.\textsuperscript{30} The Ninth Circuit found that the agency had reasonably chosen a scientific standard for tree mortality assessment and had directly responded to public comments that questioned this standard as required by NEPA.\textsuperscript{31} Even if the court had found Earth Island’s interpretation of the scientific data more persuasive, “that would not be enough to declare the alternative agency interpretation arbitrary and capricious.”\textsuperscript{32}

Second, Earth Island claimed that regardless of the standard used to determine tree mortality, the Forest Service relied on factually inaccurate data in forming the restoration plan.\textsuperscript{33} Earth Island presented data from a spotted owl scientist who found a large number of green trees in areas where the agency report specifically stated that there were none.\textsuperscript{34} Furthermore, Earth Island claimed that the non-agency scientists using the Smith method had arrived at drastically different conclusions from what the agency reported.\textsuperscript{35} The court, stating that an agency must ensure professional integrity in analyses of scientific data, remanded this issue to the district court.\textsuperscript{36}

CUMULATIVE IMPACT CLAIMS UNDER NEPA

Earth Island also prevailed on one of two claims about the adequacy of the environmental impact statement (EIS). Although PC075 and the Star Fire covered adjacent portions of both Eldorado and Tahoe National Forests, the Forest Service prepared a separate EIS for the restoration and timber sales of each forest.\textsuperscript{37} Earth Island claimed that under NEPA,

\textsuperscript{27} Id.
\textsuperscript{30} See Draft, Final, and Supplemental Statements, 40 C.F.R. § 1502.9(a)–(b) (2005).
\textsuperscript{31} Earth Island Inst. v. United States Forest Serv., 351 F.3d 1291, 1301 (9th Cir. 2003).
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 1300.
\textsuperscript{34} Id. at 1302.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Star Fire ROD, supra note 18, at 11–12.
the agency was required to prepare a single EIS to cover timber sales in both forests.\(^{38}\) Alternatively, even if a single EIS was not required, the Eldorado EIS allegedly did not adequately analyze the cumulative effects of the fire restoration projects within each individual EIS on adjacent areas.\(^{39}\) The Eldorado EIS did not consider the effect of the destruction of the Eldorado side of PC075 and its HRCA on owls that may reside in Tahoe side of PC075.\(^{40}\)

Previously, in *Native Ecosystems Council v. Dombeck*,\(^{41}\) the Ninth Circuit held that under NEPA a single review document for different projects was required when there is a “single proposal governing the projects or when the projects are ‘connected,’ ‘cumulative,’ or ‘similar’ actions under the regulations implementing NEPA.”\(^{42}\) In this case, the Ninth Circuit determined that since the Forest Service did not develop one comprehensive plan covering both forests, the plaintiffs had to show that the separate actions (the restoration plans) were “connected, cumulative, or similar” in order to force the Forest Service to file a single EIS.\(^{43}\) In determining whether actions are connected for the purposes of NEPA an “independent utility” test applies.\(^{44}\) In this test, if either project would have occurred without the other, each project has an independent utility and the two projects are not connected actions. The Ninth Circuit ruled that the Tahoe restoration plan would have been implemented without the Eldorado plan, so the two plans met the independent utility test and were not connected actions.\(^{45}\) Earth Island failed to show that the two plans were cumulative or similar based on the circumstances of prior administrative boundaries, different patterns of ownership and destruction, disparate timetables, and separate supervisory personnel.\(^{46}\)

As far as the alternative claim that PC075 should be considered as one unit, the Ninth Circuit found that the agency incorrectly assumed that PC075 in Tahoe could be delisted despite the known presence of owls, and incorrectly treated the presence of owls in habitat it determined to be unsuitable as an aberration.\(^{47}\) The court found that the EIS only briefly mentioned the role the Eldorado HRCA might play in supporting the Tahoe section of PC075.\(^{48}\) The Ninth Circuit ruled that because the agency knew that owls occupied PC075 in Tahoe, the agency should have

\(^{38}\) Earth Island Inst., 351 F.3d at 1304–05.
\(^{39}\) Id. at 1305.
\(^{40}\) Id. at 1306–07.
\(^{41}\) Id. at 1306–07.
\(^{42}\) 304 F.3d 886 (9th Cir. 2002).
\(^{43}\) Id. at 893–94.
\(^{44}\) Earth Island Inst., 351 F.3d at 1305.
\(^{45}\) Native Ecosystems Council, 304 F.3d at 894.
\(^{46}\) Earth Island Inst., 351 F.3d at 1306.
\(^{47}\) Id.
\(^{48}\) Id.
reasonably foreseen that, if the SNFP criteria were followed, PC075 within Tahoe could not be delisted. Since the Eldorado EIS failed to consider the effect of increased logging on the Tahoe PAC, it insufficiently considered the cumulative impacts of the separate EIS.

NFMA CLAIMS

Earth Island also prevailed on two of three claims under NFMA. NFMA requires the Forest Service to implement forest management plans for each unit of the National Forest system. Any subsequent changes in the plan, including granting of permits and contracts for the use of the forest, must be consistent with the plan in place—in this case the SNFP.

Earth Island claimed that three agency decisions constituted changes that violated the SNFP, and thus violated NFMA. First, Earth Island claimed that the Forest Service restoration plan allowed for logging of trees over twenty inches in diameter, in violation of the SNFP. The court disposed of this claim because the twenty-inch diameter rule only applied to thinning of trees within live forest stands covered under the SNFP, and the SNFP did not restrict tree diameter for salvage logging after a fire.

The Ninth Circuit agreed with Earth Island's second and third claims under NFMA. In the second instance, Earth Island claimed that the delisting of the two PACs within the Eldorado Forest violated the SNFP since the agency failed to meet both criteria for delisting—determination of the lack of suitable habitat and confirmation of non-occupancy by owls. Also, the agency allegedly failed to adjust PAC boundaries after determining that they were unsuitable. The Forest Service admitted that thirteen percent of the original PAC experienced less than seventy-five percent mortality, suggesting that portions of the PAC remained green and thus requiring the agency to conduct owl occupancy surveys. Nevertheless, the agency argued that since the habitat was determined unsuitable, the surveys were unnecessary since the “probability of [owl] occupancy [was] extremely low.” However, agency surveys, which began a month after the initial restoration plan was released, and independent surveys by Earth Island's biologist, showed evidence of owl occupancy. The Ninth Circuit reasoned that even if it accepted the agency’s argument that post-catastrophe occupancy surveys are only required within suitable owl habitat, the surveys should evaluate owl

50. 16 U.S.C. § 1604(i).
51. Earth Island Inst., 351 F.3d at 1303-04.
52. Id. at 1304.
53. Id. at 1303.
54. Id.
occupancy "despite the catastrophe."\textsuperscript{55} If surveys confirmed that owls were present, the SNFP restrictions should remain. On these claims, the court found for Earth Island, ruling that the agency failed to fulfill the second criterion for dropping the PAC from the SNFP when it ignored the confirmed presence of owls.\textsuperscript{56}

CONCLUSION

While courts defer to agency decisions regarding methodology and interpretation of data, an agency still must follow the intent of the statute under which it operates. The SNFP clarifies that the presence of owls limits logging in designated areas, and that the Forest Service must meet two criteria before delisting can occur. In this case, the Forest Service failed to meet both criteria by only considering the unsuitability of habitat without taking into account owl occupancy. Finally, while a single EIS considering the Eldorado and Tahoe restoration plans together was not required, when the implementation of one project has an impact on the other, that cumulative impact must be factored in the EIS.

AUTHOR'S NOTE

In a prescient footnote, Circuit Judge Thomas stated, "[n]aturally, the agency is not permanently trapped by the language of the Framework."\textsuperscript{57} Despite a broad base of support for the original SNFP from scientists, conservationists, business owners, and local communities, in 2004 the Forest Service announced drastic forest plan management revisions that triple the amount of logging allowed by increasing the maximum diameter allowed from twenty to thirty inches.\textsuperscript{58} \textsuperscript{59} As of early

\textsuperscript{55} Id. at 1304 (emphasis in original).
\textsuperscript{56} Id. The Forest Service claimed that since it found the habitat unsuitable, it was not required to perform occupancy surveys. The SNFP, however, specifically states that "PACs are maintained regardless of owl occupancy status unless the habitat is rendered unsuitable by a catastrophic stand-replacing event and protocol surveys confirm non-occupancy." SNFP, supra note 4, at 39 (emphasis added). Suitable habitat is based on specific components, such as stands with large trees of certain types, diversity, complexity, and a moderately high canopy cover. Id. at 9. Although the Forest Service may deem a habitat unsuitable, it does not mean that owls may not be present. Delisting a PAC requires both of these criteria to be met. In contrast, a PAC must be maintained if the habitat is rendered suitable \textit{regardless} of owl occupancy status. Id., app. A, at 34.
\textsuperscript{57} Earth Island Inst., 351 F.3d at 1304 n.10.
\textsuperscript{58} Judge Noonan, concurring in \textit{Earth Island Inst.} and concerned that the agency derives revenues from logging project it permits, asked counsel for the Forest Service, "If the decision-maker is taking money, isn't the decision-maker corrupt?" Counsel replied, "This is a system Congress gave us." The Judge answered, "That's not an answer." David Kravets, \textit{Group Tries to Keep Trees on Fire-ravaged Land, CONTRA COSTA TIMES}, available at http://www.contracostatimes.com/mld/cctimes/living/science/5171597.htm (Feb. 13, 2003).
2005, the State of California and a coalition of conservation groups have sued the Forest Service under NEPA and the federal Administrative Procedure Act. Conservation groups see the 2004 revisions as a boon to the timber industry.

*Julia Thrower*

---


Ninth Circuit Expands Admissibility of Scientific Evidence

In Clausen v. M/V New Carissa, the Ninth Circuit held that the plaintiffs' expert conducted an admissible differential diagnosis to establish causation in the death of an oyster crop after an oil spill. More generally, the court ruled that expert testimony that has not been published or that is not based on research independent of the lawsuit may be admissible as long as the trial judge properly deems the evidence "scientifically valid." The court thereby significantly expanded the standard of admissible evidence defined by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc.

An oil spill off the coast of Oregon gave rise to the Clausen litigation. During the winter of 1999, rough weather forced the M/V New Carissa, en route to Coos Bay, Oregon, to anchor just north of the bay and wait for conditions to improve. The storm battered the freighter all night, dragging the ship toward shore. The crew tried to raise the anchor and move the ship to deeper water, but the storm ultimately forced the ship aground. As wind-speeds grew to seventy miles-per-hour, cracks in the hull appeared, widened, and threatened a massive oil spill. Fortunately, the Coast Guard and Navy rescued the crew and detonated the ship, burning the cargo of oil before it dissipated into Coos Bay.

Copyright © 2005 by the Regents of the University of California.

1. 339 F.3d 1049 (9th Cir. 2003).
2. Id. at 1060.
3. Id. at 1061.
4. 509 U.S. 579, 593-95 (1993). The Ninth Circuit last interpreted the Daubert criteria for scientific evidence on remand, where they held that scientific expert testimony must be based on research conducted independently of the litigation or have been published and peer-reviewed. Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II), 43 F.3d 1311, 1317-18 (9th Cir. 1995).
5. Daubert, 339 F.3d at 1051.
6. Id.
7. Id.
8. Id. at 1051-52.
9. Id. at 1052.
result, of the 400,000 gallons of oil aboard the New Carissa, only 70,000 escaped into the ocean.\(^{10}\)

The oil spill allegedly devastated a local oyster farm. Once released, the oil quickly entered Coos Bay and its estuaries, where the Clausens ran a commercial oyster farm.\(^{11}\) Immediately after the oil spill, the federal and state authorities began to monitor the oyster beds.\(^{12}\) They soon detected an increase in the concentration of oil and closed the farms.\(^{13}\) Shortly thereafter, around three and a half million oysters died.\(^{14}\) Tests showed that the tissues of every oyster tested contained oil from the New Carissa.\(^{15}\)

The Clausens promptly sued the owners of the New Carissa under the Federal Oil Pollution Act and the Oregon Spill Act, which hold the parties responsible for an oil spill strictly liable for all damages caused by the spill.\(^{16}\) At trial, both parties introduced expert testimony from marine biologists specializing in aquatic toxicology to determine whether the oil spill caused the Clausens' oysters to die.\(^{17}\) The experts both determined that the deaths resulted from a bacterial infection of lesions in the oysters' gills, but disagreed as to the ultimate cause of the infection. Both experts conducted a differential diagnosis\(^{18}\) to determine the cause of the lesions.\(^{19}\) They eliminated four possible causes and agreed that only low salinity or the effects of low-level oil toxicity could have caused the lesions.\(^{20}\) Dr. Neff, the defendants' witness, attributed the lesions to low salinity levels in the estuary because no previous study in the scientific literature had observed tissue lesions in oysters without much higher concentrations of oil than those present in Coos Bay following the spill.\(^{21}\) Dr. Elston, the plaintiffs' expert, testified that low-level contact toxicity with oil caused the lesions.\(^{22}\) He eliminated low salinity because previous years with lower salinity levels never resulted in mass oyster die-offs, and

---

10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
17. Id. at 1052-53.
18. Differential diagnosis originally developed in the medical community as a way to identify the cause of a patient's symptoms. More generally, it is a method where one begins with all possible causes of the observed phenomenon. Once all possible causes are identified, the researcher then systematically eliminates the most unlikely causes until only the true cause remains. Sir Arthur Conan Doyle gave a more familiar explanation of differential diagnosis through the detective Sherlock Holmes, "Once you have eliminated the impossible, whatever remains, however unlikely, must be the truth."
19. Id. at 1053.
20. Id.
21. Id. at 1053.
22. Id. at 1053-55.
because normal signs of low salinity mortality (shell etching, a rotting odor) were absent.\textsuperscript{23} He also demonstrated that Dr. Neff's salinity measurements were not robust enough to support Neff's conclusion. \textsuperscript{24} The defendants moved in limine to exclude this testimony for not meeting the standards set forth in \textit{Daubert}, but the magistrate judge denied the motion.\textsuperscript{25}

At trial, the jury considered the expert testimony and found for the plaintiffs. The defendants then appealed, claiming that the district court abused its discretion by admitting Dr. Elston's testimony.\textsuperscript{26} On appeal, the defendants conceded that differential diagnosis is a valid way to demonstrate causation.\textsuperscript{27} Nonetheless, defendants alleged that Dr. Elston erred in conducting his differential diagnosis; specifically, defendants alleged that Dr. Elston should not have included low-level toxicity of oil as a possible cause of death.\textsuperscript{28} They claimed that there is no basis in the scientific literature for concluding that low-level oil toxicity can cause gill lesions, that claiming otherwise was "mere guesswork," that even if there was, the literature still lacked a minimum threshold above which damage could occur, and that therefore Dr. Elston's study was unreliable and inadmissible according to \textit{Daubert} standards.\textsuperscript{29}

Federal Rule of Evidence 702 governs the admissibility of expert testimony. It requires that the testimony is based upon sufficient facts or data, produced by reliable principles and methods, and reliably applied by the witness to the facts of the case.\textsuperscript{30} In \textit{Daubert}, the Supreme Court held that a court can determine reliability under Rule 702 by considering (1) if the proffered hypothesis is testable, (2) if it has been published and peer reviewed, (3) if the likelihood of error is understood, and (4) if the scientific community accepts the hypothesis.\textsuperscript{31} On remand, the Ninth Circuit interpreted the second prong as casting doubt on evidence that was not produced by independent research or subjected to "normal scientific scrutiny through peer review and publication."\textsuperscript{32} The court decided to only admit an unpublished study if the study's conclusions were thoroughly documented and that some objective source could show that the study complied with the scientific method.\textsuperscript{33}

\textsuperscript{23} Id. at 1054-55. 
\textsuperscript{24} Id. at 1055. 
\textsuperscript{25} Id. 
\textsuperscript{26} Id. 
\textsuperscript{27} Id. at 1057 (citing decisions from five other circuits showing that "differential diagnosis is a common scientific technique... [and] is admissible under Daubert"). 
\textsuperscript{28} Id. at 1059. 
\textsuperscript{29} Id. 
\textsuperscript{30} FED. R. EVID. 702. 
\textsuperscript{31} Daubert, 509 U.S. at 593-94. 
\textsuperscript{32} Daubert II, 43 F.3d at 1317-18. 
\textsuperscript{33} Id. at 1318-19.
Considering the *Daubert* factors, the Ninth Circuit held that the defendants' arguments against Dr. Elston's inclusion of low-level oil toxicity were baseless.\(^{34}\) It held that the proximity of the oil spill and oyster deaths in time and space alone was enough to support an inference of causation.\(^{35}\) The fact that the ship owners' own expert had also included low-level oil toxicity as a possible cause in his differential diagnosis did not endear the court to the defendants' grievance.\(^{36}\) Rather, the court noted that scientific observations (some attributed to Dr. Neff, the defendants' expert) showed that contact toxicity occurred in every animal that was studied, making Dr. Elston's inference that it could have lead to the oyster deaths reasonable, despite the lack of any published research with this result.\(^{37}\) Further, the court did not bar the testimony due to the lack of a known minimum threshold because "such evidence is not always available, or necessary, to demonstrate that a substance is toxic."\(^{38}\) The court also found Dr. Elston's rejection of the other possible cause, low salinity, to be reliably grounded in "objective, verifiable evidence."\(^{39}\) Therefore, the court decided that the trial judge did not abuse its discretion by allowing the plaintiffs to present Dr. Elston's evidence to the jury.\(^{40}\)

The *Clausen* decision significantly extends the *Daubert* standard for the admissibility of expert testimony. It firmly establishes that differential diagnosis is a valid technique for demonstrating causation in the Ninth Circuit. More importantly, the Ninth Circuit ruled that scientific testimony can be introduced just like any other expert testimony. This testimony need not have survived any peer review as long as a judge can be convinced it is relevant and reliable. Both the limited and broader holdings provide new ways to demonstrate causation, which should enable litigants greater access to judicial remedies for damage to the environment.

The ultimate impact of this change on environmental litigants, however, remains uncertain. The *Clausen* decision represents an enormous expansion of the discretion of trial judges to weigh the merit of scientific evidence and admit it as they see fit. This appears to be a boon to environmentalists seeking to show causation in a dynamic litigation environment. However, it is not difficult to imagine alternative scenarios where polluters could introduce scientific testimony to the contrary. This

\(^{34}\) *Daubert*, 339 F.3d at 1060-61.

\(^{35}\) *Id.* at 1061.

\(^{36}\) *Id.*

\(^{37}\) *Id.* at 1060.

\(^{38}\) *Id.* at 1059 (quoting Westberry v. Gislave Gummi AB, 178 F.3d 257, 264 (4th Cir. 1999)).

\(^{39}\) *Id.* at 1061 (quoting Kennedy v. Collagen Corp., 151 F.3d 1226 (9th Cir. 1998)).

\(^{40}\) *Id.*
could transform toxic tort litigation into an even more expensive battle of the experts, with the judge retaining enormous discretion over what gets admitted into evidence. As a result, it remains to be seen whether environmental advocates will embrace or regret this development.

Tom Fletcher
Eleventh Circuit Requires EPA to Review Methods Used by States to Measure Water Quality

Does the United States Environmental Protection Agency (EPA) have a non-discretionary, statutory duty to review changes in water quality assessment methodology used by a state in administering the Clean Water Act (CWA)? In Florida Public Interest Research Group v. United States Environmental Protection Agency, the Eleventh Circuit Court of Appeals found that EPA is obligated to review, in accordance with CWA procedures, any new water quality standards arising from a change in assessment methodology, regardless of the methodology's purported intent. The holding is a victory for citizen watchdog groups concerned about states' attempts to circumvent the requirements of the CWA through complicated administrative rule changes. The decision requires the lower court to investigate whether the EPA is enforcing federal clean water laws, and oversee EPA's review of Florida's Impaired Waters Program.

The CWA establishes two main approaches for reducing water pollution in surface waters. The primary approach targets individual, point-source polluters through technology-based standards, such as numerical limits on effluent content. If point-source pollution control measures are not sufficient to achieve the desired water quality, the CWA provides for a secondary, holistic watershed approach that utilizes water-quality-based standards. For example, the designated use of a waterbody, such as drinking water or shellfish harvesting, will determine

---

Copyright © 2005 by the Regents of the University of California.
3. Id. at 1082, 1090. Two issues were raised on appeal: whether the plaintiffs have standing, and whether the Florida Department of Environmental Protection (FDEP) changed its water quality standards. The plaintiffs were found to have standing. Id. at 1082. This case summary does not address this aspect of the case.
6. See 33 U.S.C. § 1313(d)(1)(A); see also Pronsolino, 291 F.3d at 1126.
the level of water quality required for a particular waterbody. The water quality level is then used to determine the total level of a pollutant that the waterbody can accept while maintaining the specified water quality.

According to the Water Quality Standards and Implementation provision of the CWA, states are responsible for establishing water quality standards for all of their waterbodies. States must submit their water quality standards to EPA for review. Following these rules, Florida created Surface Water Quality Standards (WQS) for its waterbodies. Upon review, EPA approved Florida's WQS. The state's WQS serve as the regulatory basis for pollution control and Florida's require that "[u]nless otherwise stated, all criteria express the maximum [quantity of pollutants in a waterbody] not to be exceeded at any time." The standards further say, "in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." This strict language is essential for meeting CWA guidelines.

After a state has established water quality standards, the CWA requires the state to determine which waterbodies are impaired; that is, which waters do not meet the criteria needed to support their designated uses. Every two years a state is supposed to send an Impaired Waters List (IWL) to EPA for approval. Once a waterbody is identified as impaired, state and federal agencies work together to establish limits for specific pollutants from individual sources and implement more holistic watershed-based strategies to reduce pollution in the waterbody. These limits, known as Total Maximum Daily Loads (TMDL), are the estimated amount of pollutants that a waterbody can absorb and still meet water

---

10. Id. § 1313(a)(3)(A).
11. Id. § 1313(c)(2)(A).
12. Florida waters are designated into the following classes: Potable Water; Shellfish Propagation or Harvesting; Recreation; Agricultural Water Supplies; Industrial Use. FLA. ADMIN. CODE ANN. r. 62-302.400.
15. FLA. ADMIN. CODE ANN. r. 62-302.530 (emphasis added).
16. Id. (emphasis added).
18. Id. § 1313(d)(1)(A), (d)(2). Impaired Waters Lists are also known as § 303(d) lists.
19. Sierra Club v. Meiburg, 296 F.3d 1021, 1025–26 (11th Cir. 2002) (citing 33 U.S.C. §§ 1313(e)(1), (2); 1329(b), (h)).
quality standards. A waterbody may contain several contaminants and need several TMDLs, with a plan for reducing each pollutant. Importantly, only waterbodies designated as impaired receive this higher level of coordinated protection and scrutiny.

Florida submitted its first IWL in 1992. By 1998, Florida had created only three out of the hundreds of TMDLs needed to start cleaning its impaired waters. Citizen groups, concerned about high levels of pollution in their rivers, sued EPA, asking EPA to create TMDLs for waterbodies listed as impaired, since Florida was not complying with the CWA mandate.

As a result of the citizen suit, the United States District Court issued a consent decree requiring EPA to promulgate TMDLs for waters on Florida's 1998 IWL if the state failed to do so. In response to this court order, the Florida Legislature enacted the Florida Watershed Restoration Act mandating the Florida Department of Environmental Protection (FDEP) to develop and adopt a new methodology for designating impaired waters and establishing TMDLs. FDEP complied in April of 2001 by adopting the Impaired Waters Rule (IWR). The rule purports to interpret, rather than change existing water quality criteria or standards.

While developing the new IWR, FDEP sent drafts to EPA for review. Correspondence between FDEP and EPA in September 2000

---

21. See id.
22. See id. § 1313(d)(1).
23. In 1990, EPA published the National Toxics Rule (NTR), directing states to adopt WQS for toxics, including dioxin. Florida did not promulgate a dioxin standard, meaning that waterbodies were not being assessed for impairment from dioxin. Without a dioxin rule, Florida's 1992 IWL was not in compliance with federal law. Florida's failure to comply with the NTR shifted responsibility to EPA. When EPA failed to apply the federal dioxin rule to Florida, citizen groups sued to compel compliance. EPA settled the suit, agreeing to a schedule for implementation of the federal standard. Subsequently, citizen groups sued Florida for failing to implement or enforce the federal standard in NPDES permits. Interview with David Ludder, President & General Counsel for Legal Environmental Assistance Foundation, Inc. (Mar. 15, 2005).
28. FPIRG I, at *11 (quoting FLA. STAT. ch. 403.067(3)(b)).
29. Id.
revealed that EPA considered the draft IWR to change the WQS and would thus need to be reviewed and likely revised to comply with the CWA.\textsuperscript{31} By April 2001\textsuperscript{32} the EPA reversed its previous assessment of the IWR although the substance of the questionable provisions remained largely unchanged.\textsuperscript{33} EPA reasoned that because Florida did not follow the established procedure for changing water quality standards, the IWR only interpreted the existing water quality criteria and therefore EPA did not have to review the rule for compliance with the CWA.\textsuperscript{34}

With EPA approval, FDEP began re-examining about 20% (1600) of Florida’s waterbodies using the new IWR to update its IW\textsuperscript{35} As a direct result of the use of the new IWR over 200 waterbodies were removed from the list.\textsuperscript{36} Florida then submitted the updated portion of the IW\textsuperscript{L} to EPA for review as required by the CWA.\textsuperscript{37} Disagreeing with either FDEP’s methodology or conclusions, EPA returned eighty-two waterbodies to the IW\textsuperscript{L}.\textsuperscript{38} However, “in no case did the EPA require Florida to change its IWR. Even where it disagreed entirely with a methodology of the new set of regulations, the EPA simply conducted its own independent review of waterbodies, repeating rather than simply reviewing the work that Florida was required to do.”\textsuperscript{39}

Citizen groups concerned about the delisting of highly impaired waterbodies again turned to the courts for help to protect water quality.\textsuperscript{40} The Florida Public Interest Research Group Citizen Lobby (FPIRG) argued in their suit against EPA that since the IWR effectively revised Florida’s Surface WQS, the IWR was subject to non-discretionary review by EPA.\textsuperscript{41} EPA moved for summary judgment claiming that they had no

\begin{footnotesize}
\begin{enumerate}
\item Fl. Pub. Interest Research Group Citizen Lobby, Inc. v. United States Envtl. Protection Agency (\textit{FPIRG I}), 386 F.3d 1070, 1077 n.6 (11th Cir. 2004).
\item George W. Bush, the brother of Florida Governor Jeb Bush, was elected President in November of 2000.
\item \textit{FPIRG II}, 386 F.3d at 1077 n.6.
\item \textit{FPIRG II}, 386 F.3d at 1077.
\item There is some dispute in the record as to exactly how many water bodies were de-listed.\textit{Id.} at 1080 n.14.
\item See 33 U.S.C. § 1313(d)(2) (2000); 40 C.F.R. § 130.7(d) (2005).
\item \textit{FPIRG II}, 386 F.3d at 1080 & n.14 (11th Cir. 2004).
\item \textit{Id.} at 1079.
\item \textit{FPIRG II}, 386 F.3d at 1080. FPIRG brought the action under the Clean Water Act’s citizen suit provisions at 33 U.S.C. § 1365(a)(2).
\end{enumerate}
\end{footnotesize}
duty to review the new rule because it merely interpreted Florida's WQS, it did not change them.\textsuperscript{42} The district court agreed with EPA, granting summary judgment on the rationale that since (1) the FDEP had not followed the proper procedures to amend Florida's water quality standards; (2) the EPA had not formally approved any amendments to Florida's water quality standards; and (3) the EPA's subsequent review of the final list of impaired waters meant that the Impaired Waters Rule could not have the effect of revising Florida's water quality standards, there was no triable issue of fact.\textsuperscript{43}

FPIRG appealed the district court ruling arguing that the court must examine the effect of the rule, not its purported intention.\textsuperscript{44} FPIRG argued that since Florida's IWR, as applied, violated EPA-approved state water quality standards, EPA must view the new rule as a change to the standard and review the new standard in accordance with the CWA.\textsuperscript{45} FPIRG noted that the IWR adopted a number of new methods for determining water quality which violate the WQS requirement that maximum pollutant levels are \textit{not to be exceeded at any time}.\textsuperscript{46} For example, the IWR incorporated a statistical method that allows maximum pollutant levels to be exceeded a certain number of times based on the number of samples.\textsuperscript{47} This statistical method requires at least two samples,\textsuperscript{48} thus by definition violating the water quality criteria that WQS \textit{not be exceeded at any time}. The IWR excluded data collected during "upsets or bypasses from permitted facilities" and during "rain in excess of the 25-year, 24-hour storm."\textsuperscript{49} The exclusion of this data violates the WQS requirement that \textit{in no case} shall pollutants exceed set limits.\textsuperscript{50} The IWR requires that maximum levels for toxics be exceeded twice before a waterbody is classified as impaired.\textsuperscript{51} The IWR includes further exclusions for waterbodies not meeting the sample size and other data requirements.\textsuperscript{52} Furthermore, FDEP acknowledged that it does not have

\begin{itemize}
  \item \textsuperscript{42} \textit{FPIRG I}, 2003 U.S. Dist. LEXIS at *3.
  \item \textsuperscript{43} \textit{FPIRG II}, 386 F.3d at 1081.
  \item \textsuperscript{44} \textit{Id.} at 1088.
  \item \textsuperscript{45} 33 U.S.C. § 1313 places a mandatory duty on the Administrator to review any new or revised state water quality standards. \textit{See also} Natural Res. Def. Council v. United States Envtl. Protection Agency, 16 F.3d 1395, 1399 (4th Cir. 1993).
  \item \textsuperscript{46} \textit{FPIRG II}, 386 F.3d 1070, 1075 (11th Cir. 2004).
  \item \textsuperscript{48} \textit{FPIRG II}, 386 F.3d at 1075.
  \item \textsuperscript{49} FLA. ADMIN. CODE ANN. r. 62-303.420(5) (2005).
  \item \textsuperscript{50} \textit{FPIRG II}, 386 F.3d at 1075 (citing FLA. ADMIN. CODE ANN. r. 62-302.530).
  \item \textsuperscript{51} \textit{Id.} at 1075–76.
  \item \textsuperscript{52} The IWR excludes data more than 7.5 years old, resulting in the automatic delisting of a water body, without a requirement to collect new data. \textit{See id.} at 1079 nn.10–11.
\end{itemize}
the practical ability to implement an effective enforcement strategy because it lacks the technical ability to test for various pollutants.\textsuperscript{53}

Upon review, the Eleventh Circuit Court of Appeals vacated the district court’s entry of summary judgment and remanded the case for further proceedings. The court explained that

the district court had erred in determining as a matter of law that the IWR did not establish new or revised water quality standards. The district court should not have relied on the FDEP’s failure to follow its own procedures to amend the water quality standards, nor on the EPA’s subsequent review of the Impaired Waters List. Rather, the district court was required to determine how Florida’s Surface Water Quality Standards had previously been applied, and whether the Impaired Waters Rule, as applied, actually changed the water quality standards.\textsuperscript{54}

Because EPA never determined whether Florida’s WQS were properly amended according to the state’s own legal requirements, and EPA simply assumed that the IWR was not a change in water quality standards, they took as a given the answer to the very question at issue.\textsuperscript{55}

In its holding the court of appeals took note of EPA’s concern during the drafting of the rule that Florida was in fact changing WQS.\textsuperscript{56} The court of appeals instructed the district court to make an independent review of the impact of the IWR on Florida’s existing water quality standards in accordance with the mandate imposed by \textit{Miccosukee Tribe of Indians of Florida v. United States}.\textsuperscript{57}

The Eleventh Circuit’s decision is significant because it required the district court to make an independent determination as to whether the new IWR resulted in a change in Florida’s WQS. However, in a March 8, 2005 telephone hearing, the EPA submitted a motion requesting the opportunity to make an official determination as to whether the IWR changes WQS.\textsuperscript{58} The plaintiffs argued that EPA had already made that decision as evidenced by previous communications and actions.\textsuperscript{59} The district court granted EPA’s motion and the agency was given 120 days to

\textsuperscript{53} Lane v. Department of Environmental Protection, 01-1332RP (Fla. DOAH May 13, 2002) (Test. of Tim Fitzpatrick, Tr. of File Hearing v.24, 2745-46, Sept. 20, 2001) (on file with author).

\textsuperscript{54} Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. United States Envtl. Protection Agency (FPIRG II), 386 F.3d 1070, 1082 (11th Cir. 2004).

\textsuperscript{55} Id. at 1087.

\textsuperscript{56} Id. at 1077.

\textsuperscript{57} The court held that in the absence of action by the EPA, the district court should conduct its own factual findings and may not rely on the representations of the state. 105 F.3d 599, 603 (11th Cir. 1997).

\textsuperscript{58} The district judge did not issue a written order. Telephone Interview with Eric Huber, counsel for Sierra Club. (March 22, 2005).

\textsuperscript{59} Id.
officially determine whether 1) the IWR is a change to Florida’s WQS and 2) to determine if Florida’s new WQS are consistent with the CWA.60

Concomitantly, the plaintiffs have challenged the entire Florida TMDL program, arguing that the real-world impact of the program, including the IWR, is that impaired waterbodies are not being protected and cleaned up.61 In recent years, EPA’s policy toward oversight of state water quality programs has shifted from enforcement toward voluntary compliance.62 Florida is at the forefront of an effort by about two-dozen states, seeking to reinterpret certain CWA requirements and remove polluted water bodies from IWLs.63 The Eleventh Circuit’s holding is a victory for citizen groups like FPIRG that view states’ listings of impaired waters and establishment of TMDLs as critical tools to address water pollution left untouched by technology-based standards. The decision is an important part of a larger struggle to force state and federal agencies to comply with clean water laws, protecting and restoring our rivers, lakes, and estuaries.

Leah Granger

60. Id. On October 5, 2005, EPA issued a determination on Florida’s Impaired Waters Rule, stating that “EPA is unable to approve” the Impaired Waters Rule because the State did not comply with its own rulemaking procedures. Florida Public Interest Research Group Citizen Lobby, Inc. v. United States Environmental Protection Agency, No. 4:02CV408-WS (N.D. Fla. Oct. 5, 2005) (Notice of Filing EPA’s Decision under Section 303(c)(3) of the Clean Water Act, 33 U.S.C. §1313(c)(3)).

61. Sierra Club, Inc. v. EPA, No. 4:04CV120 Spmlak (N.D. Fla. 2005) (Order Denying FDEP’s Motion To Intervene).

62. “In 1993, EPA began a number of agency wide and program-specific reforms focusing on flexibility and “common sense” approaches to regulation. Many affect implementation of water quality programs.” “Implementation issues that have been the focus of attention in recent Congresses, along with concerns over flexibility and regulatory relief, are expected to predominate when Congress does take up reauthorization in the future.” Claudia Copeland, Congressional Research Service Issue Brief for Congress, IB89102: Water Quality: Implementing the Clean Water Act (Aug. 15, 2001).

D.C. Circuit Rejects EPA'S Proposed Standards and Extends Timeline for Yucca Mountain Nuclear Waste Repository

In Nuclear Energy Institute, Inc. v. Environmental Protection Agency,¹ the Court of Appeals for the District of Columbia upheld the federal government's decision to site a federal nuclear waste repository at Yucca Mountain, Nevada.² Nonetheless, it invalidated the governing health and safety standards.³ More specifically, it held that certain agencies'⁴ reliance on a 10,000-year compliance period for determining public health and safety standards was inconsistent with the governing statutory framework.⁵ In doing so, the court approved the decision to construct a Yucca Mountain repository but ultimately extended the project's timeline.

The disposal of nuclear waste is a serious challenge for lawmakers, agency rulemakers, and the general public.⁶ Currently, nuclear waste is stored at 131 facilities in 39 states.⁷ Over 161 million people live within 75 miles of one or more of those facilities.⁸ By 2035, the amount of nuclear waste produced in the United States will have grown to 105,000 metric

---

1. 373 F.3d 1251 (D.C. Cir. 2004).
2. Id. at 1257, 1315.
3. Id.
4. These federal agencies, as noted below, included the Environmental Protection Agency and the Nuclear Regulatory Commission.
8. Yoo & Koester, supra note 7, at 1332.
tons, twice the current inventory. Some nuclear waste has a half-life of seventeen million years.

Any plan for the disposal of nuclear waste therefore raises serious concerns about harmful consequences that "persist for time spans seemingly beyond human comprehension." At various times, Congress considered burying radioactive nuclear waste in the polar ice caps or rocketing it to the sun. It ultimately decided on deep geological burial.

The Nuclear Energy Institute decision arose out of a lengthy process of selecting and authorizing a federal nuclear waste repository. In 1982, Congress enacted the Nuclear Waste Policy Act (NWPA), directing various federal agencies to assume responsibility for disposing of the nation's nuclear waste. The NWPA: (1) charged the Department of Energy (DOE) with selecting, designing, and operating the repository; (2) required the Environmental Protection Agency (EPA) to establish environmental protection standards; and (3) directed the Nuclear Regulatory Commission (NRC) to assume responsibility for licensing the repository. In 1987, Congress enacted the Nuclear Waste Policy Amendments Act (NWPAA), directing DOE to focus exclusively on Yucca Mountain as a national repository. In 1992, Congress enacted the Energy Policy Act (EnPA), directing the EPA and NRC to focus on Yucca Mountain as well.

Pursuant to this statutory framework, the federal agencies and Congress moved forward with a plan to develop Yucca Mountain. First, EPA adopted a 10,000-year compliance period for public health and

9. Nuclear Energy Institute v. EPA, 373 F.3d 1251, 1258 (D.C. Cir. 2004). The current design for the Yucca Mountain repository would house up to 70,000 metric tons of radioactive waste. Id. at 1261.
10. Id. at 1258.
11. Id.
12. Id. at 1257.
13. Id.
14. The benefits of establishing a single waste repository may include: (1) centralizing the waste; (2) storing the waste away from densely populated areas; and (3) national security. Yoo & Koester, supra note 7, at 1331. In turn, the harms may include: (1) the possibility of a larger-scale nuclear exposure; (2) the hazards involved with transporting the nuclear waste; and (3) any disproportionate costs imposed on Nevada and its residents. See State of Nevada Office of the Governor, A Mountain of Trouble: A Nation at Risk – Report on Impacts of the Proposed Yucca Mountain High-Level Nuclear Waste Program (Feb. 2002), available at http://www.state.nv.us/nucwaste/yucca/impactreport.pdf.
16. Id. at 1259.
17. Id. at 1260. Initially, the NWPA charged the DOE with nominating and investigating at least five sites, and then recommending three sites. Id. at 1259. In 1984, the Energy Secretary recommended three sites: Deaf Smith County, Texas; Hanford, Washington; and Yucca Mountain, Nevada. Id. at 1259.
18. Id. at 1260.
safety standards at Yucca Mountain. Second, NRC assessed the repository's performance over the 10,000-year period and issued certain licensing standards. Third, DOE issued site-suitability criteria and the Energy Secretary recommended Yucca Mountain to the President for development as an underground nuclear waste repository. The President then recommended Yucca Mountain to Congress. In 2002, Congress passed a joint resolution approving the development of a Yucca Mountain repository.

In Nuclear Energy Institute, Petitioners, including the State of Nevada, initiated a broad-based challenge to the federal regime governing the Yucca Mountain repository. First, Petitioners argued that the 10,000-year compliance period adopted by the EPA and relied upon by the NRC was based on an impermissible construction of the underlying statute. Second, Petitioners asserted a constitutional challenge to Congress' joint resolution approving the selection of Yucca Mountain as a federal repository.

The Court of Appeals for the District of Columbia accepted Petitioners' first claim but rejected the second. In a lengthy opinion issued on July 9, 2004, the court invalidated the 10,000-year compliance period adopted by EPA and relied upon by NRC. At the same time, it upheld the constitutionality of the joint-congressional resolution approving the selection of Yucca Mountain as a federal repository.

First, applying the Chevron doctrine, the court held that the 10,000-year compliance period violated the EnPA because it was inconsistent

21. Id. at 1260–61.
22. Id. at 1261.
23. Id.
24. Petitioners included the State of Nevada, local communities, environmental organizations, and the nuclear energy industry. Id. at 1257. The D.C. Court of Appeals had exclusive jurisdiction over the case based on the Hobbs Act. Id. at 1264–65.
25. Id. at 1257.
26. Id. at 1315. Petitioners also challenged certain actions by the President and the Energy Secretary and the Energy Department's Final Environmental Impact Statement. Id. However, the court held that those challenges were moot upon Congress's enactment of a joint resolution approving the Yucca Mountain site as a repository. Id. at 1309.
27. In response to Petitioners' challenge, the court consolidated thirteen different lawsuits. Cynkar, supra note 7, at 1305.
28. Nuclear Energy Institute, 373 F.3d at 1315.
29. Id.
with the findings and recommendations of the National Academy of Sciences (NAS).\textsuperscript{31} Previously, the NAS determined that the compliance period should exceed 10,000 years because certain peak exposure periods were “likely to occur after 10,000 years.”\textsuperscript{32} Section 801(a) of the EnPA required EPA to promulgate public health and safety standards “based upon and consistent with the findings and recommendations of the National Academy of Sciences.”\textsuperscript{33} The court determined that “based upon and consistent with” was ambiguous, and then proceeded to reject the 10,000-year compliance period under 
Chevron’s second step. Rejecting the agencies’ protests and articulated policy reasons for selecting a 10,000-year compliance period, the court vacated EPA’s 10,000-year compliance standard as an “unreasonable construction of Section 801(a).”\textsuperscript{34} It noted that no scientific evidence supported the shortened compliance period and suggested that a 1,000,000-year standard would be more consistent with the NAS report.\textsuperscript{35} The court similarly vacated NRC’s regulations insomuch as they relied on the compliance period adopted by EPA.\textsuperscript{36} Accordingly, it directed both EPA and NRC to reconsider the compliance period on remand.\textsuperscript{37}

Second, the court upheld Congress’s approval of the Yucca Mountain repository. It noted that Congress’s power to adopt a joint resolution selecting Yucca Mountain, located on federal land, as a repository was consistent with the Property Clause.\textsuperscript{38} It held that the “Property Clause clearly provides an adequate source of constitutional authority for Congress’s enactment of the Resolution.”\textsuperscript{39} Furthermore, the court rejected Petitioners’ Tenth Amendment argument that Congress must regulate federal lands by means of facially neutral and generally applicable standards when it imposes a unique burden on a particular state.\textsuperscript{40} It noted that nothing in the Constitution required Congress to exercise its power pursuant to neutral criteria and held that

and “directly spoken to the precise question at issue.” Id. at 842. If Congress’s intent is clear, “the court, as well as the agency, must give effect to the unambiguously express intent of Congress.” Id. at 842–43. Second, if the statute is “silent or ambiguous with respect to the specific issue,” a court will ask whether the agency’s interpretation “is based on a permissible construction of the statute.” Id. at 843. Although courts generally defer to the agency’s statutory interpretation, courts will reject an interpretation that is inconsistent with or “diverges from any realistic meaning of” the underlying statute. Natural Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 752–53 (D.C. Cir. 2000) (the “judicial function is neither rote nor meaningless”).

\textsuperscript{31}  Nuclear Energy Institute, 373 F.3d at 1257.
\textsuperscript{32}  Id. at 1267, 1271.
\textsuperscript{33}  Id. at 1267.
\textsuperscript{34}  Id. at 1273.
\textsuperscript{35}  Id. at 1267, 1271.
\textsuperscript{36}  Id. at 1299.
\textsuperscript{37}  Id.
\textsuperscript{38}  Id.
\textsuperscript{39}  Id. at 1304.
\textsuperscript{40}  Id. at 1302.
nothing in the resolution ran up against other federalist constraints imposed by the Constitution. Accordingly, the court affirmed Congress' power to site a national nuclear repository at Yucca Mountain.

Both sides claimed a victory after the court issued the Nuclear Energy Institute decision, but Petitioners' victory may ring hollow in the future. Petitioners celebrated the court's decision to vacate the 10,000-year compliance period and adopt a longer compliance period. Granted, an extended compliance period may lead to additional safeguards, more comprehensive long-term decisionmaking, and more accurate health and safety standards with respect to peak exposure risks likely to occur after 10,000 years. However, the court recognized that Congress could also authorize EPA and NRC to ignore the advice of NAS. Neither agency is bound by the Nuclear Energy Institute decision to adopt a longer compliance period if Congress revises the statutory framework. Moreover, EPA is expected to adopt new standards as soon this year.

As a result, the practical reality undermines the initial success of Petitioners and the State of Nevada. As the court put it, "Nevada wins the battle... only to lose the war."

In the end, the court indicated that the battle for Yucca Mountain should be waged in the halls of Congress, not the courtroom. Unfortunately for Nevada, this political battle has been and will be a losing battle. Congress and the President have demonstrated a unified political will to move forward with constructing a national nuclear waste repository at Yucca Mountain. In light of that political will, the only question is how long it will take Congress and the federal agencies to overcome the hurdle set by this judicial decision. The next step will either involve revised standards based on an extended compliance period or another statutory mandate from Congress. Ultimately, despite Nevada's partial victory with respect to the 10,000-year compliance period, Yucca

41.  *Id.* at 1304–09. In doing so, the Court rejected the Petitioners' broad reliance on the Tenth Amendment, the Guarantee Clause, the Port Preference Clause, the Uniformity Clause, the Bill of Attainder Clause, and the equal footing doctrine for its “equal treatment” claim. *Id.*
42.  Yoo & Koester, supra note 7, at 1319.
44.  Nuclear Energy Institute, 373 F.3d at 1273. At least one member of the House of Representative has proposed legislation that would allow Congress to set the governing standards. See also *House Member Plans Measure to Speed Opening Nevada Nuclear Dump, ASSOCIATED PRESS STATE & LOCAL WIRE*, July 13, 2005.
46.  Nuclear Energy Institute, 373 F.3d at 1273.
47.  *Id.* at 1292.
Mountain remains poised to become the nation’s nuclear waste repository.\textsuperscript{48}

\textit{Beko Reblitz-Richardson}

\textsuperscript{48} For updates on the Yucca Mountain controversy, see http://www.state.nv.us/nucwaste/whatsnew.htm (last visited June 26, 2005).
INTRODUCTION

In Safe Food & Fertilizer v. EPA, the D.C. Circuit upheld an Environmental Protection Agency (EPA) rule exempting zinc-bearing “hazardous secondary materials” (HSM) from Subtitle C of the Resource Conservation and Recovery Act (RCRA) when they are recycled into zinc fertilizer. Specifically, the court upheld EPA’s rationale that HSMs cannot be considered “discarded” under RCRA if they are managed as valuable commodities, and are incorporated into products that pose no greater health risk than products made with virgin materials. By holding that EPA’s decision to streamline regulations for these materials is consistent with the purpose of RCRA, the court established that reuse in a distinct, off-site process can be considered legitimate recycling. Additionally, it endorsed a framework for further reductions in the regulatory burden associated with such recycling and resource conservation.

BACKGROUND ON THE ZINC FERTILIZER RULE

About half of the zinc fertilizers on the market are made with zinc-bearing HSMs rather than virgin feedstock. In addition to valuable concentrations of zinc, these HSMs usually contain dioxins and toxic metals, including lead, arsenic, mercury, cadmium, and chromium. Because these fertilizers are used in growing plants for food production, the non-profit petitioner in this case, Safe Food & Fertilizer, argued that EPA should maintain the regulatory status quo ante and continue to stringently regulate the use of HSM in zinc fertilizers.

Copyright © 2005 by the Regents of the University of California.
1. 350 F.3d 1263 (D.C. Cir. 2003).
2. Id.
Prior to the rule under review, EPA regulated most zinc-bearing HSM as solid waste even when recycled in fertilizers. As a consequence of RCRA's "derived-from" rule, the resulting fertilizers were also solid wastes that could be applied to fields only if they met EPA's Land Disposal Restrictions (LDRs). However, this regulation had a loophole—the LDRs did not apply to zinc fertilizers made from electric arc furnace dust, a zinc-bearing sludge generated by air pollution control devices known as "K061 waste." Following a 1992 D.C. Circuit ruling requiring EPA to make LDRs more stringent generally, EPA realized that doing so for waste-derived fertilizers would encourage fertilizer manufacturers to use the exempt K061 waste rather than incur the expense of complying with the stricter LDRs for other types of zinc-bearing HSM. Strengthening the LDRs under the status quo, then, would have been counterproductive because K061 contains higher concentrations of contaminants than other zinc-bearing HSM. Instead of simply strengthening the LDRs, EPA issued a rule addressing waste-derived fertilizers more generally. The new rule eliminated the special exemption for K061 wastes while creating a broader conditional exemption for all HSM used in the production of fertilizers and for the fertilizers themselves. This new exemption is conditioned on a trio of safeguards to ensure that recycling of these materials did not harm the environment or human health. Generators must handle the HSM in a manner consistent with the handling of a valuable commodity, as opposed to an industrial waste. In addition, fertilizer manufacturers must comply with handling, storage, and reporting procedures, and the concentrations of six contaminants in the fertilizers must not exceed EPA-defined ceilings. EPA set these ceilings so that the waste-derived fertilizers would pose a substantially

---

4. Under the derived-from rule, all products derived from a hazardous substance are treated as hazardous waste. Am. Petroleum Inst. v. EPA, 906 F.2d 729, 738 (D.C. Cir. 1990) (citing 40 C.F.R. § 261.3(c)(2)).
5. EPA exempted K061-derived fertilizers in 1988 because they have contaminant levels comparable to those in fertilizers made with virgin sources of zinc. Land Disposal Restrictions for First Third Scheduled Wastes, 53 Fed. Reg. 31,138 (Aug. 17, 1988). However, conventional zinc fertilizers have recently become much purer, such that K061-derived fertilizers are generally the most contaminated in the market, and, therefore, no longer merit such an exemption. Zinc Fertilizer Rule, supra note 3, at 48,397.
7. Safe Food, 350 F.3d at 1266.
8. Id.
10. Id.
11. The court refers to this as the market-participation theory. Safe Food, 350 F.3d at 1269.
12. Id. at 1269-70.
identical health risk to those made with virgin sources of zinc.\textsuperscript{13} EPA refers to this latter safeguard as the “identity principle.”\textsuperscript{14}

\textbf{DECISION}

In \textit{Safe Food & Fertilizer v. EPA}, the court first addressed two EPA arguments that part or all of Safe Food’s claims should be dismissed on jurisdictional grounds. The court held that Safe Food had standing to challenge the rule, but that their challenge was limited to the new aspects of this rulemaking and could not extend more generally to the legality of recycling hazardous materials into fertilizers.\textsuperscript{15}

Addressing the merits, Safe Food asserted that EPA misconstrued the meaning of “discarded” under RCRA, and therefore wrongly excluded these recycled materials from the definition of solid waste.\textsuperscript{16} It also argued that EPA’s distinction between product and waste based on the identity principle was not valid. The court decided both issues under the deferential standard formulated in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}.\textsuperscript{17}

Asserting its first claim, Safe Food argued that EPA could not conditionally exclude zinc-bearing HSM recycled by fertilizer manufacturers because the material left the generating process and is therefore discarded. According to Safe Food, this recycling process was not excluded under \textit{American Mining Congress v. EPA}, in which the D.C. Circuit determined that materials recycled in a continuous process by the generating industry are not discarded in the plain meaning of that word, and therefore not subject to EPA’s jurisdiction under RCRA.\textsuperscript{18} Safe Food argued that because it was not thus excluded, EPA’s jurisdiction over materials recycled in a distinct industrial process was established.

\textsuperscript{13} \textit{Id.} at 1270.


\textsuperscript{15} First, EPA asserted that Safe Food had no standing because the fertilizers made from recycled zinc are chemically identical to those made from virgin zinc, and therefore pose no redressable harm. \textit{Safe Food}, 350 F.3d at 1266. The court dismissed EPA’s argument, noting that the two fertilizers are not actually chemically identical. More fundamentally, the court held that petitioners did not have to demonstrate that EPA’s rule enhanced their risk, only that it violated RCRA, resulting in exposure to the hazardous constituents of the fertilizer. \textit{Id.} at 1267. EPA argued more successfully to dismiss Safe Food’s claim that EPA violated RCRA by allowing zinc-bearing HSM to be recycled to fertilizers so long as they meet LDRs. \textit{Id.} The court agreed with EPA that this was an “impermissible back-door challenge” to a rule for which the 90-day public comment period had long expired. \textit{Id.} at 1267-68.

\textsuperscript{16} \textit{Id.} at 1268.

\textsuperscript{17} 467 U.S. 837 (1984). Under \textit{Chevron} doctrine, courts defer to agency interpretations of a statute wherever the language is ambiguous and the agency has made a reasonable interpretation.

\textsuperscript{18} \textit{Safe Food}, 350 F.3d at 1268; \textit{Am. Mining Cong. v. EPA}, 824 F.2d 1177 (D.C. Cir. 1987).
implicitly.\textsuperscript{19} The court disagreed, noting that a previous holding that materials reused within an ongoing process are not discarded did not compel it to rule that materials reused outside of the generating process were discarded.\textsuperscript{20} The court reasoned that it might not serve a company's economic interest to integrate every process that could make use of byproducts from its core processes.\textsuperscript{21} Therefore, sending HSM off-site for recycling should not be considered conclusive evidence that it was discarded.\textsuperscript{22}

In addition, Safe Food made a more specific textual argument for K061 waste, contending that K061 must be regulated as a solid waste regardless of how it is recycled, because RCRA defines solid waste as "any garbage, refuse, sludge from... [an] air pollution control facility and any other discarded material."\textsuperscript{23} As Safe Food interpreted this language, K061 waste must be solid waste even if it is not "discarded" because it is produced by air pollution control facilities.\textsuperscript{24} In contrast, EPA interpreted this definition to indicate that K061 wastes are solid wastes only if they are discarded.\textsuperscript{25} Although the court recognized that Safe Food's interpretation was sensible, it followed \textit{Chevron} and deferred to the EPA's interpretation since it comported with accepted principles of construction and was not precluded by the statute.\textsuperscript{26}

Finding that RCRA does not preclude EPA's regulatory definition of "discarded," the court turned to the second issue of whether EPA provided a rational basis for distinguishing between in-process materials and discarded wastes, and whether this rationale for exempting these materials was reasonable and consistent with the statutory purpose.\textsuperscript{27} In the preamble to its rule, EPA reasons that zinc-bearing HSMs are not discarded if generators and recyclers handle zinc-bearing HSM as valuable market commodities, if they comply with EPA requirements when incorporating the materials into zinc fertilizer, and if the resulting fertilizers are substantially chemically identical to those made with virgin

\textsuperscript{19} \textit{Safe Food}, 350 F.3d at 1268.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 1268-69.
\textsuperscript{24} \textit{Safe Food}, 350 F.3d at 1268-69.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.} at 1269. The court also notes how EPA's interpretation comports with the "reverse \textit{ejusdem generis}" principle, under which "the phrase 'A, B, or any other C' indicates that A is a subset of C." In this case, that sludges from air pollution control facilities must be a subset of the class of discarded materials. \textit{But see Ass'n of Battery Recyclers v. EPA}, 208 F.3d 1047, 1056 n.4 (D.C. Cir. 2000) (suggesting that EPA could establish RCRA jurisdiction over mineral processing sludges from waste treatment based on the enumeration of these sludges in the statutory definition rather than trying to show that they are discarded).
\textsuperscript{27} \textit{Safe Food}, 350 F.3d at 1268-69.
IN BRIEF

sources of zinc. As a matter of first impression, the court held that the identity of waste-derived and conventional products—when used in conjunction with indicators like market participation valuation and EPA-established management practices—is a reasonable tool for distinguishing in-process materials from waste.

Safe Food also argued that the identity principle, even if a valid basis for granting exemptions, did not apply in this case because waste-derived fertilizers are not chemically identical to conventional fertilizers in some important aspects. Although the court granted that EPA's contaminant ceilings were higher than the levels commonly found in conventional fertilizers, it found these differences to be "substantively meaningless" from the perspective of health and environmental risk. EPA's contaminant ceilings were at least twenty times lower than the toxicity threshold for four metal contaminants of concern. But EPA's rule did not identify a risk threshold for chromium in a form comparable to the established chromium ceiling. Without this information, the court could not determine whether the difference in chromium concentrations in conventional fertilizers and the chromium ceiling for waste-derived fertilizers was trivial from the perspective of health. Therefore, the court remanded to EPA for an explanation of whether the different chromium concentrations are relevant from the perspective of health risk.

ANALYSIS

Immediate Impact of the Decision

This decision upheld an EPA rule that eases the regulatory burden associated with recycling of zinc-bearing hazardous wastes, while closing a loophole for the unregulated recycling of the most contaminated of these wastes—K061 sludge. The environmental impact of this rule, though, is unclear. Since fertilizer manufacturers apparently found recycling zinc-bearing HSM profitable even with the higher regulatory burden, the rule may not lead to a significant increase in the recycling

28. Id. at 1269.
29. Id.
30. Id.
31. Id. at 1270.
32. Safe Food, 350 F.3d at 1270. Petitioners also argued that the uncertainties inherent in the risk assessment establishing these toxicity levels rendered the study "meaningless," but the court upheld EPA's ceilings because they were "tiny fractions of the risk thresholds." This provided a margin of safety to account for the uncertainty in the risk assessment.
33. Id. at 1271.
34. Id.
35. Id. at 1272.
rate of these materials and corresponding reduction in the volume of waste landfilled. However, the rule at issue does eliminate the incentive for fertilizer manufacturers to use the most contaminated zinc-bearing HSM, K061 waste, which undoubtedly will reduce release of contaminants to the environment.

What seems clearer is that the court rightly affirmed EPA's rationale about how a waste-derived fertilizer must be identical to a conventional fertilizer. Petitioners were concerned about whether contaminants in the waste-derived fertilizers pose a health risk. The established contaminant ceilings, though higher than the maximum levels found in conventional fertilizers, are well below the health risk thresholds for each contaminant. If the two kinds of fertilizers are indistinguishable from the perspective of health risk, then waste-derived fertilizers pose no distinguishable harm to human health and should not be differentiated in regulation. Ironically, while EPA has successfully established limits on the concentration of contaminants in waste-derived fertilizers, there is no equivalent federal regulatory program for conventional fertilizers, although many contain appreciable levels of heavy metal contaminants.36 If such a comprehensive program were established, there would be no need for special controls on waste-derived fertilizers, only a requirement that they meet the same standards as fertilizers made from virgin sources of zinc.

**Broader Implications for Recycling of Hazardous Waste**

While this decision upheld a narrowly applied EPA rule, it laid the groundwork for continued liberalization of recycling policy under RCRA by affirming a regulatory framework for legitimate inter-industry recycling. Most importantly, the court held that a risk-based conception of identity between waste-derived and conventional products is consistent with RCRA's purpose. However, the court did not address the question of whether identity is a sufficient indicator of whether a material should be considered discarded, because EPA combined this risk-based safeguard with conventional regulatory process requirements. Nevertheless, this decision gives EPA the green light to grant similar conditional exemptions for other types of inter-industry recycling. In doing so, it creates the potential for increased recycling of hazardous secondary materials, which furthers resource conservation.

But the decision also raises concerns about "sham recycling." Sham recycling, sometimes referred to as "toxics along for the ride," occurs when waste generators dispose of a material by incorporating it into

---

36. EPA regulates less than half a percent of all fertilizers on the market through RCRA. Fertilizers are regulated by state agricultural agencies, but only three states (Washington, Texas and California) have established regulatory programs for fertilizer contaminants. Zinc Fertilizer Rule, supra note 3, at 48,407.
another product to which it adds little or no actual benefit. In the instant case, dioxin and metals other than zinc would be the "toxics along for the ride" because they make no beneficial contribution to the final fertilizer product. However, the recycling of zinc-bearing materials into fertilizers seems to be a legitimate recycling activity because these other contaminants do not render the fertilizer more hazardous than conventional fertilizers, and because the zinc in the secondary materials is the key ingredient in the resulting product.

Does EPA have any jurisdiction over zinc-bearing HSM that is recycled?

The nature of the challenges brought by Safe Food enabled the court to sidestep the thornier issue regarding EPA's jurisdiction over recycled hazardous secondary materials—whether EPA can impose any regulations at all. The D.C. Circuit recently grappled with this issue in Association of Battery Recyclers, Inc. v. EPA. In that case, the court overturned EPA's conditional exemption for the processing of secondary materials bound for reclamation because the exemption required containerized storage of materials between generation and reclamation. The court held for the industry petitioners on the basis that EPA had contravened Congress' intent by regulating in-process secondary materials. In other words, the D.C. Circuit ruled in Association of Battery Recyclers that EPA cannot regulate materials under RCRA that have not yet become "part of the waste disposal problem." This suggests that the zinc fertilizer rule upheld in Safe Food would not have fared so well if, instead, an industry group had challenged EPA's conditional exemption as too restrictive. In fact, the fertilizer industry did submit comments on the proposed rule arguing that contaminant ceilings were unwarranted. Further litigation of this issue is likely brewing.

CONCLUSION

Recycling of hazardous waste is a contentious issue, one that has divided the environmental community. On the one hand, it seems clear that people shouldn't mine new zinc when existing zinc byproducts are reusable. On the other, sham recycling and "toxics along for the ride" are legitimate concerns. By looking at the health and environmental impact of the final product, and maintaining some safeguards in the interim

37. See United States v. Marine Shale Processors, 81 F.3d 1361, 1365 (5th Cir. 1996).
38. See Zinc Fertilizer Rule, supra note 3, at 48,396.
39. 208 F.3d 1047.
40. Id. at 1051-52.
41. Id. at 1056.
42. Am. Mining Cong. v. EPA, 824 F.2d 1177, 1186 (D.C. Cir. 1987).
43. Zinc Fertilizer Rule, supra note 3, at 48,405.
management of these materials, EPA thus far has successfully navigated these concerns. The zinc fertilizer rule is consistent with the multiple purposes of RCRA—not only to prevent release of hazardous materials to the environment, but also to conserve valuable resources. The D.C. Circuit's affirmation of the rule in this case wisely defers to EPA's achievement of a difficult balance between these two goals.

Casey Roberts

44. One of RCRA's objectives is to "promote the protection of health and the environment and to conserve valuable material and energy resources by . . . minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment." 42 U.S.C. § 6902(a)(6) (2000).
EPA Cannot Exempt Discharges of Ballast Water from the Clean Water Act’s Permit Requirements

Strongly repudiating an Environmental Protection Agency (EPA) interpretation of the Clean Water Act (CWA), a federal district court held that releases of ballast water are subject to the CWA. As a result, ships cannot discharge ballast water into U.S. waterways without first obtaining permits from the EPA.

BALLAST WATER HARBORS INVASIVE SPECIES

Seagoing ships pump ballast water from the ocean into onboard tanks in order to increase safety and maneuverability. Adjusting the quantity of ballast water changes a ship’s depth and orientation in the sea, thus affecting the vessel’s balance and stability. Cargo weight and placement, weather, and sea conditions affect the amount of ballast water needed for safe operation, so ships typically take in or release ballast water while a voyage is in progress, especially near ports.

Although the use of ballast water is necessary, it is also the “largest single vector of non-indigenous species,” with ships inadvertently...
transporting thousands of species every day. A single ship can hold about 28 million gallons of ballast water, and ships release about 21 billion gallons of ballast water in U.S. waters annually. The exotic species transported in ballast water are more than just a curiosity. When released into a hospitable habitat, often near a port perhaps thousands of miles from their origin, these invasive species may flourish, decimate native organisms, disrupt food chains, and damage economies. For instance, in little more than a decade since ships' ballast water introduced the European zebra mussel into the Great Lakes, the multiplying mussels have regularly clogged intake pipes to cities and factories, aggressively attached to ships and marine structures, encouraged abnormal algae growth, hampered recreational areas, and threatened native organisms. In California, the San Francisco Regional Water Quality Control Board has called invasive species "one of the greatest threats to the integrity of the San Francisco Estuary ecosystem, perhaps as great as any pollutant under the Clean Water Act." EPA DECIDED THAT REGULATING BALLAST WATER UNDER THE CWA WOULD BE INAPPROPRIATE IN LIGHT OF A LONGSTANDING EPA RULE

Several environmental organizations petitioned EPA in January 1999 to repeal an EPA rule, section 122.3(a), that excluded ballast water from regulation under the Clean Water Act (CWA). According to the petition, other government efforts to regulate ballast water, such as those of the Coast Guard, had failed to stem the tide of invasive species and "do not substitute for compliance with the CWA." More than four years later, EPA announced that it was denying the petition. To justify this

---

6. Id. at 39.
8. See UNIVERSITY OF CALIFORNIA SEA GRANT EXTENSION PROGRAM, BALLAST EXCHANGE 2 (vol. 1 1999) [hereinafter BALLAST EXCHANGE 2].
9. See id. at 3; see also Hugh McDiarmid Jr., Environmental Threats to Great Lakes Outpace Scientific Solutions, DETROIT FREE PRESS, Sept. 22, 2003 (describing effects of the even more destructive quagga mussel).
10. BALLAST EXCHANGE 2, supra note 8.
11. 40 C.F.R. § 122.3(a) (2003) (stating that permits are not required for "[a]ny discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel"); Petition for Repeal of 40 C.F.R. § 122.3(a) from Pacific Environmental Advocacy Center et al. to Carol Browner, Administrator, EPA (Jan. 13, 1999) [hereinafter Petition], available at http://www.epa.gov/owow/invasive_species/petition1.html.
13. See Petition, supra note 11, § 1.
denial, EPA presented several historical analyses, including interpretation of the CWA text, review of legislative history, and the reaction of Congress and other agencies to EPA's promulgation of section 122.3(a). EPA also recounted the history of interagency cooperation to control the introduction of invasive species in ballast water. Based on practical concerns as well as its interpretation of historical congressional intent, EPA decided that "the Coast Guard has already taken the lead in dealing with the problem... and it would be duplicative if EPA also began regulating commercial shipping."

In the Northern District of California, environmental groups sought review of the EPA's original promulgation of section 122.3(a) and review of EPA's denial of the petition. First, the groups claimed that EPA's section 122.3(a) was a regulation inconsistent with the agency's statutory authority under the CWA, so the promulgation was unlawful and subject to judicial review under the Administrative Procedure Act (APA). Second, the groups claimed that EPA's denial of the petition was arbitrary, capricious, and an abuse of discretion in light of the CWA. The court ruled for the plaintiffs on the first claim and found that promulgating section 122.3(a) exceeded EPA's statutory authority; the plaintiffs thus also prevailed on the second claim and the court ordered EPA to repeal the rule as the environmental groups had sought with their petition.

EPA'S PROMULGATION OF SECTION 122.3(A) WAS INCONSISTENT WITH THE AGENCY’S STATUTORY AUTHORITY UNDER THE CWA

The court reviewed EPA's promulgation of section 122.3(a) in light of the section 706(2) of the Administrative Procedure Act, which provides that a court "shall" set aside an agency decision that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or a decision that is "in excess of statutory jurisdiction, authority, or limitations." In making this decision, the court used the familiar Chevron standard: if Congress through its legislation has directly addressed the precise question at issue, then this unambiguously expressed congressional intent governs the agency's action; if a statute is silent or ambiguous with respect to the specific issue, a court reviewing an agency action should defer to the agency unless the agency's action is not based on a permissible construction of the statute.

18. Id. at *3.
Here, the court looked to the CWA to see whether it unambiguously requires EPA to subject “discharges incidental to the normal operation of a vessel, including ballast water,” to a permitting process.20

The text of the CWA requires permits for any activity that involves discharging a pollutant into navigable waters from a point source.21 The court quickly dispatched with the question of whether releasing ballast water into San Francisco Bay constitutes discharging a pollutant into navigable waters from a point source. The term “pollutant,” as used in the CWA, includes “biological materials.”22 “Ballast water discharges clearly introduce biological materials [invasive species] from outside sources,” so it is a pollutant.23 Since ships are point sources, when they discharge ballast water into navigable waters such as the San Francisco Bay, the plain text of the CWA requires that they first obtain a permit.

Nonetheless, the EPA defended section 122.3(a)’s exemption of ballast water by reiterating the same arguments it had used when it denied the petition seeking repeal of the exemption. EPA asserted that Congress had acquiesced to EPA’s rule in section 122.3(a), since Congress had not revised or overridden the rule in the three decades since its promulgation in 1973.24 The court, however, refused to determine congressional intent based on the length of time a regulation has been in effect without modification by Congress.25 Also, unlike the few other cases in which the Supreme Court found congressional acquiescence to an agency’s interpretation of a statute, this case lacked legislative evidence that Congress actively deliberated on the agency rule and then refused to pass contrary legislation.26 The court noted that other federal statutes pertaining to invasive species showed congressional intent to develop parallel efforts against invasive species, demonstrating that Congress would not likely have intended to limit the scope of the CWA with respect to ballast water.27 Even congressional revisions to the

22. § 1362(6).
25. Id. (noting that precedent cited by the EPA predated the Chevron rule).
26. Id. at *11 (noting, in contrast, that Congress had tried and failed thirteen times to pass a bill that would overturn an IRS rule at issue in Bob Jones Univ. v. United States, 461 U.S. 574 (1983)).
27. Id. (looking to the Non-indigenous Aquatic Nuisance Prevention and Control Act, 16 U.S.C. § 4701, as re-authorized and amended by the National Invasive Species Act of 1996 (NISA), and the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. § 1901). NISA, for instance, provides that “[t]he regulations issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States.” 16 U.S.C. § 4711(b)(2)(C). APPS implemented provisions of the
CWA itself in 1997, 1981, and 1987 were not sufficient evidence of acquiescence, because “Congress did not directly discuss regulation of ballast water discharges and other discharges incidental to the operation of a vessel, nor did Congress reject a bill overturning 40 C.F.R. § 122.3(a).”

**STATUTE OF LIMITATIONS DID NOT BAR PLAINTIFFS FROM BRINGING A SUBSTANTIVE CHALLENGE TO SECTION 122.3(A) WHEN EPA DENIED THEIR PETITION ASKING EPA TO REPEAL THE RULE**

The court rejected the government’s assertion that the plaintiffs should be time-barred from bringing a challenge to a rule promulgated in 1973. A six-year statute of limitations applies generally to challenges brought under the Administrative Procedure Act. The Ninth Circuit rule is that “challenges to procedural violations in the adoption of regulations and policy-based challenges must be brought within six years of a regulation’s promulgation,” while “a substantive challenge to an agency decision alleging that the agency lacked constitutional or statutory authority to make the decision may be brought within six years of the application of that agency decision to the challenger, as an ‘as applied’ challenge.”

The difficulty is determining if and when the application of an agency decision to a challenger occurs. EPA asserted that it did not “apply” section 122.3(a) to the plaintiffs, so the statute of limitations with respect to the plaintiffs would have begun when EPA promulgated the rule in 1973. The court, however, agreed with the environmental groups “that the case should be classified as an ‘as applied’ challenge, since the EPA could not deny plaintiffs’ petition without applying the regulation in the process.” The D.C. Circuit, Eleventh Circuit, and Seventh Circuit have ruled similarly in other cases that a plaintiff may challenge an agency action as *ultra vires* outside a statutory limitations period, by filing a petition for amendment or rescission of the agency’s regulations. In this case, the EPA applied its decision promulgating section 122.3 to the

---

29. *Id.* at *7; 28 U.S.C. § 2401(a) (2000) (“Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”).
30. *N.W. Envtl. Advocates*, 2005 WL 756614, at *7 (citing Wind River Mining Corp. v. United States, 946 F.2d 710, 713 (9th Cir. 1991)).
31. *Id.* at *8.
32. *Id.*
33. *See id.*
plaintiffs when the agency rejected their petition on September 9, 2003. The plaintiffs thus evaded the statute of limitations.

SUMMARY

The court gave significantly more credence to the statutory text than to EPA's assertions that Congress had silently acquiesced to its thirty-two year old rule. The effect of the ruling, pending any appeal, will depend on how EPA chooses to regulate ballast water. Creating a permit process to regulate mobile point sources such as ships may be less feasible than creating rules that require ships to filter ballast water or to discharge it outside of U.S. navigable waters. Regardless of how EPA chooses to regulate ballast water, this decision will potentially help stem the tide of invasive species introduced through ballast water.

Liwen A. Mah

34. Id.

35. See Rogers, supra note 15 (quoting a spokesman for the Pacific Merchant Shipping Association, which represents more than fifty west-coast shipping lines). Since the court's ruling, Michigan has enacted legislation requiring state permits for oceangoing ships and banning untreated discharges of ballast water. MICH. COMP. LAWS ANN. § 324.3112 (6) (West 2005). For an international oceans perspective, see Casting light on murky waters, LLOYD'S LIST, June 15, 2005.