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In Brief

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In Brief

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Second Circuit Says CO₂ is a Nuisance

INTRODUCTION

In Connecticut v. American Electric Power Co., the Second Circuit ruled that federal courts were competent to deal with tort claims against emitters of greenhouse gases.¹ Although the plaintiffs in this suit only sought injunctive relief in the form of a cap and mandated reductions of greenhouse gas emissions, the court’s ruling exposes the nation’s utility companies to billions of dollars worth of liability.²

In 2005, eight states, one municipality, and three land trusts brought suit against the five largest greenhouse gas emitters in the country on the theory that their emissions, amounting to 10 percent of all greenhouse gases emitted in the United States, constituted a public nuisance.³ The district court granted defendants’ summary judgment motion, holding that the suit raised political questions beyond the court’s jurisdiction.⁴ On appeal, the Second Circuit reversed the district court’s finding of a non-justiciable political question, and held that plaintiffs had standing,⁵ that plaintiffs had properly stated a federal common law nuisance claim,⁶ and that existing federal regulation did not displace such claims.⁷

I. POLITICAL QUESTION

The political question doctrine is based on separation of power concerns and is “designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government.”⁸ The Second Circuit noted, however, that “simply because an issue may have

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⁴. Id. at 274.
⁶. Id. at 387–88.
⁷. Id. at 388.
⁸. Id. at 321 (quoting United States v. Munoz-Flores, 495 U.S. 385, 394 (1990)).
political implications does not make it non-justiciable.” The Second Circuit applied the test established in Baker v. Carr to determine whether plaintiffs’ claim for relief presented a non-justiciable political question.10

Regarding the first Baker factor, the court found “no textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions . . . [and held] that the first Baker factor does not apply.”11 With regard to the second Baker factor, the court found that though “a case may present complex issues . . . when a court is possessed of jurisdiction, it generally must exercise it,” and held that “[d]efendants [were] not entitled to dismissal based on the second Baker factor.”12 With regard to the third Baker factor, the court found that an “ordinary tort suit,” such as the present case, presented no “impossibility of deciding without an initial policy determination . . . .”13 The court also clarified that the lack of a remedy under the Federal Clean Air Act (CAA) and other statutes relating to greenhouse gases did not require plaintiffs to wait for an initial federal policy decision before bringing their claim. In fact, federal common law is meant to fill such regulatory gaps.14 Accordingly, the court found that “the third Baker factor does not apply.”15

The court analyzed the fourth, fifth, and sixth Baker factors together since they pertain to whether “judicial resolution of a question would contradict prior decisions . . . where such contradiction would seriously interfere with important governmental interests.”16 The court found that these last three factors did not apply because “[a]llowing this [suit] where there is a lack of a unified policy does not . . . contravene a relevant political decision [or] embarrass the nation.”17 Because none of the Baker

9. See id. at 323.
10. Id. at 321–32. The Baker test requires a finding of a non-justiciable political question to be supported by:
[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

12. Id. at 329–30.
13. Id. at 331 (citing McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1365 (11th Cir. 2007) (quoting Baker, 369 U.S. at 217)).
15. Id. at 331.
16. Id. (quoting Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995)).
17. Id. at 332.
factors applied, the court held that the political question doctrine did not bar plaintiffs' federal common law nuisance claims.\textsuperscript{18}

II. STANDING

A. States' Standing under Parens Patriae

To determine whether the States had standing, the court applied the parens patriae doctrine as articulated in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*.\textsuperscript{19} The parens patriae doctrine is related to the notion that the state can intervene as a parent or protector of its constituency. This power "is inherent in the supreme power of every state . . . [and is] often necessary . . . for the prevention of injury to those who cannot protect themselves."\textsuperscript{20} The rationale for this doctrine is that "if the health . . . of the inhabitants of a state [is] threatened, the state [should] defend them."\textsuperscript{21} The court applied the parens patriae test established in *Snapp v. Puerto Rico ex rel. Barez*, which requires a state to (1) "articulate an interest apart from the interests of . . . private parties"; (2) "express a quasi-sovereign interest"; and (3) "allege[] injury to a sufficiently substantial segment of its population."\textsuperscript{22} The court found that the state plaintiffs met the *Snapp* test. First the court noted that the states were more than merely "nominal parties" because they have a quasi-sovereign "interest in safeguarding the public health and their resources [that] is apart from any interest held by individual private entities."\textsuperscript{23} The court also noted that it was unlikely that an individual plaintiff could stop its greenhouse gas emissions.\textsuperscript{24}

B. Article III Standing

Next, the court examined whether the state, land trust, and municipal plaintiffs had Article III standing under the three-part test articulated in *Lujan v. Defenders of Wildlife*.\textsuperscript{25}

First the court examined whether plaintiffs had "suffered an injury in fact . . . which is . . . (a) concrete and particularized, and (b) actual or

\textsuperscript{18} Id.
\textsuperscript{19} Id. at 334 (Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890)).
\textsuperscript{20} Id. (quoting *Late Corp.*, 136 U.S. at 57).
\textsuperscript{21} Id. (quoting Missouri v. Illinois, 180 U.S. 208, 241 (1901)). The parens patriae doctrine has been applied to common law public nuisance air pollution cases. See *Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).
\textsuperscript{22} *Am. Elec. Power Co.*, 582 F.3d at 335–36 (quoting *Snapp*, 458 U.S. at 607).
\textsuperscript{23} Id. at 338.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 339 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).
imminent, not conjectural or hypothetical.” In analyzing the injury in fact question, the court noted that “[w]hile generalized harm to the... environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.” Injuries here include current injuries caused by global warming and an increased risk of harm from the future effects of global warming. All plaintiffs alleged future injuries, including an increased risk of harm, and “assert[ed] that these future injuries constitute ‘special injuries’ to their property interests—juries different in kind and degree from the injuries suffered by the general public.” By contrast, defendants, relying on Bauer v. Veneman, contended that “no [p]laintiff has alleged a current injury, that the future harms alleged in the complaints are not ‘imminent’ enough to satisfy Article III injury-in-fact, and that the increased risks of harm cited by [p]laintiffs are not cognizable...”

The court analyzed the states’ claims for current harms beginning with the claim of reduced California snowpack, declining water supplies, and flooding. The court found that the “flooding... qualifies as a current injury-in-fact for Article III purposes, as in Massachusetts v. EPA, wherein coastal erosion caused by global warming qualified as a concrete and current injury to Massachusetts.” With regard to the alleged future harms put forth by plaintiffs, including rising sea levels, land inundation, agricultural and ecosystem disruption, and the reduced ecological value of land, the court held that there was no “strict temporal requirement” to establish injury-in-fact, only a requirement of “certainty.” The court found sufficient evidence of certainty in plaintiffs’ exposure to current greenhouse gas emissions and resulting harms, and stated that greenhouse gas emissions “will continue to exacerbate” plaintiffs’ current injuries.

The court next analyzed the causation prong of the Lujan test, which requires that “the... injury [is] fairly traceable to the... defendant.” Plaintiffs argued that defendants are “the five largest emitters of [CO₂] in

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26. Id. (quoting Lujan, 504 U.S. at 560-61).
27. Id. at 341 (quoting Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009)).
28. Id.
29. Id.
30. Id. (citing Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003) (holding that increased risks were not a cognizable harm unless “Congress had enacted statutes to prevent the very increased risk the plaintiffs alleged”)).
32. Id. at 342-43 (citing 520 S. Mich. Ave. Assocs. v. Devine, 433 F.3d 961, 962 (7th Cir. 2006)).
33. Id. at 344.
34. Id. at 345 (quoting Bennett v. Spear, 520 U.S. 154, 162 (1997)).
the United States” and together account for approximately 10 percent of all greenhouse gas emissions in the United States.\textsuperscript{35} Defendants countered that CO\textsubscript{2} is not “inherently harmful” and their greenhouse gas emissions would not alone “cause any future harms.”\textsuperscript{36} The court was not persuaded, finding that the alleged injuries were “fairly traceable” to defendants’ emissions and that contributing to a global greenhouse gas pollution problem is a cognizable harm.\textsuperscript{37} The court also noted that at the pleading stage, the “fairly traceable” standard is not as strict a bar as proximate cause.\textsuperscript{38} According to Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, the “fairly traceable” standard “does not mean that plaintiffs must show to a scientific certainty that . . . defendant[s’ emissions] alone caused [their] precise harm.”\textsuperscript{39}

The final prong of the \textit{Lujan} test requires that the complaint allege “a substantial likelihood that the requested relief will remedy the alleged injury in fact.”\textsuperscript{40} The court found the requirement was met. Using the analysis set in \textit{Massachusetts}, it found that the requested remedy would “slow or reduce” global warming, because “[e]ven if emissions increase elsewhere, . . . [p]laintiffs’ injuries will be less if [d]efendants’ emissions are reduced . . . .”\textsuperscript{41} Having satisfied the \textit{Lujan} test for proprietary standing and the \textit{Snapp} test for parens patriae standing, the court held “that all [p]laintiffs had standing to maintain their actions.”\textsuperscript{42}

III. STATING A CLAIM UNDER THE FEDERAL COMMON LAW OF NUISANCE

Next, the Second Circuit addressed whether plaintiffs had stated a sufficient claim for relief under the federal common law of public nuisance.\textsuperscript{43}

The court relied on precedent to show that New York City (NYC), as a non-State entity,\textsuperscript{44} and the trusts, as private parties,\textsuperscript{45} could sue based

\textsuperscript{36} \textit{Am. Elec. Power Co.}, 582 F.3d at 345.
\textsuperscript{37} \textit{Id.} at 345–46 (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 840E (1979) (“[T]he fact that other persons contribute to a nuisance is not a bar to the defendant’s liability for his own contribution.”)).
\textsuperscript{38} \textit{Id.} at 346 (citing Natural Res. Def. Council v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992); Barbour v. Haley, 471 F.3d 1222, 1226 (11th Cir. 2006)).
\textsuperscript{39} \textit{Id.} (citing Pub. Interest Res. Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 73 (3d Cir. 1990)).
\textsuperscript{40} \textit{Id.} at 347 (citing Jana-Rock Const., Inc. v. N.Y. State Dep’t of Econ. Dev., 438 F.3d 195, 204 (2d Cir. 2006)).
\textsuperscript{41} \textit{Id.} at 348–49.
\textsuperscript{42} \textit{Id.} at 349.
\textsuperscript{43} \textit{Id.}
on the federal nature of their interest. The court next examined footnote six of *Illinois v. Milwaukee* and declared that the footnote's sentence structure supported the finding "that it is not necessary for a complaining party to be a state in order to bring a federal common law of nuisance cause of action." The court also relied on the Restatement to determine whether non-state parties could bring a claim for public nuisance and whether plaintiffs alleged a viable claim. It found that New York City and the land trust plaintiffs had alleged viable claims and were entitled to bring these claims in cases invoking "an overriding federal interest." The court found that the land trust and municipal plaintiffs could "properly maintain actions under" section 821C because they "will suffer harms different in kind from the harms suffered by other members of the public" due to the size of their holdings and because they "hold open their land for public use." In examining whether trust and municipal plaintiffs had alleged a viable claim under section 821B, the court relied upon the same logic and reasoning as that used for the State claims, holding that "New York City and the [t]rusts have stated a claim under the federal common law of nuisance."

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44. *Id.* at 359–61 (citing City of Evansville v. Ky. Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979)).
45. *Id.* at 361–64 (citing Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1233 (3d Cir. 1980) (The "Third Circuit declared that 'the common law nuisance remedy recognized in *Illinois v. Milwaukee* is available in suits by private parties.'").
46. *Id.* at 364–66 (discussing *Illinois v. Milwaukee*, 406 U.S. 91 (1972)).
47. *Id.* at 366–71 (citing RESTATEMENT (SECOND) OF TORTS § 821B (1979)).
48. *Id.* at 358–71.
49. *Id.* at 368–69. The Restatement provides that

(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference. (2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must (a) have the right to recover damages, as indicated in Subsection (1), or (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

RESTATEMENT (SECOND) OF TORTS § 821C.
50. *Am. Elec. Power Co.*, 582 F.3d at 371. The Restatement provides that

(1) A public nuisance is an unreasonable interference with a right common to the general public. (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

RESTATEMENT (SECOND) OF TORTS § 821B.
The court rejected defendants’ contention that plaintiffs had failed to state valid federal common law public nuisance claims. The court found that, contrary to defendants’ assertion, the scope of the states’ cause of action was not limited by constitutional principles.51 The court then examined defendants’ contention that nuisance claims are only available to abate “simple type” nuisances that are localized, poisonous, and directly traceable.52 The court found instead that the law had “already evolved from the era when only ['simple type'] nuisances had been actionable,” and that the Supreme Court “has not imposed a requirement . . . that the challenged pollution must be ‘directly traced’ or that plaintiffs must sue all [emitters].”53 The court found no case law to support a requirement that the nuisance be poisonous or localized.55

IV. DISPLACEMENT

The doctrine of displacement concerns whether a federal statute supersedes federal common law.56 A cause of action is displaced when “federal statutory law governs a question previously the subject of federal common law.”57 Defendants argued that the CAA and five other statutes pertaining to greenhouse gases adequately addressed global climate change and displaced the common law of nuisance.58 While the court acknowledged that under the CAA, the Environmental Protection Agency (EPA) set national ambient air quality standards (NAAQS) for criteria pollutants anticipated to endanger public health, the court noted that EPA had yet to set an NAAQS for CO2.59 The court also found that while the Court in Massachusetts confirmed that EPA has the authority to regulate greenhouse gas emissions,60 “no Supreme Court case has held that the CAA has displaced federal common law in the area of air pollution.”61 The court held that, notwithstanding Massachusetts, “[w]ith respect to the [greenhouse gas] emissions causing the alleged nuisance at issue . . . EPA has yet . . . actually to regulate the emissions.”62

51. Am. Elec. Power Co., 582 F.3d at 353–55 (noting that “in circumstances like those of the instant case, in which a state is involved as a party on only one side of a dispute, the . . . state . . . is . . . more certainly entitled to . . . relief than a private party . . . ”).
52. Id. at 355.
53. Id. at 356 (citing Missouri v. Illinois, 200 U.S. 496 (1906)).
54. Id.
55. Id. at 357.
56. Id. at 371.
57. Id. (citing City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981)).
58. Id. at 375.
59. Id. at 375–76.
60. Id. at 377–78 (citing Massachusetts v. EPA, 549 U.S. 497 (2007)).
61. Id.
62. Id. at 381.
Defendants also argued that the entire web of federal air quality statutes was “sufficient to displace plaintiffs’ . . . cause of action.” After reviewing these statutes at length, the court found that “Congress . . . has not enacted any legislation that ‘addresses’ the problem that climate change presents to [p]laintiffs.” The court noted that the “linchpin in the displacement analysis concerns whether the legislation actually regulates the nuisance at issue. Study is not enough.” Finally, the court held “that neither Congress nor EPA has regulated greenhouse gas emissions . . . to ‘speak directly’ to [plaintiffs’ issue].”

CONCLUSION

Connecticut illustrates the power of the ancient doctrine of public nuisance to fill the gaps in modern federal environmental legislation by addressing global warming issues neglected by Congress and the executive branch. The case is a step towards mitigating the effects of global warming, but many environmentalists, politicians, and industry officials would prefer that Congress, not the courts, take the lead in regulating greenhouse gases. In response to this case, White House Climate Coordinator Carol Browner said “[w]hat this means is the courts are starting to take control of this issue and . . . [o]bviously that’s not something that anybody wants. We need a unified set of rules, . . . [which] is best done through legislation.” While it is unclear whether the courts or the legislature will ultimately succeed in enacting an administrable framework for achieving greenhouse gas reductions, the holding in Connecticut requires that something be done. Fortunately, defendants

63. Id.


65. Id. at 386. See John E. Bryson & Angus MacBeth, Public Nuisance, The Restatement (Second) of Torts, and Environmental Law, 2 ECOLOGY L.Q. 241, 281 (1972) (stating that “federal public nuisance law could be significantly limited if courts find [displacement] . . . However, Illinois v. City of Milwaukee, 406 U.S. 91 (1972) indicates that [displacement] should not be found.”).


have indicated that, given a clear mandate, they can reduce greenhouse gas emissions.\footnote{See Jeffrey Ball, \textit{AEP and Cinergy to Outline Ways to Cut Emissions}, WALL ST. J., Feb. 19, 2004, at A8 (quoting the CEO of defendant American Electric Power that “[i]f CO\textsubscript{2} mandates come down the road, we will live [with] them.”); John Carey, \textit{Global Warming}, BUS. Wk., Aug. 16, 2004, at 62 (quoting CEO of defendant XCEL Energy, “[g]ive us a date, tell us how much [CO\textsubscript{2}] we need to cut, . . . and we’ll get it done”).}

\textit{David Goetz}

\footnote{We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, \textit{Ecology Law Currents}, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.}
A Twenty-First Century Lazarus?  
The Demise and Possible Rebirth of FERC  
Backstop Siting Authority

INTRODUCTION

In early 2009, the Fourth Circuit struck down a rule issued by the Federal Energy Regulatory Commission (FERC) interpreting section 1221 of the Energy Policy Act of 2005 (EPAct).1 This provision authorized FERC to approve the proposed siting of transmission projects in specially designated areas subject to congestion, known as “National Interest Electric Transmission Corridors,” where a state agency had “withheld” approval of the project for more than a year.2 FERC’s final rule interpreted this provision to apply to instances where the state agency had actively denied a siting application, in addition to instances where the agency merely failed to make a decision. As a result of the Fourth Circuit’s decision that “withheld” does not encompass a denial, a single state regulator may kill an interstate transmission project and FERC has no authority to intervene, regardless of the value of the project. Given the importance of interstate transmission projects to relieving congestion and developing location-constrained renewable energy generation, Congress has taken preliminary steps to further expand federal authority over transmission siting in the wake of Piedmont Environmental Council v. FERC.3

I. LEGISLATIVE BACKGROUND

EPAct greatly expanded the federal government’s role in setting transmission policy, particularly with regard to the siting of transmission

2. Id. at 310–11.
infrastructure. Historically, state regulators have wielded exclusive authority to approve the proposed siting of transmission projects. State control was the norm even for interstate transmission projects, enabling individual state regulators to delay or effectively block projects that traversed multiple states. Such hindrances by state regulators are especially problematic, as interstate transmission projects are often essential to ensuring reliability of the transmission grid and reducing congestion costs.

EPAct created a federal role in transmission infrastructure siting decisions for the first time. EPAct instructs the Department of Energy to "designate any geographic area experiencing electricity transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor [NIETC]." The designation of a NIETC authorizes FERC to issue construction permits for the proposed siting of transmission infrastructure within the corridor under a limited number of circumstances, which can be grouped into two broad categories. The first category includes cases where the relevant actors may lack the authority to get approval for the project because: (1) the entity building the project lacked authority to apply for a construction permit in a state through which the project passed (because the utility does not serve customers within the state and is simply seeking to route


7. See Promoting Transmission Investment through Pricing Reform, Order No. 679, ¶ 1.

8. Swanstrom & Jolivert, supra note 5, at 418.


10. Regardless of which of the two categories the issuance of the permit takes place under, FERC is required to make a number of other predicate findings: (1) the facility will be used for interstate electricity transmission, (2) the project is consistent with the public interest, (3) the project significantly reduces transmission congestion, (4) the project is consistent with sound national energy policy and enhances energy independence, and (5) the project maximizes the transmission capabilities of existing facilities. Id. § 1221(b)(2)–(6).
IN BRIEF

The project across the state's land; (2) the state lacked the basic authority to approve the proposed siting of the project; or (3) the state regulator lacked the authority to consider the interstate benefits of the project (and thus might reject an otherwise beneficial project because it didn't fit within the narrow guidelines it was statutorily allowed to consider).

The second broad category includes two circumstances where the state regulator attempts to impede the project. In the first case, FERC can supersede the state regulator where the regulator approves the project, but with such conditions as to make it uneconomical or unlikely to have a beneficial effect on the transmission constraint or congestion it is designed to alleviate. In the second case, FERC can assert jurisdiction where a state regulator has "withheld approval for more than a year following the filing of an application seeking approval [of the project]."

FERC's interpretation of the latter provision gave rise to Piedmont v. FERC. In November 2006, FERC issued a final rule interpreting its backstop siting authority under section 1221 of EPAct. FERC interpreted the "withheld" language of section 1221(b)(1)(C)(i) to govern not only instances where the state regulator failed to act on an application within the one year timeframe, but also those where the state regulator actively denied the application.

II. ANALYSIS

FERC's interpretation of EPAct was challenged by the Piedmont Environmental Council, Communities Against Regional Interconnect, and the public utilities commissions of New York and Minnesota, and was ultimately overturned by a Fourth Circuit 2-1 decision. Both the majority and dissent analyzed FERC's interpretation under the test set forth in Chevron U.S.A. v. Natural Resources Defense Council. The first step in the Chevron analysis is to determine whether Congress has

11. Id. § 1221(b)(1)(B).
12. Id. § 1221(b)(1)(A)(i).
13. Id. § 1221(b)(1)(A)(ii).
14. Id. § 1221(b)(1)(C)(i). Such conditions are likely to ensure that the project is never built in spite of its approval.
15. Id. § 1221(b)(1)(C)(ii).
18. Id. ¶ 26. (stating "a reasonable interpretation of the language in the context of the legislation supports a finding that withholding approval includes denial of an application").
20. Id. at 312; id. at 321 (Traxler, J., dissenting).
"directly spoken to the precise question at issue." Where Congress's intent is clear, it is determinative. Though both the majority and dissent concluded that Congress had clearly and directly spoken to the issue, they came to diametrically opposite conclusions as to what Congress intended.

First, in looking at the actual language of the statute, the majority rejected FERC's argument that "withheld approval for more than one year" encompassed a denial by the state regulator. According to the court, "withhold" is defined as a continuous holding back of a decision for the entire statutorily-defined, year-long period, whereas "denial" is a finite act that does or does not occur within that period. The court also rejected FERC's contention that the two words are synonymous, concluding that, while "deny" is broad enough to encompass "withhold," "withhold" is not similarly broad enough to include "deny." Second, in examining the specific context in which the "withheld" language was used, the court held that FERC's interpretation rendered the clause "nonsensical," given the finality of "denied" and the continuous nature of the "for more than one year" language. Finally, the court evaluated the term "withheld" in the broader context of the statute as a whole and concluded, in light of the other circumstances in which FERC was authorized to issue a construction permit, that FERC's interpretation was overly broad. FERC's interpretation would effectively take jurisdiction from state regulators for any proposed project in a NIETC whose application they denied, making it "futile . . . for a commission to do its normal work." The court reasoned that because the other circumstances authorizing FERC to issue a permit were limited grants of jurisdiction, only to be used when the state lacked the authority to act or burdened the project with fatal conditions, FERC's interpretation of the withholding language "renders it completely out of proportion with the four other jurisdiction-granting circumstances." The court concluded

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22. Id. To determine whether Congress has clearly spoken, a court looks "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).
23. Piedmont, 558 F.3d at 312-15 (majority opinion) (holding that FERC's interpretation was beyond the clear intent of Congress, making it unnecessary to complete the second step of the Chevron analysis); id. at 321-26 (Traxler, J., dissenting).
24. Id. at 313 (majority opinion).
25. Id.
26. Id.
27. Id.
28. Id. at 314.
29. Id.
30. Id.
that the plain meaning of the "withheld" language did not include a situation in which a state regulator actively denied a siting application.\textsuperscript{31}

In contrast, the dissenting judge concluded that FERC's interpretation was consistent with the clear intent of Congress.\textsuperscript{32} Of clear importance to the dissent was the legislative history of the backstop siting provisions, which suggested that Congress intended to grant FERC authority to site NIETC transmission projects in the face of active denial by state regulators.\textsuperscript{33} In particular the dissent cited the House committee report of a bill with identical language to EPAct, which intended to give FERC jurisdiction "if after one year, a state, or other approval authority is unable or refuses to site the line."\textsuperscript{34} An appeal of the Fourth Circuit's decision in \textit{Piedmont v. FERC} was taken up by the Edison Electric Institute, but the Supreme Court denied certiorari in January 2010.\textsuperscript{35} As such, NIETC transmission projects can currently be blocked by state regulators without recourse to FERC or any another federal agency.

\section*{III. NEXT STEPS}

In the wake of \textit{Piedmont v. FERC}, there appears to be substantial interest at the federal level in broadening the scope of FERC's transmission siting authority.\textsuperscript{36} Much of the recent activity seems to be driven by the recognition that the development of significant amounts of location-constrained renewable electricity generation is contingent on the construction of large, interstate transmission projects.\textsuperscript{37} Indeed, in advocating for an expansion of its transmission siting authority following \textit{Piedmont v. FERC}, FERC has explicitly premised its argument on the need for interstate transmission projects to connect location-constrained renewable generation to major load centers.\textsuperscript{38}

A number of bills currently under consideration in Congress would significantly increase FERC's authority over transmission siting and planning.\textsuperscript{39} Each of these bills gives FERC a broader mandate, replacing

\begin{itemize}
\item \textsuperscript{31} \textit{Id.} at 315.
\item \textsuperscript{32} \textit{Id.} at 326 (Traxler, J., dissenting).
\item \textsuperscript{33} \textit{Id.} at 325.
\item \textsuperscript{34} \textit{Id.} (quoting H.R. Rep. No. 109-215(I), at 261 (2005)) (emphasis added).
\item \textsuperscript{37} \textsc{DEPARTMENT OF ENERGY, supra} note 6, at 95–96 (estimating that up to 12,000 miles of new transmission facilities are needed in order to arrive at wind meeting 20 percent of domestic generation capacity).
\item \textsuperscript{39} \textit{See} S. 1462; H.R. 2454; S. 539.
\end{itemize}
the congestion-specific mandate of EPAct, and some specifically instruct FERC to consider the connection and development of renewable resources in making transmission planning and siting decisions. Though the scope of FERC’s siting authority is substantially different under each bill, they would all effectively negate the holding of *Piedmont v. FERC*.

Senator Jeff Bingaman introduced the American Clean Energy Leadership Act (ACELA) in 2009, which would essentially give FERC unified authority over interstate transmission planning and siting decisions. Significantly, the Bingaman bill replaces the NIETC framework, unifying transmission planning and siting authority for a broad class of “high-priority national transmission projects” (HPNTP) within FERC. While EPAct narrowly focused on localized areas plagued by congestion or potential reliability problems, ACELA instructs FERC to oversee transmission planning with a holistic, interconnection-level view designed to: (1) ensure the development of renewable generation, (2) reduce congestion, and (3) improve reliability, in addition to a number of other goals. Further, ACELA explicitly authorizes FERC to approve siting for any proposed HPNTP facility when a state actively denies an application.

The American Clean Energy and Security Act of 2009 (informally known as the Waxman-Markey bill), which passed the House of Representatives, is similar in approach to ACELA. Like ACELA, the Waxman-Markey bill also places FERC in charge of national transmission planning, authorizing it to coordinate and harmonize the plans of regional transmission planning entities with a view towards a number of national imperatives. However, while Waxman-Markey authorizes FERC to take jurisdiction of siting decisions where a state regulator has denied an application, this grant is limited to the Western

40. S. 1462 § 216(c).
41. *Id.* § 216(b)(1). HPNTP facilities include any transmission facility that is part of a regional transmission plan and (1) operates at 345kv (AC) or 300kv (DC) or (2) is of a high/super conductive nature or (3) is 100kv or above feeder line to a renewable generating facility. *Id.* § 216(b)(1)(A)(i)-(iii).
42. *Id.* § 216(a). To implement these goals FERC is effectively authorized to act as the national coordinator of transmission planning for states and the various transmission and system operators. *Id.* § 216(c)(2)–(3).
43. *Id.* § 216(d)–(e). While FERC is required to consider the record developed by the state authorities and the reasons for their decision, it has ultimate discretion. *Id.*
45. *Id.* § 216A(b). An explicit goal is the development of renewable energy. *Id.* § 216A(a)(1)
46. *Id.* § 216B(b) (giving FERC authority to issue a “Certificate of Public Convenience and Necessity” if a state fails to approve a facility found in one of the regional plans from section 216A(b) within one year).
Interconnection only, excepting more than half the country from FERC’s mandate.47

Senator Harry Reid’s bill, the Clean Renewable Energy and Economic Development Act, focuses more narrowly on renewable energy sources. The Clean Renewable Energy and Economic Development Act authorizes FERC to coordinate transmission planning towards the development of a “Green Transmission Grid” (GTG).48 FERC would be authorized to oversee the creation of an interconnection-wide plan for the development of a GTG—a plan specifically designed to enhance transmission of renewable-generated electricity.49 FERC’s siting authority would be expanded such that it has ultimate jurisdiction only over transmission infrastructure that is part of the GTG.50

The consensus view in Washington appears to be in favor of a robust expansion of FERC siting and planning authority. Each of these bills reflects the necessity of national authority for the development of location-constrained renewable generation, and, as such, goes beyond the limited, congestion-specific mandate embodied in EPAct. Regardless of which bill passes, the Fourth Circuit’s decision in *Piedmont v. FERC* will likely be negated by passage of any of the discussed bills now pending in Congress. In the interim, state regulators retain the authority to block the construction of interstate transmission projects, regardless of their potential national benefits.

*Santosh Sagar*

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47. *Id. § 216(B)(a).* The Western Interconnection is the transmission grid covering fourteen western states and parts of Canada and Mexico. Western Electricity Coordinating Council, About WECC, http://www.wecc.biz/About/Pages/default.aspx (last visited Apr. 18, 2010).


49. *Id. § 403(e)(1).* Such planning is to be undertaken by an organization (such as a Regional Transmission Organization with authority to administer the transmission grid for a given region) designated by FERC. *Id. § 403(c)(1).*

50. *See id. § 404(g)* (authorizing FERC to issue permits in consultation with state agencies); *id. § 404(g)(1)(ii)(II)* (authorizing FERC to make the final determination of what siting constraints are appropriate).

*We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.*
Equating Stream Structure with Function: 
The Fourth Circuit’s Misstep in
*Ohio Valley Environmental Coalition v. Aracoma Coal Co.*

INTRODUCTION

On February 13, 2009, the U.S. Court of Appeals for the Fourth Circuit in *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, reversed a decision by the Southern District of West Virginia, which had invalidated the Army Corps of Engineers’ (Corps) issuance of four permits authorizing the burial of streams in conjunction with mountaintop removal coal mining projects.¹ This is the fourth time the Fourth Circuit has struck down a lower court decision disfavoring this destructive mining practice.² This decision improperly upholds the agency’s disregard of its regulatory duty to conduct functional assessments of aquatic ecosystems, which forebodingly opens the door for such disregard in contexts outside of mining.

I. BACKGROUND

As its name implies, mountaintop removal (MTR) mining involves removing entire mountaintops to reach underlying coal.³ Forested summits are clear-cut, stripped of topsoil, and charged with explosives that blast away 800 to 1000 vertical feet of rock.⁴ Twenty-story-high draglines and massive bulldozers are then used to scrape away the broken rock and collect the coal.⁵ This extraction process continues until it is no

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³. 30 C.F.R. § 785.14(b) (2009).
longer cost-effective.\textsuperscript{6} The exposed rock’s volume naturally increases by as much as 15 to 25 percent, making it impossible to safely return all of the rock to restore the mountain to its original contour.\textsuperscript{7} The leftover rubble, euphemistically referred to as “overburden” and “spoil,” is pushed into surrounding valleys, creating “valley fills” that obliterate headwater streams.\textsuperscript{8} Headwaters are small intermittent or ephemeral streams that “form the origin of larger streams or rivers”\textsuperscript{99} and perform critical ecological functions “related to biodiversity, water quality, and nutrient processing.”\textsuperscript{10} Impacts from valley fills permeate downstream as water laden with sediment and heavy metals from the disturbed land drains from the toes of the fills into what remains of natural streams.\textsuperscript{10}

MTR destroys and fragments hardwood forests so rich in biodiversity that they are known as the “rain forests of North America.”\textsuperscript{12} MTR also causes enormous suffering to surrounding communities from incessant blasting, contaminated drinking water, increased flooding and erosion, and lost culture.\textsuperscript{13} The increased mechanization of MTR has led to steady job declines in the mining industry.\textsuperscript{14}

A proposed MTR mining operation requires four environmental permits: a surface coal mining permit issued under the Surface Mining Control and Reclamation Act (SMCRA),\textsuperscript{15} and three certifications/permits issued under the Clean Water Act (CWA)\textsuperscript{16}—a section 401 certification,\textsuperscript{17} a section 402 National Pollutant Discharge Elimination System (NPDES) permit,\textsuperscript{18} and a section 404 permit.\textsuperscript{19} The

\begin{itemize}
\item \textsuperscript{6} Patrick C. McGinley, \textit{From Pick and Shovel to Mountaintop Removal: Environmental Injustice In the Appalachian Coalfields}, 34 ENVTL. L. 21, 57 (2004).
\item \textsuperscript{7} Bragg v. W. Va. Coal Ass’n, 248 F.3d 275, 286 (4th Cir. 2001).
\item \textsuperscript{8} See id. at 286; Bragg v. Robertson, 72 F. Supp. 2d 642, 661–62 (S.D.W. Va. 1999).
\item \textsuperscript{9} Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 186 (4th Cir. 2009).
\item \textsuperscript{11} See M. Palmer et al., \textit{Mountaintop Mining Consequences}, 327 SCI. 148, 148 (2010).
\item \textsuperscript{12} See REECE, \textit{supra} note 5, at 4.
\item \textsuperscript{14} Id. at 633.
\item \textsuperscript{15} Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 189–90 (4th Cir. 2009).
\item \textsuperscript{16} The CWA is implemented through two permitting programs: the National Pollutant Discharge Elimination System (NPDES) authorized by section 402, 33 U.S.C. § 1342 (2006) and administered by the Environmental Protection Agency (EPA) and authorized states and the “dredge and fill” program authorized by section 404, 33 U.S.C. § 1344 (2006) and administered primarily by the Corps, with veto authority by the EPA Id. §§ 1344(a), (c).
\item \textsuperscript{17} Ohio Valley Envtl. Coal., 556 F.3d at 190; see 33 U.S.C. § 1341.
\item \textsuperscript{18} Ohio Valley Envtl. Coal., 556 F.3d at 190; see 33 U.S.C. §§ 1342, 1362(12).
\item \textsuperscript{19} Ohio Valley Envtl. Coal., 556 F.3d at 190; see 33 U.S.C. § 1344(a). On April 1, 2010, the EPA issued comprehensive guidance clarifying section 402 and section 404 CWA permitting requirements for MTR and other surface coal mining operations and identifying improvements that will reduce adverse impacts on Appalachian watersheds. See EPA, DETAILED GUIDANCE:
Corps "indirectly regulates the mountaintop mining industry via [section] 404." A section 404 permit requires environmental review pursuant to the CWA and the National Environmental Policy Act (NEPA). The permitting process also involves an intermediate form of NEPA review, called the "mitigated EA (Environmental Assessment)," which the Corps uses when it decides that mitigation can reduce the adverse environmental impacts of a proposed project to below a significance threshold. This structure enables the Corps to avoid preparing an Environmental Impact Statement (EIS) and instead allows it to issue a mitigated Finding of No Significant Impact (FONSI). The mitigated EA and mitigated FONSI have been commonly used in the MTR permitting context.

During 2005 and 2006, the Corps issued individual section 404 permits to four MTR mining projects in southern West Virginia after preparing a mitigated EA and issuing a mitigated FONSI for each permit. Collectively, the contested permits authorized the creation of twenty-three valley fills and twenty-three sediment ponds, which would impact more than thirteen miles of headwater streams. The Ohio Valley Environmental Coalition (OVEC) and two other environmental organizations challenged the permits, alleging substantive and procedural violations of the CWA and NEPA, which are subject to judicial review under the Administrative Procedure Act (APA). In 2007, the district court held that the Corps issued the permits in violation of the CWA, NEPA, and APA, and granted OVEC injunctive and declaratory relief. The Corps and four coal companies appealed.
II. FOURTH CIRCUIT DECISION

In a 2-1 decision, the Fourth Circuit reversed the district court decision, holding that the Corps had properly issued the section 404 permits. The court relied heavily on Auer or Seminole Rock deference, a "highly deferential" type of review used when a court reviews an agency's interpretation of its own regulations.

A. The Majority Opinion

On two issues, a unanimous court gave deference to the agency's determination about the scope of its NEPA analysis and its interpretation of CWA regulations. First, the court held that the Corps' decision to narrow the scope of its NEPA analysis to the "underdrain system," which includes filled jurisdictional streams and their banks and excludes the upland valleys where fills would be placed, was reasonable and entitled to deference. The court determined that "upland environmental effects are 'not essentially a product of Corps action'" and thus including them would "encroach on the regulatory authority" of the West Virginia Department of Environmental Protection (WVDEP), which controls "all aspects of the valley fill projects beyond the filling of jurisdictional waters." The court also unanimously held that stream segments connecting valley fills to downstream sediment ponds were not jurisdictional "waters of the United States" subject to section 402 NPDES permitting, but were instead "unitary 'waste treatment systems'" exempt from section 402. Consequently, the Corps had not exceeded its regulatory authority under section 404 by permitting the discharge of pollutants into these segments.

A majority of the court made three additional findings: (1) granting deference to another key agency interpretation of CWA regulations, (2) upholding the Corps' proposed mitigation measures, and (3) approving the Corps' cumulative impacts analysis.

First, the court held that it was not arbitrary or capricious for the agency to use stream structure as a surrogate for assessing stream function, despite binding CWA Guidelines that the Corps "[d]etermine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the

30. See Ohio Valley Envtl. Coal., 556 F.3d at 217.
32. Id. at 194–97.
33. Id. at 197.
34. Id. at 210.
35. Id.
36. Id. at 198–99.
aquatic ecosystem and organisms.” The court determined that because the regulation does not specifically define “function” or explain “how ‘structure’ and ‘function’ are to be assessed,” the term is ambiguous and thus deserving of deference to agency interpretation. The court held that in evaluating the stream functions that will be lost, the Corps reasonably used its “best professional judgment” and relied on an internal agency guidance document, the 2002 Regulatory Guidance Letter (RGL 02-02), which permits structurally based stream mitigation on a one-to-one replacement scheme when a functional stream assessment is “not practical.” The court found that the agency had actually exceeded the requirements under the RGL 02-02 standard because its mitigation plans involved “greater than one-to-one replacement schemes.”

Second, the majority held that the Corps had adequately supported its findings of no significant degradation under the CWA and its issuance of mitigated FONSIs under NEPA. The court found that the Corps’ proposed mitigation measures were sufficient to satisfy the CWA because they were based on “the most appropriate and practicable means of compensating for anticipated impacts and losses of value.” The court determined that, regardless of the important ecological role performed by headwater streams, the Corps is not obligated to distinguish between headwater and other kinds of streams when devising mitigation measures. Moreover, the court held that “where on-site or in-kind functional mitigation is not practicable,” the Corps’ guidance, which takes a “holistic watershed approach,” allows “off-site or out-of-kind mitigation” that focuses on improving overall watershed health. While recognizing that the probable success of stream creation programs was “limited,” the court noted that one successful stream had been created in Kentucky, and that “the novelty of a mitigation measure alone cannot be the basis of our decision to discredit” the practice. The court found that the Corps’ proposed mitigation strategies satisfied NEPA because the agency had sufficiently articulated how adverse effects would be

38. See Ohio Valley Envtl. Coal., 556 F.3d at 199.
39. Id. at 203–04.
40. Id. at 204.
41. Id. at 207.
42. Id. at 205–06.
43. Id. at 203.
44. Id. at 204–05.
45. Id. at 205. This successfully created stream was not, however, a headwater stream. Id. at 225 (Michael, J., dissenting).
46. Id. at 205 (majority opinion).
mitigated to insignificance through stream enhancement, restoration, and creation measures that would result in "no net loss of habitat."  

Finally, the court majority held that the Corps had not acted arbitrarily or capriciously in performing its cumulative impacts analysis, as required by both the CWA and NEPA. The court rejected the district court's determination that the analysis was defective because the agency improperly relied on mitigation to eliminate adverse impacts. While acknowledging that the Corps' finding of no cumulative adverse impacts "does lean, to some extent, on mitigation," the court determined that it did not do so in an inappropriately "perfunctory" or "conclusory" way. The Corps had not simply applied a "mitigated to insignificance" analysis, which would have been inadequate, but it had also supported its conclusion of no adverse impacts with findings from the WVDEP's section 401 certification and the Corps' SMCRA permit.

**B. The Dissent**

The dissent strongly disagreed with the majority's finding that the Corps had adequately supported its FONSI under the CWA and its mitigated FONSIs under NEPA. The dissent held that the agency "skirt[ed]" its regulatory duty to conduct a functional assessment of the streams the proposed valley fills would impact. By proceeding instead with a one-to-one mitigation strategy that failed to account for lost stream function, the Corps "undermine[d] the goal of mitigation: replacement of what is being lost." According to the dissent, the Corps abused its discretion in refusing to "offer an interpretation of the term 'function'" as used in the CWA Guidelines and by basing its permitting decisions on an internal guidance document that conflicts with the plain language of the regulations. Because the Corps had failed to show that the permitted valley fills would not significantly degrade "waters of the United States," as required by the CWA, the Corps "likewise failed to establish that the projects [would] have no significant adverse environmental impact" under NEPA, and thus failed to justify its refusal to issue an EIS for each permit. The dissent would affirm the district
court judgment rescinding the permits and remanding them to the Corps for “further consideration” consistent with the CWA Guidelines and NEPA.58

The Fourth Circuit denied OVEC’s request for rehearing en banc by a 4-3 vote, with four additional judges abstaining.59 The two dissenting opinions emphasized the “potentially irreversible” and “profound” adverse impacts the permits will have on the region,60 and critiqued the Corps’ practice of using stream structure as a substitute for function because it “appears to read the word ‘function’ right out of the regulation,”61 and “fatally undercuts the purpose of the regulations.”62 OVEC has filed a Writ of Certiorari with the U.S. Supreme Court challenging the Corps’ failure to evaluate the impact of valley fills on stream function.63

III. ANALYSIS

The Fourth Circuit’s decision has been aptly characterized as “a dud,” which reversed the “forceful, brilliant, creative, and instructive effort in the district court.”64 The court inappropriately sanctioned the Corps’ artificially narrow scope of its NEPA analysis, which, among other things, contravenes the agency’s own regulations and practices.65 Additionally, the court’s straight-faced deference to the Corps’ incredible view that it may treat certain stream segments as part of a “unitary ‘waste treatment system[,]’” rather than jurisdictional waters, runs afoul of the CWA’s legislative history, regulations, and controlling precedent.66

But most alarming and ominous is the Fourth Circuit’s decision to allow the Corps to issue permits that will bury miles of streams under hundreds of feet of rubble without assessing the functions of the streams that will be lost and the cumulative impacts of the destruction on the aquatic ecosystem. The court sanctioned agency conduct that is effectively “ripping the heart out of the Clean Water Act.”67 Under the binding CWA Guidelines, structure and function are two entirely

58. Id. at 217–18.
60. Id. at 132–33 (Wilkinson, J., dissenting).
61. Id. at 133.
62. Id. at 134 (Michael, J., dissenting).
66. See id.
67. Earthjustice, supra note 4.
separate concepts. Where structural attributes describe how a stream looks at a given point in time, functional measures describe how a stream works over time. “Healthy streams are living, functional systems, not simple channels that can be described based on their size and shape.” The Corps’ use of structure as a surrogate for function is akin to a doctor taking a patient’s height and weight, and using these measurements as surrogates for blood pressure and heart rate. The evaluation is “completely irrational and scientifically indefensible” and underestimates the important ecological roles performed by headwater streams. The fact that the Environmental Protection Agency (EPA) is currently creating a separate functional stream assessment procedure, which will require the Corps to evaluate numerous stream functions that it did not measure for any of the challenged permits, further undermines the claim that structure is an adequate surrogate for function. If it were, it would be unnecessary to “undertak[e] the expensive and time-consuming effort of developing an independent functional protocol.”

CONCLUSION

The Supreme Court should grant OVEC’s Writ of Certiorari and reverse the Fourth Circuit’s decision. This case has immense significance for the Appalachian region and the nation as a whole. The Corps has approved numerous section 404 permits for other MTR projects in the region based on the same flawed legal theory the Fourth Circuit upheld in this case. If not overturned, this decision “will have far-reaching consequences for the environment of Appalachia” by allowing the Corps to continue to permanently destroy critical headwater streams—committing them to the fate of a mining waste dumping ground—“without any assessment of the life-giving functions that will be lost, and without a proper determination of how such loss might be mitigated.”

68. Corrected Brief of Plaintiffs-Appellees, supra note 65, at 40.
69. Structural attributes include channel shape, water depth, habitat features, and number of insects or other species measured in one sampling trip. Functional attributes include the input of organic matter over time, organism growth rates, and nutrient cycling capacity. The Impacts of Mountaintop Removal Coal Mining on Water Quality in Appalachia: Hearing Before the Subcomm. on Water and Wildlife of the S. Comm. on Env’t and Pub. Works, 111th Cong. 8 (2009) (testimony of Margaret A. Palmer, Ph.D., Univ. of Md. Ctr. for Envtl. Sci.).
70. Id.
71. See id.
72. Corrected Brief of Plaintiffs-Appellees, supra note 65, at 41.
73. See Palmer et al., supra note 11, at 148.
75. Id.
76. Id. at 187 (majority opinion).
77. Id. at 226 (Michael, J., dissenting).
78. See Petition for Writ of Certiorari, supra note 63, at 30.
The decision also forebodingly "opens the door" for the Corps to ignore its regulatory duty to conduct functional assessments of aquatic ecosystems in other contexts outside of mining.\textsuperscript{79} The Corps should not be permitted "to read the word ‘function’ right out of" the CWA Guidelines;\textsuperscript{80} indeed, "the word is one that matters."\textsuperscript{81}

\textit{Emily Sangi}

\footnotesize

\textsuperscript{79} See \textit{id.}


\textsuperscript{81} Petition for Writ of Certiorari, supra note 63, at 30.

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Comer v. Murphy: The Fifth Circuit Grapples with Its Role in Hearing Climate Change Tort Claims

INTRODUCTION

In Comer v. Murphy Oil USA, the Fifth Circuit ruled that certain private citizens had standing to assert common law public and private nuisance, trespass, and negligence claims for injuries incurred as a result of climate change. In contrast to a series of federal district court opinions, the court further ruled that these claims did not present a nonjusticiable political question.2

Plaintiffs still have a long way to go before establishing their case. While the court found plaintiffs’ claims sufficiently traceable to defendants’ actions, a necessary element for Article III standing, it made clear that it had not ruled as to whether plaintiffs had alleged facts sufficient to establish causation at the pleading stage, let alone facts sufficient to establish proximate cause at the trial stage.3

Perhaps in anticipation of the precedent this case could set by allowing private citizens to claim tort damage awards, defendants continue to argue that the case presents a nonjusticiable political question: the court would have to create standards that are not judicially

1. Comer v. Murphy Oil USA (Comer II), 585 F.3d 855, 860 (5th Cir. 2009). The fourteen plaintiffs own land and property along the Mississippi Gulf coast. Plaintiffs charged 147 insurance, electric, fossil fuel, and chemical corporations as defendants. Fourth Amended Class Action Complaint at 1–16, Comer II, 585 F.3d 855 (No. 07-60756).


3. Comer II, 585 F.3d at 880. In Comer II, Judge Davis specially concurred, stating that he would have affirmed the district court decision on alternative grounds: because plaintiffs had “failed to allege facts that could establish that the defendant’s actions were a proximate cause of the plaintiffs’ alleged injuries.” Id. This may be an issue the Fifth Circuit panel analyzes in its rehearing en banc. In contrast, in American Electric Power, the court specifically found that plaintiffs had adequately stated their public and private nuisance claims. 582 F.3d at 315.
discoverable and that would require an initial policy determination to resolve the case. Yet making this decision before the discovery stage would unnecessarily—and unconstitutionally—prevent plaintiffs from accessing the judicial process. The Fifth Circuit’s holding was correct. Courts should not anticipate the implication of a favorable ruling at the pleading stage, especially when they could limit the scope of a favorable decision through a well-crafted holding and appropriate damages.

I. THE COMER CASE

In Comer, fourteen private citizens filed a class action lawsuit against over 140 oil, chemical, power, and insurance companies doing business in Mississippi, for their contribution to the destruction of plaintiffs’ private property and nearby public property. Plaintiffs alleged that by emitting greenhouse gases, defendants contributed to increased sea levels and Hurricane Katrina’s increased ferocity, which in turn damaged the property in question.

Seeking only punitive and compensatory damages, plaintiffs specifically charged defendants with Mississippi common law tort claims of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. Defendants moved to dismiss plaintiffs’ claims, arguing that plaintiffs failed to establish standing under Article III of the U.S. Constitution and that the claims presented nonjusticiable political questions. The district court granted defendants’ motion to dismiss, and the Fifth Circuit reversed in part, holding that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims.

Further, the Fifth Circuit found that these claims did not present a nonjusticiable political question. On February 26, 2010, the court granted en banc review.

4. See Petition for Rehearing En Banc of Defendants-Appellees Murphy Oil USA at 7–10, Comer v. Murphy Oil USA, No. 07-60756 (5th Cir. Nov. 30, 2009). Requiring the court to create standards that are not judicially discoverable and that would require an initial policy determination are two of the six formulations outlined by the Supreme Court in Baker v. Carr, 369 U.S. 186, 217 (1962). At least one of the formulations must be present to dismiss a case on nonjusticiable political question grounds. Id.

5. U.S. CONST. art. III, § 2. (in pertinent part, “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . .”).

6. Fourth Amended Class Action Complaint at 1–16, Comer II, 585 F.3d 855 (No. 07-60756).

7. Comer II, 585 F.3d at 859.

8. Id. at 859–60.

9. Id. at 860.

10. Id.

11. Id.

II. ESTABLISHING STANDING

Federal standing under Article III of the U.S. Constitution is an "irreducible constitutional minimum," which requires plaintiffs to establish that their claims represent a "case or controversy." To meet this requirement, plaintiffs must show that: (1) they have suffered an injury in fact that is concrete and particularized; (2) their injury is fairly traceable to the challenged conduct; and (3) the injury will likely "be redressed by a favorable decision." The claimant bears the burden of establishing standing, and each element must be supported in the manner and with the degree of evidence required at successive stages of the litigation.

Federal standing also encompasses prudential standing, which requires plaintiffs to satisfy three factors: (1) the general prohibition on a litigant's raising another person's legal rights; (2) the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches; and (3) the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

The court found that plaintiffs' common law public and private nuisance, trespass, and negligence claims satisfied both Article III standing and prudential standing. Yet, it declined to entertain plaintiffs' claims of unjust enrichment, fraudulent misrepresentation, and civil conspiracy, based on prudential standing requirements.

III. EVALUATING ARTICLE III STANDING AND THE TRACEABILITY STANDARD

The court held that plaintiffs' public and private nuisance, trespass, and negligence claims satisfied the first and third constitutional minimum standing requirements since they alleged actual, concrete injury to their lands and property that could be redressed through compensatory and punitive damages. Defendants did not contest these arguments. The court next found plaintiffs had stated claims that were "fairly traceable to the defendant's actions." It noted that by contesting traceability, defendants were asking the court to evaluate the merits of plaintiffs' causes of action, which is not appropriate at the pleading stage. Quoting

15. Id. at 561.
17. Comer II, 585 F.3d 855, 862 (5th Cir. 2009).
18. Id. at 867-68.
19. Id.
20. Id. at 864.
21. Id.
22. Id.
a recent Third Circuit opinion stating that "an indirect relationship will suffice," the court also emphasized that the Article III traceability requirement need not be as fleshed out as the proximate causation element of the torts claim.\footnote{Id. (citing Toll Bros., Inc. v. Twp. of Readington, 555 F.3d 131, 142 (3d Cir. 2009)).}

The court spent a great amount of its analysis analogizing to the Supreme Court's recent decision in Massachusetts v. EPA, which granted Massachusetts standing to challenge EPA's decision not to regulate greenhouse gas emissions.\footnote{Massachusetts v. EPA, 549 U.S. 497 (2007); Comer II, 585 F.3d at 865-66.} The court used the decision to support its claim that injuries may be fairly traceable to actions that contribute to, rather than solely cause, greenhouse gas emissions.\footnote{Comer II, 585 F.3d at 865-66.} In further support of its claim, the court cited a string of appellate authority.\footnote{Id. at 866-7; accord Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536, 543 (6th Cir. 2004); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000) (en banc); Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231, 1247 (11th Cir. 1998).} By focusing on the Massachusetts "contribution" claim, the court opened itself up to attack from defendants.\footnote{See Comer II, 585 F.3d at 865-66.} In their petition for rehearing en banc, defendants not only distinguished Massachusetts because of the claims and parties involved, but they noted that the contribution standard would "effectively give any person allegedly harmed by global warming standing to sue virtually anyone in the world."\footnote{Petition for Rehearing En Banc, supra note 4, at vii. In particular, defendants distinguished Massachusetts because of its statutory basis, "existence of a statutory authorization to sue is of critical importance to the standing inquiry," and because Massachusetts was a "sovereign state" and not a private citizen. Id. at 13-14.} Plaintiffs responded that the court's finding applies in particular to plaintiffs that "sustained serious, substantial and concrete injuries," against defendants, who are "some of the world's largest greenhouse gas emitters."\footnote{Response to Defendant-Appellees' Petition for Rehearing En Banc at 3, Comer v. Murphy Oil USA, No. 07-60756.}

The court found that plaintiffs' second set of claims—unjust enrichment, fraudulent misrepresentation, and civil conspiracy—did not satisfy federal prudential standing requirements.\footnote{Comer II, 585 F.3d at 867-68.} It reasoned that the claims presented generalized grievances that are more properly dealt with by the representative branches and are common to all consumers of petrochemicals and the American public.\footnote{These claims were an attempt to copy successful tobacco legislation strategy. See Stephan Faris, Conspiracy Theory, ATLANTIC, June 2008.} In other words, plaintiffs did not identify a particularized injury that affected them in a "personal and individual way."\footnote{Id. at 868-69 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).}
IV. THE NONJUSTICIABLE POLITICAL QUESTION DOCTRINE

A nonjusticiable political question arises when a case is constitutionally incapable of being decided by a federal court. In *Baker v. Carr*, the Supreme Court outlined six formulations of the doctrine, at least one of which must be present to dismiss a case on nonjusticiable political question grounds. These formulations include: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Since *Baker*, the Supreme Court has only dismissed two cases as presenting nonjusticiable political questions, both of which involved issues that were textually committed to another branch of government. Many cases have held that tort claims seeking monetary damages are always justiciable. The Supreme Court has also suggested that the first factors are most important, and binding authority in the Fifth Circuit has found that tort claims for injunctive relief should be permitted to take shape before broad conclusions are drawn as to their manageability.

V. THE REASONING BEHIND THE NONJUSTICIABLE POLITICAL QUESTION

After establishing standing for plaintiffs' public and private nuisance, trespass, and negligence claims, the court next found that these claims did not present a nonjusticiable political question, emphasizing that the judicial branch cannot decline a case because of its complexity or partisan nature.
Following the traditional view of the political question doctrine set out in *Marbury v. Madison* and the trend for courts to find nonjusticiable cases based on the first *Baker* factor, the court primarily focused on whether the Constitution or other laws had textually committed climate change harms to the political or executive branch. Finding no such commitment, it then cursorily evaluated the remaining *Baker* factors. It noted that defendants had not shown the absence of judicially discoverable or manageable standards with which to decide the case since Mississippi and other states' common law tort rules provide long-established standards for adjudicating nuisance, trespass, and negligence claims.

Based on the purpose of the political question doctrine in maintaining separation of power, the court justifiably focused on whether Congress had textually committed the issue to other branches of government. Yet, to reach its conclusion, the court did not have to question the necessity of evaluating the remaining five *Baker* formulations, all of which support its conclusion. In doing so, it left a gap for defendants to attack, and made the rest of its decision more susceptible to questioning.

41. *Id.* at 870–76. *Marbury v. Madison* established the concept of judicial review in the United States while also recognizing the limits of judicial power. 5 U.S. (1 Cranch) 137 (1803). The political question doctrine presents one such limit, and the Court's classical conception of the doctrine has a strong textual basis, depending on whether the Constitution or laws commit the issue to another branch of government. *Id.* at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."); see also Shawn M. LaTourette, *Global Climate Change: A Political Question*, 40 Rutgers L.J. 219, 224–28 (2008).

42. *Comer II*, 585 F.3d at 875–76.

43. *Id.* at 876–79. The court also faulted the trial level decisions in *American Electric Power* and *General Motors* and defendants' reliance on these decisions. Namely, it did not agree with the unsupported assumption that adjudication of plaintiffs' claims would require the district court to fix and impose future emission standards on defendants and all other emitters. It also found the conclusion defendants draw from this assertion—that it would be "impossible" for a court to perform such an obviously legislative or regulatory task—faulty. The court distinguished this case from the prior two because it involves private parties suing under state tort law, seeking only monetary damages. *Comer II*, 585 F.3d at 876–79.

44. See *id.* at 874.

45. The court's problematic statements include: "the application of the *Baker* formulations is not necessary or properly useful in this case," *id.* at 875, and "[c]onsequently, if a party moving to dismiss under the political question doctrine is unable to identify a constitutional provision or federal law that arguably commits a material issue in the case exclusively to a political branch, the issue is clearly justiciable and the motion should be denied without applying the *Baker* formulations." *Id.* at 872.
VI. TORTS, CLIMATE CHANGE, AND THE RELATIONSHIP WITH FEDERAL LEGISLATION

Appellate and district courts have ruled on a variety of climate change tort claims in recent years. In *Connecticut v. American Electric Power* (*Conn. v. AEP*), plaintiffs brought public nuisance claims and sought an injunction limiting the level of greenhouse gases power companies could emit in the future. The Second Circuit reversed the district court’s opinion, and held that plaintiffs—eight states—had standing to assert their public nuisance claims against electric power companies and that these claims did not present nonjusticiable political questions.

In contrast, district courts have generally found tort claims based on climate change nonjusticiable. Aside from the lower court rulings in *Corner* and *Conn. v. AEP*, the Northern District of California court twice held that public nuisance claims based on global warming presented nonjusticiable political questions. In *California v. General Motors*, California filed federal and state public nuisance claims against private car companies, and the court denied the state from demanding damages and a declaratory motion. Although plaintiffs in *Kivalina v. Exxon* demanded only damages, the court similarly denied their federal common law public nuisance claims, holding that the claims presented a nonjusticiable political question and that plaintiffs lacked standing under Article III of the Constitution. Plaintiffs are seeking an appeal.

While environmental law is generally based on federal legislation, tort law has historically been used to fill in the gaps. For example, prior to the enactment of the Clean Water Act, the Court, exercising its original jurisdiction to hear disputes between states, used the common law of nuisance to require New York City to stop dumping its garbage into the ocean, and required the City of Chicago to treat its sewage to reduce the amount of water it needed from Lake Michigan to flush the effluent away. Later, in *City of Milwaukee v. Illinois*, the Court found that although the 1972 amendments to the Clean Water Act preempted

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47. *Id.* at 332, 339.
federal common law nuisance claims, the Act preserved state common law nuisance claims.53

The recent string of climate change cases presents the question of whether climate change is sufficiently unique to warrant a change in the judiciary's willingness to apply tort law. It would seem a stretch to answer in the affirmative when the rules of tort law are well established and courts have historically applied these rules before Congress passed comprehensive environmental legislation.54 It is true that climate change's complexity—both in terms of scale, amount and diversity of contributors, and time frame—merits comprehensive legislation and planning.55 Yet until this happens, the court can apply tort law, and it can even adjust compensation schemes specifically for climate change-related tort damages.56 In turn, Congress can override any illogical or unreasonable court decisions by passing legislation.

CONCLUSION

The court's ruling was appropriate at this early pleading stage. Access to the judicial process should trump concerns of a positive verdict's future implications for two main reasons. First, it is early in the process. Plaintiffs' claims likely will not make it past a motion for summary judgment based on lack of evidence.57 It will be difficult for plaintiffs to establish the intent element of trespass, the unreasonableness element for private and public nuisance, and causation for the cause-in-fact and proximate cause elements of negligence.58 Plaintiffs do, however, deserve access to discovery to help establish their claims. Second, even if plaintiffs eventually prevail, the implications could be limited.59 For

56. LaTourette, supra note 41, at 264.
57. On February 26, 2010, the Appellate Court granted en banc review. Comer v. Murphy Oil USA, No. 07-60756, 2010 WL 685796, at *1 (5th Cir. Feb. 26, 2010). The Supreme Court's recent ruling in Twombly indicates that a complaint must state a plausible claim for relief to survive a motion to dismiss. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007). For a complaint to be plausible, it must allow the court to draw a reasonable inference that the defendant is liable. Id.
58. In their complaint, plaintiffs also plead in the alternative, "[i]f Defendants' activity did not directly cause increase in sea surface temperatures which fueled hurricane Katrina, their actions nevertheless increased and will continue to increase risk of more intense tropical cyclones and other storms, as well as sea level rise . . . . These activities put Plaintiffs' property at greater risk of flood and storm damage, and dramatically increase Plaintiffs' insurance costs." Fourth Amended Class Action Complaint at ¶63, Comer II, 585 F.3d 855 (5th Cir. 2006) (No. 07-60756).
59. LaTourette, supra note 41, at 264 ("For example, a variant of market share liability that advances a formula for apportioning damages in proportion to defendants' greenhouse gas emissions has been proposed."); see also Daniel J. Grimm, Global Warming and Market Share
instance, the district court could craft its holding to apply only to victims of Hurricane Katrina. Alternatively, it might only award nominal or strictly proportional damages, in which case, even if every Katrina victim filed a claim, the net result would not significantly impact defendants’ profits. A multidistrict litigation proceeding could help keep the amount of cases manageable or courts could adjust tort compensation schemes for climate change rulings. Further, no decision the court might issue would prevent Congress from preempts it, for example, by creating legislation with a standard level of emissions below which companies could not be held liable.

Should this ruling last the court’s en banc review and perhaps even Supreme Court scrutiny, it would grant private citizens standing to engage in the discovery process based on global warming tort claims against private corporations. Simply allowing discovery to occur will add to the costs and risks of emitting large amounts of greenhouse gases for corporations, perhaps prompting them to take mitigating actions. If the costs and risks are great enough, it might even prompt Congress to pass national legislation.

Maria Starnas
Center for Biological Diversity v. Department of Interior: Proper Deference

INTRODUCTION

In Center for Biological Diversity v. Department of Interior (CBD v. DOI), the Ninth Circuit held that the Bureau of Land Management (BLM) failed to comply with the National Environmental Policy Act (NEPA) and Federal Land Policy Management Act (FLMPA) in evaluating the environmental impacts of a proposed land exchange between the federal government and a mining company, Asarco, LLC. The BLM assumed that mining would take place under both the no-action alternative and the proposed exchange. It thus neglected to consider the difference between the mining of public lands, which are subject to the Mining Law of 1872, and the mining of private lands, which are not. Because of this omission, the majority reversed the district court’s holding and concluded the BLM had not taken a “hard look” at the potential environmental impacts of the exchange, in violation of NEPA, and that the proposed land exchange was “arbitrary and capricious,” in violation of FLPMA.

In a strongly worded dissent, Judge Tallman claimed that the majority ignored the holding in Lands Council v. McNair (Lands Council II) by not giving the BLM proper deference for such a complicated and lengthy decision. While the court in Lands Council II attempted to provide a clear standard of deference, the plausibility of the dissent’s argument in CBD v. DOI highlights the difficulty of establishing a bright-line standard. However, the level of deference afforded to the BLM in these two cases can be distinguished and justified by a closer look at the circumstances surrounding each particular agency action.

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1. Ctr. for Biological Diversity v. U.S. Dep’t of the Interior, 581 F.3d 1063, 1072-76 (9th Cir. 2009).
2. Id.
3. Id. As FLPMA and NEPA contain no enforcement provisions, judicial review of actions taken under these statutes occurs under section 706 of the Administrative Procedures Act. 5 U.S.C. § 706(2)(E) (2009); see also id. at 1070.
4. Lands Council v. McNair (Lands Council II), 537 F.3d 981 (9th Cir. 2008) (en banc).
5. Ctr. for Biological Diversity, 581 F.3d at 1078 (Tallman, J., dissenting).
I. Statutory Overview

In *CBD v. DOI*, three statutes came into play: the Mining Law, NEPA, and FLPMA. First, under the Mining Law, private individuals are allowed to search for mineral deposits on public lands, lay claim to those deposits, and mine without purchasing the land or paying royalties. However, the Mining Law requires those seeking to mine in any manner greater than a “casual use” to submit a Mining Plan of Operations (MPO) to the BLM. The MPO must include information on the environmental impacts of the proposed mining activities and must satisfy a number of environmental standards to receive BLM approval. Therefore, the need to obtain BLM approval of an MPO can “substantially affect the manner in which mining operations . . . occur.”

Second, Congress enacted NEPA with the goal of enabling people and nature “to exist in productive harmony.” NEPA sets forth procedures “that require agencies to take a hard look at environmental consequences” of a given agency action. To satisfy NEPA’s procedural requirements, agencies must prepare an Environmental Impact Statement (EIS) for all “major federal actions significantly affecting the quality of the human environment.” An EIS must discuss the “significant environmental impacts” of the proposed action, as well as “all reasonable alternatives.”

Third, FLPMA requires the BLM to manage public lands and resources in a way that recognizes the variety of values the land may have, including ecological and environmental values, and the possible uses of lands by the government and private individuals. Thus, when considering a land exchange between the federal government and a private party, the BLM must draft a Record of Decision (ROD), weighing the advantages and disadvantages of the proposed exchange. The BLM may only approve a land exchange when this analysis shows that “the public interest will be well served” by the exchange. Therefore, both NEPA and FLPMA aim to ensure that agencies adequately evaluate the potential impacts of a given action prior to its approval.

7. Ctr. for Biological Diversity, 581 F.3d at 1072.
8. *Id.* at 1072–73; 43 C.F.R. § 3809.420 (2009).
9. *Id.* at 1073.
11. Ctr. for Biological Diversity, 581 F.3d at 1070 (internal quotation marks omitted).
14. Ctr. for Biological Diversity, 581 F.3d at 1075.
15. *See id.*
II. BACKGROUND ON AGENCY DEFERENCE IN THE NINTH CIRCUIT

The Ninth Circuit addressed the issue of agency deference in a series of recent decisions. The court established an arguably low standard of deference in the 2005 decision of Ecology Center v. Austin,17 which was overruled by an en banc clarification in Lands Council II in 2008.18 The court continues to be divided on this issue, most recently in CBD v. DOI, where the level of deference given by the majority was staunchly rejected by the dissent as disregarding the holding in Lands Council II.19

A Forest Service old-growth habitat treatment plan, sparked by the 2000 wildfires in the Lolo National Forest, was at issue in Ecology Center.20 The court held that the Forest Service’s decision to permit logging on old growth forests and post-fire habitats was arbitrary and capricious.21 The Forest Service failed to analyze how the logging would affect old-growth dependent species, as required by the National Forest Management Act (NFMA).22 Because the EIS did not adequately address the uncertainties presented by the scientific evidence used by the Forest Service in making its decision, the proposal violated NEPA.23 The court stated that an agency violates NEPA when its EIS is “so incomplete or misleading that the decisionmaker and the public can not make an informed comparison of the alternatives.”24 While the court noted that an agency is entitled to deference, it also ruled that there are “circumstances under which an agency’s choice of methodology, and any decision predicated on that methodology, are arbitrary and capricious.”25

The controversy in Lands Council II arose from a Forest Service approved logging proposal, which was to take place in the Idaho Panhandle National Forest.26 Lands Council claimed that the proposal violated NEPA and NFMA, but the district court denied its request for a preliminary injunction. On appeal, a three-judge panel held in Lands Council v. McNair (Lands Council I) that Lands Council had proven a likelihood of success on the merits and irreparable injury, and thus reversed the district court.27 The decision was revisited en banc, in order to “clarify some of [the] environmental jurisprudence with respect to [the

17. Ecology Ctr. v. Austin, 430 F.3d 1057, 1064–68 (9th Cir. 2005).
18. Lands Council II, 537 F.3d 981, 990 (9th Cir. 2008).
19. Ctr. for Biological Diversity, 581 F.3d at 1077.
20. Ecology Ctr., 430 F.3d at 1061.
21. Id.
22. Id. at 1065.
23. Id.
24. Id. at 1067.
25. Id. at 1064.
26. Lands Council II, 537 F.3d 981, 984 (9th Cir. 2008) (en banc).
27. Lands Council v. McNair (Lands Council I), 494 F.3d 771, 780 (9th Cir. 2007).
court's] review of the actions of the . . . Forest Service." This en banc decision held that the court is required to "defer to an agency's determination in an area involving a high level of technical expertise." The court overruled Ecology Center and created a new standard of deference. A court should only overrule an agency decision if the agency "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency."

III. CBD v. DOI: AN OVERVIEW

In CBD v. DOI, Asarco was already mining public lands, which the BLM sought to exchange for Asarco's private land. Under the Mining Law, Asarco would still be required to submit an MPO to the BLM for approval before undertaking new mining operations on public lands, should the land exchange not take place. On the other hand, if Asarco were to take fee simple in those public lands pursuant to the proposed exchange, Asarco would no longer be required to comply with the Mining Law, and so would not need to submit MPOs to the BLM for approval. This difference was not recognized in the BLM's final EIS for the proposed land exchange, as required by NEPA; instead, the final EIS merely stated that the "foreseeable uses of the [public] lands are mining-related uses and are expected to occur under all alternatives." Additionally, the ROD, required under FLMPA, erroneously concluded that "mining would be conducted in the same manner whether or not the exchange occurred." The majority cited this omission as a failure to conduct the necessary comparative analysis, which led it to conclude that the BLM failed to take a "hard look" at environmental effects, and thus acted in an "arbitrary and capricious" manner.

The majority opinion only noted in passing that it must give deference to a "fully-informed and well-considered" agency decision, but should strike down a "clear error of judgment." The dissent, on the other hand, focused on the majority's failure to adhere to the standard of deference set down in Lands Council II: "the life of a canary in a coal

28. Lands Council II, 537 F.3d at 984.
29. Id. at 993 (internal quotation marks omitted).
30. Id. at 987 (quoting Sierra Club v. EPA, 346 F.3d 955, 961 (9th Cir. 2003)).
32. Id. at 1065.
33. Id.
34. Id. at 1068 (emphasis omitted).
35. Id. at 1069.
36. Id. at 1065.
37. Id. at 1070.
mine can be described in three words: short but meaningful. So too apparently was the life of our decision in *Lands Council [II]*. The dissent argued that proper deference had not been given to the BLM’s decision, as their failure to consider the difference between the land exchange and the no-action alternative was a “single exception” in a 15-year record. Therefore, the majority incorrectly allowed this one exception to be “the linchpin” in the BLM’s reasoning, resulting in a holding that “undermine[d] a complicated agency action.”

**IV. ANALYSIS: PROPER DEFERENCE IN CBD v. DOI**

The contentions made by the dissent point to the difficulty of establishing a clear rule of deference that is applicable across a spectrum of cases. While the argument that the majority did not give proper deference as outlined in *Lands Council II* is plausible, the two cases are distinguishable. The lower standard of deference in *CBD v. DOI* is consequently justified.

The dissent failed to note that the issue in *Lands Council II* concerned the validity of scientific information used in making an agency decision. In contrast, the issue in *CBD v. DOI* was the lack of analysis itself, resulting in procedural inadequacy. In *CBD v. DOI*, the “linchpin” that the dissent refers to is one of a legal nature—the BLM’s failure to consider the actual state of the no-action alternative—and thus squarely falls within the discretion of the court. Therefore, the very particular standard of deference to technical agency decisions established in *Lands Council II*, albeit instructive, is not necessarily binding in this instance.

Further, the majority in *CBD v. DOI* ruled in accordance with more general principles of deference outlined in *Lands Council II*. The majority’s main point of contention can easily be labeled a failure “to consider an important aspect of the problem,” or an “explanation that runs counter to the evidence,” which *Lands Council II* held could justify a court overturning an agency decision.

38. *Id.* at 1077 (Tallman, J., dissenting).
39. *Id.* at 1078.
40. *Id.*
41. See *Lands Council II*, 537 F.3d 981, 988 (9th Cir. 2008).
42. See *Ctr. for Biological Diversity*, 581 F.3d at 1077.
43. See *id.* at 1078 (Tallman, J., dissenting).
44. See *Ctr. for Biological Diversity*, 581 F.3d at 1077; *Lands Council II*, 537 F.3d at 987.
45. See *Ctr. for Biological Diversity*, 581 F.3d at 1077; *Lands Council II*, 537 F.3d at 987 (quoting Sierra Club v. EPA, 346 F.3d 955, 961 (9th Cir. 2003)).
CONCLUSION

The majority in *CBD v. DOI* did not step beyond its bounds by acting "as a panel of scientists" in an agency action that required a high level of expertise, as was arguably the case in *Lands Council II*, but rather made a procedural legal analysis to determine whether or not the BLM made a "clear error of judgment." While the Ninth Circuit may have intended to lay down a concrete standard of deference owed to agency decisions in *Lands Council II*, the dissenting opinion in *CBD v. DOI* highlights the difficulty, if not impossibility, of doing so.

*Maya Waldron*

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46. *Lands Council II*, 537 F.3d at 988, 993.

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.
Late Intervention in FERC Proceedings:  
How Late Can a Party Be . . . to the Party?

INTRODUCTION

*California Trout v. Federal Energy Regulatory Commission* (CalTrout v. FERC) originated with CalTrout’s and Friends of the River’s (FOR) (collectively, petitioners) late motions to intervene in the Pyramid Lake Dam proceeding.¹ The ruling in this case, which affirmed FERC’s decision to deny the petitioners’ late motions to intervene, will likely lead to environmental groups and other interested parties becoming more diligent in choosing which proceedings in which to intervene, and, ultimately, could lead to a limitation of effective public involvement in FERC proceedings.

I. BACKGROUND

A. *FERC Procedural Rules*

FERC has the authority under the Federal Power Act (FPA) to grant amendments to dam licenses, following an application by the license owner, public notice, and fulfillment of National Environmental Policy Act (NEPA) requirements.² One must be a “party” to the proceeding, by intervening in that proceeding, to challenge a final decision.³ The FPA also gives FERC authority to develop the intervention procedures.⁴

In deciding whether to grant an untimely motion to intervene, at issue in this case, FERC “may” consider any of the five factors outlined in 18 C.F.R. 385.214(d)(1):

[Wh]ether: (i) The movant had good cause for failing to file the motion within the time prescribed; (ii) Any disruption of the proceeding might result from permitting intervention; (iii) The movant’s interest is not adequately represented by other parties in the

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² Id. at 1013.
³ Id. (citing 16 U.S.C. § 825(a) (2006)).
⁴ Id. (citing 16 U.S.C. § 825g(a)).
proceeding; (iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and (v) The motion conforms to the [procedural requirements in] paragraph (b). . . . 5

Factors (ii), (iii), and (iv) deal with prejudice, factor (i) relates to a showing of good cause, and factor (v) deals with conformance to the intervention procedure. 6 Further, 18 C.F.R. § 385.214(b)(3) states that a late motion to intervene must “show good cause why the time limitation should be waved,” but the court interpreted this language as an element that “may” be considered. 7

B. Case Background

After the arroyo southwestern toad (Bufo microscaphus californicus) was listed as endangered under the Federal Endangered Species Act in 1994, concerns arose that the changes in minimum flows from Pyramid Lake Dam, operated by the California Department of Water Resources (DWR), were harming the toad. 8 The original dam license required minimum constant flows out of Pyramid Dam; in the early 1990s, DWR increased outflow at certain times due to increased inflow. 9 The large changes in the flows were thought to adversely affect the eggs and tadpoles “by stranding them on land when water flows suddenly dropped and by washing them away when water flows dramatically increased . . . .” 10 The flow regime at Pyramid Dam was changed in 1995 to sustain the rainbow trout in an upper Middle Piru Creek fishery. 11 The new flow regime was a constant 25 cubic feet per second (cfs) during the toad’s breeding months (April to August) and then a reduced flow in winter after the tadpoles left. 12 According to the Fish and Wildlife Service (FWS), this higher flow regime seemed to harm the arroyo toad. 13 The rainbow trout in Middle Piru Creek did, however, benefit from the higher summer flows of the revised flow regime, because trout prefer the lower-temperature habitat of deeper water. 14

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5. Id. at 1014 (citing 18 C.F.R. § 385.214(d)(1) (2010)).
6. See id. at 1020 (citing 18 C.F.R. § 385.214(d)(1)).
7. Id. at 1014 n.8 (citing 18 C.F.R. § 385.215(b)(3)).
8. See id. at 1009.
9. See id. (noting that minimum flows were five cubic feet per second (cfs) and ten cfs, depending on the season. In the early 1990s, releases were increased to twenty-five cfs at certain times.)
10. Id.
12. See Cal. Trout, 572 F.3d at 1009.
13. See id. at 1009-10.
14. See id. at 1010.
On March 17, 2005, the DWR filed an application with FERC to amend its license for Pyramid Dam in order to abolish the minimum flow requirements and establish a “natural flow regime” in the Middle Piru Creek.\(^\text{15}\) DWR included with its application an Environmental Impact Report (EIR), prepared pursuant to the California Environmental Quality Act (CEQA).\(^\text{16}\) The EIR discussed potential impacts to trout in the area downstream of Pyramid Dam.\(^\text{17}\)

FERC gave public notice of the application on June 8, 2005, and set July 8, 2005 as the deadline for submitting comments and making motions.\(^\text{18}\) The petitioners failed to move to intervene by that date, even though CalTrout submitted comments on three separate dates in 2005, both prior to and during the comment and motion period.\(^\text{19}\) FERC released the draft Environmental Assessment (EA) pursuant to NEPA for the license amendment on March 1, 2007.\(^\text{20}\) CalTrout then filed a motion to intervene twenty-one months late and almost one and a half months after the release of the draft EA (on April 13, 2007), while the FOR filed a motion to intervene twenty-three months late and almost two and a half months after the release of the draft EA (on June 11, 2007).\(^\text{21}\) FERC rejected both motions to intervene, two CalTrout requests for rehearing, and one FOR request for rehearing.\(^\text{22}\) CalTrout and FOR then petitioned the Ninth Circuit to review FERC’s decision under the “arbitrary and capricious” standard of the Administrative Procedures Act.\(^\text{23}\)

II. OPINION

A. Good Cause

The petitioners attempted to show good cause for the late intervention in several ways.\(^\text{24}\) First, petitioners claimed that the release of new information after the intervention deadline constituted good cause to intervene in the proceeding.\(^\text{25}\) The information included: (1) the National Marine Fisheries Service rule that the Middle Piru Creek is not

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15. Id.
16. See id.
17. See id.
18. See id.
19. See id. (Cal Trout’s comments were dated March 26, April 15, and July 8, 2005).
20. Id. at 1012.
21. See id.
22. See id.
23. Id.
24. See id. at 1015-18.
25. See id. at 1017-18.
critical steelhead trout habitat; (2) a report showing rainbow trout in that portion of the creek were related to steelhead trout; and (3) a report showing the arroyo toad population in that portion of the creek benefited from large summer flows.\textsuperscript{26}

The court found that this new information did not "divulge . . . a new issue with the license amendment," but just better supported the petitioners' position.\textsuperscript{27} In addition, even assuming that there was good cause because of the new information, the petitioners still did not intervene until April and June of 2007, while the latest of the three pieces of information was published in November of 2006.\textsuperscript{28}

FERC has a rule that "automatically" allows late intervention in the case of an EIS when the motion for intervention "is filed within the comment period for a draft [EIS]" \textsuperscript{29}; however, FERC does not have such a rule for late interventions when an EA is issued. The petitioners claimed that the different standard for EAs violated NEPA's public involvement requirements.\textsuperscript{30} The court pointed out, however, that the public involvement requirements for an EA under NEPA are "not substantial," and the requirements for an EA are to "provide the public with sufficient environmental information . . . to weigh in with their views"\textsuperscript{31} and to allow public comments on draft EAs.\textsuperscript{32} These actions do not require intervention.\textsuperscript{33}

The petitioners also argued that the "unexpected" preparation of an EA instead of an EIS violated NEPA, constituting good cause.\textsuperscript{34} The court rejected this argument, noting the "petitioners have put the cart before the horse—they essentially argue that because they are about to be denied the benefits of intervention they should be deemed as having good cause to intervene."\textsuperscript{35}

The court concluded that FERC's decision that the new information did not constitute good cause for late intervention was not arbitrary or capricious.\textsuperscript{36}
B. Prejudice to Other Parties

Petitioners also claimed FERC acted arbitrarily and capriciously in deciding that late intervention would prejudice existing parties. Among other reasons to support this assertion, petitioners noted that the “only other party” in the FERC proceeding was DWR, and “no other party” contested the petitioners’ motions. The court recognized that FERC’s analysis of prejudice did “not comprehensively address any of the three factors constituting ‘prejudice.’” The court held, however, that good cause is the most important element for late motions to intervene “because it is mentioned twice in the Commission’s regulation.” Thus, “[a] finding that a movant has failed to show good cause is a sufficient basis for denying late intervention.” Then, FERC “may” also “consider any other factor, including prejudice.” FERC was not required to examine potential prejudice of other parties because it determined the petitioners did not have good cause.

C. Consistency with Precedent

Additionally, the court found that FERC acted consistently with its precedent of not allowing late intervention without good cause, distinguishing the cases cited by petitioners from the facts here. This precedent, the court said, constituted a “clear policy” of rejecting late intervention when moving parties are aware of potential effects to their interests and “sat on their rights.”

III. DISSENT

The dissent saw FERC’s good cause requirements for late intervention as too stringent, noting that FERC “routinely” grants late intervention in cases where it would not result in prejudice. The dissent noted that the majority opinion did “not dispute that [p]etitioners satisfy all three prejudice factors.” Thus, the issue in this case was whether

37. See id.
38. Id.
39. Id. at 1020–21.
40. Id. at 1021.
41. Id. at 1022.
42. Id. (emphasis added).
43. See id.
45. Id. at 1024.
46. Id. at 1026 (Gould, J., dissenting).
47. Id.
good cause must be shown, and, if so, whether the petitioners had good cause.

The dissent concluded that FERC's "consistent standard" "does not require any substantial showing of good cause when there is no evidence of prejudice or disruption."48 The dissent stated that the "good cause" requirement would be satisfied by release of new information that increases the relative importance of the proceeding to the public; however, this good cause was not necessary because FERC has a "usual policy of dispensing with the good cause requirement when, as here, there was no risk of prejudice or disruption to other parties."49 The dissent also averred that petitioners should have been allowed to intervene because they had good cause—although it was not necessary in this case—and there would be no chance for prejudice or disruption of the proceeding.50

Additionally, the dissent noted that by denying late intervention in this case, petitioners' environmental concerns would be unrepresented.51 The dissent stated that FERC violated NEPA by preparing an EA that only parties to the proceeding could challenge and where only the dam operators and FERC were parties to the proceeding.52

**IV. DISCUSSION**

*CalTrout v. FERC* is a case of two extremes: the majority rule suggests that parties decide to intervene on an "inkling" that their rights or interests might be affected,53 while the dissent suggests that intervention should be allowed as long as there is a hint of good cause and lack of prejudice or delay.

The standards set out by the majority essentially mean that any person or organization that thinks it may want to challenge a FERC decision in the future should intervene in the proceeding.54 While this is a stringent standard, it is not an impossible one. The petitioners were aware that the project could have impacts on trout in Middle Piru Creek.55 Under the majority rule, the petitioners should have taken this knowledge as a reason to intervene.56

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48. *Id.* at 1028.
49. *Id.* at 1027, 1029.
50. *See id.* at 1029.
51. *See id.* at 1026.
52. *See id.*
53. *See Petition for Rehearing and Rehearing En Banc at 18–19, Cal. Trout, 572 F.3d 1003 (Nos. 07-73664, 07-74494, 08-71593).*
54. *See id.* at 19.
55. *See id.* at 15; *see Cal. Trout, 572 F.3d at 1018–19.*
56. *See Petition for Rehearing, supra note 53, at 18–19.*
The petitioners and dissent argue that potential parties should be able to intervene without a “substantial showing of good cause” as long as it would not prejudice parties or delay the proceeding. In a sense, the standard suggested by the petitioners creates a second intervention deadline that would potentially undermine having a deadline in the first place. Under this rule, a potential party could consciously wait for the intervention deadline to pass and continue to do nothing for as long as it is apparent to them that their intervention would not prejudice or delay the proceeding. This standard prompts one to ask why FERC would set an intervention deadline in its procedural rules to begin with if there is a later de facto deadline. It does not seem logical that FERC would impose a thirty-day intervention deadline, only to have it be eradicated later by a softer rule.

The dissent's standard may be too lax for the reasons discussed above, while the majority rule seems overly restrictive because it compels potential parties to guess at which proceedings to intervene in. This result could prove unproductive and would lead to inefficiencies in the proceedings. Parties might become involved in proceedings that they ultimately do not care about, and other parties could miss out on proceedings that they find out later they do care about. For many potentially interested environmental groups, it would be unfeasible and inefficient to intervene in every proceeding in which they might eventually want to be a party. Even though the majority's rule complies with NEPA statutory requirements, the rule puts members of the public into a difficult position in FERC proceedings.

**CONCLUSION**

Although the court's rule regarding intervention is workable, it is not ideal. It will force concerned organizations and individuals to decide when to intervene without knowing whether intervention would be useful. The strict late intervention rule, coupled with the FERC requirement that only parties can challenge its decisions, may obstruct effective public participation in FERC proceedings. Liberal public participation in FERC proceedings is vital to environmental interests and

57. See Cal. Trout, 572 F.3d at 1028 (Gould, J., dissenting); see Petition for Rehearing, supra note 53, at 18.
58. Cal. Trout, 572 F.3d at 1028.
59. See id.
60. See id. at 1016–17 (majority opinion) (noting that the petitioners, should they disagree with the decision to release an EA rather than an EIS, should challenge the decision to prepare an EA, even though they would only be allowed to challenge it if they had intervened).
procedural limitations on public participation that extend as deeply as the majority's rule may hamper the furtherance of those interests.\textsuperscript{61}

\textit{Kristi Black}

\textsuperscript{61} \textit{See id. at 1026 (Gould, J., dissenting).}

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, \textit{Ecology Law Currents}, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.
Clarifying the Scope of NEPA
Review and the Small Handles Problem

INTRODUCTION

In White Tanks Concerned Citizens, Inc. v. Strock, the Ninth Circuit addressed the scope of federal environmental analysis required for wetland fill permits issued in connection with larger, otherwise non-federal development projects.\(^1\) Often called the “small handles” problem,\(^2\) courts have struggled with the extent to which an environmental analysis under the National Environmental Policy Act (NEPA) must consider the entirety of a private development or just those components subject to direct federal jurisdiction.\(^3\) In White Tanks, the Ninth Circuit clarified its previous holdings and articulated a test that considers the relationship between the federal action and the project as a whole. Specifically, the court emphasized both the logistical relationship—whether the federal permit was necessary for the entire project to go forward—and the locational relationship—whether the waters that required a federal permit under the Clean Water Act (CWA) were sufficiently interspersed in the larger project such that they could not be considered independently.\(^4\) Ultimately, the White Tanks court reversed the decision of the lower court and held that, because the jurisdictional waters at issue were dispersed in such a way that development could not proceed without a federal permit, the Army

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2. See Holly Doremus et al., Environmental Policy Law: Problems, Cases, and Readings 261 n.2 (5th ed. 2002). The federal “small handles” problem arises where an action is partly, but not entirely, federal. The central question is to what extent does the “federal handle” component subject the state and local components, or project as a whole, to federal NEPA review. See id.
3. See, e.g., Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177 (4th Cir. 2009) (holding that the Corps did not act arbitrarily or capriciously in limiting the scope of its NEPA analysis to the impact of the mining operation on jurisdictional waters as opposed to examining the broader impact of the entire valley fill project).
Corps of Engineers (the Corps) erred in not considering the broader impacts of the proposed project when granting the permit.

I. OVERVIEW

The environmental dispute in *White Tanks* concerned the construction of Festival Ranch, a master-planned community that would house an estimated 60,000 people in an undeveloped desert area. Located near the White Tank Mountains and the Hassayampa River floodplain in Maricopa County, Arizona, the site occupied 10,105 acres, including 787 acres of washes. The proposed development would fill 26.8 acres of these washes and disturb a total of 144 acres of washes that traversed the development site.

Under the CWA, all discharges of dredge or fill material into jurisdictional waters require a section 404 permit, issued by the Corps. The developers of Festival Ranch applied for a section 404 dredge and fill permit so that they could fill in 26.8 acres of washes and develop the site.

When deciding whether to grant section 404 permits, NEPA guidelines require that the Corps investigate whether the proposed project would “significantly affect[] the quality of the human environment.” In the case of the Festival Ranch permit, the Corps restricted the scope of its environmental analysis to the 787 acres of washes and 83.6 acres of upland areas directly affected by the dredge and fill activity. The Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS), and plaintiff-appellant White Tanks Concerned

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5. *White Tanks*, 563 F.3d at 1036.

6. *Id.* It is unclear whether desert washes—dry streambeds that flow only after significant rainfall—fall within the scope of the Corps’ jurisdiction under the CWA. *See Rapanos v. United States*, 547 U.S. 715 (2006) (holding, in a 4-4-1 decision, that the CWA governs relatively permanent standing or continuously flowing bodies of water such as streams, oceans, rivers, and lakes). *But cf.* 33 C.F.R. § 328.3(a)(3) (2010) (defining “waters of the United States” to include “all other waters such as . . . streams (including intermittent streams), mudflats, sandflats, [and] wetlands”). In *White Tanks*, the existence of the Corps’ jurisdiction was not disputed. *White Tanks*, 563 F.3d at 1035.


8. 33 U.S.C. § 1311(a) (2006) (making discharge of pollutants unlawful); *id.* § 1344(a) (authorizing the Corps to issue dredge and fill permits). The CWA is a comprehensive statute, designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* § 1251(a).


10. 42 U.S.C. § 4332(2)(C) (2006). Section 404 dredge and fill permits are federal actions under NEPA. *See Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir. 1986); *see also* 40 C.F.R. § 1508.18(b)(4) (2010) (defining federal action for the purpose of NEPA as including “actions approved by permit or other regulatory decision”).

Citizens, Inc.\textsuperscript{12} expressed concern that this permit would have unacceptable environmental impacts that would exceed NEPA's "significance" threshold. They urged the Corps to conduct "a full-scale environmental analysis, including an Environmental Impact Statement ('EIS') addressing the large-scale direct, secondary, and cumulative impacts of the [Festival Ranch] project."\textsuperscript{13} Despite negative comments, the Corps did not expand its analysis or complete an EIS.\textsuperscript{14} Instead, the Corps issued a Finding of No Significant Impact (FONSI) and concluded that the issuance of the section 404 permit would not cause significant environmental impacts with respect to the limited areas it considered.\textsuperscript{15}

At issue in White Tanks was the adequacy of the study that went into the Corps’ decision to grant the section 404 permit and to thereby allow the dredge and fill of the ephemeral washes that ran through the Festival Ranch site.\textsuperscript{16} In other words, when there is a federal hook (here, a section 404 permit) in an otherwise non-federal project (here, the private development of Festival Ranch), to what components does NEPA apply?

NEPA does not specify the scope of analysis that federal agencies must conduct in determining whether their actions, when combined with private actions, constitute a "significant Federal action."\textsuperscript{17} Thus, each agency has promulgated its own NEPA regulations to address this question. Under the applicable regulations, the Corps jurisdiction for NEPA review extends to those portions of a project that are subject to Corps' "control and responsibility."\textsuperscript{18} The determination of whether "sufficient control and responsibility" exists to turn a private action into a federal action hinges on the following factors:

1. Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project).

\textsuperscript{12} White Tanks Concerned Citizens, Inc. describes itself as an Arizona non-profit public interest corporation that has been involved in efforts to preserve the White Tank Mountains and surrounding areas since 2000. \textit{Id.}

\textsuperscript{13} \textit{Id.} Under NEPA, federal agencies may prepare an Environmental Assessment (EA) when the environmental effects of a proposed action are not readily discernible. 40 C.F.R. § 1501.4(b) (2010). An EA is followed by one of two conclusions. If the EA establishes that the agency's action may have a significant effect upon the environment, the agency must prepare an Environmental Impact Statement (EIS), which sets forth the unavoidable adverse environmental effects of the proposed action and alternatives to the proposed action. \textit{Id.}; 42 U.S.C. § 4332(2)(C) (2006). If the EA reveals no significant environmental effect, the agency must issue a Finding of No Significant Impact (FONSI), accompanied by "a convincing statement of reasons to explain why a project's impacts are insignificant." Nat'l Park & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001).

\textsuperscript{14} \textit{White Tanks}, 563 F.3d at 1037.

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.} at 1035.

\textsuperscript{17} \textit{See} Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394, 398 (9th Cir. 1989).

(2) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

(3) The extent to which the entire project will be within Corps jurisdiction.

(4) The extent of cumulative Federal control and responsibility.  

II. WHITE TANKS CONCERNED CITIZENS, INC. v. STROCK: ANALYSIS

In determining the appropriate scope of NEPA analysis in White Tanks, the Ninth Circuit observed that its prior decisions in Save Our Sonoran v. Flowers20 and Wetlands Action Network v. U.S. Army Corps of Engineers21 represent two ends on a spectrum.22 In Wetlands, the wetland portion of the development, which gave rise to federal jurisdiction, was concentrated in particular areas.23 The Wetlands court held that because a major portion of the development project could proceed without a section 404 permit, the Corps could limit its analysis to the jurisdictional waters.24 In Save Our Sonoran, on the other hand, the jurisdictional waters were dispersed throughout the development property "like capillaries through tissue."25 The Save Our Sonoran court held that because no development could proceed without filling the waters, the NEPA analysis should have included the entire property.26

In White Tanks, the Ninth Circuit found that the Festival Ranch project most closely approximated the development with interspersed wetlands in Save Our Sonoran, and thus, the Corps had issued its FONSI based on too narrow a scope of analysis.27 The White Tanks holding emphasized the relationship between the waters affected by the dredge and fill activity, which gave rise to the need for federal inquiry under the CWA and NEPA, and the project as a whole. The court examined two aspects of this relationship: the logistical feasibility of a "no-action alternative" and the locational relationship between the jurisdictional waters and the entirety of the project.

First, critical to the court's analysis was that, like in Save Our Sonoran, the Festival Ranch development provided for no feasible "no-action alternative."28 The court reasoned that, without a section 404

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19. Id. § 7(b)(2).
20. Save Our Sonoran v. Flowers, 408 F.3d 1113 (9th Cir. 2005).
22. White Tanks, 563 F.3d at 1040.
23. See Wetlands, 222 F.3d at 1110.
24. Id. at 1118.
25. Save Our Sonoran, 408 F.3d at 1122.
26. Id.
27. White Tanks, 563 F.3d at 1036, 1042.
28. Id. at 1041; see Save Our Sonoran, 408 F.3d at 1122.
dredge and fill permit, the development would not be a cohesive master-planned community, but rather would be isolated clusters of housing with limited connectivity. In other words, the large-scale development could not proceed without federal action (the issuance of the section 404 permit).

Second, the court emphasized the interconnected relationship between jurisdictional waters and the Festival Ranch project for which the developers sought the dredge and fill permits: “It is not the quantity of the water that matters, but the fact that the waters will be affected, and further, whether the waters must be affected to fulfill the project’s goals.” The court concluded that, like in Save Our Sonoran, the waters in the Festival Ranch development were not concentrated in particular areas but instead dispersed throughout the property to such an extent that “the washes affect[ed] the entire property.” Most importantly, by emphasizing the relational component, the court deemphasized the quantity of land affected. The Festival Ranch developers planned to fill washes that constituted less than 0.3 percent of the acreage of the entire project, and yet the relationship of the small federal handle to the entirety of the project gave rise to a much broader NEPA review.

As a final consideration, the court gave weight to the fact that the EPA and the FWS—“not the usual suspects in opposing the action of a federal agency”—disagreed with the Corps’ limited assessment.

Apart from clarifying precedent in the Ninth Circuit, the White Tanks opinion accords with the larger purpose of NEPA. The NEPA EIS requirement serves two purposes. First, the creation of an EIS ensures “that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” One commentator observed, “The irony in the ‘small handle’ logic is that the larger a project gets the smaller the scope of the Corps’ NEPA analysis becomes.” The White Tanks court addressed this concern by considering the relationship—rather than the mere percentage—of the affected land compared to the project as a

29. White Tanks, 563 F.3d at 1041.
30. Id.
31. Id.
32. Id. (quoting Save Our Sonoran, 408 F.3d at 1118).
33. In Save Our Sonoran, the washes constituted approximately 31.3 acres, or about 5 percent of the site; the application sought a permit to fill 7.5 acres of those jurisdictional waters (only 1 percent of the site). Save Our Sonoran, 408 F.3d at 1118. In Wetlands, the applicant sought a permit to fill 16.1 acres of the wetlands, in a development covering 1,000 acres. Wetlands, 222 F.3d at 1109.
34. White Tanks, 563 F.3d at 1042.
whole. The White Tanks court reasoned that, while the ephemeral washes that give rise to the federal action may represent a very small number of acres in a very large development (here, 26.8 acres or 0.3 percent of the total project), the scope of environmental review under NEPA must be dictated by the environmental effects triggered by the filling of these washes. To hold otherwise would be to permit NEPA review of a "hypothetical project" (just the federal handle) as opposed to the actual project that would be developed if the Corps granted the dredge and fill permit. This reasoning best achieves the purpose of informing the agency of the significant environmental impacts associated with its decision.

Second, the EIS requirement "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." The holding in White Tanks achieves this "informing the public" purpose of NEPA. Publicly accessible information and public pressure could influence the Corps' decision to grant the section 404 permit, which, in turn, determines the viability of the project and the environmental impact on the "federal handle." This reasoning distinguishes the holding in White Tanks from Public Citizen and Aracoma Coal Co., where public pressure would have little effect.

37. White Tanks, 563 F.3d at 1039-40. The NEPA implementing regulations explicitly require consideration of the impact of indirect effects of the proposed project, 40 C.F.R. § 1508.8 (2010), connected actions, id. § 1508.25(a)(1), cumulative actions, id. § 1508.25(a)(2), and cumulative impacts, id. § 1508.7, which result from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. See also 33 C.F.R. pt. 325 app. B § 7(b) (2010) (explaining the Corps' scope of analysis "include[s] the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project").

38. Appellant's Opening Brief at 10, White Tanks, 563 F.3d 1033 (No. 07-15659).

39. Public Citizen, 541 U.S. at 768 (quoting Robertson, 490 U.S. at 349 (internal quotation marks omitted)).

40. In Public Citizen, the Supreme Court held that an agency did not have to take into account certain environmental effects in its EA because that agency had "no ability to countermand the President's lifting of the moratorium" on trucks from Mexico; therefore, it was not the agency's action that was the proximate cause of the negative environmental impacts. Id. at 752.

41. In Aracoma Coal, the Fourth Circuit upheld the Corps' decision to restrict its NEPA review to impacts from the fill of jurisdictional waters, rather than impacts from the entirety of the mining operations. Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177 (4th Cir. 2009). The court based its holding in part on its determination that the Corps lacked "sufficient control and responsibility" because a West Virginia state agency retained substantial regulatory control over all other aspects of those operations. Id. at 197.
because the agency lacked "control and responsibility" and the power to act on the information contained in the EIS.

CONCLUSION

In White Tanks, the Ninth Circuit addressed to what extent federal authorization is required for one portion of a larger non-federal project. The problem in these cases, sometimes called the "small handles" problem, is whether federal responsibility, and therefore federal procedural requirements, should swallow the entire project. The White Tanks court struck an optimal balance between NEPA's goals of improving agency decision making and informing the public, on one hand, and the concerns of holdups and wasteful expenditures of public resources due to unwarranted review, on the other. The court looked at the distribution of lands that gave rise to NEPA jurisdiction, finding that where the "federal handle" was interspersed or scattered throughout the property, the Corps has broad permitting authority. Thus, it is not the size of the federal handle that matters; rather, courts will look to whether the federal component is dispersed in such a way that it is the but-for cause and proximate cause for the development of the larger project.

Jeslyn Miller

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Washington v. Chu: A Positive Sign for Hanford Cleanup?

INTRODUCTION

In Washington v. Chu,1 the Ninth Circuit rebuked the Department of Energy (DOE) for trying to bypass storage, treatment, and disposal requirements for materials classified as transuranic mixed waste (TRUM) at the Hanford Nuclear Reservation. DOE claimed that TRUM designated for eventual disposal at the Waste Isolation Pilot Plant (WIPP) fell within the legislative exemption for waste stored at WIPP itself.2 However, the court examined the plain language, statutory context, character, and legislative history of the WIPP exemption and determined that Congress clearly intended to create a site-specific exemption for waste at WIPP only.3

I. HANFORD SITE BACKGROUND

A 586-square-mile area adjacent to the Columbia River in southeastern Washington state, Hanford is home to a host of radioactive and hazardous wastes and has the dubious honor of being the most contaminated locality in the United States.4 It was built as part of the Manhattan Project by the Army Corps of Engineers during the early 1940s and produced seventy-three tons of plutonium over its active lifespan of forty-four years.5 Most of the reactors were cooled directly by Columbia River water, which was then pumped back into the river after a brief period of settling,6 resulting in daily discharges of thousands of

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1. See Washington v. Chu, 558 F.3d 1036, 1045–47 (9th Cir. 2009).
2. Id. at 1038, 1042 n.14.
3. Id. at 1043.
curies of radioactive material. On Hanford's central plateau, nuclear fuel rods were reprocessed to isolate bomb-grade plutonium in a chemically intensive process that used strong acids and generated considerable quantities of liquid waste. Over time, approximately 440 billion gallons of low-level waste were released directly into the soil, while higher-level waste was largely contained in leak-prone single-walled underground storage tanks. Significant atmospheric discharges also took place, including accidental and intentional releases of radioactive iodine. Despite major contamination of air, water, and land, the public was generally unaware of these emissions and the risks associated with them while Hanford was in active operation. Unsurprisingly, the negative health effects on past and present Hanford employees and members of the public are ongoing subjects of study.

Current levels of radioactive inputs into the environment are much lower than during peak activity in the mid-1960s, yet Hanford continues to face severe problems. More than two-thirds of DOE's highly radioactive waste is located here. Subsurface waste plumes have resulted in significant groundwater pollution over at least 80 square miles. Unfortunately, much of the waste in tanks, soil, and groundwater is poorly characterized and chemically complex, making treatment and storage decisions more difficult.

7. See OR. HEALTH DIV. RADIATION PROT. SERVS., ENVIRONMENTAL RADIOLOGICAL SURVEILLANCE REPORT ON OREGON SURFACE WATERS 1961–1993, at 3 (1994) [hereinafter OREGON HEALTH]. The current upstream background level is about 6,000 curies per year. See HANSON, supra note 5, at 21.


9. See GERBER, supra note 6, at 4–6.


12. See id. Much of the information only came to light in 1986, when 400 documents were made public.


14. See OREGON HEALTH, supra note 7, at 10.

15. See HANSON, supra note 5, at 3.


17. See HANSON, supra note 5, at 20. Identification and chemical separation of complex wastes must occur before long-term storage in order to keep “hazardous chemical reactions between incompatible compounds” from occurring. See id.
Unique geological and hydrological factors at the Hanford site promote migration of contaminant plumes and make their paths difficult to predict. While fluid flow patterns generally show movement towards the Columbia River to the north and east, the Hanford overlies heterogeneous glacial and fluvial sediments, and the complex spatial arrangement of these differentially permeable gravels, sands, and silts makes detailed groundwater flow difficult to predict. Due to large variations in the depth (10–200 feet) of the groundwater table, transport mechanisms in both groundwater and the unsaturated zone above it are important. Specific contaminants travel at different rates depending on interactions with co-pollutants and oxic sediments.

The Hanford site was selected to house reactors and enrichment facilities according to criteria such as sheer size, remoteness, a plentiful water supply, and “ground that could bear heavy loads.” Regrettably, the hydrologic situation described above was not considered when the site was chosen. In contrast, the location of WIPP in southeastern New Mexico was selected with specific hydrologic and geologic considerations in mind. DOE also considered the properties of the waste that could reasonably be disposed of at WIPP. This type of site-specific, waste-

20. See id. at 899, 903.
22. See Gee et al., supra note 19, at 899, 903.
24. See id.
25. See U.S. DEP’T OF ENERGY, WASTE ISOLATION PILOT PLANT, WHY SALT WAS SELECTED AS A DISPOSAL MEDIUM (2003), available at http://www.wipp.energy.gov/ftcshits/salt.pdf. The disposal site is 2150 feet below the ground surface within a stable salt formation about 2000 feet thick. See EPA, WIPP RECERTIFICATION FACT SHEET NO. 1, at 1 (2005), available at www.epa.gov/rpdweb00/docs/wipp/recertification/fs1-recert.pdf. DOE chose this location knowing that, due to plasticity effects, salt deforms to fill fractures that develop over time, theoretically resulting in an impermeable and long-lasting tomb. See U.S. DEPARTMENT OF ENERGY, supra note 25, at 1–2. But see Arjun Makhijani & Scott Saleska, High-Level Dollars, Low-Level Sense, Chapter 3, Transuranic Wastes at WIPP (1992), http://www.ieer.org/pubs/highlv3e.html (noting a danger of dissolution if the salt comes in contact with water; pressurized pockets of brine are thought to exist near the WIPP storage rooms). No perfect disposal location exists.
specific analysis is crucial to making informed storage and disposal decisions.

II. TRUM AND THE LAW GOVERNING ITS TREATMENT, STORAGE, AND DISPOSAL AT HANFORD

TRUM is a mixture of mostly solid materials “contaminated during the production and reprocessing of plutonium . . . with radioactive elements . . . carrying a periodic table value greater than uranium . . . and non-radioactive hazardous waste, such as solvents or heavy metals.”27 While TRUM has lower levels of radioactivity than spent nuclear fuel or high-level radioactive waste, it is toxic and poses a long-term risk to both human and environmental health.28 Because of this dual hazard, TRUM at Hanford is governed by both the Atomic Energy Act of 1954 and Washington State’s Hazardous Waste Management Act (HWMA), which operates instead of the Federal Resource Conservation and Recovery Act (RCRA) under Environmental Protection Agency (EPA) authorization.29 At the time of the Chu trial, “shallow, unlined soil trenches” on the Hanford Nuclear Reservation contained “at least 37,000 drums and 1,200 large boxes of [post-1970] suspected TRUM in retrievable storage,” which were waiting to undergo treatment or proper disposal.30 HWMA refers to the land disposal restrictions enumerated by RCRA,31 which prohibit land disposal of hazardous waste, including TRUM, unless it is pretreated to minimize “threats to human health and the environment” or where there exists “a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the waste remains hazardous.”32

27. See Washington v. Chu, 558 F.3d 1036, 1038 (9th Cir. 2009). TRUM-contaminated materials include “tools, equipment, protective clothing, rags, graphite, glass, and other material.” Id.

28. See id.

29. See id. at 1038, 1039 n.1–2; see also WASH. REV. CODE §§ 70.105.020, 70.105.030 (2010); WASH. ADMIN. CODE 173-303-140(2)(a) (2009).

30. See Chu, 558 F.3d at 1038. Before 1970, TRUM at Hanford was disposed of like solid, low-level radioactive waste, for example, packaged in cardboard boxes and dumped in trenches, never intended for retrieval. See HANSON, supra note 5, at 3–4.


32. See, e.g., Resource Conservation and Recovery Act, 42 U.S.C. § 6924(g)(5), (m) (2006). The Act also contains safeguards against stockpiling hazardous wastes subject to the land disposal prohibitions—only allowing storage of an amount of material that is “necessary to facilitate proper recovery, treatment or disposal” and limiting the length of time waste may be stored at a particular location. See id. § 6924(j); 40 C.F.R. § 268.50(b)–(c) (2006); see also Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 357 (D.C. Cir. 1989) (explaining that Congress “opted in large part for a ‘treat as you go’ regulatory regime”).
III. ANALYSIS

In Chu, DOE argued that TRUM at Hanford designated for eventual disposal at WIPP is covered by the exemption in the WIPP Land Withdrawal Amendment Act of 1996. The Ninth Circuit examined DOE’s claims—that the plain language of the WIPP exemption unambiguously compelled its far-reaching interpretation or, in the alternative, its interpretation was nonetheless entitled to significant deference—and found them to be without support. This examination entailed analysis of (1) the exemption’s plain language, (2) statutory context, (3) the nature of the exemption, and (4) legislative history.

First, the court looked at the plain language of the exemption. Read in a contextual vacuum, DOE’s argument that the WIPP exemption applies to all TRUM “designated . . . for disposal at WIPP” seems reasonable. The words of the exemption do not explicitly require that the waste in question currently resides at WIPP, only that the Secretary of DOE has designated it for disposal there.

The Chu court recognized this ambiguity in plain meaning but echoed the Supreme Court’s warning that “a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” Hence, enlarging the scope of analysis to encompass the entire section, the court showed that, in context, the exemption logically extends only to waste at WIPP.

Section 9 of the amended Waste Isolation Pilot Plant Land Withdrawal Act is entitled “Compliance with Environmental Laws and Regulations,” and 9(a)(1) begins by stating that the section is applicable “with respect to WIPP.” According to the court:

33. See Chu, 558 F.3d at 1038.
34. See id. at 1042–49. Application of Chevron deference was rejected for two reasons: (1) the statute was not ambiguous, so DOE’s alternative interpretation was inconsequential, and (2) even if the statute had been ambiguous, it was one DOE had to abide by, not one it was responsible for administering, so no deference was required. See id. at 1043, 1043 n.15; see also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); Am. Fed’n of Gov’t Employees v. Fed. Labor Relations Auth., 204 F.3d 1272, 1274–75 (9th Cir. 2000).
35. See Chu, 558 F.3d at 1043–49.
37. Chu, 558 F.3d at 1043.
[t]he plain and undisputed interpretation of [subsection 9(a)(1)] is that the WIPP facility must be in compliance with the enumerated environmental regulations. The [exemption] . . . is a sub-part of Section 9(a)(1)—"with respect to WIPP." Congress’s decision to place the designation exemption at this location indicates that it meant for the designation exemption to apply only “with respect to WIPP.”41

Enlarging the scope of analysis still farther, the WIPP Land Withdrawal Act of 1992 and its 1996 amendments are wholly directed to “the ongoing establishment of the WIPP site as a depository for transuranic waste . . . [t]he language and design of the statute as amended pertain solely to WIPP.”42 The court found no room in the statute for DOE’s interpretation.43

Next the court demonstrated that the character of the exemption itself belies DOE’s expansive interpretation.44 It excuses TRUM at WIPP from treatment standards that are otherwise applicable to “wastes subject to land disposal prohibitions.”45 Absent legislative exceptions like this one, the prohibitions can be avoided only when risks to human and environmental health are demonstrably low—when waste is pretreated or unlikely to migrate "for as long as the waste remains hazardous."46 A “no-migration” determination is by its nature both location-specific and waste-specific, because each site has different geologic and hydrologic properties, and wastes interact with the physical and chemical environment in very different ways.47 Therefore, allowing TRUM stored at locations other than WIPP to escape land disposal prohibitions based on designation for eventual disposal there would subvert the prohibitions’ protective purpose.48

Finally, examination of the legislative history of the WIPP exemption buttressed this point. With a “no-migration” determination petition for WIPP stuck awaiting EPA approval, Congress and DOE were concerned that “compliance with numerous environmental regulations had delayed the commencement of waste disposal at WIPP.”49 So, after EPA suggested that the prohibitions of RCRA were redundant, Congress incorporated this reasoning into its drafts of the 1996

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41. See Chu, 558 F.3d at 1045.
42. See id. at 1046.
43. See id.
44. See id.
46. See, e.g., id. § 6924(g)(5), (m).
47. See Chu, 558 F.3d at 1046.
48. See, e.g., Resource Conservation and Recovery Act, § 6924(d)(1); see also Chu, 558 F.3d at 1046-47.
49. See Chu, 558 F.3d at 1047-48.
Amendments.\textsuperscript{50} When the Act passed, DOE’s petition for a no-migration determination became moot and was terminated by the EPA.\textsuperscript{51} Based on this history, the court concluded that Congress amended section 9(a)(1) with the specific intention of “remov[ing] regulatory obstacles to disposal once the designated waste arrives at WIPP.”\textsuperscript{52}

CONCLUSION

In \textit{Washington v. Chu}, the Ninth Circuit sensibly found that a location-specific TRUM treatment, storage, and disposal exemption passed by Congress for WIPP—a repository located thousands of feet underground in a low-permeability salt formation in New Mexico—cannot reasonably be extended to similar waste kept in unlined trenches in highly permeable soils of the Hanford Nuclear Reservation near the Columbia River.

The practical ramifications of this decision should logically include accelerated removal of drums of TRUM from temporary burial locations at Hanford followed by assessment and final disposal at WIPP.\textsuperscript{53} However, shipments to WIPP ceased completely in September of 2008 (six months before the resolution of \textit{Chu}), with DOE blaming the bad economy for its decision to prioritize other Hanford cleanup projects ahead of dealing with TRUM.\textsuperscript{54} Shipments were not scheduled to restart until 2014; but, in response to a recent influx of stimulus funds,\textsuperscript{55} DOE recommenced shipping in March and, as of early April, was shipping at a rate of five loads per week.\textsuperscript{56} Just how quickly waste transfer will continue remains to be seen. Nevertheless, this may be a positive sign of forward movement in the delay prone\textsuperscript{57} and extremely complex Hanford cleanup process.

\textsuperscript{50} See \textit{id.} at 1048. EPA said the Atomic Energy Act—which regulated the radioactive components of the waste—and other regulations would adequately protect human health and the environment. See \textit{id.} This logic pervaded testimony at the lone hearing held to discuss the 1996 WIPP Amendments. See \textit{id.} at 1049.


\textsuperscript{52} \textit{Chu}, 558 F.3d at 1047.


\textsuperscript{55} See \textit{id.}

\textsuperscript{56} See E-mail from WIPP Information Center, infocntr@wipp.ws, to Nell Green Nylen (Apr. 8, 2010) (on file with author).

Regardless, with the Obama administration sending mixed signals on nuclear power—on the one hand removing Yucca Mountain from consideration as a high-level nuclear waste repository\(^{58}\) while on the other hand actively pushing new nuclear power plants as a “green” energy solution\(^{59}\)—Hanford and WIPP are certain to experience new and renewed pressures.\(^{60}\) In the absence of truly safe methods of disposal, we should seriously question the wisdom of embarking on a policy of continuing to expand nuclear waste production. As Washington State and DOE must realize, we’re still struggling to address contamination associated with the first generation of nuclear reactors.

\[\textit{Nell Green Nylen}\]

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The Water Transfers Rule:  
Weakening the Clean Water Act One  
Reasonable Interpretation at a Time

INTRODUCTION

The quality of the nation's waters depends on the ability to regulate the introduction and movement of pollutants to those waters. In 2008, the Environmental Protection Agency (EPA) adopted the National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, which allows the introduction of pollutants from one body of water to another without a permit. The Eleventh Circuit recently reviewed the validity of the new rule as applied to polluted agricultural runoff being pumped into Lake Okeechobee. Though the court recognized that the rule is not consistent with the Clean Water Act's (CWA) broad purpose of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, it determined that the rule is permissible. Specifically, the Eleventh Circuit found that because the NPDES program fails to regulate every significant source of pollution, the court will not prevent the creation of further permitting exceptions. This decision, which endorses a "unitary waters" approach to the CWA, undermines the strength of the NPDES permitting program.

I. THE LAKE

With a surface area of 730 square miles, Florida's Lake Okeechobee is the largest lake in the southeastern United States and the second...
largest lake located wholly within the continental United States. The lake is the headwaters of the Everglades and is an essential part of the Kissimmee-Okeechobee-Everglades ecosystem, which stretches from the Kissimmee River headwaters down to the Florida Bay.

Lake Okeechobee provides a natural habitat for a wide variety of birds, including the federally endangered Everglades snail kite, and is home to fish and other wildlife. The lake serves as a source of drinking water for lakeside communities and as a backup source of drinking water for communities down Florida’s lower east coast. The South Florida Water Management District (SFWMD) also diverts water from the lake to meet the irrigation needs of the Everglades Agricultural Area, while the lake itself hosts boating and other recreational activities.

Lake Okeechobee is subject to significant manmade control mechanisms and a fairly intensive management scheme. Attempts to control the perimeter of the lake date back to around 1915, when local residents and governments constructed an initial muck levee. The U.S. Army Corps of Engineers (USACE) strengthened and expanded the levee system after hurricane-induced floodwaters killed approximately 2000 people during the 1920s. Today, the Herbert Hoover Dike, which consists of 143 miles of levees, 19 culverts, hurricane gates, and other water control structures, completely surrounds the lake. SFWMD and USACE artificially control all discharges into and out of Lake Okeechobee, except those from Fisheating Creek.

Lake Okeechobee faces several serious environmental challenges, including excessive phosphorus loads caused by the urban and agricultural activities that dominate land use in the watershed. The major land uses in the drainage basins around Lake Okeechobee include

8. Id.
9. Id.
10. Lake Okeechobee, supra note 5; IN REVIEW, supra note 6, at 1.
12. IN REVIEW, supra note 6, at 3; History, supra note 11.
13. History, supra note 11.
14. IN REVIEW, supra note 6, at 3.
beef cattle grazing to the north, sugarcane production to the south, and citrus groves to the east. Dairy farms also drain a significant amount of phosphorus into the lake, although they account for only 1 percent of the land use area in the northern basins.

High phosphorus loads can cause harmful algal blooms. In recent decades, the level of phosphorus in Lake Okeechobee has led to increasingly common blue-green algal blooms with particularly large blooms covering more than 40 percent of the lake. Algal blooms, in turn, produce “dead zones” where dissolved oxygen levels are so low that most aquatic life cannot survive. The lake’s high phosphorus load also stimulates the growth of invasive cattail in the littoral zone and causes water turbidity that blocks the sunlight required by submerged plant beds.

II. THE CASE

The CWA outlaws “the discharge of any pollutant” without an NPDES permit. In turn, “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source,” with “navigable waters” encompassing “the waters of the United States.” At the heart of this case is what constitutes the discharge of a pollutant. Namely, this decision turns on the permissible interpretations of an “addition . . . to navigable waters.”

Runoff from sugar fields and industrial and residential areas drains into the canals south of Lake Okeechobee. This runoff contains chemical pollutants including phosphorous, nitrogen, and un-ionized ammonia. SFWMD operates three pump stations that move the contaminated water from these canals sixty feet uphill into Lake Okeechobee. In 2002, Friends of the Everglades, Fisherman against Destruction of the Environment, and the Miccosukee Tribe filed suit

16. Id. at 9.
17. Id.
19. IN REVIEW, supra note 6, at 2.
20. EPA, supra note 18.
21. Id. at 2.
23. Id. § 1362(12).
24. Id. § 1362(7).
26. Id. at 1214.
27. Id.
28. Id.
against SFWMD,29 seeking an injunction to force SFWMD's executive director to get an NPDES permit before pumping this polluted water into Lake Okeechobee.30 The district court held that operating the three pump stations without an NPDES permit violated the CWA and ordered the SFWMD's executive director to apply immediately for a permit.31 The defendants' appeal of this decision was the first to be considered in light of a recently adopted EPA regulation that exempts "water transfers" from the NPDES permitting program.32

The EPA adopted the water transfers rule in 2008, addressing whether moving water between meaningfully distinct bodies of water always requires an NPDES permit.33 The rule defines water transfers as "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" and exempts these transfers from NPDES permitting requirements.34 In effect, the new rule codifies a unitary waters approach to NPDES.35

The unitary waters theory treats all navigable waters in the United States as a whole. Contaminants are added to these waters only once, and once they have entered navigable waters from a point source, they can no longer be "added" by transferring them to other bodies of waters.36 A unitary waters approach to the language of the CWA is based on the dictionary definition of "addition," a term that is not defined by the CWA itself.37 Under this definition, an "addition" necessarily increases the overall number or amount of something.38 Moving pollutants from one body of water to another is therefore not an "addition" of pollutants, so long as all the waters of the United States are treated as a single unit.39

Before the Friends of the Everglades decision, all existing precedent rejected the unitary waters theory, favoring the interpretation that pollutants are "added" to waters at the point of entry and whenever they are transferred to a meaningfully distinct body of water.40 However, these cases were decided before the EPA adopted the water transfers rule and

29. Defendants were joined by the U.S. Sugar Corporation and the United States on behalf of the EPA and the USACE. Id.
30. Id.
31. Id. at 1215.
32. Id. at 1218–19.
34. Id. at 33,697.
35. See Friends of the Everglades, 570 F.3d 1210 at 1217–19.
36. Id. at 1217.
37. Id.
38. Id.
39. Id.
40. Id. at 1218.
therefore did not consider whether the unitary waters theory was entitled to *Chevron* deference.\(^{41}\)

Under *Chevron* deference, the EPA’s regulation is valid if it is a “reasonable construction of an ambiguous statute.”\(^{42}\) While agencies cannot interpret unambiguous statutes in a manner that is contrary to legislative intent, so long as there is more than one reasonable way to interpret the statute, they are free to adopt any of those reasonable interpretations.\(^{43}\) A regulation need not be the most plausible interpretation of the statutory language to be a “reasonable” interpretation.\(^{44}\) Additionally, a regulation can be reasonable even if it is inconsistent with past agency policy.\(^{45}\)

The Eleventh Circuit determined that the language of the statute\(^ {46}\) on its own was ambiguous, since the word “waters,” in ordinary usage, can refer to either a single body of water or to several different bodies of water.\(^ {47}\) Moreover, the court found that considering the language in the context of the remainder of the statutory scheme did not resolve the ambiguity.\(^ {48}\) While the meaning of seemingly ambiguous terms can often be derived from clear usage in similar provisions, the court found no such guidance in the CWA.\(^ {49}\) The court noted that Congress has used the term “any navigable waters” to protect individual water bodies, and interpreted the absence of the word “any” in the NPDES provision to indicate the lack of such clear intent in this case.\(^ {50}\) However, since Congress has also used the term “navigable waters” to unambiguously refer to individual bodies of water, the court decided that the missing “any” is not conclusive support for the unitary waters theory.\(^ {51}\)

Finally, when determining whether Congress had a specific intent with regard to the precise meaning of “addition . . . to navigable waters,” *Chevron* analysis requires that the court examine the broader context of the statute as a whole, including its stated purpose.\(^ {52}\) When amending the CWA in the 1970s, Congress declared that “it is the national goal that the

\(^{41}\) Id.

\(^{42}\) Id. at 1219.

\(^{43}\) Id.

\(^{44}\) Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (stating that "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation").

\(^{45}\) *Friends of the Everglades*, 570 F.3d at 1219.


\(^{47}\) *Friends of the Everglades*, 570 F.3d at 1223.

\(^{48}\) Id. at 1223–25 (citing sections of the CWA and other water protection statutes).

\(^{49}\) Id. at 1224.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id. at 1222–23.
discharge of pollutants into the navigable waters be eliminated by 1985.”53 Arguably, reading the CWA as allowing the discharge of pollutants from other bodies of water without a NPDES permit is contrary to this explicit goal.54 The Friends of the Everglades argued that recognizing this exception to the permitting program would be absurd since the structure of the NPDES program is based on protecting individual bodies of water,55 and the exception would allow pumping “the most loathsome navigable water in the country into the most pristine one” without a permit.56

Although the unitary waters approach frustrates the general purpose of the CWA, it is not the only CWA provision that does so.57 The court cited two aspects of the CWA that “do not comport with its broad purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.”58 First, NPDES permits are not required for nonpoint source pollution, which is a significant water quality problem.59 Second, the definition of “point source” excludes agricultural storm water discharges and return flows from irrigation, despite their substantial negative impact on water quality.60 These exceptions led the court to conclude that the broader context of the statute in its entirety does not preclude a unitary waters approach.61

III. THE IMPACT

The NPDES program is one of the CWA’s strongest tools for maintaining and improving the quality of our nation’s waters. The program authorizes the regulation of pollutant discharge from most point sources.62 The first step in the NPDES process is to set water quality standards (WQS), which are individually determined for each waterbody,

54. Friends of the Everglades, 570 F.3d at 1226.
55. NPDES permitting decisions are made according to the level of pollutants allowed (the “total maximum daily load”) in a body of water. These total maximum daily loads are determined separately for each body of water. 33 U.S.C. §§ 1313(d), 1342(a)(1).
56. Friends of the Everglades, 570 F.3d at 1226.
57. Id. at 1225–27.
58. Id. at 1226.
59. Id. at 1226–27.
60. Id. at 1227.
61. Id.
62. “Point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.
according to that waterbody's designated uses.\textsuperscript{63} If WQS can be met through the implementation of technology-based effluent limits, NPDES permits will be distributed according to those technology-based performance standards.\textsuperscript{64} If WQS cannot be met solely through technology-based limits, the EPA or another authorized body will set total maximum daily loads (TMDLs)\textsuperscript{65} for pollutants, such that staying below these limits will result in the WQS applicable to that waterbody.\textsuperscript{66} The EPA or another authorized permitting body then allocates NPDES permits among polluters in accordance with the TMDLs.\textsuperscript{67}

However, and as the court notes, the NPDES program does not cover pollution from nonpoint sources.\textsuperscript{68} Diffuse sources of precipitation-induced runoff are the sole source of pollution for nearly half of the waters listed as “impaired” under the CWA and nonpoint sources likely contribute considerably more to pollutant loads than do point sources for the remainder of the nation’s impaired waters.\textsuperscript{69} As the EPA recognizes, nonpoint source pollution is thus the most significant source of water pollution in the country.\textsuperscript{70} Although the CWA administers a grant program supporting nonpoint source pollution management programs,\textsuperscript{71} these grants have provided insufficient incentive to meet WQS.\textsuperscript{72} The goals of the CWA would therefore be better served by maintaining as broad a scope for the NPDES program as is possible, instead of limiting that scope, as the new water transfer rule does.

The Lake Okeechobee Protection Plan identifies three major environmental challenges facing Lake Okeechobee: excessive total phosphorous loads, unnaturally high and low water levels, and the rapid spread of exotic and nuisance plants.\textsuperscript{73} Prior to the EPA’s adoption of the water transfers rule, the NPDES program could have provided an effective tool for dealing with the phosphorous problem. Since discharges into the lake are highly regulated\textsuperscript{74} and fall into the point sourceclient.

\textsuperscript{64} Id. § 43.
\textsuperscript{65} When an EPA-approved TMDL is not available and technology-based effluent limits are not sufficient to protect the designated uses of a waterbody, the permitting authority will establish Water Quality-Based Effluent Limits (WQBELs). WQBELs are back calculated from WQS and, like TMDLs, set effluent limits such that adherence to those limits will result in the WQS applicable to the waterbody at issue. Id.
\textsuperscript{66} See id.
\textsuperscript{67} Id. § 34.
\textsuperscript{68} See supra note 59 and accompanying text.
\textsuperscript{69} CWAM, supra note 63, § 28.
\textsuperscript{70} Id. § 52.
\textsuperscript{72} CWAM, supra note 63, § 29.
\textsuperscript{73} PLAN, supra note 15, at 4.
\textsuperscript{74} See supra notes 13–14 and accompanying text.
category,\textsuperscript{75} NPDES could have covered most, if not all, of the transfers into the lake. As it stands, Lake Okeechobee has been listed as impaired since 1999.\textsuperscript{76} Further, the five-year average (2001–2006) phosphorous load was 634 metric tons annually (or more than 160 percent of the target load), even after the implementation of the watershed-based phosphorous reduction plan.\textsuperscript{77}

The Eleventh Circuit said that, "sometimes it is helpful to strip a legal question of the contentious policy interests attached to it," and it then put forth a hypothetical illustrating the EPA rule.\textsuperscript{78} The hypothetical rule forbade "any addition of any marbles to buckets by any person."\textsuperscript{79} Considered in complete isolation, it is unclear whether a person moving two marbles from one bucket to another is in violation of this rule.\textsuperscript{80} And determining the precise meaning of the "buckets and marbles" rule is not important, since the allocation of marbles among buckets is not likely to have a meaningful impact on the lives of people, plants, and animals that live in or around those buckets. Rather than being helpful, the court's hypothetical completely obscures the ecological implications of this decision. When we are talking not marbles and buckets, but pollutants and waters, the allocation of the former among the latter will significantly impact the surrounding ecosystem in a way that argues for the interpretation of the statute in the context of its real-world effects.

\textit{Cozette Tran-Caffee}

\textsuperscript{75} See supra note 62.

\textsuperscript{76} FLA. DEP'T OF ENVTL. PROT., INTEGRATED WATER QUALITY ASSESSMENT FOR FLORIDA: 2008 305(b) REPORT AND 303(D) LIST UPDATE 17 (2008).

\textsuperscript{77} PLAN, supra note 15, at 23.

\textsuperscript{78} Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1228 (11th Cir. 2009).

\textsuperscript{79} Id.

\textsuperscript{80} Id.

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Air Quality Monitoring during “Exceptional Events”: A Challenge to the EPA’s Final Rule in *Natural Resources Defense Council v. Environmental Protection Agency*

**INTRODUCTION**

On March 20, 2009, the D.C. Circuit held that the Environmental Protection Agency’s (EPA) definition of “natural event” as used in the Clean Air Act’s (CAA) exceptions to air quality monitoring standards was not subject to judicial review,¹ nor were statements in the final rule’s preamble reviewable.² The court found that the Natural Resources Defense Council (NRDC) could not challenge the final rule for three reasons. First, NRDC’s comment to the proposed rule failed to adequately specify the portion of the proposed rule it was arguing against, and thus the objection was unreviewable.³ Second, the court held that the preamble was insulated from review because it used conditional and equivocal language.⁴ Finally, the statements in the preamble were not ripe for review because NRDC failed to show the statements had immediate legal or practical consequences.⁵

**I. EXCEPTIONAL EVENTS**

Since 1977, EPA regulations have documented the need for a flagging system for air quality monitoring data affected by “exceptional events.”⁶ A 2005 amendment to the CAA required the EPA to promulgate regulations governing such exceptional events.⁷ In the amended statute, Congress defined “exceptional event” as an event that

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². *Id.* at 564-65.
³. *Id.* at 564.
⁴. *Id.* at 565.
⁵. *Id.*
“(i) affects air quality; (ii) is not reasonably controllable or preventable; (iii) is an event caused by human activity that is unlikely to recur at a particular location or natural event; and (iv) is determined by the Administrator . . . to be an exceptional event.” The EPA adopted this statutory language in its final rule, but the rule also went on to define “natural event” as “an event in which human activity plays little or no direct role.”

The final rule governing exceptional events also listed and examined several examples, some in its preamble, of what the EPA believes to be and what it may later determine to be exceptional events. Within the examples, the EPA states that it believes natural disasters and associated clean-up activities may be considered exceptional events since they would qualify as one “natural event.” The clean-up activities associated with major natural disasters will be allowed a 12-month timeframe, after which time a State may submit a request for an extension in order for the event to remain classified as a natural event. Additionally, the final rule notes that such clean-up activities may also be flagged as due to an exceptional event, and not just part of a natural event.

II. OPINION AND DISSERT IN NRDC v. EPA

Judge Randolph, writing for the D.C. Circuit, found NRDC’s challenges to the EPA’s final rule unreviewable due to NRDC’s failure to satisfy the CAA’s exhaustion requirement and to meet threshold requirements of justiciability. Judge Rogers, writing in dissent, believed NRDC had met its burden regarding the exhaustion requirement and thus would test the validity of the “natural event” definition. She concurred with the court’s justiciability determination.

Concerning the exhaustion requirement, the majority reasoned that NRDC’s challenge to the final rule was unreviewable since NRDC had not raised with “reasonable specificity” its definitional objection during public comment. The court reasoned that NRDC merely objected to the

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8. Id. § 7619(b)(1)(A).
10. Id. § 50.1(k).
12. Id. at 13,565.
13. Id.
14. Id.
16. Id. at 569 (Rodgers, J., dissenting).
17. Id.
18. Section 307 of the CAA states: “Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.” 42 U.S.C. § 7607(d)(7)(B) (2006).
EPA’s classification of clean-up activities associated with natural disasters as “natural events,” thus framing the objection as simply a complaint about the application of the term “natural event” rather than a challenge to the underlying definition of the term.\textsuperscript{20} Articulating the “reasonable specificity” rationale, Judge Randolph emphasized the requirement’s purpose of ensuring that the agency and other interested parties are put on notice as to the party’s objection.\textsuperscript{21} This purpose allows the agency to properly respond to the objection and allows interested parties to contribute to the dialogue.\textsuperscript{22} Here, the court reasoned, “no EPA official” would have discerned that NRDC was actually challenging the “natural event” definition in the proposed rule.\textsuperscript{23}

In order to avoid “obscure criticism” and “implied challenges,” the court stated that a citation to the section of the rule in question or a description of it “may be all that is needed.”\textsuperscript{24} Additionally, the court raised new fears that vague objections unnoticed by the agency, if able to pass the exhaustion requirement, would leave the agency vulnerable to the argument that the agency acted arbitrarily because it never responded to the comment.\textsuperscript{25}

The court found the balance of NRDC’s challenge to the final rule nonjusticiable for two reasons. First, statements in the final rule’s preamble—which NRDC argued were impermissible examples of per se exceptional events—did not amount to final agency action since the preamble used conditional language in the contested statement.\textsuperscript{26} Specifically, the use of the word “may” instead of “will” decisively signaled that the statements were merely general statements of policy instead of binding legal requirements.\textsuperscript{27} Second, the court held that the preambular statements about exceptional events were not ripe for review since the statements were “hypothetical and non-specific.”\textsuperscript{28} NRDC did not persuade the court that any of the statements had direct or immediate

\begin{thebibliography}{9}
\bibitem{20} \textit{Id.} at 563–64.
\bibitem{21} \textit{Id.} at 563, 566.
\bibitem{22} \textit{Id.} at 563.
\bibitem{23} \textit{Id.}
\bibitem{24} \textit{Id.} at 564 (citing Mossville Envtl. Action Now v. EPA, 370 F.3d 1232, 1240 (D.C. Cir. 2004) (in an action challenging the lack of beyond-the-floor standards, failure to mention those standards—by name or by the specific provision of the CAA which deals with them—results in a lack of “reasonable specificity”)); Motor & Equipment Mfrs. Ass’n v. Nichols, 142 F.3d 449 (D.C. Cir. 1998) (finding a failure to exhaust since citation to CAA was unspecific and covered numerous areas)).
\bibitem{25} \textit{Id.}
\bibitem{26} \textit{Id.} at 565.
\bibitem{27} \textit{Id.} (citing Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537–38 (D.C. Cir. 1986)).
\bibitem{28} \textit{Id.} (citing Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior, 88 F.3d 1191, 1223 (D.C. Cir. 1996)).
\end{thebibliography}
consequences; thus the statements are unreviewable until it is more certain what the EPA intends to classify as an exceptional event.\(^{29}\)

Judge Rogers, dissenting, reviewed the definition on the merits—since NRDC's comments were "close enough" to put the EPA on notice that the underlying definition was being challenged\(^{30}\)—and found it passed muster under *Chevron*, but left the question as to whether the application of the term "natural event" to particular circumstances would be permissible for another day.\(^{31}\) Judge Rogers points out that the statute does not define "natural event," nor does it specify how to categorize events with predominately natural causes but some human contribution.\(^{32}\)

### III. ANALYSIS: NATURAL EVENTS, EXCEPTIONAL EVENTS, AND THE INCREASING RISK TO PUBLIC HEALTH

In implementing the CAA, the EPA's highest priority is protecting public health.\(^{33}\) The National Ambient Air Quality Standards (NAAQS) ostensibly help achieve this priority by penalizing states containing nonattainment areas.\(^{34}\) The consequences for nonattainment could include loss of narrowly proscribed federal highway funds or stricter emissions requirements for the area's industries.\(^{35}\) Certainly there are events—both natural and anthropomorphic—for which it is reasonable, even necessary, to exclude emissions data when evaluating a region's compliance with the EPA's air quality standards. But the final rule now governing exceptional events, taken in part from Congress's legislation, boldly expands the definition of natural events and exceptional events without adequately addressing public health risks—which do not disappear simply because of changes in terminology.

The consequences from this decision would have been less severe if the EPA had required states to issue public notifications upon an occurrence of an exceptional event. The EPA has backtracked and has been inconsistent on public health risk mitigation plans related to exceptional events. Originally, the EPA was going to require states, as a condition of excluding emissions data, to submit documentation on

\(^{29}\) Id.

\(^{30}\) Id. at 567 (Rogers, J., dissenting) (citing Nat'l Petrochemical & Refiners Ass'n v. EPA, 287 F.3d 1130, 1139–40 (D.C. Cir. 2002)).

\(^{31}\) Id. at 569 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984)).

\(^{32}\) Id.


\(^{34}\) Id. § 7509.

\(^{35}\) Id. §§ 7509(a)–(b). If a sanction is applied, and within six months the deficiency is not corrected, the Administrator shall apply both sets of sanctions. For emissions requirements, the Administrator must set the rate of emission reductions to at least two-to-one for increased emissions in new or modified sources for nonattainment areas.
actions it took to mitigate the impact of exceptional events. The EPA, however, rescinded that requirement, and now states are free to determine what "reasonable" measures should be taken to protect public health. Meanwhile, the EPA adopted in the same final rule the requirement that approval for prescribed fire exceedences is contingent on the state certifying that it has adopted and is implementing a Smoke Management Program. A similar requirement should, at the very least, be required for clean-up activities.

While local government actors may be adequately responsive and knowledgeable about measures to be taken to protect public health, the basic requirement that mitigation plans be submitted—adding an important layer of process, and thus, to some degree, creating disincentives for non-essential anthropomorphic sources of pollution—is paramount. Under this final rule, it is possible for clean-up activities to occur and exceed the NAAQS, for a year or more, without consequence and without any oversight of public health protections.

Additionally, it would be more consistent with the EPA's statutorily mandated priorities to attach public health requirements to exceedences of exceptional events, particularly clean-up activities, as a way to protect public health and to better ensure that frivolous clean-up activity is less likely to occur. If the NAAQS carry the lofty goal of measuring the level at which certain kinds of pollution become intolerable to human health, the current regulation of exceptional events undermines this pursuit. In order for expediency and practicality to coexist with public health protections, greater oversight of states' actions pursuant to NAAQS exceedences endangering public health needs to exist.

CONCLUSION

Since the court did not decide NRDC's main challenge to the final rule on the merits, uncertainty remains as to the viability of the definition, particularly when challenged on an as-applied basis. If and when the EPA classifies actual clean-up activity associated with a natural disaster as a natural event, litigation is sure to follow. Looking at the statute's plain meaning, it is hard to imagine a single natural disaster—such as a hurricane, and twelve months of cleanup—as a single and

37. Id.
38. Id. at 13,567.

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.
discrete "natural event." Public health would benefit from a tighter reading of the statute and a return to the protections from pollution afforded by the CAA.

Adam Shearer
Scientific Uncertainty and the Regulation of Greenhouse Gases under the Clean Air Act

INTRODUCTION

In American Farm Bureau v. Environmental Protection Agency (Am. Farm), the court held that the EPA may not disregard findings based on insufficient evidence without adequate reasoning. Thus, the court in Am. Farm upheld the principle that while science may only provide imperfect and limited information, the EPA may not justify lack of action with such uncertainty if there are logical or qualitative means to set standards under the Clean Air Act (CAA). Establishing regulations for greenhouse gases under the CAA will push the EPA into uncomfortable territory because it will be required to set standards despite inherent uncertainties regarding the impacts of climate change on human health and welfare. The EPA has not yet established National Ambient Air Quality Standards (NAAQS) for greenhouse gases under the CAA. However, once NAAQS for greenhouse gases are set, the principles enumerated by the court in Am. Farm should guide courts when reviewing the regulation of greenhouse gases under the CAA in light of scientific uncertainty.

I. BACKGROUND

The purpose of the CAA is to protect human health and welfare by reducing air pollution through NAAQS. The EPA is charged with setting NAAQS, and during this process, it considers information from its staff and the recommendations of the Clean Air Scientific Advisory Committee (CASAC), an independent scientific review committee. The EPA must establish two NAAQS for each pollutant: a primary standard, based on public health, and a secondary standard, based on public welfare. The EPA must review and revise NAAQS every five years.

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4. Am. Farm, 559 F.3d at 516.
5. Id.
Unfortunately, regulation under the CAA suffers because of the EPA’s reluctance to strengthen regulations in the face of what the agency claims is a lack of sufficient scientific data. The congressional purpose of the CAA, though, is to set standards which are precautionary, forward-looking, and based upon projected technological advances. This purpose necessarily results in regulating amidst uncertainty. Despite this precautionary goal, the EPA often uses uncertainty as a facade to hide difficult legal and policy issues. However, regulation under the CAA require the agency to make public health policy judgments despite “gaps and uncertainties” in scientific findings. It is these judgments that the EPA has struggled to formulate without hard scientific evidence.

In 2006, the EPA issued the 2006 standards for particulate matter (PM) despite numerous objections by its staff and the CASAC. Am. Farm was a consolidation of the various legal challenges to the update. The EPA stated that a key factor in setting the NAAQS was its decision to rely on some scientific information while discounting other findings due to scientific uncertainties. The court responded by critically reviewing the EPA’s decision-making process. It held that the 2006 standards for fine PM were “contrary to law and unsupported by adequately reasoned decision making.” However, the court upheld the EPA’s NAAQS for coarse PM because the EPA’s reasoning for setting the standard based on a logical outcome rather than on a quantitative measure was valid. The court applied prior case law, which indicated

6. Id.
8. 42 U.S.C. §§ 7401(a)–(c) (stating that the goal of the CAA is to take actions to prevent and control air pollution, including promoting research and creating implementation programs, because air pollution is a danger to human health and welfare); Manely, supra note 2, at 348.
10. Id. at 391.
12. Particulate matter includes a wide range of substances “that exist as discrete particles (liquid droplets or solids).” Final Rule: National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,143, 61,146 (2006). The EPA divides PM into two groups based on size: fine and coarse. Am. Farm Bureau Fed’n v. EPA, 559 F.3d 512, 515 (D.C. Cir. 2009). Fine PM is produced by combustion and atmospheric reactions and coarse PM comes from mechanical processes or dust. Id.
13. Am. Farm, 559 F.3d at 528–29; Weaver, supra note 9, at 380.
14. Am. Farm, 559 F.3d at 515.
15. Weaver, supra note 9, at 394.
16. Am. Farm, 559 F.3d at 515.
17. Id. at 533.
that the EPA must set regulations pursuant to the CAA despite imperfect knowledge.\textsuperscript{18}

II. CLIMATE CHANGE AND SCIENTIFIC UNCERTAINTY

Anthropogenic emissions of greenhouse gases occur from burning fossil fuels and through certain chemical reactions.\textsuperscript{19} Amplified concentrations of greenhouse gases in the atmosphere increase the Earth's temperature, which will impact human "health, food production, and well-being."\textsuperscript{20} Additionally, climate change will likely raise the number of occurrences of respiratory illnesses, diseases carried by insects and rodents, heat waves, and floods.\textsuperscript{21} These impacts will disproportionately impact the poor, sensitive members of the population, and the elderly.\textsuperscript{22} Further, different regions of the country will experience more intense changes in weather conditions than others.\textsuperscript{21} A NAAQS for greenhouse gases should address all casual effects of the air pollutant to effectively protect human health and welfare.

Despite over a century of scientific research on the impact of greenhouse gas emissions on the Earth's climate,\textsuperscript{24} uncertainty remains about what impacts will be realized, how extensive they will be, and whether mitigation will be effective.\textsuperscript{25} These uncertainties exist because

\begin{itemize}
    \item \textsuperscript{18} Lead Indus. Ass'n. v. EPA, 647 F.2d 1130, 1162 (D.C. Cir. 1980) (holding that the EPA must set standards based on policy decisions and cannot simply refrain from setting standards due to scientific uncertainty); Natural Res. Def. Council v. EPA, 655 F.2d 318, 335 (D.C. Cir. 1981) (holding that the EPA can make projections which contain inherent uncertainty, subject to the restraints of reasonableness); Ethyl Corp. v. EPA, 541 F.2d 1, 24–25, 29 (D.C. Cir. 1979) (holding that while environmental issues are "particularly prone to uncertainty," the EPA may draw conclusions and set regulations from "suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like" to set precautionary standards under the CAA).
    \item \textsuperscript{19} Joshua Steinberg, The Bone-Chilling Effects of Global Warming and the EPA's Cold-Shoulder Response to Pleas for Help, a Case Note on Massachusetts v. EPA, 26 TEMP. J. SCI. TECH. & ENVTL. L. 169, 174 (2007).
    \item \textsuperscript{22} Manely, supra note 2, at 354; IPCC REPORT, SUMMARY FOR POLICYMAKERS, supra note 20, at 9, 19.
    \item \textsuperscript{23} Manely, supra note 2, at 354.
    \item \textsuperscript{24} SPENCER WEART, A HYPERLINKED HISTORY OF CLIMATE CHANGE SCIENCE (2009), available at http://www.aip.org/history/climate/summary.htm.
    \item \textsuperscript{25} Manely, supra note 2, at 313.
\end{itemize}
the carbon cycle is complex and scientists are continually studying anthropogenic carbon dioxide emissions to determine "correlations between fossil fuel burning and . . . atmospheric" carbon dioxide levels. In addition, studies of climate change involve predictive modeling which contains variables regarding future human conduct. However, the Intergovernmental Panel on Climate Change (IPCC), composed of over 2000 scientists, is conducting large-scale research projects which include various future scenarios to account for unknowns and uncertainties. As scientific knowledge accumulates, the IPCC is able to measure the level of certainty with which it predicts future impacts of climate change. Despite scientific uncertainty about the link between greenhouse gas emissions and climate change impacts, the IPCC has determined that it is very likely that climate change is occurring due to the anthropogenic release of greenhouse gases.

In April 2009, the EPA issued a final endangerment finding that carbon dioxide from new cars and light trucks poses a threat to human health and welfare. However, the EPA's previous stance on the regulation of greenhouse gases indicates that there will likely be many more "scientific uncertainty" hurdles to jump before the EPA issues NAAQS for greenhouse gases. Thus, it will be important for courts to utilize sound principles regarding regulation under the CAA to ensure that the EPA establishes NAAQS which are sufficiently precautionary and meet CAA standards.

III. AMERICAN FARM BUREAU V. EPA: AN ANALYSIS

The decision in Am. Farm provides guidance for courts to assess future legal challenges if, and when, the EPA establishes NAAQS for greenhouse gases. First, the court in Am. Farm affirmed that the EPA must thoroughly explain its reasoning and consider all available scientific information. Next, the court stated that the EPA must use studies on

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26. Id. at 373; IPCC REPORT, SUMMARY FOR POLICYMAKERS, supra note 20, at 5.
29. See generally IPCC REPORT, PHYSICAL SCIENTIFIC BASIS, supra note 28, at 10; IPCC REPORT, SUMMARY FOR POLICYMAKERS, supra note 20, at 2.
30. IPCC REPORT, PHYSICAL SCIENTIFIC BASIS, supra note 28, at 10.
31. Cf. McCubbin, supra note 21, at 439–40, 442, 445 (evidence of past reluctance by the EPA to regulate carbon dioxide shows that the EPA may be hesitant to set NAAQS for carbon dioxide in the future).
32. Manely, supra note 2, at 351.
sensitive populations.\textsuperscript{34} The court also held that the EPA must set standards for protecting the public welfare, but did not address whether standards based on studies of subjective values are adequate.\textsuperscript{35} Finally, the court upheld the EPA's decision to set regulations based on a qualitative rather than a quantitative standard.\textsuperscript{36} Due to the high level of scientific uncertainty surrounding climate change, and the normative judgments inherent to climate change mitigation, the \textit{Am. Farm} decision will help courts assess the adequacy of NAAQS for greenhouse gases.

Individual studies on greenhouse gas emissions may only address one aspect of climate change. However, scientific evidence as a whole does show, with high levels of certainty, the likely consequences of climate change.\textsuperscript{37} Studies on climate change require predicting population growth and economic development to assess increases in the Earth's temperature.\textsuperscript{38} At first glance, these studies appear to be hindered by uncertainty. However, studies by both the IPCC and U.S. State Department produced complementary findings—although the findings were not identical, they were also not contradictory.\textsuperscript{39} The \textit{Am. Farm} court held that if the EPA found that a particular study did not provide adequate certainty to set regulations, the agency must consider related studies, even if the studies differ in some respect.\textsuperscript{40} The court also insisted that the EPA assess both short-term and long-term studies when setting annual NAAQS standards, not just the more relevant long-term studies.\textsuperscript{41} Thus, \textit{Am. Farm} provides precedent that will help ensure that the EPA evaluates all pertinent studies when setting NAAQS for greenhouse gases. Doing so will result in final decisions that are well-reasoned and comprehensive.\textsuperscript{42}

Another challenge associated with the regulation of greenhouse gases is the likelihood that climate change will impact some subsets of the population more severely than others.\textsuperscript{43} The 1970 Senate Report on the CAA stated that sensitive populations should be protected by the CAA and taken into consideration when the EPA establishes primary NAAQS.\textsuperscript{44} In \textit{Am. Farm}, the EPA did not account for disparate impacts

\textsuperscript{34} \textit{Id.} at 525–26.
\textsuperscript{35} \textit{Id.} at 530.
\textsuperscript{36} \textit{Id.} at 535.
\textsuperscript{37} Manely, \textit{supra} note 2, at 313–14; IPCC \textit{Report, Physical Scientific Basis}, \textit{supra} note 28, at 8.
\textsuperscript{38} Manely, \textit{supra} note 2, at 311–12.
\textsuperscript{39} \textit{See generally id.} at 312–16.
\textsuperscript{40} \textit{Am. Farm}, 559 F.3d at 524–25.
\textsuperscript{41} \textit{Id.} at 521–22.
\textsuperscript{42} \textit{See id.}
\textsuperscript{43} Manely, \textit{supra} note 2, at 354. \textit{See generally} IPCC \textit{Report, Summary for Policymakers}, \textit{supra} note 20.
\textsuperscript{44} S. Rep. No. 91-1196, at 10 (1970); Manely, \textit{supra} note 2, at 353.
on sensitive populations because it did not review studies which specifically focused on these populations when it set the 2006 fine PM standard.\textsuperscript{45} The court in \textit{Am. Farm} held that the EPA must consider sensitive populations when setting standards.\textsuperscript{46} Courts should use this holding when reviewing EPA regulation of greenhouse gases because effects will vary depending on region, livelihood, and socio-economic class.\textsuperscript{47} Disparities in impacts will pose a special challenge for the EPA, and future courts must ensure that the EPA does not neglect to protect adversely impacted population subsets.\textsuperscript{48}

Additionally, many impacts from climate change affect the public welfare.\textsuperscript{49} Under the CAA, the EPA is required to regulate pollutants which "may reasonably be anticipated to endanger public health or welfare."\textsuperscript{50} Since the CAA requires the EPA to set standards which it "judges are necessary" to protect human health and welfare, the statute itself indicates that although the standard must be based on scientific evidence, there is inherent uncertainty in standards which protect the public welfare.\textsuperscript{51} In \textit{Am. Farm}, the EPA argued that the studies its staff and CASAC relied upon were too subjective because the studies measured the acceptable level of visibility based on each participant's personal preferences.\textsuperscript{52} The court responded by holding that the EPA must establish a secondary NAAQS to protect human welfare and that scientific uncertainty did not allow the EPA to avoid its responsibilities.\textsuperscript{53} While the court did not decide whether the EPA could reasonably rely on these subjective studies, the EPA should consider the possibility that protecting human welfare may include subjective judgments.\textsuperscript{54}

Finally, regulation of greenhouse gases will necessarily involve choosing subjective goals based upon scientific evidence that does not provide precise guidelines.\textsuperscript{55} For example, the EPA must determine what magnitude of sea level rise will not greatly impact human welfare, and then prevent additional sea level rise through regulation. The EPA has a tendency to circumvent making decisions which require normative

\begin{itemize}
\item \textsuperscript{45} See \textit{Am. Farm}, 559 F.3d at 526.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Manely, supra note 2, at 354; IPCC \textit{REPORT, SUMMARY FOR POLICYMAKERS}, \textit{supra} note 20, at 9, 19.
\item \textsuperscript{48} Manely, \textit{supra} note 2, at 354.
\item \textsuperscript{49} Id. at 367.
\item \textsuperscript{50} 42 U.S.C. \textsection 7408(a)(1)(A) (2006).
\item \textsuperscript{51} 40 C.F.R \textsection 50.2. (2009).
\item \textsuperscript{52} \textit{Am. Farm}, 559 F.3d at 528–29.
\item \textsuperscript{53} Id. at 530 (noting that while the court did not address whether the EPA could have relied on subjective studies, the court did not allow the EPA to fail to set standards due to the uncertainty associated with available information).
\item \textsuperscript{54} 42 U.S.C. \textsection 7408(a)(1)(A).
\item \textsuperscript{55} See McCubbin, \textit{supra} note 21, at 446.
\end{itemize}
judgments by citing great scientific uncertainty as a justification.\textsuperscript{56} However, in \textit{Am. Farm}, the EPA explained its choice to set a measure for coarse PM that included fine PM because coarse PM caused the greatest number of health problems when levels of fine PM were high.\textsuperscript{57} The EPA reasoned that requiring lower levels of coarse PM in areas with high fine PM levels, reducing the health impacts of coarse PM when it is most dangerous.\textsuperscript{58} The court ruled that even though the EPA used a qualitative, rather than quantitative measure, its reasoning was valid.\textsuperscript{59} Thus, while the EPA must set a standard to regulate greenhouse gases based on available scientific information, that standard may also include reasonable judgments or logical decision making.\textsuperscript{60}

**CONCLUSION**

Although the general standard of review for EPA decisions is to assume validity, \textit{Am. Farm} required the EPA to rethink and explain its reasoning when it failed to update NAAQS due to a lack of scientific information.\textsuperscript{61} Given the great uncertainties surrounding climate change and the corresponding need for a precautionary outlook, judicial oversight will be critical to the regulation of greenhouse gasses.\textsuperscript{62} The EPA will be required to make logical, qualitative, and policy judgments when it cannot rely on scientific findings alone to establish NAAQS.\textsuperscript{63} Additionally, the EPA should be mindful of the \textit{Am. Farm} decision, by establishing NAAQS for greenhouse gases which take into account all relevant studies, sensitive populations, and the public welfare despite uncertain or qualitative aspects of the underlying science. The holding in \textit{Am. Farm} provides guidance for courts reviewing EPA decisions, by reaffirming that the EPA must assess all scientific evidence when it sets precautionary standards under the CAA, and by asserting that the EPA

\begin{itemize}
\item \textsuperscript{56} See, e.g., \textit{id.} at 444–47.
\item \textsuperscript{57} \textit{Am. Farm}, 559 F.3d at 535.
\item \textsuperscript{58} \textit{id.}
\item \textsuperscript{59} \textit{id.}
\item \textsuperscript{60} \textit{id.}
\item \textsuperscript{62} McCubbin, supra note 21, at 460.
\item \textsuperscript{63} \textit{id.} at 456.
\end{itemize}
cannot use scientific uncertainty or insufficient information as a scapegoat for maintaining the status quo. 64

Jill Jaffe

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64. See Am. Farm, 559 F.3d at 525–26 (demonstrating careful judicial review of the EPA's decision-making process); Lead Industries Ass'n v. EPA, 647 F. 2d 1130, 1152–53 (D.C. Cir. 1980); Manely, supra note 2, at 345–46.

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Center for Food Safety v. Vilsack:  
Roundup Ready Regulations

INTRODUCTION

On September 21, 2009, the Northern District of California held that the U.S. Department of Agriculture’s (USDA) Animal and Plant Health Inspection Service (APHIS) violated the National Environmental Policy Act (NEPA) by deregulating a genetically engineered (GE) variety of sugar beets without first taking a “hard look” at the environmental impact of its introduction. The decision, which turned on the potential socio-economic impact deregulation would have on producers of non-GE sugar beets and related crops, has been heralded by advocates for tighter controls on GE food as an important victory, and interpreted as a sign that these groups might be able to achieve through federal courts what they have been unable to achieve through Congress or the regulatory agencies. However, celebration may be premature. Subsequent developments surrounding Geertson Seed Farms v. Johanns, a case involving APHIS’s deregulation of Roundup Ready alfalfa, raise questions about the capacity of federal courts to bring about the sought-for substantive regulatory changes.

I. BACKGROUND

In just over a decade, GE food has become dominant in agriculture, both domestically and abroad. Some suggest that the magnitude and speed of GE’s transformation of agricultural production is unmatched in history, save for the introduction of the tractor in the 1800s. Monsanto’s

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2. See infra notes 42–43 and accompanying text.  
4. Professor Debra Strauss, writing in 2007, notes that, “since biotech crops were first commercialized in 1996, the global biotech crop area has increased more than fifty-fold.” Debra Strauss, Defying Nature: The Ethical Implications of Genetically Modified Plants, 3 J. OF FOOD L. & POL’Y 5, 6 (2007).  
5. Id.
Roundup Ready seeds, engineered to resist Monsanto’s patented Roundup herbicide, are among the most widely used GE products, particularly for commodities like corn and soy beans. Moreover, Monsanto’s influence is magnified by its licensing of the Roundup Ready gene to other companies for use in their seeds, including the sugar beets at issue in Center for Food Safety.

GE food has generated significant opposition. Farmers, consumers, and scholars who object to the introduction of these products into food systems have sought increased scrutiny over this technology. These advocates seek substantially stronger regulatory mechanisms to control and monitor this new, unproven technology and to counter the threat of potential devastation posed by its introduction. They point to effective schemes abroad, most notably in Europe, which exercise stronger regulatory measures, ranging from mandated labeling of GE foods to outright bans, until proven completely safe for consumers, farming, and natural ecosystems. However, most domestic efforts towards substantive regulatory reform have been unsuccessful.


9. For instance, many criticize the U.S. “patchwork” regulatory framework, under which the U.S. Department of Agriculture, Food and Drug Administration, and Environmental Protection Agency are each assigned a portion of the responsibility for regulating GE foods, leaving no agency looking at the big picture. Kunich, supra note 8, at 862–63 (comparing the current patchwork regulatory system to “forcing a nonspecialist to perform brain surgery with a fingernail clipper” because it forces these agencies to act beyond their expertise); see also Blake Denton, Regulating the Regulators: The Increased Role for the Federal Judiciary in Monitoring the Debate over Genetically modified Crops, 25 UCLA J. Envtl. L. & Pol’y 333, 368 (2006–2007) (“the current regulatory system is typified by self-enforcement and lax regulations”); Gregory N. Mandel, Toward Rational Regulation of Genetically Modified Food, 4 Santa Clara J. Int’l L. 21 (2006).

10. The Center for Food Safety, the named plaintiff in this case, cites harms caused by GE crops to both human health (“Doctors around the world have warned that GE foods may cause unexpected health consequences that may take years to develop.”) and the environment (“GE crops can harm beneficial insects, damage soils and transfer GE genes in the environment, thereby contaminating neighboring crops and potentially creating uncontrollable weeds.”) Center for Food Safety, Myths and Realities of GE Crops, available at http://truefoodnow.org/campaigns/genetically-engineered-foods/ge-crops/myths-realities-of-ge-crops/ (last visited Apr. 12, 2010).


12. Attorney Blake Denton writes that prior to the recent pattern of federal litigation, “the public seemed powerless to effect change in the GE regulatory system,” while agencies
The USDA's APHIS is charged with the regulation of "organisms and products altered or produced through genetic engineering that are plant pests or are believed to be plant pests." APHIS's decision making is governed by NEPA's procedural rules, which require federal agencies to "undertake analyses of the environmental impact of their proposals and actions." Under NEPA, federal agencies must ask whether a proposed action will "significantly affect" the environment before proceeding. Where the answer is uncertain or not categorically determinable, the agency must prepare an Environmental Assessment (EA), a "concise public document that briefly provide[s] sufficient evidence and analysis" to answer this threshold question. If the EA finds that the proposed project will "significantly affect" the environment or may cause "significant degradation of some human environmental factor," the agency must prepare an Environmental Impact Statement (EIS) analyzing this effect in more detail prior to taking action. If the EA finds no significant impact, the agency can proceed without further analysis.

Courts may set aside an agency's decision not to prepare an EIS where there is a showing that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Well established precedents dictate that courts ensure the agency has taken a "hard look" at the environmental consequences of its action. Federal agencies are required to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on: the environmental impact of the proposed action; any adverse environmental effects which cannot be avoided should the proposal be implemented; alternatives to the proposed action; the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"continued the long-standing American practice of writing off the public's concerns, by adopting a passive role and refusing to impose labeling requirements on GM food." Denton, supra note 9, at 368.

16. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998).
17. Id.
18. Id.
19. Federal agencies are required to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on: the environmental impact of the proposed action; any adverse environmental effects which cannot be avoided should the proposal be implemented; alternatives to the proposed action; the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
21. Great Basin Mine Watch v. Hankins, 456 F.3d 955, 962 (9th Cir. 2006); see also Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (holding that "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment"); Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 452-53 (D.C.
II. THE CASE

Approximately half of the sugar produced in the United States comes from sugar beets. When Monsanto first introduced Roundup Ready sugar beets, APHIS categorized them as "regulated article[s]," thereby prohibiting farmers from planting them without special permits. Monsanto and others petitioned APHIS to deregulate Roundup Ready sugar beets. Pursuant to NEPA, APHIS prepared an EA. Because this report found that deregulating Roundup Ready sugar beets would produce no significant environmental impact, APHIS determined that it was unnecessary to prepare an EIS before deregulating Roundup Ready sugar beets.

Judge Jeffrey S. White's decision hinged on the potentially significant socio-economic impacts that deregulation of these crops could have on producers of non-GE sugar beets and some of its close genetic relatives, like red table beets and Swiss chard. Although sugar beets are grown in a wide variety of locations—from California's Imperial Valley to the Midwest—sugar beet seed is almost entirely cultivated in a single valley in Oregon. The same is true for table beets and Swiss chard. Because these seeds are wind-pollinated, geographically concentrated, and closely genetically related, the court found that the Roundup Ready gene could migrate to non-GE seed, thereby contaminating the crop.

Although the EA recognized that gene migration between GE and conventional seed would likely occur, the agency nevertheless found

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24. These permits are obtainable only by submitting scientific evidence to be "carefully reviewed by APHIS scientists, provid[ing] details about the nature of the GE organism to be introduced and the conditions that will used to prevent the spread and establishment of the organism in the environment." Animal and Plant Health Inspection Service, Biotechnology, http://www.aphis.usda.gov/biotechnology/permits.shtml (last visited Feb. 14, 2010).
27. Id.
29. Id.
30. Id.
31. Id.
"significant environmental impacts" unlikely.32 Regarding the impact such gene migration might have on producers who sought to avoid GE foods, the EA flatly stated "it is not likely that organic farmers, or other farmers who choose not to plant transgenic varieties or sell transgenic sugar beets, will be significantly impacted by the expected commercial use of this product . . ."33 APHIS later acknowledged that it had not fully analyzed this question in its EA, but argued that it was not "required to analyze the full socio-economic impacts of an action."34

The court rejected APHIS's narrow interpretation of the scope of its duties under NEPA.35 Relying on Geertson, the court held that although economic effects are not generally covered by NEPA, these effects "are relevant and must be addressed in the environmental review when they are 'interrelated' with 'natural or physical environmental effects.'"36 Here, as in Geertson, the district court found that the rights of consumers and producers to choose to eat and produce non-GE foods was a socio-economic effect interrelated with environmental effects, and so must be considered in agency review.37 Judge White found that the biological contamination by gene migration posed a risk of effectively eliminating the "farmer's choice to grow non-genetically engineered crops, or a consumer's choice to eat non-genetically engineered food . . . ."38 Such a threat, the court reasoned, would, if realized, amount to a "significant effect on the human environment."39 Because APHIS did not adequately analyze this socio-economic impact in its EA, the court found that it had not taken a "hard look" at the environmental impact of its proposed deregulation as required under NEPA, and ordered it to prepare a more detailed EIS.40

III. IMPLICATIONS

This decision has been called a "major consumer victory for preserving the right to grow and eat organic foods in the United States."41

33. Id. at 13.
34. Center for Food Safety, 2009 WL 3047227 at *8.
35. Id. at *8–9.
36. Id. at *8 (citing Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 944 (9th Cir. 2005)) (emphasis in original).
39. Id.
40. Id.
Some have even interpreted it as a turning point in the way genetically modified foods are regulated. However, developments in the ongoing *Geerston* case cast doubt on the meaning of this apparent victory for advocates of tighter regulations, and raise questions as to whether NEPA's procedural tools are sufficient to achieve the substantive regulatory changes advocates seek.

*Geerston*, also a Northern District of California case, involved similar facts to the sugar beets case. The *Geerston* court found that APHIS had unlawfully deregulated Roundup Ready alfalfa without taking a “hard look” at the effects on non-GE producers and consumers, and ordered it to prepare an EIS. The decision was accompanied by a temporary injunction against planting Roundup Ready alfalfa until APHIS prepared this report. The Ninth Circuit affirmed the injunction, but the Supreme Court has granted a writ of certiorari. Supreme Court intervention could make it more difficult for advocates to get similar injunctions in the future. However, regardless of how the Supreme Court decides, another development casts even more doubt on optimistic readings of the sugar beet case. APHIS issued a preliminary 1476-page draft EIS on Roundup Ready alfalfa on December 18, 2009, which found, once again, no significant impact from the proposed deregulation.

The section of the report evaluating “potential economic and social impacts of [Roundup Ready] alfalfa . . . on organic and conventional alfalfa farmers” begins by noting that APHIS did not receive any “specific economic data or information related to the economic ramifications for organic producers” to use in predicting the economic costs associated with organic alfalfa rejected from buyers “due to unintended presence of excluded methods [genetically engineered crops].”

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42. The Center for Food Safety’s Executive Director Andrew Kimbrell stated that the ruling “made it clear that USDA’s job is to protect America’s farmers and consumers, not the interests of Monsanto.” *Id.* Denton, writing about an evolving pattern of successful federal litigation, including the *Geertson* case, noted that “activists may have found [in the federal courts] a new realm to voice their grievances about biotechnology.” Denton, *supra* note 9, at 367, 369. And, he surmised, through this kind of litigation, “the federal judiciary will come to be a crucial player in the discussion about GM crops.” *Id.*


44. *Id.* (enjoining farmers from planting Roundup Ready Alfalfa, not enjoining them from harvesting seeds already planted).


Lacking data to fully quantify its analysis of the economic impact of possible gene transmission on organic or conventional alfalfa farmers, the EIS lays out the premises for such an analysis and details scenarios in which this alleged economic harm from gene-flow might occur to producers and consumers of conventional and organic alfalfa. Relying on earlier studies showing minimal impact of GE on the market for organic produce, the wide availability of "common, reasonable practices," which "provide many effective measures that greatly reduce the likelihood of accidental gene flow," and some revealing assumptions about the "philosophical" preferences of organic producers and consumers, APHIS concludes that none of these scenarios is likely to result in serious economic harm.

APHIS's use of these preferences is particularly telling, and raises questions about whether the litigation strategy pursued by anti-GE advocates is likely to achieve the sought-for regulatory changes. The EIS refers repeatedly to the "philosophical" factors or values that underlie the preferences and choices of organic consumers and producers. Because these "philosophical" values are seen as transcending economic motivations, they insulate organic farmers and consumers from the pressures of the market. On this assumption, even if farmers faced an increase in gene flow prevention costs, the "philosophical" values make it unlikely that they will be forced out of the organic market. By recognizing the lifestyle commitments behind the economic behavior of organic producers and consumers, the EIS actually undermines the basis for their claimed economic harm: "to the extent that organic farmers have chosen organic production out of philosophical values, the economic incentive to switch to conventional farming should not have an impact." According to APHIS, since the motivations of organic producers, consumers, and those who advocate on their behalf are "philosophical," they are economically and environmentally hollow, and not legally cognizable under the existing regulatory framework.

47. Id. at 132.
48. Id. at 125–31.
49. Id. at 132–40.
50. "The vast majority (92 percent) of U.S. organic farmers had not incurred any direct additional costs or incurred losses due to GE crops having been grown near their organically produced crops." Id. at 135 (citing G. Brookes & P. Barfoot, Global Impact of Biotech Crops: Socio-Economic and Environmental Effects in the First Ten Years of Commercial Use, 9 AGBioFORUM: J. AGROBIO TECHNOLOGY MGMT. & ECON. 139, 139–51 (2006)).
51. Id. at 137.
52. See infra notes 51–54 and accompanying text.
53. ENVIRONMENTAL IMPACT STATEMENT, supra note 46, at 136–38, 144.
54. Id. at S-28.
55. Id.
Insofar as this claim about the philosophical nature of the advocates' complaints about GE food is an accurate one, the federal litigation strategy pursued by advocates in the alfalfa and sugar beets cases seems to face an insurmountable obstacle. If advocates for greater regulation of GE foods cannot point to quantifiable economic or environmental harms, but only "philosophical" concerns, then enforcement of existing law through litigation in federal courts may not produce the sought-for regulatory reform. For that, change at the policy-making level may be required. Advocates hope that public comments on the draft EIS will convince APHIS to change its decision. For now, though, APHIS seems inclined to agree with Monsanto spokesman Steve Welker's claim: "[W]hether it's from cane or sugar beets, or Genuity™ Roundup Ready® sugar beets, sugar is sugar. There is no detectable difference in any way."56

Alex Platt

56. Johnson, supra note 22.

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.
Allstate in Brief

INTRODUCTION

In *State v. Allstate Insurance Co.*,¹ the California Supreme Court closed a loophole that had allowed insurers to escape their duty to indemnify the insured from “sudden and accidental” discharges of pollutants. This holding prevents non-negligent parties and future victims of environmental damages from bearing the ultimate financial burden of pollution.

I. BACKGROUND

Most private and public liability insurance policies take one of two approaches to covering property damage caused by pollution. The majority of contemporary policies include *absolute* pollution exclusion clauses, which deny coverage for damages caused by all sources of pollution. Older policies usually contain *conditional* pollution exclusions, extending indemnity for damages resulting only from “sudden and accidental” discharges of pollutants.² While conditional pollution exclusions have fallen out of favor over the last two decades, all standard California Governmental Liability policies prior to 1986 contained similar “sudden and accidental” exceptions to standard pollution coverage exclusions.³

California courts have struggled with establishing the boundaries for “sudden and accidental” exceptions, reaching inconsistent conclusions regarding whether coverage extends to specific pollution events under different policies. Early guidance came from *Shell Oil Co. v. Winterthur Swiss Insurance Co.*,⁴ in which an appellate court relied on the unambiguous meaning of the words “sudden” and “accidental” in rendering its decision. Shell Oil Company had been using water from three nearby lakes to cool chemical manufacturing equipment used in the production of pesticides. After wildlife began dying in the lakes, Environmental Protection Agency (EPA) investigators found chemical

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² NEIL SELMAN, CALIFORNIA INSURANCE LAW & PRACTICE § 49.39 (2009).
³ Id.
pesticides in the pipes that returned cooling water back to the lakes. Discharges contaminated with pesticides caused extensive damage, including the deaths of 1200 ducks in the spring of 1952 alone as well as crop failures in nearby farms. Upon being cited by the EPA for environmental contamination, Shell sought indemnification from its insurers for the estimated 1.8 billion dollar cleanup costs.

In evaluating the jury instructions given in the indemnification suit, the court reasoned from existing case law that “courts generally interpret coverage clauses broadly and interpret exclusions narrowly to protect the insured’s objectively reasonable expectations.” With this rule in mind, the court held that the phrase “sudden and accidental” unambiguously refers to abrupt, unintended, and unexpected discharges of pollutants. The court therefore held that the jury had been properly instructed with regards to the meaning of the policy’s “sudden and accidental” language. Accordingly, any occurrence of pollution that does not meet the plain and simple meaning of the “sudden and accidental” exception would not be covered under conditional pollution exclusions in California.

The California Supreme Court elaborated on this rule in Aydin Corp. v. First State Insurance Co. The court held that in indemnity cases for damages caused by pollution, the insurer has the initial burden of showing the pollution exclusion applies. The burden then shifts to the insured to make a prima facie case that the pollution in question is covered by an applicable exception to the exclusion. However, these shifting burdens are complicated when property damage is caused by multiple sources of pollution, only some of which qualify for coverage under “sudden and accidental” exceptions.

Since 2001, California appellate courts have reached similar conclusions in two cases involving indivisible damages caused by covered and non-covered discharges of pollution. In Golden Eagle Refinery Co. v. Associated International Insurance Co., the court held that a policyholder is not entitled to indemnification if it is incapable of distinguishing those damages caused by “sudden and accidental” discharges of pollution from

5. Id. at 826.
6. Id. at 827.
7. Id. at 829.
8. Id. at 840–41.
9. Id. at 842. However, the court remanded the case based on a separate erroneous jury instruction concerning the “expected and intentional” clause of Shell’s insurance policy. Id. at 836, 861.
10. See, e.g., ACT Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co., 22 Cal. Rptr. 2d 206, 214 (Cal. Ct. App. 1993) (holding that the gradual leakage of hazardous wastes over a thirty-year period does not fall under the exclusion exception because it does not meet the commonly accepted definition of the term “sudden”).
12. Id. at 1219.
those excluded from coverage.\textsuperscript{13} Between 1947 and 1984, Golden Eagle routinely released crude oil and crude oil derivatives into the soil surrounding its refineries.\textsuperscript{14} While some of these discharges were sudden and accidental, the insurers presented evidence of forty years of repeated and intentional dumping at the site.\textsuperscript{15} In 1985, the state of California required Golden Eagle to investigate and remediate the contamination at the site, leading to 150 million dollars worth of losses for the company.\textsuperscript{16}

In its suit for indemnification, Golden Eagle argued that if it could prove any "appreciable amount of damage" was covered under the "sudden and accidental" exception, then the burden to show what portion of the damages should not be covered rested on the insurers.\textsuperscript{17} The court rejected Golden Eagle's "appreciable amount of damage" standard, holding that "where both covered and not covered events cause damages[,] a failure to differentiate and allocate is fatal to a claim for indemnity."\textsuperscript{18} Under this rule, the insured must show a causal connection between covered pollution events and the specific amount of damages these discrete events caused.\textsuperscript{19}

The appellate court reaffirmed this holding four years later in \textit{Lockheed Martin Corp. v. Continental Insurance Co.}\textsuperscript{20} Lockheed sued for indemnification after it was cited by the EPA for contaminating thirteen separate storage yards, research and development facilities, and manufacturing plants with industrial wastes, leading to an estimated 500 million dollars in liability.\textsuperscript{21} In ruling against Lockheed, the court articulated a slightly different rule than in \textit{Golden Eagle}, holding that "[i]n a case where some damage has been caused by noncovered events, the first step in the insured's proof sequence is to show that there is damage resulting from a covered event, i.e., damage over and above that which is not covered under the policy."\textsuperscript{22}

The California Supreme Court denied review in both \textit{Golden Eagle} and \textit{Lockheed}, implying tacit approval for the rule that, as a matter of law, indemnity for pollution liability requires affirmatively distinguishing damages that result from "sudden and accidental" discharges of pollution

14. \textit{Id.} at 837.
15. \textit{Id.} at 840.
16. \textit{Id.} at 838.
17. \textit{Id.} at 842.
18. \textit{Id.} at 844.
19. \textit{See also} Travelers Cas. & Sur. Co. v. Superior Court of Santa Clara County, 75 Cal. Rptr. 2d 54, 66 (Cal. Ct. App. 1998) ("[T]he insured must do more than point to possible intervening events, such as a fire, to support a claim for coverage under the sudden and accidental exception.")
21. \textit{Id.} at 804.
22. \textit{Id.} at 815.
from those that result from excluded sources. However, in California v. Allstate Insurance Co., the California Supreme Court overturned the Golden Eagle and Lockheed standards and established a much lower and more feasible burden for policyholders seeking indemnification under “sudden and accidental” clauses.

II. ALLSTATE ANALYSIS

In 1950, California began construction of the Stringfellow Acid Pits, a Class I\(^{23}\) hazardous waste site just north of Glen Avon. In 1955, the State employed geologist Robert Fox to inspect the site. Having made no borings into the bedrock and conducting no soil analysis, Fox erroneously concluded that the Stringfellow subsurface contained an impermeable layer of rock with no subterranean water flow.\(^{24}\) Relying on this conclusion, the state constructed an unlined pit for the storage of over thirty million gallons of industrial waste.\(^{25}\) Groundwater contamination was first detected in 1972, when officials discovered chemical waste seeping through a crack in the bedrock and around the edges of negligently constructed barrier dams.\(^{26}\)

In addition to serving as a prolonged source of contamination, the Stringfellow Acid Pits experienced two “overflow episodes” leading to massive discharges of waste. The first occurred in March of 1969, when twenty inches of rain caused the pits to overflow.\(^{27}\) Despite taking precautionary measures following the 1969 overflow, torrential rains in March of 1978 forced the state to order a series of controlled discharges from the pits.\(^{28}\) While the controlled discharges prevented a disastrous breach of the containment dams, they sent one million gallons of waste into a nearby creek.\(^{29}\) The total estimated liability of all sources of contamination is approximately 500 million dollars.\(^{30}\)

The State of California sued four of its general liability insurers for indemnification for all liability arising from the Stringfellow contamination. The State appealed the lower court’s grant of summary judgment in favor of the insurers’ claim that the state was not entitled to indemnification. The appeal presented the supreme court with four separate issues: (1) Is the proper focus of the “sudden and accidental” analysis the initial deposit of waste into the facility or the escape of the

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24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id. at 1152.
waste into the environment?; (2) Is there a triable issue of fact regarding whether the absolute exclusion for pollution of a “watercourse” applies to the 1969 overflow?; (3) Is there a triable issue of fact regarding whether the 1978 emergency release qualifies as sudden and accidental?; and (4) “[D]id the trial court properly grant the insurers summary judgment on the ground that the State cannot prove what part of its property damage liability resulted from sudden and accidental discharges?”

The court easily answered the first three questions in the affirmative. However, the importance of the opinion lies with the court’s approach to situations in which sudden and accidental discharges of pollution cannot be separated from excluded sources. In a unanimous opinion, the court held that “[i]f the insured’s nonexcluded negligence ‘suffices, in itself, to render him fully liable for the resulting injuries’ or property damage, the insurer is obligated to indemnify the policyholder even if other, excluded causes contributed to the injury or property damage.” Accordingly, the court in Allstate Insurance overturned Golden Eagle and Lockheed, and the four insurers named as defendants had a duty of indemnification for all of the state’s Stringfellow liability.

The court’s holding conforms to the longstanding rule established in Shell Oil that requires courts to generally “interpret coverage clauses broadly and interpret exclusions narrowly to protect the insured’s objectively reasonable expectations.” No policy holder would reasonably expect insurance coverage to be denied in the wake of two “sudden and accidental” and calamitous pollution events like the 1969 and 1978 overflows, merely because a comparatively small amount of waste was slowly leaking into the groundwater all along. The State of California took out the liability policies to protect itself and its taxpayers against exactly these kinds of accidents. To then hold that the State’s taxpayers were ultimately financially responsible for the damages of these overflow episodes simply because it could not precisely differentiate between the multiple sources of damages would deny the state the benefit of the “sudden and accidental” exception it had bargained for.

Approaching the California Supreme Court’s decision from this line of reasoning helps illuminate its true importance. Common knowledge indicates that almost every entity, both public and private, pollutes in some way. Allowing insurers to escape indemnity obligations in the wake of accidental environmental catastrophes simply because the insured in

31. Id.
32. Id. at 1157, 1158, 1161.
33. Id. at 1163 (citation omitted) (quoting State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal.3d 94, 103 (1973)).
question also pollutes routinely undermines the purpose of these indemnification agreements. This is particularly true in a case like *Allstate Insurance* in which the liability would ultimately fall on a non-culpable party like the general public. The same would be true if a judgment against a polluting corporation were to leave it insolvent and incapable of paying the victims of its negligence. In such a case, the “sudden and accidental” exception in the company’s insurance policy would be the victims’ last chance for recovery of the damages they are owed. Holding insurers responsible for the “plain and simple” meaning of its sudden and accidental clauses prevents such injustice while remaining in line with California case law.

One could make the argument that a liberal application of “sudden and accidental” exceptions to pollution exclusions will lead to an increase in moral hazard among insured parties. Enhanced insurance coverage might have the unintended consequence of incentivizing polluters to exercise less care in the handling of hazardous materials. Rather than internalize the costs of preventative measures, polluters will choose to pass the costs of their negligence on to their insurers. As a result, more accidents will occur, leading to a rise in insurance premiums for all public and private entities, including those that diligently avoid negligent pollution. Perhaps courts should be conservative in their application of “sudden and accidental” exceptions, so as to incentivize potential polluters to exercise due diligence, instead of ensuring that polluters have the funds to clean up the messes they make after the damage has already been done.

However, this argument presents a false choice. Pollution occurrences fall under the “sudden and accidental” exception only when they could not have been anticipated and prevented with reasonable certainty. Disincentives for events like the Stringfellow overflows cannot be created in any meaningful way precisely because they are “sudden and accidental.” Thus, indemnification is appropriate because it prevents the cost of environmental contamination from being passed on to its victims. When courts strictly adhere to the plain and simple meaning of “sudden and accidental” clauses, as they did in *Allstate Insurance*, they can balance

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37. *Id.* at 953.
38. See *id*.
39. See *id.* at 947.
40. See Murphy, *supra* note 35, at 169–70.
the needs of the insured and its victims without undermining the purpose and function of pollution exclusions. 41

CONCLUSION

At first glance it is hard to see what real impact *Allstate Insurance* has on environmental conservation and protection efforts. It does not discourage future acts of negligence, nor does it impose harsher consequences on negligent polluters. Its impact is also limited by the insurance industry’s shift toward absolute pollution exclusions. However, when viewed from the standpoint of who is ultimately responsible for paying for these acts of environmental carelessness, the importance of the opinion becomes clear. The holding in *Allstate Insurance* closes a loophole that would have allowed Allstate and other insurance companies to avoid responsibility for paying the victims of the Stringfellow disaster, and in doing so it removes that weight from the shoulders of the already overburdened California tax payer. Though state insurance policies no longer include “sudden and accidental” exceptions, the courts should continue to liberally enforce these exceptions when they apply.

*Benjamin Kozik*

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The Campiche Case: Legal or Ideological Factors?

INTRODUCTION

In July 2009, the Chilean Supreme Court, in Correa v. Comision Regional del Medio Ambiente of Valparaiso, annulled the environmental permit held by Campiche’s coal-fired power plant (the Campiche Project), located in the industrial area of Las Ventanas, in the Valparaiso Region of Chile. The Supreme Court, upholding the decision reached by the Valparaiso Appeals Court, ruled that the permit was illegal under the Valparaiso Zoning Plan, as the new plant was located in an area restricted only to recreational and green uses due to flooding risks. The project, which was in the construction stage, had to be stopped, and its final outcome remains unclear.

After the Supreme Court decision, the Housing and Urban Ministry amended a provision of Supreme Decree No. 47/92 (the Urban Regulations) in a manner that would allow the Campiche Project’s construction to proceed under the existing conditions of the Valparaiso Zoning Plan. However, it is unclear how the project will proceed under these new regulations.

2. The Campiche Project is a 270 MW power plant and involves a $500 million investment. Its owner is AES GENER S.A., which is a subsidiary of AES Corporation. See Campiche’s Environmental Impact Study at www.e-seia.cl. Further information about the Campiche Project can be found at www.gener.cl.
3. See Correa v. Comision Regional del Medio Ambiente of Valparaiso, Valparaiso Court of Appeals, No. 317-09 issued on Jan. 8, 2009, at www.poderjudicial.cl. The petitioners, Ricardo Correa Dubri and two local NGOs, Grupo de Accion Ecologica Chinchimen and Consejo Ecologico de las Comunas de Puchuncavi y Quintero, alleged that the project’s environmental authorization was unlawful because it had been granted in violation of the land uses established by the Valparaiso Zoning Plan. The defendant, Comision Regional del Medio Ambiente de Valparaiso, argued that the authorization was granted in full compliance with the zoning and environmental regulations.
4. Decree No. 116/87 issued by the Housing and Urban Ministry on Aug. 5, 1987. According to Article 2 of Decree No. 116/87 the specific area is denominated Z-R2 and is restricted for human settlements due to flooding risks. Only recreational and green areas are permitted.
zoning plan. Most project opponents, which include the municipality of Puchuncavi, the local community, and NGOs, have described the amendment as specially tailored to the Campiche Project, and more litigation can be expected.

The Supreme Court's decision represents an important victory for citizen environmental suits, yet is weakly supported by existing regulations. Article 2.1.17 of the Urban Regulations permits the authorization of projects in restricted areas when appropriate protection measures are developed. This piece argues that the court ruling did not accurately interpret the Urban Regulations in relation to the Valparaiso Zoning Plan. Furthermore, it suggests that the decision can be explained as a reaction to the historical environmental problems in the area, and, from a policy perspective, to unclear zoning provisions applicable to power plants and similar infrastructure projects. Ultimately, this piece concludes that if the environmental and social concerns of Las Ventanas are not properly addressed by the authorities, we will be seeing more and more litigation with unpredictable results.

I. BACKGROUND

A. The Right to Live in an Environment Free of Pollution

The Chilean Constitution guarantees all people the right to live in an environment free of pollution. It adds that the State is duty bound to assure that such right will not be impaired and to provide for the conservation of nature.

The Constitution gives affected parties a judicial remedy to challenge unlawful or arbitrary acts or omissions that violate constitutional rights, including those contained in the article providing for the conservation of nature. The Court of Appeals must review whether illegal actions or

6. Supreme Decree No. 68/09 issued by the Housing and Urban Ministry. Pub. Official Gazette Dec. 31, 2009. The amendment refers to lots that have more than one authorized land-use. If at least 30 percent of the property allows industrial or infrastructure uses, the remaining portion can be also developed with that use.

7. In fact, the Valparaiso Regional Environmental Commission, upon the company's request and relying on the amendment to the Urban Regulations, granted a new environmental approval to the Campiche Project. See Resolution No. 275 issued on Feb. 26, 2010 at www.e-seia.cl. Two new constitutional claims have already been filed against Resolution No. 275. See Valencia vs. Comision Regional del Medio Ambiente de Valparaiso, Court of Appeals of Valparaiso, No. 135-10, filed on Mar. 24, 2010, at www.poderjudicial.cl.

8. Urban Regulations, Article 2.1.17.


10. Id.

11. Id. art. 20, para. 2.
omissions impair the constitutional right to live in an environment free of pollution. If the petitioner prevails, the Court usually will grant injunctive relief, which could prohibit an emission source from operating, or it will set aside a governmental authorization, as in the Campiche case.

Most Chilean environmental jurisprudence since 1980 is derived from this constitutional remedy. This can be explained by the fact that it is filed directly before a competent Court of Appeals, does not have extensive procedural requirements, and cases usually are decided in a relatively short time period. As Professor Oliver A. Houck notes, “in these cases a plaintiff may go directly to a judge, bypassing the labyrinth and delays of civil practice.”

Nevertheless, the Supreme Court’s jurisprudence over the last twenty years has given great deference to decisions made by environmental agencies. The Campiche decision represents a shift in this trend and could likely open a new era in Chilean judicial review.

B. Campiche Project Environmental Assessment

The environmental impact study for the Campiche Project, required by Law 19,300, was submitted to the Environmental Impact Assessment System (SEIA) in August of 2007 and was approved by Resolution No. 449/08 (Resolution 449), issued by the Valparaiso Regional Environmental Commission (COREMA). According to Chilean law, the environmental approval resolution certifies that the project complies with applicable laws and can adequately mitigate, compensate, or restore its environmental impacts.

12. Id.
15. In a similar way, the United States Supreme Court in Chevron established that an agency interpretation of the statute it administers is entitled to deference to the extent that the interpretation is reasonable and comports with the intent of the statute. Chevron U.S.A., Inc. v Natural Res. Def. Council, 467 U.S. 837 (1984).
16. The SEIA, regulated by Law No. 19,300 (1994) and Supreme Decree No. 95 issued by the Ministry of the Presidency on Aug. 21, 2001, requires that an environmental impact study or an environmental statement be submitted to the relevant COREMA prior to the construction or modification of all major projects and activities, including power plants that generate more than 3 MW.
17. The COREMA is the main environmental authority of the Valparaiso Region and has the duty to review the environmental impact studies and statements.
18. The U.S. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (2006), was a relevant antecedent for the creation of the Chilean SEIA. Nevertheless, one important difference between the systems is that in Chile the role of the environmental agency is to authorize the environmental impact study or statements that are elaborated by the project's
The most significant environmental impact identified during the Campiche Project assessment was its air emissions, and in particular its emissions of sulfur dioxide and particulate matter.\(^\text{19}\) In 1992, the area was declared as non-attainment for both pollutants, and a decontamination plan was enacted.\(^\text{20}\) Currently, under the SEIA, all new emissions must be compensated with equivalent or greater reductions from existing sources. According to Resolution 449, the Campiche Project's emissions should be compensated with reductions in an existing power plant in Las Ventanas that is owned by the same company.\(^\text{21}\)

With regard to the land use assessment, the Regional Housing and Urban Secretariat declared the project location to be favorable under the SEIA.\(^\text{22}\) A relevant factor for this decision was that, in 2006, the local municipality had authorized the construction of a power plant subject to the same zoning restrictions.\(^\text{23}\)

### C. Zoning and Infrastructure Projects

Another relevant aspect of the Campiche case is related to several inconsistencies within the Chilean land use policy, as well as within regulations pertaining to infrastructure projects. In Chile, all power plants are considered to be “energy infrastructure.”\(^\text{24}\) As such, they have been subject to specific land use regulations ever since they were differentiated from industrial uses in 2002.\(^\text{25}\) However, this new policy approach, premised on the understanding that power generation involves public interest considerations, overlapped with the reality of local zoning plans, which only recognize traditional uses, such as housing, commercial, and

\(^\text{19}\) The Campiche Project environmental impact assessment can be reviewed at www.e-seia.cl.

\(^\text{20}\) Supreme Decree 252/92 issued by the Mining Ministry on Dec. 30, 1992.

\(^\text{21}\) The AES Gener power complex in Las Ventanas includes the following units: (i) Central Ventanas, (ii) Nueva Ventanas, and (iii) Campiche, totaling 880 MW. See Gener, www.gener.cl. According to Resolution 499, the plant will compensate 110 percent of the SO\(_2\) emissions by implementing a new scrubber in Central Ventanas and by optimizing the operation of the whole complex. Id.


\(^\text{23}\) The previous unit developed by AES Gener was Nueva Ventanas Power Plant. See www.gener.cl.

\(^\text{24}\) Urban Regulations, Article 2.1.29.

industrial ones. To fill this gap, the Housing and Urban Ministry took a pro-industry approach, interpreting that power facilities, similar to transmission lines or gas pipelines, could not be banned by zoning plans. As can be imagined, several controversies developed between impacted neighbors and municipalities until this interpretation was overruled by the General Controller. Later, the Housing and Urban Ministry confirmed that the rule was applicable only to transmission lines or pipelines, not to power plants or similar projects that could be regulated or prohibited by the zoning plans.

The liberal interpretation regarding the location of power plants was applied during the Campiche Project approval and to some extent helps explain why the land-use permit was granted without extensive deliberations by the Regional Housing and Urban Secretariat and the COREMA.

Recently the Housing and Urban Ministry returned to its original interpretation, ruling that the zoning provisions applicable to industrial uses applied equally to power plants. Although this seems to be the correct interpretation, it highlights the inconsistency of land use policy in this area.

II. THE SUPREME COURT DECISION

The Supreme Court upheld the Valparaiso Court of Appeals decision that the project should not have been authorized because it was zoned in a restricted area. It held that the permit granted to the company by the municipality pursuant to Article 2.1.17 of the Urban Regulations was not enough to develop the project because only

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26. For example, the Valparaiso Zoning Plan (Decree No. 116/87 issued by the Housing and Urban Ministry on Aug. 5, 1987) does not recognize energy infrastructure uses in any area of its territory.


28. The General Controller is an independent public entity whose main duties are to review the legality of governmental acts and to control public expenses. The General Controller decisions are expressed through “legal opinions” that are binding on ministries and agencies. The legal opinions regarding the correct interpretation of “energy infrastructure” were the following: Legal Opinions No. 37,731/07, No. 44,742/07, No. 13,529/08, and No. 59,822/08, all available at www.contraloria.cl.


30. Guideline No. 173 issued by the Housing and Urban Ministry on June 30, 2006; Resolution No. 449/08 issued by the Valparaiso Regional Environmental Commission that approved the Campiche Project.


32. See Correa v. Comision Regional del Medio Ambiente of Valparaiso, Supreme Court, No. 1219-09 issued on July 22, 2009, No. 11.
recreational and green areas were authorized uses. The Court mentioned that an amendment to the Valparaiso Zoning Plan would be required to allow infrastructure development in the area.

The Court, linking the illegal permit with the constitutional right to live in an environment free of pollution, stated that the recreational and green area zoning requirement was designated to mitigate the air pollution caused by existing industrial activities. Consequently, the Court set aside the environmental permit, concluding that the illegal construction in a highly polluted area impaired the petitioner's rights as guaranteed by Article 19, No. 8 of the Constitution, which protects the right to live in an environment free of pollution.

III. ANALYSIS

The apparent simplicity of the Supreme Court's decision in Campiche is complicated when confronted with the language and spirit of Article 2.1.17 of the Urban Regulations. This provision establishes that in areas identified as "restricted" by the zoning plan, which is the precise condition of the Campiche Project location, a project can be approved if it includes environmental protections such as floodwalls and canals. The idea behind this provision is to ensure no human settlement occurs in areas that present flood hazards or other natural risk conditions without engineering works that mitigate the risk.

Therefore, the legal question of this case was whether a project approved under Article 2.1.17 of the Urban Regulations is also conditioned by the land use established in the zoning plan. The answer seems to be in the negative because the land use restriction is consistent with the flooding risk nature of the area. If the condition is overcome by protection efforts as required by Article 2.1.17, the restriction is no longer justified. This was the interpretation that moved the municipality, the Regional Housing and Urban Secretariat, and the COREMA to authorize the project. Moreover, it seems reasonable to give some power to the municipalities, due to their knowledge of local circumstances, to negotiate new projects in areas that traditionally are banned from development. Additionally, under the Court's interpretation, Article 2.1.17 of the Urban Regulations becomes almost inapplicable because developers would not have any incentive to invest in

33. Id. at No. 8.
34. Id.
35. Id. at No. 10, para. 2.
36. Id. at No. 11.
37. Urban Regulations, Article 2.1.17.
38. Resolution No. 112/06 issued by the municipality of Puchuncavi; Resolution 499.
restricted areas. The Supreme Court seems to have ignored these arguments, which is surprising considering that the courts traditionally have been very deferential towards decisions by environmental agencies.39

It is clear that the court gave strong weight to the fact that the restricted land use may have been created to alleviate air pollution in Las Ventanas.40 Although the air emissions would have been mitigated through the environmental assessment process as the Campiche Project went forward, it is true that the restricted area is a transition corridor between heavy industry and a residential area, so there could be some justification for the permanence of the zoning restriction.41

Notwithstanding this last argument, the outcome in the Supreme Court may also have ideological explanations.

First, the area has historically been home to heavy industries such as copper smelting, power plants, production and storage of hazardous substances, and port activities.42 Although all new projects since 1997 are subject to an environmental assessment process,43 and a decontamination plan was enacted in 1992,44 there is a sense that these measures have not been sufficiently effective and that many externalities continue to be endured by the community.45 The concerns are not related only to unresolved environmental impacts, but also to adverse health effects in susceptible populations.46

Second, the high level of poverty in the area demonstrates that industrial development has increased inequalities to a greater extent than it has benefited the impacted communities. A harmonic interaction between industrial and residential development not only requires clear and stable zoning regulations and comprehensive environmental assessment and enforcement, but also, at some point, transparent

40. See Correa v. Comision Regional del Medio Ambiente of Valparaiso, Supreme Court, No. 1219-09 issued on July 22, 2009, No. 11 and 12.
41. Decree No. 116/87 issued by the Housing and Urban Ministry on Aug. 5, 1987, which modified the Valparaiso Zoning Plan. Articles 1 and 2 establish that the restricted zones Z-R1 and Z-R2 are adjacent to the industrial zones.
43. The SEIA was created by Law No. 19,300 (1994) but only began to be mandatory with the enactment of Supreme Decree No. 30 issued by the Ministry of the Presidency in 1997. This was later modified by Supreme Decree No. 95 issued by the Ministry of the Presidency on Aug. 21, 2001.
44. Supreme Decree No. 252/92 issued by the Mining Ministry on Dec. 3, 1992.
mechanisms to transfer resources to the communities, which should not be excluded from progress.47

CONCLUSION

The Campiche case represents a shift in the trend of the Supreme Court, which traditionally has been very deferential towards decisions by environmental agencies. Nevertheless, the legal analysis made by the Court seems to be inconsistent with Article 2.1.17 of the Urban Regulations, which allows for approval of projects in restricted areas if protective engineering works are performed as mitigation. The Court’s requirement that the land use in the zoning plan must also be modified to authorize a power plant in a restricted area did not recognize that Article 2.1.17 is an exemption to the general rules applicable to zoning plan amendments. Therefore, the Supreme Court decision seems to rely less on legal than ideological factors, such as the environmental and social conditions in Las Ventanas that have created a situation of permanent conflict and inequalities. The role of judges is not to make policy, but to resolve questions of law. If the policymakers do not address these environmental and social concerns, we will be seeing more and more litigation with unpredictable results.

Rodrigo Ropert

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47. Although local development is a primary role of the government, many firms are promoting corporate social responsibility programs to encourage community growth and development where they operate.

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.
Cleaning Up Manila Bay: Mandamus as a Tool for Environmental Protection

"If there is lack of political will on the part of the government agencies, it is the function of the judiciary to supplant it with the will, the force, and the power of the law."

Antonio Oposa, Jr., Lead Counsel for Concerned Residents of Manila Bay

INTRODUCTION

To the United States, Manila Bay signifies the location where it first showcased its naval strength pummeling its enemy in the Spanish-American War. In the 1898 Battle of Manila Bay, all major Spanish ships were destroyed and captured without significant damage to the Americans, making the United States "a recognized world power overnight." For the Philippines, Manila Bay is the ocean portal to its epicenter for government, economy, and industry—"a place with a proud historic past, once brimming with marine life and, for so many decades in the past, a spot for different contact recreation activities, but now a dirty and slowly dying expanse mainly because of the abject official indifference of people and institutions."

In the field of law, Manila Bay is the setting for a landmark case in environmental protection that has gained worldwide recognition. In December of 2008, the Philippine Supreme Court upheld the issuance of

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a writ of mandamus against twelve government agencies to clean up Manila Bay. Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay (MMDA) is important because it is evidence of the growing general state practice of recognizing the right to a balanced and healthful ecology. Such evidence may also support the recognition of this right as opinio juris, another element in establishing customary international environmental law. This case may be of particular interest to the United States because it involves mandamus, which the United States shares in common with its former colony.

I. MANDAMUS AS A MODE FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES

Mandamus is "a writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly." In the context of MMDA, this piece focuses on mandamus in the United States as a mode of judicial review of administrative agencies (rather than as a means for appellate review). In particular, it looks at section 706 of the Administrative Procedure Act (APA), which allows federal courts to "order agencies to act where the agency fails to carry out a mandatory, nondiscretionary duty" under either the "unreasonably delayed" or "unlawfully withheld" standards. This mandatory injunction is "essentially in the nature of mandamus relief," and is still governed by mandamus principles. These principles include:

[T]he party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires and [must] satisfy the burden of showing that his right to issuance of the writ is "clear and

5. MMDA, 574 SCRA at 661.
6. Opinio juris refers to the phrase "accepted as law" in Article 38(1)(b) of the Statute of the International Court of Justice, which is necessary to establish a legally binding custom in international law. It "denotes a subjective obligation, a sense by the state that it is bound to the law in question." Cornell University Law School, Legal Information Institute, opinio juris (international law), http://topics.law.cornell.edu/wex/opinio_juris_international_law (last visited Mar. 10, 2010).
7. See I.C.J Statute art. 38(1)(b) for the basis of customary international law.
8. The early mandamus provision (Act No. 190, § sec. 222 (1901)) enacted by the Philippine Legislature under American rule was copied verbatim from the California Code of Civil Procedure. See Lamb v. Phipps, G.R. No. 7806, 22 PHIL. REP. 456, 492 (S.C. July 12, 1912) (an American Associate Justice of the Philippine Supreme Court cited American cases and authors to deny the petition for a writ of mandamus).
9. See FEUER, supra note 2, at 73–77.
11. See S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1226 (10th Cir. 2002).
12. Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984); See In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (discussing FED. R. CIV. P. 81(b)).
indisputable." Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.1

However, while the issuance of a writ of mandamus is still discretionary even when its requisites are met, mandatory injunctions under section 706 of the APA are not.15 The availability of the latter technically precludes a writ of mandamus because the APA is an adequate means to attain the relief desired.16 Nevertheless, mandamus remains significant in U.S. federal administrative practice,17 and is considered codified in the APA.18 In addition, although the writ of mandamus has been abolished by Rule 81(b) of the Federal Rules of Civil Procedure,19 "federal courts may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."20

Within this context, mandamus remains an extraordinary remedy in both the United States and the Philippines.21 The traditional view that mandamus functions much like an abuse of discretion standard under section 706(2) of the APA22 also coincides with the Filipino version.23 Although section 706 of the APA is technically distinct from a writ of mandamus, its mandatory injunctive nature and the way courts have treated it24 make it analogous and somewhat similar to the writ of mandamus issued by the Philippine Supreme Court in the MMDA case.

II. THE CASE

In January 1999, Concerned Residents of Manila Bay sued several government agencies for the clean up, rehabilitation, and protection of Manila Bay,25 invoking their Constitutional rights,26 a plethora of statutes,
and even international law. At trial, the plaintiffs established that the fecal coliform content of waters in the beaches around Manila Bay ranged from five thousand to eight thousand most probable number (MPN) per ten milliliters, which far exceeds the prescribed two hundred MPN per ten milliliters safe level for bathing and other forms of contact recreational activities. Government agencies presented evidence showing their efforts to reduce pollution along the shores of Manila Bay. On September 13, 2002, the trial court issued a writ of mandamus commanding the government agencies to clean up Manila Bay.

The government agencies appealed to the Court of Appeals, which affirmed the trial court's decision in full, "stressing that the trial court's decision did not require petitioners to do tasks outside of their usual basic functions under existing laws." When the case reached the Philippine Supreme Court, two issues remained: whether the Philippine Environment Code provisions on Upgrading of Water Quality and Clean-up Operations envisage cleanup in general or pertain merely to specific pollution incidents, and whether mandamus can be issued to clean up and rehabilitate Manila Bay, focusing on the ministerial duty requirement. These would determine the propriety of issuing the writ of mandamus.

On the first issue, the Philippine Supreme Court found that the pertinent provisions of the Philippine Environment Code do not limit "containment, removal, and cleaning operations" to specific pollution incidents. The Court held that the underlying duty to upgrade the quality of water under the Code is not conditioned on any specific pollution incident "as long as water quality 'has deteriorated to a degree

Agriculture; (6) Department of Public Works and Highways; (7) Department of Budget and Management; (8) Philippine Coast Guard; (9) Philippine National Police Maritime Group; and (10) Department of the Interior and Local Government. Metropolitan Waterworks and Sewerage System, Philippine Ports Authority, and the Local Water Utilities Administration also participated. See MMDA, G.R. Nos. 171947-48, 574 SCRA 661, 665 (Dec. 18, 2008). (Phil.)


27. See MMDA, 574 SCRA at 693–97. The continuing mandamus was granted based on various provisions of 15 statutes and the International Convention for the Prevention of Pollution from Ships of 1973. The Department of Budget and Management was even mandated to "consider incorporating an adequate budget in the General Appropriations Act of 2010 and succeeding years" to cleanup, restore and preserve the water quality of Manila Bay. Id. at 697.

28. Id. at 667. The Philippine Supreme Court actually mentioned 50,000 to 80,000 per ml, which is equivalent to 5,000 to 8,000 per 10 ml.

29. Id. (discussing evidence put forth by Metropolitan Waterworks and Sewerage System concerning its Manila Second Sewerage Project and by Philippine Ports Authority concerning its study on ship-generated waste treatment disposal and its Linis Dagat (Clean the Ocean) project.)

30. Id. at 666–69.

31. Id. at 669.

32. Id. at 670 (citing Pres. Dec. No. 1152, §§ 17, 20).

33. Id. at 686–87 (citing Pres. Dec. No. 1152, §§ 17, 20).
where its state will adversely affect its best usage.” The government agencies, the Court held, are mandated “to take such measures as may be necessary to meet the prescribed water quality standards.”

The Philippine Supreme Court then emphasized that “it is well-nigh impossible to draw the line between a specific and a general pollution incident . . . . [S]uch impossibility extends to pinpointing with reasonable certainty who the polluters are.” The duty to clean up and maintain water standards thus extends to polluters in Manila Bay itself, those in adjoining lands and waters, and even to individual persons whose contaminants eventually end up in the bay.

The Court read Philippine Environment Code’s mandate in conjunction with various codes and statutes, including the charters of each government agency, which taken together reinforce the conclusion that cleaning up Manila Bay is their ministerial duty. The Court emphasized that these laws were “clear, categorical, and complete” in obligating the government agencies to clean up Manila Bay and that they had no discretion otherwise.

In the fallo, the Philippine Supreme Court used the principle of “continuing mandamus,” which was unheard of in the country before. This principle was adopted from Vineet Narain v. Union of India, an Indian Supreme Court case, where continuing mandamus was used to enforce the cleanup of the Ganges River from industrial and municipal pollution. Although rarely used, the Philippine Supreme Court merely exercised its constitutional power to “promulgate rules concerning the protection and enforcement of constitutional rights—including the right to a healthful and balanced ecology.” Thus, heads of the government agencies involved were required to “each submit to the Court a quarterly progressive report of the activities undertaken in accordance with this Decision.”

34. Id. at 686 (citing Pres. Dec. 1152, §§ 17, 20).
35. Id. (citing Pres. Dec. No. 1152, § 17).
36. Id. at 687.
37. Id.
38. Id. at 683.
39. Id.
40. The last paragraph of the fallo, or dispositive portion, reads: “The heads of petitioners-agencies . . . in line with the principle of ‘continuing mandamus,’ shall, from finality of this Decision, each submit to the Court a quarterly progressive report of the activities undertaken in accordance with this Decision.” Id. at 697.
41. MMDA, 574 SCRA at 688 (citing Vineet Narain v. Union of India, 1 S.C.R. 226 (India 1998)).
42. See also id. at 688 (citing M.C. Mehta v. Union of India, 4 S.C.R. 463 (India 1987)).
43. CONST. (1987), Art. VIII § 5(5), (Phil.).
44. CONST. (1987), Art. II §§ 15–16 (Phil.); see also Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792, 804–05 (July 30, 1993). (Phil.).
45. MMDA, 574 SCRA at 697.
III. DIVERGENCE OF MANDAMUS
IN THE UNITED STATES AND THE PHILIPPINES

By issuing continuing mandamus, the Philippine Supreme Court seems to be implementing a general program for cleaning up Manila Bay even though mandamus in the Philippines continues to be "available only to compel the doing of an act specifically enjoined by law as a duty." 46 Perhaps this is because the decision was based on the sheer number of statutes involved. Undoubtedly, however, it is telling of the attitude of the Philippine Supreme Court for environmental protection.

Although mandamus was transplanted in the Philippines from the United States, it has evolved differently in practice. As previously mentioned, the APA displaced the writ of mandamus for courts reviewing administrative inaction or unreasonable delay in the United States. 47 These actions, in the nature of mandamus, continue to be "drastic" and are "hardly ever granted." 48 The Philippines, on the other hand, generally retains the principles and doctrines of mandamus 49 but has exercised discretion liberally in judicial review. This liberality of discretion in judicial review is highlighted in the doctrines on standing and exhaustion of administrative remedies, which the Philippines adopted along with judicial review from the United States.

Aside from highlighting the Philippine Supreme Court's liberality in judicial review, it is also important to discuss standing and exhaustion of administrative remedies since they could have been grounds to deny relief to the Concerned Residents of Manila Bay. The fact that they were not even considered in MMDA is an example of the stark contrast between the judicial review of administrative discretion in the Philippines and the United States.

As a requirement for "actual case or controversy" in judicial review, 50 the Philippine Supreme Court has granted standing on the amorphous ground of "transcendental importance." 51 Exceptions to "actual case or controversy" requirements even include "exceptional

47. Note that writs of mandamus are allowed where the APA is unavailable. See STRAUSS ET AL., supra note 17, at 1111 (citing R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002); Chamber of Commerce of U.S. v. Reich 74 F.3d 1322 (D.C. Cir. 1996)).
50. CONST. (1987), Art. VIII § 1, (Phil.). (requiring actual case and controversies for judicial review).
character of the situation" and "paramount public interest." Perhaps the government agencies did not raise standing as a possible bar to suit because it was not practical, politically or legally, for them to question the "transcendental importance" of cleaning Manila Bay.

In the United States, on the other hand, the Supreme Court emphasizes that an "injury-in-fact" must be suffered by a plaintiff, which must be "fairly traceable" to the challenged action and redressable by judicial remedy. Although these requirements are not impossible to meet, as in the exceptional case of Massachusetts v. EPA, it remains to be seen whether citizen groups could attain standing in a case similar to MMDA v. Concerned Residents.

Exhaustion of administrative remedies was not raised as an issue by the Philippine government agencies in MMDA v. Concerned Residents, although there is also a Philippine version of the doctrine. In any case, even if they had raised exhaustion, the Philippine Supreme Court could have easily fit the case into any of its many exceptions that have evolved doctrinally. It could have found the agencies' failure to clean up Manila Bay "patently illegal amounting to lack or excess of jurisdiction," causing further "irreparable injury" to Concerned Residents of Manila Bay, in which case "requiring exhaustion of administrative remedies would be unreasonable." Exceptions to the exhaustion doctrine even include the amorphous "circumstances indicating the urgency of judicial intervention," which again boils down to the attitude and discretion of the court.

The continuing mandamus in MMDA is indeed promising for the environment in the Philippines. However, there may be complications. Since government agencies are required to report their progress in implementing the law to the Supreme Court, not only to the President, the Philippine Supreme Court is ensuring execution of the law beyond mere adjudication. According to the Philippine Constitution, judicial power should extend only to resolution of "actual cases and controversies," and requiring government agencies to report to the

55. See, e.g., Province of Zamboanga del Norte v. Ct. of App., G.R. No. 109853, 342 SCRA 549, 557 (Oct. 11, 2000). (Phil.) (discussing the doctrine of exhaustion of administrative remedies in Philippine law).
56. See id. at 558–59 (describing various exceptions to the doctrine of exhaustion of administrative remedies under Philippine law).
57. Id. at 559 (citing Quisumbing v. Gumban, G.R. No. 85156, 193 SCRA 520, 521 (Feb. 5, 1991). (Phil.))
58. CONST. (1987), Art. VIII § 1, (Phil.); see also GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 91 (2009).
Supreme Court may impede efficiency through division of labor—an important purpose of the doctrine of separation of powers.\textsuperscript{59} It also remains to be seen whether continuing mandamus will be effective and result in the clean up of Manila Bay.\textsuperscript{60}

CONCLUSION

Philippine courts are inclined to grant judicial remedy for the environment. As a matter of fact, the Philippine Supreme Court has recently promulgated the Rules of Procedure for Environmental Cases,\textsuperscript{61} including the “Writ of Kalikasan (Nature)” specifically designed for environmental protection and preservation.\textsuperscript{62} The actions of the Filipino judiciary can be explained as an effort to make up for the failure of government agencies to safeguard the environment whether for lack of resources,\textsuperscript{63} competence, or political will. While the difference in resources, competence, and political will has probably shaped judicial attitude differently in both countries, there is indeed great potential for environmental protection in a modern and developed governmental structure if American courts would take a more active attitude towards environmental protection like their Philippine counterparts.

\textit{Juan Arturo Iluminado C. de Castro}

\textsuperscript{59} See STONE ET AL., supra note 58, at 357.

\textsuperscript{60} After more than six months, contempt charges were filed against various department secretaries and agency heads since only the Department of Environment and Natural Resources and MMDA submitted their reports in compliance with the Supreme Court decision. See World Justice Project, supra note 1.

\textsuperscript{61} Rules of Procedure for Environmental Cases, Administrative Matter No. 09-6-8-SC (effective April 29, 2010). The rules codifies continuing mandamus and defines it as “a writ issued by a court in an environmental case directing any agency or instrumentality of the government or officer thereof to perform an act or series of acts decreed by final judgment which shall remain effective until judgment is fully satisfied.” \textit{Id.} at R. 1, § 4(c); see also \textit{id.} At R. 7.

\textsuperscript{62} \textit{Id.} at R. 8.

\textsuperscript{63} See World Bank Group, Economy Rankings, http://www.doingbusiness.org/EconomyRankings (last visited Apr. 13, 2010) (ranking the Philippines 144th out of 183 countries in terms of ease of doing business, which is indicative of wealth and resources. The United States is ranked 4th.)

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