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CASENOTE

MAY THE EPA CONDITION APPROVAL OF STATE PROPOSALS FOR ADMINISTERING THE NPDES ON ADHERENCE TO CRITERIA NOT ENUMERATED IN THE CLEAN WATER ACT?

*American Forest & Paper Association v. EPA*¹

I. INTRODUCTION

In 1972, Congress enacted the Clean Water Act ("CWA") to restore, protect and preserve the natural condition of the waters of the United States.² To this end, the CWA outlines rigorous guidelines which must be followed before the Environmental Protection Agency ("EPA") or a state permit program will issue a permit allowing the discharge of pollutants into navigable waters.³ Ironically, though, the interpretation given to the CWA by the United States Court of Appeals for the Fifth Circuit in the 1998 case of *American Forest and Paper Association v. EPA* creates a potential threat to another often-compromised component of the environment – endangered species. The court ruled that the EPA could not add mandatory consultation with state agencies geared toward the protection of endangered species to its list of criteria for approval of state permit programs. By doing so, the court struck a blow in favor of industry and against the environment. Moreover, the Fifth Circuit's decision seems to be in direct conflict with the decision of the Tenth Circuit in a case with identical parties and nearly identical facts.

II. FACTS AND HOLDING

Under the CWA, one may not discharge a pollutant into navigable waters without first obtaining a permit to do so.⁴ Authority to issue these permits is vested in the the EPA.⁵ Section 1342 of the CWA, the National Pollution Discharge Elimination System ("NPDES"),⁶ dictates that states wishing to administer their own statewide permit programs for discharging pollutants into navigable waters may submit to the EPA a description of the state's proposed program, as well as a statement from the state's attorney general that the laws of the state supply the authority necessary to execute the proposed program.⁷ The Administrator of the EPA "shall" approve such proposals unless he or she determines that the state's proposal does not meet specified requirements.⁸ After delegating permitting authority to a state, the EPA retains oversight authority over that program.⁹

A. Fifth Circuit

During the time it administered the NPDES in the state of Louisiana, the EPA chose to consult with the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"), in order to determine whether approving a permit would threaten endangered species.¹⁰

On August 27, 1996, the Region 6 Administrator for the EPA approved the State of Louisiana's application to administer the NPDES within the State of Louisiana.¹¹ Various environmental groups protested this decision

¹ 137 F.3d 291 (5th Cir. 1998) [Hereinafter *American Forest and Paper Association v. EPA I* or *AF&PA I*] and 154 F.3d 1155 (10th Cir. 1998) [Hereinafter *American Forest and Paper Association v. EPA II* or *AF&PA II*].

² 33 U.S.C. 1342(b) (1994).

³ See *id.* § 1342.

⁴ See *id.* § 1311(a). Navigable waters is defined by section 1362 as "waters of the United States, including the territorial seas."

⁵ *Id.* § 1251(d).

⁶ *Id.* § 1342.

⁷ *Id.* § 1342(b).

⁸ *Id.*

⁹ *Id.* § 1342(c)(3).

¹⁰ *AF&PA I*, 137 F.3d 291, 294 (5th Cir. 1998).

because the Endangered Species Act of 1973 (“ESA”)¹² did not apply to individual states and Louisiana’s permit program offered no substitute means of protection for endangered species.¹³ To eliminate this problem, the EPA, in exchange for its approval of Louisiana’s proposed permit program, required the Louisiana Department of Environmental Quality (“LDEQ”) to submit any proposed permits to the FWS and the NMFS for their approval.¹⁴ If the FWS and the NMFS agreed that issuance of the permit would not threaten endangered species, the permit would be issued.¹⁵ But if either agency found that issuance of the permit did threaten endangered species, and if the LDEQ refused to make changes in the permit which satisfied the FWS and the NMFS that any risk to endangered species had been eliminated, the EPA, exercising its oversight authority, would veto the permit.¹⁶ Petitioner American Forest and Paper Association (“AF&PA”) claimed that this rule exceeded the EPA’s authority under the CWA, because the EPA had conditioned its approval of Louisiana’s proposed permit program upon Louisiana’s agreement to adhere to criteria not enumerated in the CWA.¹⁷

The EPA claimed that its authority to condition its approval of Louisiana’s proposed permit program on Louisiana’s agreement to consult with the FWS and the NMFS arose out of section 1314 of the CWA,¹⁸ which authorizes the EPA to establish guidelines which set procedural standards for state permit programs.¹⁹ Moreover, the EPA also maintained that section 1536(a)(2) of the ESA,²⁰ which states that federal agencies are to insure that their actions do not jeopardize endangered species, authorized it to condition its approval of Louisiana’s proposal in this way.²¹ The EPA further defended itself by claiming that AF&PA’s failure to object to the agreement during the public comment period before the adoption of the agreement precluded AF&PA from objecting to the agreement in court.²²

The United States Court of Appeals for the Fifth Circuit rejected the EPA’s argument that AF&PA waived its claim against the EPA’s approval of Louisiana’s permit program by failing to participate in the public comment period.²³ The court’s decision was based on the EPA’s inability to cite any provision in the CWA which provided that parties who failed to participate in the public comment period waived their right to litigate their claims.²⁴

Prior to considering the merits of AF&PA’s argument, the court of appeals addressed the EPA’s arguments that AF&PA did have standing to bring the suit and that AF&PA’s claim was not ripe.²⁵ The court rejected the lack of standing claim on the grounds that AF&PA’s injuries were not speculative²⁶ and that judicial redress did offer a remedy for AF&PA’s injury.²⁷ Furthermore, the court rejected the ripeness issue by stating that although no injury had actually occurred yet, the question presented by the case was purely legal, and thus whether an injury had actually occurred was not a primary concern.²⁸

In addressing the merits of AF&PA’s claim, the court noted that the NPDES provisions of sections 1342(b)(1) through 1342(b)(9)²⁹ of the CWA dictated that the EPA Administrator “shall approve” any state’s proposal for a permit program, as long as the proposed program meets nine specified requirements.³⁰ The court pointed out that the CWA did not list protection of endangered species as an enumerated requirement for

¹¹ Approval of Application by Louisiana to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 61 Fed.Reg. 47,932 (1996).

¹² Endangered Species Act, 16 U.S.C. §§ 1531 - 1544 (1994).

¹³ 137 F.3d at 294.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 33 U.S.C. § 1314 (1994).

¹⁹ 137 F.3d at 294.

²⁰ 16 U.S.C. § 1536 (1994).

²¹ 137 F.3d at 294-95.

²² *Id.* at 295.

²³ *Id.* (“We conclude that AF&PA’s failure to participate during the public comment period does not rob this court of jurisdiction.”).

²⁴ *Id.*

²⁵ *Id.* at 296.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *supra* text accompanying note 11.

³⁰ See *supra* text accompanying note 11.

proposed permit programs to meet in order to be approved.³¹ The EPA claimed that the requirements outlined by sections 1342(b)(1) through 1342(b)(9) were minimum standards rather than exhaustive qualifications that a proposed program must meet for approval.³² The EPA further claimed that nothing in section 1342(b) of the CWA prevented it from adding criteria for a program to meet in order to gain the approval of the EPA Administrator.³³ The court of appeals rejected this argument, determining instead that the language of section 1342(b) clearly established that the necessary criteria to gain EPA approval were non-discretionary and were exhaustively outlined in section 1342(b) of the CWA.³⁴

The United States Court of Appeals for the Fifth Circuit held that because the EPA could not add additional criteria to the requirements for approval of the program outlined in the NPDES provisions of the CWA, the EPA was barred from conditioning its approval of the LPDES upon the agreement of the LDEQ to consult with the FWS and the NMFS prior to granting a permit to discharge pollutants into navigable waters within the state of Louisiana.³⁵

B. Tenth Circuit

In 1994, Oklahoma petitioned the EPA for approval of its proposal to administer the NPDES at the state level in Oklahoma.³⁶ The final program agreed upon between the EPA and Oklahoma Department of Environmental Quality ("ODEQ") was outlined in the Memorandum of Understanding ("MOU") created by the two parties.³⁷ Under the terms of the MOU, the ODEQ and the FWS would cooperate with each other to ensure compliance with the ESA.³⁸ Under the MOU, the FWS would annually provide the ODEQ with information regarding Oklahoma's endangered species which depend upon aquatic habitats for their continued existence.³⁹ The ODEQ would then use this information to designate certain waters in the state as "sensitive waters."⁴⁰ Moreover, the MOU specified that when the ODEQ received an application for a permit to discharge pollutants into sensitive waters, the ODEQ would provide the FWS with certain information and, within thirty days after doing so, inform the FWS of whether the ODEQ believed the permit was likely to have a negative impact on endangered species or a jeopardized habitat.⁴¹ If the FWS disagreed with the ODEQ's conclusion regarding this issue, it would inform the ODEQ of such, and the two agencies would then work together to amend the permit application in such a way that the negative effects were eliminated.⁴² In the event the two agencies were unable to agree upon changes to the permit application, then the ODEQ was required to notify the EPA.⁴³ If the ODEQ believed that approval of the proposed permit would negatively affect the status of endangered species or would jeopardize habitats, the EPA could then make a formal objection to the permit application.⁴⁴ If the FWS believed approval of the proposed permit was likely to jeopardize the existence of endangered species or vital habitat, then the EPA was required to formally object to the permit and assume permitting authority.⁴⁵ If the EPA assumed permitting authority, it was then required by section 1536(a) of the ESA to consult with the FWS to ensure compliance with the ESA.⁴⁶

In the Tenth Circuit case, *American Forest & Paper Association v. EPA*, AF&PA challenged the EPA's approval of Oklahoma's permit program on the grounds that the EPA overstepped its authority by ensuring

³¹ *AF&PA I*, 137 F.3d at 296.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 297. ("The language of § 402(b) is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements.")

³⁶ *AF&PA II*, 154 F.3d 1155, 1156 (10th Cir. 1998).

³⁷ *Id.* at 1157; see *Approval of Application by Oklahoma to Administer the National Pollutant Discharge Elimination System (NPDES) Program*, 61 Fed.Reg. 65,047 (1996).

³⁸ See 61 Fed.Reg. 65,047, 65,053.

³⁹ Oklahoma Department of Environmental Quality and U.S. Fish and Wildlife Service Memorandum of Understanding (1995).

⁴⁰ *Id.* at 1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 16 U.S.C. § 1536(a) (1994).

Oklahoma's compliance with the ESA through requiring Oklahoma to consult with the FWS.⁴⁷ The EPA argued that AF&PA lacked standing to bring the lawsuit, that the dispute was not ripe for review, and that the EPA was acting within the proper scope of its authority when it promulgated the requirements which facilitated Oklahoma's compliance with the ESA.⁴⁸

The Tenth Circuit first considered the EPA's argument that AF&PA lacked standing to sue the EPA because its members could not prove that the EPA's approval of Oklahoma's permit program inflicted a concrete injury upon them.⁴⁹ AF&PA argued that its members' injuries resulted from the fact that the consultation requirements imposed by the EPA caused higher costs and increased delays in obtaining permits.⁵⁰ AF&PA further claimed that its members were injured because the consultation requirements increased the likelihood that their permit applications would not be approved.⁵¹

The court considered whether AF&PA had proved that its members had satisfied both the elements necessary to show an "injury in fact."⁵² Relevant herein, the court considered whether the injury was "concrete and particularized" and whether the injury was actual rather than hypothetical.⁵³ The court rejected AF&PA's claim that its members had suffered an injury, noting that AF&PA overstated the scope of the consultation procedures outlined in the MOU.⁵⁴ The court remarked that the consultation procedures outlined in the MOU only applied to permit applications which might impact "sensitive waters," and noted that AF&PA had not claimed that any of its members held or intended to apply for permits which allowed them to discharge pollutants into sensitive waters.⁵⁵ The United States Court of Appeals for the Tenth Circuit held that because AF&PA could not demonstrate that its members were "among the injured" or that any of its members had suffered an actual, concrete injury, it did not have standing to bring suit against the EPA.⁵⁶ Thus, its claims were dismissed.⁵⁷

III. LEGAL BACKGROUND

In 1972, Congress enacted the CWA in order to restore, protect and preserve the natural condition of the waters of the United States.⁵⁸ To this end, the CWA requires any person⁵⁹ wishing to discharge a pollutant⁶⁰ into navigable waters⁶¹ to first obtain a permit for the discharge of that pollutant.⁶² The authority to issue such permits is vested in the EPA under the NPDES.⁶³ The CWA provides, however, that a state wishing to administer its own statewide permit program for discharging pollutants into navigable waters may submit to the EPA a description of its proposed program, as well as a statement from the state's attorney general that the laws of the state supply the authority necessary to execute the proposed program.⁶⁴ The Administrator of the EPA

⁴⁷ AF&PA II, 154 F.3d 1155, 1158 (10th Cir. 1998).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1158-59.

⁵⁰ *Id.* at 1159.

⁵¹ *Id.*

⁵² *See Id.*

⁵³ *Id.* at 1158.

⁵⁴ *Id.* at 1159.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1159-60.

⁵⁷ *See id.*

⁵⁸ 33 U.S.C. § 1251(b) (1994).

⁵⁹ *See id.* § 1362(5) ("The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.").

⁶⁰ *See id.* § 1362(6) ("The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.").

⁶¹ *See id.* § 1362(7); *see also* text accompanying note 6.

⁶² *See id.* § 1311(a) (Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.').

⁶³ *Id.* § 1342(a)(1).

⁶⁴ *Id.* § 1342(b).

“shall”⁶⁵ approve such proposals unless he or she determines that the state’s proposal does not meet specified, enumerated requirements.⁶⁶

A. Waiver of Claims by Failure to Participate in the Public Comment Period

The CWA provides that copies of applications for permits for the discharge of pollutants, as well as copies of approved permits for the discharge of pollutants shall be available to the public.⁶⁷ The CWA further provides that any “interested person” may seek review of the EPA’s decisions regarding the issuance of such permits.⁶⁸ The doctrine of exhaustion requires that parties attempt to resolve their dispute through administrative remedies before initiating judicial proceedings.⁶⁹ Nevertheless, in *City of Seabrook v. EPA*,⁷⁰ the United States Court of Appeals for the Fifth Circuit failed to enforce the doctrine of exhaustion and instead rejected the EPA’s argument that because the plaintiff had failed to raise its complaint during the public comment period, it should now be precluded from raising that complaint in court.⁷¹ The United States District Court for the Northern District of Georgia reached a similar conclusion in the case of *Dobbs v. Train* when it ruled that the defendants’ argument that plaintiffs’ failure to participate in the rule-making process precluded plaintiffs from now arguing in court against the EPA’s proposed definition of the word “construction” was without merit.⁷² Courts have commonly refused to accept the argument that parties who fail to participate in the public comment period are later estopped from bringing their claims in court because holding otherwise would be contrary to social policy, requiring everyone to keep dutifully aware of whether an agency had proposed a rule which might someday have a negative impact.⁷³

B. Standing

Before bringing an action, a prospective plaintiff who has not waived his or her claims against the issuance of a permit must still satisfy the standing requirements of Article III of the U. S. Constitution by showing that he or she has suffered an actual, non-hypothetical injury in fact.⁷⁴ He or she must also establish a causal connection between the injury that he or she allegedly suffered and the conduct of which he or she complains.⁷⁵ Finally, he or she must show that it is likely, and not merely speculative, that a favorable judicial decision will redress the injury.⁷⁶ An association may assert associational standing if it is able to satisfy three additional requirements.⁷⁷ First, the association must show that one or more of its members would have standing to bring the case alone.⁷⁸ Next, the association must show that the interests it seeks to protect through the litigation are relevant to the purposes of the organization.⁷⁹ Finally, the organization must demonstrate that the nature of the

⁶⁵ *Id.* See *supra* text accompanying note 11.

⁶⁶ *Id.* § 1342(b).

⁶⁷ *Id.* § 1342(j).

⁶⁸ See *id.* § 1369(b)(1).

⁶⁹ Elizabeth Evensen, *Fifth Circuit Rejects EPA Rule Requiring State and Federal Agency Consultation as a Precondition for State Permitting Programs*, 19 J. LAND RESOURCES & ENVTL. L. 129, 133 (1999) (citing *McKart v. United States*, 395 U.S. 185, 193 (1969)).

⁷⁰ 659 F.2d 1349 (5th Cir. 1981).

⁷¹ *Id.* at 1360.

⁷² *Dobbs v. Train*, 409 F.Supp. 432, 434 - 35 (N.D. Ga. 1975).

⁷³ See *id.* at 435 (“Such a result is neither desirable, nor is it the law.”); see also *City of Seabrook*, 659 F.2d. 1349 at 1360 - 61 (“The rule urged by EPA would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register*, but a psychic able to predict the possible changes that could be made when the rule is finally promulgated. This is a fate this court will impose on no one.”).

⁷⁴ *AF&PA II*, 154 F.3d 1155, 1158 (10th Cir. 1998) (citing *Bennett v. Spear*, 520 U.S. 154 (1997)); see also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

⁷⁵ *AF&PA II* at 1158; see also *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 - 42 (1976).

⁷⁶ *AF&PA II* at 1158; see also *Simon*, 426 U.S. at 38-39.

⁷⁷ *Friends of the Earth, Inc. v. Chevron Chemical Co.*, 129 F.3d 826, 827 (5th Cir. 1997) (citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)).

⁷⁸ *Id.*; see also *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Simon*, 426 U.S. at 40 (“The standing question in this suit therefore turns upon whether any individual respondent has established an actual injury, or whether the respondent organizations have established actual injury to any of their indigent members.”).

⁷⁹ *Id.*; see also *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

case does not require the individually affected members of the association to litigate the matter as individual plaintiffs in order to resolve the issues of the case.⁸⁰

Even where standing clearly exists, the doctrine of ripeness might prevent a court from deciding a case if the dispute is premature or an injury has yet to occur.⁸¹ But where the issue to be decided is purely legal or where the court does not anticipate the development of any facts that would assist it in rendering its decision, concerns regarding ripeness are irrelevant because further factual development is not needed.⁸²

C. Chevron Analysis

If the complaining party is able to establish standing and ripeness and the court addresses the merits of the case, the court must apply the two-step analysis prescribed by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*⁸³ to determine whether it should give deference to an administrative agency's interpretation of a statute which the agency administers. First, the court must determine whether Congress has spoken directly to the question at issue.⁸⁴ If Congress has done so, then the question is settled and the agency must yield to and implement Congress' intent.⁸⁵ If the court determines that Congress has not spoken directly to the question at issue and that the statute is ambiguous, then the court must proceed to the second step of the analysis and determine whether the administrative agency's interpretation of the statute is reasonable.⁸⁶ An exception to the two-step analysis promulgated by the Court in *Chevron* occurs when an agency proposes an interpretation of a statute not administered by that agency.⁸⁷

D. Minimum Requirements for Proposed State Permitting Programs

The NPDES enumerates nine requirements that proposed state permit programs must satisfy before the EPA will authorize the state to issue its own permits for the discharge of pollutants.⁸⁸ Even if the EPA authorizes a state to administer its own permit program, the EPA retains oversight authority and may veto permits that do not satisfy these requirements.⁸⁹ In *Save the Bay, Inc. v. EPA*,⁹⁰ the United States Court of Appeals for the Fifth Circuit held that the requirements enumerated in 33 U.S.C. section 1342(b) are non-discretionary.⁹¹ Unless the Administrator of the EPA determines that the proposed state program does not meet these requirements, he or she must approve the proposal.⁹²

The interpretation of the CWA promulgated by the court in *Save the Bay* may be at odds with section 1536(a)(2) of the ESA, which seems to give federal agencies a mandate to use any means possible to ensure that the acts of those agencies did not jeopardize the continued existence of endangered species.⁹³ Case law

⁸⁰ *Id.* at 827-28; see also *Warth*, 422 U.S. at 511 ("So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.").

⁸¹ Evensen, *supra* note 71, at 135.

⁸² *Id.*; see also *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993) ("A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.").

⁸³ 467 U.S. 837, 842-43 (1984).

⁸⁴ *Id.* at 842.

⁸⁵ *Id.* at 842-43.

⁸⁶ *Id.* at 843-45.

⁸⁷ Evensen, *supra* note 71, at 136-37 (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990)).

⁸⁸ See *supra* text accompanying note 9.

⁸⁹ 33 U.S.C. § 1342(d) (1994).

⁹⁰ 556 F.2d 1282, 1285 (5th Cir. 1977).

⁹¹ *Id.* at 1285 n.3.

⁹² *Id.* at 1285.

⁹³ See 16 U.S.C. § 1536(a)(2) (1994) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the committee. . . . In fulfilling the requirements of this paragraph, each agency shall use the best scientific and commercial data available.").

regarding this interpretation of the ESA is in conflict.⁹⁴ In *Save the Bay*, the United States Court of Appeals for the Fifth Circuit interpreted the requirements of section 1342(b) as firm and non-discretionary, ruling that if a proposed permit program satisfied those requirements, the EPA had no choice but to approve the program.⁹⁵ Similarly, in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*,⁹⁶ the United States Court of Appeals for the District of Columbia construed section 7(a)(2) of the ESA narrowly in determining that it directs agencies to use their "existing" powers to execute the purposes of the ESA.⁹⁷ Each of these cases seems to be in conflict with *Tennessee Valley Authority v. Hill*, in which the United States Supreme Court interpreted section 7(a)(2) of the ESA broadly, stating that its language clearly directed all federal agencies, without exception, to insure that the acts of those agencies did not jeopardize endangered species.⁹⁸ The *Platte River* court distinguished *Tennessee Valley Authority* on the ground that it did not consider whether section 7 of the ESA expanded the powers of federal agencies in order to execute the ESA.⁹⁹ The court thus concluded that *Tennessee Valley Authority* was "hardly authority to the contrary."¹⁰⁰

IV. INSTANT DECISION

A. Fifth Circuit

In the Fifth Circuit case of *American Forest and Paper Association v. EPA*, the EPA established several lines of defense against AF&PA's claim that the EPA overstepped its authority by conditioning its approval of Louisiana's permit program on the LDEQ's consultation with the FWS and the NMFS prior to issuing a permit. The EPA first argued that by failing to participate in the public comment period prior to the approval of the LDPEs, AF&PA had waived its right to dispute the provisions of the program.¹⁰¹ The United States Court of Appeals for the Fifth Circuit rejected this defense on the ground that the EPA failed to cite any specific provision in the CWA stating that a party who failed to participate in the public comment period waived its right to seek judicial redress.¹⁰² In fact, the court pointed out that the CWA allows any interested person who files a timely objection to seek judicial review.¹⁰³ Citing *City of Seabrook v. EPA*, the court further supported its rejection of the EPA's argument that AF&PA had waived its claim by saying that its ruling was consistent with judicial precedent.¹⁰⁴ Moreover, the court maintained that its decision was consistent with public policy, because if it were to adopt the rule urged by the EPA, it would place a highly unreasonable burden on members of society to keep themselves informed of proposed rules published in the Federal Register.¹⁰⁵

Before it could address the merits of the case, the court had to answer the EPA's second line of defense, that AF&PA did not have standing to bring the suit.¹⁰⁶ In rejecting this argument, the court determined that the

⁹⁴ See *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 (interpreting language of section 402(b) of 33 U.S.C. § 1342(b) as non-discretionary); *But see Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978) (interpreting section 7(a)(2) of the ESA broadly to compel EPA to do everything within its power to protect endangered species).

⁹⁵ *Save the Bay*, 556 F.2d at 1285.

⁹⁶ 962 F.2d 27 (D.C. Cir. 1992).

⁹⁷ *Id.* at 34 ("[T]he statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act.")

⁹⁸ *Tennessee Valley Authority*, 437 U.S. at 173 ("One would be hard pressed to find a statutory provision whose terms were any plainer than those in section 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence' of an endangered species or 'result in the destruction or modification of habitat of such species' This language admits of no exception.")

⁹⁹ *Platte River*, 962 F.2d at 34.

¹⁰⁰ *Id.*

¹⁰¹ *AF&PA I*, 137 F.3d 291, 295 (5th Cir. 1998).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* ("Moreover, we have never held that failure to raise an objection during the public notice and comment period estops a petitioner from raising it on appeal.")

¹⁰⁵ *Id.* (citing 659 F.2d 1360 n. 17) ("Our decision in *City of Seabrook* remains valid: 'The rule urged by EPA would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register*, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated. This is a fate the court will impose on no one.'")

¹⁰⁶ *AF&PA I*, 137 F.3d at 296.

injuries suffered by AF&PA's permit holders were not speculative¹⁰⁷ and that judicial redress did offer a remedy for AF&PA's injury.¹⁰⁸ Moreover, the court rejected the EPA's argument that the claim was not ripe for review because, even though an injury had not actually occurred at the time the case was litigated, this fact was irrelevant as the case presented a purely legal—and not factual—issue.¹⁰⁹ The court again justified its decision on the ground that it promoted good social policy because waiting for an actual injury to occur would place an undue burden on the petitioner.¹¹⁰

Once it finally reached the merits of AF&PA's claim, the court determined whether the EPA's interpretation of the CWA was permissible.¹¹¹ To do this, the court applied the two-step analysis outlined in *Chevron U.S.A., Inc., v. Natural Resources Defense Council*.¹¹² The court's intent was to first determine whether Congress had spoken directly to the question at issue.¹¹³ If Congress had done so, then the expressed congressional intent of the CWA would govern.¹¹⁴ But if the statute were silent or ambiguous as to the issue in dispute, the court would be forced to determine whether the EPA's construction was a permissible interpretation of the CWA.¹¹⁵

The court also rejected the EPA's third and final line of defense. In so doing, the court noted that sections 1342(b)(1) through (9) of the CWA were minimum standards rather than exhaustive criteria for state permit programs.¹¹⁶ The EPA claimed that the requirements outlined by sections 1342(b)(1) through 1342(b)(9) were minimum standards rather than exhaustive qualifications that a proposed program must meet for approval.¹¹⁷ The EPA further claimed that nothing in section 1342(b) of the CWA prevented it from adding criteria for a program to meet in order to gain the approval of the EPA Administrator.¹¹⁸ The court rejected this argument, determining instead that the language of section 1342(b) clearly established that the necessary criteria to gain EPA approval were non-discretionary and were exhaustively outlined in section 1342(b) of the CWA.¹¹⁹ The court grounded this decision in the precedent it set in *Save the Bay, Inc. v. EPA*,¹²⁰ where it stated that the CWA sets out the entire list of requirements a state program must meet in order to gain the approval of the EPA Administrator.¹²¹

The court further supported its position by pointing out that section 1342(b)(6) of the NPDES provisions of the CWA grant the Secretary of the Army the power to veto a proposed permit. Such veto power exists where the Secretary of the Army determines that discharges of pollutants under the permit would negatively impact navigation of the navigable waters into which the pollutants are dumped.¹²² The court reasoned that if the EPA were to have a similar power to protect endangered species, Congress would have granted such a power.¹²³ The court thus determined that Congress had spoken directly to the question at issue by dictating that the EPA's discretion to enforce the CWA was limited to ensuring that the criteria outlined by the CWA were met rather than creating new criteria.¹²⁴

The EPA argued that pursuant to the decision of the District of Columbia in *American Iron & Steel Inst. v. EPA*,¹²⁵ the EPA may demand that states include in their permit programs provisions designed to protect

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 297.

¹¹⁰ *Id.* ("The instant case concerns a purely legal issue: whether EPA enjoys the statutory authority to require Louisiana, before it may issue a discharge permit, to consult with federal agencies regarding the impact on endangered species Because deferring review will impose an immediate, significant burden on the petitioner - and because we are confronted with a pure question of law - this dispute is ripe for review.")

¹¹¹ *Id.*

¹¹² 467 U.S. 837, 842-43 (1984).

¹¹³ *AF&PA I*, 137 F.3d at 297.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 556 F.2d 1282, 1285 (5th Cir. 1977).

¹²¹ *Id.* ("The Amendments set out the full list of requirements a state program must meet.")

¹²² *Id.* at 1285-86.

¹²³ *AF&PA I*, 137 F.3d at 298.

¹²⁴ *Id.*

¹²⁵ 115 F.3d 979 (D.C. Cir. 1997).

endangered species.¹²⁶ The Court of Appeals for the Fifth Circuit, however, distinguished *American Iron & Steel* on the ground that the case arose out of a different section of the CWA than did AF&PA's claim.¹²⁷ The court determined that this difference was significant, as the section of the CWA in dispute in *American Iron & Steel* did not require that the EPA approve all state programs that meet specified requirements.¹²⁸ The EPA's final argument was that section 1536(a)(2) of the ESA required the EPA to use all reasonable means within its power to protect endangered species.¹²⁹ In rejecting this argument, the court noted that even if this argument were true, nothing in the ESA authorized the EPA to add additional criteria to the requirements for state permit program approval as provided by the NPDES provisions of the CWA.¹³⁰

B. Tenth Circuit

The Tenth Circuit's decision in *American Forest & Paper Association v. EPA* turned on the court's interpretation of the consultation provisions outlined in the MOU, as they related to "sensitive waters."¹³¹ The court determined that only permit applications which affected "sensitive waters" were subject to the consultation procedures outlined by the MOU, and because AF&PA did not claim that its members held or intended to apply for such permits, it could not prove that any concrete injury had been suffered.¹³² AF&PA argued that the court could infer that at least one of AF&PA's members held a permit to discharge pollutants into sensitive waters based on AF&PA's allegation that its members would be negatively impacted by the consultation procedures outlined by the MOU.¹³³ The court rejected this argument, citing the well-known rule that standing cannot be inferred by a party's averments, but rather, must actually be proved.¹³⁴ Because AF&PA was unable to prove that any such injury had occurred, the court concluded that AF&PA did not have the required standing to litigate its claim and thus dismissed its complaint.¹³⁵

In its decision in *American Forest & Paper Association v. EPA*, the Tenth Circuit did consider the Fifth Circuit's decision in its case between the same parties.¹³⁶ In distinguishing its decision from that of the Fifth Circuit, the Tenth Circuit again relied very heavily on the MOU's provisions regarding "sensitive waters."¹³⁷ The Tenth Circuit stated that the Fifth Circuit did not consider whether the permit applications at issue in its case applied only to "sensitive waters" or to any waters at all.¹³⁸

V. COMMENT

It is unfortunate that the Fifth Circuit's decision in *American Forest & Paper Association v. EPA* strikes such a serious blow against the environment and endangered species, because, as evidenced by the Tenth Circuit's decision in *American Forest & Paper Association v. EPA*, a case with identical parties and very similar facts, the Fifth Circuit could have easily decided the case in favor of the EPA.¹³⁹

The inconsistency between these two decisions is most clearly evidenced by the decisions of the two courts regarding the standing of the petitioners in the cases.¹⁴⁰ In the Fifth Circuit's case, the court decided that AF&PA had standing to bring a suit on behalf of its members, as the court determined that the permit holders' injuries were not speculative.¹⁴¹ But in the Tenth Circuit's case, the court determined that the agency lacked standing to bring suit on behalf of its members, finding that permit holders suffered no injuries because the

¹²⁶ *AF&PA I*, 137 F.3d at 298.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *AF&PA II*, 154 F.3d 1158, 1160 (10th Cir. 1998).

¹³² *Id.* at 1159.

¹³³ *Id.*

¹³⁴ *Id.* (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)).

¹³⁵ *AF&PA II*, 154 F.3d 1158, at 1160.

¹³⁶ *Id.* n.8.

¹³⁷ See *id.*

¹³⁸ *Id.*

¹³⁹ See *AF&PA II*, 154 F.3d 1155.

¹⁴⁰ See *id.* at 1160; But see *AF&PA I*, 137 F.3d 291, 296 (5th Cir. 1998).

¹⁴¹ *AF&PA I*, 137 F.3d at 296 ("We do not find the permit holders' injuries speculative.")

petitioners failed to allege that they possessed permits to discharge into sensitive waters, or that they intended to apply for such permits.¹⁴² The Tenth Circuit distinguished its decision from the decision of the Fifth Circuit on the ground that the case being resolved by the Tenth Circuit applied to permits to discharge pollutants into "sensitive waters" while the Fifth Circuit's decision did not even mention the term "sensitive water."¹⁴³

Although the Tenth Circuit claimed its decision could be distinguished from the Fifth Circuit's decision on the ground that the Fifth Circuit did not consider the issue of "sensitive waters," it might also be more likely that the Tenth Circuit simply placed a higher premium on protecting the environment than did the Fifth Circuit. It would not have been difficult for the Fifth Circuit to make a convincing argument that AF&PA had not suffered a concrete, actual, non-hypothetical injury, and therefore did not have standing to bring suit. Undoubtedly, AF&PA would have appealed, but because the Fifth and Tenth Circuits decided their cases only six months apart,¹⁴⁴ the Tenth Circuit case would have then likely been decided before the Fifth Circuit case, and the Fifth Circuit could have followed the Tenth Circuit, rationalizing that the "sensitive waters" distinction was of little significance. In reality, the "sensitive waters" distinction may actually have been of little significance, as it could easily be inferred that any waters in which endangered species make their habitat could be classified as endangered waters, regardless of whether those waters were located in Louisiana, Oklahoma, or anywhere else in the United States. It is quite possible that the "sensitive waters" distinction was simply a pretense under which the Tenth Circuit could reach a pro-environment conclusion, while still distinguishing its decision from the Fifth Circuit's pro-industry holding.

Although the different outcomes reached by the Fifth and Tenth Circuits seem to hinge on the Tenth Circuit's reliance on the term "sensitive waters," another significant distinction between the two cases is that the Fifth Circuit found its dispute between AF&PA and the EPA ripe for review, while the Tenth Circuit did not have to consider this issue, as it determined that AF&PA did not have standing to bring its suit.¹⁴⁵ The Fifth Circuit justified its determination that the dispute was ripe for review, saying that deferring the opportunity to decide the case would impose an immediate, significant burden on AF&PA, and by adding that the issue to be decided by the court was purely legal, in that the case did not hinge on any facts awaiting development which would influence the court's decision.^{146,147} But the court's reasoning is questionable if one considers how, if the dispute was purely legal rather than fact-specific, two different courts considering a dispute between identical parties arising out of virtually identical facts could reach such different conclusions.

Although it may be based on faulty reasoning, the Fifth Circuit's decision in *American Forest & Paper Association v. EPA* is not without benefits. Clearly, the decision is favorable to industry, as the EPA is now prohibited from including additional permitting requirements beyond those enumerated in the CWA, thus simplifying and expediting the process of gaining a permit for the discharge of pollutants into navigable waters.¹⁴⁸ Moreover, the Fifth Circuit's decision ensures uniformity and predictable outcomes in the issuance of state permits for the discharge of pollutants into navigable waters.¹⁴⁹

Any possible benefit to be gained from the Fifth Circuit's decision, however, is outweighed by the decision's serious ramifications. The effect of the Fifth Circuit's decision is to prevent the EPA from including additional requirements besides those specifically enumerated in the CWA as conditions for approval of state permit programs. Although this effect simplifies for industries the process of obtaining a state permit for the discharge of pollutants into navigable waters, it also decreases the ability of environmental groups to affect the issuance of state permits for the discharge of pollutants. This effect thus increases the harm the issuance of such permits could have upon the environment.¹⁵⁰

¹⁴² *AF&PA II*, 154 F.3d 1159-60 ("[A]bsent an allegation that its members currently discharge or intend to discharge into sensitive waters, the Association cannot demonstrate that its members are themselves 'among the injured.' . . . This court therefore concludes the Association lacks standing to pursue this action.") (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)).

¹⁴³ *Id.* at 1160 n.8.

¹⁴⁴ The Fifth Circuit decided *AF&PA I* on March 30, 1998. The Tenth Circuit decided *AF&PA II* on September 1, 1998.

¹⁴⁵ See *AF&PA I*, 137 F.3d at 296-97.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 297.

¹⁴⁸ Evensen, *supra* note 71, at 144.

¹⁴⁹ *Id.*

¹⁵⁰ Administrative and Regulatory Law News, 23-SUM Admin. & Reg. L. News 6, 11, Summer 1998; see also Evensen, *supra* note 71, at 144 ("The consequences of this case may be very significant. Environmental groups seeking expanded protection for endangered species will find it more difficult to challenge state permitting programs. As a result of *American Forest*, state permitting programs could

VI. CONCLUSION

Although there can be no doubt that the Fifth Circuit's decision in the instant case of *American Forest & Paper Association v. EPA* is detrimental to individuals and agencies focused upon protecting the environment or endangered species, the case nevertheless seems to be correctly decided. There is no language in the CWA that indicates that the criteria to be met by state permit program proposals are minimum guidelines. Instead, the CWA's language seems to indicate that the requirements for approval are exhaustive, non-discretionary criteria. Moreover, Congress' use of the word "shall" in the CWA provision dictating when the EPA must approve state permit programs seems to indicate that approval of such programs is mandatory, rather than optional, for the EPA. Although the Tenth Circuit, in a case with identical parties and very similar facts, found that AF&PA did not have standing to bring suit against the EPA, that court distinguished its decision from the decision of the Fifth Circuit on the ground that the Tenth Circuit's case dealt specifically with "sensitive waters."¹⁵¹ Meanwhile, the Fifth Circuit's case did not even mention that term, but instead, dealt with the general issue of permits and was not limited to specific types of permits.¹⁵² Some may question whether the Tenth Circuit simply fulfilled Congress' intent in enacting the CWA while the Fifth Circuit chose to strike a blow for industry, but few would argue with the proposition that Congress could have easily prevented the disputes in both of these cases. The root of the controversies in each of these cases would have been eliminated if Congress had stated in the CWA whether the provisions of sections 1342(b)(1)-(9) were exhaustive or discretionary, as well as whether the EPA could exercise its oversight authority by denying a state permit program on the ground that the program would jeopardize the continued existence of endangered species.

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afford less protection to the environment than programs administered by EPA. It is probably time for Congress to clarify this inconsistency between state and federal programs.").

¹⁵¹ *AF&PA II*, 154 F.3d 1155 at 1160, n.8.

¹⁵² *Id.*; see also *AF&PA I*, 137 F.3d 291.