

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 18
Issue 1 *Fall 2010*

Article 9

2010

Environmental Law Updates

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Environmental Law Updates, 18 Mo. Env'tl. L. & Pol'y Rev. 144 (2010)
Available at: <https://scholarship.law.missouri.edu/jesl/vol18/iss1/9>

This Environmental News is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

EnergySolutions, LLC v. Utah,

No. 09-4122, 2010 WL 4456986 (10th Cir. Nov. 9, 2010).

Low-level radioactive waste (“LLRW”) is the byproduct of many important industries and manufacturing processes. By the end of the 1970s, the nation had just three functioning LLRW disposal sites. Policymakers agreed it was essential to encourage states to build more LLRW disposal facilities. However, due to restrictions on state protectionism found in the Constitution’s Dormant Commerce Clause, a state could not prevent waste from entering a disposal site based on the waste’s state of origin. As a result, states were weary of building disposal sites if they had no way of protecting themselves from becoming dumping grounds for the nation’s LLRW. Acknowledging this challenge, Congress in 1980 enacted the Low-Level Radioactive Waste Policy Act (“1980 Act”). This legislation gave states the authority under the Constitution’s Compact Clause to enter into interstate agreements to deal with LLRW on a regional basis, and statutorily preempted Dormant Commerce Clause concerns. Congressionally approved compacts would have the force of federal law to exclude LLRW generated outside of the compact region.

The 1980 Act stated that it was the responsibility of each state to provide for the “availability of capacity either within or outside the state for disposal of [LLRW] generated within its borders.” However, the 1980 Act provided no incentives to enter into a compact, nor did it include any penalties for failing to provide the capacity to handle waste. As a result, no new LLRW disposal sites were created and the only compacts formed were around the three preexisting disposal sites.

Congress addressed the deficiencies of the 1980 Act by enacting the Low-Level Radioactive Waste Policy Amendments Act of 1985 (“1985 Act”). The statute repealed and replaced the 1980 Act and provided penalties for states failing to provide disposal capacity, as well as increased financial incentives for states that created new LLRW disposal sites.

In January of 1986, Congress passed the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act (“Consent Act”). The Consent Act provided congressional approval for several interstate compacts, including the Northwest Compact on Low-Level Radioactive Waste Management (“Northwest Compact”) and the Rocky Mountain

Low-Level Radioactive Waste Compact ("Rocky Mountain Compact"). The Consent Act declared that the approved compacts were set forth "in furtherance of [the 1980 Act]." The Northwest Compact included eight states: Alaska, Hawaii, Idaho, Montana, Oregon, Utah, Washington, and Wyoming. According to its text, the Northwest Compact had "exclusionary authority" to deny facilities located in member states authorization to dispose of LLRW generated outside the compact area. Decisions on allowing the disposal of this sort of LLRW were made by the Northwest Low-Level Waste Compact Committee ("Northwest Committee"). The Northwest Committee was comprised of one official from each member state and required a vote of two-thirds of all members, including the member state in which the facility was located, to enter into such arrangements.

In 1991, Utah granted EnergySolutions' Clive, Utah, facility a license to dispose of LLRW. Utah specifically required the Clive Facility, through a condition in its license, to obtain permission from the Northwest Committee before disposing of any radioactive waste generated outside member states. In 2007, EnergySolutions entered into an agreement to decommission nuclear power plants located in Italy. As part of this plan, EnergySolutions would dispose of the resulting LLRW at its Clive facility. The Northwest Committee voted unanimously to deny EnergySolutions permission to import the waste.

EnergySolutions subsequently filed suit against the Northwest Compact, claiming: (1) the Northwest Compact did not have statutory authority over the Clive facility; (2) federal law preempted the decision to exclude foreign-generated LLRW; and (3) the decision to exclude foreign-generated LLRW violated the Dormant Commerce Clause. The United States District Court for the District of Utah granted summary judgment in favor of EnergySolutions on the first claim and did not rule on the second two claims since the ruling on the first rendered the others moot.

The district court concluded the Northwest Compact, as well as the other LLRW interstate compacts approved by Congress through the Consent Act, had only the authority explicitly granted to them in the 1980 and 1985 Acts. Because the district court concluded the Clive facility was not a "regional disposal facility," as defined in the 1985 Act, it held the Northwest Compact did not have authority to exclude foreign-generated waste from the Clive facility. The Northwest Compact, along with the

state of Utah and the Rocky Mountain Compact as intervening defendants, appealed.

The Tenth Circuit found that the lower court erred in looking only to the 1980 and 1985 Acts to determine congressional authorization. It noted that the language of the Consent Act transformed the Northwest Compact "from mere agreement into federal law." Specifically, the Tenth Circuit found that the lower court erred in three ways. First, the court mistakenly concluded the 1980 Act had any ongoing application to the grant of congressional authority under the regional compacts. The 1985 Act repealed the 1980 Act entirely. As a result, the district court began its analysis in the wrong place by focusing first on the 1980 Act. Second, the district court assumed the compacts approved by the Consent Act could not grant any authority not already contained in the 1980 and 1985 Acts. However, "enabling statutes," like the 1980 and 1985 Acts, are not necessary for states to form an interstate compact if Congress gives expressed or implied approval to an agreement the states have already joined. Congress approved the Northwest Compact in the Consent Act, thus the district court should have credited the language of the Northwest Compact in the first instance. Finally, the district court relied on the vague general provisions of the 1985 Act to conclude the Northwest Compact does not have exclusionary authority over the Clive facility. The lower court incorrectly ignored the Consent Act's express consent to exclusionary authority found in the Northwest Compact. Therefore, the Tenth Circuit held the Northwest Committee had authority to exclude the importation of waste from Italy, or any other waste generated outside the Northwest Compact Region.

EnergySolutions advanced four other arguments the court found unpersuasive. First, it pointed out that in the Consent Act Congress consented to the Northwest Compact "subject to the provisions of the [1985] Act." It contended that Congress' conditioning its consent on compliance with the 1985 Act negated the more specific definition of "facility" found in the Northwest Compact. EnergySolutions claimed the definition of "facility" found in the 1985 Act did not include the Clive facility. The Tenth Circuit found the definitions not to be in direct conflict with each other, and held the definition found in the Northwest Compact to control. Second, EnergySolutions argued that a clause in the 1985 Act stating the Northwest compact may not be construed to limit the

applicability of any federal law or to diminish or otherwise impair the jurisdiction of any federal agency limited the effect of the compact on federal law. However, the Tenth Circuit found that by approving the Northwest Compact, Congress abrogated the application of the Dormant Commerce Clause to the Northwest Compact's authority over LLRW entering the Clive facility. The court concluded that the clause did not limit this express grant of authority. Third, EnergySolutions argued that allowing the Northwest Compact to exclude out-of-region LLRW from the Clive facility would give it power to regulate the facility out of business. The court found this argument to oversimplify the purpose of the 1985 Act to prevent the states from becoming dumping grounds for the nation's LLRW. Finally, EnergySolutions argued that because the Clive facility is the only facility in existence not operating as a regional disposal facility, the decision that the Northwest Compact had no exclusionary authority over the Clive facility would not have affected any other compacts. The court found that the only way this would be true is if the 1985 Act provided that limitation, not the Northwest Compact. That legal conclusion would affect all other compacts, and could greatly undermine the agreements made by other states.

The Tenth Circuit ultimately held that the Northwest Compact was statutorily and constitutionally permitted to exercise exclusionary authority over the Clive facility, and reversed and remanded the case for proceedings consistent with its opinion.

MARK ABBOTT

Sierra Club v. Otter Tail Power Co., 615 F.3d 1008 (8th Cir. 2010)

In *Sierra Club v. Otter Tail Power Co.* the United States Court of Appeals for the Eighth Circuit determined that the Clean Air Act's ("CAA") preconstruction permitting process only applied to construction or modification of major emitting facilities. Thus, in the Plaintiff's citizen suit alleging that Defendants violated the CAA in their failure to obtain Prevention of Serious Deterioration ("PSD") permits for a series of modifications, the court dismissed the action stating that the claims were time barred. Because these claims were time barred, the Plaintiff's claims for declaratory and injunctive relief were also barred under the CAA. Finally, the court determined that the lower court lacked subject matter jurisdiction to review the Plaintiff's claims under New Source Performance Standard (hereinafter "NSPS") of the CAA.

Otter Tail Power Company operates the Big Stone Generating Station. Otter Tail Power Company, along with MDU Resources Group and Northwestern Energy (collectively, "Otter Tail") own Big Stone Generating Station ("Big Stone"). Since beginning operations in 1975, Big Stone has undergone various modifications. It is these modifications that Sierra Club alleges violated the PSD and NSPS obligations under the CAA.

There are three modifications asserted by Sierra Club that triggered Otter Tail's obligation to seek PSD permits. First, in 1995 the plant switched to subbituminous coal. Sierra Club claimed this significantly increased the plant's emissions of nitrogen oxides and particulate matter. Second, in relation to the 1995 modification, in 1998 Big Stone's boiler was modified to increase the surface area of its primary super-heater. Sierra Club claimed this modification increased the plant's emission of sulfur dioxide and nitrogen oxides. In neither instance did Otter Tail apply for a permit, as Sierra Club asserted they were obligated to do so. Finally, in 2001, the factory underwent modifications to allow it to supply steam to a nearby ethanol plant. Otter Tail applied to the South Dakota Department of Environment and Natural Resources ("DENR") to allow the ethanol plant project. DENR invited public comment on the permit application, however Sierra Club did not participate in this process.

DENR concluded that the modifications did not trigger NSPS or PSD requirements, thus DENR approved the amended permit. In the instant case, Sierra Club alleged that the ethanol plant project did trigger the NSPS and PSD requirements.

The Eighth Circuit first addressed the timeliness of the claims asserted by the Sierra Club. While the CAA does not specify a statute of limitations, Sierra Club and Otter Tail agreed that the general federal statute of limitations, 28 U.S.C. § 2462, applied and there was five years from the date the claim first accrued to commence suit. Moreover, the CAA citizen suit provision, 42 U.S.C. § 7604(a)(3), authorizes suit “against any person who proposes to construct or constructs any new or modified major emitting facility without a [PSD] permit....” In the instant case, the last of the modifications was performed in 2001. It was not until June 2008 that Sierra Club first commenced the citizen suit.

The question whether the CAA’s preconstruction permitting process prohibits the construction or modification of a facility without a PSD permit as a one-time obligation, or whether they impose ongoing operational requirements was one of first impression for the Eighth Circuit. As the court noted, the language of the CAA’s citizen suit provision is narrowly limited to construction or modification. Other provisions, like 42 U.S.C. § 7411(e) and 42 U.S.C. § 7661a(a), use the word ‘operate.’ Thus, if Congress had intended for the citizen suit provision to include ‘operate’ they would have included that word in the provision. Therefore, the court concluded that although 40 C.F.R. § 52.21(r)(1) initially imposes an obligation to obtain a permit, it ties that obligation explicitly to construction or modification and not operation. Therefore, while Otter Tail may have violated 40 C.F.R. §52.21(r)(1) in the first place, by not applying for a PSD permit, they did not violate the PSD permit by continuing to operate. The court concluded that Sierra Club did not file their claim in a timely manner and as such, Otter Tail does not violate the PSD obligations of the CAA in continuing to operate.

The Eighth Circuit affirmed the lower court’s dismissal of Sierra Club’s claims for declaratory and injunctive relief under the concurrent remedy doctrine. The concurrent remedy doctrine provides that “where a party’s legal remedies are time-barred, that party’s concurrent equitable claims generally are barred.” As articulated in earlier Eighth Circuit cases, “where a legal and equitable remedy exist for the same cause of

action, equity will generally follow the limitations statute," hence the Eighth Circuit concluded that the equitable remedies were time barred.

In their final claim, Sierra Club asserted that under the 2001 modifications to the plant, Big Stone triggered emission level limits under the CAA's NSPS program. The district court held that Sierra Club should have raised this claim administratively during the DENR period. The Eighth Circuit asserted that had Sierra Club taken this step, they would have been able to obtain judicial review of the NSPS claim in the district court. However, since Sierra Club had the opportunity to raise this issue earlier, 42 U.S.C. §7607(b)(2) precludes judicial review of EPA action, thus the district court concluded they lacked subject matter jurisdiction over this claim. Therefore, the Eighth Circuit concluded that the Sierra Club's NSPS claim was barred by 42 U.S.C. §7607(b)(2), since they had the opportunity bring the claim up during the DENR period, effectively foreclosing the district court's review of the claim. For the above reasons, the Eighth Circuit affirmed the judgment of the district court.

SABRINA K. BENNETT

Humane Society of the United States v. Locke,
No. 08-36038, 2010 WL 4723195 (9th Cir. Nov. 23, 2010)

In March 2008, the National Marine Fisheries Service (“NMFS”) authorized the states of Washington, Oregon, and Idaho to kill up to eighty-five California sea lions per year at the Bonneville Dam under the Marine Mammal Protection Act (“MMPA”). The Bonneville Dam is located on the Columbia River, and serves as a migration path for a number of salmonids, including five salmon and steelheads species. The states believed that California sea lions were killing off these salmonids, each of which is listed as a threatened or endangered under the Endangered Species Act (“ESA”), and therefore submitted an application to NMFS requesting permission to lethally remove the sea lions. After the states submitted the application, NMFS assembled a task force to evaluate the application. Seventeen of eighteen members of the task force concluded that the sea lions had a “significant negative impact” on the recovery of salmonids and recommended approval of the application.

In compliance with the National Environmental Policy Act (“NEPA”), NMFS also conducted an environmental impact assessment (“EIS”). After completing the assessment, NMFS found that killing the sea lions would have no significant impact on the quality of the human environment and therefore no EIS was necessary under NEPA. NMFS authorized the states to lethally remove eighty-five sea lions per year for an initial period of five years.

The Humane Society of the United States was the sole dissenter on the NMFS task force and initiated the instant action, claiming that the NMFS’s decision was arbitrary and capricious under the Administrative Procedure Act (“APA”). The United States District Court for the District of Oregon granted the defendants’ motion for summary judgment, and the United States Court of Appeals for the Ninth Circuit reviewed *de novo*.

First, the court found that NMFS’s decision to grant the states’ application was arbitrary and capricious for several reasons. The court reasoned that NMFS did not give a sufficient explanation for its finding that sea lions have a significant negative impact on the decline or recovery of salmonids. The explanation given was insufficient in light of the fact

that NMFS had conducted similar studies from 2003 to 2007, and in each instance found that sea lions did not have a significant negative impact on the salmonid population. Although the previous reports were not on record, the court found the discrepancy between the previous reports and the current assessment to be too great to ignore. Further, human harvesting of the salmonids had a greater mortality impact than the sea lions, but a previous report found that this mortality rate had no significant impact. As a result, the court remanded the decision back to NMFS to either reconsider or provide a satisfactory explanation for its decision.

Second, the court was asked to determine whether an EIS was needed under NEPA. Whether an EIS is needed when an action will have a significant beneficial impact but not a significant adverse impact on the environment is a case of first impression in the Ninth Circuit. The court chose not to rule on the issue, having already determined that the record did not demonstrate a significant beneficial impact on the human environment. The court additionally found that no EIS was required, despite the plaintiffs' arguments that: (A) lethal removal of the sea lions is controversial and uncertain; (B) that the action could have potentially lethal consequences for Stellar sea lions, which are listed as threatened under the ESA; and (C) that the removal of the California sea lions would eliminate sea lion viewing opportunities near the dam.

Third, the plaintiffs argued that the lower court abused its discretion when it granted the defendants' motion to strike the previous environmental assessments because they were not in the administrative record. The court held that it may consider documents not in the record if it is necessary in determining whether the agency considered all relevant factors. Because the agency did not explain the rationale for its decision or the inconsistency between the current report and those of previous years, the court held that the lower court should not have struck the reports, and reversed the defendants' motion to strike.

Finally, the court held that NMFS's use of bioenergetic modeling to supplement the U.S. Army Corps of Engineers' observations was not arbitrary and capricious, and therefore deferred to the agency's decision. NMFS believed that the Corps' observation-based estimates undercounted the number of salmonids killed by sea lions. Therefore, NMFS began using bioenergetic modeling to give it a more accurate count. The plaintiffs claimed that this method produced unreliable estimates, but the

court found that the plaintiffs had not sufficiently demonstrated that the estimates were unreliable. The court held that even if the plaintiffs had been able to show that bioenergetic modeling count was unreliable, NMFS primarily relied on the Corps' initial estimates to approve the states' application, and used the bioenergetic data only as a secondary source.

MEGAN L. DITTMANN

Government of the Province of Manitoba, v. Salazar,
691 F. Supp. 2d 37 (D.D.C. 2010)

The Department of Interior's Bureau of Reclamation ("Reclamation") must reexamine approval of Northwest Area Water Supply Project's ("NAWS") plan to divert water from Lake Sakakawea via pipeline to ten counties in North Dakota. The District Court for the District of Columbia ordered Reclamation to take a "hard look" at the long term effect of draining water from Lake Sakakawea and the possibility of contaminating the Hudson Bay Basin with biota from the Missouri River Basin.

NAWS is a partnership formed between the federal government and the State of North Dakota in an attempt to provide a solution to poor water supply in and around the town of Minot. The area served by NAWS currently relies on ground water from an aquifer that is replenished by the Souris River. The Souris River lies in the Hudson Bay Basin and flows south from Canada into North Dakota before flowing back north into the province of Manitoba. Lake Sakakawea is a reservoir fed by the Missouri River which lies in the Missouri River Basin and drains to the Gulf of Mexico.

Recent reservoirs built in Canada have reduced the flow of the Souris River and affected the quality of the groundwater supplied in the Minot area. The NAWS-backed approach is a proposal for a pipeline that would pump 500 million gallons of water from Lake Sakakawea every year. The water would be partially disinfected and pretreated before flowing through pipes across the continental divide between the Hudson Bay and Missouri River basins before being distributed in the NAWS service area around Minot, North Dakota. Water around Minot is part of the Hudson Bay Basin and drains into the Souris River and then into Manitoba.

The initial suit was brought in 2002 by Manitoba under the Administrative Procedure Act ("APA") claiming Reclamation had failed to prepare an adequate Environmental Impact Statement ("EIS"), as required by the National Environmental Policy Act ("NEPA"). NEPA requires federal agencies to prepare a preliminary Environmental

Assessment ("EA") before taking any major actions. If after an EA is complete, the agency issues a Finding of No Significant Impact ("FONSI"), then the requirement for the EIS, a more substantial study, is waived. In its initial suit, Manitoba alleged that the EA failed to take a "hard look" at the risks of transferring biota from the Missouri River Basin to the Hudson Basin. The court ruled in favor of Manitoba, ordering Reclamation to revisit its FONSI, but allowed work to continue on the pipeline as long as it did not affect the environment.

In 2008, Reclamation issued an EIS concerning the treatment options for water from the Missouri Basin. The EIS incorporated and reissued the agency's previous EA and FONSI. Manitoba, joined by the State of Missouri filed suit, claiming that the EIS and the incorporated documents were prepared contrary to NEPA. The instant decision concerned motions in favor of summary judgment from both the plaintiffs and the defendant and a motion for a permanent injunction from Missouri. The court held that the EIS failed to address two primary issues: the effect of drawing down Lake Sakakawea and the risk of contamination of biota from the Missouri River Basin into the Hudson Bay Basin.

The court noted that Reclamation looked only at its project in isolation and did not consider other projects that use water from Lake Sakakawea in assessing the water level issue. The court noted that there are already projects that would be using Lake Sakakawea as a source and ruled that Reclamation should have taken this into account when preparing the EIS. As for the issue of contamination, the court also found that Reclamation failed to take the required "hard look." While the EIS addressed the issue of primary contamination of water flowing through the pipe through treatment plans, the court found that it failed to account for leakage or possible spills along the pipeline's route. In addition, the EIS failed to consider an alternative approach by treating the water completely at the source in the Missouri River Basin which would prevent any biota contamination before it entered the pipeline into the Hudson Bay Basin.

The court denied Missouri's request for an injunction but issued a ruling requiring Reclamation to again take a "hard look" at the projects effect on the water level of Lake Sakakawea and the potential for biota contamination to the Hudson Bay Basin. The court also chided Reclamation, noting that the agency "has wasted years by cutting corners

and looking for shortcuts..." and "...has yet to do what NEPA demand [s]... ."

JOSHUA K. FRIEL

West Virginia Highlands Conservancy v. Huffman,
625 F.3d 159 (4th Cir. 2010)

The West Virginia Department of Environmental Protection ("WVDEP") must obtain a permit under the Clean Water Act ("CWA") to discharge pollutants into waterways during mine reclamation efforts. In *West Virginia Highlands Conservancy, Inc. v. Huffman*, the United States Court of Appeals for the Fourth Circuit held that the CWA and the regulations issued by the Environmental Protection Agency ("EPA") require permits for anyone who discharges pollutants into United States waters, even if a mining company created the need for reclamation. In addition, the statute contains no exceptions for state agencies involved in reclamation efforts and instead explicitly includes agencies within its scope.

Coal mining often contaminates water by making the water acidic. To address this issue while still allowing for coal mining, the CWA allows mining companies to apply for National Pollutant Discharge Elimination System ("NPDES") permits that limit the amount and types of pollutants that can be discharged into waterways. States are allowed to petition to run their own NPDES permit programs, which West Virginia has successfully done. The NPDES permits issued by WVDEP include an obligation to neutralize the adverse effects of the acid mine drainage. In order to guarantee that mine operators are fulfilling this requirement, the permits require the operators to post bonds with the state. These bonds, however, are sometimes not enough to cover the cost of clean up and WVDEP must finish treatment using money from the Special Reclamation Fund, which is funded by a tax on coal mined within West Virginia.

In 2007, the West Virginia Highlands Conservancy and West Virginia Rivers Coalition (collectively, "the Conservancy") requested water quality data from sites where WVDEP had been involved in mine reclamation efforts. The Conservancy filed suit under the citizens-suit provision of the CWA alleging that WVDEP was required to obtain permits at those sites because the agency was violating the CWA by discharging pollutants into waterways. WVDEP did not issue itself any

permits despite having issued permits to the former site operators. In addition, WVDEP had only issued itself one permit for a bond forfeiture and that was after the agency was sued by the Conservancy. WVDEP contends that NPDES permits are unnecessary for the bond forfeiture sites because permits are not needed when a state agency is cleaning up acid mine drainage created by others.

The Conservancy, in its suit, requested declaratory and injunctive relief requiring WVDEP to get NPDES permits for the bond forfeiture sites within thirty days. The United States District Court for the Northern District of West Virginia granted the Conservancy's motion for summary judgment. The district court also entered a final judgment ordering WVDEP to apply for the NPDES permits within 180 days and to actually obtain those permits within 360 days. WVDEP appealed that decision to the Fourth Circuit.

WVDEP made several arguments that it should be exempt from obtaining an NPDES permit. First, WVDEP argued that it should be exempt from the permit requirements because it is a state agency. WVDEP also argued that it should not have to obtain the permits because it did not create the acid mine discharges and that requiring the agency to issue permits to itself would be "ridiculous." Finally, WVDEP argued that because it could not comply with the permit requirements, it would be futile to require them.

The court analyzed the statute as well as WVDEP's arguments and determined that the CWA is a broadly worded statute that plainly declares "the discharge of *any* pollutant by *any* person shall be unlawful." See 33 U.S.C. § 1311(a) (2010) (emphasis added). In addition, EPA determined that the required "person" in the statute applies to state agencies and also issued regulation where the agency "reemphasize[d] that post-bond release discharges are subject to regulation under the Clean Water Act," and "[i]f a point source discharge occurs after a bond release, then it must be regulated through an NPDES permit." 50 Fed.Reg. 41298 (Oct. 9, 1985). The court, because of this, determined that both those who create and those who facilitate ongoing discharges must obtain NPDES permits.

The court also determined that the CWA has no causation requirement. The statute, on its face, prohibits discharge of pollutants by any person regardless of whether that person was the cause of the discharge. In addition, case law has also rejected a causation requirement.

See United States v. Law, 979 F.2d 977 (4th Cir. 1992). Also, in *South Florida Water Management District v. Miccosukee*, the Supreme Court rejected the argument that only the creators of the pollutant require an NPDES permit. 541 U.S. 95, 104-05 (2004).

Finally, the court noted that although compliance with the requirements is difficult, it is inappropriate for the court to rewrite laws when parties have difficulties following the requirements. The court found that Congress instituted the permit requirement in order to protect natural resources, and also, whenever Congress implements permit requirements, it generally leads some regulated entities to complain.

Instead of changing the permit requirements, the court suggested alternative changes that WVDEP can pursue, including petitioning to Congress or to EPA to create exceptions to the CWA for state agencies or increasing the funds available for reclamation. Accordingly, the Fourth Circuit affirmed the judgment of the district court.

CHRISTINE LESICKO

Sierra Club, Inc. v. Sandy Creek Energy Associates, L.P.,
No. 09-51079, 2010 WL 4725044 (5th Cir. Nov. 23, 2010)

Sandy Creek Energy Associates (“Sandy Creek”) began construction to build a coal-fired power plant in Texas in 2008. In order to build a power plant in Texas, companies, like Sandy Creek, must get state and federal permission. In Texas, prior to construction, the Texas Commission on Environmental Quality (“TCEQ”) performs a “Maximum Achievable Control Technology” (“MACT”) determination before construction to ensure compliance with the federal Clean Air Act (“CAA”). Compliance with the CAA requires that any plant that is considered a “major source of hazardous air pollutants” cannot be built until a determination is made that the plant uses the best available technology to control emissions. The plant in the instant case falls under this description because it will emit more than ten tons of mercury per year.

After Sandy Creek submitted its plan for the plant, TCEQ declared no MACT determination was needed because the United States Environmental Protection Agency (“EPA”) had recently implemented its “Delisting Rule,” which stated that EPA no longer regulated coal-fired power plants. Consequently, Sandy Creek began construction of the plant in 2008. Shortly after commencing construction, the D.C. Circuit Court of Appeals vacated the EPA’s Delisting Rule, declaring that EPA did not have authority to stop regulating coal-fired power plants. Once this decision came down, Sandy Creek was in violation of the federal requirement of obtaining a MACT determination.

Subsequently, a group of citizens sued to stop construction of the plant. The district court held that the requirement for a MACT determination did not apply to Sandy Creek because it was not being enforced when plans for the plant were finalized. The citizens appealed claiming that the district court erred and the requirement of a MACT determination does apply to Sandy Creek even though it was not being enforced when the project was started. Sandy Creek claimed that because it prepared and filed an application for a MACT determination before

beginning construction, the response from EPA that Sandy Creek did not need one was effectively a MACT determination.

On appeal the Fifth Circuit determined that Sandy Creek was bound by the federal requirement of a MACT determination even though it was not being enforced when they applied for clearance for the project. As the court emphasized, the statute states that “no person may construct” a plant without a MACT determination and that the wording of the statute did not indicate that a determination is only required *before* construction, but that a company must have the determination at *all phases* of construction. Since compliance is required throughout the construction process, not just before construction, Sandy Creek must come into compliance now that the Delisting Rule is vacated.

In response to Sandy Creek’s claim that because they filed for a MACT determination, the response from EPA was effectively a MACT determination, the court concluded that just because a determination was asked for does not mean a determination was given.

The court held that Sandy Creek would not be penalized for their construction prior to the vacated Delisting Rule, but all construction done after the Delisting Rule was vacated is in violation of the requirement of a MACT determination. Therefore, the court ruled that a determination must be obtained in order to continue construction.

KRISTIN MICHAEL

Sierra Club v. Kimbell, 623 F.3d 549 (8th Cir. 2010)

In *Sierra Club v. Kimbell*, a proposed forest plan for Superior National Forest was challenged as to the Forest Service's ("Service") adequacy in evaluating the edge effects on the Boundary Waters Canoe Area Wilderness ("BWCAW"). While Sierra Club was granted standing to challenge the forest plan, the forest plan was ultimately affirmed because the Service did give an adequate "hard look" to the environmental consequences of the plan, as required by the National Environmental Policy Act ("NEPA").

The BWCAW is part of the Superior National Forest, which is subject to the National Forest Management Act ("NFMA") that directs the Secretary of Agriculture to "develop, maintain, and revise forest plans for units of the National Forest System." A forest plan is a "general planning tool" that "establishes the overall management direction for the forest unit for ten to fifteen years." The forest plan must be developed in compliance with NEPA. In July 2004, the Service issued a new forest plan for Superior National Forest. Sierra Club and others sought judicial review of the plan, alleging that the plan violates NEPA by failing to consider the plan's effect on the BWCAW.

The plan that the Service chose to implement included a Spatial Zone, bordering the BWCAW, that allows for timber harvesting and motorized recreational activities. The Act officially creating the BWCAW ended logging within the area and greatly restricted the use of motorized recreational vehicles. Sierra Club's main concern is the edge effect on BWCAW because of the logging and motorized recreational activities that are going to be allowed in the bordering Spatial Zone.

The district court in granting the Service's motion for summary judgment held that the Service did consider the impacts on the BWCAW in accordance with NEPA. The Eighth Circuit Court of Appeals started its analysis with the issue of standing. The court found that Sierra Club had standing due to the immediate and concrete consequences for the recreational interests of specific visitors to the Superior National Forest that would result from the Service's adopted plan. The court then turned to Sierra Club's main argument regarding NEPA that the Service's

adopted forest plan was the “direct result of the agency’s inadequate consideration of the effects of the various alternatives on the BWCAW.” If true, the inadequate consideration would result in a NEPA violation by the Service. The court examined the Service’s Final Environmental Impact Study (“FEIS”) to see if the agency adequately considered the environmental consequences of the proposed forest plan on the BWCAW. After looking over the FEIS, the court held that the Service took a “hard look” at the consequences of the revised forest plan.

The court, in affirming the lower court’s holding, stated that the Service intended to act with neutrality concerning: (A) the BWCAW; (B) the Service’s evaluation of the impacts on the wilderness area; and (C) “the inclusion of the BWCAW within broader environmental analyses.”

JOSHUA D. MOORE

Metropolitan Taxicab Board of Trade v. City of New York,
615 F.3d 152 (2nd Cir. 2010)

In December of 2007, the City of New York (“City”) issued new rules pertaining to taxicabs put into service after October 1, 2008. These taxicabs must achieve at least 25 city miles per gallon. Additionally, if the taxicab was put into service after October 1, 2009, the taxi must achieve at least 30 city miles per gallon (“MPG”). However, on March 26, 2009, the City repealed the 25/30 MPG rule in favor of new rules regulating the lease caps on taxicabs (a lease cap is the maximum dollar amount per shift for which taxis can be leased). Under these new rules, if the taxicab is a non-hybrid, non-clean diesel vehicle (nearly all non-hybrid taxis are Ford Crown Victorias), the lease cap is lowered by \$12, effectively reducing the possible revenue potentially earned by that taxi. To qualify for an upwardly adjusted lease cap of \$3, the vehicle must be a hybrid or clean diesel vehicle (collectively termed “hybrid”).

Plaintiffs, including the Metropolitan Taxicab Board of Trade and several taxi fleet operators, sued the City seeking to enjoin the 25/30 MPG rule and later amending their complaint to enjoin the new lease caps on the basis that it violated preemption clauses in the Energy Policy and Conservation Act (“EPCA”) and the Clean Air Act (“CAA”). Plaintiffs moved for a preliminary injunction based on the economic impact these rules would have on the fleet owners.

At an evidentiary hearing on the motion, Plaintiffs’ expert testified that the new lease caps would decrease fleet owners’ profits by 65% to 75% for each non-hybrid vehicle owned. The City did not challenge this estimate and merely argued fleet owners could still make a reasonable rate of return on their purchase of a Crown Victoria. In order to justify a preliminary injunction, the Plaintiffs had to show: (1) irreparable harm absent injunctive relief; (2) a likelihood of success on the merits; and (3) that the public’s interest weighs in favor of granting an injunction. After reviewing the evidence and statutory language, the district court concluded the severe disparity in the expected profits from leasing a hybrid as compared to a Crown Victoria would leave fleet owners with no rational alternative to leasing a hybrid and amounted to a

de facto mandate to purchase hybrid vehicles. Thus, the disparity is related to both fuel economy standards and the reduction of vehicle emissions and is therefore sufficiently likely to be preempted under the EPCA and the CAA. The district court granted the injunction. The City appealed, maintaining only that the Plaintiffs were not likely to succeed on their preemption claims.

The Second Circuit reviewed the grant of a preliminary injunction for abuse of discretion. In order to be overturned, the district court must have rested its decision on a clearly erroneous finding of fact or have made an error of law.

First, the court examined Congress's intent in writing the preemption clause at hand. The relevant EPCA provision essentially states that a state is forbidden from adopting or enforcing any law or regulation that pertains to fuel economy standards for automobiles already covered by that Act. Also, per established Supreme Court preemption jurisprudence, if a state law contains a reference to the preempted subject matter, or makes the existence of the preempted subject matter essential to the law's operation, then federal law preempts state law. As such, the question asked of the City's new regulations is whether the regulations contain a reference to fuel economy standards, or make fuel economy standards essential to the operation of the new rules.

The court found the new rules relied on a distinction between hybrid and non-hybrid vehicles, which essentially was a distinction between vehicles with greater or lesser fuel-efficiency. First, the EPCA specifically draws a distinction in fuel economy standards when considering "dual fueled" vehicles, including hybrids. Additionally, imposing reduced lease caps solely based on whether or not a vehicle has a hybrid engine has no purpose other than to manage fuel economy across the taxi fleets operating in the City. Even the City itself was unable to identify any plausible alternative reason for the imposition of such engine-based rules. Therefore, the new rules regulating lease caps make fuel economy standards integral to the rules' operations and fall squarely within the EPCA preemption clause.

The Second Circuit determined the district court's "mandate analysis" was irrelevant to the issue at hand because the rules directly relate to fuel economy standards. Also, because the plaintiffs showed a likelihood of success with their claim under the EPCA preemption clause,

the court found no reason to determine whether the CAA would also preempt the City's new rules for purposes of affirming an injunction.

Because the plaintiffs were able to demonstrate a likelihood of success on the merits of their claim that the EPCA would preempt the City's new rules, the grant of a preliminary injunction against the enforcement of new lease caps was affirmed.

KATIE VOGT

Animal Welfare Institute v. Martin, 623 F.3d 19 (1st Cir. 2010)

States may, in certain circumstances, have the right to allow foothold traps that can potentially take an endangered or threatened species. In *Animal Welfare Institute v. Martin*, the United States Court of Appeals for the First Circuit held that incidentally trapping endangered or threatened species with foothold traps is not a violation of the Endangered Species Act (“ESA”).

In 2000, the U.S. Fisheries and Wildlife Service (“FWS”) named the Canada lynx, a wild cat found in Canada and the northern United States, a threatened species in some Western states and states that border Canada, including Maine. Maine, in accordance with the ESA, prohibits the trapping of Canada lynx but allows the trapping of other animals under certain regulations. However, traps that were set legally to capture other animals have incidentally trapped the Canada lynx.

In October 2006, the Animal Protection Institute (“API”) brought suit over the protection of the Canada lynx. The suit resulted in a consent decree, which extended protections over the Canada lynx significantly. Under the decree, Maine issued regulations in 2007 and 2008 which reduced the legal size of foothold traps to five and three-eighths inches in areas where lynx were prevalent. The regulations also required trappers who incidentally trap Canada lynx to report those incidents, so that biologists from the Maine Department of Inland Fisheries and Wildlife could examine and care for the captured and injured lynx before releasing them back to the wild. However, the consent decree would expire if the Canada lynx is taken off the threatened species list, or if FWS accepted Maine’s application for a federal “incidental take permit” (“ITP”) and issues the permit. The ITP would allow trapping that captures threatened or endangered species, if those takings were incidental to otherwise lawful trapping practices. However, when engaging in lawful trapping practices, trappers would need to take certain measures to minimize and mitigate harms so that these permitted incidental takings would not “appreciably” impact the threatened or endangered species. Maine’s first draft ITP application was filed in August 2006, its complete application was filed in 2007, and Maine filed a revised application at the request of FWS in

August 2008. FWS has not yet issued the ITP, so the consent decree is still in effect.

In August 2008, two private animal protection groups, the Animal Welfare Institute and the Wildlife Institute of Maine (together "AWI"), sued under the ESA citizen suit provision, 16 U.S.C. § 1540(g). AWI alleged that by allowing trappers to obtain permits to use foothold traps to catch other animal species that are not endangered or threatened, Maine violates the ESA because some lynx will be incidentally caught in those otherwise legal traps. Foothold traps spring shut on an animal's leg or foot, and keep the animal in place in the trap until the trapper returns to either kill or release the animal. There is no evidence of any Canada lynx being killed using foothold traps, but, in Maine, a small number of Canada lynx are caught using those traps each year. The lower court denied relief of permanent injunction, stating that absent proof of irreparable injury, an injunction would not be awarded. AWI then appealed to the First Circuit.

The First Circuit found that AWI had standing to sue for injunctive relief barring foothold trapping that could incidentally injure a Canada lynx. In order to obtain a permanent injunction, the plaintiffs must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."¹ The court, for purposes of the case, assumed that the incidental taking of Canada lynx in foothold traps results in a violation of the ESA. However, the court recognized that the Supreme Court has said that courts are "not mechanically obligated to grant an injunction for every violation of the law."

AWI's claim was to the contrary, asserting that courts must automatically issue an injunction where there is a continuous violation of the ESA, regardless of the facts surrounding the violation. AWI based this claim on the Supreme Court's decision *Tennessee Valley Authority v. Hill*, where the Court found that only a permanent injunction against bringing a \$100 million dam online would suffice to remedy the Tennessee Valley

¹ *Monsanto v. Geertson Seed Farms*, 130 S.Ct. 2743, 2756 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

Authority's violation of the ESA. Operation of the dam would have completely destroyed the entire habitat of an endangered snail, which would have resulted in the species' extinction. The Supreme Court has since distinguished the case's harsh outcome from other cases because of the undeniable showing of irreparable harm if the injunction weren't given—an entire species would become extinct.

The First Circuit found that the circumstances surrounding the Canada lynx are not so serious or urgent. AWI was not able to prove that any single Canada lynx had suffered serious physical injury or died from being caught in a foothold trap, let alone risk the danger of extinction as in *Hill*. The court held that the lower court's denial of a permanent foothold-trapping injunction was not an abuse of discretion. Without demonstration of irreparable harm, which seems only to be evidenced through possible extinction, no permanent injunction will be issued to stop a legally regulated activity.

RACHEL S. WATKINS

Missouri Law Review

A Quarterly published in the Winter, Spring,
Summer, and Fall of each year

by

THE SCHOOL OF LAW
University of Missouri-Columbia

CONTAINING

1. Leading Articles on current legal problems of local and general interest.
 2. Comments on legal problems.
 3. Case notes on significant court decisions.
-
-

Subscription Rates

Subscription Price \$30.00 per year

Foreign Subscription \$35.00 per year

Copies of Back Issues \$10.00 per issue

SUBSCRIPTION BLANK

☐ New Subscription ☐ Renewal

MISSOURI LAW REVIEW

(Please check the appropriate line)

School of Law

Hulston Hall, Room 15

University of Missouri-Columbia

Columbia, Missouri 65211

☐ I enclose \$30.00

☐ I enclose \$35.00

☐ Please send bill

Please enter or continue my subscription to the **MISSOURI LAW REVIEW**

Name

Street Address

City State Zip Code

Country (if not U.S.A.)

Order on the Internet: <http://www.law.missouri.edu/lawreview>

MISSOURI ENVIRONMENTAL LAW AND POLICY REVIEW

A publication by the University of Missouri-Columbia School of Law and The Missouri Bar

VOLUME 18 SPRING 2011 NUMBER 2

EDITOR-IN-CHIEF
MICHAEL A. MOOREFIELD

MANAGING EDITOR
KAMERON M. LAWSON

ASSOCIATE EDITOR-IN-CHIEF
THOMAS C. SMITH

LEAD ARTICLES EDITOR
KATIE JO WHEELER

LAYOUT & DESIGN EDITOR
DANIELLE HOFMAN

ASSOCIATE MANAGING EDITORS
JOHNATHAN R. AUSTIN
AARON SANDERS
CARA M. LUCKEY

NOTE & COMMENT EDITORS
JESSICA ADAMS
MARY CILE GLOVER-ROGERS
DANIEL S. RICH

ASSOCIATE MEMBERS

MARK A. ABBOTT
SABRINA K. BENNETT
MEGAN L. DITTMANN
JOSHUA K. FRIEL
FRED JACOB KOHUT III

CHRISTINE K. LESICKO
DAVID MARTIN
KRISTIN R. MICHAEL
ANNA L. MOLITOR

WALTER S. STOKELY
KATHERINE E. VOGT
RACHEL S. MEYSTEDT
GRANT W. WOBIG
JOSHUA D. MOORE

FACULTY ADVISOR
PROFESSOR THOM A. LAMBERT

BOARD OF ADVISORS
ROBERT BRUNDAGE STEPHEN JEFFREY STEPHEN KRCHMA

EDITOR'S PROSPECTIVE

Professor Jesica Gilbert authors our lead article, *Assessing the Risks & Benefits of Hydraulic Fracturing*. Gilbert explores the history of fracing and delves into how it has the chance to usher America into an age of energy independence. Ms. Gilbert also explains the controversy surrounding the fracing process and gives a timely analysis of current legislation and litigation surrounding fracing. In exploring the fracing debate, Ms. Gilbert draws attention to the increasing tension between America's national energy goals and its environmental policies. Ms. Gilbert discusses the current lack of regulation of the fracing industry and predicts how certain agencies might address the concerns inherent in hydraulic fracturing. She concludes with sound advice to those in the fracing business, including warnings about insurance policies, ideas for educating the public about the benefits of fracing and urges vigilance in monitoring the tumultuous regulatory landscape for this industry.

Ari Peskoe authors our second article, *A Challenge for Federalism: Achieving National Goals in the Electricity Industry*. In this piece, Mr. Peskoe traces the long and varied tug-of-war between the federal and state governments for jurisdiction over electricity regulation. Mr. Peskoe expertly highlights Congress' increased foray into regulatory spaces previously occupied by state governments. He also provides an overview of the continuing state regulations and identifies the areas in which each state is different; thereby showcasing the problems of a unified national regulatory system. In the second section of his article, Mr. Peskoe explores the future of "clean electricity" generation. He offers a solution for the state and federal dichotomy in that the federal government should set broad goals and allow the states to best chose how to reform their own systems to meet these long-term national priorities. He argues that the ensuing diversity in state actions will enable innovation and encourage imagination.

Abadir M. Ibrahim authors our final article, *The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony*. This article takes us to another continent as it explores the cultural and economical importance of the Nile River Basin and discusses the potential impact of a new agreement entitled the Nile Basin Cooperative Framework Agreement. Mr. Ibrahim provides

a strong overview of the history of Egypt's dominance over the region and how countries located in the Upper River Basin have constantly battled for control over this area. In explaining the political subterfuge that occurs with the region's hydro-politics, Mr. Ibrahim showcases how this underlying current influences every facet of these societies. Finally, Mr. Ibrahim discusses the ramifications of the new Agreement and whether or not it will be treated as a binding legal document or merely a policy statement.

Turning to our student notes, Kristin Michael authors our first note, *What's in a Label? FIFRA Regulations and the Preemption of State Tort Claims of Label Misrepresentation*. In this note, Ms. Michael discusses the recent case of *Indian Brand Farms, Inc. v. Novartis Crop Protection Inc.*, and analyzes the issue of whether a marketing brochure constituted a label and the implications of this label falling under federal pesticide regulations or state tort requirements. Ms. Michael discusses the repercussions of a potentially unclear U.S. Supreme Court ruling on what actually constitutes a label and explores various scenarios under different circuit court approaches. She argues that inconsistency in labeling requirements makes it hard for businesses to predict and anticipate issues, thus raising their overhead costs and passing these costs on to consumers. Ms. Michael provides a thorough analysis of how Missouri courts may act if faced with a similar issue and offers a solution on how to bypass the labeling issue completely.

Katherine Vogt authors our second student note, *In Closing the Door to Environmental Public Nuisance Claims, Did the Fourth Circuit Leave a Window Cracked?* This note discusses the implications of the case, *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, which dealt with the use of state public nuisance law as a mechanism for controlling emissions. Ms. Vogt discusses the history of the EPA and how it regulates air quality, and gives a thorough overview of prior case law attempting to utilize state tort law as an addition to the EPA regulations. This overview of how federal environmental law may preempt state law provides a backdrop for the ongoing public policy debates regarding emissions and the role of the federal government. Ms. Vogt uses the blueprint provided by the Fourth Circuit to predict how the courts may rule on a number of "climate change cases" that have arisen due to the inaction of the federal government to regulate greenhouse gases.

Christine Lesicko authors our third student note, *Attempting to (De)Regulate Genetically Modified Crops: The Supreme Court Overrules the District Court's Injunction*, which discusses the case of *Monsanto v. Geertson Seed Farms*. The crux of this case revolved around the proper procedure required when deregulating a genetically modified crop. Ms. Lesicko's note explores the background and issues regarding the regulations of genetically modified crops. Her analysis explains how deregulation can have significant impact on the environment and thus a complete investigation should always be required before a genetically modified crop is released from regulation. Ms. Lesicko discusses the potential implications of deregulating a genetically engineered crop without taking a "hard look" at the environmental consequences and concludes with a vote of confidence in the regulatory procedure in place as long as it is properly followed.

Rachel Meystedt authors our final student note, *Stop the Beach Renourishment: Why Judicial Takings May Have Meant Taking a Little Too Much*, which reviews the ramifications of the case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*. This U.S. Supreme Court case analyzed whether private property owners had lost their property due to a "judicial taking" by the Florida Supreme Court in violation of the Takings Clause in the Constitution. Mrs. Meystedt discusses the concept of a judicial taking and how it currently does not exist in American jurisprudence. In her opinion, the effect of this is to leave property owners with no redress for their injury whenever a judicial decision leaves them without their property. However, Mrs. Meystedt theorizes that if judicial takings were to be recognized, the court system would never be able to change property law for fear of a lawsuit by the affected property owner. Her note delves into the policy and philosophy regarding what role our judiciary should have in creating and interpreting law. Mrs. Meystedt concludes with the opinion that the American legal system may not be ready for the doctrine of judicial takings, but that its implementation may not be far off.

As always, this volume ends with updates discussing recent court holdings through the country that impact environmental law.

We would like to offer special thanks and recognition to the 2010–2011 Editorial Board for their hard work on Volume 18 of the Journal. This journal would not be possible without diligence, dedication and

passion for its continued success. Additionally, huge thanks are in order for the 2011–2012 Editorial Board who contributed much to the editing of this issue. MELPR is blessed to have such an accomplished and committed Board that has already begun to lead the Journal to new heights. During this year, MELPR has unveiled a new social media initiative with the goal of promoting current and past authors' future scholarship, and has plans in progress to host its first environmental law symposium.

Finally, thanks goes to our advisor, Professor Thom Lambert, and our new advisor, Professor Troy Rule, for their immeasurable help and guidance as we put forth another edition.

MICHAEL A. MOOREFIELD
EDITOR-IN-CHIEF, 2010–2011

KATHERINE E. VOGT
EDITOR-IN-CHIEF, 2011–2012