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# Environmental Law Updates

Monsanto Co. v. Bowman, 657 F.3d 1341 (Fed. Cir. 2011)

The Monsanto Company and Monsanto Technology LLC ("Monsanto") sells genetically modified seeds to soybean growers. Monsanto's product features patented pesticide-tolerant genes that allow soybean growers to make liberal use of the glyphosate-based pesticide Roundup, another Monsanto product. Farmers who buy these seeds sign a license agreement to use them for a single growing season, to keep the seeds for themselves, and to not save any of the subsequent crop for replanting, research, or seed production.

There is an exception to the prohibition on the resale of these seeds. Monsanto has expressly authorized the sale of its seeds to grain elevators as commodity seeds. Commodity seeds are an undifferentiated mixture of pesticide-tolerant seeds and other varieties, and are commonly used as feed. Monsanto conceded in its respondent brief that the license that prohibits the resale of its pesticide-tolerant seeds does not provide for their sale as commodity to grain elevators.

The defendant Bowman used Monsanto seeds for his first crop in the years 1999–2007. Bowman also supplemented his first crop each year with a "second-crop," or late-season planting. Because a second crop is less likely to be lucrative, Bowman opted not to plant costly Monsanto seeds for this phase, instead using cheaper commodity seeds purchased from Huey Soil Service, a local grain elevator. Bowman used glyphosate-based pesticide on his second crop plantings and conceded that these soybeans were pesticide-tolerant. Although Bowman did not save the seeds from his first crop, he gathered the progeny of the second-crop plantings for reuse the following year.

Monsanto sued Bowman in the United States District Court for the Southern District of Indiana, alleging that Bowman's reuse of his second-crop seeds was a violation of its patent rights as expressed in its license to Bowman. Bowman countered that he purchased the second-crop seeds from Huey Soil Service and they were not subject to the agreement with Monsanto that forbade second-generation use. Bowman also cautioned that interpreting Monsanto's patent to allow it to retain control over self-replicating products would undermine the exhaustion doctrine, which holds that method patents are exhausted upon sale of the good embodying the method.

Monsanto insisted its rights to the genetic patent did not terminate when those seeds reached the grain elevator and were added to the rest of the undifferentiated commodity seed. The license agreement provided that their seeds were not to be replanted for second-generation use, regardless of their stint in a grain elevator. Monsanto cited the Plant Variety Protection Act and argued that it must retain ownership over their seeds for subsequent generations if inventors are ever permitted to control goods that reproduce themselves.

Monsanto sought legal damages for Bowman's plantings dating back to 1999, when Bowman had first replanted his commodity seeds. Bowman claimed to receive notice of Monsanto's claim against him once the action had commenced. Monsanto produced a letter it had sent to Bowman in 1999 containing an allegation of patent infringement.

The Federal Circuit cited cases where replantings of seeds without Monsanto's permission were held to be unauthorized, even when the planter had never signed an agreement with Monsanto. The court interpreted Bowman's license agreement to make no distinction between the seeds that Bowman used in his first crop with those from his second crop: both crops were subject to the prohibition on replanting. The fact that Bowman had obtained his second-crop seeds from a grain elevator made no difference: the pesticide-tolerant seeds remained within Monsanto's control.

BURKE BINDBEUTEL

United States v. King, 660 F.3d 1071 (9th Cir. 2011)

The Klamath River ("River") runs through part of the Californian land the Karuk Tribe has considered home for many centuries. Gold deposits are located in the River, as well as the Coho, or silver salmon, for which the River is a designated critical habitat. Additionally, the River is a source of cultural and religious significance to the Tribe. To remove the gold deposits, miners will employ a machine called a suction dredger, which vacuums a small area of the riverbed and extracts the gold from other sediments. The Tribe contends that this mining significantly disturbs surface resources and destroys the aquatic habitat. Particularly, they allege that this mining activity kills salmonid and other fish eggs, kills fish food sources and disturbs the fish and their reproductive activities. However, under the Safe Drinking Water Act, individual states issue permits for underground water injection, in order to prevent contamination of underground sources of drinking water. In January of 1987, Cory King, the manager of Double C Farms Partnership, a large farm containing both crop land and livestock, applied for a permit to inject winter runoff from a creek that ran through the farm into 500 foot deep wells on the property. The application stated that the water "must be clean" because it was going to be pumped out of the well and used for irrigation of the crop land in the summer. King's permit was denied.

In 2005, an inspector with the Idaho Department of Agriculture was doing a routine inspection of Double C's farm when he noticed that valves attached to the wells were installed backwards, causing animal waste from Double C's livestock operation to flow backwards into these deep wells. In February of 2008, the federal government filed criminal charges against King, alleging four counts of willfully violating a state-administered underground injection control program under the federal Safe Drinking Water Act. He was convicted of all four counts.

On appeal to the Ninth Circuit, King made three arguments. First, he claimed that the government was required to prove that his injections implicated or pertained to an underground source of drinking water. Second, he claimed Idaho's permitting requirement for injection wells is not part of an applicable underground injection control program because it had a greater scope of coverage than the Safe Water Drinking Act

required. Third, he argued that if his conviction stood, Congress will have exceeded its Commerce Clause authority under the Constitution.

In response to King's first argument, the court held the government did not need to prove King's injections implicated or pertained to any source of drinking water. Instead, the applicant for a permit has a burden to prove that his activity will not have any adverse effects on drinking water. Moreover, it does not matter if the defendant can prove that the water being injected into wells is clean because that water can dissolve contaminants while it passes through the well, and these contaminants can then leach into sources of drinking water. The court then held that to prove a criminal violation of the Safe Drinking Water Act the government only needs to show a defendant willfully injected fluid more than eighteen feet into the ground without a permit, and the defendant knew a permit was required by law. The court also held the Idaho underground injection program was valid because its provisions had been specifically incorporated as applicable when the federal government approved Idaho's program.

Furthermore, the Ninth Circuit upheld the constitutionality of the injection portion of the Safe Drinking Water Act under the Commerce Clause. The court first pointed to the considerations Congress provided within the statute claiming that contaminated drinking water could have deleterious effects on Medicare and Medicaid. Moreover, the court believed water is a commodity often shipped across state lines. The pollution of drinking water could have a drastic effect on the interstate market, and therefore, even when the pollution is confined within one state's borders, Congress has the power to make laws pertaining to that pollution.

JAMES BORESI

1000 Friends of Fla., Inc. v. Palm Beach County, 69 So. 3d 1123 (Fla. Dist. Ct. App. 2011)

The Fourth Circuit recently reversed a trial court decision that would have permitted mining within the Everglades. The Palm Beach County Commission issued a development order to Bergeron Sand and Rock Mine Aggregates, Inc. ("Bergeron"), which granted them the right to mine within the Everglades. The appellants, 1000 Friends of Florida and Sierra Club, Inc., filed a complaint for declaratory and injunctive relief claiming the development order was inconsistent with a Future Land Use Element ("FLUE") policy. The FLUE policy stated that mining and excavation shall only be permitted within the Everglade region to support public roadway projects, agricultural activities, or water management projects. Bergeron used some of the aggregate mined from the property to support public roadway projects, and it was required to submit an annual compliance report detailing which projects the mined material was headed for. However, the President of Bergeron admitted he could not control whether the material excavated from the Everglades mining site would be used for the construction of public highways or for some other purpose.

The trial court entered summary judgment in favor of Bergeron concluding that the proposed mining was proper since at least a portion of the material excavated from the site would be used to support public road construction. In reviewing the trial court's decision under a de novo standard of review, The Fourth Circuit used Florida Supreme Court precedent to determine that the word "only" contained in Florida's FLUE policy was a term of exclusivity and therefore was equivalent to the word "solely." The Fourth Circuit concluded that the word "only" limited mining in the Everglades to the three enumerated activities: public roadway projects, agricultural activities, and water management projects.

Although Bergeron contended, and the trial court agreed, that the FLUE policy only required the mining "support" road building, the Fourth Circuit rejected this position which they believed elevated the word "support" to the detriment of the word "only." The Fourth Circuit pointed out that such an interpretation would allow mining projects to proceed where only one percent of the aggregate is used for public roads or another enumerated use. The statute would have no practical effect of limiting the mining activities to those three uses. The Fourth Circuit supported its

interpretation with a common canon of statutory construction: "to express or include one thing implies the exclusion of the other." Following this rule, it concluded the three uses listed were intended as an exclusive list that excluded any use not listed. The Fourth Circuit also supported its position with a rule of statutory interpretation that requires courts to avoid rendering any part of a statute meaningless. The Fourth Circuit believed the trial court's interpretation of allowing projects in "support" of building highways rendered the term "only" superfluous.

The Fourth Circuit's limiting interpretation of the FLUE policy will ensure that mining companies will not be able to participate in mining projects within the Everglades Agricultural Area that are not exclusively rooted in the three enumerated purposes of public road projects, agricultural activities, and water management projects.

PATRICK KUTZ

Patuxent Riverkeeper v. Md. Dept. of Env't, 422 Md. 294 (2011)

In this first impression case, the Court of Appeals of Maryland held that a nonprofit environmental group, Patuxent Riverkeeper ("Patuxent"), had standing to initiate a judicial review of the Maryland Department of Environment's ("MDE") decision to issue a "non-tidal wetlands permit." One of Patuxent's members had standing because he had alleged sufficient harm to his "aesthetic, recreational, and economic interests in connection to the issuance of the non-tidal wetlands permit issue."

MDE had issued a non-tidal wetlands permit to Petrie/ELG Inglewood, LLC, otherwise known as Woodmore Towne Centre, LLC ("Woodmore"). Woodmore sought to construct a road expansion and stream crossing to provide greater access to the Woodmore Towne Centre development. After MDE issued the permit to Woodmore, Patuxent initiated a judicial review of MDE's decision in the Circuit Court of Maryland. However, the circuit court dismissed the case due to lack of standing. Patuxent then petitioned the Court of Appeals of Maryland for a writ of certiorari, which was granted without any prior proceeding in the intermediate appellate court.

Chapters 650 and 651 of Maryland's laws enacted § 5-204(f) of the Environment Article in 2009. Section 5-204(f) became effective on January 1, 2010, and allows a judicial review of a final determination by the MDE regarding any "issuance, denial, renewal, or revision of a permit" as long as the person either: (1) meets the threshold requirements under federal law; and (2) is the applicant, or "participated in a public participation process through the submission of written or oral comments, unless an opportunity for public participation was not provided." To meet the federal threshold of standing, a plaintiff must show that he suffered a concrete injury in fact that is traceable to the alleged actions of the defendant. Furthermore, the injury must be redressable by a favorable decision. Previously, only people whose personal or property rights were adversely affected by MDE's decision had standing. Furthermore, a group could only establish standing if it had a property interest of its own, separate from its members. The new threshold enabled both individuals and organizations to challenge MDE's permit decisions.

A member of Patuxent, Mr. Linthicum, alleged that he had suffered an injury in fact because the permit, which allowed the construction of a road extension and river crossing, had endangered his "aesthetic, recreational, and economic interests in the Patuxent River." The court found that Mr. Linthicum had sufficiently asserted demonstrable aesthetic, recreational, and economical interests because he is an avid paddler who creates and sells maps of the river. According to scientific and academic literature, the construction would cause nitrogen and other pollutants to seep into the water downstream affecting the flow rate and ecology of the river. The wetlands also absorb toxins created by urbanized lands, and the eventual loss of the wetlands will lead to the death and desertification of the tributaries, eventually affecting the main river.

According to appellate court, Mr. Linthicum's reasonable concern about the construction's future harmful effects on the river was sufficiently alleged and closely connected to show the harm would be caused by the construction. Furthermore, resending the permit was one method of addressing the injury and preventing any further harm. Therefore, the court determined Mr. Linthicum had the minimum standing as required by federal law, and the judicial review should be allowed to continue.

The dissent agreed with the majority's analysis of the more lenient federal standing requirements. However, the dissent felt the majority's interpretation of the threshold requirements of standing was too broad because it would allow a plaintiff to claim that any environmental degradation is harm to him.

The dissent believed there needed to be a stronger interest than a plaintiff's generalized concern for the environment when challenging a State's environmental permit. Also, the dissent did not consider Linthicum's fears reasonable because he had not stopped and did not plan to stop his recreational activities. He had also seen no visual change in the river, an important reasonableness factor when claiming an aesthetic interest. Mr. Linthicum did not demonstrate a concrete and particularized injury in fact, and his alleged harms were not traceable to the issuance of the permit. According to the dissent, the court should analyze a case from the potential harm caused by the activities the permit allows, not the harm caused by the urbanization of Woodmore.

The dissent recognized the lack of a clear standard; but felt that at some point, an injury can no longer be traced to the defendant's activities. Linthicum needed to allege a more concrete and particularized injury. The dissent found the harm Linthicum alleged to be based on urbanization, not the completed construction. The dissent felt that Linthicum neglected to explain how the generalized environmental harm would harm his own interests. The dissent argued that the court should not accept Linthicum's reasoning because it would allow any petitioner or organization that appreciates nature to say that the "environmental degradation is per se harm to them." The dissent argued that the case should be affirmed and dismissed for lack of standing.

MARRIAM LIN

Friends of Animals v. Caldwell, 434 F. App'x 72 (3d Cir. 2011)

The case concerns a call for review of a decision made by the National Park Services concerning its decision and methods to reduce the white-tailed deer population in a National Historic Park. Between the years of 1983 and 2009, the white-tailed deer density in Valley Forge National Historic Park, located northwest of Philadelphia, increased 31–35 deer per square mile to 241 deer per square mile. Due to appropriate vegetation to meet a deer's voracious appetite, it is estimated the park can only support 10–40 deer per square mile.

The National Park Services strived to protect, maintain, and restore the native plant life while maintaining the white-tailed deer population. The National Park Services created four alternative plans to meet these goals following a three-year study, multiple public meetings, comments on the issue, and the distribution of an environmental impact statement.

Plan A, dubbed "No-Action," called for a continuation of the current efforts in maintaining and monitoring deer and vegetation life. Plan B, dubbed "Combined Nonlethal Actions," included rotational fencing of forested areas along with the introduction of chemical reproductive control elements for the deer population once an effective chemical agent became available. Plan C, dubbed "Combined Lethal Actions," entailed a direct reduction in the white tailed deer population through the use of sharpshooters. Plan D, dubbed "Combined Lethal and Nonlethal Actions," involved the use of sharpshooters to reduce the deer population, plus the use of a chemical reproductive agent once one became obtainable. The National Park Service chose Plan D, finding that it would take four years until the optimal deer population could be reached. Prior to narrowing the options down to the aforementioned four, the National Park Service considered the option of introducing wolves, cougars, or coyotes to the park. However, such a plan was deemed unsuitable because the park was relatively close to a densely populated urban area. Thus it would not be appropriate to introduce large predators and there was insufficient evidence to show that such predators would effectively reduce and control the population.

The plaintiffs, two non-profit groups, Friends of Animals and Compassion for Animals, filed a complaint challenging the finding that the use of sharpshooters and chemical agents was the best solution for the

deer population. The district court granted summary judgment for the National Park Services and denied the plaintiffs' motion for preliminary injunction as moot and further denied the plaintiffs' motion to supplement the record with two additional studies. The plaintiffs' subsequently appealed.

The Third Circuit affirmed the ruling of the district court after reviewing the summary judgment de novo and applying the proper standards of review to agency decisions. The plaintiffs charged that the National Park Services did not follow the National Environment Policy Act ("NEPA") when it failed to consider increasing the coyote population in its final assessment, claiming the National Park Service failed in determining when an option is "reasonable." This alleged failure of reasonability stemmed from the preference to "shoot the deer," and the other options were nothing more than token policies presented in order to appease the public.

Referencing *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686 (3rd Cir. 1999), the court stated that although an agency ought to review every reasonable alternative, there are limits to the thoroughness with which an agency can analyze every option. Finding that not only did the National Park Services adequately research and take note of possible shortcomings in increasing the coyote population, the plaintiffs failed to offer a detailed counterproposal that had a chance of success. The only evidence offered by the plaintiffs were two studies, which the court found to actually support the National Park Service's findings. Relying on the empirical studies, the multiple meetings, and the options pursued prior to narrowing the alternatives down to one, the court found the decision of the National Park Service neither arbitrary, capricious, nor in error.

The plaintiffs argued the district court failed to conduct a probing review of the record, substituting its own reasoning for the National Park Services'. The Third Circuit found that even if the district court failed to conduct a probing review and substituted its own reasoning, the error does not require a remand in this case as the current court found the National Park Service to be in compliance with the NEPA.

The Third Circuit finally addressed the district court's denial of the plaintiffs' motion to supplement the record with additional studies, finding that the studies ultimately either (a) did not conflict with the NPS's

findings or (b) were irrelevant due to the focus of the subject matter being on coyote–human interaction, not coyote–deer interaction.

The Third Circuit affirmed the decision of the district court, allowing the National Park Service to regulate the white-tailed deer population.

KEVIN LUEBBERING

Am. Elec. Power Co., Inc., et al. v Connecticut, 131 S.Ct. 2527 (2011)

In September 2005, eight states, New York City, and three land trusts brought suit in the United States District Court for the Southern District of New York against various large power corporations that own and operate fossil-fuel-fired power plants in twenty states. The plaintiffs sought to abate the corporations' ongoing contributions to the public nuisance of global warming and to obtain a decree requiring an initial cap on the defendants' carbon-dioxide emissions that would then be further reduced annually. The district court dismissed the plaintiffs' federal common law action as a non-justiciable political question. The Court of Appeals for the Second Circuit vacated and remanded, holding that the suit was not barred by the political question doctrine and that the plaintiffs had Article III standing. Turning to the merits of the case, the Second Circuit found the plaintiffs had stated a claim under the federal common law of nuisance and the Clean Air Act did not displace federal common law. The Second Circuit stated, "[u]ntil EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact 'spea[k] directly' to the 'particular issue' raised here by Plaintiffs" as its reasoning for declaring the federal common law of nuisance to not be supplanted. The Supreme Court then granted certiorari at the request of the defendants to hear the issue of whether the plaintiffs can maintain federal common law public nuisance claims against carbon-dioxide emitters.

The defendants argued to the Supreme Court that the federal courts lacked jurisdiction to hear this case. The Court was equally divided regarding this issue. Four members of the Court held that at least some of the plaintiffs had Article III standing under *Massachusetts v. EPA* (a 2007 case where the Court held the Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases), while the other four justices adhered to the dissenting opinion of *Massachusetts* and argued none of the plaintiffs had standing. Under the rule from *Nye v. U.S.*, the equally divided Court affirmed the Second Circuit's decision in regard to standing and proceeded to the merits of the case.

The Court's examination of the merits began with a strong statement from *Erie R. Co. v. Tompkins*; "[t]here is no general federal common law." However, the Court shortly thereafter mitigated this

statement by explaining how a more keen understanding of federal common law had developed.

> The new federal common law addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands. Environmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'

The Court went to maintain that Supreme Court decisions have allowed federal commons suits brought by one state to abate the pollution emissions from another state.

The Court next stated the legislative displacement of federal common law does not require the same strict standards as preemption of state laws. The test for whether congressional legislation displaces federal common law is simply whether the statute "speak[s] directly to [the] question" at issue. Using this lenient test, the Court held the Clean Air Act in conjunction with the EPA's actions after *Massachusetts* had displaced any federal common law right to seek an abatement of carbon-dioxide emissions from fossil-fuel-fired power plants. In its reasoning, the Court found the Clean Air Act directs the EPA to list categories of sources that contribute to air pollution and endanger the health and welfare of the public and to provide standards for the emissions of the substances. In addition, the Act also provides for several enforcement mechanisms. Further, the decision proclaimed the EPA, an expert agency, and not district court judges, to be the best suited to serve as the primary source for greenhouse regulation.

While this decision may have precluded the action of these particular plaintiffs, it did not leave the EPA impervious from suit; "[i]f EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court." Also, the Court left open the possibility that the plaintiffs might be able to bring suit under state law. It did not decided on this issue because it was not briefed

in the lower courts, but stated that the availability of a state law claim was dependent on the preemptive affective of the Clean Air Act.

TREVER NEUROTH

Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs, 650 F.3d 652 (7th Cir. 2011)

The Army Corps of Engineers ("Corps") granted a permit allowing Waste Management to destroy an area of wetlands bordering on Horseshoe Lake State Park ("Park") in Illinois. Waste Management indicated that it would be removing soil from the wetland area to cover layers of waste in its adjacent landfill; this is known as daily cover. Thus, approximately 61% of the wetlands area would be transformed into a dry borrow pit. The permit was granted on the condition that Waste Management mitigate the destruction by doubling the amount of wetlands on a neighboring piece of land. Once the current landfill reached capacity, Waste Management had plans to turn the borrow pit into a second landfill; however, that project was tentative pending approval by the Illinois Environmental Protection Agency. Nevertheless, once they obtained the permit from the Corps, Waste Management had the authority to begin extracting their daily cover from the wetlands, and destruction of the wetlands was inevitable regardless of whether the second landfill project gained approval.

American Bottom Conservancy ("Conservancy") is an environmental group dedicated to protecting a 175 square mile floodplain, the American Bottom which include both the Park and the wetland area in question. The Conservancy brought suit seeking to invalidate the permit granted by the Corps. In support of its allegations, the Conservancy had several members submit affidavits, two of which indicated that the construction of the landfill would be detrimental to their ability to enjoy watching various wildlife during visits to the Park. The third affidavit indicated the destruction of the wetlands would reduce the amount of wildlife observable in and around the Park. The defendants filed no counter affidavits.

The district court held that, because the first two affidavits only alleged harm caused by the creation of a landfill, and because the Corps' permit served only to allow the daily cover extraction but not the construction of a landfill, the first two affidavits did not prove any causal connection between the injury and the offending conduct. Therefore, neither of those affidavits satisfied the Article III standing requirements. The district court recognized that the third affidavit did not suffer these

problems because it referred to injuries caused by wetland destruction in general rather than landfill construction; however the third affidavit failed to establish Article III standing because it could not show any concrete injury. Accordingly, the district court found it lacked subject matter jurisdiction to adjudicate the case and dismissed without prejudice. The Conservancy appealed the dismissal arguing the affidavits set forth facts sufficient to establish standing.

On review, the Seventh Circuit indicated that to establish standing, a plaintiff needs to allege the relief sought will, if granted, avert, mitigate or compensate for an injury caused by or likely to be caused by the defendant. The court also stated the injury alleged need not be a great one; that in fact, the magnitude of the harm was not a crucial factor underlying the requirements of standing. Accordingly, the court indicated a mere reduction in or deprivation of the ability to observe wildlife is an injury sufficient to confer standing. Finally, the court stated that a suit to redress an injury to the plaintiff establishes Article III standing as long as there is some non-negligible, non-theoretical, probability of harm, which the plaintiff's suit would remedy if successful. Rejecting the lower courts analysis, the Seventh Circuit found that although not a certainty, the money and resources expended by Waste Management made it likely that the landfill would be approved. As such, the first two affiants had alleged a likely harm because the landfill was likely to go forward and this would make their wildlife viewing experiences less enjoyable. Furthermore, the court explained how the suit would provide remedy for that harm because if the Corps' permit was voided neither the daily cover extraction nor a future landfill could go forward and destroy the wetland area. Therefore, success would prevent the diminution in their wildlife viewing. Based on the foregoing, the court found the first two affidavits were sufficient to establish Article III standing.

Agreeing with the third affiant, the Seventh Circuit stated that since it was so close in proximity to the Park, the destruction of the wetlands, regardless of the cause, would result in a reduction of observable wildlife. Furthermore, the Seventh Circuit also agreed with the third affiant regarding the assertion that the mitigation area would not adequately redress these harms because the benefits of that mitigation area would take time to develop and would not be experienced in the near future. In light of those facts, the court found that the third affidavit had

alleged an injury, which a successful suit would remedy. Additionally, the Seventh Circuit indicated its precedence had been wrongly applied by the lower court and it was not necessary for a plaintiff to abandon and cease using the area altogether to establish a concrete harm. Rather, the court said the mere diminution in the pleasure derived from using the area was enough to constitute injury for standing.

Since the affidavits showed the plaintiff would suffer harm insomuch as the wetland destruction, regardless of its cause, would diminish the amount of observable wildlife, the court found sufficient injury in fact to establish standing. Additionally, because invalidation of the Corps' permit would prevent the wetland destruction, the court was satisfied that the suit, if successful, would remedy the harm alleged as is required by the standing doctrine. Thus, the Seventh Circuit reversed the district court and ordered Conservancy's suit reinstated.

RYAN NIEHAUS

Fla. Wildlife Federation, Inc. v. South Fla. Water Mgmt. Dist., 647 F.3d 1296 (11th Cir. 2011)

Five environmental groups filed suit in July 2008 against the Environmental Protection Agency ("EPA") and its administrator, asserting that Florida's narrative nutrient standard was inadequate under either the 1998 Clean Water Action Plan or the 1998 National Strategy Report. As a result, the Clear Water Act ("CWA") required the EPA administrator to promptly propose and publish new standards to be adopted within 90 days of publication. Eventually, thirteen other parties intervened as defendants, all denying the 1998 documents constituted a sufficient determination to require action.

In 2009, during the course of that suit, the administrator issued an unequivocal determination that the standard was inadequate. The EPA formally determined the standard was inadequate, at which point new standards were indisputably required. On December 30, 2009, the district court issued a consent decree, moved for by the plaintiffs and the EPA, that implemented a two-phase rulemaking process. Phase I required EPA proposal of numeric nutrient standards for lakes and flowing waters by January 14, 2010, with adoption by October 15 of the same year, unless those requirements were superseded by the proposal of similar standards by the state. Phase II required standards for coastal and estuarine waters by January 14, 2011, to be adopted by October 15. Two of the intervening parties, the Water Management District ("WMD") and the Utility Council ("UC"), appealed the order to the Eleventh Circuit.

In the process dictated by the decree, new standards were proposed for public comment. The UC argued against adoption, claiming that the existing rules were sufficient to meet CWA requirements. The standards were passed notwithstanding those arguments.

The UC alleged three injuries from the decree in its appeal. It claimed that conflicting compliance directives would cause damages. Additionally, it asserted its interests would be damaged because of its limited input into the rulemaking procedure, especially given the timeframe under the decree. Finally, it claimed a procedural injury stemming from the denial of its request for an evidentiary hearing before the district court approved the decree. The WMD alleged two additional injuries. First, it claimed violation of due process and administrative

rights in the decree process, because the process lacked an administrative record and sufficient discovery or fairness. Second, it claimed that the decree's timeframe was unrealistic and damaged its interests by denying it sufficient access to the decision-making process.

However, even without the consent decree, the Phase I rule could not be vacated because it was supported by the 2009 determination, which was independent of the decree. As a result, any injuries stemming from the Phase I rule could not be addressed and the Eleventh Circuit found the claims regarding the decree itself to be moot. Additionally, injuries sustained in the rulemaking process could no longer be redressed once the EPA had promulgated its rule, rendering moot the injuries sustained in the rulemaking process. The WMD argued in response that the claims were capable of repetition, yet evading review, but the Eleventh Circuit observed that a direct challenge to either the determination or rule would encompass review of all of the issues at hand, including the WMD's claims. As a result, the Eleventh Circuit dismissed the Appellants' claims regarding the Phase I rule. The Eleventh Circuit held the Appellants' claims regarding the Phase II rule nonjusticiable for the same reasons, and likewise dismissed them. The Eleventh Circuit made clear that it had not closed the Appellants' avenue to challenge the 2009 determination, even though the dismissal of their challenge to the consent decree was justified.

Judge Wilson, dissenting, challenged the dismissal claiming the holding essentially prevented Appellants from asserting any means of challenging the agency action. He argued that, even if the Appellants had filed an independent suit against the determination (as they had), they could not, under the courts ruling, challenge the determination as long as the consent decree stands, which leaves them no means of redress. Further, he stated precedent does not support the majority's holding of no imminent procedural injury. Rather, case law indicates the consent decree's influence on the rulemaking process may be sufficient to create injury. Finally, he disagreed that there was no redressable injury, as a favorable decision would have allowed the EPA and the district court to evaluate whether or not the new standards were required. He claimed this combination of factors effectively prevents any challenge to a consent decree that is entered before the conclusion of a rulemaking process.

MICHAEL A. POWELL

Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66 (D.C. Cir. 2011)

The National Environmental Policy Act ("NEPA") requires government agencies to prepare an environmental impact statement for any major federal action significantly affecting the human environment. In preparing this statement, government agencies must "take a hard look" at the effects of their actions, with the hope that they will consider all the environmental impacts of their actions and that their decisions will not be "arbitrary or capricious."

The Pinedale Anticline Project Area ("Project Area") covers thousands of acres of land in Wyoming. The Bureau of Land Management ("BLM") manages about 80% of the Project Area. It is believed that the land covers the third-largest natural gas field in the United States. The Project Area is also part of the winter range of mule deer and pronghorn, and provides year-round habitat for the greater sage-grouse. It provides mating-display grounds, brood-raising areas, and wintering areas for the grouse. Mule deer, pronghorn, and sage-grouse are all game species of interest to local hunters.

In 2000, the BLM authorized an expansion of natural gas development in the Project Area. Development increased faster than expected. The BLM additionally made exceptions to seasonal restrictions on development. Wildlife population declined, at least in part due to the drilling and associated increase in human presence.

In 2005, oil and gas companies proposed a new development plan to allow for additional wells and year-round drilling. For three years, the BLM considered the proposed changes. They analyzed five alternatives, and issued an environmental impact statement examining the various proposals. In 2008, they issued a decision based on one of the proposed alternatives which would allow for year-round development of natural gas fields.

The Theodore Roosevelt Conservation Partnership ("TRCP") filed a complaint in the United States District Court for the District of Columbia. TRCP argued that the BLM's environmental impact statement failed to take a "hard look" at the impact of increased drilling on hunting in the Project Area. TRCP further argued that the decision, including

mitigation measures in the 2008 decision, was arbitrary and capricious. The district court granted summary judgment in favor of the BLM.

The D.C. Circuit Court of Appeals took up the appeal. The court held the BLM's analysis of the alternatives for the development of the Project Area sufficient. The court rejected TRCP's argument that the BLM was required to consider alternatives that would reduce natural gas drilling in the Project Area. The court held that the BLM had goals of allowing for natural gas exploration and development, as well as preserving the land for grazing and protecting wildlife. However, the court held that the BLM never had the objective of preventing all declines in wildlife population. The court held that the BLM examined a reasonable range of alternatives in light of its goals.

The circuit court examined the record and found the BLM had considered the impact increased drilling would have on hunting. The BLM reasoned that hunting in the Project Area would decline because the development would lead to a decrease in the amount of big game and upland game birds. The court held this examination satisfied NEPA's "hard look" requirement.

The circuit court rejected TRCP's argument that the mitigation steps offered in the BLM's decision were arbitrary and capricious. The BLM instituted policies intended to limit the impact that increased development might have on wildlife. TRCP identified examples of the insufficiency of those measures. The court rejected TRCP's argument because it was unable to propose any alternatives that would allow for increased development of the natural gas fields. The court held that the BLM was only obligated to limit unnecessary or undue degradation, not all degradation.

For these reasons, the circuit court affirmed the district court's finding for the Bureau of Land Management.

AARON ROWLEY

EPA Final Rulemaking: Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles[1]

On August 9, 2011, the Obama Administration announced the first-of-its-kind fuel efficiency and greenhouse gas pollution standards for work trucks, buses, and other heavy-duty vehicles. The stated goal of this new rule is to address the urgent and intertwined challenges of dependence on oil, energy security, and global climate change and reducing fuel use is a step in that direction. The new standards will save American businesses, which operate and own the commercial vehicles, approximately $50 billion in fuel costs. The U.S. Department of Transportation ("DOT") and the Environmental Protection Agency ("EPA") developed the greenhouse gas pollution standards. These government agencies also worked closely with truck and engine manufacturers, fleet owners, the State of California, and other environmental groups and stakeholders.

Semi-trucks, heavy-duty pickup trucks, vans, and vocational vehicles such as transit and refuse trucks are the focus of the DOT–EPA program. Specific standards are tailored for each category. EPA Administrator Lisa Jackson stated, "More efficient trucks on our highways and less pollution from the buses in our neighborhoods will allow us to breathe cleaner air and use less oil providing a wide range of benefits to our health, our environment and our economy."

As a result of the application of the joint DOT–EPA program, the heavy-duty trucks and bus industry will achieve record savings. Semi-trucks are expected to reduce their fuel consumption by approximately 20% by model year 2018, saving an estimated four gallons of fuel for every 100 miles traveled, with a corresponding reduction in greenhouse gas emissions. Additionally, combination vehicles such as trucks and buses built in 2014 through 2018 are expected to reduce oil consumption by 530 million barrels and lessen greenhouse gas pollution by 270 million metric tons. Vocational vehicles including delivery trucks, buses, and garbage trucks are also required to reduce fuel consumption and greenhouse gas emissions by an estimated 10% by model year 2018.

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[1] 40 C.F.R. pts. 85, 86, 600, 1033, 1036, 1037, 1039, 1065, 1066, and 1068 (2011).

These vehicles could save an average of one gallon of fuel for every 100 miles traveled.

The standards from the joint DOT–EPA program will also provide a wide range of benefits to the environment. These standards will reduce emission of harmful air pollutants like particulate matter which can cause asthma, heart attacks, and premature death. The benefits of the program will also be reaped by consumers and businesses by reducing the cost for transporting goods and spurring growth in the clean energy sector. Additionally, the program will foster innovative technologies and will provide regulatory certainty for manufacturers.

CATHERYNNE WHITMORE

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