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United States Pub. Interest Research Group v. Atl. Salmon of Me., LLC, 2003 U.S. App. LEXIS 16055 (1st Cir. August 6, 2003)

On September 25, 2000, the United States Public Interest Research Group (USPIRG) and two of its members brought a suit against Atlantic Salmon and Stolt Sea Farm (Stolt) under the Clean Water Act, alleging the defendant's salmon farming operation released pollutants without the required EPA permits. The District Court granted summary judgment in favor of UPRIRG, ordering injunctive relief and fining Atlantic Salmon $50,000. Shortly after ordering the injunctive relief, the Maine Board of Environmental Protection issued a general permit covering all Maine salmon farming operations. Atlantic Salmon filed an expedited appeal, claiming the district court's injunction was beyond the court's jurisdiction, because the terms of the injunction differ from those of the Maine general permit.

Atlantic Salmon and Stolt operate a total of nine salmon farms in Maine.[1] The two companies sought, but did not receive, EPA permits in 1990. They continued farming without permits under EPA guidance until January 2001. In June of 2002 the district court found that the two companies had violated the Clean Water Act by discharging five types of pollutants.[2] To correct the damage caused by the pollutants, the court ordered an injunction that, among other things, required stocking only native species of salmon, limiting stock to one-class year, and a fallowing schedule that would require pens to remain fallow for specified periods of time.

Atlantic Salmon and Stolt argued that the injunction violated subject matter jurisdiction because it was too broad, and the Clean Water Act's shield provision provided that compliance with an effective permit is compliance with the act. The companies argued that the court injunction should give way to permits in a conflict situation.

The First Circuit held that the injunction was neither a mistake of law nor an abuse of discretion, because it imposed additional constraints but did not undermine Maine's general permits. The appellate court reasoned that while the primary jurisdiction doctrine permits courts to defer to agency opinions, the ultimate decision rests on the disposition of the court case and the possibility of undermining the agency in question. The appellate court found that, in this case, no such undermining had occurred, and as such, the district court was affirmed without prejudice.

JAMES C. CHOSTNER

Clean Air Mkts. Group v. Pataki, 338 F.3d 82 (2d Cir. 2003)

In 1990, Congress amended the Clean Air Act of 1970 in order to reduce air pollution by putting into effect an emission allocation and transfer system. This system allotted electricity-generating utilities a certain number of allowances of emission per year, with each allowance authorizing the utility to emit one ton of sulfur dioxide. Each successive year, the total number of allowable emissions is reduced. The allowances may be

[1] *Id.* at 2. Atlantic runs four farms in Machias Bay and Two in Pleasant Bay. Stolt runs three farms in Cobscock Bay.

[2] *Id.* at 9-11. The specific pollutants were non-North American salmon, large quantities of salmon fecies, uneaten salmon food, chemicals used to fight sea lice and copper flakes from the net pens.

transferred to any other person permitted to hold allowances. In 2000, the New York legislature passed the Air Pollution Mitigation Law, which required the New York State Public Service Commission to charge an air pollution mitigation offset when a utility sold or traded allowances to one of fourteen upwind states. This offset was equal to the amount the utility received in exchange for the allowances.

The Clean Air Markets Group (CAMG), an association of utilities, emissions allowance brokers, mining companies, and trade associations filed this action against Governor Pataki and the Commissioners of the New York Public Service Commission. The complaint was brought on the grounds that Section 66-k of the New York law is preempted by Title IV of the Clear Air Act Amendments of 1990, and Section 66-k violates the Commerce Clause of the United States Constitution. The district court granted a motion for summary judgment by CAMG, holding that Section 66-k conflicts with Title IV. It found that Congress had contemplated geographic restrictions on allowance transfers and rejected it. It also found that Section 66-k violated the Commerce Clause, saying that it restricted transfers of allowances in upwind states, and thus it was a barrier to the movement of interstate trade.

The Second Circuit affirmed. First, the court stated that Section 66-k interfered with the method Congress selected to regulate emissions. Congress's intent was to implement the allowance scheme on a national scale by allowing transfer of allowances to any other person who holds such allowances. The court reasoned that the legislative history of Title IV shows that Congress intended the nationwide transfer of allowances and had contemplated, but rejected, geographic restrictions on the transfers. Also, while Section 66-k does not technically limit New York utilities transferring of allowances, it causes the allowances to decrease in value and thus interferes with the allowance trading system. Thus, the Second Circuit held that Section 66-k conflicted with Title IV and thus violated the Supremacy Clause, and therefore it did not need to review whether it also violated the Commerce Clause.

ELFIN NOCE

American Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505 (4th Cir. 2003)

The American Canoe Association, the Professional Paddlesports Association, and the Conservation Council of North Carolina (collectively "ACA") sued D.M. Farms of Rose Hill, L.L.C. and Murphy Farms, Inc. (collectively the "Farms") for alleged violations of Clean Water Act (CWA). The alleged CWA violations were several occasions on which swine waste was discharged into several rivers, all of which were waters of the United States. These discharges were made without a National Pollution Discharge Elimination System permit. All five farms shared a waste management system. The waste management system consisted of lagoons, at least one for each farm, into which hog waste was flushed from the barns that house the animals. The waste and rainfall that accumulated in the lagoons was pumped through a piping system and sprayed onto fields as fertilizer. ACA moved for a declaratory judgment from the district court that they had standing to maintain the action. The court issued a Declaratory Judgment on Standing, in which it decided that the plaintiffs had standing to bring the suit. The Farms appealed this and other issues to the Fourth Circuit Court of Appeals.

An association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." The Farms challenged only the first prong of associational standing. It argued that the plaintiffs' members did not have standing in their own right to bring this lawsuit. To determine if ACA had met this requirement, the appellate court looked at the elements of individual standing. To have standing as an individual a plaintiff must show (1) injury in fact, (2) traceability, and (3) redressability. Farms asserted that the plaintiffs failed to establish the first two prongs of standing-- injury in fact and traceability.

The court noted that "in the environmental litigation context, the standing requirements are not onerous. Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." In other words, the plaintiffs themselves must be harmed in some manner by the defendants' actions. In their original motion on the standing issue, each plaintiff introduced affidavits from several of its members as well as expert testimony.

The court found that ACA's case for injury-in-fact was not as strong as it had been in prior cases that found plaintiffs to have standing. This was mainly due to the small number of discharges from the Farms. However, the court found that the individuals that testified still averred the types of fears and concerns that courts had found sufficient in those cases. The individuals that testified all expressed concerns regarding the quality of water in Six Runs Creek and the Black River. These concerns affected their aesthetic, recreational, and, in some cases, economic interests in the waters. ACA's expert testimony demonstrated that these fears were reasonable. The reports of the Farms' experts did not undermine that conclusion. The court also found that the case for traceability was also closer in this case, but found it to be sufficient. In order to satisfy the traceability requirement, "rather than pinpointing the origins of particular molecules, a plaintiff 'must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged' in the specific geographic area of concern." Neither party disputed that the Farms discharged large quantities of swine waste into the aforementioned waterways at least two times. The court opined that swine waste was capable of causing the kinds of injuries complained of by the ACA's members. The expert testimony from ACA's witness demonstrated to the court that the testifying individuals were in the geographic area of concern. The case was closer in this instance because third parties could have contributed to the alleged injuries. There were other upstream farms that could have independently discharged waste into the waters. The fact that other farms may have contributed to the pollution problems complained of by the affiants in this case did not negate the fact that the defendants' discharges still potentially harmed them. The court found a contrary conclusion questionable, stating, "it would be strange indeed if polluters were protected from suit simply by virtue of the fact that others were also engaging in the illegal activity." Therefore, the Fourth Circuit concluded that the district court's determination that the ACA had standing was proper.

JEFFREY S. LUECHTEFELD

Monk v. Huston, 340 F.3d 279 (5th Cir. 2003)

In the state of Texas, a developer who wishes to construct a landfill facility capable of handling three classes of nonhazardous industrial solid waste ("NISW") must file a permit application to be approved by the Texas Commission on Environmental Quality ("TCEQ"). In 1996, TSP Development, Limited, a Texas limited partnership filed an application with TCEQ for such a permit. The most dangerous of the three classes of nonhazardous waste the proposed landfill could hold was Class 1 waste. Class 1 waste is an industrial solid waste that, although it does not meet the hazardous waste definition of the EPA, because of its characteristics it "may pose a substantial present or potential danger to human health or the environment if improperly processed, stored, transported, or otherwise managed." *See* Tex. Health & Safety code § 361.003(2)-(3).

Shortly after TPS applied for the permit, residents of homes in the vicinity of the proposed landfill requested administrative proceedings by the State Office of Administrative Hearings ("SOAH"). The matter was referred for adjudication, and in April 2002, the residents filed suit against officers of TCEQ and SOAH.

The plaintiffs alleged violation of their due process rights under the fifth and fourteenth amendments of the Constitution, because no ascertainable standards existed to guide TCEQ's ultimate determination in approving the application. Moreover, plaintiffs sought preliminary and permanent injunctions barring TCEQ

officers from continuing to consider TPS's application until additional rules and regulations governing NISW landfills were pronounced.

The district court granted the preliminary injunction and denied defendants' motion to dismiss. The defendants appealed, and the Fifth Circuit held that the district court erred in exercising jurisdiction because the matter was not yet ripe. In order for a dispute to be ripe, the case must not be abstract or hypothetical. Moreover, if further factual development is required before the legal questions can be addressed, then the case is generally not ripe. Furthermore, the court found that, in making this determination, "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration" are key factors.

The court found that, under those general principles of ripeness, the plaintiffs' claim was not ripe for judicial resolution. The court held that plaintiffs, in claiming that they had been harmed by TCEQ's failure to give them procedural due process in its determination of landfill permits, presented an unfounded claim, because the constitutional right to due process is not an abstract right to administrative hearings. Instead, it is the right not to be deprived of life, liberty, or property without procedural protections.

The court finally noted that, even if plaintiffs are subject to possible harm to their constitutionally protected property interests, they have not yet realized that harm. The plaintiffs must wait until the TCEQ permitting process runs its course in order to see if TPS application will be granted. Consequently, because more factual development was needed, the dispute remained abstract and hypothetical. The court vacated the injunction and reversed and remanded the matter for any necessary proceedings.

JESSICA HULTING

Reno-Sparks Indian Colony v. U.S. E.P.A., 336 F.3d 899 (9th Cir. 2003)

The Clean Air Act established national standards of air quality for various airborne pollutants. The Act was amended in 1977 to ensure the standards were maintained and enforced. The Amendments created three classification levels under which areas would qualify depending on their relation to the national standard: (1) "nonattainment" if the area was below the national standard, (2) "attainment" if it exceeded the standard, and (3) "unclassifiable" if data was lacking in order to make an adequate determination.

For areas deemed to fall within "attainment" or "unclassifiable" classes, Congress established a program called Prevention of Significant Deterioration (PSD) in order to maintain high air quality by closely monitoring permissible pollution increases beyond the area's established baseline pollution level. The PSD program establishes permissible pollution standards that are typically stricter than the national standards established by the Clean Air Act. These heightened pollution standards are at issue in this case.

Baseline areas are the planning areas in each state designated as one of the three classification levels (attainment, nonattainment, or unclassifiable). They are used to determine the amount of incremental pollution PSD will allow in attainment or unclassifiable areas. PSD's pollution increase limitations are "triggered" when an application for a planning permit is submitted by a major pollution source. This trigger date is called the baseline date. If a baseline limitation has not been triggered by a qualifying application, non-major pollution sources can operate in the area subject to the more lax national standards set by the Clean Air Act instead of the more stringent PSD standards. It follows that, if there are smaller and more numerous baseline areas, it is less likely that a major pollution source has submitted an application within any one of the smaller areas that would trigger a PSD standard. This would make it easier for a minor pollution source to find an area within the state where it is not subject to the higher standards of the PSD program.

Nevada submitted its proposed list of baseline areas and its designations for those areas pursuant to the requirements of the 1977 Clear Air Act amendments. The proposal outlined 14 basins. These were sub-divided into 254 sub-basins corresponding to the state's 254 separate hydrographic areas. These theoretically correspond

to the water flow patterns of the state, under the assumption that air flow follows water flow. In 1978, the EPA established the official baselines of the states for four pollutants. It listed the nonattainment areas separately, and it condensed the remaining into "rest of state" or "whole state." In 1990, the Act was again amended, causing the EPA to promulgate a 1991 regulation that stated that areas defined as "Rest of State" should be assumed to "comprise a single area designation for PSD baseline purposes." This regulation was to be generally applied. It did not mention the EPA's prior use of the term "rest of state" in Nevada's prior designation listing.

When the world's largest manufacturer of kitty litter proposed to develop mines near the Reno-Sparks Indian Colony, the Colony was worried about the adverse effect of the mining to the air quality of surrounding areas. The tribal leader wrote a letter to the EPA regional administrator, requesting that the manufacturer be subject to the stricter controls of the PSD. The tribal leader based his request on the fact that the manufacturer's proposed locations are included in the "rest of state" or "entire state" designations in the EPA tables, which triggered the higher PSD standards.

The EPA was divided on whether to interpret the baseline areas using the two terms recognized by the EPA, as the tribal leader suggested, or using the 250 discrete baseline areas previously adopted by the PSD. In order to settle the dispute, a rule was promulgated in 2002 that clarified that the "rest of state" and "entire state" terms were actually shorthand for the more than 250 individual attainment or unclassifiable areas.

Reno-Sparks Indian Colony filed a petition to review an Environmental Protections Agency (EPA) rule stating that the 2002 Rule was arbitrary and capricious because it "mischaracterizes" the EPA's original 1978 Nevada boundary designations. The Ninth Circuit upheld the EPA's 2002 rule supporting the more than 250 distinct baseline areas.

The court listed three reasons in support of its decision that the EPA's 2002 Nevada rule (specifying 254 baseline areas for the PSD program) was not arbitrary and capricious: (1) Nevada originally intended to create 254 baseline areas, (2) the EPA never indicated a change to the baseline areas and used the terms "rest of state" and "entire state" only as shorthand, and (3) the 1991 regulation was not intended to change to Nevada's existing baselines and was only an assumption to be used when no other baselines were previously designated.

LORRAINE C. BUCK

Citizens for Better Forestry v. USDA, 341 F.3d 961 (9th Cir. 2003)

Citizens for Better Forestry, a coalition of environmental groups (hereinafter referred to as "Citizens"), filed suit against the United States Department of Agriculture in the Northern District of California. The suit was directed at the National Forest System and Resource Management Planning rule (hereinafter referred to as the "plan development rule"), which set guidelines with regard to how the National Forest Service (an agency within the Department of Agriculture) was to oversee plant and animal species, timber management, and water management. The plan development rule set national guidelines to be followed by regional land resource agencies and local "site-specific" plans.

At issue were the 2000 revisions to the 1982 plan development. The 2000 version changed the requirement that the Department of Agriculture "ensure" continued species existence in forests to require the Department to create ecological conditions where it is only "highly likely" that species will continue. The 2000 version further eliminated specific guidelines ensuring effective forest management with regard to such resources as timber. It also shortened the public's opportunity to respond to rule amendments, changing the window of opportunity to respond from 90 to thirty days. Furthermore, as finally published, the 2000 rule lacked an environmental analysis and endangered-species analysis

The Citizens challenged the substantive changes to the plan development rule and also alleged procedural violations by the Department of Agriculture in its promulgation of the rule (the Citizens claimed that the rule violated the National Environmental Policy Act (NEPA) and Environmental Impact Assessment (EIS)). Citizens filed a summary judgment motion on its procedural claims and also asked for an injunction against the implementation of the 2000 rule. The Department of Agriculture filed a cross-motion for summary judgment, claiming that Citizens lacked standing to challenge the 2000 rule and that its claims were not ripe for review. The district court granted the Department of Agriculture's motion for summary judgment, and it denied that of the Citizens. In its ruling, the district court also denied the Citizens' request for an injunction.

Citizens appealed the district court's decision to the Ninth Circuit Court of Appeals, claiming both standing and ripeness for review. The Ninth Circuit said that the Citizens had standing to sue based on the Department of Agriculture's violation of procedural rules, which were supposed to protect the Citizens' concrete interests, but as promulgated threatened them.

In so finding this, the appellate court first rejected the Department of Agriculture's argument that that the public need not be given the opportunity to comment on an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI), both of which accompany the rule and ultimately determine whether the agency should conduct an Environmental Impact Statement. The court held that the exclusion of the public from commenting on EA and FONSI was a violation of the National Environmental Protection Act, which requires public comment on environmental documents as a mechanism to prevent environmental abuses. In excluding the public from comment, the court held that the Department of Agriculture had caused the public, and thus Citizens, procedural injury.

The court next rejected the Department of Agriculture's argument that standing requires "proof" that the challenged regulation will affect a specific national forest of the plaintiff Citizens. The court held that the "asserted injury that environmental consequences might be overlooked" in the forests, shown to be used and enjoyed by Citizens, was sufficient for standing purposes.

The court next rejected the Department of Agriculture's argument that because the 2000 rule revisions indirectly effected the physical environment, there was an insufficient connection between the procedural injury and concrete interests, a connection necessary to show standing. The court, while acknowledging that the rule itself did not result in any direct environmental effects, said that because the rule controls the development of national, regional, and local land resource management plans/forestry plans, it had an "actual, physical effect" on the environment. The court reasoned that if the public could only challenge agency actions at the local development stage, the agency decisions would escape review by the public and the courts. The court said that to the extent that the rule involves an environmental plan determining how the environment will be treated in the future, the plaintiffs presented sufficient concrete injury for standing purposes. In so ruling on this point, the court relied on precedent and distinguished the present case from contrary opinions on standing in other circuits such as the Second, Eighth, and Eleventh.

The court reaffirmed that plaintiffs have standing to challenge not only site-specific plans, but also higher-level, national plans which impose on or remove from site-specific plans certain requirements. Based on the court's finding that the Department of Agriculture had violated procedural safeguards in its promulgation of the rule, the court also determined that the case was ripe for review.

MARYA KATHRYN LUCAS

Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835 (9th Cir. 2003)

The National Association of Home Builders, the Southern Arizona Home Builders Association, and the Home Builders Association of Central Arizona (Home Builders) brought suit challenging the Fish and Wildlife

Service's (FSW) decision to recognize the Arizona pygmy-owl as a distinct population segment (DPS) for listing under the Endangered Species Act. The district court granted summary judgment for FSW, holding that FWS' decision to divide the population of the pygmy-owl into eastern and western populations at the United States-Mexico border was within the scope of the Endangered Species Act policy.

On appeal, the Home Builders allege that the designation of the Arizona pygmy-owl as a DPS violated the DPS policy in finding that the population was discrete and significant.[1] The Home Builders argued that the FSW did not establish any differences between the "conservation status" across the international boarder between the United States and Mexico in determining that the Arizona pygmy-owl was discrete from the remainder of the species.

After a review of the evidence, the FSW had found that pygmy-owls were abundant in northern Mexico but were declining in number in Arizona due to the destruction and modification of their habitat. The court recognized that, in cases where there is a factual dispute involving agency expertise, courts defer to the agencies' determination. Thus, the court found that FWS' determination that the population was discrete was an exercise of agency expertise and therefore not arbitrary or capricious.

The court then turned to the issue of the significance of the Arizona pygmy-owl to the owl taxon. FSW argued that the loss of the population would cause a significant gap in the range, and the loss would result in a decrease in the genetic variability of the taxon. The court found that FWS failed to articulate a rationale reason for its finding that the gap that would be created by the loss of the Arizona pygmy-owl population would be significant to the whole taxon. Furthermore, the court found that FWS did not express a reasoned basis for finding that there was a significant difference in the genetic characteristics between the Arizona pygmy-owl those found in northwestern Mexico. Therefore the court held that FWS acted arbitrarily and capriciously in designating the Arizona pygmy-owl a DPS. The district courts' ruling was reversed and remanded for further proceedings.

ELIZABETH P. MCNICHOLS

Southern Organizing Committee for Economic and Social Justice v. U.S. E.P.A., 333 F.3d 1288 (11th Cir. 2003)

The purpose of the Clean Air Act ("CAA"), originally enacted in 1955, is to monitor and regulate the air quality throughout the United States. The Act set up a broad scheme designed to efficiently meet this goal. Pursuant to the CAA, the Environmental Protection Agency ("EPA") established National Ambient Air Quality standards, which set limitations on air pollution. When a local region fails to meet these standards, they are "classified under a statutory scheme and assigned a non-attainment status depending on their level of air pollution." The EPA's discretion is limited to regulating "non-attainment areas" pursuant to "the statutory requirements of the 1990 Amendments of the CAA". The 1990 Amendments to the CAA provide for specific attainment deadlines. They also require each state to prepare a State Implementation Plan ("SIP"), with the goal of "bring[ing] non-attainment areas into compliance". Non-attainment areas are categorized using a "mandatory classification" system provided for by the CAA. Each classification has its own specific attainment date. A non-attainment area can be classified as marginal, moderate, serious, severe, or extreme, depending on its ozone

[1] *Id.* To classify a population of species as a distinct population segment, the FSW must find the population discrete when compared to the rest of the species and significant to the rest of the population. By classifying a portion of a species as DPS, the Endangered Species Act allows that portion to be listed as an endangered species.

levels. Failure of an area to meet its specified attainment date results in reclassification to the next level "by operation of law".

In 1999, the EPA promulgated a new Extension Policy concerning attainment dates and reclassification. The policy "extend[ed] the attainment date for an area that [was] affected by transport from either an upwind area with a later attainment date or an upwind area in another state that significantly contribute[d] to downwind non-attainment" without bumping up the area to the next higher category. The policy attempted to solve the problem of "downwind areas being unjustly penalized as a result of transport." The Extension policy was a "guidance memorandum" promulgated without notice and comment rulemaking.

Southern Organizing Committee, Georgia's Coalition for the People's Agenda, and the Sierra Club appealed the EPA's final rule that approved Georgia's SIP. The SIP in question covered the Atlanta serious 1-hour ozone non-attainment area. The petitioners argued that the "EPA had exceeded its delegated authority because" the CAA mandated non-attainment areas be reclassified when the attainment date was extended. In consideration of this case, the court looked to the Seventh Circuit, Fifth Circuit, and the D.C. Circuit for opinions on this very issue. All of the aforementioned circuits concluded that the EPA's promulgation of the 1999 Extension Policy was an unacceptable exercise of its "delegated authority and contravened the text and goals of the CAA." Following these decisions, the EPA filed a motion for vacatur of its attainment date extension deadline for the Atlanta non-attainment area as well as the EPA's approval of Georgia's SIP for the Atlanta area. However, the Eleventh Circuit chose to settle this matter and adopted the view of the Seventh, Fifth, and D.C. Circuits, concluding that the 1999 Extension Policy promulgated by the EPA did indeed violate the plain text of the CAA.

R. MARISSA ALBERT