Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 16 Article 7
Issue 3 *Summer 2009*

2009

Environmental Law Updates

Center for Biological Diversity v. U.S. Department of Interior, 563 F.3d 466 (D.C. Cir. 2009)

This action arose as a result of the Department of the Interior's decision to expand the leasing areas for offshore oil and gas development along Alaska's outer continental shelf. The Leasing Program, which specifically affects the Beaufort, Bering, and Chukchi Seas off the coast of Alaska, is supposed to run from 2007 until 2012. Incidentally, the regions that are subject to the terms of the lease include the habitats of various species of wildlife, including, but not limited to, polar bears, the Pacific right whale, and the Pacific walrus.

Petitioners, including the Center for Biological Diversity, challenged the approval of the expanded Leasing Program by the Secretary of the Interior on several grounds. Their challenges consisted of the following: 1) the Interior failed to take into account the Program's effect on climate change and how such climate change will likely affect the outer continental shelf, thereby violating both the Outer Continental Shelf Lands Act (hereinafter "OCSLA") and the National Environmental Policy Act of 1969 (hereinafter "NEPA"); 2) the Interior further violated both the OCSLA and NEPA because the Program was approved without necessary biological baseline research and failed to provide a research plan detailing how this information will be obtained before the next stage of the program; 3) the Interior, by failing to consult either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service about the Program's potential harm to endangered species, violated the Endangered Species Act of 1973 (hereinafter "ESA"); and 4) the Interior's Program irrationally relied on a study by the National Oceanographic and Atmospheric Administration (hereinafter "NOAA"), which considered the sensitivity of shoreline areas to oil spills, in assessing the environmental sensitivity of the areas subject to the Program, thereby violating the OCSLA.

Upon review, the D.C. Circuit dismissed two claims – the NEPA baseline claim and the ESA claim – because the claims were not ripe for review. However, while the court found the remaining claims justiciable, it ruled that the OCSLA-based climate change claims and the OCSLA-rooted baseline data challenges lacked merit. Yet, the court found that petitioners' remaining argument regarding the Program's environmental

sensitivity rankings had merit and consequently remanded the Leasing Program to the Secretary of the Interior for reconsideration consistent with the court's opinion.

Under the court's analysis of the environmental sensitivity ranking challenge, the Interior's use of the NOAA study would have been permissible as long as it was not irrational. The court defined irrational as "based on a consideration of the relevant factors." With this restriction in mind, the court found that the Interior's sole reliance on the NOAA study was irrational in light of the OCSLA's requirement that agencies consider "the relative environmental sensitivity of...different areas of the outer Continental Shelf." According to the court, since the NOAA study assessed only the effect of oil spills on shorelines, it is not an adequate representation of the environmental sensitivity of the outer continental shelf, which typically extends anywhere from three to two-hundred miles off the United States' coast. The court ultimately determined that, on remand, the Secretary of Interior must attempt to identify the areas of the outer continental shelf that are most and least sensitive to the activity entailed in the Lease Program.

MICHAEL C. RISBERG

California ex rel. Lockyer v. U.S. Department of Agriculture, 575 F.3d 999 (9th Cir. 2009)

The Ninth Circuit affirmed the United States District Court for the Northern District of California's summary judgment decision in favor of environmental advocacy organizations when it held that the United States Department of Agriculture (hereinafter "USDA") failed to abide by proper procedures when promulgating the new State Petitions Rule, which essentially overrode the Roadless Rule. The Ninth Circuit held that the Plaintiff's claims were ripe for review, the National Environmental Policy Act's (hereinafter "NEPA") analysis requirement pertained to the situation, that the USDA should have "engaged in consultation" under the Endangered Species Act before promulgating the new rule, and that the district court did not abuse its discretion in its previous decision to restore the Roadless Rule.

The Roadless Rule was developed under the Clinton administration and protected areas in national forests that were largely roadless or undeveloped. Currently there are 58.5 million acres of inventoried roadless areas. Before 2001, these roadless areas were controlled by individual forest plans under the National Forest Management Act. These individual plans allowed forests to use the roadless areas for activities such as logging, mining, and construction. In 1999, President Clinton encouraged the Forest Service to promulgate a national plan for these roadless areas. In 2001, the Forest Service issued the Roadless Rule, which forbids construction and timber harvesting in the roadless areas.

Before the Roadless Rule went into effect, the United States District Court for the District of Idaho enjoined the Forest Service "from implementing all aspects" of the rule. Environmental groups appealed this decision, and the Ninth Circuit reversed the decision. In April 2003, the Roadless Rule went into effect nationally. However, the United States District Court for the District of Wyoming enjoined the Roadless Rule three months after it went into effect. Again, environmental groups appealed the decision. Before the Tenth Circuit issued a decision, the Forest Service issued a new rule called the State Petitions Rule, and the Tenth Circuit dismissed the appeal for want of jurisdiction.

This appeal arose from two consolidated district court cases of state and environmental advocacy group as plaintiffs and the USDA and

the Forest Service as defendants. The plaintiffs alleged that the defendants "violated (1) the NEPA by relying on a categorical exclusion when promulgating the State Petitions Rule; (2) Section 7 of the Endangered Species Act by promulgating the State Petitions Rule without fulfilling the Act's consultation requirements; and (3) the rationality requirement of the Administrative Procedure Act by "failing to articulate a purpose and need for rescission of the Roadless Rule."

The District Court granted summary judgment for the plaintiffs, holding that the "USDA violated the NEPA and the Endangered Species Act." Moreover, the District Court reinstated the Roadless Rule and enjoined the State Petitions Rule. The court reasoned that because the State Petitions Rule lifted the Roadless Rule's "substantive protections," it triggered the analysis necessary under the NEPA. Furthermore, the court held that the rule did not constitute a "routine administrative action," which would have triggered a categorical exclusion. Instead, the court held that the passing of the rule was "arbitrary and capricious." The district court also held that the State Petitions Rule violated the Endangered Species Act because the repealing of the Roadless Rule would have some effect on endangered species.

Defendants appealed, challenging that the State Petitions Rule neither triggered the NEPA nor the Endangered Species Act because the rule was merely procedural in nature and would not have any bearing on the environment. The Ninth Circuit determined that the action was ripe for review and that the court should apply a "reasonableness" standard of review.

The Ninth Circuit held that the NEPA applied to this situation because the State Petitions Rule overruled the Roadless Rule, which provided greater protection to the environment than laws before it. First, the Ninth Circuit concluded that the Roadless Rule was in effect long enough to be "meaningfully" in force because it had a positive effect on the environment of roadless areas. Furthermore, the USDA repeatedly noted that it meant to replace the Roadless Rule with the State Petitions Rule, and the Ninth Circuit cited this as reason why it is a substantive—not merely procedural—change in the law. Therefore, it does not fall within a categorical exception.

Moreover, since the action may have affected endangered species, the new rule triggered the Endangered Species Act. The Ninth Circuit

held that the USDA acted arbitrarily when determining that endangered species would not be affected by the State Petitions rule. Shortly before the State Petitions Rule came into existence, USDA concluded that the habitats of endangered species were in grave danger and subsequently used the Roadless Rule to protect these species. The Ninth Circuit then considered how the State Petitions Rule repealed the Roadless Rule, and held that, indeed, the USDA acted arbitrarily when determining that endangered species would not be affected by the new rule.

The Ninth Circuit affirmed the district court's enjoining of the State Petitions Rule and reinstatement of the Roadless Rule. Because the Ninth Circuit found that the State Petitions Rule was a substantive change in the law and that the rule triggered the Endangered Species Act, it concluded that the district court had not abused its discretion.

ABBIE HESSE ROTHERMICH

Hydro Resources, Inc. v. EPA, 562 F.3d 1249 (10th Cir. 2009)

In February 2007, the Environmental Protection Agency (hereinafter "EPA") determined that land owned by Hydro Resources, Inc. (hereinafter "HRI") in northwestern New Mexico was Indian land and therefore subject to federal regulation under the Safe Drinking Water Act (hereinafter "SDWA"). Before that determination, HRI had planned to operate a uranium mine on the land, and the New Mexico Environmental Department (hereinafter "NMED") had already given its approval. HRI filed suit to overturn the EPA's determination, and the district court granted summary judgment for the EPA. HRI appealed to the Tenth Circuit, which affirmed.

The SDWA establishes minimum drinking water protection standards. Specifically, it establishes an underground injection control program to prevent underground injections that would endanger drinking water sources. Generally, these regulations are implemented and enforced by the states. However, Indian country is under the statutory jurisdiction of the EPA.

According to the SDWA, Indian country is defined as land dependant on Indian communities and allotments. Upon conferring with the Department of the Interior and the Navajo Nation, the EPA found that HRI's land, though not located on a reservation, was located within the Church Rock Chapter, a local government organization of the Navajo Nation, and thus subject to federal regulation. Prior to that decision, the status of the land was not thought to be in dispute. In fact, the NMED had already approved HRI's request for a state permit in 1989. It was not until 1996, when the Navajo Nation attempted to assert control over the land, that the EPA got involved. At that time, the EPA determined that there was a legitimate dispute as to the status of the land, and found that a federal permit was therefore necessary. HRI challenged that determination in court and the Tenth Circuit found that the EPA did not err in finding a legitimate dispute as to the status of the land. In 2007, after much investigation, the EPA determined that the land was Indian land because of its ties to the Navajo's Church Rock Chapter. It was this determination that gave rise to the present dispute.

The court first disposed of the EPA's argument that it had no standing to review the district court's decision. The EPA argued that

because the land would be subject to the same regulations regardless of whether the NMED or EPA enforced the regulations, HRI suffered no harm as a result of the EPA's determination that it had jurisdiction. The court found that because HRI had already obtained a permit from the NMED, forcing the company to obtain another permit from the EPA would cause additional expense.

The court next turned to the issue of whether the land in question qualified as Indian land under the SDWA. Among the requirements are that the land is actually occupied by an Indian community and that the federal government and the Indians, rather than the state, have primary jurisdiction. The court determined that it was not error for the EPA to find that the Church Rock Chapter was an Indian community with defined borders that included the land owned by HRI. Additionally, because the federal government retained title to a vast majority of the property in question, the court found the federal government had primary jurisdiction over the area. In the face of a dissent on the grounds that the court was giving the Indian tribe too much power over private land owned by non-Indians, the court narrowly tailored its decision to the facts of this case. It warned that if an Indian tribe were to overreach its authority in attempting to govern private lands that happened to be located on Indian grounds, the courts would step in.

Currently, the Tenth Circuit has granted a petition for rehearing and has scheduled the matter for January 2010.

ROBERT A. NOCE

Ecology Center v. Castaneda, 562 F.3d 986 (9th Cir. 2009)

Environmental groups Wildwest Institute and The Ecology Center ("Plaintiffs") filed suit against the United States Forest Service ("Forest Service") for approving nine timber sale projects in the Kootenai National Forest in Montana. The Forest Service adopted the Kootenai National Forest Plan ("Forest Plan") in 1987 to guide "all natural resource management activities" for the forest. In compliance with the Forest Plan, the Forest Service adopts projects for small parts of the forest, including the nine timber sale projects at issue in this case.

Plaintiffs had several complaints, including violations of the National Forest Management Act ("NFMA"), the National Environmental Policy Act ("NEPA"), and Forest Service regulations. The United States District Court for the District of Montana considered these arguments and granted the Forest Service summary judgment on all three claims. Plaintiffs appealed that decision, and the Ninth Circuit Court of Appeals reviewed the district court's decision.

Plaintiffs first argued that the Forest Service failed to comply with NFMA's procedural and substantive requirements, which state that forest plans must "provide for diversity of plant and animal communities" and ensure that timber will not be harvested in a way that causes irreversible damage to the soil, slope, or watershed conditions.

Next, Plaintiffs argued that the Forest Service violated NEPA procedural requirements that force decision-makers (in this case, the Forest Service) to analyze the environmental impact of their actions and allow public access to that information.

Plaintiffs also argued that two of the Forest Service's regulations were not followed. First, the Forest Service was required to identify and monitor indicator species. The regulation states that "fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species." The second regulation required the actors to use the "best available science" when implementing the plans.

In analyzing these claims, the Ninth Circuit found that the Forest Service had determined that the projects would create ten percent old-growth forest levels, and this was sufficient to ensure species viability. Old-growth forests are forests that have developed past their dominant

species because they have been mostly undisturbed for a long period of time. The determination of the ten-percent-old-growth-forest-levels standard was based upon the best available science and was not arbitrary or capricious because it was based on the standard set by the National Forest Management Act of 1976. Therefore, no Forest Service regulations were violated.

The Ninth Circuit also found that approving the nine timber sale and restoration projects in the Kootenai National Forest was lawful under NFMA. And because the Forest Service prepared environmental impact statements and environmental assessments as required by the NEPA, they adequately considered and disclosed the environmental impact of the projects. Therefore, the Forest Service did not violate NFMA or NEPA regulations.

The Ninth Circuit affirmed the district court's holding, and the summary judgment in favor of the Forest Service remained.

RACHEL RILEY

Summers v. Earth Island Institute, 129 S. Ct. 1142 (2009)

The United States Forest Service (hereinafter "Forest Service") instituted the Burnt Ridge Project (hereinafter "the project") to salvage timber from Sequoia National Forest, which is federal land inflicted with fire-damage. The project's intent was to sell the timber salvaged on the 238 acres of land under a Forest Service exemption from traditional notice, comment, and appeal procedures in order to conduct small sales of "fire-rehabilitation and timber-salvage projects." Forest Service's endeavor was challenged by various environmental groups, collectively referred to as Earth Island, in the Eastern District of California. The environmental groups sought not only to halt the sale of the salvaged timber, but also to invalidate the regulation permitting the notice and comment exception.

A preliminary injunction granted by the district court prevented the sale of timber. However, the environmental groups continued to challenge the permissibility of the regulations permitting notice and comment circumvention. The case proceeded to the United States Supreme Court on certiorari to determine whether the environmental groups had standing to challenge the regulations, as the parties had settled matters related specifically to the project.

Whereas the Forest Service Decisionmaking and Appeals Reform Act (hereinafter "the Act") requires Forest Service to promulgate a notice, comment, and appeals procedure for land use projects, several categorical exclusions were incorporated into that regulation, one of which includes fire-rehabilitation and timber-salvage sales of 250 or fewer acres of land. The fundamental doctrine of standing requires that persons, or environmental groups, bringing suit have a personal stake in the case or controversy warranting adjudication of the matter, which, if favorable, will redress that person or group's injury. As pointed out by the Supreme Court, the Act regulates the conduct of Forest Services, only, and not the conduct of the environmental groups. Moreover, the Court also rejected, as a sufficient personal stake in the case to establish standing, the intent of certain members of the environmental group to visit the National Forest in the future. Furthermore, the environmental group's assertion that they suffered procedural injury because of the inability to file comments was also deemed insufficient by the Court to establish standing.

Finding the environmental groups lacked sufficient standing, the Supreme Court declined to evaluate the merits of the case by refusing to rule on the permissibility of the Forest Service's regulations.

CHELSEÁ R. MITCHELL

Friends of the Everglades v. South Florida Water Management District, 570 F.3d 1210 (11th Cir. 2009)

In *Friends of the Everglades v. South Florida Water Management District,* the Friends of the Everglades (hereinafter "Friends") sought injunctive relief against the South Florida Water Management District (hereinafter "Water District") to require it to obtain a permit under the Clean Water Act (hereinafter "CWA") and in accordance with the National Pollution Discharge Elimination System (hereinafter "NPDES"). The CWA requires a NPDES permit anytime there is a "discharge of any pollutant." The CWA defines a discharge as "any addition of any pollutant to navigable waters from any point source." On June 13, 2008, the EPA promulgated a regulation, stating any transfer of water between distinct bodies of water is not subject to the NPDES permitting program.

The facts were not in dispute at trial or on appeal. The Water District conceded that it was pumping polluted water uphill from agricultural canals into Lake Okeechobee. The Water District stated that the purpose of these transfers, between two distinct bodies of water, was to maintain the Florida state water system and that it did not introduce any pollutants into the water by pumping the polluted canals into the higher lake water.

The main issue decided by the court was whether the court was required to give the new EPA regulation deference pursuant to the Supreme Court test in *Chevron.* Under *Chevron,* the Supreme Court held that a court must give deference to an administrative body's interpretation of a statute it administers, if the body's construction of the statute is reasonable and the statute's meaning is ambiguous.

The Water District contended that the court should give deference to the new EPA regulation, pursuant to *Chevron,* because the CWA statute is ambiguous and the EPA regulation interpreting the statute is reasonable. The Water District argued that the CWA statute is ambiguous because there are two different but reasonable interpretations of the statute. The EPA regulation supports the Water District's interpretation that the phrase "navigable waters" should be construed as the collective waters of the United States. The Water District argued that the absence of the word "any" preceding "navigable waters" is indicative of Congress not

intending the statute to cover water transfers between separate bodies of water and thus, the EPA's interpretation is a reasonable construction of the statute.

Friends rejected the Water District's argument that the unitary waters theory is reasonable, stating that the statute is clear and unambiguous and that an addition to navigable waters is governed by the NPDES permitting program. Friends argued this pumping was an addition of a pollutant to navigable waters from a point source and that the Water District's pumping without an NPDES permit was a violation of the CWA. The plaintiff also cited numerous past Circuit Court cases decided prior to the EPA regulation that held that the unitary waters theory is inapplicable. Friends maintained that the past decisions of the Federal Courts clearly demonstrate that the CWA statute is not ambiguous. Plaintiffs concluded by stating that the lack of ambiguity does not satisfy a required prong of the *Chevron* analysis, and thus does not compel the court to defer to the EPA regulation.

After dispatching with an Eleventh Amendment immunity issue, the circuit court focused its analysis on the clarity of the CWA statute. The court explained that the main question was the definition of the statute and whether the addition of pollutants to the "navigable waters" of the United States means addition to all the waters in the United States as a whole or the waters in an individual sense. The circuit court noted that Friends' argument would require the insertion of "any" into the statute before the phrase "navigable waters." Citing maxims of judicial statutory interpretation, the court clarified that it was not allowed to add or subtract words from a statute for interpretive purposes. The court stated that under Friends' argument, the necessity of adding a word to support its conclusion is indicative of the statute being ambiguous, thus supporting the Water District's argument.

The circuit court also rejected Friends' contention that Congress' stated purpose of the CWA is contrary to the EPA's regulations and interpretation of the statute. Friends argued that the CWA's purpose is to restore and protect the Nation's waters as indicated by the CWA preamble. Friends asserted that the unitary waters theory and the EPA regulation is contrary to the purpose of the CWA because it would allow water from the worst polluted bodies of water to be pumped into pristine waters. In its rejection of this argument, the court stated that congressional acts are the

result of compromise and the political process, and not all statutes will comport with the desired purpose of an act as a whole.

After concluding that the statute is ambiguous because of the two reasonable readings of both parties, the court analyzed the second remaining prong of the *Chevron* analysis, whether the EPA's regulation was a reasonable interpretation of the statute. The court explained that its analysis had revealed the unitary waters theory to be a reasonable reading of the statute and that the EPA's regulation was not "arbitrary, capricious, or manifestly contrary to the statute." The circuit court concluded that it was required to give deference to the EPA's regulation because the EPA's construction of the statute was reasonable and the statute's meaning was ambiguous because of the two possible interpretations. The court reversed the lower court's decision, holding that the Water District's pumping from one body of water to another is not subject to the NPDES permit program.

BRIAN SCHIERDING

United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009)

In 1990, Rudy Cundiff bought tracts of land in Muhlenberg County, Kentucky that are adjacent to tributaries of the Green River. When Rudy bought the land, the wetlands on property were filled with "acidic orangish to reddish colored water" that had drained out of an abandoned coal mine located on a neighboring property. After his purchase, Cundiff began clearing the property to make the wetlands suitable for farming. In 1991, the Army Corps of Engineers observed this clearing and suspected Clean Water Act violations. As a result, the Corps sent Cundiff a cease-and-desist letter for failing to obtain a permit to fill the wetlands that had been located on the property and, therefore, violating the Clean Water Act. The cease-and-desist letters continued over the course of eight years and Cundiff continued to ignore the orders of the Army Corps of Engineers, the Environmental Protection Agency, and Kentucky state officials. The United States finally sued Cundiff alleging violations of the Clean Water Act for discharging pollutants into waters of the United States without a permit. The trial court enjoined Cundiff from discharging any pollutants into the wetlands and imposed a civil penalty of $200,000. Cundiff appealed the verdict and while the appeal was pending, the United States Supreme Court issued its opinion of *Rapanos v. United States*, 547 U.S. 718 (2006). In *Rapanos*, the issue was what constituted "navigable waters of the United States" under the Clean Water Act. Thus, on appeal, Cundiff's principal argument was that the wetlands on his property did not constitute "navigable waters of the United States" and, therefore, did not fall under the jurisdiction of the Clean Water Act.

Rapanos held that "waters of the United States" included some bodies of water that were not considered navigable in the traditional sense. The plurality held that the Clean Water Act phrase to include "relatively permanent, standing, or continuously flowing bodies of water." The court also held this included wetlands with a "continuous surface connection to such water bodies." In *Marks v. United States*, the Court held that in analyzing the statutory phrase, the court should take the approach that changes the law the least. Because *Rapanos* and *Marks* were not easily reconciled, in this case, the Sixth Circuit parsed out the correct approach between the two.

The court chose to use a case-by-case basis test dictated by Justice Kennedy in his concurrence to the *Rapanos* decision. Under this test, the first question was whether the adjacent property contains a "water of the United States." The court found that because the creeks and channels located on Cundiff's land were permanent bodies of water connected to "interstate navigable waters," such as the Green River, the Clean Water Act was correctly applied to this case by the district court. The court held that the affected tributaries of the Green River not only affected navigation, but also food webs, crop production, and bank erosion.

The next question posed was whether the wetlands in question are in "continuous surface connection" with the Green River's tributaries. The plurality's test in *Rapanos* requires a topical flow of water between a navigable waterway or its tributary with a wetland. The court also stated that the connection must include some kind of water or "dampness" that polluting such land would have a proportionate affect on the waterway. The court held that because the wetland that Cundiff filled constituted approximately 5.3 acres and had a "continuous surface connection" with at least two major tributaries of the Green River, the land in question also met this standard of Justice Kennedy's test. Therefore, the Sixth Circuit affirmed the district court's grant of summary judgment to the government and also affirmed the district court's award of civil penalties levied on Cundiff.

NICOLE HUTSON