Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 17 Article 7
Issue 3 *Summer 2010*

2010

Environmental Law Updates

North Carolina v. EPA, 587 F.3d 422 (D.C. Cir. 2009)

Nitrogen oxides ("NO_X") that are released into the air can react to form the pollutant ozone ("O_3"), which has a harmful impact on the environment. The release of NO_X and the subsequent formation of O_3 becomes an interstate issue once the pollutants are in the atmosphere, due to their susceptibility of being carried downwind into neighboring states. The EPA established a national ambient air quality standard ("NAAQS") in order to limit the harmful effects of O_3 on the environment. In 1998, the EPA found that the NO_X emissions in Georgia significantly contributed to nonattainment of the NAAQS in North Carolina. Then in 2004, applying a revised standard which changed the formula used for measuring O_3, the EPA found that the Georgia emissions levels were within the applicable standard, and as a result the EPA removed Georgia from its review. This case arose from the North Carolina's petition for review of the EPA's ruling to remove the northern part of Georgia from the EPA's regulations under the NAAQS for O_3. Without reaching the merits of North Carolina's contentions, the Court of Appeals for the D.C. Circuit held that North Carolina lacked standing – specifically, that it failed to show redressability.

The court referenced *Lujan v. Defenders of Wildlife* in describing the Article III requirements for standing: injury, causation and redressability. To sustain a cause of action, first, the plaintiff must have suffered an "injury in fact" which is "concrete and particularized" and "actual or imminent." Next, "there must be a causal connection between the injury and the conduct complained of." Finally, it must be "likely," not just "speculative," that the injury will be "redressed by a favorable decision."

In challenging the legality of government action, North Carolina asserted that its injury arose from the government's allegedly unlawful lack of regulation of Georgia. However, North Carolina was not itself the object of the government action challenged. Citing *Lujan*, the court noted that in this situation, "standing is not precluded, but it is ordinarily substantially more difficult to establish."

North Carolina contended that it had standing because it was unable to attain the NAAQS due to emissions from Georgia. The court stated that "North Carolina's ability to show redressability hinge[d] on

showing that including northern Georgia in the NO_3 ... call would result in reducing emissions from Georgia that significantly contribute to North Carolina's inability to reach attainment." However, the court determined that including Georgia in the call would only result in Georgia using its compliance supplement pool ("CSP") allowances – emissions credits provided to states to cover excess emissions under certain circumstances – in order to avoid actually reducing the state's emissions. Because Georgia would use the CSP credits and the Georgia emissions would not change, the effect of those emissions in North Carolina would remain the same. Therefore, the D.C. Circuit held North Carolina's injury lacked redressability in that its injury would not be remedied even if the court were to find in North Carolina's favor. Because North Carolina failed to show redressability, the court held that North Carolina lacked standing under the requirements of Article III.

DANIEL S. RICH

Center for Biological Diversity v. Kempthorne,
588 F.3d 701 (9th Cir. 2009)

In 2006 the US Fish and Wildlife Service ("Service") promulgated a five-year regulation that allowed for the non-lethal taking of polar bears and Pacific walrus by oil and gas activities along the Beaufort Sea on the Northern Coast of Alaska. Prior to issuing the regulation, the Service evaluated the impact the oil and gas activities would have on polar bears, and determined that the impact would be negligible. Because of this finding, the Service prepared an environmental assessment, but not an environmental impact statement. The assessment concluded that the taking regulation would likely not impact the population or survival of polar bears, and that while climate change could affect the degree of impact the regulation would have on polar bears, the magnitude of the potential effect was unclear. The district court granted the Defendant's motion for summary judgment upholding the regulation, and the Plaintiff's appealed to the Court of Appeals for the Ninth Circuit.

Two environmental groups, the Center for Biological Diversity and the Pacific Environment, brought suit against the Service alleging violations of the Marine Mammal Protection Act ("MMPA") and the National Environmental Protection Act ("NEPA"). The plaintiffs claimed that the Service did not take into account the weakened state of polar bears due to climate change, that the finding that the regulation's impact would be negligible was arbitrary and capricious, and that the Service was required to file an environmental impact statement regarding the regulation.

The court first determined the plaintiff's had standing to bring the claim. Noting that although suing to prevent generalized harm to the environment is not sufficient to confer standing, the court stated that an individual's interests in observing a species or a habitat is sufficient to confer standing, and an organization can assert the interests of its members by bringing suit. The plaintiffs met the standing requirement because the members had observed polar bears in the past, had plans to observe them in the future, and the taking regulations threatened harm to their interests of continued observation. The injury they asserted was geographically specific, and because the regulations have been and continue to be implemented, the potential harm that could occur would be imminent.

The court also found the plaintiff's action ripe for review, stating that a facial challenge to an agency's decision, based on whether the agency's action is arbitrary and capricious, is ripe for review because the decision would not benefit from further factual development. The court further held that because the taking letter of authorization lasts for only five years, and there are inherent delays in litigation, the regulation would constitute a hardship to the plaintiffs if the court denied review in light of the potential for irreparable harm to the environment.

Under the MMPA, the Service can authorize regulations to allow the incidental taking of mammals by those engaging in a specified activity in a specified geographic area. The regulation in question permitted oil and gas exploration, development and production in the Beaufort Sea, which the plaintiffs argued was too broad to qualify as a specify activity under the MMPA. The court looked at the purpose and definition of specified activity and stated that the definition was not arbitrary and capricious because the goal of the definition was in line with the purpose of the statute: to make sure that anticipated effects are substantially similar. The court held that the interpretation of the regulation was not manifestly contrary to the statute and was indeed specific enough, because the activities defined in the specific regulation were not dissimilar to the impact if the activity had been more specifically defined.

The plaintiffs also contended that the Service's finding of the regulation's negligible impact was arbitrary and capricious because it failed to take into account the impact the oil and gas activities would have on polar bears that had a weakened physical condition due to climate change. The government conducted a cumulative effect analysis that considered the weakened state of polar bears from habitat loss due to such things as climate change, hunting, oil spills and contaminants, and concluded that the impact of the regulation would be negligible. A valid finding of negligible impact requires that the analysis consider those impacts that are reasonably expected and reasonably likely, but not those that are speculative or uncertain. Because the Service could not conclude that the polar bears' reduced physical fitness due to climate change would be reasonably likely to manifest itself in the context of the regulation's oil and gas activities, the court held the negligible impact conclusion was not arbitrary or capricious.

The court also looked at the validity of the regulation under NEPA requirements. NEPA requires an environmental impact statement for federal actions that can significantly affect the quality of the human environment. An environmental assessment is a public document providing evidence and analysis to determine if there is a need for an environmental impact statement, or a finding of no significant impact. The plaintiffs challenged the Service's finding of no significant impact, and thus no need for an environmental impact statement. Finding that the environmental assessment considered climate change and the long term effects on polar bears, as well as inclusion in the letters of authorization in the regulation of mitigating guidelines to minimize disturbances to denning female polar bears, the court held the Service did take a hard look at the potential consequences of the regulation and its determination was reasonable, and not arbitrary. Because the Service made reasonable predictions about the regulation's effects based on prior data, and there uncertainty in their prediction was not high uncertainty, they committed no clear error in choosing not to produce an environmental impact statement.

The Court of Appeals for the Ninth Circuit upheld the district court's summary judgment in favor of the defendants, holding that the Service did take proper consideration of the weakened state of polar bears due to climate change, that their determination that the regulation's impact would be negligible was not arbitrary or capricious, and that the Service was not required to produce an environmental impact statement regarding the taking regulation.

DANIELLE HOFMAN

Serv. Oil, Inc. v. EPA, 590 F.3d 545 (2009)

The Environmental Protection Agency ("EPA") may no longer assess administrative penalties against point sources under the Clean Water Act ("CWA") for failing to timely apply for permits under the National Pollution Discharge Elimination System ("NPDES"). In *Service Oil, Inc. v. EPA*, the Eighth Circuit held that EPA lacks statutory authority to fine point sources for violating EPA regulations regarding the permit application process. Rather, EPA may only assess administrative penalties against point sources after an actual unlawful discharge has occurred.

In April 2002, Service Oil, Inc. ("Service Oil") commenced construction of a travel plaza in Fargo, North Dakota without first applying for an individual NPDES permit or obtaining coverage under North Dakota's general NPDES permit. After a joint inspection of the construction site by EPA and state health officials revealed that Service Oil was operating without a permit, Service Oil obtained coverage under the general NPDES permit in October 2002. Additional investigation by EPA revealed that Service Oil failed to conduct and record required site inspections. Subsequently, EPA commenced an administrative enforcement action against Service Oil for (1) failing to obtain a permit prior to beginning construction and (2) failing to comply with the permit once issued.

EPA initially alleged that Service Oil's failure to obtain a permit violated §§ 1311(a) and 1342(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p), as well as EPA regulations regarding permit applications, 40 C.F.R. § 122.26(c). The administrative law judge ("ALJ") denied EPA's motion for summary judgment because "the failure to obtain an NPDES permit does not violate § 1311(a) absent proof of a discharge." In order to circumvent this element of proof, EPA amended its complaint to allege that Service Oil violated the recordkeeping requirements of the CWA, 33 U.S.C. § 1318, as well as EPA regulations requiring that permit applications be submitted prior to the start of construction, 40 C.F.R. § 122.21. Service Oil argued that the authority of § 1318 regarding recordkeeping did not encompass EPA's permit application regulations. Thus, EPA should be forced to proceed under the authority of § 1311(a), which would require EPA to prove a discharge by Service Oil.

After an administrative hearing, the ALJ agreed with EPA that the requirements of § 1318 encompassed EPA's regulations requiring point sources to apply prior to construction. As a result, Service Oil was liable under Count 1 "regardless of whether EPA proved that a discharge occurred prior to obtaining coverage under the general permit." The ALJ assessed a $35,640 penalty against Service Oil, Inc., $27,000 of which was based on Service Oil's "complete failure to apply for and obtain a NPDES permit prior to starting construction." The Environmental Appeals Board ("EAB") affirmed the ALJ's conclusions, and Service Oil appealed.

The Eighth Circuit reviewed the EAB's penalty assessment for abuse of discretion. Its analysis centered on EPA's interpretation of § 1318. The issue before the court was "whether the failure to submit a timely permit *application* is a violation of § 1318(a)." If, as EPA claimed, the failure to apply for a permit violated § 1318, then the EAB's penalty assessment was proper. If, as Service Oil claimed, failing to apply for a permit is not a violation of § 1318, then "the penalty was based on an impermissible factor and must be reversed." Thus, the court had to determine whether the authority for the permit application regulations (the validity of which were not in question) flowed from § 1318.

The court applied the *Chevron* doctrine to EPA's interpretation of § 1318 as the authority for its permit application regulations. *See Chevron U.S.A. Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837 (1984); *In re Lyons County Landfill*, 406 F.3d 981, 984 (8th Cir. 2005) ("We consider the agency's interpretation only after finding that the statute is silent or ambiguous on the question at issue."). The court found the statute's plain meaning was unambiguous, so it did not reach EPA's interpretation. The court noted that § 1318 applies to the "owner or operator of any point source." Because a point source cannot exist without a discharge, § 1318 cannot supply the statutory authority for regulations governing pre-discharge conduct. The regulations that EPA claimed were encompassed by § 1318 govern just such pre-discharge conduct by requiring persons "proposing a new discharge" to submit a permit application "before the date on which the discharge is to commence." Thus, § 1318 does not supply authority for EPA's NPDES permit application regulations.

Rather, "the obvious authority for EPA's permit application regulations was its general rule-making authority under § 1361(a)." Under

the CWA, EPA may assess administrative monetary penalties only under specified provisions listed in § 1319(g)(1). Section 1361 is not one of the provisions under which EPA may issue fines; therefore, the EAB impermissibly considered Service Oil's failure to apply for an NPDES permit in calculating the administrative penalty. Accordingly, the court vacated the EAB's order and remanded the case for a recalculation of the proper administrative penalty.

KATIE JO WHEELER

River Runners for Wilderness v. Martin, 593 F.3d 1064 (9th Cir. 2010)

The National Park Service ("Park Service") manages a 277-mile stretch of the Colorado River that traverses the majestic Grand Canyon National Park. Within that stretch of river is a portion classified as the Colorado River Corridor ("Corridor") that is regulated by the periodically revised Colorado River Management Plan ("Management Plan"). The initial Management Plan was first released in 1979, but its controversial determination that motorized watercraft should be completely phased out of the Corridor was directly countermanded by Congress in 1981. As a result, motorized watercraft remained active in the Corridor and that status was unaltered by the promulgation of the 1989 Management Plan. However, in 2002 the Park Service began the preparation of a revised environmental impact statement ("EIS") for the development of a revised Management Plan. After receiving thousands of comment submissions, the Park Service issued a Draft EIS in 2004 and, following additional hearings and further comments, the Park Service issued its Final EIS in November 2005. This completed EIS was then integrated into the new 2006 Management Plan at issue in the instant case.

A group of organizations devoted to restoring the wilderness character of the Grand Canyon (collectively "Plaintiffs") brought suit alleging that the 2006 Management Plan was arbitrary and capricious under the Administrative Procedure Act ("APA"). Plaintiffs based their complaint on allegations that the 2006 Management Plan violated not only the Park Service's own policies, but also the National Park Service Concessions Management and Improvement Act ("Concessions Act") and the National Park Service Organic Act ("Organic Act"). The district court subsequently allowed two organizations, representing commercial raft operators and private rafters respectively (collectively "Interveners"), to intervene on the side of the Park Service. Following cross motions for summary judgment, the district court granted summary judgment in favor the Park Service and the Interveners.

On appeal, the Ninth Circuit first determined that the Park Service's internal policies do not give rise to a legally binding obligation to maintain the wilderness character of the Grand Canyon. To arrive at that assessment the court found that the policies in question lacked the force or effect of law and were not enforceable against the Park Service.

Applying the two-part test established in *United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982), the court held that the policies were not substantive rules and failed to conform to certain procedural requirements. Furthermore, the court noted that the policies were plainly marked as "guidance documents" and reserved unlimited discretion for the top Park Service administrators to waive or modify any policy. Such annotations and discretion, the court reasoned, were insufficient to show they satisfied the *Eclectus Parrots* test. Moreover, the court disagreed with the Plaintiffs' assertion that the policies required *Chevron* analysis. Since the question was not whether the agency had acted within the realm Congress intended, but was instead whether the agency had intended to promulgate binding law for itself, the court maintained that it was exactly the type of question to be decided under *Eclectus Parrots*.

The court next found that just because earlier Park Service policies classified the Corridor as potential wilderness, the 2006 Management Plan's departure from that language was not arbitrary and capricious. Federal agencies are entitled to leeway when interpreting their own policies and regulations and such leeway, the court believed, allows an agency to change course so long as it supplies a reasoned analysis. The court viewed the analysis underlying the 2006 Management Plan as sufficiently reasonable to pass muster.

Lastly, the Ninth Circuit held that the 2006 Management Plan was not arbitrary and capricious in light of either the Concessions Act or the Park Service's Organic Act ("Organic Act"). The record reflected that the Park Service adhered to the considerations required by the Concessions Act and actually chose an alternative that decreased motorized traffic in the Corridor from pre-2006 levels. Under the Organic Act, the court held that the Park Service made a reasoned analysis that resulted in findings of no impediment to free access, nor any impairment of the natural soundscape of the park. Accordingly, the court held that the Park Service did not act arbitrarily and capriciously under any of the Plaintiffs' theories and affirmed the granting of summary judgment in favor the Park Service and interveners.

KAMERON M. LAWSON

Powder River Basin Resource Council v. Wyoming Department of Environmental Quality, 226 P.3d 809 (Wyo. 2010)

In 2005, Basin Electric ("Basin") applied to the Wyoming Department of Environmental Quality ("DEQ") for an air quality permit for their proposed Dry Fork Station coal powered power plant. Basin had to show that this new power plant would not cause significant deterioration of air quality and would use the best available control technology to regulate each pollutant emitted. DEQ uses computer models to determine if a proposed source's emissions would lead to increment increases in the allowable pollutants in an area. First, DEQ determines if a proposed source's emissions alone would lead to Significant Impact Levels. If the source would not lead to Significant Impact Levels, no further analysis is needed. However, if the source would lead to Significant Impact Levels, DEQ runs computer models to determine the combined emissions from the proposed source along with emissions from other sources to determine if the emissions are below the maximum allowable increments.

Powder River Basin Resource Council ("PRBRC") claimed that DEQ improperly granted their permit based on a computer model that used the maximum actual emissions of another power plant within the regulated area. The model showed that using actual emissions for the other source would not lead to Significant Impact Levels, while the model using the maximum allowable emissions would lead to Significant Impact Levels. PRBRC noted that the plain language of the permitting statute clearly requires the permit to be based on calculations using the maximum allowable emissions of another source. The actual emissions calculation uses the highest recorded amount a source has emitted, which is usually significantly lower than the maximum amount the source is allowed to emit.

The court noted the high differential standard given to permitting agencies. However, the court stated that although the maximum actual emissions was allowed to be used in initial testing phase, neither the plain language of the statue nor precedent allowed for the actual emissions to be used in calculations for the cumulative or combined phase for determining if the source exceeds to Significant Impact Levels. Despite this, the court upheld DEQ issuance of the permit because the regulation gave DEQ the

authority to issue a permit if they predict there will be no impact from the source and DEQ could reasonably predict, using the actual emission amounts, that the power plant would not have a detrimental effect on the air quality.

PRBRC also sought to have the permit held invalid because the Dry Fork station plans include the use of a "subcritical" boiler to help control pollution and instead should use a "supercritical" boiler for the pollution control process. Deferring to DEQ's own interpretation of Wyoming's Best Available Control Technology ("BACT") Statute, the court noted that any BACT analysis must consider any control technology that could be applied to the proposed facility and that the facility does not need to add a control technology that would require such redesign of the facility. In conclusion, the court held that use of a "subcritical" boiler was a reasonable pollution control technology and that ordering the "supercritical" boiler be used would require an improper redesign of the facility.

JOHNATHAN R. AUSTIN

Peconic Baykeeper, Inc. v. Suffolk County, 600 F.3d 180 (2nd Cir. 2010)

Peconic Baykeeper, Inc. ("Baykeeper") brought suit against Suffolk County and the Suffolk County Department of Public Works ("County") under the citizen suit provision of the Clean Water Act ("CWA"). Baykeeper alleged that the County violated provisions of the CWA by applying certain pesticides and dredging mosquito ditches in order to combat the spread of mosquito-borne illnesses. In addition to requesting declaratory and injunctive relief, Baykeeper also asked for the imposition of civil penalties against the County, which would be paid to the United States Treasury. The district court entered judgment for the county, finding that none of the County's actions violated the CWA. Baykeeper appealed.

Baykeeper's first contention on appeal was that the County's spraying of pesticides violated the CWA. Specifically, Baykeeper argued that the County sprayed the pesticides in a manner inconsistent with its labeling, which violated the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). The Environmental Protection Agency issued a Final Rule in 2005 stating that any application of pesticides consistent with FIFRA requirements does not require a National Pollutant Discharge Elimination System ("NPDES") permit. An NPDES permit is required for anyone to violate the provisions of the CWA. Thus, Baykeeper's argument was that since the County did not spray in a manner consistent with the label, it violated the FIFRA. That violation required the County to obtain a NPDES, which it did not do, thereby violating the CWA. The court found that there was sufficient evidence that the County had sprayed pesticides over a creek, and since the district court had not fully explained its finding that the County complied with the FIFRA requirements, the case should be remanded for further fact-finding.

The Second Circuit also addressed the district court's independent basis for finding all spraying activities lawful under the CWA. The district court held that the applicators attached to the County's trucks and helicopters were not "point sources" because they discharged pesticides into the air, thus any discharge into the water would have been indirect. The Second Circuit disagreed, saying that even though the pesticides traveled from the air into the water, the pesticides were still being discharged from the applicators, making the applicators a "point source."

Baykeeper's second contention was that the County's dredging of mosquito ditches constituted "dredged spoil" under the CWA, and thus their discharge into navigable waters was unlawful without a permit. The district court said there was no evidence that the County had dug any new mosquito ditches, and that under the CWA a permit was not required for the old ditches, so the County's dredging activities did not violate the CWA. The Second Circuit agreed with the district court, since the CWA has a permit exception for the maintenance of drainage ditches and the purpose of the County's ditches was to drain surface waters.

The court ultimately held that further fact-finding was needed in order to decide if the County's spraying activities were in compliance with the FIFRA requirements, that the trucks and helicopters used by the County to spray pesticides were "point sources" under the CWA, and that the County's dredging activities did not violate the CWA.

THOMAS C. SMITH

Rio Grande Silvery Minnow v. Bureau of Reclamation,
601 F.3d 1096 (10th Cir. 2010)

An action brought by environmental groups under the Endangered Species Act ("ESA") in response to two biological opinions ("B.O.") issued by the Fish and Wildlife Service ("FWS") concerning effects of federal water projects on endangered minnows raised jurisdictional questions under the Article III doctrine of mootness. The plaintiffs alleged that the defendants, the Bureau of Reclamation ("Bureau") and Army Corps of Engineers ("Corps"), failed to consult with the FWS regarding all discretionary aspects of the water projects that were required by the ESA and sought injunctive and declaratory relief for this error. The environmental groups sought an injunction ordering a full consultation between the Bureau and the FWS. The argument escalated to an extended legal battle over water rights in the Rio Grande River. The crux issue is whether the Bureau had discretion to reallocate water from agricultural to municipal contract users to maintain stream flows for the benefit of the Rio Grande Silvery Minnow.

The district court found that the consultation between the Bureau and the FWS was required under the ESA, but also affirmed the 2002 B.O. on substantive grounds. The 2002 B.O. indicated that the reclamation's operations in the Rio Grande River Valley were likely to jeopardize the minnow, but that there were no reasonable alternatives. The Corps, the Bureau and, the water users subsequently filed an appeal. The court of appeals dismissed the water users' claim for lack of standing. The court of appeals also declared that the appeal of both agencies was not subject to interlocutory review, and subsequently dismissed their appeal. After the dismissal the FWS issued a new 2003 B.O. that superseded the previous one. The 2003 B.O. also concluded that the minnow would likely be jeopardized, but suggested reasonably prudent alternatives.

Both agencies voluntarily ceased their objectionable behaviors after the superseding B.O. was issued. At that point, the environmental groups sought dismissal, but requested that the district court not vacate its previous orders. The Bureau, Corps, and water users moved for vacature. Even though they voluntarily ceased their actions, the Corps and Bureau maintained that the scope of their discretion was very narrow and that the voluntary cessation exception to the mootness doctrine was not applicable.

The court of appeals agreed with the defendants, holding that the Bureau was not required to consult with the FWS and that the earlier district court order should be vacated. The court also noted that there was no evidence that the agencies used the issuance of the superseding B.O. to moot the environmental groups' case, and that any injury in connection with the prior opinions could not have survived the issuances of the 2003 B.O.

JESSICA R. ADAMS