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# Salmon Seeking Standing: Court Control over Agency Discretion as the Key to Redressibility

## INTRODUCTION

In *Salmon Spawning v. Gutierrez*, the Ninth Circuit dismissed two of the plaintiff conservation groups' three claims against the Department of State and the National Marine Fisheries Service (NMFS) for violations of Section 7 of the Endangered Species Act (ESA), holding that they lacked standing.<sup>1</sup> The court reasoned that the first two claims could not be redressed because any relief would have required the United States to withdraw from or renegotiate a treaty with Canada, which the court did not have the authority to demand the agencies to do.<sup>2</sup> However, the court distinguished the final claim on the basis that it could require the agency to reinitiate consultation—an exercise of agency discretion—which would allow a satisfactory redress.<sup>3</sup>

Although the reasoning is somewhat opaque, *Salmon Spawning* illustrates the importance of court control over agency discretion to plaintiffs seeking standing. When challenging a treaty that requires Section 7 consultation, a plaintiff is more likely to succeed on a claim seeking reinitiation of consultation rather than one that seeks renegotiation or withdrawal because the latter invokes agency discretion that a court cannot control. Claims seeking renegotiation or withdrawal are likely to fail because a court would refuse to interfere with foreign relations.

## I. BACKGROUND

In 1999, the Department of State entered into the Pacific Salmon Treaty (“the Treaty”) with Canada on behalf of the United States.<sup>4</sup> The purpose of the Treaty is to manage the population of salmon, much of it endangered, that

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1. *Salmon Spawning v. Gutierrez*, 545 F.3d 1220 (9th Cir. 2008). The three plaintiff conservation groups were the Pacific Northwest-based Salmon Spawning & Recovery Alliance, the Native Fish Society, and the Clark-Skamania Flyfishers.

2. *Id.* at 1226–28.

3. *Id.* at 1229.

4. *Id.* at 1223.

originates in Alaska and the Pacific Northwest.<sup>5</sup> To achieve sustainable populations, certain provisions limited the amount of salmon that fisheries could harvest in a given year.<sup>6</sup>

Under the terms of Section 7(a)(2) of the ESA, the Department of State's decision to enter into the Treaty on behalf of the United States was an agency action that required formal consultation with NMFS to determine whether the Treaty would be "likely to jeopardize the continued existence" of the endangered salmon.<sup>7</sup> NMFS subsequently issued a biological opinion (BiOp), in which it concluded that the Treaty would pose "no jeopardy" to the endangered salmon; therefore, the federal agencies implementing the Treaty were not subject to restrictions and terms under Section 9 of the ESA.<sup>8</sup>

Since 1999, however, NMFS has developed new criteria and measurement tools, which, the conservation groups alleged, demonstrate that Canadian take levels are higher than anticipated and are, in fact, jeopardizing the continued existence of the endangered salmon.<sup>9</sup> Given the alleged scientific flaws present in the consultation process leading to the treaty, the plaintiffs challenged the BiOp, the Treaty that relied on it, and the agency's failure to reinstate consultation in light of new information.<sup>10</sup>

## II. PLAINTIFFS' CLAIMS

In 2005, the conservation groups challenged the federal agencies involved in entering into and continuing to enforce the Treaty, alleging both procedural and substantive injuries. First, they alleged that the BiOp upon which the Treaty was premised was scientifically unsound and legally inadequate, constituting a procedural injury under Sections 7 and 9 of the ESA and Section 706 of the Administrative Procedures Act (APA).<sup>11</sup> Second, they alleged that the federal agencies' continued implementation of the Treaty was "arbitrary and capricious" and in violation of their affirmative "do-no-harm obligation," constituting a substantive injury under Section 7(a)(2) of the ESA and Section 706 of the APA.<sup>12</sup> Third, they alleged that the agencies violated Section 7 when

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5. *Id.*

6. *Id.*

7. *Id.* (quoting 16 U.S.C. § 1536(a)(2) (2006)).

8. *Id.* at 1224. Under Section 9, the agencies would have been prohibited from "taking" the endangered salmon unless they obtained an "incidental take" permit by submitting a habitat conservation plan to the Fish and Wildlife Service. The definition of "take" includes any act that actually kills or injures wildlife, including significant habitat modification or degradation. *See Babbitt v. Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687 (1995).

9. *Id.* at 1224, 1229. The conservation groups also noted that in 2005, NMFS had issued a BiOp acknowledging that Canadian harvests of certain salmon were too high to allow those populations to recover. *Id.* at 1224.

10. *See id.* at 1229.

11. *Id.* at 1225.

12. *Id.* at 1227 (quoting *Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946, 965 (9th Cir. 2006)).

they failed to reinitiate consultation in the light of “new information [that] reveals effects that may affect listed species . . . in a manner not considered,” constituting a procedural injury.<sup>13</sup> The district court dismissed all claims for lack of standing and subsequently the plaintiffs appealed.

### III. REQUIREMENTS FOR STANDING

In order to have constitutional standing to sue, plaintiffs must demonstrate that they have suffered sufficient injury to satisfy the “case or controversy” requirement of Article III of the U.S. Constitution.<sup>14</sup> Plaintiffs satisfy this burden if they meet three requirements: (1) they have suffered an injury in fact that is concrete and particularized, (2) causation of that injury is fairly traceable to the challenged conduct, and (3) that injury is likely to be redressed by a favorable court decision.<sup>15</sup>

The courts have also developed an alternative formulation of the standing requirement when plaintiffs allege procedural injury. To establish injury in fact for “procedural standing,” a plaintiff must show that the statutory procedures in question are designed to protect some threatened concrete interest.<sup>16</sup> A successful showing of procedural injury lessens the plaintiff’s burden of showing causation and redressibility.<sup>17</sup> For a procedural injury, plaintiffs need only show that a favorable outcome *might* redress the injury. In contrast, a substantive injury requires a showing that the injury is likely to be redressed.<sup>18</sup>

### IV. COURT CONTROL OVER AGENCY DISCRETION

*Salmon Spawning* was won and lost on the redressibility requirement for both the substantive and procedural injuries to the plaintiffs. For each claim, the court’s analysis hinged on whether it had the ability to order federal agencies to exercise the discretion necessary to carry out a satisfactory redress.

#### A. *Claim One: The Flawed BiOp*

The conservation groups’ first claim was that the BiOp was scientifically and legally flawed. The Ninth Circuit agreed that the groups could show a procedural injury because the Section 7 consultation procedures, which included the BiOp, were “designed to protect some threatened concrete interest

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13. *Id.* at 1229 (quoting 50 C.F.R. § 402.16 (2008)).

14. *Id.* at 1224–1225. Plaintiffs must also demonstrate statutory standing under the Administrative Procedures Act, but the court did not address statutory standing in the first two claims because it found that plaintiffs lacked constitutional standing.

15. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

16. *Salmon Spawning*, 545 F.3d at 1225.

17. *Id.* at 1226.

18. *Id.* at 1228.

that is the ultimate basis of . . . standing.”<sup>19</sup> However, the court found that the groups could not meet even a lessened burden of redressibility under the procedural standing test.<sup>20</sup>

In its analysis of redressibility, the court said it could theoretically set aside the BiOp, but the “next link the chain” was the entrance into the Treaty, which the court said it could not touch.<sup>21</sup> Even though the flawed BiOp caused a clear procedural injury and resulted in a failure to protect the plaintiffs’ concrete interests, nothing could be gained by setting aside the BiOp because the disputed agency decision essentially became frozen once the United States officially entered into the Treaty with Canada.

After the Treaty was established, Canadian fishing levels could not be revisited unless agreed to by both countries.<sup>22</sup> Put another way, “the ultimate agency decision of whether to enter into the Treaty with Canada . . . could never be influenced,” even if the court found that the BiOp was flawed.<sup>23</sup> The court noted that a decision to withdraw from or renegotiate the Treaty was “committed to the Executive Branch” and that the court was not able to order the Department of State to withdraw.<sup>24</sup> While the Department of State could, theoretically, withdraw from the Treaty voluntarily, the court could not order them to do so because it would be beyond their authority. The court declared that because “the BiOp authorized the United States to enter into a Treaty with a foreign sovereign, this ‘foreclose[d] [their] ability to provide effective relief.’”<sup>25</sup> Accordingly, the court dismissed the plaintiffs’ first claim for lack of standing.

### B. *Claim Two: Continued Implementation of the Treaty*

The conservation groups’ second claim was that the agencies’ continuation of permitting excessive Canadian harvesting was “arbitrary and capricious” in violation of an affirmative “do-no-harm obligation” conferred by Section 7(a)(2) and Section 706 of the APA.<sup>26</sup> The plaintiffs alleged that the

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19. *Id.* at 1225. The plaintiffs alleged specifically that the 1999 BiOp authorizing the United States’ entry into the Treaty was arbitrary and capricious in violation of the APA and Sections 7 and 9 of the EPA.

20. *Id.* at 1228. The court did not address causation for this claim.

21. *Id.* at 1226.

22. *Id.*

23. *Id.* at 1227.

24. *Id.* at 1226. The court cited *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–53 (9th Cir. 1993), which held that the court would “not enforce a statute that required the Executive Branch to negotiate with foreign nations, as that branch alone has the exclusive power to conduct foreign relations.”

25. *Id.* at 1226–1227 (citing *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 799 (9th Cir. 2006)).

26. *Id.* at 1227 (citing *Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946, 965 (9th Cir. 2005)).

federal agencies' continued implementation of the Treaty constituted a substantive injury under Section 7(a)(2), as they could exercise their authority to withdraw from the Treaty or to request additional conservation measures.<sup>27</sup> They also alleged that the federal agencies' failure to limit harvesting by the U.S. fisheries to offset the effects of Canadian overharvesting was also a violation of the ESA.<sup>28</sup>

The court again decided the claim on redressibility.<sup>29</sup> As in the first claim, the court reasoned that it could not force the Department of State to take any action with regards to the Treaty, including withdrawal. The Treaty arose from an agency action over which the court theoretically had authority, but once the Treaty was officially entered into, the action became something outside of the court's control.

The court also examined another possible route for providing redress, which included other discretionary agency actions. Plaintiffs argued that a court order declaring that the agencies violated the ESA would require the defendants to exercise authority to reduce the take of U.S. fisheries.<sup>30</sup> The court disagreed, quoting the Plaintiffs' own words that if it "declared that the agencies violated their ESA obligation to avoid jeopardy, that would leave it 'up to Defendants to determine whether . . . negotiations with Canada—or changes in U.S. fisheries—are needed to meet their obligations under the ESA.'"<sup>31</sup> The court concluded that a favorable decision would merely leave it up to the agencies to decide whether they should renegotiate with Canada, reduce US take levels, or do nothing. As the agencies could easily decide to do nothing, the court held that a favorable decision was not likely to redress the injury to the plaintiffs.<sup>32</sup>

The court highlighted the distinction between a substantive and procedural injury. Unlike the first claim, the evidentiary burden for a substantive injury is greater, requiring that a favorable decision was *likely* to redress the injury. For a procedural injury, the only requirement is that a favorable decision *could* redress the injury. Additionally, the court is limited by the agency's discretion in substantive claims. For procedural injury, the typical redress is to order the agencies to correctly follow the procedure. However, for this substantive injury, the agency would be given broad deference to choose its subsequent actions. As such, the effect of a court's order would be unknown, leaving the court to conclude that the plaintiffs failed to establish redressibility.<sup>33</sup>

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27. *Id.* at 1228.

28. *Id.*

29. *Id.* The court assumed that even if injury-in-fact and causation were present, the claim still failed on redressibility. The standard for redressibility is even higher for this claim than the first claim because the plaintiffs claim a substantive as opposed to procedural injury.

30. *Id.* at 1228.

31. *Id.*

32. *Id.* at 1228–1229.

33. Even if the plaintiffs had standing on this claim, they would likely face difficulties in prevailing on the merits. The arbitrary and capricious standard of Section 706 of the APA gives agencies

C. *Claim Three: Failure to Reinitiate Consultation*

The conservation groups' third claim was that the agencies were under an obligation under Section 7 of the ESA to reinitiate consultation because the recent developments in NMFS criteria for evaluating salmon populations and other new information revealed that effects of the agencies' discretionary action in entering into the Treaty "may affect listed species . . . in a manner not considered."<sup>34</sup>

Unlike the first two claims, the court held that effective redress was within its power. However, the court's analysis for the third claim is markedly shorter and shallower than for the previous two claims, making identification of the controlling factors in these three claims difficult. The redressibility analysis is limited to two sentences and the reasoning to only one: "A court order requiring the agencies to reinitiate consultation would remedy the harm asserted. Unlike the other claims, this claim is a 'forward-looking' allegation whose remedy rests in the hands of federal officials and does not hinge on upsetting the Treaty."<sup>35</sup>

The plaintiffs met the redressibility requirement because the court was able to order the federal agencies to redress the plaintiffs' procedural injury by reinitiating the consultation according to their regulatory duty under Section 7 of the ESA. Unlike the first two claims, this claim did not require the court to force the agencies to alter an international treaty. And unlike the second claim, this claim did not involve a substantive injury where a favorable decision would not bind the agencies to take any particular action.

Instead of finding that the next "link in the chain" could not be undone, the court's reasoning indicated that reinitiating consultation would essentially create the new link necessary to address plaintiffs' injury. For example, a new BiOp could find that the continued implementation of the Treaty is jeopardizing the endangered salmon. NMFS might include in the new BiOp "reasonable and prudent alternatives" detailing altered terms or plans that would prevent further harm to the salmon. Consequently, the Department of State might choose to renegotiate with Canada voluntarily or reduce harvesting levels within the United States. Though this redress could ultimately result in no agency action, just as in the second claim, it is logically distinct because it

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broad powers of discretion. Courts are generally reluctant to interfere so long as relevant factors were considered and there was no clear error in judgment. However, courts have been willing to overturn agency decisions based on improper data. *See* LAWRENCE R. LIEBESMAN & RAFFAEL PETERSEN, ENVIRONMENTAL LAW INSTITUTE, ENDANGERED SPECIES DESKBOOK 16-17 (2003).

34. *Salmon Spawning*, 545 F.3d at 1229 (quoting 50 C.F.R. § 402.16). Specifically, Salmon Spawning alleged that since the BiOp was issued in 1999, NMFS has developed new criteria showing that the Canadian harvest is taking more Puget Sound chinook than the BiOp had anticipated. NMFS changed the definition of salmon evolutionary significant units since 1999, such that almost three-quarters of the salmon caught in some Canadian fisheries are ESA-listed. *Id.*

35. *Id.*

does not call for the undoing of anything in the past. Rather, it calls for a fresh analysis and leaves open the possibility of future action.

CONCLUSION

This case deals specifically with a treaty, but the logic is likely to hold wherever the redress is linked to agency discretion over which the court has no control, either because it is in the exclusive domain of the executive branch (such as international affairs) or because the court cannot require that an agency take a particular action to redress a substantive injury and therefore redress is too uncertain. After *Salmon Spawning*, plaintiffs seeking to challenge treaties that underwent Section 7 consultation should focus their efforts on reinitiating consultation or other “forward-looking” remedies that do not involve undoing or interfering with fixed international agreements entered into by the executive branch.

*Lala Wu*



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*United States v. Robison:*  
The Case for Restoring Broad Jurisdictional  
Authority under the Federal Clean Water Act  
in the Wake of *Rapanos*' Muddied Waters

INTRODUCTION

In 2006, the United States Supreme Court restricted and muddied the legal reach of the Clean Water Act (CWA) with its holding in *United States v. Rapanos*. Since then, both district courts and circuit courts of appeals have had a difficult time interpreting agency jurisdictional scope under the CWA.<sup>1</sup> The Eleventh Circuit's reversal of a CWA conviction in *United States v. Robison*—a decision based on *Rapanos*—evinces the need for either agency or congressional action to reassert Congress' intended CWA jurisdictional breadth.<sup>2</sup> In addition to reflecting the new restricted limits of CWA authority, the *Robison* decision embraces Justice Kennedy's "significant nexus" test, marking a shift from interpreting CWA jurisdiction based on a water body's physical characteristics to one based on ecosystem functionality.<sup>3</sup>

I. BACKGROUND

Under the CWA and subsequent amendments, Congress sought broadly to protect the nation's waters. Section 301(a) of the CWA thereby limits "discharge of a pollutant" into "*navigable waters* from any point source."<sup>4</sup> Congress further defined navigable waters to mean "the waters of the United States."<sup>5</sup> In 1972, Congress passed a series of amendments to the CWA with the Federal Water Pollution Control Act.<sup>6</sup> The law clarified and expanded federal protections for "waters of the United States" by purporting "to restore and maintain the chemical, physical, and biological integrity of the Nation's

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1. See Mark Latham, *Rapanos v. United States: Significant Nexus or Significant Confusion?*, in *THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS* 5, 13 (L. Kinvin Wroth ed., 2007).

2. See *United States v. Robison*, 505 F.3d 1208, 1229 (11th Cir. 2007).

3. See *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring).

4. Federal Water Pollution Control Act, 33 U.S.C. § 1362(12) (2006) (emphasis added).

5. *Id.* § 1362(7).

6. Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972).

waters.”<sup>7</sup> The mechanism adopted was a permit system for regulating point sources of pollution.<sup>8</sup> Regulations by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) followed in 1977, which broadly defined CWA jurisdiction to include most waters, so long as the government could show a physical connection to a navigable waterway.<sup>9</sup> Significantly, however, while the 1972 legislation emphasized protecting waterways by focusing on ecosystem functionality, the 1977 regulations measured jurisdiction based on physical categorization. After these amendments, CWA jurisdictional reach became largely a question of whether a body of water fell under one of the protected physical classes, and was not based on its functional role in an ecosystem.<sup>10</sup>

Three Supreme Court cases, culminating with *Rapanos*, reflect the Court’s willingness to deviate from the traditional physical approach to CWA jurisdiction, favoring instead Congress’ functional emphasis.<sup>11</sup> All three cases involve CWA authority over wetlands, which may confer significant ecological benefits to a watershed without having a direct physical connection with a navigable waterway.<sup>12</sup> In *United States v. Riverside Bayview Homes, Inc.*, the Court held that the CWA did cover wetlands adjacent to—though not directly connected with—a larger body of water that ultimately flows into a navigable waterway if it performs a greater ecological function beyond the wetland.<sup>13</sup>

The Court revisited a functional approach sixteen years later with *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers* in 2001,<sup>14</sup> and then again with *Rapanos* in 2006.<sup>15</sup> These two cases narrowed CWA jurisdictional authority. In *SWANCC*, the 5–4 majority held that the functional approach from *Riverside* applied only to wetlands adjacent to navigable waterways.<sup>16</sup> In a footnote, however, the Court acknowledged its reasoning in *Riverside* by emphasizing that where CWA

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7. *Id.* § 101(a).

8. *Id.* § 402(a).

9. 33 C.F.R. § 328.3(a) (2009).

10. Robin Kundis Craig, *Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction After Rapanos*, 38 ENVTL. L. 635, 637, 647–48 (2008).

11. *See id.* at 649.

12. *See* Latham, *supra* note 1, at 8.

13. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). The Court looked to congressional intent in finding that “[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system.” *Id.* at 133–34.

14. 531 U.S. 159, 167 (2001).

15. *Rapanos v. United States*, 547 U.S. 715 (2006).

16. *SWANCC*, 531 U.S. at 167.

authority was suspect, the courts could employ what has become known as the “significant nexus” test.<sup>17</sup>

The Court’s 4-1-4 holding in *Rapanos*, a case involving a Section 404 permit for wetland dredging, confounded CWA jurisdictional analysis. The Court produced a plurality opinion grounded in a traditional physical framework and a concurring opinion rooted in a functional interpretation.<sup>18</sup> Justice Scalia, writing for the plurality, held that the term “navigable waters” only applied to “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are . . . ‘streams[,] . . . oceans, rivers, [and] lakes,’”—an overruling of the 1977 regulations promulgated by the EPA and the Corps. Justice Kennedy’s concurrence, however, used the relatively minor “significant nexus” remark in *SWANCC* as the basis for a sweeping rule<sup>19</sup> grounded in an analysis of ecosystem functionality.<sup>20</sup>

In *Robison*, the Eleventh Circuit addressed two issues raised by *Rapanos*. First, the court tackled the tricky questions of whether to follow the plurality or concurrence of *Rapanos*. Second, the Eleventh Circuit addressed whether the new test should apply to Section 301 pollutant discharges into bodies of water or only to dredging and filling of wetlands under Section 404.

## II. UNITED STATES V. ROBISON: AN ANALYSIS

Between May 1999 and January 2001, defendant McWane, a large manufacturer in Alabama, discharged process wastewater into storm drains and Avondale Creek in violation of the company’s National Pollutant Discharge Elimination System (NPDES) permit.<sup>21</sup> The United States sued McWane in 2004 for, among other things, violating its NPDES permit under the CWA. McWane was convicted for “knowing discharge of pollutants into the waters of the United States in violation . . . of the CWA.”<sup>22</sup> The district court instructed the jury to find a CWA violation if the government met its burden of showing

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17. See Craig, *supra* note 10, at 652–53. In other words, where it was unclear whether a water body met the definition of a “water of the United States,” a court could analyze its functional connection—including its chemical, physical and biological properties—with navigable waters. See *id.*

18. See Latham, *supra* note 1, at 13.

19. Justice Scalia criticized Justice Kennedy for reading the Court’s *SWANCC* decision “in utter isolation of the [CWA]” by adopting a “significant nexus” requirement as the central test for CWA authority. See *Rapanos*, 547 U.S. at 754.

20. *Rapanos*, 547 U.S. at 739, 746. Notably, the above cases concern the CWA’s jurisdictional reach over wetlands under Section 404. The Court’s holdings in *Rapanos*, however, may extend to point-source pollution under Section 301. Justice Scalia penned the plurality’s opinion broadly to apply to all bodies of water—not just wetlands. Justice Kennedy’s concurrence is less clear in its scope, which he wrote in terms of when a wetland has a “significant nexus” to a navigable waterway. See *id.* at 739, 779 (Kennedy, J., concurring).

21. *United States v. Robison*, 505 F.3d 1208, 1211, 1213 (11th Cir. 2007). An NPDES permit is issued by the EPA or states with programs approved by the EPA. *Id.*

22. *Id.* at 1214.

that the defendant discharged pollutants into “any stream which may eventually flow into a navigable stream or river.”<sup>23</sup>

The Eleventh Circuit Court of Appeals gave the case *de novo* review following *Rapanos*,<sup>24</sup> and concluded that the district court had erred in its interpretation of the reach of “navigable waters” under the CWA in making its jury instruction.<sup>25</sup> Adopting Justice Kennedy’s “significant nexus” test from *Rapanos* as controlling, the Eleventh Circuit held that EPA failed to show “the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River,” despite its continuous physical connection with the river.<sup>26</sup>

The Eleventh Circuit chose Justice Kennedy’s test in *Rapanos* as controlling, citing the Supreme Court’s decision in *Marks v. United States*. In *Marks*, the Court found that “when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding . . . may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”<sup>27</sup> Employing this reasoning, the *Robison* court proceeded to make two controversial and important moves. First, it determined that the “narrowest grounds” referred to the greatest deference to federal jurisdictional reach in the case in which it was applied.<sup>28</sup> The court made this determination despite the fact that *Marks* and other cases held that the strictest application of federal law was the narrowest holding, not vice versa.<sup>29</sup> Second, the court determined that Justice Kennedy’s concurrence satisfied the first condition because, “at least in wetlands cases . . . [Justice Kennedy’s test] will classify a water as ‘navigable’ more frequently than Justice Scalia’s test.”<sup>30</sup> However, as *Robison* concerned point-source pollutant discharge under CWA Section 301, the court failed to note that Justice Scalia’s test, not Justice Kennedy’s, would actually constitute a narrower jurisdictional reach, by allowing broader CWA authority. The Eleventh Circuit conceded that the government would have likely prevailed had it adopted the plurality’s test.<sup>31</sup>

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23. *Id.* at 1215.

24. Citing *Farley v. Nationwide Mutual Insurance Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999), the court determined that because the defense had preserved its objection to the jury instruction on “navigable waters” at trial, it would grant *de novo* review rather than review the decision for plain error. *Id.* at 1215 n.9.

25. *Id.* at 1229.

26. *Id.* at 1223.

27. 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

28. *Robison*, 505 F.3d at 1221.

29. See *United States v. Robison*, 521 F. Supp. 2d 1247, 1259 (S.D. Ala. 2007).

30. *Id.*

31. See *Robison*, 505 F.3d at 1224. In satisfying Justice Scalia’s physical test, the EPA testified that there was a continuous, uninterrupted flow between Avondale Creek and Black Warrior River. See *id.* at 1221.

By adopting Justice Kennedy's test, which applied to a wetlands case, for use in a case involving point-source discharge pollutants, the Eleventh Circuit effectively rejected Congress' intent in broadly defining "navigable waters" in its 1972 CWA amendments. Justice Kennedy's test had the desired effect of expanding protections for bodies of water, such as wetlands, which do not link contiguously with a navigable waterway, and therefore do not fit neatly into a single category under the CWA. But when applied to discharges into tributaries, streams and rivers, the impact is to increase the evidentiary and financial burden of the government in proving a "significant nexus" exists, effectively raising the bar for showing CWA jurisdiction.

### III. EXITING THE CASE-BY-CASE JURISDICTIONAL MALAISE

Two options are available to reverse the erosion of Congress' original intent in granting the EPA broad jurisdictional authority under the CWA and to foster consistent CWA application among the lower courts. Either the agencies charged with enforcing the CWA should issue regulations that will withstand *Chevron* deference,<sup>32</sup> or, preferably, Congress should pass legislation that broadly defines navigable waters to counter a conservative Supreme Court's strict interpretation of the CWA's jurisdictional reach.

Before *SWANCC*, the Supreme Court granted *Chevron* deference to the EPA and Corps' 1977 regulations, which broadly interpreted the CWA to cover most intrastate bodies of water that had some connection with navigable waterways.<sup>33</sup> The *SWANCC* Court, however, refused to grant the Corps any deference at *Chevron* step one, holding that the CWA clearly did not extend to cover isolated, or non-adjacent, wetlands.<sup>34</sup> The *Rapanos* holdings represent a further assault on *Chevron* deference for the agencies' CWA protections under Section 404.<sup>35</sup> In his plurality opinion, Justice Scalia held that the CWA clearly did not authorize the Corps' regulations placing wetlands adjacent to navigable waterways or their tributaries under the aegis of the CWA.<sup>36</sup>

The confusion over the CWA's jurisdictional breadth post-*Rapanos*, combined with the Court's steady erosion of agency deference in favor of

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32. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 837–38 (1984), the Supreme Court held that agency rules are to be afforded judicial deference based on a two-part test. At step one, a reviewing court must determine whether Congress' statutory construction has "directly spoken to the precise question at issue." If not, then under step two, the court must determine whether the agency's rule is "based on a permissible construction of the statute."

33. See Latham, *supra* note 1, at 7.

34. Stephen M. Johnson, *The Rulemaking Response to Rapanos: The Government's Best Hope for Retaining Broad Clean Water Act Jurisdiction*, in *THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS* 22 (L. Kinvin Wroth ed., 2007); see also Latham, *supra* note 1, at 9.

35. See Johnson, *supra* note 35, at 23–24.

36. See *id.* at 23. As Chief Justice Roberts noted, the agencies' defeat in *Rapanos* could have been avoided had they undergone new rulemaking post-*SWANCC*. See *Rapanos*, 547 U.S. at 758 (Roberts, C. J., concurring).

narrowly interpreting the CWA, reflects the need for new rulemaking. Without new rules, the courts will continue confronting the cumbersome task of interpreting the CWA on a case-by-case basis.<sup>37</sup> How ought courts determine what type of functional connection meets the test? Justice Kennedy himself seemed agnostic on this point, urging the Corps in his concurrence to issue rules that define classes of waters that necessarily meet the test, such as wetlands adjacent to “major tributaries.”<sup>38</sup>

An alternative to agency rulemaking is for Congress to take legislative action. New legislation carries the benefit of possibly avoiding litigation, should the Corps’ 1977 regulations remain consistent with a new statute.<sup>39</sup> Legislation is arduous, however, as reflected by Congress’ repeated failed attempts to pass the Clean Water Restoration Act (CWRA) in each of the last five Congresses.<sup>40</sup> Sponsored by Sen. Russ Feingold (D-WI), the CWRA embraces a functional approach to CWA jurisdiction, seeking “to reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 816) to restore and maintain the chemical, physical and biological integrity of the waters of the United States.”<sup>41</sup> Most significantly, the bill would strike “navigable waters” wherever it appears and replace the phrase with “waters of the United States,” thereby reinstating the CWA’s scope pre-*Rapanos* to waters without a direct, continuous connection to a navigable waterway.<sup>42</sup>

Prospects for CWRA passage are greater in the 111th Congress, considering the Democrats’ control of the White House and expanded majorities in both chambers of Congress. It is unclear, however, whether either the House or Senate has the political muster to take up a pitched political fight over CWA protections that will bring out myriad lobbies on both sides when the current focus is on negotiating major climate change legislation. Indeed, as

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37. There are at least two reasons the Corps and the EPA are weary of embracing the rulemaking process. First, new rules will no doubt be a source of extensive litigation since it is unclear which *Rapanos* opinion is controlling and the scope of Justice Kennedy’s “significant nexus” test is unclear. See Latham, *supra* note 1, at 19. Second, there is a risk that in a post-*Rapanos* jurisdictional landscape, the agencies will issue rules that, rather than clarifying current regulations, substantially restrict their reach. See Johnson, *supra* note 35, at 36.

38. See *Rapanos*, 547 U.S. at 780–81 (Kennedy, J., concurring). In June 2007, the agencies instead opted for the less arduous and litigious route of providing guidance documents based on *Rapanos*. Unlike rules, guidance documents lack the force of law, meaning they cannot be afforded *Chevron* deference, leaving the courts more likely to continue looking directly to the *Rapanos* split opinion for direction. See Johnson, *supra* note 35, at 34.

39. See Craig, *supra* note 10, at 665.

40. Clean Water Restoration Act, S. 2780, 107th Cong. (2002); Clean Water Restoration Act, S. 473, 108th Cong. (2003); Clean Water Restoration Act, S. 912, 109th Cong. (2005); Clean Water Restoration Act, S. 1870, 110th Cong. (2007); Clean Water Restoration Act, S.787, 111th Cong. (2009).

41. S. 1870, 110th Cong. § 2(1) (2007).

42. *Id.* § 5(3).

of June 1, 2009, the Senate Environment and Public Works Committee had yet to even consider the bill in the 111th Congress.<sup>43</sup>

## CONCLUSION

The *Robison* decision reflects the confusion over the jurisdictional reach of the CWA in the aftermath of the Supreme Court's mixed holding in *Rapanos*. The Eleventh Circuit's controversial adoption of Justice Kennedy's "significant nexus" test as controlling, combined with its lack of deference to long-standing agency regulations, signifies the need for clarification at the agency or congressional level. Without new rules or legislation, the various circuits will continue the cumbersome task of interpreting the CWA on a case-by-case basis, resulting in extraneous consumption of court resources, inconsistent results, and decisions out-of-step with Congress' original intent in passing the Federal Water Pollution Control Act Amendments of 1972.

*Jared Fish*

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43. Clean Water Restoration Act, S. 787, available at <http://www.opencongress.org/bill/111-s787/show>.



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# Court Ordered Listings: *Center for Biological Diversity v. Fish and Game Commission*

## INTRODUCTION

Since the enactment of the California Endangered Species Act (CESA), courts and practitioners have debated the evidentiary standard required to accept a species as a candidate for listing. This evidentiary standard, described as the “amount of information . . . that would lead a reasonable person to conclude that there is a substantial possibility the requested listing could occur,”<sup>1</sup> was used in *Center for Biological Diversity v. Fish and Game Commission*, a case involving the listing of the California Tiger Salamander as a candidate species.<sup>2</sup> However, rather than simply have the California Fish and Game Commission (Commission) reevaluate their prior rejection of the species, the California Court of Appeal deviated from past behavior by ordering the Commission to list the California Tiger Salamander as a candidate species as a matter of law.<sup>3</sup>

## I. BACKGROUND

The CESA is the state equivalent to the federal Endangered Species Act (ESA) and requires that the Commission list a species as endangered when it “is in serious danger of becoming extinct throughout all, or a significant portion, of its range.”<sup>4</sup> When the Commission receives a petition for listing a species, the petition is referred to the Department of Fish and Game (Department).<sup>5</sup> The Department reviews the petition and other relevant information before submitting a written evaluation to the Commission with a recommendation of whether to accept the species as a candidate for listing.<sup>6</sup> Should the species be accepted as a candidate, it gains statutory protections as

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1. NRDC v. Fish & Game Comm’n, 33 Cal. Rptr. 2d 904, 916 (Ct. App. 1994).
2. Ctr. for Biological Diversity v. Fish & Game Comm’n, 82 Cal. Rptr. 3d 855, 857 (Ct. App. 2008).
3. *Id.* at 869.
4. CAL. FISH & GAME CODE §§ 2062, 2070 (1998).
5. *Id.* § 2073.
6. *Id.* § 2073.5.

the Department conducts a year-long survey on the species' status.<sup>7</sup> The Commission then considers this status report, the original petition, and third-party comments in its decision to formally list the species under CESA.<sup>8</sup>

While the CESA describes the types of scientific information and evidence required in the petition, it does not explain how to weigh this evidence in determining whether the species should be accepted as a candidate for listing.<sup>9</sup> Instead, the applicable evidentiary standard was detailed in *Natural Resources Defense Council v. Fish and Game Commission*, where the court required candidacy listing when the evidence was sufficient to lead a reasonable person to conclude that there was a "substantial possibility" that if accepted as a candidate, the species would ultimately be listed under the CESA.<sup>10</sup> The court went on to say that their ruling was "not determining a standard of judicial review [for] the Commission's decision"<sup>11</sup> to accept or reject a petition for listing, instead ordering the Commission to reopen proceedings using the new evidentiary standard.<sup>12</sup> Thus, rather than require the Commission to list the species directly as a candidate species, the court only required the Commission to reevaluate the petition.<sup>13</sup>

However, the court took a different approach in *Center for Biological Diversity v. Fish and Game Commission*, a CESA listing case concerning the California Tiger Salamander (CTS), a mole salamander native to the state that makes its home in fast-disappearing vernal pools.<sup>14</sup> While habitat loss and fragmentation are the greatest threats to its continued survival, the CTS also faces pressure from competition with, predation by, and hybridization with introduced species.<sup>15</sup> Despite these population threats, the Commission used the *NRDC* evidentiary standard to reject the Center for Biological Diversity's (Center) emergency position to list the CTS as an endangered species in 2001, which would have bypassed candidacy status, citing insufficient information to warrant action.<sup>16</sup>

The Center then filed for listing of the CTS as a candidate species, which was also rejected in 2004.<sup>17</sup> When explaining this second rejection, the Commission found that the petition was deficient for failing to provide

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7. *Id.* §§ 2074.2, 2074.6, 2084.

8. *Id.* § 2074.2

9. California Fish & Game Commission, Notice of Findings 2 (Dec. 2, 2004), available at <http://www.fgc.ca.gov/regulations/new/2004/ctsncrejectpet.pdf> [hereinafter *Notice of Findings*].

10. *NRDC v. Fish & Game Comm'n*, 33 Cal. Rptr. 2d 904, 916 (Ct. App. 1994).

11. *Id.* at 910.

12. *Id.* at 918.

13. *Id.*

14. *Ctr. for Biological Diversity v. Fish & Game Comm'n*, 82 Cal. Rptr. 3d 855, 858 (Ct. App. 2008).

15. *Id.* at 859.

16. Notice of Findings, *supra* note 9, at 1.

17. *Id.*

adequate information on the CTS's population trend, population abundance, and degree and immediacy of threat.<sup>18</sup> In response, the Center filed for a writ of mandate, and in December 2006, the trial court granted the request by not only overturning the rejection, but requiring that the Commission accept the species as a candidate for listing because there was insufficient reason to reject the petition.<sup>19</sup> Thus, rather than require the Commission to reevaluate the petition as was done in *NRDC*, the trial court required the Commission to list the CTS as a candidate species. The Commission filed for appeal, arguing that the trial court's criticism of its findings was "unfair, unwarranted, or immaterial and shows that the trial court mistook the standard of review."<sup>20</sup> Finding no prejudicial error, however, the court of appeal affirmed the trial court's judgment.<sup>21</sup>

## II. CENTER FOR BIOLOGICAL DIVERSITY V. FISH AND GAME COMMISSION: AN ANALYSIS

When reviewing the Commission's decision to reject the CTS as a candidate for listing under CESA, the court of appeal looked at the Commission's findings and the information presented during the Commission hearings, focusing primarily on the Department's report, the Center's petition, and an opposing petition by the Central California Tiger Salamander Coalition (Coalition).<sup>22</sup>

First, the court examined the Commission's claim that the Center's petition had insufficient data on the CTS's population abundance and trend. The Commission found the Center's surveys showing a decline in the CTS population were potentially misleading, as the studies used either a limited portion of the CTS's total range or sampling procedures that had a high bias towards absence.<sup>23</sup> The Commission instead relied on an opposing opinion by the Coalition—made up primarily of industry associations<sup>24</sup>—which critics had rejected as overestimating the CTS population. The court of appeal echoed this skepticism, observing that both the Department and U.S. Fish and Wildlife Service had criticized the scientific accuracy of the Coalition's findings, which the Commission had still "credited . . . over peer-reviewed analyses of population decline."<sup>25</sup> Instead, the court found that the Commission ignored

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18. *Id.* at 3.

19. *Ctr. for Biological Diversity*, 82 Cal. Rptr. 3d at 864.

20. *Id.* at 865.

21. *Id.* at 857.

22. *Id.* at 859–60.

23. *Id.* at 863; Notice of Findings, *supra* note 9, at 4.

24. Press Release, Central California CTS Coalition, Central California Population of California Tiger Salamander Not Threatened with Extinction (Oct. 30, 2003), available at [http://www.csac.counties.org/legislation/regulation/cts\\_coalition.pdf](http://www.csac.counties.org/legislation/regulation/cts_coalition.pdf).

25. *Ctr. for Biological Diversity*, 82 Cal. Rptr. 3d at 865.

evidence of a declining CTS population by focusing on the lack of an accurate population count and discounting the effect of habitat loss on the population.<sup>26</sup>

The court next examined the Commission's rejection of the petition for lack of information on "the degree and immediacy of threat" to the CTS.<sup>27</sup> Although both the Center and Department argued that CTS habitat was threatened by human population growth, the Commission found that the habitat was sufficiently protected by existing environmental statutes such as the California Environmental Quality Act.<sup>28</sup> The Commission also noted that all populations of the CTS were listed under the federal ESA prior to its decision and thus found that, combined with other state environmental statutes, the federal listing sufficiently protected the CTS.<sup>29</sup> Thus, it was not necessary to list the CTS under CESA.<sup>30</sup>

When examining this claim, the court noted that the Department had agreed with the Center that a listing under CESA would benefit the species not only because of the increased creativity and funding for management techniques, but because CESA's standards are, at times, more restrictive than ESA's.<sup>31</sup> Further, 177 cases of dual listing under both CESA and the ESA already existed, showing that the mere fact that a species was listed under ESA was not dispositive of there being no substantial possibility that listing would eventually occur.<sup>32</sup> The court also found that the Commission failed to address the threats posed by competition with, predation by, and hybridization with nonnative species.<sup>33</sup>

After its review of the available data regarding the CTS's status, the court upheld the trial court's decision, holding that the Commission had erred in rejecting the Center's petition for listing.<sup>34</sup> First, the court rejected the Commission's argument that the decision must be upheld because the "record provides 'substantial evidence to support a rationally based doubt regarding a serious threat of extinction.'"<sup>35</sup> Instead, the court found that under the evidentiary standard articulated in *NRDC*, the Commission had to accept the petition if a reasonable person would believe there was a substantial possibility that the species would ultimately be listed under CESA.<sup>36</sup> Thus, the

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26. *Id.* at 864–65.

27. *Id.* at 865.

28. *Id.* at 862.

29. *Id.* at 862, 864.

30. *Id.* at 864.

31. *Id.* at 862–63.

32. *Id.* at 862.

33. *Id.* at 868.

34. *Id.* at 869.

35. *Id.* at 866.

36. *Id.* at 866–67.

Commission's decision "turns not on rationally based doubt about listing, but on the absence of any substantial possibility that the species could be listed."<sup>37</sup>

Using this standard, the court found that the Center's petition provided sufficient proof of the CTS as "a threatened or endangered species within the meaning of CESA," and that the issues "raised by the Commission, concerning the strength of the information in favor of the petition, would *not* lead the objective, reasonable person to conclude that there is no substantial possibility that listing could occur."<sup>38</sup> In particular, the problems of habitat fragmentation and hybridization and competition with nonnative species were significant enough in the court's eyes to satisfy the substantial possibility requirement.<sup>39</sup> In contrast, the Coalition's opposing petition did not "compellingly undercut" the Center's evidentiary support on why the CTS should be listed, as it failed to address the CTS's long-term status in the face of such threats.<sup>40</sup> Thus, finding that the *prima facie* case for candidacy listing was satisfied by the original petition's scientific evidence and that the Coalition's opposing petition did not sufficiently undermine the Center's petition's evidentiary support, the court held that the Commission's rejection was based on information insufficient to undermine the reasons for accepting the CTS as a candidate species under CESA.<sup>41</sup>

Although the *NRDC* court specifically stated that its ruling was not a standard of judicial review of Commission decisions,<sup>42</sup> here the trial court required the Commission to accept the CTS as a candidate species.<sup>43</sup> As the Center's petition had sufficient information to warrant acceptance, the trial court found that candidate species status for the CTS was required as a matter of law and that remanding the matter back to the Commission would not alter that finding.<sup>44</sup> The court of appeal affirmed the trial court's judgment in its entirety and ordered "the Commission to enter a decision accepting the petition," overriding the previous administrative decision to reject the CTS as a candidate species.<sup>45</sup>

#### CONCLUSION

On December 10, 2008, the Supreme Court of California denied a petition for review, thus allowing the court of appeal's decision to stand.<sup>46</sup> Pursuant to

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37. *Id.* at 867.

38. *Id.* (emphasis added).

39. *Id.* at 867–68.

40. *Id.* at 868.

41. *Id.*

42. *NRDC v. Fish & Game Comm'n*, 33 Cal. Rptr. 2d 904, 910 (Ct. App. 1994).

43. *Ctr. for Biological Diversity*, 82 Cal. Rptr. 3d at 857.

44. *Id.* at 869.

45. *Id.*

46. *Ctr. for Biological Diversity v. CA Fish & Game Comm'n*, 2008 Cal. LEXIS 14169 (Cal. 2008).

this ruling,<sup>47</sup> in February 2009 the Commission finally accepted the Center's petition to list the CTS as a candidate species in a 3-2 vote.<sup>48</sup> This close decision, despite the court's mandate to list the CTS, underscored the resentment against the court of appeal's decision, with one of the Commissioners even referring to the judges that issued the petition acceptance order as being "'jerks' and 'stupid.'"<sup>49</sup>

Yet despite this resentment, this decision has had an undeniable impact on the candidacy status of other poorly monitored species such as the Pacific fisher and American pika, both of which were also rejected as candidate species in 2008 because of a lack of information.<sup>50</sup> Since the decision, the Commission has not only reconsidered the Center's Pacific fisher petition,<sup>51</sup> but, in an about-face, accepted the species as a candidate for listing in March 2009.<sup>52</sup> Meanwhile, the Commission's rejection of the American pika was recently invalidated by the San Francisco Superior Court, which required the Commission to reconsider the petition using the *NRDC* standard.<sup>53</sup> While that court did not require the Commission to accept the pika as a candidate species, the Pacific fisher decision may foretell a willingness to adhere to the reasonable person standard even when less information on poorly monitored species is available—a significant achievement for the tiny CTS's court-ordered listing.

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47. California Fish & Game Commission, Notice of Candidacy (California Tiger Salamander) (*Ambystoma californiense*) (Feb. 10, 2009), available at <http://www.fgc.ca.gov/regulations/new/2009/ctsnccandidacy.pdf>.

48. See Press Release, Center for Biological Diversity, California Tiger Salamander Declared Candidate for Listing Under California Endangered Species Act: Court Order Required to Force State to Accept Listing Petition (Feb. 9, 2009), [http://www.biologicaldiversity.org/news/press\\_releases/2009/california-tiger-salamander-02-09-2009.html](http://www.biologicaldiversity.org/news/press_releases/2009/california-tiger-salamander-02-09-2009.html).

49. *Id.*

50. *Id.*

51. *Id.*

52. Press Release, Center for Biological Diversity, Pacific Fisher One Step Closer to Protection Under California Endangered Species Act (March 5, 2009), available at [http://www.biologicaldiversity.org/news/press\\_releases/2009/pacific-fisher-03-05-2009.html](http://www.biologicaldiversity.org/news/press_releases/2009/pacific-fisher-03-05-2009.html).

53. Press Release, Center for Biological Diversity, Court Tells California to Reconsider Protecting Pika From Climate Change (May 15, 2009), available at [http://www.biologicaldiversity.org/news/press\\_releases/2009/pika-05-15-2009.html](http://www.biologicaldiversity.org/news/press_releases/2009/pika-05-15-2009.html).

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# Consistency in Coastal Zone Management Act Consistency Review

## INTRODUCTION

On December 18, 2008, the Department of Commerce (Commerce) upheld the objection of the California Coastal Commission (Commission) to construction of a turnpike through one of Southern California's last undeveloped coastal habitats.<sup>1</sup> This ruling reinforces the strong deference given to states to make and enforce coastal policy. Usually in consistency appeals, Commerce applies a subjective and somewhat inconsistent balancing test to determine whether benefits outweigh the costs, but in *Foothill*, it side-stepped the test altogether, refusing to overrule the state decision unless no "reasonable alternative" existed.<sup>2</sup> In doing so, Commerce eroded federal oversight over coastal resource management. The decision also illustrates the arbitrary and unpredictable nature of Commerce's attempts to determine when environmental damage is justified under the Coastal Zone Management Act (CZMA).

## I. STATUTORY AND REGULATORY OVERVIEW

In 1972, Congress enacted the CZMA to provide a framework for "wise use" of the nation's shoreline.<sup>3</sup> It authorizes states with federally approved coastal zone management plans ("Coastal Plans") to review projects requiring federal licenses or permits if any land, water use, or natural resource of the state's coastal zone will be affected.<sup>4</sup> Federal review occurs during initial approval of state Coastal Plans, and when a state decision on a specific project is appealed to Commerce. Since Coastal Plans are broad statewide strategies for management rather than detailed development plans, Commerce's consistency

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1. Office of Ocean and Coastal Resource Management, Consistency Appeal of Foothill/Eastern Transp. Corridor Agency (Feb. 18, 2008) [hereinafter *Foothill Appeal*], available at <http://www.ogc.doc.gov/czma.nsf/78f06a8fa89def138525717a0059de08/80c046c6489b95ba852575230077b0d2?OpenDocument>. Commerce acts through the National Oceanic and Atmospheric Administration's Office of Ocean and Coastal Resource Management.

2. *Id.* at 20.

3. 16 U.S.C. § 1452(2) (2006).

4. *Id.*

review provides the federal government's only real chance to override state sovereignty in local coastal management.<sup>5</sup>

Objection by a state coastal management agency precludes federal agencies from issuing licenses or permits unless on appeal Commerce finds the activity is either "consistent with the objectives of the CZMA" or is "necessary for national security."<sup>6</sup> The CZMA lays out specific, though conflicting, requirements to "preserve, protect, and develop" coastal resources.<sup>7</sup> This ambiguity gives states significant autonomy to craft and enforce policies in the coastal zone with minimal federal intrusion.<sup>8</sup>

In consistency appeals, Commerce usually applies a "balancing" test to determine whether a project is consistent with the CZMA. First, it determines whether the project furthers a "national interest" in a "significant and substantial manner."<sup>9</sup> It almost always finds such interests, especially in energy or transportation projects.<sup>10</sup> The only projects to fail blatantly conflict with the CZMA, such as privatization of coastal resources.<sup>11</sup> Once a "national interest" is established, Commerce balances the "national interests" against the adverse coastal effects, weighing such intangible interests as energy sufficiency, endangered species, or seaside ambiance.<sup>12</sup> Since no rubric exists for assigning relative weight of each factor (or even which factors need be considered), Commerce subjectively weighs each factor, leading to case by case inconsistencies.<sup>13</sup> Although Commerce attempts to objectively compare the

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5. Interestingly, private actors rarely appeal decisions by state coastal agencies. In the 37 years since enactment, Commerce has only acted on 43 appeals, upholding 29 state objections and overriding 14 times. Appeals to the Secretary of Commerce Under the Coastal Zone Management Act, 1 (Jan. 15, 2009), <http://coastalmanagement.noaa.gov/consistency/media/appealsdecisionlist011509.pdf>.

6. 16 U.S.C. § 1452(2).

7. Congress mandated "giving full consideration [for] ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development," but gave "priority consideration" to development "related to national defense, energy, fisheries development, recreation, ports and transportation." *Id.*

8. In large part, this broad discretion is the result of ambiguous and conflicting policy goals embodied within section 302 of the CZMA. A Coastal Plan must protect and promote "natural, commercial, recreational, ecological, industrial, and esthetic resources" of the coastal zone. 16 U.S.C. §1451(b)–(c). The Act notes "increasing and competing demands" in developing the coast result in the destruction of habitat, sustainability, and public benefits. *Id.*

9. Office of Ocean and Coastal Resource Management, Consolidated Consistency Appeals of Weaver's Cove Energy, LLC, and Mill River Pipeline, LLC from Objections by the Commonwealth of Mass. (Jun. 26, 2008).

10. *Id.* See also Office of Ocean and Coastal Resource Management, Consistency Appeal of Jessie W. Taylor from an Objection by the State of South Carolina (Dec. 28, 1998) (holding that a strip mall constitutes a "national interest" in small business and economic development).

11. Office of Ocean and Coastal Resource Management, Consistency Appeal of Vieques Marine Laboratories from an Objection by the Puerto Rico Planning Board (May 28, 1996).

12. Office of Ocean and Coastal Resource Management, Consolidated Consistency Appeals of Weaver's Cove Energy, *supra* note 9.

13. Two energy projects decided in June 2008 illustrate the difficulty in deriving a single criterion for review. In *Weaver's Cove*, Commerce upheld Massachusetts' objection to a liquefied natural gas (LNG) terminal over concerns about increased tanker traffic, possible impact on fish habitat, and

project's "footprint, magnitude, and duration" with the uniqueness of resources or broad ecological impact, such calculations prove nearly impossible and are often influenced by subjective values.<sup>14</sup> Commerce tilts the scales of the "balancing test" as it sees fit, without necessarily following past decisions.

Even if a project fails the balancing test, it can still proceed if there are "no reasonable alternatives" that "meet the primary purpose of the project."<sup>15</sup> Alternatives are judged by "consistency with the state's coastal management program, specificity, availability, and reasonableness."<sup>16</sup> The state bears the burden for proving the alternative's consistency with the Coastal Plan and its specificity, while the appellant must demonstrate that the alternative is "either unavailable or unreasonable."<sup>17</sup> The reasonableness of the alternative depends on the relative impact on the primary purpose of the individual appellant's project, rather than the development's impact on the property and environment.<sup>18</sup> Commerce has upheld the state's right to require projects to comply with the Coastal Plan if it does not affect the primary purpose of the project.<sup>19</sup> These decisions highlight the importance of stating the "primary purpose" of the project with specificity and the arbitrariness of determining what constitutes a "reasonable alternative."

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cumulative effects that outweighed national interest in coastal energy development. Office of Ocean and Coastal Resource Management, Consolidated Consistency Appeals of Weaver's Cove Energy, *supra* note 9. Two days later, in *Sparrows Point*, however, it overruled Maryland's objection to a similar project despite damage to wetland habitat and increased shipping. Office of Ocean and Coastal Resource Management, Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC, from an Objection by the State of Maryland (Jun. 28, 2008). Given the inconsistency in past cases, Commerce has difficulty relying on precedent.

14. Office of Ocean and Coastal Resource Management, Consistency Appeal of AES Sparrows Point LNG, *supra* note 13.

15. Office of Ocean and Coastal Resource Management, Consistency Appeal of Davis Heniford from an Objection by the South Carolina Coastal Council 14 (May 21, 1992).

16. Office of Ocean and Coastal Resource Management, Consistency Appeal of Millennium Pipeline Company, L.P. from an Objection by the State of New York 23 (Dec. 12, 2003).

17. *Id.*

18. Commerce overruled Connecticut's objection to a pipeline through shellfish habitat and wetlands because the state failed to identify an alternative plan that could transport enough gas to meet the primary purpose of the project. Office of Ocean and Coastal Resource Management, Consistency Appeal of Islander East Pipeline Co., L.L.C. from an Objection by the State of Connecticut (May 5, 2004). In *Taylor*, the owner of a small wetland could not be prevented from developing his tract because "no reasonable alternative was available" to him. Office of Ocean and Coastal Resource Management, Consistency Appeal of Jessie W. Taylor from an Objection by the State of South Carolina (Dec. 28, 1998).

19. Office of Ocean and Coastal Resource Management, Consistency Appeal of Chevron U.S.A. Inc. from an Objection by the California Coastal Commission (Oct. 29, 1990) (upholding California's objection to offshore oil drilling on the basis that a reasonable alternative existed since procuring a rig with a Caterpillar engine would allow the project to be consistent with the Coastal Plan without affecting the primary purpose of the project).

## II. BACKGROUND

In the *Foothill* consistency appeal, a regional joint powers authority, sought to build a sixteen mile toll road, linking the busy San Diego Freeway (I-5) with the fast-growing Orange and Riverside Counties.<sup>20</sup> However, the project would also cut through an undeveloped coastal canyon, build an interchange upstream from an endangered species habitat, and lay six lanes of traffic through a popular state park.<sup>21</sup> Proponents sought to maintain mobility and reduce the economic costs associated with congestion, while opponents derided the environmental and aesthetic consequences.<sup>22</sup>

In February 2008, the Commission, California's coastal planning and management agency, objected to the project under the CZMA on grounds that the toll road was inconsistent with the state's federally approved Coastal Plan and violated "enforceable policies."<sup>23</sup> In the *Foothill* appeal, Commerce did not apply a "balancing" test; instead, it upheld the Commission's decision because at least one alternative consistent with the Coastal Plan existed.<sup>24</sup> The ruling prevented other federal agencies from issuing necessary construction permits, halting the project.<sup>25</sup>

## III. ANALYSIS

In *Foothill*, Commerce stated that "a single available and reasonable alternative is sufficient to render the Project inconsistent with the objectives of the CZMA."<sup>26</sup> Commerce determined that the project's "essential purpose" was "to provide improvements to the transportation infrastructure system that would help alleviate future traffic congestion and accommodate the need for mobility, access, goods movement and future traffic demands on I-5 and the arterial network in the study area."<sup>27</sup> Since, the Commission had offered the Central

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20. Foothill/Eastern Transportation Corridor Agency, Draft EIS/SEIR, App. Vol. 20, Tab 48, at ES-46-47 (2005).

21. *Id.*

22. Proponents, including municipalities, regional transportation agencies, commercial groups, and unions, feared worsening gridlock would halt traffic on Interstate 5. Pete Thomas, *Save Trestles: Here We Go Again*, L.A. TIMES, Sept. 18, 2008, available at <http://www.latimes.com/outposts/2008/09/save-trestles-h.html>. They argued that increased travel times would have significant social and economic costs on the region. *Id.* Opponents derided it as an expansion of "car culture" at the expense of coastal habitat and vistas. *Id.* Activist surfers led by the Surfrider Foundation asserted that it would detract from the "unique surfing experience" at Trestles, a world renowned surf break located near the project. *Id.* The contentious project even garnered endorsements from pro athletes and celebrities. *Id.*

23. The plan conflicted with the "surfing, public access, environmentally sensitive habitat areas, air quality, and wetlands" provisions. It violated "water quality, wetland resources, Native American archeology, and greenhouse gas" policies. *Foothill Appeal*, *supra* note 1, at 2.

24. The decision discussed potential adverse effects on endangered California gnatcatchers and tidewater goby. *Id.* at 22.

25. Toll roads require Army Corps of Engineers and the Department of Transportation permits. *Id.*

26. *Id.* at 14.

27. *Id.* at 16.

Corridor–Avenida LaPlata Variation (LaPlata) as a reasonable alternative, the Commerce upheld their decision.<sup>28</sup> LaPlata would follow the proposed project route, but terminate five miles short of I-5, thereby reducing efficiencies and pouring traffic onto neighborhood streets.<sup>29</sup> Since Foothill did not specifically state the goal of connecting the two roadways, Commerce dismissed the need for a connection.<sup>30</sup> It also rejected Foothill’s contentions that LaPlata was unreasonable because it did not relieve as much congestion as the project.<sup>31</sup> It noted a “reasonable alternative” need not be “the top performing alternative or . . . perform better than the applicant’s proposal . . . so long as the primary purpose can be achieved.”<sup>32</sup>

Unlike previous appeals that applied the “balancing test” first and the “reasonable alternative” second, *Foothill* rests solely on the availability of a “reasonable alternative” without independently weighing the national interests against environmental impacts. It represents an extension of deference to states in overseeing coastal programs. States now have virtual carte blanche to reject projects requiring federal funding without demonstrating that the benefits fail to outweigh the costs, so long as a “reasonable alternative” exists. *Foothill* suggests alternatives can differ substantially from the project and be vastly more costly, even to the point of making a project infeasible.<sup>33</sup>

Moreover, the factual assertions underlying the consistency review are provided by California in the Commission’s decision. By accepting the state’s findings on environmental impacts and feasibility without objective consideration, Commerce allows the state coastal management agency to apply whatever standards it thinks best without concern that its rationale would be invalidated for lack of substantiating evidence. Ironically, state agencies, whose decisions are being appealed, can control the federal review process by providing the facts upon which Commerce makes its decision. Such practices give states an advantage in controlling the way Commerce looks at a project’s

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28. Commerce presumed the “substantive validity” of the state commission’s fact finding. *Id.*

29. Foothill/Eastern Transportation Corridor Agency, Draft EIS/SEIR, App. Vol. 20, Tab 48, at ES-46-47 (2005).

30. Commerce creatively fashioned the “primary purpose of the project” in relation to the “reasonableness of the alternative.” *Id.* at 16. Foothills intended to build a road that would link fast-growing population centers with I-5. *Id.* However, the project’s draft Environmental Impact Report broadly stated the project’s “essential purpose” was “to provide improvements to the transportation infrastructure system that would help alleviate future traffic congestion and accommodate the need for mobility, access, goods movement and future traffic demands on I-5 and the arterial network in the study area.” *Id.* Since the TCA did not specifically state the goal of connecting the two roadways, the Commerce dismissed the need for a connection, even though one would be necessary to efficiently reduce congestion on I-5. *Id.*

31. *Foothill Appeal*, *supra* note 1, at 15.

32. *Id.* at 17–18.

33. Given the minimal benefits compared to the high construction and social costs, LaPlata is unlikely to be built. An objective test would have shown LaPlata would be 75 percent less effective at reducing I-5 congestion than the toll road. Foothill/Eastern Transportation Corridor Agency, Draft EIS/SEIR, App. Vol. 20, Tab 48, at ES-46-47 (2005).

consistency with respect to the specificity, availability, and reasonableness of the state's coastal management program. This practice negates the purpose of having a consistency appeals altogether. If Commerce chooses to use the "reasonable alternative" caveat to avoid a "balancing test," they should at least have an obligation to objectively judge whether an alternative is reasonable using a more rigorous standard.

#### CONCLUSION

For better or worse, Commerce has ceded virtually all responsibility for coastal management to state authorities. In *Foothill*, Commerce upheld the Commission's rights to determine whether a project is consistent with its federally approved Coastal Plan. Empowering states to choose the "reasonable alternative" that best corresponds to its Coastal plan carries great weight, because local decision makers are likely to be most familiar with the particular issues affecting their part of the coast. To some, this decision could be viewed as a victory for states' rights and federalism. However, this victory comes at too high a cost in terms of efficiency, consistency, and fairness. In *Foothill*, the region may pay a high price for local control with congested roadways. Given the costs of road construction and decreased traffic reduction on I-5, Foothills is unlikely to construct LaPlata; the ruling effectively killed the project." In effect, states are granted the power to select not just an alternative to the project, but a power to veto it altogether.

Perhaps vesting decision-making power locally with broad unchecked authority is a necessary element of comprehensive coastal management, but it seems overreaching. Since states' coastal management agencies can object to projects inside or outside of their boundaries if coastal resources are impacted, this decision could allow state coastal agencies to block any federally funded or permitted project with impacts in the coastal zone so long as *any* alternative exists.<sup>34</sup> Such power could be manipulated by groups that exert political pressure on state and local governments to oppose virtually any project. The low standard for "reasonable alternatives" exposes local, regional, and state governments to greater political pressure to oppose projects. Anti-development, not-in-my-back-yard (NIMBY), and environmental groups could exert influence on states to identify a "reasonable alternative" to kill the project with a very low chance of being overruled by Commerce. With this power, states may also affect congressional or other funding for proposed projects. For example, in a *Foothill*-like project, Congress may have been willing to fund the original project, but not a more costly, less efficient "reasonable alternative." Unconstrained power in the hands of local, politically-susceptible decision makers is likely to result in more subjective and less consistent decisions.

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34. 16 U.S.C. § 1452 (2006).

Allowing the “reasonable alternative” test to supersede the “balancing test” is a mistake that puts too much power in the control of state coastal management agencies. The “balancing test” provides more appropriate means of determining whether a project’s benefits outweigh the costs. It also prevents overreaching state control that trivializes the entire consistency review process by side-stepping any substantive review by Commerce. Further, such an approach would recognize that a project is not necessarily inconsistent with the CZMA solely because an alternative exists. The balancing test provides a more objective way to review projects that is less subjective and political. As discussed earlier, the balancing test has often resulted in inconsistent and arbitrary decisions. Accordingly, Commerce would be wise to create guidelines, standards of review, and de minimis requirements to provide greater decipherability and transparency. Commerce should also follow the precedent it sets. With such adjustments, the balancing test makes for a much more credible consistency review than the reasonable alternatives review.

*Todd E. Hutchins*



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# Gray Wolves Face Delisting, Again and Why the Courts Will Force Relisting, Again

## INTRODUCTION

On March 6, 2009, Secretary of the Interior Ken Salazar announced the removal of gray wolf populations in the northern Rocky Mountains and western Great Lakes from the endangered species list,<sup>1</sup> and on April 2, 2009 the Department followed through, publishing delisting notices for the two populations in the Federal Register on the same day.<sup>2</sup> This began a new round in the wolves' decades-long American legal saga, which recently has been dominated by administrative attempts to declare recovery and end federal protection under the Endangered Species Act (ESA) for the wolf. The new rules will face considerable scrutiny. Hemmed in by four recent decisions against the wolves' delisting, the Department of the Interior (Interior) and the U.S. Fish and Wildlife Service (FWS or "Service") wrote the new regulations hoping they will survive the adverse holdings. Based on the analysis to follow, it appears that courts will strike down the delisting rules once more.

## I. BACKGROUND

This new rule began as the Bush Administration's third attempt at delisting gray wolves. The first attempt, to downgrade the wolf's status from endangered to threatened, failed in two federal courts in 2005 on grounds that wolves were still endangered in vast portions of their range.<sup>3</sup> FWS reacted in 2007 and 2008 by simultaneously designating and delisting each of two distinct population segments, one in the Great Lakes region and another in the Mountain West, while leaving wolves outside those regions listed as

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1. News Release, U.S. Dep't of the Interior, Secretary Salazar Affirms Decision to Delist Gray Wolves in Western Great Lakes, Portion of Northern Rockies, (Mar. 6, 2009), *available at* [http://www.doi.gov/news/09\\_News\\_Releases/030609b.html](http://www.doi.gov/news/09_News_Releases/030609b.html).

2. Endangered and Threatened Wildlife and Plants; Final Rule to Identify the Western Great Lakes Populations of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15070 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17).

3. *See* Defenders of Wildlife v. U.S. Dep't of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005); Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005).

endangered.<sup>4</sup> Two federal courts struck down those delisting regulations,<sup>5</sup> providing the most relevant precedent for the current delisting attempt. Interior and FWS responded quickly, reopening the northern Rockies rule for public comment in October<sup>6</sup> and, as required by the injunctions, relisting both wolf populations in December.<sup>7</sup>

Then, on January 12, 2009, in the final days of the Bush presidency, Interior submitted to the Federal Register the new rule to again delist gray wolves in the Northern Rocky Mountains.<sup>8</sup> Eight days later, before the Federal Register was able to publish the rule, White House Chief of Staff Rahm Emanuel by memorandum directed all federal agencies and departments to withdraw all proposed and final regulations that had not yet been published in the Federal Register.<sup>9</sup> Every single such regulation would be up for a “regulatory review,” to be conducted by the Director of the Office of Management and Budget (OMB).<sup>10</sup> While Interior ostensibly began drafting the delisting rule in October, the rule’s large size, necessary as an attempt to respond adequately to the prior judicial holdings, dragged the drafting process out to mid-January, causing it to be halted by the Emanuel memorandum.

At this point, however, both the new regulation and another for the Western Great Lakes have apparently cleared the regulatory review. After the April 2 publication, the rules took effect on May 4, 2009. The gray wolf is currently off the endangered species list in Minnesota, Wisconsin, Michigan, Montana, Idaho, and parts of Washington, Oregon, Utah, North Dakota, South Dakota, Iowa, Illinois, Indiana, and Ohio.<sup>11</sup> It remains listed, interestingly, in Wyoming.<sup>12</sup> The question of whether this once-aborted rule will pass judicial

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4. Final Rule Removing the Western Great Lakes Distinct Population Segment of the Gray Wolf From the List of Endangered and Threatened Wildlife, 71 Fed. Reg. 6052 (Feb. 8, 2007); Revision of Special Regulation for the Central Idaho and Yellowstone Area Nonessential Experimental Populations of Gray Wolves in the Northern Rocky Mountains, 73 Fed. Reg. 4720 (Jan. 28, 2008).

5. *Humane Soc’y v. Kempthorne*, 579 F. Supp.2d 7 (D.D.C. 2008); *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008).

6. Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 63926 (reopened Oct. 28, 2008).

7. Reinstatement of Protections for the Gray Wolf in the Western Great Lakes and Northern Rocky Mountains in Compliance With Court Orders, 73 Fed. Reg. 75356 (Dec. 11, 2008) (to be codified at 50 C.F.R. pt. 17).

8. See U.S. DEP’T OF THE INTERIOR, FISH & WILDLIFE SERV., ENDANGERED AND THREATENED WILDLIFE AND PLANTS, FINAL RULE TO IDENTIFY THE NORTHERN ROCKY MOUNTAIN POPULATION OF GRAY WOLF AS A DISTINCT POPULATION SEGMENT AND TO REVISE THE LIST OF ENDANGERED AND THREATENED WILDLIFE (2009), available at [http://www.defenders.org/resources/publications/programs\\_and\\_policy/wildlife\\_conservation/imperiled\\_species/wolf/northern\\_rockies\\_wolf/federal\\_register\\_northern\\_rockies\\_wolf\\_delisting\\_january\\_2009.pdf](http://www.defenders.org/resources/publications/programs_and_policy/wildlife_conservation/imperiled_species/wolf/northern_rockies_wolf/federal_register_northern_rockies_wolf_delisting_january_2009.pdf).

9. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009), available at <http://media.washingtonpost.com/wp-srv/politics/documents/emanuel-regulatory-review.pdf>.

10. *Id.*

11. *Supra* note 2.

12. *Id.*

muster now depends on how courts view it in light of the 2008 decisions in *Defenders of Wildlife v. Hall*<sup>13</sup> and *Humane Society v. Kempthorne*.<sup>14</sup>

#### A. *Defenders of Wildlife v. Hall*

On July 18, 2008, Judge Donald W. Molloy of the District of Montana placed gray wolves in the northern Rockies back on the endangered species list through a preliminary injunction. The holding was twofold: (1) that FWS had not shown sufficient likelihood that natural genetic exchange between northern Rockies wolf subpopulations would either be adequate to sustain the species, and (2) that Wyoming's management plan was not shown to be adequate to protect wolves.<sup>15</sup>

A 1994 FWS-prepared environmental impact statement (EIS) on the reintroduction of wolves in Yellowstone National Park and central Idaho<sup>16</sup> denoted specific criteria to identify the recovery of the gray wolf that would permit it to be removed from the endangered species list. The EIS requires "genetic exchange between subpopulations," to prevent inbreeding that could lower the wolves' chances of survival.<sup>17</sup> In evaluating this criteria, the *Defenders of Wildlife* court gave weight to the VonHoldt study, a 2007 study commissioned by the FWS that found no evidence of genetic exchange between the Yellowstone National Park subpopulation and subpopulations in Idaho and Montana.<sup>18</sup> Without this exchange, or some explanation of why this exchange was no longer necessary, the criteria for wolf recovery was not fulfilled.<sup>19</sup> The court held that FWS's failure to provide a reasoned analysis for its change in course as to the recovery goal of genetic diversity rendered its decision arbitrary and capricious in violation of the Administrative Procedure Act (APA) section 706(2).<sup>20</sup>

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13. 565 F. Supp. 2d 1160 (D. Mont. 2008).

14. 579 F. Supp. 2d 7 (D.D.C. 2008).

15. *Defenders of Wildlife*, 565 F. Supp. 2d at 1172, 1775.

16. U.S. DEP'T OF THE INTERIOR, FISH & WILDLIFE SERV., THE REINTRODUCTION OF GRAY WOLVES TO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO: FINAL ENVIRONMENTAL IMPACT STATEMENT (1994), available at [http://www.fws.gov/mountain-prairie/species/mammals/wolf/EIS\\_1994.pdf](http://www.fws.gov/mountain-prairie/species/mammals/wolf/EIS_1994.pdf).

17. *Id.* at 42. The EIS also requires "[t]hirty or more breeding pairs comprising some 300+ wolves in a metapopulation," which has been well surpassed. *Id.* The denoted subpopulations are the two introduced populations, in Yellowstone National Park and central Idaho, plus a third population in northwestern Montana that originated by natural migration from Canada. These three subpopulations comprise a Northern Rockies "metapopulation," which is a "population that exists as a partially isolated set of sub populations." *Defenders of Wildlife*, 565 F. Supp. 2d at 1168.

18. *Defenders of Wildlife*, 565 F. Supp. 2d at 1171; see also Bridgett M. VonHoldt, *The Genealogy and Genetic Viability of Reintroduced Yellowstone Gray Wolves*, 17 MOLECULAR ECOLOGY 252 (2008).

19. *Defenders of Wildlife*, 565 F. Supp. 2d at 1168.

20. *Id.* at 1163; see 5 U.S.C. § 706(2) (2006).

Before delisting the wolves and transferring management authority to the states, the Service required each state making up the distinct population segment (DPS)<sup>21</sup> to submit wolf management plans for certification. The Service rejected Wyoming's plan in 2003 as being inadequate to keep wolf numbers above recovery levels, but accepted its 2007 plan, even though the 2007 plan did not differ in any significant way from the 2003 plan. The plaintiffs argued that the Service's decision was arbitrary and capricious under the APA because it did not explain why the 2007 plan was adequate to protect the wolves when the 2003 plan was not.

Since both the genetic exchange issue and the Wyoming plan inadequacy issue made irreparable injury to wolf populations possible, the court granted the preliminary injunction.<sup>22</sup>

### B. Humane Society v. Kempthorne

On September 29, 2008, before the *Defenders of Wildlife* preliminary injunction became a permanent injunction, Judge Paul Friedman of the D.C. District issued the second adverse judgment against the Service for its 2007–2008 round of delisting rules, requiring the Service to reinstate protection for wolves in the western Great Lakes.<sup>23</sup> This holding focused on the meaning of a clause of the ESA as applied to the FWS decision to delist the wolf.

FWS is required by the ESA to list a terrestrial species as endangered when it is “in danger of extinction throughout all or a significant portion of its range,” as determined through five statutory factors.<sup>24</sup> The ESA authorizes FWS to list, delist, and reclassify (between endangered and threatened) “species.”<sup>25</sup> The issue in *Humane Society v. Kempthorne* revolves around the ESA's definition of “species,” as revised in 1978: “The term ‘species’ includes any subspecies of fish or wildlife or plants, and any [DPS] of any species of

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21. The term “distinct population segment” derives from the Endangered Species Act definition of “species” to include “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

22. *Defenders of Wildlife*, 565 F. Supp. 2d at 1163, 1178.

23. *Humane Soc’y v. Kempthorne*, 579 F. Supp. 2d 7 (D.D.C. 2008).

24. 16 U.S.C. § 1533(a)(1).

The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

*Id.*

25. *Id.* § 1533(a).

vertebrate fish or wildlife which interbreeds when mature.”<sup>26</sup> The purpose of the distinct population segment “tool,” as described in a 1996 FWS policy document, is to “protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs that would necessitate listing a species or subspecies throughout its entire range.”<sup>27</sup> The court held that the ESA allowed FWS to use the DPS tool to list endangered or threatened subpopulations of species whose populations elsewhere are healthy and that FWS has the authority to remove those regional portions of the species from the endangered species list once they recovered.<sup>28</sup> The issue before the court was whether the FWS was entitled to use the DPS tool in another way: to designate a relatively healthy DPS and simultaneously remove its ESA protection while retaining protection for individuals outside the DPS. The court did not rule squarely on the issue, but remanded to FWS to interpret of the ambiguous statute.<sup>29</sup>

II. THE 2009 RULE: AN ATTEMPT TO ESTABLISH  
ELIGIBILITY FOR *CHEVRON* STEP TWO DEFERENCE

The submitted rules delist wolves throughout nearly all of their current range—with the notable exception of the entire state of Wyoming, despite Wyoming’s inclusion in the Northern Rocky Mountains DPS. The rules attempt to rectify the Service’s mistakes in light of *Defenders of Wildlife* and *Humane Society*. This Part analyzes arguments likely to be raised in the nascent round of lawsuits.

A. *DPS Interpretation Will Likely be Fatal to the New Rules*

The simplest decision the Service made was to excise the entire state of Wyoming from the delisting of the DPS because in Wyoming “the species remains in danger of extinction because of inadequate regulatory mechanisms.”<sup>30</sup> Wyoming’s Attorney General has threatened to sue FWS for the omission.<sup>31</sup> Environmental groups have spoken out in agreement with Wyoming, though for different reasons, arguing that the agency’s fragmentation of the Greater Yellowstone habitat into ESA and non-ESA

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26. *Id.* § 1532 (16) (2006).

27. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4725 (Feb. 7, 1996).

28. *Humane Soc’y*, 579 F. Supp. 2d at 17; *see* 16 U.S.C. § 1533(c)(2)(B).

29. *Humane Soc’y*, 579 F. Supp. 2d at 20.

30. Endangered and Threatened Wildlife and Plants; Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, *supra* note 2, at 15123.

31. Matthew Brown & John Flesher, *Salazar OKs wolf de-listing*, THE MINING JOURNAL, Mar. 7, 2009, available at <http://www.miningjournal.net/page/content.detail/id/523814.html>.

protection is not permissible under the ESA.<sup>32</sup> To pass muster in the courts, FWS now needs not only an interpretation of the ESA to which a court would defer that would allow FWS to create a DPS at the same time it delists the DPS, but an interpretation that would allow only *part* of a DPS to be delisted.

The new rule tries to justify judicial deference to the FWS by referring to two Service memoranda.<sup>33</sup> The first memorandum undertakes to support FWS's use of a joint determination in a single rule that the northern Rockies wolves are a DPS and that they do not meet the criteria for being endangered or threatened.<sup>34</sup> It is questionable, though, whether the memorandum addresses squarely the issue for which the Service's determination was remanded. It concludes that "FWS has clear authority to determine, pursuant to section 4(a)(1) [of the ESA], that gray wolves [are a DPS and are not endangered or threatened]."<sup>35</sup> The possible stumbling block is the first four words of the quoted section: *FWS has clear authority*. The *Humane Society* court reasoned that "*Chevron* step two deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face and proceeds to grapple with that ambiguity."<sup>36</sup> If the FWS again "erroneously concluded that its interpretation of the ESA was compelled by Congress," that would "preclude[] *Chevron* step two deference."<sup>37</sup> The memo makes clear that the Solicitor did not want to appear to rely on a clear meaning interpretation, but throughout the memo, analysis purporting to grapple with the ambiguity of the ESA uses absolutist language that might be interpreted by a court as reasoning that the interpretation is "compelled" by Congress.<sup>38</sup> Because the Solicitor appears to have overplayed his hand, arguing that his interpretation was compelled by Congress, rather than making a genuine inquiry into the

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32. As Earthjustice Attorney Doug Honnold put it, "We think the law is clear that they can't delist part of the population. Surprisingly, there isn't any case law on this because FWS has never taken such an absurd position before." Patrick Reis, *Bush admin's last crack at wolf delisting could leave Wyo. Behind*, LAND LETTER, Jan. 8, 2009.

33. Endangered and Threatened Wildlife and Plants, Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, *supra* note 2, at 15139, 15144-45, 15152-54, 15180.

34. OFFICE OF THE SOLICITOR, U.S. DEP'T OF THE INTERIOR, MEMORANDUM M-37018 FROM THE SOLICITOR TO THE DIRECTOR, U.S. FISH & WILDLIFE SERV., SUBJECT: U.S. FISH AND WILDLIFE SERVICE AUTHORITY UNDER SECTION 4(C)(L) OF THE ENDANGERED SPECIES ACT TO REVISE LISTS OF ENDANGERED AND THREATENED SPECIES TO "REFLECT RECENT DETERMINATIONS" (Dec. 12, 2008), available at <http://www.doi.gov/solicitor/opinions/M-37018.pdf>.

35. *Id.* at 19.

36. *Humane Soc'y v. Kempthorne*, 579 F. Supp. 2d 7, 20 (D.D.C. 2008) (citation omitted).

37. *Id.*

38. The Solicitor also tends to attack the *Humane Society* court's reasoning rather than comply with it. See, e.g., OFFICE OF THE SOLICITOR, *supra* note 34, at 4 ("The court's conclusion about section 4(a)(1) was the foundation for the next step of its analysis. Because that conclusion was in error, there is no basis for the court's conclusion in the second step of its analysis. In other words, if FWS had the authority to make the status determination, there is no question that it had the authority, indeed the obligation, under section 4(c)(1) to revise the list to reflect the determination.").

complex ambiguity of the ESA, the memorandum is likely impotent to persuade a court to adopt its reasoning. Since the memorandum acts more as a policy document than a formal interpretive rule, and has not been subjected to public notice and comment, it will not likely be afforded *Chevron* step two deference.<sup>39</sup>

The second memorandum analyzes ESA language and concludes that the Service can limit the application of ESA protections to the part of the species' (or the DPS's) range where it is endangered.<sup>40</sup> According to the memorandum, the ESA permits "taking" in parts of the range when the species is only endangered in other parts of its range.<sup>41</sup> This is in accord with case law,<sup>42</sup> and since a DPS is a "species" under the ESA,<sup>43</sup> the logic of the second memorandum is sound. Nevertheless, because the argument in the first memorandum is unlikely to be accepted by a court, the FWS has probably failed to fulfill its charge on remand in *Humane Society* and will likely fail anew in court for the same reason it did there: FWS has provided no interpretation of the ESA worthy of judicial deference that would allow it to designate and delist a DPS in the same rule.

### B. Genetic Exchange Arguments

In the new rule, FWS rehashes its genetic exchange arguments made before Judge Molloy in *Defenders of Wildlife*. It argues the limitations and flawed methodology of the VonHoldt study and asserts that genetic exchange between wolves need not be natural, but can be a result of human translocation.<sup>44</sup> The Service in the new rule does not appear to modify the recovery goal of "genetic exchange between subpopulations,"<sup>45</sup> but rather sets about showing that genetic exchange will be sufficient under the 2009 regulation. It states that if natural genetic exchange proves inadequate, FWS or another agency will employ human translocation of wolves to facilitate the exchange.<sup>46</sup>

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39. See *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828–29 (10th Cir. 2000).

40. OFFICE OF THE SOLICITOR, U.S. DEP'T OF THE INTERIOR, MEMORANDUM M-37013 FROM THE SOLICITOR TO THE DIRECTOR, U.S. FISH & WILDLIFE SERV., SUBJECT: THE MEANING OF "IN DANGER OF EXTINCTION THROUGHOUT ALL OR A SIGNIFICANT PORTION OF ITS RANGE" 17 (Mar. 16, 2007), available at <http://www.doi.gov/solicitor/opinions/M37013.pdf>.

41. *Id.*

42. See *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1144–45 (9th Cir. 2001).

43. See 16 U.S.C. § 1532(16) (2006).

44. Endangered and Threatened Wildlife and Plants; Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, *supra* note 2, at 15176–79.

45. U.S. DEP'T OF THE INTERIOR, FISH & WILDLIFE SERV., *supra* note 16, at Appendices 42.

46. Endangered and Threatened Wildlife and Plants; Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, *supra* note 2, at 15131.

Despite this scientific argument now being fully enshrined in the Federal Register, a court will reject such an argument if its analysis is not “reasoned” or the agency’s explanation for it not “satisfactory.”<sup>47</sup> Review under the APA “arbitrary and capricious” standard is “narrow,” but “searching and careful.”<sup>48</sup> The agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>49</sup>

The precedent set in *Defenders of Wildlife* is that “[t]he Fish & Wildlife Service’s speculation about genetic exchange is not convincing . . . . The rationale for rejecting the VonHoldt Study’s predictions is not convincing nor well explained.”<sup>50</sup> With no new study or analysis presented in the new rule, a district court would not likely accept Interior’s delisting of the wolves.

#### CONCLUSION

The new rules designating and delisting the Northern Rocky Mountains and Western Great Lakes distinct population segments of gray wolves are likely to fail in court. They fail to address either the scientific shortcomings or the regulatory gaps of the last judicial go-round. But the reasons the rules so predictably fail may, in the final analysis, run deeper: the agency has been employing suspect interpretations of the ESA without proper explanation, presenting contortions of agency policy, and rejecting of the best available scientific studies. Perhaps by Secretary Salazar’s next attempt to delist the wolf he will have come to the same conclusion.

*Danny Kramer*

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47. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Inss*, 463 U.S. 29, 42–43 (1983).

48. 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

49. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (internal quotes omitted).

50. *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1170–72 (D. Mont. 2008).

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# Taking the Teeth Out of a Pit Bull: Limiting ESA Protections for the Polar Bear

## INTRODUCTION

The Endangered Species Act (ESA or the Act) has been called the “pit bull” of environmental laws because of its strict limitations on agency actions that affect species listed under the Act.<sup>1</sup> Thus, many environmentalists rejoiced on May 15, 2008, when the Department of the Interior listed the polar bear as a threatened species under the ESA.<sup>2</sup> However, “[t]he [Bush] administration [was] brought kicking and screaming to this decision.”<sup>3</sup> Inappropriately letting politics dictate their decision-making process, the Department significantly limited the practical significance of the listing by issuing two special rules exempting regulation of greenhouse gas (GHG) emissions and oil developments.<sup>4</sup> These rules restrict the use of the listing to address global climate change—the primary threat to the continuing survival of the species due to its range-wide effects on the polar bear’s sea ice habitat.<sup>5</sup> Thus, the rules are not consistent with the purpose of the listing—conservation of the polar bear. While some environmentalists hail the listing as an opportunity to force the government to regulate GHG emissions and climate change, the limiting rules remain a barrier to actually protecting the polar bear from extinction. But hope is not lost for the polar bear. The Center for Biological Diversity (CBD) maintains that the rules will not hold up in court and has sued the Department for violations of the ESA, National Environmental Policy Act (NEPA), and the Administrative Procedures Act (APA).

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1. Lisa Heinzerling, *Climate Contrast: Of Polar Bears and Power Plants* (May 15, 2008), [http://gulcfac.typepad.com/georgetown\\_university\\_law/2008/05/climate-hypocri.html](http://gulcfac.typepad.com/georgetown_university_law/2008/05/climate-hypocri.html).

2. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28,212 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17) [hereinafter *Threatened Status for the Polar Bear*].

3. Juliet Eilperin, *Polar Bear Is Named ‘Threatened’ Species; U.S. Cites Shrinking Arctic Ice*, WASH. POST, May 15, 2008, at A1 (quoting former U.S. Fish and Wildlife head Jamie Rappaport Cook).

4. Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear, 73 Fed. Reg. 76,249 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear, 73 Fed. Reg. 28,306 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17).

5. Threatened Status for the Polar Bear, *supra* note 2, at 28,241, 28,288.

## I. THE PLIGHT OF THE POLAR BEAR

Polar bears are threatened by the worldwide loss of their habitat—arctic sea ice—which is caused by global climate change. The polar bear's situation is unique in that it faces a loss of habit throughout its entire range, rather than in any localized area.<sup>6</sup> These global losses are expected to continue into the foreseeable future, and the polar bear is in danger of extinction throughout all of its range.<sup>7</sup> Temperatures in the arctic are increasing at twice the rate of the rest of the planet.<sup>8</sup> Recent data indicate rapid and unprecedented loss of arctic sea ice, with a record-shattering loss in September 2007 when the arctic ice cap shrank about 39 percent below the long-term average from 1979 and 2000.<sup>9</sup> The record low in 2007 shows an accelerating trend of retreating sea ice, suggesting that current sea ice models underestimate the projected rate of loss of sea ice.<sup>10</sup> Several scientists have estimated that we may see an ice-free Arctic Ocean in the summers by 2012.<sup>11</sup>

Some climate scientists are concerned that retreating sea ice will lead to the polar bear's extinction within mere decades.<sup>12</sup> Polar bears live on sea ice for the majority of the year and depend on sea ice habitats for their key life functions—hunting, feeding, mating, breeding, movement to maternal denning areas, resting, and long-distance movement.<sup>13</sup> Therefore, changes in the abundance or distribution of sea ice dramatically impacts polar bear populations, including their ability to hunt ice seals.<sup>14</sup> The bodies of several bears that starved to death were discovered in the spring of 2006, and reduced food supply has led to cases of cannibalism documented in populations of polar bears in the Southern Beaufort Sea.<sup>15</sup>

Although the data on global polar bear populations and trends are limited, long-term studies in the Western Hudson Bay of Canada report that a 22-percent decline in the population is correlated with loss of sea ice.<sup>16</sup> On September 7, 2007, the U.S. Geological Survey (USGS) released a series of studies reporting that further retreat of sea ice in the Arctic could result in a loss of two-thirds of the world's polar bear population by the middle of the

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6. U.S. Dep't of the Interior, Frequently Asked Questions: U.S. Fish and Wildlife Service Proposal to List Polar Bears as Threatened Species (Dec. 27, 2006), [http://www.doi.gov/news/06\\_News\\_Releases/061227faq.html](http://www.doi.gov/news/06_News_Releases/061227faq.html).

7. Threatened Status for the Polar Bear, *supra* note 2, at 28,276, 28,293.

8. *Id.* at 28,224.

9. *Id.* at 28,220.

10. Threatened Status for the Polar Bear, *supra* note 2, at 28,276.

11. Press Release, Ctr. for Biological Diversity, Environmental Groups Win Protection for Polar Bear (May 14, 2008), *available at* [http://www.biologicaldiversity.org/news/press\\_releases/2008/polar-bear-05-14-2008.html](http://www.biologicaldiversity.org/news/press_releases/2008/polar-bear-05-14-2008.html).

12. Eilperin, *supra* note 3.

13. Threatened Status for the Polar Bear, *supra* note 2, at 28,219, 28,275.

14. *Id.* at 28,270.

15. *Id.* at 28,268.

16. *Id.* at 28,255, 28,267.

century.<sup>17</sup> The reports projected that polar bears living in two of the four regions studied would be extinct by 2050, including all polar bears in the United States, and would be wiped out in a third region by 2075.<sup>18</sup>

## II. KICKING AND SCREAMING

The Department's decision to list the polar bear as threatened was prompted by a petition filed by CBD on February 16, 2005, to list the polar bear as an endangered species under the ESA.<sup>19</sup> A lengthy legal battle ensued when CBD sued the Department for taking no action on the petition.<sup>20</sup> In response to a settlement agreement reached in June 2006, the Department published a proposed rule to list the polar bear as threatened on January 9, 2007.<sup>21</sup> However, the Department failed to issue a final determination within one year of the proposed rule, as required by the ESA.<sup>22</sup> The CBD took the government to court again, resulting in a court-imposed deadline of May 15, 2008, which the Department ultimately met.<sup>23</sup>

The Department's unwillingness to comply with the court-ordered listing was clear. On the very same day it issued the polar bear listing, the Department also published a special, "Interim 4(d) Rule" limiting the usual protections that the ESA provides to listed species,<sup>24</sup> followed by a slightly modified "Final 4(d) Rule" seven months later.<sup>25</sup> These rules specifically exempted regulation of GHG emissions and oil developments—the two leading threats to polar bears because of their contribution to climate change—from ESA protections for the species.<sup>26</sup> The rules essentially put the polar bear in a Catch-22—as a prerequisite to seek regulation of GHG emissions, advocates must show that the emissions are causally connected to loss of polar bear habitat, yet the Final 4(d)

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17. *Id.* at 28,274.

18. Eilperin, *supra* note 3; Ctr. for Biological Diversity, *supra* note 11.

19. Ctr. for Biological Diversity v. Kempthorne, 2008 U.S. Dist. LEXIS 34753, 2 (N.D. Cal. 2008).

20. Press Release, Ctr. for Biological Diversity, Conservationists File Lawsuit To Protect Polar Bear Under Endangered Species Act (Dec. 15, 2005), available at [http://www.biologicaldiversity.org/news/press\\_releases/polarbear12-15-05.html](http://www.biologicaldiversity.org/news/press_releases/polarbear12-15-05.html).

21. Ctr. for Biological Diversity, *supra* note 19.

22. See Endangered Species Act § 4(b)(6)(A), 16 U.S.C. § 1533(b)(6)(A) (2006).

23. Ctr. for Biological Diversity, 2008 U.S. Dist. LEXIS 34753 at 14.

24. Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear, 73 Fed. Reg. 28,306 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17). See also 16 U.S.C. § 1533(d) ("[T]he Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species").

25. Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear, 73 Fed. Reg. 76,249 (Dec. 16, 2008) (to be codified at C.F.R. pt. 17).

26. Press Release, Ctr. for Biological Diversity, Statement from the Center for Biological Diversity, Greenpeace, and Natural Resources Defense Council on Bush Administration's Further Weakening of Protection for the Polar Bear (Dec. 11, 2008), available at [http://www.biologicaldiversity.org/news/press\\_releases/2008/polar-bear-12-11-2008.html](http://www.biologicaldiversity.org/news/press_releases/2008/polar-bear-12-11-2008.html).

Rule itself stated that this was impossible to prove given the lack of scientific data to date:

There is currently no way to determine how the emissions from a specific action both influence climate change and then subsequently affect specific listed species, including polar bears. As we now understand them, the best scientific data currently available do not draw a causal connection between GHG emissions resulting from a specific Federal action and effects on listed species or critical habitat by climate change.<sup>27</sup>

### III. NOT A TOOL TO REGULATE CLIMATE CHANGE

At a press conference on the polar bear listing on May 14, 2008, Secretary of the Interior Dirk Kempthorne expressed his intent to limit the regulatory power of the decision: “[The] ESA is not the right tool to set U.S. climate policy.”<sup>28</sup> Kempthorne stated that the listing does not authorize the use of the ESA to regulate GHG emissions from power plants, automobiles, and other sources.<sup>29</sup> Kempthorne articulated his support for President Bush, who stated in April, “[t]here is a right way and wrong way to approach reducing [GHG] emissions. The American people deserve an honest assessment of the costs, benefits and feasibility of any proposed solution.”<sup>30</sup>

Andrew Wetzler, director of the Natural Resources Defense Council (NRDC) Endangered Species Project, called the Bush administration’s bluff.<sup>31</sup> Wetzler noted that the Final 4(d) Rule “reaffirm[ed] what the Bush administration . . . long made clear—they’[d] use any trick they [could] in the waning days of [the] administration to weaken protections for the polar bear and other wildlife and avoid dealing with global warming pollution.”<sup>32</sup> Indeed, the Bush administration inappropriately let political concerns dictate their decision regarding the polar bear listing. According to Lisa Heinzerling,<sup>33</sup> Professor of Law at the Georgetown University Law Center, the Department’s rules will require no one but trophy hunters to change their behavior.<sup>34</sup>

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27. Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear, 73 Fed. Reg. at 76,266.

28. Dirk Kempthorne, U.S. Sec’y of Interior, Press Conference On Polar Bear Listing (May 14, 2008), available at [http://www.doi.gov/secretary/pastsecretaries/speeches/081405\\_speech.html](http://www.doi.gov/secretary/pastsecretaries/speeches/081405_speech.html).

29. *Id.*

30. Press Release, U.S. Dep’t of the Interior, Secretary Kempthorne Announces Decision to Protect Polar Bears under Endangered Species Act (May 14, 2008), available at [http://www.doi.gov/news/08\\_News\\_Releases/080514a.html](http://www.doi.gov/news/08_News_Releases/080514a.html).

31. Ctr. for Biological Diversity, *supra* note 26.

32. *Id.*

33. Georgetown University Law Center, Lisa Heinzerling, <http://www.law.georgetown.edu/faculty/Heinzerling/> (last visited April 3, 2009).

34. Heinzerling, *supra* note 1. The special rule prohibits importation into the United States of hides or other trophies from polar bears killed in Canada. *Id.*

Conservatives and business groups hailed the limits the Bush administration placed on the listing decision's regulatory power.<sup>35</sup> As Vice President of Environmental Affairs at the U.S. Chamber of Commerce William Kovacs stated, "[t]oday's decision will protect the polar bear while also protecting American jobs and businesses."<sup>36</sup> However, these groups generally disagreed with the decision to even list the polar bear as a threatened species. Alaska's Republican governor Sarah Palin stated that the available evidence was not sufficient to support the listing, arguing that the decision was based on uncertain models of climate change and unproven estimations of the long-term effects climate change will have on the polar bear.<sup>37</sup> Similarly, M. Reed Hopper of the Pacific Legal Foundation, a Sacramento property-rights organization, was prepared to sue the Department for its "arbitrary" decision to list a "thriving species."<sup>38</sup> Hopper expressed concern that if global warming factors were taken into account, the listing could be used to impose severe restrictions on land use, job creation, and normal economic activity not only in Alaska, but in the forty-eight contiguous states as well.<sup>39</sup>

#### IV. MIXED FEELINGS

The ESA has earned its reputation as the "pit bull" of the environmental laws because of its potential to set strict limitations on agency actions that affect listed species.<sup>40</sup> Section 7 of the ESA requires each federal agency to insure that any agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."<sup>41</sup> By placing limitations on the polar bear listing decision, the Department essentially pulled the teeth out of the pit bull. As Melanie Duchin, global warming campaigner at Greenpeace USA, explained, "[e]xempting global warming and oil development from the list of threats facing polar bears guts the protections that the Endangered Species Act listing should provide."<sup>42</sup> In Heinzerling's words, "the Department of the Interior is turning interpretive somersaults to avoid regulating greenhouse gas emitters."<sup>43</sup> Essentially, the Department has rendered a decision that had the potential to be a powerful tool to protect polar bears into a mere formality to comply with a court-imposed deadline.

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35. Eilperin, *supra* note 3.

36. *Id.*

37. Chris Rizo, *Alaska AG to Challenge Polar Bear Listing*, LEGALNEWSLINE, May 21, 2008, available at <http://www.legalnewsline.com/news/212648-alaska-ag-to-challenge-polar-bear-listing>.

38. Posting of Pete Smith to Change Alley, <http://environmentdebate.co.uk/2008/05/15/endangered-status-for-polar-bear/> (May 15, 2008).

39. *Id.*

40. Heinzerling, *supra* note 1.

41. Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2006).

42. Ctr. for Biological Diversity, *supra* note 26.

43. Lisa Heinzerling, *supra* note 1.

Some environmentalists remain optimistic about the listing and feel that the government will have no choice but to curb GHG emissions.<sup>44</sup> Kassie Siegel, director of the climate program at CBD and lead author of the original 2005 petition, is among those who considered the listing a step in the right direction because it forced the Bush administration to officially acknowledge the impacts of global warming.<sup>45</sup> But the token listing, when combined with the exemptions, was not enough. Together with the NRDC and Greenpeace, CBD challenged the Interim and Final (4)d Rules, as well as the Department's decision to list the polar bear as "threatened" rather than "endangered."<sup>46</sup> CBD believes that the Bush administration's attempts to limit the ESA's power to regulate GHG emissions will not hold up in court.<sup>47</sup>

The CBD asserts four claims for relief:<sup>48</sup> (1) the Secretary's failure to list the polar bear as "endangered" in all parts of its range was arbitrary and capricious, in violation of both the ESA and the APA, because it failed to consider the best available scientific data as required by the ESA and relied on factors, such as political considerations, beyond what is allowed by the ESA and APA; (2) the Final 4(d) Rule was arbitrary and capricious, in violation of both the ESA and the APA, because it failed to comply with the ESA's requirement to issue regulations "necessary and advisable to provide for the conservation of such [threatened] species"<sup>49</sup> and failed "to articulate a lawful rationale for exempting all activities outside the current range of the species from the take provisions of the ESA";<sup>50</sup> (3) the Secretary failed to provide for a public comment period prior to issuance of the Interim 4(d) Rule, in violation of the APA;<sup>51</sup> and (4) the Secretary's failure to prepare an environmental assessment (EA) or an environmental impact statement (EIS) for the Final 4(d) Rule was in violation of both NEPA and the APA.<sup>52</sup>

While CBD continues its legal battle against the 4(d) rules, there are reasons to remain optimistic. Namely, the U.S. Fish and Wildlife Service is

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44. Eilperin, *supra* note 3.

45. Ctr. for Biological Diversity, *supra* note 11.

46. Ctr. for Biological Diversity, *supra* note 26.

47. Ctr. for Biological Diversity, *supra* note 11.

48. This represents the most up-to-date claims of the suit pending at time of publication, as expressed in the "Third Amended Complaint for Declaratory Judgment and Injunctive Relief" submitted to the United States District Court for the District of Columbia. Plaintiff's Complaint In Re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation (March 13, 2009), Center for Biological Diversity v. Kempthorne, No. 1:08-cv-2113 (D.C. 2009) (No. 08-0764 (EGS)).

49. *Id.*

50. *Id.*

51. *Id.*

52. See National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006) ("All agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official."); 5 U.S.C. § 706 ("The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.").

required to prepare a recovery plan with specific measures for the protection of polar bears—a plan that potentially may have some regulatory teeth.<sup>53</sup> However, currently the CBD must continue on in its legal fight, as Interior Secretary Ken Salazar declined to use the special authority granted by the 2009 omnibus appropriations bill to overturn the Bush administration’s 4(d) rules.<sup>54</sup> The bill, which passed through Congress on March 10, 2009, gave the Obama administration the authority to annul rules weakening the ESA, including the two 4(d) rules limiting the protections afforded to polar bears.<sup>55</sup> However, rather than overturn the rules, the Obama administration expressed that it is looking to Congress to pass legislation that directly addresses climate change and curbs emissions.<sup>56</sup>

#### CONCLUSION

The Bush administration inappropriately allowed politics to dictate their decisions regarding the polar bear. However, environmentalists remain optimistic that the listing can be used to force the government to regulate GHG emissions and climate change. Since the Obama administration has declined to rescind Bush’s 4(d) rules, the polar bear can only wait in hope that the CBD will win its legal battle to get the teeth put back into its pit bull—the ESA.

*Jamie Lee Williams*

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53. Ctr. for Biological Diversity, *supra* note 11.

54. Andrew C. Revkin, *U.S. Curbs Use of Species Act in Protecting Polar Bear*, N.Y. TIMES, May 9, 2009, at A1, available at <http://www.nytimes.com/2009/05/09/science/earth/09bear.html>.

55. Press Release, Ctr. for Biological Diversity, Appropriation Committee Moves Omnibus Appropriations Bill, Giving Obama Administration Power to Remove Regulations Weakening Endangered Species Act and Rescind Harmful “Special Rule” for Polar Bear (Feb. 23, 2009), available at [http://www.biologicaldiversity.org/news/press\\_releases/2009/omnibus-bill-02-23-2009.html](http://www.biologicaldiversity.org/news/press_releases/2009/omnibus-bill-02-23-2009.html).

56. Revkin, *supra* note 54.



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# Affirming the Status Quo? Regulating the National Ambient Air Quality Standards for Ozone

## INTRODUCTION

On March 12, 2008, the Environmental Protection Agency (EPA) promulgated a final rule that revised the National Ambient Air Quality Standards (NAAQS) for ground-level ozone.<sup>1</sup> The EPA set both the primary and secondary eight-hour standards at 0.075 parts per million (ppm).<sup>2</sup> While the new levels are approximately 0.005 ppm lower than the previous standards set in 1997, the revisions are not entirely consistent with the recommendations of the agency's own Clean Air Scientific Advisory Committee (CASAC).<sup>3</sup> Representative Henry A. Waxman, Chairman of the House Committee on Oversight and Government Reform, suggested that the Bush administration significantly interfered with the adoption of CASAC's proposal, resulting in the passage of standards less stringent than those recommended by EPA's own scientists.<sup>4</sup> The current controversy over the latest revisions to the O<sub>3</sub> NAAQS represents a shift in focus away from the air quality goals of the Clean Air Act (CAA). In short, it is unlikely that this decision is a step toward optimal air quality.

## I. BACKGROUND

The ultimate goal of the CAA is to protect public health and welfare through enhancement of the nation's air quality.<sup>5</sup> Section 109 of the CAA requires that the administrator of the EPA set both national primary and secondary ambient air quality standards for a variety of common air pollutants

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1. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16436, 16440 (Mar. 27, 2008) (to be codified at 40 C.F.R. pts. 50, 58).

2. *Id.* at 16436. NAAQS represent average ozone concentrations over eight-hour periods and are used to determine whether a particular site meets the requisite ambient air quality standards.

3. *Id.*

4. See *Hearing on EPA's New Ozone Standards: Hearing Before the Comm. on Oversight and Gov't Reform*, 111th Cong. 5 (2008) [hereinafter *Hearing*] (statement of Rep. Waxman, Chairman, Comm. on Oversight and Gov't Reform).

5. See *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981).

at five-year intervals.<sup>6</sup> To provide independent advice to the EPA administrator on the technical bases for the NAAQS, the CAA created CASAC, a seven-member panel that conducts research related to air quality, sources of air pollution, and strategies for both attaining and maintaining optimal air quality standards.<sup>7</sup>

Ground-level ozone, a listed pollutant under the CAA and the primary component of smog, forms as the result of natural reactions between nitrogen oxides and volatile organic compounds in the atmosphere.<sup>8</sup> Primary standards for ozone and other listed pollutants are generally established at levels necessary to protect the public health to an adequate margin of safety, while secondary standards are set to levels requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such pollutants in the ambient air.<sup>9</sup> These secondary “public welfare” standards take into account the harmful effects of the pollutant on crops, vegetation, wildlife, buildings and national monuments, and visibility.<sup>10</sup>

Courts may reverse an EPA standard-setting rule under several scenarios: (1) if the administrator acted in a manner that was arbitrary, capricious, or an abuse of discretion; (2) if the findings were contrary to constitutional right, power, privilege, or immunity and in excess of statutory jurisdiction; or (3) if the errors were so significant that the challenged rule would likely have been different without the error.<sup>11</sup>

The courts have established the precise manner in which the EPA can set NAAQS consistent with the statutory scheme of the CAA. First, in *Lead Industries Association v. EPA*, the D.C. Circuit reviewed EPA regulations concerning the NAAQS for lead in ambient air.<sup>12</sup> The plaintiffs, concerned that the standards were too stringent, alleged that the administrator exceeded his authority by setting standards that went beyond levels necessary to protect the public health.<sup>13</sup> Moreover, they contended that the CAA limited the administrator’s ultimate power in order to prevent rigid standards that would “cause massive economic dislocation.”<sup>14</sup> The court, however, held that the

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6. Clean Air Act § 109(a), (d), 42 U.S.C. § 7409(a), (d) (2006); U.S. EPA, National Ambient Air Quality Standards (NAAQS), <http://www.epa.gov/air/criteria.html> (last visited Apr. 9, 2008); U.S. EPA, Fact Sheet: Final Revisions to the National Ambient Air Quality Standards for Ozone 5 (2008), [http://www.epa.gov/airnow/ozone/final\\_ozone\\_naaqs\\_factsheet.pdf](http://www.epa.gov/airnow/ozone/final_ozone_naaqs_factsheet.pdf) [hereinafter *Fact Sheet*].

7. 42 U.S.C. § 7409(d); U.S. EPA, EPA Clean Air Scientific Advisory Committee (CASAC), <http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommittees/CASAC> (last visited April 10, 2009).

8. U.S. EPA, Cleaning Up Commonly Found Air Pollutants, <http://www.epa.gov/air/caa/peg/cleanup.html> (last visited May 23, 2009).

9. Clean Air Act § 109(b), 42 U.S.C. § 7409(b).

10. *Fact Sheet*, supra note 6, at 5.

11. *Lead Indust. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1145 (D.C. Cir. 1980); *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1184 (D.C. Cir. 1981).

12. *Lead Indust. Ass’n*, 647 F.2d at 1130.

13. *Id.* at 1162.

14. *Id.* at 1148.

plain language of the CAA, coupled with its legislative history, left no room for the administrator to consider economic or technological practicability when implementing air quality standards.<sup>15</sup>

Next, in *American Petroleum Institute v. Costle*, the D.C. Circuit reviewed a series of consolidated cases relating to the primary and secondary NAAQS for ozone.<sup>16</sup> Several petitioners, including the American Petroleum Institute, alleged, inter alia, that the EPA's standards were too stringent, arbitrary and capricious, not economically feasible, unreasonable, and unsupported by the record.<sup>17</sup> The court reaffirmed its determination in *Lead Industries* by holding that the administrator need not consider attainability and cost in setting ozone standards.<sup>18</sup> In stark contrast to the American Petroleum Institute, petitioner Natural Resources Defense Council (NRDC) alleged that the administrator's primary ozone standard of 0.12 ppm was too lenient and did not establish an adequate margin of safety.<sup>19</sup> NRDC argued that the administrator erred in setting a primary NAAQS for ozone that did not protect sensitive individuals against predictable risks.<sup>20</sup> The court, however, established that the administrator had undertaken a rational review of all relevant studies, reasonably concluding that a standard of 0.12 ppm was sufficient to deter the possibility of serious adverse human side effects.<sup>21</sup>

More recently, the Supreme Court tackled the issue in *Whitman v. American Trucking Associations, Inc.*, in which several private companies, along with Michigan, Ohio, and West Virginia, challenged the EPA's 1997 revisions to the ozone standards.<sup>22</sup> The Court reaffirmed that economic considerations could not be taken into account when creating NAAQS.<sup>23</sup> Specifically, the Court noted that Section 109(d)(2)(C)(iv) of the CAA requires the EPA's Science Advisory Board, CASAC, to advise the administrator of "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of ambient air quality standards. Cost considerations, however, such as the economic impacts of ambient air quality standards on industries, communities and other sources of pollution, could be utilized primarily by the States in implementing the NAAQS and not by the EPA in setting the standards.<sup>24</sup>

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15. *Id.* at 1149.

16. *Am. Petroleum Inst.*, 665 F.2d at 1182.

17. *Id.* at 1183–84.

18. *Id.* at 1185.

19. *Id.* at 1181, 1183.

20. *Id.* at 1186.

21. *Id.* at 1187.

22. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 462 (2001).

23. *Id.* at 465.

24. *Id.*

## II. ANALYSIS

In revising the eight-hour primary NAAQS for ozone from 0.080 ppm to 0.075 ppm, then-EPA Administrator Stephen L. Johnson considered several data: (1) evidence of adverse health effects related to short-term exposure to ozone, (2) insights gathered from quantitative exposure and health-risk assessments, and (3) comments from both the public and CASAC.<sup>25</sup> Faced with the opportunity to revise the standards set in 1997, CASAC unanimously concluded that adverse health effects might be possible at ozone levels anywhere in the range of 0.060 ppm to 0.080 ppm.<sup>26</sup> CASAC's evaluation indicated that such risks include increases in school absenteeism, increased hospital visits due to respiratory illnesses in asthmatics, hospitalizations, symptoms such as chest tightness and increased medication usage, and premature mortality.<sup>27</sup> CASAC further recommended a standard in the range of 0.060 to 0.070 ppm, noting that no significant scientific uncertainty existed that would justify maintaining the standard at 0.080 ppm.<sup>28</sup>

In revising the secondary (public welfare) NAAQS from 0.080 ppm to 0.075 ppm, Johnson examined the effects of ozone on plant communities, species biodiversity, and the structure and function of ecosystems as a whole.<sup>29</sup> In particular, he looked at the intended use of public lands and the value of maintaining such areas.<sup>30</sup> However, while CASAC unanimously suggested development of a cumulative seasonal standard, he instead set the secondary NAAQS to a level identical to the primary standard.<sup>31</sup> Interestingly, on March 11, 2008, President George W. Bush notified the EPA that protection for "public welfare" could be achieved by setting the secondary ozone standard to a level identical to the primary standard.<sup>32</sup>

In an April 2008 letter addressed to Administrator Johnson, Dr. Rogene F. Henderson, Chair of CASAC, expressed concern over the revised standard.<sup>33</sup> Henderson reiterated CASAC's view that the primary eight-hour standard be set within the range of 0.060 to 0.070 ppm, with a seasonal secondary standard accumulated over approximately twelve "daylight" hours and three maximum ozone months of the summer growing season.<sup>34</sup> Henderson argued that

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25. National Ambient Air Quality Standards for Ozone, *supra* note 1, at 16439.

26. *Id.* at 16438.

27. *Id.* at 16449.

28. *Id.*

29. *Id.* at 16493.

30. *Id.* at 16496.

31. *Id.* at 16497.

32. *Id.* at 16497. President Bush expressed his opinion via a memorandum sent from Dudley to Administrator Johnson. *Id.*

33. Letter from Dr. Rogene F. Henderson, Chair, CASAC, to Stephen L. Johnson, Administrator, EPA (Apr. 7, 2008), [http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/\\$File/EPA-CASAC-08-009-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/$File/EPA-CASAC-08-009-unsigned.pdf).

34. *Id.*

CASAC's recommended secondary standard would more appropriately reflect the "clear" link between ozone-related effects on vegetation and the cumulative, seasonal exposures that are not appropriately captured through the use of an eight-hour daily measure of ozone exposure.<sup>35</sup>

In May of 2008, Representative Waxman convened a committee hearing to discuss the EPA's new ozone standards. Waxman revealed at the hearing that Johnson had once described the seasonal standard as "compelling."<sup>36</sup> Some participants in the hearing argued that while CASAC's views were "advisory" in nature, the administrator was by no means obligated to automatically "rubber stamp" all CASAC recommendations.<sup>37</sup> They further argued that setting the NAAQS level for ozone was necessarily a policy judgment entrusted to the administrator—not CASAC.<sup>38</sup>

Johnson, also present at the hearing, defended the revised primary NAAQS as the "most stringent [eight]-hour standard" in the country's history.<sup>39</sup> Moreover, with regard to the secondary standard, Johnson reaffirmed his decision to set identical primary and secondary standards, as opposed to a cumulative seasonal standard. Johnson explained that in addition to considering the comments by CASAC and the general public, he conferred, pursuant to Executive Order 12866,<sup>40</sup> with the executive branch "as a matter of good government" about the potential options that lay before him.<sup>41</sup> The revised secondary standard was also defended on the ground that a seasonal standard would not be more protective of the public welfare than a standard equivalent to the primary public health standard.<sup>42</sup>

#### CONCLUSION

While the EPA's latest revisions to the ozone NAAQS increase their stringency from the 1997 standards, these new standards may not accurately represent the levels required to preserve the public health and welfare. Moreover, the most recent revisions may represent a new phase of EPA decision making whereby science takes a backseat to matters of policy. While

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35. *Id.*

36. *Hearing, supra* note 4, at 4 (statement of Rep. Waxman, Chairman, Comm. on Oversight and Gov't Reform).

37. *Id.* at 11 (statement of Rep. Darrel Issa, sitting for Rep. Tom Davis, Ranking Member, Sen. Comm. On Oversight and Gov't Reform).

38. *Id.*

39. *Id.* at 17–18 (statement of Stephen L. Johnson, Administrator, EPA).

40. *Id.* at 18; U.S. EPA, Summary of Executive Order 12866: Regulatory Planning and Review, <http://www.epa.gov/lawsregs/laws/eo12866.html> (last visited May 23, 2009) (Executive Order 12866 requires actions that have major regulatory effects, such as those that have the potential to significantly impact the economy, to be submitted for review by the Office of Information and Regulatory Affairs and the Office of Management and Budget).

41. *Hearing, supra*, note 4, at 18.

42. *Id.* at 22 (statement of Susan E. Dudley, Administrator, Office of Info. and Regulatory Affairs).

prior cases, such as *Whitman*, indicated that EPA may not consider cost-benefit analyses when setting a NAAQS,<sup>43</sup> it is worth questioning whether or not such considerations were in fact crucial to the administrator's final decisions. CASAC itself recognizes the practical difficulties for states to comply with the lowered primary and secondary ozone standards.<sup>44</sup> It may be that EPA's next NAAQS review will comport more closely with CASAC's recommendations.

On the other hand, a new review may establish a more significant pattern of government involvement in the setting of EPA standards. With a new administration it is difficult to conjecture precisely what issues will take precedence in EPA's decision-making process. However, given the CAA's mandatory five-year interval review period for revising the NAAQS,<sup>45</sup> it is more than likely that air quality standards for ozone will continue to reflect the status quo for quite some time.

*Shahrzod Hanizavareh*

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43. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 462 (2001).

44. Henderson, *supra* note 33, at 3.

45. National Ambient Air Quality Standards for Ozone, *supra* note 1, at 16436.

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# In One Acorn: The Fate of the 2008 NFMA Planning Rule under the Obama Administration

## INTRODUCTION

Under the National Forest Management Act of 1976, the U.S. Forest Service must make land management plans for each unit of the National Forest System.<sup>1</sup> The individual plans must be made in accordance with generally applicable regulations promulgated and periodically revised by the Forest Service.<sup>2</sup> The regulations themselves must be made using an integrated, interdisciplinary approach; provide for participation by the public in discussion, development, and review; affirm the principles of the Multiple-Use Sustained Yield Act of 1960 (MUSYA); and meet the requirements of the National Environmental Policy Act of 1969 (NEPA).<sup>3</sup>

The Forest Service's latest revision to its guidelines has been controversial. In *Citizens for Better Forestry v. USDA*, the Northern District of California enjoined implementation of a 2005 version of the revisions ("the 2005 rule") for non-compliance with NEPA, the Administrative Procedures Act (APA), and the Endangered Species Act (ESA) after conservation groups sued.<sup>4</sup> The Forest Service published a replacement revision in 2008 ("the 2008 rule"), which itself became the subject of litigation almost as soon as it was released—many conservation groups argue that the new rule, while in line with the court's ruling in *Citizens*, still does not live up to the protective standards of the pre-2005 regulations.<sup>5</sup> For example, the 2008 rule removes the long-standing requirement to "ensure viable populations of fish and wildlife species" and allows the Forest Service to "categorically exclude" plans from public comment, strangling public participation and review.<sup>6</sup> The Obama

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1. Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. § 1604(g) (2006).
2. *Id.*
3. *Id.* § 1604(b), (d)-(e), (g)(1); Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. § 528-31 (2006); National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4327 (2006).
4. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007).
5. *Absent Analysis, Forest Planning Rule Assumes No Impact*, ENV'T NEWS SERVICE, Feb. 7, 2008, <http://www.ens-newswire.com/ens/feb2008/2008-02-07-093.asp>.
6. Press Release, Western Environmental Law Center, Forest Service Attempts to Remove Protections for Wildlife Across the Country, Meets With Lawsuit (Apr. 11, 2008), *available at*

administration should draft a new version of the rule as soon as possible, and in the interim, should set aside the 2008 rule and allow forest plans to proceed under the 1982 rule, which held forest plans to specific standards designed to protect sustainability and diversity.

#### I. BACKGROUND

The forest planning regulations were first adopted in the late 1970s and then revised substantially in 1982, remaining in that form until the Clinton administration made revisions in the late 1990s.<sup>7</sup> The Bush administration never enacted Clinton's modifications, but instead suspended the rule pending development of its own rule, which it published in 2005.<sup>8</sup> The 2005 rule significantly relaxed planning requirements and was published without public comment, completion of an ESA study, or an environmental impact statement (EIS) under NEPA.<sup>9</sup> It was challenged in early 2007 in the Northern District of California.<sup>10</sup> In March of that year, the court granted summary judgment to the plaintiffs on the grounds that the 2005 rule violated the APA, NEPA and the ESA and enjoined the U.S. Department of Agriculture from implementing the rule.<sup>11</sup> In order to comply with the court's ruling, the Forest Service re-issued a draft rule later that year, which became final in 2008.

The 2008 rule has been sharply criticized on five grounds. First, conservation groups contend that the rule is simply a restatement of the 2005 rule, altered just enough to appear in line with the court's ruling, but still in violation of the law. Rather than analyze the environmental impacts as required by NEPA, the EIS merely states that there will be no environmental impact.<sup>12</sup> Conservation groups have brought litigation over the 2008 EIS under the theory that the "final EIS" provided "violates NEPA by failing to adequately consider, analyze, or disclose the direct, indirect, and cumulative effects of the 2008 rule on the environment."<sup>13</sup>

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<http://www.westernlaw.org/pressroom/press-releases/forest-service-attempts-to-remove-protections-for-wildlife>.

7. ROSS W. GORTE ET AL., CRS REPORT FOR CONGRESS: FEDERAL LANDS MANAGED BY THE BUREAU OF LAND MANAGEMENT (BLM) AND THE FOREST SERVICE (FS): ISSUES FOR THE 110TH CONGRESS 20 (2008).

8. David Mason, Survey, *Forest Guardians v. Forsgren and NFMA Planning Reform: The Return of Maximum Forest Service Discretion*, 85 DENV. U. L. REV. 653, 670 (2008). The article refers to the draft of the 2008 Planning Rule issued in 2007. No substantial changes were made to the rule as enacted.

9. *Id.* at 672.

10. GORTE ET AL., *supra* note 7, at 20.

11. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1090, 1097, 1100 (N.D. Cal. 2007). The Forest Service is located within the U.S. Department of Agriculture and Forest Service regulations are promulgated by the Department.

12. Complaint for Declaratory and Injunctive Relief at 15, *Citizens for Better Forestry v. U.S. Dep't of Agric.*, No. CV 08-1927 (N.D. Cal. April 11, 2008).

13. *Id.* at 17.

Second, the 2008 rule has been disparaged for weakening the species preservation standards set by the 1982 rule. The 1982 rule required the Forest Service to manage the forests in such a manner that the ecosystem and habitat would be “highly likely” to support viable populations of “native and desired non-native species” over time.<sup>14</sup> By contrast, the 2008 rule “allows” but does not require individual forest plans to maintain viable populations of their species.<sup>15</sup> A separate provision in the 1982 rule (§ 219.26) required forest plans to provide for species diversity.<sup>16</sup> The 2008 rule removes this requirement, making promotion of species diversity discretionary.<sup>17</sup>

Third, while the Forest Service touts the 2008 rule as being “flexible” and “responsive,” that flexibility comes at the price of providing a large amount of agency discretion and a weakening of public involvement in the planning stages.<sup>18</sup> Specifically, the 2008 rule relaxes procedures for changing the plan monitoring programs, by allowing changes to be made administratively without public participation.<sup>19</sup> It also leaves the method and timing of participation up to the administrative official, whereas the 1982 rule imposed clear procedural requirements and required analysis of public input by issue and by geographical area.<sup>20</sup>

Fourth, the 2008 rule also relaxes requirements in other significant areas, such as timber management and harvesting.<sup>21</sup> The 1982 rule required the Forest Service to “study the ecological effects and economic implications of its timber harvesting practices in detail.”<sup>22</sup> In contrast, the 2008 rule removes much of the detail from the regulations, continuing to require the designation of areas suitable for harvest, but not requiring, for example, designation of the method for determination of harvest volumes.<sup>23</sup> The 2008 rule allows timber harvesting to go forward without the protections for water quality and watersheds, which were part of the 1982 rule.<sup>24</sup> Furthermore, the 2008 rule allows for more frequent categorical exclusion of “substantial site-specific timber harvests.”<sup>25</sup>

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14. Mason, *supra* note 8, at 671.

15. Laura M. Bies & Thomas M. Franklin, *Forest Service 2004 NFMA Planning Rule: Implications for Wildlife*, 33(1) WILDLIFE SOC'Y BULL. 302, 302 (2005). This article discusses the 2005 rule, but the relevant provisions are identical to those of the 2008 rule.

16. Mason, *supra* note 8, at 673.

17. Mason, *supra* note 8, at 671.

18. National Forest System Land Management Planning, Final Rule, 70 Fed. Reg. 21468, 21474–78 (Apr. 21, 2008) (to be codified at 36 C.F.R. pt. 219).

19. Mason, *supra* note 8, at 671–72.

20. *Id.* at 674.

21. *Id.* at 675.

22. *Id.*

23. *Id.*

24. Sierra Forest Legacy, National Forest Management Act, [http://www.sierraforestlegacy.org/FC\\_LawsPolicyRegulations/FPR\\_NFMA.php](http://www.sierraforestlegacy.org/FC_LawsPolicyRegulations/FPR_NFMA.php) (last visited April 11, 2009).

25. Mason, *supra* note 8, at 675.

Finally, while the 1982 rule required that plans analyze the effects of forest management on “the basis of available scientific information,” the 2008 rule merely requires that the Forest Service “take into account” the best available science, weakening the extent to which science must be incorporated into the forest plan.<sup>26</sup>

## II. REQUESTS OF CONSERVATION GROUPS

While the 2008 rule establishes at least facially stronger environmental safeguards than the 2005 rule, the safeguards are still substantially weaker than those in the 1982 regulations. Several conservation groups have requested that the Obama administration break with Bush-era forest planning by returning to the 1982 approach. The American Lands Alliance (ALA) circulated a letter to the head of Obama’s Energy and Natural Resources Transition Team, which requested that the new administration rescind the 2008 planning rule and allow forest land use plans to proceed pursuant to the 1982 regulations.<sup>27</sup> The ALA recommends restoring the requirement for viable populations of species, returning protections for old-growth forests, and eliminating the possibility that long-term forest management plans could be categorically excluded from NEPA review.<sup>28</sup>

The Society for Conservation Biology took a stronger stance, requesting that the administration publish a new version of the rule that explicitly re-establishes the standards of protection under the 1982 version.<sup>29</sup> It would also like the Obama administration to strengthen the role of science in policy making, not only with regard to the planning rule, but also in forest management more generally.<sup>30</sup>

## III. REASONS TO BE CAUTIOUS

There are significant reasons to believe that changing the forest rule is not at the top of the Obama administration’s agenda. It would be foolish to expect the administration to prioritize forest rulemaking over economic concerns and other domestic priorities. Further, Obama has thus far focused his

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26. *Id.*; National Forest System Land Management Planning, Final Rule, 70 Fed. Reg. 21468, 21473 (Apr. 21, 2008) (to be codified at 36 C.F.R. pt. 219).

27. Letter from Randi Spivak, Executive Director, American Lands Alliance, to David J. Hayes, Energy and Natural Resources Transition Team for President-Elect Barack Obama 8 (Nov. 26, 2008), available at [http://www.americanlands.org/assets/docs/Forest\\_100\\_Day\\_Ltr\\_Priorities\\_FINAL.pdf](http://www.americanlands.org/assets/docs/Forest_100_Day_Ltr_Priorities_FINAL.pdf).

28. *Id.* at 8–9.

29. SOCIETY FOR CONSERVATION BIOLOGY, RECOMMENDATIONS FOR ACTIONS BY THE OBAMA ADMINISTRATION AND THE CONGRESS TO ADVANCE THE SCIENTIFIC FOUNDATION FOR CONSERVING BIOLOGICAL DIVERSITY 4 (2008), <http://www.conbio.org/Activities/Policy/docs/SCB2008TransitionTeamRecommendations.pdf>.

30. *Id.* at 12.

environmental agenda on clean energy and climate change, rather than on specific forest policies or land management.<sup>31</sup>

In addition, while the Department of Agriculture has announced its new associate chief of the Forest Service, it has yet to announce a new chief. This may indicate that Gail Kimbell, a Bush administration appointee, will continue to occupy that position, at least for the foreseeable future.<sup>32</sup> Kimbell, though qualified, came under sharp criticism from environmental groups for her role in the “Healthy Forests Initiative,” which many environmental groups have alleged was a carte blanche for the logging industry.<sup>33</sup> As Obama has pledged to “listen rather than dictate” in working with officials,<sup>34</sup> this may open the door for Kimbell to let pro-industry policies linger.

#### IV. REASONS FOR OPTIMISM

Conservationists can, however, take heart in the overwhelmingly positive signs that the Obama administration will reverse the devastating policies set by his predecessor. In January 2009, Kimbell gave an interview for the *Vermont Cynic*, the student-run newspaper at the University of Vermont.<sup>35</sup> In the interview, she praised the new administration’s emphasis on science, an area which opponents of the 2005 and 2008 rules singled out as lacking.<sup>36</sup> This interview indicates a willingness to at least cooperate fully in restoring science to forest planning.

Another positive sign is the delay in implementing a rule regarding the sustainable use of forest botanical products that was finalized in December 2008 and intended to go into effect at the end of January 2009.<sup>37</sup> Secretary of Agriculture Tom Vilsack pushed back the start date of the rule in order to allow for more opportunity for public comment.<sup>38</sup> This is indicative of Obama’s commitment to a “transparent and inclusive” government, which is required to restore standards and protections to the 1982 forest planning rule.<sup>39</sup>

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31. Les Blumenthal, *Obama's Stance on Lands: He'll Break with Bush*, MCCLATCHY, Nov. 23, 2008, [http://www.mcclatchydc.com/staff/les\\_blumenthal/story/56228.html](http://www.mcclatchydc.com/staff/les_blumenthal/story/56228.html).

32. Press Release, USDA Forest Service, Forest Service Announces Changes Within the Executive Leadership Team (January 7, 2009), [http://www.fs.fed.us/news/2009/releases/01/exec\\_lead\\_change.pdf](http://www.fs.fed.us/news/2009/releases/01/exec_lead_change.pdf).

33. Associated Press, *Quick Criticism of New Forest Service Chief*, MSNBC.COM, Jan. 15, 2007, <http://www.msnbc.msn.com/id/16634602>.

34. See Blumenthal, *supra* note 31.

35. Laura Andrew, *On the record: 16th Chief of the U.S. Forest Service, Abigail R. Kimbell*, UVM '74, VT. CYNIC, Feb. 2, 2009, available at <http://www.vermontcynic.com/2.11606/on-the-record-1.1609219>.

36. *Id.*

37. Press Release, United Plant Savers, Special Forest Products and Forest Botanical Products Final Rule Delayed, Jan. 28, 2009, <http://www.unitedplantsavers.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=195&cntnt01returnid=15>.

38. *Id.*

39. *Id.*

Further, the administration has stated its intent to restore federal protection for roadless areas that were in place under the Clinton administration.<sup>40</sup> Obama has also picked many former Clinton administration staff members for his transition team, a hopeful sign that Clinton's policies will be restored.<sup>41</sup>

Last, the new stimulus bill directs more than \$1 billion to the Forest Service, freeing up money that had been allocated to firefighting. With such funding, an overhaul of the planning rule and general forest management would be fiscally possible.<sup>42</sup> Even former Forest Service officials see reason for optimism: Andy Stahl, director of Forest Service Employees for Environmental Ethics, and Jim Furnish, former Deputy Forest Service Chief, both predict that Obama will reverse course from the 2008 rule and go back to the 1982 version.<sup>43</sup>

#### CONCLUSION

The 1982 rule has not been without its own share of criticism. The Forest Service views the rule as requiring "unreasonable and unnecessary administrative burdens."<sup>44</sup> However, the protections it provided should immediately be reinstated until the Obama administration has time and resources to draft a new rule that streamlines the planning process without compromising rigorous environmental standards. The administration has two options for achieving this end. The first is a "hands-off" approach: it could decide not to challenge the lawsuit to the 2008 rule in court, which would likely force a reversion to the 1982 rule until a new rule is issued.<sup>45</sup> The second approach would be to simply rescind the 2008 rule and reinstate the 1982 rule as an interim measure while the newest version is created, essentially mooting the ongoing litigation. Either of these tactics would line up the Forest Service policies with Obama's stated commitment to the environment; the second would send a strong message that the administration is ready and willing to enforce the protections that are required for healthy, sustainable forests.

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40. Posting of Margaret Clune Giblin to CPRBlog, <http://www.progressivereform.org/CPRblog.cfm> (select "November 2008" under the "CPRBlog Archives" on the right; then follow the "National Forests, a New Administration, and Climate Change" hyperlink) (Nov. 20, 2008).

41. Blumenthal, *supra* note 25.

42. Ethan Lindsey, *Obama Administration Will Shift Forest Service Policy*, OR. PUB. BROADCASTING NEWS, Feb. 9, 2009, available at <http://news.opb.org/article/4230-obama--will-shift-forest-service-policy/>.

43. Bob Berwyn, *Summit County: Forest Service Expecting Positive Change Under Obama*, SUMMIT DAILY NEWS (Summit County, Colo.), Dec. 14, 2008, available at <http://www.summitdaily.com> (search "Summit County: Forest Service" then follow the "Summit County: Forest Service Expecting Positive Change Under Obama" hyperlink).

44. Mason, *supra* note 8, at 670.

45. Eric Bontrager, *Interim Planning Guidelines Add Flexibility for Climate Change Responses*, GREENWIRE, Nov. 13, 2008, available at RED LODGE CLEARINGHOUSE, <http://rlch.org/content/view/1316/62/>.

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## Sustainable Communities Strategies Will Be Essential to the Success of SB 375

In a follow-up to the 2006 passage of the California Global Warming Solutions Act (AB 32),<sup>1</sup> California adopted Senate Bill 375 (SB 375)<sup>2</sup> to reduce greenhouse gas (GHG) emissions through improved land use and transportation planning. This innovative legislation requires each of California's metropolitan planning organizations (MPOs) to create a regional sustainable communities strategy that integrates land use and transportation planning in an attempt to meet GHG emissions targets.<sup>3</sup> While the bill establishes new procedural requirements for regional transportation plans, along with incentives for transit-oriented and high-density infill development, it does not mandate reductions in GHG emissions. In fact, SB 375 allows MPOs to avoid reducing GHG emissions by adopting non-binding alternative planning strategies.<sup>4</sup> In this Note, I argue that the ultimate success of SB 375 will depend on the willingness of metropolitan planning organizations to adopt sustainable communities strategies that meet GHG reduction targets.

### I. BACKGROUND

California is the fifteenth largest emitter of greenhouse gases on the planet.<sup>5</sup> Transportation is the single largest source of GHG emissions in the state, comprising 38 percent of all emissions, compared to 23 percent from electricity generation and 20 percent from industrial emissions.<sup>6</sup> With transportation as the leading source of GHG emissions, land use planning that reduces vehicle miles traveled will be critical to meeting the goal set by AB 32 of reducing GHG emissions to 1990 levels no later than 2020.<sup>7</sup> The legislative findings of SB 375 make clear that “without improved land use and

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1. CAL. HEALTH & SAFETY CODE §§ 38,500–38,599 (West 2008).
2. S. 375, Gen. Assem., 2007–2008 Reg. Sess. (Cal. 2008) (to be codified in scattered sections of the CAL GOV'T CODE and CAL. PUB. RES. CODE § 21,155).
3. CAL. GOV'T CODE § 65,080(b)(2)(B) (West 2008).
4. *Id.* at § 65,080(b)(2)(H).
5. CAL. AIR RES. BD., CLIMATE CHANGE DRAFT SCOPING PLAN DISCUSSION DRAFT (2008), available at <http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.pdf>.
6. CAL. AIR RES. BD., CALIFORNIA GREENHOUSE GAS INVENTORY (Apr. 28, 2009), available at [http://www.arb.ca.gov/cc/inventory/data/tables/rpt\\_Inventory\\_IPCC\\_Sum\\_2007-11-19.pdf](http://www.arb.ca.gov/cc/inventory/data/tables/rpt_Inventory_IPCC_Sum_2007-11-19.pdf)
7. See CAL. HEALTH & SAFETY CODE §§ 38,500–38,599 (West 2008).

transportation policy, California will not be able to achieve the goals of AB 32.”<sup>8</sup>

## II. BILL SUMMARY

The goal of SB 375 is to reduce vehicle miles traveled by providing incentives for high-density urban development along public transportation corridors.<sup>9</sup> Mixed commercial and residential development near transit can reduce total vehicle miles traveled by creating pedestrian-friendly communities with easy access to public transportation.

SB 375 requires the California Air Resources Board (CARB) to establish vehicle emissions reduction targets for each of the state’s MPOs.<sup>10</sup> Each MPO is required to draft a sustainable communities strategy that integrates land use and transportation planning in an attempt to meet the GHG reduction target for its respective metropolitan region.<sup>11</sup> If CARB finds that the sustainable communities strategy fails to meet the emissions target, then the MPO is required to create a separate alternative planning strategy that, if implemented, would meet the GHG reduction target for the region.<sup>12</sup>

Transit-oriented and other qualified high-density housing and mixed-use development projects that comply with either a CARB-approved sustainable communities strategy *or* a valid alternative planning strategy are eligible for CEQA exemptions or streamlined CEQA review processes to accelerate land use approvals.<sup>13</sup> The bill also prevents cities from blocking affordable housing projects needed to meet regional housing needs.<sup>14</sup> Though this Note does not detail the CEQA streamlining and affordable housing provisions of SB 375, these important reforms will help reduce GHG emissions by encouraging infill development near transit corridors.

## III. REGIONAL EMISSIONS TARGETS

SB 375 requires CARB to develop passenger vehicle GHG emission reduction targets for each of the state’s ten MPOs.<sup>15</sup> By September 30, 2010, CARB must adopt GHG reduction targets to be met by both 2020 and 2035.<sup>16</sup> The MPOs are charged with the task of coordinating land use and

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8. S. 375, § 1(c), Gen. Assem., 2007–2008 Reg. Sess. (Cal. 2008) (to be codified in scattered sections of the CAL GOV’T CODE and at CAL. PUB. RES. CODE § 21,155).

9. *See id.* § 1(e)-(f).

10. CAL. GOV’T CODE § 65,080(b)(2)(A) (West 2008).

11. *Id.* § 65,080(b)(2)(B).

12. *Id.* § 65,080(b)(2)(H).

13. *See* CAL. PUB. RES. CODE §§ 21,155.1-21,155.2(B) (West 2008).

14. *See* CAL. GOV’T CODE §§ 65,587 (West 2008).

15. *Id.* § 65,080(b)(2)(A).

16. *Id.*

transportation planning within their respective metropolitan regions to attempt to meet the GHG reduction targets set by CARB.<sup>17</sup>

*A. Sustainable Communities Strategies*

The bill requires each MPO to prepare a “sustainable communities strategy” as part of its regional transportation plan, which guides future federal and state transportation infrastructure funding.<sup>18</sup> The sustainable communities strategy establishes how planned land uses and transportation projects will achieve the GHG reduction targets set by CARB. The strategy must detail a future growth scenario that includes:

A forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the greenhouse gas emissions from automobiles and light trucks to achieve, if there is a feasible way to do so, the greenhouse gas emission reduction targets . . . .<sup>19</sup>

The California Air Resources Board must certify that the sustainable communities strategy is designed to meet the GHG targets.<sup>20</sup> If CARB determines that the GHG targets will not be met, then the MPO must document the barriers to compliance and create an alternative planning strategy that, if implemented, would meet the emissions goals set by CARB.<sup>21</sup>

*B. Alternative Planning Strategies:  
Excluded from Regional Transportation Plans*

Under existing law, each MPO is required to adopt a regional transportation plan that serves as a long-term guide for future federal, state and local transportation funding.<sup>22</sup> SB 375 requires MPOs to incorporate the sustainable communities strategy into the regional transportation plan whether or not the strategy meets the regional GHG target.<sup>23</sup> The alternative planning strategy is crafted only if CARB certifies that the sustainable communities strategy fails to meet the regional GHG reduction target and is not incorporated into the regional transportation plan.<sup>24</sup> SB 375 provides that “the alternative planning strategy shall be a separate document from the regional transportation

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17. *Id.* § 65,080(b)(2)(B).

18. *Id.*

19. *Id.* § 65,080(b).

20. *Id.* § 65,080(b)(2)(I)(ii).

21. *Id.* § 65,080(b)(2)(I)(iii).

22. *See* 23 U.S.C. § 134 (2006) (requiring each metropolitan planning organization to prepare a regional transportation plan); CAL. GOV'T CODE § 65,080(a)-(b) (requiring internal consistency between fiscal and policy elements of regional transportation plans).

23. *See* CAL. GOV'T CODE § 65,080(b)(2)(H) (West 2008).

24. *Id.*

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plan.”<sup>25</sup> This provision is important because state and federal transportation funding must be consistent with each MPO’s regional transportation plan.<sup>26</sup>

By excluding the alternative planning strategy from the regional transportation plan, SB 375 does not prevent state and federal transportation funds from flowing to transportation projects, such as highway expansions, that increase GHG emissions. As long as a suitable alternative planning strategy is adopted, MPOs can choose to adopt sustainable communities strategies that fail to meet GHG targets and still receive state and federal transportation funding for projects that contribute to, rather than reduce, GHG emissions.

#### CONCLUSION

The willingness of MPOs to adopt sustainable communities strategies that meet GHG reduction targets is critical to the success of SB 375. To effectively reduce GHG emissions and meet the goals of AB 32, MPOs throughout California must adopt sustainable communities strategies that satisfy the CARB GHG emission targets and therefore avoid the development of alternative planning strategies. As sustainable communities strategies are subject to CEQA-mandated public comment periods, environmentalists and local communities will have new opportunities to ensure that MPOs consider the long-term climate impacts of land use and transportation planning decisions. The planning processes surrounding the development of sustainable communities strategies will likely emerge as a critical front in the battle to protect California’s communities and natural resources from the dangers of a changing climate.

*Brent Schoradt*

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25. *Id.*

26. See 23 U.S.C. § 134 (2006) (requiring each metropolitan planning organization to prepare a regional transportation plan); CAL. GOV’T CODE § 65,080(a)-(b) (West 2008) (requiring internal consistency between fiscal and policy elements of regional transportation plans).