

WILDLIFE LAW CALL

SPRING 2019

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I. Oil and gas leasing

a. *Montana Wildlife Federation v. Zinke*

Catherine Balli

In 2015, 98 federal land management plans for ten western states were amended to develop conservation efforts for the greater sage-grouse and its habitat.¹ These plans directed the Bureau of Land Management (BLM) to designate lands as Priority or General Habitat Management Areas, which would then prioritize oil and gas leasing within these areas as to not disturb greater sage-grouse.² In 2016, BLM issued a memorandum to implement the 2015 plans.³ However, in 2017, President Donald J. Trump issued Executive Order 13783, *Promoting Energy Dependence and Economic Growth*, which was followed by Secretary of the Interior Ryan Zinke's Secretarial Order No. 3353.⁴ Secretary Zinke's order directed the BLM and other agencies to provide a report that recommending public lands for energy development.⁵



BLM recommended that several areas designated in the 2015 plans for the greater-sage grouse conservation could be modified and boundaries redrawn.⁶ BLM also recommended that the leasing plans for the habitat area be clarified.⁷ BLM released a new plan in 2018 that reflected both President Trump's and Secretary Zinke's orders.⁸ This new plan removed the prioritization of protected land

and allowed for the leasing and development of oil within habitat areas.⁹

Montana Wildlife Federation (Plaintiff) brought a claim before the U.S. District Court for the District of Montana against Secretary Zinke (Defendant).¹⁰ Plaintiff's claim alleges that the sudden and drastic policy change of the greater sage-grouse habitat unlawfully ignored previously understood and agreed-upon protections for sage-grouse populations such that BLM's 2018 plan was in direct conflict with the 2015 plan.¹¹ Plaintiff further claims that eleven oil and gas lease sales in Montana, Wyoming, and Nevada due to the 2018 BLM plans affected protected sage-grouse habitats throughout the region and those effects were not adequately considered.¹² Defendants moved for the court to sever the claims into separate actions with regard to the Wyoming and Nevada oil and gas leases, arguing that the claim in Wyoming and Nevada uniquely affected the local interests of those states.¹³ The district court must first decide whether Federal government's motion warrants such severance.

On November 6, 2018, the court denied the motion to sever the out-of-state claims due to the Federal Defendants not meeting their burden to show that transferring the cases to their respected districts would be proper.¹⁴ The court determined that the Plaintiff's choice to combine the cases was a strategic choice that relieved the judicial system of multiple cases involving the same question.¹⁵ Additionally, a key issue in this case involves a national directive that impacts sage-grouse habitats that stretch beyond state lines.¹⁶ The court will now move forward to resolve Plaintiff's challenge to the eleven lease sales, the Zinke Memo, and the 2018 BLM plan as violating the 2015 plans, the Federal Land Policy and Management Act, and the Administrative Procedure Act.¹⁷

—2018 U.S. Dist. LEXIS 189917 (D. Mont. Nov. 6, 2018).

¹ *Mont. Wildlife Fed'n v. Zinke*, 2018 U.S. Dist. LEXIS 189917, 1 (D. Mont. Nov. 6, 2018).

² *Id.* at 2.

³ *Id.*

⁴ *Id.* at 3.

⁵ *Id.* at 3.

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 5.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 10.

¹⁵ *Id.*

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 5.

b. San Juan Citizens Alliance v. BLM

Catherine Balli

In October 2015 the Bureau of Land Management (BLM) approved the leasing of 13 oil and gas parcels within the Santa Fe National Forest (SFNF) in New Mexico.¹⁸ The area within the SFNF, known as the San Juan Basin, has the largest natural gas fields within the United States.¹⁹ Several agencies have conducted studies to determine the impact of oil and gas leasing within this portion of the SFNF.²⁰ In 1987 BLM created a land resource management plan to issue oil and gas leases in the San Juan Basin.²¹ By 1998 this plan was no longer sufficient by NEPA standards and BLM could not issue oil and gas leases.²² This led to a joint project led by BLM, U.S. Bureau of Reclamation, and the U.S. Forest Service (USFS) to produce alternative development methods for the oil and gas within SFNF.²³ These combined efforts led to BLM issuing the 2003 Resource Management Plan (2003 RMP) and a Final Environmental Impact Statement (Final EIS) for the San Juan Basin.²⁴ However, the Final EIS did not satisfy USFS

NEPA requirements and therefore no new oil and gas leases were issued.²⁵

In 2006 USFS conducted a “planning-level NEPA analysis,” which studied the impacts that oil and gas leases would have on the SFNF.²⁶ This study led to the 2008 Final EIS and Decision by USFS, which addressed the issues in the 2003 RMP and Final EIS.²⁷ Forest Service then conducted an air quality analysis in 2012 and prepared a “final supplement to the environmental impact statement (FSEIS).” The Forest Service then reviewed the 2008 Final EIS and the 2012 FSEIS and concluded that they were sufficient enough to begin oil and gas leasing within the San Juan Basin.²⁸

In 2015, the environmental assessment (EA) conducted by BLM investigated the possible impact of leasing on several aspects of the environment, but with special attention on special status species and migratory birds; air quality and climate; water quality; soil resources.²⁹ BLM concluded that the recent EA combined with USFS’s 2003 RMP, 2008 FEIS, and 2012 FSFEIS sufficed to forgo an EIS and began issuing the 13 leases.³⁰ Plaintiffs, a group of citizens who use and enjoy the areas within the SFNF, asserted that BLM violated NEPA by failing to take a hard look at the environmental impact that the development of oil and gas could have on the SFNF.³¹

In this case, the Plaintiffs argued that BLM did not meet the “hard look” standard required by NEPA³² However, BLM argued that the “hard look” standard was satisfied by the USFS’s 2008 and 2012 EISs.³³ However, Plaintiffs argue that reliance on these two studies was not enough to bypass an EIS.³⁴



¹⁸ *San Juan Citizens Alliance v. U.S. BLM*, 326, F. Supp. 3d 1227, 1236 (D. N.M. June 14, 2018).

¹⁹ *Id.* at 1236.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 1237.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1238.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1239.

³³ *Id.* at 1240.

³⁴ *Id.* at 1237.

The courts considers Plaintiffs’ four asserted areas where BLM failed to take a “hard-look” at the environmental impacts of activities such as oil and gas leasing: First, it looked at impacts on greenhouse gas emissions (GHG). The court remands this matter to BLM to conduct a harder look into GHG impacts, specifically the “foreseeable downstream greenhouse gas emissions from the combustion produced oil and gas likely to be developed from the leases.”³⁵ Next, the court considered the effect that these leases could have on air quality and found that BLM had not failed to take a hard look into the air quality impacts.³⁶ Third, the court concluded that the BLM had met its obligation to consider the impact that the leases would have on the water quality in the area.³⁷ Finally, the court considered cumulative impacts. Because the greenhouse gases and water quality effects were not adequately reviewed, the court determined that cumulative impacts were not adequately reviewed and BLM would need to take a hard look.³⁸ Therefore, the court remanded the matter to BLM for further analysis on the remanded issues.³⁹

—326 F. Supp. 3d 1227 (D.N.M. 2018).

c. *Wilderness Workshop v. BLM*

Amanda Chkir

The North American Model of Wildlife Conservation calls for wildlife and land management policies to follow sound science. It also provides that, under the public trust doctrine, wildlife is regulated by the government and held in trust for the greater public. This case reflects these two pillars in practice.

Wilderness Workshop (Plaintiff), a non-profit environmental organization, challenged a decision of the Bureau of Land Management (BLM) that opened up public land in Colorado to fluid mineral leasing.⁴⁰ Plaintiff

claimed that BLM failed to take a hard look at the direct, indirect, and cumulative impacts to people and the environment and that it failed to consider a reasonable range of alternatives.⁴¹

“Hard Look” at impacts of oil and gas development on the environment and human health:

Plaintiff attacked BLM’s Resource Management Plan (RMP) and accompanying Environmental Impact Statement (EIS), specifically claiming that BLM failed to: analyze the foreseeable indirect greenhouse gas emissions (GHG) resulting from combustion or other end uses of the oil and gas extracted; consider the cumulative impacts of GHG emissions associated with oil and gas production; and analyze the significance and severity of the volume of the emissions.⁴²

1. Foreseeable indirect impacts of oil and gas

Plaintiff pointed out that BLM did not include an emission analysis in the RMP that would predict the foreseeable emissions resulting from the processing, transmission, storage, distribution and end use of the gas and oil.⁴³ BLM responded that a qualitative instead of quantitative report was sufficient, because forecasting oil and gas production is too speculative in nature to deliver accurate results.⁴⁴ Including such speculation could be misleading, according to BLM, which is why it was left out of the RMP.⁴⁵ The Court sided with Plaintiff, stating it was irreconcilable to provide estimates of the amount of oil and gas to be extracted, but claim emissions estimates too speculative to include.⁴⁶ Thus, BLM failed to take a hard look at this factor, in violation of NEPA (National Environmental Policy Act).

³⁵ *Id.*

³⁶ *Id.* at 1252.

³⁷ *Id.* at 1255.

³⁸ *Id.*

³⁹ *Id.* at 1256.

⁴⁰ *Wilderness Workshop v. United States Bureau of Land Management*, 342 F.Supp.3d 1145, 1150 (D. Colo. 2018).

⁴¹ *Id.* at 1154.

⁴² *Id.*

⁴³ *Id.* at 1155.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1156.

2. Cumulative impacts of GHG / climate change

Next, Plaintiff argued that BLM failed to analyze the cumulative climate change impacts in its RMP at a “regional, national, and global scale.”⁴⁷ Cumulative impact “is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”⁴⁸ BLM argued that quantification of things like changes in temperature, precipitation or surface albedo, was beyond the scope of the RMP. The court sided with BLM, concluding that because there will be more specific regulations regarding leasing and drilling approvals in the future, the cumulative impacts would be more foreseeable at that time. BLM took an appropriately hard look at the cumulative impacts to climate change.

3. Analysis of the significance and severity of the volume of emissions

In the RMP, BLM reported that tools did not exist to measure incremental climate impacts of GHG resulting from certain activities.⁴⁹ Plaintiff claimed that BLM was aware of, but chose to disregard, the monetized damages associated with an incremental increase in carbon emissions in a given year.⁵⁰ BLM reasoned that any change would be too insignificant to include, and the court sided with BLM; it was not a violation to omit this analysis.⁵¹ The RMP was sufficient without the data Plaintiff faulted the BLM for not providing.⁵²

Reasonable Range of alternatives

Preparation of the RMP included multiple proposed alternate plans, varying according to how much land would be open for oil and gas production. Plaintiff argued that BLM should have considered an alternative eliminating oil

and gas leasing in areas with low potential for development.⁵³ BLM responded that it was not required to consider this alternative because such a low percentage of the low potential areas were projected for development.⁵⁴ The court found for Plaintiff on this point, reasoning that if there was such low leasing potential, then BLM should have considered a no-leasing option. For this reason, BLM failed to consider reasonable alternatives and violated NEPA.

—342 F.Supp.3d 1145 (D. Colo. 2018).

d. *Rocky Mountain Wild v. BLM*

Mark Lockfefer

Under the Federal Land Policy and Management Act (FLPMA), the Bureau of Land Management (BLM) is directed to manage public lands to protect the quality of lands while maximizing the benefit of the resources of those lands.⁵⁵ In accomplishing this task, BLM is also required by section 7(a)(2) of the Endangered Species Act (ESA) to carry out its duties while ensuring that its actions “are ‘not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat.’”⁵⁶ If it is determined that a species may be affected by an agency action, a formal consultation between the U.S. Fish and Wildlife Service (FWS) and BLM ensues, where a biological opinion states whether or not the action is likely to jeopardize the listed species habitat. Agencies are permitted to conduct an informal consultation or prepare a biological assessment with FWS to excuse formal consultation if it is determined, as a result of the informal consultation or biological assessment, that the action will not likely affect a listed species or critical habitat.⁵⁷

In this case, in 2005, Congress amended the Energy Policy Act charged BLM with establishing a commercial leasing

⁴⁷ *Id.*

⁴⁸ *Id.* at 1157.

⁴⁹ *Id.* at 1158.

⁵⁰ *Id.* at 1159.

⁵¹ *Id.*

⁵² *Id.* at 1160.

⁵³ *Id.* at 1166.

⁵⁴ *Id.* at 1167.

⁵⁵ *Rocky Mt. Wild v. United States BLM*, No. 1:13-cv-1988-JLK, 2019 U.S. Dist. LEXIS 163703, at *1, *4 (D. Colo., Sept. 11, 2018).

⁵⁶ *Id.* (quoting 16 U.S.C. § 1536(a)(2)).

⁵⁷ *Id.* at *5.

program for oil shale and tar sands (OSTS) exploration activities and extraction.⁵⁸ BLM's initial OSTS 2008 plan amendments were to open approximately 2 million acres of federal land for oil shale leasing, and approximately 430,000 acres of tar sands for leasing.⁵⁹ This proposal was heavily opposed by environmental groups so BLM agreed to withdraw the 2008 plan amendments, and instead presented a 2013 plan amendment which excluded lands containing sage grouse habitat or other lands with important wilderness or wildlife characteristics.⁶⁰ The new 2013 amendments broke down the approval of commercial leasing of lands for OSTS into phases: land allocation, research and development leasing, and commercial operations.⁶¹ BLM determined with these amendments that it was currently in the land allocation phase and ESA section 7 consultation requirements would not be required until an application for leasing or permit was received.⁶² Since BLM believed it did not need to follow the ESA consultation requirements, BLM concluded, on its own, that the 2013 amendments had "no effect" on listed species or critical habitat.⁶³



Plaintiffs sued BLM, challenging its "no effect" determination at the land allocation phase of the 2013 amendments, alleging a violation of the ESA's consultation requirement. Plaintiffs argued that BLM must be required to conduct consultation "to avoid the piecemeal destruction of species and their habitats by individual projects."⁶⁴ BLM conceded that their amendments constituted agency action, but argued that they did not meet the "may effect" requirement, which would trigger a section 7 consultation.⁶⁵ The U.S. District Court for the District of Colorado addressed these arguments by looking to the reasonableness of BLM's stage-by-stage process for application approval and looking to Tenth Circuit precedent. The Court reasoned that the stage-by-stage process, where consultation does not occur at the initial stage, is reasonable because it does not commit BLM to any action that might affect endangered species or critical habitat.⁶⁶ BLM still requires applicants to comply with environmental review under section 7 of the ESA before any execution of the lease.⁶⁷ The Court also found this to be in line with current Tenth Circuit precedent.⁶⁸

After determining that it was reasonable for BLM to not conduct consultation at the initial stage, the Court looked at whether the "no effect" determination was improper.⁶⁹ The Court determined that preliminary planning did not have a direct effect on activities that could harm endangered species because that could only happen in a future lease and resulting exploration activities.⁷⁰ It was also determined that there was no indirect effect to endangered species from the land allocation. BLM presented evidence that leasing was not reasonably likely to occur following the land allocation in the 2013 Amendment because no company has yet demonstrated technology which could effectively process and recover liquid tar sands.⁷¹ Further, since there were only limited leases issued prior to the 2013 Amendment, there was not

⁵⁸ *Id.* at *2.

⁵⁹ *Id.* at *6.

⁶⁰ *Id.* *6-*7.

⁶¹ *Id.* at *7.

⁶² *Id.* at *7-*8.

⁶³ *Id.* at *9.

⁶⁴ *Id.* at *17.

⁶⁵ *Id.*

⁶⁶ *Id.* at *21.

⁶⁷ *Id.* at *20.

⁶⁸ *Id.* at *25.

⁶⁹ *Id.* at *26.

⁷⁰ *Id.* at *27.

⁷¹ *Id.* at *28.

enough evidence to show a pattern of activity to discern harm by the agency action.⁷²

For these reasons the Court disagreed with Plaintiffs that an agency is required to go through section 7 consultation in every instance of agency action that may affect endangered species or critical habitat.⁷³ BLM concluded that future development and OSTs leasing was not reasonably certain to occur, and therefore determined section 7 compliance could wait until actual exploration activities were likely to occur.⁷⁴ The Court held that BLM's determination was reasonable and the determination was consistent with Tenth Circuit precedent.⁷⁵

—2019 U.S. Dist. LEXIS 163703 (D. Colo. Sept. 11, 2018).

II. Pipeline permitting

a. *Indigenous Environmental Network v. U.S.*

Amanda Chkir

This case stems from the famously contested Keystone pipeline project, which has met with heavy resistance from indigenous groups, environmentalists, and other groups. Plaintiff in this action, Indigenous Environmental Network (IEN), claimed that the Department of State (Department) violated the Administrative Procedure Act (APA), National Environmental Policy Act (NEPA), and Endangered Species Act (ESA) when the Department approved the construction of the pipeline. This summary will focus on IEN's claims for violation of the ESA.⁷⁶

The ESA requires agencies in collaboration with the relevant expert wildlife agency, to make sure that a proposed action “is not likely to jeopardize” any

endangered or threatened species, or to result in the destruction or adverse modification of habitat.⁷⁷ To jeopardize means “to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that species.”⁷⁸ If a proposed action has the potential to adversely affect one of these species, the agency must initiate a formal consultation, which requires an analysis of whether the action would jeopardize the species.⁷⁹ The agency must use the best available science in its analysis.⁸⁰

The Department initiated formal consultation in response to the proposed Keystone pipeline, in which the U.S. Fish and Wildlife Service (FWS), as its relevant expert wildlife agency, identified thirteen species of concern in the project.⁸¹ However, FWS only found that one of those species, the American burying beetle, would be adversely affected by Keystone.⁸² IEN claims that the Department violated the ESA when it failed to use the best available science to assess the potential harm to whooping cranes, interior least terns and piping plovers, black-footed ferret, rufa red knot, northern long-eared bat, and the western prairie fringed orchid.⁸³ The court's analysis of the whooping crane will be discussed because it is the most complex.

IEN claimed that the in its analysis, FWS did not consider the best available science to evaluate the impacts on the whooping crane.⁸⁴ The whooping crane is a migratory bird found only in North America and only has an estimated population of 338 birds, when 1000 are needed to be considered genetically viable.⁸⁵ The Department relied on historical sightings to determine the whooping crane's migration.⁸⁶ IEN proposes that instead of only historical sightings, the Department should have considered telemetry data as well.⁸⁷ This would have allowed satellite

⁷² *Id.* at *28-*29.

⁷³ *Id.* at *34.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Indigenous Environmental Network v. United States*, 347 F.Supp.3d 561, 584 (D. Mont. 2018).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at *585.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at *586.

⁸⁶ *Id.*

⁸⁷ *Id.*

tracking of tagged birds to further show the stop-over locations of the bird.⁸⁸ The Department's expert testified that telemetry has multiple flaws and IEN's expert failed to prove how telemetry data would have contributed to the historical sighting data compiled over 50 years.⁸⁹ The Court concluded that the telemetry data might provide additional information regarding how recent specific areas are used by whooping cranes, but that IEN failed to show how this would change the agencies' analysis.⁹⁰

IEN also argued that the proposed conservation measures were insufficient.⁹¹ The conservation measures included avoiding designated critical habitat, applying a five-mile buffer to high-use areas, burying power lines within one mile of suitable migration habitat, in addition to marking new lines and installing bird flight diverters.⁹² The court found the measures to be adequately evaluated by FWS and that IEN did not provide a sufficient basis for the court to divert from the expertise of FWS⁹³: "The determination of what constitutes the best scientific data available belongs to the agency's special expertise."⁹⁴

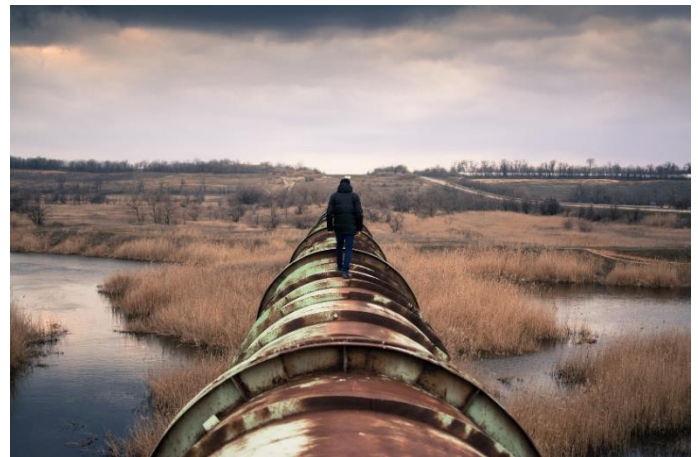
This analysis shows how courts give deference to agency action, despite there being other, potentially better, available alternatives.

—347 F.Supp.3d 561 (D. Mont. 2018).

b. *Sierra Club v. Dep't of Interior* **Andrea Kumaus**

These consolidated cases, concerning two major issues regarding the Atlantic Coast Pipeline⁹⁵, were brought by Defenders of Wildlife, the Sierra Club, and Virginia

Wilderness Committee.⁹⁶ The first petition concerned the U.S. Fish and Wildlife Service's (FWS) issuance of an incidental take statement (ITS) authorizing the pipeline to take (take meaning to kill, harm, or harass) five species that listed as threatened or endangered under the Endangered Species Act (ESA).⁹⁷ Plaintiffs first argued that the ITS was arbitrary and capricious under §706 of the Administrative Procedure Act (APA).⁹⁸ Plaintiffs' second petition argued that the National Park Service (NPS), which issued a right of way permit allowing the pipeline to drill and pass underneath the parkway surface⁹⁹, acted arbitrarily and capriciously.



The U.S. Court of Appeals for the Fourth Circuit ultimately found that both agency decisions were arbitrary and capricious.¹⁰⁰

Regarding the first petition, the court concluded that for each of the five listed species that would be harmed by the pipeline, FWS failed to satisfy the requirements for a habitat surrogate¹⁰¹ and therefore failed to create

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Sierra Club v. United States Department of the Interior*, 899 F.3d 260, 265 (4th Cir. 2018).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ "Although FWS is not required to set a numeric limit [in an Incidental Take Statement], it can only use a habitat surrogate if it demonstrates a causal link between the species and the delineated habitat, shows that setting a numerical limit is not practical, and sets a clear standard for determining when incidental take is exceeded." *Id.* at 266.

enforceable take limits.¹⁰² FWS declined to set numeric limits on five of the six listed species that would be adversely affected.¹⁰³ FWS instead set its take limits as “small percent” “majority” or “all”¹⁰⁴ —not enforceable limits.¹⁰⁵ FWS also failed to include a description of the casual link between the surrogate and take of the listed species, and did not explain why it would not be practical to express the amount of anticipated take or to monitor take related impacts in terms of individuals of the listed species.¹⁰⁶ FWS was vague and its take limits were unenforceable, and therefore arbitrary and capricious.¹⁰⁷

Regarding the remaining petitions, the court reasoned that NPS invoked inapplicable laws with respect to granting rights-of-way for gas pipelines.¹⁰⁸ NPS also did not fulfill its statutory mandate of ensuring consistency with the values and purpose of the Blue Ridge Parkway unit and the overall National Park System.¹⁰⁹ Overall NPS failed to explain and ensure the pipeline’s consistency with the purpose of the National Park System, making its decision arbitrary and capricious.¹¹⁰

—899 F.3d 260 (4th Cir. 2018).

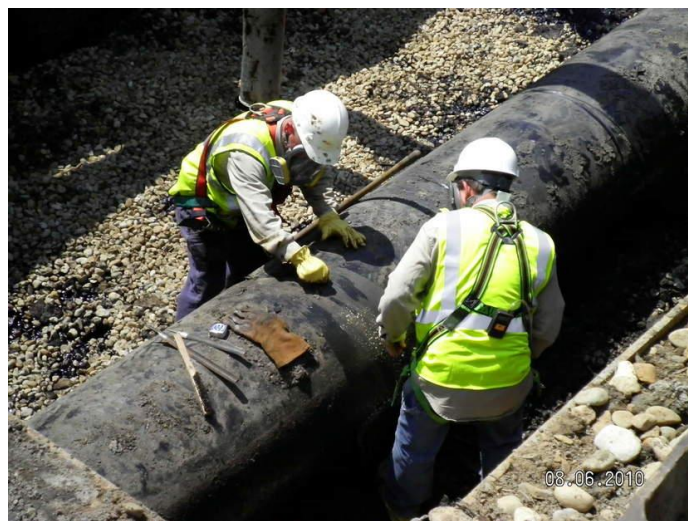
c. National Wildlife Federation v. Dep’t of Transportation **Mark Lockefefer**

The National Wildlife Federation (NWF) brought a lawsuit against the Secretary of Transportation and Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA) for violations of the Clean Water Act (CWA); National Environmental Policy Act (NEPA); and Endangered Species Act (ESA).¹¹¹ Enbridge Energy later joined in the as a defendant. Enbridge owns a pipeline which begins in Superior, Wisconsin, runs through Michigan’s Upper and Lower Peninsula, and ends in

Ontario, Canada. The pipeline is known as Line 5.¹¹² Under the Oil Pollution Act, which amended the CWA, Enbridge was required to file a response plan for its pipeline in case of an oil spill.¹¹³ The response plan is to be reviewed and approved by PHMSA in order for the pipeline to be operated.¹¹⁴

NWF challenged PHMSA’s approval of two of Enbridge’s Response Plans as arbitrary and capricious. NWF argued three points: 1) the plans did not comply with CWA with respect to PHMSA’s interpretation of the pipeline as an “onshore” facility; PHMSA did not adequately explain why it approved the response plans; and because PHMSA had discretion in approving the response plans, PHMSA was required to create an environmental impact statement (EIS) and consult with appropriate federal agencies to ensure that endangered and threatened species and critical habitats were not jeopardized.¹¹⁵

As to NWF’s first argument, the U.S. District Court for the Eastern District of Michigan determined that PHMSA’s



¹⁰² *Id.* at 268.

¹⁰³ *Id.* at 271.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 281.

¹⁰⁸ *Id.* at 294.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Nat’l Wildlife Fed’n v. Dep’t of Transp.*, No. 17-10031, 2019 U.S. Dist. LEXIS 53921, *1, *2 (E.D. Mich., Mar. 29, 2019).

¹¹² *Id.*

¹¹³ *Id.* at *5.

¹¹⁴ *See Id.* at *6-*8.

¹¹⁵ *Id.* at *10-*11.

approval of both response plans because the pipeline interpretation as a single “onshore facility” was reasonable.¹¹⁶ The Court reasoned that the CWA specifically included pipelines in its definition of onshore facilities¹¹⁷, and because there were no differences in oil spill response plans between “onshore” and “offshore facilities” it was not unreasonable for PHMSA to come to that conclusion.¹¹⁸ NWF argued in the alternative that, even if it was reasonable for Line 5 to be categorized as a single “onshore facility,” the response plans still did not fulfill the CWA requirements.¹¹⁹ The court explained that NWF was mistaken regarding the CWA requirements for a response plan, that Enbridge’s plan adequately identified the locations where there would be a worst case discharge¹²⁰, and that PHMSA was in the best position to determine the sufficiency of resources and equipment. The Court relied on PHMSA’s review since there were no specific challenges to the sufficiency of PHMSA’s review made by the NWF.¹²¹

The Court agreed with NWF on its second point. When the Court analyzed PHMSA’s approval of the response plans, it noted that PHMSA used standardized review criteria.¹²² On the standardized review, PHMSA primarily responded with simple “yes’s” or “no’s,” and never gave an explanation as to how it reached its conclusions.¹²³ The Court stated that PHMSA was required to give explanations for its responses in order to satisfy the CWA, granted summary judgment to NWF on this claim, and remanded the decisions to PHMSA for a full explanation of why it approved Enbridge’s Response Plans.¹²⁴

Finally, NWF argued that PHMSA was obligated under NEPA and ESA to prepare EISs to determine the pipeline’s

direct and indirect effects on the environment¹²⁵ and to consult with relevant federal agencies to determine how “the proposed actions is likely to affect endangered species and critical habitats.”¹²⁶ PHMSA countered that it was not obligated to do so because only federal agencies with “discretion to meaningfully influence response plans based on environmental concerns.”¹²⁷ The Court determined that PHMSA indeed had discretion under the CWA to reject oil spill response plans and require an amended response plan before approval.¹²⁸ Further, PHMSA was granted discretion in the response plan review process in determining whether the response plans are consistent with the National Contingency Plan and Area Contingency Plan.¹²⁹ The Court then granted summary judgment to NWF on this claim, and required PHMSA to draft an EIS and consult with the relevant federal agencies to determine the pipeline’s impact on listed endangered species and critical habitats.

—2019 U.S. Dist. LEXIS 53921 (E.D. Mich. Mar. 29, 2019).

III. Outer Continental Shelf Lands Act

a. *League of Conservation Voters v. Trump Mitchell Kavanagh*

In 1953, the Outer Continental Shelf Lands Act (OCSLA) was enacted into law with two stated purposes: (1) to provide for the jurisdiction of the United States over Outer Continental Shelf (OCS) lands and (2) to authorize the Secretary of the Interior to lease such lands for certain purposes, including the assignment or relinquishment of leases for the sale of royalty oil and gas.¹³⁰ OCSLA section 12(a) provides that “[t]he President of the United States

¹¹⁶ *Id.* at *16.

¹¹⁷ *Id.* at *13.

¹¹⁸ *Id.* at *15.

¹¹⁹ *Id.* at *16.

¹²⁰ *Id.* at *17-*19.

¹²¹ *Id.* at *24.

¹²² *Id.* at *26-*27.

¹²³ *Id.* at *27-*29.

¹²⁴ *Id.* at *33-*34.

¹²⁵ *Id.* at *35.

¹²⁶ *Id.* at *37-*38.

¹²⁷ *Id.* at *34.

¹²⁸ *Id.* at *44-*46.

¹²⁹ Both the National Contingency Plan and Area Contingency Plan set forth procedures and standards for responses to hazardous accidents to ensure the safety of human life and the environment. It is PHMSA’s responsibility to review those plans and, in their discretion, determine whether or not the response plans are consistent with those procedures and standards. *Id.* at *47-*48.

¹³⁰ *Outer Continental Shelf Lands Act (OCSLA)*, United States Coast Guard (last visited Apr. 29, 2019),

may, from time to time, withdraw from disposition any of the unleased lands of the Outer Continental Shelf.”¹³¹ In 2015 and 2016, President Barack Obama did just that and issued three memoranda and an executive order withdrawing certain areas of the OCS from leasing.¹³²

After President Donald Trump took office, he issued Executive Order 13795 on April 28, 2017 with the intent to revoke President Obama’s withdrawals.¹³³ Days later, the League of Conservation Voters, along with several other conservation groups, filed complaints that Executive Order 13795 violated both the U.S. Constitution’s Property Clause and section 12(a) of the OCSLA.¹³⁴ American Petroleum Institute (API) and the State of Alaska eventually joined the Trump administration and intervened as Defendants, and on March 19, 2018, the U.S. District Court for the District of Alaska denied Federal Defendants’, API’s, and Alaska’s motions to dismiss, finding sufficient, specific facts to support Plaintiffs’ standing and right to pursue a private cause of action.¹³⁵ By August 2018, Plaintiffs and Defendants filed their motions and cross-motions for summary judgment.¹³⁶

To make its decision, the Court first had to interpret the text of OCSLA section 12(a).¹³⁷ If there was any ambiguity in the text, the Court would then need to examine the context in which the statute was enacted.¹³⁸ Plaintiffs argued that 1) the text of Section 12(a) only gave the President the authorization to withdraw OCS lands from disposition, not the authorization to revoke a prior withdrawal of OCS lands; and 2) the power to revoke a prior withdrawal was vested solely in Congress under the Property Clause.¹³⁹

Defendants, counterargued that section 12(a) did not narrowly define the President’s authority in any way other



than specifying that OCS lands must be unleased in order to be withdrawn.¹⁴⁰ The Court noted that the text of section 12(a) only expressly authorized Presidential withdrawals, not revocations, and that the phrase “from time to time” in the statute appeared to give the President discretion to withdraw OCS lands at any time and for discrete periods but provided no clear authority to revoke a prior withdrawal.¹⁴¹ The Court further analyzed the phrase “from time to time,” and found section 12(a) ambiguous because it was not discernible from the text whether the statute was intended to give the President broad authority and the power to revoke prior withdrawals or whether revocation of withdrawals required Congressional authority.¹⁴²

Due to the ambiguity of section 12(a), the Court was forced to look at the context of the statute to determine Congress’s intent.¹⁴³ It held that the structure of OCSLA, its legislative history and prior statutes, purposes, and subsequent history all supported Plaintiffs’ claim that section 12(a) did not grant the President the power to revoke a prior withdrawal and that this power was vested solely in

https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/C/G-5PC/CG-CVC/CVC1/ocs/general/ocsla/Outer_Continental_Shelf_Lands_Act_OCSLA.pdf.

¹³¹ *Id.*

¹³² *League of Conservation Voters v. Trump*, 363 F.Supp.3d 1013, 1016-1031 (D. Alaska 2019).

¹³³ *Id.* At 1017.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 1018.

¹³⁹ *Id.* at 1020.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1021.

¹⁴² *Id.* at 1024.

¹⁴³ *Id.*

Congress.¹⁴⁴ Consequently, the Court held that section 5 of Executive Order 13795—which sought to revoke prior presidential withdrawals of OCS lands for leasing—was unlawful and invalid.¹⁴⁵

Plaintiffs’ motion for summary judgment was granted; Federal Defendants’ motion, API’s cross motion, and Alaska’s motion for summary judgment were denied; and Section 5 of Executive Order 13795 was vacated.¹⁴⁶ In addition, the Court held that President Obama’s 2015 and 2016 withdrawals would remain in full force and effect unless and until revoked by Congress.¹⁴⁷ While Plaintiffs also sought an injunction against the Secretaries of the Interior and Commerce to prevent them from implementing Section 5, the Court denied this remedy on the grounds that vacatur would suffice to prevent that from occurring.¹⁴⁸

—363 F.Supp.3d 1013 (D. Alaska 2019).

b. Fisheries Survival Fund v. Jewell

Andrea Kumaus

This case revolves around a nautical area off the coast of New York.¹⁴⁹ The Bureau of Ocean Energy Management (BOEM) planned to lease this area to defendant-intervenor Statoil Wind US, LLC for development of a wind energy facility.¹⁵⁰ The two main issues in this case are 1) whether BOEM violated NEPA by improperly segmenting its NEPA analysis, failing to consider a reasonable range of alternatives, and failing to prepare an Environmental Impact Statement (EIS) in deciding upon the site for the proposed wind farm area¹⁵¹; and 2) whether BOEM violated its obligations under the Outer Continental Shelf Lands Act (OCSLA) by failing to consider a number of relevant factors in proceeding with the lease sale (including fishing, safety, natural resource conservation, and navigation concerns).¹⁵²

An agency’s NEPA requirements only arise “once it reaches a critical stage of a decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment”.¹⁵³ The U.S. District Court for the District of Columbia viewed the terms of the proposed lease as precluding Statoil from engaging in any construction activities and vesting complete authority in BOEM to preclude such activity in the leased area before the construction and operation plan is approved.¹⁵⁴ This does not constitute an irreversible and irretrievable commitment of resources.¹⁵⁵ That Statoil must still submit a Site Assessment Plan and a Construction and Operations Plan before starting development, and that BOEM retains the authority to prevent any activity in the wind farm area by rejecting any Site Assessment or Construction and Operations Plan, shows BOEM’s commitment to “NEPA’s goal of insuring that federal agencies infuse in project planning a thorough consideration of environmental values,” ensuring that NEPA-related preclusion authority



¹⁴⁴ *Id.* at 1025-1030.

¹⁴⁵ *Id.* at 1031.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* *Fisheries Survival Fund v. Jewell*, No. 16-CV2409 TSC WL 4705795 (D.C. Cir. Sep. 30, 2018).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 5.

¹⁵² *Id.* at 5, 10.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

is exercised.¹⁵⁶ Therefore the court barred plaintiffs’ NEPA claims.

OCSLA provides that “[e]xcept as provided in paragraph (3) of this subsection, no action may be commenced ... prior to sixty days after the plaintiff has given notice of the alleged violation, in writing, under oath, to the Secretary”.¹⁵⁷ Plaintiffs in this case provided notice, and even signaled their intent to invoke the provision in their notice letter, but failed to demonstrate any imminent threat to public health or safety, or any immediate effect on their legal interests that would authorize their claim. The lease has no immediate effect except to grant Statoil the right to submit a Site Assessment Plan and, potentially, a Construction and Operations Plan. Therefore the court barred plaintiffs’ OCSLA claims.¹⁵⁸

The court granted BOEM’s motion for summary judgment, denied plaintiffs’ motion for summary judgment, and denied Statoil’s motion as moot.

—2018 WL 4705795 (D.C. Cir. Sept. 30, 2018).



¹⁵⁶ *Id.* at 9.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Kentucky Waterways All., v. Kentucky Utilities Co.*, 905 F.3d 925, 928-940 (6th Cir. 2018).

¹⁶⁰ *Id.* at 930.

¹⁶¹ *Id.*

IV. Clean Water Act

a. *Kentucky Waterways Alliance v. Kentucky Utilities Co.*

Mitchell Kavanagh

Kentucky Utilities Company (KU) operates the E.W. Brown generating station, a coal-burning power plant, that rests near Kentucky’s Dix River and is adjacent to Harrington Lake.¹⁵⁹ At plants such as E.W. Brown, coal is burned to heat large amounts of water that helps to produce electricity.¹⁶⁰ This coal-burning process, while beneficial, creates coal ash.¹⁶¹ KU uses a “sluice” system to dispose of its coal ash, where the ash is combined with copious amounts of water and sent into two man-made ash ponds, sinks to the bottom, and permanently remains.¹⁶²

In the case at issue, Kentucky Waterways Alliance and Sierra Club, two environmental groups, contended that KU’s ash ponds contaminated nearby groundwater, and the contaminated groundwater flowed into Harrington Lake, causing an excess of selenium, a chemical that is extremely toxic to fish, to pollute it.¹⁶³ Additionally, Plaintiffs claimed that this contamination increased as a result of the ash ponds being built on karst terrain, a type of terrain that creates caves, sinkholes, tunnels, and paths that expedites the flow of groundwater.¹⁶⁴ The issue arose in 2011 when KU decided to convert one of its ash ponds into a dry landfill.¹⁶⁵ After KU received a permit to do so from the Kentucky Department of Environmental Protection (KDEP) in 2015, and after KU provided a detailed plan to treat contaminated groundwater and prevent further contamination, KDEP found KU in violation of its pollutant limits in 2017 and issued a Notice of Violation to KU.¹⁶⁶ KDEP and KU eventually entered into an “Agreed Order” to address KU’s pollution problem, requiring KU to submit a “Corrective Action Plan” and have its progression monitored.¹⁶⁷ Plaintiffs were not satisfied

¹⁶² *Id.* at 930-31.

¹⁶³ *Id.* at 931.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 932.

¹⁶⁷ *Id.*

with this outcome and filed their lawsuit in the Eastern District of Kentucky in July 2017, claiming that KU violated both the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA).¹⁶⁸ The district court dismissed Plaintiffs' claims, holding that the CWA did not cover groundwater pollution and that Plaintiffs lacked standing to sue on their RCWA claim because it was already being handled by KDEP.¹⁶⁹

The Sixth Circuit reviewed the case *de novo*.¹⁷⁰ When it examined Plaintiffs' CWA claim, the Court stated that the claim only has life when five elements are present: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source."¹⁷¹ Plaintiffs argued two theories for their CWA claim: (1) the "point source" theory that both groundwater and karst terrain were point sources and (2) the "hydrological connection" theory, which did not consider groundwater a point source but instead a medium through which pollutants pass before being discharged into navigable waters, with the ash ponds being the point source.¹⁷² The Court held that the point source theory failed because CWA did not extend to this form of pollution.¹⁷³ Under CWA, a point source is defined as a "discernible, confined and discrete conveyance," and neither groundwater nor karst terrain fit these definitions.¹⁷⁴ The hydrological connection theory also failed for failing to meet the definitions in the CWA's text.¹⁷⁵ Finally, the Court found no contextual evidence to support Plaintiffs' CWA claim, and it noted that CWA and RCRA are mutually exclusive.¹⁷⁶ Because coal ash is solid waste, RCRA is the statute that regulates ash treatment, not the CWA.¹⁷⁷

Plaintiffs' claim that KU violated RCRA was the proper federal channel for their complaint.¹⁷⁸ However, the district court concluded that it lacked jurisdiction because the State of Kentucky had already addressed KU's

conduct.¹⁷⁹ While the Court determined that the district court's motivations were sound in its deference to state regulations, it pointed out that Plaintiffs filed their RCRA suit under 42 U.S.C. § 6972(a)(1)(B) and met the requirements for a citizen suit.¹⁸⁰ Plaintiffs needed to show that KU's conduct presented "an imminent and substantial endangerment to health or environment" and provide the Environmental Protection Agency (EPA), State of Kentucky, and KU with ninety days' notice to respond to the allegations without the EPA or Kentucky filing an action precluding the federal lawsuit.¹⁸¹ Thus, the Court affirmed the district court's dismissal of Plaintiffs' CWA suit, holding that the CWA does not impose liability on surface water pollution that stems from groundwater, and the Court reversed the district court's dismissal of Plaintiff's RCRA claim, holding that the Plaintiffs met the statutory requirements to bring suit. It remanded on that claim.¹⁸²

—905 F.3d 925 (6th Cir. 2018).

b. Prairie Rivers Network v. Dynegy Midwest Generation

Milan Spampinato

Prairie Rivers Network, a nonprofit organization advocating for healthy rivers and lakes, brought a citizen enforcement action against the owner of a retired coal-fired power plant (Dynegy Midwest Generation), alleging that the owner violated the Clean Water Act (CWA).¹⁸³ The nonprofit alleged that the owner of the power plant violated the CWA by discharging pollutants from coal ash pits into groundwater, which then discharged into the Middle Fork of the Vermilion River, violating the conditions of its National Pollutant Discharge Elimination

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 932-33.

¹⁷³ *Id.* at 933.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 936-38.

¹⁷⁷ *Id.* at 937-38.

¹⁷⁸ *Id.* at 938.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 938-39.

¹⁸¹ *Id.* at 939.

¹⁸² *Id.* at 940.

¹⁸³ See *Prairie Rivers Network v. Dynegy Midwest Gen., LLC*, 350 F. Supp. 3d 697, 698 (C.D. Ill. 2018).

System (NPDES) permit.¹⁸⁴ The power plant owner filed a motion to dismiss.¹⁸⁵

The U.S. District Court for the Central District of Illinois held that (1) the CWA did not apply to or prohibit the discharge of the contaminants into the groundwater, even though the contaminated groundwater seeped into the river; and (2) the plant owner's violation of the NPDES permit did not support the CWA claim.¹⁸⁶

The NPDES regulates discharges of pollutants from the Vermilion Power Station (VPS), and establishes effluent limitations and monitoring and reporting requirements for certain pollutants in the wastewater streams.¹⁸⁷ In May 2016 and September 2017, plaintiff tested groundwater seeps and discovered chemicals that exceed background levels and health-based standards for the Environmental Protection



Agency (EPA) and the Illinois Environmental Protection Agency (Illinois EPA).¹⁸⁸ Count I of plaintiff's complaint alleged that defendant discharged pollutants in excess of the limit imposed in the NPDES Permit.¹⁸⁹ The discharge of the pollutants from VPS into Middle Fork from unpermitted seeps are not authorized by the Permit and are contrary to the limited authorization to discharge

contained in the NPDES Permit.¹⁹⁰ Count II alleged discharges in violation of the NPDES Permit Conditions.¹⁹¹

Count 1

Defendant argued that the complaint should be dismissed because Seventh Circuit precedent establishes that the CWA does not regulate discharges to groundwater, even when the groundwater is connected to surface waters regulated by the CWA.¹⁹² Plaintiff countered by distinguishing this case on that basis that prior precedent concerned only whether the CWA governed discharges into the groundwater, without evidence that the groundwater "discretely conveyed pollution into a navigable water."¹⁹³ Nevertheless, the U.S. District Court for the Central District of Illinois held that prior precedent directly applies to the facts of this case.¹⁹⁴

Discharges from artificial waters into groundwater are not governed by the CWA in the Seventh Circuit, even if there is an alleged hydrological connection between the groundwater and surface waters, qualifying as "navigable waters" of the United States.¹⁹⁵ Plaintiffs argued that prior precedent was not applicable because of use of the words "may" and "possibility" in regard to whether the CWA has

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 707.

¹⁸⁷ *Id.* at 700.

¹⁸⁸ *Id.* at 701.

¹⁸⁹ *Id.* at 702.

¹⁹⁰ *Id.* at 702.

¹⁹¹ *Id.* at 702 ("Plaintiff alleges that the discharge of pollutants from the VPS coal ash pits into the Middle Fork violates Standard Condition 23 of the Permit. Further, Defendant's discharge of pollutants have discolored the Middle Fork, and include iron and manganese at concentrations exceeding the effluent limits in Subtitle C of the Illinois Administrative Code, in violation of Standard Condition 25 of the Permit.").

¹⁹² *Id.*, citing *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994).

¹⁹³ *Id.* ("Further, Plaintiff alleges the allegations in Count II set forth distinct violations of the CWA that provide an independent basis for the court's jurisdiction.").

¹⁹⁴ *Id.* at 704.

¹⁹⁵ *Id.* ("Plaintiff focuses on the court's use of "may" and "possibility[.]" seeming to argue that the court only considered the hydrological connection as a hypothetical and did not actually make any determination or ruling as to whether the scenario faced by this court in the instant case is covered by the CWA. The court finds Plaintiff's argument unpersuasive.").

authority over groundwaters, just because those waters “may” be hydrologically connected with surface waters.¹⁹⁶ The court found Plaintiff’s argument unpersuasive.¹⁹⁷

Count 2

Plaintiff argued that even if Count I is dismissed for lack of subject matter jurisdiction under the CWA, Count II should survive because of its independent claims.¹⁹⁸ However, Defendant responded that Plaintiff still based its claim in Count II on a violation of 33 U.S.C.A § 1311(a), which requires a discharge to navigable waters.¹⁹⁹ Defendant argued that Plaintiff must show (1) a discharge to navigable waters and (2) a violation of the Permit to be actionable under the CWA.²⁰⁰

The court already determined that CWA afforded no subject matter jurisdiction over the discharges because the discharges were made into groundwaters, which are not covered by the CWA.²⁰¹ The court reasoned that Plaintiff still had not shown that there had been any “discharge into navigable waters,” which would invoke the jurisdiction of the CWA.²⁰² Ultimately nothing in the statute states that the CWA covers discharges in non-navigable waters of the United States, so long as the discharges violate conditions of the NPDES permit.²⁰³ The court warned against bootstrapping a complaint into federal court because the same discharges that violated the NPDES permit did not also violate the CWA.²⁰⁴

Defendant’s motion to dismiss was granted and Plaintiff’s complaint was dismissed in full.²⁰⁵ Judgment was entered in favor of Defendant and the case was terminated.²⁰⁶ However, Prairie Rivers Network has appealed to the Seventh Circuit on December 14, 2018.²⁰⁷

Prairie Rivers Network is factually similar to the ongoing case of *Maui County v. Hawaii Wildlife Fund*.²⁰⁸ In *Maui County*, environmental organizations brought action against Maui County, alleging that the county violated the Clean Water Act (CWA) by discharging effluent without a NPDES permit at four injection wells.²⁰⁹ The Ninth Circuit held: (1) the county’s wells were point sources and subject to NPDES regulation; (2) discharge of pollutants from wells into groundwater violated the CWA without the NPDES permit; and (3) the county had notice that its actions violated the CWA.²¹⁰ The Supreme Court granted certiorari on February 19, 2019, in regard to the issue of whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.²¹¹

Briefing for the appeal to the Seventh Circuit was stayed pending the Supreme Court’s action in *Maui County*.²¹²

—350 F.Supp.3d 697 (C.D. Ill. 2018).

c. *Black Warrior Riverkeeper v. Army Corps of Engineers*

Laura Stickney

In 2012, Global Met Coal Corporation (Global Met) applied to the U.S. Army Corps of Engineers (Corps) for a permit authorizing Global Met to “discharge dredge or fill materials” from its Black Creek Mine into the Crooked Creek and the Black Warrior River in Alabama, pursuant

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 706.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 707.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Hawai’i Wildlife Fund v. City of Maui*, 886 F.3d 737, 740 (9th Cir. 2018).

²⁰⁹ *Id.* at 740.

²¹⁰ *Id.* 744-52.

²¹¹ SCOTUSBLOG <https://www.scotusblog.com/case-files/cases/county-of-maui-hawaii-v-hawaii-wildlife-fund/>.

²¹² *Prairie Rivers Network v. Dynegy Midwest Gen., LLC*, No. 18-3644 (7th Cir., Mar. 7, 2019).

to Section 404 of the Clean Water Act (CWA).²¹³ Shortly thereafter, the U.S. Fish and Wildlife Service (Service) advised the Corps that nine species listed under the Endangered Species Act (ESA) may live within or near the proposed discharge site, six of which had designated critical habitat abutting the proposed portion of the Black Warrior River.²¹⁴ These species notably included the flattened musk turtle, several mussel species, and the plicate rocksnail.²¹⁵

The ESA requires every federal agency to ensure “that its actions are not likely to jeopardize the continued existence of any species listed as endangered or threatened or result in the destruction or adverse modification of habitat of such species.”²¹⁶ If it is determined that an agency action may affect a listed species or critical habitat, the agency must formally or informally consult with the Service.²¹⁷ After an independent survey of the proposed site, the Service concluded that if best management practices were followed in approving the permit, including requiring a 100-foot setback along both creeks for sediment protection, the discharge’s impact to the several species and critical habitat could be minimal and no further consultation would be necessary.²¹⁸ Following several scientific studies of the affected area and an Environmental Assessment (EA), the Corps determined that the project *may* affect several species, but with the 100-foot setback and utilization of best management practice, the issuance of the permit was “*not likely* to adversely affect” the species and critical habitat.²¹⁹ Black Warrior Riverkeeper, Inc. and Defenders of Wildlife (plaintiffs) challenged this finding.²²⁰

Use of Best Scientific and Commercial Information Available

²¹³ *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Engineers*, 354 F.Supp.3d 1253 (N.D. Ala. 2018).

²¹⁴ *Id.* at 1259.

²¹⁵ *Id.* at 1261.

²¹⁶ *Id.* at 1258 (citing 16 U.S.C. § 1536(a)(2)).

²¹⁷ *Id.*

²¹⁸ *Id.* at 1260.

²¹⁹ *Id.* at 1262 (emphasis added).

Plaintiffs first contended that the Corps ignored available scientific studies showing that the project would adversely affect the endangered species, particularly several studies showing that sediment from mining is harmful to listed mollusks, fish, and turtles.²²¹ However, the record showed that the Corps indeed considered these studies but found that they did not affect its conclusion because the studies’ observations occurred either farther upstream or downstream from the area that would be affected by the Black Creek Mine.²²² Accordingly, the court deferred to the Corps’ evaluation and conclusion on these studies as sufficiently demonstrating the Corps’ rational basis for its conclusion.²²³

Critical Habitat Consideration

Plaintiffs also argued that the Corps failed to consider the outfall discharges’ direct and indirect impacts on critical habitat in the area.²²⁴ This argument also failed because the Corps’ initial and supplemental EAs considered the mine’s likely impact on the critical habitat, as well as the potential impact of pollutants such as lead, cyanide, and trivalent arsenic on the critical habitat.²²⁵ In fact, the finalized permit expressly addresses the permissible discharge amounts of these pollutants.²²⁶ Despite plaintiffs’ disagreement with the Corps’ finding that critical habitat would not likely be affected by the permit’s issuance, the findings were sufficient to show a rational basis and satisfied the court’s review.²²⁷

Conclusion

The Corps were entitled to summary judgment because plaintiffs failed to show, among other unsuccessful arguments, that the Corps did not take into consideration the best scientific and commercial data or consider the direct and indirect impacts on critical habitats of listed

²²⁰ *Id.* at 1268.

²²¹ *Id.* at 1268.

²²² *Id.* at 1268-269.

²²³ *Id.* at 1269.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

species. Therefore, the issuance of a permit to Global Met allowing the discharge of dredge or fill materials from the Black Creek Mine into the Crooked Creek and Black Warrior River, despite the presence of multiple endangered species and their critical habitat, was not arbitrary and capricious.²²⁸

—354 F.Supp.3d 1253 (N.D. Ala. 2018).

V. Freedom of Information Act

a. *Sierra Club v. U.S. Fish & Wildlife Service*

Gabrielle Cunningham

Industrial facilities, power plants, and manufacturing complexes “draw billions of gallons of water each day from lakes, rivers, estuaries and oceans in order to cool their facilities through cooling water intake structures.”²²⁹ Cooling water intake structures harm fish, shellfish, and their eggs by pulling them into the cooling system; kill aquatic life by “generating heat or releasing chemicals;”



²²⁸ *Id.* at 1276.

²²⁹ *Sierra Club, Inc. v. United States Fish and Wildlife Service*, 911 F.3d 967, 973 (9th Cir. 2018).

²³⁰ *Id.*

²³¹ Clean Water Act, 33 U.S.C. § 1326(b); *Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 911 F.3d at 973 (9th Cir. 2018).

²³² *Id.*

²³³ *Id.*

and injure fish, reptiles, and mammals by trapping them against intake screens.²³⁰ The Environmental Protection Agency (EPA) regulates cooling water intake structures pursuant to the Clean Water Act.²³¹

The EPA proposed new regulations for cooling water intake structures in April 2011, with the final rule published in the Federal Register in August 2014.²³² The EPA consulted with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) about the impact that new regulations might have under the Endangered Species Act (ESA).²³³ Section 7 of the ESA requires “agencies to consult with the Services whenever an agency engages in an action that ‘may affect’ a ‘listed species’” in order to ensure that the regulation is “not likely to jeopardize the continued existence” or “result in the destruction or adverse modification of habitat” of any endangered or threatened species.²³⁴

The Sierra Club made a Freedom of Information Act (FOIA) request to FWS and NMFS for documents regarding EPA’s research of cooling water intake structures, as well as consultation under ESA Section 7.²³⁵ Many of the documents were withheld under FOIA Exemption 5, which protects documents subject to the “deliberate process privilege” from disclosure.²³⁶ Sierra Club challenged this denial before the U.S. District Court for the Northern District of California.²³⁷ The court found that 12 of the 16 requested documents were not protected by the “deliberate process privilege,” and ordered FWS and NMFS to release the documents to the Sierra Club.²³⁸

FOIA “mandates a policy of broad disclosure of government documents.”²³⁹ The “deliberative process privilege” that FWS and NMFS claim under Exemption 5, permits agencies to withhold records “to prevent injury to the quality of agency decisions by ensuring that the frank

²³⁴ 50 C.F.R. § 402.14(a); 911 F.3d at 974.

²³⁵ *Id.*

²³⁶ 5 U.S.C. § 552(b)(5); 911 F.3d at 974.

²³⁷ 911 F.3d at 973.

²³⁸ 5 U.S.C. § 552(b)(5); 911 F.3d at 974.

²³⁹ *Id.* at 978 (citing *Maricopa Audubon Society v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997)).

discussion of legal or policy matters in writing, within the agency, is not inhibited by public disclosure.”²⁴⁰ To qualify for the “deliberate process privilege,” a document must: 1) be from a government agency, and 2) “fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.”²⁴¹

FWS and NMFS must show that the documents they claim should be exempt from disclosure are both “pre-decisional and deliberative.”²⁴² A document is pre-decisional if it is used to “assist an agency decision-maker in arriving at his decision.”²⁴³ The Court looked at each of the documents in question to determine its status as pre-decisional. Documents may be deliberative when they are “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency” or that “inaccurately reflect or prematurely disclose the views of the agency.”²⁴⁴ The Court reviewed each of the 12 documents requested and determined that nine of them are not deliberative.

The Ninth Circuit affirmed the district court’s order requiring production of nine of the 12 documents, and reversed the order requiring production for the other three documents because they satisfied the standard under FOIA Exemption 5.²⁴⁵

—911 F.3d 967 (9th Cir. 2018).

VI. Bald & Golden Eagle Protection Act

a. *Front Range Nesting Bald Eagle Studies v. U.S. Fish & Wildlife Service*

Milan Spampinato

An eagle conservation organization brought suit against U.S. Fish and Wildlife Service (FWS or “the Service”) under the Administrative Procedure Act (APA), National Environmental Policy Act (NEPA), and Bald and Golden Eagle Protection Act (BGEPA), challenging a permit authorizing a construction company to engage in activities that might significantly disturb a pair of bald eagles.²⁴⁶

The U.S. District Court for the District of Colorado held that: (1) the organization’s action was not mooted by the fact that the construction had begun; (2) vacatur or permit was likely to redress the organization’s claims; (3) FWS’s failure to address public comments requesting an extension of the comment period for construction company’s permit application was arbitrary and capricious; (4) FWS considered a reasonable range of alternatives; (5) FWS did not impermissibly preordain the outcome of its NEPA analysis; (6) FWS did not act arbitrarily and capriciously when it specified the number of bald eagles that the construction was authorized to disturb; and (7) FWS’s environmental assessment failed to conduct any cumulative impacts analysis, in violation of NEPA.²⁴⁷

²⁴⁰ *Id.* (citing 108 F.3d at 1092).

²⁴¹ *Id.* (citing *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001)).

²⁴² *Id.* (quoting *Carter v. Dep’t of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002)).

²⁴³ *Id.* at 979.

²⁴⁴ *Id.* at 982 (citing *Nat’l Wildlife Fed. v. U.S. Forest Serv.*, 861 F.2d 1114, 1118-19 (9th Cir. 1988)).

²⁴⁵ *Id.* at 979.

²⁴⁶ *Front Range Nesting Bald Eagle Studies v. United States Fish & Wildlife Serv.*, No. 18-CV-0356-WJM, 2018 WL 6571390, *1, *1 (D. Colo. Dec. 13, 2018).

²⁴⁷ *Id.*



Under the BGEPA, the Secretary of the Interior can grant permits to take an eagle when a taking is necessary for the protection of wildlife.²⁴⁸ FWS's National Bald Eagle Management Guidelines recommend a 660-foot setback from the nest location for general construction activities that will be visible from a bald eagle nest.²⁴⁹

The Service received an incidental take permit application from Garrett Construction Company ("Garrett").²⁵⁰ Garrett had plans to construct an apartment complex on a plot of land with a mature cottonwood tree that housed a pair of bald eagles.²⁵¹ Garrett argued that local interests including building a housing complex; the needs of future residents; and the city's need for housing while experiencing rapid population growth, all justified incidental take.²⁵² Garrett proposed and adopted numerous measures to minimize the disturbance of the bald eagles²⁵³, including a 660-foot setback and a "hay bale sound/visual barrier" to minimize eagle disturbance.²⁵⁴ The Service issued a permit authorizing Garrett "to disturb

up to two Bald eagles . . . including the loss of productivity (i.e., eggs or young) due to potential abandonment of the eagle nest during construction activities."²⁵⁵ At issue in the instant case are the Environmental Assessment (EA) and requisite standards in the updated Permit.²⁵⁶ The only substantial difference between the first and updated permit was the required monitoring of the eagle nests.²⁵⁷ The updated permit changed from weekly monitoring to at least once per month.²⁵⁸

First, the court determined that the case was not moot because it is clear that the eagles have not abandoned the nest tree.²⁵⁹ Second, the court determined that Plaintiff properly addressed redressability because the Service can still impose conditions on the construction that are reasonably likely to protect Plaintiff's interest in observing the eagles to a greater degree than the permit does.²⁶⁰

Next, Plaintiff brought multiple NEPA challenges.²⁶¹ First, the court found the Service's lack of explanation of the shortened comment period to be arbitrary and capricious.²⁶² Second, the court rejected Plaintiff's argument that the Service failed to adequately consider a range reasonable alternative because of the "highly deferential" review under the APA.²⁶³ Third, Plaintiff failed to meet the high standard for a preordained outcome based on a NEPA violation.²⁶⁴ A regulation governing an Environmental Impact Statement (EIS) must be prepared

²⁴⁸ *Id.*

²⁴⁹ *Id.* at *3.

²⁵⁰ *Id.*

²⁵¹ *Id.* ("The eagles first laid eggs in the nest in 2012 and have successfully fledged at least one eaglet every year since, except in 2014 and 2017.").

²⁵² *Id.* The construction activity that could disturb the bald eagles includes: "heavy equipment and light duty traffic, excavation, building foundation and two- and four- story vertical construction of multi-family residences (288 units), a clubhouse and a swimming pool along with all associated parking and infrastructure including but not limited to concrete and asphalt installation, garages, domestic water distribution, sanitary sewer, storm sewer, landscaping, park construction, regional trail and other miscellaneous construction."

²⁵³ *Id.* at *4. For example, Garrett prohibited "vertical construction within 660 feet of the nest." *Id.* Also, Garrett contacted a qualified biologist to monitor the nest weekly. *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at *7.

²⁵⁶ *Id.* The only substantial difference between the first and second issued permit was the required monitoring of the eagle nests. It changes from weekly monitoring to at least once per month.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at *8.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at *12.

²⁶⁴ *Id.*

early enough so that it cannot be used after the fact to justify decisions already made.²⁶⁵ Fourth, Plaintiff alleged that the Service did not take a “hard look” at the NEPA requirements with regard to the number of takes; the cumulative environmental impact; the efficacy of the hay bale wall; amount of monitoring (only monthly); and Plaintiff’s data (showing eagle’s reaction to the construction drilling).²⁶⁶

Next, Plaintiff accused the Service of not taking a “hard look” that NEPA requires. However, because the Service failed to perform a cumulative impacts analysis, the court held that the EA and Permit must be vacated.²⁶⁷ Fifth, the court held that the Service’s decision to impose a 660-foot buffer, as opposed to half mile or quarter mile buffers, was adequately explained and reasonable.²⁶⁸ The Service reasoned that if Garret implemented the half- or quarter-mile nest buffer, his project would no longer be viable.²⁶⁹ Finally the court upheld the Service’s finding that their cumulative take was compatible with the preservation of the bald eagles.²⁷⁰ The court reasoned that Plaintiff was erroneous in assuming that the Service underestimated the number of incidental takes occurring at the project.²⁷¹

In conclusion, the court vacated the Service’s final EA and incidental take permit issued to Garrett and remanded the matter for additional consideration consistent with the holding.²⁷²

—353 F.Supp.3d 1115 (D. Colo. 2018).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at *12-*16.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at *16-*17.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at *17.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *South Carolina Coastal Conserv. League v. Ross*, No. 2:18-cv-03326-RMG (consolidated with 2:18-cv-3327-RMG) at *1 (D.S.C. Jan. 18, 2019).

VII. Marine Mammal Protection Act

a. South Carolina Coastal Conservation League v. Ross

Gabrielle Cunningham

Two cases were filed on December 11, 2018 in the U.S. District Court for the District of South Carolina, challenging the decision of the National Marine Fisheries Service (NMFS) to “issue incidental harassment authorities to five companies to conduct seismic airgun surveys for oil and gas in the coastal waters” of the Atlantic Ocean on December 11, 2018.²⁷³ Seismic airgun surveys are “conducted by trawling arrays of airguns behind a ship which explode every 10-15 seconds.”²⁷⁴ The sound emitted can be heard thousands of miles away, and can cause degradation to hearing, habitat displacement, stress, and migratory disruptions to whales and fish.²⁷⁵

Plaintiffs claim that the five companies will be allowed to begin seismic airgun surveys as soon as the Bureau of Ocean Energy Management (BOEM) issues permits to them.²⁷⁶ Plaintiffs seek relief in the form of a declaration that Defendants violated the Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and Administrative Procedure Act (APA), and request that the Court vacate agency actions authorizing the seismic airgun surveys and “enjoin Defendants from authorizing takings of marine mammals incidental to the airgun surveys.”²⁷⁷

The federal government partially shut down on December 22, 2018, after Congress and President Donald Trump were not able to reach an agreement for the federal budget.²⁷⁸ The Court consolidated this case with *City of*

²⁷⁴ *Seismic Airguns*, Ocean Conservation Research, <https://ocr.org/sounds/seismic-airgun-surveys/> (last visited May 7, 2019).

²⁷⁵ *Id.*

²⁷⁶ *Ross*, No. 2:18-cv-03326-RMG (consolidated with 2:18-cv-3327-RMG), at *1 (D.S.C. Jan. 18, 2019).

²⁷⁷ *Id.*

²⁷⁸ *Manu Raju, Sophie Tatum, Government Partially Shuts Down for the Third Time in a Year After Congress Adjourns for the Night*, CNN (Dec. 22, 2018),

Beaufort et al. v. National Marine Fisheries Service, 2:18-cv-3327-RMG, on December 28, 2018.²⁷⁹ The Attorney General of South Carolina moved to intervene on January 7, 2019, but Defendants requested a stay of the deadline for their response for an indefinite period “commensurate with the duration of the lapse in appropriations.”²⁸⁰ Defendants argued that an indefinite stay of their obligation to respond to lawsuits alleging environmental violations was justified by the lapse of appropriations, which led to the furloughing of many employees.²⁸¹ The Fourth Circuit applied its previously held view that “[o]ur system of law universally frowns on a party who would use the stay as both a sword and a shield.”²⁸² The Court found that a stay was warranted, but that the Federal agencies had to ensure that a stay would not “thwart [the] Court’s orders, jurisdiction, and remedial powers.”²⁸³

The Court determined that an injunction was necessary to properly assess the remedies available for intervening states if BOEM issued permits during the shutdown.²⁸⁴ “[W]ithout an injunction, the proposed intervenors would be prejudiced and left without redress if BOEM issues permits during the lapse in appropriations.”²⁸⁵

In conclusion, the Court enjoined BOEM and any other federal agency from “taking action to promulgate permits” or applications for oil and gas surveys in the Atlantic Ocean until the end of the shutdown.²⁸⁶ In March 2019, the

<https://www.cnn.com/2018/12/21/politics/cornyn-no-vote-government-shutdown/index.html>.

²⁷⁹ South Carolina argued that it did not receive any assurances that BOEM “[would] not act and issue permits during the shutdown.” Defendants announced that the Department of Interior “[would] not be acting on pending permit applications for the seismic survey[s] at issue . . . until funding is restored,” on January 15, 2019. In response, South Carolina cited news reports that BOEM had recalled workers to continue processing permits for oil and gas surveys. Defendants replied that BOEM could continue to process the applications during the lapse and issue a permit decision “as soon as March 1, 2019.” *South Carolina Coastal Conservation League v. Ross*, No. 2:18-cv-03326-RMG (consolidated with 2:18-cv-3327-RMG), at *1 (D.S.C. Jan. 18, 2019); Angela Howe, *Judge Calls for a Hold on Seismic Permits*, <https://www.surfrider.org/coastal-blog/entry/judge-calls-for-a-hold-on-seismic-permits> (last visited May 7, 2019).

attorneys general of South Carolina, Maryland, Connecticut, Delaware, Maine, New Jersey, New York, North Carolina, Massachusetts, and Virginia moved for a preliminary injunction on seismic testing, opposed by NMFS. Briefing and discovery proceeded over spring 2019 until the Court directed a status report in light of *League of Conservation Voters v. Trump* (see *supra* p. 10), and briefing on motions for summary judgment is scheduled to begin no later than July 2019.²⁸⁷

—2019 WL 259116 (D.S.C. Jan. 18, 2019).

VIII. Hydroelectric Power

a. *Eastern Hydroelectric Corp. v. FERC* Laura Stickney

In 1995, the Federal Energy Regulatory Commission (FERC) licensed Eastern Hydroelectric Corporation (petitioner) to generate 643 kilowatts of hydroelectricity from petitioner’s Juliette Dam located on the Ocmulgee River outside of Juliette, Georgia.²⁸⁸ Several years later, petitioner applied for an amendment to its license to increase the allowed amount of electricity generated at the dam.²⁸⁹ FERC, along with the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and Georgia Department of Natural Resources (GDNR) (collectively Resource Agencies), jointly recommended

²⁸⁰ *Ross*, No. 2:18-cv-03326-RMG (consolidated with 2:18-cv-3327-RMG), at *1 (D.S.C. Jan. 18, 2019).

²⁸¹ *Id.* at *2.

²⁸² *Id.* (citing *In re A.H. Robins Co. Inc.*, 828 F.2d 1023, 1026 (4th Cir. 1987).

²⁸³ *Id.*

²⁸⁴ *Id.* at *4 (citing *Bryan v. BellSouth Telecomm., Inc.*, No. CIV. 1:02CV00228, 2006 WL 1540644, at *3 (M.D.N.C. May 31, 2006)).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Ross*, No. 2:18-cv-03326-RMG (consolidated with 2:18-cv-3327-RMG) (D.S.C. Jan. 18, 2019), <https://portal.ct.gov/-/media/AG/seismic-testing----memorandum-as-filed.pdf?la=en> (last visited May 7, 2019).

²⁸⁸ *Eastern Hydroelectric Corp. v. FERC*, 887 F.3d 1197, 1199 (11th Cir. 2018).

²⁸⁹ *Id.*

that a fishway be constructed to allow American shad – a nonendangered anadromous fish that lives in salt water but spawns in fresh water – to swim past the dam to access additional spawning grounds.²⁹⁰ FERC approved petitioner’s application subject to the requirement that petitioner meet with the Resource Agencies to design and construct a fishway for the American shad, and submit the planned construction of the fishway within 90 days for FERC approval.²⁹¹

Over the next decade, petitioner struggled with the Resource Agencies over the skyrocketing costs of building the fishway.²⁹² In 2012, after numerous warnings from FERC that petitioner was violating its license agreement, FERC accepted revised fishway designs from petitioner.²⁹³ The order approving the fishway design also required petitioner to file within 120 days a Fishway Operation Plan describing detailed advice and consultations with the Resource Agencies, as well as petitioner’s method for determining the effectiveness of the fishway – i.e. how to determine if the American shad are finding and navigating the fishway.²⁹⁴

Throughout the next year, petitioner again consistently failed to file fishway construction plans in compliance with the requirements to consult with the Resource Agencies.²⁹⁵ In April 2014, FERC ordered petitioner to cease generation at the Juliette Dam and sent two letters requesting that petitioner contact FERC to resolve the matter, both of which remained unanswered.²⁹⁶ In October 2014, FERC issued an order revoking petitioner’s license for the Juliette Dam upon encouragement from FWS and NMFS, stating that petitioner failed to comply with requirements to consult with the Resource Agencies for effective fishway protocols and that Commission had no reason to believe that petitioner intended to comply in the future.²⁹⁷ Following FERC’s denial of petitioner’s withdrawal of the

application for increased hydroelectric generation and a request for a hearing, petitioner filed for appellate review of FERC’s order under 16 U.S.C. § 825, arguing that FERC was not authorized to revoke the license because petitioner did not knowingly violate the compliance order²⁹⁸ and, if it had knowingly violated the compliance order, only the license for increased generation should be revoked instead of the entire license for Juliette Dam.²⁹⁹

Knowing Violation of Compliance Order

Despite petitioner’s argument otherwise, the record shows that petitioner understood the requirements of the compliance order, which included providing evidence of consultations with the Resource Agencies regarding the effectiveness of the American shad fishway.³⁰⁰ Petitioner’s response to the compliance order stated that it was actively discussing plans to meet with the Resource Agencies and two letters sent by FERC to petitioner further detailed the requirements.³⁰¹ These facts provided the court with substantial evidence to find that petitioner knew of the requirements of the compliance order and failed to meet them.³⁰²

Revocation of the Entire License

Petitioner argues that the fishway requirement is, at most, only tied to the application for increased power generation and if violated should only result in the revocation of the increased generation allowance.³⁰³ However, the fishway requirement was contained in a general condition provision of petitioner’s license for Juliette Dam, and is therefore not tied exclusively to the increased hydroelectric generation.³⁰⁴ Thus, violation of the American shad fishway requirement can permissibly result in revocation of the entire Juliette Dam license.³⁰⁵

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 1199-1200.

²⁹⁴ *Id.* at 1200.

²⁹⁵ *Id.* at 1200-01.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 1201.

²⁹⁸ *Id.* at 1202.

²⁹⁹ *Id.* at 1203.

³⁰⁰ *Id.* at 1202.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 1203.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

Conclusion

FERC's revocation of petitioner's license to generate hydroelectric power at Juliette Dam was held to be proper in light of petitioner's consistent noncompliance with its license requirements for an American shad fishway.³⁰⁶

—887 F.3d 1197 (11th Cir. 2018).

ABOUT THE WILDLIFE LAW CALL

These case briefs were composed by students in Legal Issues with Energy Development and Wildlife at Michigan State University College of Law, taught by Carol Frampton, Chief of Legal Services for the National Wild Turkey Federation (NWTF). The *Wildlife Law Call* is assembled and distributed with the support of the Association of Fish

and Wildlife Agencies (AFWA). **This newsletter does not report every recent case or issue**, but we hope you will find these briefs, selected from recent fish- and wildlife-related decisions and emerging issues, interesting and informative.

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1100 1st Street, Suite 825
Washington, D.C. 20002
(202) 838 3460

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ASSOCIATION of
FISH & WILDLIFE
AGENCIES

Post Office Box 530
Edgefield, SC 29824-
0530



³⁰⁶ *Id.* at 1204.