# THE SIGNIFICANCE OF NATIONAL WILDLIFE REFUGES IN THE DEVELOPMENT OF U.S. CONSERVATION POLICY

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## I. INTRODUCTION

The National Wildlife Refuge System has begun its second century amidst conflict over oil development in the Arctic and concern over the ecological sustainability of uses throughout its nearly 550 individual refuges.[1] The face of the future is uncertainty. However, a retrospective review of refuge conservation shows a promising trajectory. The system has overcome persistent neglect to contribute to conservation policy. Haltingly, it has kept pace with conservation science to remain the chief American contribution to large-scale wildlife protection. Early on, it pioneered the use of habitat acquisition to protect imperiled species. More recently, it has begun to implement the cutting-edge ecological mandate to maintain biological integrity, diversity, and environmental health. Perhaps the most meaningful feature of the history of the refuge system is how closely it mirrors the development of conservation policy in the twentieth century.

Nonetheless, with the exception of the Arctic National Wildlife Refuge, the system has largely ducked the national

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[1] The National Wildlife Refuge System includes 545 refuges, on approximately 100 million acres. U.S FISH & WILDLIFE SERVICE, ANNUAL REPORT OF LANDS UNDER CONTROL OF THE U.S. FISH & WILDLIFE SERVICE AS OF SEPTEMBER 30, 2004 at 1 (Apr. 2005) [hereinafter FWS LAND REPORT], http://www.fws.gov/realty/PDF_Files/2004_lands.pdf.

spotlight. The refuges have sidestepped the dramatic controversies that have dogged other land systems: logging and road-building in the national forests,[2] grazing on Bureau of Land Management tracts,[3] and motorized vehicle (including snowmobile and jet ski) use in national parks.[4]

Unlike the National Park System, the refuge system contains few of the signal icons of our natural heritage. It lacks the mammoth scale of the Bureau of Land Management System. No popular mascot like Smokey Bear represents the refuge system. The refuges are the under-appreciated, quiet, middle child in the family of federal public lands. They receive the fewest visitors and the smallest per acre appropriations.[5] Neither the oldest nor the youngest, the largest nor the smallest, the most protected nor the least restricted, the refuge system has languished at the periphery of public consciousness and legal scrutiny of public lands. But, like the tree whose rings record changes in the weather over the course of its life, the refuge system encapsulates within its geography, management, and law a history of American conservation policy of the last hundred years.

This article tells the story of the refuges and along the way highlights how the refuge system is emblematic of the larger epic of nature conservation in the United States. The tale focuses on two refuges that, at first blush, seem extremely different. Pelican Island is a speck of land in a Florida lagoon, surrounded by

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[2] *See* Laura Paskus, *Feds Pass Roadless Headache to States,* HIGH COUNTRY NEWS, Aug. 16, 2004, http://www.hcn.org/servlets/hcn.Article?article_id=14926; Blaine Harden, *Reopening Forest Areas Stirs Debate in Alaska; Many Question the Need to Aid Timber Industry*, THE WASHINGTON POST, Aug. 1, 2004, at A3; Kathie Durbin, *In Fire's Aftermath, Salvage Logging Makes a Comeback*, HIGH COUNTRY NEWS, Sept. 1, 2003, http://www.hcn.org/servlets/hcn.Article?article_id=14197.

[3] Juliet Eilperin, *In Grazing Debate, Some Ranchers Are Switching Sides*, THE WASHINGTON POST, Sept. 13, 2004, at A2; April Reese, *At 40, Landmark Law Protecting America's Wild Lands Tested in New Ways*, LAND LETTER, Sept. 2, 2004; Faith Bremner, *Changes to Grazing Regulations Cause Controversy*, GANNETT NEWS SERVICE, Feb. 27, 2004.

[4] Cornelia Dean, *Park Service under Attack by Adviser*, N.Y. TIMES, Oct. 29, 2004, at A16; Felicity Barringer, *Judge's Ruling on Yellowstone Keeps It Open to Snowmobiles*, N.Y. TIMES, Oct. 16, 2004, at A9; Katharine Q. Seelye, *Lawsuit in Texas Challenges Ban on Personal Watercraft in National Parks*, N.Y. TIMES, Apr. 15, 2002, at A18.

[5] Cam Tredennick, *The National Wildlife System Improvement Act of 1997: Defining the National Wildlife Refuge System for the Twenty-First Century*, 12 FORDHAM ENVTL. L.J. 64-65 (2000) (citing H.R. Rep. No. 105-329, at 4 (1997)) (showing that the Refuge System received smaller appropriations per acre managed than any other major federal public land system). During fiscal year 2003 the Refuge System hosted 39 million visits, compared to the National Park Service's 266 million visits and the Bureau of Land Management's 66.6 million visits. U.S. DEP'T OF THE INTERIOR, ORIENTATION TO THE U.S. DEP'T OF THE INTERIOR, ORIENTATION WEBSITE DATA TABLES (2004), http:// www.doiu.nbc.gov/orientation/tables_all.cfm. The U.S. Forest Service hosted 212 million visits in 2003. U.S. DEPT. OF AGRICULTURE, FOREST SERVICE PERFORMANCE AND ACCOUNTABILITY REPORT – FISCAL YEAR 2003 at 10 (Apr. 2004), http://www.fs.fed.us/plan/par/2003/final/pdf/ForestService 2003PerfAcctReport.pdf.

residential and commercial development.[6] The Arctic National Wildlife Refuge is at the other end of the country, on the coast of the Arctic Ocean. It is enormous, 19.3 million acres (including 8 million acres of wilderness), and encompasses a range of ecosystems from frigid mountain peaks to the coastal tundra.[7] Yet, both played key roles in the development of the refuge system, and both are typical refuges in providing significant wetlands habitat for migratory animals.

I begin with an overview of the refuge system, then talk about these two prominent refuges. From there, I review the evolution of refuge system management and show how it reflects the major conservation developments over the past century. I conclude by observing the ways in which the national wildlife refuges are now the most important federal lands for demonstrating sustainability and ecosystem management on a large scale.

## II. AN OVERVIEW OF THE REFUGE SYSTEM

The National Wildlife Refuge System is a tangle of some 550 land units with widely varying sizes, purposes, origins, climates, levels of development and use, and degrees of federal ownership. This is due to the opportunistic growth of wildlife refuges, migratory bird refuges, waterfowl production areas, game ranges, wildlife management areas, and other land unit categories into the system.[8] Units were created in response to crises, personal preferences of high-ranking officials (and legislators), funding availability, social program priorities, donations, and, of course, wildlife needs. The retrospective task of bringing coherence to this conglomeration requires historical context, flexible interpretation, and a modicum of imagination. Despite the diverse authorities and origins of the individual wildlife refuges, all share a general purpose of animal conservation. All refuges are managed by the U.S. Fish and Wildlife Service ("Service" or "FWS").

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[6] Pelican Island National Wildlife Refuge, http://www.fws.gov/pelicanisland/; Anne Criss, *Refuges at Risk*, 21 NAT'L WETLANDS NEWSL. (Envtl. Law Inst.), July-Aug. 1999, at 1, 12.

[7] Arctic National Wildlife Refuge, http://arctic.fws.gov.

[8] ADVISORY COMM. ON WILDLIFE MANAGEMENT, appointed by Interior Sec. Stewart L. Udall, REPORT ON THE NATIONAL WILDLIFE REFUGE SYSTEM (1968), *reprinted in* U.S. FISH AND WILDLIFE, FINAL ENVIRONMENTAL STATEMENT, OPERATION OF THE NATIONAL WILDLIFE REFUGE SYSTEM app. W, at W-1 (1979). Beginning in 1940, there has been an ongoing effort to consolidate the refuge unit types into fewer categories. Proclamation No. 2416, 54 Stat. 2717 (July 25, 1940).

The most significant physical attributes of the sprawling, 95 million acre refuge system are its broad reach and diverse landscapes.[9] Therefore, the system is a key network for protecting representative ecosystems and sustaining migrating animals, such as ducks and caribou.

As with the National Park System, the bulk of the refuge system lands and its largest units occur in Alaska.[10] Though 96 percent of refuge units are located outside of Alaska, they constitute only 15 percent of the system's acreage. The Arctic National Wildlife Refuge tops the list of giant refuges with 19.3 million acres. Yukon Delta National Wildlife Refuge runs a close second with 19.2 million acres. The 3.5 million acre Alaska Maritime National Wildlife Refuge has the largest sweep, containing a string of islands that would stretch from California to Georgia if superimposed on the lower forty-eight states. Nonetheless, there are some very large refuges outside of Alaska, including Desert (1.6 million acres) in Nevada, Charles M. Russell (910 thousand acres) in Montana, Cabeza Prieta (860 thousand acres) in Arizona, Okefenokee (390 thousand acres) in Georgia and Florida, Hart Mountain (270 thousand acres) in Oregon, Alligator River (160 thousand acres) in North Carolina, and Aransas (114 thousand acres) in Texas. [11] Several refuges containing key habitats are under 100 acres in size. The smallest, Mille Lacs in Minnesota, logs in at only six-tenths of an acre.[12]

Waterfowl production areas tend to be small, averaging 223 acres in size.[13] The smallest, North Dakota's Medicine Lake WPA, is less than an acre. The largest, Montana's Kingsbury Lake WPA, is 3,733 acres.[14]

Every state and several territories have at least one unit in the refuge system. The wide distribution of the system is evident in the location of the top three states in numbers of refuge units. North Dakota has sixty-five, California has thirty-eight, and Florida has twenty-nine.[15] The system's origins in wildlife conservation are evident in its habitats that support more than 700 bird, 220 mammal, 250 reptile and amphibian, and 200 fish

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[9] FWS LAND REPORT, *supra* note 1, at 1.

[10] *Id.* at 10 tbl.2-25 tbl.3.

[11] *Id.* at 12-25 tbl.3.

[12] *Id.*

[13] U.S. Fish & Wildlife Service, *What are Waterfowl Production Areas?*, http://www.fws.gov/refuges/faqs/WPAs.html.

[14] U.S. FISH & WILDLIFE SERVICE, WATERFOWL PRODUCTION AREAS: PRAIRIE JEWELS OF THE REFUGE SYSTEM 1 (July 2002), http://refuges.fws.gov/generalInterest/factSheets/FactSheetWPA.pdf.

[15] FWS LAND REPORT, *supra* note 1, at 12-25 tbl.3.

species.[16] The four major bird migration corridors ("flyways") across the U.S., the Atlantic, Mississippi, Central, and Pacific, contain concentrations of hundreds of refuges. These flyway refuges provide breeding, feeding and resting habitat for millions of birds each season. The Waterfowl Production Areas protect thousands of prairie wetlands ("potholes") in an area of the northern plains otherwise dominated by private agricultural land use.

Endangered and threatened species protection has triggered the acquisition of fifty-nine refuges, including Crystal River in Florida for manatees, Ozark Plateau for bats, Hakalau Forest in Hawaii for indigenous birds, and Ash Meadows in Nevada for a variety of imperiled plants and fish.[17] The system contains a total of 180 animal and 78 plant species listed under the Endangered Species Act.[18] It also covers a substantial portion of the nation's protected wetlands. In total, more than one-third of the system's acreage is wetlands.[19]

The refuge system shares with the park system a dominant use policy. The Department of the Interior's Fish and Wildlife Service manages the refuge system for the purpose of maintaining, enhancing, and restoring nature.[20] Congress calls this preeminent goal "conservation."[21] Though other, especially recreational, activities (often called secondary uses) coexist with the paramount conservation use, they must not interfere with attainment of the ultimate objective.[22] Parts V and VI describe how changes in the way the law has articulated this dominant goal reflect larger trends in conservation policy.

Alas, practice seldom matches theory; and, the refuges suffer from incompatible uses that thwart the systemic aim of nature protection. As recently as 1989, a General Accounting Office study, largely undisputed by the Fish and Wildlife Service, found secondary uses harming conservation goals on nearly 60

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[16] *Id*. at 1.

[17] U.S Fish & Wildlife Service, *National Wildlife Refuges Established for Endangered Species*, http://www.fws.gov/refuges/habitats/EndSpRefuges.html.

[18] U.S. Fish & Wildlife Service, *Refuge System Threatened and Endangered Species Database Quicklinks*, http://www.fws.gov/refuges/databases/tes.html.

[19] U.S. FISH & WILDLIFE SERVICE, WETLANDS AND THE NATIONAL WILDLIFE REFUGE SYSTEM: PROTECTING AND RESTORING WETLANDS 1 (Jan. 2003), http://wetlands.fws.gov/Pubs_Reports/factsheets/refugesprotectslow.pdf.

[20] National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, § 3(a)(4), 111 Stat. 1252 (1997) (codified at 16 U.S.C. § 668ee(4) (2004)).

[21] *Id*.

[22] 16 U.S.C. § 460k (2000).

percent of refuges.[23] These uses include off-road vehicle operations, motor boating, mining, and military exercises.[24]

Though it has widened in the past several years, the traditional conservation focus of the refuges has been animals. Unlike most national parks, most refuges are open to hunting, which the Service promotes as part of its legal mission.[25] Hunters have funded refuge acquisition since the New Deal through the duck stamp program. Currently, the refuges annually host around 2 million hunting and 6 million fishing visits.[26] Still, the vast majority of visits to the refuges are for wildlife observation.[27] Non-consumptive, wildlife-dependent recreation on refuges, such as bird-watching and hiking, generates 30 percent more economic activity than hunting and fishing from over 35.5 million annual visits.[28]

## III. THE SUPERSTAR REFUGE: ARCTIC

A grasp of the hodgepodge of units that constitute the refuge system is important to understand both the history and the potential of this largest of our nature protection networks. But, it is also revealing in what is missing from the current debate over the superstar Arctic National Wildlife Refuge. This refuge is the superstar of the system in two senses. First, its physical attributes are colossal. At 19.3 million acres, Arctic is the largest refuge in the system.[29] Moreover, it includes the largest wilderness area in the system, about 8 million acres.[30] But, the most spectacular attributes of the Arctic refuge are its biological resources. It is the only protected area in the United States that

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[23] UNITED STATES GENERAL ACCOUNTING OFFICE, NATIONAL WILDLIFE REFUGES: CONTINUING PROBLEMS WITH INCOMPATIBLE USES CALL FOR BOLD ACTION 16, 18 (RCED-89-196, 1989).

[24] *Id*. at 20-21.

[25] National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, § 5(a)(4)(K), 111 Stat. 1252 (1997) (codified at 16 U.S.C. § 668dd(a)(4)(K) (2004)).

[26] U.S. FISH & WILDLIFE SERVICE, PROVIDING QUALITY WILDLIFE-DEPENDANT RECREATION FOR VISITORS TO THE NATIONAL WILDLIFE REFUGE SYSTEM (White Paper for the Conservation in Action Summit, May 2004) at 20, http://www.fws.gov/refuges/ConservationSummit/RecreationTeam/WildlifeDependentRecreationPaper_042604.pdf.

[27] Bill Hartwig, Chief, National Wildlife Refuge System, Address at the Conservation in Action Summit (May 25, 2004), http://www.fws.gov/refuges/ConservationSummit/Daily/hartwigSpeech_052504.html.

[28] JAMES CAUDHILL & ERIN HENDERSON, DIVISION OF ECONOMICS, U.S. FISH & WILDLIFE SERVICE, BANKING ON NATURE 2002: THE ECONOMIC BENEFITS TO LOCAL COMMUNITIES OF NATIONAL WILDLIFE REFUGE VISITATION, at iv (Sept. 2002), http://refuges.fws.gov/policyMakers/pdfs/BankingOnNature2002_101403.pdf.

[29] FWS LAND REPORT, *supra* note 1, at 12-25 tbl.3.

[30] U.S FISH & WILDLIFE SERVICE, ARCTIC NATIONAL WILDLIFE REFUGE (Jan. 2000), http://library.fws.gov/Refuges/arctic00.pdf.

contains the complete spectrum of arctic ecosystems, from the tallest peaks of the Brooks Range to the marine environment of the Arctic shore.[31] Its lands host the migration of thousands of caribou, the nesting of hundreds of thousands of diverse migratory waterfowl and shorebirds, and habitat for imperiled species, such as polar bears.

But, in a more revealing sense, the Arctic refuge is a superstar because it is famous. It is the only unit of the system regularly discussed on front-pages of the nation's newspapers. This is, of course, due to the potential of an enormous oil and gas field underlying the coastal plain of the refuge. [32] The field might be as large as Prudhoe Bay, developed during the 1970s in conjunction with the Trans-Alaska Pipeline. Development of an oil field, however, would impact the Porcupine Caribou Herd, which calves in or near the coastal plain during the summer, and the polar bears, which den in the winter. Development would also threaten the functioning of the vast wetlands complex of the coastal plain, degrade the wilderness character of the refuge, and disrupt the lives of many Alaskan natives.[33]

Since the enactment of the Alaska National Interests Lands Conservation Act in 1980,[34] the question of whether to drill for oil has been a hardy perennial sprouting in one place or another every year in proposed legislation. Only Congress may allow drilling in the Arctic Refuge, and such legislation is a priority of the current Bush administration.[35] Drilling opponents have always succeeded in stopping legislation leasing oil in the refuge, though in 1995 it took a presidential veto to win the refuge a last-minute reprieve.[36] In 2003, the final energy bill drafted by the House-Senate conference committee dropped a House provision authorizing drilling in the Arctic Refuge in the face of a filibuster threat.[37] That energy bill did not pass and now Congress is poised once again to consider allowing petroleum development in the Arctic

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[31] *Id*.

[32] *See, e.g*., Andrew C. Revkin, *Clashing Opinions at Meeting on Alaska Drilling*, N.Y. TIMES, Jan. 10, 2001, at A15; Sam Howe Verhovek, *Refuge Inside Arctic Circle Is Also in the Middle of U.S. Energy Debate*, N.Y. TIMES, Oct. 8, 2000, at A14.

[33] NATIONAL RESEARCH COUNCIL, CUMULATIVE ENVIRONMENTAL EFFECTS OF OIL AND GAS ACTIVITIES ON ALASKA'S NORTH SLOPE 1-11 (2003).

[34] Codified at 16 U.S.C. § 3101 (2004).

[35] NATIONAL ENERGY POLICY, REPORT OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP (May 2001) at 5-9, 10, 20, http://www.whitehouse.gov/energy/National-Energy-Policy.pdf; Felicity Barringer, *Bush's Record: New Priorities in Environment*, N.Y. TIMES, Sept. 14, 2004, at A1.

[36] Lynne Corn *et al*., Arctic National Wildlife Refuge, Issue Brief for Congress (Congressional Research Service IB10094), at CRS-3 (2002).

[37] Carl Hulse, *Accord Reached by Republicans for Energy Bill*, N.Y. TIMES, Nov. 15, 2003, at A1.

Refuge. The President included revenues from oil leases in his 2006 budget. By inserting oil drilling language in the upcoming budget resolution, Senate Energy Chairman Pete Domenici hopes to insulate the debate from the filibuster threat. Indeed, the Senate voted by only a fifty-one to forty-nine margin to retain the drilling language in the budget resolution on March 16, 2005. Though other hurdles remain for authorizing petroleum development in the Arctic Refuge, prospects for enacting some kind of drilling permission now appear brighter this year than ever before.

In the controversy over whether petroleum development in the Arctic Refuge is worth the threat to habitat and wilderness, a crucial broader issue has been lost: How will drilling and development affect the 93 million acre Refuge System, of which the Arctic Refuge is only one part? There is a centrifugal, divergent tendency in administering far-flung refuges with disparate establishment purposes. Proponents of drilling like to call the Arctic Refuge "ANWR" ("An-wahr"),[38] which obscures its identity as a node in a larger network of habitat reserves. Current debates over drilling in the refuge are almost completely devoid of systemic concerns, and instead discuss the refuge as though it were unconnected to a larger web of reserves managed for large-scale conservation goals. The great contemporary challenge for the refuge system is how to orchestrate individual units for large-scale ecological protection. This is no easy task.

But, Congress sought to simplify the management challenge in 1997 by establishing a hierarchy of acceptable uses for the refuges.[39] Unlike recreational uses, which may merely be compatible with the mission, commercial development must make affirmative contributions to the system's conservation mission.[40] Otherwise, the risks that economic uses of individual refuges pose to the refuge system could not be justified.

To frame the debate solely in fiscal terms, or even in terms of allowable harm to the refuge, misses the mark. It turns the clock back to the days when we thought we could protect nature by saving isolated fragments. Instead, drilling proponents ought to

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[38] *See, e.g.*, Lynn Scarlett, *An Address to the Natural Resources under the Bush Administration Symposium,* 14 DUKE ENVTL. L & POL'Y F. 281, 285 (2004).

[39] National Wildlife Refuge System Improvement Act of 1997 § 5(a)(3)(C) (codified at 16 U.S.C. § 668dd(a)(3)(C) (2004)); GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCE LAW 14A:5 (Clark Boardman Callaghan, 1992) (2002); Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation,* 29 ECOLOGY L. Q. 457, 526-38 (2002).

[40] 50 C.F.R. § 29.1 (2005). *See also* Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,472, 62,484 (Oct. 18, 2000).

explain how petroleum development advances the conservation mission of the Refuge System as a whole, or why the Arctic Refuge does not belong in this vital system of environmental protection. To do less threatens not only this one refuge, but the entire Refuge System and its historic contributions to the conservation gains of the past century.

## IV. THE FIRST REFUGE: THE PELICAN ISLAND SANCTUARY

Pelican Island, some forty-five miles south of Cape Canaveral, is located within the Indian River Lagoon, and lies in the biologically diverse zone where subtropical and temperate habitats overlap.[41] At first blush, one can hardly think of a place farther removed from the debates over drilling in the Arctic coastal plain. But, Pelican Island is connected to the Arctic debate because it is another node in the refuge system. While the Arctic Refuge anchors the system in size and biological integrity, the Pelican Island Refuge anchors the system historically. It is widely regarded as the very first national wildlife refuge.[42]

The Pelican Island refuge contains seagrass beds, oyster bars, mangrove islands, salt marsh, and maritime hammocks. But, it is best known for the birds that use this habitat. It was the birds that attracted the German immigrant homesteader, Paul Kroegel, in the late nineteenth century to act as warden to protect Pelican Island.[43] First as a self-appointed volunteer, then as an Audubon Society-American Ornithological Union employee, and finally as the first refuge manager, Kroegel exemplifies the citizen-activists who shaped the refuge system.[44] To this day, the FWS achieves many of its conservation successes in partnership with its neighbors and citizen supporters.[45]

Early visitors to Pelican Island described it as "draped in white, its trees seemingly covered with snow."[46] This "snow," derived both from feathers and guano, resulted from the masses of birds that flocked to the island. Unfortunately, the plumage birds, egrets, ibises, roseate spoonbills, also attracted market hunters,

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[41] U.S FISH & WILDLIFE SERVICE, PELICAN ISLAND NATIONAL WILDLIFE REFUGE (Sept. 2002), http://library.fws.gov/Refuges/pelicanisland02.pdf.

[42] *Id.*

[43] *Id*.

[44] *Id.*

[45] *See, e.g., id*; FWS LAND REPORT, *supra* note 1, at 1.

[46] William Reffalt, Prologue to Pelican Island 1 (unpublished 2003), http://refuges.fws.gov/centennial/pdf2/pelicanIsland_reffalt.pdf.

who decimated populations to supply the costume and fashion industry.[47]

The steep, steady decline of birds in this rich habitat attracted the attention of Frank Chapman, a bird curator at New York's American Museum of Natural History, author of many bird books, and founder of *Bird-Lore* (the Audubon Societies' magazine).[48] Chapman was involved in the American Ornithological Union and the fledgling Audubon Society. He traveled among the well-connected circles of elite New York.[49] Chapman, a dedicated worker, even enlisted his new bride to skin and prepare pelicans during their honeymoon visit to Pelican Island.[50] Chapman exemplifies the contributions made to refuge protection by professional scientists.

Working with the American Ornithological Union, Chapman helped enact a wildlife protection statute in Florida and was pushing to acquire Pelican Island, when the Bureau of Biological Survey suggested instead a federal sanctuary.[51] The sanctuary idea found a sympathetic audience in President Theodore Roosevelt, who declared Pelican Island "a preserve and breeding ground for native birds" in 1903.[52] The Bureau of Biological Survey, under the leadership of another scientist, C. Hart Merriam, became the first federal manager of most of the early refuges. The Biological Survey merged with the Bureau of Fisheries in 1940 to create U.S. Fish and Wildlife Service.[53]

President Theodore Roosevelt, of course, personifies the ascendancy of Progressive Era conservation as necessary for sustaining national prosperity. However, he also talked about conservation as a moral issue. Using his bully pulpit, Roosevelt exemplifies the expansive presidential assertion of power that pioneered most of the new conservation innovations on the refuges.[54] By the end of his term, Roosevelt had designated more

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[47] *Id.*

[48] *Id.*; FRANK M. CHAPMAN, AUTOBIOGRAPHY OF A BIRD-LOVER 187 (1933).

[49] Reffalt, *supra* note 46, at 1.

[50] *See* CHAPMAN, *supra* note 48, at 161.

[51] At the time, the principal leaders in conservation for the Bureau of Biological Survey, the American Ornithological Union, the fledgling Audubon Society, and the American Museum of Natural History, overlapped substantially. Stephen Fox goes so far as to claim that the boundaries between these institutions blurred. *See* STEPHEN FOX, JOHN MUIR AND HIS LEGACY: THE AMERICAN CONSERVATION MOVEMENT 173 (1981).

[52] Executive Order of March 14, 1903, *microformed on* CIS Presidential Executive Orders & Proclamations (1986) (1903-41-5).

[53] Reorg. Plan No. 3 of 1940, 5 Fed. Reg. 2107, 2108 (June 4, 1940), *reprinted in* 54 Stat. 1231, 1232 (1940).

[54] Charles Wilkinson, *Clinton Learns the Art of Audacity*, HIGH COUNTRY NEWS, Sept. 30, 1996, http://www.hcn.org/servlets.hcn.Article?article_id=2799.

than fifty refuges and spurred Congress to endorse the enterprise.[55]

Though a couple of earlier executive orders by Benjamin Harrison[56] and William McKinley[57] have some claim as precedents for presidential establishment of wildlife sanctuaries, they both relied on legislation authorizing the forest reserves that became the national forests.[58] The 1903 Roosevelt proclamation created a brand new designation under inherent executive authority. It truly did open the door to a new system governed not by multiple use principles, but by the dominant use philosophy that all activities on refuges should be compatible with wildlife protection. National wildlife refuge management, first under the control of the Bureau of Biological Survey and later the U.S. Fish and Wildlife Service, has always used and developed science as a basis for making decisions.

## V. GROWTH AND CONSOLIDATION: ENCLAVES TO FLYWAYS

In the decades following the establishment of the Pelican Island refuge, the number of refuges grew. However, it was not until the next Roosevelt, F.D.R., took office that the rate of growth accelerated and early efforts were made to sew together refuges into a conservation system. Two developments converged in the mid-1930s to fuel growth and consolidation.

First, Congress enacted the Duck Stamp Act in 1934, which dedicated revenue from the sale of migratory bird hunting stamps that all hunters of waterfowl have to affix to their state hunting licenses, to be used for habitat acquisition.[59] Though earlier statutes had authorized acquisition of habitat for improving existing, and establishing new, refuges, the lack of appropriations had hampered the program.[60] Since 1934, the duck stamp funds have been a steady source for refuge system expansion. The duck stamp program also strengthened the ties between the hunting community and the refuges.

Second, largely through Bureau of Biological Survey research, scientists were learning more about the life cycles and

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[55] Rachel F. Levin, *Leading the Way…Early Pioneers of the Refuge System*, FISH & WILDLIFE NEWS, Mar./Apr. 2000, at 14.

[56] *See* Proclamation No. 39, 27 Stat. 1052 (Dec. 24, 1892).

[57] *See* Proclamation No. 5, 32 Stat. 1973 (July 4, 1901).

[58] *See* General Revision Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, 1103 (repealed by 90 Stat. 2792).

[59] *See* Migratory Bird Conservation Act, ch. 257, § 5, 45 Stat. 1222, 1223 (1929) (codified at 16 U.S.C. § 715(d) (2004)).

[60] *See* NATHANIAL P. REED & DENNIS DRABELLE, THE UNITED STATES FISH & WILDLIFE SERVICE 8 (Westview Press 1984).

geographic patterns of migratory birds.[61] By the mid-1930s, the four principal flyways running north-south across the lower forty-eight states were well delineated.[62] Conservation policy shifted from the Pelican Island-era concern of protecting a few rich sites of wildlife habitat to maintaining a series of connected, stepping-stone habitats that birds could use in their migrations.[63] A quick glance at a map of today's refuge system confirms the legacy of this insight. Refuges are concentrated in four north-south corridors. The geometry of refuge management shifted from the enclave points on the map to the flyway lines across the country.

And so, the system grew from 63 units in 1934 to 204 units in 1944.[64] The effort to link refuges together to achieve the larger-scale goal of migratory bird conservation was reflected in F.D.R.'s 1940 order to rename nearly 200 units to reflect their common mission.[65] The Franklin Roosevelt proclamation converted "reservations," "bird refuges," "migratory waterfowl refuges" and "wildlife refuges" to "national wildlife refuges," and the name stuck.[66] Though part of the impetus behind the common mission came from international treaty commitments and hunters' interests, science strongly influenced the consolidation of units around the national wildlife refuge mission of conservation.

After the Franklin Roosevelt Administration, the next great steps toward greater coordination of units in the name of science did not occur until the 1960s. Increased concern about species extinction and developments in the field of ecology began to transform the mission of the refuge system.

In 1966, Congress enacted its first statute dealing with species extinction as a general category of concern. Though Congress had previously addressed depletion of particular stocks of certain species,[67] the 1966 law plowed new ground in creating an open-ended category of "endangered species."[68] The plan was for species, regardless of their popularity or evident value, to receive special consideration as they slipped toward the brink of extinction. The 1966 law relied principally on habitat acquisition

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[61] *See* Ira N. Gabrielson, *Obituary—Frederick Lincoln*, 79 THE AUK 495 (1961).

[62] *See* Frederick C. Lincoln, *The Migration of North American Birds*, U.S. DEPT. OF AGRIC. CIRCULAR NO. 353, 33 (Oct. 1935).

[63] *See* IRA N. GABRIELSON, WILDLIFE REFUGES 135 (1943).

[64] ROBERT L. FISCHMAN, THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW 38 (2003).

[65] *See* Proclamation No. 2416, 54 Stat. 2717 (July 25, 1940).

[66] *Id.*

[67] *See, e.g.,* The Migratory Bird Treaty Act of 1918, ch. 128, 40 Stat. 755; The Black Bass Act of 1929, ch. 346, 44 Stat. 576; The Bald and Golden Eagle Protection Act of 1940, ch. 278, 54 Stat. 250.

[68] Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, § 1-3, 80 Stat. 926.

to recover species populations.[69] In doing so, the law provided the first statutory charter for the refuge system as a whole, and gave the Interior Department a new source of money, the Land and Water Conservation Fund, to acquire refuge acreage.[70]

The part of the 1966 law dealing with the refuges is often called the Refuge Administration Act.[71] Its basic framework for refuge administration remains in place today, though it has been substantially revised by the 1997 Refuge Improvement Act.[72] Any understanding of the legislative origins of refuge consolidation and comprehensive management must start with the 1966 law whose focus was endangered species protection. The preservation imperative for the refuge system is part of a larger trend that swept natural resources law in the 1960s. In addition to the endangered species law, it included the 1964 Wilderness Act[73] and the 1968 Wild and Scenic Rivers Act.[74]

The 1966 statute consolidated the conservation land holdings of the FWS into a system: it was the first statute to refer to this hodgepodge as the "National Wildlife Refuge System."[75] The law also mandated a uniform use management rule,[76] borrowing the compatibility principle from the 1962 Refuge Recreation Act.[77] The 1966 law closed the system to all uses except those that the Service determined would be compatible with the purpose of the refuge on which they occur.[78] The compatibility criterion, established by statute in 1966 but practiced by the Service for decades before that, would become a byword of international sustainable development in the 1980s.

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[69] *Id*.

[70] Land and Water Conservation Fund Act of 1965 ("LWCFA"), Pub. L. No. 88-578, 78 Stat. 897 (1964) (codified at 16 U.S.C. §§ 460l-4 to 460l-11 (2004)). The LWCF earmarks a percentage of offshore oil and gas lease receipts and other sources of federal revenue to finance public land acquisition. Agencies may not spend the money, however, unless Congress appropriates it. Appropriations generally fall far short of the earmarked funds authorized. COGGINS &GLICKMAN, *supra* note 39, at sec. 10C:44.

[71] National Wildlife Refuge System Administration Act, Pub. L. No. 89-669, § 1(a), 80 Stat. 926 (1966) (codified at 16 U.S.C. § 668dd(d)(1)(a) (2000)).

[72] National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252, 1257 ("[a]n Act to amend the National Wildlife Refuge System Administration Act of 1966 ... ").

[73] Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. § 1131-36 (2004)).

[74] National Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified at 16 U.S.C. § 1271-87 (2004)).

[75] National Wildlife Refuge System Administration Act, Pub. L. No. 89-669, § 1(a), 80 Stat. 926 (1966) (codified at 16 U.S.C. § 668dd(a)(1) (2004)).

[76] *Id*. § 4(d), 80 Stat. 928.

[77] Refuge Recreation Act, Pub. L. No. 87-714, § 1, 76 Stat. 653 (1962) (codified as amended at 16 U.S.C. § 460k (2000)).

[78] *Id.*

The 1960s also saw a new wave of science influence refuge management. In 1967, Edward O. Wilson and Robert MacArthur published their path-breaking monograph, *The Theory of Island Biogeography*. Application of this new theory viewed refuges as small, isolated islands, vulnerable to species extinctions regardless of how well they are managed.[79] The theory taught that refuges, even if maintained in pristine condition, were not sufficient to prevent species extinction unless they were large enough and linked to other protected areas.[80] Small pockets of species do not persist long anywhere.

The rise of ecology as a scientific basis for management in the 1960s is exemplified in the Leopold reports. In 1963, Professor A. Starker Leopold, a son of the famous Aldo, led a committee that recommended national park management strive to maintain and restore native species in their natural, biotic associations.[81] This recommendation was updated and applied to the refuge system in a similar 1968 report prepared at the request of the Secretary of the Interior.[82] The 1968 Leopold committee report described the long-range systemic goal for the refuges to serve as show places for the full spectrum of native wildlife.[83] The committee proposed "to add a 'natural ecosystem' component to the program of refuge management."[84] In this recommendation, the Leopold committee sought an overarching, guiding principle that would provide a uniform direction for system management and respond to growing ecological concerns about the viability of isolated reserves. Though it anticipated by three decades the formal FWS adoption of an ecosystem management policy,[85] it nudged the refuges toward the forefront of conservation.

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[79] ROBERT H. MACARTHUR & EDWARD O. WILSON, THE THEORY OF ISLAND BIOGEOGRAPHY 3-7, 121-122, 182 (Princeton University Press 1967).

[80] *See id*. at 180-81.

[81] A. STARKER LEOPOLD ET AL., WILDLIFE MANAGEMENT IN THE NATIONAL PARKS: THE LEOPOLD REPORT 4 (1963) (reprinted by the U.S. Department of the Interior, National Park Service), http://www.cr.nps.gov/history/online_books/leopold/leopold.htm.

[82] ADVISORY COMM. ON WILDLIFE MANAGEMENT, appointed by Interior Sec. Stewart L. Udall, REPORT ON THE NATIONAL WILDLIFE REFUGE SYSTEM (1968), *reprinted in* U.S. FISH AND WILDLIFE, FINAL ENVIRONMENTAL STATEMENT, OPERATION OF THE NATIONAL WILDLIFE REFUGE SYSTEM app. W (1979).

[83] *Id*. at W-3, W-22.

[84] *Id*. at W-4.

[85] *See* U.S. Dept. of the Interior, Fish and Wildlife Service, National Policy Issuance #95-03, Ecosystem Approach to Fish and Wildlife Conservation (effective Feb. 9, 1995), http://policy.fws.gov/npi95_03.html.

## VI. THE RECENT ERA: ECOSYSTEM MANAGEMENT

The refuge system spent the 1970s and 1980s lagging behind the enormous changes that affected other federal lands. With the exception of the 1980 Alaska National Interest Lands Conservation Act,[86] Congress enacted few significant legislative reforms specific to the refuges. In the 1970s, the Forest Service[87] and Bureau of Land Management (BLM)[88] received completely new statutory charters governing their public land management, and the National Park Service obtained a substantial revision of its legislative mandate.[89] But the FWS limped along with its 1966 framework.

As with other federal lands, the refuges began to shift toward a more ecological approach to management as a result of scientific developments, environmental statutes (such as NEPA and the ESA), and the opening of the courts to hear citizen environmental complaints. Nonetheless, conditions on the refuges were poor. A combination of austere funding, lax oversight, limited jurisdiction, and local political pressure gave rise to widespread incompatible uses on refuges. An important 1989 GAO report found incompatible uses harming conservation goals on 59 percent of refuges.[90] Among the most commonly occurring secondary activities were mining, off-road vehicle use, power boating, military exercises, grazing, logging, hunting, and rights of way use.[91]

In response to the GAO report, a lawsuit,[92] and several follow-up studies that confirmed the major problems with

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[86] Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 U.S.C.).

[87] Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476, *amended by* National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. 1600-1614 (2000)).

[88] Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub. L. No. 94-579, 90 Stat. 2744 (codified at 43 U.S.C. 1701 et. seq. (2004)).

[89] National Park System General Authorities Act of 1970, Pub. L. No. 91-383, 84 Stat. 825; Redwood Amendment Act of 1978, Pub. L. No. 95-250, 92 Stat. 163; National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, 3518 (codified as amended at 16 U.S.C. 1a-1 to 8 (2000)).

[90] UNITED STATES GENERAL ACCOUNTING OFFICE, NATIONAL WILDLIFE REFUGES: CONTINUING PROBLEMS WITH INCOMPATIBLE USES CALL FOR BOLD ACTION 16, 18 (RCED-89-196, 1989).

[91] *Id*. at 20-21.

[92] The plaintiffs, who included the Wilderness Society, National Audubon Society, and Defenders of Wildlife, claimed that the Service was continuing to allow incompatible recreational and commercial uses on specified refuges. They also challenged the process by which the Service approved uses throughout the System. S. Rep. No. 103-324, at 6-7 (1994). *See also* Cam Tredennick, *The National Wildlife System Improvement Act of 1997: Defining the National Wildlife Refuge System for the Twenty-First Century*, 12 FORDHAM ENVTL. L.J. 41, 70-71 (2000) (describing the litigation and its political aftermath).

incompatible uses,[93] Congress enacted the 1997 Refuge Improvement Act.[94] That new charter for the refuge system, as interpreted through FWS policies in 2000 and 2001, reestablishes refuge management as a leading exemplar of conservation policy that it was in its beginning at Pelican Island.

The most important aspect of the new refuge management regime is that it has a clear statutory goal of conservation, defined in ecological terms. The refuge conservation mission is defined by statute as being for animals, plants, and their habitats.[95] This is a very different conception of conservation from the progressive-era, multiple-use, sustained yield missions that sought to conserve a steady stream of commodities to be extracted from the public lands. It also embraces a broader land (and water) ethic that extends to plants and habitat than the earlier refuge goals, which focused on animals ("wildlife") almost exclusively. The FWS is directed by the statutory mission "to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants utilizing . . . methods and procedures associated with modern scientific resource programs."[96] The 1997 conservation mandate finally provided a unifying mission for a system that retains a disparate set of establishment purposes for individual refuges.

Moreover, refuge administration now recognizes a key lesson of conservation biology: nature reserves need to be interconnected. The 1997 statute defined the mission of the refuge system to serve as a "national network" of lands and waters to sustain plants and animals.[97] This realigns the geometry of refuge conservation from linear flyways to a more complex web of relationships.

The importance of the new systemic mission is not merely its ecological argot. The mission establishes a bottom line for management. The FWS may not permit uses to occur where they are incompatible with the conservation purpose of the system.[98] Moreover, economic uses must contribute to attaining the

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[93] U.S. DEPARTMENT OF THE INTERIOR INSPECTOR GENERAL, SURVEY REPORT: MAINTENANCE OF WILDLIFE REFUGES (1993); SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, NATIONAL WILDLIFE REFUGE SYSTEM MANAGEMENT AND POLICY ACT OF 1994, S. Rep. No. 103-324, at 6 (1994); MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 292-93 (3d ed. 1997) (citing U.S. FISH & WILDLIFE SERVICE, AUDUBON ET AL. V. BABBITT – FINAL REPORT (Dec. 1994)).

[94] National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified at 16 U.S.C. § 668dd-ee (2004)).

[95] *Id.* § 4.

[96] *Id.* § 5(4).

[97] *Id.* § 4.

[98] *Id.* § 3(a)(1).

conservation mission.[99] This clear command to maintain ecological functions (rather than resource outputs) on the refuges represents the current trend for all public land management. In his thoughtful and cautious book, *Keeping Faith with Nature*, Professor Robert Keiter suggests that Congress establish biodiversity conservation and ecosystem protection as clear priorities for the public lands.[100] The refuge system is leading the way.

But there is more. In an effort to hold the FWS accountable to the broad purpose for the refuge system, Congress imposed a number of path-breaking substantive management criteria. In addition to a revised compatibility determination that the Service must now put in writing, the 1997 law requires that the Service maintain "biological integrity, diversity, and environmental health"[101] on the refuges. This is the most ecological standard in all of U.S. public land law. It represents a return of the refuge system to the cutting edge of conservation. Almost all definitions of ecosystem management include at least one if not more of the three key phrases (integrity, diversity, and health). And ecosystem management, viewing ecological sustainability as the baseline condition of public land uses, is where a century of conservation has led us.[102]

The FWS policies implementing the 1997 law push refuge management even further toward the head of the pack in the practice of twenty-first-century conservation. For instance, a 2000 Service policy finds incompatible those uses that reasonably may be anticipated to cause habitat fragmentation,[103] one of the chief villains identified by island biogeography and conservation biology in the decline of species.[104] The only other management criterion that comes close to this as a manifestation of the best science applied to public land administration is the superseded minimum viable population standard for national forest management that

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[99] 50 C.F.R. § 29.1 (2005); Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,472, 62,484 (Oct. 18, 2000).

[100] ROBERT B. KEITER, KEEPING FAITH WITH NATURE 66 (2003).

[101] National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 5(a)(4)(B), 111 Stat. 1252 (codified at 16 U.S.C. § 668dd(a)(4)(B) (2004)).

[102] *See* KEITER, *supra* note 100, at 71-75; R. Edward Grumbine, *Reflections on "What Is Ecosystem Management?"*, 11 CONSERVATION BIOLOGY 41 (1997).

[103] Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,484, 62,486 (Oct. 18, 2000).

[104] Conservation biologists agree that fragmentation of wildlife habitats is a direct threat to biological integrity. *See* NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT (1995); REED F. NOSS ET AL., THE SCIENCE OF CONSERVATION PLANNING: HABITAT CONSERVATION UNDER THE ENDANGERED SPECIES ACT (1997); LARRY D. HARRIS, THE FRAGMENTED FOREST: ISLAND BIOGEOGRAPHY THEORY AND THE PRESERVATION OF BIOTIC DIVERSITY (1984).

both the Bush and Clinton administrations abandoned in successive rulemakings.[105]

Another significant implementing policy addresses external threats to refuge resources under the mandate to maintain biological integrity, diversity, and environmental health. External threats are those sources of degradation that originate from actions that occur outside of the refuge boundary.[106] The Service policy advises refuge managers to seek redress before local planning and zoning boards, and state administrative and regulatory agencies, if voluntary or collaborative attempts to forge solutions do not work.[107] Though tempered by cautionary language, these are nonetheless bold instructions for a traditionally timid agency. The manual provision on external threats joins with mandates for planning and other management criteria to strengthen trans-boundary coordination, which is universally acclaimed as necessary to achieve ecosystem conservation.[108]

The external threat to public lands is one of the most serious hurdles to achieving the conservation mission on a scattershot system. Because refuges, compared to national forests and national parks, tend to concentrate in wet areas at the lower reaches of watersheds, the refuge system faces particularly difficult trans-boundary problems. Chemical run-off and soil erosion from upstream farming, oil and gas extraction, and residential development degrade refuges throughout the system.[109] How the Service responds to these external threats will be an early indication of the effectiveness of the strong language in the refuge policy to secure biological integrity, diversity and environmental health. It will also prompt collaborative coalition-building to address watershed-level concerns.

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[105] The original criterion is found in the regulations establishing criteria for land and resource management plans. National Forest System Land and Resource Management Planning, 47 Fed. Reg. 43,026, 43,050 (Sept. 30, 1982). The Clinton Administration repeal is found at the final planning regulations. National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514 (Nov. 9, 2000). The Bush Administration repeal is found at the final planning regulation. 70 Fed. Reg. 1023 (Jan. 5, 2005).

[106] Policy on Maintaining the Biological Integrity, Diversity, and Environmental Health of the National Wildlife Refuge System, 66 Fed. Reg. 3,810, 3,822 (Jan. 16, 2001).

[107] *See id.*

[108] *See, e.g.,* KEITER, *supra* note 100, at 72.

[109] *See, e.g.,* U.S. FISH &WILDLIFE SERVICE, DIVISION OF ENVIRONMENTAL CONTAMINANTS, CONTAMINANT ASSESSMENT PROCESS – SUMMARY REPORTS, http://ecos.fws.gov/cap/viewPublicSummaries.do; Anne Criss, *Refuges at Risk*, NAT'L WETLANDS NEWS (Envtl. Law Inst.), July-Aug. 1999, at 1, 13; PAUL J. CONZELMANN & THOMAS W. SCHULTZ, U.S. FISH &WILDLIFE SERVICE, UPPER OUACHITA NATIONAL WILDLIFE REFUGE CONTAMINANTS STUDY 1989-1990 iv (1992); C.M. Pringle, *Threats to U.S. Public Lands from Cumulative Hydrologic Alterations Outside of Their Boundaries,* 10 ECOLOGICAL APPLICATIONS 971 (2000).

Facing construction of a 19,250-seat, concert amphitheater on a tract of land adjacent to the Minnesota Valley National Wildlife Refuge, the Service demonstrated the promise and power of the external threats portion of the integrity, diversity, and health policy. The refuge staff carefully documented how the amphitheater would project noise, nighttime light, and stormwater into the refuge, and negatively affect refuge resources and priority public uses. They took measures to ensure that these concerns were incorporated into the formal environmental impact analysis of the proposed project, [110] and the Service followed the policy's prescription to raise concerns in the context of local land use procedures. The FWS Regional Director testified in opposition to the project's conditional use permit before the county commission. In the face of the Service's well-documented opposition, which was amplified by the refuge friends organization, the county commissioners unanimously rejected the permit application.[111]

The final respect in which the refuges are tracking the development of conservation policy is in the field of restoration. Restoration goes beyond maintaining minimum ecological vital signs. It seeks affirmative, long-term commitments to reversing past harms to natural systems. The 1997 statutory mission of the system includes restoration, where appropriate, of plants and animals.[112] This mission is reflected in three unusual affirmative obligations in the statutory management criteria. First, the FWS has a duty to acquire water rights,[113] the only affirmative trust mandate of its kind in U.S. public land law. Because instream flow problems in refuges are generally caused by upstream users outside of the refuge boundaries, this provision supports the commitment to abate external threats stated in the biological integrity, diversity, and environmental health policy.

Second, the 1997 statute requires the Service to "monitor the status and trends"[114] of animals and plants in each refuge. This biological monitoring duty will prompt development of an essential, yet chronically missing, element of adaptive management. Adaptive management, another component of most definitions of ecosystem management, requires feedback about the

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[110] SCOTT COUNTY ENVIRONMENTAL REVIEW, FINAL ENVIRONMENTAL IMPACT STATEMENT, Q PRIME AMPHITHEATER (Jan. 23, 2004), http://www.co.scott.mn.us/xpedio/groups/public/documents/web_files/cs_csqprimefinal.hcsp.

[111] SCOTT COUNTY, MINNESOTA, BOARD OF COMMISSIONERS MINUTES (June 29, 2004), http://www.co.scott.mn.us/xpedio/groups/public/documents/web_files/do_2004coboardminutesframe.hcsp.

[112] National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, § 4, 111 Stat. 1252, 1254 (1997) (codified at 16 U.S.C. § 668dd(a)(2) (2004)).

[113] *Id*. § 5(a)(4)(G).

[114] *Id*. § 5(a)(4)(N).

consequences of decisions in order to adjust them continually.[115] Public land management, generally, lacks a research component that adequately evaluates the success of predictions, such as a prospective finding of compatibility. Therefore, implementation of this biological monitoring criterion will facilitate the Service's policy of employing adaptive management in planning, and consequently, ecosystem management as well.

Third, the Service now has an affirmative conservation stewardship duty.[116] This looks to the future when the system will face problems not specifically addressed in the current law. While it will initially be used as a shield by the Service to defend protective actions, it may ultimately be wielded as a sword to advance the restoration goal, the mission, and the substantive management criterion to maintain biological integrity, diversity, and environmental health.[117]

## VII. CONCLUSION

The specific examples of the Pelican Island and the Arctic National Wildlife Refuges serve as bookends to a historical review of the conservation challenges of the past hundred years. Pelican Island reflects the early refuge function as an isolated sanctuary where habitat could be maintained for hunted animals. Over time, however, conservation approaches recognized the inadequacies of a zoo-like collection of rich habitats. Slowly, coordination among refuges, and between refuges and their surrounding neighbors, has emerged as a critical theme in building a true system out of the disparate hodgepodge of refuge units. The failure to consider the interconnected impacts from drilling for oil in the Arctic Refuge on the larger FWS conservation network reveals the shortcomings of the current management regime: the refuges do not yet fully cohere into a system that is more than the sum of its parts. The web remains frayed and patchy.

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[115] Reed F. Noss, *Some Principles of Conservation Biology, As They Apply to Environmental Law*, 69 CHI-KENT L. REV. 893, 907; KEITER, *supra* note 100, at 73. *See generally* KAI N. LEE, COMPASS & GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT (1993); C.J. WALTERS, ADAPTIVE MANAGEMENT OF RENEWABLE RESOURCES (1986).

[116] The National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, § 5(a)(3)(A), 111 Stat. 1252, 1254 (1997) (codified at 16 U.S.C. § 668dd(a)(3)(A) (2004)) ("each refuge shall be managed to fulfill the mission of the System ... ").

[117] I borrow the shield and sword images from J.B. Ruhl's study of the ESA's affirmative conservation mandate, a provision the Improvement Act's conservation stewardship duty closely resembles. J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1129-34 (1995).

The typicalness of the refuge system makes it the ideal vehicle for exploring the history of conservation. But it also makes the system a kind of type-O, universal donor for conservation policy. In its unobtrusive way, the system offers important lessons that are far more adaptable to non-federal land conservation than the experiences of our more prominent nature reserves. In the United States we tend to regard the national parks (think Yellowstone) and the wilderness areas (think Bob Marshall or River of No Return) as the pinnacles of federal conservation. However, both of these land systems grew out of peculiarly American notions of a monumental, pristine, uninhabited nature that are not widely shared in other cultures.

In contrast, the refuge system's management policy is articulated in the *lingua franca* of international conservation policy: ecology and sustainable development. The refuge system's interpretation of ecology through the mandate to maintain biological integrity, diversity, and environmental health, and its model of sustainability through limiting uses to those compatible with the dominant conservation mission, deserve special attention as contributions to the international conservation agenda. Existing international programs already recognize this aspect of refuge management. The U.N. has designated biosphere reserves that contain five refuges.[118] The Ramsar Convention's wetlands of international importance include twenty national wildlife refuges.[119] The Western Hemisphere Shorebird Reserve Network has also designated twenty refuges as essential habitat for migratory shorebirds.[120] More generally, the persistent challenges of limiting incompatible uses and coordinating a crazy-quilt system to achieve large-scale goals are as typical of the refuges as they are of nature reserves around the world.

The 1992 Rio Earth Summit, and its Agenda 21, established an international commitment to promote economic prosperity in a manner that safeguards our natural heritage.[121] Yet, the United States has no national program for attaining sustainable development and no official criteria with which to measure progress. The National Wildlife Refuge System's operating

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[118] U.S. FISH & WILDLIFE SERVICE, SPECIAL MANAGEMENT AREAS: BIOSPHERE RESERVES, http://www.fws.gov/refuges/habitats/specialAreas.html.

[119] U.S. FISH & WILDLIFE SERVICE, WETLANDS OF INTERNATIONAL IMPORTANCE, http://www.fws.gov/refuges/habitats/ramsar.html. *See also* Daniel Navid, *The International Law of Migratory Species: The Ramsar Convention*, 29 NAT. RESOURCES J. 1001 (1989), for a general overview of the Ramsar Convention.

[120] U.S. FISH & WILDLIFE SERVICE, SPECIAL MANAGEMENT AREAS: WESTERN HEMISPHERE SHOREBIRD RESERVE NETWORK, http://www.fws.gov/refuges/habitats/specialAreas.html.

[121] John C. Dernbach, *Sustainable Development: Now More Than Ever*, *in* STUMBLING TOWARD SUSTAINABILITY 45, 45-46 (John C. Dernbach ed., 2002).

principles, though not explicitly designed to fulfill our obligation to sustainable development, nonetheless offer a powerful case study in coordinated conservation management. Refuge management has the potential to serve as the United States' chief non-monetary contribution to the advancement of sustainable development.

Even in the United States, the refuges have a special leadership role to play in private land conservation. The compatibility principle, of course, finds expression in local planning and zoning ordinances from coast to coast. But, more important than the congruence of legal principles of land use is the similarity of conditions on the refuges with conditions on private land. Many non-Alaskan refuges were already severely degraded when they entered the system. A tradition of intensive habitat manipulation, especially through farming, has erased the historic conditions that signal health and integrity in many refuges. The conditions on refuges are more like those on private property in the same vicinity than other public land systems. Therefore, the techniques that the refuge system develops to restore habitat and sustain wildlife on its non-pristine properties will be applicable to private lands. The refuges remain recognizable to their neighbors, who may be willing to emulate successes they observe in the refuges.

# MOVING TOWARD RECOVERY: A SOUTHEASTERN ANALYSIS OF THE THREATENED & ENDANGERED SPECIES RECOVERY ACT OF 2005 (H.R. 3824)

STEVEN A. BURNS & JEFFREY H. WOOD*

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## I. INTRODUCTION

The Southeastern United States is home to a large number of species listed as endangered or threatened under the federal Endangered Species Act ("ESA" or "Act").[1] Alabama ranks third nationally with 114 listed species inhabiting the state, while Florida is only slightly behind with 111 listed species, followed by Tennessee

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[1] 16 U.S.C. §§ 1531-1544 (2005).

(100 listed species), Georgia (67 listed species), Mississippi (39 listed species), and Louisiana (27 listed species).[2] As a result, property owners in this region have become all too familiar with Section 4 of the Act, which governs listing decisions and requires the designation of critical habitat;[3] Section 7 of the ESA, which requires federal agencies to consult with the U.S. Fish and Wildlife Service ("Service" or "FWS") before approving activities that may affect listed species or their critical habitat;[4] and Section 9 of the ESA, which prohibits any person from engaging in any activity that might "take" any listed species.[5] For example, in Florida, the listings of various species of beach mice and the resulting development constraints have garnered significant attention,[6] as have the recoveries of the Florida panther and American alligator.[7] Likewise, in Alabama, the listing of the Alabama sturgeon has been the subject of a fifteen-year legal battle over the science used by the Service to determine whether the Alabama sturgeon is a separate and distinct species from the plentiful Mississippi shovelnose sturgeon.[8]

Therefore, it comes as no surprise that calls for reform of the ESA are often loudest among the Southern congressional delegations.[9] Many concerns over the ESA were raised at a Congressional field hearing held by the House Resources Committee in Jackson, Mississippi, on April 30, 2005, including the need for compensation

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[2] Hawaii has 317 listed species, the most of any state, followed by California with 304. *See* U.S. Fish & Wildlife Service, Listings by State & Territory, *available at* http://ecos.fws.gov/tess_public/TESSWebpageUsa Lists?state=all (last visited Nov. 2, 2005).

[3] *See* 16 U.S.C. § 1533 (2005).

[4] *See* 16 U.S.C. § 1536 (2005).

[5] *See* 16 U.S.C. § 1538 (2005).

[6] *See, e.g.,* Lynette Wilson, *Little Beach Mouse Causes Big Uproar on Perdido Key*, PENSACOLA NEWS JOURNAL, July 21, 2005, at 1A; AP, *Endangered Mice to Get Own Habitat*, MIAMI HERALD, July 29, 2004, at 3B (discussing that the designation of critical habitat for the St. Andrew beach mouse "could lead to certain land being put off-limits to human encroachment."); Jim Waymer, *Species Act Remains Source of Controversy*, FLORIDA TODAY, Dec. 28, 2003, at 1 (opining that "[d]evelopment threatens to wipe out the 4,000 pairs of Florida scrub jays that remain" and "could [also] claim a rare scrub mint plant that grows on only several acres in Titusville.").

[7] *See, e.g.,* Curtis Morgan, *Panther Back from Near Extinction*, MIAMI HERALD, Feb. 3, 2002, at 1A (explaining that, as a result of a controversial cross-breeding program, the once nearly-extinct Florida panther has expanded across much of wild Southwest Florida); Natalie Angier, *Not Just Another Pretty Face*, N.Y. TIMES, Oct. 26, 2004, at F1 (noting that, while most members of the Crocodylia order were not too long ago critically endangered, now "visitors to the Florida Everglades soon grow blasé at the sight of American alligators").

[8] *See, e.g.*, Val Walton, *Group Asks Judge to Lift Sturgeon's Protection*, THE BIRMINGHAM NEWS, Sept. 23, 2005 (discussing the current status of litigation challenging the listing of the Alabama sturgeon as endangered).

[9] Four of the thirteen original cosponsors were from Arkansas, Mississippi, and South Carolina. *See infra* note 26. The combined delegations of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia voted in favor of final passage of H.R. 3824 by a margin of 114 in favor to 37 opposed, or 75 percent in favor.

for takings of private property, reform of the listing process, and an increased focus on voluntary conservation measures, among other things.[10] Nonetheless, much of the momentum for reforming the ESA during the 109th Congress has emerged from the western congressional delegations, where large tracts of public and private lands are saddled with ESA-based restrictions.[11]

Whether the ESA is a glowing success or an abject failure depends on whom you ask. Some, tending toward the environmentalist side, stress the Act's role in preventing the extinction of such charismatic megafauna as the bald eagle, as well as less celebrated species.[12] On the other hand, advocates of reform have criticized the Act's failure to achieve recovery with respect to the vast majority of listed species,[13] even as it restricts otherwise legal and economically productive activity and depresses property values.[14] Further, critics and supporters alike have complained that the Service has failed to use the best scientific information, and that the agency's decisions have been subjected to improper political influence.[15]

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[10] *See Full Committee Field Hearing of the House of Representatives Committee on Resources: Oversight Field Hearing on Lessons Learned Protecting and Restoring Wildlife in the Southern United States under the Endangered Species Act*, *available at* http://resourcescommittee.house.gov/archives/109/full/043005.htm (last visited Nov. 3, 2005).

[11] *See* Michael Doyle, *West vs. East on Endangered Species Reform*, THE FRESNO BEE, June 23, 2005, at B4 ("Western lawmakers are stacking the deck as they push for changes in a perennially controversial environmental law.").

[12] *E.g.,* Robert Bonnie, *Building on Success: Improving the Endangered Species Act,* at 4 (May 2005), *available at* http://www.environmentaldefense.org/documents /4466_Building %20on%20Success.pdf (writing, on behalf of Environmental Defense, "The bald eagle is an ESA success story"). On the other hand, it is widely noted, even among opponents of H.R. 3824, that the ban of the pesticide DDT had at least as much to do with increasing the numbers of this bird as any program or restriction under the ESA. *See, e.g.,* 151 CONG. REC. H8537 (daily ed. Sept. 29, 2005) (statement of Rep. Grijalva) ("The ban on DDT, which the EPA said posed unacceptable risks to the environment and human health, saved the bald eagle."); Bonnie at 1 ("Thanks to the 1973 banning of DDT . . . and the protection provided by the ESA, bald eagles have returned to America's skies."). The ban on DDT was a completely separate action that had nothing to do with the ESA. U.S. Envtl. Prot. Agency, *DDT Regulatory History: A Brief Survey (to 1975)* (July 1975), *available at* http://www.epa.gov/history/topics/ddt/02.htm.

[13] Richard W. Pombo, Report to the House Committee on Resources, *Implementation of the Endangered Species Act of 1973*, at 1-2 (May 2005).

[14] *E.g.,* Nat'l Ass'n of Home Builders, *Species and Habitat Protection*, *available at* http://www.nahb.org/generic.aspx?sectionID=215&genericContentID=3464 (last visited Nov. 8, 2005) ("The ESA requirements continue to result in severe economic impacts and hardships to private property owners and communities nationwide."); U.S. Chamber of Commerce, *Endangered Species Act*, *available at* http://www.uschamber.com/issues/index/regulatory/endangered.htm (last visited Nov. 8, 2005) (making the same claim).

[15] *Junk Science is the Law of the Land: Routine Censorship of Scientists is Endangering the Nation's Wildlife,* FRONTLINE NEWSLETTER (Apr. 7, 2005), *available at* http://www.nahb.org/generic.aspx?sectionID=215&genericContentID= 3464 (last visited Nov. 8, 2005); Earthjustice, *Science and the Law: Protections for Endangered Species Depend on Both*, *available at* http://www.earthjustice.org/policy/pdf/science_and_the_law_ 3_30_05.pdf (last visited Nov. 8, 2005) (expressing concern for manipulation of scientific information for

It is against this backdrop that the first attempt at meaningful reform of the ESA since 1997 occurred this year. On September 29, 2005, the U.S. House of Representatives voted in favor of H.R. 3824, the Threatened and Endangered Species Recovery Act of 2005 ("TESRA" or "H.R. 3824").[16] This legislation, if enacted, would be the first amendment to the ESA since 2003[17] and the first reauthorization and set of extensive amendments since 1988.[18]

Part II of this article memorializes the process leading to House passage of H.R. 3824. Part III describes and briefly analyzes the particularly important revisions proposed by H.R. 3824, and Part IV discusses the prospects for Senate consideration and ultimate enactment of legislation to amend and reauthorize the ESA. Finally, Part V concludes with an analysis of the strengths and weaknesses of H.R. 3824, and suggests issues of concern and possible courses of action as the legislative process continues in the Senate.

## II. CONSIDERATION AND APPROVAL OF H.R.3824

This latest attempt to reform the ESA began in early 2005, and H.R. 3824 moved rapidly through the House of Representatives upon introduction. In an eleven-day period in September, the bill was introduced, marked up and amended by the Resources Committee, and approved by the full House. This portion of the article describes the process leading to House passage of the bill.

### *A. Activity Leading to Introduction of Legislation*

Beginning in March and for several months thereafter, Rep. Richard Pombo (R-CA), Chairman of the House Resources Committee, and his staff prepared draft legislation, which initiated this

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political purposes); M. Reed Hopper, *Endangered Species Act Reform Project*, *available at* http://www. pacificlegal.org/view_SpecialProjects.asp?iID=18&sTitle=%3Cb%3E Endangered+Species+Act+Reform+Project%3C%2Fb%3E (last visited Nov. 8, 2005) (noting, on behalf of a conservative advocacy organization, that "environmental policy is often based on politically motivated pressure from environmental activists and federal agencies trying to justify their budgets").

[16] A line-by-line analysis of the changes to the ESA proposed by H.R. 3824 is available online. *See* Bill Satterfield et al., *H.R. 3824: The Threatened & Endangered Species Recovery Act of 2005 – Changes in Existing Law*, *available at* http://www.balch.com/ resources/details.cfm?ID=279 (last visited Nov. 3, 2005).

[17] Pub. L. No. 108-136, § 318, 117 Stat. 1392, 1433 (2003).

[18] Pub. L. No. 100-478, 102 Stat. 2306 (1988). A reform effort in the United States Senate in 1997 led to the introduction of S. 1180, the so-called Kempthorne-Chafee bill, which was voted out of committee, but the full Senate took no further action on the bill. *See* Ike Sugg, *Endangered Species Reform Dangers*, THE WASHINGTON TIMES, Nov. 10, 1997, at A14.

most recent effort to reauthorize and amend the ESA.[19] As part of that effort, the Committee conducted a general hearing regarding ESA implementation in Jackson, Mississippi, on April 30, 2005, and another hearing more narrowly focused on a petition to list the Eastern oyster on July 19, 2005.[20] The Committee has held scores of hearings – according to Chairman Pombo, more than fifty – since authorization for the Act expired in 1992.[21]

The first draft of House ESA reform legislation was a seventy-three page "staff discussion draft" of TESRA, dated June 17, 2005. Among the provisions of the discussion draft was a proposed repeal of critical habitat requirements, which was the first indication of the sweeping reform that TESRA signaled.[22] Meanwhile, Chairman Pombo and his staff negotiated with Rep. Nick Rahall (D-WV), ranking minority member of the Committee, in an effort to reach a bipartisan consensus.[23] While Mr. Rahall ultimately did not support TESRA, the Democratic staff contributed significantly to the text of the bill prior to its introduction.[24]

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[19] Chairman Pombo has worked actively on the ESA since his first term in Congress, which began in 1993. For example, he introduced his first bill proposing amendment of the ESA on March 8, 1994. *See* H.R. 3978, 103d Cong. (1994).

[20] *Potential Listing of the Eastern Oyster Under the Endangered Species Act: Hearing Before the House Comm. on Resources*, *109th Cong.*, *available at* http://resources committee.house.gov/archives/109/full/index.htm (last visited Nov. 10, 2005). Mr. Don Waldon, Administrator of the Tennessee-Tombigbee Waterway Development Authority, testified at the field hearing in Mississippi. Among those submitting written testimony were Dan Warren of Southern Company and Dr. Mike Howell, Professor of Biology from Samford University in Birmingham. Others testifying included state wildlife officials, an employee of the Army Corps of Engineers, the executive director of a prominent environmental group, and various industry representatives.

[21] 151 CONG. REC. H8524 (daily ed. Sept. 29, 2005) (statement of Rep. Pombo).

[22] TESRA's repeal of critical habitat provisions would also remove the requirement for the Service, absent extraordinary circumstances, to analyze the economic and national security impacts concurrently with the listing decision. *See* 16 U.S.C. § 1533(a)(3) & (b)(2) (2005) (requiring critical habitat designation occur concurrently with a listing decision unless such habitat is not determinable or it is not prudent to do so, and requiring consideration of "the economic impact, the impact on national security, and any other relevant impact" of designating critical habitat). On July 12, 2005, the seven member Alabama House delegation signed a letter to Chairman Pombo expressing concern about the removal of the impact analysis requirement. Letter from Rep. Terry Everett et al. to the Honorable Richard Pombo (July 12, 2005). As discussed *infra*, H.R. 3824 (as passed by the House) includes a provision requiring the Service to analyze the economic and national security impacts of a listing decision.

[23] *See* 151 CONG. REC. H8535-36 (daily ed. Sept. 29, 2005) (statement of Rep. Rahall) (describing the process of negotiations as consuming "several months").

[24] One proponent of the bill stated that about 90 percent of the bill was drafted by Democratic staff. 151 CONG. REC. H8523 (daily ed. Sept. 29, 2005) (statement of Rep. Cardoza). Mr. Rahall characterized the "90 percent" figure as unfair, and he cited particular items in the manager's amendment that he opposed, but did not dispute the fact of significant Democratic contributions to the text of the bill. *Id.* at H8561-62 (statement of Rep. Rahall).

On Monday, September 19, 2005, Chairman Pombo's office made available a final draft of the proposed legislation. The draft was dated September 17 and measured seventy-four pages. Later that day, Chairman Pombo and thirteen cosponsors introduced the draft legislation as H.R. 3824,[25] beginning an intensive, eleven-day effort to introduce, markup, and secure House passage of TESRA.[26]

### *B. Committee Consideration*

The House Resources Committee held a "legislative hearing" on H.R. 3824 on Wednesday, September 21, 2005. The Bush Administration did not provide a formal position on the bill at that time, citing the short time since introduction.[27] On Thursday, September 22, the Committee held a markup and considered numerous amendments.[28] During the markup, Rep. John Peterson (R-PA) offered an amendment on behalf of the Alabama delegation that would have required an impact analysis at the time of listing.[29] Based on an assurance from Chairman Pombo, supported by Mr. Rahall, that they would support inclusion of a similar measure in the manager's amendment, Rep. Peterson withdrew the so-called "Alabama amendment." The Committee subsequently voted to report H.R. 3824 to the full House of Representatives by a vote of twenty-six yeas to twelve nays.[30] The Committee Report was filed, and the bill was reported to the full House on Tuesday evening, September 27.[31] By

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[25] Cosponsors upon introduction of H.R. 3824 were Reps. Cardoza (D-CA), Walden (R-OR), Berry (D-AR), Radanovich (R-CA), Ross (D-AR), Cubin (R-WY), McMorris (R-WA), Thompson (D-MS), Brown (R-SC), Baca (D-CA), Graves (R-MO), Costa (D-CA), and Gibbons (R-NV).

[26] Between September 19, 2005, and September 29, 2005, members of the House were presented with five versions of this proposed bill, in addition to the manager's amendment and a lengthy substitute amendment: (1) the September 17 draft; (2) H.R. 3824 as introduced (Sept. 19, 2005); (3) a "committee print" of the bill as marked up (Sept. 26, 2005), which was necessary to interpret the manager's amendment; (4) H.R. 3824 as reported (Sept. 27, 2005); and (5) H.R. 3824 as enrolled in the House after final passage (Sept. 29, 2005). Still another version of the bill was printed on September 30, 2005, for purposes of transmittal to the Senate, where it was referred to the Committee on Environment and Public Works. 151 CONG. REC. S10796 (daily ed. Sept. 30, 2005).

The dates and times of official actions relating to H.R. 3824 (that is, all actions other than circulations of drafts and unofficial committee prints) are available on Thomas, the Congressional web site, at http://thomas.loc.gov/cgi-bin/bdquery/z? d109:HR03824:@@@X (last visited Oct. 11, 2005).

[27] Testimony of the Honorable Craig Manson, Assistant Secretary of the Interior for Fish and Wildlife and Parks, before the House Committee on Resources (Sept. 21, 2005), *available at* http://resourcescommittee.house.gov/archives/109/testimony/2005/craigmanson.htm.

[28] *See* H.R. REP. NO. 109-237, at 25-32 (2005).

[29] H.R. REP. NO. 109-237, at 25-26 (2005).

[30] H.R. REP. NO. 109-237, at 33-34 (2005).

[31] H.R. REP. NO. 109-237 (2005).

that time, ninety-five Members of Congress, including the entire Alabama House delegation, had cosponsored the bill.

On the evening of Wednesday, September 28, the Rules Committee reported a rule providing for consideration of H.R. 3824, under which two amendments would be in order: a "manager's amendment" to be offered by Chairman Pombo, and a "substitute amendment" (meaning that its text would completely replace that of the underlying bill) offered by Reps. George Miller (D-CA), Boehlert (R-CA), Dingell (D-MI), Gilchrest (R-MD), Dicks (D-WA), Saxton (R-NJ), Tauscher (D-CA), and Kirk (R-IL).[32] The manager's amendment included, among other items, a provision requiring an impact analysis at the time of listing in response to the concerns expressed by the Alabama delegation.[33] The Miller substitute amendment did not include the impact analysis requirement.

### *C. Floor Consideration and Passage*

Consideration of H.R. 3824 began on the floor of the House of Representatives in the late morning of September 29.[34] On that day, the Administration released a statement supporting passage of the bill, while also expressing reservations about certain provisions.[35] The House first considered the rule governing consideration of H.R. 3824. After roughly an hour of debate, the rule passed by a roll call vote of 252 yeas and 171 nays.[36] At approximately 1:00 P.M., the House began consideration of H.R. 3824 and engaged in several hours of debate.[37] Soon after 4:30 P.M., the House voted by a margin of 206 yeas and 216 nays to reject the substitute amendment.[38] Shortly thereafter, the House agreed to the manager's amendment by voice vote. After additional debate, the House voted to approve H.R. 3824 with 229 votes in favor (including 36 Democrats) and 193 against

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[32] H.R. Res. 470, 109th Cong. (2005); H.R. REP. NO. 109-240, at 2 (2005).

[33] H.R. REP. NO. 109-240, at 3 (2005).

[34] 151 CONG. REC. H8518 (daily ed. Sept. 29, 2005) (noting a time of 10:30 shortly after the beginning of consideration of H.R. Res. 470).

[35] Office of Management and Budget, Statement of Administration Policy: H.R. 3824 – Threatened and Endangered Species Recovery Act of 2005 (Sept. 29, 2005). This document expressed concerns about the budgetary impact and lack of administrative discretion with respect to recovery agreements, various deadlines, and the conservation aid program for private property owners. The document also expressed the view that the proposed "jeopardy" definition in the bill would lead to litigation and "further divert agency resources from conservation purposes."

[36] 151 CONG. REC. H8528-29 (daily ed. Sept. 29, 2005).

[37] 151 CONG. REC. H8535-82 (daily ed. Sept. 29, 2005).

[38] 151 CONG. REC. H8582-83 (daily ed. Sept. 29, 2005) (roll call vote no. 505).

(including 34 Republicans).[39] Members were allowed to revise and extend their remarks, and a number of members placed speeches in the "extension of remarks" section of the *Congressional Record* on October 3, 6, and 7, 2005.[40]

## III. AN ANALYSIS OF MAJOR REVISIONS IN H.R. 3824

H.R. 3824 makes substantial changes to the Endangered Species Act. This portion of the article attempts to identify the major revisions in this legislation, focusing on those issues that have generally been identified as issues of importance in the Southeast.

### *A. Moving Toward Recovery*

A central justification for reforming the ESA is its apparent failure to result in the recovery of threatened or endangered species. As one commentator has explained: "Listing is not supposed to be forever. The goal of the ESA is to help a species recover so that it is no longer in danger of extinction and no longer in need of the law's protections."[41] While over 1,200 species are currently listed as threatened or endangered species, only ten domestic species have been delisted due to recovery.[42] Section 4(f) of the ESA requires the Service to develop recovery plans for each listed species that include "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list."[43] These recovery plans, however, are seldom developed until many years after the final listing of the species.[44] In fact, the ESA does not require the Service to establish recovery objectives at the time a listing decision is made.

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[39] 151 CONG. REC. H8583-84 (daily ed. Sept. 29, 2005) (roll call vote no. 506). All seven members of the Alabama delegation voted in favor of the rule providing for consideration of H.R. 3824, against the substitute amendment, and in favor of final passage of H.R. 3824. *See supra* note 9.

[40] 151 CONG. REC. E2003-04 (daily ed. Oct. 3, 2005), E2015-17, 2020-21, 2028, 2042 (daily ed. Oct. 6, 2005), E2048, E2052-53, E2055, E2056, E2057-58, E2066, E2071-72, E2076 (daily ed. Oct. 7, 2005).

[41] JOHN C. NAGLE & J.B. RUHL, THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT 153 (2002).

[42] *See* Richard W. Pombo, Report to the House Committee on Resources, *Implementation of the Endangered Species Act of 1973*, at 2 (May 2005).

[43] 16 U.S.C. § 1533(f) (2005).

[44] *See* Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENVTL. L. 483, 502 (2004) (explaining that in light of the "ESA's ultimate goal of actually improving the status of listed species rather than merely retarding or halting their slide toward extinction," Congress is likely to revisit the recovery plan provisions of the ESA in order to improve the likelihood of species recovery).

TESRA attempts to improve the recovery percentages for listed species by focusing resources on recovery planning. Specifically, TESRA requires development of a recovery plan within two years of the listing of a threatened or endangered species unless FWS finds that a recovery plan would not "promote the conservation and survival of the species."[45] FWS must develop regulations providing for the appointment of recovery teams, which are to comprise "sufficient representation from constituencies with a demonstrated direct interest in the species and its conservation or in the economic and social impacts of its conservation to ensure that the views of such constituencies will be considered in the development of the plan."[46] The intent is that "those most directly affected by the plans have a voice in their preparation."[47] Such participants may "supply new insights, particularly concerning land and water management constraints and opportunities . . . [which] will be particularly valuable in devising the recommended measures."[48] The regulations also are to explain the circumstances when FWS would not be required to appoint a recovery team, as well as public comment procedures on a decision not to appoint a recovery team.[49] The recovery plan itself must include:

- "[o]bjective, measurable criteria that, when met, would result in a determination . . . that the species . . . be" delisted or downlisted,[50] which must be developed by recovery team members with "relevant scientific expertise" and based on the best available scientific data;[51]
- "site-specific or other measures" to achieve these criteria, as well as "[e]stimates of the time required and the costs, including direct, indirect, and cumulative costs, to carry out" these measures;[52]
- "alternative measures" whenever possible, and an identification "among such alternative measures of comparable expected efficacy, the alternatives that are least costly;"[53] and

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[45] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(a)).

[46] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(d)(2)(A)(ii)). TESRA does not include a deadline for promulgation of these regulations.

[47] H.R. REP. NO. 109-237, at 41 (2003).

[48] H.R. REP. NO. 109-237, at 41 (2003).

[49] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(d)(2)(D)).

[50] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(A)).

[51] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(B)).

[52] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(A)).

[53] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(D)(ii)).

- "[a]n identification of those specific areas that are of special value to the conservation of the species."[54]

As noted above, H.R. 3824 repeals the ESA's present critical habitat provisions. TESRA's new identification of "areas of special value" in the recovery planning process is the nearest approximation to critical habitat under H.R. 3824. However, the designation of such areas carries no regulatory significance comparable to the requirement of current law to consider the effects of a proposed federal action on critical habitat during consultation under ESA Section 7. According to the House Resources Committee report, such areas "are not to be identified for the regulatory purposes that accompanied critical habitat. Rather their identification should inform, but not dictate, other decisions under the ESA."[55]

The Committee Report emphasizes that recovery plans remain, as under current law, guidance documents lacking in direct regulatory force and authority.[56] According to the report, "recovery plans are intended to inform, but not dictate, relevant decision making under the ESA."[57] However, "they can have binding effect if a federal agency decides to adopt all or part of any specific plans . . . or if the nonfederal entities or landowners voluntarily choose to adopt such provisions in cooperative agreements, habitat conservation plans, safe harbor agreements, etc."[58]

TESRA authorizes "species recovery agreements" of terms of not less than five years, which are available for those who own or control land,[59] and "species conservation contract agreements" of terms of ten, twenty, or thirty years for land owners only.[60] Such agreements may include "annual payments or . . . other compensation" to a party to such an agreement, subject to the availability of appropriations.[61]

### *B. Compensation for Private Land Owners*

Plaintiffs across the country have filed suit asking federal and state courts to grant them compensation for the loss of property rights

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[54] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(A)).
[55] H.R. REP. NO. 109-237, at 40 (2005).
[56] H.R. REP. NO. 109-237, at 41-42 (2005).
[57] H.R. REP. NO. 109-237, at 41 (2005).
[58] H.R. REP. NO. 109-237, at 42 (2005).
[59] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)(2)(A)).
[60] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)(3)(A)).
[61] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)(3)).

or revenue due to regulatory restrictions imposed under the ESA.[62] The "threat of regulatory deprivation of development rights looms on the horizon anytime an endangered or threatened species is identified on private property."[63] Nonetheless, courts have thus far been hesitant to grant compensation for regulatory takings that occur as a result of the ESA.[64] This has prompted a growing chorus of cries from the property rights movement for a statutory mechanism to compensate land owners when ESA-based constraints are imposed on private property.

TESRA adds a new section entitled "Private Property Conservation" to the ESA.[65] This new Section 13 requires (among other things) FWS to provide "financial conservation aid" to "alleviate the burden of conservation measures imposed upon private property owners."[66] The process begins with the land owner filing a written request for a determination, pursuant to a new ESA Section 10(k), that a proposed activity does not violate the "take" prohibition of ESA Section 9(a).[67] Upon receiving a determination from FWS that the proposal would violate Section 9(a), the land owner must forego the proposed use, submit a request for aid (i.e., compensation) to FWS within 180 days, and demonstrate that "the foregone use would be lawful under State and local law and . . . that the property owner has the means to undertake the proposed use."[68]

The amount of the financial aid is to equal "no less than the fair market value of the use that was proposed by the property owner."[69] "Fair market value" is defined as an amount equal to the "fair market

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[62] For example, in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), a South Florida land developer was prevented from developing his property because two different species of endangered rats lived on his property. More recently, in *Seiber v. United States*, No. 03-5010, 2004 WL 830172 (Fed. Cir. Apr. 19, 2004), state and federal regulators prohibited Oregon timber harvesters from logging a large parcel of property due to the presence of nesting habitat for the threatened northern spotted owl. Neither decision resulted in compensation to the private land owner.

[63] *See* Robert P. Fowler & Jeffrey H. Wood, *The Temporary Taking and Relevant Parcel Aspects of Regulatory Takings Claims under the Endangered Species Act*, ABA Public Lands & Resources Committee Newsletter (Aug. 2004), *available at* http://www.abanet.org/environ/committees/publiclands/newsletter/aug04/ publicland0804.pdf.

[64] *See* Seiber v. United States, No. 03-5010, 2004 WL 830172, at *9-12 (Fed. Cir. Apr. 19, 2004) (rejecting a constitutional takings claim because, among other things, the plaintiffs "did not lose all value in their parcel as a whole"). *See also* Library of Congress Congressional Research Office, *The Endangered Species Act and Claims of Property Rights "Takings": A Summary of the Court Decisions* (Mar. 10, 2003) (compiling "the court decisions in cases challenging ESA-based measures as a 'taking' of private property under the Fifth Amendment").

[65] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13).

[66] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(a)).

[67] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(d)(1)).

[68] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(d)(2)).

[69] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(d)(2)).

value of the foregone use of the affected portion of the private property," based on "what a willing buyer would pay to a willing seller in an open market."[70] The amount is to be determined by a pair of appraisers – one chosen by each party – or, if the two cannot agree, a third appraiser chosen mutually.[71] The government must make payment within 270 days, "unless there are unresolved questions regarding the fair market value" at that time.[72] Aid is to be provided pursuant to direct spending, meaning that it would *not* be subject to the annual appropriations process.[73]

Separately, H.R. 3824 also includes a new ESA Section 17 that would provide compensation for the loss of livestock caused by listed predators that have been reintroduced.[74] Unlike the compensation provisions described above, this mechanism is subject to the availability of annual appropriations.[75]

### *C. Best Science Standard*

Commentators have raised concerns about whether FWS is consistently employing the "best scientific and commercial data available" when listing species or making other decisions under the ESA.[76] TESRA introduces the term "best available scientific data,"

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[70] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(g)).

[71] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(g)).

[72] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(e)(1)).

[73] *See* H.R. Rep. No. 109-237, at 61 (2005) (reprinting the cost estimate provided by the Congressional Budget Office ("CBO")). CBO estimates the compensation section would cost less than $10 million over the first five years of implementation, due in part to the fact that it will take a couple of years to develop the program. *Id.* at 59. Even after the program matures, CBO estimates that costs will likely average "less than $20 million a year." *Id.* at 61. CBO took the position that "it would be difficult for landowners to receive aid for larger claims above $1 million . . . because most larger land-use projects would be ineligible to receive written determinations [of take liability]," *id.*, which is a prerequisite to seeking compensation. The CBO document found that "most aid payments eventually made by the government would be relatively small (often as little as a few thousand dollars) because the vast majority of aid requests would likely involve small parcels of land or some minor fraction ('affected portion') of larger tracts." *Id.* This estimate is in stark contrast to H.R. 3824 opponents' claims that costs associated with speculative claims could approach "billions of dollars" in new costs to the government. 151 CONG. REC. 2020, 2021 (daily ed. Oct. 6, 2005) (statement of Rep. Eshoo). Notably, criticism regarding speculative claims does not account for the requirement to demonstrate the lawfulness of the foregone use and the property owner's demonstration of the means to undertake that use. *Id.*

[74] H.R. 3824, 109th Cong. § 16 (Sept. 29, 2005) (proposed ESA § 17).

[75] H.R. 3824, 109th Cong. § 16 (Sept. 29, 2005) (proposed ESA § 17(d)).

[76] *See* Francesca Ortiz, *Candidate Conservation Agreements as a Devolutionary Response to Extinction*, 33 GA. L. REV. 413, 442 (stating: "The best science may raise questions as to its objectivity and reliability. Who collected the data? Who interpreted it? Was there any underlying agenda other than pure science? What assumptions have been made? Have study results been corroborated? Are there conflicting conclusions? The list of questions can go on, but the point is that numerous factors impact all scientific studies; data collected may be incomplete or inaccurate, and, even if accurate, different people can interpret the data in

which is defined as "scientific data, regardless of source, that are available to the Secretary at the time of a decision or action for which such data are required by this Act and that the Secretary determines are the most accurate, reliable, and relevant for use in that decision or action."[77] TESRA requires the Secretary to adopt regulations establishing criteria for this standard within one year of enactment, and these regulations must assure compliance with the Information Quality Act and assure that data "consists [sic] of empirical data" and "is [sic] found in sources that have been subject to peer review by qualified individuals recommended by the National Academy of Sciences to serve as independent reviewers for a covered action in a generally acceptable manner."[78]

TESRA does not include a provision specifically mandating the use of genetic information or analysis. However, in a statement that appeared in the *Congressional Record* on October 6, 2005, Chairman Pombo stated that "the Committee expects that [FWS] will take advantage of developments that have occurred in genetics testing and other technical advances in the years since enactment of the original Endangered Species Act, to make the most scientifically sound listing decisions possible."[79]

### *D. Open & Sound Decision-Making Process*

Listing decisions are based on factors that have a direct bearing on the status of the species in the wild – for example, changes to the species' habitat, overutilization of the species, or the adequacy of existing conservation programs.[80] Thus, the quality of the scientific information used by FWS to evaluate these factors and to make other ESA-related decisions is critical. However, businesses and environmental groups alike have alleged in various instances that the scientific information on which listing decisions are based is subject to political influence, and that FWS has failed to consider important information that was available to it.[81]

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different ways. Furthermore, information that is considered accurate today may prove inaccurate as new information comes to light."). Not everyone is convinced that comprehensive changes to the best science standard are necessary. *See* GAO, *Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations*, at 9-26 (Aug. 2003). Others have asked whether scientific data alone should determine whether a species should be listed. *See* Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1036 (1997).

[77] H.R. 3824, 109th Cong. § 3(a) (Sept. 29, 2005) (proposed ESA § 3(2)(A)).

[78] H.R. 3824, 109th Cong. § 3(a) (Sept. 29, 2005) (proposed ESA § 3(2)(B)&(C)).

[79] 151 CONG. REC. 2028 (daily ed. Oct. 6, 2005) (statement of Rep. Pombo).

[80] ESA § 4(a)(1). 16 U.S.C. § 1533(a)(1).

[81] *See supra* note 16.

TESRA provides a new definition of "best available scientific data" which requires FWS to issue regulations, which "assure" that data are "found in sources that have been subject to peer review by qualified individuals recommended by the National Academy of Sciences to serve as independent reviewers for a covered action in a generally acceptable manner."[82] FWS must use the "best available scientific data" for listing decisions,[83] as well as for preparing recovery plans[84] and biological opinions.[85]

Further, TESRA includes several measures intended to provide greater public access to information used by FWS in listing determinations. Under TESRA, listing petitions (which "any person" may submit to FWS to request a new listing determination) must include "a copy of all information cited in the petition."[86] FWS must maintain a public website containing a "complete record" of all information concerning listing determinations or revisions.[87] In addition, TESRA includes a new ESA Section 14 which requires FWS to maintain a public website with final and proposed listings; five-year species status reviews; draft and final recovery plans; biennial reports to Congress on the status of species; annual reports to Congress on conservation costs; and data included in the reports to Congress on the status of species and conservation costs.[88] However, at least one provision in TESRA seems to run counter to the concept of greater openness in the listing process; namely, TESRA's recovery planning provisions exempt activities of recovery planning teams from the Federal Advisory Committee Act.[89]

### *E. Impact of State Programs on Listing Decisions*

Some have recommended that the ESA give greater weight to state-sponsored conservation programs as an alternative to federal regulation.[90] TESRA adds a provision expressly including state

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[82] H.R. 3824, 109th Cong. § 3(a) (Sept. 29, 2005) (proposed ESA § 3(a)(2)(A), (C)).
[83] H.R. 3824, 109th Cong. § 4(b) (Sept. 29, 2005) (proposed ESA § 4(b)(1)(A)).
[84] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)).
[85] H.R. 3824, 109th Cong. § 11(a)(2)(C) (Sept. 29, 2005) (proposed ESA § 7(a)(2)).
[86] H.R. 3824, 109th Cong. § 4(a) (Sept. 29, 2005) (proposed ESA § 4(b)(2)(A)).
[87] H.R. 3824, 109th Cong. § 6(b)(1)(A)(v) (Sept. 29, 2005) (proposed ESA § 4(b)(4)(A)(iii)).
[88] H.R. 3824, 109th Cong. § 14 (Sept. 29, 2005) (proposed ESA § 14).
[89] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(d)(3)).
[90] *See, e.g.*, U.S. House of Representatives Committee on Resources, Testimony of Donald Waldon, Administrator of the Alabama-Tombigbee Waterway Development Authority, at 9-11 (Apr. 30, 2005), *available at* http://resourcescommittee.house.gov/archives/109/testimony/2005/donaldwaldon.pdf (last visited Nov. 3, 2005) (arguing that "the Service should begin giving greater weight to state-sponsored conservation plans as a means of providing the species with the greatest chance of recovery without triggering the ESA's costly constraints").

conservation efforts (and those of other federal agencies and nations) among the "regulatory mechanisms" which FWS must consider in making a listing determination.[91] In addition, TESRA authorizes FWS to enter into conservation agreements for candidate species and other non-listed species.[92] Once a state program is in effect pursuant to such a conservation agreement, any incidental take permit issued for the State plan remains in effect for the State and any private land owners enrolled in the program if the species is later listed.[93] FWS may suspend the conservation agreement authorizing the State program only after consultation with the Governor, upon finding that it "no longer constitutes an adequate and active program for the conservation of [listed] species."[94] FWS may terminate any such agreement after consulting with the Governor if, upon concluding a Section 7 consultation, FWS finds that it would likely jeopardize the continued existence of the species, or if the program is suspended and not revised to address its deficiencies within 180 days.[95]

### *F. Incentives for Voluntary Conservation Efforts*

A growing consensus across political and ideological boundaries has emerged in favor of creating more incentives for private land owners to participate in the conservation of threatened and endangered species.[96] This is even more critical in the South, where there is relatively little federal land (and, therefore, relatively little habitat for listed species on federal land) compared to the West. Yet the ESA offers surprisingly little reason for a private land owner to implement conservation measures. If anything, the Act discourages such activity by imposing strict federal regulation on the owner of land that happens to serve as habitat for listed species.

In response, TESRA takes a number of steps to make habitat conservation plans ("HCPs") more manageable and, therefore, more attractive for the land owner. The bill codifies "no surprises" and permit revocation measures similar to those found in regulations that

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[91] H.R. 3824, 109th Cong. § 4(a) (Sept. 29, 2005) (proposed ESA § 4(a)(1)(D)).

[92] H.R. 3824, 109th Cong. § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)).

[93] H.R. 3824, 109th Cong. § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)).

[94] H.R. 3824, 109th Cong. § 10(3)(C) (Sept. 29, 2005) (proposed ESA § 6(e)(3)).

[95] H.R. 3824, 109th Cong. § 10(3)(C) (Sept. 29, 2005) (proposed ESA § 6(e)(4)).

[96] *See, e.g.,* American Farm Bureau Federation, *Better Endangered Species Incentives Needed* (Sept. 15, 2005), *available at* http://www.fb.org/news/nr/nr2005 /nr0915.html (last visited Nov. 8, 2005); Environmental Defense, *Farm, Timber, Environmental, Scientific, and Other Interests Praise Endangered Species "Safe Harbor" Agreements* (Jan. 15, 2002), *available at* http://www.environmentaldefense. org/article.cfm?contentid=711 (last visited Nov. 8, 2005) (noting support from a wide variety of interest groups for safe harbor agreements).

have been promulgated by FWS.[97] New ESA Section 10(a)(4) provides that FWS may not require any permit holder who is in compliance with an HCP to "adopt any new minimization, mitigation, or other measure with respect to any species adequately covered by the permit," except as provided in the permit itself.[98] FWS may require additional measures to respond to "changed circumstances not identified in the permit" only if such measures "do not involve the commitment of any additional land, water, or financial compensation" beyond that accounted for in the permit itself.[99] Under TESRA, FWS may revoke a permit due to changed circumstances only if: (1) the permitted activities are inconsistent with the goals for the species that are to be included in the HCP itself; (2) the Secretary provides sixty days notice; and (3) "the Secretary is unable to, and the permittee chooses not to, remedy the condition causing such inconsistency."[100]

TESRA also requires that measures in an HCP to "reduce or offset the impacts of incidental taking" be "roughly proportional in extent to the impact of the incidental taking."[101] This provision, however, expressly allows "greater than acre-for-acre mitigation where necessary to address the extent" of the impacts of the take.[102] Such measures must be "capable of successful implementation and . . . consistent with the objective of the applicant to the greatest extent possible."[103] Committee Report language explains that the "rough proportionality" language is intended to codify a principle in the case of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), namely, "that government can only demand conditions on land use activity that are tailored to address the particular impacts that will accrue from the

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[97] 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5) (2004) (no surprises); 69 Fed. Reg. 71,723, 71,731 (Dec. 10, 2004) (promulgating permit revocation provisions to be codified at 50 C.F.R. §§ 17.22(b)(8), 17.32(b)(8)). Both sets of regulations have already been the subject of litigation, but this litigation has, thus far, addressed only procedural issues and not the content of the regulations. Spirit of the Sage Council v. Norton, 411 F.3d 225, 227-29 (D.C. Cir. 2005) (describing the history of the litigation). Various environmental groups remain opposed to the regulations. *E.g.*, Center for Biological Diversity, An Analysis of H.R. 3824, at 4 (undated), *available at* http://www.biologicaldiversity.org/swcbd/Programs/policy/esa/CBD-ANALYSIS.pdf (last visited Nov. 11, 2005) ("The Pombo bill codifies the 'No Surprises' policy--currently a highly controversial administrative regulation that has been widely condemned by scientists"). Therefore, further litigation challenging these regulations remains likely.

[98] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(4)).

[99] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(4)(C)).

[100] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(5)(B)).

[101] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(3)). The same "proportionality" requirement applies with respect to "reasonable and prudent measures" included in an incidental take statement issued in the course of a Section 7 consultation.

[102] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(3)).

[103] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(3)).

project under review."[104] Further, FWS cannot rely on conclusory statements regarding hypothetical impacts of a project as justification to impose excessive conditions on private land use activities to address the incidental take of species. In short, the government must develop a sufficient administrative record to justify "terms and conditions" under this standard.[105]

TESRA does not specifically authorize candidate conservation agreements or safe harbor agreements, although FWS regulations implementing both of these types of agreements remain in effect.[106] In addition, the Resources Committee report acknowledges these regulations,[107] which arguably constitutes tacit Congressional approval of these regulatory innovations. Further, as noted above, the bill allows FWS to approve State programs covering non-listed species.[108] The incidental take statement for such programs continues to apply to the State and private land owners enrolled in the State program if a covered species is listed.[109]

In addition, TESRA includes measures that may provide alternative means to pursue actions that, under current law, often require incidental take permits. The bill authorizes FWS to enter into "species recovery agreements" (minimum term of five years) and "species conservation contract agreements" (ten, twenty, or thirty year terms) with private landowners who agree to "protect and restore habitat for covered species."[110] Funding to implement these conservation measures is authorized (subject to the availability of appropriations) to varying extents under these agreement mechanisms.[111] Such an agreement is deemed to be a permit under ESA Section 10(a),[112] which means that under other provisions of TESRA, it is subject to "no surprises" protections[113] and not subject to further consultation under ESA Section 7.[114]

Finally, under TESRA, property owners may request written determinations from the Secretary to determine if a proposed use will comply with Section 9.[115] This is the same process that, as discussed

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[104] H.R. REP. NO. 109-237, at 46 (2005).
[105] H.R. REP. NO. 109-237, at 46 (2005).
[106] 50 C.F.R. § 17.22(c) & (d) (2004).
[107] H.R. REP. NO. 109-237, at 42 (2005).
[108] H.R. 3824, 109th Cong. § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)).
[109] H.R. 3824, 109th Cong. § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)).
[110] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)).
[111] *See* H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA §§ 5(m)(1), 5(m)(2)(B)(iv), 5(m)(3)(E)).
[112] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)(8)).
[113] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(4)).
[114] H.R. 3824, 109th Cong. § 11(a)(4) (Sept. 29, 2005) (proposed ESA § 7(a)(6)).
[115] H.R. 3824, 109th Cong. § 12(d) (Sept. 29, 2005) (proposed ESA § 10(k)).

in Part III.B above, provides the basis for seeking compensation under new ESA Section 13.[116]

### *G. Changes to Section 7 Consultation*

TESRA makes several changes impacting Section 7 consultation under the ESA. First, because TESRA repeals critical habitat provisions, it changes the standard applicable to consultations under Section 7(a)(2). Under current law, federal agencies must consult with FWS to "insure" that a proposed action does not jeopardize the continued existence of a species or destroy or adversely modify designated critical habitat.[117] Under TESRA, however, federal agencies are only required to meet the "jeopardy" standard.[118] While FWS has long maintained that the distinction between the two standards is insignificant, recent case law has begun to recognize a difference. The theory under this trend is that avoiding jeopardy imposes only a "survival" standard, but prevention of adverse critical habitat modification requires consideration of the species' opportunity for "recovery" (through the inclusion of the word "conservation" in the definition of "critical habitat").[119] Elimination of critical habitat thus preempts any effort by the courts to use critical habitat to impose more onerous measures in a biological opinion.

Second, TESRA provides statutory authorization for the practice of "informal" consultations, which FWS has frequently employed via regulations first issued in 1986.[120] TESRA also authorizes FWS to implement other alternative consultation procedures, that is, "specific agency actions or categories of agency actions that may be determined to meet the standards of [ESA section 7(a)(2)]." However, the Committee Report states that "the same steps—consultation, biological opinion, Secretarial suggestion of or concurrence in a reasonable and prudent alternative—would have to occur" even under any alternative procedures that FWS may develop.[121]

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[116] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(d)(1)).

[117] 16 U.S.C. § 1536(a)(2) (2005).

[118] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 7(a)(2)).

[119] *E.g.,* Gifford Pinchot Task Force v. FWS, 378 F.3d 1059, 1070 (10th Cir. 2004) (criticizing FWS' regulations defining "critical habitat" for "fail[ing] to provide protection of habitat . . . for species' recovery").

[120] H.R. 3824, 109th Cong. § 11(a)(2)(D) (Sept. 29, 2005) (proposed ESA § 7(a)(2)(B)). *See also* H.R. REP. NO. 109-237, at 44-45 (2005) (explaining the history of the relevant regulations).

[121] *See* H.R. REP. NO. 109-237, at 45 (2005).

Third, a new Section 7(a)(5) provides that the "jeopardy" analysis "shall consider only the effects of any agency action that are distinct from a baseline of all effects upon the relevant species that have occurred or are occurring prior to the action."[122] Committee Report language elaborates on the intent of this provision:

> The ESA section 7(a) analysis is to determine the incremental effects of a proposed Federal agency action. Federal actions such as the ongoing operation of existing facilities cannot be expected to compensate for past activities or events in many cases occurring long before the ESA was originally enacted. Thus, this section provides that a jeopardy finding under ESA section 7(a) as amended would have to be based only on the incremental effects of the proposed action and not on pre-existing conditions.[123]

One area where this provision could have a substantial effect is in proceedings before the Federal Energy Regulatory Commission ("FERC") regarding hydropower facilities that predate enactment of the ESA. For purposes of its own environmental reviews under NEPA and the Federal Power Act, FERC uses a baseline that accounts for the existence of the dam.[124] However, FERC has also deferred to the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration ("NOAA Fisheries") in the decision to employ a baseline reflecting pre-dam conditions for purposes of a biological opinion under ESA Section 7.[125] Such an interpretation would be precluded under this provision in TESRA.

TESRA includes several other changes to section 7 consultation worth noting. For example, TESRA includes a new ESA Section 7(a)(6) providing that consultation is not required for actions that implement or are consistent with a permit issued under ESA Section 10, or any HCP or other agreement associated with the

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[122] H.R. 3824, 109th Cong. § 11(a)(4) (Sept. 29, 2005) (proposed ESA § 7(a)(5)).

[123] H.R. Rep. No. 109-237, at 45 (2005).

[124] *E.g.,* Pub. Util. Dist. No. 1 of Chelan County, Wash., 107 FERC ¶ 61,280, at PP 60-61 (2004). FERC's position on this point has withstood judicial review. Am. Rivers v. FERC, 201 F.3d 1186, 1199 (9th Cir. 2000).

[125] Pacific Gas & Elec. Co., 107 FERC ¶ 61,232, at PP 19-23, *reh'g denied,* 108 FERC ¶ 61,266 (2004). Under current law, NOAA Fisheries administers the ESA for ocean-going and anadromous species. *See* 50 C.F.R. §§ 223.102, 224.101 (2004). H.R. 3824 would eliminate the authority of NOAA Fisheries under the ESA and consolidates ESA administration for all species under FWS, effective one year from the date of enactment. *See* H.R. 3824, 109th Cong. § 21 (Sept. 29, 2005).

permit.[126] Also, TESRA includes provisions expressly requiring FWS to consider comments from the action agency and the permit applicant and to cooperate with both the action agency and the permit applicant in the development of reasonable and prudent alternatives.[127] Finally, TESRA imposes limitations on the reasonable and prudent measures that FWS may impose in section 7 consultation. Under TESRA, the reasonable and prudent measures which FWS may impose in the incidental take statement must be "roughly proportional to the impact" of the take.[128] Further, where "various terms and conditions are available" to implement such measures, the terms and conditions must be "capable of successful implementation" and "consistent with the objectives of the Federal agency and the permit or license applicant … to the greatest extent possible."[129]

### *H. Economic & National Security Impact Analysis*

TESRA repeals the ESA's provisions relating to critical habitat, removing the requirement that FWS conduct an economic and national security impact analysis at the time it designates critical habitat, which is generally supposed to be completed concurrently with the listing process.[130] However, in response to concerns raised by the Alabama delegation, the bill as passed by the House includes an impact analysis requirement at the time of listing. Specifically, TESRA requires FWS to prepare, concurrently with the listing decision, "an analysis of (i) the economic impact and benefit of that determination; (ii) the impact and benefit on national security of that determination; and (iii) any other relevant impact and benefit of that determination."[131]

A statement by Chairman Pombo explaining this requirement appeared in the *Congressional Record* on October 6, 2005. According to Chairman Pombo, the Resources Committee "expects the impact analyses under H.R. 3824 will be better and more useful than those prepared under current law," because TESRA "expand[s] the scope of the analysis to include all consequences of the listing (rather than those

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[126] H.R. 3824, 109th Cong. § 11(a)(4) (Sept. 29, 2005) (proposed ESA § 7(a)(6)).

[127] H.R. 3824, 109th Cong. § 11(b)(3)(B) (Sept. 29, 2005) (proposed ESA § 7(b)(3)(A)).

[128] H.R. 3824, 109th Cong. § 11(b)(5) (Sept. 29, 2005) (proposed ESA § 7(b)(5)(A)).

[129] H.R. 3824, 109th Cong. § 11(b)(5) (Sept. 29, 2005) (proposed ESA § 7(b)(5)(B)). As noted above, the "roughly proportional" language has the same meaning for reasonable and prudent measures as for a Section 10(a) permit. H.R. REP. NO. 109-237, at 46 (2005); *see supra* at 13 (noting that the "roughly proportional" requirement has the same meaning for reasonable and prudent measures as for incidental take permits).

[130] H.R. 3824, 109th Cong. § 5(a) (Sept. 29, 2005).

[131] H.R. 3824, 109th Cong. § 4(d) (Sept. 29, 2005) (proposed ESA § 4(a)(3), as redesignated by H.R. 3824 § 5(a)).

attributable to critical habitat designation)."[132] The analysis will provide "truly meaningful information concerning proposed listing decisions to all those affected, including individuals, corporations, property owners, state and local governments, the military services, and other Federal agencies."[133] Chairman Pombo also noted that "[i]t is expected that this opportunity for greater participation by all potentially affected parties at the front end of the listing process will provide additional assurance that [FWS] will adequately consider all relevant data associated with each proposal to list a species."[134]

### *I. Other Notable Provisions*

H.R. 3824 also included a number of other important measures that should be noted. For example, H.R. 3824 provides a national security exemption, which authorizes the President, "after consultation with the appropriate federal agency," to "exempt any act or omission" from the ESA if "necessary for national security."[135] Similarly, the bill includes an emergency exemption, which authorizes the President to "suspend the application of any provision of this Act in any area for which a major disaster is declared."[136] Even as it authorizes these exemptions, H.R. 3824 repeals provisions for the ESA Committee, which may authorize ESA exemptions, but only pursuant to a cumbersome and seldom-used process.[137] Commentators have noted the ineffectiveness of this Committee, which is commonly known as the "God Squad."[138]

Controversy has also surrounded the FWS's practice of listing "distinct population segments" of particular species, instead of listing the entire species population.[139] TESRA provides that the Secretary

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[132] 151 CONG. REC. E2028 (daily ed. Oct. 6, 2005) (statement of Rep. Pombo).

[133] *Id.*

[134] *Id.*

[135] H.R. 3824, 109th Cong. § 12(e) (Sept. 29, 2005) (proposed ESA § 10(l)).

[136] H.R. 3824, 109th Cong. § 12(f) (Sept. 29, 2005) (proposed ESA § 10(m)).

[137] H.R. 3824, 109th Cong. § 11(d)(1) (Sept. 29, 2005).

[138] *See* Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 146-47 (2004) (stating the "'God Squad' provision has had little effect because it is infrequently invoked, and even on the handful of occasions on which the Endangered Species Committee has been convened, it has never granted a wholesale exemption from the ESA's protections on the basis of cost-benefit analysis").

[139] H.R. REP. NO. 109-237, at 37 (2005). The House Resources Committee Report on H.R. 3824 explains as follows: "[I]n practice the 'Services have concluded that potential populations qualify as a [DPS] over 80 percent of the time.' . . . The Secretaries need clear direction and authority to limit the number of "distinct populations" that are found and listed. The historic overuse of that authority is diverting limited resources from more important ESA goals, is trivializing the ESA by protecting less-significant units, and is needlessly increasing the conflicts between the ESA and desired human land uses." *Id.*

should use the authority to list a distinct population segment "only sparingly."[140]

TESRA includes provisions, not codified in the ESA itself, to govern how the ESA interacts with certain other laws. Of particular interest to land owners in Florida, H.R. 3824 provides that Section 7 consultation is "equivalent to a section 101 incidental take authorization required under the Marine Mammal Protection Act of 1972," which should help streamline the permit process applicable to dock construction in Florida.[141] In addition, H.R. 3824 provides that, for a limited time not to exceed five years, any action by a federal or state agency or any "other person" pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") is deemed to be in compliance with the consultation requirement, the take prohibition, and the protective regulations for threatened species.[142] According to report language, the intent of this measure is to allow additional time for federal and state agencies to comply with newly promulgated regulations governing ESA compliance for FIFRA-related activities.[143]

Finally, changes are also made to the annual cost analysis that FWS prepares under current law.[144] TESRA expands the cost analysis to include the costs of state and local governments[145] and requires states to provide information on ESA-related costs as a condition of receiving funds under ESA section 6 in the next fiscal year.[146] Local governments are also encouraged to provide the information voluntarily.[147] The intent of the amendment is "to provide as comprehensive a picture of ESA expenditures as possible so that the societal commitment to endangered and threatened species conservation can be more accurately tracked."[148]

### *J. Measures Considered but Rejected*

Several proposed amendments to the ESA were considered but ultimately rejected. First, as introduced on September 19, 2005, H.R.

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(quoting Kate Geoffrey & Thomas Doyle, *Listing Distinct Population Segments of Endangered Species: Has It Gone Too Far?*, NAT. RESOURCES & ENV'T at 82, 84 (Fall 2001)).

[140] H.R. 3824, 109th Cong. § 4(a)(2) (Sept. 29, 2005) (proposed ESA § 4(a)(2)).

[141] H.R. 3824, 109th Cong. § 25 (Sept. 29, 2005).

[142] H.R. 3824, 109th Cong. § 20 (Sept. 29, 2005).

[143] H.R. REP. NO. 109-237, at 55 (2005).

[144] ESA § 18, 16 U.S.C. § 1544.

[145] H.R. 3824, 109th Cong. § 15(a) (Sept. 29, 2005) (proposed ESA § 16, as redesignated by H.R. 3824 § 16(2)).

[146] H.R. 3824, 109th Cong. § 15(b) (Sept. 29, 2005) (proposed ESA § 6(d)(3)).

[147] H.R. 3824, 109th Cong. § 15(a) (Sept. 29, 2005) (proposed ESA § 16(c), as redesignated by H.R. 3824 § 16(2)).

[148] H.R. REP. NO. 109-237, at 53 (2005).

3824 would have added a new definition of "jeopardize the continued existence," which read as follows:

> The term "jeopardize the continued existence" means, with respect to an agency action (as that term is defined in section 7(a)(2)), that the action reasonably would be expected to significantly impede, directly or indirectly, the conservation in the long-term of the species in the wild.[149]

The full implications of this language are not entirely clear. Nevertheless, the inclusion of the word "conservation" raised concerns among regulated entities that the definition would have imposed a more strenuous standard for the approval of a proposed federal action during consultation under ESA Section 7. The ESA defines that term as "the use of all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided pursuant to [the ESA] are no longer necessary."[150]

The Committee Report indicates that the inclusion of the word "long-term" was intended to facilitate activities causing only a short-term effect. Committee Report language explained: "A short-term impediment to conservation, no matter how significant, that has no lasting long-term effects would not support a jeopardy finding under the definition."[151] At the same time, however, requiring FWS to consider long-term effects could effectively broaden the analysis. For example, to determine the long-term effects of a proposal, it may be necessary to identify the cumulative effects of other actions, in order to

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[149] H.R. 3824, 109th Cong. § 3(c) (Sept. 19, 2005). This definition did not appear in the June 17th discussion draft, but rather appeared initially in H.R. 3824 as introduced. Remarks on the House floor indicate the provision was added with the support of, and possibly at the behest of, Rep. Nick Rahall, the ranking Democrat on the House Resources Committee. *See* 151 CONG. REC. H8536 (daily ed. Sept. 29, 2005) (statement of Rep. Rahall) ("For example, the manager's amendment abandons the definition of jeopardizing a species we agreed upon in committee."); *id.* at H8562 (statement of Rep. Rahall) ("One of the points that we had reached agreement on was that there was to be a recovery-based standard of determining when Federal agency actions jeopardize the continued existence of a species. The manager's amendment drops this crucial provision."). Rep. George Miller cited the subsequent deletion of this measure as one of the primary bases of his criticism of the bill. *See* 151 CONG. REC. H8581 (daily ed. Sept. 29, 2005) (statement of Rep. Miller). Mr. Pombo stated that the manager's amendment removed the definition to respond to the Administration's concerns about fostering excessive litigation. *See* 151 CONG. REC. H8581 (daily ed. Sept. 29, 2005) (statement of Rep. Pombo). *See also supra* at 6-7 (noting this as among the concerns included in the Administration's statement of position). The applicable provision of the manager's amendment is that which deletes lines 3-11 of page 4. 151 CONG. REC. H8560 (daily ed. Sept. 29, 2005).

[150] 16 U.S.C. § 1532(3) (2005).

[151] H.R. REP. NO. 109-237, at 36 (2005).

determine the relation, if any, between the proposal and other activities that can reasonably be expected to occur over time.[152]

In addition, H.R. 3824 originally proposed, but ultimately did not include, a provision restricting FWS's ability to apply the protective regulations of the ESA to threatened species. Under ESA Section 4(d), the "take" prohibition does not apply to threatened species automatically, but rather only if FWS issues "protective regulations."[153] In practice, however, FWS extends the "take" prohibition to threatened species across the board. As introduced, H.R. 3824 would have required FWS to provide a detailed statement "of the reason or reasons for applying any particular prohibition to the threatened species."[154] Under H.R. 3824, FWS would have been permitted to apply a protective regulation to more than one threatened species "only if the specific threats to, and specific biological conditions and needs of, the species are identical, or sufficiently similar, to warrant the application of identical prohibitions."[155] In other words, FWS would have been required to justify protective regulations on a species-specific basis, rather than extending the "take" prohibition to threatened species across the board. The House Resources Committee voted to strike this provision.[156]

Any comprehensive analysis of H.R. 3824 should also reference the substitute amendment offered by Rep. George Miller (D-CA) and others, which was defeated on the House floor. The substitute amendment largely followed the structure and content of

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[152] A reference to the long-term may be especially problematic for operators of hydropower facilities entering relicensing proceedings. FERC typically issues hydropower licenses for terms measuring in the decades. It is a top priority of licensees to obtain as much certainty as possible regarding license requirements at the time FERC issues the license. Without certainty, the license applicant cannot determine whether operation of the project will be economically viable. Negotiations on "reopener" clauses, allowing FERC to impose new requirements should circumstances change, can be among the most contentious issues in a relicensing proceeding. The "long-term" language may be interpreted as authorizing or even requiring FWS to insist on reserving the right to reexamine environmental conditions and impose new license conditions decades in the future, or to impose overly restrictive conditions to account conservatively for whatever might happen over a long period of time.

[153] 16 U.S.C. § 1533(d).

[154] H.R. 3824, 109th Cong. § 8 (Sept. 19, 2005) (proposed ESA § 4(d)(2)).

[155] H.R. 3824, 109th Cong. § 8 (Sept. 19, 2005) (proposed ESA § 4(d)(3)).

[156] The Resources Committee approved an amendment offered by Rep. Mark Udall (D-CO) to strike this language by voice vote. *See* H.R. REP. NO. 109-237, at 26 (2005). The Committee Report explained this action as follows: "An amendment striking [this section] was adopted when members of the Committee pointed out that the problem that section addressed was created by a single [FWS] rule which could be remedied by rulemaking without statutory change. The amendment . . . was agreed to on that basis. The Committee expects and directs the Secretary of the Interior to conduct promptly a rulemaking to reconsider and eliminate or restructure the [FWS] rule . . . in light of this report and legislative history." H.R. REP. NO. 109-237, at 24 (2005) (citation omitted).

H.R. 3824, but it differed as to the details in many notable respects. Like TESRA, the substitute amendment would have repealed critical habitat provisions of the present ESA.[157] However, the substitute amendment would have required a more detailed identification of habitat in the recovery plan. Under this amendment, the recovery plan would have been required to include an "identification of those publicly owned areas of land or water that are necessary to achieve the purpose of the recovery plan . . . and, if such species is unlikely to be conserved on such areas, such other areas as are necessary to achieve the purpose of the recovery plan."[158] Moreover, FWS would have been required to consider the effects of a proposed federal action on these areas during a consultation under ESA Section 7(a)(2).[159]

With respect to other issues, the substitute amendment would have: included the above-noted definition of "jeopardize the continued existence";[160] deleted the mandate to designate a distinct population segment "sparingly";[161] deleted the measure providing that "[n]othing in a recovery plan shall be construed to establish regulatory requirements";[162] deleted a provision for state-specific downlisting and delisting criteria;[163] deleted the provision for state-sponsored candidate conservation programs;[164] deleted provisions for alternative consultation procedures and new "baseline" provisions applicable in consultations;[165] restored the "God Squad" provisions;[166] and deleted the compensation section and replaced it with a "Private Property Conservation Program" more akin to the recovery implementation

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[157] Am. No. 2 to H.R. 3824, § 5 *reprinted at* 151 CONG. REC. H8564-65, (daily ed. Sept. 29, 2005).

[158] Am. No. 2 to H.R. 3824, § 10(a)(3) (proposed ESA § 5(c)(1)(A)(iv)), *reprinted at* 151 CONG. REC. H8564, 8566 (daily ed. Sept. 29, 2005).

[159] Am. No. 2 to H.R. 3824, §§ 5, 10(a)(3) (proposed ESA § 5(c)(2)), *reprinted at* 151 CONG. REC. H8564, 8566 (daily ed. Sept. 29, 2005).

[160] Am. No. 2 to H.R. 3824, § 3(c), *reprinted at* 151 CONG. REC. H8564 (daily ed. Sept. 29, 2005).

[161] *Compare* H.R. 3824, § 4(a) (Sept. 29, 2005) (proposed ESA § 4(a)(2)) *with* Am. No. 2 to H.R. 3824, § 4(a), *reprinted at* 151 CONG. REC. H8564 (daily ed. Sept. 29, 2005).

[162] *Compare* H.R. 3824, § 9(a) (Sept. 29, 2005) (proposed ESA § 5(i)(1)(B)) *with* Am. No. 2 to H.R. 3824, § 10(a) (proposed ESA § 5(i)(1)), *reprinted at* 151 CONG. REC. H8564, H8567 (daily ed. Sept. 29, 2005).

[163] *Compare* H.R. 3824, § 9(b) (Sept. 29, 2005) (proposed ESA § 5(j)) *with* Am. No. 2 to H.R. 3824, § 10 (proposed ESA § 5), *reprinted at* 151 CONG. REC. H8564, H8566-67 (daily ed. Sept. 29, 2005).

[164] *Compare* H.R. 3824, § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)(A)) *with* Am. No. 2 to H.R. 3824, § 11(1) (proposed ESA § 6(c)(3)(A)), *reprinted at* 151 CONG. REC. H8564, H8567 (daily ed. Sept. 29, 2005).

[165] *Compare* H.R. 3824, §§ 11(a)(2)(D), 11(a)(4) (Sept. 29, 2005) *with* Am. No. 2 to H.R. 3824, § 12(d), *reprinted at* 151 CONG. REC. H8564, H8568 (daily ed. Sept. 29, 2005).

[166] *Compare* H.R. 3824, § 11(d) (Sept. 29, 2005) *with* Am. No. 2 to H.R. 3824, § 12(d), *reprinted at* 151 CONG. REC. H8564, H8567 (daily ed. Sept. 29, 2005).

agreements of H.R. 3824, with payments limited to a 70 percent cost-share, and subject to the availability of appropriations.[167]

In advocating on behalf of the substitute amendment, some of the proponents professed to agree that there are problems with the ESA, and they stressed the similarity of the substitute to the legislation introduced by Chairman Pombo. In the words of Rep. John Dingell (D-MI), one of the cosponsors of the substitute amendment, "I would note that there are few real differences between the substitute . . . and the legislation as it is before us."[168] Even with respect to the issue of compensation, which has been contentious in the past, some proponents of the substitute offered differences not in principle, but rather in program design and implementation. For example, Rep. Peter DeFazio (D-OR) stated that he had intended to "offer an amendment to say that we would compensate people for foregoing the usual historic and accustomed use."[169] His objection was that the compensation mechanism, in his view, would have allowed for enormous payments based on claims of speculative foregone development.[170] Chairman Pombo noted, appropriately:

> [W]e have come a long ways, because, as you know, I have been working on [ESA reform] since I got here, and when I first started, all I heard was there is nothing wrong with the [ESA] that a little bit more money would not solve. Here we are today, everybody saying that there is problems [sic] with the law and we have to fix it. So we have come a long ways, and I am being attacked for spending more money under the act on the reauthorization.[171]

## IV. PROSPECTS FOR SENATE CONSIDERATION AND ENACTMENT

In the Senate, the Environment and Public Works ("EPW") Committee has jurisdiction over the ESA. In response to passage of H.R. 3824, Sen. James Inhofe (R-OK), who chairs the EPW

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[167] *Compare* H.R. 3824, § 13 (Sept. 29, 2005) *with* Am. No. 2 to H.R. 3824, § 14 *reprinted at* 151 CONG. REC. H8564, H8567 (daily ed. Sept. 29, 2005).

[168] 151 CONG. REC. H8540 (daily ed. Sept. 29, 2005) (statement of Rep. Dingell).

[169] 151 CONG. REC. H8520 (daily ed. Sept. 29, 2005) (statement of Rep. DeFazio).

[170] *Id.* at H8521. This claim is contrary to the cost estimate by CBO, which found that "it would be difficult for landowners to receive aid for larger claims above $1 million under the section 13 process because most larger land-use projects would be ineligible to receive written determinations under section 12." H.R. REP. NO. 109-237, at 61 (2005). The CBO cost estimate is discussed further *supra* at note 70.

[171] 151 CONG. REC. H8581 (daily ed. Sept. 29, 2005) (statement of Rep. Pombo).

Committee, issued a press release stating: "I applaud the efforts of House Resources Chairman Richard Pombo for working so diligently to pass a bipartisan ESA bill."[172] That statement also said, "I look forward . . . to working with my Senate colleagues on producing ESA legislation *this year*."[173] Since that time, Sen. Inhofe has cited a critical habitat designation for the Arkansas River shiner as an additional indication of the need for legislative reform.[174]

Other key senators have also offered public support for an ESA reform bill. Most notably, Sen. Mike Crapo (R-ID), past chairman of the jurisdictional subcommittee of the EPW Committee, stated on October 6, 2005, that he would like to introduce legislation as soon as "this month."[175] Sen. Crapo and Sen. Blanche Lambert Lincoln (D-AR) are leading a mostly Republican, mostly Western group of eight senators who intend to draft ESA legislation, focusing especially on private land owner incentives, increasing the role of the states, improving the quality of science in listing decisions, and increasing the emphasis on recovery.[176] Senators Crapo and Lincoln are the Chair and ranking Democrat, respectively, of the Subcommittee on Forestry, Conservation and Rural Revitalization of the Senate Committee on Agriculture, Nutrition and Forestry. Through that subcommittee, Senators Crapo and Lincoln held hearings during the summer on species conservation measures in the Farm Bill and on oversight of the conservation reserve program.[177] Regarding their efforts, Sen. Lincoln said in July, "I am looking forward to working with Sen. Crapo in the next couple of months, we are going to focus on ESA and conservation programs and put together something thoughtfully."[178] Senators

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[172] Press Release, U.S. Sen. Comm. on Envt. & Pub. Works, Inhofe Applauds House Approval of Endangered Species Legislation (Sept. 29, 2005), *available at* http://epw.senate.gov/pressitem.cfm?party+rep&id= 246665.

[173] *Id.* (emphasis added).

[174] Press Release, U.S. Sen. Comm. on Envt. & Pub. Works, Inhofe Disappointed with Critical Habitat Designation (Sept. 29, 2005), *available at* http://epw.senate.gov/pressitem.cfm?party+rep&id=247259.

[175] Endangered Species: Sen. Mike Crapo (R-Idaho) Talks About His Plans for Endangered Species Legislation, Transcript of interview on E&E TV (Oct. 6, 2005), *available at* http://www.eande.tv/transcripts/?date= 100605#transcript.

[176] Press Release, U.S. Senator Mike Crapo (Aug. 8, 2005), Crapo, Lincoln to Chair Bipartisan Working Group to Write ESA Bill, *available at* http://crapo.senate.gov/media/newsreleases/release_full.cfm?id= 243683&& (last visited Oct. 17, 2005); Press Release, U.S. Senator Mike Enzi (Aug. 16, 2005), Enzi Aim to Reform Endangered Species Act, *available at* http://enzi.senate.gov/esa3.htm. Sen. Enzi's press release also states that the group seeks to increase ESA funding while increasing accountability for program funds. The other six senators in this group, all Republicans, are Sens. Thomas (WY), Enzi (WY), Bennett (UT), Burns (MT), Allard (CO), and Craig (ID). Benton Ives-Halperin, Republicans in Both Chambers Preparing to Tackle Endangered Species Act, CQ Today (Aug. 17, 2005).

[177] Those hearings took place on July 26 and 27, 2005.

[178] Allison A. Freeman, *Sens. Crapo, Lincoln Drafting Landowner Incentives Bill,* ENVT. & ENERGY DAILY (July 27, 2005).

Crapo and Lincoln announced the introduction of S. 2110, the Collaboration for the Recovery of the Endangered Species Act ("CRESA"), on December 15, 2005. This bill provides tax breaks and other incentives for private conservation measures.

A variety of other senators have offered public statements indicating either an interest in legislative reform, or concern about the implementation of the ESA in their state, or both. On the Senate floor this past spring, Senator Craig Thomas (R-WY) gave a speech in which he specifically cited ESA reform as a priority.[179] Sen. Mike Enzi (R-WY) recently stated, "[i]t is well past time to modernize the Endangered Species Act."[180] Sen. David Vitter (R-LA) was quoted as saying at a public hearing, "Clearly the time has come to strengthen and improve the act and do a better job of proactively recovering species."[181] A representative of Sen. Conrad Burns (R-MT) has stated publicly that the senator supports TESRA and looks forward to working with Sen. Crapo on ESA legislation.[182] Senators Bennett (R-UT), Domenici (R-NM), and Bingaman (D-NM) have also sponsored or cosponsored legislation addressing localized ESA issues, indicating an awareness of difficulties with ESA implementation in their states.[183]

Tempering these indications of support for ESA reform, however, is the leadership of the EPW Subcommittee on Fisheries, Wildlife and Water ("FWW"). Sen. Lincoln Chafee (R-RI), who chairs the subcommittee, has stated that he does not intend to pursue ESA legislation quickly. To the contrary, before H.R. 3824 was introduced, Sen. Chafee said, "[i]f an unacceptable, partisan bill passes in the House, I think that will make activity slow down here."[184] Likewise, the minority leadership on the FWW subcommittee and full EPW committee also show every sign of resisting meaningful ESA reform legislation. At a subcommittee hearing on May 19, 2005, Sen. James Jeffords (I-VT), ranking member of the EPW committee, stated

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[179] 151 CONG. REC. S3353, S3354 (daily ed. Apr. 7, 2005) (statement of Sen. Thomas).

[180] Press Release, U.S. Senator Mike Enzi (Aug. 16, 2005), *available at* http://enzi.senate.gov/esa3.htm.

[181] Allison A. Freeman, *Chafee Keen on Landowner Incentives but Not on House ESA Bill,* ENVT. & ENERGY DAILY (July 14, 2005).

[182] Scott McMillion, *ESA Close to Reform,* BOZEMAN DAILY CHRONICLE (Oct. 23, 2005), *available at* http://www.bozemandailychronicle.com/articles/2005/10/23/news/01esareform.txt.

[183] 151 CONG. REC. S492 (daily ed. Jan. 25, 2005) (statement of Sen. Bennett upon introducing S. 164); 151 CONG. REC. S9299 (daily ed. July 28, 2005) (statement of Sen. Domenici upon introducing S. 1540, a bill for which Sen. Bingaman served as an original cosponsor).

[184] Allison A. Freeman, *Chafee Keen on Landowner Incentives but Not on House ESA Bill,* ENVT. & ENERGY DAILY (July 14, 2005).

that the ESA is basically working well, and the hearing merely served a function of routine oversight.[185] At the same hearing, Sen. Hillary Clinton (D-NY), who serves as the ranking Democrat on the FWW subcommittee, emphasized the benefits of species conservation, although she also expressed some sympathy for the concepts of incentives for land owners and enhancing state involvement.[186]

## V. CONCLUSION

H.R. 3824 offers much for private land owners in the South to look forward to. They will certainly welcome the shift from a focus on critical habitat designation to species recovery. H.R. 3824 includes extensive, process-oriented recovery planning provisions. These measures provide previously unavailable opportunities for regulated interests to participate on the recovery team to develop guidelines to govern the measures that may subsequently be required in a Section 7 consultation or a Section 10 permit (though it may prove expensive to develop or hire the expertise necessary to take full advantage of these provisions). They also require consideration of the cost of recovery measures to an unprecedented extent. The compensation provisions in

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[185] *Oversight on the Endangered Species Act, Before the Subcomm. on Fisheries, Wildlife and Water of the House. Comm. on Environment & Public Works,* 151st Cong. (May 19, 2005) (statement of Sen. James Jeffords), *available at* http://epw.senate.gov/hearing_ statements.cfm?id=237935 ("So, if the Act is achieving its goals, why are we here today? We are here because we are responsible for overseeing the programs that this Subcommittee has jurisdiction over, and to hear from the witnesses on the status of these programs and recommendations to improve them.").

[186] *Oversight on the Endangered Species Act, Before the Subcomm. on Fisheries, Wildlife and Water of the House Comm. on Environment & Public* Works, 151st Cong. (May 19, 2005) (statement of Sen. Hillary Rodham Clinton), *available at* http://epw.senate.gov/ hearing_statements.cfm?id=237952. Senators Chafee and Clinton have stated they prefer to await the results of a so-called "Keystone process" before pursuing legislative activity. *See* Allison A. Freeman, *Lawmakers Consider Tweaks to ESA Overhaul Proposal,* GREENWIRE (Sept. 22, 2005). This refers to a process initiated in response to a letter from Senators Chafee, Inhofe, Crapo, Clinton, Jeffords, and Lincoln, to the Keystone Center in Keystone, Colorado. The Keystone Center has assembled an "ESA Working Group" to consider the current law on critical habitat and to attempt to identify methods "to better conserve habitat and help species recover." *See* The Keystone Center, ESA Working Group (Sept. 28, 2005), *available at* http://www.keystone.org/ html/esa_working_group.html. The Keystone group comprises two dozen individuals representing environmentalists, businesses, states, and academia. The Keystone Center has planned two meetings, one each in November and December of 2005, which will be closed to those who are not members of the group. If the Keystone Center identifies ideas, "which is by no means guaranteed," then it will make a written product publicly available after it is provided to the Senators. It is impossible to predict exactly when or what that would be, but the nature of the process indicates that completion prior to next January or February of 2006 is optimistic.

Senator Crapo has stated that while the Keystone process is "an excellent way to approach the issue," he does not believe that senators must wait on the outcome of that process. Endangered Species: Sen. Mike Crapo (R-Idaho) Talks About His Plans for Endangered Species Legislation, Transcript of interview on E&E TV (Oct. 6, 2005), *available at* http://www.eande.tv/transcripts/?date=100605#transcript.

H.R. 3824 are extraordinary in providing funds, not subject to annual appropriations, for lost value (including business losses) associated with compliance with the "take" prohibition for otherwise lawful activities. Also, H.R. 3824 offers various opportunities for improvements in the use of science during the listing process.

H.R. 3824 includes numerous opportunities for participation by the public and regulated entities, in addition to those provided through the recovery planning process. The impact analysis required at the time of listing should provide better information to the public about the potential impacts of a listing, particularly for the benefit of those most likely to be affected. Measures to enhance applicant participation may enhance agency responsiveness in a Section 7 consultation. On the other hand, the recovery planning process does not include substantial public notice or other public participation until the issuance of a draft recovery plan, and H.R. 3824 exempts the recovery team from the Federal Advisory Committee Act.

Finally, H.R. 3824 provides greater state authority to implement species conservation programs than current law by authorizing conservation agreements under which the state may implement candidate conservation programs that remain effective even if a species is listed. Given bipartisan support for the notion of providing greater regulatory authority to the states,[187] it seems possible that Congress could consider delegating other ESA-related functions to the states, following the model of pollution control statutes such as the Clean Water Act and the Clean Air Act.

Compared to the House, the Senate is likely to proceed more slowly. Given the recent public statements of various senators, there appear to be three avenues where meaningful ESA reform legislation may emerge: the FWW subcommittee, the Crapo-Lincoln efforts, or the EPW committee. The FWW subcommittee is not expected to move quickly on draft legislation, and as of the completion of this article for publication, there has been no outward indication that either the chairman or the ranking member is actively drafting legislation comparable in scope to H.R. 3824. However, Senators Crapo and Lincoln have indicated they may be relatively farther along in the development of draft legislative language. Finally, given his public pronouncements, Sen. Inhofe could conceivably take up H.R. 3824 and use it as the vehicle for full EPW committee action, should he grow impatient with the subcommittee's lack of commitment to action (although we are aware of no indication from Sen. Inhofe's office or

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[187] *See supra* note 187 (noting the support of Sen. Clinton, ranking Democrat on the FWW Subcommittee, for this concept).

the full committee that there is any intention of doing so at the present time).

While much work is left to be done, H.R. 3824 promises to enlist the active support of those who control most of the land in the South where threatened and endangered species live. With its move toward a recovery-focused ESA, this legislation offers a refreshing and remarkable contrast from the current statutory framework of confrontation and prohibition, by which most species have, at best, merely hung onto survival. When landowners and regulated entities are provided the opportunity to actually participate in shaping the conservation program, and when they are rewarded rather than punished for their efforts, the real winners may well prove to be the threatened and endangered species themselves.

# ADDRESSING NONPOINT SOURCE POLLUTION IN THE FIFTH AND ELEVENTH CIRCUITS: COULD *PRONSOLINO* HAPPEN IN MISSISSIPPI AND ALABAMA?

JOSH CLEMONS*

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## I. INTRODUCTION

The Clean Water Act (CWA), first enacted in 1972[1] and significantly amended in 1987[2], has driven the cleanup of countless American waterways that had been befouled by the by-products of over a century of industrial expansion. Perhaps the CWA's greatest strength has been the no-nonsense way it has stanched the discharge of pollutants into U.S. waters from "point sources" like industrial outfall pipes. Rivers that once literally caught fire because of chemical pollution no longer do so.[3]

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[1] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816-904 (1972) (codified as amended in scattered sections of 33 U.S.C.).

[2] Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat.7.

[3] *See* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174-75 (2001) (Stevens, J., dissenting) ("In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the [Clean Water Act]. The Act proclaimed the ambitious goal of ending water pollution by 1985. . . . Although Congress' vision of zero pollution remains unfulfilled, its pursuit has unquestionably retarded the destruction of the aquatic environment. Our Nation's waters no longer burn.").

Much work remains to be done, however. Many water bodies continue to be heavily polluted by pollution from "nonpoint sources." The most prevalent nonpoint sources include runoff from agricultural, silvicultural, and construction activities.

The notorious "dead zone" in the Gulf of Mexico provides a compelling example of the environmental destruction nonpoint source pollution can cause. The dead zone, which in 2004 covered 5,800 square miles,[4] is defined by oxygen levels too low to support most marine life—a condition known as hypoxia.[5] Hypoxia is the result of the process of eutrophication, which occurs when an overabundance of nutrients triggers increased algal production.[6] When the algae die, their decomposition consumes oxygen.[7] Nutrients, in the form of agricultural fertilizers, make their way from farmland to the Gulf via runoff into the Mississippi River. According to the National Oceanic and Atmospheric Administration (NOAA), this type of pollution "is one of the major stresses impacting coastal ecosystems."[8]

In states like Mississippi and Alabama, where agriculture continues to be a dominant feature of the economic landscape, nonpoint source pollution remains a major problem. Part of the reason is because compared to its clear and muscular methods of directly regulating point source pollution, the CWA's nonpoint source provisions are wishy-washy. Whereas point sources are subject to well-defined standards of control technology and strict numerical limits, nonpoint source regulation is a picked-over smorgasbord of studying, planning, and promises of federal money to pay for the studying and planning. To the extent nonpoint source pollution is addressed in the CWA, it is left to the states to take the lead, which they traditionally have been hesitant to do.

For years, government and private advocates for nonpoint controls have sought a way to achieve real-world improvements in nonpoint source pollution. One possible way to get results is to include nonpoint sources when calculating total maximum daily loads (TMDLs) of permissible pollution discharge under section 303(d) of the CWA.[9] It has long been assumed that section 303(d)

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[4] *See* MSNBC.com, *"Dead Zone" Spreads Across Gulf of Mexico* (last updated Aug. 3, 2004), http://www.msnbc.msn.com/id/5595098.

[5] *See* National Ocean Service, National Oceanic and Atmospheric Admin., *HYPOXIA IN THE GULF OF MEXICO: Progress Towards the Completion of an Integrated Assessment*, *at* http://www.nos.noaa.gov/products/pubs_hypox.html (follow "Introduction" hyperlink) [hereinafter "NOAA"] (last modified Aug. 6, 2003).

[6] *Id*.

[7] *See* EPA-MAIA, *Eutrophication*, *at* http://www.epa.gov/maia/html/eutroph.html (last modified July 26, 2005).

[8] NOAA, *supra* note 5.

[9] 33 U.S.C. § 1313(d) (2000).

applies to waters polluted by point sources only, or a combination of point and nonpoint sources. However, ambiguity in the statutory language has left open the question of whether section 303(d) applies to waters polluted *only* by nonpoint sources. The applicability of section 303(d) to such waters could be of great concern in states like Mississippi, which has many of this type of water-quality limited stream segments. The potential exists for significantly more pressure to be brought on such states to clean up their water.

Unless Congress amends the CWA to make clear whether section 303(d) applies to waters polluted only by nonpoint sources (which is unlikely at this time[10]), courts will be deciding the question. So far, the highest court to do so is the U.S. Court of Appeals for the Ninth Circuit, the only U.S. Appellate Court to take up the issue.

Of course, a Ninth Circuit decision is not controlling in Mississippi and Alabama, which are in the Fifth and Eleventh circuits, respectively. However, a thorough analysis of the Ninth Circuit decision may have useful predictive value for how such a case might be resolved in the Fifth and Eleventh Circuits.

This paper provides that analysis. The structure of the CWA with respect to point and nonpoint sources is discussed for background purposes. Water quality standards, the regulatory framework in which nonpoint source pollution resides (as it is generally not amenable to technology-based control—like point source pollution is), are described. Also discussed is the TMDL mechanism and the controversy over applying it to waters polluted only by nonpoint source pollution. The Ninth Circuit decision is closely examined, followed by an analysis of relevant cases from the Fifth and Eleventh circuits. The paper concludes with an estimation of the likelihood of a decision similar to *Pronsolino* (the Ninth Circuit case discussed above) becoming the law of the Fifth and Eleventh circuits.

## II. POINT AND NONPOINT SOURCES

The CWA divides sources of water pollution into two types: point sources and nonpoint sources. A "point source" is defined in the CWA as:

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[10] *Clean Water Authority Restoration Act of 2003*, S. 473, 108th Cong. (2003). A recent congressional attempt to settle another question about the extent of CWA jurisdiction has stalled indefinitely as this bill has languished in committee since February 2003.

> any discernable [sic], confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.[11]

Point sources are subject to the permit requirements of the National Pollutant Discharge Elimination System (NPDES).[12] Discharge of a pollutant from a point source into the waters of the United States without a NPDES permit is illegal and can incur administrative, civil, and/or criminal penalties upon the discharger.[13] To hold a permit, a point source discharger must achieve specific technology-based effluent limitations; in other words, he must clean it before he can discharge it.[14] The NPDES program has been enormously successful in reducing pollution from point sources.

Unfortunately, other sources of water pollution—nonpoint sources—were mostly neglected for the first twenty-five or so years after the passage of the 1972 Act. The CWA does not define nonpoint source pollution, but it is basically any anthropogenic or naturally occurring pollution that does not come from a point source. The most common source of nonpoint source pollution is runoff from rainfall, snowmelt, or irrigation that picks up pollutants on the ground and deposits them in streams, lakes, or coastal waters.[15] Agricultural and silvicultural runoff, as well as runoff from roads and parking lots, are major nonpoint sources. Others include "grazing, septic systems, recreational boating, urban runoff, construction, physical changes to stream channels, and habitat degradation."[16] The most pervasive nonpoint source pollutants are sediment and nutrients; other common nonpoint source pollutants include "pesticides, pathogens (bacteria and

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[11] 33 U.S.C. § 1362(14) (2000).
[12] *See id.* § 1342.
[13] *See id.* §§ 1311(a), 1319.
[14] *See id.* § 1311(b).
[15] U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. EPA841-F-96-004A, NONPOINT SOURCE POLLUTION: THE NATION'S LARGEST WATER QUALITY PROBLEM (1996).
[16] *Id.*

viruses), salts, oil, grease, toxic chemicals, and heavy metals."[17] Although municipal point sources remain a problem, agricultural and urban runoff are the major sources of water quality impairment in the U.S.[18] Nonpoint source pollution is estimated to account for approximately half of the country's remaining water pollution.[19]

Unlike point source pollution, which is directly regulated via NPDES permits, nonpoint source pollution is not directly regulated by the CWA.[20] Instead, the CWA holds out the promise of federal funds for states that address nonpoint source pollution in their section 208 areawide waste treatment management plans[21] and section 319 nonpoint source management programs.[22]

## III. ADDRESSING NONPOINT SOURCE POLLUTION UNDER THE CLEAN WATER ACT

The CWA uses two core strategies to attack water pollution: technology-based effluent limitations and water quality standards. The water quality standards approach was developed in the Water Quality Act of 1965,[23] but it met with very limited success; to supplement water quality standards, Congress added the technology-based effluent limitation approach in 1972.[24]

Effluent limitations, by definition, are hard numbers (specific quantities, rates and/or concentrations) that apply only to point sources.[25] Water quality standards may or may not include hard numbers, and by their nature encompass pollution from both point and nonpoint sources. Effluent limitations focus on the *quality of the water coming out of the pipe*; water quality standards focus on the *quality of the receiving water*. Effluent limitations and water quality standards come together in the TMDL.

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[17] *Id.*

[18] *See id.*

[19] CLAUDIA COPELAND, ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, CLEAN WATER ACT: A SUMMARY OF THE LAW, CONG. RESEARCH SERV. REP. RL 30030 (updated Jan. 24, 2002).

[20] *See* Oregon Nat. Desert Ass'n v. Dombeck, 172 F.3d 1092, 1096 (9th Cir. 1998).

[21] 33 U.S.C. §§ 1288(b)(2) (2000) (describing requirements of plan, including identification of nonpoint sources and procedures and methods to control them), 1288(f) (describing grants to state and local agencies to cover costs of developing and operating planning process).

[22] *Id.* §§ 1329(b) (describing programs), 1329(h) (concerning grants for implementing programs).

[23] Pub. L. No. 89-234, 79 Stat. 903 (1965).

[24] *See* Copeland, *supra* note 19.

[25] *See* 33 U.S.C. § 1362(11) (2000).

### *A. Water Quality Standards*

Section 303 of the CWA requires states to establish water quality standards for the waters within their boundaries that are subject to CWA jurisdiction.[26] If a state fails to do so, the Environmental Protection Agency (EPA) must promulgate standards for that state.[27]

The water quality standard is a straightforward, commonsensical approach to pollution control. In effect, it is based on the answers to two simple questions: what purposes must this water body serve and how clean must it be to serve those purposes? The answers to these questions become the two primary components of the water quality standard: designated uses of the water body and water quality criteria based upon those uses.[28]

Designated uses must include, at a minimum, so-called "existing uses". Existing uses are defined as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."[29] In other words, if the water body was being used for a particular purpose on or after November 28, 1975, then that use *must* be protected. Use designation should also consider the water body's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration…navigation."[30] Examples of designated uses include public water supply, shellfish harvesting, recreation, and fish and wildlife.[31]

Once uses are designated, the state must establish water quality criteria to ensure that the designated uses are protected.[32] Criteria typically include standard water quality indicators like temperature, pH, and dissolved oxygen, as well as limits on toxic pollutants (e.g., dioxin, heavy metals) and non-toxic pollutants (e.g., sediment, heat). If a water body has multiple designated

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[26] *Id*. § 1313(a), (c).

[27] *See id*. § 1313(b).

[28] *See id*. § 1313(c)(2)(A).

[29] 40 C.F.R. § 131.3(e) (2005). Neither the CWA nor the regulations explicitly states that designated uses must include existing uses; however, the requirement is implicit in the antidegradation policy regulations, which mandate that, at a minimum, "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Id*. § 131.12(a)(1).

[30] 33 U.S.C. § 1313(c)(2)(A) (2000). *See also* 33 U.S.C. § 1251(a)(2) (2000) (declaring Congress' "national goal" of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water").

[31] These are among the designated uses in Mississippi. OFFICE OF POLLUTION CONTROL, MISS. DEPT. OF ENVTL. QUALITY, STATE OF MISSISSIPPI WATER QUALITY CRITERIA FOR INTRASTATE, INTERSTATE AND COASTAL WATERS (adopted 2002; approved by the EPA 2003).

[32] 33 U.S.C. § 1313(c)(2)(A) (2000).

uses, the criteria must protect the most sensitive use.[33] Criteria may consist of specific numerical limits or may be in narrative form.[34] The EPA also develops criteria for guidance purposes,[35] but it is the state criteria that are legally enforceable.

An additional element of the legal framework that affects the establishment of water quality standards is the antidegradation policy.[36] This policy is designed to prevent states from allowing waters that exceed the bare minimum water quality requirements to deteriorate to the lowest acceptable level.

Antidegradation is divided into three tiers. Tier I includes all waters for which the water quality necessary to support all existing uses must be maintained.[37] Tier I regulation has the effect of protecting all existing uses, even if a state has not formally designated those uses. Tier II protects the subset of Tier I waters that are of quality higher than that necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water (waters meeting this minimum standard are often referred to as "fishable/swimmable").[38] Uses that require water quality higher than fishable/swimmable may be "un-designated" if social and/or economic development in the area require a degradation in water quality.[39] In order to "un-designate," the state must go through an administrative process that includes public participation, and water quality may not be degraded below Tier I standards.[40] Tier III waters, or "outstanding [n]ational resource waters," are of the highest quality, and *no* degradation is allowed.[41] Tier III waters include "waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance."[42]

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[33] 40 C.F.R. § 131.11(a)(1) (2005).

[34] *Id.* §131.11(b).

[35] 33 U.S.C. § 1314(a). The EPA may reject a state criterion that is less stringent than its own if the state cannot adequately justify the weaker standard. *See* Miss. Comm'n. on Natural Res. v. Costle, 625 F.2d 1269 (5th Cir. 1980) (upholding EPA's disapproval of Mississippi's dissolved oxygen standard, and promulgation of its own standard). The EPA may, however, accept a less stringent state criterion if it is scientifically defensible and protective of the designated use. *See* Natural Res. Def. Council v. U.S. Envtl. Prot. Agency, 16 F.3d 1395 (4th Cir. 1993) (upholding the EPA's approval of Virginia's and Maryland's relaxed standard for dioxin).

[36] *See* 33 U.S.C. § 1313(d)(4)(B) (2000); 40 C.F.R. § 131.12 (2005).

[37] *See* 40 C.F.R. § 131.12(a)(1) (2005).

[38] *See id.* § 131.12(a)(2). The "fishable/swimmable" standard is announced in the Congressional declaration of goals and policy in § 101 of the CWA (enacted at 33 U.S.C. § 1251(a)(2) (2000)).

[39] *See* 40 C.F.R. § 131.12(a)(2) (2005).

[40] *See id.*

[41] *Id.* § 131.12(a)(3).

[42] *Id.*

The antidegradation policy is an "anti-backsliding" measure. It is not a water quality standard in itself, as it is entirely narrative and features no numerical limits.

### *B. Total Maximum Daily Loads*

Water quality standards by themselves accomplish nothing—the standards must be *implemented* for the CWA to be effective. The Total Maximum Daily Load (TMDL) is intended to be the implementation tool for polluted waters, and it is the next step in the common sense approach that begins with the water quality standard. After it is determined what uses are to be made of the water body and what water quality is necessary to protect those uses, the TMDL answers the next logical question: how much pollution can each source contribute while still maintaining the necessary water quality?

The TMDL answers that question by serving as a "pollution budget."[43] Working backwards from the water quality standard, the regulating entity determines how much of each pollutant can be added to the water body daily without violating the standard.[44] That amount is considered the *loading capacity*.[45] The loading capacity is allocated among existing and future point, nonpoint, and background sources.[46] The TMDL is the sum of these allocations, with an accounting for seasonal variations and a margin of safety.[47] Ideally, water quality standards will be attained by harmonizing those allocations.[48]

Many water bodies, of course, fail to maintain the necessary water quality, so the first step in the TMDL process is identifying and prioritizing polluted water bodies. CWA section 303(d)(1)(A) mandates that:

> [e]ach State shall identify those waters within its boundaries for which the effluent limitations [on point sources] are not stringent enough to

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[43] JOINT STATEMENT OF THE DEP'T OF AGRICULTURE AND THE EPA ADDRESSING AGRICULTURAL AND SILVICULTURAL ISSUES WITHIN EPA REVISIONS TO TMDL AND NPDES RULES (May 1, 2000), http://www.epa.gov/owow/tmdl/tmdlwhit.html.

[44] *Id*.

[45] 40 C.F.R. § 130.2(f) (2005).

[46] A portion of the loading capacity allocated to a point source is a "wasteload allocation." *Id.* § 130.2(h). A portion allocated to a nonpoint source or natural background loading is a "load allocation." *Id.* § 132.2(g).

[47] 33 U.S.C. § 1313(d)(1)(C) (2000); 40 C.F.R. § 130.2(i) (2005).

[48] *See* CLAUDIA COPELAND, CLEAN WATER ACT AND TOTAL MAXIMUM DAILY LOADS (TMDLS), CONG. RESEARCH SERV. REP. 97-831 ENR (updated Feb. 13, 2003).

> implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.[49]

This is key language. Waters that are identified as not meeting water quality standards, despite the application of effluent limitations to point sources, will be put on the "303(d)(1) list" and required to have formal TMDLs established. Waters not placed on the 303(d)(1) list are required to have only "estimated" TMDLs.[50]

The TMDL process, including provisions for public involvement, must be detailed in the state's continuing planning process that is mandated by section 303(e).[51] The continuing planning process must include, among other things, "[t]he process for developing total maximum daily loads (TMDLs) and individual water quality based effluent limitations for pollutants"[52] and "[t]he process for establishing and assuring adequate implementation of new or revised water quality standards, including schedules of compliance."[53]

Establishing full-blown TMDLs through the formal TMDL process involves considerable effort. To develop its 303(d)(1) list, the state must first "assemble and evaluate all existing and readily available water quality-related data and information."[54] Once this

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[49] 33 U.S.C. § 1313(d)(1)(A) (2000).

[50] *Id.* § 1313(d)(3).

[51] 33 U.S.C. § 1313(e) (2000); *see* 40 C.F.R. § 130.7(a) (2005). "The process for identifying water quality limited segments still requiring wasteload allocations, load allocations and total maximum daily loads (WLAs/LAs and TMDLs), setting priorities for developing these loads; establishing these loads for segments identified, including water quality monitoring, modeling, data analysis, calculation methods, and list of pollutants to be regulated; submitting the State's list of segments identified, priority ranking, and loads established (WLAs/LAs/TMDLs) to EPA for approval; incorporating the approved loads into the State's WQM plans and NPDES permits; and involving the public, affected dischargers, designated areawide agencies, and local governments in this process shall be clearly described in the State Continuing Planning Process (CPP)". *Id.*

[52] 40 C.F.R. § 130.5(b)(3) (2005).

[53] *Id.* § 130.5(b)(6). A state must have an EPA-approved continuing planning process before EPA can authorize the state to administer its own NPDES program. *See also* 33 U.S.C. § 1313(e)(2) (2000). The state need not have actually implemented or completed any TMDLs, or cleaned up any water at all. It need only have developed the processes to do so.

[54] 40 C.F.R. § 130.7(b)(5) (2005). This data and information includes, at a minimum, that concerning "(i) [w]aters identified by the State . . . as 'partially meeting' or 'not meeting' designated uses or as 'threatened'; (ii) [w]aters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards; (iii) [w]aters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions. These organizations and groups should be actively solicited for research they may be conducting or reporting. For example, university researchers, the United States Department of Agriculture, the National Oceanic and

task is complete, the state is to identify and prioritize "water quality-limited segments" needing TMDLs and provide documentation to EPA supporting the listing decisions.[55] The state must then establish the TMDLs for the identified water quality-limited segments.[56] EPA approves or disapproves the listings and TMDLs.[57] And, as noted above, the public must be included in the process.[58]

## IV. THE CONTROVERSY OVER APPLYING TMDLS TO NONPOINT SOURCES

In describing the waters that are potentially subject to TMDLs, section 303(d) alludes to point source pollution but is silent on nonpoint source pollution. The section encompasses those waters "for which . . . effluent limitations . . . are not stringent enough to implement any water quality standard."[59] "Effluent limitations" apply only to point sources. Only in the regulations, which require the loading capacity to be allocated among the various types of sources, is nonpoint source pollution clearly mentioned in the TMDL context.[60]

Because of the statutory ambiguity, the potentially regulated nonpoint source community has argued that section 303(d) does not apply to nonpoint sources.[61] For clarification (among other reasons), the EPA in 1999 proposed a revision to its TMDL regulations that explicitly stated that section 303(d) does

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Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data; and (iv) [w]aters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment." *Id*. This requirement potentially encompasses an enormous amount of data and information.

[55] 40 C.F.R. § 130.7(b)(1)-(2), (4), (6) (2005). The documentation must include, at minimum: "(i) [a] description of the methodology used to develop the list; and (ii) [a] description of the data and information used to identify waters, including a description of the data and information used by the State as required by § 130.7(b)(5); and (iii) [a] rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in §130.7(b)(5); and (iv) [a]ny other reasonable information requested by the Regional Administrator. Upon request by the Regional Administrator, each State must demonstrate good cause for not including a water or waters on the list. Good cause includes, but is not limited to, more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to the water being listed in the categories in § 130.7(b)(5); or changes in conditions, e.g., new control equipment, or elimination of discharges." *Id*. § 130.7(b)(6). This is no small amount of documentation.

[56] *Id*. § 130.7(c)(1).

[57] *Id*. § 130.7(d)(2).

[58] *See supra* note 51 and accompanying text.

[59] 33 U.S.C. § 1313(d)(1)(A) (2000).

[60] 40 C.F.R. § 130.2 (2005); *see supra* note 51 and accompanying text.

[61] *See* Oliver Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 ENVTL. L. REP. 10391 (1997).

apply to nonpoint sources.[62] The final rule, retaining this provision, was issued in July 2000,[63] but Congress quickly acted to block the rule by adding a rider to an appropriations bill forbidding EPA to fund its implementation for fiscal years 2000-2001 (through October 2001).[64] In response to public and scientific criticism of the rule, EPA delayed its implementation until April 30, 2003.[65] In March 2003, the rule was withdrawn before it was ever implemented.[66] The ambiguity concerning the applicability of section 303(d) to nonpoint sources remains – except in the Ninth Circuit.

### *A. The Pronsolino Case*

The Garcia River drains 73,222 acres of northern California's heavily forested Mendocino County as it meanders towards its terminus at Point Arena.[67] From time immemorial into the 20th century, the Garcia's cold, clear water supported runs of steelhead trout and coho, pink, and chinook salmon.[68] Today, as a result of sedimentation from logging and other erosive land use practices, only steelhead and a small remnant population of coho remain.[69]

In keeping with its capability to support coho and steelhead, the Garcia River's designated uses include cold

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[62] Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,012, 46,020 (proposed Aug. 23, 1999) (to be codified at 40 C.F.R. pt. 130).

[63] Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130).

[64] Military Construction Appropriations Act of 2001, Pub. L. No. 106-246, 114 Stat. 511, 567 (2000).

[65] Effective Date of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulations; and Revision of the Date for State Submission of the 2002 List of Impaired Waters; 66 Fed. Reg. 53,044 (Oct. 18, 2001) (to be codified at 40 C.F.R. pts. 9. 122, 123, 124, and 130); *see also* Linda A. Malone, *The Myths and Truths that Threaten the TMDL Program*, 32 ENVTL. L. REP. 11133 (2002) (describing controversy over rule).

[66] Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. 13,608 (Mar. 19, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130).

[67] *See* CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, REFERENCE DOCUMENT FOR THE GARCIA RIVER WATERSHED WATER QUALITY ATTAINMENT ACTION PLAN FOR SEDIMENT 19 (Sept. 21, 2000).

[68] Friends of the Garcia River (FrOG), http://www.rcwa.us/garcia/.

[69] *Id.*; *see generally* LARRY R. BROWN & PETER B. MOYLE, STATUS OF COHO SALMON IN CALIFORNIA, REPORT TO THE NATIONAL MARINE FISHERIES SERVICE (1991), http://www.krisweb.com/biblio/gen_nmfs_brownetal_1991.pdf; Gregg Patterson, *California Dreamweavers*, TROUT MAGAZINE, Winter 2001, http://www.tucalifornia.org/tm-garcia.htm.

freshwater habitat; migration of aquatic organisms; estuarine habitat; and spawning, reproduction, and/or early development.[70] These uses can be impaired when there is too much sediment in the water. Because of the excess of sedimentation in the Garcia, the river was added to California's section 303(d) list in 1992.[71] California initially failed to establish TMDLs for the Garcia; fishing and environmental groups sued the state to force it to do its legal duty.[72] Although the state signed a consent decree agreeing to establish the Garcia River TMDL, it failed to finalize its draft TMDL in a timely manner, which prompted the EPA to issue its own TMDL (which was virtually identical to the state's draft TMDL).[73]

The Garcia River TMDL limits sediment loading in the Garcia River to 552 tons per square mile per year.[74] This figure was chosen to achieve the goal of reducing the average annual sediment load by sixty percent.[75] The TMDL was broken down into five load allocations: mass wasting from natural background, mass wasting from roads, mass wasting from timber harvesting, runoff from road surfaces, and runoff from road and skid trail crossings and gullies from diversions on roads and skid trails.[76] The TMDL included no wasteload allocations for point sources because the river was polluted only by nonpoint sources.

The EPA, in accordance with its regulations, required the state to incorporate the TMDL, along with "appropriate implementation measures," into the State Water Quality Management Plan.[77] California's North Coast Regional Water Quality Control Board determined that failure to implement the TMDL would spur the EPA to withdraw its federal funding to the state.[78] The California Department of Forestry (CDF), which licenses timber-harvesting plans, concurred.[79]

The TMDL soon made itself known to landowners on the river. In 1998 Betty and Guido Pronsolino applied to the CDF for a permit to harvest the timber on their eight hundred acres in the Garcia River watershed.[80] CDF granted the permit, but in order to

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[70] U.S. ENVIRONMENTAL PROTECTION AGENCY, GARCIA RIVER SEDIMENT TOTAL MAXIMUM DAILY LOAD 8 (Mar. 16, 1998) [hereinafter *Garcia River TMDL*].

[71] Pronsolino v. Nastri, 291 F.3d 1123, 1129 (9th Cir. 2002) (*Pronsolino (II*)).

[72] *Id.*

[73] *Id.*

[74] *Garcia River TMDL* at 36.

[75] *Id.* at 37.

[76] *Id.* at 36.

[77] *Id.* at 6; 40 C.F.R. §§ 130.6(c)(1), 130.7 (2005).

[78] Pronsolino v. Marcus, 91 F.Supp.2d 1337, 1340 (N.D. Cal. 2000) (*Pronsolino (I*)).

[79] *Id.*

[80] *See Pronsolino (II),* 291 F.3d 1123, 1129.

comply with the TMDL, it imposed various restrictions on the harvest plan.[81] The Pronsolinos' forester estimated that compliance with the restrictions would cost the Pronsolinos at least $750,000.[82] Two other area landowners, Larry Mailliard and Bill Barr, applied for timber harvesting permits around the same time and were similarly restricted, at estimated costs of $10,602,000 and $962,000, respectively.[83]

The Pronsolinos, Mailliard, and Barr, joined by the Mendocino County Farm Bureau, the California Farm Bureau, and the American Farm Bureau Federation (collectively, "the plaintiffs") went to court. Rather than suing the state on the ground that its restrictions were excessive, or the EPA on the ground that the TMDL was arbitrary or capricious, the plaintiffs went straight to the heart of the matter and sued the EPA on the ground that it lacked the authority to issue a TMDL *at all* for a water body polluted only by nonpoint sources.[84] This line of attack primarily targeted the EPA's interpretation of its own TMDL regulations, which in turn implicated the EPA's interpretation of the CWA.

As noted above, Congress did not explicitly authorize the EPA to apply section 303(d) to waters polluted only by nonpoint source pollution in the CWA. Under section 303(d)(1)(A), each state must identify "those waters within its boundaries for which the effluent limitations [on point sources] are not stringent enough to implement any water quality standard applicable to such waters."[85] There are at least two possible interpretations of this language. The first (and more expansive) interpretation, offered by the EPA, is that section 303(d) applies to all waters not meeting water quality standards. The second (and more restrictive) interpretation, asserted by the plaintiffs, is that section 303(d) applies only to waters that are not meeting water quality standards *and* are polluted by at least one point source. Because the issue is unsettled in other circuits, the arguments marshaled

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[81] *See id.* at 1130, n.6. The restrictions included retaining trees of a certain size, refraining from harvesting trees from unstable areas, and other measures to prevent or mitigate sediment loading of watercourses that lead to the Garcia River.

[82] *See id*. at 1130.

[83] *See id*.

[84] The plaintiff's cause of action was the judicial review chapter of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000). The APA gives a person who is "adversely affected or aggrieved by [federal] agency action" a statutory right to challenge the action in court. *Id.* § 702. The reviewing court has the power to set aside an agency action that is "arbitrary, capricious, . . . or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." *Id*. § 706(2).

[85] 33 U.S.C. § 1313(d)(1)(a) (2000).

by the plaintiffs and the EPA are likely to reappear in other cases and are therefore worthy of examination.

Predictably, each side argued that the text of the statute unambiguously supported its position, and that even if the statute was ambiguous, its interpretation should prevail. Thanks to Congress' diabolically inelegant language, both sides could make strong arguments for their completely contradictory interpretations. The plaintiffs asserted that section 303(d) plainly refers only to waters in which point source controls have been insufficient to meet water quality standards. They argued it would therefore be nonsensical to apply the statute to waters without point source controls.[86] The EPA countered that the statutory language refers to waters that fail to meet standards, but does not exclude waters polluted only by nonpoint sources; thus, according to the EPA, the statute encompasses *all* waters that do not meet water quality standards, regardless of whether point sources contribute to the problem or not.[87]

In the EPA's view, its interpretation of the text harmonizes with the text's location in the section of the CWA entitled "Water quality standards and implementation plans."[88] After all, the water quality standard approach, unlike the technology-based approach, focuses on the quality of the receiving water, regardless of whether the pollutants it receives come from point or nonpoint sources. Section 303(a)-(b) commands states to establish water quality standards for all their waters, and TMDLs are to be a tool for implementing the standards. A vast number of water bodies in the U.S. are impacted only by nonpoint source pollution, so unless Congress intended for water quality standards to be established, but *not* to be implemented in these regions, it follows that TMDLs should be established for all substandard waters.[89]

Or does it follow? In the plaintiffs' estimation, section 303's primary *raison d'etre* is not to implement water quality standards, but rather to force the development of better point source control technology.[90] They argued that TMDLs are to be used as a diagnostic tool to discover the cases in which standards are not being met despite use of the best practicable technology to treat

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[86] *See* Opening Br. of Plaintiff-Appellants at 17-18, *Pronsolino (II*) (Nos. 00-16026, 00-16027), 2000 WL 33982496.

[87] Br. of Fed. Appellees at 21, *Pronsolino(II)* (Nos. 00-16026, 00-16027), 2000 WL 33983574.

[88] *Id*. at 21-22.

[89] *Id*. at 23-24.

[90] *See* Opening Br. of Pl.-Appellants at 22-24, *Pronsolino (II*) (Nos. 00-16026, 00-16027).

point sources.[91] Presumably, regulatory pressure to improve the technology would then come to bear upon point source dischargers.

The plaintiffs went on to contend that section 303 does not cover nonpoint source pollution because Congress addressed nonpoint source pollution in sections 208 and 319.[92] Section 208, entitled "Areawide waste treatment management," requires states to identify areas that have "substantial water quality control problems" and develop a plan that must include a process to identify and manage nonpoint sources of pollution, specifically including agricultural and silvicultural sources.[93] The section 208 "carrot" is the promise of federal grant money for development and operation of the planning process.[94] Section 319, entitled "Nonpoint source management programs," requires states to identify waters that, "without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards."[95] To control nonpoint source pollution in the identified waters, the states must develop management programs identifying best management practices and the educational and enforcement programs necessary to implement those practices.[96] As with section 208, the federal government encourages implementation of these programs by offering money to offset implementation costs.[97]

In response to the plaintiffs' argument that including nonpoint source pollution within section 303 rendered that section redundant with sections 208 and 319, the EPA described how the sections work together to maximize the probability that water quality standards will be attained.[98] Section 208 applies to a wider range of water bodies than section 303, and section 319 functions as a tool for implementing TMDLs, rather than as a replacement for the section 303 TMDL requirement.[99]

By the arguments recounted above, each party sought to prove that section 303 unambiguously said what that party claimed it said. When a statute is unambiguous, the agency administering the statute cannot "interpret" it; the agency has no option except to do what the statute commands. Thus, if either

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[91] *See id*. "Best practicable technology," or BPT, is the standard of control technology with which point sources (other than municipal treatment works) must comply. 33 U.S.C. § 1311(b)(1)(A) (2005).

[92] *See* Opening Br. of Pl.-Appellants at 27-31, *Pronsolino (II*) (Nos. 00-16026, 00-16027).

[93] 33 U.S.C. § 1288(a)(2), (b)(1)(A), (b)(2)(F) (2005).

[94] *Id*. § 1288(f).

[95] *Id*. § 1329(a)(1)(A).

[96] *Id*. § 1329(b)(1)-(2).

[97] *Id*. § 1329(h).

[98] Br. of Fed. Appellees at *27-31, *Pronsolino (II)* (Nos. 00-16026, 0016027).

[99] *Id*.

party could show that the statute was unambiguous in its favor, the conflict would be over and that party would win.

The parties no doubt were aware, however, that the statutory text is not unambiguous. Consequently, the related question arose of how much deference the courts should give the EPA's interpretation of the statute at issue. In addition, when the EPA determined that a TMDL was required on the Garcia River, it was not interpreting the statute; it was interpreting its own TMDL regulations, which were themselves an interpretation of section 303(d).

When a statute is ambiguous with respect to a specific situation, the agency charged with administering the statute has to interpret it, as EPA did when it interpreted section 303 as applying to waters polluted solely by nonpoint source pollution. Such interpretations are subject to judicial review. Under the Administrative Procedure Act (APA), a person who is "adversely affected or aggrieved" by a final agency action (such as the establishment of a TMDL) is entitled to sue the agency.[100] The reviewing court can set aside the action if it is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . ."[101]

When faced with an APA challenge, courts bring to their deliberations the understanding that the defendant agency typically has a more thorough grasp of the subject matter than the court does. This is a result of the agency being charged by Congress with administering the statute in controversy.[102] Accordingly, a court will defer to the agency's decision, to some extent, and refrain from "substitut[ing] its judgment for that of the agency."[103] Separation of powers doctrine counsels this approach because Congress is presumed to have given the executive branch (the agency) and not the judicial branch (the court) the authority to resolve ambiguities.[104]

There are various levels of deference, all underlain by these principles, that courts give to agency actions. The level of deference given depends on the type of action in question. When the challenged action is an agency's interpretation of an ambiguous statute that it administers, courts typically employ the

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[100] 5 U.S.C. §§ 702, 704 (2000).

[101] *Id.* § 706.

[102] *See, e.g.,* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844-45 (1984).

[103] Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[104] *See* United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

test described by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, stating "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[105] This so-called "*Chevron* deference" is indeed quite deferential. The agency's interpretation need not be the best one possible, or one the court favors; it need only be one that the statute does not appear to prohibit. *Chevron* deference is due when "Congress [has] delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[106] Generally speaking, this rule means that *Chevron* deference will be given only if the interpretation in question was made in a formal adjudication, or has been through notice-and-comment rulemaking.[107]

Other interpretations, which have not been subjected to the adversarial process of an adjudication–or the slings and arrows of public input–and do not have the force of law, are entitled to less deferential "*Skidmore* deference," named after the 1944 U.S. Supreme Court case *Skidmore v. Swift & Co.*[108] *Skidmore* deference applies "where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked."[109] Under *Skidmore*, if an agency acts with a degree of congressional authorization and/or formality less than what is required for *Chevron* deference, then judicial deference "depend[s] upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[110] Such interpretations may be promoted in guidance documents, policy statements, opinion letters, and the like.[111]

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[105] *Chevron,* 467 U.S. at 843.

[106] *Mead*, 533 U.S. at 226-27.

[107] *See id.* at 227 ("Delegation of such authority [to make rules carrying the force of law] may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."); *see also* Wilderness Watch and Pub. Employees for Envtl. Responsibility v. Mainella, 375 F.3d 1085, 1091 n.7 (11th Cir. 2004) (indicating that formal rulemaking is required for an agency interpretation to merit *Chevron* deference).

[108] 323 U.S. 134 (1944).

[109] *Mead*, 533 U.S. at 237.

[110] 323 U.S. at 140.

[111] *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters --like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion

There is a third relevant deference level which applies when the challenged action is the agency's interpretation of its own ambiguous regulation. Courts are very deferential to the agency, giving the agency's interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[112] This is usually referred to as "*Seminole Rock* deference," after the 1945 U.S. Supreme Court case that first recognized it, *Bowles v. Seminole Rock & Sand Co.*[113] Despite the fact that the Court's majority opinion in *U.S. v. Mead* indicates there are no interstices to fill between *Chevron* deference, *Skidmore* deference, and no deference, *Seminole Rock* deference is considered to have ongoing vitality.[114]

The *Pronsolino* court did not expressly consider whether the EPA's existing regulations were permissible interpretations of the CWA; rather, the court focused on whether the decision to establish a TMDL for the Garcia River was a permissible interpretation of the agency's existing regulations. Prior to *Mead,* this situation plainly would have called for the *Seminole Rock* standard. The court, however (perhaps out of a surfeit of wariness upon entering the post-*Mead* thicket of *Chevron* deference, *Skidmore* deference, and *Seminole Rock* deference), measured the EPA's action against all three standards.[115]

The court observed first that Congress, in the CWA, had given the EPA authority to write rules with the force of law to implement the statute,[116] and that the EPA wrote the TMDL regulations pursuant to that authority, so according to *Mead* the regulations are due *Chevron* deference.[117] Turning to the EPA's interpretation of the regulation in this case, the court found that "[n]o reason appears why, under this TMDL definition, the amount of either point source loads or nonpoint source loads cannot be

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letters are 'entitled to respect' under our decision in [*Skidmore*], but only to the extent that those interpretations have the 'power to persuade.'").

[112] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[113] 325 U.S. 410 (1945).

[114] *See, e.g.,* Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 643-44 (6th Cir. 2004); *see also Mead*, 533 U.S. at 246 (Scalia, J., dissenting) (noting that the *Seminole Rock* principle that "judges must defer to reasonable agency interpretations of their own regulations" was left "untouched" by the majority opinion, which describes an indistinct deference framework that seems to consist only of *Chevron* and *Skidmore*).

[115] *Pronsolino (II)*, 291 F.3d 1123, 1130-35.

[116] *Id*. at 1131. *See* 33 U.S.C. §§ 1361(a) (2000) ("The Administrator [of the EPA] is authorized to prescribe such regulations as are necessary to carry out his [sic] functions under this Act"), 1313(d)(2) (granting the Administrator the authority to approve/disapprove and establish TMDLs).

[117] The court's analysis is slightly misguided; the plaintiffs were not challenging the regulations themselves, which did not specifically say whether nonpoint source-only waters require TMDLs, but rather the EPA's interpretation of the regulations to that effect. This slip likely has little practical effect, however. *See infra* note 144.

zero."[118] In other words, mandating a TMDL for the Garcia River was "a permissible construction" of the regulation and was not "plainly erroneous or inconsistent with the regulation."[119]

The court also upheld the EPA's interpretation when it was judged against the less deferential *Skidmore* standard. Unlike *Chevron* and *Seminole Rock*, under *Skidmore* the agency must somehow persuade the court that its interpretation is proper. One method of persuasion is consistent interpretation of a statute over time. Here, the court was impressed by the EPA's early-1970s CWA regulations, which the court read as contemplating the inclusion of waters polluted only by nonpoint sources on section 303(d) lists.[120] This was enough to overcome the plaintiffs' argument that, until the early 1990s, the EPA had paid almost no attention to nonpoint source pollution in the TMDL context.[121]

The court's examination of the language and structure of section 303(d), and the statutory scheme as a whole, bolstered its decision. Recall that the controversy revolves around section 303(d)(1)(A)'s phrase "for which the [CWA's] effluent limitations . . . are not stringent enough to implement any water quality standard. . . ."[122] The plaintiffs contended that "not stringent enough" refers to a situation in which effluent limitations are applied, but the application of *those particular* effluent limitations cannot get the job done; that is, the limitations themselves are defective.[123] The EPA countered that "not stringent enough" refers to a situation in which the application of effluent standards *in general* cannot get the job done; the limitations being applied may meet the CWA's technology requirements, but still not be enough to ensure that water quality standards are met.[124]

While conceding that the plaintiffs' position was not "entirely implausible," the court felt that it was "considerably weaker" than the EPA's interpretation.[125] The EPA's construction of the statute would bring all substandard waters into section 303(d)'s embrace, while the plaintiffs' would exclude any substandard waters that have no point sources. The court figured

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[118] *Pronsolino (II)*, 291 F.3d at 1132.

[119] *Id.* at 1133. The court applies *Chevron* explicitly, but the *Seminole Rock* standard (as recited in a later case, Auer v. Robbins, 519 U.S. 452 (1997)) is cited only in passing, in a parenthetical in support of the court's conclusion that the EPA's action was entitled to *Chevron* deference.

[120] *Id.* at 1133-34.

[121] *Id.* at 1134; *see* Opening Br. of Pl.'s-Appellants at 39-48, *Pronsolino (II)* (Nos. 00-16026, 00-16027).

[122] 33 U.S.C. § 1313(d)(1)(A) (2000).

[123] *Pronsolino (II)*, 291 F.3d 1123, 1135-37.

[124] *Id.*

[125] *Id.* at 1135.

that this "odd reading" of the statute could be avoided by considering that Congress' intent was that the EPA would attack point source pollution first, and then nonpoint source pollution, rather than both types at once.[126] Legislative history supported this notion: Senator Muskie, who was instrumental in the development of the CWA, had noted that funding limitations might require EPA to prioritize point source above nonpoint source efforts.[127]

The court was unreceptive to the plaintiffs' argument that, because the CWA generally differentiates between point and nonpoint sources, section 303(d) must similarly differentiate.[128] The CWA does treat the two types of sources differently for some purposes, the court conceded, but the fundamental purpose of section 303 – the implementation of water quality standards – militates in favor of the EPA's interpretation.[129] And while sections 208 and 319 undeniably concern nonpoint sources exclusively, and would overlap to some extent with section 303 if that section is applied to nonpoint sources, there is not an "irreconcilable contradiction" that precludes the application of section 303 to nonpoint sources.[130]

The court also pointed out the aspect of the CWA's structure that makes the plaintiffs' proposed interpretation the less likely of the two. Section 303(d)(1)(A) applies to waters polluted by a blend of point and nonpoint sources ("the language admits of no other reading"), so under plaintiffs' interpretation a water body polluted by many nonpoint sources and one insignificant point source would require a TMDL, but an identical water body without the point source would not.[131]

The plaintiffs' final argument was based on federalism. Ameliorating nonpoint source pollution requires, in essence, regulating land use by restricting or prohibiting practices that engender polluted runoff.[132] By requiring TMDLs for nonpoint source-only waters, the plaintiffs argued, the federal government was improperly intruding into the state's traditional domain of land use regulation.[133] According to the plaintiffs, this intrusion potentially raised "severe constitutional questions"[134] because the

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[126] *Id*. at 1136.
[127] *Id*.
[128] *Pronsolino (II)*, 291 F.3d 1123, 1137-1138.
[129] *Id*. at 1137.
[130] *Id*. at 1138.
[131] *Id*. at 1139.
[132] *See generally* Jim Vergura & Ron Jones, *The TMDL Program: Land Use and Other Implications*, 6 DRAKE J. AGRIC. L. 317 (2001).
[133] Opening Br. of Pl.'s-Appellants at 56-60, *Pronsolino (II*) (Nos. 00-16026, 00-16027).
[134] *Id*. at 59.

dynamics of federalism do not allow the federal government to demand that a state regulate in a specific way.[135] The court was not persuaded by this argument because implementation and monitoring of the TMDL would be the states' responsibility, and the CWA does not require implementation or provide for enforcement.[136] The only penalty a state risks for failing to regulate nonpoint sources is loss of federal grant money.[137]

The plaintiffs appealed the Ninth Circuit's decision to the U.S. Supreme Court, which denied, without explanation, the request to hear the case.[138] Denying a request to hear a case does not necessarily mean the Supreme Court agrees with the lower court's decision, but it does mean that the case has proceeded as far as possible and the decision will remain binding precedent in its jurisdiction unless and until it is overturned in a later case.

### *B. Flaws in The Ninth Circuit's Analysis*

Before considering the likelihood of the *Pronsolino* decision being replicated in other circuits, it is necessary to expose the weaknesses in the Ninth Circuit's analysis. The court based its decision on three lines of analysis: deference to the EPA's interpretation of the statute; the statute's language and structure; and federalism concerns. Each line of analysis is considered in turn.

#### 1. Deference

The uncertain nature of the court's deference analysis may be a result of the court's failure to identify precisely which agency interpretation it is analyzing. There are two possibilities: (1) the EPA's interpretation of CWA section 303(d) as encompassing nonpoint sources (as well as point sources) as embodied in the agency's TMDL regulations,[139] or (2) the EPA's interpretation of those regulations as encompassing waters polluted *solely* by nonpoint sources. The court begins the deference analysis by reciting the EPA's argument that its interpretation of section 303, as embodied in its regulations, warrants *Chevron* deference.[140]

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[135] Reply Br. of Pl.'s-Appellants at *14, *Pronsolino (II)* (Nos. 00-16026, 00-16027) (*available in* 2001 WL 34096713) (citing New York v. United States, 505 U.S. 144, 166 (1992)).

[136] *Pronsolino (II)*, 291 F.3d at 1140.

[137] *Id*.

[138] Pronsolino v. Nastri, 539 U.S. 926 (2003).

[139] 40 C.F.R. § 130.1 – 130.15 (2005).

[140] *Pronsolino (II)*, 291 F.3d 1123, 1131.

That is, the EPA believes the court should be examining the *first* possible interpretation listed above. Immediately thereafter the court recites the plaintiffs' argument that "the EPA's interpretation should receive no deference at all."[141] The plaintiffs are referring to the *second* possible interpretation listed above, which the court seems to realize, but does not clearly acknowledge; in discussing the plaintiffs' position, the court notes that "[t]he pertinent regulations do, however, reflect the EPA's interpretation – that is, that the statute requires the identification on § 303(d)(1) lists of waters impaired only by nonpoint sources of pollution – *and the EPA so reads its regulations*."[142]

Determining which interpretation is truly at issue is important because the two possible interpretations call for different deference analyses. An analysis of the EPA's interpretation of the statute, as embodied in its regulations, would merit *Chevron* deference—and thus would be very likely to be upheld—because "Congress [has] delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[143] The EPA has legislative rulemaking authority, and the regulations were promulgated through notice-and-comment rulemaking.[144]

The second interpretation (the EPA's interpretation of its own regulations as encompassing nonpoint source-only waters) did not go through notice-and-comment rulemaking or formal adjudication; rather, it has been expressed only in memoranda and guidance documents.[145] Thus, *Chevron* deference would likely be inappropriate.[146] There is room for debate over which deference level, *Skidmore* or *Seminole Rock*, is appropriate. If Justice

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[141] *Id*.

[142] *Id*. (emphasis added).

[143] United States v. Mead Corp., 533 U.S. 218, 226 (2001).

[144] *See* Water Quality Planning and Management, 50 Fed. Reg. 1774, 1775-78 (Jan. 11, 1985) (to be codified at 40 C.F.R. pts. 35 and 130) (documenting responses to comments in publication of final rule).

[145] *See Pronsolino (II)*, 291 F.3d 1123, 1133 (describing memoranda and guidance documents); *see e.g.,* Memorandum from Robert Perciasepe, Asst. Adm'r., EPA, to Regl. Admr's. and Regl. Water Div. Dirs., EPA, *New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)* (Aug. 8, 1997), http://www.epa.gov/OWOW/tmdl/ratepace.html) (referring to "303(d)-listed waters impaired solely or primarily by nonpoint sources").

[146] The *Mead* majority makes the "likely" qualification necessary by commenting in a footnote that "the limit of *Chevron* deference is not marked by a hard-edged rule." 533 U.S. at 237 n.18. Presumably, this is because courts must now determine whether Congress expressed an intention, even implicitly, to delegate to the agency the authority to make rules with the force of law. *See id*. at 237. Justice Scalia asserted, apparently with some prescience, that "[t]he principal effect [of *Mead*] will be protracted confusion." *Id*. at 245 (Scalia, J., dissenting).

Scalia's opinion is accurate that *Seminole Rock* is still the correct analysis for an agency's interpretation of its own regulation, then *Seminole Rock* is clearly the proper deference level. However, the majority opinion in *Mead* does not mention *Seminole Rock* at all, and appears to contemplate only a two-tiered *Chevron-Skidmore* framework. Yet the agency interpretation at issue in *Mead* was an interpretation of a statute, so there was not necessarily any reason for the majority to mention *Seminole Rock*. Perhaps, as noted above, the Ninth Circuit was acting with an excess of caution in purporting to apply all three standards.[147]

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[147] Arguably, distinguishing between *Chevron* and *Seminole Rock* deference is academic hair-splitting anyway because, considered practically, there is virtually no difference between *Chevron* deference and *Seminole Rock* deference. Under *Chevron* the interpretation will be upheld if it is a "permissible construction of the statute." Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984). Under *Seminole Rock* the interpretation will be upheld "unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). The essence of both standards is that an interpretation will be upheld if it is not prohibited by the standard against which it is being compared - the statute (*Chevron*) or the regulation (*Seminole Rock*). Furthermore, the distinction between types of interpretation would not seem to matter from the perspective of a reviewing court. A regulation is an agency's interpretation of a statute, so an interpretation of the regulation is, in effect, a further interpretation of the statute. The statute – the manifestation of Congress' limited delegation of legislative authority to the executive branch - is the ultimate standard against which the validity of agency action must be gauged, no matter the degree of separation between the statute and the interpretation in question. An agency's power to act is restricted to the authority Congress has given it. Either the agency has the authority to make a particular interpretation or it does not. There is no reason to accord agencies different levels of deference based on how attenuated the link is between the interpretation in question and the statute.

Perhaps *Mead* did not leave *Seminole Rock* untouched, as Justice Scalia believes. In its deference analysis, the *Mead* majority emphasizes (1) the extent of congressional delegation of authority and (2) the degree of formality surrounding the agency's interpretation. Both of these factors ultimately relate to the level of control the people have over their government. This approach, despite being difficult and potentially confusing in practice, is more logical than continuing to recognize the formalistic distinction between interpretation of a statute and interpretation of a regulation. Whether *Mead* leaves *Seminole Rock* a dead letter remains to be seen; however, if it does, it may be just as well.

This is not to downplay the persuasiveness of Justice Scalia's criticism of the principle underlying the *Mead* decision: that the majority takes for the judiciary some of the interpretive authority that formerly, and properly, inhered in the executive branch. *See Mead*, 533 U.S. at 241-45 (Scalia, J., dissenting). *Pronsolino* well illustrates Justice Scalia's concerns. The EPA's decision to issue a TMDL for a nonpoint source-only river is precisely the kind of agency interpretation for which *Chevron* was meant to guide judicial review, because it involves a choice between competing policies where Congress' intent is not clear. As Justice Stevens, writing for the majority in *Chevron*, observed, the judiciary is the least appropriate branch of government to make these decisions (although sometimes they must). *Chevron*, 467 U.S. at 865-66. This stance is based on basic principles of separation of powers, and Justice Stevens' lucid explanation is worth quoting:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that

In light of the potential confusion, the safest course for the Ninth Circuit to have taken would have been to subject the regulations to the *Chevron* test (which they would likely pass[148]) and apply both the *Skidmore* and *Seminole Rock* analyses to the interpretation of the regulations.[149] The court, however, conflates the two interpretations and the level of deference each interpretation merits. The court arguably ends up at the right decision, but by a very indirect path. As will be shown, despite language indicating otherwise, the court in effect applied only the *Seminole Rock* standard, and it applied it to the interpretation of the regulations.

After first noting that the EPA has authority under the CWA to issue regulations with the force of law, the court analyzes the regulations (but does not compare them to the statute), observing that "[n]o reason appears why, under [the regulations'] TMDL definition, the amount of either point source loads or nonpoint source loads cannot be zero," and concludes that the regulations "apply whether a water body receives pollution from point sources only, nonpoint sources only, or a combination of the two."[150] The interpretation the court is analyzing here is the EPA's interpretation of its regulation as encompassing nonpoint source-only waters. According to the court's reading of *Mead*, this interpretation is entitled only to *Skidmore* deference; according to Justice Scalia's view of *Mead*, this interpretation would be entitled to *Seminole Rock* deference. Yet the court devotes a page and a half of its opinion to an inapposite *Chevron* analysis. This part of the opinion should not be considered persuasive outside the Ninth Circuit unless one agrees that (1) *Seminole Rock* remains the appropriate standard in this situation, and (2) the difference between *Chevron* and *Seminole Rock* deference is negligible.

The court follows the *Chevron* analysis with what it claims is a *Skidmore* analysis, which requires the agency's interpretation

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> delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices - resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Id.* Justice Scalia echoes this reasoning in his *Mead* dissent.

[148] *See* San Francisco Baykeeper v. Whitman, 297 F.3d 877, 885 (9th Cir. 2002) (finding an EPA interpretation of a different subsection of § 303(d) as not requiring simultaneous submission of the water quality-limited stream list and TMDLs to be reasonable under *Chevron*).

[149] Of course, if the interpretation passed the *Skidmore* test, the more deferential *Seminole Rock* analysis would have been unnecessary.

[150] *Pronsolino (II)*, 291 F.3d 1123, 1131-33.

to be in some way *persuasive*, not just permissible. In *Skidmore*, Justice Jackson allowed that a reviewing court may consider "all those factors which give [the agency's interpretation] power to persuade."[151] This is an open-ended standard that gives reviewing courts great latitude. Following *Skidmore* and *Mead*, the *Pronsolino* court states that relevant factors can include "the agency's expertise, care, consistency, and formality, as well as the logic of the agency's position."[152] The court chooses to consider two factors in its decision. The first is agency expertise:

> Section 303(d) is one of numerous interwoven components that together make up an intricate statutory scheme addressing technically complex environmental issues. Confronted with an issue dependent upon, and the resolution of which will affect, a complicated, science-driven statute for which the EPA has delegated regulatory authority, we consider the EPA's interpretation of the issue informative.[153]

This is all the analysis the court applies to this factor, and it is fairly open to criticism. There is no question that the CWA is a complex statute that requires the EPA to make many decisions of a highly technical nature,[154] but deciding whether section 303(d) applies to waters impaired only by nonpoint sources is not such a decision. It is a jurisdictional decision that merely requires knowledge of the statutory scheme adequate to make a reasoned

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[151] *Skidmore,* 323 U.S. 134, 140.

[152] *Pronsolino (II)*, 291 F.3d 1123, 1131 (citing *Mead*, 533 U.S. at 228) (factors include "degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position") (footnotes omitted), which in turn cites *Skidmore*, 323 U.S. at 140 (factors in determining an interpretation's validity include "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements").

[153] *Pronsolino (II)* at 1133. The weakly operative word "informative" brings to mind Justice Scalia's criticism of *Skidmore* deference as "an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers." *Mead*, 533 U.S. at 250 (Scalia, J., dissenting).

[154] For example, defining the "best practicable control technology currently available" and the "best available technology economically achievable" for point sources, which requires taking into account "the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as [EPA] deems appropriate." 33 U.S.C. §§ 1311(b)(1)(A), 1311(b)(2)(A), 1314(b)(1)B), 1314(b)(2)(B) (2000).

judgment. The EPA, being the CWA's administering agency, is likely to be intimately familiar with the CWA, and perhaps should be deferred to on that account; however, it is misleading for the court to invoke the CWA's "technically complex environmental issues" and its "science-driven" character when those things are irrelevant to the interpretation being made.

The court may have inserted the language about the CWA's complexity to enable its conclusion that the EPA's interpretation is persuasive per *Skidmore*. Prior to *Mead*, and even now if Justice Scalia is correct, this makeweight would have been unnecessary. *Chevron* or *Seminole Rock* would have applied, and under those highly deferential standards there would have been no need for the court to be "persuaded." Nonetheless, the court perceived *Mead* to be the law applicable to the situation, so the court was obliged to apply it. This factor, however, is less persuasive than the court makes it out to be. Take away the window dressing about agency expertise and the complexity of a science-driven statute, and the court's analysis of this factor reduces to acknowledging the obvious fact that the EPA has "delegated regulatory authority" for the CWA.[155] While that fact alone probably would have been enough to pass muster under *Chevron* or *Seminole Rock*, under *Mead/Skidmore* it is merely a factor to be considered along with any others that the court deems persuasive.

The second factor the court considers is the consistency of the EPA's interpretation of section 303(d). The court finds that the EPA has consistently interpreted section 303(d) as encompassing nonpoint source-only waters. Here, too, the court is slightly off the mark.

The court begins by asserting that the EPA's first CWA regulations "*quite clearly* required the identification on § 303(d)(1) lists of waters polluted only by nonpoint sources."[156] Yet the regulations are no clearer on this point than the statute itself. The regulations provided that section 303(d)(1) lists would include any water "where it is known that water quality does not meet applicable water quality standards and/or is not expected to meet applicable water quality standards even after the application of the effluent limitations require. . . ."[157] Like the statute, this regulation can reasonably be read as applying only to waters that are polluted by one or more point sources (that is, waters in which at least one effluent limitation is required), or waters that are polluted, but free of point sources (that is, waters in which no

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[155] *Pronsolino (II)*, 291 F.3d at 1133.
[156] *Pronsolino (II),* 291 F.3d 1123, 1133 (emphasis added).
[157] *Id.* (quoting 1973-1978 regulations) (citations omitted).

effluent limitations are required). Thus, contrary to the court's assessment, the regulation provides little, if any, evidence that the EPA had made a decision on the applicability of section 303(d) to nonpoint source-only waters.

At this point in the opinion, the court must address the plaintiffs' argument that the EPA's interpretation had *not* been consistent, but instead was "an invention of the early 1990s."[158] In support of their claim, the plaintiffs cite the fact that the EPA did not turn its attention to the states' failure to include nonpoint source-polluted waters on their section 303(d)(1) lists until the early 1990s.[159] The court responds by observing that, before that time, the EPA had neglected section 303(d) in general in order to expend its energy on point source pollution.[160] The shift in the EPA's enforcement focus did not necessarily indicate a change in its interpretation of section 303(d). The court concludes this section of its discussion by pointing out that there had been no showing that the EPA had ever interpreted section 303(d) in a manner *inconsistent* with the disputed interpretation.[161]

Of course, saying that the EPA had never interpreted the statute inconsistently with the proposed interpretation is not quite the same as saying that the EPA had always interpreted the statute consistently. The absence of a previous inconsistent interpretation may mean only that, as was the case here, the agency had never expressed its position on the subject in any form that would merit substantial judicial deference. This is weak justification for the proposed interpretation. The court should have given little weight to the fact that the plaintiffs were unable to point to a prior inconsistent interpretation when no prior interpretations worthy of substantial deference—consistent or inconsistent—had been made at all.

To summarize, once the court's four pages of deference analysis have been stripped of the inapposite application of *Chevron*, the insubstantial "agency expertise/statutory complexity," and "consistent interpretation" reasoning, what remains is that the court affords "substantial *Skidmore* deference, at the very least."[162] This is because (1) the EPA has delegated regulatory authority under the CWA, and (2) the EPA had not previously made any statements *inconsistent* with its proffered interpretation. Deferring to the agency on the basis of these facts

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[158] *Id.* at 1134.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Pronsolino (II)*, 291 F.3d 1123, 1134-35.

would be granting much more than *Skidmore* deference. It would, in effect, be granting *Seminole Rock* deference, which requires only that the interpretation not be "plainly erroneous or inconsistent with the regulation."[163]

2. "Plain Meaning and Structural Issues"

An essential aspect of the doctrine of judicial deference is the principle that a court will not substitute its own construction of a statute for one made by the administering agency.[164] The agency's interpretation does not have to be the "best" one, nor the one the court would have chosen. It simply has to be permissible, reasonable, or somehow persuasive (depending on the level of deference granted). In other words, if a court finds that deference to the agency's proffered interpretation is warranted, there is no need for the court to examine conflicting interpretations to determine which is the "best" because to do so renders deference analysis virtually meaningless.[165] Yet that is exactly what the court proceeds to do, under the guise of examining "Plain Meaning and Structural Issues."[166]

The court analyzes the statutory text and structure to determine which of the "competing interpretations" of section 303(d)(1)(A) offered by the plaintiffs and the EPA is the better one. The court frames the analysis less than perfectly. Rather than comparing the competing interpretations to each other and the statute, the court should have simply compared the EPA's interpretation to the statute. The plaintiffs' preferred interpretation is irrelevant in a deference analysis; once the court has found that the statute is ambiguous, the only remaining task is to determine whether the *agency's* interpretation is reasonable (*Chevron*) or persuasive (*Skidmore*). For a reviewing court to find that the agency's interpretation is reasonable or persuasive, and then rule that the plaintiffs' interpretation is the better one and should be law, is to substitute its judgment for that of the agency—exactly the kind of judicial interference in the legislative and executive domains that the deference doctrine was developed to

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[163] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[164] *E.g.,* Chevron U.S.A, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984).

[165] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) ("The [majority] implies that courts may substitute their interpretation of a statute for that of an agency whenever, '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue.") (internal citation omitted).

[166] *Pronsolino (II)*, 291 F.3d at 1135.

avoid.[167] Surely, allowing citizens to have authority to interpret a statute equivalent to the authority possessed by the statute's administering agency would require an extraordinarily clear statement of intent from Congress.

During this discussion, the court implies several times that the EPA's construction of the statute is a permissible one.[168] Under *Chevron* or *Seminole Rock*, this alone would be enough for the court to uphold the interpretation. Even under *Skidmore*, the court had already found that the EPA's interpretation was due "substantial" deference[169]—a finding that makes comparison of the competing interpretations superfluous. It is difficult to imagine the court determining that the EPA's interpretation was permissible, yet still ruling that the plaintiffs' interpretation was better and should be the law.

This is not to say that the court's textual and structural analysis, at least with respect to EPA's interpretation, is in itself flawed. It does, in fact, buttress the court's *de facto Seminole Rock* deference by concluding that the EPA's interpretation is "entirely reasonable."[170] The analysis is merely unnecessary.

3. "Federalism Concerns"

The plaintiffs' final argument was that the EPA was seeking to regulate local land use, which is considered to be a state function, in violation of the Constitution's federalism principles.[171] As noted above, the court dismissed this argument because the CWA does not give the EPA the authority to require states to implement or enforce section 303 plans.[172]

The court's reasoning is correct, at least to a point. However, the EPA is capable of making life difficult for states that drag their heels on TMDL implementation and enforcement. In addition to the ability to withdraw section 208 and section 319 funds, the EPA has at least three other "unstated authorities" (as Professor Oliver Houck calls them): (1) it may deny new NPDES permits in water quality-limited streams; (2) it may modify permits for existing sources; and (3) it may revoke the state's

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[167] *See Chevron*, 467 U.S. at 865-66 (quoted *supra* n. 147).

[168] For example: "Whether or not the [plaintiffs'] suggested interpretation is entirely implausible, it is at least considerably weaker than the EPA's competing construction." 291 F.3d at 1135. "If 'stringent' means 'thoroughgoing,' however [one of the definitions cited from the *Oxford English Dictionary Online*], § 303(d)(1)(A) would encompass the EPA's broader reading of the statute." *Id*. at 1136 n.14.

[169] *Id*. at 1134-35.

[170] *Id*. at 1139.

[171] Reply Br. of Pl.'s-Appellants at *14, *Pronsolino (II)* (Nos. 00-16026, 00-16027).

[172] *Pronsolino (II)*, 291 F.3d at 1140.

authority to administer its own program – an extreme sanction that Professor Houck refers to as a "gorilla in the closet."[173] By bringing these authorities to bear on a state, the EPA could indirectly influence land use decisions.

Nonetheless, the plaintiffs' "Hail Mary" federalism argument does not deserve serious consideration for the straightforward reason that under the CWA the EPA simply does not have any authority to make land use decisions. The federal government seeks only to ensure that the waters under its jurisdiction are sufficiently clean. It is up to the states to determine how that goal is accomplished. Here, California determined that the goal would best be accomplished by restrictions on timber harvesting practices. It should also be remembered that the plaintiffs were not, in fact, forbidden to use their land for timber harvesting. The complaint that the EPA was excessively intruding on the state domain of land use rings hollow and accordingly was not exhaustively addressed by the court.

### *C. Prospects for a Similar Decision in the Fifth and Eleventh Circuits*

The question of whether water bodies polluted only by nonpoint sources are subject to TMDLs has not been decided by federal circuit courts of appeals other than the Ninth. The question could be of importance in Mississippi and Alabama because both states have significant agriculture and timber industries, which are two of the major contributors to nonpoint source pollution. *Pronsolino*, a Ninth Circuit decision, is not binding precedent in Mississippi, which is in the Fifth Circuit, or Alabama, which is in the Eleventh Circuit. Thus, the Fifth and Eleventh circuits, if presented with the question of whether section 303(d) applies to nonpoint source-only waters, could rule either way. An examination of past decisions may provide clues as to which way each court might go.

The foundation of the Ninth Circuit's decision is the deference analysis, so the following discussion will focus on that reasoning. To recap, the Ninth Circuit deferred to the EPA's interpretation because (1) the EPA has delegated regulatory authority under the CWA, and (2) the EPA had not made any statements inconsistent with its asserted interpretation. As noted, this is essentially *Seminole Rock* deference. According to *Mead*,

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[173] Oliver Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program*, 28 ENVTL. L. REP. 10415 (1998).

however, the proper deference level for the EPA's section 303 interpretation is *Skidmore* (which requires the interpretation to be not only permissible but persuasive). Thus, cases utilizing *Skidmore* will be considered.

1. The Fifth Circuit

Based on precedent, it is likely, if not certain, that the Fifth Circuit Court of Appeals would uphold the EPA's interpretation if a fact situation similar to that in *Pronsolino* presented itself.

In *Pension Benefit Guaranty Corp. v. Wilson N. Jones Memorial Hospital,*[174] an employer challenged the interpretation of an ambiguous regulatory term by the Pension Benefit Guaranty Corporation (PBGC), which is a federal government corporation that regulates pension plan terminations. The District Court upheld the interpretation as reasonable under *Chevron,*[175] but the Fifth Circuit correctly determined that *Mead* dictated application of the less deferential *Skidmore* standard. Nonetheless, the court upheld the interpretation. The court found PBGC's interpretation persuasive because (1) it was consistent with previous interpretations, (2) it was logical, and (3) the interpretation was made by an expert agency acting within its statutory mandate after a thorough review of the facts.[176]

In *Louisiana Environmental Action Network v. U.S. Environmental Protection Agency,*[177] an environmental organization challenged the EPA's interpretation of the Clean Air Act, which the agency made in accordance with "General Preamble" guidance that it issued without notice and comment. The court found the agency's interpretation persuasive under *Skidmore* because (1) it comported with a "primary purpose" of the statute, and (2) it was logical.[178]

In *In re Dengel,*[179] a trustee in bankruptcy challenged the U.S. Trustee's interpretation of a statute concerning a method of calculating fees. The interpretation had been promulgated in a policy handbook. The court applied *Skidmore* and upheld the interpretation. The court was persuaded because (1) the purpose of the U.S. Trustee's policy comported with the legislative history

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[174] 374 F.3d 362 (5th Cir. 2004).

[175] Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp., 250 F. Supp. 2d 676 (E.D. Tex. 2003).

[176] 374 F.3d at 370.

[177] 382 F.3d 575 (5th Cir. 2004).

[178] *Id.* at 583-84.

[179] 340 F.3d 300 (5th Cir. 2003).

of the statute, and (2) the statute did not prohibit the interpretation.[180]

In *Washington v. HCA Health Services of Texas, Inc.,*[181] a terminated employee challenged his termination on the ground that, under the Americans with Disabilities Act (ADA), his status as "disabled" should be determined based on his un-medicated state rather than his medicated state. The court acknowledged that the ADA was ambiguous on the issue, and seeking guidance as to the correct interpretation, deferred to the Equal Employment Opportunity Commission's Interpretive Guidelines (EEOC Guidelines).[182] This case differs from the others because the plaintiff was not directly challenging the agency interpretation; rather, the court was choosing the agency's interpretation for guidance to the meaning of an ambiguous statute. However, the court cited *Skidmore* for the proposition that agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[183] The court found the EEOC Guidelines worthy of deference because (1) the Guidelines had been part of the EEOC's regulations since the regulations were promulgated, (2) the EEOC's interpretation had been consistent, (3) the legislative history supported the EEOC's interpretation, and (4) the EEOC has "significant expertise and authority to interpret and promulgate regulations under the ADA."[184]

These cases exhibit the Fifth Circuit's tendency to be deferential to agencies when applying *Skidmore.*[185] The factors that have persuaded the court may be summarized as follows: consistency with previous interpretations of the ambiguity; consistency with legislative history; consistency with a primary purpose of the statute; agency expertise and authority; and/or logic. Application of these factors to the EPA's interpretation of section 303 in a *Pronsolino*-like fact situation does not have a clearly predetermined outcome. Yet to the extent that the factors favor one outcome over the other, they favor upholding the EPA.

First, as the Ninth Circuit pointed out, the EPA has not interpreted section 303 inconsistently. As stated above, this is not

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[180] *Id*. at 310.

[181] 152 F.3d 464 (5th Cir. 1998), *vacated on other grounds by* 199 F.3d 192 (5th Cir. 1999).

[182] *Id*. at 470.

[183] *Id*. (quoting *Skidmore*, 323 U.S. at 140).

[184] *Id*.

[185] The Fifth Circuit has purported to apply *Skidmore* in two other cases in which the agency interpretation was overruled: Spector v. Norwegian Cruise Line Ltd., 356 F.3d 641 (5th Cir. 2004) and Moore v. Hannon Food Svc., Inc., 317 F.3d 489 (5th Cir. 2003). However, these cases are not considered here. In *Spector,* the court misapplies the analysis. In *Moore,* the court fails to apply the analysis at all.

necessarily the same as interpreting it consistently, and should not have been particularly strong evidence in the EPA's favor in *Pronsolino*. However, if a similar situation arises in the Fifth Circuit, then the EPA will be able to argue that its decision to apply section 303 to nonpoint source-only waters is consistent with the action it took on the Garcia River that was upheld by the Ninth Circuit. Thus, the "consistency" factor would favor the EPA.

Second, the legislative history is inconclusive about whether Congress intended section 303 to cover nonpoint source-only waters. This fact was acknowledged by both the district court and the Ninth Circuit in the *Pronsolino* case.[186] For this reason the CWA's legislative history should not be an important factor.

Third, the EPA's interpretation comports with the primary purposes of the CWA, which are found in CWA section 101 and include (1) "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," (2) eliminating the discharge of pollutants into U.S. waters, (3) achieving water quality standards, and (4) developing and implementing programs for the control of nonpoint sources of pollution in an expeditious manner.[187] This factor weighs very heavily in the EPA's favor.

Fourth, agency expertise and authority works in the EPA's favor. It has been noted above that the agency's technical expertise is not generally in the realm of determining jurisdiction.[188] However, the agency undeniably has the delegated authority to administer the CWA. This is a factor to which the Fifth Circuit gave weight in both *Pension Benefit Guaranty Corp.* and *HCA Health Services*. It stands to reason that the court would follow similar reasoning here.

Finally, the EPA's interpretation of section 303 is logical. Logic, of course, may be in the eye of the beholder, but it would be difficult to argue persuasively that Congress intended for maximum pollutant loads to be defined for some water bodies that fail to meet water quality standards, but not for others. A water body is listed in section 303(d) because it violates water quality standards; the characterization of the pollution source as point or nonpoint has no logical relationship to the violation. Anthropomorphizing the water body makes the point clear: the water does not care from where its pollutants came, it cares only that it is polluted. By the light of the CWA's explicit objective "to restore and maintain the chemical, physical, and biological

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[186] *Pronsolino (I)*, 91 F. Supp. 2d 1337, 1349-51 (N.D. Cal. 2000); *Pronsolino (II),* 291 F.3d 1123, 1139 (9th Cir. 2002).

[187] 33 U.S.C. § 1251(a)(1), (2), (7).

[188] *See supra* note 154 and accompanying text.

integrity of the Nation's waters,"[189] it is far less logical to argue that Congress intended for nonpoint source-only waters to escape the TMDL process than to argue that it did not.

2. The Eleventh Circuit

Based on precedent, the Eleventh Circuit is less likely than the Fifth to defer to an agency interpretation based on a *Skidmore* analysis. In none of the following cases in which *Skidmore* is followed does the court defer to the agency's proposed interpretation.

In *Arriaga v. Florida Pacific Farms, L.L.C.*,[190] the circuit court's only post-*Mead* case to utilize *Skidmore*, the court chooses not to defer to opinion letters from the U.S. Department of Labor that interpreted a statutory phrase. The court allowed that the agency's interpretation had been consistent in multiple opinion letters over the years, but pointed out that the first such letter did not explain the agency's reasoning and the later letters simply followed the first.[191] Consistency alone, without a foundation of articulated reasoning, was not enough to satisfy the court.

In *Securities and Exchange Commission v. Adler,*[192] the court rejected a Securities and Exchange Commission (SEC) interpretation that was offered in a non-binding "report of investigation" because (1) the interpretation was inconsistent with the agency's position in previous instances, and (2) the agency had "ample opportunity" to adopt its interpretation in a formal rulemaking, but had not done so.[193]

In *Miree Construction Corp. v. Dole,*[194] the court elected not to defer to a decision by the Wage Appeals Board of the U.S. Department of Labor. Again, the court's primary concern seemed to be consistency. The court, following *Skidmore*, declared that "an agency decision is more likely to be entitled to deference if it is a 'long-standing, clearly articulated interpretation of the statute.'"[195] Those characteristics were absent from the interpretation in question.

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[189] 33 U.S.C. § 1251(a) (2000).
[190] 305 F.3d 1228 (11th Cir. 2002).
[191] *Id*. at 1238-39.
[192] 137 F.3d 1325 (11th Cir. 1998).
[193] *Id*. at 1339.
[194] 930 F.2d 1536 (11th Cir. 1991).
[195] *Id*. at 1541 (quoting *Fed. Maritime. Comm'n. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

In *Frank Diehl Farms v. Secretary of Labor,*[196] the court heard a challenge to a statutory interpretation that had been made by the Occupational Health and Safety Review Commission and the Secretary of Labor in an administrative order. The court determined that the interpretation was not entitled to deference under *Skidmore* because (1) it was not made contemporaneously with the original legislation, (2) it was inconsistent with previous interpretations, and (3) it "did not involve a technical matter, but rather involved a statutory construction well within the courts' expertise."[197]

These cases show that the Eleventh Circuit is wary of deferring to agency interpretations of statutory ambiguities, although it will consider various factors in accordance with *Skidmore*. Factors that the court considered in these cases included: consistency with previous interpretations; clear articulation of the reasoning supporting the interpretation; whether the agency had had the opportunity to advance its interpretation by formal rulemaking; whether the agency's interpretation was made contemporaneously with the original legislation; and whether the interpretation involved a technical matter.

In a *Pronsolino*-type situation in the Eleventh Circuit, the consistency factor should weigh slightly in the EPA's favor, as explained in the Fifth Circuit discussion above. Likewise, the EPA has articulated its reasoning for interpreting section 303(d) as encompassing nonpoint source-only waters, for example in the preamble to the proposed TMDL rule.[198] That factor is also likely to work to the EPA's advantage.

The remaining factors weigh against the EPA. The EPA had, and took, the opportunity to advance its interpretation of section 303(d) by formal rulemaking with the proposed TMDL rule. The fact that the EPA withdrew the proposed rule before it could go into effect could be read as a lack of agency confidence in the interpretation, although it appears that the withdrawal was motivated as much by public controversy as by agency reconsideration.[199] Either way, the agency had the opportunity to clarify its interpretation of section 303(d) in its regulations, yet failed to complete the formal rule-making process.

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[196] 696 F.2d 1325 (11th Cir. 1983).

[197] *Id*. at 1329-30.

[198] *See supra* note 62; *see also* Persciasepe, *supra* note 145.

[199] Withdrawal of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. at 13,608-12 (Mar. 19, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130).

Further, the EPA interpretation was not made contemporaneously with the original legislation. The CWA was enacted in 1972; the EPA's first CWA regulations did not appear until 1978.[200]

Finally, interpreting whether section 303(d) should include nonpoint source-only waters does not involve a technical matter.[201] It is a matter of statutory construction, which a court is no less qualified to make than the agency charged with administering the statute.

Based on the court's tendency not to defer to agency interpretations under *Skidmore*, and on the factors that the court has considered important in the past, it is not likely that the Eleventh Circuit would rule in the EPA's favor if presented with a case like *Pronsolino*.

## V. CONCLUSION

If cases like *Pronsolino,* contesting the applicability of section 303(d) to nonpoint source-only waters, were to be brought in Mississippi and Alabama today, it appears that the results would be split. In Mississippi, which is in the Fifth Circuit, precedent indicates that the courts would uphold the EPA's interpretation. In Alabama, part of the Eleventh Circuit, the courts probably would reject the EPA's interpretation.

Clean water advocates in Mississippi and Alabama should consider these possibilities as they work for further improvement in the states' nonpoint source-impaired water bodies. From a legal standpoint, section 303(d) may not be the most appropriate tool for this very important job. For the time being, achieving water quality standards in *all* the waters of the U.S.—not just those affected by point sources—may be most effectively pursued by focusing on efforts under sections 208 and 319 and tougher state laws.

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[200] *See Pronsolino (II)*, 291 F.3d at 1133.

[201] *See supra* note 154 and accompanying text.

# POWER PLANT SITING IN A DEREGULATED ELECTRIC ENERGY INDUSTRY: DISCERNING THE CONSTITUTIONALITY OF SITING STATUTES UNDER THE DORMANT COMMERCE CLAUSE

SHANE RAMSEY*



## I. INTRODUCTION

Perhaps one of the most important conflicts between environmental regulation and energy policy today is that of electric generation capacity. Adequate generation capacity is vital to the United States electricity market, yet states are failing to site the number of power plants needed to meet the growing demand for generation of electric energy. For instance, in May of 2000, the Energy Policy Development Group issued a study in which they projected that the increased electric energy demand may require 393,000 megawatts of new capacity by 2020.[1] Large states such as California and New York are failing to certify the number of plants necessary to meet the increased demand for electric energy.[2] This problem is not unique to California or New York, but rather is a common theme seen throughout the country.

A significant source of the problem can be found in state siting statutes. When a generation expansion project (an effort to build a new power plant) is proposed, the state has the right to

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[1] Elise N. Zoli, *Power Plant Siting in a Restructured World: Is There a Light at the End of the Tunnel?*, 16 NAT. RESOURCES & ENV'T 252, 252 (Spring 2002).

[2] *Id.*

block the project.[3] Moreover, in twenty-two states, local governments are also permitted to block such expansion projects.[4] These statutes are often outdated, failing to take into account the vast changes the electric energy industry has undergone in the last decade or so.[5] Unsurprisingly, parochialism plays a significant role in determining which power plants get sited.[6] Only a handful of states allow siting boards to consider regional benefits during the siting process.[7] To the extent that these statutes require siting boards to look solely to the in-state benefit of a project, these decision makers are bound to follow the letter of the law.[8] Thus, in most states, power plants will not be sited unless they provide a significant in-state benefit, no matter how large a benefit the proposed plant may provide on a regional basis.

This type of decision-making is potentially problematic under the dormant Commerce Clause.[9] Despite the potential for problems arising under this clause of the Constitution, there has been very little litigation over this issue. This likely stems from the fact that, until recently, the energy industry was heavily regulated. In recent years, however, the energy industry has been deregulated, leading to increased competition in the marketplace.[10] This increase in competition will inevitably lead to more litigation involving the dormant Commerce Clause. This Comment seeks to address the relevant dormant Commerce Clause issues pertaining to power plant siting laws that are likely to arise in a deregulated electric energy industry.

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[3] Richard J. Pierce, Jr., *Environmental Regulation, Energy, and Market Entry*, 15 DUKE ENVTL. L. & POL'Y F. 167, 178 (Spring 2005). As Elise Zoli noted, "[b]y and large, Americans continue to respond negatively to the essential infrastructure required to power the American economy and our lives—power plants and transmission lines—when elements of that infrastructure are proposed in our communities and neighborhoods." Zoli, *supra* note 1, at 253.

[4] Pierce, *supra* note 3, at 178.

[5] Ashley C. Brown & Damon Daniels, *Vision Without Site: Site Without Vision* at 2 (2003), http://www.ksg.harvard.edu/hepg/siting.htm (follow "Vision Without Site, Site Without Vision" hyperlink under "2003").

[6] *Id.* at 4.

[7] *Id.*

[8] *Id.*

[9] See *infra* Part III for dormant Commerce Clause discussion. Electric energy indisputably constitutes interstate commerce, and thus is afforded protection under the Commerce Clause. FERC v. Mississippi, 456 U.S. 742, 757 (1982) ("[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy"). As Professors Bossleman, Rossi and Weaver have noted, "[t]he U.S. government's authority to regulate energy resources is far reaching under the Commerce Clause. Since 1937, Congress has had the authority to regulate purely intrastate activities that affect interstate commerce, such as electricity and natural gas generation, transmission, [and] distribution." FRED BOSSELMAN ET AL., ENERGY, ECONOMICS, AND THE ENVIRONMENT 15 (2000).

[10] *See infra* Part II.

Part II will provide a general background on the electric energy industry discussing the move towards deregulation and the new players this deregulatory framework has created. Part III will introduce the dormant Commerce Clause. Part IV will apply to the dormant Commerce Clause to three hypothetical situations likely to occur under a standard power plant siting regime. Part V will offer concluding remarks.

## II. THE DEREGULATED ELECTRIC ENERGY INDUSTRY

### *A. Basic Concepts of the Electric Energy Industry*

The physical equipment that encompasses the modern electric power system can be divided into three basic categories: (1) generation[11], (2) transmission[12], and (3) distribution.[13] In the past, the same entity–a vertically integrated firm–owned and operated all three features of the system.[14] Vertical integration was the norm based on the belief that a vertically integrated firm was capable of providing electric energy in the most efficient manner.[15]

Traditionally, the electric utility was viewed as being "clothed with the public interest",[16] thus resulting in their regulation as a "public utility"—a firm granted a monopoly in a given geographic area in exchange for a duty to serve the public.[17]

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[11] Generation is the process by which energy is produced. "Most electric power plants use either coal, oil, natural gas and uranium as fuel. . . . A bit more than half the electricity in the United States comes from coal-fired plants. About a fifth comes from nuclear power plants." BOSSELMAN ET AL., *supra* note 9, at 654.

[12] Transmission is the process by which the electric energy is transferred from the generating facility. Because power plants are immovable, their output must be transferred from the generation facility to the consumer. *Id.* at 656. "The transmission system accomplishes much of this task with an interconnected system of lines, distribution centers, and control systems." *Id.*

[13] The system of distribution delivers the electricity to the consumer. "The distribution system consists of the substations, poles and wires common to many neighborhoods as well as underground lines found in many other areas." *Id.* at 657.

[14] *Id.* at 654.

[15] Greg Goelzhauser, *Price Squeeze in a Deregulated Electric Power Industry*, 32 FLA. ST. U. L. REV. 225, 228 (2004).

[16] *See* Munn v. Illinois, 94 U.S. 113 (1876). Since *Munn*, certain industries have been thought of as being "clothed with the public interest" and thus obligated to provide equal service to all. BOSSELMAN ET AL., *supra* note 9, at 150.

[17] BOSSELMAN ET AL., *supra* note 9, at 150. *See also* Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1236 (1998).

Proponents of regulation argue that regulation of a natural monopoly is critical to ensuring that consumers are not taken advantaged of. However, critics of regulation argue that it is not necessary. David Bryce aptly summarized the two sides of the debate:

The public utility is viewed as a "natural monopoly"—"a single firm that is able to provide a good or service to a market at a lower average cost than two or more firms because of economies of scale or other network economies."[18] Today, however, the electric energy industry is undergoing extensive changes and these natural monopolies are being encouraged[19] to yield to a competitive market. Innovations in technology have led some economists to suggest that economies of scale no longer exist in the generation sector of the electric power industry.[20] This belief has led to efforts to open the generation sector to competition.[21] However, the transmission and distribution sectors are still viewed as natural monopolies, and hence have not been deregulated.[22]

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> Natural monopoly theory posits that economies of scale within certain industries enable a single firm to provide service at lower average cost than several competing firms. Where a natural monopoly exists, failure to regulate the monopolist firm may lead to pricing structures highly detrimental to consumers of the monopolist's services. Regulation becomes necessary to achieve a balance between the monopolist service provider and consumers that roughly mimics competitive market conditions.
>
> Critics of basing regulatory policy on concerns of natural monopoly argue that perfectly competitive markets are not needed to prevent firms from achieving monopoly profits. Instead, the threat of competitors entering a market, coupled with their ability to exit if profits do not materialize, offsets the capacity of a single firm to attain monopoly profits. Moreover, natural monopolies do not exist in perpetuity. Technological developments in a given industry or modification of regulatory policy may reduce or eliminate natural monopoly conditions.

David V. Bryce, *Pipeline Gathering in an Unbundled World: How FERC's Response to "Spin Down" Threatens Competition in the Natural Gas Industry*, 89 MINN. L. REV. 537, 543 (Dec. 2004).

[18] BOSSELMAN ET AL., *supra* note 9, at 150.

[19] Order No. 888, discussed *infra*, recommended, rather than required, electric utilities to "unbundle" their services and provide open access. As the order stated, "the proposed rule would accommodate, but not require, corporate unbundling." Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21,540, 21,551 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

Less than half of states have opted to pass laws regarding deregulation. States that have chosen to pass deregulation legislation include Arizona, Arkansas, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, and West Virginia. Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L. J. 507, 645, n.739 (2004).

[20] Goelzhauser, *supra* note 15, at 228.

[21] *Id.*

[22] *Id.*

### *B. Deregulation: Wholesale Competition in the Electric Energy Industry*

Deregulation in the electric energy industry strips utilities of the monopoly franchises granted to them by the states and allows new power suppliers to enter the market and compete for their business. The theory behind deregulation is that it will produce downward cost pressures when inefficient electric energy suppliers lose market share.[23] New energy suppliers will then—through the use of market-based incentives to build generation facilities—be available to match demand and provide electricity to willing customers.[24]

Based on principles of federalism, the process of deregulation has occurred in two separate arenas: at the state and federal level. The Federal Energy Regulatory Commission (FERC) was granted regulatory authority over the wholesale purchase of electric energy in interstate commerce[25] through the enactment of the Federal Power Act.[26] The Federal Power Act gives the states authority over most intrastate matters concerning retail sales of electric energy.[27] Thus, transactions regarding interstate wholesale purchases are governed by FERC, while intrastate retail sales transactions are governed by the relevant state public service commission.[28] Wholesale markets have made greater steps towards deregulation than their retail counterparts.[29] Therefore, this Part will discuss deregulation at the federal (wholesale) level.

With the passage of the Public Utilities Regulatory Policy Act[30] (PURPA) in 1978, wholesale markets began a transition towards competition.[31] PURPA authorized FERC to command wheeling for wholesale customers and suppliers.[32] Restrictive agency and judicial interpretations, however, resulted in PURPA having only a minimal impact on industry restructuring.[33] Despite PURPA's minimal impact on industry restructuring, it did

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[23] David J. Hayes, *Energy, Again—But with a Kicker*, 16 NAT. RESOURCES & ENV'T 215, 219 (Spring 2002).

[24] *Id.*

[25] 16 U.S.C. § 824(b)(1) (2000).

[26] *Id.* at §§ 791-828.

[27] *See* Goelzhauser, *supra* note 15, at 229.

[28] *Id*.

[29] "Consumers do not currently have the option to select their retail providers." *Id.* at 234.

[30] Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended at 16 U.S.C. §§ 824a-1 to a-3, 824i-k, 2601-2645 (1994)).

[31] Goelzhauser, *supra* note 15, at 231.

[32] *Id.* at 231-32.

[33] *Id.* at 232.

have the effect of allowing independent firms to enter the generation market and compete with the traditional integrated provider.[34]

Congress's passage of the Energy Policy Act of 1992[35] (EPAct) saw the electric energy industry take its next big step towards competition. In passing the EPAct, Congress gave FERC more authority to order wholesale transmission access.[36] Under the EPAct, a firm participating in a wholesale market may "apply to FERC for issuance of an order requiring a 'transmitting utility' to provide wheeling services, including any enlargement of transmission capacity necessary to provide the service requested by the applicants."[37] FERC is then "authorized to grant the application and order a transmission facility owner to provide the applicant with the requested service on fair terms."[38] The EPAct also encouraged independent firms to enter the generation market by removing restrictions "on the type of generators that could sell deregulated wholesale power."[39] Essentially, the EPAct accelerated the shift to competitive wholesale markets initiated by PURPA.[40]

The most significant development to date in electricity deregulation occurred in 1996 when FERC issued Order No. 888.[41] Order No. 888 deregulated the electricity production industry by "unbundling" the wholesale transmission and generation sectors of the electric energy industry.[42] Order No. 888 was based on the belief that, "[u]nless all public utilities are required to provide non-discriminatory open access transmission, the ability to achieve full wholesale power competition, and resulting consumer benefits, will be jeopardized."[43] Order No. 888, while not perfect, has led the energy industry in a significant way towards wholesale competition as "a wider range of generators and utilities have access to a networked wholesale power grid."[44]

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[34] *Id.*

[35] Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

[36] Goelzhauser, *supra* note 15, at 232.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 232-33.

[40] *Id.* at 233.

[41] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

[42] BOSSELMAN ET AL., *supra* note 9, at 757.

[43] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 60 Fed. Reg. 17,662 (proposed April 7, 1995) (codified at 18 C.F.R. pt. 35).

[44] Rossi, *supra* note 17, at 1280.

Deregulation has led to an increase in the number of groups competing for a market share in this newly competitive industry. The electric energy industry is currently comprised of six major groups:[45] (1) investor-owned utilities (IOUs);[46] (2) federal agencies that generate, transmit or market power;[47] (3) publicly owned systems, mostly operated by cities and known as 'municipals' or 'public power;'[48] (4) rural electric cooperatives funded through the Department of Agriculture;[49] (5) independent power producers[50] and (6) power marketers.[51]

It is against the backdrop of competition and newly emerging players in the electric energy industry that we consider the effect of the dormant Commerce Clause on power plant siting laws.

## III. THE DORMANT COMMERCE CLAUSE

The Constitution grants Congress the power to regulate interstate commerce.[52] Additionally, the United States Supreme Court has given the Commerce Clause not only a pro-active interpretation in allowing Congress to regulate interstate commerce, but also a dormant aspect, which limits the states' ability to act in a manner that creates an undue burden on interstate commerce.[53] Although the Constitution gives Congress the power to regulate interstate commerce, many subjects of this regulation escape congressional attention "because of their local

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[45] BOSSELMAN ET AL., *supra* note 9, at 659.

[46] "Although referred to as *public* utilities, IOUs are private, shareholder-owned companies ranging in size from small local operations serving a customer base of a few thousand to giant multistate corporations serving millions of customers." *Id.* (emphasis in orginal).

[47] "The Federal Government generates electric power at federally owned hydroelectric facilities. It is primarily a wholesaler, marketing its power through five Federal power marketing agencies: 1. Bonneville Power Administration, 2. Western Area Power Administration, 3. Southeastern Power Administration, 4. Southwestern Power Administration, and 5. Alaska Power Administration." *Id.*

[48] "The more than 2,000 public power systems include local, municipal, State, and regional public power systems ranging in size from tiny municipal distribution companies to giant systems like the Los Angeles Department of Water and Power." *Id.* at 660.

[49] "Electric cooperatives are electric systems owned by their members, each of whom has one vote in the election of a board of directors." *Id.*

[50] "Most independent power producers began operation because of the Public Utility Regulatory Policies Act of 1978 (PURPA) and its requirement that utilities purchase power from certain defined qualifying facilities (QFs)." *Id.* at 661 (citation omitted).

[51] "Since the passage of the Energy Policy Act of 1992, many new companies have been created to serve as marketers and brokers of electric power. These companies do not own or operate any electric facilities. They buy and sell electricity on the open market." *Id.*

[52] U.S. CONST. art. 1, § 8, cl. 3.

[53] *See* Cooley v. Bd. of Wardens, 53 U.S. 299 (1852), *overruled on other grounds*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

character and their number and diversity."[54] Absent federal regulation, states may control these subjects "so long as they act within the restraints imposed by the Commerce Clause itself."[55] While the bounds of these restraints do not appear in the language of the Commerce Clause, the Court has given effect to such restraints based on the basic principle of the Commerce Clause. As Justice Jackson explained, that basic principle of the Commerce Clause is that the nation is one economic unit and "that one state in its dealings with another may not place itself in a position of economic isolation."[56]

Generally speaking, there are two categories of cases that fall under the dormant Commerce Clause.[57] First are cases in which the statute in question discriminates against out-of-state interests. These are statutes in which the state is engaging in economic protectionism.[58] These statutes fall into two categories: (1) statutes that discriminate on their face,[59] and (2) statutes that are facially neutral, but have the effect of discriminating against interstate commerce.[60] These statutes are subject to the strictest scrutiny; the state must show a compelling interest and show that they cannot accomplish this compelling interest in any manner that would be less restrictive on interstate commerce.[61] Second

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[54] South Carolina State Hwy. Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938).

[55] Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978).

[56] H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949) (citations omitted).

[57] *See generally* MARK V. TUSHNET, THE NEW CONSTITUTIONAL ORDER 228-29 n.98 (Princeton University Press 2000) ("[I]t is said that [the] doctrine [of the dormant Commerce Clause] has two branches, one barring states from enacting statutes that discriminate . . . and the other barring . . . unacceptably high burdens on interstate commerce.").

[58] *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[59] *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[60] *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). While the Court in *Hunt* clearly followed a discriminatory in effect analysis, the Court has not been completely consistent in this approach. *See generally* Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 S.C. L. REV. 381 (Spring 1995) (arguing that the Court has not consistently applied the approach they took in *Hunt* and that the Court should develop a clear cut approach to statutes that discriminate in effect). While Professor Twyman argues that the Court has not really undertaken discrimination in effect analysis, the Court itself has acknowledged that there are two levels of the discrimination analysis. *See* Hughes v. Oklahoma, 441 U.S. 322 (1979) (stating that courts must inquire whether the state regulation "discriminates against interstate commerce either on its face or in practical effect").

[61] *Dean Milk Co.*, 340 U.S. at 344-46. Statutes that discriminate on their face, however, are virtually per se invalid. For instance, in *Philadelphia v. New Jersey*, the Court struck down a New Jersey statute that prohibited the treatment and disposal of waste which originated or was collected outside of the state. 437 U.S. at 628-29. In so doing, the Court noted that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Id.* at 624. Moreover, the *Philadelphia* Court failed to even mention the *Dean Milk* test. Such an omission should not be seen as a mere oversight, but rather as a statement that the Court will not even consider upholding a statute that clearly discriminates against out-of-state interests on its face. *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 42 (1980) (holding a statute that discriminates on its face

are cases in which "the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental."[62] These statutes are subject to a lower standard of review, as described by the following statement from the Court in *Pike v. Bruce Church*:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens.[63]

Thus, under the *Pike* test, the Court must balance the magnitude of the burden on interstate commerce against the state interest achieved by the statute. If the burden on interstate commerce is greater than the state interest achieved by the statute, then the regulation will be held as an unconstitutional violation of the dormant Commerce Clause.[64]

With the relevant dormant Commerce Clause jurisprudence in mind, we now turn to its application in a deregulated electric energy industry.

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displays a local favoritism or protectionism that significantly alters its Commerce Clause status).

[62] Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

[63] *Id.* (citations omitted). *See also* Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (Nov. 1940). Professor Dowling's now famous Virginia Law Review article is credited with crafting the balancing test adopted by the Court in *Pike*. Jeremy R. Jehangiri, *The Dowling Thesis Revisited: Professor Dowling and Justice Scalia*, 49 S.D. L. REV. 867, 867 n.1 (2004).

[64] *See* Jehangiri, *supra* note 63, at 876.

## IV. APPLYING THE DORMANT COMMERCE CLAUSE TO THE DEREGULATED ELECTRIC ENERGY INDUSTRY

### *A. The Hypothetical*

State X uses a power plant siting procedure that is similar to that of many other states. Under this procedure, the power plant siting board determines, pursuant to a statutory provision, whether the power plant should be sited in State X. The relevant statutory provision states the following:

> Exclusive forum for determination of need-- On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the State X Electrical Power Plant Siting Act. The commission shall publish a notice of the proceeding in a newspaper of general circulation in each county in which the proposed electrical power plant will be located. The notice shall be at least one-quarter of a page and published at least 45 days prior to the scheduled date for the proceeding. The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its

> members which might mitigate the need for the proposed plant and other matters within its jurisdiction such as, but not limited to, the environmental impact of the proposed plant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity and shall serve as the commission's report. An order entered pursuant to this section constitutes final agency action.[65]

1. Case One

A merchant power company ("Merchant Plant"), an energy company that sells electricity on the interstate market, has applied for a permit to construct a power plant in State X. The plant will provide energy to State X as well as energy to States Y and Z. Merchant Plant, however, is not a State X utility. A prior decision of State X's Supreme Court has interpreted their power plant siting statute in a manner that only allows State X utilities to apply for a permit within State X's borders. Based on this State X Supreme Court decision, the siting board denies Merchant Plant's request for a permit.[66]

State X's actions here present a constitutional problem. Under this regime, it is impossible for any out-of-state company to enter the wholesale electrical market in State X. Merchant Plant's only hope of entering State X is to contract with a State X utility and have that utility apply for the permit on behalf of the out-of-state utility.[67] This, however, allows in-state utilities to bar out-of-state utilities from competing with them in State X simply by refusing to apply for a permit on their behalf.

Requiring Merchant Plant to contract with a State X utility before applying for a permit in State X overtly discriminates against interstate commerce. Statutes that discriminate on their face are virtually per se invalid. For instance, in *Philadelphia v. New Jersey*, the Court struck down a New Jersey statute that

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[65] This statute is based on Florida's power plant siting statute. *See* FLA. STAT. § 403.519 (2004). This statute is similar to other state power plant siting statutes.

[66] This hypothetical is based on a modified version of the facts from Tampa Electric Co. v. Garcia, 767 So. 2d 428 (Fla. 2000).

[67] This point was made by the Utility Commission for the City of New Smyrna Beach, Florida in *Tampa Electric Co. v. Garcia*. *See* Br. for Appellee at 40, Tampa Electric Co. v. Garcia, 767 So. 2d 428 (Fla. 2000), 1999 WL 33626599.

prohibited the treatment and disposal of waste that originated or was collected outside of the state.[68] In so doing, the Court noted that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."[69] Moreover, the Court stated that no matter how important the state interest is, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, *apart from their origin*, to treat them differently."[70] Here there is no reason, apart from the origin of Merchant Plant, to exclude them from applying for a permit in State X. As will be discussed below, State X can achieve their legitimate goals (as evidenced by the statute) without requiring the utility applying for a permit to be a State X utility.

Additionally, the Supreme Court has held unconstitutional many state statutes that attempted to give local businesses a competitive advantage by forcing anyone contemplating doing business in the state to first contract with an in-state company.[71] As the Court has stated, "the cardinal principle [under the dormant Commerce Clause is] that a State may not 'benefit in-state economic interests by burdening out-of-state competitors.'"[72] State X is giving in-state utilities a distinct advantage by limiting the ability of out-of-state utilities to apply for a permit. Such a provision is not permitted under the dormant Commerce Clause.

The discriminatory nature of State X's siting statute renders it virtually per se invalid. A state may not justify such a statute under any circumstances unless the state shows that its legitimate local interests could not be protected through a non-discriminatory alternative.[73] However, in cases in which the statute in question had discriminated on its face—as opposed to simply discriminating in effect—the Court has failed to employ this least restrictive alternative test. The *Philadelphia* Court failed to mention the least restrictive alternative test articulated

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[68] 437 U.S. 617, 628-29 (1978).

[69] *Id.* at 624. *See also* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 42 (1980) (holding a statute that discriminates on its face displays a local favoritism or protectionism that significantly alters its Commerce Clause status).

[70] Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978) (emphasis added).

[71] *See* C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994); Wyoming v. Oklahoma, 502 U.S. 437 (1992); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Toomer v. Witsell, 334 U.S. 385 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Buck v. Kuykendall, 267 U.S. 307 (1925).

[72] West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994).

[73] Although, as I will note below, the Supreme Court has failed to employ the least restrictive alternative test in cases of facial discrimination. Rather, the Court has simply held such statutes unconstitutional without any mention of this test.

by the Court in *Dean Milk Co. v. City of Madison*[74]. Such an omission should not be seen as a mere oversight, but rather as a statement that the Court will not consider upholding a statute that clearly discriminates against interstate commerce on its face.[75] Even assuming that the Court would employ the *Dean Milk* test in this situation, State X's statute could not possibly withstand such rigorous scrutiny.

In *Dean Milk*, the Court considered the constitutionality of a City of Madison ordinance that prohibited the sale of any milk unless it had been processed at an approved plant within a radius of five miles from the city.[76] The Court held that such a regulation plainly discriminated against interstate commerce.[77] In so doing, the Court stated, "[t]his [the City of Madison] cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interest, are available."[78] The question here, therefore, is whether State X can achieve its legitimate local interests represented by the siting statute without banning out-of-state utilities from applying for permits absent contracting with in-state utilities.

The siting statute serves three legitimate local interests: (1) ensuring that the electric system is reliable; (2) ensuring that electricity will be provided at a reasonable cost; and (3) ensuring that the proposed power plant is the most cost-effective plant available.[79] All three of these interests can easily be achieved without requiring utilities applying for a permit within State X to be State X utilities. These interests have no relation whatsoever to whether the utility providing the electricity is an in-state utility or an out-of-state utility. The less restrictive alternative would be to site all plants—irrespective of their state of origin—and require the plants to meet the criteria listed in the statute. This would allow State X to achieve its valid state interests as enumerated in the statute, while at the same time not discriminating against interstate commerce.

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[74] 340 U.S. 349 (1951).

[75] *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 42 (1980) (holding a statute that discriminates on its face "displays a local favoritism or protectionism that significantly alters its Commerce Clause status").

[76] *Dean Milk*, 340 U.S. at 350.

[77] *Id.* at 354.

[78] *Id.*

[79] State X's siting statute provides, in relevant part, that the siting commission "shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available." *See supra* note 65 and accompanying text.

Because State X's actions discriminate against interstate commerce, it is unnecessary to determine whether the requirement would unconstitutionally burden interstate commerce.[80] For the sake of thoroughness, however, the following discussion will explore whether State X's actions substantially burden interstate commerce.

In addition to discriminating against interstate commerce, State X has placed a substantial burden on interstate commerce. State X is restricting the ability of out-of-state utilities to apply for permits to build within State X. An out-of-state utility may not apply for a permit unless it first contracts with an in-state utility. Such a requirement substantially burdens interstate commerce by imposing additional transaction costs on utilities that seek to enter the State X electric energy market.

Statutes that do not discriminate against interstate commerce, but do burden interstate commerce, are analyzed under the Court's statement in *Pike v. Bruce Church*–the magnitude of the burden on interstate commerce balanced against the state interest achieved by the statute.[81] Because the statute places a burden on interstate commerce, the question becomes, first, whether a legitimate local interest exists, and, if so, whether the interest could be promoted as well by a mechanism that has a lesser impact on interstate activities.[82]

The above discussion illustrates that legitimate local interests do not support State X's in-state utility requirement. All three of the interests delineated in the statute can be achieved by other less burdensome means, and in fact, have no relation to whether the utility applying for a permit is an in-state utility or an out-of-state utility. Moreover, the statute in question does not operate evenhandedly in its treatment of utilities in the business of providing wholesale electrical power. The statute in question treats out-of-state utilities different from those of in-state utilities and imposes on out-of-state utilities an additional transaction cost that is not present for in-state utilities. State X's statute places a burden on interstate commerce that cannot be reconciled under the *Pike* test, and thus would likely be held unconstitutional.

As the foregoing discussion illustrates, State X's actions in Case One both discriminate against, and substantially burden, interstate commerce. By prohibiting an out-of-state utility from

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[80] *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (holding that the Court would "not resort to" the burden analysis when the statute in question discriminates against out-of-state interests).

[81] Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

[82] *Id*.

applying for a permit within their state, State X has benefited in-state utilities at the expense of out-of-state utilities and has significantly restricted the flow of goods in interstate commerce. These actions violate the dormant Commerce Clause, and thus are not constitutionally permitted.

2. Case Two

Merchant Plant has applied for a permit to construct a power plant within State X. The plant will provide energy to State X as well as energy to States Y and Z. Unlike Case One, however, the State X Supreme Court has never held State X's power plant siting law to require the utility be a State X utility in order to receive a permit. The siting board considers Merchant Plant's request for a permit, but ultimately denies the permit based on the determination that State X has no current need for electricity.[83]

While Case One was an easy case of facial discrimination, Case Two cannot be as easily decided. Case One is clearly different from Case Two in that in Case Two State X is not engaging in economic protectionism—they are not favoring their in-state companies over out-of-state companies. State X may, however, be discriminating against interstate commerce by prohibiting a power plant to be sited in their state unless the plant provides power to State X.

The argument for discrimination is much more difficult to make in Case Two, although there is an argument to be made. There are many dormant Commerce Clause cases dealing with the authority—or lack thereof—of a state to restrict the transportation of goods made in their state to other states. The following discussion will examine a sample of these cases.

In *New England Power Co. v. New Hampshire*, the Court examined the constitutionality of a New Hampshire statute that prohibited a utility engaged in water-powered generation of electrical energy from transporting such energy out-of-state unless the utility first obtained approval from the New Hampshire Public Utilities Commission.[84] The Court struck this statute down as both a case of discrimination and a burden on interstate commerce, holding that this statute permitted New Hampshire to gain an economic advantage for their citizens at the expense of citizens in neighboring states.[85] In doing so, the Court quoted its previous

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[83] This hypothetical is based on a modified version of the facts from *Point of Pines Beach Ass'n. v. Energy Facilities Siting Bd.*, 644 N.E.2d 221 (Mass. 1995).

[84] 455 U.S. 331, 335 (1982).

[85] *Id.* at 338.

decision in *Philadelphia v. New Jersey* where it stated, "a '[s]tate is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.'"[86] This principle—that a state may not restrict goods made in their state from being shipped in interstate commerce—is a long recognized standard that has been repeated numerous times by the Court.[87]

Under this principle, it would seem that State X's actions in Case Two are a clear-cut case of discrimination. State X is preventing Merchant Plant from creating power in its state that will benefit customers in States Y and Z. This argument, however, is not as straightforward as it appears at first glance.

State X is not really prohibiting Merchant Plant from transmitting electrical energy created in their state to States Y and Z, but rather is refusing to site Merchant Plant within State X if the energy produced by the plant will not provide a needed energy supply to the residents of State X. If State X was in need of power and sited Merchant Plant within State X, Merchant Plant would be free to transport the energy created at its plant to whomever it chose; nothing in State X's statute would prohibit this. The principle delineated above, therefore, can be distinguished from State X's actions in Case Two. A court considering a challenge to State X's siting statute in a scenario such as Case Two would likely hold as such. Additionally, State X's statute does not have the effect of discriminating against interstate commerce; therefore, no "discriminatory in effect" analysis will be undertaken.

While Case Two can likely be taken out of the discrimination category by the distinctions noted above, State X's actions in Case Two may still substantially burden interstate commerce. The fact that State X does not prohibit the transportation of electric energy created in their state as long as the plant sited provides needed energy to State X is enough to show that there is no discrimination—State X is not favoring their citizens over the citizens of other states. This distinction, however, does not help State X justify their actions under the burden analysis.

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[86] 437 U.S. 617, 627 (1978) (quoting Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928)).

[87] *See, e.g.,* Hughes v. Oklahoma, 441 U.S. 322 (1979); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

State X's actions clearly burden interstate commerce. As the Court in *New England Power Co.* noted, the Commerce Clause prohibits a state from providing its residents with "a preferred right of access, over out-of-state consumers," to products created within the state.[88] In so doing, the Court held that New Hampshire's exportation ban placed direct and substantial burdens on interstate commerce.[89] The same holds true in Case Two despite the fact that State X would allow exportation if electric energy was needed in the state. This distinction is only important under the discrimination analysis. Under the burden analysis such local favoritism and economic protectionism is not required. The burden analysis requires simply that the regulation in question place a substantial burden on interstate commerce.[90] Here, State X is preventing residents in States Y and Z from receiving needed power simply because State X has no current need for electric energy. Such a regulation clearly burdens interstate commerce.

After a burden on interstate commerce has been established the next question becomes whether the statute can be permitted to stand under the *Pike* balancing test—the magnitude of the burden on interstate commerce balanced against the state interest achieved by the statute.[91] As noted above, State X has three legitimate local interests enumerated in the siting statute: (1) ensuring that the electric system is reliable; (2) ensuring that electricity will be provided at a reasonable cost; and (3) ensuring that the proposed power plant is the most cost effective plant available. These three interests all work under the assumption that there is a need for electricity in the state. Under *Pike* the question is whether this interest outweighs the burden on interstate commerce. Essentially, the question that must be addressed is whether State X has the authority under the dormant Commerce Clause to shut out a company from doing business in their state solely because the service provided by the company will not benefit the customers of State X.

The burden in this case is unquestionably significant. State X is denying residents in States Y and Z access to affordable power. Conversely, State X's interest underlying the statute is insignificant. State X does not have a justifiable reason to shut utilities out of their state solely because there is no present need for electrical energy. State X is essentially saying, "[w]e don't

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[88] 455 U.S. at 338 (1982).
[89] *Id.* at 339.
[90] *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
[91] *Id.* at 142.

want your plant in our state if it is not going to benefit us." This justification simply does not meet dormant Commerce Clause scrutiny.

State X does, however, have a legitimate right to regulate the siting of power plants to protect the three interests listed above, but these interests can be protected without outright banning any utility that is not currently needed within the state. For instance, State X can still require all utilities applying for a permit within the state to meet the requirements laid out in the statute in the event that the utility would in the future supply electricity to State X consumers.

While State X's actions in Case Two do not discriminate against interstate commerce, they do substantially burden interstate commerce. These actions do not survive constitutional scrutiny under the burden analysis of the dormant Commerce Clause. Thus, the regulation in Case Two is unconstitutional.

3. Case Three

Assume the same facts as Case Two, but in this scenario the permit is denied because the siting board determines that the plant will have an adverse effect on the environment. Specifically, the State X siting board maintains that the siting of Merchant Plant will negatively affect a nearby wetland.[92]

State X's actions in Case Three provide the best chance for State X to survive a dormant Commerce Clause challenge. Case Three is clearly not a case of discrimination—facial or in effect. Both out-of-state plants as well as in-state plants may be denied a siting permit based on environmental concerns. Thus, State X's actions in Case Three will be upheld unless the regulation is found to substantially burden interstate commerce.

In decisions such as the one State X made here, state power is at its highest.[93] In considering the constitutionality of state regulations that touch upon public health and safety—as environmental concerns arguably do—"the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce."[94] However, as the *Philadelphia* Court noted, a state may not attempt "to isolate itself from a problem common to many by erecting a barrier against the

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[92] This hypothetical is based on a modified version of the facts from *Florida Power Corp. v. Dep't. of Envtl. Reg.*, 638 So. 2d 545 (Fla. 1st DCA 1994).

[93] Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981) (holding that "State's power to regulate commerce is never greater than in matters traditionally of local concern").

[94] Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 449 (1978) (Blackmun, J. concurring).

movement of interstate trade."[95] The question, then, is whether a court would yield to this high level of legislative deference, or whether a court would find that State X was attempting to isolate itself from a problem common to many by barring Merchant Plant's request based on environmental concerns.

From the facts presented in Case Three it appears that a court would yield to the legislature's decision. The environmental concerns used by State X to deny the permit are the type of public health and safety regulations that the Court has paid high deference to.[96] Moreover, there is no evidence that State X is attempting to isolate itself from a problem common to many by denying Merchant Plant's permit. The statute is not an outright ban on power plants based on environmental concerns. Rather, the statute undertakes a case-by-case analysis of plant siting applications. This is clearly distinguishable from *Philadelphia* where New Jersey imposed an outright ban (except for a few statutory exceptions) on the dumping of out-of-state waste within the state of New Jersey.[97] Here, State X will allow power plants within their state so long as they do not pose a serious environmental concern.

Additionally, Case Three meets the requirements of the *Pike* test. State X has a legitimate local interest in the environment. In fact, this type of public health and safety regulation is the strongest interest a state possesses. State X's interest, therefore, is very strong. By contrast, the effect on interstate commerce is only incidental. It is true that State X's actions are denying customers in three states from receiving affordable power, but this is not an outright ban. Merchant Plant still has the option of amending their permit application to correct the environmental concerns. Moreover, other utilities are free to apply for a permit to erect a plant to serve the customers of States X, Y and Z. Under these circumstances it seems clear that State X's actions in Case Three would withstand dormant Commerce Clause scrutiny.

The caveat to this is that a state wishing to constitutionally restrict a power plant from siting within their state based on environmental concerns will have to come forward with an

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[95] Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

[96] *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981) ("[R]egulations that touch upon safety" are those that "'the Court has been most reluctant to invalidate.'"); Dean Milk Co. v. City of Madison, 340 U.S. 349, 353 (1951) (noting that state regulations are to be upheld when "the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities.") (citing Parker v. Brown, 317 U.S. 341, 362).

[97] *See Philadelphia,* 437 U.S. 617, 628 at 618-19.

accurate record indicating that the potential plant poses a real and serious problem.[98] Such a requirement would prevent states from rejecting valid applications based on sham reasons. Provided a state could come forward with an accurate record, environmental restrictions on power plant siting would likely withstand scrutiny under the dormant Commerce Clause.

### *B. Have states been given explicit power over power plant siting issues?*

As the foregoing discussion illustrates, power plant siting laws can, in some instances, violate the dormant Commerce Clause. However, the argument has been advanced that Congress has explicitly left the issue of power plant siting to the states. The Court has recognized that Congress may specifically grant states the right to "restrict the flow of interstate commerce."[99] As the Court opined, "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."[100] However, "Congress must manifest its unambiguous intent" to give the states the ability to regulate interstate commerce.[101] If the Court finds that Congress did not manifest unambiguous intent, the state regulation will be subject to Commerce Clause scrutiny.

The only court to address a dormant Commerce Clause challenge to a power plant siting law held that Congress specifically left this issue to the states. If Congress has in fact explicitly left the issue of power plant siting to the states then State X's actions would be immune from a dormant Commerce Clause challenge.

In *Tampa Electric Co. v. Garcia*, the Florida Supreme Court held that there was no merit in a dormant Commerce Clause challenge to Florida's power plant siting statute because power plant siting is an area that Congress expressly left to the states.[102] The court, however, gave scant attention to the dormant Commerce Clause challenge electing to place their minimal analysis of the issue in a footnote.[103] According to the court,

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[98] *Kassel*, 450 U.S. at 670. ("[I]f safety justifications are *not illusionary*, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.") (emphasis added).

[99] Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980).

[100] W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652-53 (1981).

[101] Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992).

[102] 767 So. 2d 428, 436 (Fla. 2000).

[103] *See id.* n.18.

Congress explicitly gave the states power over the siting of electric facilities in the EPAct.[104] The relevant portion of that act provides, "[n]othing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities."[105] The question is whether this language is an express and unambiguous grant of authority by Congress. The following discussion of Supreme Court jurisprudence on this issue will show that the Florida Supreme Court erred in holding such language to be an express and unambiguous grant of authority by Congress.

In *W. & S. Life Ins. Co. v. State Bd. Of Equalization of Cal.*[106], the Court considered a dormant Commerce Clause challenge to a California retaliatory tax, imposed "on out-of-state insurers doing business in California, when the insurer's State of incorporation impose[d] higher taxes on California insurers doing business in that State than California . . . otherwise impose[d] on that State's insurers doing business in California."[107] The Court held that the McCarran-Ferguson Act permitted California to impose this tax, free of any dormant Commerce Clause challenge.[108] In so doing, the Court relied on the following language from the act: "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business."[109] In reliance on this portion of the act the Court opined, "[t]he unequivocal language of the Act suggests no exceptions."[110]

By contrast, in *Lewis v. BT Inv. Managers, Inc.*[111] and *Wyoming v. Oklahoma*[112] the Court did not find an express grant of authority in the relevant statutory language. In *Lewis*, the Court considered a Florida statute that prohibited out-of-state banks from owning or controlling businesses within the state that provided investment advisory services.[113] In support of the statute the State argued that Congress had expressly left this issue to the states.[114] This argument relied, in part,[115] on the savings clause of

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[104] *Id.*

[105] The Energy Policy Act of 1992, Pub. L. No. 102-486, Title VII, Subtitle C, State and Local Authorities, section 731.

[106] 451 U.S. 648 (1981).

[107] *Id.* at 650 (citing Cal. Ins. Code § 685 (1972)).

[108] *Id.* at 653.

[109] McCarran-Ferguson Act § 2(a), 15 U.S.C. § 1012(a) (2000).

[110] *W. & S. Life Ins. Co.*, 451 U.S. at 653.

[111] 447 U.S. 27 (1980).

[112] 502 U.S. 437 (1992).

[113] 447 U.S. at 29.

[114] *Id.* at 44-45.

the Bank Holding Company Act of 1956, which provides: "[t]he enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof."[116] The Court held that "[t]his section was intended to preserve existing state regulations of bank holding companies."[117] The Court continued, "we find nothing in its language or legislative history to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation."[118] According to the Court, this section only applies to state laws that operate within the boundaries of the Commerce Clause.[119]

In *Wyoming*, the Court reviewed an Oklahoma statute that required electric power plants that generated power by burning coal to burn a mixture of coal that contained a minimum of 10% Oklahoma mined coal.[120] Oklahoma argued that the "savings clause" of the Federal Power Act, "which reserves to the States the regulation of local retail electric rates," made the statutes discriminatory impact on the movement of Wyoming coal into interstate commerce permissible.[121] The savings clause of the Federal Power Act provides:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of

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[115] The State also relied on another portion of the Bank Holding Company Act of 1956, however, this section of the act is not similar to the statute relied on by the Florida Supreme Court in *Garcia* and is thus irrelevant for purposes of this discussion. Therefore, this argument will not be discussed.

[116] Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133, 138 (codified as amended at 12 U.S.C. § 1846 (2000)).

[117] *Lewis*, 447 U.S. at 48-49.

[118] *Id.* at 49.

[119] *Id.*

[120] Wyoming v. Oklahoma, 502 U.S. 437, 440 n.1 (1992).

[121] *Id.* at 457.

> hydroelectric energy which is transmitted across a State line.[122]

The Court held that this language did not alter the limits of state power otherwise imposed by the Commerce Clause.[123] Noting that Congress must manifest its unambiguous intent before a federal statute will be read as allowing a violation of the Commerce Clause, the Court opined, "Congress did no more than leave standing whatever valid state laws then existed . . . by its plain terms, [the savings clause] simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise lawful."[124]

Based on the three foregoing cases it seems abundantly clear that the Florida Supreme Court was incorrect in holding that the EPAct gave states express authority over power plant siting issues. The statute relied on by the Florida Supreme Court in *Garcia* is more analogous to the statutes examined in *Lewis* and *Wyoming* – where the Court found no express and unambiguous intent on the part of Congress to leave the respective issues to the states – than to the statute examined in *W. & S. Life Ins. Co.* – where the Court found express and unambiguous intent on the part of Congress to leave the issue of insurance to the states. Like the statutes in *Lewis* and *Wyoming*, the statute in *Garcia* was a savings clause that did nothing more than save from pre-emption state authority as was otherwise lawful. The statute in *Garcia* certainly did not have the kind of "unequivocal language [which] suggests no exceptions" that the Court relied on in *W. & S. Life Ins. Co.* to uphold California's taxation statute.[125] Congress has not manifested unequivocal intent to leave the issue of power plant siting to the states, thus any state siting regime is subject to the constitutional requirements imposed by the dormant Commerce Clause.

## V. CONCLUSION

This Comment has demonstrated—by the use of a hypothetical based on an actual power plant siting statute and a variation on the fact patterns of 3 reported cases—that various provisions of power plant siting statutes violate the dormant Commerce Clause. The need for expanded generation capacity has

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[122] Federal Power Act, 16 U.S.C. § 824(b)(1) (2000).

[123] *Wyoming*, 502 U.S. at 458 (citing New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982)).

[124] *Id.* (quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982)).

[125] *See* W. & S. Life Ins. Co. v. State Bd. Of Equalization, 451 U.S. 648 (1981).

never been greater. Unfortunately, the problem of inadequate capacity will not properly be addressed until a court, for the first time, seriously addresses the constitutionality of power plant siting laws under the dormant Commerce Clause. When a court finally does undertake a serious analysis of these state regulations, it is likely to find that many of the provisions in these regulations simply do not pass dormant Commerce Clause scrutiny.

# RECENT DEVELOPMENTS

PETER B. MCKERNAN, II

Table of Contents



## I. INTRODUCTION

This last year brought land use and environmental law to the headlines on numerous occasions. Discussions usually reserved for lawyers were cast to the forefront of the general public. Decisions such as *Kelo v. City of New London* raised issues of ownership rights that many people debated. All relevant contemporary cases and laws impacting the area of land use and environmental law cannot be covered in one article. The purpose of *Recent Developments* is to highlight a few of the new issues and laws arising over the last year that are of particular interest.

To stay abreast of all the issues facing the environmental and land use arena, there are a number of excellent websites providing useful and up-to-date information. At the state level, the Florida Senate maintains publications describing new legislation stemming from its various committees.[1] Of particular interest this last year, was the report from the Senate's Committee on Environmental Preservation. The Florida Department of Environmental Protection (DEP)[2] and the Florida Department of Community Affairs[3] also provide current news. Recently, DEP created a useful addition: the Florida Wetland Restoration Information Center.[4] Readers should consult with the Florida Bar Environmental Land Use Law Section for excellent articles on new law and court decisions.[5] In addition, private firms' websites, such as Holland Knight[6] and Hopping, Green and Sams,[7] offer an excellent source of current hot topics.

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* Special thanks to Peter and Elizabeth McKernan.

[1] http://www.flsenate.gov.

[2] http://www.dep.state.fl.us.

[3] http://www.dca.state.fl.us.

[4] http://www.dep.state.fl.us/water/wetlands/fwric/.

[5] http://www.eluls.org.

[6] http://www.hklaw.com.

[7] http://www.hgslaw.com.

## II. FEDERAL CASE LAW

### *Kelo v. City of New London,* 125 S.Ct. 2655 (2005).

The Court was faced with the issue of whether creating jobs, increasing the tax base and revitalizing an area constituted a public use under the Takings Clause of the Fifth Amendment.[8] In an effort to revitalize the city of New London, the city's planners sought property to develop a $300 million research facility for Pfizer Pharmaceuticals.[9] They hoped the facility would be a catalyst for the area.[10] To obtain the necessary land, a development company was given the right to purchase, and if necessary "exercis[e] eminent domain in the City's name."[11] Portions of land upon which the company exercised eminent domain belonged to the petitioners.[12] None of the petitioners' properties constituted blight; they were all chosen because of the geographic area in which they were located.[13]

The effected residents went to court, claiming an improper taking under the Fifth Amendment.[14] Connecticut law allows for takings "as part of an economic development project" of "public use and in the public interest."[15] The Supreme Court analyzed whether the new use constituted a "public purpose."[16] The history of cases in this area recognized the duty owed to federalism and the "broad latitude" afforded to legislatures.[17] The city found the area to be distressed and in need of rejuvenation, and the planned development would serve a public purpose.[18] The Supreme Court could not Connecticut's decision, because the decision as to what constitutes a public purpose is one belonging to the state. [19] In opening this door to government's eminent domain power, the Court noted that many states had restricted the power, and that states were free to decide what constituted a public purpose.[20]

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[8] Kelo v. City of New London, 125 S.Ct. 2655, 2658 (2005).
[9] *Id.* at 2569.
[10] *Id.*
[11] *Id.* at 2660.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* (citing CONN. GEN. STAT. § 8-186 (2005)).
[16] *Id.* at 2663.
[17] *Id.* at 2664.
[18] *Id.* at 2665.
[19] *Id.*
[20] *Id.*

*Orff v. United States,* 125 S.Ct. 2606 (2005).

A unanimous Supreme Court held that Congress did not intend to waive sovereign immunity, as it applies to a breach of contract under the Reclamation Reform Act of 1982.[21] The petitioners in this case were farmers who had contracted with the Westlands Water District to receive water.[22] The water district had in turn contracted with the United States Bureau of Reclamation for water.[23] While not contracted directly with the Bureau of Reclamation, the petitioners sued to enforce the contract as intended third-party beneficiaries when the amount of water was reduced.[24]

The Court reviewed 43 U.S.C. § 390uu to determine whether it conveyed a waiver of sovereign immunity.[25] The Court reiterated that a "waiver of sovereign immunity must be strictly construed in favor of the sovereign."[26] Applying such, the applicable statutory section did not waive sovereign immunity.[27] The statute confers the right to "*join* the United States as a *necessary party defendant* in any suit", not the right to sue the United States alone.[28]

*Riverkeeper, Inc. v. U.S. EPA,* 358 F.3d 174 (2d Cir. 2004).

At center stage in this case was an Environmental Protection Agency regulation designed to reduce the impact of power plants' water-cooling systems.[29] Such systems destroy and kill voluminous amounts of fish, plankton, eggs, larvae and other organisms.[30] Entities from both sides of the impact debate argued against the validity of the regulation.[31] Environmental groups argued the regulation did not reflect the best technology available, that an alternative method did not meet required rules, and that dry cooling is the best technology available.[32] The court lumped the utilities' challenges into four categories: that the regulation is

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[21] Orff v. United States, 125 S.Ct. 2606, 2608 (2005) (citing 43 U.S.C. § 390uu).
[22] *Id.*
[23] *Id.*
[24] *Id.* The Bureau reduced the level of water pursuant to environmental obligations necessitated to prevent harm to threatened species. *Id.*
[25] *Id.* at 2609-10.
[26] *Id.*
[27] *Id.* at 2610.
[28] *Id.*
[29] Riverkeeper v. U.S. EPA, 358 F.3d 174, 181 (2d Cir. 2004).
[30] *Id.*
[31] *Id.* at 183.
[32] *Id.*

"insufficiently flexible," "too vague and malleable," that it contradicts the statute, and that it is "unsupported by record."[33]

The court reviewed the statutes to determine whether Congress had "'unambiguously expressed' its meaning", and if such, that intent would control.[34] If the statutes were ambiguous, then the court would review the regulation to see whether it was permissible within the intent.[35] If the regulation is found to be within the intent of the legislation, then it must also meet the test of not being "arbitrary, capricious, and [an] abuse of discretion, or otherwise not in accordance with law."[36]

In reviewing the environmental petitions, the court found that water-cooling systems differed from pollution in regards to the precision of measuring impact.[37] Effluent is more readily measured, while the impact on water organisms of cooling systems requires the EPA to make "judgment calls."[38] Therefore, it is reasonable for the EPA to issue standards stating an acceptable margin of error in measuring compliance.[39] The court then struck down an alternative EPA laid out.[40] The regulation had allowed for restorative measures if the preventative measures were found lacking.[41] An alternative allowing for restorative measures, where preventive measures fail, was against the intent of the legislature to minimize impact in the siting and design process.[42]

As for the environmental groups' contention that dry cooling offers the best technology available, the court deferred to EPA's findings.[43] EPA stated that dry cooling costs ten times that of water cooling.[44] Dry cooling consumes more energy, resulting in more emissions.[45] The costs would discourage new facilities; and, among other things, dry cooling is not technically feasible for those under the umbrella of this regulation.[46] The court noted it was "not well equipped" to weigh a 95% entrapment reduction against the other factors, such as added pollution and monetary costs.[47] The EPA had been given the statutory right to make such calls,

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[33] *Id.*
[34] *Id.* at 184.
[35] *Id.*
[36] *Id.* (citing 5 U.S.C. § 706(2)(A) (2000)).
[37] *Id.* at 188–89.
[38] *Id.*
[39] *Id.* at 189.
[40] *Id.* 189–90.
[41] *Id.*
[42] *Id.* at 189.
[43] *Id.* at 194–96.
[44] *Id.* at 194.
[45] *Id.* at 194-95.
[46] *Id.* at 195.
[47] *Id.* at 196.

and absent clear error or a lack of record, the court had to let the regulation stand in this regard.

The industrial group argued that some of the impinged species were "'nuisance[s]' that we are better off 'eradicating,' and that some species respond to 'losses' by increasing their reproduction to compensate."[48] Based on this line of reasoning, the group argued that EPA had not contemplated other environmental factors other than the impingement numbers.[49] Once again, the court deferred to EPA's studies and believed that EPA had done a thorough job of contemplating the relative factors upon which to make a sound decision.[50]

The court also dismissed claims of vagueness, such as EPA not putting forth a "national performance standard based on . . . technologies" available.[51] The court disagreed, noting that the process encourages permitting facilities to "engage in a dialogue" with the authorities.[52] After reviewing the available guidelines, the court thought it was "sufficiently clear . . . the industry will be able to understand its responsibilities under the Rule."[53] The court went on to review the Rule's intake velocity requirements, proportion flow requirements, state law requirements, below threshold structures, and the re-permitting process, finding all actions to be within EPA's authority.[54]

*Am. Canoe Ass'n v. Louisa Water and Sewer Comm'n,* 389 F.3d 536 (6th Cir. 2004).

Members of the American Canoe Association and Sierra Club filed suit under the Clean Water Act alleging that the defendants had violated discharge permits.[55] The plaintiffs sued on their members' behalf, stating "health, economic, recreational, aesthetic and environmental interests were affected by the pollution."[56] The organizations also sued on their own behalf, asserting that the pollution violations "adversely affected [their] organizational interests."[57] Additionally, Sierra Club attached affidavits from two of its members stating how they were harmed

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[48] *Id.* at 196.
[49] *Id.*
[50] *Id.* at 197.
[51] *Id.*
[52] *Id.* at 198.
[53] *Id.*
[54] *Id.* at 198–04.
[55] American Canoe Association v. Lousisa Water and Sewer Commission, 389 F.3d 536, 538 (6th Cir. 2004).
[56] *Id.* at 539.
[57] *Id.*

by the pollution.[58] The district court threw the case out, stating the plaintiffs lacked standing.[59]

On appeal, the court ruled that the plaintiffs did have standing.[60] An organization has standing to sue for its members when the members have standing to sue on their own.[61] A member has standing to sue when they have been injured in a "concrete and particularized way" that can be attributed to the defendant's actions.[62] The court held that the members demonstrated aesthetic, recreational and information injuries stemming from the defendant's actions.[63] The court went on to say that the plaintiffs' members had also met the causation requirement to survive dismissal.[64]

As for the status of the organizations, the court analyzed this point independently from individual member standing.[65] The plaintiffs argued they suffered an informational injury when the alleged polluters failed to report required data.[66] Siding with them, the court agreed that the organizations' interests were "negatively affected by the defendants' failure" to monitor and report.[67]

## III. FLORIDA CASE LAW

*Blanton v. City of Pinellas Park,* 887 So. 2d 1224 (Fla. 2004).

The court interpreted the Marketable Title to Real Property Act (MRTA) as not providing a means by which a claim to a statutory easement could be extinguished.[68] At issue was a means of ingress and egress for Mr. Blanton.[69] Blanton possessed a landlocked ten acre parcel of land.[70] He sued for a statutory easement under section 704.01(2), Florida Statutes, after the adjacent landowner demanded more than $1.1 million for strip of

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[58] *Id.* at 540.
[59] *Id.*
[60] *Id.*
[61] *Id.* (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000)).
[62] *Id.* (citing Ailor v. City of Maynardville, Tenn., 368 F.3d 587, 596 (6th Cir. 2004)).
[63] *Id.* at 541-42.
[64] *Id.* at 542-43.
[65] *Id.* at 544.
[66] *Id.*
[67] *Id.* at 546.
[68] Blanton v. City of Pinellas Park, 887 So. 3d 1224, 1226 (Fla. 2004). MRTA is found under FLA. STAT. § 712 3003. The statutory easement was authorized by § 704.01(2).
[69] *Id.*
[70] *Id.*

land appraised at $18,100.[71] The trial court held that the easement was subject to time constraints under MRTA, and the Second District affirmed.[72] The opposition cited a case[73] where the Florida Supreme Court held that a common law easement could be extinguished by MRTA.[74]

In reversing the lower opinion, the court distinguished their prior case on grounds that they were interpreting a different section of the Florida Code, 704.01(1), and that the previous case was differentiated further because it involved common law easements, rather than statutory easements.[75] The opinion went on to say that a statutory easement does not come into existence until an "award ordered by the circuit court is paid."[76] Then, it noted how MRTA extinguishes claims occurring "prior to the effective date of the root of title."[77] The court ended the case by pointing to a public policy of the legislature: ensuring that land is used for a productive purpose.[78]

*River Place Condo Ass'n at Ellenton v. Benzing,* 890 So. 2d 386 (Fla. 2d DCA 2004).

This case involved a land dispute as to who was the proper owner of land that had been submerged in a river until a dredge and fill operation uncovered it.[79] At issue was whether the immediate upland owner or the owner having "record or other title" to the filled lands is the proper owner.[80] The statute[81] in question divested the state of ownership of lands that had been filled prior to 1975.[82] The appeal involved language reading, "the landowner having record or other title to all or a portion thereof or to the lands immediately upland thereof and its successors in interest."[83] Because the statute gave land to two different types of landowners, the question was which class of landowner had

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[71] *Id.*

[72] *Id.*

[73] H & F Land, Inc. v. Panama City-Bay County Airport & Ind. Dist., 736 So. 2d 1167 (Fla. 1999).

[74] *Blanton*, 887 So. 2d at 1227.

[75] *Id.* at 1228.

[76] *Id.* at 1231.

[77] *Id.* (citing FLA. STAT. § 712.04 (2003) (emphasis omitted)).

[78] *Id.* at 1233.

[79] River Place Condo. Ass'n at Ellenton v. Benzing, 890 So. 2d 386, 387-389 (Fla. 2d DCA 2004).

[80] *Id.*

[81] FLA. STAT. § 253.12(9) (2003).

[82] *River Place*, 890 So. 2d at 387.

[83] *Id.* at 387-88 (quoting FLA. STAT. § 253.12(9) (2003)).

priority over the other.[84] The court resolved the issue against the upland landowner, declaring that since the statute listed the landowner having title first, such went the priority of ownership.[85]

*Noblin v. Harbor Hills Dev., L.P.,* 896 So. 2d 781 (Fla. 5th DCA 2005).

At issue was whether Noblin had an express or implied easement allowing her ingress and egress on property to search and extract oil and minerals; [86] and, if such an easement existed, whether the Marketable Record Titles to Real property Act (MRTA)[87] extinguished such as easement.[88] On the first issue, Noblin successfully argued that his 1948 deed giving an interest in oil and minerals, containing a provision allowing for exploiting minerals and oil, expressly conveyed an easement to enter, search, and extract such minerals and oil.[89] The court agreed that the term "exploit" should be read to grant an easement to search on the property.[90] The court also that noted even if the deed did not contain the "right to exploit", an implied easement would also be found to exist.[91]

As to the second issue, whether MRTA had extinguished the easement, the court went through an analysis as to when MRTA may extinguish an easement in a case such as this.[92] The court noted factual issues in dispute on which the analysis must rely.[93] Since findings of fact were required to determine whether MRTA extinguished the easement, the case was remanded for further proceedings.[94]

*City of Orlando v. MSD-Mattie, L.L.C.,* 895 So. 2d 1127 (Fla. 5th Dist 2005).

A landowner objected to a city leasing excess fiber optic capacity in lines running over private property.[95] The city had been granted an easement for electric transmission and

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[84] *See id.* at 387-89.
[85] *See id.*
[86] Noblin v. Harbor Hills Dev., L.P., 896 So. 2d 781, 782 (Fla. 5th DCA 2005).
[87] FLA. STAT. ch. 712 (2002).
[88] *Noblin*, 896 So. 2d at 782.
[89] *Id.* at 783.
[90] *Id.* at 783–84.
[91] *Id.* at 784.
[92] *Id.* at 785.
[93] *Id.* at 786.
[94] *Id.* at 786-87.
[95] City of Orlando v. MSD-Mattie, L.L.C., 895 So. 2d 1127, 1128 (Fla. 5th DCA 2005).

communications necessary for transmitting electricity.[96] The court analyzed the easement agreement and found that the language allowed the city the right to put up wires for communication necessitated by the electric transmission lines.[97] The court relied upon the bundle of sticks analogy and reiterated that an "easement is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor."[98] Even if additional use does not impose an increased burden on a subservient estate, an express easement cannot be expanded in purpose.[99]

*Savage v. Palm Beach County,* 2005 WL 2086197 (Fla. 4th DCA 2005).

The county decided to purchase lots from the public, and some of the landowners objected to the compensation offered under condemnation proceedings.[100] The landowners appealed the trial court's decision to exclude testimony from two appraisers.[101] The trial court reasoned, that because the appraisers were basing their opinion on the conclusion that governmental agencies had refused necessary permits in the area in order to reclaim the land, by allowing their testimony the county would be defending the permitting actions of Federal and State agencies.[102] Since the property owners had a right to appeal those permitting decisions administratively, the appraisers' opinions would be speculative and unsupported.[103] The appellate court reversed the lower court, reckoning that the "property owners were deprived of the opportunity to prove the fair value of their property."[104] They held that it was within the experts' testimony to opine on the permitting process and other valuation issues.[105]

*Staten v. Gonzalez-Falla,* 904 So. 2d 498 (Fla. 1st DCA 2005).

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[96] *Id.*
[97] *Id.* at 1129.
[98] *Id.* at 1130.
[99] *Id.*
[100] Savage v. Palm Beach County, 2005 WL 2086197 (Fla. 4th DCA 2005).
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

Gonzalez-Falla was the owner of a landlocked piece of property.[106] He filed and won a statutory right of way at trial.[107] Staten appealed because the trial court did not limit the easement to the uses allowed per the applicable statute.[108] The applicable statute allows a statutory right of way for necessity.[109] Needs that qualify for necessity include "dwellings or for agricultural or for timber raising or cutting or stockraising purposes."[110] Staten complained that Gonzalez-Falla was creating a nuisance by leasing the property to hunters who were "loud and annoying at all hours of the day and night and [were] us[ing] the property in an unsanitary manner."[111]

On appeal, the court held that it was error not to limit the easement to the restrictions found in section 704.01(2), Florida Statutes, the statute under which the easement was granted.[112] The court reasoned that the legislature permitted a statutory easement for certain purposes, and therefore, the easement should be limited to the purposes for which it could be granted.[113]

*St. Johns River Water Management District v. Womack,* 2005 WL 2253833 (Fla. 5th DCA 2005).

The trial judge held that the district had been "unduly influenced, by private interests, to set aside their public responsibilities" when they denied a permit for Womack.[114] Womack had submitted six plans to the district's staff for development of property he owned along the Wikiva River. Each time the district's staff recommended the permit be denied.[115] The first five applications had been certified and prepared by an engineer experienced in such permits.[116] The last permit, which was the only one voted on by the District Board, was prepared by Womack himself.[117] After being denied by the Board, Womack filed suit alleging that the improper denials constituted a

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[106] Staten v. Gonzalez-Falla, 904 So. 2d 498, 499 (Fla. 1st DCA 2005).
[107] *Id.*
[108] *Id.*
[109] FLA. STAT. § 704.01(2) (2001).
[110] *Staten*, 904 So. 2d at 499.
[111] *Id.*
[112] *Id.* at 500.
[113] *Id.*
[114] St. Johns River Water Mgmt. Dist. v. Womack, 2005 WL 2253833 (Fla. 5th DCA 2005).
[115] *Id.*
[116] *Id.*
[117] *Id.*

temporary and permanent condemnation of his land, in violation of section 373.617, Florida Statutes.[118] The trial court agreed and awarded Womack $262,384 for the value of the taking and his expenses.[119]

While the appellate court noted the improprieties occurring within the district, it overturned the award for damages.[120] The only final determination by the Board to deny Womack's permit was based on Womack's own submission.[121] Womack's own experts at trial conceded that Womack's personally prepared submission was not sufficient to allow a permit.[122] Since the only final action of the Board was justified, as per Womack's own experts, no takings had occurred.[123] Therefore, the order granting Womack damages was dismissed.[124]

## IV. FLORIDA STATUTES

The 2005 Florida Legislative session passed a number of bills impacting the environment. Some of the measures are more readily understood than others. One such bill clarified that there is no exemption for government entities from paying vehicle tire and battery fees.[125] Another bill repealed the sales tax exemption for solar energy systems.[126] One bill effectively doubled the fine for littering.[127] The politicians also took charge in the recycling area by passing a law that creates a pilot program to encourage the recycling of campaign signs.[128] A cross section reflecting a portion of the more substantially involved statutes follows. A number of laws involving, among other things, procedural questions have been omitted. For a more comprehensive listing and the text of the bills, the Florida Senate maintains an excellent website.[129] This summary is based on the Senate Committee on Environmental Protection Report.[130]

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[118] *Id.*
[119] *Id.* at Appendix.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] CS / CB 786.
[126] SB 1620.
[127] CS / CB 1774.
[128] CS / SB 1542.
[129] http://www.flsenate.gov/.
[130] http://www.flsenate.gov/publications/2005/senate/reports/summaries/pdf/environmental.pdf.

*CS / SB 494 Renewable Energy*

This bill encourages renewable energy by requiring utilities to offer contracts to producers of renewable energy. It also requires that counties expanding or building new waste-to-energy facilities must meet a 30 percent waste reduction goal. Counties with populations under 100,000 are exempt from the latter requirement. Last, the bill encourages local governments to consider waste-to-energy facilities, rather than increasing landfill capacities.

*CS / SB 502 Lake Okeechobee Protection Program*

The legislature recognized that the Lake Okeechobee Protection Plan must be expeditiously implemented. It acknowledged that funding was needed to target the most prolific phosphorous polluters. Responsibility for implementing the plan was jointly assigned to the Department of Agriculture, the Department of Environmental Protection, and the South Florida Water Management District. The bill details funding procedures for the agencies, as well as sources of funding.

*CS / CS / CS / CS / SB 444 Water Supplies*

Looking both at the present and to the future, this bill changed a number of the laws pertaining to the development of water resources. Details in the statute include procedures and matching requirements to obtain state funding for alternative supplies. The bill also addresses permitting and the development of geographic water plans. Counties must address the present and future needs, especially in the face of new development.

*SB 1612 Water Management Security*

Water districts are now required to review employee criminal history for those working at structures of critical importance. Water districts are authorized to review employee criminal histories when they do not manage critical infrastructures. Convictions for certain offenses bar an individual from seeking employment with the water districts for seven years. Individuals currently employed are grandfathered in, unless they work in a restricted area.

*CS / CS / SB 2502 Environmental Permitting Programs*

New rules are enacted for phosphate mining that impacts wetlands. It requires mining companies to demonstrate the financial ability to mitigate wetlands affected by the permit. The bill also requires DEP to combine the process for wetlands permitting between the federal and state levels.

*SB 2288 Natural Resources*

Among other things, this bill encourages local government to construct and operate public marinas, boat ramps, and docks by requiring DEP to issue permits by rule. The marinas are not to exceed 40,000 square feet of wetlands and other surface waters. The resulting marinas are to be held in perpetuity for the use of the public.

*CS / CS / SB 774 Greenways and Trails*

The bill encourages private landowners to continue supporting the Florida National Scenic Trail by incentives and liability protection. It also creates the "Florida Circumnavigation Saltwater Paddling Trail". The bill directs DEP to set up starting and finishing points for the paddling trail. Lastly, the bill establishes a program to enhance bicycling in the State of Florida by studying how it can conserve resources, improve health, and reduce traffic congestion.

*CS / CS / SB 2426 Beach Safety*

DEP must create a uniform beach warning and safety program. The program's goals are to encourage uniform notification of dangers and to warn the public. The bill provides that, while establishing the program and since the coastal zone is inherently dangerous, the failure of a governmental entity to implement and use such warnings is not grounds for liability.

*CS / SB 2510 Natural Resources*

This bill addressed a number of issues including: natural resources damage assessments, heavy mineral mining and Coastal Zone Management Act reviews. Notably, the bill creates a Florida Oceans and Coastal Council within DEP. The Council is responsible for compiling and reviewing research regarding

activities along the coast and ocean. With the research gathered, they are to develop a library, as well as develop a research plan for future use by the Legislature to determine later appropriation of funds.