

The National Agricultural
Law Center



University of Arkansas
System Division of Agriculture

NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

Recent Developments Concerning Environmental Law and Agriculture

by

Linda A. Malone

Originally published in DRAKE JOURNAL OF AGRICULTURAL LAW
7 DRAKE J. AGRIC. L. 341 (2002)

www.NationalAgLawCenter.org

RECENT DEVELOPMENTS CONCERNING ENVIRONMENTAL LAW AND AGRICULTURE

*Linda A. Malone**

TABLE OF CONTENTS

I.	Introduction.....	341
II.	Supreme Court Cases.....	342
III.	Developments Relating to the Endangered Species Act.....	349
IV.	Pesticides and Herbicides.....	356
V.	Clean Water Act and Related Developments.....	359
VI.	Concentrated Animal Feeding Operations.....	368
VII.	The TMDL Program.....	370
VIII.	Wetlands Regulation.....	373
IX.	Conclusion.....	380

I. INTRODUCTION

Environmental regulation of agriculture stands at a critical and controversial juncture. This juncture is not so much the result of changes in environmental requirements, as it is the result of a gradual and inevitable extension of environmental regulation to previously unregulated areas of agriculture. The relative immunity of nonpoint source pollution to mandatory regulation, for example, may be extinguished in proposed regulations for impaired waters and concentrated animal feedlots. The regulatory threat, however, is tempered by court decisions that are more inclined to place limits on the Environmental Protection Agency's ("EPA") regulatory authority or to require compensation for regulatory takings. If this tension between the regulators and the courts continue, all that can be said with certainty is that the controversial regulation of impaired

*. Marshall-Wythe Foundation Professor of Law, William and Mary School of Law.

waters, wetlands, endangered species, concentrated animal feedlot operations, and nonpoint source pollution will be lengthy, divisive, and subject to political pressure.

II. SUPREME COURT CASES

In *Palazzolo v. Rhode Island*,¹ petitioner claimed the state's action, in applying its wetlands regulation to prevent the development of wetlands on his property, constituted a regulatory taking without just compensation, as required by the Fifth Amendment.² The Rhode Island Superior Court³ and state Supreme Court rejected the claim on several grounds.⁴ The Rhode Island Supreme Court found the petitioner's takings claim was not yet ripe, despite the state's actions in denying two of petitioner's requests for a permit to develop his property.⁵ The court determined that doubt still remained as to whether the state would grant a permit for a less extensive development of the land in question, and therefore the state's action was not a final decision.⁶ Moreover, the court held that petitioner could not bring a regulatory takings claim based on a regulation that existed before petitioner acquired legal ownership of the property in question.⁷ The court additionally held that even if these impediments to petitioner's claim had not existed, it would nevertheless have found that no taking had occurred.⁸ The court held that the petitioner could not establish that the economic value of his property had been totally destroyed, under the total taking standard established in *Lucas v. South Carolina Coastal Council*.⁹ The court reasoned that because the portion of petitioner's property that was not covered by the regulation was still worth \$200,000, petitioner could also not succeed under the more general reasonable investment backed standard set forth in *Penn Central Transportation Co. v. City of New York*.¹⁰ The court found the petitioner could not have any reasonable ex-

1. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

2. See *id.* at 611.

3. See *Palazzolo v. Coastal Res. Mgmt. Council*, C.A. No. 86-1496, 1995 WL 941370 (R.I. Super. Ct. Jan. 5, 1995) [hereinafter *Palazzolo*].

4. See *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000) [hereinafter *Tavares*].

5. See *id.* at 714.

6. See *id.*

7. See *id.* at 715.

8. See *id.* at 717.

9. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

10. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

pectations of profitable use, given the regulation preventing the development was in place when the petitioner acquired the property.¹¹

The Supreme Court disagreed with most of the Rhode Island Supreme Court's holdings.¹² The Court found the state's actions in denying petitioner's permits did constitute of a final decision, despite the fact the petitioner had not sought permits for projects involving a significantly smaller portion of his wetlands, due to the rationale given by the state for the refusal of the permits.¹³ The regulation in question did not permit any development of wetlands unless a "compelling public purpose" was served, irrespective of the amount of wetlands involved, and the state had already indicated in its denial of petitioner's permit applications that the petitioner's purpose did not serve a compelling public interest.¹⁴ The Court found the state had decided there would be no permitting of ordinary development on wetlands, and therefore petitioner's claim was ripe without further applications or other state action.¹⁵

The Court also found that a purchaser or successive titleholder is not necessarily barred from pursuing a takings claim resulting from a regulation in place before the acquisition of the property, even though the new titleholder was on notice about the regulation.¹⁶ The Court held that one of the purposes of the Takings Clause was to enable citizens to compel compensation for state actions that were manifestly unreasonable and onerous, and that manifestly unreasonable actions did not become less unreasonable as time passed or ownership interests changed.¹⁷ The Court further pointed out that such a rule penalize new owners for the failure of previous owners to protest possibly unreasonable state actions, when the previous owners may have been unable or unwilling to take action.¹⁸

Having dealt with these preliminary bars to petitioner's claim, the Court proceeded to evaluate the substance of petitioner's claim. The Court agreed with the Rhode Island Supreme Court that the petitioner did not have a claim for a total taking, since petitioner had accepted the lower court's determination that the remainder of petitioner's property was still worth \$200,000, passing over petitioner's argument that the wetland and other portions of the property were dis-

11. See *Tavares*, 746 A.2d at 715-17.

12. See *Palazzolo*, 533 U.S. at 632.

13. See *id.* at 619.

14. See *id.* at 619-20.

15. See *id.* at 624-25.

16. See *id.* at 626.

17. See *id.* at 627.

18. See *id.*

tinct segments due to the fact it was not raised at the lower levels.¹⁹ However, the Court remanded on the issue of whether the regulation and permit denials destroyed petitioner's reasonable investment backed expectations, because the lower court based its rejection of this claim on its incorrect holding that petitioner could have no claim and no reasonable expectations of profit when the regulation was in existence before petitioner acquired the property.²⁰

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,²¹ petitioner had sought a section 404 permit from the United States Army Corps of Engineers ("Corps") to fill wetlands for the purpose of building a waste disposal site.²² The wetlands in question had developed from abandoned sand and gravel mining pits and were isolated, completely intrastate wetlands, neither connected nor adjacent to any interstate waters.²³ However, it was discovered that migratory birds frequented the wetlands.²⁴ Under section 404 of the Clean Water Act ("CWA"), the Corps has the authority to issue or deny permits "for the discharge of dredged or fill material into the navigable waters"²⁵ with "navigable waters" being further defined as the "waters of the United States, including the territorial seas."²⁶ The Corps had a regulation further defining that intrastate waters may be considered to be waters of the United States when they are or could be used as habitat by either birds protected under Migratory Bird Treaties, other migratory birds that cross state lines, or endangered species, as well as when water from such bodies is used to irrigate interstate crops.²⁷ This Corps regulation was known as the Migratory Bird Rule.²⁸ Upon discovering the site was used as habitat by birds that migrated across state lines, the Corps denied the permit on the basis of the Migratory Bird Rule.²⁹ This decision was challenged by petitioner under the Administrative Procedure Act, on the alternative grounds that either the Corps had exceeded its statutory authority in applying

19. *See id.* at 630-31.

20. *See id.* at 632.

21. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), *remanded to 2001 WL 31272* (7th Cir. 2001).

22. *See id.* at 162-63.

23. *See id.*

24. *See id.* at 164.

25. *Id.* at 163 (citing 33 U.S.C. § 1344(a)).

26. *Id.* (citing 33 U.S.C. § 1362(7)).

27. *See id.* at 164 (citing 51 Fed. Reg. 41,217).

28. *See id.* at 164 n.1 (The Court noted that "[t]he Corps issued the 'Migratory Bird Rule' without following the notice and comment procedures outlined in the Administrative Procedure Act, 5 U.S.C. § 553").

29. *See id.* at 165.

the CWA to gain jurisdiction over these intrastate waters, or that Congress had exceeded its Commerce Clause power to regulate such intrastate waters if activities on such waters, taken cumulatively, had a substantial effect on interstate commerce.³⁰ Noting the substantial contributions activities relating to migratory birds made to interstate commerce, the Court found that the cumulative impact did in fact exist for such regulation.³¹ The Court of Appeals found that Congress intended for the Act to reach as many waters as possible, and therefore the Corps' Migratory Bird Rule was a reasonable interpretation of its jurisdiction under the Act.³² However, upon review, the Supreme Court reversed this decision, finding that the CWA did not authorize the Corps to have jurisdiction over isolated, intrastate waters based on the Migratory Bird Rule.³³

The Court stated that although it had previously recognized in *United States v. Riverside Bayview Homes, Inc.*³⁴ that the word "navigable" was of limited importance in determining Clean Water Act jurisdiction, it was not prepared to completely negate the word's presence by failing to require any significant nexus between waters to be regulated and actual navigable waters.³⁵ The Court pointed out that *Bayview Homes* involved wetlands that were adjacent to open, navigable waters, and as such, although not navigable in themselves, were "inseparably bound up" with the waters of the United States, as opposed to the wetlands in this case, which the Court found to be completely isolated and not bound up with any water of the United States.³⁶ The Court therefore held that the CWA by its language did not extend to these waters.³⁷

The Corps attempted to argue that, regardless of whether the CWA was originally intended to cover such isolated, intrastate waters, Congress had acquiesced in such jurisdiction, as evidenced by the failure of legislation presented at the time of the 1977 amendments to the CWA that explicitly attempted to limit the Corps' expansive interpretation of its jurisdiction.³⁸ However, the Court held that congressional acquiescence to administrative interpretations is never to be lightly assumed, and failed legislative bills alone are generally insufficient to demonstrate such acquiescence, given the wide variety of reasons why a bill

30. *See id.*

31. *See id.*

32. *See id.* at 166.

33. *See id.* at 174.

34. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

35. *See Solid Waste Agency of N. Cook County*, 531 U.S. at 172.

36. *See id.* at 167-68.

37. *See id.* at 171-72.

38. *See id.* at 168-69.

might be proposed or fail.³⁹ The Court did not find sufficient other legislative history to reinforce the Corps' claim that the failed bill indicated acquiescence, and therefore rejected this argument.⁴⁰

The Corps further argued, even if the statute and the legislative history did not demonstrate that Congress intended to give the Corps jurisdiction over non-navigable, intrastate waters, Congress at the very least failed to address the issue one way or the other, and therefore the Court should give *Chevron* deference in this instance.⁴¹ The Court stated *Chevron* deference does not apply when an agency's interpretation of a statute stretches the limits of Congress' power, as this interpretation would stretch Congress' Commerce Clause power, lest the Court needlessly find constitutional issues that Congress did not intend to casually create.⁴² The Court held that such an interpretation would only be accepted when clear indications were present to demonstrate that Congress really did intend to utilize the utmost boundaries of its constitutional power.⁴³

The Supreme Court remanded the case back to the United States District Court after determining the United States Army Corps of Engineers exceeded their authority under section 404(b) of the CWA.⁴⁴ The district court was instructed to decide whether the Migratory Bird Rule was the only proper basis for the Corps' requirement of a permit or if alternate grounds of jurisdiction could be utilized that would not be inconsistent with the opinion of the Court.⁴⁵ The Court held that if the district court found that the Corps' authority in this case relies on the Migratory Bird Rule alone, the action must be dismissed.⁴⁶ If the district court found other valid bases for jurisdiction, further proceedings would be conducted in accordance with the judgment of the Supreme Court.⁴⁷

In response to the Court's ruling, the Corps changed its working definition of "wetlands," removing the category for isolated, solely intrastate water bodies.⁴⁸ The Corps expected litigation in response to this change, but viewed the change as a positive first step, and expected to issue further guidance in the

39. See *id.* at 169-70.

40. See *id.* at 170.

41. See *id.* at 172.

42. See *id.* at 172-74.

43. See *id.* at 174.

44. See *Solid Waste Agency of N. Cook County v. U. S. Army Corps of Eng'rs*, No. 98-2277, 2001 WL 312372, at *1 (7th Cir. Mar. 29, 2001).

45. See *id.*

46. See *id.*

47. See *id.*

48. See *Court Decision on Isolated Waters Prompts Army Corps to Revise Definition*, 69 U.S.L.W. (BNA) No. 33, at 2561 (Mar. 20, 2001).

form of policy guidance documents in response to the decision.⁴⁹ In addition, the ruling was expected to increase the regulatory burden on states, as a large percentage of the nation's wetlands will no longer be covered by federal regulation.⁵⁰ The new ruling would limit the scope of regulation to about twenty percent of the nation's wetlands, eliminating regulation for wet meadows, forested wetlands, vernal pools, non-navigable streams and rivers, and large portions of the Alaskan tundra.⁵¹ Only fourteen states have regulations that would fill the gap created under this ruling.⁵² Authorities feared that many wetlands would go unprotected and called for the development of new state programs.⁵³

On a sharply divided court, Judge Reinhardt of the United States Court of Appeals for the Ninth Circuit held that development moratoria cannot result in compensable takings under *First English Evangelical Lutheran Church v. County of Los Angeles*,⁵⁴ even when they deprive owners of all economically beneficial use of land for extended periods.⁵⁵ The United States Supreme Court granted cert in the case, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,⁵⁶ to determine if a moratorium constitutes a taking within the elusive notion of a temporary taking.⁵⁷

The district court ruled that the agency's temporary moratorium had worked a compensable temporary taking.⁵⁸ It stressed that the regulation "denied the plaintiffs all economically viable use of their property."⁵⁹ Furthermore, although the regulation "was clearly intended to be temporary, since it was adopted pending the enactment of a new regional plan, there was no fixed date for when it would terminate."⁶⁰ In addition, the court expressed skepticism about whether development "moratoria remain[ed] legitimate planning tools after *First Eng-*

49. See *id.*

50. See *State Regulatory Burden May Increase After Recent U.S. Supreme Court Decision*, 69 U.S.L.W. (BNA) No. 31, at 2491 (Feb. 20, 2001).

51. See *id.*

52. See *id.*

53. See *id.* at 2492.

54. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 305 (1987).

55. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 777-78 (9th Cir. 2000) [hereinafter *Tahoe-Sierra Pres. Council II*].

56. See *id.*

57. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002) [hereinafter *Tahoe-Sierra Pres. Council III*].

58. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1251 (D. Nev. 1999).

59. *Id.* at 1249.

60. *Id.* at 1250.

lish.”⁶¹ Although some courts have upheld such moratoria, the district court considered these possibly consistent with the Supreme Court’s allowance for normal delays.⁶² It distinguished moratoria like those in *First English*, which had no expiration date, from the interim planning moratorium, which is enacted with a deadline and usually extends for a short period.⁶³ In the latter case, the government’s culpability would be less. However, in the present case, “[e]nacting an unconstitutional ordinance with no plans to end it is different than simply putting a hold on development for a few months while trying to formulate a plan under which development will be possible.”⁶⁴

Judge Reinhardt’s Ninth Circuit opinion attacked the district court’s basic premise:

It is true that *First English* holds that, when a taking has occurred, the government must compensate property owners, even if the taking is “temporary.” Contrary to the plaintiffs’ suggestion, however, the Court’s holding in *First English* was not that temporary moratoria are “temporary takings.” In fact, the opposite is true. The *First English* Court very carefully defined “‘temporary’ regulatory takings [as] those regulatory takings which are ultimately invalidated by the courts.” (Citations omitted) What is “temporary,” according to the Court’s definition, is not the regulation; rather, what is “temporary” is the taking, which is rendered temporary only when an ordinance that effects a taking is struck down by a court. In other words, a permanent regulation leads to a “temporary” taking when a court invalidates the ordinance after the taking. (Citations omitted) The Court’s definition, therefore, does not comprehend temporary moratoria, which from the outset are designed to last for only a limited period of time. In short, we reject the plaintiffs’ contentions that *First English* applies to temporary moratoria and that it works a radical change to takings law by requiring that property interests be carved up into finite temporal segments.⁶⁵

The Ninth Circuit opinion discussed at some length the court’s rejection of “conceptual severance” of parcels, citing Professor Margaret Jane Radin for the proposition that “[a] planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel.”⁶⁶ Each of these

61. *Id.* at 1249.

62. *See id.* (citing *Santa Fe Vill. Venture v. City of Albuquerque*, 914 F. Supp. 478, 483 (D.N.M. 1995); *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1206-07 (N.D. Cal. 1988)).

63. *See id.*

64. *Id.*

65. *Tahoe-Sierra Pres. Council II*, 216 F.3d at 778.

66. *Id.* at 776 (citing Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674-78 (1988)).

three types of regulation will have an impact on the parcel's value, because each will affect an aspect of the owner's *use* of the property—by restricting when the use may occur, where the use may occur, or how the use may occur. However, Judge Reinhardt's Ninth Circuit opinion did concede that

were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use, we might be compelled to conclude that a categorical taking had occurred. We doubt, however, that a true temporary moratorium would ever be designed to last for so long a period.⁶⁷

The Ninth Circuit denied *en banc* review,⁶⁸ over strong dissent by Judge Kozinski.⁶⁹ He asserted that the panel decision written by Judge Reinhardt "does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English*, and adopts Justice Stevens's *First English* dissent."⁷⁰

Justice Stevens, writing for the majority, affirmed the decision of the Ninth Circuit.⁷¹ The Court held that a moratorium does not constitute a *per se* taking and that the question of whether the takings clause requires the government to pay compensation for enacting a temporary regulation that denies property owners all viable economic use of their property is not decided by any categorical rule, but rather by applying the factors of *Penn Central Transportation Co. v. New York City*.⁷²

III. DEVELOPMENTS RELATING TO THE ENDANGERED SPECIES ACT

*New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Service*⁷³ involved the United States Department of Fish and Wildlife Services' critical habitat designation of a species listed as endangered, the Southwestern Willow Flycatcher.⁷⁴ The Endangered Species Act ("ESA") requires the Fish and

67. *Id.* at 781.

68. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 228 F.3d 998 (9th Cir. 2000) (denying rehearing *en banc*).

69. *See id.* at 999 (Kozinski, J., dissenting, joined by O'Scannlain, Trott, T.G. Nelson, and Kleinfeld, JJ.).

70. *Id.* (citing *First English*, 482 U.S. 304); see also Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 4 Fed. Cir. B. J. 485, 487 (2001).

71. *Tahoe-Sierra Pres. Council III*, 122 S. Ct. at 1465.

72. *See id.*; *Penn Cent. Transp. Co.*, 438 U.S. 104.

73. *See New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001).

74. *See id.* at 1279.

Wildlife Services to make an economic analysis of the impact of any critical habitat designation before finalizing it.⁷⁵ In making its economic analyses, Fish and Wildlife Services had adopted an “incremental baseline approach” to the economic effects, whereby economic effects that flow from the listing of the species, rather than the selection of a particular habitat designation, were below the “baseline” and not to be considered in the determination of economic impact.⁷⁶ Using the baseline method, Fish and Wildlife Services determined that the critical habitat designation had resulted in no economic effects beyond those that were caused by the listing of the species.⁷⁷ Petitioners challenged the designation under the Administrative Procedure Act, primarily on the basis that the baseline approach violated the ESA, claiming that the ESA requires that all economic effect be considered when making a critical habitat designation.⁷⁸ The district court upheld the Fish and Wildlife Services methodology,⁷⁹ but the Tenth Circuit Court of Appeals reversed.⁸⁰

The court began its analysis by stating that the district court erred in giving *Chevron* deference to Fish and Wildlife Services’ interpretation of the ESA, because this interpretation had never undergone the rule-making process.⁸¹ The court proceeded to give the proper standard, whether the agency’s interpretation was “well-reasoned” and had the “power to persuade.”⁸² The court then decided that since the baseline approach renders the economic analysis required by Congress virtually meaningless, the baseline approach had to be in violation of the language and intent of the argument that including economic impacts that are caused, or at least co-extensively caused, by the listing itself, rather than the designation, would cause economic concerns to become a factor in the listing process, something that is forbidden by the ESA.⁸³ The court found that the consideration of economic factors at a point subsequent to listing could not have an effect on the process of the prior listing, nor diminish the protections offered by the listing, but rather would result in such economic factors influencing the deci-

75. *See id.* at 1280 (citing 16 U.S.C. § 1533 (b)(2)).

76. *See id.*

77. *See id.*

78. *See id.*

79. *See New Mexico Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv.*, 81 F. Supp. 2d 1141, 1162 (D.N.M. 1999).

80. *See id.*, *rev’d*, *New Mexico Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001).

81. *See New Mexico Cattle Growers Ass’n.*, 248 F.3d at 1281.

82. *See id.* (quoting *Fristoe v. Thompson*, 144 F.3d 627, 631 (10th Cir. 1998)).

83. *See id.* at 1284-85.

sion of which areas should be designated as critical habitat, which was in fact what Congress had intended.⁸⁴

*Tulare Lake Water Basin Storage District v. United States*⁸⁵ involved contractual water use rights and when regulatory interference with those rights may constitute a taking.⁸⁶ In this area, the water supply is primarily managed by the Central Valley Project, run by the Federal Bureau of Reclamation, and the State Water Project, run by the Department of Water Resources, projects which share a coordinated pumping system and must therefore be run in concert with each other.⁸⁷ Both projects are granted water permits by the State Water Resources Control Board to withdraw or use certain amounts of water from the Feather and Sacramento Rivers.⁸⁸ The projects in turn had contracted with certain of the plaintiffs in this matter, giving the plaintiffs the right to withdraw or use a certain amount of the water, and those plaintiffs had by contract given those rights to certain other plaintiffs for irrigation and other purposes.⁸⁹

In 1992, the National Marine Fisheries Service discovered that the operation of the projects was likely to jeopardize the continued existence of the Chinook salmon population, in violation of the ESA.⁹⁰ This situation was further complicated by the discovery, the following year, that the projects would also jeopardize the continued existence of the delta smelt.⁹¹ The agency determined that the "reasonable and prudent alternative" that would prevent the federal activity from jeopardizing the species' existence, as required by the ESA, would involve restrictions on the time and manner in which the water was pumped.⁹² These restrictions resulted in plaintiffs being deprived of the water for which they had contracted.⁹³ The plaintiffs proceeded to bring a takings claim under the Fifth Amendment, claiming that they were being forced to bear the entire cost, in terms of water, of a public burden.⁹⁴ Plaintiffs argued that this was essentially equivalent to a physical taking of the water property right, since the government's action completely destroyed the water property's economic uses, as per

84. *See id.* at 1285.

85. *Tulare Lake Water Basin Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001).

86. *See id.*

87. *See id.* at 314.

88. *See id.* at 315.

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.* at 316.

93. *See id.*

94. *See id.*

the *Lucas*⁹⁵ standard.⁹⁶ The defendant countered with three arguments: that the restrictions on water merely resulted in the frustration of the water contracts' purpose, and were therefore not a taking under *Omnia Commercial Co. v. United States*;⁹⁷ that there were no reasonable investment backed expectations nor a substantial decrease in value as would be required by the standard for use interference takings, as set forth by *Penn Central*;⁹⁸ and the federal government cannot be liable for a taking when it merely imposes a limitation that state law would otherwise require.⁹⁹ Both parties moved for summary judgment, and the court granted plaintiff's motion.¹⁰⁰

The court began by distinguishing the facts of this case from the situation in *Omnia Commercial Company v. United States*.¹⁰¹ Contrary to the defendant's claims, the court found in this case, the ownership of the right to use specified quantities of water had already been transferred to the plaintiffs, whose property interests in the water and its use were thereby superior to all others, and therefore not subject to *Omnia*.¹⁰²

The court proceeded to evaluate the nature of the taking in this instance, and decided the government's action was, as plaintiffs argued, such a deprivation of and interference with plaintiffs' property that it was as complete as a physical taking, and therefore automatically required compensation,¹⁰³ according to *Lucas v. South Carolina Coastal Council*.¹⁰⁴ The court rejected defendant's argument that this case should be analyzed as a potential regulatory, substantial use interference taking under *Penn Central*, pointing out that although the regulation in question might merely be the typical regulatory restriction on use, in the area of water rights, the entire property right consists of the right to use the water, and to

95. See *Lucas*, 505 U.S. at 1003.

96. See *Tulare Lake Water Basin Storage Dist.*, 49 Fed. Cl. at 318.

97. See *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-11 (1923).

98. See *Penn Cent. Transp. Co.*, 438 U.S. 104.

99. See *Tulare Lake Water Basin Storage Dist.*, 49 Fed. Cl. at 317-20.

100. See *id.* at 314, 324.

101. *Omnia*, 261 U.S. at 502. In *Omnia* the Plaintiff had contracted for the right to purchase steel plate at a below market price, but was subsequently unable to do so, because the United States requisitioned all of the Defendant's steel plate. The Supreme Court held that the Fifth Amendment only applied to an actual appropriation of a property, not any of the side effects of the appropriation, and that although the actual owner of the steel would have been due just compensation, the government had no obligation to compensate an individual who merely had a contractual expectation of receiving the property. See *id.*

102. See *Tulare Lake Water Basin Storage Dist.*, 49 Fed. Cl. at 317-18.

103. See *id.* at 318.

104. See *Lucas*, 505 U.S. at 1015.

restrict use is to restrict the whole right.¹⁰⁵ The court further supported its position by pointing to previous case law indicating that a seizure of water rights is to be treated as a physical taking, wherever the diversion or withdrawal of the water occurred.¹⁰⁶

As a final matter, the court dealt with the defendant's claim that either the language of the contracts or other requirements of state law limited the plaintiffs' titles in their water property rights.¹⁰⁷ The court agreed that the contract language specified that the Department of Water Resources, the state permitting agency, could not be held liable for water shortages beyond their control, which would presumably include shortages imposed by the federal government.¹⁰⁸ However, the court pointed out, the fact that the state agency was contractually immune from such liability merely provided a breach of contract defense, rather than turning the nature of the plaintiffs' water rights into a contingent interest.¹⁰⁹ Moreover, the provision did not provide the federal government with immunity.¹¹⁰ Similarly, the court agreed that if plaintiffs' water use was unreasonable or violative of the public trust, then plaintiffs could have no vested interest in the water under California law, but disagreed with defendant's argument that the plaintiffs' use was unreasonable because it would interfere with the salmon and the delta smelt.¹¹¹ Instead, the court agreed with the plaintiffs' argument that the state's formal allocation of water rights reflected the state's view of the water's reasonable use, and absent a reallocation of the state's water by the state, which did not happen here, the state had recognized as reasonable the Department of Water Resources' right to contract out the use of the water which it was allocated.¹¹²

In *Kandra v. United States*,¹¹³ plaintiffs, in the process of challenging the United States Bureau of Reclamations Annual Operating Plan for the Klamath Reclamation Project, sought to obtain a preliminary injunction enjoining the implementation of the plan.¹¹⁴ To keep from jeopardizing the endangered Lost River and Shortnose Sucker fish, a main staple of the Klamath and Yurok Tribes,

105. See *Tulare Lake Water Basin Storage Dist.*, 49 Fed. Cl. at 318-20.

106. See *id.* at 319 (citing *Dugan v. Rank*, 372 U.S. 609 (1963); see also *United States v. Causby*, 328 U.S. 256 (1946); *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931)).

107. See *Tulare Lake Water Basin Storage Dist.*, 49 Fed. Cl. at 320-21.

108. See *id.* at 321.

109. See *id.*

110. See *id.*

111. See *id.* at 321-22.

112. See *id.* at 322-23.

113. See *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001).

114. See *id.* at 1192.

who hold fishing and water treaty rights in the Klamath River Basin, and the threatened coho salmon, the Bureau of Reclamations determined to maintain water elevations of the Upper Klamath Lake and water flows below the Iron Gate Dam at a certain level.¹¹⁵ However, the maintenance of those water levels would result in no irrigation water deliveries to the majority of land within the Klamath Reclamation Project, since insufficient water would be present to support both uses.¹¹⁶

The court began by stating the standard for a preliminary injunction: a party “must show either (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.”¹¹⁷ The court first sought to determine whether the hardships would fall much more heavily upon the plaintiff in this case.¹¹⁸ The court recognized that the plaintiffs would suffer severe hardship to both their economic interests and their way of life if the Bureau of Reclamations deprived the plaintiffs of irrigation water.¹¹⁹ On the other hand, the court found this hardship was balanced by several other hardships that would occur if the plan was not implemented.¹²⁰ These hardships included jeopardy to the continuing existence of endangered species, a possible hardship that was given the highest priority by Congress in the Endangered Species Act, harm to the livelihood and tribal customs of the Klamath and Yurok Tribes, and economic harm and deprivation of a way of life for other fishing communities.¹²¹ In balancing these interests, the court was unable to find that the balance of hardship was more heavily weighted on one side than the other.¹²²

The court then proceeded to evaluate the likelihood of the success of the plaintiffs’ claims. Plaintiffs alleged two breach of contract claims: that the Bureau of Reclamation breached its contract “by using Project water for purposes other than irrigation,” and that the Bureau of Reclamation breached its contract with plaintiffs by failing to ensure that the water supply remained sufficient to meet the contract obligations.¹²³ The court found the plaintiffs’ contract rights to irrigation water were subservient to the Endangered Species Act and tribal trust

115. *See id.* at 1195-98.

116. *See id.* at 1199.

117. *Id.* (citing *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839-40 (9th Cir. 2001)).

118. *See id.* at 1200.

119. *See id.* at 1200-01.

120. *See id.* at 1201.

121. *See id.*

122. *See id.*

123. *See id.*

requirements, thereby rejecting plaintiffs first breach of contract claim.¹²⁴ The court also rejected the plaintiffs' second breach of contract argument, stating that the plaintiffs had provided little evidence that the Bureau of Reclamation could have preserved the water by asserting claims against junior users.¹²⁵ Moreover, the Bureau of Reclamation would have been prevented from doing so while "[w]ater rights adjudication for the Klamath River Basin to perfect asserted water rights . . ." was pending in the state courts.¹²⁶

Plaintiffs also claimed the Bureau of Reclamation violated both the National Environmental Policy Act ("NEPA"), by failing to make an Environmental Impact Statement regarding the effects implementation of the plan would have, and the ESA in a variety of ways.¹²⁷ Neither NEPA nor the ESA provide a private cause of action, so the plaintiffs' claims had to be brought under the Administrative Procedure Act ("APA"), and would succeed only if the plaintiffs could show the Bureau of Reclamation's acts were arbitrary and capricious.¹²⁸ The court did not find sufficient evidence to show that the agency's actions had been arbitrary and capricious.¹²⁹ It further pointed out that even if the actions were arbitrary and capricious, the APA can only force an agency to set aside a decision, not to compel an action.¹³⁰ This means that even if the agency were to succeed in forcing the Bureau of Reclamation to set aside its plan, they could not force it to continue to release water for irrigation, as the preliminary injunction would require.¹³¹

On July 10, 2000, the National Marine Fisheries Service published the final section 4(d) rule of the ESA, delegating power to manage species protection and recovery to state and local levels.¹³² This revolutionary approach allows secretaries to "extend all endangered species protections to threatened species."¹³³

124. *See id.*

125. *See id.*

126. *Id.* (several pre-1909 water rights claims to the Upper Klamath Lake had been filed in state court).

127. *See id.* at 1202.

128. *See id.*

129. *See generally id.* at 1202-05 (discussing the requirement of the National Environmental Policy Act and the Reclamation Bureau's failure to fulfill the requirements).

130. *See id.* at 1205.

131. *See id.*

132. *See* Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionary Significant Units (ESUs), 65 Fed. Reg. 42,422, 42,476-42,480 (July 10, 2000) (to be codified at 50 C.F.R. pt. 223).

133. *See* Valerie Ann Lee & Jaelith Hall-Rivera, *Breathing New Life Into the ESA: The Pacific Northwest's Endangered Species Act Experiment in Devolution*, 31 *Envtl. L. Rev.* (Envtl. L. Inst.) 10,102, 10,103 (Jan. 2001).

Section 4(d) requires each secretary to issue "such regulations as he deems necessary and advisable to provide for the conservation" of threatened species.¹³⁴

The Department of Commerce issued a final rule under section 4(d) of the ESA, in reference to fourteen species of salmon and steelheads.¹³⁵ A few months later a group of Pacific Northwest irrigators filed a petition "to remove seven populations of Columbia basin salmon and steelhead from the 'endangered' or 'threatened' lists."¹³⁶ Many more petitions seem likely as a result of a district court opinion that the National Marine Fisheries Service erred when listing only wild and not hatchery-reared Oregon coastal coho salmon because the ESA does not allow part of a population of fish to be listed.¹³⁷

IV. PESTICIDES AND HERBICIDES

In *No Spray Coalition, Inc. v. City of New York*,¹³⁸ an environmental group attempted to obtain a preliminary injunction against the City of New York under a provision of the Resource Conservation Recovery Act ("RCRA") to prevent the city from restarting its insecticide spraying over the city.¹³⁹ To obtain a preliminary injunction, a party must show either a likelihood of success on the merits and the possibility of irreparable injury; or that serious questions are raised and the balance of hardships tips sharply in its favor.¹⁴⁰ However, when the plaintiff seeks a preliminary injunction against a "government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard."¹⁴¹ To have any likelihood of succeeding in its claim, the plaintiff had to show under RCRA that the defendant had "discarded" the insecticides.¹⁴² The court stated a product is not discarded until after it has been used for its intended purpose.¹⁴³ With respect to the insecticides being sprayed into the

134. 16 U.S.C. § 1533(d) (1994).

135. See *Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionary Significant Units (ESUs)*, 65 Fed. Reg. at 42,422-42,481.

136. *First Salmon Delisting Petition Filed in Northwest as Result of Court Ruling*, 32 Env't. Rep. (BNA) No. 39, at 1928 (Oct. 5, 2001).

137. See *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1154-64 (D. Or. 2001).

138. *No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148 (2d Cir. 2001).

139. See *id.* at 149.

140. See *id.* at 150 (citing *Otokoyama Co. v. Wine of Japan Import, Inc.*, 175 F.3d 266, 270 (2d Cir. 1999)).

141. *Id.* (quoting *Beal v. Stern*, 184 F.3d 117, 122 (2d Cir. 1999)).

142. See *id.*

143. See *id.*

air by the defendant, their intended purpose was to kill mosquitoes and the mosquitoes' larvae, so a suit under the RCRA would be unlikely to succeed in those or similar circumstances.¹⁴⁴

In *American Farm Bureau v. United States Environmental Protection Agency*,¹⁴⁵ twenty-five organizations challenged the EPA's implementation of the Food Quality Protection Act of 1996,¹⁴⁶ which amends both the Federal Food, Drug and Cosmetic Act ("FFDCA")¹⁴⁷ and the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").¹⁴⁸ The FFDCA permits private actions against the EPA if it fails to comply with the statutory schedule for reassessing the maximum allowable level of pesticide residue in food that is permissible under the FFDCA.¹⁴⁹ Defendant EPA moved to dismiss the complaint based on failure of the counts to meet APA requirements, plaintiffs' failure to exhaust administrative remedies, claims not ripe, claims lacking in standing, and lack of jurisdiction.¹⁵⁰ Reviewing the two-prong test subsequent to *TRAC*,¹⁵¹ and discussing case law subsequent to *TRAC*,¹⁵² the court held that because *TRAC* analysis of the FFDCA

144. See *id.* (holding that city's spraying of insecticide did not violate RCRA).

145. See *Am. Farm Bureau v. E.P.A.*, 121 F. Supp. 2d 84 (D.D.C. 2000).

146. See Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (1996).

147. See Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-394 (2000).

148. See Federal Insecticide, Fungicide on Rodenticide Act, 7 U.S.C. §§ 136-136y (2000).

149. See *Am. Farm Bureau*, 121 F. Supp. 2d at 96 (citing 21 U.S.C. § 346(q)(3)).

150. See *id.* at 90.

151. See *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 77-79 (D.C. Cir. 1984) (holding that a petition seeking a writ of mandamus to force the FCC to act was subject to the exclusive jurisdiction of the Court of Appeals because 28 U.S.C. § 2342(1) (1982) & 47 U.S.C. § 402(a) (1982) authorized exclusive jurisdiction to review final FCC action). The court reasoned that the Court of Appeals had exclusive jurisdiction to make decisions that could affect the circuit court's future jurisdiction, and that the district court lacked concurrent jurisdiction based on the principle that when Congress explicitly vests jurisdiction with one court, it cuts off original jurisdiction in other courts. See *id.* at 76-77. The two prong test developed after *TRAC* asks: "(1) does the statute commit review of agency action to the court of appeals and (2) does the action seek relief that might affect the circuit court's jurisdiction?" *Am. Farm Bureau*, 121 F. Supp. 2d at 91 (citing *Jamison v. FTC*, 628 F. Supp. 1548, 1550 (D.D.C. 1986)).

152. See *Am. Farm Bureau*, 121 F. Supp. 2d at 91-92; *Cal. v. Riley*, 750 F. Supp. 433 (E.D. Cal. 1990) (holding that limited appellate review provisions of the FFDCA did not divest the district court of subject matter jurisdiction to hear challenges to EPA action under statutory or constitutional claims according to 28 U.S.C. § 1331); *Nader v. E.P.A.*, 859 F.2d 747 (9th Cir. 1988) (holding that because FFDCA § 346(a) and § 348 only allowed appellate review of orders issued under sections not implicated in the case at hand, EPA's rejection of petition to revoke pesticide tolerance was not appealable to the court of appeals); *Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987) (holding that the appellate review provision § 355(h) of FFDCA applied only to cases chal-

was not comparable to *TRAC* analysis of statutes that provide for broader appellate review, *TRAC* did not apply to the plaintiff's claims, and jurisdiction was proper.¹⁵³

Defendants argued that certain counts should be dismissed as the plaintiffs lacked standing.¹⁵⁴ Defendants asserted that the plaintiffs failed to satisfy the first two elements of constitutional standing as defined in *Lujan v. Defenders of Wildlife*.¹⁵⁵ Plaintiffs claimed procedural, informational, and economic injury because of the EPA's failures.¹⁵⁶ The court agreed with the defendants' argument that the EPA is not required by statute to produce the information sought by the plaintiffs, and therefore the plaintiffs could not base their standing upon informational or procedural injury.¹⁵⁷ The court further found the plaintiffs' procedural injury failed because they did not identify a legally protected interest infringed upon by the EPA's procedural shortcomings.¹⁵⁸ The court held the plaintiffs' claims of informational and economic standing also failed to meet the first two requirements as set out by *Lujan*.¹⁵⁹

Defendants' asserted additional counts of the complaint warranted dismissal based on the failure of the counts to meet APA requirements, the plaintiffs' failure to exhaust administrative remedies, and ripeness.¹⁶⁰ Defendants asserted the plaintiffs failed to challenge an individual, concrete action of the EPA, and instead attacked the general policy provisions of the EPA regarding pesticide tolerances and registrations.¹⁶¹ The court reasoned general policy programmatic attacks were explicitly refused in *Lujan*, and therefore dismissed four of plain-

lenging disapproval of new drug regulations, not actual challenges to FDA regulations of new drugs); *Jamison*, 628 F. Supp. 1548 (holding that *TRAC* allowed for an injunction where the statute committed review of FTC action to the appellate court and future review was likely regardless of constitutional claims).

153. See *Am. Farm Bureau*, 121 F. Supp. 2d at 93.

154. See *id.*

155. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992) (to establish the constitutional minimum of standing, plaintiffs must show: (1) plaintiff has suffered injury which is (a) concrete and particularized, and (b) actual or imminent, not hypothetical or conjectural, (2) a causal connection between the injury and the conduct that is traceable to defendant, and (3) it is likely the injury will be redressed by a favorable decision).

156. See *Am. Farm Bureau*, 121 F. Supp. 2d at 95-96.

157. See *id.* at 96.

158. See *id.*

159. See *id.* at 97.

160. See *id.* at 101.

161. See *id.*

tiffs' claims.¹⁶² However, taking judicial review of the EPA's entries in the Federal Register regarding comments on policy, the court found that those notices alone were not enough to merit granting the defendant's motion on the basis of APA requirements.¹⁶³ The court additionally denied the defendant's exhaustion claim under similar reasoning.¹⁶⁴

The EPA announced a notice of availability, and was seeking public comments on a draft Pesticide Registration Notice ("PR-Notice") entitled "Spray and Dust Drift Label Statements for Pesticide Products."¹⁶⁵ This PR-Notice was intended to provide guidance to pesticide registrants and other interested persons on drift label statements for pesticide products.¹⁶⁶ The goal of this PR-Notice was to improve the consistency of product label statements for controlling pesticide drift from dust and spray applications, so that human health and the environment might be better protected.¹⁶⁷ The comment period on this PR-Notice was initially scheduled to close on November 20, 2001,¹⁶⁸ but was extended until March 31, 2002 after the Agency received several requests to do so.¹⁶⁹

V. CLEAN WATER ACT AND RELATED DEVELOPMENTS

In *American Wildlands v. Carol Browner*,¹⁷⁰ appellant challenged the EPA's approval of some of Montana's water quality standards under the Clean Water Act. Under the CWA, states are required to develop water quality standards for waters within their boundaries.¹⁷¹ In promulgating these standards, states must give each body of water a "designated use," determine and set forth the degree to which various pollutants may be present in the water body without harming the designated use, and provide an "antidegradation review policy" to

162. *See id.* at 103-04.

163. *See id.* at 106.

164. *See id.*

165. *See* Pesticides; Draft Guidance for Pesticide Registrants on New Labeling Statements for Spray and Dust Drift Mitigation, 66 Fed. Reg. 44,141, 44,141 (Aug. 22, 2001).

166. *See* Pesticides; Draft Guidance for Pesticide Registrants on New Labeling Statements for Spray and Dust Drift Mitigation, 66 Fed. Reg. at 44,141.

167. *See* Pesticides; Draft Guidance for Pesticide Registrants on New Labeling Statements for Spray and Dust Drift Mitigation, 66 Fed. Reg. at 44,141.

168. *See* Pesticides; Draft Guidance for Pesticide Registrants on New Labeling Statements for Spray and Dust Drift Mitigation, 66 Fed. Reg. at 44,141.

169. *See* Draft Guidance for Pesticide Registrants on New Labeling Statements for Spray and Dust Drift Mitigation; Extension of Comment Period, 67 Fed. Reg. 3192, 3192 (Jan. 23, 2002).

170. *Am. Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001).

171. *See id.* at 1194 (citing 33 U.S.C. § 1313(d)).

allow the states to evaluate any activities that might tend to further degrade water quality.¹⁷² The antidegradation review policy must be consistent with the three-tier federal anti-degradation policy.¹⁷³ Furthermore, the states must identify any body of water that does not meet its standard and set forth a “total maximum daily load” (“TMDL”) establishing the maximum amount of various pollutants that can enter the water body from all sources combined.¹⁷⁴ However, EPA regulations permit states to allow water quality requirements to be exceeded in certain areas where pollutant discharge initially meets a water body, so-called “mixing areas,” so long as certain criteria are still met.¹⁷⁵ After developing its standards, each state must submit those standards to the EPA for approval.¹⁷⁶ If the EPA disapproves of the standards, it must notify the state of any necessary changes, and if those standards are not made, the EPA is required to impose appropriate standards on the state.¹⁷⁷

Appellants challenged the EPA’s approval of Montana’s antidegradation and mixing zone policies.¹⁷⁸ Montana’s standards had exempted existing nonpoint sources from Tier II antidegradation review, and had further exempted subsequent nonpoint sources from such sources when reasonable conservation practices were used and beneficial uses were protected.¹⁷⁹ Montana also exempted mixing zones from its antidegradation review policy, so long as the degradation to the water body at the periphery of the mixing zone was not significant, although Montana did develop a number of other strict requirements regarding mixing areas.¹⁸⁰ The district court found that the EPA’s approval of these standards was proper, and the Tenth Circuit affirmed.¹⁸¹

The court first determined that Congress had delegated its authority to the EPA to apply and interpret the CWA, both in general and in this specific instance, and its interpretation was therefore entitled to *Chevron* deference and would not be overturned unless the agency’s decision was arbitrary and capri-

172. See *id.* (citing 33 U.S.C. § 1313(c)(2)); 40 C.F.R. §§ 130.3, 130.10(d)(4), 131.6, 131.10, 131.11).

173. See *id.* (citing 40 C.F.R. § 131.12).

174. See *id.* (citing 33 U.S.C. § 1313(d)).

175. See *id.* at 1195 (citing EPA, WATER QUALITY STANDARDS HANDBOOK § 5.1.1, at 5-5 (2d ed. 1994)).

176. See *id.* (citing 40 C.F.R. § 131.13).

177. See *id.* at 1194 (citing 33 U.S.C. §§ 1313(c)(3)-1313(c)(4)(A)).

178. See *id.* at 1196.

179. See *id.* at 1195 (citing MONT. CODE ANN. §§ 75-5-317(2)(a)-75-5-317(b)).

180. See *id.* (citing MONT. ADMIN. R. §§ 17.30.715(1)(c), 17.30.505(1)(b), 17.30.505(1)(c), 17.30.506(1) (2001)).

181. See *Am. Wildlands v. Browner*, 94 F. Supp. 2d 1150 (D. Colo. 2000).

cius.¹⁸² The court then determined that since the CWA does not give the EPA the authority to regulate nonpoint source pollution, but instead merely requires states to address the issue through their standards and so forth, the EPA was reasonable in interpreting that it could not disapprove an antidegradation policy on the sole basis of how that policy addressed the issue of nonpoint source pollution.¹⁸³ The court then turned to the EPA's argument that antidegradation review requirements apply to a water body as a whole, rather than to a segment such as a mixing zone.¹⁸⁴ The court found this interpretation was reasonable, especially given the practical reality beneath mixing zones, and found the EPA was not arbitrary and capricious in approving Montana's exemption of mixing zones from antidegradation review so long as review of the water around such zones indicates that the overall water quality is not being damaged.¹⁸⁵

In *Headwaters, Inc. v. Talent Irrigation Dist.*¹⁸⁶, plaintiff alleged defendant's application of a pesticide into its man-made canals without a National Pollutant Discharge Elimination System permit was a violation of the CWA.¹⁸⁷ The district court held the canals were waters of the United States under the CWA, and the pesticide was a pollutant.¹⁸⁸ However, the district court concluded no permit was needed for application because the EPA-approved label on the herbicide, approved under FIFRA, did not require the user to acquire a permit.¹⁸⁹ The Ninth Circuit reversed.¹⁹⁰

The court began by stating that it is the duty of the courts to interpret statutes so that they may coexist, if possible.¹⁹¹ The court noted FIFRA and the CWA serve different purposes, the purpose of comprehensive uniformly safe labeling and the purpose of preserving the quality of water.¹⁹² An approved label establishes general conditions for a pesticides use, while permits for the discharge of pesticides requires consideration of specific, case-by-case environ-

182. *See Am. Wildlands*, 260 F.3d at 1197.

183. *See id.* at 1198.

184. *See id.*

185. *See id.*

186. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).

187. *See id.*

188. *See id.* at 532-34.

189. *See id.* at 534.

190. *See id.*

191. *See id.* at 530-31.

192. *See id.* at 531.

mental considerations.¹⁹³ Therefore, the court held a label's failure to specify that a permit is required does not mean the CWA does not apply.¹⁹⁴

The court then proceeded to determine whether the district court was correct in determining the canals to be navigable waters, or waters of the United States, in light of the recent Supreme Court holding in *Solid Waste Agency of Northern Cook County*, which stated the definition of navigable waters did not include isolated, intrastate bodies.¹⁹⁵ The court held that the canals still remained within the category of navigable waters, despite the fact that the canals could be and were isolated by the act of the defendant at certain times, because in general, the canal received water from and dispensed water into natural bodies of waters that were tributaries of navigable waters, and therefore they were not isolated.¹⁹⁶

In *Rice v. Harken Exploration Co.*,¹⁹⁷ plaintiff ranchers who owned the surface rights to a property sued the oil and gas properties operator on the ranch for the discharge of oil and produced brine into "navigable waters" under the Oil Pollution Act, which defines navigable waters as waters of the United States.¹⁹⁸ The waters in question were a seasonal creek on the ranch as well as the ground water under the ranch.¹⁹⁹ Plaintiff claimed that these waters were covered, as Congress wished to extend the jurisdiction of the Act to the extent of the Commerce Clause.²⁰⁰ Defendant argued that neither of these waters constituted navigable waters, and the district court agreed and awarded the defendant summary judgment.²⁰¹ The Fifth Circuit affirmed the summary judgment.²⁰²

The court began by stating that although there was little case law elucidating the extent to which bodies of water are included in the Oil Pollution Act's navigable waters jurisdiction, the Oil Pollution Act's definition of navigable waters was intended by Congress to be identical with the CWA's definition of navigable waters; a definition that has been frequently analyzed in courts.²⁰³ The court proceeded to state that although the Supreme Court has held that the CWA's definition of navigable waters is not limited to waters that actually are

193. *See id.*

194. *See id.* at 532.

195. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'r*, 531 U.S. 159 (2001).

196. *See Headwaters*, 243 F.3d at 533-34.

197. *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001).

198. *See id.* at 265-67.

199. *See id.* at 265.

200. *See id.* at 267-68.

201. *See id.* at 267-72.

202. *See id.* at 265.

203. *See id.* at 267-68.

navigable in the traditional sense,²⁰⁴ the broadness of the definition had recently been limited by the Court's holding in *Solid Waste Agency of Northern Cook County*.²⁰⁵ The Court refused to hold Congress had intended to stretch the limits of its Commerce Clause power in establishing the jurisdiction of the CWA, and appeared to limit jurisdiction to bodies of water that are actually navigable, are adjacent to an open body of navigable water, or are otherwise significantly linked to an open body of navigable water.²⁰⁶ The court held there was insufficient evidence presented for a reasonable trier of fact to find the seasonal creek at issue in this case was either navigable or had any significant connection with an open body of navigable water.²⁰⁷ The court proceeded to state that Clean Water Act case law was clear that groundwater itself was not navigable water under the CWA.²⁰⁸ Therefore, it would be inappropriate to allow a claim based on the discharge of a contaminant into groundwater merely because the contaminant somehow reached navigable water, since the Act's jurisdiction was limited to discharges that were actually made into the navigable water itself.²⁰⁹

In a related proceeding, defendant insurers of Harken Exploration Company appealed the order of the United States District Court, which held insurers had a duty to defend Harken in underlying lawsuits.²¹⁰ Defendants additionally appealed the district court's award of the plaintiffs' defense costs for the underlying suits and the use of a ten percent interest rate to calculate prejudgment interest.²¹¹ The district court's rulings were affirmed.²¹² Harken asked appellants to defend it in the federal lawsuit filed by the Rices.²¹³ Harken carried two separate insurance policies, one issued by each appellant.²¹⁴ Appellants denied Harken's request and refused to defend it in the federal lawsuit.²¹⁵ When the Rices' lawsuit was dismissed from federal court and re-filed in state court, Harken again in-

204. *See id.* (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985) (upholding regulations that CWA restricts discharges into non-navigable "wetlands" adjacent to an open body of navigable water)).

205. *See Solid Waste Agency of N. Cook County*, 531 U.S. at 159.

206. *See Rice*, 250 F.3d at 269-70.

207. *See id.* at 270-71.

208. *See id.*

209. *See id.* at 272.

210. *See Harken Exploration Co. v. Sphere Drake Ins.*, 261 F.3d 466, 470 (5th Cir. 2001).

211. *See id.*

212. *See id.* at 478.

213. *See id.* at 470.

214. *See id.*

215. *See id.*

formed defendants of the suit and requested defense.²¹⁶ Appellants refused.²¹⁷ Appellants appealed the Dallas Court's grant of partial summary judgment in favor of Harken, contending they did not owe Harken a duty to defend because there was not an occurrence, as defined by the policies, that under the policies they were only obligated to indemnify, not defend Harken, and the alleged property damage did not occur during the policies' coverage periods.²¹⁸

The court found the companies had a duty to defend Harken, stating "the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy."²¹⁹ The Rices alleged an occurrence, or accident, against Harken in claiming that the rupture, leak or overflow of pollutants contaminated the Ranch's water and damaged the ranch generally.²²⁰ The Rices claimed Harken was negligent in its pollution of the ranch and acted maliciously with awareness that its actions would cause property damage.²²¹ The court disagreed with Appellants' contention that the contaminated water and damage to the ranch were not unexpected as they were the natural consequences of operating an oil facility.²²² The court found merit with both parties' arguments regarding the applicability of the policies to indemnify or defend Harken for damage caused by pollutants.²²³ The court stated that since multiple interpretations of the policy were reasonable, the policy must be construed against the insurer.²²⁴ Considering the Rices' allegations of fifty-three occurrences of polluting, both before and after notice was given to Harken, the court found that the damage did occur during the coverage periods of the policies.²²⁵ The court additionally held that Harken's defense costs were reasonable and properly awarded, and that the Dallas Court's use of a ten percent interest rate was not in error since the parties had not unambiguously and expressly established the amount owed under a contract, as per section 302.003 of the Texas Financial Code Annotated.²²⁶

216. *See id.*

217. *See id.*

218. *See id.* at 471.

219. *Id.*

220. *See id.* at 473.

221. *See id.*

222. *See id.* at 474.

223. *See id.* at 475.

224. *See id.* (citing *St. Paul Fire & Marine Ins. v. Green Tree Corp.*, 249 F.3d 389, 392 (5th Cir. 2001)).

225. *See id.* at 476-77.

226. *See id.* at 477-78.

In *Aiello v. Town of Brookhaven*,²²⁷ plaintiff sued defendant on the basis of its past actions as an operator of a landfill and culverts serving the landfill. Plaintiff alleged that defendant both violated the RCRA (as a past owner or operator of a treatment, storage, or disposal facility, who had contributed or who was contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment), and the Clean Water Act (by discharging pollutants into a navigable waterway without a permit).²²⁸ The basis of the claim was the fact that hazardous wastes disposed of into the landfill were found to have leached into open bodies of navigable waters and their tributaries.²²⁹

The court determined that the defendant had violated the RCRA, but held the defendant was not liable under the CWA, because any discharge of the pollutants was entirely in the past, precluding such liability under *Gwaltney*.²³⁰ The court rejected the plaintiff's argument that the continuing migration of the pollutants after discharge constituted a continuing discharge in itself.²³¹

The court's finding was adhered to upon reconsideration.²³² After the Town of Brookhaven was found liable under the RCRA for contaminating waters juxtaposed to the plaintiffs' properties, the court assessed the full cost of the court-appointed expert to the town.²³³ Defendant objected, claiming the court erred in failing to determine whether the resident plaintiffs had the capacity to pay a portion of the expert's costs.²³⁴ The court affirmed its order, finding the court had the discretion to assess the costs in whatever manner the court believed justified.²³⁵ It was counter-intuitive to place financial obstacles in the path of citizen litigation in the protection of the environment.²³⁶ As taxpayers of the town, the residents helped finance the town's costs of litigation, including the costs of experts.²³⁷ Finally, the court found that as working-class residents, im-

227. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001).

228. *See id.* at 104-05.

229. *See id.* at 104.

230. *See id.* at 120-21.

231. *See id.*

232. *See Aiello v. Town of Brookhaven*, 149 F. Supp. 2d 11, 13 (E.D.N.Y. 2001).

233. *See id.* at 13-14.

234. *See id.* at 14.

235. *See id.*

236. *See id.* at 15.

237. *See id.*

posing additional costs of expert testimony would constitute hardship to the plaintiffs.²³⁸

In *Pronsolino v. Marcus*,²³⁹ plaintiffs, having applied for a timber-harvesting permit, received the permit from the California Department of Forestry with many serious restrictions attached that were designed to reduce soil erosion into the Garcia River.²⁴⁰ The EPA designated the Garcia as a water body that was in violation of its water quality standards due to nonpoint source pollution, and thus required the state to establish total maximum daily loads for the Garcia.²⁴¹ The state missed its deadline to submit its own TMDLs, whereupon the EPA imposed its own TMDLs on the state.²⁴² The TMDLs established a total maximum amount of sediment loading that equated to a sixty percent reduction in sediment pollution from all combined sources, including nonpoint sources such as timber harvesting.²⁴³ The plaintiffs argued the permit restrictions were directly caused by the EPA's TMDL standard, as the California Department of Forestry would not issue any permit that could violate it, for fear of losing funding.²⁴⁴ The plaintiff then brought suit under the Administrative Procedure Act, challenging the EPA's interpretation that the Clean Water Act allows it to establish TMDLs on rivers polluted solely by nonpoint source pollution.²⁴⁵

The court evaluated the statutory language of the CWA, and noted that section 303, which requires the states to create EPA-approved water quality standards or to have the EPA impose standards upon them, did not draw any distinctions among navigable waters or their pollutants.²⁴⁶ The court instead found the mandatory planning process of section 303, in order to insure the adequate implementation of water quality standards for all navigable waters, required the EPA to address nonpoint as well as point sources in approving or determining TMDLs.²⁴⁷

238. See *id.* at 16.

239. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337 (N.D. Cal. 2000).

240. See *id.* at 1338.

241. See *id.* at 1339-40.

242. See *id.* at 1339.

243. See *id.* at 1340.

244. See *id.* at 1338-40.

245. See *id.* at 1337.

246. See *id.* at 1341-47.

247. See *id.* at 1347. The district court's decision was upheld by a three-judge panel of the appeals court. See *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). The court held that the statutory language of § 303(d), whereby states must identify and compile a list of all waters for which certain "effluent limitations are not stringent enough" required the states to identify (1) waters as to which the effluent limitations applied, but water quality standards were not met and (2)

Various federal agencies, including the EPA, Department of the Interior, Department of Agriculture, Department of Commerce, and others, have agreed upon a final comprehensive science-based approach to watershed delineation and assessment on federal lands.²⁴⁸ Factors affecting the watershed will be considered when determining the best management practices and priorities for both land and water uses.²⁴⁹ The agencies' watershed goals will involve minimizing adverse water quality impacts from management programs, minimizing the impairment of current and future uses, and restoring watersheds that do not reach water quality standards.²⁵⁰

In December 2000, Montana submitted a total maximum daily load plan designed to relieve impairments to water quality caused by reduced flow in water bodies by adjusting water withdrawal.²⁵¹ Although EPA officials commended the plan, the EPA refused to set a precedent for approving solely flow-based TMDLs, stating that the CWA only required TMDLs for situations resulting from pollutants.²⁵² The EPA went on to state that flow alterations are not included in the CWA's definition of a pollutant.²⁵³ Montana officials stated that the state would probably attempt to address water flow concerns on a voluntary basis with water users, while focusing its resources on the actually required TMDLs.²⁵⁴

The EPA has requested comments on its proposed draft for technical guidance for managing agriculture nonpoint source pollution.²⁵⁵ The guidance provides background information on the problem as well as information on up-to-date reduction methods.²⁵⁶ The comment period for the notice of a draft, which offered technical guidance for managing nonpoint sources of water pollu-

waters as to which effluent limitations do not apply and water quality standards are not met. *See id.* at 1126. Upon this rationale, TMDL requirements were found to apply to the Garcia River. *See id.*

248. *See* Unified Federal Policy for a Watershed Approach to Federal Land and Resource Management, 65 Fed. Reg. 62,566, 62,566 (Oct. 18, 2000).

249. *See* Unified Federal Policy for a Watershed Approach to Federal Land and Resource Management, 65 Fed. Reg. at 62,569-62,570.

250. *See* Unified Federal Policy for a Watershed Approach to Federal Land and Resource Management, 65 Fed. Reg. at 62,569-62,570.

251. *See* Susan Bruninga, Plan Addressing Flow in Montana Creek Not Caused by TMDL Program, EPA Says, 32 Env't. Rep. (BNA) No. 33, at 1635 (Aug. 17, 2001).

252. *See id.*

253. *See id.*

254. *See id.*

255. *See* Notice of Availability of Guidance for Controlling Nonpoint Source Pollution from Agriculture and Request for Comments, 65 Fed. Reg. 61,325, 61,325 (Oct. 17, 2000).

256. *See* Notice of Availability of Guidance for Controlling Nonpoint Source Pollution From Agriculture and Request for Comments, 65 Fed. Reg. at 61,325.

tion from agriculture, published on October 17, 2000, required that comments sent by mail be postmarked no later than January 16, 2001.²⁵⁷

VI. CONCENTRATED ANIMAL FEEDING OPERATIONS

In January 2001, the EPA announced a proposed rule that would change the permitting requirements for confined animal feeding operations ("CAFOs").²⁵⁸ The EPA asked for comment on two options for defining CAFOs under NPDES permitting.²⁵⁹ The first option would establish a two-tiered system, designating all facilities with greater than 500 animal units as CAFOs and granting discretion to the permitting authority to determine whether smaller facilities are CAFOs.²⁶⁰ The other option would establish a three-tiered system, designating all facilities with more than 1000 animal units as CAFOs, designating all facilities with 300-1000 animal units that meet certain other conditions as CAFOs, and granting discretion to the permitting authority to determine that any facility is a CAFO, no matter what the size.²⁶¹ Under the proposed rule, the number of facilities classified as CAFOs and subject to permitting would increase to as many as 39,000 from the current level of 2,500.²⁶² The proposed rule would also expand permitting to include dry-manure poultry operations and stand-alone immature swine and heifer operations.²⁶³ EPA officials stated that the new regulations were not intended to cover operations that used concentrated feeding practices during the winter and stressed the need for public comment and input to cover situations

257. See Notice of Availability of Guidance for Controlling Nonpoint Source Pollution From Agriculture and Request for Comments, 65 Fed. Reg. at 61,325.

258. See National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2960 (proposed Jan. 12, 2001) (to be codified at 40 C.F.R. pts. 122 and 412).

259. See National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. at 2960.

260. See National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. at 2962.

261. See National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. at 2962.

262. See Terrence J. Centner, *EPA Announces Proposed Rule Changes for Animal Feeding Operations*, 17 AGRIC. L. UPDATE 1,2 (Sept. 2000).

263. See *id.* at 1; Scott Fancher, *EPA Announces Proposed Rule Changes for Animal Feeding Operations*, 17 AGRIC. L. UPDATE 1 (Sept. 2000).

they had not thought of.²⁶⁴ Environmentalists were critical of the proposal, in part because the proposal did not address the possibility of phasing out lagoons to store animal waste.²⁶⁵ As with the TMDL proposal, the CAFO proposed rule generated a firestorm of sharply divided comments.²⁶⁶ Agricultural groups contended the proposed requirements for nonpoint pollution were not authorized by the CWA, would be excessively costly, and challenged the co-permitting requirements designed to extend responsibility beyond contract growers to the corporations that own the livestock.²⁶⁷ State officials contended the rules would undermine functionally equivalent state programs.²⁶⁸ Environmental groups, however, supported the proposal as a long overdue regulation of CAFO's.²⁶⁹

Prior to issuing the proposed rules, the EPA approved a final project agreement to allow egg producers to develop an environmental management system and to allow states to issue general CWA permits for these operations.²⁷⁰ The EPA viewed the project as a way to bring more of the operations into the regulatory regime more quickly, pending a change in the CAFO regime that would include "dry litter" operations.²⁷¹ Environmentalists were critical of the plan, saying that it would "reward some of the most egregious violators of the Clean Water Act."²⁷²

The EPA is also attempting to regulate contamination by atmospheric deposition.²⁷³ Mercury levels in fish in the Savannah River exceeded state con-

264. See Tripp Waltz, *Concentrated Winter Feeding not Covered by EPA Proposal on Feedlot Runoff Control*, 32 *Env't. Rep. (BNA) No. 13*, at 605 (Mar. 20, 2001).

265. See Susan Bruninga, *EPA Proposal Could Require Thousands More Feedlots to Get Permits* 31 *Env't. Rep. (BNA) No. 50*, at 2659 (Dec. 22, 2000); see also Susan Bruninga, *Draft CAFO Proposal Would Require Co-Permitting, Revise Threshold Limits*, 31 *Env't. Rep. (BNA) No. 43*, at 2316 (Nov. 3, 2000); Susan Bruninga, *Most Feedlots Would Have to Apply for NDPES Permits Under EPA Guidance*, 31 *Env't. Rep. (BNA) No. 31*, at 1724 (Aug. 18, 2000) (discussing various criticisms offered by several environmental organizations); Carolyn Whetzel, *Proposal to Curb Runoff From Feedlots an 'Administrative Nightmare,' Farmers Say*, 32 *Env't. Rep. (BNA) No. 11*, at 495 (Mar. 16, 2001) (industrial criticism of the proposed regulation).

266. See Susan Bruninga, *Legality, Strictness of Proposal to Tighten Rules on CAFOs Questioned in Comments*, 32 *Env't. Rep. (BNA) No. 35*, at 1722 (Aug. 31, 2001).

267. See *id.*

268. See *id.* at 1723.

269. See *id.*

270. See Susan Bruninga, *Environmental Group Vows Fight Over XL Project for Egg Producers*, 31 *Env't. Rep. (BNA) No. 43*, at 2325 (Nov. 3, 2000).

271. See *id.* at 2326.

272. *Id.*; see generally Thomas R. Head, III, *Local Regulation of Animal Feeding Operations: Concerns, Limits, and Options For Southeastern States*, 6 *ENVTL. LAW* 503 (2000) (discussing local regulation of CAFOs).

273. See Susan Bruninga, *EPA Authority to Set TMDL for Mercury From Air Deposition*

sumption guidelines, and the EPA's final TMDL included mercury, in an attempt to lower those levels.²⁷⁴ Comments on the final TMDL regulations contested the EPA's jurisdiction to regulate pollution that comes from atmospheric deposition, but the EPA backed up its assertion of jurisdiction by citing federal court decisions that affirmed the EPA's authority to regulate based solely on non-point sources of pollution.²⁷⁵

VII. THE TMDL PROGRAM

Established in the 1972 Clean Water Act, the TMDL program provides a process for identifying waters that fail to satisfy state water quality standards, calculating the total maximum daily loads of a pollutant that a water body can assimilate while maintaining applicable water quality standards, and incorporating TMDLs into the state water quality planning process.²⁷⁶ Recently, the TMDL program has become one of the most debated environmental concepts in the country, largely due to a revised set of regulations drafted in July 2000.²⁷⁷ Those rules specifically provide that nonpoint sources of pollution such as agricultural operations are to be included in the TMDL process.²⁷⁸ They also establish a controversial timetable for states to develop TMDLs.²⁷⁹

Contested in Comments, 32 Env't. Rep. (BNA) No. 10, at 445 (Mar. 9, 2001).

274. See *id.*

275. See *id.*; *Pronsolino*, 91 F. Supp. 2d at 1345; David K. Bowles, *Case Summary: Pronsolino v. Marcus EPA May Impose TMDLs for Substandard Rivers Impaired Solely By Nonpoint Sources*, ABA SPECIAL COMM. ON AGRIC. MGMT. NEWSLETTER, June 2000, at 15; Susan Bruninga, *Court Rules TMDL Program Can Apply to River Polluted by Nonpoint Sources*, 31 Env't. Rep. (BNA) No. 14, at 639 (Apr. 7, 2000).

276. See 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, 43,590 (July 13, 2000) (to be codified at 40 C.F.R. pt. 9).

277. See 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. at 43,586.

278. See 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. at 43,593.

279. See 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. at 43,590-43,591.

With citizen suits and inconsistent court orders, the EPA convened a committee in 1996 under the Federal Advisory Committee Act ("FACA") to address the TMDL issue directly.²⁸⁰ The FACA Committee was comprised of diverse groups including agricultural, industrial, and environmental interests.²⁸¹ While its members were able to achieve considerable agreement on a number of important issues, the Committee split on the question of how the TMDL process should be used to address nonpoint source pollution.²⁸² In March 2000, the General Accounting Office ("GAO") issued its first report highlighting a substantial lack of data available to determine which water bodies were impaired and to set appropriate TMDLs.²⁸³ The GAO published a second report in June 2000, questioning the reasonableness of EPA's economic analysis of the proposed regulations.²⁸⁴

A final rule revising the TMDL program was issued in July 2000.²⁸⁵ Nonpoint sources were included in the TMDL program, and states were required to establish TMDL's by mid-2002.²⁸⁶ The revisions were immediately challenged by several groups representing industries that are primarily point source producers of pollution and agriculture groups concerned primarily about the regulation of nonpoint source pollutions.²⁸⁷

The EPA has proposed an eighteen month delay to the effective date of the final rule issued on July 13, 2000, which revises the CWA's Total Maximum Daily Load Rule.²⁸⁸ If the EPA's proposal were accepted, the effective date of

280. See Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program*, 28 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,415, 10,422 (Aug. 1998).

281. See *id.*

282. See *id.*

283. See GAO, *Water Quality, Key EPA and State Decisions Limited by Inconsistent and Incomplete Data*, GAO/RCED-00-54 (Mar. 2000).

284. See GAO, *Review of Two EPA Proposed Regulations Regarding Water Quality Management*, GAO/RCED-00-206R TMDL Regulations (June 2000).

285. See 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, 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pt. 9).

286. 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.* at 43,588, 43,617.

287. See Susan Bruninga, *Nine Petitions Filed in Major Fight Over Final Rule Revising TMDL Program*, 31 *Env't. Rep.* (BNA) No. 49, at 2618 (Dec. 15, 2000); see also Lisa E. Roberts, Note, *Is the Gun Loaded This Time? EPA's Proposed Revisions to the Total Maximum Daily Load Program*, 6 *ENVTL. LAW.* 635 (2000).

288. See Delay of Effective Date of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Pro-

the July 13, 2000 final rule would be extended from October 1, 2001 to April 30, 2003.²⁸⁹ The July 2000 final rule had a spending prohibition attached to it, which will expire on September 30, 2001, and unless Congress or the EPA takes action, the rule is scheduled to go into effect thirty days later on October 1, 2001.²⁹⁰ In light of the numerous concerns expressed by organizations, pending litigation in the D.C. Circuit Court of Appeals,²⁹¹ and a Congressional mandated report entitled "Assessing the TMDL Approach to Water Quality Management," issued by the National Research Council ("NRC") of the National Academy of Science, which recommends the TMDL program be changed in certain respects,²⁹² the EPA believes that it would be prudent to extend the effective date, to allow time for a reconsideration and re-proposal of certain aspects of the July 2000 rule.²⁹³ Currently, the program continues to operate under the 1985 TMDL regulations, which were amended in 1992.²⁹⁴ In addition, acting under further suggestion by the NRC report, the EPA has proposed to extend the deadline for States to submit their next list of impaired waters from April 1, 2002 to October 1, 2002.²⁹⁵ Written comments on this proposed rule were being accepted up until September 10, 2001.²⁹⁶ Comments on the proposed delay in implementation of the TMDL program were extensive and sharply divided.²⁹⁷ Environmental groups opposed delay, but farm groups and industrial dischargers supported the delay.²⁹⁸ Farm groups in particular objected to the rule's regulation of nonpoint source pollution as beyond the EPA's authority, and required implementation plans as federal presumption of local land-use policy.²⁹⁹ These groups also supported the delay

gram 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. 41,817, 41,817 (Aug. 9, 2001) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130) [hereinafter Delay of Effective Date].

289. See Delay of Effective Date, 66 Fed. Reg. at 41819.

290. See Delay of Effective Date, 66 Fed. Reg. at 41819.

291. The Federal Water Quality Coalition filed one of about a dozen petitions for review of the July 2000 rule. *Am. Farm Bureau Fed'n v. Whitman*, No. 00-1320 (D.C. Cir. July 18, 2000).

292. See NATIONAL RESEARCH COUNCIL, *ASSESSING THE TMDL APPROACH TO WATER QUALITY MANAGEMENT* (2001), available at <http://www.nap.edu>.

293. See Susan Bruninga, *Environmental Advocates Oppose Delay in TMDL Rule; Industry, Ag Groups Supportive*, 32 *Env't. Rep. (BNA)* No. 37, at 1828 (Sept. 21, 2001).

294. See NATIONAL RESEARCH COUNCIL, *supra* note 292, at 15.

295. See Bruninga, *supra* note 290, at 1829.

296. See *id.* at 1828.

297. See *id.*

298. See *id.*

299. See *id.* at 1828-29.

for states to submit their lists of impaired waters.³⁰⁰ Since the close of the comment period, many environmental organizations have grown dissatisfied with the rule currently under consideration, labeled the "Watershed Rule" by EPA officials, and have asked the agency "to scrap the rulemaking altogether," preferring the EPA to concentrate on implementing the 1992 rule instead.³⁰¹ Environmental organizations are afraid the new rule will not require the EPA to implement TMDLs in states that fail to do so on their own.³⁰² The centerpiece of the new rule is a "continuous planning process" ("CPP") called for in § 303(e) of the CWA.³⁰³ The CPP basically consolidates into one plan all the CWA water quality requirements found in other sections.³⁰⁴ The TMDL program would therefore be integrated into the CPP. These CPPs would be developed by the states to address watershed problems, and would only be subject to review by the EPA once every five years to determine if water quality objectives were being met.³⁰⁵

VIII. WETLANDS REGULATION

In *Branstad v. Veneman*³⁰⁶ plaintiff farmers repaired a tile drainage system on their farmland, with permission from the USDA. The USDA asserted its approval only extended to the system on one area of the wetlands, rather than the wetlands at issue.³⁰⁷ The Branstads sued the USDA alleging the department erroneously converted protected wetlands to crop use and arbitrarily refused to consider the plaintiffs' administrative appeal.³⁰⁸ The court concluded the Branstads made the requisite showing of irreparable harm because they could not be fully compensated for the intangible value of the farming operation or the intangible costs of their likely bankruptcy.³⁰⁹ Reiterating the importance of the prevention

300. See *id.* The EPA subsequently circulated a draft report on the total estimated costs of the TMDL program which reported the costs to industry to implement the TMDL program could range from under \$1 billion to \$4.3 billion annually. See EPA, *The National Costs of the Total Maximum Daily Load Program (Draft Report)*, EPA 841-D-01-003 (Aug. 2001).

301. Susan Bruninga, *Water Quality Standards: Some Reform of Impaired Waters Program May Be Achieved in Guidance, Official Says*, 33 *Env't. Rep. (BNA)* No. 33, at 1808 (Aug. 16, 2002).

302. See *id.*, at 1809.

303. See *id.*, at 1808-09.

304. See *id.*

305. See *id.*

306. *Branstad v. Veneman*, 145 F. Supp. 2d 1011 (N.D. Iowa 2001).

307. See *id.* at 1014.

308. See *id.* at 1014-1016.

309. See *id.* at 1024.

of wetlands conversion, the court found the public policy interests of the "Swampbuster" Act could not justify arbitrary agency action or the failure to maintain the status quo while judicial review is undertaken.³¹⁰ The court granted the Branstad's motion for preliminary injunction enjoining the USDA's enforcement actions against the Branstad's for conversion of wetlands and failure to comply with a restoration agreement for that tract.³¹¹

After the court granted the plaintiffs' request for an injunction, the defendant secretary moved for reconsideration.³¹² The secretary filed a motion under rule 60(b), the "exceptional circumstances" standard, of the Federal Rules of Civil Procedure.³¹³ The court denied the motion, doubting that the secretary could either satisfy the due diligence factor required for obtaining rule 60(b) relief, or produce "newly discovered evidence" that would warrant a different result.³¹⁴

While the court found that the secretary had correctly and timely filed its motion for relief from a judgment of an order under rule 60(b),³¹⁵ the court held that the secretary had relied upon the wrong standard ("manifest error") instead of the rule 60(b) standard of "adequate showing of exceptional circumstances," premised upon "newly discovered evidence."³¹⁶ In order to prevail under rule 60(b), the movant must show "(1) the evidence was discovered after trial; (2) due diligence was exercised to discover the evidence; (3) the evidence is material . . . and (4) the evidence is such that a new trial would probably produce a different result."³¹⁷ The court doubted the USDA's efforts to expedite recovery of the evidence during the preliminary injunction hearing, but relied on the "more fundamental deficiencies" of the change in result prong.³¹⁸

The "newly discovered evidence" that the USDA cited in its appeal dealt with the finding that the Branstads had mailed their appeal to the wrong address, not that the National Appeals Division's ("NAD") office had lost the request.³¹⁹ The court did not find that this evidence would have changed the results of the preliminary injunction, as it did not generate an inference that the wrong address was the primary reason for the NAD's rejection of the request for considera-

310. See *id.* at 1025.

311. See *id.* at 1026.

312. See *Branstad v. Veneman*, No. C01-3030-MWB, 2001 U.S. Dist. LEXIS 10543 (N.D. Iowa July 19, 2001).

313. See *id.* at *6.

314. See *id.* at *14, *16.

315. See *id.* at *10-*11.

316. See *id.* at *11.

317. *Id.* at *14.

318. See *id.* at *15.

319. See *id.* at *5.

tion.³²⁰ The court rejected the USDA's argument that the outcome would have been changed because the failure to receive the request was based on the negligence of the Branstads in mailing the request to the wrong address and not the fault of the agency.³²¹

Subsequently, the plaintiffs sought review of the USDA's decision that they had violated the Swampbuster Act.³²² The court revised the agency's determinations that the plaintiff's administrative appeal had been rendered moot by their entry into a wetlands restoration agreement.³²³ The court held the director's decision had been an abuse of discretion, arbitrary and capricious, and contrary to law; as such, it could not stand.³²⁴

In *Prokop v. USDA*,³²⁵ plaintiff farmer sought review of a USDA determination classifying his property as farmed wetland pasture.³²⁶ Plaintiff informed the defendant of his intent to clean out a drainage canal on his farm to protect his continued eligibility for farm program benefits.³²⁷ Defendant inspected the plaintiff's farm and classified two areas as farmed wetland pasture under the "Swampbuster" Act.³²⁸ Plaintiff exhausted his appeals of this classification through all agency channels.³²⁹ The court found that the record supported the USDA's classification, and the plaintiff was disqualified from federal farm program benefits.³³⁰

*Brace v. United States*³³¹ concerned plaintiff's purchase of two parcels of land in 1975 from his father with the intent to carry on the family farming business.³³² The government claimed, "plaintiff purchased the property with the intent of integrating [it] into [a] larger 600 acre operation."³³³ Plaintiff claims he cleared, leveled and drained the property, and began to grow crops on the site in 1976.³³⁴ Defendant asserts that the plaintiff did not begin to farm the land until

320. *See id.* at *24.

321. *See id.*

322. *See Branstad v. Veneman*, 212 F.Supp.2d 976, 978 (N.D. Iowa 2002).

323. *See Branstad*, 212 F.Supp.2d at 1006-07.

324. *See Branstad*, 212 F.Supp.2d at 1006-07.

325. *Prokop v. USDA*, 91 F. Supp. 2d 1301 (D. Neb. 2000).

326. *See id.* at 1302.

327. *See id.* at 1303.

328. *See id.*

329. *See id.* at 1304-05.

330. *See id.* at 1316.

331. *Brace v. United States*, 48 Fed. Cl. 272 (2000).

332. *See id.* at 274.

333. *Id.*

334. *See id.* at 275.

1986.³³⁵ Plaintiff received three orders to refrain from further disturbing the area, and in the summer of 1988, requested his property receive the status of "commenced conversion from wetlands" prior to December 23, 1985.³³⁶ The United States filed an enforcement action against the plaintiff and subsequently the district court entered a Consent Decree enjoining the plaintiff from operating and maintaining the drainage system.³³⁷ "Plaintiff complied with the court decree by eliminating the drainage system."³³⁸ Plaintiff filed suit alleging that as a result, a substantial portion of the property was unusable for his farming operation and had been taken from him for public benefit without just compensation.³³⁹

Plaintiff claimed he could not have been aware that the federal jurisdiction and authority extended to his property under the Clean Water Act when he purchased and began farming the land because jurisdiction had not been extended until 1977.³⁴⁰ The court held that the plaintiff knew the character of the land was wetlands at the time of purchase, knew "the soil and conservation plans were prepared for his father, [and] knowingly took a risk that environmental regulations would become more stringent when he fail[ed] to promptly apply for a section 404 permit."³⁴¹

In *Borden Ranch Partnership v. United States Army Corps of Engineers*,³⁴² real estate developer Tsakopoulos brought an action challenging the authority of the United States Army Corps of Engineers and the EPA to regulate deep ripping of wetlands.³⁴³ The Corps filed a counterclaim seeking injunctive relief and civil penalties for developer's alleged violations of the CWA.³⁴⁴ Tsakopoulos purchased a ranch that had primarily been used for cattle grazing with the intent to convert the ranch into a vineyard and orchards and subdivide into smaller parcels for sale.³⁴⁵ For the vineyards and orchards to grow, "deep-ripping" was required.³⁴⁶ Tsakopolous was issued a retrospective permit to deep rip part of the property, but not the area containing vernal pools, and with restric-

335. *See id.* at 274.

336. *See id.* at 275.

337. *See id.*

338. *Id.*

339. *See id.*

340. *See id.* at 274, 276.

341. *Id.* at 284.

342. *See Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001).

343. *See id.*

344. *See id.* at 813.

345. *See id.* at 812.

346. *See id.*

tions on the depth of the deep ripping in the areas containing swales.³⁴⁷ The Corps subsequently discovered that deep ripping had occurred in protected wetlands and issued a cease and desist order.³⁴⁸ Tsakopolous continued to deep rip without a permit.³⁴⁹ Tsakopolous claimed regulators were abusing their authority by applying law to normal farming and ranching activities, which were exempt from the CWA.³⁵⁰ The appellate court concluded that normal plowing could be regulated under the CWA if it significantly changed the flow of water into nearby navigable waters.³⁵¹ Tsakopolous' conversion of ranch lands into vineyards and orchards was found to be a change in the use of the land, radically altering the regime of protected wetlands.³⁵² The court found the Corps and the EPA exercised proper authority and jurisdiction over the area.³⁵³

Plaintiff landowner appealed the final order in favor of the Army Corps of Engineers.³⁵⁴ The court affirmed defendants' jurisdiction over the land owner's activities, reversed the findings of violations in the vernal pool because it exceeded defendant's jurisdiction, affirmed the finding of deep ripping in the swales, and remanded the civil penalties for recalculation because of the reversal of the vernal pool violation.³⁵⁵

On appeal, the government conceded the ruling in *Solid Waste* precludes the Corps' authority over the vernal pool in dispute and withdrew its enforcement claim with respect to the pool.³⁵⁶ The court accordingly reversed the district court's findings of CWA violations in the vernal pool.³⁵⁷

The court concluded that there was no merit in plaintiff landowner's three challenges to the court's calculation of a civil penalty.³⁵⁸ First, plaintiff contended "the penalty should have been based on the number of days in which the illegal ripping occurred, not on the number of individual passes with the ripper."³⁵⁹ He argued "that the statutory language per day for each violation means that he can only be assessed \$25,000 for any day in which ripping violations oc-

347. *See id.*
 348. *See id.* at 813.
 349. *See id.*
 350. *See id.* at 815.
 351. *See id.*
 352. *See id.* at 816.
 353. *See id.*
 354. *See id.* at 813.
 355. *See id.* at 819.
 356. *See id.*
 357. *See id.* at 816.
 358. *See id.* at 819.
 359. *Id.* at 817.

occurred, regardless of the total number of rippings in that day.”³⁶⁰ The court disagreed and held that the better rule is to treat each rip as a separate violation as it is more in line with the statutory language, with prior judicial interpretations, and with the general policy goal of discouraging pollution.³⁶¹ Under plaintiff’s reading, individuals would be encouraged to “stack all their violations into one ‘Pollution Day,’ in which innumerable offenses could occur, subject only to the \$25,000 maximum.”³⁶² The court did, however, remand to the District Court for a recalculation reducing the penalty because of the elimination of the vernal pool findings.³⁶³

The dissent argued that “return of soil in place after deep plowing is not a ‘discharge of a pollutant,’” and therefore, not subject to section 404 of the Clean Water Act.³⁶⁴ If deep ripping was prohibited by the CWA, Congress should have spoken specifically to that act, as returning soil is not equivalent with adding pollutants as Congress described in the Act.³⁶⁵ The dissent concluded that the policy decision made by the majority should be made by Congress, that the court’s decision went beyond statutory interpretation and that Congress should speak explicitly on this subject if it wishes to regulate such farming actions.³⁶⁶ The Supreme Court has granted certiorari on this decision, to be argued in the fall term of 2002.³⁶⁷

The Corps issued a new and modified section 404 Nationwide Permits (“NWP”) to replace NWP 26 in March 2000.³⁶⁸ The old NWP 26 allowed development on up to three acres without an individual section 404 permit.³⁶⁹ The new program applies to activities of one half acre or less which do not occur in tidal wetlands, provides additional protection for wetlands in 100-year floodplains, and requires notice to the Corps if an activity will destroy more than one tenth of an acre (as opposed to one third of an acre under the prior NWP program).³⁷⁰

360. *Id.*

361. *See id.* at 817-18.

362. *See id.* at 817.

363. *See id.* at 818.

364. *See id.* at 819.

365. *See id.* at 820.

366. *See id.* at 821.

367. *See Borden Ranch P’ship v. U.S. Army Corps of Eng’r*, 122 S. Ct. 2355 (2002).

368. *See Final Notice of Issuance and Modification of Nationwide Permits*, 65 Fed. Reg. 12,818, 12,818 (Mar. 9, 2000).

369. *See Final Notice of Issuance and Modification of Nationwide Permits*, 65 Fed. Reg. at 12,818.

370. *See Final Notice of Issuance and Modification of Nationwide Permits*, 65 Fed. Reg. at 12,819.

In addition, the scope of agricultural activities allowed in wetland areas has been expanded to include dredge and fill activities on up to one-half acre of wetlands in order to improve agricultural production.³⁷¹ Before the modifications, NWP 40 had been limited to agricultural building construction.³⁷² The revisions also used the term "farm tract" rather than farm, allowing multiple NWP 40s to be issued for a single farming operation, as long as the operation is divided into multiple farm tracts.³⁷³ The revised regulation prohibits Regional Army Corps Districts from placing more protective regional conditions on NWP 40 participants, but states are free to place more stringent state requirements on the permits or to revoke NWP 40 certification completely.³⁷⁴

The EPA issued a final rule as of August 16, 2000, to strengthen section 404 of the CWA, known as the Tulloch rule,³⁷⁵ which regulates the re-depositing of dredged materials into wetlands, including agricultural wetlands.³⁷⁶ In response to the comments received on the proposed rule, the final rule incorporates several modifications.³⁷⁷ The language of the final rule has been revised to clarify that the burden of proof has not shifted to the regulated community, with respect to defining what constitutes regulable discharge.³⁷⁸ Secondly, a definition of "incidental fallback" has been supplied in the regulatory language, and was derived from past preamble discussion of the issue, and is consistent with relevant court decisions involving the term.³⁷⁹ The final rule is expected to increase the protection of the Nation's water resources, including wetlands, as well as provide increased levels of predictability for the regulated community.³⁸⁰ The final rule follows a case-by-case method of analysis to determine whether or not the dredged materials or a regulable discharge resulted from a particular activity,

371. See Martha Noble, *U.S. Army Corps of Engineers Modifies Nationwide Permit No. 40*, ABA SPEC. COMM. AGRIC. MGMT NEWSLETTER, June 2000 at 1.

372. See *id.*

373. See *id.*

374. See *id.*

375. See 40 C.F.R. pt. 232.

376. See Further Revisions to the Clean Water Act Regulatory Definition of Discharge of Dredged Material; Final Rule, 66 Fed. Reg. 4550, 4550 (Jan. 17, 2001) (to be codified at 40 C.F.R. pt. 232).

377. See Further Revisions to the Clean Water Act Regulatory Definition of Discharge of Dredged Material; Final Rule, 66 Fed. Reg. at 4550.

378. See Further Revisions to the Clean Water Act Regulatory Definition of Discharge of Dredged Material, Final Rule; 66 Fed. Reg. at 4550.

379. See Further Revisions of the Clean Water Act Regulatory Definition of Discharge of Dredged Material; Final Rule, 66 Fed. Reg. at 4553.

380. See Further Revisions of the Clean Water Act Regulatory Definition of Discharge of Dredged Material; Final Rule 66 Fed. Reg. at 4550.

thus providing the flexibility necessary to adequately address varying fact-patterns.³⁸¹

IX. CONCLUSION

Ironically, the firestorm of disagreements between environmental and agricultural interests has led to one point of agreement in the upcoming Congressional debates over farm bill legislation. Environmental advocates, municipal organizations, and agricultural groups agree that Congress should provide more funding for conservation programs for agriculture. The House Agriculture Committee approved legislation that would provide approximately \$16 billion over ten years for soil, water and wildlife conservation programs, or about \$1.2 billion annually for the Environmental Quality Incentives Program.³⁸² Nearly half of that amount would go for the first time to livestock producers, including CAFO's.³⁸³ Municipal organizations also support the Working Lands Stewardship Act of 2001 with authorization for \$6 billion to farmers, ranchers, and foresters to preserve open space, improve water quality, protect public health, and create habitat for protected species.³⁸⁴ Environmental groups support an even more generous bill that would nearly triple the funding of agricultural conservation programs.³⁸⁵ The critical difference in their support is that agriculture views the financial subsidies as an alternative to regulation, while municipal and environmental groups view them as a supplement to broader regulation. Whichever view prevails, it appears likely that the Conservation Reserve and Wetlands Reserve programs will be more generously funded, as will most agricultural conservation programs. Disagreement, once again, will be over how much of that funding should be available to livestock producers. In every sense, the upcoming farm bill debates promise to be over "pork barrel politics."

381. See Further Revisions of the Clean Water Act Regulatory Definition of Discharge of Dredged Material; Final Rule, 66 Fed. Reg. at 4554-55.

382. See Press Release, Representative Tom Osborne, Representative Tom Osborne Praises Passage of the Farm Security Act of 2001 (Oct. 5, 2001), available at http://www.house.gov/apps/list/Press/ne03_Osborne/PR2001/005.html.

383. See U.S. House Committee on Agriculture, *The Farm Security Act of 2001*, available at <http://agriculture.house.gov/2646.sum.pdf> (last visited Apr. 18, 2002).

384. See Susan Bruninga, *Municipal Groups Support Legislation Increasing Funds for Conservation*, 32 Env't. Rep. (BNA) No. 35, at 1724 (Aug. 31, 2001).

385. See *id.* at 1724.