

Legislative Solution Possible to Resolve Uncertainty Surrounding Clean Water Act Jurisdiction*

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By Jeff Kray**

Almost as soon as Congress passed the Clean Water Act (“CWA”)¹ in 1972, disputes started to arise over the extent to which certain wetlands and non-navigable tributaries constitute “waters of the United States” subject to federal jurisdiction. Thirty-six years later this core jurisdictional issue—which impacts development, water quality permitting, stormwater control, water supply and infrastructure, and all other activities that have the potential to create water pollution—has remained largely unresolved. Decisions by the United States Supreme Court, the United States Army Corps of Engineers (“Corps”), and

the Environmental Protection Agency (“EPA”) have only served to muddy the waters, leaving both regulators and the regulated community precious few stars by which to navigate.

There is some reason to believe that Congress will finally wade into the core jurisdictional issue this year, and attempt to bring greater certainty into the 1972 Act’s reach. But whether Congressional action will resolve or add to the uncertainty depends on whether some tough decisions are made. As discussed below, some of the legislative opportunities for providing greater certainty include

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Dear Subscribers:

On March 10, 2009, the EPA proposed a rule that would require mandatory reporting of greenhouse gas (GHG) emissions produced by major U.S. sources. The purpose of the reporting is to collect accurate and comprehensive data concerning the production of GHGs, on which to base future policy decisions. These new reporting requirements would apply to fossil fuel and industrial chemical suppliers, motor vehicle and engine manufacturers, and large direct emitters of GHGs (those that have emissions equal to or greater than 25,000 metric tons per year). The direct emitters covered include energy intensive industries such as cement production, iron and steel production, and electricity generation. The EPA notes that most small businesses would fall below the threshold reporting emission amount and so would not have to report under this rule. The first annual report under this rule would be due to the EPA in 2011, for the 2010 calendar year, except for vehicle and engine manufacturers, which would begin reporting for the 2011 model years.

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1) directing the Corps and EPA to apply one of several competing judicial tests for determining federal CWA jurisdiction; 2) allocating all federal responsibility for making CWA jurisdictional determinations solely to either the Corps or EPA; or 3) redefining “waters of the United States” to either expressly include or even exclude federal jurisdiction over wetlands.

“Navigable Waters” Under the CWA

The CWA jurisdictional issue was most recently addressed by the United States Supreme Court in 2006 in *Rapanos v. United States*.² Since *Rapanos*, there have been at least eight federal appellate decisions, seventeen federal district court decisions (four on appeal), eight petitions for writs of certiorari to the Supreme Court that have been denied, most recently on December 1, 2008, and approximately twenty-five cases presently in some form of litigation addressing *Rapanos* related issues.³ The most recent guidance on the *Rapanos* decision coming out of the Corps and EPA can be found in a revised Joint Guidance Memorandum issued on December 2, 2008.⁴

The CWA’s primary objective is to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”⁵ To achieve this express statutory objective, the CWA strictly prohibits discharging pollutants into the “navigable waters of the United States” without a permit from the Corps, EPA, or an authorized state environmental authority.⁶ The CWA defines “navigable waters” to mean “waters of the United States.”⁷ The Corps has interpreted “waters of the United States” to include adjacent wetlands and tributaries.⁸ Corps regulations also extend the definition of “waters of the United States,” and hence Corps jurisdiction, to “[a]ll other waters

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such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds,”⁹ “[t]ributaries of [such] waters,”¹⁰ and “[w]etlands adjacent to [such] waters [and tributaries],”¹¹ even if these adjacent wetlands are separated from U.S. waters by man-made structures, such as berms.¹² The problem has been applying these definitions in the field.

The *Rapanos* Decision

In *Rapanos*, the Supreme Court, by a 4:4:1 plurality, remanded to the Sixth Circuit the issue of whether the Corps exceeded its statutory authority under the CWA by requiring property owners to acquire permits before dredging and filling certain wetlands.¹³ The case presented the Court with the opportunity to determine whether the wetlands at issue were subject to the United States’ CWA jurisdiction. Unfortunately, the Court’s decision in *Rapanos* did little to clarify CWA jurisdiction and, in fact, advanced conflicting tests for determining whether wetlands are protected by federal law.

Justice Scalia’s plurality decision in *Rapanos* narrowly interpreted “waters of the United States,” and would remove many wetlands from federal jurisdiction by requiring a continuous surface water connection.¹⁴ Justice Scalia’s approach failed, however, to command a majority, and was specifically rejected in Justice Kennedy’s concurrence. Justice Kennedy found that the plurality interpretation of “waters of the United States” was inconsistent with the CWA’s text and purpose, and he advanced a test that would require the federal government to establish a “significant nexus” between wetlands and navigable waters on a case-by-case basis.¹⁵ For further analysis of the *Rapanos* decision, see J. Kray, Long Anticipated Supreme Court Wetlands Decision Leaves Much to be Decided, Marten Law Group *Environmental News* (June 21, 2006).

The *Robison* (McWane) Case

As the Sixth Circuit Court of Appeals noted in a decision issued on February 4, 2009, in *United States v. Cundiff*, “[p]arsing any one of *Rapanos* lengthy and technical statutory exegeses is taxing, but the real difficulty comes in determining which—if any—of the three main opinions lower courts should look to for guidance.”¹⁶ Although the *Cundiff* decision is the most recent to apply *Rapanos*, it provides little guidance because that court held that federal CWA jurisdiction was proper “under each of the primary *Rapanos* opinions and therefore we do not have to decide here, once and for all, which test controls in all future cases.”¹⁷

In *United States v. Robison*,¹⁸ one of the more notable post-*Rapanos* cases, the Eleventh Circuit Court of Appeals overturned a criminal conviction imposed against a pipe manufacturer and two of its employees for CWA violations on the grounds that the jury instructions contained

a definition of “navigable waters” that was inconsistent with the plurality decision in *Rapanos*. Relying on Justice Kennedy’s “significant nexus” test in *Rapanos* put the Eleventh Circuit at odds with the First Circuit Court of Appeals¹⁹ and with the Corps’ and EPA’s joint guidance memoranda stating that their respective staff may determine CWA jurisdiction under either the Kennedy test or the Scalia test.²⁰ The *Robison* decision thus calls into question the EPA’s post-*Rapanos* analysis of its CWA jurisdiction. For that reason, the Justice Department filed a petition for writ of certiorari asking the Supreme Court to review the Eleventh Circuit’s decision in *Robison*. That petition was the first, and so far only, time that the United States had asked the Supreme Court to review a post-*Rapanos* CWA jurisdictional decision. On December 1, 2008, the Supreme Court denied certiorari without comment. For more on the *Robison* case see our article, J. Kray, Post-*Rapanos* Courts Setting High Evidentiary Bar for Clean Water Act Jurisdiction, Marten Law Group *Environmental News* (December 19, 2007).

Corps/EPA Guidance

The December 2, 2008, revised joint guidance memorandum issued by the Corps and EPA (2008 Guidance) is intended to assist personnel at those agencies in determining when to exercise CWA jurisdiction over wetlands and waterbodies addressed by the U.S. Supreme Court in *Rapanos*.²¹ The Corps and EPA had issued an earlier version of the joint guidance memorandum (prior guidance) in June 2007.²²

Representatives for both environmental and industry groups have criticized both the 2007 prior guidance and the 2008 Guidance, for different reasons. One thing they agree on is that, like its predecessor, the 2008 Guidance does little to resolve the uncertainty that *Rapanos* created.²³ Specifically, the 2008 Guidance fails to resolve CWA jurisdiction over wetlands adjacent to nonnavigable waters, intermittent and ephemeral streams, and other nonterritorial water bodies that may account for a large portion of the 53% of water bodies the EPA estimated were at risk in *Rapanos*.²⁴ By leaving many of the hard jurisdictional questions to a time and paperwork intensive case-by-case analysis, the 2008 Guidance has done little to reduce jurisdictional disputes or speed up the permit process, and may in fact encourage litigation.²⁵ For a discussion referencing the 2007 prior guidance, see J. Kray “Post-*Rapanos* Guidance on Clean Water Act Jurisdiction Issued by EPA and Corps.” Marten Law Group *Environmental News* (June 6, 2007).

Options for Congressional Action

Because the executive and judicial branches of government have been largely unsuccessful, the 111th Congress has the opportunity to clarify the scope of federal CWA jurisdiction. We see three primary areas for potential Congressional action.

First, Congress could direct the Corps and EPA to apply one of the Supreme Court's competing judicial tests from *Rapanos* for determining federal CWA jurisdiction. Such a step is inviting as a way to reduce litigation over which test applies. Any euphoria the Corps, EPA, and the regulated community might feel over Congressional clarification of *Rapanos* may, however, be short-lived. If Congress legislated application of Justice Kennedy's significant nexus test, then the agencies would still in many instances need to make case-by-case jurisdictional determinations about whether the waterbody at issue "significantly affects the chemical, physical, and biological integrity of downstream traditional navigable waters." Furthermore, litigation may not abate because parties unhappy with the test Congress selects may challenge the decision on constitutional grounds that Congress is violating the separation of powers between the legislative and judicial branches by limiting the Supreme Court's decision in *Rapanos*. Finally, selecting one of the *Rapanos* tests would be treating a symptom of the problem, judicial interpretation, rather than the source, Congress' definition of "navigable waters."

Second, Congress could allocate all federal responsibility for determining whether a wetland is within federal CWA jurisdiction solely to either the Corps or EPA. EPA presently shares CWA § 404 enforcement responsibilities with the Corps. As a result, EPA and the Corps coordinate determinations of CWA jurisdiction for (1) intra-state, non-navigable, isolated waters and (2) findings of a "significant nexus" for the following waters:

- Nonnavigable tributaries that do not typically flow year-round or have continuous flow at least seasonally (e.g., typically at least 3 months each year);
- Wetlands that are adjacent to such tributaries; and
- Wetlands that are adjacent to but that do not directly abut a relatively permanent nonnavigable tributary.²⁶

Allocating all jurisdictional responsibility to one of the agencies would reduce the need for coordination on jurisdictional determinations and may reduce permitting delays that arise from such coordination. Untangling the CWA relationship as between EPA and the Corps is, however, complex. Both agencies have areas of authority under the CWA that involve jurisdictional determination. EPA has authority to issue CWA § 402 National Pollutant Discharge Elimination System program (NPDES) permits and the Corps has authority to issue CWA § 404 permits for discharging dredged or fill material to waters of the United States. Thus, Congress would need to address the entire CWA scheme to fully reduce the agencies' overlap.

Third, Congress could redefine "waters of the United States" to either expressly include or exclude federal jurisdiction over wetlands and nonnavigable nonrelative permanent tributaries. As it stands, the term "navigable

waters" was defined by Congress only as "waters of the United States, including the territorial seas," and makes no mention of other waterbodies.²⁷ The idea of amending the CWA to expressly include wetlands was proposed in 2003,²⁸ 2005,²⁹ and again in May 2007, when Representative James Oberstar (D-Minn.) introduced H.R. 2421, a bill that sought to amend the CWA to "to clarify the jurisdiction of the United States over waters of the United States."³⁰ Mr. Oberstar is the current chair of the House Committee on Transportation and Infrastructure. On January 15, 2009 that Committee issued its Legislative Agenda which includes "strengthening Clean Water Act protections" as one of its goals. Mr. Oberstar and Senator Russ Feingold (D-Wis.) have indicated that they will introduce legislation to amend the CWA and clarify the scope of federal jurisdiction over wetlands and nonnavigable tributaries.³¹

H.R. 2421 aims to define the Corps' and the EPA's CWA jurisdiction very broadly and require federal permits for actions impacting wetlands, intermittent and ephemeral streams, prairie potholes, and other nonterritorial water bodies not covered under the Corps' Guidance. It would certainly clarify when such permits are required and resolve the present uncertainty which has increased project costs and delayed or prevented projects which impact such waterbodies. Such legislation would also increase the number of projects requiring CWA permits and may, if permits are not issued, prevent some projects which developers and landowners may presently maintain do not require CWA permits.

Another, less discussed, alternative would be to expressly exclude wetlands and other nonterritorial water bodies from federal CWA jurisdiction. At first blush such legislation may appear to remove such water bodies from environmental protection, but this is likely not going to be the case. States and local governments also regulate wetlands and would likely step in.³² Reducing the scope of federal CWA jurisdiction would certainly provide clarity that is presently lacking on these issues.

Endnotes

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1. 33 U.S.C. § 1251 *et seq.*
2. 126 S. Ct. 2208 (2006). For further analysis of the *Rapanos* decision, see J. Kray, Long Anticipated Supreme Court Wetlands Decision Leaves Much to Be Decided, Marten Law Group *Environmental News* (June 21, 2006).
3. P. Mancusi-Ungaro, "Rapanos Update: EPA and Corps Issues New *Rapanos* Guidance and Supreme Court Denies *Cert* in

- U.S. v. Robison (McWane)*”, ABA Water Quality and Wetlands Committee Newsletter, V.8, No. 2 (January 2009). For analysis of the Supreme Court’s decisions to deny petitions for certiorari in two cases that presented opportunities to clarify *Rapanos*, see J. Kray, Supreme Court Passes on Post-*Rapanos* Opportunities to Clarify “Navigable Waters” Jurisdiction, Marten Law Group *Environmental News* (May 9, 2007).
4. The December 2, 2008, Guidance is available at http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/cwa_juris_2dec08.pdf. See also J. Kray “Post-*Rapanos* Guidance on Clean Water Act Jurisdiction Issued by EPA and Corps.” Marten Law Group *Environmental News* (June 6, 2007).
 5. 33 U.S.C. § 1251(a).
 6. 33 U.S.C. § 1311(a). CWA Section 404(a) authorizes the Secretary of the Army (through the Corps), or a state with an approved program, to issue permits “for the discharge of dredged or fill material into that navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a). Section 402 authorizes the EPA (or a state with an approved program) to issue a National Discharge Elimination System (NPDES) permit for the discharge of pollutants other than dredged or fill material. 33 U.S.C. § 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404. See, e.g. 33 U.S.C. § 1344(b)-(c).
 7. 33 U.S.C. § 1362(7).
 8. 33 C.F.R. § 328(a)(7); see also *Rapanos v. United States*, 126 S. Ct. 2208, 2237 (2006) (“In a regulation, the Corps has construed the term ‘waters of the United States’ to include not only waters susceptible to use in interstate commerce—the traditional understanding of the term ‘navigable waters of the United States’...- but also tributaries of those waters and, of particular relevance here, wetlands adjacent to those waters or their tributaries”).
 9. 33 C.F.R. § 328.3(a)(3) (emphasis added).
 10. 33 C.F.R. § 328.3(a)(5).
 11. 33 C.F.R. § 328.3(a)(7).
 12. 33 C.F.R. § 328.3(c); see also *Rapanos*, 126 S. Ct. 2208.
 13. *Id.*
 14. *Id.* at 2225.
 15. *Id.* at 2249.
 16. The *Cundiff* opinion is available here.
 17. *Id.*
 18. 505 F.3d 1208 (11th Cir. 2007). Captioned *McWane, Inc. v. United States* on petition for writ of certiorari.
 19. See L. Fandino and J. Kray “Federal Circuits Split on Application of Supreme Court’s *Rapanos* Decision,” Marten Law Group *Environmental News* (December 6, 2006).
 20. See J. Kray “Post-*Rapanos* Guidance on Clean Water Act Jurisdiction Issued by EPA and Corps.” Marten Law Group *Environmental News* (June 6, 2007).
 21. The guidance focuses only on those Corps and EPA regulations that were at issue in *Rapanos*, namely 33 C.F.R. § 328.3(a)(1), (a)(5), and (a)(7) and 40 C.F.R. § 230.3(s)(1), (s)(5), and (s)(7). Thus, the Corps and EPA do not intend the guidance to affect other programs, such as the CWA section 402 National Pollution Discharge Elimination System (NPDES) program, that use “waters of the United States” to define federal jurisdiction.
 22. For more on the June 2007 guidance, see J. Kray “Post-*Rapanos* Guidance on Clean Water Act Jurisdiction Issued by EPA and Corps.” Marten Law Group *Environmental News* (June 6, 2007).
 23. K. Boyle, Wetlands: EPA, Army Corps satisfy no one with new guidance (E&E News PM December 5, 2008).
 24. See Corps and EPA Responses to the *Rapanos* Decision, Key Questions for Guidance Release (Key Questions Memo).
 25. For example, the guidebook for jurisdictional determinations (“JDs”) is eighty-five (85) pages long, with eight appendices, and the JD form itself is eight (8) pages long.
 26. See June 5, 2007 Memorandum for Director of Civil Works and US EPA Regional Administrators.
 27. 33 U.S.C. § 1362(7).
 28. See Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong. (2003).
 29. See Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong. (2005).
 30. For more information on past Congressional action on this issue, see our article J. Kray, Democrats Introduce Controversial Legislation to Broaden EPA’s Clean Water Act Authority, Marten Law Group *Environmental News* (May 16, 2007).
 31. K. Boyle, *Water Pollution: House Democrats urge Obama to make enforcement a priority* (E&E News PM December 16, 2008), available at <http://www.eenews.net/eenewsprm> (subscription required).
 33. For an overview of the history of state wetlands regulation, see Jonathan H. Adler, Wetlands, Waterfowl and the Menace of Mr. Wilson: Commerce Clause Jurisdiction and the Limits of Federal Wetland Regulation, 29 *Envtl. L.* 1, 47-54 (1999).

EPA Reconsideration of Waiver for California Motor Vehicle Regulations Could Have Far Reaching Implications*

By Sharon Rubalcava, Lee DeHihns, and Marisa Blackshire**

In a move that signals the new administration’s commitment to regulating greenhouse gas emissions, President Obama has requested that the Environmental Protection Agency (EPA) reconsider a Bush-era decision denying California a waiver for motor vehicle regulations that imposed greenhouse gas

emission standards. On February 12, 2009, the EPA published notice of its intent to reconsider the previous waiver denial in the Federal Register. (70 FR 7040.)

Section 209(a) of the Clean Air Act (CAA) generally preempts state standards relating to the control of emissions

from new motor vehicles and new motor vehicle engines. However, an exception to this general preemption is contained in section 209(b) of the CAA, which requires EPA to waive preemption where certain criteria are met. The California Air Resources Board (CARB) adopted greenhouse gas emission regulations for passenger cars, light-duty trucks and medium-duty passenger vehicles with a 2009 model year on December 21, 2005. After adopting the emission regulations, CARB submitted a request that EPA grant a Clean Air Act Section 209(b) waiver for the regulations. EPA did not respond to the request for over two years, and when it was ultimately pressed for a decision, it denied the request on March 6, 2008.

Denial of the waiver was a significant departure from past EPA practice. Under the Clean Air Act, California had legally set its own exhaust emissions limits more than 50 times from the early 1970s to 2005, with Section 209(b) waivers routinely granted by EPA (during the same time period there have been approximately five waiver denials, the last occurring in 1975). In issuing the denial, EPA determined that climate change impacts in California were not sufficiently different from the nation as a whole and, therefore, did not support adoption of state standards regulating motor vehicle greenhouse gas emissions. California, other states interested in implementing California's standard, members of Congress, scientists and various stakeholders identified numerous concerns with the arguments set forth in the denial, including the conclusion that climate change impacts in California were not sufficiently different from the nation as a whole. Critics argued that a conclusion about whether climate change impacts in California were sufficiently different from the rest of the nation was not necessary under Clean Air Act section 209(b)(1).

In the wake of repeated concerns about the waiver denial, and in a move that signals a dramatic shift in Federal environmental policy, President Barack Obama fulfilled a campaign pledge by requesting that EPA reconsider the Bush-era waiver denial on January 26, 2009. The February 12, 2009, Federal Register notice was issued in response to President Obama's request, and its effects could be far-reaching, impacting greenhouse gas emission regulation across all sectors of the economy—not simply the automobile industry.

Reconsideration of the waiver is important to California insofar as 38% of greenhouse gas emission reductions contemplated by the recently adopted Climate Change Scoping Plan are to come from the transportation sector, and the motor vehicle regulations at issue are a large part of California's plan for transportation emission reductions. However, reconsideration of the waiver has much further implications because 17 other states are seeking to adopt California's vehicle emission standards. The 17 states seeking to adopt California's greenhouse gas emission standards are:

- New Jersey;
- Connecticut;
- Oregon;
- Washington;
- Rhode Island;
- Vermont;
- New York;
- Maine;
- Massachusetts;
- Arizona;
- Pennsylvania;
- New Mexico;
- New Jersey;
- Utah;
- Florida; and
- Colorado.

If granted, the waiver will require automakers to comply with new, more stringent rules that cut fuel consumption across vehicles sold in California and any other state that adopts California's regulations. Section 102 of the Energy Independence and Security Act of 2007, P.L. 110-140 requires an average of 35 miles per gallon by 2020, but California's regulations would require the rough equivalent of 45 to 50 miles per gallon. Accordingly, automakers, dealers and their allies have staunchly opposed California's request. The argument most often cited by automakers in their opposition to California's request is that issuance of the waiver would result in a "patchwork" of emissions laws that will cause "irreparable harm" and extreme "unintended consequences" to domestic carmakers already struggling to avoid bankruptcy. The counter argument is that approval of the waiver request would resolve the "patchwork" issue by opening the door to the possibility of establishing California's standards on a 50-state level, without new legislation.

More importantly, however, EPA's action on the waiver will signal where the Obama administration is heading with respect to the regulation of all greenhouse gas emissions, which at a minimum means that regulatory action—or inaction—by the prior administration is being abandoned. The debate about whether the states or the federal government should regulate greenhouse gas emissions is ongoing; there have been unsuccessful attempts at preempting state efforts to regulate greenhouse gas emissions in the past. Representatives John Dingell (D-MI) and Rick Boucher (D-VA), respectively, the chairmen of the House Energy and Commerce Committee and of its Energy and Air Quality Subcommittee, mounted an unsuccessful effort to preempt

state efforts at combating global climate change in 2008. In contrast with the Warner-Lieberman cap-and-trade legislation, Dingell and Boucher's white paper, "Appropriate Roles for Different Levels of Government," utilized the EPA justification for denying California's waiver request and deemed climate change a global, not local, problem that states should not have the ability to regulate. EPA granting the California waiver, though, could tip this ongoing preemption debate in favor of the states, and signal how states will act to regulate other types of greenhouse gas emissions in the absence of federal regulation.

The Federal Register notice initiated EPA's reconsideration of the request. It announced a public hearing concerning the waiver request and the re-opening of the written comment period for the request. The public hearing was held on March 5, 2009, and the close of the written comment period was April 6, 2009. Regardless of the outcome, EPA's

reconsideration of the California waiver will speak volumes about how this administration plans to shape the task of adopting greenhouse gas emission regulations and tackle what has become the most talked about environmental issue of its time: global climate change.

ENDNOTES

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U.S. Supreme Court Limits Rights of Environmental Groups to Challenge Federal Agency Decisions*

By Dustin Till**

In a 5-4 decision issued on March 3, 2009, the United States Supreme Court limited the circumstances in which environmental groups can challenge federal agency regulations. *Summers v. Earth Island Institute*, No. 07-0463 (Mar. 3, 2009). The case was brought by Earth Island Institute and other environmental groups (collectively, Earth Island), and challenged rules which exempt certain post-fire rehabilitation and salvage projects from public notice, comment, and administrative appeal procedures. Earth Island initially challenged the rules as applied to the Burnt Ridge Project in the Sequoia National Forest. It subsequently settled that claim, but sought to continue to pursue a facial challenge to the rules on grounds they violated requirements of the Forest Service Decisionmaking and Appeals Reform Act.

In the proceedings below, a federal District Court and the Ninth Circuit Court of Appeals agreed that Earth Island had standing to pursue its facial challenges to the rules, even though it settled the as-applied challenge to the Burnt Ridge Project after the complaint was filed. In an opinion authored by Justice Antonin Scalia, the Supreme Court reversed. Because the underlying project-specific challenge had settled, the Court held that affidavits submitted by Earth Island failed to sufficiently demonstrate that one of its members would imminently suffer a concrete and specific injury-in-fact—a mandatory requirement for Article III standing. In dissent, Justice Stephen Breyer countered that Earth Island's affidavits established a "reasonable likelihood" that an Earth Island member would suffer harm in the near future.

Summers v. Earth Island Institute rolls back Ninth Circuit jurisprudence which arguably loosened standing requirements and permitted environmental groups to challenge federal regulations based on procedural injuries which "may yield diminished recreational enjoyment" of federal lands.¹ In order to clear the standing hurdle, plaintiffs' procedural grievances (e.g., lack of appeal rights to certain projects), the Supreme Court said, must be coupled with an unambiguous, and actual or imminent harm such as concrete plans to visit a specific tract of public land that is subject to a project under the challenged regulations. The decision has implications well beyond these specific Forest Service rules in limiting the suits environmental plaintiffs may bring, as standing plays a central role in efforts to challenge agency actions and rules under federal environmental laws.

I. Background

In 1992, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act (ARA),² which required the Forest Service to establish notice and comment and administrative appeal processes for proposed projects and activities which implement land and resource management plans.³ On June 4, 2003, the Forest Service published regulations (the 2003 Regulations) implementing the ARA. Among other things, the 2003 Regulations exempted from the ARA's notice-and-comment and administrative-appeal requirements those projects that were also categorically exempt from review under the National Environmental Policy

Act (NEPA).⁴ The validity of these regulations formed the basis of the dispute before the Court. The Forest Service subsequently established new NEPA categorical exemptions for post-fire rehabilitation projects of less than 4,200 acres⁵ and post-fire timber salvage sales of 250 acres or less.⁶ By establishing these NEPA categorical exemptions, the Forest Service also exempted conforming projects from the ARA's public notice, comment, and appeal requirements under the 2003 Regulations.

Shortly after establishing the new post-fire categorical exclusions, the Forest Service issued a decision memo approving a 238 acre post-fire salvage sale in the Sequoia National Forest. Applying the new NEPA categorical exclusions and the 2003 Regulations, the Forest Service's decision memo concluded that the Burnt Ridge Project was not subject to appeal under the ARA.

On December 1, 2003, Earth Island filed a complaint in the U.S. District Court for the Eastern District of California challenging both the 2003 Regulations as applied to the Burnt Ridge Project and the validity of the 2003 Regulations themselves. To demonstrate standing, Earth Island filed affidavits alleging that an organization member, Ara Marderosian, had repeatedly visited the Burnt Ridge area, had imminent plans to do so again, and would be injured if the project went forward without an opportunity for his comment. Earth Island also filed the affidavit of another member, Jim Bensman. The affidavit stated that Bensman had visited numerous National Forests and had plans to visit unidentified National Forests in California and elsewhere later that year. Bensman's affidavit further stated that the 2003 Regulations had prevented him from appealing a number of unspecified timber sales.

The parties eventually settled their dispute regarding approval of the Burnt Ridge Project, and Earth Island dismissed its "as applied" challenges with prejudice. With respect to the remaining facial challenges to the 2003 Regulations, the Forest Service argued that, as a result of the settlement, Earth Island lacked Article III standing because its members were no longer threatened with an injury-in-fact. The Forest Service also argued that Earth Island's claims were no longer ripe because there was no longer a dispute over a particular project. Rejecting these arguments, the District Court invalidated a portion of the 2003 Regulations, including the public notice, comment, and appeal provisions.⁷ The District Court also issued a nationwide injunction prohibiting the Forest Service from applying the invalidated rules.

On appeal, the Ninth Circuit partially affirmed the District Court's decision.⁸ The Ninth Circuit found that Earth Island had standing to pursue its procedural injury claims, even though its "as applied" challenges to the Burnt Ridge Project were mooted by the settlement. The Ninth Circuit based its standing decision on the Bensman affidavit, noting that his "preclusion from participation

in the appeals process *may* yield diminished recreational enjoyment of the national forests." The Ninth Circuit went on to uphold the District Court's decision with respect to the provisions of the 2003 Regulations that were applicable to the Burnt Ridge Project (i.e., the notice, comment, and appeal exemptions), on grounds that they conflicted with the ARA's plain language. The Supreme Court subsequently granted the Forest Service's writ of certiorari.

II. The Supreme Court's Decision

Writing for the majority, Justice Scalia held that Earth Island lacked standing to pursue its facial challenges to the 2003 Regulations. The Court specifically held that the Marderosian and Bensman affidavits failed to establish a concrete and particularized injury. To satisfy Article III standing requirements, a plaintiff must demonstrate that it has suffered an injury-in-fact that is both concrete and specific and actual or imminent. The injury must be fairly traceable to the challenged action, and it must be likely that the injury will be redressed by the requested relief.⁹ Organizations can satisfy the "concrete and particularized injury" requirement by demonstrating that the recreational or aesthetic interests of one of its members will be affected.¹⁰

The Court first held that the Marderosian affidavit did not establish an injury-in-fact. In the affidavit, Marderosian claimed an injury-in-fact based on prior visits to the Burnt Ridge area, as well as imminent plans to return. The Court, however, noted Marderosian's "injury in fact with regard to that project has been remedied" in light of the settlement with Earth Island.¹¹ The Court further stated:

We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action . . . apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III's injury-in-fact requirement.¹²

The majority next disagreed with Earth Island's contention that the Bensman affidavit established a concrete-and-specific injury. The Court first noted that the Bensman affidavit failed to identify the Burnt Ridge Project or any other specific timber sales that were subject to the 2003 Regulations. The affidavit also failed to identify concrete and specific plans to visit National Forest areas that would be impacted by such projects. According to the majority, without such specification, a court is unable to tell what projects are unlawfully subject to the regulations and whether Bensman may suffer a recreational or aesthetic injury by encountering them during visits to National Forests.¹³ "Accepting an inten-

tion to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.”¹⁴

The Court next rejected the Ninth Circuit’s determination that Earth Island had standing based on an alleged procedural injury. Earth Island contended that, as a result of the 2003 Regulations, it was denied the opportunity to comment on certain Forest Service projects, including the Burnt Ridge Project. The Ninth Circuit agreed, holding that the “preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests.”¹⁵ The Supreme Court, however, held that “deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.”¹⁶

Because the Court resolved the case on grounds of standing, it declined to reach the merits of whether Earth Island’s challenges to the 2003 Regulations were ripe and whether a nationwide injunction was the appropriate remedy.

IV. The Dissent

In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, took exception to the majority’s conclusion that Earth Island had only demonstrated a “conjectural or hypothetical” injury-in-fact. Citing to the Court’s landmark 2007 global warming decision, *Massachusetts v. EPA*, Justice Breyer argued that:

[A] threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates. Thus we recently held that Massachusetts has *standing* to complain of a procedural failing, namely, EPA’s failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur), might not occur for several decades.¹⁷

Justice Breyer argued that the affidavits submitted by Earth Island established a “realistic likelihood” that the challenged conduct (i.e., the prohibition on public notice, comment, and appeal of certain timber sales) had occurred in the past, would occur in the future, and would certainly result in harm to some of Earth Island’s members.¹⁸ “These allegations and affidavits more than adequately show a ‘realistic threat’ of injury to plaintiffs brought about by reoccurrence of the challenged conduct—conduct that the Forest Service thinks lawful and *admits* will reoccur.”¹⁹

In his majority opinion, Justice Scalia explicitly rejected these arguments, suggesting that the dissent “proposes a hitherto unheard-of test for organizational standing: whether, accepting the organization’s self-

description of the activities of its members, there is a statistical probability that some of the members are threatened with concrete injury.”²⁰ While recognizing that it is possible (or even likely) that one of Earth Island’s members will suffer an injury-in-fact in the future, Justice Scalia concluded that “speculation will not suffice. Standing . . . is not an ingenious academic exercise in the conceivable . . . [but] requires . . . a factual showing of perceptible harm.”²¹

ENDNOTES

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1. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007) (emphasis supplied).
2. Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. § 1612 note).
3. ARA § 322(a).
4. 36 C.F.R. §§ 215.4(a) and 215.12(f). See also 68 Fed. Reg. 33,582 (June 4, 2003).
5. 68 Fed. Reg. 33,814 (June 5, 2003) (codified at Forest Service Handbook 1909.15, ch. 30, §§ 31.2(10), (11)).
6. 68 Fed. Reg. 44,598 (July 29, 2003) (codified at Forest Service Handbook 1909.15, ch. 30 §§ 31.2(12), (13), and (14)).
7. *Earth Island Inst. v. Ruthenbeck*, CV 03-6368-JKS, 2005 WL 5280466 (Sept. 20, 2005).
8. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007).
9. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).
10. *Sierra Club v. Morton*, 405 U.S. 727, 734-36 (1972).
11. Slip Op. at 5-6.
12. Slip Op. at 6.
13. Slip Op. at 7.
14. Slip Op. at 7.
15. *Earth Island Inst.*, 490 F.3d at 693.
16. Slip Op. at 8.
17. Dissent at 5-6 (emphasis in original) (citing *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007)).
18. Dissent at 5-7.
19. Dissent at 10 (emphasis in original).
20. Slip Op. at 9.
21. Slip Op. at 11 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992) (internal quotations omitted)).

UPDATES

Climate Change

Federal Agencies Settle Climate Change Suit

Note: The following appeared in the March 18, 2009, Andrews Environmental Litigation Reporter, 29 No. 17 Andrews Env'tl. Litig. Rep. 2. © 2009 Thomson Reuters.

The Overseas Private Investment Corporation (OPIC) and the U.S. Export-Import Bank have settled a lawsuit brought by four cities and two environmental groups by agreeing to consider greenhouse gas emissions associated with the projects they finance. *Friends of the Earth Inc. et al. v. Spinelli et al.*, No. 02-4106, *settlement announced* (N.D. Cal. Feb. 6, 2009). Friends of the Earth, Greenpeace, the city of Boulder, Colorado, and three California cities sued the agencies in August 2002 in the U.S. District Court for the Northern District of California.

OPIC is an independent federal agency that provides political-risk insurance, project financing and investment funding to U.S. businesses seeking to expand into foreign markets. The Export-Import Bank assists in financing the export of U.S. goods and services to international markets.

Under the settlement the agencies agreed to provide more than \$500 million in financing for ventures that include renewable energy projects, applying preferential financing terms and other methods to attract investments in developing markets. OPIC will annually report greenhouse gas emissions from its projects that emit more than 100,000 tons of carbon dioxide equivalents per year. That information will be posted on the agency's Web site. Cap-and-trade regulatory systems classify greenhouse gases in terms of carbon dioxide equivalents, which is a measure that quantifies the global warming potential of the emissions in standard units.

Over the next 10 years OPIC will reduce by 20% greenhouse gas emissions associated with projects that emit more than 100,000 tons of such gases, according to the settlement. The Export-Import Bank will direct its staff to consider a proposed project's level of carbon dioxide emissions when deciding whether to approve projects involving fossil fuel. Each agency also agreed to pay \$100,000 in attorney fees and costs.

The lawsuit charged that OPIC and the Export-Import Bank illegally provided more than \$32 billion in financing and insurance for oil fields, pipelines and coal-fired plants over the past 10 years without assessing their contribution to global warming and impact on the U.S. environment, as required by the National Environmental Policy Act of 1969 (NEPA). These projects included many of the largest new oil field developments in South America, Mexico, Russia,

the Caspian Sea region, Southeast Asia and West Africa, the suit said.

The agencies' actions ultimately will result in more than 32 billion tons of carbon dioxide emissions over the lifetimes of various projects, according to the suit. More than 80% of these emissions will be released by the eventual burning of fuel being exported from the projects' host countries into the global marketplace, primarily the United States, Western Europe and Japan, the suit said.

The plaintiffs sought an injunction requiring the defendants to comply with NEPA and prepare environmental assessments for each of the fossil-fuel-related projects they fund. In 2005 U.S. District Judge Jeffrey White gave the lawsuit the green light, saying the plaintiffs' evidence sufficiently demonstrated that the emissions from projects supported by OPIC and the Export-Import Bank would threaten the plaintiffs' interests.

Clean Water Act

Feds Seek \$130M from Akron Over Alleged Clean Water Violations

Note: The following appeared in the March 18, 2009, Andrews Environmental Litigation Reporter, 29 No. 17 Andrews Env'tl. Litig. Rep. 7. © 2009 Thomson Reuters.

The federal government says the city of Akron, Ohio, should pay nearly \$130 million for allegedly dumping sewage into a river for more than 15 years, according to a suit filed in federal court. *United States v. City of Akron, Ohio*, No. 5:09 CV 272, *complaint filed* (D. Ohio Feb. 5, 2009). Akron has been violating the Clean Water Act, 33 U.S.C.A. § 1311, since 1994, according to the Environmental Protection Agency.

The United States filed suit on the agency's behalf in the U.S. District Court for the Southern District of Ohio on February 5, 2009. According to the complaint, the city has discharged pollutants from its wastewater treatment plant that have made their way into the Cuyahoga River, the Little Cuyahoga River and the Ohio Canal. A permit issued by the Ohio Environmental Protection Agency in 1994 granted Akron the right to discharge pollutants within certain limits, but the city has consistently exceeded those limits, the government says.

The amount of untreated sewage released has been "toxic to human, aquatic or animal life," according to the complaint. The government says people have or may come into contact with the sewage, which could cause adverse health effects. "Untreated sewage can carry bacteria, viruses, parasitic organisms [and] intestinal worms. The diseases these may cause range in severity from mild gastroenteritis to life-threatening ailments such as cholera,

dysentery, infections, hepatitis and severe gastroenteritis,” the complaint says. The city also violated the permit by failing to monitor and report on the discharges, according to the complaint.

The EPA is asking the court to enjoin Akron from further violations of the Clean Water Act and order it to comply with the permit and pay more than \$100 million in penalties for past violations. The government also is seeking an order directing the city to increase its sewer capacity and install backflow-prevention devices to eliminate or minimize the unintended release of sewage. Finally, the EPA is seeking an order requiring Akron to clean up any sewage discharges that occur.

W.Va. Must Clean Up Water Runoff from Reclaimed Mines

Note: The following appeared in the March 4, 2009, Andrews Environmental Litigation Reporter, 29 No. 16 Andrews Env'tl. Litig. Rep. 7. © 2009 Thomson Reuters.

The West Virginia Department of Environmental Protection (WVDEP) is violating the Clean Water Act by failing to treat contaminated runoff from eighteen reclaimed surface mines it manages, a federal court has ruled. *West Virginia Highlands Conservancy Inc. v. Huffman*, No. 07-0087, 588 F. Supp. 2d 678 (N.D. W. Va. Jan. 14, 2009). The ruling means the state likely will have to increase coal taxes by large amounts to pay for pollution control improvements, according to Joe Lovett of the Appalachian Center for the Economy and the Environment. “The court’s ruling will require the WVDEP to stop protecting the coal industry from paying the full environmental costs of coal mining,” he said in a statement.

U.S. District Judge Irene M. Keeley said the state does not enjoy sovereign immunity from compliance with the Clean Water Act (CWA), 33 U.S.C.A. § 1251. She also said the state is considered to be the mines’ operator under the statute, regardless of who owns them. Therefore, the state must obtain permits to regulate acid runoffs from the mines into navigable U.S. streams and waters, Judge Keeley said. “The state was running these sites ‘off the books’ to try to escape accountability for necessary water treatment,” Jim Hecker, lead counsel in the case and Public Justice’s director of environmental enforcement, said in a statement. “The court ordered the state to obtain the required discharge permits,” Hecker said. “Once it does, the state will have to comply with the water-quality standards it is now violating.”

The West Virginia Highlands Conservancy filed the lawsuit in the U.S. District Court for the Northern District of West Virginia. The group alleged that WVDEP Secretary Randy Huffman is allowing the release of pollutants into the state’s rivers and streams from the reclaimed mines without the necessary federal permits, a violation of the CWA. The permits limit the amount of pollutants that

can be released annually. The CWA provides that the discharge of any pollutant by any “person” is illegal, and it defines “persons” as including states and their political subdivisions.

The WVDEP tried to assert sovereign immunity under the Eleventh Amendment, but Judge Keeley said it is well-established law that a citizen may sue a state official for injunctive relief for violating a federal law. The plain language of the CWA “compels the finding that the WVDEP is violating the act because the WVDEP is a ‘person’ discharging pollutants” into U.S. waters, the judge said. “Accordingly, when brought against state officials to obtain prospective injunctive relief, suits such as this do not run afoul of the 11th Amendment or infringe a state’s sovereign immunity,” she said.

The judge further held that the WVDEP is the “operator” of the eighteen mines, even though seventeen of them still have owners. The eighteenth site was deeded directly to the state. The WVDEP is responsible for managing the sites where the owners forfeited their performance bonds. In those cases where the bonds did not cover the full costs of reclaiming the sites, state law requires the WVDEP to make up the difference from the “special reclamation fund” established by W. Va. Code § 22-3-11, according to the judge. Thus, the WVDEP is the caretaker of those sites, and the agency is not exempt from the compliance with the Clean Water Act, Judge Keeley concluded.

She granted summary judgment to the conservancy, declared the WVDEP in violation of the Clean Water Act and ordered it to obtain the necessary permits for all eighteen sites.

Mercury Emissions

EPA to Drop Appeal of Mercury Emissions Case

Note: The following appeared in the March 18, 2009, Andrews Environmental Litigation Reporter, 29 No. 17 Andrews Env'tl. Litig. Rep. 1. © 2009 Thomson Reuters.

The Environmental Protection Agency has moved to dismiss its U.S. Supreme Court petition challenging a lower court’s invalidation of its cap-and-trade program for regulating mercury emissions from power plants. *Environmental Protection Agency v. New Jersey et al.*, No. 08-512, *motion to dismiss filed* (U.S. Feb. 6, 2009). Environmental groups say this means that the Obama administration intends to promulgate regulations limiting mercury emissions under Section 113 of the Clean Air Act, 42 U.S.C.A. § 7401. “Today’s news signals an end to years of attempts by the Bush administration to undermine Clean Air Act protections against mercury and comes not a moment too soon,” Earthjustice attorney David Baron said in a statement.

Last year a three-judge panel of the District of Columbia U.S. Circuit Court of Appeals vacated an EPA rule that would have established a cap-and-trade program for mercury emissions rather than require power plants to install pollution controls. Cap-and-trade provisions allow companies that exceed emissions caps to buy credits from companies that are within the caps. The panel said the EPA must set strict limits for mercury emissions from power plants.

The controversy arose after the agency issued a rule removing coal- and oil-fired power plants from a list of hazardous-air-pollutant sources that are regulated under the Clean Air Act. A coalition of seventeen states and environmental groups subsequently filed suit in the D.C. Circuit to overturn the rule. The petitioners argued that the EPA should regulate mercury under the Clean Air Act, which requires that the “maximum achievable control technology” be used to limit mercury emissions. The D.C. Circuit agreed, finding that the agency could not avoid its legal duty to regulate mercury emissions from all power plants.

The appeals court said the EPA’s explanation that it need not adhere to the Clean Air Act “deploys the logic of the Queen of Hearts, substituting EPA’s desires for the plain text” of the statute. The EPA and an industry trade association, the Utility Air Regulatory Group, asked the Supreme Court to review the D.C. Circuit’s decision. The trade group is not expected to withdraw its petition.

Commenting on the EPA’s decision, New Jersey Attorney General Anne Milgram said in a statement that she was pleased by the agency’s action. New Jersey was the lead plaintiff in the suit against the EPA. “I applaud new EPA Administrator Lisa Jackson for taking this decisive action and ending this protracted legal battle,” Milgram said.

Maritime Pollution

Second Circuit Upholds Conviction for Maritime Pollution Violation

Note: The following appeared in the February 18, 2009, Andrews Environmental Litigation Reporter, 29 No. 15 Andrews Env’tl. Litig. Rep. 5. © 2009 Thomson Reuters.

A Connecticut federal jury did not err when it convicted a ship management company of releasing polluted materials into the ocean and falsifying records about it, the Second U.S. Circuit Court of Appeals has found. *United States v. Ionia Management S.A.*, Nos. 07-5801-cr and 08-1387-cr, 2009 WL 116966 (2d Cir. Jan. 20, 2009). The defendant said the court erred by instructing the jury that the company could be found liable for failing to maintain a record when the ship’s crew only possessed falsified records and did not make any false entries.

The government charged Ionia Management S.A. with violating the Act to Protect Pollution From Ships, 33 U.S.C.A. § 1901. According to federal prosecutors, the crew of the M/T Kriton discharged oily wastewater into the sea at ports along the East Coast at various times between January 2006 and April 2007. The government said the crew used a “magic hose” to bypass the ship’s oil-water separator, which cleans waste before discharge, as required by law.

A jury in the U.S. District Court for the District of Connecticut convicted Ionia Management of falsifying records by failing to maintain an accurate oil record book, or ORB, as required by the ocean pollution law. U.S. District Judge Janet Bond Arterton assessed a \$4.9 million fine against Ionia. Ionia then asked the Second Circuit to overturn the conviction. The company said it could not be convicted of failing to maintain an ORB because the crew members did not make any false entries; they only possessed an inaccurate record.

Ionia also argued that the evidence failed to establish that the company should be held criminally responsible for the crew’s actions under the theory of *respondeat superior*. Under that doctrine, an employer can be held responsible for its employees’ actions if they are performed in the course of their employment. The appeals court rejected Ionia’s argument.

This was the first time the Second Circuit interpreted the Act to Protect Pollution From Ships’ requirement that vessels “maintain” an ORB. The panel said it would join the Fifth Circuit in finding that “this provision imposes a duty on ships, upon entering the ports or navigable waters of the United States, to ensure that its ORB is accurate (or at least not knowingly inaccurate).” The panel said this reading is supported by the regulation’s plain text and advances the goals of international treaties to control ocean pollution.

The court also said the theory of *respondeat superior* was properly applied to Ionia. Crew members testified that they acted under the direction of their supervisors when they wrongfully discharged the oil and maintained false records in the ORB, the panel said. “The jury could infer ... that the crew used the bypass hose to benefit Ionia and subsequently lied to protect the company,” the appeals court said.

Enforcement

Coal Mine Operator to Pay \$6.5M Over Alleged Water Pollution

Note: The following appeared in the March 18, 2009, Andrews Environmental Litigation Reporter, 29 No. 17 Andrews Env’tl. Litig. Rep. 12. © 2009 Thomson Reuters.

Patriot Coal Company has agreed to pay a \$6.5 million penalty to resolve alleged violations of the Clean Water Act at several mines in West Virginia, federal and state regulators have announced. *United States v. Patriot Coal Co. et al.*, No. 09-00099, *consent decree filed* (S.D. W. Va. Feb. 5, 2009). The fine is the third largest penalty ever paid in a Clean Water Act case for violations of a discharge permit, according to the Justice Department.

The agency said Patriot's consent decree, filed in the U.S. District Court for the Southern District of West Virginia, also mandates innovative operating standards that should serve as a model for other coal mines in central Appalachia. Additionally Patriot will be required to perform environmental projects, including five stream restoration projects in local watersheds. The St. Louis based company also must perform an assessment of the impact of its mining on aquatic life. The Justice Department estimated the cost of the projects at \$6 million.

"This settlement represents a very important step in making sure that the coal mining industry is in compliance with the Clean Water Act," according to a statement by John Cruden, acting assistant attorney general for the department's Environment and Natural Resources Division. "It will benefit the citizens of West Virginia and helps make sure that the Mountain State's streams and rivers are not damaged," he said.

According to the complaint filed in the case, Patriot violated its Clean Water Act permits more than 1,400 times between January 2003 and December 2007 at its mining facilities in West Virginia. The Justice Department said Patriot and its subsidiaries discharged excess amounts of metals, sediment and other pollutants into rivers and streams in the state. The company owns 16 mining complexes in West Virginia and Kentucky.

Liabe Parties to Pay \$12M for Cleanup of N.Y. Superfund Site

Note: The following appeared in the March 18, 2009, Andrews Environmental Litigation Reporter, 29 No. 17 Andrews Envtl. Litig. Rep. 11. © 2009 Thomson Reuters.

Thirteen companies and municipalities will pay the Environmental Protection Agency more than \$12 million in cleanup costs the agency incurred at the Consolidated Iron & Metal Company Superfund site in Newburgh, N.Y. *United States v. City of Newburgh, N.Y., et al.*, No. 08-7378, *consent decree approved* (S.D.N.Y. Jan. 29, 2009). The consent decree was filed in the U.S. District Court for the Southern District of New York. The money will be combined with other funds supplied by the state and federal government to clean up the property. The cleanup costs will total about \$20 million, according to the EPA. "We are extremely satisfied with the agreement and look forward to completing the cleanup of this site so the

community can one day put the property back to productive use," acting EPA regional administrator George Pavlou said in a statement.

The parties named in the agreement are Connell LP, IBM Corporation, Northrop Grumman Ship Systems Inc. and the New York cities Newburgh and Poughkeepsie. Thirteen additional settling parties are not named in the consent decree. As part of the deal, the EPA agreed not sue the companies for any more cleanup costs related to the site, and any money the companies receive by suing third parties will be divided with the agency up to a \$1 million maximum.

The Superfund site is located at a former junkyard and scrap metal processing facility formerly operated by Consolidated Iron from the 1950s until 1999, according to the consent decree. Its operations released lead, PCBs and volatile organic compounds, which contaminated the soil at the site, the EPA said. The city of Newburgh became the site's owner in 2004 and arranged for appliances and cars to be transported there. The EPA added the site to the Superfund list in 2001.

Frontier Refining to Spend \$127 Million on Pollution Controls

Note: The following appeared in the March 18, 2009, Andrews Environmental Litigation Reporter, 29 No. 17 Andrews Envtl. Litig. Rep. 10. © 2009 Thomson Reuters.

Frontier Refining has agreed to spend more than \$127 million on pollution control upgrades to resolve Clean Air Act violations at its refineries in Wyoming and Kansas. *United States v. Frontier Refining et al.*, No. 09-1032, *consent decree filed* (D. Kan. Feb. 10, 2009). Under the consent decree, filed in the U.S. District Court for the District of Kansas, Frontier and subsidiary Frontier El Dorado Refining also agreed to pay a \$1.23 million civil penalty. Additionally, Frontier will implement environmentally beneficial projects valued at more than \$1.3 million, including installing dome covers on refinery storage tanks to reduce emissions of volatile organic compounds. "Today's settlements demonstrate [the Environmental Protection Agency's] continuing efforts to reduce emissions of nitrogen oxide and sulfur dioxide, which are the largest sources of pollution from refineries," Catherine McCabe, acting assistant administrator for the agency's office of enforcement and compliance assurance, said in a statement.

The refineries will install advanced control technologies that will reduce annual emissions of pollutants, the Justice Department said. The settlement further requires Frontier to correct deficiencies in the refinery's risk-management program identified during a 2006 EPA inspection. The deficiencies included unperformed inspections and testing of storage vessels containing toxic, flammable substances. The Clean Air Act, 42 U.S.C.A. § 7401, requires facilities that

handle large amounts of chemicals to develop a risk-management program to assess the hazards associated with dangerous chemicals, the Justice Department said. The plan must include an accident prevention program and emergency response plan to handle accidental releases, the agency said.

The Justice Department also announced a similar settlement with Wyoming Refining Company, requiring the company to pay a \$150,000 civil penalty and spend \$14 million on pollution-control upgrades for alleged Clean Air Act violations at its refinery in Newcastle, Wyoming.

