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NY/NJ PORT AUTHORITY MAY TAKE MIGRATORY BIRDS NOT LISTED IN PERMIT UNDER EMERGENCY TAKE PROVISIONS OF PERMIT

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The Port Authority of New York and New Jersey does not have to choose between violating federal law and ignoring serious threats to human safety in addressing the dangers posed by migratory birds at the New York airports it administers on an emergency basis, according to the Second Circuit Court of Appeals in *Friends of Animals v. Clay,* 811 F.3d 94 (2nd Cir. 2016). The Court affirmed the emergency take provisions of the Port Authority's "depredation permit" that authorizes the taking of migratory birds that "are causing injury to certain human interests" – namely the safety of airline travel.

The plaintiff, Friends of Animals, challenged the Port Authority's permit issued under the regulations of the Migratory Bird Treaty Act, which authorized the Port Authority to take a quota of 18 species of migratory birds that have presented a public safety issue at the airports and to take *any* migratory bird that poses a "direct threat to human safety" on an emergency basis regardless of whether that species is among the 18 listed in the permit.

FOA alleged that the U.S. Fish and Wildlife Service exceeded its authority in issuing the "emergency-take" provisions because the emergency take provisions allowed the Port Authority to take migratory bird species not specifically listed in the permit. FOA acknowledged the Hobson's choice presented by its argument where a migratory bird of a species not listed in the permit poses a direct threat to an aircraft: violate the law or ignore a threat to human safety. While FOA argued that the Port Authority could rely on an affirmative defense of necessity and that the government was unlikely to prosecute under the circumstances, the Second Circuit concluded that the regulations do not put the Port Authority in such an "untenable position."

The Court found that while the authority to issue depredation permits in 50 C.F.R. § 21.41 is limited in certain respects by the regulations, there is no express limitation on the issuance of an emergency-take provision and authority for limiting the issuance of the permits would have to be found elsewhere. FOA pointed to the application provisions in 50 C.F.R. § 21.41(b) combined with language in Section 21.41(c)(1). Section 21.41(b) requires an applicant to identify the particular species of migratory bird committing the injury to human interests in its application for a depredation permit. Section 21.41(c)(1) provides that "permittees may not kill migratory birds unless specifically authorized on the permit." FOA argued that combined, these two provisions prevented FWS from issuing a depredation permit authorizing the taking of bird species not listed on the permit itself.

In dispensing with FOA's argument, the Court found that the provisions of Section 21.41(b) concern the applicant and the application, not the permit itself. "Section 21.41(b) is a helplessly slender reed on which to rest the argument that FWS is powerless to authorize the Port Authority to take migratory birds that threaten air safety." The Court was similarly unimpressed with FOA's reliance on Section 21.41(c)(1) because the permit itself "specifically authorize[s]" the taking of "any migratory birds … when the migratory birds … are posing a direct threat to human safety…." Since the permit does identify "any migratory birds," the emergency-take provisions are authorized under Section 21.41(c)(1).

OMAHA ROAD SALT IS NOT RCRA WASTE

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Krause filed a RCRA citizen suit against the City of Omaha, alleging that the City's use of road salt for snow and ice control was an unlawful disposal of a solid waste. The plaintiff alleged that some of the roads were in a floodplain, that the road salt was

carried by runoff to the dirt shoulders of the roads, and that it was hazardous to wildlife, land, and water resources. The City moved to dismiss under FRCP 12(b)(6), alleging that the complaint did not state a claim for which relief could be granted because it did not allege that there had been an actual disposal of a "solid waste" under RCRA.

On appeal, the Eighth Circuit noted that while it must accept the plaintiff's factual allegations as true, it was not required to accept his legal conclusion that road salt was a "solid waste" under RCRA. RCRA does not specifically address road salt.

The court analyzed the RCRA definition of solid waste, along with the analysis of other courts that addressed whether certain materials were regulated as solid waste under RCRA. The common conclusion of those cases was that a material does not become a solid waste until it is actually discarded. The court further noted that RCRA was intended to address the "waste disposal problem." Referring to legislative history, the court stated that a material is not a solid waste under RCRA until it has served its intended purpose and is no longer wanted by the consumer. Another court had reached the same conclusion with regard to pesticide application.

The court also referred to the definition of "discarded materials" in the RCRA rules, and concluded that road salt, applied for its intended purpose of controlling snow and ice on streets, had not been "discarded" or "abandoned." Because road salt was thus not a solid waste under RCRA, the complaint did not state a claim for relief and was dismissed. *Krause v. City of Omaha*, NO. 8:15CB197 (Aug. 19, 2015), 2015 WL 5008657

WOTUS LITIGATION UPDATE: 6TH CIRCUIT RULES IT WILL HEAR APPEALS

Submitted by

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On February 22, 2016, in a 2-1 decision, the U.S. Court of Appeals for the Sixth Circuit held that it had jurisdiction over the numerous lawsuits challenging the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers' (collectively "Agencies") Clean Water Rule ("Rule"). In re U.S. Dep't of Def., U.S. E.P.A. Final Rule, No. 15-3839 (6th Cir. Feb. 22, 2016). The Sixth Circuit found that the Rule, which redefines the Clean Water Act's definition of "waters of the United States," can only be challenged in the federal courts of appeals and not the federal district courts.

The decision was considered a victory for the Agencies, who would prefer having the lawsuits play out in the circuit courts, rather than in district courts. However, over the

Agencies' objection, the Sixth Circuit stayed the Clean Water Rule pending consolidation and resolution of the pending legal challenges.

The Agencies argued that, pursuant to 33 U.S.C. § 1369(b)(1)(E) and (F), the Rule is "an effluent limitation or other limitation under [33 U.S.C. §§ 1311, 1312, 1316, or 1345]," or alternatively, involves the issuance or denial of a permit, and therefore original jurisdiction belongs in the court of appeals. The Sixth Circuit agreed, applying a "functional" rather than a "formalistic" rationale to justify its decision.

Split Decision

Notably, only one member of the three-person panel, Judge David McKeague, concluded that jurisdiction in the court of appeals would be proper under both subsections (E) and (F) of 33 U.S.C. § 1369(b)(1). Writing for the majority, Judge McKeague interpreted the Clean Water Act as providing direct circuit court review of regulations that will indirectly result in limitations on point sources. On the other hand, Sixth Circuit Judge Richard Griffin, like most Clean Water Act practitioners, did not agree with Judge McKeague's assessment that the Rule was an effluent limitation pursuant to subsection (E). However, Judge Griffin did agree that the Rule will indirectly impact the issuance or denial of permits, and therefore that original jurisdiction belongs in the circuit courts.

In concluding that jurisdiction is proper under subsections (E) and (F), the majority relied on *E.I Dupont de Nemours Co. v. Train*, 430 U.S.112 (1977), as well as Eighth, Fourth, and D.C. Circuit decisions that followed *E.I. Dupont*. According to the court, the cases reflect "Congress' manifest intent to encompass review of more agency actions than a literal reading of the provision[s] would suggest." Further, the majority found that the court was bound by the Sixth Circuit's decision in *National Cotton Council v. EPA*, 553 F.3d. 927 (6th. Cir. 2009), in which the court found that it had jurisdiction to review an EPA rule relating to whether Clean Water Act permits were required for certain pesticide applications because the law allowed the court to review a rule "that impacts permitting requirements." Finally, the court held that there were no "practical considerations that would justify holding that adjudication of the instant petitions in the various district courts would better serve Congress' purpose."

In a dissent, Sixth Circuit Judge Damon Keith disagreed with both his colleagues, concluding that under the "plain meaning of the statute," neither subsection (E) nor subsection (F) confers jurisdiction on the appellate courts. He also concluded that *National Cotton Council* was not binding because it did not expand those subsections to cover all rules "relating" to EPA permitting procedures such as the one at issue here—a rule that merely defines the scope of the term "waters of the United States."

Many parties have filed petitions for rehearing en banc, which were due March 23, 2016. Responses to the petitions were due April 1, 2016.

Implications

While the Sixth Circuit's decision may ultimately be reversed if the court decides to hear the case en banc as requested by plaintiffs, the ruling is already having immediate impacts. For example, at least one federal district court has dismissed a pending challenge to the Rule, holding that the Sixth Circuit's ruling was controlling and that it lacked jurisdiction. *State of Oklahoma v. EPA*, No. 15-0381 (N.D. Oklahoma).

In addition, the decision will have important implications for the controversial Clean Water Act issue regarding judicial review of jurisdictional delineations performed pursuant to the Rule. If the Rule is ultimately upheld, it will govern jurisdictional delineations, which are technical studies and reports that involve the application of the Rule to particular projects to determine if features in those properties are subject to Clean Water Act protections. Currently there is a split among the circuits, with the U.S. Court of Appeals for the Fifth Circuit holding that jurisdictional delineations are not final agency actions subject to judicial review, and the U.S. Court of Appeals for the Eighth Circuit holding the opposite. See *Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383, 386 (5th Cir. 2014); *U.S. Army Corps of Engineers v. Hawkes Co. Inc*., 782 F.3d 994 (8th Cir. 2015). The Agencies have argued on appeal from the Eighth Circuit decision that the U.S. Supreme Court should resolve this split as determined by the Fifth Circuit, finding that jurisdictional delineations are not final actions subject to judicial review.

The position taken by the Agencies before the Eighth Circuit in *Hawkes* with respect to jurisdictional delineations conducted under the Rule is inconsistent with the position they have advocated before the Sixth Circuit. Specifically, if the Rule involves the issuance or denial of a permit, as argued by the Agencies and held by the Sixth Circuit, then the application of the Rule to particular properties and activities pursuant to a jurisdictional delineation would be an adjudicatory determination by the Agencies. Adjudicatory determinations and permitting decisions are subject to judicial review, despite the Agencies' arguments to the contrary in *Hawkes*. As a result, the Agencies' argument in *Hawkes* that jurisdictional delineations are not permitting decisions cannot be reconciled with their argument before the Sixth Circuit characterizing the Rule as an agency action that involves the issuance or denial of a permit.

It is unclear whether the Agencies are aware of this inconsistency in their legal arguments between the two cases. Unfortunately, despite the legal inconsistency in the Agencies' positions regarding jurisdictional determinations and the Rule, the death of Supreme Court Justice Antonin Scalia creates the possibility of a 4-4 split in the *Hawkes*

case and other Clean Water Act cases. Justice Scalia—one of the Court's most vocal critics of environmental rules—was widely seen as a likely vote for plaintiffs challenging the Agencies' characterization of jurisdictional delineations in *Hawkes* and, ultimately, for those challenging the Rule.

NINTH CIRCUIT REINSTATES DESIGNATION OF 120 MILLION ACRES OF ALASKA CRITICAL HABITAT FOR POLAR BEAR

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In 2010, the U.S. Fish and Wildlife Service designated approximately 187,000 square miles of land, sea and ice in Alaska as critical habitat under the Endangered Species Act (ESA) for the polar bear. Equivalent to nearly 120 million acres, this is an area larger than California, and about the same size as Spain, and is by far the largest critical habitat designation in history. In an opinion issued on February 29, 2016, the Ninth Circuit upheld the entire designation. Alaska Oil & Gas Ass'n v. Jewell, No. 13-35619.

In the U.S. District Court for the District of Alaska, the State of Alaska, groups representing the petroleum industry, and Alaska Native corporations challenged two of the three critical habitat units, the terrestrial denning habitat unit and the barrier island unit. They did not challenge the sea ice unit. Taken together, the challenged units add up to just under 10,000 square miles, or 6.4 million acres, only about 5% of the total.

The district court ruled for the plaintiffs. As to terrestrial denning habitat It found that the Service's studies did not demonstrate the presence of each of the four primary constituent elements. The Ninth Circuit reversed on this ground, holding that the district court demanded "too high a standard of scientific proof." The Ninth Circuit also rejected the plaintiffs' argument that the ESA did not permit designation of habitat that may be needed to address erosion due to climate change. The court held that the Service adequately explained its decision, and that designated features did not need to be present in the habitat at the time of listing of the species. The court also upheld the failure to exclude Deadhorse, the center of Prudhoe Bay oil activity, from the designation, given record evidence that polar bears roam through the area.

As to barrier islands, the district court found the designation overbroad because it designated all islands along the coast without evidence that bears used specific islands. The Ninth Circuit again reversed, holding "the district court erroneously focused on the areas existing polar bears have been shown to utilize rather than the features necessary for future species protection." The court determined it was rational to include not only areas where polar bears built dens, but also the areas necessary to ensure access to those dens.

In a question of first impression, the Ninth Circuit approved the Service's compliance with section 4(i) of the ESA, which requires the Service to provide written justification for failing to adopt a final listing or critical habitat designation consistent with a state's comments. 16 U.S.C. § 1533(i). Agreeing with the D.C. Circuit, the Ninth Circuit found that compliance with section 4(i) may be reviewed only for procedural compliance, that is whether the Service "was fully aware of and took into account the commenting parties' interests and concerns." The panel rejected the approach of the district court, which had faulted the Service for a response which incorporated the state's comments by reference and which was mailed to the governor instead of a state wildlife agency.

The Ninth Circuit affirmed some of the district court's rulings, including one upholding the Service's assessment of economic impacts in deciding whether to exclude certain areas from the designation. Though the plaintiffs challenged only two of three units, the district court vacated the entire designation. Thus the Ninth Circuit's ruling reinstates all 120 million acres of critical habitat. The decision is an exemplar of deference to an agency selecting and interpreting scientific data. The Service's approach in this case was quite similar to the approach in recent critical habitat regulatory changes, so the decision bodes well for the Service's policies. See 81 Fed. Reg. 7,414 (Feb. 11, 2016) (amending regulatory definitions of "geographical area occupied by the species" and "physical or biological features" essential to the conservation of the species).

Defenders of Wildlife and Center for Biological Diversity v. Jewell, No.14-5284, 2016 WL 790900, (D.C. Cir. Mar. 1, 2016).

FWS DECISION TO DELIST SAGEBRUSH LIZARD AND RELY ON TEXAS AND NEW MEXICO CONSERVATION PLANS UPHELD

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In March 2003, the U.S. Fish and Wildlife Service ("FWS") adopted its Policy for Evaluation of Conservation Efforts when Making Listing Decisions ("Policy"). The Policy's purpose was to assist FWS in predicting the persistence of a species when "formalized conservation efforts" have not yet been implemented, or when such efforts have been implemented, but their effectiveness is not known at the time of the listing decision. The intent of the Policy was to "'ensure consistent and adequate evaluation of recently formalized conservation efforts when making listing decisions,'" by identifying criteria to assess whether the effort "'provides a high level of certainty that the effort will

be implemented and/or effective and results in the elimination or adequate reduction of the threats'" to any species being considered for listing. If FWS decided not to list a species based on part on a formalized conservation effort, it would then monitor both the implementation and the effectiveness of that effort. If the effort is not successful, FWS would then reevaluate whether the species should, in fact, be listed after all.

In December 2010, FWS proposed listing the dunes sagebrush lizard as endangered. The lizard, which lives in southeastern New Mexico and western Texas, lives in a "dynamic dune system created by a shinnery oak tree and the large root and stem system that surrounds it." The lizard's survival depends on the quality and quantity of this habitat. Earlier surveys had shown that the habitat in New Mexico was being compromised, and that if the destruction continued, there would be threats to the lizard populations. At the time listing was proposed, FWS had concluded that federal, state, and local conservation efforts were inadequate to protect the lizard, including a land-use plan proposed by the Bureau of Land Management ("BLM") and voluntary conservation agreements in New Mexico. The BLM plan provided for many exceptions and had no specified schedule or monitoring, and its success could only be measured following future implementation. The New Mexico agreements were promising, but because there were no similar agreements in Texas, FWS concluded that the agreements had not been fully implemented and thus not determined to be effective.

Following the listing proposal, FWS obtained additional new information about ongoing conservation efforts. Comments in response to the BLM plan gave FWS a better understanding of the plan, resulting in a conclusion that the BLM plan would provide "a standard that would consistently guide the protection of the lizard and reduce or eliminate threats to the species and its habitat on BLM lands in New Mexico." Additionally, a Texas plan, which included a conservation agreement and habitat conservation plan, would encourage development to occur away from lizard habitat and place a cap on total habitat loss. Based on the Policy, FWS determined the voluntary efforts of New Mexico and Texas to be "sufficiently 'certain to be implemented and effective,' … to be relied upon in determining whether listing was appropriate," as provided by the Policy. Accordingly, FWS was satisfied that the plans' "monitoring and reporting requirements would ensure conservation measures are implemented as planned and are effective at removing threats to the lizard and its habitat." On this basis, although the 2010 listing proposal had been appropriate based on the information available at the time, FWS determined that withdrawal of the proposed listing was now appropriate.

Appellants unsuccessfully challenged FWS's decision to withdraw the listing, and the U.S. District Court for the District of Columbia granted summary judgment in favor of FWS. (*Defs. Of Wildlife v. Jewell*, 70 F.Supp.3d 183, 199 (D.D.C. 2014).) Appellants thereafter appealed to the D.C Circuit Court of Appeals.

The appellate court first considered appellants' second argument, that the FWS's listing withdrawal decision was arbitrary and capricious in that "the decision unreasonably elevates unenforceable, voluntary state agreements over the ESA's required consideration of the adequacy of 'existing regulatory mechanisms.'" Appellants argued that even if the Texas plan satisfied the requirements of the Policy, FWS was still required to evaluate whether the withdrawal decision complied with the ESA, because the criteria in the Policy was not a substitute for evaluation under the statute. According to appellants, a voluntary conservation agreement should be analyzed under both the Policy and ESA criteria concerning the inadequacy of existing regulatory mechanisms and before the agreement could affect a listing decision.

The appellate court determined that appellant's argument that FWS unlawfully considered "'voluntary' actions and 'unenforceable restrictions'" was essentially a challenge to FWS's interpretation of the Policy, which does allow for consideration of voluntary agreements. The court further noted, however, that in their district court pleadings, appellants had stated that they were not challenging the Policy itself and whether or not it violated the ESA, but were only challenging FWS's application of the Policy to the lizard. Appellants' district court pleadings additionally explained that their challenge was as to "'whether the Texas and New Mexico Agreements were "sufficiently certain to be implemented and effective."'" Indeed, when the district court granted summary judgment in favor of FWS, that court had noted that appellants had expressly waived any argument challenging the Policy.

However, appellants had nevertheless attempted to repackage this same contention in their reply brief on appeal, again stating that they were not challenging the Policy, but instead arguing that FWS could not rely on "an agreement or mechanism, regulatory or otherwise," that would be rejected under the ESA as speculative and uncertain. In response, the appellate court found that appellants had simply rephrased the statutory challenge to the Policy that they had affirmatively waived in the district court. Accordingly, the appellate court concluded that it would not now determine whether the Policy's criteria for evaluating voluntary conservation agreements was consistent with the ESA, and held that because appellants had waived this challenge in the district court, they could not now argue it on appeal.

Having dispensed with the first argument, the court considered appellants' challenge to FWS's application of the Policy in considering whether to withdraw the listing of the endangered lizard. In doing so, in light of the court's holding in the first argument, the court limited its review to a determination of whether FWS's consideration of the Texas plan in making the withdrawal decision was arbitrary and capricious. Here, appellants argued that FWS did not establish that the Texas plan was "sufficiently certain to be implemented and effective" as required by the Policy. Appellants contended that the lack of an implementation schedule did not provide the appropriate level of certainty

required to demonstrate that the plan would achieve the needed level of voluntary participation. And appellants argued that based on the effectiveness criteria, the Texas plan did not reduce specific threats to the lizard or achieve required incremental objectives.

The court found that there was substantial evidence in the record to show that the level of participation in the plan would be high and consistent with levels necessary for the lizard's survival. In response to concerns that failing to list the lizard would cause current enrollees to opt out of the plan, the court noted that the threat of listing the lizard would remain, and that such an occasion was provided for in the withdrawal notice. In sum, the notice provided that if "enrollment in the voluntary agreements declined substantially," if there were "noncompliance issues with the conservation measures," or if there were "new or increasing threats," FWS could reinitiate listing procedures. Because FWS had determined that any potential for incentive to disenroll from the plan could be addressed by listing the lizard, and that a high level of participation in Texas was likely based on the efforts in New Mexico, the court held that appellants had not shown that it was arbitrary or capricious for FWS not to have gone beyond the Policy in its evaluation of the Texas plan.

As to appellants' contentions that FWS should have required specified enrollment goals in the Texas plan, the court found that appellants had failed to raise this argument in the district court and thus had forfeited it on appeal. And appellants further failed to argue below that the Policy required FWS to separately analyze the level of participation "by mineral and surface estate holders" in the Texas plan, thus forfeiting that argument as well. In any event, the record had shown that FWS had considered this problem, and nevertheless concluded that overall enrollment would be high.

In response to the lack of an implementation schedule, the court held that FWS had recognized that issue as well, and had nevertheless concluded that the plan had "'sufficient structures, regulatory mechanisms, and planning to achieve the necessary conservation benefit.'" The plan included some "schedule-like elements," including specified habitat loss limits at certain points in time.

As to the plan's implementation, therefore, the court held that FWS's determination that the Texas plan was sufficiently certain to be implemented was not arbitrary and capricious.

In addition, appellants argued that FWS had "failed to analyze how the Texas plan reduces specific threats to the lizard and to identify explicit incremental objectives for the conservation effort." FWS maintained that the plan's effectiveness is shown by the fact that it: "(1) prioritizes avoidance of habitat loss; (2) limits (on a percentage basis) overall habitat loss; (3) specifically identifies efforts to remove threats to shinnery oak

(removal of mesquite and moving of oil-and-gas infrastructure); (4) identifies efforts to eliminate other threats like predator perches and threats from roads; (5) requires each individual certificate to list conservation measures specific to each site; and (6) details provisions for mitigation and adaptive management, both of which should ensure active management and monitoring of the conservation effort." The court concluded that appellants had failed to show these conclusions by FWS were arbitrary or capricious.

Appellants had also claimed that FWS should have better predicted whether the caps on habitat loss imposed by the plan would reduce the threat to the lizard. Finding that predicting the future status of wildlife was a difficult task, the court found that deference to FWS's expertise in evaluating the relevant scientific data was appropriate, and that appellants had offered no superior evidence that FWS should have considered. Moreover, if such loss is unavoidable under the plan, "[T]hose engaging in the loss must 'adopt conservation measures that minimize habitat impacts, and as a last resort, mitigate for the loss of lizard habitat.'" FWS found there would be a "high degree of certainty that the biological objectives will be accomplished through implementation, research, and then adjustment of the strategy, as appropriate."

Finally, the court concluded that while the Texas plan was not foolproof, FWS's evaluation of its adequacy involved its "judgment based on its expertise and experience." Because appellants failed to show that FWS's exercise of that judgment in relying on the Texas plan was arbitrary and capricious, the appellate court affirmed in favor of FWS.