# **RECENT CASE DECISION: ENVIRONMENTAL REGULATION**

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**Reporter**

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**Text**

**[\*708]** *Federal*

*Sw. Org. Project v. U.S. Dep't of the Air*, 2021 WL 965478 (D.N.M. March 15, 2021).

Plaintiffs along with other entities filed for injunctive relief to "abate and mitigate endangerment" under the Resource Conservation and Recovery Act against the Defendant, a United States agency. The defendants allegedly have operated a fueling facility which has continued to store fuels of different kinds at the Kirtland Air Force Base. There was discovery of a fuel leak contamination in November 1999, which led the NM Environment Department to further investigate. The investigation found that the leak has "created a plume of contaminated soil and groundwater extending...off the Kirtland Air Force Base property beneath a residential neighborhood." Plaintiffs seek injunctive relief against the defendant for the present and past handling of the fuel leak.

Defendants filed a motion to dismiss stating that the court lacks subject-matter jurisdiction pursuant to Rule 12(b)(1). Further, the defendants argue that pursuant to the Primary Jurisdiction Doctrine, the court should defer to **[\*709]**the NM Environment Department's Expertise in regulating the defendant's actions. The court granted the defendants motion on the grounds that it did not have subject-matter jurisdiction over the plaintiff's claim under the RCRA. The court relied on the following two findings, the plaintiffs did not advance their claim properly under the RCRA, and the action of exercising jurisdiction would "severely undermine the RCRA's limited judicial review provisions under 42 U.S.C. § 6976(b)." The court further found that the appropriate measure would be to defer to the NM Environment Department pursuant to the Primary Jurisdiction Doctrine. The court found that the issues presented were outside the realm of the judge's experience, which would result in an undue delay and burden on both parties. Additionally, that the regulatory action would be best served by the NM Environment Department which includes their scientific and technical experience. The defendant's motion to dismiss is granted.

*WildEarth Guardians v. Wehner*, No. 17-cv-00891-RM, 2021 WL 915931 (D. Colo. Mar. 10, 2021)

Petitioners WildEarth Guardians and the Center for Biological Diversity (collectively "WildEarth") brought this action under the Administrative Procedure Act ("APA") seeking a declaration that Wildlife Services and relevant federal departments, have violated the National Environmental Policy Act ("NEPA").

The court review was highly deferential to the agency, in this case, Wildlife Services' Colorado branch ("WS-Colorado"), unless the agency decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

WildEarth claimed that WS-Colorado did not take a "hard look" at the environmental impacts of the predator damage management ("PDM"). Because NEPA only imposes procedural instead of substantive requirements on an agency action, the court found that WS-Colorado followed the procedure prescribed under NEPA regarding lethal PDM activities. Furthermore, the environmental assessment ("EA"), issued by WS-Colorado, explicitly considered the impacts of ***oil*** and gas development on animal habitats. WS-Colorado also has sufficiently reviewed factors contributing to increased black bear and human conflicts under NEPA, and relied on a scientific study regarding coyote density in Colorado. Therefore WS-Colorado had a rational basis and considered relevant factors sufficiently in reaching its determination, thus satisfied NEPA's "hard look" requirement.

**[\*710]**WildEarth also claimed that WS-Colorado was required but failed to prepare an environmental impact statement ("EIS"). The court determined whether EIS is necessary based on whether the agency had a rational basis in analyzing environmental effects and took into consideration the relevant factors. WildEarth failed to show an EIS was required on either of following five factors: (1) cumulative impact on target predator populations, (2) human health and safety, (3) ecologically critical areas, (4) highly controversial and uncertain risks, (5) endanger protected species. Therefore, the court found WS-Colorado's evaluation of the significance factors was not arbitrary or capricious, and denied WildEarth' petition for review.

*Center for Biological Diversity v. United States Forestry Service*, 2021 WL 855938 (S.D. Ohio March 8, 2021).

This is a sequel case to a previous decision that found the Forestry Service had failed to take a "hard look" at the impact of fracking in the Wayne National Forest prior to granting leases. The parties were to brief on the availability of remedies besides complete vacatur or remand, and they came back with conflicting views on whether to apply the Allied-Signal Test advanced by the Service, while Organizations claimed agency actions that violated the National Environmental Policy Act must be vacated. Allied-Signal stated that a two-factor balancing test that looks at the seriousness of deficiencies and disruptive consequences of an interim change that may itself be changed to determine if vacatur is appropriate. Ordinarily, Organizations are right. However, this court agreed with Service, and chose to adopt Allied-Signal like so many other courts had already done. Under Allied Signal, courts have found defendants/parties opposing vacatur bear the burden to show that compelling equities demand anything less than vacatur. In addressing the first part of Allied-Signal, the court agreed with Organizations that seriousness of defect should be measured by the effect the error had in contravening the relevant statute, and that Organizations concern that keeping the leases and only requiring the hard look be done risks the Service not properly conducting the review was valid, but still found for Service as a serious possibility the agency could substantiate its decision existed. Service also stated that there would be serious economic disruptions if the leases were vacated due to revealed bidding strategies and wasted funds in ***oil*** exploration by bidders, which the court found outweighed the Organizations concerns on pure economic harms being insufficient to deny vacatur.

**[\*711]** *N. Cascades Conservation Council v. United States Forest Serv.*, No. 220CV01321RAJBAT, 2021 WL 871421 (W.D. Wash. Mar. 9, 2021).

Conservations challenged a tree thinning and construction Project, alleging violations of the National Environmental Policy Act and National Forest Management Acts. This opinion addresses two Contractors' motion to intervene as defendants. The Project requires 3,000 to 4,000 acres of thinning and about thirty miles of road construction. The Project has three contracts to take care of this work. Both Contractors each have one of these contracts. The United States District Court for the Western District of Washington granted Contractors' motion to intervene for the following reasons: Contractors' motion was timely, their contracts were significant protectable interests, Contractors' only way to protect those interests would be by actively participating, and Contractors were not adequately represented by existing parties. The contracts were protectable interests (1) because of their contractual nature; (2) because as users of public timber, they had a broad interest in any lawsuit that could hurt their ability to obtain timber; and (3) because they had interests in forest health and community resilience that are cognizable under Rule 24 of the Federal Rules of Civil Procedure.

*United States v. Acquest Transit LLC*, No. 09-CV-55S, 2021 WL 809984 (W.D.N.Y. Mar. 3, 2021).

In 2009, the Government filed suit against Contractor for violating the Clean Water Act ("CWA") by disposing of fill from Contractor's property into waters of the United States. The United States District Court for the Western District of New York issued a preliminary injunction against Contractor because it found they were dumping into water that was connected to "waters of the United States" by man-made ditches. At the time, man-made ditches were allowed to connect water to "waters of the United States" for purposes of jurisdiction under CWA. Before the court is an issue arising from a recent change in the definition of "waters of the United States." The Navigable Waters Protection Rule ("NWPR") (effective June 22, 2020) does not allow man-made ditches to connect bodies of water to satisfy the definition of "waters of the United States." Contractor moved to dismiss counts one and three of the amended complaint because Contractor believed the NWPR applied retroactively to this case, therefore the water in question would be excluded from CWA jurisdiction since it was connected by man-made ditches. Government argued that the NWPR only applied prospectively and did not affect this case. The court agreed, finding that the NWPR cannot be applied **[\*712]**retroactively because it created new regulation rather than clarified existing law. Therefore, the Government's claims did not automatically lack jurisdiction. The court denied Contractor's motion to dismiss because findings of fact need to be made to determine the navigability of the water in question for purposes of CWA jurisdiction. The court also ordered the trial to be bifurcated with a jury trial to determine whether Contractor is liable under CWA, and if so, a bench hearing will determine the punishment.

*Taylor Energy Co. v. Dep't of the Interior*, 990 F.3d 1303 (Fed. Cir. 2021)

After Hurricane Ivan irreparably damaged Lessee's offshore ***oil*** well operations, Lessee entered into statutorily required decommissioning operations, placing funding into trusts for the Department of the Interior ("DOI") to disburse. The agreements required Lessee to seek insurance reimbursements, which would offset Lessee's required deposits, but also stated Lessee could not receive funding disbursements for such amounts as reimbursed by insurance. Lessee proposed to DOI a full and final deposit into the trust account, without any deposit offsets, but that Lessee would then keep all insurance proceeds and reimbursements received for work performed. DOI rejected the proposition because Lessee "(1) must make the full deposit due because [Lessee] had 'not yet completed any phased of the [work]; and (2) must reimburse the trust account for any disbursements [Lessee] received that duplicated reimbursement from [Lessee's] insurance company. The DOI also rejected another request for some delay in labor costs. Lessee appealed both decisions to the Interior Board of Land Appeals (IBLA), which affirmed in favor of DOI. In the District Court, Lessee sought judicial reversal of IBLA's decisions as "arbitrary, capricious, contrary to law and an abuse of discretion," and sought breach of contract relief in a related suit in the Claims Court on the same facts. The Claims Court dismissed its case for lack of subject matter jurisdiction, but Lessee then moved to transfer the district court action to the Claims Court and the district court granted the motion. DOI appealed the transfer order. The appeals court determined that under the Administrative Procedure Act, the IBLA decision is binding on the claims court, that claims court could not provide an adequate remedy, and Lessee may only seek judicial review of ILBA decisions in district court in order to recover any money damages.

**[\*713]** *S.G. v. City of Los Angeles*, No. LA CIV17-09003, 2021 WL 911254 (C.D. Cal. Feb. 4, 2021).

Students sued City of Los Angeles and city developers ("City") seeking declaratory relief; statutory relief, and injunctive relief requiring City to consider needs of people with disabilities affected by development projects and prohibiting City from continuing to engage in the practices complained of, and seeking punitive damages. City planned and approved a construction project that was immediately adjacent to the school Students attend, which is a participant school in the Deaf and Hard of Hearing ("DHH") program. Students alleged violations of the Americans with Disabilities Act ("ADA"); 42 U.S.C. §§ 12131, *et. seq.*, the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794; violations of the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983; violation of the First Amendment, pursuant to 42 U.S.C. § 1983; violation of the Unruh Act, Cal. Civ. Code §§ 51-53; violations of the California Constitution, art. I, §§ 2 and 7; negligence under Cal. Civ. Code §§ 1714 and 3333, and Cal. Government Code § 815.2; and violation of mandatory duties. The court dismissed or denied all claims. The court applied narrow interpretation of licensing and permitting regulations. It applied forum analysis to dismiss the First Amendment claim but also noted the issue was dismissed without prejudice to the extent of a qualified immunity issued on factual record. The court applied due process and municipal liability to the Fourteenth Amendment claims, dismissing them lacking the necessary substantive predicates or mandatory language. The court dismissed the state law claims due to lack of any allegations that were not conclusory in nature, and no substantive allegations showing breach of mandatory duty. The court did leave open for Students' revision of their claim on the single issue of City's claim of immunity. This case has since been appealed, but there is no decision from the higher court as of publication.

*Sierra Club v. Dep't of the Interior*, 990 F.3d 898 (5th Cir. 2021).

A wildlife advocacy organization ("Organization") challenged a Department of the Interior Fish & Wildlife Service ("DOI") biological opinion and incidental take statement authorizing "harm or harassment" of one ocelot in connection with a natural gas pipeline project. The issue before the court was whether the decision was arbitrary and capricious, and whether the DOI complied with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, in its authorization decision determining the project was unlikely to jeopardize the cat's life. Per the ESA, an incidental take statement, specifying the extent of impact, is required when the agency **[\*714]**determines the action will not endanger the life of the animal but will result in harm or harassment. Incidental takes are permissible if conditions are reasonable and prudent measures designed to minimize the extent of the take. The court reviewed the incidental take statement under the Administrative Procedure Act's narrow and highly deferential standard to determine whether it is arbitrary, capricious, an abused of discretion, or otherwise not in accordance with law. The court held the take statement was not arbitrary or capricious because it clearly specified the anticipated take of the cat, set a clear and enforceable re-initiation trigger, and provided for action in the event of the cat's death. The court also rejected Organization's challenge of the DOI's finding of no jeopardy to the cat's life, finding DOI appropriately came to this conclusion after its formal consultation process and evaluations of the direct and indirect impacts of the action on the cats against the applicable environmental baseline. The court noted that the DOI took all required actions and made all required considerations such that its decision could not reasonably be classified as arbitrary and capricious, particularly under the highly deferential legal standard of review.

***Kern******Oil*** *& Ref. Co. v. U.S. Envtl. Prot. Agency*, 840 Fed.Appx. 188 (9th Cir. 2021).

Company seeks review of an EPA decision granting an application for "small refinery exemption" under the Renewable Fuel Standard program. EPA contends that the matter should be remanded because EPA failed to provide an explanation for its remedy decision. Therefore, the court orders EPA to determine an appropriate remedy for ***Kern*** within 90 days of this order. Further, the court denies ***Kern***'s request for an order for the EPA to provide a specific remedy.

*U.S. v. Dico, Inc.*, 4:10-cv-00503, 2021 WL 351993 (S.D. Iowa Feb. 1, 2021).

This Motion to Enter Consent Decree originates out of two major judgements against Original Owner and Subsequent Purchaser of a property which is now an EPA superfund site. In 1974, the EPA found TCE in the Des Moines water supply and traced it back to Owner's property. EPA, via CERCLA, created a superfund site which is nowhere near completion at present date. A judgement was set against them including a multi-million-dollar judgement. In 1994, PCB's were discovered in Owner's buildings and the EPA ordered repair, capsulation, and maintenance of the buildings to prevent further leaks. Purchaser later sold the building materials to a **[\*715]**Third Party which demolished and repurposed some of the condemned material. The EPA discovered this grievance a year later and moved for another judgement which was filed in 2010 and finalized in 2017. At the time of this case Purchaser had made no attempt to settle either judgment fine. In September 2020, the EPA lodged a proposed Consent Decree with the court to settle all outstanding claims and fines as one with additional procedural compliance. The court affirmed the order based on a four-part approval test. (1) Procedural Fairness -- The court found no issues in the negotiation process. (2) Substantive Fairness -- The court found that since the fines/procedures had been settled once before there was no issue here. (3) -- Reasonableness -- The court initially showed skepticism of the settlement but after weighing the costs against the interest of the public and finally settling the case they approved it. (4) -- Consistency with CERCLA -- The court found no issues in this area. The court found this settlement as "fair, adequate, and reasonable" while protecting the public interest. The order was approved.

*Backes v. Bernhardt*, No. 1:19-CV-00482-CL, 2020 WL 906313 (D. Or. Feb. 24, 2020).

Mine Operators brought a cause of action challenging the final decision by the Bureau of Land Management ("BLM") and the Internal Board of Land Appeals ("IBLA"). The Mine Operators received two Noncompliance Notices from BLM claiming they violated BLM regulations regarding mining operation and occupancy of public land, seemingly signed by a "Jim Bell." Mine Operators submitted a Freedom of Information Act request to determine the identity of the person, Jim Bell, who acted on behalf of BLM, alleging no one associated with the name "Jim Bell" worked at the local BLM offices where the notices originated from. Mine Operators did not raise the issue of the signature on the Noncompliance Notices during administrative proceedings. Discovery is typically not permitted in APA judicial proceedings; however, there are four exceptions. Mine Operators claimed the second exception -- "necessary to determine whether the agency has relied on documents not in the record" -- and the fourth exception -- "a plaintiff makes a showing of agency bad faith" -- applied in their situation. The court found that the signature was not a factor in IBLA's decision, therefore IBLA did not rely on documents not in the record to make its decision. The court also found no evidence of bad faith because BLM provided good reason for not disclosing the identity of the signer. Mine Operators claim BLM failed to properly delegate the authority to sign the **[\*716]**Noncompliance Notice. There is no statute that creates a duty to delegate the signatory authority and therefore there is no legal basis for the claim.

*State*

*Dorrell v. Woodruff Energy, Inc*, 2021 WL 922446 (N.J. Super. App. Div. March 11, 2021).

Individual owned a store and while preparing to sell the property, discovered it had been contaminated with petroleum products, with kerosene or fuel ***oil*** being undisputed as contaminants. Under the New Jersey Spill Compensation and Control Act (Spill Act), plaintiff claimed that Company 1 and Company 2 were persons "in any way responsible for the hazardous substances found" and therefore liable. Company 1 did deliver fuel ***oil*** to a one thousand gallon above ground storage tank (AST) in the store's dirt floor basement and a leak from this tank is undisputed, Company 2 is alleged to have delivered gasoline to three underground storage tanks (UST) that were later removed or abandoned. The disputed facts came from Individuals expert witness with a degree in earth science that had done site remediation work in the past. The trial court certified him as an expert in investigating subsurface conditions, but not to identify specific contaminants. The trial court later appeared to reopen the question on whether the expert could identify contaminants but never resolved that question. The trial court found that no evidence necessarily linked Company 1 with the leak in the basement and Company 2 had more likely than not delivered gasoline to the other three tanks, relying on plaintiff's expert testimony as no other defense experts found gasoline on the site. Individual appealed, and lost, claiming that trial court applied to high a burden on her claims against Company 1. Appeals court said that the trial had quoted the controlling case and applied the correct standard. Company 2 also appealed, and won a remand, on the qualifications of the plaintiff's expert as the plaintiff had never properly established their expert's qualifications as required.

*State by Smart Growth Minneapolis v. City of Minneapolis*, 954 N.W.2d 584 (Minn. 2021).

Interest Groups filed petition alleging that City's "scheduled approval of comprehensive plan violated Minnesota Environmental Plan Act (MERA)." The District Court granted City's motion to dismiss and Interest Groups appeal. The Court reverses the District Court's holding and finds that City's comprehensive plan under Metropolitan Land Planning Act (MEPA) **[\*717]**violates the MERA because it will likely cause materially adverse environmental results. The MERA was enacted to "provide every person 'with an adequate civil remedy to protect air, water, land and other natural resources ... from pollution, impairment, or destruction.'" (internal citation omitted). To Court clarifies that "pollution, impairment, or destruction" is defined as any action "by any person ... which materially adversely effects or is likely to materially adversely affect the environment." Following the enactment of the MERA, the legislature passed three additional environmental acts " 'to complement the MERA,' one of which was the MEPA." The MEPA was passed with the purpose of requiring entities to prepare an impact statement when "there is potential for significant environmental effects." The issue before the Court is whether the exemption of comprehensive plans under MEPA means that comprehensive plans are exempt from actions brought under the MERA. The Court notes that this is a question of statutory interpretation. Precedent leads the Court to determine that MERA will not be applied broadly absent " *express* statutory language form to that effect" and there is no express language exempting MEPA from review under MERA. Therefore, MEPA does not prevent comprehensive plans from being reviewed under MERA. The Court also considered whether Interest Group's petition "sets forth a legally sufficient claim for relief." Because the facts in the petition, if true, provide grounds for relief, the District Court erred in dismissing Interest Group's petition.

*State v. Bedford LLC*, 137 N.Y.S. 3d 248 (Misc. 2020).

This order arises out of a continuous litigation between State and Property Owner regarding the cleanup of a "Brownfield" site. The Owner had no reason to believe that contaminates had passed through and/or were dumped on the property and that it had contributed to the plume in the area. However, State informed them of differing findings and that there was a high chance of it. Owner had the choice of investigating themselves or reimbursing State following the State's investigation. The owners eventually chose to join the cleanup program as a volunteer and not participant. The important distinction being that Volunteers are not liable for offsite contamination and/or cleanup while participants are. The State subsequently accepted the application but made Owner a participant, against their applications intentions. Litigation continued regarding this and other issues, mostly pertaining to access to the property for testing by State and the classification of Owner. Under the agreement the State has the ability to investigate and monitor Brownfield sites as needed and can **[\*718]**upgrade the site to a State Superfund site, however, Owner disagrees since they contend they did not agree to these terms and is outside the State's powers through various statutes. The parties had differing expert opinions on the flow origin; however, the court focuses on the undisputed fact that there are high levels of contaminants. The court holds that no evidentiary trial is needed since by allowing access the State could resolve most issues. The Owner is ordered to allow and facilitate the access and testing by the State to further determine issues. This is granted because the State does have statutory power to do so and they did not have to prove that it was contaminated since that was undisputed.

*Tenn. Dep't Of Env't and Conservation v. Roberts*, No. M2020-00388-COA-R3-CV, 2021 WL 388611 (Tenn. Ct. App. Feb. 3, 2021).

Original case concerned the Department putting in an order for fund recovery from Property Owners. Owners had uncovered rusted-out ***oil*** tanks when renovating the property and smelled petroleum. Department cleaned up and destroyed contaminants and filed for fund recovery. The original administration judge found that Owners were "responsible parties" and the release "occurred" upon discovery. Tanks had been covered and abandoned prior the Owners' purchase of the property. Owners appealed to the Board and an administrative judge ordered differing interpretations and reversed. Department appealed to the trial court which then reversed the second judge by finding an abuse of discretion and scope. Question on appeal on what the judge "when sitting with the board" can decide and/or advise the full board on. Board has full power to change initial orders dependent on the proper application of the legal framework. A judge who is sitting with the board can interpret or decide procedural questions of law. However, broad deference must be given to the initial judge regarding evidence since they act like that of "a trial judge in a civil action." Therefore, the Board is only able to rule on the record and not decide evidentiary standards. Sitting board judges are allowed to decide procedural questions only not decide the substantive legal issues brought up. Darnell was found to have overstepped his power and scope by deciding new interpretations of "occurrence" and "responsible party". He also erred in barring the Department from arguing alternative theories. The sitting judge does have the absolute ability to inform the board of their theory or alternative theories but may not decide the issues for the board itself. Decision was affirmed in part, reversed in part, and remanded for further proceedings.

**[\*719]** *Beer v. New York State Dep't. of Envtl. Conservation*, 189 A.D.3d 1916 (2020).

Department of Environmental Conservation ("DEC") issued a water withdrawal permit to Town of New Paltz ("Town") to develop new water well with the Village of New Paltz ("Village"). The purpose of the project was to supply another water source to Catskill Aqueduct customers during planned outages. Beer, representing property owners in the area, sought to cancel the permit issued by DEC for the new well on both procedural and substantive grounds.

Procedurally, Beer claimed DEC altered the proposed plan after the required 15-day public comment period by imposing new conditions on development. Substantively, Beer claimed the proposal did not satisfy the statutory requirements under ECL 15-1503(2) and failed to consider the well's proximity to a nearby sand and gravel mine.

DEC asserted that Beer was collaterally estopped from bringing the claims and that the claims were time barred. New York's Supreme Court, Appellate Division, agreed with DEC on both the procedural and substantive claims. The standard of review for administrative decisions is a lack of rational basis or whether the decision was arbitrary and capricious.

The court held that the conditions imposed after the public comment period were not substantial and did not constitute a modification. Beer failed to show that DEC lacked a rational basis for the conditions. On the substantive claims, the court held that Beer's challenge was properly dismissed as untimely and barred by collateral estoppel because of the four-month statute of limitations. Additionally, the court held that the mining activity was above the water table and no rational basis existed to modify the mining permits because of the new water permit.

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