Chapter 13
ENVIRONMENTAL PROTECTION

§ A ENVIRONMENTALLY SENSITIVE LAND

Although the line between environmental and land use controls is hardly bright (as the United States Supreme Court's many opinions in the *Granite Rock* case in this chapter amply demonstrate), some land use regulations are more clearly designed to improve environmental conditions than others. Indeed, many of the cases in this section often find their way into environmental law texts as often as in land use and property texts. Nevertheless, it is difficult to appreciate the full spectrum which the law of property embraces without at least some introduction to the protection of coastal areas, land use implications of the Clean Air, Clean Water, and Superfund statutes, growth management, and public land law. The cases which follow are designed to provide this introduction. They are neither the most recent nor, for the most part, the most famous. They are, however, among the most fundamental.

[1] GROWTH MANAGEMENT AND CONTROL

CONSTRUCTION INDUSTRY ASS'N OF SONOMA COUNTY v. CITY OF PETALUMA

United States Ninth Circuit Court of Appeals
522 F.2d 897 (9th Cir. 1975)

CHOY, CIRCUIT JUDGE.

The City of Petaluma (the City) appeals from a district court decision voiding as unconstitutional certain aspects of its five year housing and zoning plan. We reverse.

Statement of Facts

The City is located in southern Sonoma County, about 40 miles north of San Francisco. In the 1950s and 1960s, Petaluma was a relatively self-sufficient town. It experienced a steady population growth from 10,315 in 1950 to 24,870 in 1970. Eventually, the City was drawn into the Bay Area metropolitan housing market as people working in San Francisco and San Rafael became willing to commute longer distances to secure relatively inexpensive housing available there. By November 1972, according to unofficial figures, Petaluma's population was at 30,500, a dramatic increase of almost 25 per cent in little over two years.

The increase in the City's population, not surprisingly, is reflected in the increase in the number of its housing units. From 1964 to 1971, the following number of residential housing units were completed:

1968 — 379 1964 — 270

1969 — 358 1965 — 440
1970 — 591 1966 — 321
1971 — 891 1967 — 234

In 1970 and 1971, the years of the most rapid growth, demand for housing in the City was even greater than above indicated. Taking 1970 and 1971 together, builders won approval of a total of 2000 permits although only 1482 were actually completed by the end of 1971.

Alarmed by the accelerated rate of growth in 1970 and 1971, the demand for even more housing, and the sprawl of the City eastward, the City adopted a temporary freeze on development in early 1971. The construction and zoning change moratorium was intended to give the City Council and the City planners an opportunity to study the housing and zoning situation and to develop short and long range plans. The Council made specific findings with respect to housing patterns and availability in Petaluma, including the following: That from 1960-1970 housing had been in almost unvarying 6000 square-foot lots laid out in regular grid patterns; that there was a density of approximately 4.5 housing units per acre in the single family home areas; that during 1960-1970, 88 per cent of housing permits issued were for single-family detached homes; that in 1970, 83 per cent of Petaluma's housing was single-family dwellings; that the bulk of recent development (largely single-family homes) occurred in the eastern portion of the City, causing a large deficiency in moderately priced multi-family and apartment units on the east side.

To correct the imbalance between single-family and multi-family dwellings, curb the sprawl of the City on the east, and retard the accelerating growth of the City, the Council in 1972 adopted several resolutions, which collectively are called the "Petaluma Plan" (the Plan).

The Plan, on its face limited to a five-year period (1972-1977), fixes a housing development growth rate not to exceed 500 dwelling units per year. Each dwelling unit represents approximately three people. The 500-unit figure is somewhat misleading, however, because it applies only to housing units (hereinafter referred to as "development-units") that are part of projects involving five units or more. Thus, the 500 unit figure does not reflect any housing and population growth due to construction of single family homes or even four-unit apartment buildings not part of any larger project.

The Plan also positions a 200 foot wide "greenbelt" around the City, to serve as a boundary for urban expansion for at least five years, and with respect to the east and north sides of the City, for perhaps ten to fifteen years. One of the most innovative features of the Plan is the Residential Development Control System which provides procedures and criteria for the award of the annual 500 development unit permits. At the heart of the allocation procedure is an intricate point system, whereby a builder accumulates points for conformity by his projects with the City's general plan and environmental design plans, for good architectural design, and for providing low and moderate income dwelling units and various recreational facilities. The Plan further directs that allocations of building permits are to be divided as evenly as feasible between the west and east sections of the City and between single family dwellings and multiple residential units (including rental units), that the sections of the City closest to the center are to be developed first in order

to cause "infilling" of vacant area, and that 8 to 12 per cent of the housing units approved be for low and moderate income persons.

In a provision of the Plan, intended to maintain the close in rural space outside and surrounding Petaluma, the City solicited Sonoma County to establish stringent subdivision and appropriate acreage parcel controls for the areas outside the urban extension line of the City and to limit severely further residential infilling.

Purpose of the Plan

The purpose of the Plan is much disputed in this case. According to general statements in the Plan itself, the Plan was devised to ensure that "development in the next five years, will take place in a reasonable, orderly, attractive manner, rather than in a completely haphazard and unattractive manner." The controversial 500 unit limitation on residential development units was adopted by the City "[i]n order to protect its small town character and surrounding open space." The other features of the Plan were designed to encourage an east-west balance in development, to provide for variety in densities and building types and wide ranges in prices and rents, to ensure infilling of close in vacant areas, and to prevent the sprawl of the City to the east and north. The Construction Industry Association of Sonoma County (the Association) argues and the district court found, however, that the Plan was primarily enacted "to limit Petaluma's demographic and market growth rate in housing and in the immigration of new residents." *Construction Industry Ass'n v. City of Petaluma*, 375 F. Supp. 574, 576 (N.D. Cal. 1974).

Market Demand and Effect of the Plan

According to undisputed expert testimony at trial, if the Plan (limiting housing starts to approximately 6 per cent of existing housing stock each year) were to be adopted by municipalities throughout the region, the impact on the housing market would be substantial. For the decade 1970 to 1980, the shortfall in needed housing in the region would be about 105,000 units (or 25 per cent of the units needed). Further, the aggregate effect of a proliferation of the Plan throughout the San Francisco region would be a decline in regional housing stock quality, a loss of the mobility of current and prospective residents and a deterioration in the quality and choice of housing available to income earners with real incomes of $14,000 per year or less. If, however, the Plan were considered by itself and with respect to Petaluma only, there is no evidence to suggest that there would be a deterioration in the quality and choice of housing available there to persons in the lower and middle income brackets. Actually, the Plan increases the availability of multi-family units (owner occupied and rental units) and low-income units which were rarely constructed in the pre-Plan days.

Other Challenges to the Plan

Although the district court rested its decision solely on the right to travel claim, all the facts and legal conclusions necessary to resolve appellees' other

claims are part of the record. Thus, in order to promote judicial economy, we now dispose of the other challenges to the Plan.

Substantive Due Process

Appellees claim that the Plan is arbitrary and unreasonable and, thus, violative of the due process clause of the Fourteenth Amendment. According to appellees, the Plan is nothing more than an exclusionary zoning device,[1] designed solely to insulate Petaluma from the urban complex in which it finds itself. The Association and the Landowners reject, as falling outside the scope of any legitimate governmental interest, the City's avowed purposes in implementing the Plan the preservation of Petaluma's small town character and the avoidance of the social and environmental problems caused by an uncontrolled growth rate.

In attacking the validity of the Plan, appellees rely heavily on the district court's finding that the express purpose and the actual effect of the Plan is to exclude substantial numbers of people who would otherwise elect to move to the City. The existence of an exclusionary purpose and effect reflects, however, only one side of the zoning regulation. Practically all zoning restrictions have as a purpose and effect the exclusion of some activity or type of structure or a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose.[2] We must determine further whether the Exclusion bears any rational relationship to a legitimate state interest. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged

[1] "Exclusionary zoning" is a phrase popularly used to describe suburban zoning regulations which have the effect, if not also the purpose, of preventing the migration of low and middle income persons. Since a large percentage of racial minorities fall within the low and middle income brackets, exclusionary zoning regulations may also effectively wall out racial minorities. *See generally* Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1969 U. TOL. L. REV. 65 (1969); Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

Most court challenges to and comment upon so called exclusionary zoning focus on such traditional zoning devices as height limitations, minimum square footage and minimum lot size requirements, and the prohibition of multi-family dwellings or mobile homes. The Petaluma Plan is unique in that although it assertedly slows the growth rate it replaces the past pattern of single family detached homes with an assortment of housing units, varying in price and design.

[2] Our inquiry here is not unlike that involved in a case alleging denial of equal protection of the laws. The mere showing of some discrimination by the state is not sufficient to prove an invasion of one's constitutional rights. Most legislation to some extent discriminates between various classes of persons, business enterprises, or other entities. However, absent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the classification does not bear a rational relationship to a legitimate state interest. *See Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250, 254 (9th Cir. 1974).

zoning regulation.[3] The reasonableness, not the wisdom, of the Petaluma Plan is at issue in this suit.

It is well settled that zoning regulations "must find their justification in some aspect of the police power, asserted for the public welfare." *Village of Euclid v. Ambler Realty Co.* The concept of the public welfare, however, is not limited to the regulation of noxious activities or dangerous structures. As the Court stated in *Berman v. Parker*:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

Accord, *Village of Belle Terre v. Boraas*.

In determining whether the City's interest in preserving its small town character and in avoiding uncontrolled and rapid growth falls within the broad concept of "public welfare," we are considerably assisted by two recent cases. *Belle Terre*, *supra*, and *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974), each of which upheld as not unreasonable a zoning regulation much more restrictive than the Petaluma Plan, are dispositive of the due process issue in this case.

In *Belle Terre*, the Supreme Court rejected numerous challenges to a village's restricting land use to one-family[4] dwellings excluding lodging houses, boarding houses, fraternity houses or multiple-dwelling houses. By absolutely prohibiting the construction of or conversion of a building other than a single-family dwelling, the village ensured that it would never grow, if at all, much larger than its population of 700 living in 220 residences. Nonetheless, the Court found that the prohibition of boarding houses and other multi-family dwellings was reasonable and within the public welfare because such dwellings present urban problems, such as the occupation of a given space by more people, the increase in traffic and parked cars and the noise that comes with increased crowds. According to the Court,

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.

416 U.S. at 9. While dissenting from the majority opinion in *Belle Terre* on the ground that the regulation unreasonably burdened the exercise of First

[3] Appellees' brief is unnecessarily oversize (125 pages) mainly because it is rife with quotations from writers on regional planning, economic regulation and sociological policies and themes. These types of considerations are more appropriate for legislative bodies than for courts

[4] The word "family" as used in the ordinance meant one or more persons related by blood, adoption or marriage, living together as a single housekeeping unit. Two or fewer persons living together, though not related by blood, adoption or marriage were considered a "family."

Amendment associational rights, Mr. Justice Marshall concurred in the Court's express holding that a local entity's zoning power is extremely broad:

> [L]ocal zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: *Restricting uncontrolled growth*, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly confined. And, it is appropriate that we afford zoning authorities *considerable latitude in choosing the means by which to implement such purposes.*

416 U.S. at 13–14, (Marshall, J., dissenting) (emphasis added) (citations omitted).

Following the *Belle Terre* decision, this court in *Los Altos Hills* had an opportunity to review a zoning ordinance providing that a housing lot shall contain not less than one acre and that no lot shall be occupied by more than one primary dwelling unit. The ordinance as a practical matter prevented poor people from living in Los Altos Hills and restricted the density, and thus the population, of the town. This court, nonetheless, found that the ordinance was rationally related to a legitimate governmental interest, the preservation of the town's rural environment and, thus, did not violate the equal protection clause of the Fourteenth Amendment.

Both the *Belle Terre* ordinance and the *Los Altos Hills* regulation had the purpose and effect of permanently restricting growth; nonetheless, the court in each case upheld the particular law before it on the ground that the regulation served a legitimate governmental interest falling within the concept of the public welfare: the preservation of quiet family neighborhoods (*Belle Terre*) and the preservation of a rural environment (*Los Altos Hills*). Even less restrictive or exclusionary than the above zoning ordinances is the Petaluma Plan which, unlike those ordinances, does not freeze the population at present or near-present levels. Further, unlike the *Los Altos Hills* ordinance and the various zoning regulations struck down by state courts in recent years, the Petaluma Plan does not have the undesirable effect of walling out any particular income class nor any racial minority group.[16]

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[16] Although appellees have attempted to align their business interests in attacking the Plan with legitimate housing needs of the urban poor and racial minorities, the Association has not alleged nor can it allege, based on the record in this case, that the Plan has the purpose and effect of excluding poor persons and racial minorities. *Cf. Board of County Supervisors of Fairfax County v. Carper*, 107 S.E.2d 390 (Va. 1959). Contrary to the picture painted by appellees, the Petaluma Plan is "inclusionary" to the extent that it offers new opportunities, previously unavailable, to minorities and low and moderate income persons. Under the pre-Plan system, single family, middle income housing dominated the Petaluma market, and as a result low and moderate income persons were unable to secure housing in the area. The Plan radically changes the previous building pattern and requires that housing permits be evenly divided between single family and multi-family units and that approximately eight to twelve per cent of the units be constructed specifically for low and moderate income persons.

In stark contrast, each of the exclusionary zoning regulations invalidated by state courts in recent years impeded the ability of low and moderate income persons to purchase or rent housing in the locality. *See, e.g.*, *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (zoned exclusively for single family, detached dwellings and multi-family dwellings designed for middle and upper income persons); *Oakwood at Madison, Inc. v. Township*

Although we assume that some persons desirous of living in Petaluma will be excluded under the housing permit limitation and that, thus, the Plan may frustrate some legitimate regional housing needs, the Plan is not arbitrary or unreasonable. We agree with appellees that unlike the situation in the past most municipalities today are neither isolated nor wholly independent from neighboring municipalities and that, consequently, unilateral land use decisions by one local entity affect the needs and resources of an entire region. It does not necessarily follow, however, that the due process rights of builders and landowners are violated merely because a local entity exercises in its own self interest the police power lawfully delegated to it by the state. *See Belle Terre*, *supra*; *Los Altos Hills*, *supra*. If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. As stated *supra*, the federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests.

We conclude therefore that under *Belle Terre* and *Los Altos Hills* the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.

Commerce Clause

The district court found that housing in Petaluma and the surrounding areas is produced substantially through goods and services in interstate commerce and that curtailment of residential growth in Petaluma will cause serious dislocation to commerce. Our ruling today, however, that the Petaluma Plan represents a reasonable and legitimate exercise of the police power obviates the necessity of remanding the case for consideration of appellees' claim that the Plan unreasonably burdens interstate commerce.

It is well settled that a state regulation validly based on the police power does not impermissibly burden interstate commerce where the regulation neither discriminates against interstate commerce nor operates to disrupt its required uniformity. *Huron Cement Co. v. Detroit*.

Consequently, [because] the local regulation here is rationally related to the social and environmental welfare of the community and does not discriminate against interstate commerce or operate to disrupt its required uniformity, appellees' claim that the Plan unreasonably burdens commerce must fail.

Reversed.

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of Madison, 283 A.2d 353 (N.J. App. Div. 1971) (minimum one or two acre requirement and severe limitation on multi-family units); *Appeal of Kit Mar Builders, Inc.*, 268 A.2d 765 (Pa. 1970) (two to three acre minimum lot size); *Appeal of Girsh*, 263 A.2d 395 (Pa. 1970) (prohibition of apartment buildings); *National Land & Investment Co. v. Kohn*, 215 A.2d 597 (Pa. 1965) (four acre minimum lot); *Board of County Supervisors of Fairfax County v. Carper*, 107 S.E.2d 390 (Va. 1959) (rezoning to minimum two acre lots with the effect of keeping poor in another section of municipality).

NOTES AND QUESTIONS

1. *The Legality of the Plan.* "Growth Management" now includes a variety of land use planning and control techniques, from population "caps" to simple plans. *See* E. KELLY, MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES AND IMPACTS (1993). How much does the legality of the technique depend upon plans and planning? What about population caps? Greenbelts, after *Lucas*? For a compendious collection of literature, cases, commentaries, and models, see GROWING SMART (2001), the work product of the American Planning Association's multi-million-dollar, multi-year project.

2. *Balancing the Plan with the Cost.* What about growth management schemes tied to lack of community facilities/infrastructure, like roads, water, sewer, police and fire protection? *See Golden v. Planning Bd. of Town of Ramapo*, 285 N.E.2d 291 (N.Y. 1972). What if the landowner/developer offers to construct all necessary infrastructure immediately, even though the growth management calls for no growth in the proposed area, or, if any, gradually over a period of, say, 25 years?

3. *The Legality of Incremental Restrictions.* Both *Petaluma* and *Ramapo* excluded incremental units a few at a time. Why? Is such exclusion from growth management restrictions legal?

4. *Growth Boundaries.* Note the use of the urban growth boundary in *Petaluma*. Could one limit growth *exclusively* through such boundaries? *See* KELLY, *supra*, at 53–54.

[2] COASTAL ZONE

Coastal zone management has been the subject of state and local regulation through much of the last three decades in the United States. This is not particularly surprising, since fully three-quarters of our population lives in the coastal zone. However, it was not until the mid-1970s that a national program of coastal zone management commenced under the federal Coastal Zone Management Act ("CZMA"). Designed largely to encourage states in coastal areas to plan, manage, and regulate the use of land therein, the CZMA provides funds for the creation and implementation of state coastal zone management plans, on the condition that they follow various coastal land regulatory and management guidelines.

The federal Coastal Zone Management Act of 1972 was passed during the heady days of national land use and environmental activism in response to competing development and preservation demands on the nation's coastal areas. Congress found that population growth and development in coastal areas resulted in the destruction of marine resources, wildlife, open space, and other important ecological, cultural, historic, and aesthetic values. In response, Congress created a management and regulatory framework and appropriated money for the development and implementation of state-run coastal zone management programs. The framework is imposed if, but only if, a state chooses to accept the money — and most of the thirty-five eligible coastal states and territories have so chosen. The program consists of three parts: a management plan/program, implementation regulations, and consistency regulations.

The CZMA requires a state's coastal zone management program to include nine planning elements, the most important plan themes of which are a definition of the boundaries of that part of a coastal zone that is subject to the program, objectives and policies for coastal area protection, a statement of permissible land and water uses, and the identification of special management areas.

The program's coastal boundaries are defined as coastal waters and adjacent shorelands that are strongly influenced by each other. While it is not particularly difficult to find the seaward boundary, the trick is to identify the vaguely defined inland boundary. The zone extends seaward to the outer limit of the U.S. territorial sea, but the inland boundary of the zone is based on the extent of area necessary to control shorelands, the use of which has a direct and significant impact on coastal waters. According to federal regulations, areas that might be included are areas of particular concern — salt marshes and wetlands, beaches, state-determined floodplains, islands and watersheds. However vague the regulations, a state must define its inland boundary with sufficient precision so that "interested parties" can determine whether their activities are controlled by the management program. CZMA regulations also set out criteria for determining permissible uses subject to the management program.

TOPLISS v. PLANNING COMMISSION

Intermediate Court of Appeals of Hawaii
9 Haw. App. 377, 842 P.2d 648 (1993)

HEEN, JUDGE.

On April 30, 1990, Petitioner-Appellant Larry T. Topliss, dba Pacific Land Company (Petitioner), filed a petition (Permit Petition) with Appellee Planning Commission of the County of Hawaii (Commission) for a Special Management Area (SMA) permit (SMAP) pursuant to the Coastal Zone Management Act (CZMA), Hawaii Revised Statutes (HRS) chapter 205A (1985 and Supp. 1991), to develop two multi-story office buildings on his property (property) in Kailua-Kona.

The property lies on the northern corner of the intersection of Kuakini Highway and Seaview Circle. Kuakini Highway has an 80-foot right-of-way with a 24-foot pavement, while Seaview Circle has a 60-foot right-of-way with a 20-foot pavement. The Permit Petition acknowledges that the property "lies on a vital intersection and is adjacent to a high-traffic highway." The Permit Petition also describes the intersection as "a high-traffic intersection."

The property consists of two adjacent lots within the 143-lot Kona Sea View Lots Subdivision, most of which are in single family residential use.[1] [The Court then summarized the applicable land use regulations and plans and concluded the property was appropriately classified for the proposed development.]

The property has an area of approximately one-half acre and is nearly 400 feet above sea level and about 3600 feet from the shoreline. The property is

[1] The two lots have areas of 15,001 and 7,502 square feet

rather severely sloped away from Kuakini Highway with a grade of approximately 20%. The difference in elevation between the property's mauka and makai boundaries is approximately 40 feet. The roof line of the proposed building abutting Kuakini Highway would extend approximately six feet above the elevation of the property's boundary. Between the property and the coastline lies most of the Kona Sea View Lots Subdivision, a "non-transgressable thicket," hotels and apartments along Alii Drive, and Alii Drive itself, which is the paved county roadway closest to and paralleling the coastline. Two circuitous vehicular routes measuring 2.7 miles in the southerly direction and 1.5 miles in the northerly direction are the only accesses to the coastline.

The property came within the purview of the CZMA in 1980 when the Commission designated all of the area makai of Kuakini Highway from Kailua southward to Keauhou as a SMA. At that time, the Commission cited "anticipated development pressures" in the area, the steep topography, soil composition, the Hawaii County General Plan designation of "the entire Kuakini right of way . . . as an important scenic resource," and the need to "better coordinate the overall development of the area" as the grounds for its action.

The Commission denied the Permit Petition and Petitioner appealed to the third circuit court. By stipulation of the parties, the matter was remanded to the Commission for the entry of findings of fact (FOF) and conclusions of law (COL). Meanwhile, on September 4, 1990, Petitioner filed a petition with the Commission to amend the boundaries (Boundary Petition) of the SMA to exclude his property.

The Boundary Petition was heard by the Commission on January 31, 1991. At the same hearing, the Commission denied Petitioner's request to reconsider the denial of the Permit Petition. On February 21, 1991, the Commission entered separate FOF, COL, and Orders denying both Petitions. Petitioner appealed both orders to the third circuit court and on September 5, 1991, that court entered an order affirming the Commission. The matter is here on Petitioner's appeal from the circuit court's order.

I.

Although Petitioner does not challenge the validity of the CZMA, the thrust of his attack is that when the Commission denied his Petitions it violated the CZMA's clear objectives and purposes.[2] We disagree with respect to the Boundary Petition, but agree with respect to the Permit Petition.

The dispositive question is construction of the CZMA. Our duty in construing statutes is to ascertain and give effect to the legislature's intention and to implement that intention to the fullest degree. *State v. Briones*, 784 P.2d 860 (Haw. 1989). Petitioner argues that the CZMA is simply a zoning statute which must, as a general rule, be strictly construed against further derogation of common-law property rights. The rule cited by Petitioner is inapplicable here, however, since the language of the CZMA is clear and unambiguous and

[2] We reject Petitioner's arguments that the Commission's refusal to remove the property from the CZMA was "spot zoning" and amounted to a "taking."

the legislature's intent is beyond peradventure. *See Maui County v. Puamana Management Corp.*, 631 P.2d 1215 (Haw. App. 1981).

The CZMA is "a comprehensive State regulatory scheme to protect the environment and resources of our shoreline areas." *Mahuiki v. Planning Comm'n*, 654 P.2d 874, 881 (Haw. 1982).

The CZMA imposes special controls on the development of real property along the shoreline areas in order "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." HRS § 205A-21. *Sandy Beach Defense Fund v. City Council*, 773 P.2d 250, 254 (Haw. 1989).

When it enacted the CZMA, the Hawaii legislature specifically found that "special controls on developments within an area along the shoreline are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure that adequate access, by dedication or other means, to public owned or used beaches, recreation areas, and natural reserves is provided." HRS § 205A-21 (1985). The legislature therefore declared it to be "the state policy to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." *Id.* In order to carry out the CZMA's policies and objectives, the legislature authorized the counties to establish SMAs. HRS § 205A-23 (1985). Development within a SMA is controlled by a permit system administered by the counties pursuant to HRS § 205A-28 (1985).

II.

The Boundary Petition

A.

Petitioner argues that the Commission exceeded its lawful authority when it established Kuakini Highway as the mauka [towards the mountains, inland, away from the beach] boundary of the SMA. He contends that the CZMA authorizes the Commission to include within the SMA lands that have a "direct and significant impact" on the coastal waters protected by the CZMA.[3] He asserts that in this case the property has "no potential for direct or substantial impact upon either the coastal water or the coastal resources to

[3] Petitioner claims that the following findings of fact do not support the Commission's conclusion that the property should not be removed from the SMA:

> 63. Upon mandatory review and update of the SMA maps, the [Planning] Department recommended that the SMA in the North Kona district should include the area along Alii Drive, bounded by Kailua, Keauhou and Kuakini Highway. The rationale for this expansion focused on the rapid growth experienced in the area and a need to ensure that development evaluates the physical constraints as well as the scenic viewplanes from Kuakini Highway, which has been identified as an important scenic resource in the General Plan.
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> 68. It is important that the boundary line be retained at Kuakini Highway since viewplanes have been identified as an area of critical concern.
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> 71. If the development of Property is found to have no significant adverse impacts on viewplanes or open space, this does not mean that the Property can be removed from the SMA.

be protected" and should not be included within the SMA.[4] The argument is without merit.

Among the CZMA's stated objectives and policies are the protection, preservation, restoration and improvement of the "quality of coastal scenic and open space resources[,]" HRS § 205A-2(b)(3) and (c)(3)(C) (1985), and the "designing and locating" of new "developments to minimize the alteration of . . . existing public views to and along the shoreline[,]" HRS § 205A-2(c)(3)(B) (1985).[6]

In order to protect and preserve the coastal zone's scenic and open space resources, the CZMA requires the Commission to "minimize, where reasonable . . . [a]ny development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast[.]" HRS § 205A-26(3)(D) (1985).

The intent of the CZMA is clearly to authorize inclusion in the SMA of lands that have a significant impact on the scenic resources in the area and whose development would alter the public views to and along the shoreline. Protection of the coastal areas and waters from adverse environmental or ecological impact is only one of the CZMA's objectives. Another clear objective is protection against interference with or alteration of coastal scenic resources. Where a property or development has the potential for such interference, then it may be included within a SMA even though it is not in close proximity to the coastline.

Petitioner's arguments that (1) the Commission's "rapid growth" finding[7] is "factually incorrect" because the area surrounding the property "had already become substantially developed as early as 1977[,]" and (2) the property "is one of the very last parcels in the neighborhood which is yet to be developed[,]" is without merit.

First, the finding is merely a reiteration of the original finding made in 1980 when the SMA boundary was established at Kuakini Highway. There is nothing in the record to support Petitioner's argument that the area was already substantially developed at the time the finding was made. Moreover, whether the growth in the area was rapid or slow is really of no import. The aim of the CZMA is to control growth of whatever rapidity. *See Sandy Beach Defense Fund*.

Second, the fact that the property is among the last to be developed in the neighborhood does not vitiate the finding. The objective of controlling growth relates to the entire SMA not just the neighborhood in which the property is located.

Since control of growth in the SMA is an objective of the CZMA, it cannot be said, as Petitioner argues, that control of rapid growth is the Commission's

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[4] Any contraction of a SMA boundary is subject to review by State authorities for compliance with the objectives and policies of the CZMA. HRS § 205A-23 (1985).

[6] In a report of the United States Senate Commerce Committee on the Coastal Zone Management Act of 1972, S.Rep. No. 92-753, 92 Cong., 2d Sess. 3, *reprinted* in U.S. Code Cong. & Admin. News 4776 (1972), the committee suggested that a State coastal zone management program should include "both visual and physical" access "to the coastline and coastal areas[.]" *Id.* at 4786. Hawaii's coastal management program arises from the federal enactment, and the above sections of the CZMA clearly are meant to be in accord with the Commerce Committee's suggestion.

[7] See note 4, *supra*.

attempt to use general planning and zoning objectives to justify imposition of the special controls of the CZMA.

B.

Petitioner acknowledges that the CZMA expresses the legislature's concern for "views along the shoreline." However, he contends that the "scenic viewplanes" cited by the Commission in FOF No. 63 is purely a creation of the Commission and is not among the "state interests" advanced by the CZMA.[8] Consequently, the continued inclusion of the property in the SMA unconstitutionally deprived him of his property. The argument is without merit.

First, Petitioner misstates the language of the CZMA. HRS § 205A-2(c)(3)(B) clearly establishes the protection of views to and along the shoreline as among the legislature's policies regarding scenic and open space resources.[9]

Second, as stated above, HRS § 205A-26(3)(D) requires the Commission to minimize a development's interference with the line of sight from Kuakini Highway toward the sea.

In our view, the term scenic viewplanes employed in FOF No. 63 relating to the Boundary Petition is merely a paraphrase of the statutory terms "views to and along the shoreline" or "line of sight toward the sea," and clearly comports with the intent of the statute.

C.

Petitioner also argues that since the shoreline itself, as defined in the CZMA,[10] cannot be seen from the property, the continued inclusion of the

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[8] See note 4, *supra*.

[9] HRS § 205A-2(c)(3)(B) (1985) reads as follows:

> Coastal Zone Management Program; objectives and policies
>
> * * *
>
> (c) Policies.
>
> * * *
>
> (3) Scenic and open space resources;
>
> * * *
>
> (B) Insure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and *existing public views to and along the shoreline*[.]

(Emphasis added.)

[10] HRS § 205A-1 (Supp. 1991) defines shoreline as:

> the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.

property in the SMA goes beyond the legislature's authorization to protect "views *to and along* the shoreline" and "shoreline open space and scenic resources." We disagree.

HRS § 205A-26(3)(D) clearly mandates the Commission to protect and preserve more than just the view of the shoreline. As noted above, the statute, by its very language, is intended to protect the view toward the sea even though the "shoreline" cannot be seen either because of intervening development or natural growth.

Petitioner also contends that even if "protecting panoramic coastal views" is within the legislative mandate, it is not a reasonable basis for imposing SMA regulations, since Hawaii County may impose height and setback limitations under its zoning powers. However, the fact that the County can impose the same restrictions through the exercise of one power does not make the proper exercise of another specifically authorized power unreasonable.

D.

Petitioner asserts that since there is no significant view of either the ocean or the shoreline from the portion of Kuakini Highway that abuts the property, the inclusion of the property in the SMA did not advance the State's interest in preserving the viewplane from the highway. We disagree.

Admittedly, Petitioner's evidence indicates that the view from the portion of Kuakini Highway abutting the property is limited. However, that does not affect the Commission's finding as to the significance of the total viewplane from the highway. If, in fact, Petitioner's development would not have a significant, adverse impact on the total viewplane, the Commission could consider that as favoring the development or could impose conditions on the development to minimize the impact. However, that would not necessarily support removal of the property from the SMA.

E.

Petitioner argues that "[t]he original enactment of Hawaii's CZMA in 1975 . . . defined the SMA to exclude 'portions of [lands in] which there are numerous residential commercial or other structures of a substantial nature in existence as of the effective date of [CZMA],"' and there is no indication that that exclusion should not be continued. The argument misstates the statute.

The original enactment excluded from SMAs only such built up areas that may be located on lands "which abut any *inland* waterway or body of water wholly or partially improved with walls[.]" Act 176, 1975 Haw. Sess. Laws § 1 (emphasis added). That is not the situation here and there is nothing to indicate the legislature intended to continue that exclusion or to expand it.

III.

The Permit Petition

In denying the Permit Petition, the Commission made the following FOF:

> 62. Rule 9-10(H)(5) says that one factor which should be considered in constituting a "significant adverse effect" is when the proposed use, activity or operation "involves substantial secondary impacts . . . such as effect on public facilities."
>
> 69. Based upon the evidence adduced, including that submitted with the Petition, the testimony of the public and the Petitioner, and the information contained in the [Planning] Department's Background Report, the Commission concluded that the Petitioner's proposed development would have cumulative and significant adverse effects and impact on the public roadway facilities and system in the area of said development, to wit:
>
> (A) Increased traffic congestion;
>
> (B) Decreased pedestrian safety, especially with a school bus stop in the vicinity;
>
> (C) Potential increase in vehicular accidents at the intersection of Kuakini Highway and Sea View Circle.

Petitioner challenges the quoted FOF as not being based on substantial evidence. We disagree. The record contains substantial evidence showing that the development will impact on the roads in the vicinity of the Kuakini Highway-Sea View Circle intersection. Nevertheless, after a thorough review of the record, we have a definite and firm conviction that a mistake has been made.

Pursuant to HRS § 205A-26(2) (1985), development cannot be approved within a SMA unless findings are made that the development (A) will not have any substantial adverse environmental or ecological effect except, however, where the substantial adverse effect is practicably minimized and "clearly outweighed by public health, safety, or compelling public interests;" (B) is consistent with the objectives, policies, and SMA guidelines of the CZMA; and (C) is consistent with the county general plan and zoning. In our view, where a proposed development meets those statutory requisites, the Commission's denial of a SMAP would be in excess of its authority.

The purpose of the CZMA is to control development within a SMA through the device of the SMAP, not to totally prevent or prohibit such activity. It follows that, where an administrative record indicates that a proposed development within a SMA would not contravene the statute's policies, objectives, and purposes, the Commission would exceed its authority by denying a SMAP that may have been requested for that project. The question, here, is whether the Commission's findings satisfied its duty and authority under the statute.

Here, the Commission in other FOF found that the development would have no significant impact on archaeological or historical sites, "floral" and "faunal"

resources of the coastal area, or on the coastal waters.[12] The Commission made no finding regarding any impact on the viewplanes and open space.

The only reason given by the Commission for denying the permit, as noted in FOF 62 and 69, is that the development would have cumulative and significant adverse effects on the roadway system at the intersection in question. However, at oral argument in this court, the Commission's counsel conceded that the traffic generated by the development in this case would have very little, if any, impact on the coastal zone's environment or ecology.

Under the circumstances of this case, absent a finding that the impact on the public facilities would result in a substantial adverse environmental or ecological effect, or render the development inconsistent with the objectives, policies, and guidelines of the CZMA, the Commission's finding that the development would have significant adverse effects and impact on the existing highway system in the area of the development does not provide a sufficient basis for denying the Permit Petition. In other words, if traffic from a development within a SMA is not shown to have a substantial adverse effect on the coastal environment, such impact as the traffic may otherwise have on the existing roadway system in the area of the development cannot be the basis for denying a SMAP application.

Additionally, even if the development in this case is shown to have a substantial adverse effect in accordance with the statute, the Commission was required under HRS § 205A-26(2)(A) to determine whether that effect could be practicably minimized and, when minimized, whether the effect is clearly outweighed by public health, safety, or compelling public interests. *See Mahuiki*, 654 P.2d at 881 n.10. That was not done in this case. Here, Petitioner represented to the Commission that he would be willing to design the development so as to minimize the traffic impact as much as possible. It does not appear from the record that the Commission considered Petitioner's offer as we think it was required to do under the statute.

On remand, the Commission should reconsider the Permit Petition and determine whether the traffic generated by the development will or *will not* have a substantial adverse environmental or ecological effect on the coastal zone. If the Commission finds that the traffic *will not* have such a substantial adverse effect, then the Commission should approve the Permit Petition without conditions relating to the traffic.

If the Commission finds that the traffic *will* have such a substantial effect, but that the effect can be practicably minimized and, as minimized, the effect is clearly outweighed by public health, safety, or compelling public interests,

[12] The Commission made the following pertinent findings of fact:

46. The project site has been previously altered and is unlikely to contain any surface archaeological sites of significance.

47. The Department of Land and Natural Resources commented "It is our understanding that the lots in this subdivision were graded some time ago, making it unlikely that significant historic sites are present. The project should have 'no effect' on such sites."

49. Because the land has been altered, it is not likely to be a habitat for any rare or endangered species of flora or fauna.

50. The project site is located approximately 3,600 feet from the shoreline.

51. The impact to coastal waters should be negligible.

the Commission should approve the Permit Petition. In order to achieve the minimization, the Commission may impose reasonable conditions on the development. If, of course, the development cannot be made to conform to HRS § 205A-26(2)(A), then the Commission should deny the Permit Petition.

This opinion is not meant to prevent the Commission from imposing other reasonable conditions affecting matters within the purview of the CZMA, such as the viewplanes to the ocean, where such may be deemed necessary to comply with the intent of the CZMA.

Conclusion

We affirm the Commission's denial of the Boundary Petition. We vacate the denial of the Permit Petition and remand the matter to the Commission for further proceedings consistent with this opinion.

NOTES AND QUESTIONS

1. *The Definition of the Coastal Zone.* Defining the landward part of the coastal zone for purposes of CZMA can be difficult, especially for regulatory purposes, since the federal government looks to the states, to which it gives the money for program development and implementation, for enforcement. What if the statutory definition would result in CZM regulations covering the entire developable area of the state? This is what happened in Hawaii, which then developed two coastal zones: the all-inclusive one for "administrative" purposes, and a second, usually only a few hundred yards wide (defined county-by-county), for regulatory purposes. *See* D. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII Ch. 7 (1984).

2. *The Purpose of the CZMA.* The Coastal Zone Management Act appears to be directed at preserving critical coastal natural resources and values. Assuming it is possible to obtain a permit from an appropriate local agency under an approved coastal zone management program, what would you expect restrictions on development to look like? What kind of bulk and height standards would you expect to be imposed? Consider these questions in light of the materials in this Chapter on flood hazard protection and the dilemma of the landowner subject both to coastal zone protection and flood hazard prevention regulations enforced at the local level. *See* Davidson, *Coastal Zone Management and Planning in California: Strategies for Balancing Conservation and Development*; Winters, *Environmentally Sensitive Land Use Regulation in California*, 10 SAN DIEGO L. REV. 693 (1973).

3. *Coastal Zone Management and the Public Trust.* As the following case illustrates, coastal zone issues cannot be addressed without taking into account the ways in which individual states define the public trust interest in shorelands.

OPINION OF THE JUSTICES

(Public Use of Coastal Beaches)
Supreme Court of New Hampshire
139 N.H. 82, 649 A.2d 604 (1994)

To the Honorable House:

The undersigned justices of the supreme court submit the following reply to your questions of May 5, 1994. Following our receipt of your resolution, we invited interested parties to file memoranda with the court on or before September 1, 1994.

SB 636 (the bill), as amended, proposes to amend RSA chapter 483-B (1992) by inserting after section 9 a new section, 483-B:9-a, titled "Public Use of Coastal Beaches." The legislature's purpose is set out in the bill as follows:

> It is the purpose of the general court [the legislature] in this section to recognize and confirm the historical practice and common law right of the public to enjoy the existing public easement in the greatest portion of New Hampshire coastal beach land subject to those littoral rights recognized at common law. This easement presently existing over the greater portion of that beachfront property extending from where the "public trust" ends across the commonly used portion of sand and rocks to the intersection of the beach and the high ground, often but not always delineated by a sea wall, or the line of vegetation, or the seaward face of the foredunes, this being that beach where violent sea action occurs at irregular frequent intervals making its use for the usual private constructions uneconomical and physically impractical.

The bill defines "coastal beaches" as "that portion of the beach extending from where the public trust shoreland ends, across the commonly used portion of sand and rocks to the intersection of the beach and high ground, often but not always delineated by a seawall, or the line of vegetation, or the seaward face of the foredunes."

The bill states that "New Hampshire holds in 'public trust' rights in all shorelands subject to the ebb and flow of the tide and subject to those littoral rights recognized at common law" and that the " 'public trust' shoreland establishes the extreme seaward boundary extension of all private property rights in New Hampshire except for those 'jus privatum' rights validly conveyed by legislative act without impairment of New Hampshire's 'jus publicum' interests."

The bill then provides that for an historical period extending back well over 20 years the public has made recognized, prevalent and uninterrupted use of the vast majority of New Hampshire's coastal beaches above the 'public trust' shoreland. The legislature recognizes that some public use of the beach area above the public trust lands is necessary to the full enjoyment of the land. The general court recognizes and confirms a public easement flowing from and demonstrated by this historical practice in the coastal beaches contiguous to the public trust shoreland where the public has traditionally had access and which easement has been created by virtue of such uninterrupted public use.

Further, the bill states that "[a]ny person may use the coastal beaches of New Hampshire where such a public easement exists for recreational purposes subject to the provisions of municipal ordinances," but "[t]he provisions of [the bill] shall in no way be construed as affecting the title of property owners of land contiguous to land subject to a public easement." Finally, the new section provides that "[i]n a suit brought or defended under this section, or whose determination is affected by this section, a showing that the area in dispute is within the area defined as 'coastal beach' shall be prima facie evidence that a public easement exists."

Your first question asks "[w]hether New Hampshire law identifies a particular coastal feature or tidal event as outlining the maximum shoreward extension of the public trust area boundary . . . beyond which the probable existence of private property rights may, without a public easement arising from historical practice, restrict any public access under the provisions of Part I, Article 12 of the New Hampshire Constitution and the 5th amendment of the United States Constitution." We answer in the affirmative.

Part I, article 12 of the New Hampshire Constitution provides that "no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." This clause requires just compensation in the event of a taking. *Piscataqua Bridge v. N.H. Bridge*, 7 N.H. 35, 66–70 (1834). "The same principle was embodied in the Fifth Amendment to the Constitution of the United States at the insistence of a majority of the States, including New Hampshire, in ratifying the Constitution." *Burrows v. City of Keene*, A.2d 15, 18 (N.H. 1981). The fifth amendment of the Federal Constitution provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The public trust has its origins in the concept of the jus publicum, an English common law doctrine under which the tidelands and navigable waters were held by the king in trust for the general public. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich.L.Rev. 471, 475–76 (1970). The English common law was based, in turn, upon the ancient Roman concept of "natural law" that held that certain things, including the shores, by their nature are common to all. *See* Comment, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts,* 37 Me.L.Rev. 105, 107–08 (1985). At common law, the king had "both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and all of the lands below high-water mark, within the jurisdiction of the crown of England." *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). The king held the title to intertidal lands, or jus privatum, absolutely, and in his role as sovereign he held the public rights, or jus publicum, in trust for the benefit of the public. *Id.* Although the king could convey the lands below the high water mark, any conveyance to a private individual was subject to the jus publicum. *Id.* at 13. The jus publicum included uses "for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects." *Id.*

Following the American Revolution, "the people of each state became themselves sovereign; and in that character hold the absolute right to all their

navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Waddell*, 41 U.S. 367 (1842). Upon entering the union, the original thirteen States and all new States acquired title to lands under waters subject to the ebb and flow of the tide. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). As sovereigns, the States hold the intertidal lands in trust for the public and "have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Id.* at 475.

In 1889, this court rejected a Massachusetts law that adopted the low water mark as the boundary between public and private ownership. *Concord Co. v. Robertson*, 25 A. 721, 730–31 (N.H. 1889). The Massachusetts rule, embodied in a 1647 ordinance, extended private titles "to encompass land as far as mean low water line or 100 rods from the mean high water line, whichever was the lesser measure." *In re Opinion of the Justices*, 313 N.E.2d 561, 565 (Mass. 1974). The purpose of the ordinance was "to encourage littoral owners to build wharves." *Id.*

The *Robertson* court rejected the need to vest New Hampshire private property owners with fee title to the tidelands below high water mark: While the [Massachusetts] ordinance maintains the public title of large ponds, it converts into private property, and gives away, a great amount of tide-land. In this state, the transfer of the fee to the abutters has not been necessary to encourage improvements below high-water mark. Their common-law right of reasonable use has been sufficient for all the purposes for which the [Massachusetts] ordinance changed the common-law title. Private ownership of so much of the tide-land (not exceeding 100 rods in width) as is bare twice a day, and public ownership where vessels can come to a wharf at low tide, is not an adequate or useful adjustment of rights for commercial purposes. Where tide-land ought to be improved and occupied by the abutter, above and below low-water mark, he has a common-law right to improve and occupy it. 25 A. at 730. The court noted that "no serious inconvenience has arisen from the adoption of the water's edge as the boundary of public and private ownership." *Id.* at 727. "The experience of more than 250 years has shown no practical difficulty in the question of the abutters' reasonable private use, and no defect in the law calling for such amendments as have been made in Massachusetts in relation to tide-waters." *Id.* Regarding ownership of the shore, the court concluded that "[t]he introduction of any line other than high-water mark as the marine boundary would overturn common-law rights that had been established here, by a usage and traditional understanding of two hundred years' duration." *Id.* at 730–31.

Robertson still represents the law in New Hampshire. While it is settled, therefore, that the public trust in tidewaters in this State extends landward to the high water mark, the following common law questions are not settled: what is the high water mark; where is it located; and how is it located. We do not purport to determine in this opinion answers to such questions.

Your second question asks "[w]hether the effect of [the bill], which recognizes that the public trust extends to those lands 'subject to ebb and flow of the tide' infringes upon existing private property rights as protected by Part

I, Article 12 of the New Hampshire Constitution and the 5th amendment of the United States Constitution." We answer in the negative.

As already set out in our answer to your first question, New Hampshire has long recognized that lands subject to the ebb and flow of the tide are held in public trust. "Land covered by public water is capable of many uses." *Concord Co. v. Robertson*, 25 A. at 721. "Rights of navigation and fishery are not the whole estate" but rather the public trust lands are held "for the use and benefit of all the [public], for all useful purposes." *Id.* at 721; *see St. Regis Co. v. Board*, 26 A.2d 832, 837–38 (N.H. 1942) (public trust encompasses "all useful and lawful purposes"); *State v. Sunapee Dam Co.*, 50 A. 108, 110 (N.H. 1900) ("in this state the law of public waters is what justice and reason require"). These uses include recreational uses. *See Hartford v. Gilmanton*, 146 A.2d 851, 853 (N.H. 1958) (public waters may be used to boat, bathe, fish, fowl, skate, and cut ice).

In addition, we have uniformly held that owners of property adjacent to lands held in public trust have common law rights which are "more extensive than those of the public generally." *Sundell v. Town of New London*, 409 A.2d 1315, 1317 (N.H. 1979).

These rights, recognized at common law, constituted property which could not be taken without compensation. These private rights of littoral owners include but are not necessarily limited to the right to use and occupy the waters adjacent to their shore for a variety of recreational purposes, the right to erect boat houses and to wharf out into the water. We have also held that these private littoral rights are incidental property rights which are severable from the shore property itself and may be conveyed separate from the littoral property.

Because these littoral rights are an incident of ownership of shore property, their value is reflected in the fact that shorefront property commonly is substantially more valuable than property otherwise situated. *Id.* at 1318. "The rights of littoral owners on public waters are," however, always subject to the paramount right of the State to control them reasonably in the interests of navigation, fishing and other public purposes. In other words, the rights of these owners are burdened with a servitude in favor of the State which comes into operation when the State properly exercises its power to control, regulate, and utilize such waters. *Sibson v. State*, 259 A.2d 397, 400 (N.H. 1969). Private shorefront owners are entitled to exercise their property rights in the tidelands so long as they do not unreasonably interfere with the rights of the public. *See Concord Co. v. Robertson,* 25 A. at 727.

Therefore, to the extent that the term "lands subject to ebb and flow of the tide" applies to tidelands below the high water mark, the bill simply codifies the common law and does not infringe upon private property rights. Where private title to tidelands is already burdened by preexisting public rights, a regulation designed to protect those same rights will not constitute a taking of property without just compensation.

Your third question asks "[w]hether the provisions of [the bill], which recognize a public easement in the 'dry sand area' of historically accessible coastal beaches is a taking of private property for a public purpose without

just compensation in violation of Part I, Article 12 of the New Hampshire Constitution and the 5th amendment of the United States Constitution." Except for those areas where there is an established and acknowledged public easement and subject to the assumptions contained in the discussion below, we answer in the affirmative.

The bill apparently recognizes two property interests in two distinct areas of shoreland. First, the bill establishes that "New Hampshire holds in 'public trust' rights in all shorelands subject to the ebb and flow of the tide." Second, the bill establishes a public easement in land "extending from where the public trust ends across the commonly used portion of sand and rocks to the intersection of the beach and the high ground, often but not always delineated by a sea wall, or the line of vegetation, or the seaward face of the foredunes." This high ground is generally known as the "dry sand" area. The bill states that "for an historical period extending back well over 20 years the public has made recognized, prevalent and uninterrupted use of the vast majority of New Hampshire's coastal beaches above the 'public trust' shoreland." The general court recognizes and confirms a public easement flowing from and demonstrated by this historical practice in the coastal beaches contiguous to the public trust shoreland where the public has traditionally had access and which easement has been created by virtue of such uninterrupted public use.

As noted in our answer to your first question, this court has not defined the term "high water mark." Because, however, the bill states that the dry sand area is not within the public trust we will, for purposes of this opinion, base our analysis on that assumption. We construe the bill, therefore, as recognizing public trust rights below the dry sand area and a prescriptive easement in the dry sand. *See Waterville Estates Assoc. v. Town of Campton*, 446 A.2d 1167, 1168 (N.H. 1982) ("easement is a nonpossessory interest in realty which can only be created by prescription, written conveyance or implication").

"To establish a prescriptive easement, the plaintiff must prove by a balance of probabilities twenty years' adverse, continuous, uninterrupted use of the land [claimed] in such a manner as to give notice to the record owner that an adverse claim was being made to it." *Mastin v. Prescott*, 444 A.2d 556, 558 (N.H. 1982). Although the general public is capable of acquiring an easement by prescription, *Elmer v. Rodgers*, 214 A.2d 750, 752 (N.H. 1965), [e]vidence of continuous and uninterrupted public use of the premises for the statutory period . . . is insufficient alone to establish prescriptive title as a matter of law. The nature of the use must be such as to show the owner knew or ought to have known that the right was being exercised, not in reliance upon his toleration or permission, but without regard to his consent. *Vigeant v. Donel Realty Trust*, 540 A.2d 1243, 1244 (N.H. 1988).

While the fact that the owner was also using the premises for the same purposes would not prevent a finding of adverse use by the general public, *Elmer v. Rodgers*, 214 A.2d at 752, "[a] permissive use no matter how long or how often exercised cannot ripen into an easement by prescription." *Ucietowski v. Novak*, 152 A.2d 614, 618 (1959). The general public may, therefore, acquire coastal beach land by prescription in New Hampshire.

Problems militate, however, against the use of the prescriptive doctrine. "First, there is the obvious problem of establishing factual evidence of the specialized type of adverse use for the requisite period of time . . . needed to create an easement by prescription." 3 R. Powell, Powell on Real Property § 34.11[6], at 34–171 (1994). "Secondly, prescriptive easements, by their nature, can be utilized only on a tract-by-tract basis, and thus cannot be applied to all beaches within a state." *Id.* In a suit to quiet title, adequate evidence may well exist to prove that on a given piece of property, the area landward of the public trust across the dry sand is subject to a public easement. Such a determination is, however, a judicial one.

It is the constitutional mandate that questions of law belong to the judiciary for final determination, as a necessary deduction of the required separation of the legislative, executive and judicial powers of government. (Const., Part I, Art. 37). It follows that legislation cannot bar or restrict this power of the judiciary, and the courts have inherent power, through appropriate process, to act upon and decide such questions, if they are not of a strictly political nature. *Cloutier v. State Milk Control Board*, 28 A.2d 554, 556 (N.H. 1942).

Although the bill does not completely deprive private property owners of use of their property, "[t]he interference with private property here involves a wholesale denial of an owner's right to exclude the public." *Bell v. Town of Wells*, 557 A.2d 168, 178 (Me. 1989). "If a possessory interest in real property has any meaning at all it must include the general right to exclude others." *Id.*

"Property," in the constitutional sense, is not the physical thing itself but is rather the group of rights which the owner of the thing has with respect to it. The term refers to a person's right to possess, use, enjoy and dispose of a thing and is not limited to the thing itself. The property owner's right of indefinite user (or of using indefinitely) . . . necessarily includes the right . . . to exclude others from using the property, whether it be land or anything else. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, ipso facto, taking the owner's property. The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it. *Burrows v. City of Keene*, 432 A.2d at 19; *see Claridge v. New Hampshire Wetlands Bd.*, 485 A.2d 287, 291 (N.H. 1984).

When the government unilaterally authorizes a permanent, public easement across private lands, this constitutes a taking requiring just compensation. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). In *Nollan* the United States Supreme Court stated:

> [A]s to property reserved by its owner for private use, the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property. [O]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. We think a permanent physical occupation has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even

> though no particular individual is permitted to station himself permanently upon the premises.

Id. at 831–32; *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426–27 & n. 5, (1982).

Because the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitutions against the taking of private property for public use without just compensation. Although the State has the power to permit a comprehensive beach access and use program by using its eminent domain power and compensating private property owners, it may not take property rights without compensation through legislative decree. *See Eaton v. B.C. & M.R.R.*, 51 N.H. 504, 510–11 (1872). "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Appeal of Public Serv. Co. of N.H.*, 454 A.2d 435, 440 (N.H. 1982); *see Eaton*, 51 N.H. at 518 ("if the work is one of great public benefit, the public can afford to pay for it").

Based on our response to your third question, we deem it unnecessary to answer your fourth question.

We emphasize that this opinion does not amount to a judicial decision. An opinion of the justices on proposed legislation is not binding upon the court in the event the proposed legislation should become law and a case should arise requiring its construction. *Opinion of the Justices*, 25 N.H. 537, 538 (1852).

NOTES AND QUESTIONS

1. Other aspects of the public trust doctrine are explored in Chapter 4, Section C-3. The approach of the New Hampshire Supreme Court to the issue of public rights above the high water mark is more representative of how states view the relationship between the public trust and private ownership rights than the New Jersey Supreme Court's opinion in *Matthews v. Bay Head Imp. Ass'n.*, 471 A.2d 355 (N.J. 1984) (which is reproduced in Chapter 4).

2. *Advisory Opinions.* The above opinion, called an advisory opinion, was issued by the New Hampshire court in response to questions posed by the New Hampshire legislature concerning the constitutionality of a proposed piece of legislation rather than by an actual case or controversy before the court. It has long been an established principle of American constitutional law that the United States Supreme Court does not issue advisory opinions — *see* Letter from the Justices to George Washington (August 8, 1793) (declining to express an opinion on a number of legal questions arising out of the ongoing hostilities between Britain and France and the application of American neutrality laws), *reprinted in* P. BATOR, ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65–66 (2d Ed. 1973). However, a number of states, including New Hampshire, do issue such opinions.

[3] WETLANDS

RAPANOS v. UNITED STATES ARMY CORPS OF ENGINEERS

Supreme Court of the United States
126 S. Ct. 2208 (2006)

JUSTICE SCALIA announced the judgment of the Court, and delivered and opinion, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join.

In April 1989, petitioner John A. Rapanos backfilled wetlands on a parcel of land in Michigan that he owned and sought to develop. This parcel included 54 acres of land with sometimes-saturated soil conditions. The nearest body of navigable water was 11 to 20 miles away. 339 F.3d 447, 449 (6th Cir. 2003) *(Rapanos I).* Regulators had informed Mr. Rapanos that his saturated fields were "waters of the United States," 33 U.S.C. § 1362(7), that could not be filled without a permit. Twelve years of criminal and civil litigation ensued.

The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 CFR § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 — not counting costs of mitigation or design changes . . . ." [O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." *Id.*, at 81. These costs cannot be avoided, because the Clean Water Act "impose[s] criminal liability," as well as steep civil fines, "on a broad range of ordinary industrial and commercial activities." . . . In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines. *See United States v. Rapanos,* 235 F.3d 256, 260 (6th Cir. 2000).

In issuing permits, the Corps directs that "[a]ll factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." § 320.4(a).

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act — without any change in the governing statute — during the past five Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over "the waters of the United States" to cover 270-to-300 million acres of swampy lands in the United States — including half of Alaska and

an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit — whether man-made or natural, broad or narrow, permanent or ephemeral — through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States."

I.

Congress passed the Clean Water Act (CWA or Act) in 1972. The Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 86 Stat. 816, 33 U.S.C. § 1251(a). The Act also states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." § 1251(b).

One of the statute's principal provisions is 33 U.S.C. § 1311(a), which provides that "the discharge of any pollutant by any person shall be unlawful." "The discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source," § 1362(12), and "pollutant" is defined broadly to include not only traditional contaminants but also solids such as "dredged spoil, . . . rock, sand, [and] cellar dirt," § 1362(6). And, most relevant here, the CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." § 1362(7).

The Act also provides certain exceptions to its prohibition of "the discharge of any pollutant by any person." § 1311(a). Section 1342(a) authorizes the Administrator of the EPA to "issue a permit for the discharge of any pollutant, . . . notwithstanding section 1311(a) of this title." Section 1344 authorizes the Secretary of the Army, acting through the Corps, to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." § 1344(a), (d). It is the discharge of "dredged or fill material" — which, unlike traditional water pollutants, are solids that do not readily wash downstream — that we consider today.

For a century prior to the CWA, we had interpreted the phrase "navigable waters of the United States" in the Act's predecessor statutes to refer to interstate waters that are "navigable in fact" or readily susceptible of being rendered so.

The Corps' current regulations interpret "the waters of the United States" to include, in addition to traditional interstate navigable waters, 33 CFR § 328.3(a)(1) (2004), "[a]ll interstate waters including interstate wetlands," § 328.3(a)(2); "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce," § 328.3(a)(3); "[t]ributaries of [such] waters," § 328.3(a)(5); and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)," § 328.3(a)(7). The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States. § 328.3(c). It specifically provides that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.' " *Ibid.*

In *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675 (2001) ("*SWANCC*"), we considered the application of the Corps' "Migratory Bird Rule" to "an abandoned sand and gravel pit in northern Illinois." 531 U.S., at 162, 121 S. Ct. 675. Observing that "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*," 474 U.S. 121, 167, 121 S. Ct. 675 (1985) (emphasis added), we held that *Riverside Bayview* did not establish "that the jurisdiction of the Corps extends to ponds that are not adjacent to open water." 531 U.S., at 168, 121 S. Ct. 675 (emphasis deleted). On the contrary, we held that "nonnavigable, isolated, intrastate waters," *id.,* at 171, 121 S. Ct. 675 — which, unlike the wetlands at issue in *Riverside Bayview*, did not "actually abu[t] on a navigable waterway," 531 U.S., at 167, 121 S. Ct. 675 — were not included as "waters of the United States."

Following our decision in *SWANCC*, the Corps did not significantly revise its theory of federal jurisdiction under § 1344(a). The Corps provided notice of a proposed rulemaking in light of *SWANCC*, 68 Fed. Reg. 1991 (2003), but ultimately did not amend its published regulations. Because *SWANCC* did not directly address tributaries, the Corps notified its field staff that they "should continue to assert jurisdiction over traditional navigable waters . . . and, generally speaking, their tributary systems (and adjacent wetlands)." 68 Fed. Reg. 1998. In addition, because *SWANCC* did not overrule *Riverside Bayview*, the Corps continues to assert jurisdiction over waters " 'neighboring' " traditional navigable waters and their tributaries. 68 Fed. Reg. 1997 (quoting 33 CFR § 328.3(c) (2003)).

Even after *SWANCC*, the lower courts have continued to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as "tributaries." For example, courts have held that jurisdictional "tributaries" include the "intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64)," *Treacy v. Newdunn Assocs., LLP,* 344 F.3d 407, 410 (4th Cir. 2003); a "roadside ditch" whose water took "a winding, thirty-two-mile path to the Chesapeake Bay," *United States v. Deaton,* 332 F.3d 698, 702 (4th Cir. 2003); irrigation ditches and drains that intermittently connect to covered waters, *Community Assn. for Restoration of Environment v. Henry Bosma*

Dairy, 305 F.3d 943, 954–955 (9th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526, 534 (9th Cir. 2001); and (most implausibly of all) the "washes and arroyos" of an "arid development site," located in the middle of the desert, through which "water courses . . . during periods of heavy rain," *Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113, 1118 (9th Cir. 2005).

These judicial constructions of "tributaries" are not outliers. Rather, they reflect the breadth of the Corps' determinations in the field. The Corps' enforcement practices vary somewhat from district to district because "the definitions used to make jurisdictional determinations" are deliberately left "vague." GAO Report 26 [U. S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297, pp 20–22 (Feb. 2004) (hereinafter GAO Report)]; *see also id.*, at 22. But district offices of the Corps have treated, as "waters of the United States," such typically dry land features as "arroyos, coulees, and washes," as well as other "channels that might have little water flow in a given year." *Id.,* at 20–21. They have also applied that definition to such manmade, intermittently flowing features as "drain tiles, storm drains systems, and culverts." *Id.,* at 24 (footnote omitted).

In addition to "tributaries," the Corps and the lower courts have also continued to define "adjacent" wetlands broadly after *SWANCC.* For example, some of the Corps' district offices have concluded that wetlands are "adjacent" to covered waters if they are hydrologically connected "through directional sheet flow during storm events," GAO Report 18, or if they lie within the "100-year floodplain" of a body of water — that is, they are connected to the navigable water by flooding, on average, once every 100 years, *id.,* at 17, and n 16. Others have concluded that presence within 200 feet of a tributary automatically renders a wetland "adjacent" and jurisdictional. *Id.,* at 19. And the Corps has successfully defended such theories of "adjacency" in the courts, even after *SWANCC*'s excision of "isolated" waters and wetlands from the Act's coverage. One court has held since *SWANCC* that wetlands separated from flood control channels by 70-foot-wide berms, atop which ran maintenance roads, had a "significant nexus" to covered waters because, *inter alia*, they lay "within the 100 year floodplain of tidal waters." *Baccarat Fremont Developers, LLC v. United States Army Corps of Eng'rs,* 425 F.3d 1150, 1152, 1157 (9th Cir. 2005). In one of the cases before us today, the Sixth Circuit held, in agreement with "[t]he majority of courts," that "while a hydrological connection between the non-navigable and navigable waters is required, there is no 'direct abutment' requirement" under *SWANCC* for " 'adjacency.' " 376 F.3d 629, 639 (2004) *(Rapanos II).* And even the most insubstantial hydrologic connection may be held to constitute a "significant nexus." One court distinguished *SWANCC* on the ground that "a molecule of water residing in one of these pits or ponds [in *SWANCC*] could not mix with molecules from other bodies of water" — whereas, in the case before it, "water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting bodies," and "[a] drop of rainwater landing in the Site is certain to intermingle with

water from the [nearby river]." *United States v. Rueth Development Co.,* 189 F. Supp. 2d 874, 877–878 (N.D. Ind. 2002).

II.

In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute "waters of the United States" within the meaning of the Act. Petitioners in No. 04-1034, the Rapanos and their affiliated businesses, deposited fill material without a permit into wetlands on three sites near Midland, Michigan: the "Salzburg site," the "Hines Road site," and the "Pine River site." The wetlands at the Salzburg site are connected to a man-made drain, which drains into Hoppler Creek, which flows into the Kawkawlin River, which empties into Saginaw Bay and Lake Huron. *See* Brief for United States in No. 04-1034, p 11; 339 F.3d at 449. The wetlands at the Hines Road site are connected to something called the "Rose Drain," which has a surface connection to the Tittabawassee River. App. to Pet. for Cert. in No. 04-1034, ppA23, B20. And the wetlands at the Pine River site have a surface connection to the Pine River, which flows into Lake Huron. *Id.*, at A23-A24, B26. It is not clear whether the connections between these wetlands and the nearby drains and ditches are continuous or intermittent, or whether the nearby drains and ditches contain continuous or merely occasional flows of water.

The United States brought civil enforcement proceedings against the Rapanos petitioners. The District Court found that the three described wetlands were "within federal jurisdiction" because they were "adjacent to other waters of the United States," and held petitioners liable for violations of the CWA at those sites. *Id.,* at B32-B35. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that there was federal jurisdiction over the wetlands at all three sites because "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters." 376 F.3d at 643.

III.

We need not decide the precise extent to which the qualifiers "navigable" and "of the United States" restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over "waters." 33 U.S.C. § 1362(7). The only natural definition of the term "waters," our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that "the waters of the United States" in § 1362(7) cannot bear the expansive meaning that the Corps would give it.

The Corps' expansive approach might be arguable if the CSA defined "navigable waters" as "water of the United States." But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") show plainly that § 1362(7) does not refer to water in general. In this form, "the waters" refers more narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and]

lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second). On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely "streams," connotes a continuous flow of water in a permanent channel — especially when used in company with other terms such as "rivers," "lakes," and "oceans." None of these terms encompasses transitory puddles or ephemeral flows of water.

Justice Kennedy observes, *post,* at 2242, 126 S. Ct. 2208 (opinion concurring in judgment), that the dictionary approves an alternative, somewhat poetic usage of "waters" as connoting "[a] flood or inundation; as the *waters* have fallen. 'The peril of *waters*, wind, and rocks.' *Shak.*" Webster's Second 2882. It seems to us wholly unreasonable to interpret the statute as regulating only "floods" and "inundations" rather than traditional waterways — and strange to suppose that Congress had waxed Shakespearean in the definition section of an otherwise prosaic, indeed downright tedious, statute. The duller and more commonplace meaning is obviously intended.

The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.

In addition, the Act's use of the traditional phrase "navigable waters" (the defined term) further confirms that it confers jurisdiction only over relatively *permanent* bodies of water. The Act adopted that traditional term from its predecessor statutes. *See SWANCC*, 531 U.S., at 180, 121 S. Ct. 675 (Stevens, J., dissenting). On the traditional understanding, "navigable waters" included only discrete *bodies* of water. For example, in *The Daniel Ball*, we used the terms "waters" and "rivers" interchangeably. 77 U.S., at 563, 10 Wall., at 563. And in *Appalachian Electric*, we consistently referred to the "navigable waters" as "waterways." 311 U.S., at 407–409, 61 S. Ct. 291. Plainly, because such "waters" had to be navigable in fact or susceptible of being rendered so, the term did not include ephemeral flows. As we noted in *SWANCC*, the traditional term "navigable waters" — even though defined as "the waters of the United States" — carries *some* of its original substance: "[I]t is one thing to give a word limited effect and quite another to give it no effect whatever." 531 U.S., at 172, 121 S. Ct. 675. That limited effect includes, at bare minimum, the ordinary presence of water.

Our subsequent interpretation of the phrase "the waters of the United States" in the CWA likewise confirms this limitation of its scope. In *Riverside Bayview*,

we stated that the phrase in the Act referred primarily to "rivers, streams, and other *hydrographic features more conventionally identifiable as 'waters'*" than the wetlands adjacent to such features. 474 U.S., at 131, 106 S. Ct. 455 (emphasis added). We thus echoed the dictionary definition of "waters" as referring to "streams and bodies *forming geographical features* such as oceans, rivers, [and] lakes." Webster's Second 2882 (emphasis added). Though we upheld in that case the inclusion of wetlands abutting such a "hydrographic featur[e]" — principally due to the difficulty of drawing any clear boundary between the two, *see* 474 U.S., at 132, 106 S. Ct. 455; Part IV, *infra* — nowhere did we suggest that "the waters of the United States" should be expanded to include, in their own right, entities other than "hydrographic features more conventionally identifiable as 'waters.' " Likewise, in both *Riverside Bayview* and *SWANCC*, we repeatedly described the "navigable waters" covered by the Act as "open water" and "open waters." *See Riverside Bayview, supra*, at 132, and n. 8, 134, 106 S. Ct. 455; *SWANCC*, *supra*, at 167, 172, 121 S. Ct. 675. Under no rational interpretation are typically dry channels described as "*open* waters."

Moreover, only the foregoing definition of "waters" is consistent with the CWA's stated "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." § 1251(b). This statement of policy was included in the Act as enacted in 1972, *see* 86 Stat. 816, prior to the addition of the optional state administration program in the 1977 amendments, *see* 91 Stat. 1601. Thus the policy plainly referred to something beyond the subsequently added state administration program of 33 U.S.C. § 1344(g)-(l). But the expansive theory advanced by the Corps, rather than "preserv[ing] the primary rights and responsibilities of the States," would have brought virtually all "plan[ning of] the development and use . . . of land and water resources" by the States under federal control. It is therefore an unlikely reading of the phrase "the waters of the United States."

Even if the phrase "the waters of the United States" were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible. As we noted in *SWANCC*, the Government's expansive interpretation would "result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S., at 174, 121 S. Ct. 675. Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. . . . The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land — an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. *See* 33 CFR § 320.4(a)(1) (2004). We ordinarily expect a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority.

In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or

continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute."

IV

We . . . address in this Part whether a wetland may be considered "adjacent to" remote "waters of the United States," because of a mere hydrologic connection to them.

In *Riverside Bayview*, we noted the textual difficulty in including "wetlands" as a subset of "waters": "On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.' " 474 U.S., at 132, 106 S. Ct. 455. We acknowledged, however, that there was an inherent ambiguity in drawing the boundaries of any "waters":

> [T]he Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs — in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Ibid.

Because of this inherent ambiguity, we deferred to the agency's inclusion of wetlands "actually abut[ting]" traditional navigable waters: "Faced with such a problem of defining the bounds of its regulatory authority," we held, the agency could reasonably conclude that a wetland that "adjoin[ed]" waters of the United States is itself a part of those waters. *Id.*, at 132, 135, and n. 9, 106 S. Ct. 455. The difficulty of delineating the boundary between water and land was central to our reasoning in the case: "In view of the breadth of federal regulatory authority contemplated by the Act itself and *the inherent difficulties of defining precise bounds to regulable waters*, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.*, at 134, 106 S. Ct. 455 (emphasis added).

When we characterized the holding of *Riverside Bayview* in *SWANCC*, we referred to the close connection between waters and the wetlands that they gradually blend into: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U.S., at 167, 121 S. Ct. 675 (emphasis added). In particular, *SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*—and upon which the dissent repeatedly relies today, *see post,* at 2256–2257, 2258, 2258–2259, 2259–2260, 2261–2262,

2263–2264, 2264–2265 — provided an *independent* basis for including entities like "wetlands" (or "ephemeral streams") within the phrase "the waters of the United States." *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction. It thus confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting ("adjacent") wetlands begin, permitting the Corps' reliance on ecological considerations *only to resolve that ambiguity* in favor of treating all abutting wetlands as waters. Isolated ponds were not "waters of the United States" in their own right, *see 5*31 U.S., at 167, 171, 121 S. Ct. 675, and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such.

Therefore, *only* those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC,* 531 U.S., at 167, 121 S. Ct. 675. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a "wate[r] of the United States" (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

V

In either case, the agency must prove that the contaminant-laden waters ultimately reach covered waters.

Finally, respondents and many *amici* admonish that narrowing the definition of "the waters of the United States" will hamper federal efforts to preserve the Nation's wetlands. It is not clear that the state and local conservation efforts that the CWA explicitly calls for, *see* 33 U.S.C. § 1251(b), are in any way inadequate for the goal of preservation. In any event, a Comprehensive National Wetlands Protection Act is not before us, and the "wis[dom]" of such a statute, *post,* at 2262 (opinion of Stevens, J.), is beyond our ken. What is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only "the *waters* of the United States."

In an opinion long on praise of environmental protection and notably short on analysis of the statutory text and structure, the dissent would hold that "the waters of the United States" include any wetlands "adjacent" (no matter how broadly defined) to "tributaries" (again, no matter how broadly defined) of traditional navigable waters. For legal support of its policy-laden conclusion, the dissent relies exclusively on two sources: "[o]ur unanimous opinion in *Riverside Bayview*," *post,* at 2255; and "Congress' deliberate acquiescence in the Corps' regulations in 1977," *post*, at 2257–2258. Each of these is

demonstrably inadequate to support the apparently limitless scope that the dissent would permit the Corps to give to the Act.

We vacate the judgments of the Sixth Circuit in both No. 04-1034 and No. 04-1384, and remand both cases for further proceedings.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring.

Five years ago, this Court rejected the position of the Army Corps of Engineers on the scope of its authority to regulate wetlands under the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 et seq. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675 (2001) *(SWANCC)*. The Corps had taken the view that its authority was essentially limitless; this Court explained that such a boundless view was inconsistent with the limiting terms Congress had used in the Act. *Id.,* at 167–174, 121 S. Ct. 675.

In response to the *SWANCC* decision, the Corps and the Environmental Protection Agency (EPA) initiated a rulemaking to consider "issues associated with the scope of waters that are subject to the Clean Water Act (CWA), in light of the U.S. Supreme Court decision in *[SWANCC].*" 68 Fed. Reg. 1991 (2003). The "goal of the agencies" was "to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA." *Ibid.*

Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. *See Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 842–845, 104 S. Ct. 2778 (1984). Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.

The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.

JUSTICE KENNEDY, concurring in the judgment.

These consolidated cases require the Court to decide whether the term "navigable waters" in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact. In *Solid Waste Agency v. United States Army Corps of Eng'rs,* 531 U.S. 159, 121 S. Ct. 675 (2001) *(SWANCC),* the Court held, under the circumstances presented there, that to constitute " 'navigable waters' " under the Act, a water or

wetland must possess a "significant nexus" to waters that are or were navigable in fact or that could reasonably be so made. *Id.,* at 167, 172, 121 S. Ct. 675. In the instant cases neither the plurality opinion nor the dissent by Justice Stevens chooses to apply this test; and though the Court of Appeals recognized the test's applicability, it did not consider all the factors necessary to determine whether the lands in question had, or did not have, the requisite nexus. In my view the cases ought to be remanded to the Court of Appeals for proper consideration of the nexus requirement.

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. 33 CFR §§ 328.3(a)(1), (5), (7) (2005). The Corps views tributaries as within its jurisdiction if they carry a perceptible "ordinary high water mark." § 328.4(c); 65 Fed. Reg. 12823 (2000). An ordinary high-water mark is a "line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 CFR § 328.3(e).

Contrary to the plurality's description, *ante*, at 2215, 2222, wetlands are not simply moist patches of earth. They are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." § 328.3(b). The Corps' Wetlands Delineation Manual, including over 100 pages of technical guidance for Corps officers, interprets this definition of wetlands to require: (1) prevalence of plant species typically adapted to saturated soil conditions, determined in accordance with the United States Fish and Wildlife Service's National List of Plant Species that Occur in Wetlands; (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years. *See* Wetlands Research Program Technical Report Y-87-1 (on-line edition), pp 12–34 (Jan. 1987), www.saj.usace.army.mil/permit/documents/87manual.pdf (all Internet material as visited June 16, 2006, and available in Clerk of Court's case file). Under the Corps' regulations, wetlands are adjacent to tributaries, and thus covered by the Act, even if they are "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." § 328.3(c).

B

While the plurality reads non-existent requirements into the Act, the dissent reads a central requirement out — namely, the requirement that the

word "navigable" in "navigable waters" be given some importance. Although the Court has held that the statute's language invokes Congress' traditional authority over waters navigable in fact or susceptible of being made so, *SWANCC*, 531 U.S., at 172, 121 S. Ct. 675 (citing *Appalachian Power*, 311 U.S., at 407–408, 61 S. Ct. 291), the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.

When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region. That issue, however, is neither raised by these facts nor addressed by any agency regulation that accommodates the nexus requirement outlined here.

This interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption. To be sure, the significant nexus requirement may not align perfectly with the traditional extent of federal authority. Yet in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty. *Cf. Pierce County v. Guillen,* 537 U.S. 129, 147, 123 S. Ct. 720 (2003) (upholding federal legislation "aimed at improving safety in the channels of commerce"); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508, 524–525, 61 S. Ct. 1050 (1941) ("[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries . . . . [T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce"). As explained earlier, moreover, and as exemplified by *SWANCC*, the significant-nexus test itself prevents problematic applications of the statute. *See supra,* at 2246, 531 U.S., at 174, 121 S. Ct. 675. The possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's text and structure. *See Gonzales v. Raich,* 545 U.S. 1, 125 S. Ct. 2195 (2005) ("[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence" (internal quotation marks omitted)).

III

In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the

principles outlined above. Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the issue, a remand is appropriate, in my view, for application of the controlling legal standard.

In these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting [omitted].

NOTES AND QUESTIONS

1. The *Rapanos* case concerns the jurisdiction of the Corps of Engineers in issuing § 404 Dredge and Fill Permits. Note in particular the breadth of that jurisdiction which the Corps has claimed in the past and the high costs — both in terms of time and money — in seeking (let alone complying with) a § 404 permit. Should there be a "de minimus" rule for, say, single-home development?

2. *State vs. Federal Court.* State courts do not always follow the lead of the federal courts in dealing with land use issues, and wetlands/takings is no exception. In a well-reasoned (on the takings issue) opinion, the Rhode Island Supreme Court found no taking resulted from the denial of an "application to alter wetlands" in order to construct 4 industrial buildings on 8 acres because the landowner had filed no further plans (and so did not meet the *Lucas* total taking standard) and because he had purchased the property with full knowledge of state wetland regulations (and therefore could have no reasonable investment-backed expectations under the *Penn Central* partial takings rule). *Alegria v. Keeney*, 687 A.2d 1249 (R.I. 1997). However, the court emphasized Rhode Island had a demonstrable history of wetland protection for welfare (not health and safety) reasons. How important is this emphasis in the court's decision? Would the U.S. Supreme Court agree?

3. Both the plurality opinion of the Court and Justice Kennedy's concurring opinion turn, in part, on a "nexus." How do the opinions differ with respect to this key term? Is there any relation to the "nexus" requirement in the *Nollan* case which you read earlier? Note that Justice Scalia wrote that opinion as well as the plurality opinion here in *Rapanos.*

4. *Do the Environment and Ecology Fall within the Public Welfare?* Justice Scalia in *Lucas* makes it clear that government cannot preserve land for ecological reasons by means of regulations, but instead must pay for it. On what grounds? Can you make a case for sustaining such regulation absent compensation? *See Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

5. *The Denominator Issue.* What if the "relevant parcel" were 100 acres of beachfront wetlands zoned for preservation in accordance with a county development plan, on which, say, 800 acres designated for residential and mixed commercial use had already been developed? *See Sandy Beach Defense*

Fund v. City Council of City & County of Honolulu, 773 P.2d 250 (Haw. 1989). For discussion of policy considerations in determining the relevant denominator, see Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch*, 44 ADMIN. L. REV. 403, 423–24 (1993); Kennedy, Comment, *The United States Claims Court: A Safe Harbor from Government Regulation of Privately-Owned Wetlands*, 9 PACE ENVTL. L. REV. 723, 744 (1992).

6. Chief Justice Roberts' concurring opinion laments the lack of consensus on the Court over what criteria to apply, and suggests much confusion will result due to Justice Kennedy's concurrence with the result but on different grounds. But the plurality represents four Justices, presumably writing for the Court, regardless of the split, doesn't it? Why would that plurality represent less than the rule of the case? *See, e.g.*, *American Home Assur. Co. v. Plaza Material Corp.*, 908 S.2d 360 (2005); *Altmann v. Republic of Austria*, 335 F. Supp. 2d 1066 (C.D. Cal. 2004).

[4] PUBLIC LANDS

Much of the land that was eventually to become the vast majority of federal land called "the public domain" was acquired through fortuitous purchases. Alaska, Florida, the Louisiana Purchase, and the Mexican Purchase, totaling 54 percent of the land area of the United States, come most readily to mind. The land was for the most part acquired during a decidedly expansionist period in U.S. history (between 1803 and 1867). The major thrust of legislation and other programs governing its use was to put as much public land as possible rapidly and expeditiously into private hands. The wholesale "give-aways" (usually in the form of below market-price sales) that characterized early United States land policy did not abate until the first part of the twentieth century, which saw the setting up of a national park system, followed by national forests, reserves, and a host of other federal land classifications designed to hold and conserve, rather than dispose of, public land. (For more discussion, see the notes following *Plume v. Seward & Thompson* in Chapter 1.)

CALIFORNIA COASTAL COMMISSION v. GRANITE ROCK CO.

Supreme Court of the United States
480 U.S. 572 (1987)

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether Forest Service regulations, federal land use statutes and regulations, or the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 *et seq.*, preempt the California Coastal Commission's imposition of a permit requirement on operation of an unpatented mining claim in a national forest.

I

Granite Rock Company is a privately owned firm that mines chemical and pharmaceutical grade white limestone. Under the Mining Act of 1872, a

private citizen may enter federal lands to explore for mineral deposits. If a person locates a valuable mineral deposit on federal land, and perfects the claim by properly staking it and complying with other statutory requirements, the claimant "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," 30 U.S.C. § 26, although the United States retains title to the land. The holder of a perfected mining claim may secure a patent to the land by complying with the requirements of the Mining Act and regulations promulgated thereunder, *see* 43 CFR § 3861.1 *et seq.* (1986), and, upon issuance of the patent, legal title to the land passes to the patent-holder. Granite Rock holds unpatented mining claims on federally owned lands on and around Mount Pico Blanco in the Big Sur region of Los Padres National Forest.

From 1959 to 1980, Granite Rock removed small samples of limestone from this area for mineral analysis. In 1980, in accordance with federal regulations, *see* 36 CFR § 228.1 *et seq.* (1986), Granite Rock submitted to the Forest Service a 5-year plan of operations for the removal of substantial amounts of limestone. The plan discussed the location and appearance of the mining operation, including the size and shape of excavations, the location of all access roads and the storage of any overburden. The Forest Service prepared an Environmental Assessment of the plan. The Assessment recommended modifications of the plan, and the responsible Forest Service Acting District Ranger approved the plan with the recommended modifications in 1981. Shortly after Forest Service approval of the modified plan of operations, Granite Rock began to mine.

Under the California Coastal Act, any person undertaking any development, including mining, in the State's coastal zone must secure a permit from the California Coastal Commission. According to the CCA, the Coastal Commission exercises the State's police power and constitutes the State's coastal zone management program for purposes of the federal CZMA. In 1983 the Coastal Commission instructed Granite Rock to apply for a coastal development permit for any mining undertaken after the date of the Commission's letter. Granite Rock immediately filed an action in the United States District Court for the Northern District of California seeking to enjoin officials of the Coastal Commission from compelling Granite Rock to comply with the Coastal Commission permit requirement and for declaratory relief under 28 U.S.C. § 2201. Granite Rock alleged that the Coastal Commission permit requirement was preempted by Forest Service regulations, by the Mining Act of 1872, and by the CZMA. Both sides agreed that there were no material facts in dispute. [The District Court dismissed the action but the Ninth Circuit Court of Appeals reversed. The CCC appealed.]

[Section II of the Court's opinion is omitted.]

III

Granite Rock does not argue that the Coastal Commission has placed any particular conditions on the issuance of a permit that conflict with federal statutes or regulations. Indeed, the record does not disclose what conditions the Coastal Commission will place on the issuance of a permit. Rather, Granite

Rock argues, as it must given the posture of the case, that there is no possible set of conditions the Coastal Commission could place on its permit that would not conflict with federal law — that any state permit requirement is *per se* preempted. The only issue in this case is this purely facial challenge to the Coastal Commission permit requirement.

The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. This Court has "repeatedly observed" that ' "[t]he power over the public land thus entrusted to Congress is without limitations." ' *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). Granite Rock suggests that the Property Clause not only invests unlimited power in Congress over the use of federally owned lands, but also exempts federal lands from state regulation whether or not those regulations conflict with federal law.

We agree with Granite Rock that the Property Clause gives Congress plenary power to legislate the use of the federal land on which Granite Rock holds its unpatented mining claim. The question in this case, however, is whether Congress has enacted legislation respecting this federal land that would preempt any requirement that Granite Rock obtain a California Coastal Commission permit. To answer this question we follow the preemption analysis by which the Court has been guided on numerous occasions: [The Court noted that state law can be preempted if Congress "evidences an intent to occupy a given field" or if a state law actually conflicts with federal law.]

A

[Granite Rock and the Solicitor General as amicus made three arguments that the state permit requirement was preempted. Only that part of the opinion is reproduced that considers the argument "that indications that state land use planning over unpatented mining claims in national forests is preempted should lead to the conclusion that the Coastal Commission permit requirement is preempted."]

B

The second argument proposed by Granite Rock is that federal land management statutes demonstrate a legislative intent to limit States to a purely advisory role in federal land management decisions, and that the Coastal Commission permit requirement is therefore preempted as an impermissible state land use regulation. In 1976 two pieces of legislation were passed that called for the development of federal land use management plans affecting unpatented mining claims in national forests. Under the Federal Land Policy and Management Act (FLPMA), the Department of Interior's Bureau of Land Management is responsible for managing the mineral resources on federal forest lands; under the National Forest Management Act (NFMA), the Forest Service under the Secretary of Agriculture is responsible for the management of the surface impacts of mining on federal forest lands. Granite Rock, as well as the Solicitor General, point to aspects of these

statutes indicating a legislative intent to limit States to an advisory role in federal land management decisions. For example, the NFMA directs the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies," 16 U.S.C. § 1604(a). The FLPMA directs that land use plans developed by the Secretary of the Interior "shall be consistent with State and local plans to the maximum extent [the Secretary] finds consistent with Federal law," and calls for the Secretary, "to the extent he finds practical," to keep apprised of state land use plans, and to "assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans." 43 U.S.C. § 1712(c)(9).

For purposes of this discussion and without deciding this issue, we may assume that the combination of the NFMA and the FLPMA preempt the extension of state land use plans onto unpatented mining claims in national forest lands. The Coastal Commission[2] asserts that it will use permit conditions to impose environmental regulation.

While the CCA gives land use as well as environmental regulatory authority to the Coastal Commission, the state statute also gives the Coastal Commission the ability to limit the requirements it will place on the permit. The CCA declares that the Coastal Commission will "provide maximum state involvement in federal activities allowable under federal law or regulations." Cal. Pub. Res. Code Ann. § 30004. Since the state statute does not detail exactly what state standards will and will not apply in connection with various federal activities, the statute must be understood to allow the Coastal Commission to limit the regulations it will impose in those circumstances. In the present case, the Coastal Commission has consistently maintained that it does not seek to prohibit mining of the unpatented claim on national forest land.

The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities. As noted above, 43 U.S.C. § 1712(c)(9) requires that the Secretary of Interior's land use plans be consistent with state plans only "to the extent he finds practical." The immediately preceding subsection, however, requires that the Secretary's land use plans "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." § 1712(c)(8).

[2] Although the California Coastal Act requires local governments to adopt Local Coastal Programs, which include a land use plan and zoning ordinance, *see* Cal. Pub. Res. Code Ann. §§ 30500, 30512, 30513, no Local Coastal Program permit requirement is involved in this case. The permit at issue in this litigation is issued by the Coastal Commission directly.

Congress has also illustrated its understanding of land use planning and environmental regulation as distinct activities by delegating the authority to regulate these activities to different agencies. The stated purpose of Part 228, subpart A of the Forest Service regulations, 36 CFR § 228.1, is to "set forth rules and procedures" through which mining on unpatented claims in national forests "shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." The next sentence of the subsection, however, declares that "[i]t is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior." Congress clearly envisioned that although environmental regulation and land use planning may hypothetically overlap in some instances, these two types of activity would in most cases be capable of differentiation. Considering the legislative understanding of environmental regulation and land use planning as distinct activities, it would be anomalous to maintain that Congress intended any state environmental regulation of unpatented mining claims in national forests to be *per se* preempted as an impermissible exercise of state land use planning. Congress' treatment of environmental regulation and land use planning as generally distinguishable calls for this Court to treat them as distinct, until an actual overlap between the two is demonstrated in a particular case.

Whether or not state land use planning over unpatented mining claims in national forests is preempted, the Coastal Commission insists that its permit requirement is an exercise of environmental regulation rather than land use planning. In the present posture of this litigation, the Coastal Commission's identification of a possible set of permit conditions not preempted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement. This analysis is not altered by the fact that the Coastal Commission chooses to impose its environmental regulation by means of a permit requirement. If the Federal Government occupied the field of environmental regulation of unpatented mining claims in national forests — concededly not the case — then state environmental regulation of Granite Rock's mining activity would be preempted, whether or not the regulation was implemented through a permit requirement. Conversely, if reasonable state environmental regulation is not preempted, then the use of a permit requirement to impose the state regulation does not create a conflict with federal law where none previously existed. The permit requirement itself is not talismanic.

IV

Following an examination of the "almost impenetrable maze of arguably relevant legislation," Justice Powell concludes that "[i]n view of the Property Clause . . ., as well as common sense, federal authority must control." As noted above, the Property Clause gives Congress plenary power over the federal land at issue; however, even within the sphere of the Property Clause, state law is preempted only when it conflicts with the operation or objectives of federal law, or when Congress "evidences an intent to occupy a given field," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 248. The suggestion that traditional preemption analysis is inapt in this context can be justified, if at all, only by the assertion that the state regulation in this case would be "duplicative." The description of the regulation as duplicative, of course, is based on

the conclusions of the dissent that land use regulation and environmental regulation are indistinguishable, and that any state permit requirement, by virtue of being a permit requirement rather than some other form of regulation, would duplicate federal permit requirements. Because we disagree with these assertions, we apply the traditional preemption analysis which requires an actual conflict between state and federal law, or a congressional expression of intent to preempt, before we will conclude that state regulation is preempted.

Contrary to the assertion of Justice Powell that the Court today gives States power to impose regulations that "conflict with the views of the Forest Service," we hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law. Neither do we take the course of condemning the permit requirement on the basis of as yet unidentifiable conflicts with the federal scheme.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion. It is so ordered.

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part. [Some of Justice Powell's arguments are discussed in the majority opinion. However, his views on the differences between environmental and land use regulation are of interest:]

In fact, the regulation of land use is more complicated than the Court suggests. First, as is true with respect to the Secretary of the Interior, the Secretary of Agriculture has been directed to develop comprehensive plans for the use of resources located in national forests. [Justice Powell reviewed the statutes and concluded:] Thus, it is clear that the Secretary of Agriculture has the final authority to determine the best use for federal lands, and that he must consider the views of state regulators before making a decision. There is no suggestion in the statute or the legislative history that state regulators should have the final authority in determining how particular federal lands should be used.

The Forest Service also has a role in implementing the Nation's mineral development policy. The Court shrugs off the importance of this obligation, noting that "the responsibility for managing [mineral] resources is in the Secretary of the Interior." This statement erroneously equates mineral resources management with land use management. Title 43 of the Code of Federal Regulations details the activities of the Bureau of Land Management (BLM) [of the Department of the Interior] in this context. Generally, BLM manages the process by which rights to minerals are obtained from the United States and protected against others, the payment of royalties to the Federal Government, and the conservation of the minerals themselves. In some cases — like oil, gas, and coal — BLM supervises leasing of the right to extract the materials. But this case involves "hardrock" minerals governed by the Mining Act of 1872. With respect to those minerals, the BLM's actions are limited to determining whether the land is subject to location under the mining laws; whether a mining claim is properly located and recorded; whether assessment work is properly performed; and whether the requirements for patenting a claim have been complied with. None of these determinations is a "land use"

determination in the sense of balancing mineral development against environmental hazard to surface resources. The Forest Service makes these determinations through its review of a mining plan of operation.

The second part of the Court's analysis considers both the NFMA and the FLPMA. The Court assumes that these statutes "preempt the extension of state land use plans onto unpatented mining claims in national forest lands." But the Court nevertheless holds that the Coastal Commission can require Granite Rock to secure a state permit before conducting mining operations in a national forest. This conclusion rests on a distinction between "land use planning" and "environmental regulation." In the Court's view, the NFMA and the FLPMA indicate a congressional intent to preempt state land use regulations, but not state environmental regulations. I find this analysis insupportable, either as an interpretation of the governing statutes or as a matter of logic.

The basis for the alleged distinction is that Congress has understood land use planning and environmental regulation to be distinct activities. The only statute cited for this proposition is § 202(c)(8) of the FLPMA, 43 U.S.C. § 1712(c)(8), that requires the Secretary of the Interior's land use plans to "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." But this statute provides little support for the majority's analysis. A section mandating consideration of environmental standards in the formulation of land use plans does not demonstrate a general separation between "land use planning" and "environmental regulation." Rather, § 202(c)(8) recognizes that the Secretary's land use planning will affect the environment, and thus directs the Secretary to comply with certain pollution standards.

Nor does this section support the Court's ultimate conclusion, that Congress intended the Secretary's plans to comply with all state environmental regulations. [B]ecause the FLPMA requires compliance only with "applicable" standards, it is difficult to treat this one section as an independent and controlling command that the Secretary comply with all state environmental standards. Rather, viewing the complex of statutes and regulations as a whole, it is reasonable to view § 202(c)(8) simply as a recognition that the Secretary's plans must comply with standards made applicable to federal activities by other federal laws.

The only other authority cited by the Court for the distinction between environmental regulation and land use planning is a Forest Service regulation stating that the Forest Service's rules do not "provide for the management of mineral resources," 36 CFR § 228.1 (1986). From this, the Court concludes that the Forest Service enforces environmental regulation but does not engage in land use planning. This conclusion misunderstands the division of authority between the BLM and the Forest Service. The Forest Planning Act and the NFMA direct the Secretary of Agriculture and the Forest Service to develop comprehensive plans for the use of forest resources. Similarly, the Organic Administration Act commands the Secretary of Agriculture to promulgate regulations governing the "occupancy and use" of national forests, 16 U.S.C. § 551. These regulations are integral to the Forest Service's management of national forests. To view them as limited to environmental concerns ignores

both the Forest Service's broader responsibility to manage the use of forest resources and the federal policy of making mineral resources accessible to development.[5] The Coastal Commission has no interest in the matters within the jurisdiction of the BLM; the regulations that it seeks to impose concern matters wholly within the control of the Forest Service. Thus, this regulation does not support the Court's distinction between environmental regulation and land use planning.

The most troubling feature of the Court's analysis is that it is divorced from the realities of its holding. The Court cautions that its decision allows only "reasonable" environmental regulation and that it does not give the Coastal Commission a veto over Granite Rock's mining activities. But if the Coastal Commission can require Granite Rock to secure a permit before allowing mining operations to proceed, it necessarily can forbid Granite Rock from conducting these operations. It may be that reasonable environmental regulations would not force Granite Rock to close its mine. This misses the point. The troubling fact is that the Court has given a state authority — here the Coastal Commission — the power to prohibit Granite Rock from exercising the rights granted by its Forest Service permit. This abdication of federal control over the use of federal land is unprecedented.

The state regulation in this case is particularly intrusive because it takes the form of a separate, and duplicative, permit system. As the Court has recognized, state permit requirements are especially likely to intrude on parallel federal authority, because they effectively give the State the power to veto the federal project. Although the intrusive effect of duplicative state permit systems may not lead to a finding of preemption in all cases, it certainly is relevant to a careful preemption analysis.

The dangers of duplicative permit requirements are evident in this case. The federal permit system reflects a careful balance between two important federal interests: the interest in developing mineral resources on federal land, and the interest in protecting our national forests from environmental harm. The Forest Service's issuance of a permit to Granite Rock reflects its conclusion that environmental concerns associated with Granite Rock's mine do not justify restricting mineral development on this portion of a federal forest. Allowing the Coastal Commission to strike a different balance necessarily conflicts with the federal system.

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[5] The lack of statutory support for the Court's distinction is not surprising, because — with all respect — it seems to me that the distinction is one without a rational difference. As the Court puts it: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." This explanation separates one of the reasons for Forest Service decisions from the decisions themselves. In considering a proposed use of a parcel of land in the national forest, the Forest Service regulations consider the damage the use will cause to the environment as well as the federal interest in making resources on public lands accessible to development. The Forest Service may decide that the proposed use is appropriate, that it is inappropriate, or that it would be appropriate only if further steps are taken to protect the environment. The Court divides this decision into two distinct types of regulation and holds that congress intended to preempt duplicative state regulation of one part but not the other. Common sense suggests that it would be best for one expert federal agency, the Forest Service, to consider all these factors and decide what use best furthers the relevant federal policies.

JUSTICE SCALIA, with whom JUSTICE WHITE joins, dissenting. [Justice Scalia agreed with Justice Powell on the land use regulation issue:]

It seems to me ultimately irrelevant whether state environmental regulation has been preempted with respect to federal lands, since the exercise of state power at issue here is not environmental regulation but land use control. The Court errs in entertaining the Coastal Commission's contention "that its permit requirement is an exercise of environmental regulation," and mischaracterizes the issue when it describes it to be whether "any state permit requirement, whatever its conditions, [is] *per se* preempted by federal law." We need not speculate as to what the nature of this permit requirement was. We are not dealing with permits in the abstract, but with a specific permit, purporting to require application of particular criteria, mandated by a numbered section of a known California law. That law is plainly a land use statute, and the permit that statute requires Granite Rock to obtain is a land use control device. Its character as such is not altered by the fact that the State may now be agreeable to issuing it so long as environmental concerns are satisfied. Since, as the Court's opinion quite correctly assumes, state exercise of land use authority over federal lands is preempted by federal law, California's permit requirement must be invalid.

NOTES AND QUESTIONS

1. *Federal vs. Local Jurisdiction.* What would happen if the Secretary of the Interior were to lease, say, 40 acres in an abandoned military base to a private developer for 99 years for the construction of high-rise condominium and apartment buildings, in an area zoned by the local government in whose jurisdiction the land would otherwise fall, for open space, or zoned for low-density residential use?

2. *The Extent of Federal Jurisdiction.* The extent of the type of peripheral land use regulation designed to protect federal land but exercised over private land is becoming an issue around national forests and other public lands. How far does such control physically extend? What about acid rain or mist from nearby, but nonadjacent, chemical works which defoliates national forests or parklands? What kind of police power is this? How does it differ from that exercised by the states? See Sax, *Helpless Giants: The National Policy and the Regulation of Private Land*, 75 MICH. L. REV. 239 (1976).

3. *The Sale of Federal Lands and the Accompanying Controversies.* Disposal of much of federal land, especially military land, takes place under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 472 *et seq.* ("FPASA"). Indeed, it was under this Act that the Administration attempted to sell off perhaps the most controversial part of the "national estate," the 72-acre Fort DeRussy on Waikiki Beach in Honolulu, Hawaii. Part of 715 acres designated for disposal under the aforementioned Asset Management Program by the Property Review Board was a parcel containing 17 of the Fort's 72 acres which were to be sold for real estate development purposes. Among the issues was whether the land should have been offered first to the City at a discount for a public park (which was more or less its current use). See Comment, *The Sale of Fort DeRussy: An Analyses of the Reagan Administration's Federal Land Sales Program*, 7 U. HAW. L. REV. 105 (1985), and

Government Land Bank v. General Serv. Admin., 671 F.2d 663 (1st Cir. 1982), for possible answers. For a policy analysis of the issues raised by federal land disposal in a historical context, see RETHINKING THE FEDERAL LANDS, (Brubaker ed., 1984); M. CLAWSON, THE FEDERAL LANDS REVISITED (1983).

4. *Preemption.* Should Congress expressly preempt state regulation in situations like the one involved in *Granite Rock*? Is the burden of going through two systems for permits too great? If Congress does preempt, how can the state's interest be protected?

5. *Environmental vs. Land Use Law.* Should a state anxious to retain a voice in these activities reexamine its laws to determine if they are "environmental" ones, not merely "land use" controls? If they are not, can the state amend them and make them "environmental"? Is the distinction between the two clear? *See* Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COLO. L. REV. 711 (1991).

§ B CLEAN AIR, CLEAN WATER, AND THE USE OF PROPERTY

[1] CLEAN AIR

Government, and in particular the federal government, got into the air pollution control business in 1970 with amendments to the Air Quality Act of 1967. In many ways, the Clean Air Act is the toughest of federal laws affecting the use of land and the one that, in the past dozen years, has had a substantial effect. This is so at least in part because it deals directly with the use of land. State and local governments, the actual administrators of the federally mandated clean air program, have no choice about whether or not to participate. The Clean Air Act requires state and local governments to implement clean air measures in substantial part through land use controls.

Basically, the Clean Air Act provides for geographically uniform federal quality standards for ambient air (the air around us) to be established with respect to certain key pollutants by the administrator of the Environmental Protection Agency (EPA). The standards are to be enforced by the states through a state implementation plan (SIP), which the EPA administrator may approve only if it meets the federal standards. If not, the administrator may draw up and issue a SIP for a recalcitrant state. The act also provides for the promulgation of emission standards (for air at a point of discharge into the atmosphere) for new stationary sources of pollution (factories, power plants, and the like), for certain hazardous air pollutants, and for pollutants from motor vehicles. Various lawsuits and amendments to the Clean Air Act have added requirements for the prevention of significant deterioration of air quality in clean air regions, the designation of air quality maintenance areas, and the need for preconstruction reviews of new major stationary sources of pollution. Finally, the amendments suggest that a state divide all its air quality maintenance regions into three zones, which, other things being equal, regulate the number of new pollution sources — and, hence, the use of land — in each.

CITIZENS AGAINST REFINERY'S EFFECTS, INC. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

United States Court of Appeals
643 F.2d 183 (4th Cir. 1981)

K.K. HALL, CIRCUIT JUDGE.

Citizens Against the Refinery's Effects (CARE) appeals from a final ruling by the Administrator of the Environmental Protection Agency (EPA) approving the Virginia State Implementation Plan (SIP) for reducing hydrocarbon pollutants. The plan requires the Virginia Highway Department to decrease usage of a certain type of asphalt, thereby reducing hydrocarbon pollution by more than enough to offset expected pollution from the Hampton Roads Energy Company's (HREC) proposed refinery. We affirm the action of the administrator in approving the state plan.

The Act

The Clean Air Act establishes National Ambient Air Quality Standards (NAAQS) for five major air pollutants.[1] The EPA has divided each state into Air Quality Control Regions (AQCR)[2] and monitors each region to assure that the national standard for each pollutant is met. Where the standard has not been attained for a certain pollutant, the state must develop a State Implementation Plan designed to bring the area into attainment within a certain period. In addition, no new source of that pollutant may be constructed until the standard is attained.

The Clean Air Act created a no-growth environment in areas where the clean air requirements had not been attained. EPA recognized the need to develop a program that encouraged attainment of clean air standards without discouraging economic growth. Thus the agency proposed an Interpretive Ruling in 1976 which allowed the states to develop an "offset program" within the State Implementation Plans. The offset program, later codified by Congress in 1977 Amendments to the Clean Air Act, permits the states to develop plans which allow construction of new pollution sources where accompanied by a corresponding reduction in an existing pollution source. In effect, a new emitting facility can be built if an existing pollution source decreases its emissions or ceases operations as long as a positive net air quality benefit occurs.

If the proposed factory will emit carbon monoxide, sulfur dioxide, or particulates, the EPA requires that the offsetting pollution source be within the immediate vicinity of the new plant. The other two pollutants, hydrocarbons and nitrogen oxide, are less "site-specific," and thus the ruling permits the offsetting source to locate anywhere within a broad vicinity of the new source.

The offset program has two other important requirements. first, a base time period must be determined in which to calculate how much reduction is needed

[1] The five major pollutants for which standards have been developed are sulfur dioxides, carbon monoxide, nitrogen dioxide, particulates, and photochemical oxidents. 40 CFR § 50 (1976).

[2] There are 247 AQCRs in the nation. Virginia has seven AQCRs.

in existing pollutants to offset the new source. This base period is defined as the first year of the SIP, or where the state has not yet developed a SIP, as the year in which a construction permit application is filed. Second, the offset program requires that the new source adopt the Lowest Achievable Emissions Rate (LAER) using the most modern technology available in the industry.

The Refinery

HREC proposes to build a petroleum refinery and offloading facility in Portsmouth, Virginia. Portsmouth has been unable to reduce air pollution enough to attain the national standard for one pollutant, photochemical oxidants, which is created when hydrocarbons are released into the atmosphere and react with other substances. Since a refinery is a major source of hydrocarbons, the Clean Air Act prevents construction of the HREC plant until the area attains the national standard.

In 1975, HREC applied to the Virginia State Air Pollution Control Board (VSAPCB) for a refinery construction permit. The permit was issued by the VSAPCB on October 8, 1975, extended and reissued on October 5, 1977 after a full public hearing, modified on August 8, 1978, and extended again on September 27, 1979. The VSAPCB, in an effort to help HREC meet the clean air requirements, proposed to use the offset ruling to comply with the Clean Air Act.

On November 28, 1977, the VSAPCB submitted a State Implementation Plan to EPA which included the HREC permit. The Virginia Board proposed to offset the new HREC hydrocarbon pollution by reducing the amount of cutback asphalt used for road paving operations in three highway districts by the Virginia Department of Highways. By switching from "cutback" to "emulsified" asphalt, the state can reduce hydrocarbon pollutants by the amount necessary to offset the pollutants from the proposed refinery. The standard of review here is whether the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The Geographic Area

CARE contends that the state plan should not have been approved by EPA since the three-highway-district area where cutback usage will be reduced to offset refinery emissions was artificially developed by the state. The ruling permits a broad area (usually within one AQCR) to be used as the offset basis.

The ruling does not specify how to determine the area, nor provide a standard procedure for defining the geographic area. 41 Fed. Reg. 55529 (1976). Here the Virginia Board originally proposed to use four highway districts comprising one-half the state as the offset area. When this was found to be much more than necessary to offset pollution expected from the refinery, the state changed it to one highway district plus nine additional counties. Later the proposed plan was again revised to include a geographic area of three highway districts.

The agency action in approving the use of three highway districts was neither arbitrary, capricious, nor outside the statute. First, Congress intended

that the states and the EPA be given flexibility in designing and implementing SIPs. Such flexibility allows the states to make reasoned choices as to which areas may be used to offset new pollution and how the plan is to be implemented. Second, the offset program was initiated to encourage economic growth in the state. Thus a state plan designed to reduce highway department pollution in order to attract another industry is a reasonable contribution to economic growth without a corresponding increase in pollution. Third, to be sensibly administered the offset plan had to be divided into districts which could be monitored by the highway department. Use of any areas other than highway districts would be unwieldy and difficult to administer. Fourth, the scientific understanding of ozone pollution is not advanced to the point where exact air transport may be predicted. Designation of the broad area in which hydrocarbons may be transported is well within the discretion and expertise of the agency.

The Base Year

Asphalt consumption varies greatly from year to year, depending upon weather and road conditions. Yet EPA must accurately determine the volume of hydrocarbon emissions from cutback asphalt. Only then can the agency determine whether the reduction in cutback usage will result in an offset great enough to account for the new refinery pollution. To calculate consumption of a material where it constantly varies, a base year must be selected. In this case, EPA's Interpretive Ruling establishes the base year as the year in which the permit application is made. EPA decided that 1977 was an acceptable base year. CARE argues that EPA illegally chose 1977 instead of 1975.

Considering all of the circumstance, including the unusually high asphalt consumption in 1977, the selection by EPA of that as the base year was within the discretion of the agency. Since the EPA Interpretive Ruling allowing the offset was not issued until 1976, 1977 was the first year after the offset ruling and the logical base year in which to calculate the offset. Also, the permit issued by the VSAPCB was reissued in 1977 with extensive additions and revisions after a full hearing. Under these circumstances, 1977 appears to be a logical choice of a base year.

The Legally Binding Plan

For several years, Virginia has pursued a policy of shifting from cutback asphalt to the less expensive emulsified asphalt in road-paving operations. The policy was initiated in an effort to save money, and was totally unrelated to a State Implementation Plan. Because of this policy, CARE argues that hydrocarbon emissions were decreasing independent of this SIP and therefore are not a proper offset against the refinery. They argue that there is not, in effect, an actual reduction in pollution.

The Virginia voluntary plan is not enforceable and therefore is not in compliance with the 1976 Interpretive Ruling which requires that the offset program be enforceable. The EPA, in approving the state plan, obtained a letter from the Deputy Attorney General of Virginia in which he stated that the requisites had been satisfied for establishing and enforcing the plan with

the Department of Highways. Without such authority, no decrease in asphalt-produced pollution is guaranteed. In contrast to the voluntary plan, the offset plan guarantees a reduction in pollution resulting from road-paving operations.

The Lower Achievable Emissions Rate

Finally, CARE argues that the Offset Plan does not provide adequate Lowest Achievable Emission Rates (LAER) as required by the 1976 Interpretive Ruling because the plan contains only a 90% vapor recovery requirement, places an excessive 176.5 ton limitation on hydrocarbon emissions, and does not require specific removal techniques at the terminal. EPA takes the position that the best technique available for marine terminals provides only a 90% recovery and that the 176.5 ton limit may be reduced by the agency after the final product mix at the terminal is determined.

Since the record shows no evidence of arbitrary or capricious action in approving the HREC emissions equipment, the agency determination of these technical matters must be upheld.

NOTES AND QUESTIONS

1. *Air Quality Zoning.* The Portsmouth refinery was a highly controversial project that required a number of other federal permits in addition to air quality clearance. Since the refinery was in an area where the air quality standards had not been attained, the state had to use the emission offset policy to justify air quality compliance. This led to an exercise in air quality zoning. The three highway districts used in the offset decision spanned most of the eastern, mainly rural, third of the state and cut across four Air Quality Control Regions (ACQR). In effect, the state was zoned so that air pollution could be "averaged" in a way that would make the refinery acceptable. Was this decision justified?

2. *Restricting Offsets.* The interpretive ruling at issue in the *Citizens* case favored keeping emission offsets at least within the same AQCR as the proposed source and hydrocarbon offsets in particular within 85 miles of urban areas, where they are abundant. In 1977 Congress codified the emission offset policy as follows:

> The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if (A) the other area has an equal or higher nonattainment classification than the area in which the source is located and (B) emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located. Such emission reductions shall be, by the time a new or modified source commences operation,

> in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.

42 U.S.C. § 7503(c)(1).

Would the offset allowed in the *Citizens* case qualify under this statute? Note that states had begun the switch to water-based paving asphalt at the time this offset was approved and was eventually approved by EPA as an emission control strategy. Virginia had been slow to make the change. How did this affect the outcome in the case? Was it correct to allow the state to use water-based asphalt as an emission offset when it was cheaper, a better energy conservation strategy, readily available, and about to be approved by the EPA?

3. *Regional Impacts.* What was the regional impact of the refinery's approval? One commentator noted:

> The economic benefit dimension of the offset policy indicates the importance of limiting the offset area to the vicinity of the source. The offset policy was intended to create an economic incentive to reduce air pollution. The Portsmouth area may reap an economic benefit from the refinery, but distant rural regions in the offset area will not. They will contribute their emission reductions to the refinery offset, without receiving an economic benefit comparable to that enjoyed by the Portsmouth area. An industry that wanted to locate in a remote region of the refinery offset area might be forced, or might find it cheaper, to locate elsewhere because offset credits have been exhausted.

Rudykoff, *Recent Development,* Citizens Against the Refinery's Effects, Inc. (CARE) v. United States Environmental Protection Agency (EPA)*, 643 F.2d 183 (4th Cir., 1981)*, 12 ENVTL. L. 811, 819 (1982). For an argument that fragmented statutes prevented a comprehensive review of the project, see Liroff, *Oil vs. Oysters — Lessons for Environmental Regulation of Industrial Siting From the Hampton Roads Refinery Controversy*, 11 B.C. ENVTL. AFF. L. REV. 705, 714 (1984).

[2] THE CLEAN WATER ACT: A SELECTIVE OVERVIEW

It is difficult to make effective use of land without discharging something into a waterway. Therefore, the repeated attempts by Congress to see that the United States — and in particular its states and local governments — does what is possible to clean up the nation's waterways has had significant land use consequences. The Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977 (the "Clean Water Act"), is the complex legislation that was passed to implement the Congressional intent.

The Clean Water Act contains several parts that have a particularly strong bearing on the use of land: Section 208 wastewater planning, pollution discharge (point and nonpoint source), U.S. Army Corps of Engineers' dredge

and fill permit programs, and wastewater treatment plant construction. Drinking water preservation (the "injection" issue) is the subject of separate legislation, closely related to the Clean Water Act. With clean air, coastal zone, flood hazard, and other programs, the federal government drastically affects land use control, long considered to be the domain of state and local government.

The Clean Water Act has as its principal purpose the cleaning and maintenance of the nation's waters. It attacks the problem broadly by means of so-called "structural" and "nonstructural" techniques. The structural techniques pertain to the financing and construction of wastewater treatment plants and ancillary facilities. Nonstructural techniques pertain primarily to regulatory mechanisms, such as planning and land use controls. The purpose of both is to eliminate the discharge of pollutants into the nation's waterways. Initially, most federal money went into the former category, even though there was little, if any, early planning or consideration of the growth-generating potential of large municipal wastewater treatment plants. It became increasingly apparent that all the hardware the federal government could afford for the treatment of pollutants discharged into individual waterway segments was not going to significantly improve the nation's waterways without plans required by other sections of the Clean Water Act. The shift in emphasis, together with the increased role of the Corps of Engineers in granting or not granting permits to dredge and fill navigable waterways, appears to represent current EPA policy.

Inherent in the federal programs, both structural and nonstructural, is the emphasis on their implementation by state and local governments. While it is the federal government that provides most of the money for municipal wastewater treatment facilities, it is the local government unit — city, county, village, special district — that constructs, operates, and maintains the facility and attempts to implement the various rules and regulations concerning connections, pretreatment of effluent, and the like, which come with the money. It is also a regional unit of state or local government that is to do the planning — especially the wastewater management planning upon which much regulatory implementation depends. To state and local governments also falls the job of monitoring, regulating, and enforcing compliance.

[a] Draconian Effects

It is illegal to discharge pollutants into a waterway without a permit from a state agency under the National Pollution Discharge Elimination System (NPDES). Intensive use of land is impossible without some provision for sewage and other waste disposal (usually in waterways); how this program is administered critically affects that use. The NPDES permit requirement extends to both private and public-facility discharges — including publicly owned treatment works (POTWs). The permits are issued by an approved state agency only upon condition that such discharge will meet the effluent and other standards set by the administrator of the EPA. For the EPA administrator to approve a state permitting program, the state agency must have the power to revoke a permit violating its terms. The state program must also insure that any permit for a POTW will include conditions that guarantee

compliance with pretreatment standards for private-source hookups (industrial/commercial facilities connected to the POTW). These standards require the treatment of sewage for the removal of some pollutants before the sewage reaches a POTW, in order to avoid overburdening the plant. The cost of this pretreatment is a factor in the locating of private industry in an area. The effect on growth is in many areas predictably substantial, as treatment works, new or expanded, with substantial treatment excess capacity to accommodate future needs attracted development to the areas they served.

[b] Section 208 Plans and Section 404 Permits

While the structural solutions have been vastly better funded, emphasis in the late 1970s moved to what was intended to precede the construction of wastewater treatment facilities: the areawide waste treatment management or "208" plans (so named because they are required in section 208 of the Clean Water Act) and 404 permits. The purpose of the 208 planning process is to halt water pollution by the management of water quality and land use in metropolitan regions. The required emphasis on land use controls in the plans is clearly set out in the Clean Water Act. What is not so clear is how such land use controls should be implemented.

The purpose of Section 404 of the Clean Water Act is to prohibit discharge of dredged or fill materials into navigable — including coastal — waters of the United States without a permit from the U.S. Army Corps of Engineers. Until the late 1960s, the Corps granted or refused such permits based primarily on the likely effect on navigation of such materials. Thereafter, the Corps, in response to a growing national concern for environmental values and related federal legislation, commenced implementation of a so-called "public interest" permit review process to consider the effect of proposed dredge and fill upon fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest. Then, in the mid-1970s, the Corps listed additional factors to be considered — economics, historic values, flood damages prevention, land use classification, recreation, and water supply/water quality — together with a policy to protect wetlands from unnecessary destruction. The result is the slow conversion of a relatively simple permitting process directed at preserving navigation into a full-fledged land use-environmental review of proposed projects in coastal and coastal wetland areas. The *Rapanos* case, *supra,* reflects implementation of the Corps' section 404 mandate.

HOMESTAKE MINING CO. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

United States District Court, District of South Dakota
477 F. Supp. 1279 (D.S.D. 1979)

Memorandum Opinion

BOGUE, DISTRICT JUDGE.

This case is before the Court on cross-motions for summary judgment. It concerns defendant South Dakota's adoption and Defendant Environmental

Protection Agency's (EPA) approval of water quality standards under the Federal Water Pollution Control Act (FWPCA). These standards were incorporated in a National Pollution Discharge Elimination System (NPDES) permit issued to Plaintiff Homestake Mining Company.

The FWPCA

The cornerstone of the FWPCA is § 301(a), which prohibits "the discharge of any pollutant by any person" unless certain sections of the Act are complied with. An existing pollutant source, such as plaintiff, can continue to discharge waste pursuant to a NPDES permit. A permit is issued upon application and an opportunity for public hearing. It sets limits on the amount of pollutants that can be discharged from any one source.

The Act provides for two types of restrictions on the discharge of pollutants. First, there are federal technology-based effluent limitations which are established in two stages. The first stage is to be met by July 1, 1977, and is to be based upon "the best practicable technology currently available" (BPT). The second stage is to be met by July 1, 1984, and is to be based on "the best available technology economically achievable" (BAT).

The second type of restriction on the discharge of pollutants is provided for in §§ 301(b)(1)(c) and 510, 33 U.S.C. §§ 1311(b)(1)(c) and 1370. In this case, plaintiff argues that these restrictions have been improperly implemented by the defendant.

Facts

Plaintiff contends that EPA's approval of South Dakota's water quality standards, which are somewhat stricter than those mandated by the FWPCA, was arbitrary, capricious and contrary to law. In 1974, South Dakota revised its water quality standards and designated Whitewood Creek for use as a cold water permanent fishery and for recreation in and on the water. This designation affected plaintiff in that plaintiff discharges waste into Gold Run Creek which is a tributary of Whitewood Creek. On October 28, 1977, South Dakota again revised its water quality standards as required by § 303(c) of the FWPCA. These revisions did not change the designation of Whitewood Creek as a cold water permanent fishery.

Under § 402(a) of the FWPCA, EPA issued draft NPDES permits to plaintiff in 1975 and 1976. These permits contained effluent limitations based on BPT and the more stringent state water quality standards. Plaintiff was given a chance for a hearing on the terms of its permit, but eventually declined this opportunity and accepted the permit on September 17, 1976.

Plaintiff is now asking this Court to declare EPA's approval of South Dakota's more stringent water quality standards to be violative of the FWPCA. Such a declaration by this Court would free plaintiff from the requirements of its NPDES permit. In its prayer for relief plaintiff asks this Court to enjoin the application to it of both South Dakota's water quality standards and the Cheyenne River Basin Plan.

In support of its claim, plaintiff argues three main points: (1) That EPA's approval of South Dakota's water quality standards was arbitrary, capricious,

an abuse of discretion and not in accordance with the FWPCA; (2) That §§ 302 and 303 of the FWPCA have been improperly interpreted, implemented and applied by the defendants; (3) That EPA's approval of the Cheyenne River Basin plan was arbitrary, capricious and not in accordance with the law. Each of these three issues will be addressed separately.

. . . .

Approval of the Cheyenne River Basin Plan

Plaintiff next challenges EPA's approval of the § 303(e), Cheyenne River Basin Plan. A large part of western South Dakota, including Whitewood Creek, is included in the Cheyenne River Basin. The Plan establishes South Dakota's strategy for correcting water pollution and thereby improving and maintaining water quality in the Cheyenne River Basin. It specifies the process of planning and managing pollution abatement operations to achieve South Dakota's standards for pollutant discharges to, and water quality in the Basin's, lakes, rivers and tributaries.

This plan was implemented pursuant to § 303(e) of the FWPCA.

Section 303(e) provides for the establishment, by the states, of a continuing planning process. Section 303(e)(3)(c) reads as follows:

> The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following: . . . (c) total maximum daily load for pollutants in accordance with subsection (d) of this section.
>
> The method of establishing the daily load is set out in § 303(d)(1). That section provides:
>
> (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. . . .
>
> (C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

Section 304(a)(2)(D) of the FWPCA, requires EPA to identify pollutants which are suitable for maximum daily load calculations by October 18, 1973. Prior to the adoption of South Dakota's water quality standards defendants

failed to comply with these sections of the Act in that maximum daily loads for pollutants were not established.

These procedures were meant to assist EPA and the states in implementing the requirements of the Act. Plaintiff contends that these procedures are mandatory requirements of the FWPCA. Furthermore, plaintiff argues that the failure to comply with these procedures should invalidate the entire Cheyenne River Basin Plan.

Although South Dakota did not establish total maximum daily loads as required by § 303(d), this was not required of the state until 180 days after EPA's identification of pollutants. Section 304(d)(2), 33 U.S.C. § 1314(d)(2). Because EPA had not identified the pollutants at the time of the Basin Plan's adoption, South Dakota cannot be said to have failed to comply with this portion of the FWPCA. The question then becomes whether EPA's failure to identify pollutants suitable for maximum daily load calculations pursuant to § 304(a)(2)(D) is of such magnitude as to invalidate the Cheyenne River Basin Plan and in turn, to invalidate plaintiff's NPDES permit.

It appears to this Court that EPA's failure to identify pollutants does not invalidate the Basin Plan. First of all, plaintiff's attack on the entire Basin Plan is clearly an attempt to avoid having to comply with the terms of its NPDES permit. Section 509(b)(1)(F) provides that a challenge to an NPDES permit can be made within 90 days of the permit's issuance in the applicable Circuit Court of Appeals. This, plaintiff did not do. Furthermore, plaintiff withdrew its request for an adjudicatory hearing regarding its permit under 40 CFR § 125.36(b). Since plaintiff neglected its other opportunities to challenge its NPDES permit, the Court is unwilling to invalidate the entire Cheyenne River Basin Plan because of plaintiff's dissatisfaction with its permit.

Furthermore, it appears that § 402(a)(1) of the FWPCA allows the issuance of a permit prior to the taking of all implementing actions. This statute provides in part as follows:

> [T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, . . . prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

It appears to this Court that Congress anticipated that some of the Act's requirements would not, or could not, be complied with prior to the issuance of permits. Therefore, § 402 was included in the Act to insure that the permit issuance program was not stymied because another part of the Act had not been strictly complied with.

The FWPCA is a complex statute. EPA clearly has more experience working with it than do most other public or private entities. In implementing and interpreting such a complex statute, EPA's interpretation must be given a great deal of weight. In approving South Dakota's Cheyenne River Basin Plan, EPA substantially complied with the Act's requirements. Furthermore, plaintiff's right to challenge the effluent limitation and its NPDES permit was

preserved. Therefore, this Court sees no reason to declare the Basin Plan invalid or to find EPA's approval of it to be arbitrary and capricious.

NOTES AND QUESTIONS

1. *Ground Water.* The EPA also has responsibilities for keeping increasingly endangered ground water supplies unpolluted. This is essential, as there is twice as much usable groundwater in North America as there is water in the major lakes, and its use is increasing at twice the rate of total freshwater use. U.S. WATER RESOURCES COUNCIL, SECOND NATIONAL ASSESSMENT OF THE NATION'S WATER RESOURCES, Part II 38, 39 and 51 (1958). Indeed, some cities like Honolulu and San Antonio get most of their fresh water from underground water sources. The EPA has limited authority to regulate certain discharges into such sources under the Clean Water Act, *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). *But see United States v. GAF Corp.*, 389 F. Supp. 1379 (1975); *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977). However, its principal authority comes from the Safe Drinking Water Act, 42 U.S.C.A. § 300f *et seq.* which establishes a national regulatory program for injection of pollutants into certain underground water sources.

The thrust of the Act is to prevent the pollution of underground drinking water sources by requiring states to establish a permit program for underground injection wells which may endanger such water supplies. In addition, section 300h-3(e) — the so-called Gonzales Amendment to the Act, also protects those underground water formations known as aquifers — which are also the sole or principal source of drinking water for an area by forbidding any federally assisted project which might contaminate such an aquifer through its recharge zone "so as to create a significant hazard for public health." As the use and development of land generates considerable waste, the effects on local development controls can be considerable. Consider that approximately 200 "deep" and 40,000 "shallow" injection wells for the disposal of commercial and industrial waste are in operation across the country, and that an estimated 17 million septic tanks and cesspools discharge 800 billion gallons of wastewater into the ground each year. EPA, Report to Congress, Waste Disposal Practices and Their Effects on Ground Water 362, 508 (1977).

2. *Pollution Sources.* Note the similarity in approach in the Clean Air Act and the Clean Water Act, especially comparing effluent and emission standards. As with the Clean Air Act, the Clean Water Act requires different standards for new and existing sources of pollution. As industrial and commercial dischargers turned increasingly to the largely federally-funded, publicly-owned treatment works to dispose of highly-polluted wastewater, the EPA issued guidelines requiring the pretreatment of such wastewater to avoid undue burdening of the treatment works. Consider the effect of such regulations on private decisions to locate a new facility.

3. *Section 208.* The Section 208 plans were originally intended to be the basis for the water cleanup effort. The purpose of the plans was to abate water pollution through the management of water quality and the regulation of land use in metropolitan regions. Such plans are required for any area identified as having substantial water quality control problems as a result of urban-industrial concentrations or other factors. A representative organization

capable of developing effective area-wide waste treatment management plans for that area is then designated to prepare such a plan within one year. Unfortunately, many of the regional bodies so designated — like Council of Governments (COGS) and regional councils — had just planning powers and no more. The next step — implementation — has been lacking in many areas. Land use controls, as you now know, rest principally with local governments and not with the states and regional agencies. Sanctions — which amount to loss of POTW construction grant funding and no NPDES permits for point sources which conflict with the plan — have not proven particularly effective. *See* Goldfarb, *Water Quality Management Planning: The Fate of 208*, 8 TOLEDO L. REV. 105 (1976); Comment, *Sewers, Clean Water and Planning Growth*, 86 YALE L.J. 733 (1977). They may not be entirely toothless, however. In *Smoke Rise, Inc. v. Washington Suburban San. Comm'n*, 400 F. Supp. 1369 (D. Md. 1975), a 208 plan proved remarkably effective as a basis for upholding a rather long moratorium on sewer hookups. What effect do you suppose this had on residential construction in the area?

[3] ENDANGERED SPECIES PROTECTION AND PROPERTY RIGHTS

Congress enacted the Endangered Species Act (ESA) to:

> provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth [in the act].

16 U.S.C. § 1531(b).

In crafting the act, Congress demonstrated an awareness that wildlife not only has "esthetic" value but "ecological, educational, historical, recreational, and scientific value" as well. Passage of the Endangered Species Act was an affirmation of our Nation's commitment to and understanding of the need for species preservation and protection.

Largely in response to criticism from business interests, Congress amended the ESA several times to strike a better balance between species protection and development. One of the more controversial issues under the ESA is whether the modification of habitat on private lands constitutes a "taking" of an endangered or threatened species. Section 9 of the ESA explicitly prohibits the "taking" of any endangered species of animal or plant. The term "take" is defined as meaning: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct."

DEFENDERS OF WILDLIFE v. BERNAL
United Stated Court of Appeals, Ninth Circuit
204 F.3d 920 (9th Cir. 2000)

Defenders of Wildlife and the Southwest Center for Biological Diversity (collectively "Defenders") appeal the district court's order lifting a temporary

restraining order and denying their motion for a permanent injunction to halt the construction of a new school on property which Defenders contend contains potential habitat for the cactus ferruginous pygmy owl (pygmy-owl), listed as endangered under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1543. At issue in this case is whether the construction of a critically-needed new high school by the Amphitheater School District (the School District) in northwest Tucson will result in the "take" of the endangered pygmy-owl in violation of section 9 of the ESA, 16 U.S.C. § 1538(1)(B).

After a three-day bench trial the district court found that the proposed construction would not result in the take of a pygmy-owl and denied the permanent injunction. In this appeal Defenders assert that the district court (1) erroneously concluded that plaintiffs failed to meet their burden of proof, (2) should have required the School District to apply for an incidental take permit, (3) inappropriately excluded expert testimony and (4) incorrectly denied Defender's Motion for a New Trial. We have jurisdiction over final judgments of the district court pursuant to 28 U.S.C. § 1291, and we affirm.

I. *Factual and Procedural Background*

In 1994, the School District paid $1.78 million to purchase a 73 acre site in northwest Tucson, upon which a new high school would be built. The high school complex is intended to accommodate 2,100 students and is composed of several buildings, athletic fields and parking areas for students, faculty and visitors. In December 1994, after the purchase of the school site, the United States Fish and Wildlife Service (FWS) formally published a proposed rule to list the pygmy-owl as an endangered species under the ESA. On March 10, 1997, after the required procedures and commentary period, the FWS listed the pygmy-owl as an endangered species under the ESA.

The pygmy-owl is a small reddish brown owl known for its relatively long tail and monotonous call which is heard primarily at dawn and dusk. The pygmy-owl nests in a cavity of a large tree or large columnar cactus. Its diverse diet includes birds, lizards, insects, and small mammals and frogs. The pygmy-owl occurs from lowland central Arizona south through portions of western Mexico and from southern Texas south through other portions of Mexico on down through portions of Central America.[9] The FWS indicates that there are a total 54,400 acres of suitable pygmy-owl habitat in northwest Tucson, which includes the 73 acre school site. The school site falls within the area designated by the FWS as critical habitat for the pygmy owl. *See* 64 Fed. Red. 37,419 (1999).[10] funded projects.

[9] The cactus ferruginous pygmy-owl is one of four subspecies of the ferruginous pygmy-owl. It is the cactus ferruginous pygmy-owl that we are concerned with in this case, and the term "pygmy-owl" as used in this opinion refers to that subspecies.

[10] Critical habitat is defined as "i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with [the Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions [the Act], upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). At the time the FWS issued its regulation determining that the pygmy owl is an endangered species on March 10, 1997, it did not designate the critical habitat

Within the 73 acre parcel acquired by the School District in 1994, there are three "arroyos," defined as "dry washes" or "ephemeral desert waterways." The U.S. Army Corps of Engineers designated the arroyos as "jurisdictional waters" pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq*. The original design of the School District complex called for some construction within the "jurisdictional waters," thereby requiring the School District to obtain a permit under the Clean Water Act. Because a federal permit was at issue, the FWS informed the Corps that "formal consultation" pursuant to section 7 of the ESA was required to assess the impact of the proposed project on the pygmy-owl.[11] Consultation was initiated, but before completion of the process the School District withdrew its application for the permit because it had redesigned the project so that construction would not affect the jurisdictional waterways. As a result of the redesigned project, no development is planned for the 30 acres containing the arroyos in the western portion of the property. The School District has acquired or will acquire 17 acres to the east of the initially acquired property for utilization in the redesigned school project. Thus, the entire school site is 90 acres, including the 30 acres containing the arroyos. The 30 acre parcel will remain undeveloped and fenced off. For ease in identification in this opinion, the entire 90 acre parcel will be referred to as the "school site." The 60 acres upon which the school complex is designed to be built will be referred to as the "60 acre parcel." The undeveloped 30 acre parcel, which contains the arroyos, will be referred to as the "30 acre parcel."

In March 1998, the School District began plant salvaging operations as a precursor to beginning construction. Defenders immediately filed suit seeking a temporary restraining order and a preliminary injunction against the School District to prevent any action on the school site. Defenders alleged that the proposed construction violated Section 9 of the ESA because it was likely to

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for the species as provided for in 16 U.S.C. § 1533(a)(3)(A). During the pendency of this appeal, in response to a lawsuit instituted in October 1997, the FWS issued a regulation on July 12, 1999, 64 Fed. Reg. 37419–37440, that designated the critical habitat of the pygmy-owl. We requested supplemental briefs from the parties discussing what effect, if any, this identification of critical habitat by the FWS had on this case. The regulation designated 731,712 acres, including the 54,000 acres north of Tucson and the 90-acre school site that had been discussed in the trial. It does not affect the result in this case brought under Section 9 of the ESA involving private land because the district court found that there was no "taking" of the endangered species (the pygmy owl). There is legal significance under section 7 of the ESA, which pertains to federal agency actions and federally authorized or funded projects. The regulation itself makes this clear:

> The designation of critical habitat has no effect on non-Federal actions taken on private land even if the private land is within the mapped boundary of designated critical habitat. Critical habitat has possible effects on activities by private landowners only if the activity involves Federal funding, a Federal permit, or other Federal action.

64 Fed. Reg. 37428 (1999). Critical habitat designation is only applicable to Federal lands and to private lands if a Federal nexus exists. 64 Fed. Reg. 37444 (1999).

[11] The pertinent part Section 7 provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical. . . .

16 U.S.C. § 1536(a)(2).

harm or harass a pygmy-owl, which Defenders assert inhabit or use the site. Section 9 of the ESA applies to private parties, whereas Section 7 of the ESA, which had earlier been resolved, applies only to actions carried out, funded, or authorized by a federal agency. The district court entered a temporary restraining order. The court later consolidated the hearing on Defenders' request for a preliminary injunction with the trial on the merits. Following a three-day trial, the district court issued its final order, denying the request for a permanent injunction, and lifting the temporary restraining order. We granted Defenders' motion for an injunction pending appeal.

II. *Statutory Framework*

Section 9 of the ESA makes it unlawful to "take" a species listed as endangered or threatened. *See* 16 U.S.C. § 1538(a)(1)(B). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The take alleged is that the proposed construction will harass or harm the pygmy-owl. The Department of the Interior has promulgated a regulation further defining harm and harass as follows:

> Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

50 C.F.R. § 17.3.

Harming a species may be indirect, in that the harm may be caused by habitat modification, but habitat modification does not constitute harm unless it "actually kills or injures wildlife." The Department of Interior's definition of harm was upheld against a facial challenge to its validity in the case of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). In upholding the definition of "harm" as encompassing habitat modification, the Supreme Court emphasized that "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife.'" *Id.* at 700 n. 13.

Three months prior to the *Sweet Home* decision we held in *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995), that habitat modification that is reasonably certain to injure an endangered species by impairing their essential behavioral patterns satisfied the actual injury requirement and was sufficient to justify a permanent injunction. In a subsequent action, it was contended that *Sweet Home* had overruled *Rosboro* and that an actual violation of the ESA was required before an injunction could issue. However, in *Marbled Murrelet v. Babbit*, 83 F.3d 1060, 1066 (9th Cir. 1996), we held that the Supreme Court's decision in *Sweet Home* does not overrule *Rosboro* and that a reasonably certain threat of imminent harm

to a protected species is sufficient for issuance of an injunction under section 9 of the ESA.

III. *Harm and Harassment Claims*

In order to prevail in this action Defenders had to prove that the School District's actions would result in an unlawful "take" of a pygmy-owl. An injunction would be appropriate relief. *See Marbled Murrelet*, 83 F.3d at 1064. Defenders had the burden of proving by a preponderance of the evidence that the proposed construction would harm a pygmy-owl by killing or injuring it, or would more likely than not harass a pygmy-owl by annoying it to such an extent as to disrupt its normal behavioral patterns. *See Rosboro,* 50 F.3d at 784. The district court's final order was a thorough, detailed and carefully reasoned discussion and analysis of the testimony of the expert witnesses and other evidence produced at the trial. The judge framed his discussion and analysis as follows:

> In this case, there are primarily two material factual Questions: 1) Does a pygmy-owl use or occupy any part of the school site? 2) Will the construction and operation of the site result in a S 9 "take" through the "harm" or "harassment" of a pygmy-owl? The Court has concluded that the evidence supports a finding that an owl or owls use a portion of the site which the Defendants do not intend to develop. Accordingly, the Court's inquiry has further devolved into two remaining questions: 1) whether clearing the unused portion of the property could "take" the owl, in spite of what the FWS has concluded in the Final Rule,[12] and 2) what proof is offered that the construction and operation of the school will harm or harass the owl.

The district judge first discussed his factual findings as to the territory that was occupied or used by the pygmy-owls. He found from the expert testimony and other evidence produced that the pygmy-owls used territory to the north of the boundary and the west of the boundary of the school site and that no pygmy-owl had been detected anywhere within the school site itself. However, he found that there was a reasonable inference that one or more pygmy-owls used the area of the arroyos between the north boundary and west boundary of the school site. These arroyos are within the 30 acre parcel that will remain undeveloped. He also found that there was insufficient evidence to prove that a pygmy-owl used any portion of the 60 acre parcel upon which the school complex is to be built.

The judge explained at some length what evidence he relied on to support his findings. The judge stated that the opinion of scientific experts, the evidence of the habits of the pygmy-owl, and the recent aural detection of the bird, supports a logical inference that the bird or birds currently use the areas where they have been detected near the north and west boundaries of the site, and the area between those two points within the arroyo. He noted that because habitat within this arroyo area is suitable for pygmy-owls, provides

[12] The FWS said in its Final Rule that the clearing of unoccupied habitat would not be a § 9 take, whereas the "clearing or significant modification of occupied habitat" could potentially harm, harass, or otherwise take the pygmy owl. 62 Fed. Reg. 10746 (1997).

cover and prey for birds, provides a natural corridor for the owl to travel from the north boundary to the west boundary where it has been frequently sighted, an inference can be drawn that the owl uses this area. The judge then contrasted the 30 acre parcel, which he refers to as "the Area," with the rest of the school site:

> Contrarily, there have been no sightings of the owl beyond the clusters of detections near the north and west boundaries of the property and extensive surveys of the entire property have failed to produce one single detection of a pygmy-owl. A search of 361 cavities of saguaro cacti on the site, in which pygmy owls prefer to nest, produced no pygmy-owls. There is therefore little factual basis to conclude that the owl uses the rest of the school site, outside of the Area.
>
> Because owls display site fidelity and have been seen near the Area but never detected on the school site outside of the Area, in spite of concentrated efforts to find them there, a logical inference can be made that the owl is not using the remainder of the site. Finally, the heaviest concentrations of sightings confirmed by the [Arizona Game and Fish Department] near the site are in Residential areas west of the school site where there is low impact housing (one house on a 3–5 acre plot with minimal disturbance to native vegetation). This supports the inference that the "core" of the owl's activity may not be in the Area but may be west of the school site, and that the 30 acre Area may be the outer fringe of the territory the bird uses.

The district court next discussed the basis for his finding that harm to the pygmy owl was not proven. He observed that while the inference that an owl uses the 30 acre parcel is based on solid factual premises and well-founded expert opinion, the allegation that the construction of the high school will harm the owl lacks this support and is weakened by seemingly inconsistent facts. The judge noted that although he gives weight to the opinions of the experts, he cannot blindly rely on their opinions and must consider how the conclusions were reached and whether they are relevant and reliable, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). One of Defenders' experts had testified that a school would increase the amount of human activity on the school site and that although pygmy-owls can tolerate some level of human activity, he suspected that level would be enough to render or cause a pygmy-owl not to occupy the area. The judge noted that in contradiction to the expert's suspicions that the owl would be harmed by human activity associated with the high school, there was evidence that pygmy-owls can tolerate a fairly high degree of human presence. The Arizona Game and Fish Department had reported that "pygmy-owls are not intimidated by the presence of people or can acclimate to low density urbanization and associated activities." In 1995-96, a K-8 school was constructed and has been operating a short distance north of the proposed school site. One neighbor testified that she had chased an owl shouting at it and waving a broom, but the owl had returned to the residence. At one residence, an owl family was found in a grapefruit tree close to the house and was inspected at close range for weeks on end by the resident and his guests.

The judge stated that the facts do not support a finding that the owl will be harassed. He noted that there was evidence that the owl can tolerate and even benefit from human activity, and that Defenders have only offered speculation that the activity associated with the school would harass the owl. He observed that the experts made little or no attempt to support their opinions with recorded observations of pygmy owls in similar circumstances or to draw analogies from other similar birds. The judge found that this failure to support opinion with fact seriously degraded the value of the expert opinions. He stated "the limited data about the owls which was presented did not show with clarity that breeding, feeding, and sheltering would be adversely impacted by the construction or operation of the school." The judge summarized his findings as follows:

> The contradictory facts presented by Plaintiffs and assumptions about what will harm the bird cannot support a conclusion that the owl will actually be injured or will likely be harassed. Finally, the FWS has concluded that clearing of unoccupied habitat will not "take" an owl and the Court has concluded that construction of the school, as planned, will not involve clearing of occupied habitat.

We review a district court's finding of fact under the clearly erroneous standard. *See* Fed. R. Civ. P. 52(a); *Russian River Watershed Protection Comm. v. Santa Rosa*, 142 F.3d 1136, 1140 (9th Cir. 1998). The well supported factual findings of the district judge are not clearly erroneous, and we affirm the conclusion of the district court that the construction of the school complex will not "take" a pygmy-owl.

IV. *Failure to Apply for an Incidental Take Permit*

Defenders contend that the district court should have required the School District to apply for an Incidental Take Permit (ITP). The district court concluded that the permitting provisions found in Section 10 of the ESA are not mandatory. We review a district court's conclusion on a question of law de novo. *See Russian River*, 142 F.3d at 1141.

If a proposed action constitutes a take under Section 9 of the ESA, a party may apply for an ITP under Section 10. 16 U.S.C. § 1539(a)(1)(B). If the FWS grants the ITP, the party can proceed with the proposed activity despite the taking of an endangered species. The School District declined to apply for an ITP because its position was that the proposed construction would not result in the take of an endangered pygmy-owl. Defenders argue that the district court erred by failing to require the School District to seek an ITP based on the expert scientific testimony presented.

We have established that pursuing an ITP is not mandatory and a party can choose whether to proceed with the permitting process. *See Rosboro,* 50 F.3d at 783. However, if a party chooses not to secure a permit and the proposed activity, in fact, takes a listed species, the ESA authorizes civil and criminal penalties. *See* 16 U.S.C. § 1540. Thus a party may proceed without a permit, but it risks civil and criminal penalties if a "take" occurs. The district court did not err in concluding that the School District was not required to seek an ITP.

Conclusion

Based on the foregoing, the judgment of the district court is AFFIRMED.

B. FLETCHER, CIRCUIT JUDGE, concurring:

I concur in the opinion but make these observations to clarify the limited precedential value of our opinion — the principal reason for our declining to publish in the first instance. Future cases that involve action or contemplated action in pygmy owl habitat in Arizona will be informed by the critical habitat designation and accompanying explanation in the new Final Rule. At the time this case was tried and argued to us on appeal no final designation on critical habitat had been made. We concluded that the critical habitat designation had no legal significance in this action brought under Section 9, which involves private land. We concluded that the critical habitat designation did not alter the outcome in this case because, in the end, this case turned on the sufficiency of plaintiffs' evidence, not on the inclusion or exclusion of the school site from critical habitat. As explained in the FWS regulation, "[c]ritical habitat has possible effects on activities by private landowners only if the activity involves Federal funding, a Federal permit, or other Federal action." 64 Fed. Reg. 37428 (1999). Here, the district court made a factual determination that, based on plaintiffs' evidence, the pygmy owl did not occupy the school construction site. We concluded that that factual decision was not clearly erroneous. In light of the earlier FWS rule stating that the clearing of unoccupied habitat does not result in a "take," the district court concluded that plaintiffs offered insufficient evidence to demonstrate a take. We do not hold that the designation of critical habitat will never have any bearing on actions on private lands within designated critical habitat, and thus, our decision has limited value for any other case involving either the pygmy owl or private lands that lie within the mapped boundary of designated critical habitat. *See Palila v. Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495 (9th Cir. 1981).

NOTES AND QUESTIONS

1. The protection of habitat for endangered species drastically affects the use which owners can make of land. Habitat protection plans, negotiated among landowners, government agencies and environmental groups, were designed to protect endangered species while leaving some economically beneficial use of land. If such effects are unsuccessful, does the Act result in a taking of private property without compensation?

2. Once a species is listed as endangered, controversy over the effects of critical habitat designation under § 1532 of the ESA is the predictable consequence of such designations. Technically directed at federal activities only, such designations are easily used as a basis for restricting private land use for fear of "taking" a species by harming its habitat. Moreover, state and local laws may require special protections for species preservation, which habitat designation arguably triggers. Given proposed designations of thousands of acres of land in states like California and Hawaii for the protection of red tree frogs and subterranean-dwelling cave spiders, the economic analysis which the Fish and Wildlife Service is obligated to undertake during the habitat designation process is coming under increasing scrutiny. *See, e.g.*,

New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001).

3. The decision in *Bernal* was originally delivered as an unpublished opinion, but the court was persuaded to publish it to provide guidelines as to what constitutes a "take" and what constitutes "harm." In her concurring opinion, Judge Fletcher attempts to limit the effect of the decision. How persuasive do you find her arguments? How would you advise a landowner whose property is subject of a hearing to designate it as a critical habitat?

4. Having begun with a dispute over a fox in the wilds of Long Island at the beginning of the nineteenth century, it is fitting that this book end with a dispute over an owl in the Arizona desert at the outset of the twenty-first century.

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