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Citizens Coal Council v. United States Env'tl. Prot. Agency, 385 F.3d 969 (6th Cir. 2004)

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quest for the pollution reports granted ACA standing. The court reversed the district court's decision and remanded the case for further proceedings.

Thomas Jantunen

Citizens Coal Council v. United States Env'tl. Prot. Agency, 385 F.3d 969 (6th Cir. 2004) (holding the Environmental Protection Agency's Final Rule adding new subcategories to the Coal Mining Point Source category under the Clean Water Act exceeded the Agency's statutory mandate).

The Kentucky Resources Council and the Citizens Coal Council (together "Councils") petitioned the United States Court of Appeals for the Sixth District to review an Environmental Protection Agency ("EPA") rule ("Final Rule") propagated under the Clean Water Act ("CWA") that applied to the effluent emissions from coal mining operations.

The CWA assigned EPA the duty to identify pollution control measures and practices for various pollution point sources. EPA created categories of pollution point sources so that EPA could establish effluent limitation guidelines for various industries. Within the Coal Mining Point Source Category, EPA created four subcategories. EPA did not create a subcategory for remining operations on previously mined, but then abandoned, land. As technology for remining improved, which made remining a feasible option, the costs associated with complying with EPA effluent regulations under the existing categories prevented miners from engaging in remining activities.

In response to the need for legislation to allow remining, Congress passed the Rahall Amendment to the CWA. This amendment created a modified permit for remining operations and required only that pollution emissions not exceed levels present before commencement of the remining operation.

EPA created two new subcategories for remining operations under the Coal Mining Point Source category: the Coal Remining Subcategory and the Western Alkaline Coal Mining Subcategory. The Councils claimed both new subcategories were inconsistent with the CWA and the Rahall Amendment and were therefore invalid.

The court first considered whether EPA had the authority to create subcategories inconsistent with the Rahall Amendment. The Rahall Amendment authorized remining permits only when effluent emissions from the remining activity would be less than pre-remining emissions. The Final Rule allowed a permitting authority to grant a Coal Remining permit in situations where that authority could not collect baseline measurements but concluded that remining would reduce effluent emissions. A permitting authority could issue these permits at its discretion, bypassing the Rahall Amendment's requirement of base-

line measurements. The court concluded that the Rahall Amendment created an opt-in modified permit and did not limit EPA's authority to create new subcategories consistent with the CWA.

The court held the Final Rule was inconsistent with the CWA. The CWA directed EPA to determine the technology available and applicable for each category of operation to reduce emissions before EPA decided what level of emissions would be reasonably attainable. Under the Final Rule, a permitting authority first determined the permissible level of emissions, and then determined what technology the mining operation should use to attain those levels. The CWA also set forth a list of factors for EPA to consider in determining the best technology to control effluent. The court stated that EPA was unable to show that EPA considered all of the factors mandated by the CWA. The court held that, by adopting the Final Rule, EPA did not fulfill the CWA requirement that EPA should consider technology available in determining an attainable level of pollution emission.

A dissenting opinion by Judge Suhrheinrich stated that the court incorrectly found that EPA must consider the technology available and the effluent limits in any specific order. The dissent also stated that the original complaint failed to plead the issue of whether EPA considered all relevant factors as required by the CWA, and therefore should not have been a factor in the decision. Finally, the dissent argued that the CWA did not require that EPA assign numerical limitations on effluent. The CWA only required that EPA identify the amount of pollutants. The dissent suggested an interpretation of the word "amount" not requiring specification of numerical limits.

The court thus held that both of the new subcategories created by the Final Rule were inconsistent with the CWA, making the Final Rule invalid. The court remanded the case to the EPA with instructions to withdraw or amend the Final Rule.

Mark Terzaghi Howe

NINTH CIRCUIT

Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989 (9th Cir. 2004) (holding that NEPA compliance requires a federal agency to thoroughly evaluate potential cumulative environmental affects of proposed projects with individually minor potential of causing environmental harm, and make that information available to the public before proceeding with the project).

The Bureau of Land Management ("BLM") executed two of four planned timber sales in the South Fork Little Butte Creek ("SFLBC") watershed in the Cascade Mountains in Southwest Oregon. The BLM produced a different environmental assessment ("EA") for each of the