The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, FRIDAY, MARCH 11, 2011 VOL 243 • NO. 48 An ALM Publication

ENVIRONMENTAL LAW

Timing Is Critical in Appeals of Agency Action

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Special to the Legal

Determining when an adverse administrative agency action may be appealed presents environmental lawyers with a technical but vexing problem. If a challenge is filed too early, it will be dismissed, the associated litigation costs will be unrecoverable and the relationship with the agency will be potentially impaired. On the other hand, delaying commencement of an appeal may fail to prevent or halt injury to the client and may render a subsequent appeal untimely.

An appeal of a federal agency action is governed by any requirements specified in the statute authorizing the agency action. In the absence of specific statutory provisions addressing an appeal, a person aggrieved by the agency action may invoke Section 704 of the Administrative Procedure Act (APA), which authorizes judicial review of "final agency action for which there is no other adequate remedy."

Given the critical importance of defining "final agency action," it is not surprising that the U.S. Supreme Court has considered the issue. In *Bennett v. Spear*, a 1997 case, the court held that an agency action is final when it represents the consummation of the decision-making process, and when it determines rights or obligations or has direct and appreciable legal consequences. Although this definition may appear to provide clear guidance to environmental practitioners, several decisions issued by courts of appeals within the last two months illustrate the ongoing difficulty of determining whether final agency action has occurred.

In the March 2 case *Dow AgroSciences LLC v. National Marine Fisheries Service*, in the 4th U.S. Circuit Court of Appeals, pesticide manufacturers challenged a biological opinion (BiOp) issued by the National Marine Fisheries Service (NMFS) pursuant to the Endangered Species Act (ESA). The ESA and its implementing regulations require each federal agency to consult with either NMFS or the U.S. Fish and Wildlife Service when its action may adversely affect an endangered or threatened (listed) species or critical habitat. In the course of re-registering three insecticides for resale and use, the Environmental Protection Agency (EPA) consulted with NMFS.

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As a result of the formal interagency consultation, NMFS issued a BiOp finding that the reregistration of the pesticides "is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." In particular, NMFS concluded that the pesticides would jeopardize the survival of numerous listed salmoid species and their critical habitat. The BiOp recommended a "reasonable and prudent alternative" to the current registration. The alternative included providing setbacks for the application of the pesticides, limiting application in high wind and other specific requirements.

The pesticide manufacturers commenced an action against NMFS pursuant to Section 704 of the APA challenging the BiOp. The manufacturers contended that the BiOp was not based on the best scientific and commercial data available. The NMFS moved to dismiss the action. The district court granted the motion on the ground that until the EPA determines which restriction to adopt as part of the re-registration, no final agency action has occurred.

On appeal, the 4th Circuit reversed. The 4th Circuit noted that the BiOp's reasonable and prudent alternative is not merely advisory. Rather, the BiOp contains an Incidental Take Statement, which serves as a permit to "take" the listed species if the requirements of the BiOp are followed. In other words, compliance with the BiOp creates a safe harbor from liability for a take of a listed species, and thereby creates legal consequences.

Importantly, the NMFS's determination of the BiOp's safe harbor provision is final even if it conflicts with the EPA's subsequent registration decision. An appeal of the EPA's registration decision cannot overturn the BiOp issued by NMFS; the appeal may only overturn the requirements imposed by the registration. Just like the BiOp at issue in *Bennett*, the BiOp in *Dow* had a coercive effect and imposed legal consequences. Because the BiOp ended the NMFS process, because no opportunity existed to challenge the conditions of the safe harbor other than to appeal the BiOp, and because the BiOp had ongoing legal consequences, the BiOp was an appealable final agency action.

In the Feb. 2 case, *Ocean County Landfill Corp. (OCLC) v. EPA*, the 3rd Circuit, like the 4th Circuit in the *Dow* case, examined whether the decision of one agency that may be relied upon by a second agency constituted an appealable final agency action. But the facts of *OCLC* led to the opposite of the conclusion that was reached in *Dow*.

Over the course of several years, the EPA assisted the New Jersey Department of Environmental Protection (NJDEP) in conducting an analysis under the Clean Air Act of whether two permittees, OCLC and Manchester Renewal Power Holdings (MRPC), were under common control for the purposes of air emission permitting. On May 11, 2009, the EPA sent a letter to OCLC and MRPC stating that the EPA had concluded its review process and rendered a final determination that the two entities were under common control. In its letter, the EPA required the NJDEP to reopen the two existing Title V permits and reissue them to both companies as a single source.

OCLC filed an appeal under Section 307(b)(1) of the Clean Air Act challenging the EPA's determination of common control. Section 307(b)(1) provides for judicial

review of final action of the administrator of the EPA.

The 3rd Circuit did not accept the EPA's own characterization of its decision as final, but rather examined the underlying factors relevant to the *Bennett* test. The 3rd Circuit concluded that the EPA's finding that OCLC and MRPC were under common control was but one step in the permitting process that includes notice and opportunity to comment before the process concludes. The 3rd Circuit noted: "There is no way to know in advance whether the final permit that results from that process will incorporate the common control determination that OCLC seeks to challenge here." Indeed, unlike the BiOp in *Dow* which could not be altered by EPA decisions and would likely govern future conduct, the common control determination in *OCLC* might be reconsidered by the EPA in the context of reviewing the NJDEP permit. The determination had no independent legal consequence absent its future incorporation into the permit.

The 3rd Circuit further noted that the EPA's action did not require immediate compliance by OCLC because the NJDEP had yet to take action. Similarly, OCLC's day-to-day operation would not be affected until the NJDEP issues a new permit. Moreover, additional information to be developed in the future, including the terms of the new permit when known, would help inform judicial review. In contrast, immediate review would delay the permitting process.

Based upon these factors and notwithstanding the EPA's characterization of its decision as "final," the 3rd Circuit concluded that the EPA's letter was not appealable as a final agency action. Rather, it constituted an opinion that neither marked the consummation of the decision-making process nor had legal consequences.

In the Feb. 3 case, *Barnum Timber Co. v. EPA*, in the 9th Circuit, the agency action was neither a mere opinion as in *OCLC* nor a determination with coercive effect as in *Dow*. Rather, it was a final decision with potential legal consequences that were vigorously disputed.

In *Barnum*, a timber company challenged the EPA's decision to retain Redwood Creek as an impaired water body under Section 303(d) of the Clean Water Act. The Section 303(d) list consists of those water bodies that do not meet water quality standards. To lower pollutant loadings to a level that the water body can assimilate, states are required to develop total maximum daily loads consisting of wasteload allocations to point sources, load allocations to nonpoint sources and a margin of safety. Barnum contended that in light of this statutory scheme and California law, the EPA's approval of California's Section 303(d) list including Redwood Creek caused the value of Barnum's property to diminish.

The issue directly addressed by the majority and dissenting opinions focused on Barnum's standing to bring the case, not whether the Section 303(d) listing constituted final agency action. But these issues overlap. To demonstrate its standing, Barnum must show injury-in-fact — i.e., a concrete and particularized, actual or imminent harm to a legally protected interest, a causal connection and redressability. In the course of examining injury and causation, a court must necessarily look at whether there are immediate and direct legal consequences from the agency decision. This analysis is at the core of ascertaining whether final agency action has occurred. Indeed, in *Bennett*, the Supreme Court pointed to the legal consequences of the BiOp as relevant to both standing issues and the existence of final agency action.

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To show harm, Barnum submitted declarations from two forestry experts stating that the Section 303(d) listing diminished the value of Barnum's property. The 9th Circuit majority concluded that Barnum's declarations were sufficient to show an injury-in-fact. Likewise, because the Section 303(d) listing had allegedly altered public perception and led to the decrease in the value of Barnum's property, a causal connection existed. Finally, the harm could be redressed by vacating the listing if it were found to be arbitrary and capricious.

In a vigorous dissent, Judge James S. Gwin (sitting by designation) found that Barnum did not satisfy any of the standing elements. He noted that Barnum's discharge to Redwood Creek is a nonpoint source discharge regulated solely by California, not the EPA. In his view, a Section 303(d) listing does not directly impact use of property. Instead, Barnum was speculating about what restrictions California might impose in the future.

Gwin noted that the *Bennett* court focused on the "powerful coercive effect" of the BiOp on the EPA; an agency receiving a BiOp very rarely fails to follow the BiOp and risk liability for taking a listed species. The BiOp thus had direct and appreciable consequences. In contrast, a Section 303(d) listing does not require California to use any specific means to implement the TMDL nor does it impose any direct regulations. Consequently, in Gwin's dissenting view, the Section 303(d) listing did not have the attributes of a final agency action and Barnum had no standing to contest it.

The three cases discussed above demonstrate the difficulties of applying the "final agency action" standard when the action of one agency may later be relied upon by a second agency. In *Dow*, the 4th Circuit held that the NMFS BiOp constituted final agency action because it had an immediate effect and could not be reversed on appeal of the EPA's future action. In *OCLC*, the 3rd Circuit concluded that the EPA's common control decision was not final, but merely an opinion that could be reconsidered by the EPA or reviewed by a court after the NJDEP issued the Title V permit. In *Barnum*, the 9th Circuit held that the EPA's Section 303(d) listing that allegedly caused a decrease in property values conferred standing even though California had yet to establish and implement the TMDL.

The differing outcomes of these cases suggest that despite the Supreme Court's articulation of the legal standard, environmental practitioners will continue to face uncertainty over what constitutes final agency action. •