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With all eyes on [Suncor Energy v. Boulder County](#), it's been easy to overlook another environmental law case on the docket of the U.S. Supreme Court this week: *Dept. of the Air Force v. Prutehi Guahan*. *Prutehi Guahan* illustrates how NEPA remains a critical component of environmental law, even in the post-*Seven County* world. In the oral argument, set for Wednesday, the Solicitor General representing the U.S. Air Force and Earthjustice representing nonprofit organization Prutehi Guahan will debate two seemingly dry questions presented: (1) does an application to renew a permit under the Resource Conservation and Recovery Act (RCRA) constitute "final agency action" for purposes of review under the Administrative Procedure Act; and (2) do requirements for environmental review under the National Environmental Policy Act apply to a federal agency before it submits an application to renew a RCRA permit? In context, resolution of these two questions carries substantial implications for environmental justice, particularly for U.S. territories impacted by military activities.

Prutehi Guahan arises on the Pacific island of Guam (*Prutehi Guahan* means “Protect Guam” in the Indigenous language of Chamorro). As a U.S. territory, Guam hosts a number of U.S. military installations. The United States took possession of Guam in 1898 and has held it ever since, except for years during World War II when it was occupied by Japan.

One of the U.S. military installations on Guam is Anderson Air Force Base on the northern end of the island. Directly adjacent to the base, the Air Force operates an Explosive Ordnance Disposal (EOD) range at Tarague Beach. Tarague Beach serves as a nesting habitat for endangered green sea turtles and resting areas for migratory seabirds. Local communities gather traditional medicines nearby and engage in subsistence fishing just offshore. Tarague Beach also sits above Guam’s sole-source aquifer, which provides drinking water for more than eighty percent of Guam’s population.

Since 1982, the Air Force has held a permit under RCRA to conduct Open Burning/Open Detonation (OB/OD) activities at the Tarague Beach facility. Open burning entails placing waste munitions in a five-foot-tall “burn kettle,” adding diesel fuel and wood, and burning the munitions in the open air. Open detonation involves exploding the munitions in a pit, triggered by a remote detonator. OB/OD operations on Guam have been used to dispose of waste munitions including unexploded ordnance, tear gas, ammunition, and propellants, some dating back to World War II.

OB/OD operations are obviously extremely hazardous to human health and the environment. In 1980, EPA banned OB/OD for RCRA interim status facilities, with one exception: EPA allowed OB/OD for waste explosives “which cannot safely be disposed of through other modes of treatment.” See 40 C.F.R. § 265.382. Today, we know that waste explosives, “when open burned or open detonated, have the potential to release to the environment heavy metals, perchlorate, particulate matter, per- and polyfluoroalkyl substances (PFAS), polychlorinated biphenyls (PCBs), dioxins/furans, explosive compounds, and other toxic contaminants.” 55 Fed. Reg. 19,954 (Mar. 20, 2024).

The potential health impacts from open burning of waste munitions are unfortunately well known. In 2022, Congress passed the Honoring our PACT Act, which identified more than two dozen cancers and other diseases that may be presumptively associated with “exposure to burn pits and other toxins.” See 38 U.S.C. § 1120. While the PACT Act may assist military veterans potentially impacted

by such toxic exposures overseas, the operation of OB/OD units remains legal in the United States and its Territories if conducted in accordance with a RCRA permit.

During the Biden administration, EPA attempted to address this incongruence by promulgating new regulations addressing OB/OD. The new regulations would attempt to shift presumptions of munitions disposal away from OB/OD and toward “alternative treatment technologies” that had been developed by the Department of Defense and National Academy of Sciences, Engineering, and Medicine (NASEM) over recent decades. In the alternative to “open burning” and “open detonation,” alternative treatment technologies could include categories of “contained burn,” “closed detonation,” and other technologies identified in a [2019 report](#) by the U.S. EPA.

Unfortunately, the new proposed OB/OD rule was delayed for public release after sitting with the Office of Management and Budget for 282 days (Executive Order 12866 sets a presumptive cap of 90 days). The proposed rule was finally released for public comment on March 24, 2024. 89 Fed. Reg. 19,952. Following the end of the public comment period, plus review and consideration of comments, time ran out on the administration and the proposed OB/OD rule effectively died.

Nevertheless, the availability of alternatives to OB/OD is the key to the present case before the U.S. Supreme Court. According to the Air Force, while it has continued active open detonation activities at Tarague Beach, it has not conducted open burning there since the early 2000s. And yet, instead of adopting available alternative technologies to OB/OD, the Air Force included both OB and OD in an application to renew its RCRA permit for Tarague Beach, which it submitted to the Guam EPA in May 2021.

Since 1986, Guam, like most states, has been authorized to administer its own RCRA permitting program. RCRA permits issued by Guam are presumptively valid for three years, subject to administrative extension upon timely receipt of an application for permit renewal. The last RCRA permit for Tarague Beach was issued in 2018. Thus, the Air Force was required to submit an application for permit renewal in 2021 if it decided to continue the OB/OD operation. As such, the 2018 permit continued in effect while Guam EPA considered whether to approve the new permit application.

In January 2022, plaintiffs sued the U.S. Air Force and other government parties, arguing that the Air Force violated NEPA by submitting a RCRA permit renewal

application without preparing an EIS or EA. There is no dispute that the Air Force did not do any NEPA analysis before submitting its RCRA permit renewal application to Guam EPA. However, the Air Force disputes any requirement to do any NEPA analysis in this context, for two main reasons. First, the Air Force argues that submission of a permit application to Guam EPA is not “final agency action” reviewable under the Administrative Procedure Act. Second, the Air Force argues that NEPA is not required before submitting a RCRA permit application because RCRA has its own specific procedures and the “specific governs the general.”

On “final agency action,” the Air Force observes the following:

To be “final” under this Court’s APA precedents, an action must both (a) mark the consummation of an agency decisionmaking process and (b) determine legal rights or obligations. The Air Force’s submission of a permit-renewal application does neither: It is simply the initial step of an ongoing regulatory process, and it entails no meaningful legal consequences until Guam EPA grants or withholds a new permit.

This appealing argument was in fact embraced by the U.S. district court in dismissing the plaintiff’s complaint. The Ninth Circuit Court of Appeals reversed, however, accepting the argument from Earthjustice that it was the *decision* by the Air Force to submit the permit renewal application in 2021 that constituted final agency action. That decision had legal consequences. Among other things, it extended the life of the 2018 RCRA permit—ironically now longer than the three years the Air Force originally requested in its 2021 permit application.

On NEPA vs. RCRA, the Air Force raises the familiar canon of the “specific governs the general” to suggest that NEPA procedures are unnecessary in this RCRA permitting process, which itself requires some measure of analysis and public comment. The Air Force also points to EPA regulations codifying the familiar notion that the RCRA process is a “functional equivalent” of the NEPA process. See 40 C.F.R. § 124.9(b)(6) (providing that “all RCRA ... permits are not subject to the environmental impact statement provisions of ... [NEPA]”). While these arguments appear to weigh heavily in favor of the Air Force, the Ninth Circuit did not consider them dispositive, reversing the district court again and ruling for Prutehi Guahan. First, as noted by Earthjustice, the regulation appearing to create the NEPA exemption is explicitly framed as “when EPA is the permitting authority,” which is

not the case here where Guam EPA is the permitting authority. In fact, Guam EPA has not adopted this exemption. More significantly, as pointed out by the Ninth Circuit, RCRA and NEPA have different time horizons. NEPA analysis would require the Air Force to consider alternatives to OB/OD or Tarague Beach before preparing the permit renewal application, perhaps leading to a decision to adopt available alternative technologies or alternative locations. RCRA analysis, by contrast, would require Guam EPA to evaluate the technical sufficiency of the Air Force's proposal for managing hazardous waste munitions using one method at one specific location. With separate actors, different purposes, and distinct timing, NEPA and RCRA could both be given effect and readily harmonized in this context. The Ninth Circuit accordingly ruled for Prutehi Guahan on this point as well.

Beyond the specific legal arguments raised by the parties in this litigation, the case raises profound questions for democracy and environmental justice. As one group of [amici](#) noted, NEPA has particular importance to the 3.6 million people living in the U.S. Territories of Guam, Puerto Rico, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands. Although mostly U.S. citizens and fully subject to U.S. control, Territory residents are unable to vote for U.S. Presidents and have no voting representation in the U.S. Congress. They are also disproportionately impacted by U.S. military bombing and disposal activities.

Guam itself hosts two Superfund sites, one associated with Andersen Air Force Base, which has already led to groundwater contamination. In Puerto Rico, more than 40 years ago, concerned citizens attempted to use the Clean Water Act to address concerns with Navy bombing activities around the island of Vieques. After the U.S. Supreme Court denied the plaintiffs' request for injunctive relief, see *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), the military activities continued, resulting in the present Atlantic Fleet Weapons Training Area Superfund Site, requiring continuing cleanup actions on the order of hundreds of millions of dollars. For the people of Guam and the territories, left without democratic processes to oppose U.S. military actions, "NEPA is not merely a procedural formality." Another [amici](#) based in Guam describes NEPA as "a lifeline in Guam ... often the only structured opportunity for Guam's communities to participate in federal decisions that directly affect them." Pointedly, they observe, "RCRA review does not serve the same function."

Whether the U.S. Supreme Court agree with these arguments is hard to say. But we can certainly say there is a lot at stake in this case, for Guam, for the territories, and for democracy itself.

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