

9-1-2005

Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964 (7th Cir. 2005)

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Amy M. Petri, Court Report, Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964 (7th Cir. 2005), 9 U. Denv. Water L. Rev. 185 (2005).

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necessary, but it does not permit a plaintiff to sue the United States alone.

Charles P. Kersch, Jr.

UNITED STATES CIRCUIT COURTS

SEVENTH CIRCUIT

Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964 (7th Cir. 2005) (holding: (1) NRDC failed to show causal connection between compliance with the EPA's General Permit and violation of the Clean Water Act; (2) EPA's General Permit did not violate the Clean Water Act requirement for public notice and public hearing; (3) the EPA complied with the Endangered Species Act when issuing the General Permit; and (4) a stay of judgment on whether Clean Water Act permit requirements affected oil and gas companies).

The Clean Water Act ("CWA") requires that the Environmental Protection Agency ("EPA") or authorized states issue permits to dischargers of pollutants. The EPA created a General Permit ("GP") for storm water discharges from both large and small construction sites. This GP only applied in jurisdictions where the EPA had not authorized the state or Indian Tribe to administer its own permitting program. Operators of large and small construction sites who desired to discharge storm water under this GP had to submit a Notice of Intent ("NOI") to the EPA. Next, they had to create, maintain, and implement a Storm Water Pollution Prevention Plan ("SWPPP"). Finally, they had to implement best management practices to ensure compliance with water quality standards.

The National Resources Defense Council ("NRDC") and several organizations filed petitions for review of the EPA's Final Action creating the GP in the U.S. Court of Appeals for the 7th Circuit. The NRDC alleged the GP violated the CWA by allowing discharge of pollutants without ensuring the discharge satisfied the standards set by the CWA. The NRDC also alleged the GP failed to provide a public hearing for complaints and that it violated the Endangered Species Act ("ESA"). Several organizations representing business interests in the oil and gas industry (collectively "Oil and Gas") challenged a regulation contained in the EPA GP, which required permit authorization for oil and gas companies and conflicted with a prior statute passed by Congress that granted the oil and gas companies some immunity from EPA regulation.

The NRDC represented members in potentially affected areas, but it failed to show a link between pollution from local construction activities and its members' reduced aesthetic and recreational enjoyment of

the affected waters. The court found the NRDC did not have standing to sue based on the lack of causal evidence between the storm water discharge and any violation of the CWA.

The NRDC claimed that filing a NOI and SWPPP should entail a public hearing and public notice in accordance with the CWA. The CWA requires public notice and a public hearing for all permit applications and permits relating to the discharge of pollutants into water. When proposing a GP, the EPA filed notice in the Federal Register subsequently soliciting and receiving public comments, satisfying the CWA public notice and public hearing requirements. The court held that the statute defining this process was ambiguous as to whether Congress intended to treat NOIs and SWPPPs in the same manner as permits and permit applications.

NRDC also claimed the EPA violated Section 7 of the ESA. This provision requires a consultation with the Fish and Wildlife Service and/or the National Marine Fisheries Service (collectively "Service"). The NRDC claimed this process should occur each time an operator receives a NOI or a completed SWPPP. The court held that the EPA fulfilled this requirement when it initially filed the GP.

Oil and Gas argued the EPA lacked authority to require a permit for construction activities related to oil and gas exploration. Since a case was pending before the Fifth Circuit regarding the issue, the court stayed consideration until the Fifth Circuit court decided that case.

In conclusion, the court held the NRDC lacked standing to challenge a violation of the CWA by the EPA, the EPA fulfilled the public notice and public hearing requirements set forth by the CWA when initially filing a GP, and the EPA's consultation with the Service fulfilled ESA requirements. The court stayed consideration of the Oil and Gas claim, which claimed the EPA lacked authority to regulate storm water discharge from oil and gas companies, until the Fifth Circuit court decided a similar case.

Amy M. Petri

EIGHTH CIRCUIT

Bunch v. Canton Marine Towing Co., 419 F.3d 868 (8th Cir. 2005)
(holding a cleaning barge constituted a "vessel in navigation" under the Jones Act and an employee who had a substantial connection to the barge was a "seaman" eligible for benefits under that Act).

Canton Marine Towing Company, Inc. ("Canton") employed Ashley Bunch as a barge cleaner at Canton's Missouri facility, which consisted of a cleaning barge moored to the bed of the Missouri River. Bunch injured himself aboard Canton's tugboat, the Sir Joseph. Canton used the tugboat to ferry Bunch to the cleaning barge from Can-