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Montijo-Reyes v. United States, 436 F.3d 19 (1st Cir. 2006)

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COURT REPORTS

FEDERAL COURTS

UNITED STATES CIRCUIT COURTS

FIRST CIRCUIT

Montijo-Reyes v. United States, 436 F.3d 19 (1st Cir. 2006) (holding a discretionary function of the Federal Tort Claims Act protected the United States Corps of Engineers disposal of dredged material, and no causal connection existed between injuries allegedly caused by the discharged dredged material and an alleged violation of the Clean Water Act or Puerto Rico's Water Quality Standards Regulations).

In January 1999, the United States Corps of Engineers ("Corps") proposed emergency dredging of Arecibo Harbor, Puerto Rico. In March 1999, the Puerto Rico Environmental Quality Board ("EQB") requested additional documentation before they would issue a water quality certificate. The Corps submitted an Environmental Assessment, increasing the estimated amount of dredged materials and altering the disposal site to counteract erosion. In July 1999, the Corps requested a waiver of water quality certificate from the EQB and in August, the EQB granted the waiver. In June 2000, the Corps began disposal of dredge material in United States open waters, at different site than originally planned. The United States Fish and Wildlife Service halted disposal after discovering a hard coral community at the site. To complete the project, the Corps disposed the remaining dredged materials on La Marginal Beach, which increased the beach height approximately fifteen feet, and constructed a concrete wall and silt fence to protect a nearby street.

In September 2001, Montijo-Reyes filed suit pursuant to a provision of the Federal Tort Claims Act ("FTCA") alleging damages resulting from the disposal of the dredged materials and stating the Corps violated the Clean Water Act ("CWA") and the Puerto Rico Water Quality Standards Regulations ("WQSR") as the Corps had neither a water quality certificate nor an exemption from the EQB. The United States District Court for the District of Puerto Rico granted summary judgment to the Corps holding a discretionary function exception to the FTCA precluded the claims and there was no causal connection between the failure to obtain a water quality certificate and the alleged damages. Montijo-Reyes appealed.

The court used a two-part test to determine if a governmental entity falls within the discretionary function exception to the FTCA. The

first part evaluates the conduct to determine if it is discretionary. The second determines whether the discretionary conduct is susceptible to policy-related judgments. The district court held the Corps used discretion in determining where to place the dredged materials and in constructing a concrete wall and silt fence. The United States Court of Appeals for the First Circuit found no public policy issues required the Corps to maintain a disposal site as they did, or to protect homes from the indirect effects of the dredged materials.

Both the CWA and QSR require a certificate or waiver before discharge of dredged materials. Montijo-Reyes alleged the Corps's failure to obtain either a certificate or waiver caused damages to their property. The court held the QSR did not prescribe any specific measures for disposal site maintenance. Further, the court held Montijo-Reyes did not show a causal connection between the Corps's failure to get a water quality certificate or EQB exemption, and the damages to their property resulting from the dredged material disposal.

The court affirmed the summary judgment holding in favor of the Corps.

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FOURTH CIRCUIT

Ohio Valley Env'tl. Coalition v. Bulen, 429 F.3d 493 (4th Cir. 2005)
(holding that the Army Corps of Engineers complied with section 404(e) of the Clean Water Act when it issued Nationwide Permit 21 because it identified a category of activities, determined that those activities would have a minimal environmental impact both separately and cumulatively, and provided notice and opportunity for public hearing before issuing the permit).

A coalition of environmental groups brought this action against the United States Army Corps of Engineers ("the Corps") and coal companies and associations over promulgation of a general permit under the Clean Water Act ("CWA") for discharge of dredged or fill material into waters of the United States. The United States Court of Appeals for the Fourth Circuit addressed whether the Corps exceeded its authority under the CWA when it promulgated Nationwide Permit 21 ("NWP 21"). NWP 21 is a general permit for the discharge of dredged or fill material into the waters of the United States that allows projects to proceed only after receiving individualized authorization from the Corps. The court concluded that the Corps complied with the CWA when it promulgated NWP 21.

The CWA prohibits the discharge of any "pollutant" into the waters of the United States without a permit. The Corps has the authority under the CWA to issue individual permits and general permits for the