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Ackerson v. Bean Dredging, L.L.C., 589 F.3d 196 (5th Cir. 2009)

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ENVIRONMENTAL UPDATES

Prairie Band Pottawatomie Nation v. Federal Highway Administration,
No. 08-2534-KHV, 2009 WL 4016106 (D. Kan. Nov. 18, 2009)

Prairie Band Pottawatomie Nation v. Federal Highway Administration (hereinafter “FHA”) involved a proposal to construct a southern bypass around the city of Lawrence, KS. In May of 2001, the Kansas Department of Transportation (hereinafter “KDOT”) announced that it would begin evaluating proposals for building the bypass and asked the U.S. Army Corps of Engineers (hereinafter “ACE”) to ensure the bypass complied with environmental standards. The ACE subsequently created an Environmental Impact Statement, approved the bypass, and issued KDOT a permit for the route which was approved by the FHA.

A portion of the bypass called the 32nd Street route will bisect the Haskell-Baker Wetlands near the Haskell Indian Nations University in Lawrence. These wetlands are historically and culturally significant to Haskell students and Native Americans nearby. These Native Americans, joined by other environmental groups, brought action against the Federal Highway Administration, Michael Bowen, the FHA Division Administrator, KDOT, and KDOT Secretary Debra Miller. Along with other claims, plaintiffs alleged violations of the Clean Water Act, arguing that the 32nd Street route of the bypass would destroy fifty-five acres of wetlands, affect water quality, and also impact 2800 feet of water flow.

Plaintiffs asserted two claims under the Clean Water Act. First, they claimed that the FHA and KDOT, along with its officers, neither overcame the presumption of non-water alternatives for the bypass nor considered less harmful alternatives. Second, they claimed that there was no consideration of the possibility for mitigating the impact of the bypass.

The Clean Water Act, in part, governs the discharge of materials into navigable waters. Section 404(b) of the Act, 33 U.S.C. § 1344, states that the Army may issue permits for the discharge of such materials. Regulations promulgated under the Act, 40 C.F.R. § 230.10, direct the ACE to decline a permit for depositing such material when that deposit would result in an unacceptable adverse impact or when an alternative to the proposal would have less of a harmful impact on the environment.

The court sustained the motion for dismissal of all claims against Bowen and Miller. The court ruled that the claims against the individuals were made against them acting in their official capacities. The court

reasoned that such claims actually constituted claims against the FHA and KDOT and since FHA and KDOT were already named as defendants in the case, it was unnecessary for the plaintiffs to name the individual defendants.

The court also dismissed the claims against the FHA and KDOT. The court stated that the Clean Water Act gives the ACE alone the power to prepare Environmental Impact Statements and decide whether or not to issue a permit to allow the deposit of fill materials. Therefore, the power to issue a permit for the construction of the bypass rested solely with the ACE. Thus, the court held that only the ACE could properly be named as a defendant and therefore dismissed all Clean Water Act claims against FHA and KDOT.

AARON SANDERS

ENVIRONMENTAL UPDATES

Water Works & Sewer Board v. Inland Lake Investments, L.L.C., No. 1070030, 2009 WL 2723203 (Ala. Aug. 28, 2009)

Inland Lake Investments (hereinafter “ILI”) began constructing a development next to the Water Works and Sewer Board’s (hereinafter “the Board”) property and adjacent to Inland Lake (hereinafter “the Lake”), which the Board used as a major water source for supplying drinking water to nearby counties. Despite the Board telling ILI that the Board would need to review ILI’s development plans, including sediment and erosion control, before the Board could approve the construction, ILI began construction. As construction began, the Board observed sediment entering Sawmill Slough, a tributary of the Lake on its property. Further, during a heavy rain, the Board witnessed muddy water streaming from ILI’s property into the Lake.

An expert on sediment control testified that almost no controls had been implemented on ILI’s property and that the property drained onto the Board’s property. He continued to state that the controls would not be adequate to prevent further sediment discharge during later heavy rains. Beyond just this, an Alabama Department of Environmental Management environmental scientist visited the site and observed sediment from ILI’s property to the Lake. According to the Board’s water treatment manager, the increased sediment in the water, which he had witnessed, would require more chemical treatment. This resulted in a sludge that was more expensive to dispose of than normal but could be removed.

It was under these circumstances that the Board brought a suit against ILI claiming continuing trespass, among other claims, and asking for a preliminary injunction. The trial court found that because the sediment could be removed after each trespass, no irreparable injury existed. Therefore, the court held that there was an adequate remedy at law and denied the Board’s preliminary injunction.

The Alabama Supreme Court addressed the issue beginning with a review of irreparable damages. The court reflected that this injury is one that cannot be fixed solely by money or other remedies. It then went on to examine a similar case where a dam regularly overflowed at high tide. The court stated that it held in that case that the ability to rectify the damages does not matter in reoccurring injuries because a single suit will not fix the problem. Therefore, the court stated that the law has the ability

to prevent the harm. In this case the Board would have to bring a claim anytime it rained, which, according to the court, is simply unproductive and wasteful. The court also referred to the principle that injunctions are appropriate when damages are insufficient due to the need for multiple suits. This led the court to hold that there was a continuing trespass every time it rained severely and thus compensation would be inadequate because the trespass continued and created the need for multiple actions. However, because a preliminary injunction requires that the harms to ILLI not unreasonably outweigh the advantages to the Board, which was not discussed by the trial court, the court remanded for determination of this point.

MARTHA D. LEVERENZ

ENVIRONMENTAL UPDATES

Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009)

The Fifth Circuit recently decided a case which held that owners of land and property along the Mississippi Gulf Coast had standing to bring nuisance, trespass, and negligence claims against oil and coal companies. The plaintiffs' claims maintained that the defendants' emitted greenhouse gasses through their operation of energy, fossil fuels, and chemical industries in the United States. The plaintiffs' claimed that the defendants' contribution to global warming ultimately lead to a rise in sea levels, which added to Hurricane Katrina's ferocity.

The plaintiffs' class action lawsuit sought compensatory and punitive damages under various claims based on Mississippi common law including public nuisance, private nuisance, trespass, negligence, and others. The defendants' filed a motion to dismiss, maintaining that the plaintiffs lacked standing and that the claims also presented a nonjusticiable political question. The plaintiffs appealed from the United States District Court for the Southern District of Mississippi's decision granting the motion to dismiss.

One of the central questions before the Fifth Circuit was whether the plaintiffs had standing to assert their claims. The Fifth Circuit held that the plaintiffs established standing for the nuisance, trespass, and negligence claims. With Mississippi's liberal standing requirements, the only obstacle before the plaintiffs was meeting the federal law's standing requirement that the injury suffered must be fairly traceable to the defendants' actions. The defendants contended that the injury was too attenuated and that its actions were only one of the many contributions to gas emissions. In holding that the traceability element of standing was met, the Fifth Circuit relied on the Supreme Court decision of *Massachusetts v. EPA*. In *Massachusetts*, the Supreme Court accepted both the link between man-made greenhouse gas emissions and global warming and also the link between rising ocean temperatures and the intensity of hurricanes. The Fifth Circuit also relied on another portion of the *Massachusetts's* decision, holding that the defendants need not be the sole or material cause to global warming, but rather, the defendants need only contribute to global warming.

Another issue before the Fifth Circuit was determining whether the case presented a nonjusticiable political question. In making this

determination, the Fifth Circuit applied the formulations set forth in the Supreme Court's decision in *Baker v. Carr*. The five formulations applied included: whether the case presented a textual commitment of the issues to another political branch, an absence in a judicially manageable standard for adjudicating the claims, a need for nonjudicial policy determinations in adjudicating the case, whether the judicial decision would imply a lack of respect for a coordinate branch, and whether the judicial decision would cause any potential embarrassment from different pronouncements by various federal departments on the one question. The Fifth Circuit held that the defendants failed to establish that the issue was committed to another federal political branch. In the holding, the Fifth Circuit noted that common law tort claims are rarely thought to present nonjusticiable political questions because there are clear and well-settled rules for the courts to apply.

In finding the nuisance, trespass, and negligence claims as justiciable, the Fifth Circuit reversed and remanded the district court decision.

MARY CILE GLOVER-ROGERS

ENVIRONMENTAL UPDATES

Native Village of Kivalina v. ExxonMobil Corp., No. C 08-1138 SBA,
2009 WL 3326113 (N.D. Cal. Sept. 30, 2009)

This action arose as a result of the Native Village of Kivalina (hereinafter “Kivalina” or “the Village”) bringing a nuisance suit against ExxonMobil, along with twenty-four energy and utility companies (hereinafter “Exxon”), in order to recover damages due to global warming. The Village is located on the tip of a barrier reef seventy miles north of the Arctic Circle, with the Village’s coastline being protected by sea ice that acted as a barrier to sea storms. Kivalina alleged that due to global warming, the Arctic sea ice shielding Kivalina from winter storms has diminished, resulting in the erosion that forces Kivalina to relocate. Kivalina is suing Exxon for monetary damages due to Exxon’s alleged role in contributing to global warming that has resulted in the ice erosion.

The court discussed two questions. First, the court sought to determine if a political question existed by evaluating whether the court would have to make a policy determination relating to the use of fossil fuels and a subsequent consideration of the fossil fuels’ value in relation to the environmental, economic, and social consequences of the use. Second, the court evaluated whether Kivalina had Article III standing to bring suit by examining whether the global warming claims were fairly traceable to Exxon’s conduct.

Addressing the political question first, the court dismissed Kivalina’s complaint because the issue was outside of the Article III jurisdiction of federal courts. The court relied on two determinations in reaching the conclusion that it did not have jurisdiction. First, the court found no textually demonstrable constitutional commitment to the issue and no judicially discoverable or manageable standards to guide a reasoned ruling, one way or the other. In looking to prior decisions, the court could not find any precedent to guide a decision concerning weighing the costs and benefits of using fossil fuels or energy alternatives to address climate change through the reduced emission of greenhouse gases. Second, the court asserted that Kivalina’s claim brought forth initial policy determinations about who should bear the cost of global warming and this determination was more appropriate for the legislative or executive branch.

In turning to the question of whether Kivalina had Article III standing, the court focused on the chain of causation requirement and whether Kivalina could prove that Exxon's conduct caused Kivalina's injury. Here, the court concluded that Kivalina did not have standing, as the Village could not show that its damages were dependent on a series of events removed "both in space and time" from Exxon's conduct. Additionally, the court held that the Village was not entitled to special sovereign standing.

The court granted Exxon's motion to dismiss for lack of jurisdiction and subsequently dismissed Kivalina's state law claims without prejudice for refileing in state court.

MICHAEL A. MOOREFIELD

ENVIRONMENTAL UPDATES

North Carolina v. EPA, 587 F.3d 422 (D.C. Cir. 2009)

The D.C. Circuit recently rejected a petition by the State of North Carolina to reinstate the northern portion of the State of Georgia to EPA's regulations under the national ambient air quality standard (hereinafter "NAAQS") for one-hour ozone. The court found that North Carolina failed to meet the redressability prong of the *Lujan v. Defenders of Wildlife* standing requirements because its requested remedy was not likely to redress its injury.

In 1979, EPA established the first NAAQS for ozone—0.120 ppm as measured over the course of one hour (hereinafter "one-hour ozone standard"). In 1997, EPA tightened the standard to .08 ppm over the course of eight hours (hereinafter the "eight-hour ozone standard"). EPA transitioned from the one-hour standard to the eight-hour standard in 2004. EPA lowered the eight-hour ozone standard again to 0.075 ppm effective May 27, 2008.

Nitrogen oxide (hereinafter NO_x), a precursor to the formulation of ozone, is regulated by EPA under state implementation plans (hereinafter "SIPs"). In 1998, EPA issued findings that Georgia's NO_x emissions significantly contributed to violations of the one-hour ozone standard in the downwind cities of Birmingham, Alabama and Memphis, Tennessee. EPA also found that Georgia significantly contributed to violations of the eight-hour ozone standard in North Carolina. Consequently, EPA required upwind states like Georgia (including Missouri) to revise their SIPs to account for these conclusions. This action is known as the NO_x SIP Call.

In 2001, the D.C. Circuit held in *Michigan v. EPA* that EPA should implement more refined modeling to reduce the scope of the NO_x SIP Call from considering states as a whole to considering the specific regions within each state contributing to downwind ozone nonattainment. In response to this decision, EPA narrowed the NO_x SIP Call to the northern portion of Georgia; in Missouri, EPA narrowed the NO_x SIP Call to the eastern portion of Missouri. The rule was published on April 21, 2004, to be effective on June 21, but by April 12, EPA had determined that Memphis and Birmingham were complying with the one-hour ozone standard. The Georgia Coalition for Sound Environmental Policy, an industry group that intervened in this case (hereinafter "Industry"), successfully petitioned EPA to reconsider the inclusion of northern

Georgia in the one-hour NO_x SIP Call. Georgia was officially removed from the NO_x SIP Call in 2008 by the “Withdrawal Rule,” upon which North Carolina petitioned the D.C. Circuit for review.

In *Lujan*, the Supreme Court held that petitioners must establish three elements for standing: injury in fact, causation, and redressability. North Carolina argued that it met the three requirements. North Carolina contended that it is injured by emissions from northern Georgia that significantly contribute to North Carolina’s nonattainment under the eight-hour ozone standard because northern Georgia is no longer subject to the requirements of the one-hour NO_x SIP Call. North Carolina also argued that its injury could be remedied if the Court vacated the portion of the Withdrawal Rule exempting northern Georgia from the one-hour NO_x SIP Call.

Intervenor Industry contended that North Carolina lacked standing for failure to demonstrate redressability. Under *Lujan*, it must be “likely,” not just “speculative,” that a “favorable decision” would redress the petitioner’s injury. Intervenor Industry pointed to evidence submitted by intervenor Georgia Environmental Protection Division (hereinafter “Division”) that reinstatement of northern Georgia to the NO_x SIP Call would not reduce emissions traveling from Georgia to North Carolina. Even if reinstated, northern Georgia would meet its emission cap without actually having to reduce its emissions due to the availability of emission credits under EPA’s compliance supplement pool allowances.

While the court agreed with Petitioner North Carolina that it had sustained injury caused by NO_x-emitting generating units in northern Georgia, the court ultimately sided with intervenors and respondents on the redressability issue. The court found the Division’s evidence that Georgia’s emissions would remain at current levels no matter the outcome of the case to be dispositive. Because the reinstatement of northern Georgia to the NO_x SIP Call would not likely result in lower ozone levels in North Carolina, North Carolina’s injury was not redressable. North Carolina thus lacked standing to request review, and the court dismissed its petition.

KATIE JO WHEELER

ENVIRONMENTAL UPDATES

Burlington Northern & Santa Fe Railway Co. v. United States, 129 S. Ct. 1870 (2009)

This appeal arose after the United States (hereinafter “US”) brought an action against the Atchison, Topeka & Santa Fe Railway Company, and the Southern Pacific Transportation Company (now known respectively as the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company) (hereinafter “the Railway”) and the Shell Oil Company (hereinafter “Shell”) seeking reimbursement for hazardous material cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter “CERCLA”). The Act was passed by Congress to hold landowners of property on which there is hazardous waste contamination as well as those originally responsible for the contamination liable for the costs of having it removed. US argued that both the Railway, which leased part of the property that had been contaminated by hazardous waste, and Shell, which sold the chemicals to the property owner, Brown & Bryant, Inc. allowed the hazardous materials to escape onto the land and cause the contamination, and therefore ought to be held jointly and severally liable for the cleanup costs under CERCLA.

After a six week bench trial, the District Court for the Eastern District of California found in favor of the government as to the Railway’s and Shell’s liability; however, the court felt that the damages could be apportioned between the two companies and the property owner, as opposed to holding the Railway and Shell jointly and severally liable. US appealed the decision as to apportionment of damages and Shell cross-appealed its liability under CERCLA. The Ninth Circuit held that the district court erred with respect to not holding the Railway and Shell jointly and severally liable and affirmed Shell’s liability. Both the Railway and Shell appealed to the Supreme Court.

The two issues before the Court were: 1) whether Shell could be held liable under CERCLA and 2) whether the Railway and Shell could be held jointly and severally liable. The Court addressed the first issue noting that under the circumstances, Shell could only be held liable if it were found to be an arranger. According to the Court, for Shell to be an arranger it must have arranged for the disposal of hazardous substances. US argued that the mere fact that Shell acknowledged that during delivery

some of the hazardous waste leaked, qualified Shell as an arranger. The Court, in an eight to one decision, however, disagreed with US and held that Shell was not an arranger under the statute because a plain language reading of the statute would require that Shell intended to allow the hazardous substances to leak upon transfer, and under the facts Shell encouraged facilities and shippers to increase the efficiency of its transfers and the integrity of its chemical holding tanks with price discounts and, later, by mandating these higher standards. This reaffirmed the holdings of most other circuits, which hold that sellers who merely sold hazardous substances that were still suitable to use and sold them in such a way as to not intentionally allow the release or improper disposal of these materials into the environment, were not arrangers and, thus, not liable under CERCLA. This holding removed Shell from the second inquiry of the Court.

In taking up the second issue, whether the Railway could be held to joint and several liability under CERCLA, the Court stated that although CERCLA imposed a strict liability standard on persons shown to be responsible for the release of hazardous waste into the environment, it did not require that every court hold all offenders to joint and several liability. Instead, the Court said that CERCLA provides that where apportionment of damages can be ascertained, offenders should be held to their proportion of the harm. And because the facts adduced at trial, according to the Court, reasonably supported the district court's approximation of harm for which the Railway was responsible and its ruling that apportionment was appropriate, the Court reversed the Ninth Circuit, which had held that apportionment under CERCLA was only appropriate when supported by ample evidence to establish the degrees of liability to a reliable measure.

TERRY L. GARNER

ENVIRONMENTAL UPDATES

Wyoming v. United States Department of Interior, 587 F.3d 1245 (10th Cir. 2009)

The National Park Service (hereinafter “Park Service”) was instructed by executive order in 1974 to establish policies for the use of off-road vehicles in national parks. As a result, one of the rules the Park Service adopted was that the use of snowmobiles was prohibited, except on designated routes. Over the years, special rules were promulgated that designated those routes within Yellowstone National Park (hereinafter “Yellowstone”), but failed to limit the number of snowmobiles allowed. From that omission, in 2001, a see-saw, multi-jurisdictional legal battle ensued that saw numerous actions filed in both D.C. and Wyoming district courts. Essentially, snowmobiling opponents filed suit in D.C. district court to reduce or eliminate snowmobile use in Yellowstone; while, conversely, snowmobiling proponents filed suit in Wyoming district court to increase snowmobile access to the park. With each subsequent settlement or judgment, the number of snowmobiles permitted in the park fluctuated wildly.

The instant case centered on a rule passed by the Park Service in 2007 that allowed 540 snowmobiles access into the park daily. Nearly simultaneous challenges were filed in D.C. and Wyoming that alleged the rule was invalid because it permitted either too few or too many snowmobiles. Handing down its decision first, the D.C. district court invalidated the rule as “arbitrary and capricious” because it allowed more snowmobiles than the court believed were permitted by law.

While the Park Service commenced work on a new rule, the Wyoming district court resolved what it considered to be the unresolved question in the case: how many snowmobiles were permitted until a new rule could be handed down? The Wyoming court decided that, as a stop-gap measure, 720 snowmobiles per day should be allowed to enter Yellowstone. On appeal to the Tenth Circuit, a conservation group (hereinafter “appellants”) maintained that the D.C. district court’s decision vacating the 2007 rule rendered the Wyoming case moot. In the intervening period, on November 20, 2009, the Park Service promulgated a new temporary rule allowing 318 snowmobiles to enter Yellowstone each day.

In arriving at its decision, the Tenth Circuit first determined that the Wyoming district court's stop-gap decision at issue on appeal was, by its own terms, effective only until the Park Service adopted a new rule. With the promulgation of that rule, the court believed that the Wyoming district court's order had expired by its own terms. Since, as the court noted, the appellants' desire was to declare the Wyoming district court without authority to dictate the number of snowmobiles this winter, the court could offer no more relief from that order than the new Park Service regulation already provided. Thus, the court held that the Park Service's rule, by eliminating the issues upon which the case was based, rendered the appeal moot.

Moreover, the Tenth Circuit rejected the appellants' contention that the Wyoming district court's order should remain in effect since the Park Service had not promulgated a permanent rule. Without any support in the order's language for such an interpretation, the court found that to be an unreasonable reading. The opinion of the Wyoming district court stated only that the Park Service must pass an "acceptable" rule, and by "acceptable," the district court was referencing compliance with the D.C. district court's ruling that required less snowmobiles. If, as the Tenth Circuit believed, the Wyoming district court desired to avoid conflict with the D.C. court proceedings, then the court found it implausible that the Wyoming court would have intentionally produced such a conflict by dictating what type of rule should be adopted.

After determining that the November 2009 Park Service regulation effectively mooted the case, the court vacated the Wyoming district court's judgment and remanded with instructions to dismiss for lack of subject matter jurisdiction.

KAMERON M. LAWSON

ENVIRONMENTAL UPDATES

Slokish v. United States Federal Highway Administration, No. CV-08-1169-ST, 2009 WL 3335320 (D. Or. 2009)

In 2008, the Wildwood-Wemme highway widening project (“the project”) was substantially completed near Mt. Hood, OR. The Plaintiffs consist of individuals and organizations who sought to preserve, protect, and rehabilitate Native American sacred and cultural sites and historical and archaeological resources in the lands surrounding Mt. Hood. Plaintiffs alleged that the defendants violated the National Historic Preservation Act (“NHPA”), the National Environmental Policy Act and § 4f of the Department of Transportation Act. The defendants include the United States Federal Highway Administration (hereinafter “FHWA”), United States Bureau of Land Management, Advisory Council on Historic Preservation, and Matthew Garrett, Director of the Oregon Department of Transportation.

The Klickitat and Cascade Tribes, as well as each leader individually, claimed injury because the project is to be located within traditional cultural property. Carol Logan is a resident of Oregon and is of Native American ancestry; she is a member of the Mt. Hood Sacred Land Preservation Alliance (hereinafter “MHSLPA”), a group which has been campaigning to protect the area since the 1980s and often uses the area for cultural, religious, recreational, and aesthetic purposes. The Cascade Geographic Society (hereinafter “CGS”) is a nonprofit corporation that is dedicated to preserving and promoting the cultural, historical, and natural resources of the Cascade Mountain Range and its rivers, and also uses the area affected by the project for cultural, recreational, and aesthetic purposes.

The stretch of highway particularly at issue here is a right-of-way next to the Mountain Air Park subdivision of the Wildwood Recreation Area situated between the villages of Wildwood and Wemme near the town of Welches. Another portion of the right-of-way includes a section of the A.J. Dwyer Scenic Area. As the project continued the contractors began cutting trees out of the right-of-ways, including old-growth Douglas Fir trees.

The defendants asserted that the case was moot because the Wildwood-Wemme project was substantially complete, and all the remaining tasks were limited to areas already impacted by the project. The

court held that the case was not moot because there was a continuing harm and stated that if refused to reward the defendants' efficiency in completing the project by shielding them from their obligations under the NHPA provisions. The court explained that it was irrelevant whether or not the building project was substantially complete because the harm was continuing due to the construction efforts, and that harm was in violation of the NHPA provisions.

The defendants also argued that none of the plaintiffs had standing to bring the claim. The court agreed with the defendants as to the Klickitat and Cascade tribes, as well as each leader, as they do not assert that they ever visited, used, or planned to visit the area impacted by the project; therefore, both the tribes and their leaders lacked injury sufficient to establish standing. Standing was held to be sufficient as to Logan, the MHSLPA, and CGS, as each stated prior use of the area and intent to return, so an injury in fact existed.

The defendants further urge that the plaintiffs' NHPA claims should be dismissed for failure to state a claim. In particular, the defendants want the claims regarding to the tribes who lacked standing to be dismissed. The court stated that the fact that the tribes and their respective chiefs lack standing is not fatal to the claims because Logan has sufficient standing to assert the various claims at issue. The court held that even though the tribes and their chiefs did not have standing to bring the claims, Logan did. Logan could bring all the claims under the NHPA because the NHPA is designed to cover a broad class of individuals and any pleadings must be construed broadly in favor of the plaintiffs, and therefore, Logan's pleadings withstand the motion to dismiss.

JESSICA ADAMS

ENVIRONMENTAL UPDATES

California Energy Commission v. Department of Energy, 585 F.3d 1143 (9th Cir. 2009)

In recent years, California began experiencing a critical water crisis. The state's population is expected to grow in the next thirty years, so it is expected that the need for water will also continue to grow. While this need for water is increasing, California's water supply is decreasing due to problems such as over-appropriated surface waters, over-drafted groundwater aquifers, and salt water contamination.

In an attempt to combat this water crisis, the California Legislature required the California Energy Commission (hereinafter "CEC") to establish water efficiency standards for residential washing machines, which accounts for twenty-two percent of a typical household's water usage. To do this, CEC established a water factor (hereinafter "WF"), which is the ratio of gallons of water used per load per the cubic feet of capacity. The first standard, Tier 1, would have taken effect on January 1, 2007, and would have required all washers (top and front loading) to perform at a WF of no more than eight and a half. The second standard, Tier 2, set to take effect on January 1, 2010, would require all washers to perform with a WF of no more than six. The Environmental Policy and Conservation Act (hereinafter "EPCA") preempts any state regulation of a product covered by federal efficiency standards, and the Department of Energy (hereinafter "DOE") already has energy efficiency standards for residential washers. Because the efficiency regulations proposed by CEC are preempted by the EPCA, CEC was required to petition the DOE for a request to waive preemption.

First, DOE contended that the EPCA does not grant the United States Court of Appeals for the Ninth Circuit jurisdiction to review the denial of the waiver. DOE argued this because the EPCA only allows review by a United States court of appeals for persons affected by certain sections (6293, 6294, 6295) of the title. But, the court concluded first that it had jurisdiction because CEC's petition is related to DOE's authority under section 6295. In addition, the court looked at *NRDC v. Abraham* and found the holding to be applicable in this case. *Abraham's* holding stated that the EPCA provided district courts jurisdiction in several different circumstances, and when there is a "specific statutory grant of

jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals.”

After determining that it had proper jurisdiction, the court then discussed DOE's denial of CEC's petition. DOE denied the petition for three reasons and argued that its denial was also due to CEC's failure to provide complete information. The first reason was that there is a three year statutory delay requirement between the waiver and the date in which the standard would take effect. The date that the first standard was to take effect, January 1, 2007, would not have met this three year requirement, as the petition for the waiver was not accepted until December 23, 2005 and was not ruled on until December 28, 2006. The court of appeals found that DOE was viewing the rule as being inflexible, when in practice, viewing the rule this way would be unworkable. The court concluded the rule is unworkable because DOE did not provide a date that it would rule on a waiver application, and DOE took a year to rule on CEC's petition. Thus, DOE should have been more flexible when determining whether the three year delay was an issue.

The second reason DOE denied CEC's petition was because CEC failed to show unusual or compelling state interests, which is required for DOE to grant the petition. CEC was required to demonstrate interests in “saving water that are substantially different in nature than those prevailing” in the states and the water savings resulting from the regulations would make the regulations necessary when balanced against alternative approaches. The court examined the data and analyses submitted by CEC and determined that the cost analysis and Pacific Gas and Electric study were sufficient for DOE to make a determination of whether the proposed standards were necessary.

The third reason CEC's petition was denied was that the Tier 2 regulation of requiring all washers to perform below a six WF would make top-loading washers unavailable. DOE asserted that none of the current top-loading washers perform at this WF level. But, DOE was required to prove by a preponderance of evidence that the unavailability of top-loading machines would occur, and the court found DOE's supporting evidence insufficient to make that determination.

Therefore, the court in this case found DOE's reasons for denying CEC's petition unpersuasive. But, the court also found that it is not an appropriate action for it to grant the petition for the waiver. Thus, the

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court reversed DOE's decision and remanded it for further proceedings so that DOE can consider the other issues that have not yet been resolved.

CARA M. LUCKEY

Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199 (2d Cir. 2009)

Simsbury-Avon Preservation Society (hereinafter "SAPS") brought suit against Metacon Gun Club, Inc. alleging unlawful discharge of lead into soil and nearby wetlands in violation of the Resource Conservation and Recovery Act (hereinafter "RCRA") and the Clean Water Act (hereinafter "CWA"). The original suit brought in the District Court of Connecticut was dismissed and SAPS appealed to the Second Circuit.

Metacon operated a private shooting range since the 1960's that covered 137 acres of woods, meadows, wetlands and mountainsides situated on a flood plain near the Farmington River in Simsbury, Connecticut. In 2003, the Connecticut Department of Environmental Protection sampled groundwater and surface waters from the gun range site, but due to flawed procedures, asked Metacon to resample using appropriate procedures, and report the findings. The firm that conducted the testing for Metacon concluded that the shooting activities at Metacon were not causing ground or surface water contamination at the site. SAPS, however, conducting its own tests, found to the contrary: that spent ammunition contaminated various media on the site. It found that this contamination represented a potential exposure risk for humans and wildlife, but that an additional investigation and risk assessment would be needed to determine the degree of risk it presented. Metacon did not have a hazardous waste disposal permit under the RCRA or a National Pollutant Discharge System permit, which were required under the CWA for the discharge of pollutants.

SAPS brought claims against Metacon alleging violations of the RCRA for disposing of hazardous material without a permit and for disposing of solid waste that may present an imminent and substantial endangerment to public health or the environment. SAPS brought additional claims under the CWA alleging violations for discharging pollutants without a permit.

The Court of Appeals for the Second Circuit first addressed the RCRA claims. In order for waste to qualify as a hazardous material, it must first qualify as a solid waste. In order for SAPS to have been successful in its claim that Metacon was disposing of hazardous material without a permit under 40 CFR § 261.2, it would have had to show that

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any spent casings or munitions were discarded materials which were abandoned by being disposed of or by being accumulated, stored or treated, but not recycled, before or in lieu of being disposed of. The district court dismissed this claim, giving deference to the EPA's guideline that if something is deposited onto land as part of its intended use, then it is not abandoned material. Because the spent casings and munitions were deposited onto the land as part of their intended use, Metacon was not required to obtain a permit under RCRA for the operation of a shooting range.

The court next looked at the RCRA claim that Metacon had disposed of solid waste on the site that may present an imminent and substantial endangerment to public health or the environment. The court dismissed this claim for insufficient evidence because Metacon periodically swept the land to remove any spent casings. The court dismissed for an additional reason argued by Metacon: that there was insufficient evidence in SAPS reports, and the reports admitted that an additional investigation and assessment would be needed to determine the degree of risk that was presented. The samples presented failed to show the likelihood that existing lead contamination would in fact result in harm to human health or the environment, and failed to show the severity of any harm that might occur. Therefore, SAPS' samples alone were insufficient to form a basis for a jury to conclude that Metacon had violated federal law.

The court next looked to the allegations that Metacon violated the CWA by discharging pollutants without a permit. The district court dismissed this claim on the theory that SAPS failed to show Metacon was discharging pollutants into navigable waters, and Metacon argued alternatively that SAPS had failed to show that whether the pollutant, lead, was discharged from a point source. The court of appeals affirmed on the point source theory.

A point source is a discreet conveyance from which pollutants may be discharged. EPA regulations implicate that surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and is thus not subject to the CWA permit requirement. SAPS claim revolved around two areas on the range; a berm that lined the back of the gun range to collect spent casings and munitions, and the firing line itself. There was no evidence that lead was actually leached from the berm into

groundwater, and not evidence that any runoff was channeled or collected by man as necessary to make it a point source. Therefore, the court held that SAPS failed to provide evidence that any lead that may reach into jurisdictional wetlands from the berm resulted in point source discharge, and failed to show that lead discharged from the firing line constituted a discharge into jurisdictional wetlands. Thus a permit for operating the shooting range was also not required under the CWA.

DANIELLE HOFMAN

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In re Delta Smelt Consolidated Cases, No. 1:09-CV-407 OWW DLB,
2009 WL 3273843 (E.D. Cal. Oct. 8, 2009)

This case arises from water district members' challenge to the Fish and Wildlife Service's biological opinion regarding the effect of state water project developments on threatened delta smelt, an endangered species of fish endemic to the Sacramento-San Joaquin River Delta in California. Prepared pursuant to the Endangered Species Act (hereinafter "ESA"), the Fish and Wildlife Service (hereinafter "FWS") opinion advises against the proposed state water project because the developments would threaten the existence of the delta smelts. FWS sought to prohibit the water district members from proceeding with the developments as planned. In response, the water district members, including the San Luis & Delta-Mendota Water Authority, argue that the application of the ESA's "take prohibition" and interagency cooperation provision to the delta smelt was an invalid exercise of authority under the Commerce Clause of the U.S. Constitution because "the delta smelt is a purely 'intrastate species,' and because it has no commercial value." Each party moved for summary judgment.

Section 9(a)(1)(B)-(C) of the ESA forbids any "person" to "take" any endangered species of fish or wildlife "within the United States or the territorial sea of the United States" or "upon the high seas[.]" The ESA defines "person" broadly to include "an individual, corporation, partnership, trust, association . . . or any other entity subject to the jurisdiction of the United States." To "take" is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

The court held that the water district members lacked standing to challenge the application of the take prohibition provision in this case, because plaintiffs did not show a causal connection between their injury and the application of the take prohibition clause to the coordinated operation of the proposed projects. Further, the claim was unripe in that it was a premature adjudication of a dispute which had not yet arisen. There were no concrete plans on the part of project operators to violate the ESA, no communication of a specific warning or threat to initiate enforcement proceedings, nor any history of past prosecution or enforcement against the project operators.

The court also held that the application of the section of the ESA governing interagency cooperation so as to require federal agencies to evaluate the effects of planned water project operations on the threatened delta smelt was a valid exercise of authority under the Commerce Clause, even though the delta smelt were a purely intrastate species. The ESA was a general regulatory statute bearing a substantial relation to commerce, and applying the ESA's interagency cooperation provision to an intrastate species was an essential part of the larger regulatory scheme. One of the ESA's regulatory goals was to protect the monetarily valuable resource of the planet's biodiversity, and protecting biodiversity as a whole could not have been accomplished by protecting only those species mobile enough to cross state lines or those whose ranges happened to extend over multiple states.

DANIEL S. RICH

Ackerson v. Bean Dredging, L.L.C., 589 F.3d 196 (5th Cir. 2009)

Dredging is a technique used by environmental and infrastructural planners that sucks or scrapes the bottom of waterways and then relocates the “spoils” to a different location, typically for the purpose of reshaping the waterway. In 2005, the United States Congress created the Mississippi River Gulf Outlet (hereinafter “MRGO”) dredging project in order to provide a shorter water route between the Gulf of Mexico and the inner harbor in New Orleans, Louisiana. This project employed numerous dredge company contractors to perform yearly dredges, supervised by the Army Corps of Engineers.

A common claim by environmentalists is that dredging upsets the aquatic ecosystems in the dredged and dumped locations. Plaintiffs here brought this consolidated class action against the United States and thirty-two dredging company contractors involved in the MRGO project, alleging that the numerous defendants caused environmental damage to protected wetlands in the MRGO area. Also, Plaintiffs alleged that “the MRGO project caused an amplification of the storm surge in the New Orleans region during Hurricane Katrina,” thus being a significant contributing factor to the breached levees and flood walls that devastated the St. Bernard and Orleans Parishes. Specifically, Plaintiffs asserted claims against Defendants for negligence, breach of implied warranty, concealment, and violation of environmental protection laws, while seeking damages and an injunction from future dredging activities.

The United States was dismissed from the lawsuit as a party under Federal Rule of Civil Procedure 12(b)(1) because the court lacked subject matter jurisdiction due to governmental immunity. The remaining defendants (hereinafter “Contractors”) similarly filed a motion to dismiss under Rules 12(b)(1) and 12(c) claiming they had governmental immunity due to their agency relationship. Although there were many issues in this case, the most significant was whether the trial court properly found the Contractors to have been acting as agents of the government and therefore able to invoke governmental immunity to this lawsuit.

The district court dismissed the lawsuit in part because it found that Contractors were acting as agents of the government by performing a contract job under the supervision of the Army Corps of

Engineers, and therefore they were protected by governmental immunity. This appellate court reviewed de novo and affirmed the decision. Plaintiffs challenged that Contractors had not proven they were acting in an agency relationship, but this court rejected that argument and determined that Contractors did not have that burden of proof. This court looked at *Yearsley v. W.A. Ross Construction Co.*, a United States Supreme Court case which did not require a public-works contractor defendant to establish their relationship as an agent of the government. Instead, the *Yearsley* court simply assumed that there was an agency relationship when the contractor was hired to build dikes in the Missouri River pursuant to a contract with the federal government. Due to the similarity of these cases, this court determined that it too would consider the contractors to be agents for purposes of determining whether there may have been governmental immunity.

This court then applied the rule of *Yearsley* that agents and officers of the government can only be found liable for wrongdoings if they exceed their given authority or if they act without power conferred to them by the federal government. Quoting from *Myers v. United States*, this court explained that “to the extent that the work performed by [the contractor defendant] was done under its contract . . . and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by the appellants.” In this case, Plaintiffs did not submit any evidence that Contractors acted outside the appropriate bounds of their authority; rather, their actions were permitted as within the scope defined by the United States Congress for the MRGO project. Therefore, this court found no basis for Plaintiffs’ claims and affirmed the dismissal of the case.

JESSICA M. LONG

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