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Environmental Law Updates

Mark Whitfield v. Triad Transp., Inc., 2008 WL 139082 (E.D. Ark. 2008)

The case of *Mark Whitfield v. Triad Transport, Inc.* stems from a fire incident accompanied by a sequence of explosions that occurred at the defendants' hazard waste facility in Saline County, Arkansas. The plaintiffs, who were residents of Saline County and were either forced to evacuate or were physically harmed by the events, filed an action in circuit court, asserting a series of complaints based on trespass, nuisance, absolute liability, and negligence. Among the plaintiffs' complaint are allegations of failing to properly package and label the chemicals that were shipped to the facility, as well as failing to prevent the chemicals from exploding or igniting on the site, failing to properly design the waste facility, and failing to abate the plaintiffs' property.

The defendants subsequently sought to remove the action to federal court, claiming that the plaintiffs' complaint turns on an issue of federal law and the only way to grant the plaintiffs' injunction was to employ the federal rules and regulations. Because the defendants, as the moving party, carry the burden of establishing federal jurisdiction, they must prove that the plaintiffs' cause of action arises under federal law. In response, the plaintiffs moved to remand, which was ultimately granted by the Arkansas Eastern District Court.

The defendants claim that the federal court has original jurisdiction because the plaintiffs' contentions are required to be consistent with the Hazardous Materials Transportation Act ("HMTA") provisions. Additionally, the defendants further contend that the complaints are controlled by the Resource Conservation and Recovery Act, and because the plaintiffs are seeking an injunctive remedy, the court will be required to fashion a remedy under those federal regulations. However, the court ruled that federal question jurisdiction is not created by a federal defense, including the preempted defense, even if that is the sole contested issue in the case. As a result, the court found the complete preemption doctrine to be applicable. Under the doctrine, once a state law has been preempted, any claim based on the preempted state law is thus considered a federal claim and arises under federal law. Therefore, the court must decide if Congress manifested an intent for a state law cause of action to be removed to federal court, keeping in mind that an ordinary federal case, preemption is only a defense to the plaintiffs' complaint.

The court held that because the HMTA has a preemption clause that has never been held to completely preempt state common law claims in the last thirty years, the defendants failed to show that the plaintiffs' allegations are preempted by the federal law. Because the HMTA regulates the transport of hazardous material, and not the end use of the hazardous substance, there is no overlap between the HMTA and the plaintiffs' contentions. Allowing the HMTA to preclude the plaintiffs' cause of action would therefore be unreasonable and against the intention of Congress. As a result, the defendants' motion to remove the case to federal court was unwarranted and the plaintiffs' motion to remand was granted.

CELINA LOPEZ

U.S. v. Vasquez-Ramos, 522 F.3d 914 (9th Cir. 2008) (Opinion withdrawn and superseded on rehearing by 531 F.3d 987)

On April 10, 2008, the Ninth Circuit held that prosecution for the possession of feathers and talons of bald and golden eagles without a permit did not violate the Religious Freedom Restoration Act ("RFRA"). In 2002, law enforcement officers were investigating the killing of bald eagles in captivity at the Santa Barbara Zoo when they found parts and feathers of eagles and other migratory birds in the residences of Mario Manuel Vasquez-Ramos and Luis Rodriguez-Martinez. They were charged with violating the Bald and Golden Eagle Protection Act ("BGEPA") and the Migratory Bird Treaty Act ("MBTA"). Defendants were not members of federally-recognized Indian tribes and did not have a permit for possession of the bird parts. Defendants filed a motion to dismiss, claiming that their prosecution impermissibly burdened their religious practice under the RFRA.

The BGEPA makes it illegal to possess bald or golden eagles or eagle parts without a permit. Only members of federally-recognized Indian tribes may apply for permits and permit-eligible tribe members may receive eagles and eagle parts only through the National Eagle Repository in Colorado. The time it takes for a request to be filled ranges from ninety days for bird parts to three and a half years for a whole bird. The demand far exceeds supply, giving rise to a black market for eagles and eagle parts.

The MBTA makes it illegal to possess any migratory birds, including bald and golden eagles. While there is no specific exemption for Native American religious use, the United States has adopted a policy under which members of federally-recognized Indian tribes may possess migratory bird parts. Non-members are not protected from prosecution.

Under the RFRA, the government cannot substantially burden a person's exercise of religion unless it demonstrates that the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The government conceded that the Defendants' religious beliefs are substantially burdened by the BGEPA and the MBTA. However, in previous cases, the Ninth Circuit found that the government has a compelling interest in eagle

protection that justifies limiting supply to eagles that pass through the repository even though religious demand far exceeds supply. The court stated that it was bound by precedent unless circumstances changed significantly.

In 2007, the Department of Interior removed the bald eagle from the Endangered Species List. The Defendants argued that there has been sufficient recovery of eagle populations such that the government's interest in eagle protection is no longer compelling. However, the court stated that the bald eagle is not a mere bird but a symbol of American ideals and freedom and it remains a symbol regardless of the number of eagles in existence. The court also recognized that the Department of Interior, when removing the bald eagle from the Endangered Species List, repeatedly emphasized the importance of continued protection of the bald eagle afforded by the BGEPA and the MBTA.

The Defendants argued that the government could remedy the supply problem by increased diligence in salvage and recovery of eagle carcasses. However, the court stated that even if that were true, the RFRA does not require the government to make the practice of religion easier by increasing the supply of available carcasses. Thus, the court held that the prosecution of Native Americans who were not members of federally recognized tribes for possessing feathers and talons of bald and golden eagles and other migratory birds without a permit did not violate the RFRA.

MIKE QUILLIN

Florida Key Deer v. Paulison, 522 F.3d 1133 (11th Cir. 2008)

The National Wildlife Federation and other wildlife conservation organizations ("Wildlife Organizations") brought suit to enforce § 7(a)(2) of the Endangered Species Act ("ESA") against Federal Emergency Management Agency ("FEMA") and the Fish and Wildlife Service ("FWS"). The organizations claimed FEMA jeopardized the existence of Florida Key deer and other endangered and threatened species in its administration of the National Flood Insurance Program ("NFIP") authorized by the National Flood Insurance Act. Specifically, the Wildlife Organizations alleged that FEMA's operation of the NFIP threatened the Key deer and other species by promoting new land development in areas deemed critical habitats for the species and developments that threatened the species' existence. The organizations claimed § 7(a)(2) of the ESA required FEMA to consult the FWS on the flood insurance program's impact on the Key deer; FEMA disagreed, stating that ESA was not applicable to the NFIP. The U.S. District Court for the Southern District of Florida agreed with the Wildlife Organizations, issued a Memorandum Opinion and Final Declaratory Judgment mandating FEMA consult with the FWS, and maintained jurisdiction to ensure FEMA's compliance with the court's injunction.

FEMA subsequently consulted with the FWS, which found that FEMA's administration of the NFIP in the Florida Keys indeed jeopardized the Key deer and other species; in 1997, the FWS issued "reasonable and prudent alternatives" ("RPA") to FEMA, and indicated FWS would review new developments within the critical habitats. Monroe County based its approvals of building permits on FWS's review of the building projects, and under the RPAs, FEMA was to monitor Monroe County's compliance, and alert the County of any violations. The RPAs also included FWS's "conservation recommendations" for FEMA under §7(a)(1) of the ESA, particularly that FEMA grant reduced insurance premiums to those counties achieving a county-wide habitat conservation plan. In an amended complaint from the original action, the Wildlife Organizations contested the sufficiency of FWS's RPAs and conservation recommendations under the ESA and Administrative Procedure Act, and added FWS as a defendant. FEMA consulted with the FWS again, as required by the RPAs in response to Monroe County's

failure to enact a habitat conservation plan. In its 2003 opinion on the effect of FEMA's administration of the NFIP on the endangered Florida Keys species, FWS urged FEMA to continue executing the 1997 RPAs and conservation recommendations. The Wildlife Organizations amended their complaint, challenging FWS's 2003 RPAs and conservation recommendations and moved for summary judgment.

The district court granted the organizations' summary judgment, stating that FEMA failed to meet its § 7(a)(1) species conservation obligations in the administering of the NFIP program, and that both FEMA and FWS failed to comply with the requirements of § 7(a)(2). The district court issued an injunction, prohibiting FEMA from insuring any new developments in critical habitats within Monroe County until further consultations. FEMA and FWS appealed to the 11th Circuit Court of Appeals, claiming § 7(a)(2) of the ESA is not applicable to FEMA's NFIP and did not require FEMA to analyze FWS's RPAs prior to implementing them. FEMA and FWS also argued that § 7(a)(1) did not require species-and location-specific conservation programs, and that the district court's injunction did not comply with the ESA and NFIA.

The 11th Circuit Court found that § 7(a)(2) applied to FEMA's NFIP because all actions involving Federal discretionary control are subject to § 7(a)(2). Since FEMA had discretion in its NFIP administration and its community rating system program for providing flood insurance premium discounts, FEMA had the discretion to consider protecting the endangered species in the implementation of its programs as required under §7(a)(2). In addition, the court observed that FEMA's operation of NFIP was a "legally relevant cause" of the new development threatening the species' existence. The court also concluded that FEMA was not required to independently evaluate FWS's RPAs before implementing them; however, the court cautioned that FEMA's decision to take up FWS's RPAs would likely be challenged if new information became available that neither FWS considered in its RPAs nor FEMA considered in its decision, when the agencies were required to consider that information.

Additionally, the court found that although it did not need to address whether § 7(a)(1) required species-and location-specific conservation programs, FEMA failed to comply with this section of ESA because FEMA's conservation program lacked "action." Because FEMA

failed to provide evidence showing that communities had implemented conservation plans in response to FEMA's program incentives, the court deemed FEMA's program as having "no effect" on conservation and an "insignificant measure" in protecting the endangered species. Finally, the court agreed with the district court's injunction, stating that the district court could enjoin FEMA from further action until FEMA met ESA's requirements. The court also clarified that the injunction was *not* "inconsistent" with ESA and NFIA because the injunction precluded FEMA from providing flood insurance to developments in the critical habitats for the endangered species – it did not *require* that FEMA keep providing flood insurance in Monroe County. As a result, the 11th Circuit court affirmed the district court's judgment.

SHEILA NEEDLES

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917 (9th Cir. 2008).

Each year, hundreds of thousands of endangered fall juvenile Chinook salmon and steelhead struggle up the Columbia River and its tributaries to hatch their young in fresh water, paddle downstream to achieve adulthood, and then culminate their pilgrimage by returning upstream to spawn. During the perilous voyage to the Pacific Ocean, the fish must navigate no less than 14 sets of dams. As the endangered fish engage each dam reservoir, they must combat other lurking predatory fish. Even after surmounting such threats as the Northern Pikeminnow, the salmonid and steelhead must either pass through the dam turbines or spill over the dam. While dam spill-over is the safest method, the dam spill-over requires careful maintenance to avoid gas supersaturation, which can give the fish "gas bubble trauma," similar to the "bends" experienced by human divers who surface too quickly. Sadly, up to 92 per cent of the salmon and steelhead never realize this harrowing trek, and their current numbers dwindle against the backdrop of their historic abundance. Complementing the life phases of the anadromous salmonid and steelhead is annual litigation in the Northwestern federal courts over the operation of the Federal Columbia River Power System ("FRCPS") and its dams' impacts on those brave fish.

At issue in the instant litigation is Section 7 of the Endangered Species Act ("ESA"). It requires federal agencies to insure that their actions are not likely to jeopardize listed species or destroy the species' critical habitat. Plaintiffs, environmental advocacy groups, brought this action, claiming the National Marine Fisheries Service ("NMFS" (now known as NOAA Fisheries")) violated provisions of the ESA by conducting an inadequate analysis of proposed dam action on the endangered fish. The Ninth Circuit Court of Appeals agreed that the NMFS conducted a subpar analysis because [1] NMFS's use of hypothetical "reference operation" in their jeopardy analysis violated the ESA in that it excluded dam impacts deemed "non-discretionary;" [2] the Biological Opinion ("BiOp") failed to incorporate degraded baseline conditions; [3] the BiOp failed to adequately consider agency action on the fish's chances of recovery; and [4] the NMFS was acting arbitrarily

and capriciously because its dam analysis failed to consider dam impacts on the recovery value of critical habitat.

The court found that NMFS had purposefully used the obtuse hypothetical "reference operation" standard so that NMFS would not have to precisely determine the extent of discretionary agency action. An agency cannot avoid considering real risks to an endangered species simply by labeling the action "non-discretionary." The court reminded NMFS of the United States Supreme Court precedent, *TVA v. Hill*, which obligates federal agencies to afford priority to the declared national policy of saving endangered species.

NMFS also failed to incorporate degraded baseline conditions, and instead compared the impacts of proposed agency dam operations with its hypothetical reference operation. The court reasoned that NMFS could not properly consider its jeopardy analysis in a vacuum. Allowing NMFS to use the hypothetical reference operation standard would just result in a slow and incremental destruction of endangered species. This path, the court found, is at odds with the essential purpose of the ESA.

In not considering proposed dam impacts on endangered species' chance of recovery, the NMFS violated the ESA's mandate to consider dam impacts which are "likely to jeopardize" an endangered species. The NMFS's reasoning was that the ESA simply requires it to bar action that would reduce appreciably the likelihood of survival. However, if an agency only has to consider survival, there can never be jeopardy, even if recovery is impossible. This is because a species can cling to survival even when recovery is unlikely. Therefore, the court gave no deference to NMFS's interpretation.

The court characterized NMFS' BiOp as "little more than an analytical slight of hand, manipulating variables to achieve a 'no jeopardy' finding." For example, under NMFS's statistical analysis, dead fish were suddenly alive again. Because the ESA requires an approach to the dam operations that is "a more realistic, common sense examination," the court said the district court had properly rejected NMFS's BiOp.

JOSEPH R. SCHLOTZHAUER

Animal Prot. Inst. and Ctr. for Biological Diversity v. Holsten, 541 F.Supp.2d 1073 (D.Minn. 2008)

The Animal Protection Institute ("Institute") and the Center for Biological Diversity ("Center"), collectively called "Plaintiffs," filed a suit alleging that Mark Holsten, as Commissioner of the Minnesota Department of Natural Resources ("DNR"), was previously, and is currently, violating section 9 of the Endangered Species Act ("ESA"). Section 9 prohibits any takings of species listed under the ESA. The Institute and Center claim that the ESA is being violated because Holsten is allowing snaring and trapping of the Canada Lynx, a species currently considered threatened under the ESA. The Plaintiffs allege that the snaring and trapping activities constitute a "taking" of the Canada Lynx in violation of the ESA.

The facts indicate that there are at least 13 reported incidents of Canada Lynx being trapped or snared. The Plaintiffs argue that because the DNR authorizes licensing and regulation of trapping in Minnesota it is liable for the taking of the snared and trapped lynx. However, the Minnesota Fish and Wildlife Service ("FWS") issued a 2003 pamphlet instructing people on how to avoid incidental takings of lynx when attempting to hunt Bobcats, and, in 2006, the FWS formally designated critical habitat for the lynx. Plaintiffs moved for summary judgment for DNR's liability and an injunction that would require the DNR to take all action needed to make sure that no more Canada Lynx were taken in Minnesota through trapping or snaring activities.

In response, DNR moved for summary judgment as to the liability and the requested injunction. First, DNR argued that since it would take a year to issue the injunction the issue requests for relief are moot and the Plaintiffs should reserve their right to seek relief when the permit is issued. Second, DNR argued it was not liable under the ESA for any incidental takings of the lynx because it only approves trapping and snaring with a proper license. The argument was based on DNR's understanding that the United States Supreme Court has held the ESA "take" prohibition and "harm" regulations to include proximate cause and foreseeability requirements. Therefore, the actions of the trappers are independent, intervening causes relieving DNR of liability. Third, DNR

argued that Plaintiffs proffered no evidence that a lynx taking occurred when trappers followed appropriate state regulations.

The court rejected DNR's arguments primarily because of its misinterpretation of case precedent. In the court's opinion the cited precedent lent more support to the Plaintiff's position because the broader purposes of the ESA extends protection against any activities that cause the harms that Congress enacted the statute to avoid. Eighth Circuit precedent also established that government agencies are liable for takings if any activities that agency authorizes result in a taking. The court rejected the second argument because DNR had not issued any regulations to avoid lynx takings, but had developed recommendations, which the trapper may disregard.

As to the Plaintiffs request for an injunction the DNR argues that prospective injunctive relief is not warranted because no incidental takings were reported after the winter of 2005. Another argument DNR proffers is that the Tenth Amendment bars the injunction because nothing in the ESA says that Congress meant to place a duty on any state to take specific measures to ensure no incidental takings of a listed species occurred.

Based on the fact that 13 takings were reported since 2002, in combination with the lack of regulatory response on DNR's part, the court determined that additional takings were probable without further implementation of appropriate regulations. Also, DNR's Tenth Amendment argument fails because in this case, DNR is not being asked to take steps toward advancing the goals of the ESA, but, rather, is being ordered to come into compliance with the ESA.

Relying on the above arguments the court found DNR liable for violating section 9 of the ESA by authorizing trapping and snaring in the Canada Lynx's habitat, that the Tenth Amendment did not bar the injunctive relief, and that injunctive relief was not moot. Therefore, the court granted the injunctive relief and ordered DNR to take all action necessary to make sure that no further takings of the Canada Lynx occurred, including applying for an incidental take permit before April 30, 2008 and developing a proposal for reducing incidental takings of the Canada Lynx.

LEE STOCKHORST

Nuclear Info. & Res. Serv., et al v. NRC, et al, 509 F.3d 562 (D.C. Cir. 2007).

In 2003, Louisiana Energy Services L.P. ("LES") filed an application with the National Regulatory Commission ("NRC") for a new enriched uranium facility near Eunice, New Mexico. Two organizations, the Nuclear Information and Resource Service, and Public Citizen jointly filed a petition before the Atomic Safety and Licensing Board, who denied the groups' claims, upholding the licensing. An appeal was filed by the two groups in the District of Columbia Circuit U.S. Court of Appeals in an effort to intervene in the licensing proceedings.

The environmental groups argued the NRC's environmental impact statement did not satisfactorily address the impact of the proposed nuclear facility. More specifically, they asserted the NRC violated the Atomic Energy Act by "supplementing" the impact statement during the hearing process and by not challenging LES's disposal strategy and cost estimates. Further, they asserted the National Environmental Policy Act ("NEPA") failed to adequately address the environmental consequences of disposing of the facility's uranium waste.

In finding for LES, Judge Brett M. Kavanaugh wrote for the three-judge panel. The Court rejected the group's claims that the impact statement was supplemented by establishing a simple timeline that illustrated an environmental impact statement had been completed by the time of the hearing process. The panel also rejected the groups' claim that the NRC's review was deficient. They held the agency met its obligation to take a 'hard look' at the environmental consequences of approving the license. Finally, the court found there was no evidence that the NRC's estimate on the nuclear project was unreasonable. They held that as a reviewing court, they were not authorized to micromanage the agency's "licensing procedure, or to second-guess its acceptance of reasonable cost estimates."

DAVID ZUGELTER

OSI, Inc. v. United States, 525 F.3d 1294 (11th Cir. 2008)

During the 1960s and 70s, the Air Force leased land from OSI, Inc., called LF4, to use as a landfill. The Air Force also leased a larger tract of land adjacent to LF4, called Maxwell AFB (the two tracts of land were referred to as the OU-1 area), which was also used as a landfill in the 1990's. Many materials, including hazardous waste, were dumped on these sites. In 1990, the Air Force alerted OSI of possible soil and groundwater contamination on LF4 and investigated the possible risk contamination would pose to human health or the environment.

OSI sued the government for tort claims related to the Air Force's dumping activities on LF4, sought cost recovery under CERCLA, and filed a citizen suit under RCRA. The district court dismissed all claims and the court of appeals affirmed the dismissal of the tort claim, but vacated and remanded the grant of summary judgment on the RCRA and CERCLA claims so that the district court could add to the record and provide more explanation for its decision. On remand, the district court granted summary judgment for the government on the CERCLA and RCRA claims. OSI appealed.

OSI claimed that the district court erred and it had sufficient evidence to show imminent and substantial harm and should have won on summary judgment for the RCRA claim. The government argued that the district court's decision should be affirmed because the court lacked jurisdiction to hear the claim. The government claimed that there was an ongoing CERCLA remedial action being conducted, and that CERCLA bars challenges to cleanup that is ongoing. The court of appeals agreed with the government on this claim.

The second argument on appeal was the interpretation of specific CERCLA provisions concerning citizen suits and the source of authority for CERCLA cleanups on federal land. RCRA allows an individual to bring a civil action against anyone who has contributed to the disposal of hazardous waste which poses an imminent and substantial risk to health and the environment. CERCLA, however, allows for remedial actions such as the one selected by the Air Force. CERCLA also bars federal courts from reviewing challenges to removal or remedial actions under the statute. The court found that if the Air Force's remedial action is classified as one under the statute then the district court lacked jurisdiction over the

RCRA citizen suit until the cleanup was complete. The court of appeals found that the language in the statute was broad enough to be read as authorizing remedial actions for both federal and non-federal land. Therefore, the court held that the Air Force's remedial action for OU-1 fell under the statute's provision for remedial cleanup and was subject to the jurisdictional bar and the district court's grant of summary judgment was affirmed.

BREANNE ARDILA

Benzman v. Whitman, 523 F.3d 119 (2nd Cir. 2008)

This case involves the plaintiff class of residents who live, go to school, or work in lower Manhattan or Brooklyn. The claim is against the individual and governmental agency liability for the September 11th aftermath. The main claim is about the air quality of the area after September 11th. The plaintiff class argued that the government officials misled them by saying the air quality was safe enough for people to return home, to work and to school. The defendants in the case are Christine Todd Whitman, former Administrator for the Environmental Protection Agency, Stephan L. Johnson, current Administrator for the EPA, and the EPA.

The plaintiffs have four complaints related to the defendant's response to the allegedly dangerous air quality of lower Manhattan and Brooklyn caused by the collapse of the World Trade Center towers on September 11, 2001. The first count is a called the *Bivens* claim, which sought damages from Whitman alleging that soon after the 9/11 incident, Whitman and other EPA officials under her supervision failed to report health risks of the allegedly dangerous air particles due to the dust from the collapse of the buildings or had misrepresented the nature of those risks. Plaintiffs allege the EPA violated the plaintiffs' substantive due process right to be free from health risks created by the government. This count does not accuse Whitman of purposefully intending to cause harm, but rather she acted with deliberate indifference because she knew her statements and the press release statements were false.

The second count of the claim known as "the APA count" alleged that the EPA failed to meet its regulatory obligations regarding air quality and cleanup in the affected area. This claim is under the APA against the EPA. The APA also claimed that the EPA violated the plaintiffs' Fifth Amendment right of due process. It also claimed a finding of liability and injunctive relief to compel the EPA to perform tests to see whether there were dangerous substances in the affected area and to have a professional cleanup of the area.

The third count is a mandamus claim that seeks to compel the EPA to perform what the plaintiffs call mandatory duties of the EPA to clean up the dust caused by the collapse of the World Trade Center buildings.

The fourth count is a claim brought pursuant to CERCLA subsection 1, which alleged that the EPA violated the National Contingency Plan ("NCP") regulations under CERCLA.

The district court denied a dismissal of the first count and held that it clearly established a violation of substantive due process. The EPA then sought dismissal of count two as well under the Federal Rules of Civil Procedures 12(b)(1) and 12(b)(6). The district court agreed that the agency decisions were discretionary because the NCP regulations were not mandatory duties. However, the court also ruled that this did not preclude judicial review of the entire APA count. Count three was also dismissed. Count four was dismissed because the plaintiffs alleged a failure to perform non-discretionary acts.

Whitman now appeals the denial to dismiss the first count. The plaintiffs' main allegation is that Whitman should have been held personally liable for the damages because she was aware of the dangers and knowingly approved of false press releases. The purpose of having a *Bivens* claim is to prevent unconstitutional behavior by individual federal officials. However, the defendants argue that no court has ever held a government official liable for damages by approving press releases or making public statements. This is a new claim all together. The Second Circuit now examines the situation to see if there are any "special factors" that would weigh against allowing a *Bivens* claim. The court decided that a suit against a federal official for a federal disaster response would constitute as a "special factor" that would weigh against a *Bivens* claim. The court then said that if an implied cause of action were available, it would have to determine if the facts showed that the governmental officer violated a constitutional right. In order to do so the plaintiff must show that the official's conduct was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis,* 523 U.S. 833, 848 n.8 (1998). In the instant case, the court found no intent by Whitman to injure anyone. The Supreme Court recognizes two different theories of liability under the substantive Due Process: "special relationship" liability, and "state-created-danger" liability. The Second Circuit found that the plaintiffs' claims did not prove either of the special relationships that might lead to a substantive due process claim.

The court finally stated that there are not always legal remedies available for every situation when there is arguably an unfavorable action by the government.

JERRI ZHANG

Weaver's Cove Energy, LLC v. Rhode Island, 524 F.3d 1330 (D.C. Cir. 2008)

In 2004, Weaver's Cover Energy (WCE) applied for a dredge and fill permit from the Army Corps of Engineers to dredge parts of the Taunton River in Massachusetts and of Mount Hope Bay in Rhode Island. WCE intended to use the area to build a liquefied natural gas import terminal. WCE initiated suit against the Rhode Island Department of Environmental Management (RIDEM) and the Massachusetts Department of Environmental Protection (MassDep) alleging that the two state agencies failed to comply with the timeliness required by the Clean Water Act (CWA), and had thereby waived their right to review WCE's application for a dredge and fill permit. The D.C. Circuit panel affirmed dismissal of WCE's case since WCE did not have standing to sue.

Section 401(a)(1) of the CWA prohibits states that participate in the environmental regulatory process from "fail[ing] or refus[ing] to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements . . . shall be waived with respect to such Federal application." WCE submitted its application pursuant to the CWA to RIDEM and MassDep in early 2004. WCE waited two years without a decision as to the application's completeness from MassDep before amending its application to MassDep's satisfaction in December of 2006. RIDEM, which had already informed WCE to submit additional information, received continuing supplements from WCE until May of 2007. MassDep notified WCE that it would stay WCE's application pending the Coast Guard's determination regarding the application in June of 2007. That same month, RIDEM stated its review would continue. WCE then filed an action alleging that RIDEM and MassDep had failed the requirements of the Clean Water Act by failing to act definitively in a reasonable amount of time. WCE argued that by failing to act in a timely manner, the two state regulators had waived their part in the permitting process.

To seek judicial relief, WCE needed to show an injury to a legally cognizable interest, that the conduct of the defendant caused the injury, and that the judiciary could provide a remedy for WCE's injury. WCE's strongest argument for injury was that the delay caused by the two state

agencies injured a legal interest, made cognizable by Section 401(a)(1) of the CWA. Assuming arguendo that such an injury could satisfy the first requirement of standing, the Court reasoned that the court was powerless to redress that injury, because the state agencies would still be able to provide their recommendations to the Corps, which held the ultimate responsibility for the federal permit. Notably, the Corps is not limited by the same one year restriction that the states are. This means that the Court could issue a mandate that the state agencies waived their right to provide certification requirements, but as long as they recommend certification requirements to the Corps before the Corps issues or denies a permit, the Corps will still be free to consider the state's recommendations and the Corps is not limited by an explicit timeframe. WCE argues that leaving the Corps free to accept untimely submittals from the states renders Section 401(a)(1) inoperative. However, the court reasons that the Corps had the discretion to hear from state regulators if it wanted to, and could do so whenever it decided.

BRETT MALAND