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CASE SUMMARIES

Sierra Club v. Peterson 228 F.3d 559 (5th Cir. 2000).

The dispute in *Sierra Club v. Peterson* involved the use of “even-aged timber management” as a technique for timber harvesting in certain areas of Texas forests. Under the National Forest Management Act of 1976, the United States Forest Service is charged with authorizing particular timber harvesting methods. In *Peterson*, the Forest Service approved a plan of “even-aged timber management,” a process that involves cutting all or almost all of the trees in the same stand at the same time with the purpose of creating stands of trees that are the essentially same age. Environmental groups argued that even-aged timber management causes substantial and permanent damage to soil, diminishes some inner forest species, and reduces the diversity of plant and animal communities.

The environmental groups submitted a challenge to the timber-harvesting plan with the Chief of the Forest Service in 1989. With the challenge under consideration, the Chief put in place a temporary scheme that allowed even-aged timber management. The environmental groups then filed suit in the Fifth Circuit seeking to enjoin the Forest Service from authorizing even-aged timber management in the Texas forests. In their Fourth Amended Complaint, the environmental groups challenged the broad programmatic decisions of the Forest Service and supported its challenge by identifying twelve specific timber sales. The District Court granted a preliminary injunction. The Fifth Circuit Court of Appeals reversed the district court’s decision. The Court of Appeals limited its review to specific timber sales and held that even-aged timber management can be authorized when certain substantive restrictions are met.

The environmental groups then filed a Supplemental Complaint alleging that the use of “on-the-ground” even-aged timber management techniques violated the NFMA. They again challenged the broad pragmatic decisions of the NFMA and supported their argument by identifying specific decisions. The district court recognized that under the Administrative Procedure Act (APA), a “final agency action” is a prerequisite to a suit and concluded that the environmental groups met this burden. The Fifth Circuit Court of Appeals affirmed the trial court but later vacated the opinion and directed the parties to address the issue of whether the environmental groups actually challenged a specific final agency action.

The court then switched its tune, vacating and remanding the District Court’s decision and holding that the environmental groups impermissibly challenged the general programmatic decisions of the Forest Service and did not challenge a final agency action. The Fifth Circuit relied on the United States Supreme Court’s holding in *Lujan v. National Wildlife Federation* prohibiting a challenge to programmatic agency actions. The Fifth Circuit also rejected the specific citations of sales offered in support of the general challenge, stating that groups are not allowed to challenge an entire program by simply identifying specific improper final agency actions within that program. If a party includes a general challenge to forestry practices, the district court lacks the jurisdiction to consider the challenge.

The dissent in *Peterson* disagreed with the majority’s broad interpretation of the *Lujan* holding. It distinguished the two cases on the basis that the *Lujan* plaintiffs failed to challenge any single agency action, while the *Peterson* plaintiffs challenged several specific Forest Service decisions in support of their general challenge. The dissent concluded that *Lujan* does not prohibit plaintiffs from combining both general and specific allegations.

The lesson learned from *Peterson* is that careful drafting of challenges to Forest Service decisions is essential. It is permissible to challenge the Forest Service’s individual timber sales as “final agency actions,” however it is impermissible to cite individual timber sales as examples in a broad challenge to the Forest Service’s overall program. A plaintiff must be careful to challenge only specific decisions and leave out any general challenges that may serve to negate legitimate specific challenges.

STEPHEN M. SCANLON

Humane Society of the United States v. Glickman
217 F.3d 882 (D.C. Cir. 2000).

In the *Humane Society of the United States v. Glickman*, the Humane Society of the United States brought suit against the Department of Agriculture for alleged violations to the Migratory Bird Treaty Act. These allegations stemmed from the United States Department of Agriculture's full-scale plan to eradicate a number of Canada geese in the state of Virginia. This plan proposed a number of various methods to kill and destroy the habitat of the Canada geese. Believing that these actions would thwart the mandated process for killing of a migratory bird, the Humane Society requested a temporary restraining order against the proposed plan. The District Court granted the TRO.

The United States Court of Appeals for the District of Columbia upheld the lower courts' ruling that the Migratory Bird Treaty Act requires United States Department of Agriculture to obtain a permit from the Department of Interior before the implementation of their Canada Geese Management Plan. In its decision, the Court noted that the Secretary of the Interior is able to issue permits for killing Canada geese and other migratory birds if a reason is shown to be compatible with the terms of Migratory Bird conventions. The Department of Agriculture asserted that they did not need to request a permit because it was their belief that the Migratory Bird Treaty did not apply to the federal government. Although there exists a canon of construction counseling that the term "person" does not ordinarily include a sovereign, the Court of Appeals found that based on the construction of the statute that the APHIS-WS, as well as other federal agencies, must follow the Migratory Bird Treaty Act guidelines and apply for a permit with the Department of Interior.

JOSHUA KLINGER

ENVIRONMENTAL NEWS

The Ninth Circuit's Ruling on "Deep Ripping" Could Have Deep Consequences for Farmers

Angelo Tsakopoulos was likely unsuspecting of the legal perils that lie ahead when he decided to convert several thousand acres of his 8,400-acre ranch in California into vineyards and orchards in early 2001. In August, the Ninth Circuit upheld a lower court ruling that held Angelo had violated provisions of the Clean Water Act by destroying wetlands protected under the Clean Water Act. The issue arose because in order to transform the use of his rangeland, Tsakopoulos had to use a plowing technique which cuts deeper than normal into the ground, called "deep ripping," and in this case, the plowing destroyed the protected wetlands, which the court said required Tsakopoulos to obtain a permit, which he had not done. Accordingly, the court classified Tsakopoulos' activity as discharging pollutants into navigable waters of the United States.

Tsakopoulos offered several arguments in his defense. First, he reasoned that deep ripping couldn't be considered as pollution because all that it entails is churning the soil that is already there. In other words, how can plowing be considered pollution if nothing is being added to the soil? The Circuit Court majority, however, didn't buy this line reasoning. The court ruled that according to precedent, when it comes to the destruction of wetlands, under the Clean Water Act, the introduction of foreign substances is not requisite.

Tsakopoulos also argued that even if deep ripping were to be considered as pollution under the Clean Water Act, his activities should be exempted as outside the Clean Water Act's scope, which immunizes certain "normal farming" activities. Nonetheless, the court resorted to precedent and legislative intent to show that under the Clean Water Act, Congress purported to stop the practice of converting wetlands to drylands, and further that actions which change the "hydrological character" of the land do not fall under the Clean Water Acts exemptions.

Running counter to this logic, the dissent pointed out that Congress had no intent to regulate the "hydrological" decisions of farmers or ranchers when it came to decisions involving *their own land*. Furthermore, the dissent argued that this sort of plowing has been going on since the inception of our country and based on this historical perspective, the Clean Water Act should not be implicated in this situation. Moreover, the dissent reasoned that the majority had reached an erroneous decision on grounds that by determining a plow head can be the source of pollution, the court is making a policy decision, which Congress is better equipped to handle.

In the end, as a result of his violation of the Clean Water Act, Tsakopoulos was given the choice to either pay \$1.5 million dollars in fines or \$500,000 plus restoration of 4 acres of wetlands; he agreed to the latter choice and appealed. On appeal, the court only remanded to the District Court to recalculate fines in terms of violations for “ripping” vernal pools, which the court held were not protected under the Clean Water Act.

DARON J. GAREY

The Missouri River Gets a Facelift

Over the years the face of the Missouri River has seen considerable change. When explorers Merriwether Lewis and William Clark and other members of the Corps of Discovery traveled her waters for the first time, some 200 years ago, she was a river distinguished by her majestic nature alone. Since that time, however, mankind has not been kindly to the “Big Muddy Missouri.” Until recently, modern-day explorers would not likely focus on her natural beauty, as it could scantily be seen; her beauty has largely been covered up over time with litter and debris. Missouri citizens together with the federal government and other nonprofit entities, however, have banded together to reverse the effects of time and to give the Missouri River a much-needed facelift.

A sunny day in October was the backdrop for the massive cleanup effort, which embarked some 34 miles, from Hartsburg to Rocheport. Columbia resident and documentary filmmaker, Jim Karpowicz is credited with the idea for the hugely successful project. More than a year before the project’s realization, he approached a veteran at cleanups of this type, Chad Pregracke, who ultimately directed the cleanup efforts. In preparation, Pregracke and his nonprofit organization, Living Lands and Waters, bought a tugboat to serve as the project’s “floating headquarters” and platform for trash collection and processing.

At the time of purchase, however, the tug required extensive renovation, which was done in Minneapolis. Because of the time necessary to make repairs, the barge barely left port in time to reach the banks of the Missouri for the start of the project. Traveling at speeds of only 4 – 10 miles per hour, organizers were anxiously sweating the barge’s arrival, wondering if she would make it for the start of the event. Their fears were unfounded, however, as the fateful day arrived and Pregracke’s barge was anchored in position and, like the many volunteers who had also arrived, was ready for work.

During the day, volunteers for the cleanup were shuttled to different areas along the river in ferryboats to collect trash already flagged by others. Thanks to a lack of rain, the waterline had receded, thus making normally submerged debris accessible to volunteers. Workers collected a myriad of items that might well have been expected like cans and bottles, but they even found some things of an odder sort, automobile fenders, a refrigerator, televisions, and even a pool table. The cleanup effort, however, was not limited to the river as volunteers also scoured the adjacent Katy Trail State Park for litter.

Once onboard the vessel, more volunteers sorted the trash into different groups for recycling and disposal. To give an idea of the amount of trash collected, Pregracke even employed the use of a bobcat to move debris from one end of the vessel to the other.

By day’s end, the Missouri River had experienced somewhat of a reversal of the effects of time. Thanks to concerned citizens who had the vision to see beneath the litter, the Missouri River is now a much more pleasant and beautiful place, revealing once again her natural beauty.

DARON J. GAREY

EPA Responds to September 11 Terrorist Attacks

Within hours of the attacks on the World Trade Center and the Pentagon, the Environmental Protection Agency was responding. Twenty-six EPA specialists were on the scene quickly, and now more than 225 EPA experts are responding to the disasters. The EPA has sent criminal investigators, forensic and technical specialists, and emergency response experts to assist the FBI, FEMA, and the local emergency crews.

The EPA’s Emergency Response Program is designed to protect the public and the environment from immediate threats caused by the release of hazardous substances. The EPA emergency personnel are providing services such as

monitoring air quality issues, analyzing samples for asbestos and other dangers, and disposing of biomedical waste. Also, the EPA has worked with New York and Virginia in an effort to waive landfill requirements during this time, in order to expedite the clean up effort.

The EPA has budgeted for \$600,000 to provide assistance and has provided some of the needed equipment, including respirators, breathing apparatus machines, and protective suits. There is also an ongoing effort to ensure that those working on the scene, including volunteers, are properly protected. It is the EPA's goal to continue to work with its federal partners to ensure the health and safety of the public and the environment during the national crisis.

M. KATHERINE FREED

EPA's New Initiative to Protect America's Waterways

EPA Administrator, Christie Whitman, recently announced that President Bush's new budget would include \$21 million for a new EPA initiative to protect, preserve, and restore America's waterways. The announcement came during a visit to the Minnesota Valley National Wildlife Refuge in the Minneapolis-St. Paul area.

Whitman announced that the EPA would target 20 of the country's greatest watersheds for grants. The program will place the EPA working cooperatively with state governors, tribes, and other interested parties. The EPA also hopes to support local communities in their efforts to improve existing measures with tools, training, and technical assistance.

"As we mark the 30th anniversary of the Clean Water Act this year, we have much to celebrate and many challenges left to face with regard to our nation's water resources," Whitman said. "I have heard a watershed defined as 'communities connected by water,' a good reminder that we all live downstream from someone. I am proud to say that the Bush Administration needs no reminding of that fact." Whitman also noted that the initiative "recognizes the important role that states and local communities have in helping to achieve our common goals, by giving them the power to do what works."

Some of the water quality problems that the initiative hopes to improve include habitat loss and alteration, nutrient enrichment, pathogens, and invasive species in the water. The EPA plans to target these problems since these problems prevent our resources from meeting water quality goal, as well as deprive the public of economic, recreation, and drinking water opportunities. In order for the initiative to be successful, it requires local assessment, involvement, and commitment.

M. KATHERINE FREED

EPA Announces 2003 Budget Request

Christie Whitman announced the Bush administration's proposed Fiscal Year 2003 EPA budget on February 4, 2002. The budget request totals \$7.7 billion, a \$200 million increase over the 2002 request. Nearly half of the budget is for grants to states and Indian tribes. Another focus of the budget is the Brownfields program, which will receive \$200 million, more than double what it received in Fiscal Year 2002. The Brownfields program reclaims and converts abandoned industrial sites for new community uses. The success of the Brownfields program is attributed to the fact that communities chose what solution best suits their local needs.

Another key expenditure in Fiscal Year 2003 will be homeland security. The EPA plans to spend an additional \$124 million to prepare for and respond to terrorist incidents. This amount includes \$20 million to safeguard drinking water and \$75 million to improve cleanup techniques for buildings contaminated by biological agents. Another expenditure is \$10 million for the National Environmental Technology Competition. The Competition is intended to encourage technological innovation and public-private partnerships that develop new cost effective technologies addressing current environmental challenges.

GARY TROXELL