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Case Summaries

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CERCLA

Donahey v. Bogle, 129 F.3d 838 (6th Cir. 1997).

In October, 1962, defendant Helen L. Bogle, bought a piece of industrial property in Marysville, Michigan. On the same day, she rented out the use of this land to the co-defendant, St. Clair Rubber Company, which was solely owned by her brother, Seabourne Livingstone. St. Clair Rubber Company produced various rubber products and adhesives. During its manufacturing process, St. Clair created a waste by-product which was drained off into 55 gallon drums. In the early 1970s, St. Clair's employees transported these drums of waste to the property St. Clair rented from Bogle and allowed the sludge to drain out of the drums and onto the land for approximately one week. The employees then would burn the sludge at the end of the week. Later in that same decade, St. Clair stopped this process of dumping and burning the sludge.

In the fall of 1981, the plaintiff, Richard Donahey, considered buying the land so that he could rent out the use to Daca Manufacturing, Inc., a corporation in which he had an interest. While considering this purchase, Donahey inspected the land and realized, based upon his own manufacturing experience, that the land was a site for the dumping of hazardous waste. Before agreeing to purchase this land from Bogle, the plaintiff entered into an agreement with St. Clair to restore the property to an "environmentally satisfactory condition" and to indemnify him for costs resulting from any of St. Clair's dumping activities. On January 6, 1982, the plaintiff purchased the land from Bogle for $115,000; $28,750 down and the remainder in monthly installments at 11% interest. The plaintiff deeded the land to himself and his spouse and they then leased the property to Daca Manufacturing.

Soon thereafter, the former St. Clair employees revealed the dumping activities to the Michigan Department of Natural Resources ("MDNR"). Also, the local newspaper published an article in 1985 about the land's contamination and the threat that it imposed on the city by being close to the local water supply. MDNR mandated to the plaintiffs, as the property owners, that an environmental evaluation of the property must be conducted. In response, the plaintiffs hired Lawrence Halfen, an environmental consultant, to create a remediation plan. He proposed an initial plan which would cost between $30,000 and $35,000. While conducting this plan, he ran into unforseen problems, finding buried pits six to ten feet deep. After failing to resolve these problems through his initial efforts, he proposed a second plan in 1987 with an estimated cost of $450,000.

In 1987, the plaintiffs requested the defendant Bogle, the previous owner, to assist in compensating for this expensive plan and notified her that the future payments on the land contract would be placed in an escrow account. In response, Bogle communicated to the plaintiffs that she was accelerating the payments due under the contract. No communication was made to St. Clair Company because it ceased to exist as a corporation in the early 1980s.

On November 6, 1987, the plaintiffs filed an eleven-count complaint in the United States District Court of the Eastern District of Michigan against Bogle, St. Clair Rubber Company, and Seabourne Livingstone. The plaintiffs petitioned that the purchase contract with Bogle should be rescinded and that all costs that the plaintiffs incurred in their attempt to clean up the land should be recovered from the defendants. They also stated that they were entitled to attorney's fees under §107(a)(4)(B) of CERCLA from the defendants. Defendant Bogle responded with a counterclaim asserting that the land contract was breached and she was entitled to all unpaid amounts plus interest. She also claimed that she was not a covered party under CERCLA, but that Livingstone and the plaintiffs were the only covered parties under CERCLA.

On October 1, 1991, the District Court held that the plaintiffs were obligated under the agreement to pay defendant Bogle within ten days of the judgement, including pre- and post- judgment interest. It also concluded that defendant Livingstone was not a responsible party as an "owner" under 42 U.S.C. §9607(a)(2), since the facts of the case did not show that he played an active role in St. Clair's environmental activities. The Court also concluded that the plaintiffs were not entitled to recover any of

the attorney's fees from the defendant as recoverable response costs under CERCLA. Furthermore, the court forbade the plaintiffs from abandoning the land and concluded that the land belonged to them.

In 1992, the United States Sixth Circuit Court of Appeals upheld that defendant Bogle was entitled to the further payments under the agreement with the plaintiff. However, it reversed the lower court in part. It held that Livingstone was a responsible party under CERCLA since he had authority to control the contamination of the land. The Sixth Circuit further held that the plaintiffs were entitled to attorneys' fees and response costs and the case should be remanded to the district court to determine the amount of the total costs.

In 1994, the Supreme Court of the United States vacated this judgment and remanded the case to the Court of Appeals in light of *Key Tronic Corporation v. United States*, 511 U.S. 809, 114, S. Ct. 1960, 128 L. Ed.2d 797 (1994), which held that attorney's fee were generally not recoverable as response costs under CERCLA.

On remand the Sixth Circuit Court of Appeals reversed its previous decision by affirming the district court's denial for the recovery of the plaintiff's attorney's fees as a response cost under CERCLA. The court referred to the *Key Tronic* case in support of its decision. It went further to reverse its previous decision that Livingstone was a responsible party under CERCLA. In determining that Livingstone as a shareholder was released from St. Clair's liability, the court stated that the federal courts should refer to the state law in determining the standard for piercing the corporate veil and applied the Michigan state law for determining Livingstone's release of liability on the basis of the corporate veil theory. The Court justified its reversal of its previous decision on the matter of Livingstone being a responsible party by stating that Rule 14(a) provided that granting an en banc hearing vacated the previous opinion and judgment.

Two justices strongly dissented. Justice Ryan stated that the Court was wrong in concluding that the state law should apply to hold that Livingstone, a shareholder who owned 100% of St. Clair, was not directly liable as an "operator" under 42 U.S.C. §9607(a)(2).

In Chief Judge Boyce Martin's dissent, he agreed with Ryan's argument that the Court's decision wrongly allowed a 100% shareholder to be released from CERCLA liability because of the state's corporate veil law. He argued that the ruling allowed intelligent polluters to use the state law to usurp federal law. In stating that Livingstone should be liable under CERCLA as an 'owner or operator,' the Chief Justice stated that he would limit piercing the corporate veil with federal law to only those shareholders who retain some degree of control over the corporation. Since Livingstone owned 100% of the liable company and was a manager of the company, the Chief Justice concluded that Livingstone should be liable as an "operator" under CERCLA even though Livingstone did not exercise his control over waste disposal activities.

-Jason R. Creed

Brown Group, Inc. v. George F. Brown & Sons, Inc., 1997 WL 768098 (Mo. Ct. App. Dec. 9, 1997).

An action commenced by Brown Group, Inc. ("Brown") asserted that environmental response costs imposed by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), as amended, 42 U.S.C. §§ 9601-9675, were within the coverage language of an insurance contract, and as such, George F. Brown & Sons, Inc. ("Broker") and underwriter ("Lloyd's") were contractually obligated to reimburse Brown for response costs related to the landfill closure. Under CERCLA, the government may conduct a removal action, and then sue the partly responsible party ("PRP") for the costs incurred, or the government and the PRP may enter into an agreement whereby the PRP responds to the environmental harm and seek contribution from other PRPs.

In 1984, the United States Environmental Protection Agency ("EPA"), in concert with a state actor, directed Brown to close an environmentally hazardous landfill located on its property, in violation of federal laws and regulations. After the New York State Department of Environmental Conservation ("NYSDEC") required Brown to take specific affirmative environmental action, Brown filed a claim with Broker, which estimated incurred response costs at two million, six hundred thousand dollars ($2,600,000); later estimates placed the costs in excess of four million dollars ($4,000,000). After Broker declined coverage, Brown filed suit that alleged "property damage" under the policies sold by Broker and underwritten by Lloyd's. After the trial court granted summary judgment in favor of Broker, Brown appealed.

In Brown Group, the primary issue for the Missouri Court of Appeals was whether the environ-

mental response costs incurred by Brown pursuant to CERCLA were by definition included in the term "damages." In defense of their grant of summary judgment, Broker asserted several arguments. First, Broker argued Brown's "response costs" incurred pursuant to CERCLA were not included in the narrow definition of "damages." Second, Broker maintained Brown's voluntary undertaking of the clean up prohibited Brown's recovery of costs associated with such clean up. Lastly, Broker argued that because of Brown's intentional dumping, the remedial action taken by Brown was not the result of an accident, and thus not covered by the insurance certificate.

In Brown Group, the Missouri Court of Appeals for the Eastern District relied on Farmland Industries, Inc. v. Republic Insurance Co. ("Farmland") (941 S.W.2d 505 (Mo. 1997)), decided almost three months after the trial court's grant of summary judgment, to provide the analytical basis. In Farmland, parties sought indemnification from their insurers with regard to incurred environmental response costs; insurers argued that the term "damages" did not include environmental response costs. The Farmland court held, in a case of first impression, that under Missouri law, environmental response costs incurred as a result of CERCLA were "damages" within the definitional language of the issued policies. The Farmland court rejected the contention that the term "damages" distinguishes between legal and equitable claims. The Farmland court rejected Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Company, Inc. ("NEPACCO") (842 F.2d 977 (8th Cir. 1988)) decision and its progeny due to NEPACCO's concession that the term "damages" was ordinarily ambiguous and the court's attempt to restrict the "damages" analysis to the "insurance context" only.

Conforming to Farmland, wherein the court interpreted "damages" broadly to embrace environmental response costs, the Brown Group court reasoned that the similarity between the insurance language in Farmland and the instant facts dictated the conclusion that Brown's environmental response costs were covered under the insurance certificate. The court held that pursuant to Farmland, Brown's environmental response costs were "damages" covered under the insurance certificate. The court found the trial court's decision to be in direct conflict with Farmland, and as a result reversed the judgment and remanded for additional proceedings in line with the instant decision.

The court rejected the Broker's argument that Brown's voluntary clean up precluded a finding that "damages" incurred were "imposed by law." As the court noted, while Brown's clean up effort was "voluntarily" undertaken, the state made known that if Brown did not act, the state would close the landfill and pursue the costs from such action from Brown. Lastly, as to Broker's contention that Brown's landfill was not the result of an accident, the issue of what Brown "intended or expected" with regard to the dumping was a question of fact for a trial court, not an appellate court.

Finally, the Brown Group court gave no weight to whether an insured voluntarily or incidentally complied with the government, as it related to the meaning of "damages." In addition, Brown Group noted that the Farmland holding is applicable to actions initiated under CERCLA and "similar state laws"; if a Missouri environmental agency acts absent federal involvement, such an agency would "control" and "response costs" thereby incurred would still fall inside the term "damages." Like Farmland, Brown Group avoided limiting "response costs" to only those mandated by the federal government and accepted that state actors are not prohibited from demanding response costs associated with environmental waste and cleanup efforts.

-Troy Allen

State of Arkansas v. DOW Chemical Company, 981 F.Supp. 1170 (W.D. Arkansas 1997).

From 1962 to 1976, the Hercules Power Company produced various chemical herbicides at its Jacksonville, Arkansas site. A predecessor of Vertac Chemical Corporation, Hercules produced chemical herbicides under contract with Dow Chemical Corporation. In 1978, following Vertac's purchasing the plant, the Environmental Protection Agency (EPA) found dioxin contaminated wastes bled off the 140-acre Vertac site and polluted substantial areas surrounding Jacksonville.

The EPA and state agencies filed suits against Vertac and the two predecessor corporations in 1980 for improperly releasing hazardous chemicals into the environment. Vertac's successors entered a consent decree with the EPA and the Arkansas Pollution control and Ecology Department in 1989. The decree released Vertac's successors from all claims which the Federal and Arkansas governments brought.

In a still pending 1991 suit, Arkansas (State) brought statutory

and common-law claims against Dow Chemical Company (Dow). The State sued because of Dow's failure to exercise control over Vertac's waste disposal procedures and the resultant contamination from production of herbicides 2, 4, 5-T. The suit also addressed Dow's termination of an agreement to provide certain chemicals to Vertac, forcing Vertac to abandon the Jacksonville site.

In early 1994, Dow entered into a consent decree in which it agreed to pay $1 million to settle the Vertac action. Subsequently, the State brought the instant action to recover natural resource damages under four Arkansas statutes. Dow filed a motion to dismiss these claims on multiple grounds. First, Dow contended either res judicata or that the statute of limitations barred the state's claims. Second, Dow claimed that no cause of action existed under the natural resource damages theory. Third, Dow contended that the amended complaint was not timely under the Federal Rules of Civil Procedure (FRCP), and that under the FRCP, the state had asserted no claim for which relief may be granted. Finally, Dow claimed the statutes applied liability retroactively, as the hazardous activities occurred prior to their enactment, meaning the statutes offended the notice requirement of the Due Process Clause.

The state relied primarily on the consent decree's language that released Dow from all claims past, present or future, but exempted claims for natural resource damages under state or federal law. The state raised natural resource damages claims under four statutes: the Arkansas Remedial Action Trust Fund Act (RATFA), Ark.Code Ann. §§ 8-7-501 et seq.; the Arkansas Hazardous Waste Management Act (AHWMA), Ark.Code Ann. §§ 8-6-201; the Arkansas Solid Waste Management Act (ASWMA), Ark.Code Ann. §§ 8-6-201; and the Arkansas Water and Air Pollution Control Act (AWAPCA), Ark.Code Ann. §§ 8-7-202.

Judge Howard, sitting for the United States District Court for the Eastern District of Arkansas, denied in part and granted in part Dow's motion to dismiss. The Court first refused to bar the state's claims under res judicata. Citing precedent, the Court ruled that courts construe a consent decree as a contract and in examining the decree's language, the Court found it replete with exemptions for natural resource damages claims. Noting that the decree is in essence an arm's length agreement, the Court held that no prior action barred the claims under res judicata.

Next, the Court weighed Dow's assertion that Arkansas statutes warrant no cause of action for natural resource damages. To adjudicate Dow's assertion that the Arkansas statutes express only a remedy and that natural resource damages should be limited to the CERCLA definition, the Court considered both CERCLA and each of the statutes. In a rapid review of natural resources under CERCLA, the Court agreed with Dow that the CERCLA definition applied to the consent decree's terms. The Court reasoned that since CERCLA's definition included water, ground water, drinking water, controlled by any state or local government, damage claims for water sources were necessarily encompassed in the definition.

Finding that three out of the four statutes stated a cause of action, the Court looked to the language and intent of each to apply them to the instant controversy. Reviewing ASWMA, Judge Howard found the purpose to protect the public health and welfare by preventing air or water pollution damage to the environment through punishing improper transportation, processing, or abandonment of hazardous substances. In AHWAMA, the Court found the purpose to prevent environmental damage through mismanagement of hazardous wastes. Finally, under AWAPCA, the state prohibits causing water pollution. Noting a remedy provision in each statute, the Court held that given their language, subject matter, objective and purpose, Dow's no-cause-of-action claim was illogical and defied reason.

The Court's analysis of RATFA, however, yielded a different result. After considering RATFA's language, intent, and prior interpretations, the Court found for Dow, holding that no cause of action for natural damages existed. In a swift dismissal, the Court held the State's complaint was a short and plain statement of the claim showing that the plaintiff was entitled to relief in accord with FRCP 8(a).

Dow hoped to void the suit under protection of Arkansas' statute of limitations. Dow contended that as a criminal offense, the two-year limitation applied. First the Court noted that statutory construction determines if a penalty is criminal or civil. As a threshold matter, the Court stated that the Arkansas General Assembly intended these penalties to be civil damages in nature, but refused to end the analysis there. Looking to the Supreme Court's guidance, the Court determined that the remedies involved were not so punitive that they transform a civil remedy into a criminal penalty. In so holding, the Court weighed the regulatory na-

ture, the environmentally protective focus, and the circumstances surrounding the penalties to reach its conclusion.

In another instance of statutory construction, the Court explored the intent of each statutory provision to determine if, in accordance with Supreme Court guidance, the Arkansas legislature clearly intended for the acts to function retroactively. The Court discovered that AWAPCA was not being applied retroactively. The provisions of the act allow the state to bring natural resource claims for present damage to state controlled waters. As for the two remaining acts, the Court found that the legislatures did clearly intend for them to apply retroactively. Casting aside Dow's due process claim, the Court, after finding no improper retroactive statutory application, held that the claims are not repugnant to the notice provision of the Due Process Clause.

Weighing the final procedural challenge, the Court held that the State properly amended its complaint to bring the natural resource damages claims, but failed to properly bring claims that Dow aided and abetted Vertac in defrauding the state. Citing FRCP 15(c)(2), the Court ruled that the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth set forth in the original pleading. Since the transactions related to the aiding and abetting charge were not an "amplification or clarification" of prior pleadings, the Court held that they failed to meet the consent decree time constraints to amend claims. However, the statutory damage claims were found to be sufficiently related, and thus were accepted as timely amendments to the claim.

The Court held that where parties enter into a consent decree subsequent claims for natural resource damages, permissible under Arkansas statutes and the United States Constitution, if not negotiated by the decree, may be timely added to the complaint and are not barred by res judicata.

-Richard A. Hill

Cincinnati Insurance Co. v. Flanders Electric Motor Service, Inc., 131 F.3d 625, (7th Cir.1997).

Flanders Electric Motor Service, Inc. ("Flanders") brought this action seeking relief from final judgment from a decision handed down by the 7th Circuit Court of Appeals upholding Cincinnati Insurance Co.'s ("Cincinnati") decision to deny coverage to Flanders for damages stemming from an environmental contamination claim involving Flanders. The court ruled against Flanders' motion for relief from the prior judgment.

Flanders is a motor sale and repair business located in Evansville, Indiana. From 1971 to 1988, Flanders sent several electronic transformers from Indiana to the Missouri Electrical Works ("MEW") for repairs. On at least two occasions, the transformers may have contained fluids contaminated with PCBs. An investigation at the MEW site by the Environmental Protection Agency ("EPA") revealed that leaks from oil drums and transformers over several years resulted in a substantial PCB contamination. The EPA notified Flanders and 600 other businesses that they could be held partially responsible under the Comprehensive Environmental Response, Compensation, and Liability Act.

In September of 1989, Flanders notified Cincinnati that Flanders was considered a potentially liable party at the MEW site. At the time, Flanders had one general insurance policy and two umbrella insurance policies with Cincinnati that covered property damage claims. Flanders asserted that Cincinnati was required to defend Flanders against the asserted claims. Each of the policies had a pollution exclusion clause that stated the policies did not provide coverage for damage to property that arose from pollution, unless the release of pollutants was characterized as "sudden or accidental."

Cincinnati denied Flanders' request for coverage on the basis of the pollution exclusion clauses. They filed a declaratory judgment in federal district court in November 1991, asking for the court to uphold Cincinnati's decision to deny coverage. Cincinnati later filed a summary judgment motion in August 1992, asking the court to deny any claim Flanders' had to insurance coverage. The district court granted the motion for summary judgment in October 1993, holding that the phrase "sudden and accidental" was clear and unambiguous, and coverage to Flanders was denied. Flanders first asked the court to reconsider the motion, which the court denied, Flanders then appealed the decision to the 7th Circuit Court of Appeals.

Oral argument on the appeal was held in April of 1994. In September of 1994, the Indiana Supreme Court agreed to hear an appeal of a case, American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind.1996), dealing with the same general issues as were present in the Flanders case. At the time, Indiana law was unsettled on the issue of the "sudden and accidental" language found in the insurance policy. Soon after this case was accepted by the Indiana Supreme Court, Flanders

filed a Motion for Stay of Proceedings with the court of appeals, asking it to wait until the Kiger decision was made.

The 7th Circuit denied Flanders request for a stay, and in November of 1994, issued a ruling upholding Cincinnati's denial of coverage. The court found that, even though the Indiana law was still unsettled on the issue, the court was confident the Indiana Supreme Court would find the term "sudden and accidental" was not ambiguous, and therefore precluded coverage of the property damage.

In March of 1996, the Indiana Supreme Court decided Kiger. That court determined that the words "sudden and accidental" as used in the pollution exclusion clause were ambiguous, and was in favor of providing coverage where the insured showed the contamination was "unexpected" or "unintended." As a result of the Kiger decision, Flanders filed a Motion for Relief from Final Judgment, pursuant to federal rules of Civil Procedure 60(b)(5) and 60(b)(6). The district court denied Flanders' motion, and this appeal resulted.

The court of appeals reviewed the motion for an abuse of discretion. In doing so, the court looked to see if the trial court was within legal principals in making its decision, and applied those principals to the case within the range a reasonable judge would use. The court stated that it is an "extraordinary remedy" to provide relief from judgment and the burden of proving the abuse of discretion was with the appellant.

Rule 60(b) authorizes courts to relieve a party from final judgment for a variety of reasons. Under Rule 60(b)(5), the court may grant relief where the decision made is prospective in nature, or that the decision is no longer equitable. Rule 60(b)(6) allows the court to provide relief where extraordinary circumstances exist. The court found that neither of these situations applied in the present case.

In addressing the extraordinary circumstances argument, the court noted that in diversity cases, the court is not required to reopen a case simply because the applicable law in the state has changed. Citing a need to have finality in cases, the court stated that where the federal courts failed to correctly predict how the state court would decide an issue, there are no grounds for setting aside the federal court decision. The court stated that allowing a diversity case to reopen every time a state changed its law would be the equivalent of holding the "doctrine of finality" does not apply in diversity cases.

Flanders argued the decision was no longer equitable due to the fact that other potentially liable parties at the MEW site were being provided coverage because of the Kiger decision. Also, Cincinnati provided coverage to Flanders under the same insurance policies for damages to MEW's neighbor, who was claiming damage to adjacent property from contamination at the MEW site. This inequity, Flanders argued, was due to the 7th Circuit's refusal to stay the original decision until after the Kiger case was decided.

The court rejected this argument, stating that from when the appeal was filed to when the decision was made was longer than the average time the 7th Circuit spent disposing of cases. This, the court said, was not an "early ruling", as Flanders argued. The court also noted the request by Flanders did not occur until one month prior to the decision being handed down, and termed this a last minute request. While the court acknowledged that Flanders was disadvantaged by the situation, the hardship and unfairness was not sufficient to uphold the motion.

The court next addressed the issue of the decision's prospectivity. The court admitted that, while almost every court case had some future consequence, it does not automatically make the decision prospective. The court reasoned that the judgment in this case was a declaration of the party's rights as they existed at the time of the decision. They did not contain provisions that were "executory" or involved "the supervision of changing conduct or conditions" which were required to make an action prospective.

Finally, the court briefly addressed the issue under Rule 60(b)(5) of the decision's equity. Since the court found the decision was not prospective, the inequitable nature of the decision was not at issue. However, the court noted that even though this standard of unfairness was less than required under Rule 60(b)(6), it still had not been met. In reaching this conclusion, the court stated that the inequities created by the original decision were "unextraordinary", and did not outweigh the policy favoring the finality of decisions.

-Robert Bilbrey

CWA

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997).

In 1996, James Wilson was convicted of violating federal regulations promulgated under the Clean Water Act ("the Act") prohibiting dredging and filling a wetland without a permit. Wilson

was developing part of the planned community of St. Charles, Maryland, situated between the Potomac River and the Chesapeake Bay. The area Wilson was developing was located near a swamp and was designated on topographical maps as a wetland. The Army Corps of Engineers ("Corps") argued that four parcels of land within the area Wilson was developing were wetlands. The Corps charged Wilson with violating its rule prohibiting the discharge of pollutants on a wetland without a permit. Under the rules, Wilson had discharged a pollutant by digging ditches around the parcels and depositing the dirt next to the ditches in order to drain the land. The Fourth Circuit Court of Appeals held that the land at issue was a wetland, but reversed Wilson's conviction because the regulation defining the Corps' jurisidiction over the land exceeded Congress' delegation of authority under the Act in that it encompassed areas Congress could not reach under the Commerce Clause.

The Court first determined whether the parcels were wetlands. The Corps introduced evidence at trial establishing that the area at issue was a wetland. This included maps that designated the area as a wetland and evidence that the parcels had properties characteristic of wetlands. For instance, the Corps showed that water on the land ran in hydrologic cycles through intermittenT streams to the Potomac River and finally to the Chesapeake Bay and that the land also contained wetland-typical vegetation. But despite the land's classification as a wetland, the Court held that the Act did not permit its regulation. The Court focused on the appropriateness of the jurisdiction-setting regulation rather than the constitutionality of the Act itself under the Commerce Clause.

The Environmental Protection Agency and the Corps share regulatory jurisdiction under the Act, which prohibits discharges of dredge or fill material without a permit into "navigable waters." 33 U.S.C. § 1311(a). The Act defines "navigable waters" as "waters of the United States." *Id.* The Corps has interpreted this provision as extending its regulatory authority to wetlands, whether they be adjacent to a navigable water or not. The regulation states that the Corps may regulate any water whose degradation "could affect" interstate commerce. 33 C.F.R. § 328.3(a)(3) (1993). Wilson challenged this construction of the statute, contending that the regulation exceeded Congress' delegation of authority to the Corps because the commerce power could not reach wholly intrastate wetlands. He also challenged the jury instructions used at trial based on the regulation. The jury instructions set forth, in part, that if the degradation or destruction of the land could affect interstate commerce, then the Corps could assert jurisdiction over the land at issue.

The Fourth Circuit saw this regulation defining the Corps' authority as contrary to the Supreme Court's Commerce Clause jurisprudence. It conceded that Congress, by defining "navigable waters" as "waters of the United States," did intend to bring in some waters that would not be deemed "navigable" under the classic definition of the term. Thus, the *Wilson* Court held that some unnavigable waters may be regulated. However, the Court felt that this specific regulation was ultra vires because it not only surpassed "navigable waters," but extended further to waters that are not even closely related to navigable or interstate waters. It therefore ruled that the Corps exceeded its authority under the Act in promulgating the rule, and struck it down.

The Fourth Circuit panel also agreed that the mens rea required to prove a felony violation of the Act accompanies each element of the underlying offense. Section 1319(c)(2)(A) of the Act states that a person who "knowingly violates section 1311" (discharging a pollutant into "navigable waters") "shall be punished." The Court interpreted this section as requiring the government to prove the defendant's knowledge of facts meeting each element of the substantive offense. The Court maintained, however, that the government need not prove that the defendant knew that his conduct was illegal. Thus, the Court outlined that the government must prove that the defendant, first, knew he was discharging a substance; second, knew what substance he was discharging; third, knew the method or instrumentality used to discharge the substance; fourth, knew the physical characteristics of the land into which the substance was discharged; fifth, was aware of the facts establishing the wetland's link to "waters of the United States;" and sixth, knew that he did not have a permit. In conclusion, the Fourth Circuit in *Wilson* ruled that the Corps misinterpreted its jurisdiction under the Act, expanding "waters of the United States" beyond its definitional limit, and that in order to establish a violation of the Act, the government must prove the requisite mens rea with regard to each material element.

-Stephen S. Davis

NEPA/ESA

Bensman v. United States Forest Service, 1997 WL 719770 (W.D. Mo. 1997).

In March, 1997, a windstorm in the Mark Twain National Forest (MTNF) near Alton, Missouri, damaged nearly 700 acres of timber. As a result, after a period of public comment and after the required consultation with the Fish and Wildlife Service, the National Forest Service sold contracts on approximately 700,000 board/feet of lumber to three family-owned logging companies. Pursuant to the agreement, the companies were to harvest trees that were "blown down, leaning, or uprooted" by the March windstorm. The areas that would be affected by the salvage operation are at least two miles from White's Cave, the home of between 20 and 30 Indiana Bats. Indiana bats were first listed as an endangered species in 1967, and have continually declined since then despite numerous efforts at preserving the species.

In late September, 1997, plaintiffs, three members of the environmental group Heartwood, filed a pro se action against the Forest Service and the Fish and Wildlife Service in Federal District Court, Western District of Missouri, alleging that the guidelines set forth within NEPA and the ESA were not followed with respect to the three salvage contracts sold after the March windstorm, and with respect to a harvesting operation know as the "Panther Hollow project." The court, upon filing, issued a Temporary Restraining Order (TRO) on the proposed salvaging.

Less than a month later, a hearing was held on a preliminary injunction. The court allowed the three logging companies that purchased contracts, and two timber industry associations to intervene. The order granting the injunction will not be appealed, because at the time of the contract sale the timber was on the verge of rotting. By the time any action on appeal could be taken, the timber would most certainly be worthless. Thus, the defendants determined that any further action on the issue would be moot.

Plaintiffs first argued that the Forest Service violated the ESA by failing to place top priority on the conservation of the Indiana bat. They next argued that the Forest Service failed to consider a study done on the bats and which times of the year harvesting timber would most affect the bats. They then argued that harvesting the timber would harm or harass the bats. Plaintiffs also argued that the Forest Service did not enter into formal consultation with the Fish and Wildlife Service. Finally, they argued that the Forest Service and the Fish and Wildlife Service failed to fully examine the consequences of the harvest as required by NEPA.

Defendants countered that the court lacked jurisdiction because Heartwood failed to give the statutory 60-day notice. They then argued that the court should apply a traditional balancing test, weighing the threat of irreparable harm to the species, the balance between this harm and the harm created by granting an injunction, the probabiliy of movant's success, and the public interest.

In granting the preliminary injunction, Judge Russell Clark of the District Court declared that Heartwood had satisfied the 60 day notice requirement by stating to the Regional Forester that "if this project and the Pahther Hollow Decision are not remanded... [they] plan[ed] to promptly file a lawsuit challenging both decisions." Heartwood also informed the Fish and Wildlife Service that they intended to "sue over rubber-stamping" the two projects. The court then decided that, contrary to the Forest Service's argument that a balancing test should have been used, the proper standard was to determine whether letting the salvage contracts was arbitrary and capricious. In doing so, the court noted that the intent of Congress in enacting the ESA was to require Federal agencies to place endangered species "at the top of their priority list, and that the actions of the Forest Service indicated that they did not." Furthermore, the court found that even by applying the standard as suggested by the Forest Service, the value of protecting the bat outweighed the value of harvesting the timber. The court also decided that the Forest Service failed to formally consult with the Fish and Wildlife Service. Finally, the court decided that there was no "hard look" given to the proposed harvest by the Fish and Wildlife Service as required by NEPA.

Ultimately, the court held that despite the Forest Service's and the Fish and Wildlife Services's actions in deciding to allow the timber salvage operations to occur, the requirements of the ESA were not satisfied, and the habitat of the Indiana bat would be destroyed. Thus, the court determined that contrary to the beliefs of the Forest Service and the Fish and Wildlife Service, the habitat of the Indiana bat would be adversely affected by timber salvage operations. and granting an injuction was appropriate to halt the harvest.

-Benjamin A. Joplin