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UNITED STATES COURT OF APPEALS

United States v. Cinergy Corporation, 458 F.3d 705 (7th Cir. 2006)

Cinergy is the owner of numerous coal-fired electric power plants. The Environmental Protection Agency ("EPA") brought suit claiming that Cinergy violated section 165(a) of the Clean Air Act, 40 U.S.C. § 7475(a), by physically modifying the power plants without first obtaining a permit from the EPA under 40 C.F.R. § 52.21. Cinergy contended that § 52.21 applies only to those modifications that increase the hourly rate of emissions. Because the modifications in question produced annual increases in nitrogen oxides and sulfur dioxide emitted by the plants and not hourly increase, Cinergy contended that § 52.21 did not apply. The EPA, however, asserted that Cinergy misread the regulation, with which the district judge agreed. From that decision, Cinergy appealed.

40 C.F.R. § 52.21 specifically requires a permit for any physical modification which would result in a "significant net emissions increase of any pollutant subject to regulation under the Clean Air Act." Per § 52.21, the amount of increase as well as the base emissions rate from which a "significant" increase is calculated are both measured in "tons per year" rather than per hour. Thus, the plain language suggests that only those methods that increase *annual* emissions is covered by § 52.21.

Cinergy's proposed interpretation of § 52.21 was that the measure of emissions in "actual operating hours" means the total number of hours that the plant is actually in operation. Cinergy clarified this interpretation by arguing that the EPA's regulations are concerned with increases in *actual* emissions rather than *potential* increases. The example given by Cinergy is: if a physical modification were made to a plant enabling it to operate 24 hours a day rather than the 18 it was operating before, the annual emissions would increase, but the hourly increases would remain the same. The EPA, Cinergy argued, would be concerned if the modifications increased the *actual*, or hourly, emissions. Thus, an emissions increase would be found only if the hourly rate of emissions increases.

The court disagreed with Cinergy's interpretation for numerous reasons. First, such an interpretation would sway a company to choose a physical modification that enabled an increase in the number of hours of operation over a modification that increased the hourly emissions rate even if the former would produce a higher annual level of emissions simply because it would elude the permit requirement. Such an interpretation would also give companies an incentive to renovate old plants, thus increasing their hours of operation, rather than replacing the plant entirely. The Clean Air Act is generally more lenient on old plants as they often cannot operate many hours; however, with Cinergy's interpretation, there would be an incentive to renovate old plants making them capable of more production hours. Further, Cinergy's interpretation would complicate the determination for when a permit is required. It is easy to determine a plant's hourly rate of emissions just by observing the plant in operation; however, to predict the annual emissions depends solely on the hourly emissions. If hourly emissions are not the issue, then prediction of annual emissions rates would be extraordinarily difficult. Primarily based on these reasons, the Seventh Circuit affirmed the holding of the district court.

AMANDA K. WOLF

N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006)

Northern California River Watch, an environmental group, initiated litigation under the Clean Water Act ("CWA") against the City of Healdsburg alleging that Healdsburg violated the CWA by discharging sewage from its waste treatment plant into waters covered under the Act without first obtaining a National Pollutant Discharge Elimination System ("NPDES") permit. The United States District Court for the Northern District of California granted judgment for Northern California River Watch after finding that discharges into Basalt Pond, a rock quarry pit filled with water from a surrounding aquifer, are discharges into Russian River, a navigable water of the United States protected by the CWA. The court followed the Supreme Court decision, *U.S. v. Riverside Bayview Homes, Inc.*, that adjacent wetlands may be defined as waters under the Act, to reach its ruling. The appeal followed due to the recent decision of *Rapanos v. United States*.

The purpose of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." In doing so, the CWA strictly prohibits discharges of pollutants into the navigable waters of the United States without an NPDES permit from the Environmental Protection Agency. Basalt Pond is a rock quarry pit that contains 58 acres of surface water. The Pond lies along the west side of the Russian River, separated from the River by a levee. The Russian River is a navigable water of the United States. Due to the levee, there is not usually a surface connection between Basalt Pond and the Russian River. In 1971, Healdsburg built a waste-treatment plant on the north side of Basalt Pond and in 1978 began discharging into the Pond; Healdsburg did not have a NPDES permit. Basalt Pond would overflow from the outflow of the sewage plant every one to two years if the Pond did not drain into the surrounding aquifer. It takes a few months for the Pond water in the aquifer to find its way to the Russian River. The district court found that Basalt Pond is a "water of the United States" within the meaning of the CWA.

On appeal was the issue whether Basalt Pond is subject to the CWA because the Pond contains wetlands adjacent to a navigable river of the United States. The Ninth Circuit analyzed the legislative and judicial history surrounding the CWA. The court first determined that Basalt Pond

and its surroundings are wetlands adjacent to waters within the meanings of the regulations due to an aquifer that supplied a pathway for a continuous passage of water between the Pond and the Russian River. The court then addressed the issue of whether adjacent wetlands constitute waters of the United States subject to the CWA. The court reviewed a number of Supreme Court cases interpreting the meaning of "adjacent wetlands" in the regulations, including the impact of *Rapanos v. United States*.

Applying Justice Kennedy's "significant nexus" principles from *Rapanos*, the Ninth Circuit found that the mere adjacency of Basalt Pond and its wetlands to the Russian River was not sufficient for CWA protection. However, the fact that the Pond and the navigable Russian River were separated only by a man-made levee so that water from the Pond seeps directly into the adjacent River, provided a significant nexus between the wetlands and the Russian River, and justified CWA protection. The court also found an actual surface connection between the Pond and the River when the River overflows and the two bodies of water commingle. The Ninth Circuit further agreed with the district court's findings that the Pond and the River have significant ecological connection due to the substantial bird, mammal and fish populations. These findings supported the conclusions that Basalt Pond has a significant nexus to the Russian River and warranted protection as a navigable water under the CWA and that Healdsburg's discharge of wastewater into Basalt Pond without a permit was a violation of the Act.

The Ninth Circuit then addressed Healdsburg's claims of exemption under the CWA's waste treatment system exception. However, the court found that the exception was meant to avoid requiring dischargers to meet standards for discharges into their own *closed system* treatment ponds. Regulations under the CWA still extend to discharges *from* treatment ponds, and Basalt Pond was neither a self-contained pond nor incorporated in an NPDES permit as part of a treatment system.

Therefore, the Ninth Circuit held that Basalt Pond was not a system exempt from coverage under the CWA. The court also found that exemption from the CWA because a site is an ongoing excavation operation did not apply. As a result, the Ninth Circuit affirmed the district court's decision to grant judgment in favor of Northern California River Watch.

NIKKI A. MULLINS

Tri-Valley CAREs v. Dept. of Energy, 2006 WL 2971651 (9th Cir. 2006)

Tri-Valley CAREs, Nuclear Watch of New Mexico, and other individual plaintiffs appealed a decision of a federal district court in California which dismissed their lawsuit against the U.S. Department of Energy ("DOE"). Tri-Valley alleged violations of the National Environmental Policy Act ("NEPA") when it proposed constructing a biological weapons research laboratory near San Francisco, California and the Freedom of Information Act ("FOIA") by stalling production of requested documents that it eventually produced for the plaintiffs. The plaintiffs argued the research laboratory would have a significant effect on the human environment and therefore the DOE needed to prepare an Environmental Impact Statement. The district court granted the federal government's motion for summary judgment.

On appeal to the U.S. Court of Appeals for the Ninth Circuit, Tri-Valley made three arguments: first, that the DOE failed to comply with the NEPA by issuing a Finding of No Significant Impact ("FONSI") after conducting the required Environmental Assessment instead of preparing an Environmental Impact Statement; second, that the DOE failed to timely provide non-exempt documents under the FOIA when requested; third, the district court erred in striking portions of the plaintiffs' extra-record declarations. Because the plaintiffs were appealing a district court's summary judgment motion, the appeals court reviewed the case *de novo*.

First, NEPA requires an agency to produce an Environmental Impact Statement, instead of a FONSI, when the federal agency's Environmental Assessment raises substantial questions about the effects of the proposed agency action. NEPA does not, however, require a particular outcome after producing the Environmental Impact Statement; instead, it requires federal agencies to seriously consider the environmental impacts of their decisions. The Ninth Circuit found that the DOE considered the impact of the research facility, but reversed the DOE decision that the effects of a terrorist attack do not have to be considered in the Environmental Assessment. The Ninth Circuit remanded the case to the DOE to further consider the impact of a terrorist attack.

Second, production of a FOIA-requested document, however late it may be, moots a FOIA claim. An exception to this rule is when there is evidence of bad faith or a recurring pattern of FOIA violations. Because

there was no evidence of either bad faith or of repeated FOIA violations, the appeals court held that the district court did not err in dismissing the plaintiffs' FOIA claim.

Finally, judicial review of agency decisions is generally limited to review of the administrative record; extra-record materials are allowed only in limited circumstances: if necessary to determine whether the agency has considered all relevant factors and has explained its decision; when the agency has relied on documents not in the record; when supplementing the record is necessary to explain technical terms or complex subject matter; or when there is evidence of agency bad faith. The court held that none of these circumstances applied and thus the district court did not err in excluding those extra-record materials from the case.

After reviewing the plaintiffs' three points on appeal, the Ninth Circuit affirmed the district court's decision in part, reversed the decision in part, and remanded the case for further action.

JOHN H. GRIESEDIECK

Oregon Natural Desert Ass'n v. U.S. Forest Service, 465 F.3d 977 (9th Cir. 2006)

Acting through authority granted by the Wild and Scenic Rivers Act of 1968 ("WRSA"), Congress selected particular areas of the North Fork Malheur and Malheur Rivers in the Blue Mountains of eastern Oregon as wild and scenic river corridors in 1988. An action brought under the Administrative Procedure Act ("APA") by the environmental organizations Oregon Natural Desert Association and Center for Biological Diversity (collectively, "ONDA") alleged that actions by the United States Forest Service were arbitrary and capricious. The agency's contested actions involved "annually issuing [annual operating instructions ("AOIs")] to grazing permit holders for pastures within the protected riparian stretches" of these rivers Congress had formerly designated as wild and scenic. The district court dismissed the case for lack of subject matter jurisdiction after determining that the action by the United States Forest Service was not final within the meaning Section 10(c) of the APA.

Presented in this appeal was the "narrow question" of whether the decisions of the United States Forest Service to issue AOIs to permittees who graze livestock on national forest land represent final agency action. The Court of Appeals reviewed the decision by the district court, ultimately finding the plaintiffs' claims ripe for review. In order to obtain judicial review under the APA, a plaintiff must challenge a final agency action. However, in order to qualify as final agency action, and accordingly be subject to judicial review, certain requirements must be met. Specifically, the action must mark the consummation of the agency's decision-making process, and be one by which rights or obligations have been determined, or from which legal consequences will flow.

The Forest Service is authorized by the Federal Land Policy and Management Act of 1976 to allow livestock to graze on designated allotments within a national forest. Through its issuance of a grazing permit, an Allotment Management Plan ("AMP") and AOIs, the Forest Service authorizes and manages grazing on these specified allotments. ONDA contested the Forest Service's decisions pertaining to its management of livestock grazing on six of those allotments from 2000 to 2004. ONDA alleged that the Forest Service's mandatory and non-

discretionary duties under the WSRA, the National Forest Management Act of 1976 ("NFMA"), the National Environmental Policy Act, in addition to its own regulations are all violated by the terms contained within the AOIs. ONDA challenged the AOIs under the APA provisions allowing for judicial review since a private right of action is not made available by the substantive statutes under which ONDA sought relief.

The Court of Appeals focused on the "practical and legal effects" of the Forest Service's actions, interpreting the aspects of finality in "a pragmatic and flexible manner." The court did not defer to the agency's own interpretation of the finality of its actions, but rather looked to whether the action amounted to a definitive statement of the agency's position or if it had a direct and immediate effect on the day-to-day operations of the subject party, or if immediate compliance with the terms was expected.

After reviewing the record, the court came to the conclusion that "an AOI is a discrete, site-specific action representing the Forest Service's last word from which binding obligations flow." The result of the obligations is focused and instantaneous on the permit holder's day-to-day operations, fulfilling the "direct and immediate" requirement. The court disagreed with district court's determination, ultimately finding that the Forest Service's actions were "agency actions" and "final" within the meaning of the APA. The resulting effect is that judicial review under the APA is appropriate, requiring the case to be reversed and remanded.

MICHAEL A. BRIDGES

Colvin Cattle Co. Inc. v. U.S., 2006 WL 3085559 (Fed. Cir. 2006)

Colvin Cattle Company, Inc. ("Colvin") brought suit against the United States in the Court of Federal Claims alleging the government's interference with the company's ability to graze its cattle on federal lands resulted in an unconstitutional taking of its water rights, and that the subsequent loss in value of the company's ranch also constituted a taking.

Colvin owns a 520-acre cattle ranch in Nevada, adjacent to the Montezuma Allotment, which consists of 625,000 acres of public land in Nevada. Colvin was granted a grazing lease on the Allotment, but failed to pay the grazing fee and its lease was eventually cancelled in 1997. Colvin claimed the United States recognizes vested state-law based water rights, and that under Nevada law a stock-watering right has always included a right to graze.

The trial court ruled in favor of the United States on all issues and dismissed Colvin's complaint. The Court of Appeals affirmed, holding that interference with grazing on public land was not a taking of water rights and the loss of value to Colvin's ranch as a result of the cancelled lease did not result in a taking of their ranch.

The Court first explained that Colvin had to establish that it had a property interest for purposes of the Fifth Amendment. Colvin did not claim that it possessed a free-standing right to graze, but that the right to graze was inherent in its water rights. The court concluded that no such inherent grazing right exists, and governmental actions restricting Colvin's ability to graze do not implicate its water rights in any constitutionally protected manner, and therefore, cannot constitute a taking.

The court explained that state law did not and could not provide grazing rights on federal land, and that the federal government can prohibit absolutely or fix the terms on which its property may be used. Colvin argued that the Nevada Stockwatering Act included a right to graze, but the court rejected this argument stating that a state statute becomes inoperative when it conflicts with the authority of the federal government. Also, the court noted that the Nevada Supreme Court previously held that Nevada was not asserting any right or title to the public domain under the Nevada Stockwatering Act.

Finally, the court rejected Colvin's claim for the taking of its ranch due to its subsequent decrease in value once their grazing rights were

terminated. The court explained that the ranch may have lost value by virtue of losing the grazing lease, but the loss in value did not occur by virtue of governmental restrictions on a constitutionally cognizable interest.

DARRYL M. CHATMAN

UNITED STATES DISTRICT COURT

Cal. Sportfishing Prot. Alliance v. Lake Wildwood Ass'n,
2006 WL 2734370 (E.D. Cal. Sept. 25, 2006)

The California Sportfishing Protection Alliance ("CSPA") filed suit against the Lake Wildwood Association ("the Association") alleging violations of a National Pollution Discharge Elimination System ("NPDES") permit issued by the California Regional Water Quality Control Board for the Central Valley Region ("the Board"). The CSPA filed their suit under the Clean Water Act ("CWA") provision for civil suits to enforce an NPDES permit they believed to properly limit the Association's discharge of pollutants into Deer Creek and the Yuba River in southern California. The district court granted the Association's motion for summary judgment because the CSPA had failed to state a claim upon which relief could be granted. This ruling clarifies the differences between general NPDES permits and individual NPDES permits, as well as further solidifying the federal judiciary's interpretation of two key CWA violation requirements.

In June 2000, under the power granted to it by the NPDES permit program, the Board adopted a general order setting waste discharge limits for "low threat and dewatering discharges" in the Central Valley Region. The CSPA alleges that the Association had discharged water through its dam "containing high levels of turbidity, temperature, and pollutants in excess of the Order's Effluent Limitations." As a result, Deer Creek and the Yuba River "the receiving waters" had experienced an increase in ambient temperature and a decrease in oxygenation, which negatively impacted the life cycles of fish and other wildlife. In light of these alleged violations, the CSPA took all required steps under the CWA to bring a citizen's suit to enforce the NPDES permit. The Association moved to dismiss the complaint, arguing both that they are not subject to an existing NPDES permit and that their activities do not require a permit.

An action to enforce a NPDES permit necessarily depends on the validity of the permit. The NPDES general permit that the Association has allegedly violated expired on June 1, 2005. Despite the explicit expiration date on the general permit, the CSPA contended that state and federal law dictate that the permit's terms and conditions are automatically extended.

The CSPA cited a California regulation which states, "the terms and conditions of an expired permit are automatically continued pending issuance of a new permit if all the requirements of the NPDES regulations on continuation of expired permits" have been followed. However, the Court pointed out that this provision applies only to "individual" permits, not general permits. Individual permits are issued to particular parties, who are engaged in the potentially illegal discharge of pollutants, and are therefore required to apply for a permit. Concluding that the Association was not subject to any valid general permit the Court state that the California regulation cited by the CSPA has no relevance where the original impetus for considering a permit is purely *discretionary*, as with a general permit.

However, this conclusion did not settle the matter before the court. The CSPA could still have filed a citizen's enforcement suit under the CWA if it could prove that the Association was engaged in an activity requiring an NPDES permit. Under the CWA, an NPDES permit is required whenever someone (1) discharges, i.e., adds (2) a pollutant (3) to navigable waters (4) from (5) a point source. The Association conceded that the sediment, heat, and other bacteria released from its water are pollutants. It also conceded that the receiving waters are navigable waters under the CWA's definition. However, it argued, first that it had not "added" any pollutants to the receiving waters; and second that the dam did not constitute a point source.

The Association asserted that, under the standard evinced in *National Wildlife Federation v. Gorsuch*, "there is no addition as required by the CWA unless a source physically introduces a pollutant into the water from the outside world." With this definition in mind, the *Gorsuch* court concluded that the water quality changes associated with dams (e.g., increased turbidity, decreased oxygenation) were not "discharges of pollutants" because the structures themselves did not introduce anything into the water that was not already present. The inquiry into whether something has been introduced from the "outside world" centers on whether the source and the receiving waters are actually the same body of water. For an "addition" of a pollutant from the "outside world" to occur, Lake Wildwood and the receiving waters would have to be "distinct" bodies of water. In concluding that the two were not "distinct" bodies of water, the Court cited to several cases and jurisdictions for the proposition

that water behind and in front of a damn are not "meaningfully distinct." Therefore, the Association was not required to have an NPDES for its "discharge."

In an ancillary footnote, the Court also addressed whether the dam constituted a "point source" under the CWA. The court concluded that it was "doubtful" that the damn in this case could be considered to be a point source. The court cited *Gorsuch* again for the proposition that neither courts nor Congress had had the occasion to specifically address whether dams should be regulated by NPDES permits. However, the Court cited the same authority from *Gorsuch* to indicate that it was possible for a dam to be a point source if its operation resulted in the discharge of grease, oil, or trash. Regardless, the court did not need to reach the issue here as it had already established that the Association's discharge did not involve the addition of any pollutants to the receiving waters.

ROBERT J. MORRISON

State of Missouri v. U.S. Army Corps of Engineers, 2006 WL 3147736 (D. Minn. 2006)

The Army Corps of Engineers ("Corps") has the responsibility of maintaining and regulating the Missouri River reservoir system. Pursuant to an order from the United States District Court for the District of Minnesota and in response to the 2003 Amended BiOp completed by the Fish and Wildlife Service ("FWS"), the Corps issued its Annual Operating Plan ("AOP") for the reservoir system for 2006. The 2003 Amended BiOp called for bimodal spring pulse releases to benefit the endangered pallid sturgeon. In addition to the 2006 AOP, the Corps also released the Draft Spring Pulse Water Control Plan Technical Criteria for spring pulses from Gavins Point Dam.

The Corps then performed an environmental assessment ("EA") of the system in order to determine what purpose the bimodal spring pulse releases would serve and if there was a need for the releases. Another goal of the EA was to determine whether a supplemental environmental impact statement ("SEIS") was warranted. After a comparison of the environmental impacts of a bimodal spring pulse release plan with a range of alternative spring pulse proposals, the EA established that the spring pulse plan would have no impact that had not previously been considered under previous alternatives. Following completion of the EA, the Corps decided that the EA constituted a sufficient examination, and, therefore, a supplemental final environmental impact statement ("FEIS") was not necessary.

Because of insufficient system storage, the first scheduled rise was not feasible. After a sufficient storage level was attained, the Corps proceeded with the second scheduled rise. As a result of the second rise, the State of Missouri ("Missouri") alleged that fourteen pallid sturgeon nests with thirty-four eggs were lost. Missouri subsequently brought a lawsuit under the Administrative Procedures Act ("APA") challenging the March 2006 Revisions ("Revisions") to the Missouri River Mainstream Reservoir System Master Water Control Manual which the Corps uses as an operational guide for the six dams which compose the Missouri River reservoir system. In the lawsuit, Missouri made two claims that the Corps violated the National Environmental Policy Act ("NEPA"). The first claim was that the Corps violated NEPA when it prepared an EA instead of a

SEIS. The second claim was that the Corps did not consider a full range of alternatives to the Revision.

Upon an examination of the administrative record, the United States District Court for the District of Minnesota held the Corps had not violated NEPA. The record showed that the changes in the proposed action were not substantial compared to previous actions taken by the Corps, and there was no significant additional information bearing on the proposals of the Revisions between the time the EA was completed and adoption of the Revisions. The record also showed that fourteen alternatives were analyzed when the Corps was considering the impact of its Revisions. Although the Corps admitted the alternatives were limited to those that complied with the recommendations of the 2003 Amended BiOp, this limitation was necessary in order to safeguard the endangered pallid sturgeon and to avoid liabilities for taking an endangered species.

The court held that the Corps decision to use an EA instead of supplementing the FEIS when it issued the Revisions did not violate NEPA. The court also held that the Corps fully considered a range of alternatives to the Revision in compliance with NEPA. Under the appropriate standard of review for a claim brought under the APA, the court determined that the Corps' Revisions were not made arbitrarily, capriciously, or contrary to law.

AMY L. GLEGHORN

United States v. Mallinckrodt, Inc., 2006 U.S. Dist. LEXIS 83211 (E.D. Mo. November 15, 2006)

The United States brought an action against Mallinckrodt, Inc. for cost recovery in response to an environmental cleanup brought under CERCLA. Mallinckrodt and the third party defendants asked the court to approve a settlement agreement, dismiss the third defendants with prejudice, bar any actions already brought or that could be brought for contributions against the settling parties, and accept the *pro tanto* method of accounting to limit liability to the amounts in the settlement.

The United States objected to the provision of the settlement that allowed protection against contribution on the grounds that CERCLA §113(f)(2) only applies to parties that settle with the United States. Mallinckrodt claimed that CERCLA §113(f)(1) and federal common law protect defendants from contribution when they enter a settlement agreement, and even though the third parties would be protected under the settlement from other third party contribution claims, the government would not be barred.

The U.S. District Court for the Eastern District of Missouri agreed with Mallinckrodt, finding that the language of the statute did not mention private settlement claims but a liberal construction would allow a private settlement to bar future contribution actions brought by third parties. The bar does not apply to the government because the government has a right to recoup the cost to cleanup from any liable party. Further, although federal common law and the statute would allow this action, Congress intended for the courts to review the language of the settlement to insure it furthers the goals of CERCLA.

For settlement approval, the defendants had to show that it was fair, reasonable, and consistent with CERCLA. To judge fairness, the court examined the negotiation process and the substance. Substance is judged on equitable distribution of liability based on an accepted measure, such as comparative fault. Reasonableness is a function of the adequacy of the remedy, adequacy of liability to cover the costs, and the savings of the settlement over litigation. The court found the negotiations to be at arms length, the settlement to be proportionate, the remedy adequate, and the settlement consistent with CERCLA's goal of encouraging environmental cleanups.

A final motion before the court regarded a consent decree by the United States against 5 of the potentially liable parties. In judging whether to allow the consent decree, the court applied the fair, reasonable and consistent test used to evaluate the private settlement. Like the private settlement, the decree was created at arms length, proportionately represented the parties' liability and was consistent with the goal of CERCLA.

ANNA L. ROSS