# RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW


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## I. CLEAN WATER ACT AND NATIONAL ENVIRONMENTAL POLICY ACT

### *Stewart v. Potts*, 126 F. Supp. 2d (S.D. Tex. 2000)

This case presents the United States Army Corps of Engineers' latest success in forsaking the nation's bottomland hardwood forests and wetlands near the Gulf of Mexico. In many ways, this is not a new story. The Corps of Engineers routinely grants permits for destruction of wetlands and related bottomland forests. Certainly, some permits are for projects that can be said to benefit society. But then there are permit

approvals for projects like the one in dispute here: construction of another golf course. This case goes deeper than the canopy of the forest, or what may soon be the 18th hole at the City of Lake Jackson's new golf course. This case addresses what should be a fundamental concern of the Corps of Engineers. That is, the establishment of a conscientious and rational method by which to assess the cumulative impacts of its permit decisions. In this case, the District Court for the Southern District of Texas provides support for the Corps of Engineers' sidestepping of its duty to perform cumulative impacts analysis under the National Environmental Policy Act (NEPA).

This case is round two of a conflict that has engaged the district court for the past five years. The controversy centers on the Corps of Engineers' approval of a Clean Water Act section 404 dredge and fill permit application by the City of Lake Jackson, Texas. The City of Lake Jackson proposes to construct a 200-acre public golf course in the midst of a bottomland hardwood forest and wetlands area adjacent to the Brazos River near the Gulf of Mexico. The City's construction plan calls for clearing the trees from 154 acres of the 200-acre site. The site also hosts 24 acres of wetlands, of which a total of approximately two acres of designated "fringe" wetlands will be directly impacted by the proposed construction. Moreover, the proposed golf course site comprises a substantial part of a 1,200-acre forest and adjacent wetlands in the floodplain of the Brazos River and is the known habitat of neotropical migratory birds and other wildlife. Pursuant to the Clean Water Act, the City coordinated the siting of the project with the Army Corps of Engineers and applied for the permit prior to initiating development activities.

In round one of the litigation, environmentalist Sharron Stewart, the Houston Audubon Society, and the Sierra Club (collectively referred to as "the plaintiffs") sued the District Engineer of the United States Army Corps of Engineers and the Secretary of the Department of the Army (collectively referred to as "the defendants" or "the Corps of Engineers") for violations of NEPA and the Clean Water Act. *See* Stewart v. Potts, 996 F. Supp. 668 (S.D. Tex. 1998). The plaintiffs alleged that the Corps of Engineers unlawfully approved the issuance of the section 404 permit for the proposed golf course. In its 1998 round one ruling, the district court dismissed all of the plaintiffs' claims except for the claim related to the Army Corps' failure to analyze the cumulative impacts of wetlands and forest destruction in the area. The court remanded the permit decision to the Corps of Engineers with an order "to consider 'the cumulative and indirect effects' of fragmentation of upland forest on 'migratory birds and wildlife.'" Despite being outside the defined

boundaries of the jurisdictional wetlands, the court held that the Corps of Engineers had jurisdiction and the responsibility to consider the impact of forest fragmentation as part of its wetlands and cumulative impacts analyses. The court found support for its decision in NEPA's implementing regulations. 40 C.F.R. § 1508.7 defines cumulative impact as follows:

> The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

On remand, the Corps of Engineers reviewed the City's new report on potential impacts and then prepared a supplement to the previous environmental assessment. Again, the Corps of Engineers found that the golf course would have no significant effect on the environment and thus found no need to prepare an Environmental Impact Statement (EIS). Thereafter, the permit was reissued to the City of Lake Jackson.

Round two of the litigation formally commenced in May 2000, when the plaintiffs moved to reopen the case and made the following claims:

> (1) The Corps of Engineers "conducted an inadequate analysis of cumulative impacts";
>
> (2) The Corps of Engineers "exhibited bias" in its review of the supplemental information;
>
> (3) The Corps of Engineers "failed to properly circulate the revised cumulative impact analysis to other government agencies"; and
>
> (4) The Corps of Engineers "improperly failed to perform an environmental impact statement."

Essentially, the plaintiffs claimed that the impacts of the proposed golf course construction would be "significant" and therefore an EIS was needed in order to make a fully informed decision as to the soundness of the proposed project. The defendants and plaintiffs both filed motions for summary judgment. The court denied the plaintiffs' motion and granted the defendants' motion for summary judgment on all four claims.

The plaintiffs' principal claim attacked the Corps of Engineers' method for performing the required cumulative impacts analysis. The Corps of Engineers used an "already reduced baseline" approach whereby it compared the current acreage of bottomland forest in the area (approximately 240,000 acres) with the planned removal of 154 acres of forest at the site. From this perspective, the golf course project

represents a 0.006% decrease in forest size. The plaintiffs claimed that this approach does not take into account the past loss of forest and therefore fails to assess the cumulative impacts of incremental deforestation. Instead, the plaintiffs asserted that, according to the regulatory definition of cumulative impact, the Corps of Engineers is required to quantify the total impact of past, present, and future actions in the area. To see the cumulative effect, the plaintiffs argued that the planned destruction of the 154 acres needed to be added to the previously documented loss of 51,645 acres of bottomland forest in the region since the site was purchased by the City in 1979. Thus, in contrast to the Corps of Engineers' calculated loss of 0.006%, the same numbers viewed in historical context amount to a cumulative loss of 16%, or 51,799 acres, of the bottomland forest in the region. The plaintiffs asserted that the 16% cumulative loss was significant and warranted an EIS.

The court appears to appreciate the logic of the plaintiffs' argument, to a point. Ultimately, however, the court declared that NEPA does not require the use of any specific approach, and the Corps of Engineers was free to assess the cumulative impacts as it did. The court stressed that the degree of impact from the loss of acreage controlled the determination as to whether the loss, however it was calculated, was significant or not. On this issue, the court noted that it would not second-guess the Corps of Engineers' assessment of the impacts data. The court held that the impacts data was adequately reviewed, and the Corps of Engineers did not abuse its discretion in finding no significant impact. Therefore preparation of an EIS was not required. The court also granted summary judgment to the defendants on the two other side issues, on the grounds that the Corps of Engineers operated within its realm of discretion.

Finally, the court reached its decision in favor of the Corps of Engineers by acquiescing to the limited scope of its judicial review under the Administrative Procedure Act (APA). Notwithstanding the blatant realities of documented bottomland forest loss in the area, the court echoed the common practice of giving agencies great deference under the APA's "arbitrary and capricious" standard, especially when reviewing scientific findings as in this case. Likewise, under NEPA, courts do not mandate specific results; courts only require agencies to take a "hard look" at the consequences of the proposed action. Bound by deference to the Corps of Engineers' ecological findings of no significant impact, the district court had no other legal option but to grant the defendants' motion for summary judgment. Still, the court, in what one hopes is comprehension of the consequences of the Corps of Engineers' warped view of cumulative impacts analysis, added the caveat that "NEPA prohibits uninformed, not unwise, agency actions."

Jason Barbeau

## II. CLEAN AIR ACT AND THE DELEGATION DOCTRINE

### *Whitman v. American Trucking Co.*, 121 S. Ct. 903 (2001)

The United States Supreme Court, in a unanimous decision with multiple concurring opinions, has rendered an important decision which will doubtlessly leave a significant mark on both the Environmental Protection Agency (EPA) and its implementation of the Clean Air Act (CAA). American Trucking Associations, Inc. (American Trucking) and its co-respondents, which include other private companies and several midwestern states, sued the EPA after it revised the National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone. These revisions did not consider implementation costs, thus making the NAAQS more stringent. Section 109(a) of the CAA requires the Administrator to promulgate NAAQS for each air pollutant for which "air quality criteria" have been issued under section 108 of the CAA. The Administrator reviews the standard every five years to make "revisions . . . as may be appropriate." Here, the Court addressed whether the Administrator may consider the costs of implementation in setting NAAQS, as well as whether the court of appeals had jurisdiction to review the EPA's interpretation of Part D of Title I of the CAA (with respect to implementing the revised ozone NAAQS). The Court further considered whether, if the challenge was properly before the Court, whether the EPA's interpretation of Part D was permissible.

Justice Scalia begins the opinion by confronting the cost-benefit issue with regard to air quality standards. The EPA derives from section 109(b)(1) its mandate to set NAAQS, "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety." American Trucking argues that "public health" means "the ways and means of conserving the health of the members of a community, as by preventative medicine, organized care of the sick, etc." The Court rejects this definition and holds that the primary definition of "public health" means "the health of the community."

American Trucking also argued that keeping the air quality standard low creates economic benefits which give people the means to afford better health care and lead a healthier lifestyle. However, the Court noted that Congress anticipated this dilemma when the CAA was originally considered, since section 110(f) allows the Administrator to waive compliance deadlines if the control measures are not available or if operation "is essential . . . to the public health or welfare." In other

sections of the CAA, costs are explicitly required to be considered. Thus, the Court refused to find a cost-benefit requirement where none exists in the CAA. The Court concluded that this unambiguous language clearly gives the EPA authority to decide what is an adequate margin of safety that the public can tolerate without considering the economic costs.

Next, the Court addressed whether the court of appeals was correct in holding that section 109(b)(1) of the CAA does not contain an intelligible principle to guide the EPA's exercise of authority when setting the NAAQS. The Court reversed this holding and held that an intelligible principal is provided by the CAA when it instructs the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on the [the] criteria [documents of section 108] and allowing an adequate margin of safety, are requisite to protect public health." This type of challenge to an agency action is termed a "delegation challenge" and questions whether the statute has unconstitutionally delegated legislative power to the agency. Article I, Section 1 of the United States Constitution vests "[a]ll powers herein granted . . . in a Congress of the United States"; therefore an administrative agency cannot be delegated a legislative duty by Congress. Using an "intelligible principle" in a statute that guides an agency cures this problem by limiting the agency's legislative power and providing a clear mandate.

Here, the Court stated that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." The Court further noted that an agency willingness to adopt a limiting construction of a statute does not cure a "standardless delegation." The Court compared the CAA to other similar statutes that have been upheld, and holds that the amount of discretion left to the EPA is "well within the scope of discretion permitted by our precedent."

The Court then addressed whether subpart 1 of section 110 of the CAA controls the implementation of revised ozone NAAQS in nonattainment areas (as the agency argued), or whether subpart 2 or some combination of subparts 1 and 2 control the implementation. Subpart 1 contains general nonattainment regulations that pertain to every pollutant for which NAAQS exist. Subpart 2 addresses only ozone. The Administrator argued, unsuccessfully, that the court of appeals lacked jurisdiction to review the EPA's implementation policy because it was not a final agency action.

In reviewing the ripeness issue with regard to final agency action, the Court referred to the standard set forth in *Harrison v. PPG Industries,*

*Inc.*, which stated that if the "EPA has rendered its last word on the matter" in question its action is final and is therefore reviewable. The Court found persuasive the title "FINAL DECISION ON THE PRIMARY STANDARD" on the explanatory preamble to the agency's final ozone NAAQS. When determining that the EPA's implementation policy was final agency action and ripe for review, the Court weighed such factors as: (1) the EPA had received public comments, (2) the EPA received a directive from the White House, and (3) the agency refused in subsequent rulemakings to reconsider it by explaining to disappointed commentators that its decision was conclusive.

The Court next proceeded to summarily hold that this issue was ripe for review. The Court applied the standard set forth in *Ohio Forestry Ass'n v. Sierra Club*, stating that if a question is purely one of statutory interpretation that would not "benefit from further factual development of the issues presented" then the issue is ripe for review. The Court held that the because the EPA had concluded its consideration, the Court could apply judicial review.

The Court next turned to the well-known administrative law approach articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*. Chevron presents a two part test that determines how an agency can utilize a statutory mandate. The test states that if a statute resolves a question, then "that is the end of the matter." However, if the statute is silent or ambiguous with respect to the issue, then the court must defer to a "reasonable interpretation made by the administrator of an agency."

In the present case, the Court chose to reverse the court of appeals and hold that the statute is somewhat ambiguous. Referring to the EPA's interpretation of its mandate, the Court states that "the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear." The Court therefore ruled against the EPA and held that the implementation policy used by the EPA is unlawful.

The issue of which subpart controls is the next step in the Court's analysis. The Court disagrees with the Administrator and holds that it is incomplete to state that the substantive language of subpart 1 is broad enough to apply to revised ozone standards. Instead, the Court evaluates subpart 2 and holds that it does provide for classifying nonattainment ozone areas under the revised standards. The Court went on to acknowledge, however, that some gaps exist in subpart 2's scheme and that this prevents the assumption that Congress intended subpart 2 to be the exclusive, permanent means of enforcing a revised ozone standard in nonattainment areas. The Court also held that "the statute is in our view

ambiguous concerning the manner in which subpart 1 and 2 interact with regard to revised ozone standards, and we defer to the EPA's reasonable resolution of that ambiguity." The Court refused to defer to the interpretation the EPA had previously given.

The Court then held the EPA's implementation policy under section 109(b) to be unlawful, though not for the same reasons as articulated by the court of appeals. The Court clearly recognized the significance and weight of the second part of the *Chevron* test, but chose to hold that the agency acted outside its statutory mandate. This determination is significant because it disallows the EPA's own interpretation of what powers the CAA delegates to the agency. At first glance, this case appears to be a victory in favor of administrative agency discretion. The effect of the decision, however, is to strike down the interpretation implemented by the EPA despite an acknowledgment that the EPA had discretionary rights. Ultimately, the Court held that (1) costs cannot be considered when setting primary and secondary NAAQS under section 109(b) of the CAA; (2) the delegation doctrine was not violated by the section 109(b)(1) delegation; (3) the court of appeals did have jurisdiction to review the EPA's interpretation; and (4) the EPA's interpretation was unreasonable. Therefore, the judgment of the court of appeals was affirmed in part and reversed in part and the cases were remanded for further proceedings in light of the unanimous Supreme Court decision.

Matthew Beam

## III. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

### *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, 240 F.3d 534 (6th Cir. 2001)

The Franklin County Convention Facilities Authority (CFA) filed a cost-recovery action under the Comprehensive Environmental Response Compensation and Liabilities Act (CERCLA) arising from contamination caused by American Premier Underwriters' (APU) predecessors. Among other arguments, APU alleged that the retroactive application of CERCLA violates substantive due process and the takings clause of the Fifth Amendment.

APU is the corporate successor of several railroad companies whose operations were at least partially located in Columbus, Ohio, starting in the mid-nineteenth century. Although the exact date is

uncertain, sometime before 1901 a large wooden box full of creosote and benzene was buried near a Columbus railroad depot, on land owned by two of APU's successor railroad companies. The box was not discovered for decades.

In 1973, the City of Columbus took possession of the land pursuant to its powers of eminent domain. As part of the purchase agreement, the railroad companies agreed to "remain responsible for any 'claims which may affect . . . any portion of the premises.'" In 1989, CFA subleased the property from the City as the site for a new convention facility.

In 1990, a contractor working for CFA accidentally split open the box while digging a storm sewer line. Some of the contents of the box leaked into the surrounding soil and emitted a strong odor. Environmental remediation was immediately undertaken. The cleanup costs eventually totaled roughly $1 million, but CFA only paid approximately $240,000 as a result of a contract dispute with Foster Wheeler Enviroresponse, the company in charge of the remediation.

Among other disputes, over such details as the improper designation of the wastes as "hazardous," the consistency of the response costs with the National Contingency Plan, and others, APU advanced the argument that applying CERCLA's compensation scheme retroactively to its predecessors would violate substantive due process and the takings clause of the Fifth Amendment. For several reasons, the United States Court of Appeals for the Sixth Circuit disagreed, and affirmed the district court's judgment in favor of CFA.

First, the court discussed whether APU was estopped from advancing the constitutional argument, since its predecessor, Penn Central Corporation, litigated and lost on the issue in 1994, in *Penn Central Corp. v. United States*. Quoting Wright & Miller's *Federal Practice and Procedure*, the court pointed out that a claim which would ordinarily be precluded may be heard by the court if "'there has been a substantial change in the legal climate that suggests a new understanding of the governing legal rules which may require different application.'" The court noted that the 1998 Supreme Court decision, *Eastern Enterprises v. Apfel*, constituted such a change in the legal climate because it invalidated retroactive application of the Coal Industry Retiree Health Benefit Act of 1992. Believing that Eastern Enterprises signaled a possible change in the Supreme Court's outlook upon retroactive application of statutes, the Sixth Circuit decided to rule on the constitutional issue.

In so doing, the court noted that "due process is satisfied 'simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.'" The court further stated that

"[l]egislative acts adjusting the burdens and benefits of economic life carry a presumption of constitutionality, and the burden of proving that the legislature acted in an arbitrary and irrational way is on the party complaining of the violation."

Under that standard, the court analyzed the issue using two Supreme Court cases: *Usery v. Turner Elkhorn Mining Co.* and *Eastern Enterprises*. In *Usery*, the Court upheld the constitutionality of the retroactive application of Title IV of the federal Coal Mine Health and Safety Act of 1969 (CMHSA). CMHSA required coal mine operators to pay benefits to miners who had left the industry before implementation of the statute, but the defendant coal mine operators argued that "'to impose liability upon them for former employees' disabilities is impermissibly to charge them with an unexpected liability for past, completed acts that were legally proper and . . . unknown to be dangerous at the time.'" Against that argument, the Court upheld CMHSA's constitutionality, reasoning that retroactive application simply serves to "spread the costs of the employees' disabilities to those who have profited from the fruits of the employees' labor." The Court thus expressly rejected the idea that the imposition of unexpected duties and liabilities made the statute unconstitutional.

Next, the Sixth Circuit examined the Supreme Court's *Eastern Enterprises* decision, in which it struck down the retroactive application of the Coal Industry Retiree Health Benefit Act of 1992 (CIRHBA) as unconstitutional. CIRHBA contained certain guaranteed health benefits that had been agreed upon in collective bargaining agreements in the 1970s. However, the statute attempted to apply those benefits to coal industry employers who had left the industry before the agreements had been reached. Five justices agreed that retroactive application to those employers was unconstitutional, but none of them could agree as to why it was so.

The Sixth Circuit thus concluded first that *Eastern Enterprises* had no precedential weight because the Supreme Court did not agree upon a single rationale for striking down CIRHBA. The court further noted that even if there had been a single rationale, the case was distinguishable from the present one. According to the court, *Eastern Enterprises* is distinguishable in part because here, CERCLA was intended to operate retroactively. The court pointed to CERCLA's use of past tense verbs in its imposition of liability (e.g., those who "owned" or "operated" a facility at the time of contamination may be liable). It also noted that CERCLA permits abandoned sites to be cleaned up, then permits the remediating party to recover its costs from those responsible. Next, the court used the rationale of *Usery* when it stated that cleanup costs are

rationally imposed upon parties that benefit from using the hazardous materials as well as their "presumably inexpensive method of abandonment."

In response to APU's takings argument, the court stated that the economic impact upon APU, while significant, is "directly proportional to APU's prior acts of pollution." Thus, although the economic impact is unexpected, it does not "interfere with APU's reasonable investment backed expectations," as required by the test for takings violations. Since APU's liability stems directly from the actions of its predecessors, who incidentally retained liability for any claims related to the property, and who could have reasonably anticipated environmental liability, the application of CERCLA does not violate the Fifth Amendment. Finally, the court noted that there is "nothing unusual" about the CERCLA scheme here. "Congress intended to spread the costs of present risks and liabilities, which were created in the past, to those who benefited from their creation." Thus, permitting the retroactive application of CERCLA to such parties furthers Congress's intent, and does not violate the Constitution.

Amanda Ropp Blystone

## IV. NATIONAL ENVIRONMENTAL POLICY ACT

### *Cantrell v. City of Long Beach*, 241 F.3d 674 (9th Cir. 2001)

The United States Court of Appeals for the Ninth Circuit reversed a district court's dismissal of a suit by birdwatchers for lack of standing under the National Environmental Policy Act (NEPA). The Ninth Circuit found that the birdwatchers did in fact have a sufficiently concrete interest in birdwatching to confer standing under NEPA. However, the court also found that the birdwatchers did not have taxpayer standing to bring their state law claims in federal court.

Two federally endangered species of birds foraged and nested in twenty-six acres of shallow water habitat in an area of Long Beach, California known as the West Basin. The habitat is located on a closed naval base and is the site of development of a marine container site. The appellants are local residents and avid birdwatchers of Long Beach and Lakewood, California. They belong to various environmental groups and oppose the plan to destroy the historical buildings and bird habitats on the naval base in preparation for the use of the property as a marine container terminal.

Before transferring the property to the local government, the Secretary of Defense must prepare a decision document in accordance with NEPA. Under NEPA, any federal agency considering "major federal actions significantly affecting the quality of the human environment" is required to prepare an environmental impact statement (EIS) which identifies the environmental consequences of the proposed action and recommends ways to minimize those which are adverse. The Final Environmental Impact Statement (FEIS) evaluated four potential alternatives for the site: the marine container proposal, an auto terminal, an institutional campus, and the "no project alternative." By the time the appellants filed their brief in this appeal, the historic buildings and bird habitats on the naval base had already been destroyed.

The City of Long Beach and the Navy took the position that the appeal of the birdwatchers was moot. The Ninth Circuit recently addressed mootness in the context of NEPA in two cases: *West v. Secretary of the Department of Transportation* and *Northwest Environmental Defense Center v. Gordon*. Specifically, in *Gordon* the court stated that "[a]s long as effective relief may still be available to counteract the effects of the violation, the controversy remains live and present."

According to *West*, the court is particularly wary of entities ignoring the requirements of NEPA, building structures before going to court, and then hiding behind the mootness doctrine. Such a result is unacceptable. In the present case, the buildings had already been razed and the bird habitat demolished. However, if the defendants were required to undertake additional environmental review, they could consider alternatives to the current plan, and develop ways to mitigate the damages to the birds' habitat. Due to the fact that effective relief might still be available, demolition of the habitat was insufficient to render the case moot.

The Navy contended that the birdwatchers did not satisfy the United States Constitution's Article III standing requirements. According to the United States Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Service, Inc.*, in order to satisfy these requirements a plaintiff must show: (1) that it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

NEPA is a procedural statute. Under Lujan v. Defenders of Wildlife, in order to show an injury in fact, a plaintiff asserting a procedural injury must show that "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his

standing." In the instant case, the birdwatchers are seeking to enforce a procedural right. This fact does not affect the analysis if the birdwatchers show infringement upon a concrete and particularized interest.

An environmental plaintiff need not live near the site in question to establish a concrete injury. According to the Ninth Circuit in *Ecological Rights Foundation (ERF) v. Pacific Lumber Co.*, "repeated recreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person." Here, the birdwatchers asserted that the removal of trees and the shallow water habitat would directly and concretely affect their recreational and aesthetic interests. The court found that this was a sufficient demonstration of a concrete interest.

The Navy argued that the injury must be an invasion of a legally protected interest. The Navy further claimed that the birdwatchers have no legal right to enter the closed Naval base, or to stand near it and watch the birds across the property line. The court found that the birdwatchers' desire to observe the birds from publicly accessible land outside the station is an interest sufficient to confer standing. The injury in fact requirement is designed to ensure that litigating parties have a concrete and particularized interest distinct from the interest held by the public at large. Therefore, if an area can be observed and enjoyed from adjacent land, plaintiffs need not physically enter the affected area to establish an injury in fact. This does not imply that the interest must be a substantive right sounding in property or contract.

The birdwatchers argued that their ability to observe the birds in their habitat from publicly accessible land surrounding the station would be drastically limited, if not destroyed, by the Navy's actions. In order to allege a legally protected, concrete aesthetic interest, a plaintiff must demonstrate only that the challenged action affects his aesthetic or ecological surroundings. The fact that the site of the environmental damage was not publicly accessible was not fatal to the standing claim.

For purposes of Article III standing, the relevant showing is injury to the plaintiff, not injury to the environment. To make it clear, according to ERF, "[r]equiring the plaintiff to show actual environmental harm as a condition for standing confuses the jurisdictional inquiry . . . with the merits inquiry." Here, the birdwatchers have shown a concrete and particularized interest in observing the birds and their habitat from land near the station, and therefore have satisfied Article III's injury in fact requirement.

Once a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are realized. A person may

assert a procedural right to protect his concrete interests without meeting all the normal standards for redressability and immediacy. To establish standing, the birdwatchers need not show that the revised EIS would result in the abandonment of the plans to build the marine container terminal. Here, the birdwatchers sought to enforce a procedural right under NEPA to protect their concrete interests. The Ninth Circuit therefore held that the birdwatchers had standing to challenge the adequacy of the Navy's FEIS even though a revised EIS might not result in a different reuse plan for the Naval base.

The second claim made by the birdwatchers was that, as taxpayers of California, they had standing under the California Code of Civil Procedure to assert state law claims for waste of government funds, improper public gifts, and misuse of tidelands trust assets. The Court held that the birdwatchers did not establish standing as taxpayers to bring their state law claims in federal court. The Ninth Circuit therefore affirmed the district court's dismissal of these claims.

California's lenient taxpayer standing requirements notwithstanding, the birdwatchers were obligated to establish a direct injury under the more stringent federal requirements for state and municipal taxpayer standing. To establish standing in a state or municipal taxpayer suit under Article III, a plaintiff must allege a direct injury caused by the expenditure of tax dollars. According to the Ninth Circuit in *Hoohuli v. Ariyoshi*, the pleadings of a valid taxpayer suit must "set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity." Standing is denied when a plaintiff fails to allege that the government spent specific amounts of tax dollars on the conduct in question. In this case, the birdwatchers did not make an adequate showing of a direct economic injury resulting from the destruction of the Naval base and the construction of the marine container terminal. Most of the birdwatchers' allegations involved construction costs and potential financial losses financed by the Port of Long Beach, which does not receive tax dollars and is financed by its own revenues. Therefore, the birdwatchers failed to satisfy the Article III requirements for taxpayer standing because they never alleged a direct injury caused by the expenditure of tax dollars.

Holly Jackson

## V. ARCHEOLOGICAL RESOURCES PROTECTION ACT

### *United States v. Lynch*, 233 F.3d 1139 (9th Cir. 2000)

This case involves an appeal of a felony conviction for a violation of the Archeological Resources Protection Act (ARPA). The defendant/appellee, Ian Martin Lynch, entered a conditional plea of guilty in the United States District Court for the District of Alaska for knowingly removing an archeological resource from public land. As part of the conditional plea Lynch retained the right to appeal the court's interpretation of the *scienter* requirement.

The facts of this case are undisputed. The defendant was on a hunting trip with two companions on an uninhabited island in southeast Alaska. According to a report conducted for the Alaska Native Claims Settlement Act, the island has been identified to contain the remains of the native Alaskan Warm Chuck Village and Burial Site. While his companions were packing up camp, Lynch decided to explore various parts of the island. His exploration led Lynch to find what appeared to be a partially buried human skull and other various bones. Lynch removed the skull from the ground, but returned the other bones to the location where he had found them. After putting the other bones back in their place, Lynch then "took the skull back home to do some research on it." Although parts of the island had been previously identified by anthropologists and Native historians as being archeologically significant and containing burial and cemetery grounds, the skull was not found in any such area. However, a Forest Service archeologist determined that the skull was deliberately placed at the site in a burial-type manner.

In order to determine if the skull was an "archeological resource" under the meaning enumerated in the ARPA, it would have to be at least 100 years old. Osteological examination of the skull failed to provide sufficient evidence as to the age of the skull. Thus, in order to determine the specific age of the skull, carbon dating was used. The result of the carbon dating method analysis indicated that the skull was at least 1400 years old. After the carbon dating analysis, Lynch was indicted for a felony violation of the ARPA.

Lynch argued that his indictment omitted the requisite statutory *scienter*, and filed a motion to dismiss the indictment pursuant to this omission. The district court denied Lynch's motion, and concluded that the taking of the skull was "*malum in se*." On appeal, the court focused extensively on the level of knowledge required for a violation of the APRA.

The court first addressed the Government's argument that the ARPA's use of "knowingly" rather than "willfully" reflects legislative intent to not require knowledge that one's actions are against the law. While the court agreed with this argument, it noted that the present case turns not on Lynch's knowledge of the law, but rather on whether he knew, or should have known, that the human remains he found were "archeological resources" and that they possessed value other than satisfaction of his curiosity. Citing various portions of the ARPA's legislative history to support its determination, the court determined that the legislative history appeared to reject the requirement of specific intent. The court next looked to portions of the remarks of Congressman Morris Udall, the sponsor of the bill, from the legislative debate. Congressman Udall addressed the concerns over prosecution of the "casual visitor" who stumbles across an artifact, stating:

> Certainly, no sponsor of this legislation and probably no reasonable person would want some overzealous bureaucrat to arrest a Boy Scout who finds an arrowhead along a trail . . . . The thrust of this act is not to harass the casual visitor who happens to find some exposed artifact, but to stop the needless, careless, and intentional destruction of archeological sites . . . .

Other legislative history on the Senate side was also cited by the court. Speaking before the Senate Subcommittee on Parks, Recreation, and Renewable Resources, Senator Pete V. Domenici stated, "We want the felony jurisdiction to be only for extreme cases where there is both knowledge and a very valuable product . . . ."

Pursuant to these cited provisions of the legislative history, the court determined that knowledge of the law is not necessary. Rather, the court held that for a felony conviction, the prosecutor must prove that a person charged under the ARPA knew, or at least had reason to know, that the object taken is an "archeological resource." The court stated that "picking up a skull is not in every case 'malum in se,' nor does every case 'involve public welfare.'" Prosecution for knowingly violating a statute enacted to criminalize removal of archeological resources must follow at least minimal traditional mens rea principles in order to give meaning to "knowingly." The court therefore held that since under 16 U.S.C. § 470ee(a), the Government failed to prove that the defendant knew or had reason to know that he was removing an "archeological resource," the judgment against the defendant/appellee was vacated.

While the court did not determine whether Lynch should be entitled to the deference of the "casual visitor" as discussed in the legislative history to the ARPA, the facts suggest that the defendant/appellee may not deserve such leniency. In a statement given by Lynch in his interview with Forest Service officials, Lynch stated that he was

interested in, or at least curious about, artifacts associated with early inhabitants of the island. Lynch also admitted that he was in fact "hoping to find something in his cave wanderings, and that he liked to collect things."

Although the burial site was able to be restored at a price of five hundred dollars, the original disturbance of the site is precisely the sort of event the ARPA was enacted to prevent. Clearly, discovery of small arrowheads or pieces of pottery was not intended to be punished by felony convictions. However, calculated removal of a human skull and skeleton from an area known to contain burial and cemetery grounds should in fact be punished. If Native American lands, artifacts and burial sites are not protected by the force and effect of the law established through the ARPA, courts are doing a disservice to the very cultural identity and historical significance of the sites the statute was enacted to protect.

Scott Lovernick

## VI. Endangered Species Act

### *Greenpeace v. National Marine Fisheries Service*, 198 F.R.D. 540 (W.D. Wash. 2000)

The Gulf of Alaska and the Bering Sea/Aleutian Islands region, also called the North Pacific ecosystem, is home to the largest commercial fishery in the United States. The region is also the habitat of the western population of Steller sea lions, which were listed under the Endangered Species Act (ESA) as a threatened species in 1990 and reclassified as endangered in 1997. This case arises out of the complex interaction between the fisheries and the Steller sea lion population.

The case began in 1998 when the plaintiffs, various environmental organizations, sued the National Marine Fisheries Service (NMFS), challenging the 1998 North Pacific Fishery Management Plans under both the ESA and the National Environmental Policy Act (NEPA). Representatives of the fishing industry intervened as defendants. The plaintiffs' suit complained of the significant decrease in the population of certain fish, particularly pollock and mackerel, which form the majority of the diet of Stellar sea lions.

The United States District Court for the Western District of Washington found that NMFS findings regarding jeopardy to the Stellar sea lions were not arbitrary and capricious, but that the agency's reasonable and prudent alternatives were arbitrary and capricious because they were not legally justified. This was largely because the

record did not support a finding that the agency's stated alternative would avoid jeopardy. A programmatic supplemental environmental impact statement was then required.

The ESA encompasses a duty to avoid jeopardy and adverse modification, and further provides for consultation by an expert agency to evaluate the consequences of a proposed action on a listed species. The expert agency then prepares a Biological Opinion, which sets forth the agency's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the expert agency must suggest reasonable and prudent alternatives (RPAs) which it believes would not violate section 7 of the ESA.

On December 3, 1998, NMFS issued a Biological Opinion which concluded that the pollock fishery as proposed would result in jeopardy and adverse modification to the Stellar sea lion and its critical habitat. On October 15, 1999, NMFS proposed RPAs that consisted of the alternative management measures by which NMFS believed the pollock fishery could be implemented consistent with section 7 of the ESA. On motions for summary judgment, the court found the RPAs to be "arbitrary and capricious because NMFS failed to adequately explain how the proposed alternative measures would avoid jeopardy and adverse modification."

Together with the proposed RPAs, NMFS produced the required administrative record. This record was incomplete because NMFS had decided to withhold numerous documents. This most recent development in the ongoing controversy over the Stellar sea lion resulted from the plaintiffs' motion to compel production of these documents. The documents in question were prepared by NMFS scientists and staff in connection with the development of the RPAs. Specifically, these documents contained observations and criticisms of the draft RPAs. NMFS opposed the motion to compel, claiming that the documents were protected from discovery under several privileges, including the deliberative process privilege.

The deliberative process privilege shields from disclosure intra-governmental communications relating to matters of law or policy. "The underlying purpose of the privilege is to protect the quality of governmental decision-making by maintaining the confidentiality of advisory opinions, recommendations, and deliberations that comprise part of the process by which government formulates law or policy." The reasoning behind the privilege is that open and honest discussions among various employees of a given agency "would be chilled if the personal ideas and opinions of government employees involved in the decision-

making process were subject to public scrutiny." In order to qualify for the privilege, a document must be both "predecisional" and "deliberative," which means that it must "actually be related to the process by which policies are formulated." Thus, factual material, or material that isn't directly related to policy-making, is protected only to the extent that an agency's "preliminary positions or ruminations are about how to exercise discretion on some policy matter." For instance, the privilege may be inapplicable where the agency's decision-making is itself at issue.

In this case, the district court had issued an order concluding that the deliberative process privilege did not apply to most of the documents in question because the RPA determination is essentially one of fact rather than one of law or policy. Here, NMFS asked the court to reconsider, arguing that in determining whether a particular document falls within the privilege "a reviewing court should focus on whether the document in question is part of the deliberative process, rather than whether the material is essentially deliberative or factual." The court concluded that a determination of jeopardy and adverse modification under the ESA was not a process "that implicated NMFS's policy-oriented judgment." Therefore, the court's analysis "did not focus on the content of specific documents, but was based on the nature of the agency process as a whole."

The court rejected NMFS's claims and upheld its prior order. The crux of its decision was that "[s]ection 7 of the ESA does not require, nor permit, discretionary policy-making. A determination of jeopardy or adverse modification is limited to objective, fact-based scientific conclusions. Thus . . . the process as a whole is not "deliberative" within the meaning of the privilege."

The court compared its analysis to that of the Ninth Circuit in *National Wildlife Federation v. United States Forest Service*, in which the court "adopted a functional" approach to determining whether the deliberative process privilege applied to any particular document. Under this approach, "the privilege is not tied to the type of information contained in a document." Rather, the privilege applies if disclosure of factual information would divulge the agency's decision-making process. There, the court concluded that the documents at issue "represent[ed] the tentative opinions and recommendations of Forest Service employees on matters instrumental to the formulation of policies governing the allocations of the Forest's resources to competing uses." In contrast, the Federal District Court in Washington found that this was not the case "where the process itself was unrelated to any discretionary policy-making."

In conclusion, the court stated that "the deliberative process privilege does not apply to shield an analysis of jeopardy and adverse modification under the ESA. Under the ESA any analysis under these two standards is essentially a factual rather than legal or policy determination."

It is critically important to environmental litigation that administrative records be complete and accurate. An agency's decision-making is reviewed by a court solely on the basis of that record; a court cannot look beyond it to determine whether an agency decision was arbitrary and capricious. Therefore, an incomplete record, sanitized and edited by the agency whose decision is being challenged would undoubtedly sound a death knell for challenges by environmental plaintiffs. Additionally, the court made a general statement that documents created in the analysis of jeopardy and modification under the ESA must be included in the administrative record. This will go a long way toward ensuring that agency decisions are based on a complete record with full consideration given to all input. It will also ensure that litigation seeking to ensure the protection of endangered species will not be obstructed by incomplete or inaccurate records.

Jennifer Marshall

## VII. CLEAN WATER ACT: SECTION 404 JURISDICTION AND THE MIGRATORY BIRD RULE

### *Solid Waste Agency v. United States Army Corps of Engineers*, 121 S. Ct. 675 (2001)

The United States Army Corps of Engineers (Corps) has the authority under section 404(a) of the Clean Water Act (CWA) to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." In the present case, the United States Supreme Court limited the Corps' jurisdiction by holding that the Migratory Bird Rule did not apply to an abandoned sand and gravel pit, and thus could not be regulated by the Corps. The tension within the Court's 5-4 decision is evidenced by the dissent's characterization that "the Court takes an unfortunate step that needlessly weakens our principal safeguard against toxic water."

A consortium of twenty-three suburban Chicago cities and villages, the Solid Waste Agency of Northern Cook County (SWANCC), attempted to locate a site for the disposal of baled nonhazardous waste. SWANCC eventually decided to purchase an abandoned sand and gravel

pit located within a successional stage forest. Excavation trenches which were used during the mining operation were to be part of the dump site. Because the trenches had evolved into permanent and seasonal ponds, SWANCC contacted the Corps to determine whether a section 404 permit was required. Initially, the Corps did not find that a permit was necessary because it found that the site did not contain any wetlands. However, after becoming aware that the site was used as a habitat for several migratory bird species, the Corps asserted jurisdiction over these seasonal ponds. The Corps therefore formally

> determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as 'waters of the United States' . . . based upon the following criteria: (1) the proposed site has been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas are used as habitat by migratory bird [sic] which cross state lines.

SWANCC thus made several proposals to mitigate harmful effects upon the migratory birds species. Not only did SWANCC obtain the necessary state and local approval for its application, but it also obtained the required water quality certification from the Illinois Environmental Protection Agency. The Corps, however, refused to issue a permit because it found that SWANCC had not proven that its proposal was the "'least environmentally damaging, most practicable alternative.'" Specifically the Corps was unsatisfied with SWANCC's proposal because "SWANCC's failure to set aside sufficient funds to remediate leaks posed an 'unacceptable risk to the public's drinking water supply,' and . . . the impact of the project upon area-sensitive species was 'unmitigatable since a landfill surface cannot be redeveloped into a forested habitat.'"

Challenging the Corps' jurisdiction and the merits of the permit denial, SWANCC filed suit under the Administrative Procedure Act in the Northern District of Illinois. The district court granted summary judgment in favor of the Corps on the jurisdictional issue. On appeal to the Seventh Circuit, SWANCC argued that the Corps "had exceeded their statutory authority in interpreting the CWA to cover nonnavigable, isolated, intrastate waters based upon the presence of migratory birds and, in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction." The Seventh Circuit began its analysis with the constitutional issue and found that the authority to regulate did exist using the "cumulative impact doctrine" because the "aggregate effect of the 'destruction of the natural habitat of migratory birds' on interstate commerce . . . was substantial." Using this

logic, the Seventh Circuit held that the "CWA reaches as many waters as the Commerce Clause allows" and thus the Corps' application of the migratory bird rule did not exceed its statutory authority.

The Supreme Court did not, however, reach the constitutional issue in the present case because it used an interpretation of section 404 which avoids the issue. Using this interpretation the Court reversed the Seventh Circuit and found that the Corps had no jurisdiction over the permanent and seasonal ponds at issue because they are not adjacent to any navigable waters. In the majority opinion, Chief Justice Rehnquist focused on the language of section 404 which confers jurisdiction on the Corps as well as case law which interprets the statute to expand the Corps' jurisdiction to wetlands abutting on a navigable waterway.

The Corps interpreted "waters of the United States" to include the ponds because of their use as habitat by migratory birds. However, the Court concluded that this "migratory bird rule" is not supported by the language of the CWA. In so finding, the Court contrasted the Corps' position in the present case and the Court's holding in *United States v. Riverside Bayview Homes, Inc.* In *Riverside*, the Court upheld the Corps' jurisdiction and authority to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." However, the Court pointed out here that its previous opinion was based on the finding that there was a "significant nexus between the wetlands and 'navigable waters.'" The Court found that to confer jurisdiction upon the Corps in the present case would require a finding that the CWA extends jurisdiction to ponds not adjacent to open water. Such a finding, the Court concluded, is not supported by the text of the statute.

Thus, the Court's decision turns on the use of the term "navigable waters" in section 404(a) and its definition, provided by 33 U.S.C. § 1362(7), as the "waters of the United States including the territorial seas." The Court further pointed out that the Corps' initial interpretation of navigable waters limited the term to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." The Corps contended that it had changed its interpretation to include "other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." The Corps further argued that Congress acquiesced to this definition when it failed to pass a bill narrowing the Corps' jurisdiction.

The Court, however, cautioned against the use of "failed legislative proposals" to evidence congressional acquiescence. Consequently, it concluded that the Corps had not made a sufficient showing that the failed House bill was a response to the Corps' expanded definition so that its failure could be considered acquiescence by Congress. Chief Justice Rehnquist was further disappointed, it seemed, by the text of section 404(g). The "navigable waters" of section 404(g) were previously recognized by the *Riverside* Court to include other waters that may not traditionally be navigable. While the Corps argued that these "other waters" were those referenced in its second interpretation of the CWA, the Court found that section 404(g) could also mean only other waters that are adjacent to navigable waters. As a result, the Court refused to extend its *Riverside* definition of "navigable waters" to "isolated ponds, some only seasonal, wholly located within two Illinois counties." Any other holding, the Court argued, would make the term "navigable" meaningless when one considers that Congress relied on the Commerce Clause as its authority for enacting the CWA.

The final Corps argument addressed by the Court concerned the agency's right to deference to its reasonable interpretation of the CWA under *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.* It was the Corps' contention that section 404(a)'s scope as to nonnavigable, isolated, intrastate waters was not specifically addressed by Congress. Thus, the Corps argued that the Corps' migratory bird rule deserved deference under *Chevron*. The Court, however, found that section 404 was clear and that, even if it were not, the *Chevron* doctrine would not be applied in the present case. In order to support this contention, the Court noted that "where an otherwise acceptable construction of a statue would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

While acknowledging the possible aggregate effect on commerce of the destruction of migratory bird habitat, the Court struggled to reconcile the regulation of land that is habitat for migratory birds and the limitation of Corps jurisdiction to "navigable waters" in section 404. The concern stemmed from the fact that conferring jurisdiction over these ponds under the migratory bird rule "would result in a significant impingement of the States' traditional and primary power over land and water use." Consequently the Court found no evidence of congressional intent to "readjust the federal-state balance" and thus decided to read the statute to "avoid the significant constitutional and federalism questions" raised by the Corps' interpretation of its jurisdiction, and denied *Chevron* deference. Although the Court rejected the migratory bird rule for

determining the Corps' jurisdiction in this case, it is not clear whether its rejection applies only to a case such as this where the waters involved are not within the CWA's meaning of navigable waters, or applies to the rule itself.

In a strongly worded dissent, Justice Stevens lambasted the majority's finding that "navigability" is necessary for the Corps to have jurisdiction under the CWA. The dissent concluded that the CWA's "purpose of protecting the quality of our Nation's waters for esthetic, health, recreational, and environmental uses" redefines the scope of the Corps' jurisdiction to include all the waters of the United States. Citing *Riverside*, the dissent also contended that the Court already "crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes" so that the Corps' jurisdiction should not be limited to just those waters that are adjacent to navigable waterways. In contrast to the majority opinion, the dissent opined extensively on the power of Congress to grant such jurisdiction under the Commerce Clause.

In his analysis, Justice Stevens examined the history behind federal water regulation and found a doctrinal shift from protecting navigability to preventing degradation. Additionally he found the CWA's directive focus to be not on "unobstructed navigation" but on those improvements necessary for conservation. As a result, the dissent concluded that the statute's comprehensive goal demands expansion of its jurisdictional scope to "all waters of the United States." Consequently "activities regulated by the CWA have nothing to do with Congress's 'commerce power over navigation.'" The term "navigable waters" was then dismissed by the dissent as a "shorthand for 'waters over which federal authority may properly be asserted.'"

In probably the dissent's strongest reasoning Justice Stevens quoted language from *Riverside*, where the Court found that Congress did acquiesce to the Corps' expanded jurisdiction over wetlands and concluded that "the Court is wrong to reverse course today." Also agreeing as to the ambiguity of the language in section 404(g) the dissent contended that the majority ignored the legislative history behind the provision. Significantly, the legislative history references the Corps' jurisdiction over navigable waters until state programs are implemented to regulate "phase 2 or 3 waters." Justice Stevens noted that phase 3 waters include all other waters covered by the statute and thus can include the ponds in question. Accusing the majority of quoting out of context and selective reading, the dissent claimed that the majority ignored evidence of Congress's intent to extend federal jurisdiction to "isolated waters."

Justice Stevens further argued that just as the Corps' interpretation was given deference in *Riverside*, it should also be given deference here because "it is the majority's reading, not the agency's, that does violence to the scheme Congress chose to put into place." Additionally, the dissent claimed that environmental regulation had previously been held by the Court to not encroach upon a state's power to regulate land use. Therefore, as Illinois did not take advantage of its opportunity to regulate wetlands under section 404(g), there were no federalism concerns and thus the Corps' interpretation of the statute was reasonable and should be given deference.

Finally, the dissent specifically addressed the constitutional issue that the majority failed to reach: the propriety of the Migratory Bird Rule within the context of the Commerce Clause. Justice Stevens wrote that the causal connection between the loss of migratory bird habitat and the decline of commercial activities is "direct and concrete." Not only did the dissent label the protection of migratory birds a "well-established federal responsibility," but it concluded that "[t]he power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce." Essentially it is this sort of reasoning that allowed the dissent to find no merit in SWANCC's constitutional argument, one not even addressed by the majority's opinion. It is, however, the majority's strict construction of section 404 that prevails over the more environmentally-friendly position of the dissent.

Cynthia Morales

## VIII. National Historic Preservation Act and National Environmental Policy Act

### *Woodham v. Federal Transit Administration*, 125 F. Supp. 2d 1106 (N.D. Ga. 2000)

In this decision, the United States District Court for the Northern District of Georgia granted a motion to dismiss on the pleadings filed on behalf of the Federal Transit Association (FTA) and the Metropolitan Atlanta Rapid Transit Authority (MARTA). In 1984, FTA granted $3,870,756 to MARTA to acquire property for the development of the Lindbergh MARTA station. In 1997, the FTA granted MARTA $1,600,000 more, of which $1,000,000 was used to buy 9.6 acres of real estate surrounding the existing station. MARTA acquired 38.4 additional acres at the site with private money. The remaining $600,000 was used to develop proposals for a Transit Oriented Joint Development Plan.

On June 4, 1999, MARTA submitted its Joint Development Plan to the FTA for final approval. Under the terms of the Plan, MARTA proposed the development of office buildings, residential condominiums, and retail shops on the 9.6 acres of land that was purchased with federal money. This plan would allow MARTA to lease the acquired property to third party developers and retain the lease proceeds as income to fund future projects and lower general program costs. The FTA gave final approval, concluding that the plan fulfilled the requirements of its joint development guidelines. The plaintiff, John Woodham, asserted that the FTA's approval of the joint development plan violated the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and "regulations governing the disposition of property acquired with federal funds" under the Federal Transit Act. The FTA and MARTA moved to dismiss each cause of action by arguing that Mr. Woodham could prove no set of facts that would entitle him to relief.

First, the court analyzed the plaintiff's argument that the joint development plan proposed by MARTA and approved by FTA constituted a "major federal action" which required the FTA to execute NEPA's substantive and procedural requirements. The court noted that "the presence of federal funds does not necessarily transform a local project into a 'major federal action.'" Instead, it observed that "the distinguishing feature of federal involvement is the ability to influence or control the outcome in material respects." The court found that the FTA had no control or responsibility over the project proposed by MARTA because MARTA had developed the joint development plan using private money. The court further held that the FTA money originally used by MARTA to acquire the 9.6 acres surrounding Lindbergh station did not constitute a major federal action, especially where 38.4 acres were acquired with private money.

The court also noted that the FTA's final approval of the joint development plan carried no legal weight as to the determination of whether the Lindbergh project constituted a major federal action. In this case, the FTA's final approval consisted only of a review of whether the project satisfied "federal regulations governing the lease of federal property," and thus did not provide the FTA with sufficient discretion over the project to make it either major or federal.

The court relied on *South Bronx Coalition for Clean Air v. Conroy*, a recent New York district court case in which "the Metropolitan Transit Authority (MTA) sold a federally funded bus depot and used the proceeds to acquire a new facility." There, the district court dismissed the alleged NEPA violations on the grounds that the FTA's role was limited to providing funds for the construction of the bus depot and

concurring in the approval of the MTA's plan to use the proceeds for the construction of the new depot. Thus, the court in *South Bronx* concluded that because the FTA lacked sufficient control over the MTA's project decisions, NEPA did not apply.

Next, the court addressed the plaintiff's argument that the FTA's approval of MARTA's joint development plan violated the NHPA. The NHPA applies to federal agencies having jurisdiction over a proposed "federal or federally assisted undertaking" and federal agencies having authority to license any undertaking. The court found that federal financial assistance alone will not trigger the provisions of the NHPA. Rather, the court stated that in order for a federal agency to fall under the province of the NHPA, it must have a requisite amount of control or supervision over the spending of the federal funds.

The court began and ended its analysis by noting that the scope of jurisdiction under the NHPA was essentially co-extensive with jurisdiction under NEPA, and that prior case law had characterized the "undertaking" requirement of the NHPA as being coterminous with the "major federal action" requirement of NEPA. Thus, in its NHPA review of the FTA's activities in the Lindbergh project, the court found that the FTA lacked any control over the financial decisions of MARTA, and further that the FTA's approval was nothing more than a "'ministerial act' in which the FTA exercised no discretion." Consequently, the court held that the plaintiff's claim was not actionable and unsupported by the pleadings.

Finally, the court discussed the plaintiff's claim that MARTA violated the Federal Transit Act and its implementing regulations by "leasing federally funded property to third party investors." The Department of Transportation designed regulations to govern the use of federal funding under the Federal Transit Act, including the use and disposition of property acquired with such monies. These regulations require that real property obtained with federal funds must be used for its originally authorized purpose and that the grantee may not sell the land or encumber its title. The plaintiff argued that because MARTA had failed to use the property for its "originally authorized purpose" and instead had burdened the land with long-term leases, it must compensate the awarding agency in accordance with the Department of Transportation's regulations.

The court began its analysis by citing several of the implementing regulations that in fact encouraged grantees of federal funds to lease federal property to defray program costs and to incorporate private investment. The court determined that the provisions of MARTA's joint development plan that had authorized it to lease federal land to third

party investors and allowed it to use the proceeds as program funding were not in violation of the Federal Transit Act and instead fulfilled the intent of the Act.

The court also stated that MARTA's use of the Lindbergh property under the joint development plan followed its "originally authorized purpose." The court noted that Congress, in the Federal Transit Act, authorized the FTA to provide funding for "a mass transportation improvement that enhances economic development, including commercial and residential development." In this case, MARTA's joint development plan enhanced economic growth by encouraging transit use and by promoting the construction of condominiums, retail stores, and office buildings. The court thus held that the plaintiff had failed to assert a violation of the Federal Transit Act or its implementing regulations.

In sum, the court found that the plaintiff had not made allegations sufficient to support its three causes of action: violations of NEPA, the NHPA, and the Federal Transit Act and its implementing regulations. The motion to dismiss was therefore granted.

Dan Silverboard