RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. DUE PROCESS AND THE ADMINISTRATIVE PROCEDURE ACT

Foss v. National Marine Fisheries Service, 161 F.3d 584 (9th Cir. 1998)

On August 29, 1994, a commercial fisherman (the plaintiff) applied to the National Marine Fisheries Service (NMFS) for a federal individual fishing quota (IFQ) permit to fish halibut and sablefish in Alaska waters. The NMFS rejected the plaintiff's application as untimely because it was filed forty-five days after the July 15, 1994, deadline.

The plaintiff challenged the denial of the IFQ permit in the United States District Court for the Western District of Washington, claiming (1) that the NMFS violated his procedural due process rights; (2) that the regulation adopting a deadline for the IFQ application was arbitrary or capricious; (3) that he was entitled to equitable tolling of the application deadline; and (4) that the NMFS regulation violated the Administrative Procedure Act (APA). In response to this complaint, the NMFS moved for summary judgement. The District Court granted the motion, holding that

because the plaintiff had no property or liberty interest in the permit, he did not have a due process claim. The other claims were also rejected, and the plaintiff appealed.

First, the Ninth Circuit Court of Appeals addressed the plaintiff's due process claim. In order to have a legitimate due process claim, a plaintiff must show that he has a protectable liberty or property interest and that he was denied adequate procedural protections. Citing Ninth Circuit precedent, the court stated that permit applicants have a protectable property interest under the Due Process Clause, where the regulations establishing the right to a permit are mandatory in nature. Applying this rule to the facts of the case, the court found that the NMFS had no discretion in issuing IFQ permits because of the mandatory language of the NMFS regulation. Therefore, the court held that for purposes of procedural due process, the plaintiff had a protectable property interest in receiving an IFQ permit.

Having found that the plaintiff passed the first part of the procedural due process inquiry, the court then turned to the issue of whether the plaintiff received adequate procedural protections. The court applied a balancing test that weighted three factors: (1) a plaintiff's private property interest; (2) the risk of erroneous deprivation of such interest; and (3) the government's interest in maintaining its procedures. The court found that although the plaintiff had a substantial property interest ($850,000) in the IFQ permit, the plaintiff failed on the other two factors. The NMFS provided extensive notice and review procedures for the IFQ program and there was little risk of erroneous depravation of the permit. Thus, the court held that the plaintiff received sufficient notice and due process.

The plaintiff's second claim, that the regulation was arbitrary or capricious, was quickly dismissed. First, the court noted that when reviewing a regulation under the arbitrary or capricious standard, a court may only look to see if the agency has considered the relevant facts, and if there is a rational connection between the facts and the regulation. Examining the record, the court found that the NMFS had both considered all the relevant facts, and that the regulation establishing an application deadline was rationally related to those facts.

Agreeing with the district court, the appeals court also rejected the plaintiff's equitable tolling claim. The equitable tolling doctrine may be applied in two situations: (1) when the government's actions amount to "wrongful conduct" or (2) if the applicant is unable to meet a deadline because of "extraordinary circumstances." Here, the

plaintiff argued that he was misled by a government official during a conversation in December of 1992, where he was told that the IFQ program had been proposed, but was not imminent. The proposed rule was actually published in December 1992, and the final rule was later published in November of 1993. Given these facts, the court held that the equitable tolling doctrine was not applicable because this statement did not rise to the level of "wrongful conduct," and there were no "extraordinary circumstances" that prevented the plaintiff from making a timely application.

The appeals court also found no supporting evidence for the plaintiff's final claim that the NMFS rule was promulgated without notice or comment, in violation of the APA. In reality, the NMFS solicited public comment and the public commentary was extensive. Notice was printed in both the Federal Register and in industry publications. Furthermore, the NMFS sent IFQ applications to thousands of fishermen and conducted information workshops in both Alaska and Washington. After deciding the above issues, the Ninth Circuit dismissed this claim along with the others and affirmed the District Court's decision.

Mary Desmond

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998)

The defendant, Richard Sills (Sills), appealed from a judgment in the United States District Court for the Eastern District of New York that held him responsible for the "costs incurred from the cleanup of discharges of a cleaning solvent used in the operation of his dry cleaning business." Additionally, Sills appealed an order that denied his motion for a new trial on a damage allocation issue. Plaintiff, Bedford Affiliates (Bedford), the owner of the property on which the dry cleaners was located, cross-appealed from a judgment holding it liable for part of the clean up costs and denying recovery of attorney's fees.

Pursuant to the express terms of a lease assigned to the Manheimers' predecessors in interest, the lessee of Bedford's land was obligated to maintain it in compliance with federal and state laws, and the property was to be returned to the lessor "in good condition."

From 1962 to 1973, the property was subleased to several retail dry cleaning operators, and in 1973, RonGlen Cleaners (RonGlen) subleased the property. Sills managed and controlled the dry cleaning store's operations.

During RonGlen's tenancy, three releases of a hazardous dry cleaning solvent called Tetrachloroethylene (perc) occurred. First, in 1978, Sills received a letter from the Department of Health about leakage of perc through a dryer hose located in the back of the building. In response, Sills instructed the manager of the store to lay down copper tubing and run the perc into the city drain. The manager complied. The second incident occurred when a dry cleaning machine's handle broke and twenty-five gallons of perc spilled onto the floor of the store and flowed into a dirt trench. The store manager removed the contaminated soil and placed it in a dumpster. The final incident occurred when a defective gasket caused a dry cleaning machine to drip. Instead of shutting down the machine, RonGlen used it for two days before replacing the broken gasket. None of these instances were reported.

Since not one of the incidents was reported, Bedford lacked knowledge of any contamination on the property until late 1990. At that time, RonGlen vacated the location and assigned its sublease to D & L Cleaners of New York (D & L). D & L, in turn, hired an environmental consultant to investigate the property for pollution. After conducting tests, the consultant concluded that the soil and groundwater contained perc and suggested that Bedford notify the County Health Department and remove the contaminated soil.

Bedford did not contact the Health Department. Instead, in December of 1990, its attorney sent a letter to the Manheimers, notifying them of the contamination on the property, and the breach of their lease. Bedford demanded that the Manheimers clean up the property or risk eviction. The Manheimers continued paying rent to Bedford every month, but took no action to remedy the situation.

In mid-1992, Bedford finally terminated the lease. D & L remained in possession of the property and paid a "use and occupancy" fee directly to Bedford, and Bedford agreed to avoid interfering with D & L's business during Bedford's investigation of the property. While D & L was in possession of the property, Bedford negotiated with the New York State Department of Environmental Conservation (DEC) and agreed to clean up the property. Because the cleanup plan required that the property be vacant, Bedford brought an action in state court to evict D & L, who officially vacated the property in mid-December, 1993.

Bedford then hired Tyree Brothers Environmental Services, Inc. (Tyree) as its environmental contractor. For close to a year, Tyree excavated soil, and later found that substantial contamination had migrated outward from the initial releases of perc. Consequently, Bedford then submitted and implemented an interim remedial measure work plan to treat the contaminated soil and eliminate further groundwater contamination. The plan utilized an extensive soil vapor extraction system. Neither cleanup plan was subject to any public comment.

In January of 1995, Bedford filed an action in federal court to discharge some of its financial commitments for cleanup costs. The trial judge found that Bedford could not pursue a complete cost recovery claim, but it could establish a claim for contribution under section 113(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Since Sills was the actual polluter at fault, he was therefore responsible for ninety-five percent of Bedford□s clean up costs. Bedford was imputed five percent liability as the owner of the property, and the Manheimers were imputed five percent liability for their role as lessee. The Manheimers' liability, however, would only take effect if Bedford could not collect the entire amount owed by Sills. The court allowed Bedford to recoup the fees paid for the cleanup, but barred recovery of any legal fees, including those arising from Bedford's efforts to retake possession of the property prior to the cleanup. Additionally, the court held that future response costs would be awarded according to the aforementioned 95-5-5 apportionment.

On appeal, Sills argued that the district court erred on three grounds. First, the district court should not have found that Bedford had made out a prima facie claim under CERCLA. Second, it should not have apportioned liability under CERCLA. Third, it should not have granted the Manheimers' cross-claim for contractual indemnification without first piercing RonGlen's corporate veil.

In response to Sills' first argument, the appellate court held that the district court had correctly decided that Bedford could not pursue a cost recovery claim against Sills and the Manheimers, because whenever multiple parties are responsible, CERCLA imposes joint and several liability. One potentially responsible person can therefore never recover all of the response costs from similarly situated entities, since they themselves are not an innocent party. The court pointed out that CERCLA's language suggests that Congress wanted to give an innocent party the ability to sue for full recovery of its costs. On

the other hand, a party that was itself liable can only recover costs exceeding its pro rata share of the entire cleanup investment.

Accordingly, the court found that holding Bedford liable for five percent of its response costs due to past and present ownership of the property was soundly based in the Statute. Bedford, however, argued that it did not actually cause the contamination and was therefore eligible for complete cost recovery. The court was unpersuaded. Instead, it found that Bedford was ineligible for CERCLA's statutorily created affirmative defenses to liability, because it had a direct or indirect contractual relationship with Sills, and the contamination occurred in the course of that relationship. Similarly, Bedford acquired the property before the hazardous conditions arose. The court refused to create a broader defense because Congress itself chose not to create it.

Next, the court addressed the issue of whether or not CERCLA preempted Bedford's state law restitution and indemnification claims. After outlining the means by which federal law may preempt state law, the court ruled that CERCLA as a whole does not expressly preempt state law, but simply prohibits entities from "recovering compensation for the same removal costs or damages or claims under both CERCLA and state or other federal laws." Specifically, the court found that CERCLA "prohibits states from requiring contributions to any fund 'the purpose of which is to pay compensation for claims which may be compensated under CERCLA.'" The court also pointed out that instituting common law restitution and indemnification actions in state court would bypass CERCLA's settlement system and create a conflict between CERCLA and state common law causes of action. Accordingly, the court held that CERCLA preempts the state law remedies of restitution and indemnification.

Next, the court analyzed Sills' contention that Bedford was not entitled to recovery because it failed to establish a prima facie cause of action. Sills alleged that Bedford's failure to allow any public comment prior to initiating the property cleanup should completely preclude recovery of response costs. The court pointed out that the EPA did not wish to create a rigid requirement, but rather wanted to enforce a case-by-case balancing approach in evaluating the cleanup effort as a whole. According to the court, the public comment provision was flexible. Additionally, the court paid close attention to the fact that the DEC had been actively involved in the cleanup of the property since Bedford negotiated its first consent order. It went so far as to declare the government's extensive involvement a substitute

for public comment. Consequently, Bedford had established a prima facie case for contribution despite its lack of public comment.

Next, the court addressed the issue of the district court's apportionment of CERCLA liability. The court found that CERCLA's expansive language afforded the courts broad discretion to "balance the equities in the interests of justice." Accordingly, the appellate court would not overturn the district court's determination absent an abuse of discretion. Without much analysis, the court concluded that the attribution of ninety-five percent of the cleanup costs to a sublessee and five percent to the owner was not an abuse of discretion.

The court then addressed Bedford's request for attorney's fees incurred in connection with its action to obtain possession of the property at issue. The court conceded that CERCLA normally does not provide for the award of private parties' attorney's fees, but then redefined the issue in this case as whether the attorney's fees that Bedford incurred to regain possession of the property and begin cleanup were so "closely tied to the actual cleanup" that they qualified as response costs. The court remanded this issue to the district court.

Finally, the court addressed the Manheimers' cross-claim against Sills for contractual indemnification. The court contended that certain individuals can be held personally liable under CERCLA for acts of their corporations without performing a preliminary veil-piercing. On the other hand, the court found that, before holding an individual personally liable under New York common law, a court must first pierce the corporate veil. Since the district court imposed personal liability on Sills pursuant to the Manheimers' state contractual indemnification claim, the requisite veil-piercing had to be performed. In its veil-piercing analysis, the appellate court ultimately found that the district court lacked the necessary facts to support veil-piercing. While it was clear that Sills dominated and controlled RonGlen, there was no evidence that Sills' domination led to the property's contamination. Consequently, the contractual indemnification award was vacated and remanded to the district court for reconsideration of the second element of the veil-piercing analysis.

Julia C. Haffner

Uniroyal Chemical Co. v. Deltech Corp., 160 F.3d 238 (5th Cir. 1998)

This litigation arose from the rupture of a tanker truck leased by Safeway Transportation, Inc. (Safeway) from TMI Enterprises (TMI). The truck ruptured while parked at a TMI facility and subsequently released twenty-one tons of a mixed compound, manufactured in part by Uniroyal and in part by Deltech, into the surrounding environment. Uniroyal was the only party to respond to the State's request for emergency action to remedy the spill. After the other parties refused reimbursement, Uniroyal filed suit under CERCLA against TMI and Safeway in the United States District Court for the Middle District of Louisiana to recover the costs it had incurred in responding to the rupture.

Uniroyal raised two separate issues of statutory construction on appeal to the Fifth Circuit from the district court's ruling in favor of the defendants. The first issue was whether Uniroyal had established that the defendants were "responsible persons" under the statute, a necessary element of a private cost-recovery action under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), section 9607(a)(1). In resolving this issue, the court noted that "a disposal requirement" is contained in three out of the four classes of responsible persons as defined in section 9607(a)(1)-(4). The defendants argued that the disposal of hazardous waste is an inherent requirement for bringing a claim under section 9607(a)(1), and as such, Uniroyal could not satisfy its burden since there was no evidence of waste disposal in this case. Since there is not a single reference in section 9607(a)(1) to a "disposal," unlike in the three other classes of responsible persons in sections 9607(a)(2)-(4), the court was obliged to adhere to the clear intent of Congress and concluded that neither the overall statutory scheme of CERCLA, nor the legislative history of the statute, nor the case law supported the defendants' vigorous contentions.

After holding that the express language of section 9607(a)(1) imposes liability on the owner or operator of a CERCLA facility without requiring a disposal, the court then moved to the second issue of whether Uniroyal had successfully proven the existence of a CERCLA facility, as defined in section 9601(9). The court concluded that Uniroyal had satisfied this requirement because the release from the tanker truck did not fall under the "consumer product exception" within section 9601(9) which operates to bar CERCLA liability. The court held that the exception was not applicable because neither the

tanker truck loaded with industrial chemicals, nor the trucking terminal could constitute a consumer product in consumer use. Because the phrase "consumer product in consumer use" is provided in the language of section 9601(9), but is not defined anywhere in CERCLA, the court turned to the legislative history of the Act and the Environmental Protection Agency's interpretation of the exception, both of which support an ordinary interpretation of the term consumer product to mean "any good normally used for personal, family, or household purposes, which was being used in that manner when the subject release occurred." Since this definition could not apply to either the truck or the terminal, both were qualified as facilities under CERCLA, and therefore, Uniroyal had successfully established this element as well.

The Fifth Circuit vacated the decision of the district court granting summary judgment in favor of defendant trucking company and remanded the action for further proceedings consistent with its opinion.

Whitney Pitkanen

III. CLEAN WATER ACT

Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923 (5th Cir. 1998)

In January 1997, the Environmental Protection Agency (EPA), pursuant to the Clean Water Act (CWA), promulgated a series of final effluent limitation guidelines (ELG) and General Permit requirements for the coastal oil and gas producing industry. Eighteen petitioners, comprising of several oil and gas companies, the State of Texas, the Railroad Commission of Texas, and environmental groups from six consolidated actions, sought review to challenge the EPA's ELG zero discharge limit on produced water and sand discharges as arbitrary and capricious under the Administrative Procedure Act. The oil and gas companies complained that the EPA's zero discharge limit was generally too stringent. The environmental groups, on the other hand, challenged the EPA's separate decision that allowed a more lenient ELG standard for facilities located at Cook Inlet, Alaska without designating it as a separate coastal subcategory.

Produced water and produced sand are byproducts brought up during the production phase of oil and gas well drilling. This water and sand contains toxic pollutants like phenol, benzene, naphthalene,

ethylbenzene, toluene, and various toxic metals and organics. In 1992, the EPA examined the various types of control technologies available to coastal operators in Texas and Louisiana and determined that a re-injection process was already widely practiced throughout the industry and this practice resulted in a zero discharge rate. Of the 876 coastal subcategory facilities, some sixty-two percent of the facilities along the Gulf Coast had already been using the re-injection process and had obtained a zero discharge rate by 1994. Based on these findings, the EPA adopted zero discharge rates for the entire coastal subcategory, except for the Cook Inlet area. The EPA concluded that because of the different geography, the particular circumstances, and the substantially higher cost as compared with the rest of the coastal subcategory facilities, the Cook Inlet facilities should therefore not be held to the same zero discharge standard.

In promulgating ELGs, in accordance with the CWA, the EPA must use progressively more stringent technological standards in setting discharge limits and must further set limits according to the best available technology (BAT) where economically feasible across a category or subcategory as a whole. BAT is the CWA's most stringent standard and is based on the performance of the single best performing plant in the industrial field. In the present case, the EPA incorporated the zero discharge limit into the ELG and into the General Permit because most of the 876 facilities in the coastal subcategory were already using the re-injection process. Thus, most facilities would either have already stopped discharging produced water by 1997, or would stop shortly thereafter. The remaining facilities, other than the Cook Inlet facilities, would not be forced to entirely close down because of the zero discharge limit, but rather would simply incur minor additional costs to comply with the higher BAT zero discharge standard already substantially complied with throughout the subcategory.

The court ruled that the EPA's policy choice to implement the zero discharge limit conformed to the minimal standards of rationality and the EPA provided a sufficient record to support that choice. Petitioners had an especially difficult presumption to overcome given the proportion of oil and gas subcategory dischargers already practicing zero discharge at the time of the EPA rulemaking. Therefore, the court deferred to the EPA's decision. The decision rested on an evaluation of complex scientific data within the Agency's technical expertise. Similarly, the court held that the EPA's choice to set different limits within a subcategory was a rational choice between conducting administratively burdensome and time-consuming re-

categorization and making an administratively efficient and rational exception to the established categorization scheme. In sum, the court concluded that the EPA did not abuse its discretion when it adopted the near industry-wide zero discharge limit and similarly did not act contrary to the intent of the CWA when it set separate limits on produced water and sand wastes in Cook Inlet.

Kamron A. Keele

IV. FALSE CLAIMS ACT

United States v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998)

In May of 1995, Jonathan Stevens brought a qui tam suit under the False Claims Act (FCA) in the United States District Court for the District of Vermont, claiming that the Vermont Agency of Natural Resources (Agency) had falsely reported the wages and hours of employees working on federally-funded water projects. The State of Vermont filed a Motion to Dismiss, arguing that the State does not fall within the categories of "person[s]" held liable for fraudulent claims under the FCA and, in the alternative, that the Eleventh Amendment of the U.S. Constitution gives the State immunity from the FCA suit. The District Court rejected the State's arguments and denied the Motion to Dismiss. The Agency appealed the dismissal, and the United States Court of Appeals for the Second Circuit affirmed.

Section 3729 of the FCA holds "any person" who makes false monetary claims civilly liable for damages incurred by the United States Government. This provision may be enforced in either a civil suit brought by the Attorney General of the United States or a qui tam suit brought by a private person on behalf of the U.S. Government. Even though a private person may bring suit under the FCA, the U.S. Government can take control of the suit or largely influence the suit. States, as private persons, have been allowed in the past to bring qui tam suits under the FCA. The term "person" is not defined by the FCA.

The court first addressed the Eleventh Amendment issue. The Eleventh Amendment has been interpreted as prohibiting a citizen from suing his own state unless the state gives its consent to the suit. The court held that this type of sovereign immunity does not apply to FCA suits brought by private citizens. This is because FCA suits are essentially suits brought by the United States, due to the substantial

interest the United States retains, and states do not have immunity against suits brought by the United States.

The court then determined whether the State was a "person" that could be held liable under the FCA. The State argued that absent clear congressional intent to impose liability on the states, states should not be subject to liability. This is called the "plain statement" rule. The court rejected this test, noting that the "plain statement" rule only applies to statutes which invade a state's traditional role and upset the balance between the federal and state governments. The FCA does not impede upon a state's traditional role because it is only attempting to protect federal funds.

In order to determine the scope of the FCA, the court turned to the use of the statute, the context in which the statute was created, and the legislative history to determine whether states are included within the definition of "person." It found that both the courts and Congress consider states to be persons, for purposes of bringing suit under the FCA. The court noted that unless there was evidence to the contrary, the definition of "person" should be interpreted the same, regardless of whether the "person" is the "person" bringing the qui tam suit, or the "person" being sued.

To determine whether or not there was any evidence to the contrary, the court turned to the legislative history of the FCA. The legislative history supports the inclusion of states in the definition of "person." The FCA was created in part because state officials in charge of obtaining military supplies were defrauding the federal government and it was generally designed to provide broad protection to the U.S. Treasury from fraudulent claims. Therefore, the court held that states are included in the definition of "person[s]" held liable under the FCA and the FCA could be enforced against the State.

After finding that neither the Eleventh Amendment nor the scope of the FCA prohibited bringing suit against the State, the Second Circuit affirmed the decision of the United States District Court for the District of Vermont.

Kaiulani S. Lie

V. NATIONAL ENVIRONMENTAL POLICY ACT

Morongo Band of Mission Indians v. FAA, 161 F.3d 569 (9th Cir. 1998)

The Ninth Circuit Court of Appeals denied the Morongo Band of Mission Indian's petition for review of a decision by the Federal Aviation Administration (FAA) to implement its airport arrival enhancement project. The project, designed to increase safety and efficiency in the face of the increasing volume of arrivals at the Los Angeles International Airport, included moving an existing arrival route eight miles south, near the Morongo Reservation. The Morongo Band of Mission Indians (the Tribe) objected to the potential noise impact of the project and challenged the FAA's approval of the new route under the National Environmental Policy Act (NEPA), the National Historic Preservation Act, section 4(f) of the Transportation Act, and various FAA regulations.

Initially, the Tribe argued that the FAA failed to properly exercise its fiduciary responsibility to Indian Tribes. The Ninth Circuit acknowledged that such a duty exists for agencies of the federal government, but stressed that the responsibility is satisfied "by the agency's compliance with general regulations and statutes not specifically aimed at protection of Indian tribes."

The Tribe further claimed that the FAA violated NEPA in several respects. First, the Tribe argued that the FAA had not "rigorously explored and objectively evaluated all reasonable alternatives" as required by NEPA. However, agencies are allowed to set their own "parameters and criteria" for generating alternatives. Since moving the proposed arrival route either north or south would have either precluded the definition of a new airspace sector or conflicted with existing departure and arrival routes, the Ninth Circuit found that the FAA had adequately explored the alternatives.

Second, the Tribe argued that the FAA had violated NEPA by inadequately evaluating the potential noise impact. Specifically, the Tribe claimed that the FAA mischaracterized existing noise levels at the reservation by not monitoring actual noise levels on the reservation. The FAA measured noise levels in rural Phoenix and in remote locations of the Grand Canyon. The court found that the Tribe made no showing to establish that the FAA's decision to use a noise level derived from these measurement's was arbitrary or capricious.

The Tribe further asserted that using urban noise levels as a threshold with which to evaluate noise impact was inappropriate

because the Reservation is in a rural area. The FAA justified this level by stating that even areas with lower-than-urban background noise, such as the Morongo Reservation, would experience marginal adverse effects by the noise generated by the proposed arrival route. The Ninth Circuit found that the FAA had performed a detailed analysis of the estimated impact of the new route and that the Tribe had failed to establish that the methodology used in the FAA was arbitrary or capricious.

Third, the Tribe argued that the FAA had a duty to consider single-event noise levels rather than average daily noise levels because of the "sensitive cultural and religious uses of the land." However, since the Tribe offered nothing to support the existence of such a duty, the court found that the FAA's use of average daily noise levels was similarly not arbitrary or capricious.

Finally, the Tribe claimed that the FAA violated its own regulations that require an EIS to be prepared if the project "is determined not to be reasonably consistent with the plans or goals that have been adopted by the community in which the property is located." The court rejected this argument and countered that NEPA's concern is with the process, not with substantive results. The court stated that while "the Tribe may be unhappy with any increase in noise that interferes with its traditional practices," it did not show any inconsistencies between the project and the "plans or goals of the community." The court then rejected all of the Morongo Band's non-NEPA claims and denied its petition for review.

Bruce Moses