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I. ENDANGERED SPECIES ACT

Environmental Protection Information Center
v. Simpson Timber Co.,
255 F.3d 1073 (9th Cir. 2001)

In this case, the Ninth Circuit Court of Appeals determined that plaintiff environmental group, Environmental Protection Information Center (EPIC), had standing to challenge the Fish and Wildlife Service's (FWS) failure to consult regarding the effect of an incidental take permit issued to the Simpson Timber Company (Simpson) on two threatened species, the marbled murrelet and the coho salmon. However, the court of appeals found that because the FWS did not retain discretionary involvement over the take permit, reinitiation of consultation under Section 7(a)(2) of the Endangered Species Act (ESA) was not warranted.

In 1992, Simpson initially obtained an incidental take permit pursuant to Section 9 of the ESA authorizing it to take some northern spotted owls on timber lands owned by the company in Northern California. As part of the conditions of the permit, Simpson submitted a Habitat Conservation Plan (HCP) detailing the measures that would be undertaken to minimize the impact of logging on the owl as well as outlining the ongoing reporting and monitoring procedures the company would make to the FWS. In the years following the issuance of the take permit, both the marbled murrelet and the coho salmon were listed as threatened and were found to inhabit Simpson's timberland. Plaintiffs sought an injunction to stop logging activities on the land until the FWS had reinitiated consultation over the two newly listed species. The district court granted Simpson's motion to dismiss the complaint for failure to state a claim and found that the FWS had not retained the necessary federal involvement over Simpson's incidental take permit to require it to take steps that would, in effect, benefit the murrelet and the salmon species.

On appeal, the Ninth Circuit held EPIC did have standing to enforce the substantive provisions of the ESA against the FWS to ensure that a federal agency did not authorize any action likely to jeopardize a threatened species. The court found defendant's argument that the ESA's citizen suit provision did not apply to claims of defective administration by a governmental agency without merit, stating that "citizen suits are a permissible means to enforce the substantive provisions of the ESA against regulated parties—including government agencies like the FWS in its role as the action agency."

Furthermore, the court of appeals emphasized that plaintiffs also had standing under the Administrative Procedure Act (APA). EPIC's complaint alleged a procedural violation of Section 7(a)(2) of the ESA and therefore triggered review under the APA to determine whether the agency's actions were "arbitrary and capricious" and "not in accordance with procedures required by law." The court found that EPIC sought to protect interests that clearly fell within the "zone of interests" of Section 7 of the ESA because, as a nonprofit organization dedicated to the protection of threatened species, plaintiffs had a demonstrable interest in ensuring the FWS's compliance with the procedural mandates of the ESA.

The court next addressed whether the FWS had a duty to reinstate consultation as to the effect of Simpson's logging activities on the two species listed as threatened since the original take permit was issued. Pursuant to Section 7(a)(2), federal agencies are required to determine whether any action taken "may affect an endangered or threatened species." 50 C.F.R. § 402.14(a) (2000). If so, the agency is then required to initiate formal consultation with either the FWS or the National Marine Fisheries Service (NMFS). The duty to consult may be ongoing and must be reinstated where:

discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion;
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16 (emphasis added).

The court of appeals looked to its decision in *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (*Sierra Club*), as controlling precedent under the factual context of EPIC's claim. In *Sierra Club*, the court determined that the Bureau of Land Management (BLM) did not have a duty to consult with the FWS regarding the potential impact of a timber company's proposed road on a newly listed species because the BLM only retained involvement over the right-of-way agreement with the company in limited instances—none of which were related to the impact

on the listed species. The court distinguished EPIC's claim from that of plaintiffs in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (*Pacific Rivers*), where the Forest Service had established long-range management plans representing "on-going agency action" that would make reinitiation of consultation under Section 7(a)(2) necessary. Whereas in *Pacific Rivers* the Forest Service exercised plenary control over the take permit in promulgating and implementing comprehensive forest management plans on the land, in the present case, "Simpson's ESA section 10 permit, like the right-of-way agreement in *Sierra Club*, involves agency authorization of a private action and a more limited role for the FWS." Accordingly, the issue of discretionary agency involvement depends on whether the agency has maintained enough control to "implement measures that inure to the benefit of the protected species."

Plaintiffs next argued that provisions of Simpson's HCP required the company to modify timber activities, where appropriate, to be compatible with the habitat requirements of other species found on that land and considered in danger by regulatory agencies. Consequently, plaintiffs asserted, Simpson would be required to benefit both the marbled murrelet and the coho salmon under the terms of its take permit. The court of appeals disagreed and found that the provisions of the HCP meant only that the timber company had to protect other *currently* listed species—not species that might become threatened or endangered at a later time. Based on its interpretation of Simpson's HCP, the court concluded that the FWS did not retain any discretionary involvement to enact measures protecting newly listed species on the permit lands and could therefore not be required to reinitiate consultation over the marbled murrelet and the coho salmon.

The court also pointed to a number of provisions in the Implementation Agreement (IA) authorizing the FWS to review compliance by Simpson with various conservation plans and to seek additional information related to the company's actions as they affect species on the permit lands. Although the FWS was able to review and implement corrective measures and establish guidelines for Simpson under the terms of the agreement, nothing in the IA expressly permits the FWS to act to benefit the two newly listed species. The FWS's powers are largely confined to remedying breaches of the permit and do not extend to demanding "additional measures to protect new species."

The court also distinguished its holding from that in *Houston v. Natural Resources Defense Council*, 146 F.3d 1118, 1126 (9th Cir. 1998) (*Houston*), in which it found that because the Bureau of Reclamation

(Bureau) continued to negotiate and execute contracts with a private water supplier, this constituted “agency action” requiring reinitiation of consultation by the Bureau. The fact that the agency in *Houston* ultimately had the power to decrease the total supply of water available—thereby decreasing the amount granted in renewed contracts—meant that the Bureau had retained the necessary discretionary control over the action. However, the court emphasized that “[w]e did not suggest in *Houston* that once the renewed contracts were executed, the agency had continuing discretion to amend them at any time to address the needs of endangered or threatened species.” Similarly, the FWS was empowered to monitor Simpson’s compliance with the terms of the permit but could not amend the permit substantively to provide for protection of the newly listed species.

Finally, plaintiffs argued that 50 C.F.R. § 13.23(b) (2000) allows the FWS to “amend any permit for just cause during its term, upon written finding of necessity” and that as a result, the FWS had the discretionary authority to act to benefit the marbled murrelet and the coho salmon. The court also rejected this argument, stating that plaintiffs’ interpretation of the regulation would mean that sufficient discretionary involvement to assess impacts on newly listed species is always reserved—in effect making the determination of “discretionary Federal involvement or control over the action” under 50 C.F.R. § 402.16 superfluous.

In his dissent, Judge Nelson criticized the majority’s creation of a “new requirement that the agency explicitly reserve the right to implement measures to protect new species in the permit.” The dissent asserted that the plain language of 50 C.F.R. § 402.16 does not specify the nature of the agency’s discretionary control for the consultation requirement to be triggered. Moreover, the dissent argued that even under the more stringent test established in *Sierra Club*, the FWS still has the duty to consult based on the mitigation measures promised by Simpson in the HCP. “Because FWS retains power to amend Simpson’s permit for just cause or suspend the permit if Simpson does not design its timber harvesting in such a way as to mitigate damage to other threatened species, consultation could obviously lead to measures that benefit the coho salmon or marbled murrelet.”

Judge Nelson emphasized that Simpson negotiated the terms of its permits expressly by promising to mitigate harm to the spotted owl as well as other species of concern. In doing so, Simpson obtained a substantial benefit in exchange for these promises—the right to take spotted owls in the process of its timber harvesting activities. According

to the dissent, the majority incorrectly substituted an additional requirement into the regulation that such parties would have to foresee the specific purposes for which discretionary control might be exercised to benefit a new species. The implementing regulations of Section 7 impose an ongoing duty on the FWS to insure that Simpson's actions do not jeopardize the threatened species. "We cannot ignore these provisions without in some way violating the bargain. To hold otherwise would rewrite the permit and give a windfall to Simpson in the form of extra assurances that were not bargained for in the original agreement."

Amy Stengel

Center for Biological Diversity v. Norton,
262 F.3d 1077 (10th Cir. 2001)

For appellant, Center for Biological Diversity (Center), this case presents a souring of a previous triumph. Such a result stemmed from the Center's endeavor to have the Arkansas River shiner (the shiner) listed as an endangered or threatened species pursuant to the Endangered Species Act (ESA). Initially, the Center sought injunctive relief requiring the Secretary of the Interior to take a final agency action on listing the shiner. When the Secretary did in fact identify the shiner as a threatened species, thereby rendering this action moot, the Center then filed a motion for litigation costs, including attorneys' fees. Ultimately, the United States Court of Appeals for the Tenth Circuit held that it was not entitled to such an award, and thus, the Center was left to recite the old sports colloquialism: "In victory comes defeat."

On August 3, 1994, the Secretary published, in the Federal Register, a notice of proposed regulation to list the shiner as an endangered species. In this proposal, the Secretary found that the critical habitat designation for the shiner was not determinable, thus instigating a two-year period in which she was required to find a final critical habitat. As the Center saw it, a final agency action listing the shiner should have been promulgated on August 3, 1995, and a final action concerning the critical habitat designation should have been issued no later than August 3, 1996. However, on April 10, 1995, a congressionally-imposed one-year moratorium precluded the Secretary from making final determinations as to whether a species was threatened or endangered. This was not lifted until April 26, 1997, creating a backlog of more than 240 proposed listings.

As of February 1998, no action had been taken on the shiner or its critical habitat and the Center initiated suit seeking injunctive relief

requiring the Secretary to take final action on both: the proposed rule to list the shiner as endangered, and the designation of its critical habitat. Ultimately, in the midst of litigation, the Secretary issued a final rule listing the shiner as threatened and determined that the designation of its critical habitat was not practical. Accordingly, on December 7, 1998, the Center and the Secretary entered into a Joint Stipulation of Dismissal. The Center then initiated the present matter seeking litigation costs, including attorneys' fees. The district court below denied the Center's motion.

At issue in this case is whether the Secretary's determination of the shiner's status was under her own cognizance, or was rather incited by the Center's lawsuit. Under the ESA, a court may award litigation costs, including attorneys' fees, in citizen suits "whenever the court determines such an award is appropriate." 16 U.S.C. § 1540(g)(4). However, in the present matter, there was no final adjudication on the merits of the Center's initial claim for injunctive relief as the Secretary listed the shiner and ruled on its critical habitat designation during the course of litigation. With this, the court reiterated its ruling in *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477 (10th Cir. 1995), when it held that a party seeking attorneys' fees under a statute that allows such fees to be awarded when "appropriate" must also demonstrate that their action was the "catalyst behind the change in the defendant's conduct." In doing so the court acknowledged that it had never applied the "catalyst test" to fees requested pursuant to the ESA before, but was willing to do so without ruling on its applicability because both the Center and the Secretary advocated the test's use.

In *Powder River Basin Resource Council*, the court created a two-prong test to determine whether the claimant's action was the catalyst that spurred the defendant to act, i.e., (1) the lawsuit must be "causally linked to securing the relief obtained," and (2) that the defendant's subsequent response was required by law. Both parties agreed that the Secretary was indeed required by law to take action on the proposed listing of the shiner and the determination of its critical habitat, therein conceding the satisfaction of the second prong. Thus, the only issue before the court in the present case was whether the Center's suit was the impetus behind the Secretary's final action; or rather, was it "causally linked to the relief obtained."

At the onset of its analysis, the court, arguably, ratcheted up the stringency of the catalyst test as it held that the showing of a "causally linked" relation was not enough. Rather, the Center "must demonstrate that its suit was a substantial factor or significant catalyst prompting the Secretary's action." Thus, the court distinguished between something

that might be a causal link and something that was the “only reason” for the final action. With this in mind, the court then began to entertain the Center’s arguments advocating a causal link.

The Center relied exclusively on the chronology of events leading up to the Secretary’s final decision on the status of the shiner. Specifically, the Center illustrated the fact that the Secretary had failed to make a decision on the shiner until after it had initiated litigation and nearly three years after the publication of the proposed rule. It was only when the complaint was filed that the Secretary identified a tentative date by which the final decision on the shiner would be issued. This alone, the Center argued, was evidence that the designation of the tentative date “clearly came as a result of [its] lawsuit.” Finding the Secretary’s arguments more persuasive, the court dismissed the Center’s chronological contentions.

The Secretary tethered her arguments to a declaration and its attachments executed by Jamie Rappaport Clark, the Director of the United States Fish and Wildlife Service. Director Clark’s declaration was issued on April 2, 1999, in opposition to the Center’s motion for litigation costs. It chronicled evidence of work being done on the shiner issue well before the Center filed its lawsuit and stated that the tentative date was not “altered or accelerated in response to the lawsuit.” Corroboration of this assertion was also found by the court in a memorandum dated February 2, 1998 and supplemented to Director Clark’s declaration. This memorandum was prepared before the Center filed its suit and provided that a draft of the final rule with respect to the shiner would be available by May 29, 1998. However, this draft was not actually submitted until July 19, 1999. The court ruled that this delay in submitting the draft of the proposed final rule “undermines the Center’s assertion that its lawsuit accelerated agency action on the shiner.”

In a seemingly last breath attempt, the Center argued that the district court committed a legal error, as it required the Center to produce a “smoking gun,” or direct evidence of a causal link, in addition to the chronology of events. The court, however, dismissed this claim and ruled that “[t]he evidence before the district court sufficiently supported the court’s conclusion that the Center failed to produce even a supporting chronology.” Thus, while witnessing the listing of the shiner, the Center did not receive an award of litigation fees for its efforts, as it did not prove that its action was “causally linked” to the final agency decision.

Will Binder

II. CLEAN WATER ACT & NPDES PERMITS

Piney Run Preservation Ass'n v. County Commissioners of Carroll County, Maryland et al.,
263 F.3d 255 (4th Cir. 2001)

In *Piney Run Preservation Ass'n v. County Commissioners of Carroll County, Maryland*, the Court of Appeals for the Fourth Circuit set new precedent by holding that the holder of a National Pollutant Discharge Elimination System (NPDES) permit may legally discharge any pollutant in any amount so long as emissions of the particular pollutant are not specifically limited by the permit, and the discharge does not exceed the “reasonable contemplation of the permitting authority at the time the permit was granted.” In so doing, the court concluded that language in the permit providing that “discharge of pollutants not shown shall be illegal” did not prohibit the discharge of pollutants that were disclosed during the application process, but not expressly permitted.

The Petitioner and Defendant, the County Commissioners of Carroll County, Md. (Commissioners) held an NPDES permit, (issued by the Maryland Department of the Environment (MDE)), for the operation of a wastewater treatment plant. The effluent stream from this plant was dumped into a small stream called Piney Run—a water designated “Class III-P” under Maryland law. This classification means that the water is a source of public drinking water and can support a self-sustaining trout population.

The Respondent and Plaintiff, Piney Run Preservation Association (Piney Run), is an organization of citizens concerned with preserving Piney Run. At least one of its members, Ms. Dorothy Rowland, owned property bisected by Piney Run. Ms. Rowland claimed that an increase in the concentration of green algae in the waters of Piney Run had negatively impacted her aesthetic experience. Piney Run claimed that this increase resulted from unpermitted thermal discharges from the Commissioners’ plant. While heat is listed as a “pollutant” under the Clean Water Act, 33 U.S.C. § 132(6) (1994), the permit itself did not specifically limit, or bar, its discharge. However, a footnote to the list of permitted pollutants in the permit provided that “discharge of pollutants not shown shall be illegal.”

The district court held that the Commissioners violated their permit anytime their discharges exceeded 20° Celsius, the temperature established in the Maryland State Water Quality Standards as the maximum allowable for Class III-P waters. In so doing, the court did not

decide the applicability of the footnote, holding instead that thermal discharges above that level would be illegal regardless of whether the permit prohibited the discharge of heat or not. (The Fourth Circuit's opinion states that the district court had in fact held that the permit itself did not bar the discharge of heat. However, the district court clearly made no ruling on this subject). The district court found that the Commissioners had violated this 20°C heat standard on 290 occasions and fined them \$400,000 plus costs and attorneys' fees for Piney Run. The Fourth Circuit reversed and remanded for entry of judgment in favor of the Commissioners.

The Fourth Circuit began by holding that Piney Run had standing to bring the case. It did so on standard aesthetic injury grounds, agreeing with the district court that Ms. Rowland had suffered a concrete "injury in fact" fairly traceable to the conduct of the Commissioners. It reaffirmed its own precedent that "fairly traceable" only requires that the plaintiff "show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged." It further agreed with the district court that the Piney Run Preservation Association had proper association standing to bring the claim on her behalf.

The court then turned to the question of whether the Commissioners had violated the terms of their permit. It began this section with a brief recitation of the history of the Clean Water Act, contrasting that Act's prohibitive approach with the water quality standard approach of the Water Pollution Control Act of 1948 and the Water Quality Act of 1965. It noted that the current default rule under the Clean Water Act, 33 U.S.C. § 1311(a), is that all discharge of pollutants is prohibited. The primary exceptions to this are the so-called "permit shield" provisions of § 1342(k), which allow discharges made pursuant to a valid NPDES permit. The question in the instant case, as the court saw it, is whether a permittee violates its permit when it discharges pollutants reported to the permitting agency but not explicitly limited in the permit.

To answer this question, the court applied *Chevron U.S.A., Inc v. National Resources Defense Council*, 467 U.S. 837 (1984), in which a court looking for the proper construction of a statute must first look to the terms of the statute itself. If the terms are not clear the court must accept any reasonable agency determination that occurred as a result of notice-and-comment rulemaking. The Fourth Circuit concluded that the terms of the Act's permit shield provisions are not sufficiently clear to decisively answer the question. Therefore, it turned to a formal adjudication proceeding, *In re Ketchikan Pulp Co.*, 7 E.A.D. 605 (EPA 1998), 1998 WL 28494, in which the EPA decided that, "when the

permittee has made adequate disclosures during the application process regarding the nature of its discharges, unlisted pollutants may be considered to be within the scope of an NPDES permit, even though the permit does not expressly mention those pollutants.” Based on this language, the Fourth Circuit concluded that the Commissioners would be in violation only if the permit specifically limited or barred the heat discharges or if the heat discharges were not adequately disclosed to the permitting authority.

In deciding whether heat discharges were barred by the permit, the court was primarily concerned with the language of the footnote mentioned above, which barred the “discharge of pollutants not shown shall be illegal.” Piney Run claimed that this should be interpreted according to its plain language, that all pollutants not listed may not be discharged in any quantity. The Commissioners suggested that the language should be read as prohibiting discharge only of pollutants not properly disclosed to the MDE. The Court treated this as a question of contract interpretation, which it reviews *de novo*.

The court first determined that the seemingly plain language of the footnote was actually ambiguous because it was not clear whether it applied only to the pollutants “shown” in the permit, or to all pollutants “shown” to MDE during the permitting process. The court apparently disregarded the fact that the footnote is actually attached to the list of pollutants expressly allowed by the permit, because this fact plays no part in its analysis. Instead, the court looked at the permit and the permitting process as a whole and concluded that the provision banned only those discharges not adequately disclosed to MDE during the permitting process.

In support of this holding, the court noted that the permit anticipates that the plant’s discharges would change over time. For example, the permittee is required to submit a new permit application at least 180 days prior to any “new, different, or increased discharge of pollutants,” unless the increase will not result in a violation of a specific effluent limitation in the permit. The court concluded from this provision that the primary purpose of the permitting process is to notify the regulating agency of the amount and nature of discharges so it can maintain water quality standards. The court further concluded that this purpose is served by adequately informing the regulating agency of the nature and amount of the discharge. Therefore, the court extended the permit shield to the discharge of all pollutants properly disclosed to the permitting authority without regard to whether each is discussed in the resulting permit. The court did not support the other possibility of barring the discharge of

statutory pollutants, even in infinitesimal amounts, unless these discharges were expressly permitted. The court did not acknowledge that the default rule set out by Congress in the Clean Water Act § 1311(a) *does* prohibit the discharge of pollutants, even in infinitesimal amounts, unless expressly allowed by permit.

The court finally concluded that the Commissioners adequately informed the MDE of its potential heat discharges and that its actual discharges were within the contemplation of the permit. On these grounds, it reversed and remanded for judgment in favor the Commissioners.

Ben Demoux

Sierra Club v. Whitman,
268 F.3d 898 (9th Cir. 2001)

In this decision, the United States Court of Appeals for the Ninth Circuit held that it is squarely within the discretion of the EPA Administrator to fail or refuse to find a violation of the Clean Water Act and to fail or refuse to take enforcement action against Clean Water Act violators. Accordingly, such decisions by the Administrator of the EPA are not subject to judicial review.

Pursuant to the Clean Water Act of 1972, 33 U.S.C. § 1365(a)(2) (1994), Sierra Club, Grand Canyon Chapter, and Teresa Leal (Sierra Club) collectively filed a citizen suit against the EPA, the EPA Administrator, EPA Region IX, and the Region IX Administrator. Sierra Club alleged that the EPA failed to take enforcement action against the City of Nogales (the City) or the International Boundary and Water Commission (the Commission) for operating a wastewater treatment plant in violation of the Clean Water Act. Specifically, the EPA granted the City and the Commission a permit to discharge pollutants in 1991. In 1996, the permit expired. The EPA issued another permit in 1998 but withdrew it before the new permit came into effect (the EPA's withdrawal of the new permit is currently on appeal). As such, the plant currently operates and discharges pollutants under the permit that expired in 1996.

The court explained, quoting the Clean Water Act, "whenever 'the Administrator finds that any person is in violation' of permit conditions, the Administrator 'shall issue an order requiring such person to comply . . . or . . . shall bring a civil action' against the violator." Further, citizens may sue "the Administrator where there is alleged a failure . . . to perform any act or duty under this chapter which is not discretionary

with the Administrator.” Thus, based upon reports showing that the facility at issue violated permit limits 128 times between January 1995 and January 2000, Sierra Club sued the EPA under this citizen suit provision. The district court dismissed Sierra Club’s suit for lack of jurisdiction, concluding that the Administrator had not failed to perform any nondiscretionary act or duty. Thus, according to the lower court, the EPA did not waive the sovereign immunity of the United States.

On appeal, the Ninth Circuit first addressed the issue of sovereign immunity. Absent waiver, suits against federal administrative agencies and against officials of the United States are barred under the doctrine of Sovereign Immunity. Thus, absent waiver, suits against the EPA and its Administrator are barred. The citizen suit provision of the Clean Water Act waives sovereign immunity “only for suits alleging a failure of the Administrator to perform a non-discretionary duty.” Accordingly, under the Ninth Circuit’s analysis, the question of sovereign immunity and the appropriateness of judicial review turns on whether Congress intended the Administrator’s duties to be nondiscretionary.

The court next addressed whether the Administrator has a nondiscretionary duty to make findings as to Clean Water Act violations. The court stated that the EPA Administrator has no mandatory duty “to make findings when provided with information suggesting a violation” of the Clean Water Act. First, the court reasoned that there is a traditional presumption that agencies have discretion as to whether to investigate or enforce unless Congress has otherwise indicated. Second, the court found no explicit language in the statute stating that the agency has an affirmative duty to make findings. Third, the court rejected the argument that seemingly nondiscretionary language in the statute—“the Administrator ‘*shall*’ issue an order of compliance or commence a civil action”—leads to an implicit mandatory duty for the Administrator to make findings.

Finally, the Ninth Circuit concluded that even if the Administrator had a mandatory duty to make findings as to purported Clean Water Act violations, the EPA has complete discretion regarding whether to take enforcement action. Again, the court pointed to the traditional presumption that decisions regarding whether to investigate or to enforce are within the discretion of administrative agencies unless Congress otherwise indicates. Sierra Club argued that the presumption of agency discretion is rebutted by the statutory language: the Administrator “*shall* issue an order requiring . . . [compliance].” The Ninth Circuit rejected this argument citing the structure of Section 1319 and the legislative history of the Clean Water Act.

In his concurrence, Circuit Judge Gould agreed that the Administrator has no mandatory duty to make findings when presented with information showing Clean Water Act violations. According to the concurrence, because the EPA has no mandatory duty to make findings and because Sierra Club did not present the EPA findings regarding violations, the court inappropriately addressed whether the Administrator has a nondiscretionary duty to enforce: “[T]he discretionary finding of violation is a necessary preliminary condition to an agency enforcement action.”

In conclusion, the Ninth Circuit held that the district court lacked subject matter jurisdiction in this action. Both the duty to make findings and the duty to enforce are discretionary duties under the Clean Water Act. Under the Clean Water Act’s citizen suit provision, Congress has waived the sovereign immunity of EPA and its Administrator solely for suits alleging failure to perform nondiscretionary duties. Thus, the EPA and its Administrator may choose whether or not to make findings when presented with evidence of Clean Water Act violations. The EPA and its Administrator may choose whether or not to enforce the Clean Water Act even when the EPA has made findings of violations. In short, duties as to investigation and enforcement are wholly discretionary and such decisions by the EPA and its Administrator are entirely shielded from judicial review.

Michelle Boudreaux

III. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Broward Garden Tenants Ass’n v. EPA,
157 F. Supp. 2d 1329 (S.D. Fla. 2001)

The Broward Garden Tenants Association (Tenants Association), an organization of minority residents living in the Broward Gardens Complex in Ft. Lauderdale, Florida, brought suit against the Environmental Protection Agency (EPA), the City of Ft. Lauderdale, the Department of Housing and Urban Development, and other parties (collectively, the defendants). The Tenants Association alleged that the defendants had violated the Constitution by establishing and maintaining a racially segregated system of low income housing near the Wingate Superfund Site. The defendants filed a motion to dismiss, arguing that the federal court lacked subject matter jurisdiction under section 9613(h) of the Comprehensive Environmental Response, Compensation, and

Liability Act (CERCLA), which states that except for a list of limited exceptions, no federal court shall have jurisdiction to review any challenges to removal or remedial action selected under CERCLA. The court agreed with the defendants and dismissed the action.

The Tenants Association contended that the defendants built Broward Gardens despite their knowledge that the predominately minority community would be subject to contamination. The Wingate site was listed on the National Priorities List and the surrounding area had higher cancer levels than other areas in Broward County. The EPA developed a plan under CERCLA to cleanup Wingate and entered into a consent decree with the city and other potentially responsible parties. The plaintiffs claimed that the plan was inadequate and that the site continued to expose area residents to dioxin and arsenic in their air, soil and drinking water.

The defendants argued that section 9613(h) of CERCLA banned the plaintiffs' challenges to the consent decree. The plaintiffs countered that CERCLA's ban on pre-enforcement actions did not apply because their challenges to the consent decree were constitutional in nature. The court interpreted the plaintiffs' claims to be challenges to the cleanup procedures selected in the consent decree. Because the cleanup of Wingate was still ongoing, the court dismissed the plaintiffs' statutory claims citing unanimous agreement in the circuit courts that section 9613(h) is a bar to statutory claims directed against ongoing cleanups. The court then turned to address the subject matter jurisdiction over constitutional challenges to the consent decree.

Because the Eleventh Circuit has not ruled on the issue, the court examined the case law of other circuits. The majority view, according to the court, holds that all constitutional claims are barred by section 9613(h). In *Aztec Minerals Corp. v. EPA*, 1999 WL 967270 (10th Cir. Oct. 25, 1999), the Tenth Circuit stated that judicial review under section 9613(h) is expressly limited to the exceptions listed in the provision. Additionally, in *Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991), the Sixth Circuit held that neither the legislative history, nor the statutory language, of CERCLA allowed for constitutional challenges. Furthermore, the Sixth Circuit found that this bar did not violate due process rights because the statute left open the possibility of a post-enforcement hearing. Under the majority view, the *Broward* court found the plaintiffs' claims to be barred.

The court next turned to the First Circuit's approach to the issue as stated in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991). In *Reardon*, the First Circuit drew a distinction between claims challenging

the constitutionality of CERCLA itself, which are allowable, and claims challenging the constitutionality of the remedy under CERCLA, which are barred. The *Broward* court stated that because the Tenants Association was challenging the constitutionality of a remedy selected by EPA under CERCLA, their claims would fail under the First Circuit's test.

Finally, the court examined two cases in the Virginia district courts, *Reeves Bros. v. EPA*, 956 F. Supp. 665 (W.D. Va. 1995), and *Washington Park Lead Committee, Inc. v. EPA*, which allowed constitutional claims under section 9613(h) to be heard. The court noted that these cases have not been followed in other circuits and are not binding on this case. The court, therefore, dismissed the plaintiffs' claims for lack of subject matter jurisdiction, noting that the plaintiffs were still free to bring claims based on state law in state court, or to challenge the Wingate cleanup in federal court once it is complete.

Alisa Coe

IV. ADMINISTRATIVE PROCEDURE ACT

*Ocean Advocates v. United States
Army Corps of Engineers,*
167 F. Supp. 2d 1200 (W.D. Wash. 2001)

This was a suit under the Administrative Procedure Act (APA) for judicial review of a federal administrative agency action. The matter came before the court on three motions for summary judgment filed by Ocean Advocate, the United States Army Corps of Engineers (Corps) and defendant-intervenor Atlantic-Richfield Company (ARCO). Ocean Advocates sought declaratory, injunctive, and other relief, claiming that the Corps' decision to issue and extend ARCO's permit violated the Magnuson Amendment to the Marine Mammal Protection Act, the National Environmental Policy Act (NEPA), and Section 10 of the Rivers and Harbors Act. The Corps and ARCO opposed Ocean Advocates' motion for summary judgment and both submitted a cross-motion for summary judgment. The Corps alleged that it did not violate the Magnuson Amendment, NEPA, or the Rivers and Harbors Act. In addition to joining the Corps in its arguments, ARCO argued that Ocean Advocates' claims regarding the Magnuson Amendment must be dismissed for lack of standing, or barred on the basis of laches. The court issued an order denying Ocean Advocates' motion and its request for relief. It then granted the Corps' motion and found that the Corps'

action did not violate the Magnuson Amendment or NEPA. The court granted ARCO's motion on the merits, but denied its motion on the issues of standing and laches. Finally, the court found that Ocean Advocates did not have a private right of action to pursue a claim under Section 10 of the Rivers and Harbors Act.

Cherry Point, Washington, is a "heavy impact industrial" zoning area. In 1971, ARCO constructed a refinery at Cherry Point in order to refine Alaskan North Slope crude oil pursuant to a 1969 permit issued by the Corps. At that time, ARCO decided to build only on the southern portion of the dock. Construction on the northern portion was postponed until the southern dock reached capacity or until the loading and unloading hampered refinery operations. In 1992, when ARCO submitted an application for a permit to construct on the northern portion of the dock, the receiving rate at the southern dock was still substantially below capacity. The Corps gave public notice of ARCO's application and received substantive remarks from the United States Fish and Wildlife Service (FWS). On March 1, 1996, after confirming that there would be no significant impact to any endangered species, the Corps issued a Finding of No Significant Impact (FONSI) and issued ARCO a permit under Section 10 of the Rivers and Harbors Act. The construction was to be completed by March 1, 2001, but in March 2000, ARCO requested a one-year extension of the permit. The Corps again consulted with the FWS which found that there would be no significant impact on listed species. On June 22, 2000, the Corps approved ARCO's request for a permit extension, concluding that the dock extension would not violate the Magnuson Amendment and that the Endangered Species Act (ESA) consultation was complete.

Standing. The court began its analysis by considering ARCO's claim that Ocean Advocates lacked standing to pursue its claim regarding a violation of the Magnuson Amendment. To establish standing under the APA, a plaintiff must demonstrate that he is "adversely affected or aggrieved by agency action within the meaning of a relevant statute," and that his grievance falls within the "zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." The court held that the plaintiffs did satisfy the constitutional requirements for standing based upon harm to their professional, aesthetic, and recreational use of the area. The court also held that the plaintiffs demonstrated that they were within the zone of interests to bring a claim under the Magnuson Amendment, and therefore they satisfied the requirements of standing.

Laches. The court then addressed ARCO's defense of laches. In order to apply laches, a defendant must establish a lack of diligence by the plaintiff and prejudice to the defendant resulting from the plaintiff's lack of diligence. To determine if a party is diligent, a court may consider such issues as whether the party has made its position known prior to filing suit. The court held that laches should not be applied here because there was no lack of diligence on the part of the plaintiff, and therefore, there can be no evidence of undue prejudice.

Magnuson Amendment. The court then discussed the *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), standard of review which gives deference to the permit-issuing agency's interpretation of the statute. The Magnuson Amendment prohibits any federal official from issuing any permit for constructing a terminal dock in eastern Washington that may result in an increase in the volume of crude oil capable of being handled at a facility. To support its decision to grant ARCO's permit the Corps relied on the specific language of the permit itself, which allows for a "petroleum product loading/unloading facility." Because the permit applies only to petroleum projects, it has no effect on the volume of crude oil. The Corps applied this language to the language of the Act, finding that even if the construction were to increase the volume of crude oil actually handled, it would not change the capability of the facility because the facility is not yet at maximum capacity. The court, applying the deference of *Chevron*, agreed with this interpretation and held further that the Corps' interpretation was not arbitrary and capricious and should be upheld.

NEPA: NEPA requires agencies to prepare an environmental impact statement (EIS) for all major federal actions "significantly affecting the quality of the human environment." The court's role is to ensure that the Corps fulfilled its responsibility to weigh the context and intensity of the proposed project. Ocean Advocates claimed that the Corps' FONSI was arbitrary and that the agency failed to address cumulative impacts. The court disagreed, holding that the FONSI was not arbitrary and the administrative record supports the Corps' finding that there would be no cumulative impact that needed to be studied. The court also held that the Corps' actions complied with NEPA in that it addressed concerns of impact to threatened and endangered species and found that the risk was minimal.

Rivers and Harbors Act. Finally, under Section 10 of the Rivers and Harbors Act, the Corps may grant extensions of permits unless it determines the extension would be contrary to public interest. Regardless of the Corps' determination, however, the Supreme Court has

found that no private right of action can be implied from the language of that Act. Therefore, the court found it unnecessary to consider Ocean Advocates' claim.

In summary, this court held that the Corps considered all of the information before it and made reasoned decisions that the Magnuson Amendment would not be violated and there would be no significant impact to the human environment under NEPA. The court therefore upheld the Corps' issuance of the permit.

Alison Hoyt

V. MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

State of New York v. Evans,
162 F. Supp. 2d 161 (E.D.N.Y. 2001)

The United States Department of Commerce (DOC), by way of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), has the power to make regulations necessary for conservation and management of the Atlantic coast fish species, scup.¹ Under the Magnuson-Stevens Act, the DOC exercises "exclusive fishery management authority" over an area beginning three miles offshore and extending to 200 nautical miles from the coastline. This area of water is considered to be federal waters. The DOC exercises its authority by creating fishing regulations that have the force of law in these waters. The DOC's regulations are based on Fishery Management Plans (FMPs) that have been adopted by the National Marine Fisheries Service (Fisheries Service).

The Magnuson-Stevens Act also gives each individual Atlantic coast state exclusive regulatory authority over scup fishing within three miles of that state's coastline. These states look to the Atlantic States Marine Fisheries Commission (States Commission) for guidance in exercising its authority in state waters. The States Commission is composed of representative members from the eastern coastal states. It prepares Coastal Fishery Management Plans (CFMPs) that are required under the Atlantic Coastal Fisheries Cooperative Management Act to be implemented and enforced by Atlantic coastal states through state legislation. These CFMPs do not require federal approval. However,

1. Scup is a schooling fish species found in the Northwest Atlantic Ocean, primarily between the coasts of Massachusetts and North Carolina.

should a state fail to employ or comply with a CFMP, the DOC may come in and impose a freeze on fishing in a noncompliant state's state waters.

In early 1995, the Fisheries Service concluded that "the scup stock is overexploited and at a low abundance level." In response to this, the Fisheries Service adopted a scup FMP based on a joint proposal by the Mid-Atlantic Fishery Management Council and the States Commission, with input from the South Atlantic and New England Fishery Management Councils. Because scup schools spend the summer in state waters and the winter in federal waters, this FMP divided the fishing year into winter and summer periods and set fishing quotas in an attempt to protect the fish stock. In 1997, the DOC's final published regulations implementing this FMP called for a state-by-state summer quota on scup. Upon the attainment of its scup quota, a state would close its waters to scup fishing. When all states had met their quotas, the DOC would then close federal waters to all scup fishing. Any scup caught in state waters after a state's quota had been exceeded were dubbed overages and subtracted from that state's quota for the next summer as a penalty. The States Commission adopted an identical plan as its scup CFMP.

Massachusetts objected to the FMP quotas, prompting it to bring suit against the DOC in a federal court in June 1997. Following a court ruling in *Commonwealth of Massachusetts by Division of Marine Fisheries v. Daley*, 10 F. Supp. 2d 74 (D. Mass. 1998), in favor of Massachusetts, the DOC's state-by-state quotas were set aside, thus preventing the calculation of and punishment stemming from individual state scup overages. The DOC was consequently forced to regulate scup fishing through the enforcement of a federal plan calling for an overall coastwide summer quota of 685,000 pounds of scup. The States Commission opposed this coastwide quota as being too low and proposed a state plan that nearly doubled the federal plan's summer quota. The DOC did not consent to the state plan and in May 2000, published the final regulation that put into effect its proposed scup quota.

In the years since the DOC's initial scup FMP in 1997, leading up to the enactment of and including the 2000 DOC regulations, several states ignored the DOC quotas and often exceeded them by several hundreds of thousands of pounds of scup. It was in response to the 2000 regulations, however, that New York and Rhode Island (Plaintiffs) filed suit seeking invalidation of the coastwide summer quota as arbitrary and capricious.

The court reviewed the DOC's 2000 regulatory implementation of the FMPs under the arbitrary and capricious standard of the Administrative Procedure Act. Under this standard, there is a

presumption of validity attached to the DOC's action, but the plaintiff may rebut that presumption with sufficient evidence. The court determined that the primary issue was whether the administrative record justifies the DOC's enactment of the regulations.

The court found that the DOC's coastwide quota was adequately supported in the record. This decision was based on the well-documented fact that scup are overfished as well as the DOC's duty under the Magnuson-Stevens Act to prevent this overfishing. The court agreed with the DOC that the coastwide quota "represents the maximum amount of fish that may be harvested while preventing overfishing and enabling this overfished resource to rebuild to its target level." Thus, based solely on the administrative record the coastwide quota is not arbitrary and capricious, but is a legitimate conservation measure.

Despite this finding, the Plaintiffs further argued that the DOC's recognition of the state favored, state-by-state allocations being preferable to coastwide quotas is evidence that the DOC's failure to implement the former measures is arbitrary and capricious. The court, however, found that previously enacted state-by-state allocations of summer scup quotas were ignored by the states and later invalidated by *Commonwealth of Massachusetts by Division of Marine Fisheries v. Daley*, 10 F. Supp. 2d 74 (D. Mass. 1998). Thus, there was no evidence on the record that state-by-state allocations would be or have ever been an effective alternative to the coastwide quotas that were implemented, further justifying the DOC's decision.

Finally, the Plaintiffs argued that the DOC rejected the state-by-state allocations in favor of the coastwide quota based on an "improper desire to avoid further litigation." This, the Plaintiffs contended, is not a factor that Congress intended the DOC to consider when implementing conservation regulations. This argument, however, was quickly quashed by the court based on the DOC's established willingness to work toward state-by-state allocations in the future, despite the First Circuit's warning in *Massachusetts v. Daley*, 170 F.3d 23, 32 (1st Cir. 1999), that any such allocation would be "subject to swift judicial review." In fact, the court found the DOC's decision to be motivated by other factors besides a fear of litigation, such as a desire to avoid both political wrangling and decisions based only on convenience. From the above findings, the court concluded that the DOC's 2000 scup regulations were an appropriate exercise of the DOC's conservation and management authority. Thus, the Plaintiffs' claim was dismissed.

Robin Houston Jones

VI. MASSACHUSETTS TOBACCO INGREDIENTS AND NICOTINE YIELD ACT

Phillip Morris, Inc. v. Reilly,
267 F.3d 45 (1st Cir. 2001)

Several tobacco manufacturing companies, headed by Philip Morris, Inc., challenged the constitutionality of a Massachusetts statute alleging that the statute effected an unconstitutional taking of their trade secret property within the meaning of the Fifth Amendment to the Constitution. The Massachusetts Tobacco Ingredients and Nicotine Yield Act (Disclosure Act), enacted by the state of Massachusetts in 1996, required manufacturers of cigarettes and smokeless tobacco products to reveal to the state the “identity of any added constituent . . . in descending order according to weight, measure or numerical count.” The state of Massachusetts argued such information was necessary in order to develop research on “how these ingredients might impact health when combined in particular amounts with others” or when “burned alone or in combination.” Still, the manufacturers argued that they had invested millions of dollars to create distinctive blends and to protect the identity of the ingredients from disclosure. Therefore, depriving the manufacturers “of their property interests in trade secrets, [results] in a takings for which the Constitution requires that just compensation be made.” The Fifth Amendment to the United States Constitution states that “private property [shall not] be taken for public use, without just compensation.” The state of Massachusetts argued that the Disclosure Act was a valid use of their police powers in an effort to safeguard public health within the state.

The Disclosure Act, like the Federal Cigarette Labeling and Advertising Act and other state statutes, requires tobacco manufacturers to reveal weight, measure, and count information on any added ingredients, which the manufacturers regard as trade secret property. However, unlike the Disclosure Act, other statutes that require revealing this information treat it as trade secret property pursuant to the protections of the Trade Secret Act. The Disclosure Act, on the other hand, specifies that the submitted trade secret property shall become public record if two conditions are met.

First, the DPH [Massachusetts Department of Public Health] must determine that there is a reasonable scientific basis for concluding that the availability of such information could reduce risks to public health. Second, the Massachusetts Attorney General must advise DPH that the public release of the information would not constitute an unconstitutional taking of property.

If the Department of Public Health, after conducting the appropriate studies, concludes that the additives could present health risks that could be reduced by public knowledge of the information, they would be able to inform consumers with the state Attorney General's blessing.

The court then proceeded to outline the applicable law in the area of takings. Takings jurisprudence has been divided into two areas: per se takings and regulatory takings. As discussed by the court, a per se taking occurs when government action results in a permanent physical occupation of private property or if government actions or regulations deny the owner all economically beneficial use of his land. The Supreme Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that just compensation must be awarded any time there is a finding of per se takings. The court in this case recognized that the per se category applied primarily to cases in which individuals had been forced to solely bear a burden which should be borne by society as a whole. This was not the case in the present action.

However, the Supreme Court also explained in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Supreme Court stated, "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances in that case." Therefore, the court must look to the factual circumstances in the adjudicated case to make the appropriate determinations.

The court of appeals then referred to the Supreme Court's examination of takings in the case *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984). In *Monsanto*, the Supreme Court had to decide whether the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) resulted in regulatory takings of trade secret property. The Supreme Court identified these three factors to be taken into account in making that determination: "the character of the government action, its economic impact, and its interference with reasonable investment-backed expectations." The Court then explained that Monsanto had the right to avoid revealing any valuable trade secrets by availing themselves of other markets. But, in order to be awarded the privilege of marketing their products in the states, they would need to reveal the components of their products. Likewise, tobacco manufacturers have the ability to market tobacco products in other states, thus avoiding the loss of any valuable trade secrets. But the power of the state to regulate the marketing of

tobacco within its borders is unquestioned particularly since it has “long been the source of public concern and the subject of government regulation.”

Applying this rationale, the First Circuit Court of Appeals therefore reasoned that the notion that a Commonwealth “cannot condition the right to sell a legal item of commerce on disclosure of trade secret information will not wash.” The court concluded that the Disclosure Act, which required tobacco manufacturers to reveal trade secret information for potential disclosure in the state of Massachusetts, was a “valid exercise of the police power and in the absence of explicit guarantees of confidentiality from the Commonwealth, does not effect an unconstitutional taking.”

While the holding by the First Circuit Court of Appeals speaks specifically to trade secret property, it would not be a stretch to state that other types of property are now subject to seizure within this circuit if states find that the public health would be served. Still, the court of appeals does not automatically seize the trade secrets but suggests that revealing them is the price of doing business within that jurisdiction. In the area of environmental law, where regulatory takings and just compensation are so significant, the ability to effectively regulate some property uses without giving cause for just compensation would greatly serve the purpose of protecting public health and the environment. It will be interesting to see in which other scenarios courts may be willing to accept this reasoning.

Luis G. Martinez

VII. DOLPHIN CONSUMER PROTECTION ACT

Brower v. Evans,
257 F.3d 1058 (9th Cir. 2001)

As early as 1959, fishermen in the Eastern Tropical Pacific Ocean (ETP) pursued the surface-dependent dolphin in order to locate and capture the yellowfin tuna in the waters below. Between the years of 1959 and 1972, millions of dolphins were inadvertently killed as a result of using them as traps for tuna. Consequently, in 1990, Congress enacted the Dolphin Protection Consumer Information Act (DPCIA) which prohibited companies from labeling tuna “dolphin safe” if the fisherman used purse seine nets or the method of encircling dolphins.

In 1997, however, the United States and several other nations with purse seine fishing vessels in the ETP formed the Panama Declaration

(Declaration), in which they sought legislation “to allow tuna caught with purse seine nets to be labeled ‘dolphin safe’ as long as no dolphins were observed to be killed or seriously injured during the set.” While the legislature enacted the International Dolphin Conservation Program Act (IDCPA) in order to, *inter alia*, implement the Declaration, it rejected the Declaration’s aforementioned provision. The legislature reasoned that while dolphins may be safe from physical harm or death, the language of the agreement still permitted the chase and encirclement method which was likely to cause psychological stress to the dolphin, hindering the species’ much needed population growth. Instead, the legislature amended the DPCIA, via the IDCPA, to require the Secretary of Commerce (Secretary) to make Initial and Final Findings as to “whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the [ETP].” 16 U.S.C. § 1385(g)(1)-(2) (1994). Research upon which these findings were to be based was to be conducted by the National Marine Fisheries Service (NMFS) and was to include stress-related research and a review of current relevant literature.

The NMFS’ report included findings that the dolphins were not reproducing at the level projected. These findings were based on the low numbers of dolphin mortalities as compared to earlier years and the dolphin’s reproductive potential. The NMFS identified stress, separation of cows and calves, as well as under-reporting of direct kills as likely factors contributing to lower-than-expected reproduction rates. Since the mandated stress research projects had not yet been completed, the NMFS reviewed existing literature regarding stress in mammals to conclude that it was likely that the fisheries activities were causing physiological stress in dolphin populations. Additionally, while the NMFS conceded it did not have sufficient evidence to determine whether there was physiological evidence of stress in individual dolphins from the affected populations, it suggested that the necropsy sampling research would provide a conclusive answer. Thus, the NMFS concluded that the data from the oceanographic studies and literature review suggests that the ETP tuna purse-seine fishery was the source of significant adverse impact on the dolphin populations. Based on this inconclusive finding, and the fact that the necropsy studies had not yet been completed, the Secretary issued his Initial Finding “that there is insufficient evidence that chase and encirclement by the tuna purse seine fishery ‘is having a significant adverse impact’ on depleted dolphin stocks in the ETP.” Plaintiffs challenged this finding as arbitrary and capricious.

The Secretary made several arguments defending his decision to lower the “dolphin safe” labeling standard. First, the Secretary argued, in essence, that the statute should be construed to mean that the default rule was to allow lowering the standard. Thus, if he fails to find evidence of significant adverse impact, then the less protective standard will go into effect. The Ninth Circuit quickly disposed of this argument by holding that the IDCPA makes it necessary for the Secretary to make an affirmative finding. The provision at issue states, “[T]he Secretary shall . . . make an initial finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the [ETP].” The court found that this inquiry requires a “yes” or “no” answer, and an excuse as to why an adequate answer was not reached would not suffice. Additionally, since Congress rejected the less-protective labeling standard formerly presented in the Panama Declaration, it was obvious that the Secretary’s construction of the statute was contrary to legislative intent. Furthermore, the court determined that the Secretary’s interpretation would lead to illogical results. Construing the provision as allowing the less-protective labeling standard as a default would render the required stress studies irrelevant. Consequently, the court rejected the Secretary’s construction of the provision.

In support of his Initial Finding, which failed to incorporate any stress study evidence, the Secretary contended that the legislative history suggests that his Initial Finding would be based on limited evidence. While the Ninth Circuit conceded this point, it held that making a finding on limited evidence did not mean that the Secretary could disregard, or fail to obtain, data from the stress studies specifically required by statute.

The Secretary also challenged the district court’s finding that the NMFS unreasonably delayed the stress studies and failed to collect, analyze, and report on any stress study data. The Ninth Circuit found that the IDCPA required several research studies to be performed prior to the Initial Finding. At the time of the Initial Finding announcement, however, the NMFS had commenced only one of the studies, the literature review of relevant stress-related research. The court applied factors from *Telecommunications Research & Action v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (including a “rule of reason,” and the nature and extent of the interests harmed by the delay), to determine whether the Secretary unreasonably delayed the congressionally mandated studies. The court was unable to find that the NMFS diligently performed the studies required to enhance its report.

Finally, the Secretary argued that there was insufficient data to decide whether the fishery was having a significant adverse impact on the depressed dolphin populations. The Secretary and Earth Island, the plaintiff's organization, agreed that the Initial Finding determination was to be based on the "best available evidence." Looking at analogous provisions of the Endangered Species Act, the Ninth Circuit determined that the "best available evidence" standard required less than conclusive proof. The stress literature review and data obtained from the mandated abundance study suggested that dolphin populations were not increasing at expected levels, and that the cause of this was likely due to stress resulting from the tuna fisheries' methods. Since there was no evidence to the contrary, the court found that this was the best available evidence. Thus, the Ninth Circuit held that the Secretary's claim of insufficient evidence as a basis for his finding that the chase and capture tactics had no significant adverse impact on dolphin populations was contrary to law and an abuse of his discretion.

Jennifer Lootens

VIII. REGULATORY TAKINGS

Palazzolo v. Rhode Island,
533 U.S. 606 (2001)

The United States Supreme Court reversed, and remanded in part, a decision of the Rhode Island Supreme Court. The Court found an error where the Rhode Island Supreme Court barred a "regulatory takings" claim on the grounds that the petitioner acquired title to the property after the regulation diminishing the value of the property went into effect.

Westerly is a Rhode Island coastal town of some historical significance that gained popularity as a vacation destination. In 1959, the petitioner and associates formed a corporation, Shore Gardens, Inc., and purchased about twenty acres of salt marsh with the hope of developing it into eighty residential lots. They filed development plans with various state agencies in 1962, 1963, and 1966. All plans were rejected for lacking essential information or on account of adverse environmental impacts. The corporation did not contest these determinations, and apparently put development plans aside indefinitely.

In 1971, the Rhode Island legislature created an agency, Rhode Island Coastal Resources Management Council, to protect coastal properties. As part of its program, the agency designated salt marsh terrain, such as that owned by the petitioner, as protected wetlands and

established regulations that limited development in those areas. The corporate charter of Shore Gardens, Inc., was revoked in 1978 for failure to pay taxes. The property title, by operation of state law, passed to the petitioner at that time because he was the sole shareholder.

In 1983, the petitioner (as sole owner) submitted a development plan to the Council that resembled the earlier Shore Gardens, Inc. plans, and it was rejected on the same grounds. He then submitted a more detailed plan in 1985, seeking license to build a private beach club that entailed filling more than half the property with gravel. The Council rejected this plan because it conflicted with regulatory standards adopted before the title of property had transferred to the petitioner.

The petitioner filed an inverse condemnation action in Rhode Island Superior Court asserting that the state had violated the Fifth and Fourteenth Amendments by taking the property without compensation, and sought \$3,150,000. In 2000, the Rhode Island Supreme Court upheld the decision of the lower court, that the takings claim was unripe because the Council had not rejected all possible development plans. Further, the court found the plaintiff did not have standing to challenge the regulations put into effect before he gained title to the property. The court held that a section of the property could be developed, thus preventing a total economic loss that would require compensation. Finally, it found because ownership occurred after the regulations took effect, the owner had not lost any reasonable investment-backed expectations.

Upon review, the Supreme Court first considered whether a final decision had been made as to the permit application for using of the land, for without one, the case would be unripe for judicial review. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The Court stated that a final decision does not have to preclude all opportunities for rehearing, but where “the permissible uses of the property are known to a reasonable degree of certainty,” a takings claim is likely to be ripened. The state’s denial amounted to a decision as to the extent of permitted development, and thus the case was not unripe.

The Court then rejected the rule it viewed as the logical consequence of the Rhode Island decision, that a purchaser or a successive title holder is deemed to have notice of regulations already enacted and barred from claiming that the regulations effect a taking. The Court stated that such a rule would be too “potent a Hobbesian stick,” “too blunt an instrument,” and that the Fifth Amendment Takings Clause of the Constitution guarantees property owners action against “regulatory

power so unreasonable and so onerous as to compel compensation.” As to whether notice should be dispositive, the Court turned to dicta in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). There, the dissent argued that the Nollans were constructively on notice that their right to development was contingent on an easement grant when they purchased the property, but the majority had implicitly rejected the proposition.

The Court found no error in the Rhode Island Supreme Court’s opinion that the regulation was not a total economic deprivation as found in *South Carolina Coastal Council v. Lucas*, 505 U.S. 1003 (1992). Because *Lucas* did not apply, yet the case was ripe and the petitioner was found to have standing, the case was remanded to the Rhode Island Supreme Court to reconsider the case using the more general regulatory taking principles of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which in part takes into account reasonable investor-backed expectations.

Justice O’Connor concurred with the decision, but emphasized that the *Penn Central* test is not limited to gauging investor-backed expectations, and should be considered “an ad-hoc inquiry.” At least as important, she added, is “the character of the governmental action.” She made clear her concurrence was due to her adherence to the *Penn Central* principle of ad-hoc inquiry into takings claims, and not to the proposition that a property owner may take title to full property rights despite existing regulations” “As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry.”

Justice Stevens concurred in part and dissented in part. He concurred only with the Court’s analysis of ripeness. He dissented on the issue of whether the analysis applied the petitioner, and would therefore affirm the Rhode Island decision in its entirety.

Justices Ginsburg, Souter, and Breyer dissented. They would have first upheld the Rhode Island court’s decision that the case was unripe, because the record showed some of the land could be developed while following regulations, but the petitioner had simply neglected or refused to produce plans appropriate to the regulation requirements. Further, because some land could be developed, it simply fell outside the scope of *Lucas*, and yet the petitioner had only argued that all economic value had been destroyed before the trial court. The dissent therefore rejected all discussion of *Penn Central* as that issue was not contested in the lower court. Finally, the dissent noted that the record was quite ambiguous as to the actual value of the property. Because of the lack of clear error

within the scope of the contested issues, according to dissent, the state court should have been given the benefit of the doubt.

A. Scott Anderson