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~ ~ May 15, 2008 ~ ~

## SECOND CIRCUIT

*Benzman v. Whitman*, 2008 U.S. App. LEXIS 8656 (2d. Cir. N.Y. Apr. 22, 2008).

Following the terrorist attacks of September 11, 2001, the Administrator of the Environmental Protection Agency (EPA) issued press releases stating that the air and water in Lower Manhattan were safe. After learning that the air and water were not safe in the days immediately after the disaster, the residents and workers filed suit for damages. The United States District Court for the Southern District of New York denied the Administrator's motion to dismiss the claim. On appeal, the Second Circuit reversed the district court's denial of the Administrator's motion to dismiss the Fifth Amendment substantive due process claim and the constitutional Administrative Procedures Act claim.

<http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbNcT1BOXDA2LTExNjY3Zfb3BuLnBkZg==/06-11/>

## FOURTH CIRCUIT

*Piney Run Pres. Ass'n v. County Comm'rs*, 2008 U.S. App. Lexis 8732 (4th Cir. Md. Apr. 23, 2008).

The Piney Run Preservation Association filed suit against the Commissioners of Carroll County, Maryland, alleging that the county discharged treated wastewater into Piney Run stream in violation of the Clean Water Act (CWA). The United States District Court for the District of Maryland dismissed the suit, because the Maryland Department of the Environment (MDE) was already pursuing a CWA enforcement action against the County. On appeal, the Association argued that the MDE did not diligently prosecute the action and the district court's decision was, therefore, in error. The Fourth Circuit upheld the district court's decision, finding that the association did not establish that the MDE action was not capable of requiring compliance with the CWA or that the MDE did not act in good faith.

<http://pacer.ca4.uscourts.gov/opinion.pdf/071348.P.pdf>

## FIFTH CIRCUIT

### Louisiana

*Riverside Homeowners Association v. City of Covington*, 2008 La. App. LEXIS 566 (La. App. 1 Cir. Apr. 16, 2008).

The city of Covington, Louisiana, annexed a portion of the bottom of the Bogue Falaya River and a private property adjacent to the river. The Riverside Homeowners Association sought a declaratory judgment and permanent injunction to annul and restrain the annexation. A lower court granted summary judgment to the city. On appeal, the association argued that the city was not authorized to annex the private property, because there was not contiguity between the city's boundary and the portion of land it wanted to annex. The appellate court found that because the city had the authority to annex the state-owned river under La. Civ. Code Ann. art. 450, the required contiguity existed to annex the private property. The appellate court affirmed the lower court's decision.

<http://www.la-fcca.org/Opinions/Pub2008/2008-04/2007CA0886%20cw%202007CA0887%20and%202007CV>

## SIXTH CIRCUIT

*Great Lakes Exploration Group, LLC v. Unidentifies Wrecked & Abandoned Sailing Vessel*, 2007 U.S. App. LEXIS 8654 (6th Cir. Apr. 22, 2008).

The Great Lakes Exploration Group allegedly located a submerged wreck in Lake Michigan and sought an *in rem* action seeking an arrest warrant for the vessel. The United States District Court for the Western District of Michigan dismissed the action when the company refused to comply with the district court's order to disclose the location of the vessel in order for the State of Michigan to determine whether the shipwreck was "embedded" in the state's submerged lands for the purposes of the Abandoned Ship Act (ASA). On appeal to the Sixth Circuit, the company argued that the district court erred in requiring the company to disclose the exact location of the ship under Supp. R. Certain Adm. & Mar. Cl. C(2)(b), C(3)(a)(i), and E(2)(a). The court held that the company could be required to disclose the vessel's location in the pleading stage; however, the district court should not have enforced the requirement before assuring the continuance of federal jurisdiction over the claim. The appellate court reversed the district court's decision and remanded the case.

<http://www.ca6.uscourts.gov/opinions.pdf/08a0161p-06.pdf>

## SEVENTH CIRCUIT

### Illinois

*City of Waukegan v. National Gypsum Co.*, 2008 U.S. Dist. LEXIS 28264 (N.D. Ill. Apr. 7, 2008).

The city of Waukegan brought suit under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) and the Illinois Water Pollutant Discharge Act (IWPDA) for pollution caused by polychlorinated biphenyls (PCBs) in Waukegan Harbor. The city named the Port District and several companies it claimed "owned or operated" the harbor as defendants. The court held that the Port District was not liable under CERCLA, because it did not operate the vessels that may have stirred up PCBs in the submerged land in the port. The court also granted several of the companies' motion to dismiss, finding that they were not owners or operators of the harbor under CERCLA. However, the court held that one company, Bombardier Motor Corp., could be held liable under CERCLA and the IWPDA, since its underwater testing facility "released" or "discharged" pollutants into the water when it stirred up sediment in the harbor.

[http://www.hklaw.com/content/maritime/mardocs/City\\_of\\_Waukegan\\_v\\_National\\_Gypsum\\_080407.pdf](http://www.hklaw.com/content/maritime/mardocs/City_of_Waukegan_v_National_Gypsum_080407.pdf)

## NINTH CIRCUIT

*Center for Biological Diversity v. United States Fish & Wildlife Serv.*, 2008 U.S. App. LEXIS 8701 (9th Cir. Apr. 18, 2008).

The United States Fish and Wildlife Service (FWS) did not designate a distinct population segment of coastal cutthroat trout under the Endangered Species Act. Several environmental groups filed suit challenging the decision. The United States District Court for the District of Oregon granted summary judgment in favor of FWS. On appeal, the Ninth Circuit reversed a portion of the district court's decision, finding that the FWS's decision was arbitrary where it failed to consider whether marine, estuary, and near-shore ocean areas of the trout was a significant portion of range. However, the court upheld the district court's finding that the FWS sufficiently considered whether the trout was threatened in the Lower Columbia River.

*Humane Society of the United States v. Gutierrez*, 2008 U.S. App. LEXIS 8733 (9th Cir. Apr. 23, 2008).

The National Marine Fisheries Service approved the lethal taking of up to 85 California sea lions annually under § 120 of the Marine Mammal Protection Act. The sea lions prey on endangered salmon species below the Bonneville Dam on the Columbia River. The Humane Society filed a request for a preliminary injunction to stop the taking of the sea lions. The district court denied the request, and the group sought an emergency stay pending appeal of the district court's denial of the injunction. The Ninth Circuit granted a stay on the lethal taking of sea lions, because the Humane Society was able to show irreparable harm to the sea lions absent a stay. Furthermore, the court found that only a small percentage of the protected salmon would be affected by the sea lions during the 2008 salmon run.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/DFD97497C4E5228688257434007CC8CD/\\$file/0835305o](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/DFD97497C4E5228688257434007CC8CD/$file/0835305o)

*Nat'l Wildlife Fedn. v. Nat'l Marine Fisheries Serv.*, 2008 U.S. App. LEXIS 8841 (9th Cir. Apr. 24, 2008).

The United States District Court for the District of Oregon found that the National Marine Fisheries Service's (NMFS) 2004 biological opinion (BiOp) regarding the effects of the Federal Columbia River Power System dams on listed endangered species was flawed under the Endangered Species Act (ESA). On appeal to the Ninth Circuit, the court affirmed the district court's holding that the NMFS jeopardy analysis was structurally flawed and incompatible with the ESA. The appellate court also agreed that NMFS' critical habitat determination was arbitrary and capricious. Finally, the court found that the district court's remand order did not exceed the scope of its authority.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/58B35E9D60BF9F5A8825743500007558/\\$file/0635011.pdf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/58B35E9D60BF9F5A8825743500007558/$file/0635011.pdf)

*United States v. Lei Shi*, 2008 U.S. App. LEXIS 8830 (9th Cir. Haw. Apr. 24, 2008).

A crewman fatally stabbed the captain and first mate of the fishing vessel on which he was working. The U.S. Coast Guard intercepted the vessel approximately 60 miles off the coast of Hawaii and arrested the crewman. He was subsequently convicted on one count of seizing control over a ship by force and two counts of performing an act of violence likely to endanger the safety of the ship. The defendant, Lei Shi, argued that because the crime was committed on the high seas the United States had no jurisdiction over him. The Ninth Circuit held that the United States had jurisdiction to punish crimes of piracy under U.S. Const. art. I, § 8, cl. 10. Furthermore, the United States had implemented the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, which allows the U.S. to prosecute those who commit acts of maritime violence.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/4E0EE994365149758825743500005DF9/\\$file/0610389.pdf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/4E0EE994365149758825743500005DF9/$file/0610389.pdf)

## California

*Center for Biological Diversity v. Kempthorne*, 2008 U.S. Dist. Lexis 34753 (N.D. Cal. Apr. 28, 2008).

The U.S. Fish and Wildlife Service failed to issue a final listing determination and critical habitat designation for the polar bear within one year of publication of the proposed rule as required by 16 U.S.C. § 1533(b)(6). The Center for Biological Diversity filed suit seeking a declaratory judgment and injunctive relief. Because the agency did to meet the January 9, 2008, deadline, the district court granted summary judgment in favor of the Center. The court ordered FWS to publish a final listing determination on or before May 15, 2008.

<https://ecf.cand.uscourts.gov/doc1/03514542565>

*Charles A. Pratt Construction Co., Inc. v. California Coastal Commission*, 2008 Cal. App. LEXIS 684 (Cal. App. 2d Dist. May 8, 2008).

The California Coastal Commission denied a subdivision developer a coastal development permit under the California Coastal Act. The developer brought suit to require the Commission to set aside its decision and seeking damages for a regulatory taking of its property. A lower court denied the developer's petition and dismissed the takings claim as unripe. The developer appealed the decision. The appellate court affirmed the lower court's decision, since the Commission had jurisdiction over the decision and its reasons for denying the permit were supported by substantial evidence. The court also found that the takings claim was not ripe, given that the developer was not foreclosed from submitting other plans for development.

<http://www.courtinfo.ca.gov/opinions/documents/B190122.PDF>

## ELEVENTH CIRCUIT

*Sierra Club v. Flowers*, 2008 U.S. App. LEXIS 10059 (11th Cir. Fla. May 9, 2008).

The Sierra Club brought suit against the Army Corps of Engineers, challenging the agency's grant of Clean Water Act (CWA) permits to mining companies extracting limestone in a wetlands area between the Florida Everglades and Miami. The United States District Court for the Southern District of Florida granted summary judgment to the Sierra Club. On appeal, the Eleventh Circuit vacated the portions of the decision in which the district court failed to apply the proper standard of review to the Corps' environmental analysis under the Administrative Procedures Act (APA). Under the APA, a court is required to review agency actions to determine if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law without observance of procedure required by law." 5 U.S.C. § 706(2). The Eleventh Circuit found that the district court failed to analyze the National Environmental Policy Act (NEPA) and the CWA claims under this deferential standard. The court found that "[t]he district court seems to have predetermined the answer to the ultimate issue, concluding that the Corps should not permit mining in the Lake Belt, and analyzed the permitting process with that in mind." The appellate court remanded the case to the district court with instructions to use the proper APA standard in analyzing the NEPA and CWA claims.

<http://www.ca11.uscourts.gov/opinions/ops/200713297.pdf>

## D.C. CIRCUIT

*Weaver's Cove Energy, LLC v. Rhode Island Department of Environmental Management*, 2008 U.S. App. LEXIS 9525 (D.C. Cir. May 2, 2008).

Weaver's Cove Energy sought certification to build a liquefied natural gas (LNG) import terminal in Massachusetts. The company filed a petition for review under the Natural Gas Act, seeking a declaration that the Rhode Island Department of Environmental Management (RIDEM) and the Massachusetts Department of Environmental Protection (MassDEP) had waived their right to deny certification under the Clean Water Act (CWA) when the states failed to act on the company's application within one year of its submission. The United States Court of Appeals for the District of Columbia did not reach the arguments and dismissed the action for lack of standing under U.S. const. art. III. The court found that the company did not show that the injury caused by the state agencies would be redressed by the declaration it sought.

<http://pacer.cadc.uscourts.gov/docs/common/opinions/200805/07-1235-1114320.pdf>

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