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Bunch v. Canton Marine Towing Co., 419 F.3d 868 (8th Cir. 2005)

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the affected waters. The court found the NRDC did not have standing to sue based on the lack of causal evidence between the storm water discharge and any violation of the CWA.

The NRDC claimed that filing a NOI and SWPPP should entail a public hearing and public notice in accordance with the CWA. The CWA requires public notice and a public hearing for all permit applications and permits relating to the discharge of pollutants into water. When proposing a GP, the EPA filed notice in the Federal Register subsequently soliciting and receiving public comments, satisfying the CWA public notice and public hearing requirements. The court held that the statute defining this process was ambiguous as to whether Congress intended to treat NOIs and SWPPPs in the same manner as permits and permit applications.

NRDC also claimed the EPA violated Section 7 of the ESA. This provision requires a consultation with the Fish and Wildlife Service and/or the National Marine Fisheries Service (collectively "Service"). The NRDC claimed this process should occur each time an operator receives a NOI or a completed SWPPP. The court held that the EPA fulfilled this requirement when it initially filed the GP.

Oil and Gas argued the EPA lacked authority to require a permit for construction activities related to oil and gas exploration. Since a case was pending before the Fifth Circuit regarding the issue, the court stayed consideration until the Fifth Circuit court decided that case.

In conclusion, the court held the NRDC lacked standing to challenge a violation of the CWA by the EPA, the EPA fulfilled the public notice and public hearing requirements set forth by the CWA when initially filing a GP, and the EPA's consultation with the Service fulfilled ESA requirements. The court stayed consideration of the Oil and Gas claim, which claimed the EPA lacked authority to regulate storm water discharge from oil and gas companies, until the Fifth Circuit court decided a similar case.

Amy M. Petri

EIGHTH CIRCUIT

Bunch v. Canton Marine Towing Co., 419 F.3d 868 (8th Cir. 2005)
(holding a cleaning barge constituted a "vessel in navigation" under the Jones Act and an employee who had a substantial connection to the barge was a "seaman" eligible for benefits under that Act).

Canton Marine Towing Company, Inc. ("Canton") employed Ashley Bunch as a barge cleaner at Canton's Missouri facility, which consisted of a cleaning barge moored to the bed of the Missouri River. Bunch injured himself aboard Canton's tugboat, the Sir Joseph. Canton used the tugboat to ferry Bunch to the cleaning barge from Can-

ton's Illinois facilities. On most days, Bunch spent about twenty minutes aboard the Sir Joseph.

Although the cleaning barge was originally built for navigation, Canton generally kept it secured in position. Strong currents would shift the position of barge slightly. During Bunch's tenure, Canton moved the cleaning barge only once from the Illinois side of the river to the Missouri side. The cleaning barge did not have propellers and did not move by itself. On April 20, 2001, as Bunch traveled from the cleaning barge to the Illinois facilities aboard the Sir Joseph, Bunch stopped the tug to inspect other barges. After inspecting the other barges, Bunch fell climbing back aboard the Sir Joseph and sustained injuries.

Bunch sued Canton and the Sir Joseph under the Jones Act ("Act"), section 33 of the Merchant Marine Act of 1920, 46 U.S.C. app. § 688. The United States Supreme Court established a two-part test for determining seaman status under the Act in *Chandris, Inc. v. Latsis*: (1) the "employee's duties must contribute to the function of the vessel or to the accomplishment of its mission," and (2) the employee "must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." Applying this test, the United States District Court for the Eastern District of Missouri granted summary judgment to Canton, concluding Bunch was not a "seaman" covered by the Jones Act because Bunch "simply did not have a substantial connection to a vessel in navigation."

On appeal, the United States Court of Appeals for the Eighth Circuit needed only to consider whether the cleaning barge, upon which Bunch spent the majority of his work time, qualified as a "vessel in navigation." The court applied the recent United States Supreme Court decision in *Stewart v. Dutra Construction Co.*, wherein the Supreme Court clarified the definition of "vessel" under the Act. Based on *Stewart*, the court focused on Canton's use of the cleaning barge, questioning whether the cleaning barge could operate "as a means of transportation on water." The court concluded the cleaning barge was a "vessel in navigation" because Canton had not permanently moored or anchored the cleaning barge to the river bed, and Canton had moved the barge from its mooring to travel across the river during the time Bunch worked for Canton. The fact that currents would move the barge also demonstrated the mooring was not permanent. Lastly, there was no evidence showing that Canton had taken the barge out of service or rendered the barge incapable of maritime transportation. The court remanded the case to the district court for proceedings consistent with its decision.

Kevin Kennedy

***In re* Operation of the Mo. River Sys. Litig., 418 F.3d 915; 421 F.3d 618 (8th Cir. 2005)** (multiple states and conservation organizations initi-