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Nat'l Ass'n of Home Builders v. U.S. Army Corp of Eng'rs, 440 F.3d 459 (D.C. Cir. 2006)

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dumped wastewater, he violated the CWA. The court remanded the case after reversing the acquittal for further sentencing.

Thomas Jantunen

DISTRICT OF COLUMBIA

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 440 F.3d 459 (D.C. Cir. 2006) (holding challenge to a rule promulgated under the Clean Water Act was ripe for review as (1) legality of the challenged provisions would not vary case by case and (2) the regulation was a substantive rule that required parties to adjust their conduct immediately).

In 2001, the Environmental Protection Agency and the United States Army Corps of Engineers (collectively "Agencies") jointly promulgated a new rule known as "Tulloch II" regarding the discharge of dredged material under section 404(a) of the Clean Water Act ("CWA"). The framework rule "regards" any dredging using mechanized earth-moving equipment as always resulting in a discharge, requiring a permit, unless project-specific evidence shows only incidental fallback results. Additionally, the new rule incorporates a definition of incidental fallback as the redeposit of "small volumes" of dredged material.

The National Association of Home Builders; the National Stone, Sand and Gravel Association; the American Road and Transportation Builders Association; and the Nationwide Public Projects Coalition (collectively "Industry") brought suit against the Agencies in the United States District Court for the District of Columbia. The Industry challenged Tulloch II as exceeding the statutory authority of the Corps and the EPA under the CWA. Specifically the Industry argued that adding "regards" to the rule creates an impermissible rebuttable presumption that all dredging results in unlawful discharge. The Industry also challenged defining incidental fallback in terms of volume.

The district court held the Industry's challenge was not ripe because (1) until the Agencies actually applied the rule in concrete factual situations the issues were not fit for review and (2) delaying such a review would not impose hardship on the Industry plaintiffs.

The United States Court of Appeals for the District of Columbia Circuit found, as had the district court, that under the first prong of the ripeness doctrine the issues raised were both final and purely legal. The court, however, determined that the legality of the issues would not change on a case by case basis. The court concluded the Industry's claim rested not on if the Agencies would exercise discretion unlawfully in the future but that any faithful application of the rule would exceed the Agencies' statutory mandate. Under the second ripeness

prong, hardship, the court also found the case was ripe for review. The court reasoned that the Industry would face hardship because each permit applicant would have to choose between applying for a permit the Industry challenged or face penalties for failing to do so. Hence, the court held the regulation reviewable as a substantive rule as it required the parties to adjust their conduct immediately.

In conclusion, the court held the Industry's challenge that Tulloch II exceeds the Agencies' statutory authority to promulgate rules under the CWA was ripe for review. The court reversed district court's dismissal and remanded the case.

Matthew Willson

FEDERAL CIRCUIT

Goodrich v. United States, 434 F.3d 1329 (Fed. Cir. 2006) (holding the issuance of a Record of Decision and final Environmental Impact Statement is sufficient to constitute a taking of a water right and commence the statute of limitations for a takings claim, regardless of when the water right owner is affected by the consequences of the decisions).

Rancher John B. Goodrich ("Goodrich") grazed and watered cattle on what is now the Whitetail Allotment of the Lewis and Clark National Forest ("Forest"). In 1991, the Forest Service undertook a range analysis of the Forest to determine the adequacy of the allotment management plan ("AMP"), which governed livestock operations on Forest Service Lands. In 1995, the Forest Service published a draft EIS outlining the impact of each alternative, all of which involved moving cattle belonging to Joseph Kennedy ("Kennedy") onto the Whitetail Allotment. The current AMP specified the "current permittee," Goodrich, was entitled to receive any additional grazing use on the Whitetail Allotment. Therefore, Goodrich opposed the proposals, arguing the Forest Service could meet its environmental goals and maintain compliance with the current AMP by moving additional Goodrich cattle to the Whitetail Allotment instead of moving Kennedy's cattle. After considering Goodrich's and other public comments, the Forest Service issued a final EIS and a Record of Decision ("ROD") on February 27, 1997, adopting Alternative 10, stating that one permittee with 108 animal unit months ("AUMs") would be moved to the Whitetail Allotment. The final EIS confirmed Kennedy as the designated permittee.

On April 25, 2000, Goodrich received official notice from the Forest Service of intent to implement Kennedy's permits that grazing season. On July 1, 2000, Kennedy's cattle physically entered the Whitetail Allotment. As a result, Goodrich lost 79 AUMs (down from the original allotment of 108 AUMs). On June 9, 2004, Goodrich filed suit in the United States Court of Federal Claims alleging that, by allowing