Water Law Review

Volume 6 | Issue 1 Article 23

9-1-2002

Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002)

Holly Shook

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National Environmental Policy Act ("NEPA") requirements, thus expediting the grant approval process. When HUD approved the grant, the funds were only to be used for preliminary purposes.

The DWS took $30,000 in grant funds in 1995 to pay for the contractors working on the state EIS. This was the only time the DWS drew upon the grant funds. In 1998, the DWS placed the Kohala project on hold, but it assured HUD the project would resume. Finally, in 1999, the DWS reallocated the funds to another project in South Hilo.

Since NEPA did not have a separate judicial review provision and the suit involved legal issues, the appellate court relied on the reasonableness standard of review. The court noted that controlling weight is given to the agency's interpretation of its own regulations unless it is plainly erroneous or inconsistent.

NEPA only required an EIS if "major Federal actions significantly affect the quality of the human environment." Because there is no clear standard for determining what constitutes "major Federal action," the analysis relies on the degree and nature of the involvement. Here, the court weighed the amount of funds actually spent on the project, the total amount of federal funding, and the total estimated cost of the project and concluded that HUD and USGS's involvement did not constitute "major Federal action." The court also found that there could not be any "major Federal action" because of the lack of decision-making power, authority and control HUD and USGS possessed over the project. Furthermore, the DWS always maintained final decision-making power over the project.

Ka Makani also argued that HUD's own provisions required an EIS. The court found that HUD did not need to conduct an EIS if the grant is a special purpose grant, as it was in this case. Furthermore, the court held it illogical to conduct an EIS over the entire Kohala project.

Staci A. McComb

Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002) (holding that notice of alleged Clean Water Act violations regarding a particular source is sufficient for all similar claims derived from that same source in a citizen suit, and past cited violations, along with evidence of present violations, is sufficient to establish an ongoing violation of the Clean Water Act).

The Community Association for Restoration of the Environment ("CARE") brought a citizen suit against Henry Bosma and his two dairy operations ("Bosma") in the United States District Court for the Eastern District of Washington, alleging that Bosma violated the Clean Water Act ("CWA") by discharging pollutants and manure into

navigable waters without a permit. The court ruled in favor of CARE finding that it provided Bosma with adequate notice of CARE's intent to sue, and that CARE had established that Bosma's operation met the definition of an ongoing violation as required under the CWA. Bosma appealed both district court rulings to the Ninth Circuit Court of Appeals. The appellate court affirmed the judgment and held that the court did not commit "clear error" in finding that CARE provided sufficient notice and proved an ongoing violation existed.

Bosma owned and operated two dairies. Each dairy contained approximately 3,000 head of cattle, and met the definition of a concentrated animal feeding operation ("CAFO") under the CWA. The Act describes a CAFO as a point source, and CAFO operators are required to obtain a National Pollution Discharge Elimination System ("NPDES") permit. The Washington Department of Ecology ("DOE") regulates CAFOs. For many years, Bosma had a record of discharge problems, and refused three requests by DOE to obtain the required NPDES permit. In January 1977, Bosma obtained a general NPDES dairy permit from DOE for one of the dairies, and later modified the permit to include both dairies in 1998.

A person seeking to bring suit under the citizen suit provision of the CWA must give sixty days notice of his intent to sue to the alleged violator, the administrator, and the state so that the violator has a chance to comply and avoid litigation. In October 1997, CARE sent notice of its intent to sue Bosma for twelve allegedly illegal discharges. Within sixty days, CARE filed a complaint in the district court alleging the original violations listed in the mailed notice, and thirty-two additional violations. Bosma argued that the original notice alleging twelve violations was insufficient notice of CARE's thirty-two additional violations, however, the appellate court found that CARE's notice was adequate and provided Bosma with sufficient information so that Bosma had knowledge of the point source where the alleged violations occurred.

The CWA regulates the discharge of pollutants, and defines discharge of pollutant as any discernable, confined and discrete conveyance from any point source. CARE alleged that Bosma, as a point source, violated the CWA over thirty times by allowing the manure from his two dairies to drain illegally into a drainage system that eventually drained into navigable waters. Moreover, CARE asserted that Bosma's manure fields were part of the point source under the CWA and that the discharge of manure was included under the CWA. The appellate court found that CARE's notice sufficient for all alleged violations because the violations were all derived from the same point source, and the multiple violations constituted several instances of a single violation.

The CWA requires that notice provides sufficient information so that the alleged violator can identify the alleged actions and the dates of violation, the persons responsible, and the name and contact information of the person giving notice. Focusing on the statute, the

court of appeals looked to the words "sufficient information" and determined that Bosma received adequate notice. It determined that the purpose of notice is to prevent litigation and allow the violator to correct the problem. Then the court interpreted point source to include manure fields, reasoning that the purpose of the CWA is to regulate all discharges, including those coming from land near a drainage ditch. This conclusion, paired with ample evidence that Bosma was aware the drainage ditch drained into navigable waters, provided Bosma with notice of all closely related claims in regards to the drainage ditch. Thus, notice to a person or company in violation may serve as notice for all similar claims derived from the same source.

The court of appeals also affirmed the district court's finding that CARE proved the existence of an ongoing violation. It considered multiple violations over time as an ongoing violation unless Bosma could prove that there was no likelihood of repeating the violation. Repetition may be inferred by the trier of fact, or implied when additional violations occur after the plaintiff filed suit. The court of appeals rejected Bosma's argument that CARE had not presented sufficient evidence to show he actually committed the alleged violations, and that therefore, future violations could not be inferred. It found CARE had proven the existence of past violations by providing evidence of date-specific violations. The court also inferred an ongoing violation in light of the particular facts of the case. The DOE had cited Bosma for numerous violations in the past and Bosma refused to obtain a permit for many years. Additionally, CARE provided testimony, photos, and video footage showing that Bosma placed deposits of manure in proximity to the water after CARE filed suit. The court of appeals concluded that evidence of past violations, in conjunction with evidence of existing violations, was a basis for a reasonable person to infer that there may be continuing violations. Because Bosma failed to provide sufficient evidence to the contrary, the court affirmed the district court's decision.

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Cent. Delta Water Agency v. United States, 306 F.3d 938 (9th Cir. 2002) (holding that: (1) individual farmers and state agencies showed a genuine issue of material fact as to risk of injury-in-fact to confer Article III standing; and (2) claim and issue preclusion did not bar action against the Bureau of Reclamation).

Two farmers in the Central Delta Area of the San Joaquin River ("San Joaquin") and two California State Agencies ("State Agencies") sued the Bureau of Reclamation ("BOR") and pursued a temporary restraining order ("TRO") in the United States District Court for the Eastern District of California to prevent flooding of fisheries unless the BOR reserved sufficient water to meet salinity standards downstream.