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FD&P Enters., Dist. LEXIS 497 (D.N.J. Jan. 15, 2003)

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management system's imminent threat to their reasonable use was insufficient to establish standing, and the court dismissed their takings claims for lack of subject matter jurisdiction. Based on this dismissal, the court similarly dismissed the Knausts' state law claims without prejudice, declining to exercise supplemental jurisdiction.

The Knausts' regulatory takings claim resulted from the Business Park's alleged interference with their plans to construct a commercial mushroom farm. The Business Park's two-level storm water management system discharged only benign, contaminant-free, treated storm water not subject to EPA regulation. The district court noted that the Knausts failed to produce any evidence of contamination. In fact, the Knausts admitted that they neither collected runoff samples for laboratory analysis, nor did they detect contamination in any water samples from the subterranean lakes. Further, the Knausts did not offer proof that the water management system failed to remove the contaminants it was designed to eliminate.

Despite lacking subject matter jurisdiction because collateral estoppel precluded claims regarding the Knausts' ownership interest in the subterranean caves and the waters therein, the court addressed the merits of the takings claim. The court granted the City summary judgment because the Knausts could not support a takings claim against water they did not own, and because they produced no evidence that the Business Park's alleged contamination sufficiently threatened their reasonable use, causing "actual or imminent injury." Ripeness problems mandated the takings claim dismissal, because the Knausts never applied to the City for a zoning change permitting the development. Until that occurrence, the court was unable to determine the zoning law's economic impact on the Knausts, and its interference "with reasonable investment-backed expectations"—crucial elements in takings analysis.

Robert Lykos

FD&P Enters., Inc. v. United States Army Corps of Eng'rs, No. 99-3500, 2003 U.S. Dist. LEXIS 497 (D.N.J. Jan. 15, 2003) (holding the appropriate test for jurisdiction under the Clean Water Act was whether there is a substantial nexus, beyond a mere hydrological connection, between the property and a navigable body of water; and jurisdiction over the filling of wetlands in order to build a commercial facility to further interstate freight transportation was not violative of the Commerce Clause of the United States Constitution because it was an activity that would "substantially affect" interstate commerce).

FD&P Enterprises ("FD&P") provided freight transportation to the New York-New Jersey metropolitan area. FD&P owned 100 acres of wetlands in Jersey City, New Jersey, the western perimeter bordering Penhorn Creek, a non-navigable tributary of the Hackensack River, a

navigable body of water utilized for interstate commerce. On December 18, 1992, FD&P applied to the United States Army Corps of Engineers ("Corps") for a permit under the Clean Water Act ("CWA") to fill 53.5 acres of its wetlands and build an intermodal facility.

On June 23, 1999, after seven years of failed negotiations, FD&P brought this action against the Corps in the United States District Court of New Jersey alleging the Corps lacked jurisdiction over the wetlands on the FD&P Property; and if the Corps' had jurisdiction over the FD&P wetlands, it would violate the Commerce Clause of the United States Constitution.

On the first count, FD&P moved for summary judgment. The issue presented was whether the Corps had jurisdiction under the CWA over the wetlands on the FD&P Property that were adjacent to a non-navigable tributary that fed into a navigable body of water. The CWA granted the Corps authority to issue permits for the discharge of material into "navigable waters of the United States."

Originally, the courts interpreted the statute broadly to permit regulation of wetlands adjacent to non-navigable tributaries that fed navigable bodies of water. However, in 2001, the Supreme Court held a significant nexus between the wetlands and the "navigable" waters was necessary to determine jurisdiction under the CWA in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* ("SWANCC"). Although the Court recognized the ponds at issue in SWANCC were hydrologically connected to navigable waters, it declined to find a sufficient nexus between the two isolated waters to allow the CWA's regulation.

The SWANCC decision caused confusion about the scope of the CWA and a split of authority represented by the Fifth and Ninth Circuits. The Fifth Circuit interpreted SWANCC to permit the CWA to regulate a body of water if it was actually navigable or adjacent to an open, navigable body of water. On the other hand, the Ninth Circuit interpreted SWANCC only to apply to "isolated waters," and maintained that non-navigable tributaries of navigable waters were subject to jurisdiction under the CWA. After noting the CWA's valuable purpose, the court concluded the appropriate test for the CWA's jurisdiction in the instant case was whether there was a substantial nexus, beyond a mere hydrological connection, between the FD&P Property and the navigable waters of the Hackensack River.

The Corps argued FD&P's wetlands were sufficiently related to the Hackensack River and the company's plan to fill the wetlands would release greater levels of sediments and chemicals and damage the river. FD&P contended their wetlands provided no environmental benefit to the Hackensack River and denied the filling of the wetlands would cause any damage to the river.

Because the evidence put forth by both parties generated a genuine issue of material fact as to a substantial nexus between the FD&P Property and the Hackensack River, and the effect the filling of

the wetlands would have on the river, the court denied FD&P's motion for summary judgment.

On the second count regarding the violation of the Commerce Clause of the United States Constitution, the court stated that Congress may regulate three categories of activity under its commerce power: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. Although FD&P asserted filling its wetlands would not "substantially affect" interstate commerce, the court found FD&P's plan to fill their wetlands to build a commercial facility to further interstate freight transportation to suffice as "substantially affecting" interstate commerce. Therefore, the court held the Corps' jurisdiction over the FD&P Property would not violate the Commerce Clause of the United States Constitution.

Jessica L. Grether

Bailey v. United States Army Corps of Eng'rs, Civ. No. 02-639, 2002 U.S. Dist. LEXIS 23272 (D. Minn. Nov. 21, 2002) (holding that a restoration order, after the denial of an after-the-fact permit for the building of an access road which included dredging and filling wetlands, does not give rise to pre-enforcement judicial review until all existing state procedures are exhausted).

Gary Bailey ("Bailey") sought judicial review in the United States District Court for the District of Minnesota of decisions made by the United States Army Corps of Engineers ("Corps"), state agencies ("MPCA") and Lake of the Woods County ("County"), as well as compensation for the alleged taking of property in violation of the Fifth Amendment. The Corps, MPCA and the County brought motions to dismiss and the court granted each.

Bailey owned a parcel of lakefront property in northern Minnesota. The land included wetlands adjacent to navigable waters and fell under the jurisdiction of the Corps pursuant to the Clean Water Act ("CWA"). Bailey submitted a plat to the County for a residential development and before the plat was approved, he began building an access road across the land by dredging and filling wetlands. He then applied for an "after-the-fact" permit for the project from the Corps and submitted a wetland "replacement" plan because the project would drain and fill the wetlands. The Corps rejected the permit because the lots did not have sufficient areas of upland and the land was insufficient for locating individual sewage treatment systems that would comply with state regulations. The Corps directed Bailey to remove the road and the Department of Natural Resources directed Bailey to restore the wetlands to the lot. Bailey did not comply with the order and the Corps did not seek enforcement of the order.