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Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917 (5th Cir. 2000)

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This suit followed. The Bakers alleged, among other things, that Massachusetts EOEAs officials—namely, Trudy Coxe, Thomas French, Jay Copeland, Patricia Huckery, Bradford Blodgett, Jane Mead, Susan Tierney, and Janet McCabe (collectively “EOEA officials”)—violated the Bakers’ substantive due process and equal protection rights (“Count I”), and First Amendment rights for retaliation in the exercise of free speech (“Count VII”) by delaying the permit issuance. The district court dismissed Count I for failure to state a claim, and granted summary judgment concerning Count VII in favor of the EOEAs officials.

The First Circuit affirmed both decisions. Regarding Count I, due to the nature of the governmental conduct, the court found that substantive due process and equal protection claims regarding local land use permits were essentially the same inquiry. The court declared that even an arbitrary denial, absent either a gross abuse of power that shocked the conscience, invidious discrimination, or legally irrational action, did not rise to the level of a constitutional violation. The court determined the Bakers’ three alleged instances of official misconduct did not breach this constitutional barrier. In each instance, the EOEAs performed a legitimate government purpose by reviewing the permit application, and the Bakers suffered no adverse action from the alleged misconduct.

Regarding Count VII, the court noted that delay of an application for a land use permit in unjustifiable retaliation for expressions of political views violated the First Amendment if a plaintiff established three elements: (1) he engaged in protected speech; (2) he was qualified for the permit; and (3) the delay was in retaliation for the disfavored speech. The First Circuit focused on only the last requirement, as did the district court. The court acknowledged the speech at issue involved Mr. Baker’s opposition to the ACEC legislation in the Massachusetts legislature, two years before the Bakers filed their pier permit application. However, only defendants Copeland, Huckery, French, and McCabe knew of Mr. Baker’s opposition to the legislation, thereby making the evidence of retaliatory motive insufficient. Further, the protected speech occurred two years before the review of the Bakers’ application. More importantly, even if Mr. Baker had made a *prima facie* case, Coxe had a nonretaliatory reason for opposing the permit—the tree farm’s impact on the heronry, not the pier’s impact on the heronry. The court found the district court’s reasoning appropriate, and the Bakers’ claims of errors non-meritorious. As such, the First Circuit affirmed the district court’s decision.

Adam B. Kehrl

FIFTH CIRCUIT

Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917 (5th Cir. 2000)
(holding groundwater quality monitoring company was not liable)

under the Comprehensive Environmental Response, Compensation and Liability Act as an operator, arranger, or transporter, and was not liable for breach of warranty and negligence).

Since 1961, Defendants, Conoco, Inc. and Condea Vista Chemical Co. ("Conoco/Vista"), have owned the Lake Charles Chemical Complex ("Complex") in Westlake, Louisiana. In 1968, Conoco began managing ethylene dichloride at the Complex. As a result of historic releases and migration, the ethylene dichloride contaminated the Complex's subsurface to a depth of twenty feet, including the Complex's shallow groundwater zones. The Louisiana Department of Environmental Quality ("LDEQ") required Conoco to investigate and address the ethylene dichloride contamination under state groundwater protection laws, and federal and state solid waste laws. LDEQ also required Conoco to install a groundwater monitoring and assessment program pursuant to the Resource Conservation and Recovery Act ("RCRA").

Geraghty and Miller ("G&M"), a groundwater quality monitoring company, entered into a contract with Conoco, and Vista as a third-party beneficiary, under which G&M was to assess contamination beneath several suspected source areas at the Complex. G&M installed fifty monitoring wells by July 1985. By May 1988, Conoco/Vista suspected potentially serious technical and physical deficiencies in three of the monitoring wells, and expressed concern that such deficiencies were aggravating the contamination. With approval from LDEQ, Conoco/Vista plugged and abandoned four deficient wells in 1989. In 1990, G&M and Conoco/Vista entered into the Groundwater Wells Interim Agreement ("Interim Agreement"), requiring the parties to agree upon criteria to determine whether the remaining wells were properly installed, which wells needed to be removed, and who would bear the costs. The parties were unable to agree on the criteria. Thus, Conoco/Vista retained other environmental consulting firms to continue the groundwater assessment program. In 1993, Conoco/Vista plugged, abandoned, and replaced the remaining G&M wells.

In 1997, G&M filed this CERCLA action seeking compensation from Conoco/Vista for G&M's past and future response costs. Conoco/Vista counterclaimed seeking relief under sections 107 and 113 of CERCLA. G&M dismissed its original complaint and moved for summary judgment, arguing that Conoco/Vista's counterclaim was time-barred. The district court granted summary judgment in favor of G&M. In addition, the district court held Conoco/Vista's common law causes of action filed in 1993 were barred by the Texas statute of limitations. Finally, the district court held G&M was not a "covered person" under CERCLA.

On appeal, the Fifth Circuit Court of Appeals reviewed four issues. The issues before the court were: (1) whether the district court erroneously entered summary judgment without giving Conoco/Vista

notice and an opportunity to respond; (2) whether the six-year statute of limitations barred Conoco/Vista's CERCLA contribution claim; (3) whether G&M was liable under CERCLA as an operator, arranger, or transporter of hazardous materials; and (4) whether the district court correctly entered summary judgment on Conoco/Vista's state common law counterclaims for breach of contract, fraud, breach of warranty, and negligence.

First, the court stated that although the district court erred by not observing the notice requirements of Rule 56(c) of the Federal Rules of Civil Procedure, consideration of summary judgment without giving Conoco/Vista notice and hearing was harmless error. The court declared Conoco/Vista ultimately had an opportunity to be heard on all of the issues. In addition, the court found the district court's post-summary judgment consideration and ruling cured any procedural defect.

Second, to determine whether the six-year statute of limitations barred Conoco/Vista's CERCLA contribution claim, the court had to decide whether Conoco/Vista's response actions at the Complex constituted "remedial" or "removal." The court categorized the initial placement of monitoring wells as removal activities. Thus, the court concluded the statute of limitations did not bar Conoco/Vista's counterclaim for CERCLA contribution.

In order to prevail in a CERCLA contribution action, Conoco/Vista had to show that G&M was a "covered person" under the statute. CERCLA's definition of a "covered person" includes owners, operators, arrangers, and transporters of hazardous substances. The court held G&M was a "covered person." However, because the facts concerning the degree of G&M's control over the monitoring wells was in dispute, the court held summary judgment declaring G&M was not an "operator" was premature. The court remanded the issue of whether G&M was an "arranger" to determine if and how the hazardous waste was moved by G&M at the Complex. The court found G&M was not liable as a "transporter" under CERCLA, because no evidence existed to show G&M had moved the ethylene dichloride to another facility or site.

Third, the district court found the Texas statutes of limitations barred all of Conoco/Vista's state common law counterclaims. Conoco/Vista asserted their claims were timely by virtue of the relation back doctrine and the Texas discovery rule, and because the parties agreed to toll the statutes as part of the Interim Agreement. The Fifth Circuit, however, held the Interim Agreement was ambiguous and reversed the district court's grant of summary judgment on the issue. The court then looked at whether the statute of limitations had expired for each of the state law claims. The court held the Texas statute of limitations for breach of contract, breach of warranty, and fraud was four years, and for negligence it was two years. The court rejected Conoco/Vista's argument that the discovery rule applied, and stated that both the four- and two-year statutes of limitations applied to the breach of warranty and negligence claims. The court remanded

the claims of fraud and breach of contract to the district court, because disputed facts existed concerning when Conoco/Vista discovered or should have discovered the injury.

Sommer Poole

Miss. River Basin Alliance v. Westphal, 230 F.3d 170 (5th Cir. 2000) (affirming trial court's grant of summary judgment, and holding the Army Corps of Engineers' Supplemental Environmental Impact Statement for the Mississippi River Mainline Levee Enlargement and Berm Construction Project satisfied NEPA requirements).

Conservation groups brought this appeal to the United States Court of Appeals for the Fifth Circuit after the United States District Court for the Eastern District of Louisiana granted Westphal's motion for summary judgment. At issue was whether the Army Corps of Engineers' ("Corps") Supplemental Environmental Impact Statement ("SEIS") satisfied the National Environmental Policy Act's ("NEPA") requirements for the Mississippi River Mainline Levee Enlargement and Berm Construction Project ("Project"). NEPA required that the SEIS adequately consider cumulative impacts, mitigation issues, and project alternatives. The Fifth Circuit stated it must set aside any action found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. The court determined the SEIS did satisfy NEPA.

Under the Project, the Corps was to build and maintain 139 separate flood control measures along the Mississippi River. The project would take thirty-three years to complete. The Corps completed the Project's SEIS in July 1998. The SEIS analyzed four alternatives. The first alternative, the Nonstructural Option, required that the government seek to reduce and reimburse for existing damages. The second alternative, the Landside Borrow Choice, required the Corps use levees' landside soil for the projects. The third alternative, the Traditional Method, required the Corps use levees' riverside soil. Finally, the Avoid and Minimize Plan required the Corps to obtain either landside soil from willing sellers or use riverside land if landside soil was not reasonably available. The Corps selected the Avoid and Minimize alternative and further chose not to purchase landside soil, instead using riverside land. A dispute arose because the Mississippi River Basin Alliance and other conservation groups (collectively, "Conservation Groups") believed the Corps should take material from the levees' landside.

The appellate court first reviewed the Corps' cumulative impact analysis to determine if it was arbitrary. The Conservation Groups argued the Corps' analysis was arbitrary in that it directly contradicted relevant evidence. Further, the Conservation Groups claimed the Corps avoided a cumulative impacts analysis by claiming compensatory mitigation resolved the issue. Finally, the Conservation Groups claimed the Corps gave the impression the Project was benign, when it