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bcc

Subject Ethics Issue Research

Confidential and Attorney-Client Privileged

Karlene -

My research on the ethical issues involved has found two other cases in which a Forest Service employee filed an Administrative Procedure Act lawsuit against the Forest Service. Of all the OGC and FS folks I have talked to, none can remember any others. You might not be surprised to learn that both were on the Tongass NF. The Forest Service has not asserted defenses against claims made by federal employees in other APA or environmental law litigation based upon their status as federal employees. A third case of interest was a lawsuit brought by an EPA attorney. Only in one of these cases was personnel action taken against the employee, and that was later withdrawn.

Mary Dalton and FSEEE v. U.S. Forest Service, No. 97-0774 (D.D.C.) involved a Forest Service biologist challenging the 36 CFR 215 appeal regulations prohibition against Forest Service employees filing administrative appeals. Although the conflict of interest issues received considerable attention in internal discussions, the government's motion for summary judgment did not argue any standing issues or jurisdictional issues based upon the status of the plaintiff as an employee or her involvement on the project interdisciplinary team. The litigation was settled before a decision on the merits was issued. The settlement resulted in a change to the 36 CFR 215 appeal regulations such that Forest Service employees were no longer prohibited from filing appeals (see 63 Fed. Reg. 4187). Personnel action was taken against the employee, but the action was later withdrawn and damages paid to the employee under a settlement.

William Shoaf v. Powell, No. A96-137-cv (D. Alaska) involved a NEPA, TTRA and APA challenge a timber sale on the Tongass NF. The lead plaintiff was no longer a Forest Service employee, but prior to his retirement he had been the interdisciplinary team leader for the entire project until publication of the ROD. The government did not argue any standing issues or jurisdictional issues based upon the status of the plaintiff having worked extensively on the project when he was as an employee. The court denied plaintiff's request for preliminary relief and the action was dismissed by stipulation because timber sale would have been substantially completed.

Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273 (1st Cir., 1996) involved a NEPA and CWA challenge to a Forest Service permit for the expansion of a ski area in New Hampshire. The plaintiff was an EPA attorney in Washington D.C. who was appearing pro se. The government challenged the plaintiffs' standing to bring the case on injury in fact grounds, but no defense was asserted on the basis that the challenge was brought by a federal employee.

Protection for Whistleblowers in Environmental Laws

The Merit Systems Protection Board has found that an employee's disclosure that proposed timber sale would violate NEPA and Federal Land Policy and Management Act (FLPMA) was protected by the Whistleblowers Protection Act. Bump v. Department of Interior, 69 M.S.P.R. 354 (M.S.P.B. Jan 23, 1996) affirmed at 217 F.3d 854 (Fed.Cir. Oct 07, 1999) (Table). Attached is a copy of the MSPB case.



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At least six federal environmental laws specifically prohibit retaliation against employees who file claims, testify, or provide information against their employer under the Act:

- Toxic Substances Control Act, 15 U.S.C. § 2622;
- CERCLA, 42 U.S.C. § 9610;
- Water Pollution Control Act, 33 U.S.C. § 1367;
- Solid Waste Disposal Act, 42 U.S.C. § 6971;
- Clean Air Act, 42 U.S.C. § 7622;
- Safe Drinking Water Act, 42 U.S.C. § 300j 9

The statutes invoked in *FSEEE v. USFS*, however, do not contain a specific whistleblower provision.

### New Ethics Issue

The filings on Friday by FSEEE raise new ethics issues, however. It appears to me that the motion and declaration by the employee may in themselves violate ethics and Touhy regulations. In particular, the declaration does not state that it is being given in a personal capacity, and it appears to draw upon the employee's status as a government employee to build credibility of the testimony. The questions that need to be explored are:

1. Is there a reasonable likelihood that the motion and declaration may violate the Touhy regulations as the employee providing testimony against the United States without approval by the agency? How can that testimony be differentiated from testimony by an employee in EEO litigation against the agency?
2. Is there a reasonable likelihood that the motion and declaration may violate the ethics regulations by providing expert testimony on behalf of a litigant? (See especially the brief at page 22.)
3. What process should be followed by the agency to determine whether a violation occurred so that any action is defensible against possible claims of retaliation against alleged whistleblowing by the employee?
4. How can any personnel action taken on the ethics and Touhy matters be taken without undermining the litigation strategy in the environmental litigation, which seeks to inform the court that very little is not moot in the litigation?

In order to be at our most defensible position, I am thinking that we ought to formally refer the matter to the Forest Service ethics officer for advice on whether or not there is a violation in this matter. Attached are the brief and declaration by Glen Ith.



TRD Brief.pdf Ith Declaration.pdf

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## **USFS Allows Employee Appeals**

*Greenwire*

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In response to a whistleblower lawsuit, the U.S. Forest Service plans to drop a regulation that forbids employees from challenging agency actions through the citizen appeal process. USFS biologist Mary Dalton sued in April after she was suspended and then transferred when she filed an administrative appeal in 1996 challenging a timber sale on Alaska's Tongass National Forest. She claimed that the required environmental impact statement omitted most of her research about potential damages from logging to wildlife habitat.

U.S. District Judge James Robertson last week postponed any ruling in the case, giving the USFS 60 days "to make good on its pledge to formally rescind" the 1989 regulation that bars agency workers from using the appeals process.

But the agency is going ahead with plans to auction off the timber sale that Dalton found questionable, arguing that the period in which to have an administrative appeal heard ended in 1996.

Andy Stahl of the Association for Forest Service Employees for Environmental Ethics, which is representing Dalton: "It's really a remarkable sleight of hand. First they shot the messenger and now they are blaming her for their own refusal to revive her appeal."

Dalton has asked Phil Janik, the USFS regional boss, to postpone the sale so that her appeal can be considered. And she is fighting her transfer out of Alaska in a separate action through the federal employee system (*AP/Ashland Daily Tidings*, Nov. 28).