

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DELAWARE VALLEY FISH CO., *et al.*,)
)
 Plaintiffs)
)
 v.) 09-CV-142-B-W
)
 FISH AND WILDLIFE SERVICE, *et al.*,)
)
 Defendants)

**RECOMMENDED DECISION ON
MOTION FOR PRELIMINARY INJUNCTION**

The Plaintiffs in this action commenced litigation to challenge the manner in which the Defendants have chosen to regulate the importation and exportation of live American eels (*Anguilla rostrata*). Although American eels are not an endangered species and may be exported from the United States for commercial purposes, the Endangered Species Act (ESA) gives the United States Department of the Interior jurisdiction to regulate imports and exports of fish and wildlife. The Plaintiffs contend that the Department and its Bureau, the U.S. Fish & Wildlife Service (FWS), have unlawfully and arbitrarily subjected imports and exports of live, wild fish to ESA licensing, permitting, export declaration and inspection requirements and they request declaratory, injunctive and monetary relief to stop the same. Co-Plaintiff South Shore Trading Company, a Nova Scotia corporation, also seeks the return of a specially-equipped truck seized at the border by FWS in May of 2008, based on SST's attempt to export live eels without following preclearance regulatory procedures, and the release of a \$35,750 security provided by South Shore Trading following the seizure to secure the release of live eels held in the truck's

tank. Now pending for disposition is a motion for a preliminary injunction (Doc. 3) that would require FWS to return the truck based on an alleged due process violation, a motion that corresponds with count III of the complaint (Doc. 1 ¶¶ 100-102.) The Court referred the motion for report and recommendation. Based on my review of the record and the applicable law, I recommend that the Court grant the motion and order the truck's release.

Facts

On June 2, 2009, I held a conference with the parties in connection with the motion for preliminary injunction. The parties agreed that an evidentiary hearing is not needed. Beyond the evidence attached to or referenced in the motion for preliminary injunction and the opposition memorandum, the Defendants also requested at the conference that the Court take notice of 12 M.R.S. § 6575, which limits open season for elver¹ harvesting in Maine to certain days in March, April, and May. South Shore Trading acknowledged that the Maine elver season, as of the date of the conference, is closed for 2009. Finally, the Defendants indicated that Assistant United States Attorney James McCarthy is now investigating or preparing a criminal prosecution designed to achieve a criminal forfeiture of the truck. The Defendants estimate another six months will pass before an indictment might be returned.

Mitchell Feigenbaum is the principal shareholder and the chief operating official of South Shore Trading Company, Ltd. (SST), a Nova Scotia corporation in good standing with its principal place of business in Port Elgin, New Brunswick, Canada. (Apr. 9, 2009, Feigenbaum Aff. ¶ 1, Doc. 3-2.) He describes the central legal issue of the case as follows: "Specifically, in the Complaint, SST challenges the FWS position that import and export declarations are required

¹ Elvers, sometimes referred to as glass eels, are post-larval, juvenile eels. They migrate from spawning grounds in the Sargasso Sea to fresh water habitats that drain into the North Atlantic. They are typically caught in nets that sift the incoming tide.

for non-endangered live fish intended for human consumption, notwithstanding the clear and unambiguous language of the ESA to the contrary." (Id. ¶ 4.)

On May 30, 2008, FWS seized a 2008 Ford truck owned by SST after the operator of the vehicle attempted to enter Canada with a load of live eels without having filed an export declaration. (Id. ¶¶ 5-6.) Feigenbaum believes that the motivation for the seizure was that FWS believed that the eels were not caught legally. (Id. ¶ 7.) He maintains that FWS has no evidence that the fish were illegally obtained even after many months of withholding SST's truck. (Id. ¶ 8.) Defendant Robert Rothe, a special agent with the Bureau, informed Feigenbaum that the truck could not be returned to SST because it was material evidence. (Id. ¶ 14.) According to Feigenbaum, Rothe stated that the truck would be used as evidence in the civil forfeiture proceeding against the \$35,750 security. (Id.)

During the June 2 conference, the Defendants conceded that the truck does not need to be retained because of its evidentiary value in connection with the civil forfeiture proceeding, but that it is being retained as subject to criminal forfeiture in the matter being investigated or prepared by AUSA McCarthy. The Defendants allowed that they could preserve whatever evidence they need photographically, without retaining the truck any longer, if that were the only issue.

SST's truck was custom built to accommodate the movement of high-value, live fish. (Id. ¶ 18.) Mr. Feigenbaum attests that SST needs the truck "before the commencement of the 2009 eel buying season, which is rapidly approaching" (id. ¶ 19), but at this juncture the season has closed.² I accept Mr. Feigenbaum's affidavit testimony that SST owns only three trucks,

² Actually, Maine law required elver traps to be closed as of noon on May 29 through noon on May 31. 12 M.R.S. § 6575-A.

including the subject truck, and is not in a position to replace the specially-designed truck based on credit restrictions and a slump in demand for its product, stemming from the economic downturn. (Id. ¶¶ 22-23.) I also credit Feigenbaum's assertion that SST purchases eels in New Brunswick and Nova Scotia and would utilize the truck there if it were available. (Id. ¶ 24.) Feigenbaum attests that SST "will lose buying opportunities in this highly competitive business" if it has only two trucks. (Id.) However, no information is provided about the elver season in Nova Scotia and New Brunswick. Consequently, it is difficult to gauge whether SST "will suffer damage to its reputation, market position and other aspects of goodwill" if the preliminary injunction is not provided at this time. (Id. ¶ 25.) Similarly, the matter of timing also undercuts SST's assertion that "hundreds of independent fishermen in the State of Maine are counting on [it] to buy their eels for the 2009 season." (Id. ¶ 26.) I understand that the product in question is perishable. SST does not offer any evidence suggesting that the market to purchase live elvers in Maine extends beyond the closing of the season. I cannot determine on the existing record that SST still could have obtained live elvers from its Maine suppliers even as of the date of the conference.

The Defendants have filed an affidavit sworn to by Robert Rothe, a special agent with FWS. Rothe attests that FWS and the United States Attorney's Office for the District of Maine have been engaged in a criminal investigation of South Shore Trading, Delaware Valley Fish Co., Feigenbaum, and others since about May 30, 2008. (Rothe Aff. ¶ 2, Doc. 18-2.) That ongoing investigation relates to the alleged exportation of eels in violation of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1540(e)(4)(A). (Id.) Rothe attests that FWS seized SST's truck on May 30, 2008, for violations of the ESA and that the truck is evidence of the alleged criminal violations and is criminally forfeitable under applicable law. (Id. ¶ 3.) The

Defendants also provide a factual summary drawn from a verified complaint filed by the United States in its civil forfeiture action against the \$35,750 security. See Complaint, United States v. One Certified Check for \$35,750.00, No. 1:09-cv-145. That summary is as follows:

On about May 30, 2008, South Shore Trading exported from the United States (at Milltown, Maine) to Canada, a shipment containing about 65 kilograms of live American eel elvers (young eels) in a specialized live-transport red 2008 Ford truck (the “truck”). (Id., ¶ 5). No Declaration for Importation or Exportation of Fish or Wildlife, Form 3-177 (wildlife declaration), was filed with FWS prior to this export of wildlife. (Id., ¶ 6). No 48-hour advance notice was given to FWS prior to this export of wildlife. (Id.) No export inspection was obtained from FWS and no inspection fee was paid prior to this export of wildlife. (Id.) No export clearance was received from FWS prior to this export of wildlife. (Id.) Later on May 30, 2008, the South Shore Trading driver returned the truck with the shipment to the United States Customs station at Milltown, Maine. (Id., ¶ 8). FWS officers thereupon inspected the shipment. (Id.) Following the inspection, FWS seized the shipment containing about 65 kilograms of live American eel elvers and the truck. (Id. & Affidavit of Mitchell Feigenbaum in Support of Motion for a Preliminary Injunction ¶ 5).

On June 16, 2008, FWS notified SST of its intention to seek the civil forfeiture of the \$35,750 security. (Rothe Aff. ¶ 4.) FWS filed the related claim for civil forfeiture of the \$35,750 on January 20, 2009. (Id.)

SST sells live eels to specific companies in Spain and China that acquire the eels for resale as a food product. (Feigenbaum Aff. ¶¶ 31-34.) Mr. Feigenbaum asserts that FWS never required SST to file any export declarations throughout the 1990s for live eels carried into Canada from Maine. (Id. ¶ 53.) He asserts that this practice continued after he took over management of the company in 2000. (Id. ¶¶ 24-25, 54-55.) He acknowledges that FWS required SST to obtain a license from FWS in 1999 and to declare fish brought into the United States. (Id. ¶¶ 49-50.) He also acknowledges that FWS required export declarations for exports departing from New York, which exports were handled by a freight forwarder on behalf of SST. (Id. ¶¶ 73-76.) In a petition for remission filed with the Department in August of 2008,

Feigenbaum described a dialogue he had with one Agent Nevers, prior to May 2008, in which Agent Nevers stated that FWS does not consider live fish to fall within the fishery products exception. (Aug. 2008 Feigenbaum Petition for Remission ¶¶ 59-63, Doc. 18-3.)

According to Mr. Feigenbaum, a set of logistical issues and the availability of new air carrier service in Canada caused SST to direct its overseas shipping from Halifax, beginning in 2008. (*Id.* ¶¶ 72-92.) Feigenbaum posits, based on pre-seizure conversations with Agent Rothe, as well as statements made by agents in connection with the May seizure, that FWS's allegedly sudden enforcement activity at the Canadian border arose from a suspicion that SST's change in operations (directing its Maine-caught eels to Halifax rather than New York) was an attempt to smuggle poached fish, because FWS had not previously required SST to file export declarations when it drove its trucks from Maine into Canada. (*Id.* ¶¶ 93, 98.)

Discussion

SST filed its preliminary injunction motion on April 9, 2009, suggesting that it sought to secure the release of its truck "before the commencement of the 2009 eel fishing season, which opens on or about March 21, 2009." (Mot. at 4.) Obviously, given the filing date, release of the truck prior to closure of the season was not likely to happen. By the time the briefing cycle on the motion was over, it was already May 26 and the season—the Maine season, at least—was set to close May 29. This timing obviously takes much of the urgency out of this motion. It is apparent from the record that the season ebbs and flows with the tide and water temperatures, but it is not apparent that the Court, even if it could have instantaneously granted the motion on May 26, could have seasonably prevented the commercial injury that SST wished to avoid, assuming that SST's showing is otherwise sufficient. Still, this does not necessarily make SST's burden

insurmountable. My conclusion, discussed in part B, below, is that a preliminary injunction is called for all the same. The standard for granting a preliminary injunction is as follows:

When deciding a motion for a preliminary injunction, a district court weighs several factors: "(1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing an injunction will burden the defendants less than denying an injunction would burden the plaintiffs; and (4) the effect, if any, on the public interest." United States v. Weikert, 504 F.3d 1, 5 (1st Cir. 2007). The first factor, the plaintiff's likelihood of success, is "the touchstone of the preliminary injunction inquiry." Philip Morris, Inc. v. Harshbarger, 159 F.3d 670, 674 (1st Cir. 1998).

Boston Duck Tours, LP v. Super Duck Tours, LLC, 531 F.3d 1, 11 (1st Cir. 2008).

In this case, the merits question is addressed to the propriety of seizing and retaining the truck for in excess of one year without instituting any hearing in that time to justify the ongoing retention of the truck. SST argues that FWS loses on this question for two independent reasons. The first argument is that FWS's regulations do not have the force of law and, therefore, could not justify the seizure and retention of the truck in the first instance. The second argument is that, assuming the seizure was proper, the Fourth Amendment and the Fifth Amendment require return of the truck because the indefinite retention of the truck is *per se* unreasonable where no process has been instituted to justify its extended duration. (Mot. at 5-6.) FWS responds that it "has authority to seize, without a warrant, wildlife . . . and their container . . . 'pending disposition of civil or criminal proceedings'" where there has been an attempt to export wildlife without filing a wildlife export declaration, giving FWS 48-hour notice of the export, and paying a fee for inspection. (Opposition Mem. at 6, relying on 16 U.S.C. §§ 1540(e)(3), (e)(4)(B) & 50 C.F.R. §§ 14.51, 14.52.) FWS's view is that it may retain the truck indefinitely pending criminal prosecution because the truck is "criminally forfeitable" rather than civilly forfeitable. (Id. at 7.) For the reasons outlined below, I conclude that SST is unlikely to be able to demonstrate any

illegality in relation to FWS's interpretation of the fishery products exemption, at least as applied to exports. However, I also conclude that SST is likely to succeed when it comes to demonstrating that the year-long retention of its truck, without a hearing, violated due process.

A. The Regulatory Dispute

This portion of the motion turns on the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and FWS regulations promulgated in furtherance of ESA objectives. For present purposes, sections 1538 and 1540 of the ESA are the focus. Section 1538 of the ESA generally prohibits the importation and exportation of endangered species. 16 U.S.C. § 1538(A)(1). The parties agree that American eels (*Anguilla rostrata*) are not listed as an endangered species. However, section 1538 also places certain duties on importers or exporters of non-listed fish and wildlife species, including a duty to obtain a license from FWS to import and export fish and wildlife, maintain and provide certain records, and "file such reports as the Secretary may require." *Id.* § 1538(d)(2). In this respect, the ESA provides the Secretary with the authority to "prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection." *Id.* § 1538(d)(3). An importer or exporter is subject to these duties if it is, among other alternatives not relevant here:

an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to section 4 of this Act [16 USCS § 1533] as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption . . .)

Id. § 1538(d)(1)(A). The "shellfish and fishery products" exemption, where applicable, relieves an importer from the FWS licensing, reporting and inspections requirements.

SST insists that its exportation of live eels falls within the exemption as a matter of law because the live eels it exports are a fishery product destined for human consumption. (Mot. at

6.) SST says FWS "lack[ed] the authority to require the filing of an export declaration pursuant to the unequivocal, unambiguous language of the Endangered Species Act," referencing the foregoing statutory provision. (Id. at 3.) In SST's view, the statutory exception reflects "Congress's explicit mandate that the FWS's authority to require import or export notices does not extend to trade in non-endangered seafood." (Id. at 8.)

FWS does not read the ESA in this fashion. In its view, the ESA gives it "the authority to require a declaration and clearance for all wildlife exports." (Opposition Mem. at 4.) FWS observes that it has implemented these measures "by requiring all commercial operators to obtain a wildlife import/export license before they enter the wildlife business" (id. at 5, citing 50 C.F.R. §§ 14.91 – 14.93 (C.F.R. Part 13)), by "requir[ing] each importer/exporter to file a wildlife declaration form at the [Bureau] port 'prior to' every export of wildlife (id., citing 50 C.F.R. § 14.63), and by requiring 48-hour notice of a wildlife export to enable a Bureau officer to clear the export (id. at 6, citing 50 C.F.R. §§ 14.52(a) – 14.54(f)). FWS argues that SST's reading of the ESA is simply wrong. (Id. at 8.) It argues that the term "fishery product" does not include live fish. (Id. at 9.) In its view, the fishery product exception is, implicitly, a *nonliving* fishery product exception. (Id.) As for the origin of its regulatory construction, FWS cites language contained in its December 9, 2008, final rule. (Id., citing 73 Fed. Reg. 74616, 74617.) In addition, FWS observes that the fishery product exception stated in the ESA is limited to imports. (Id. at 10.)

As FWS notes, the language of the fishery products exception is limited to imports and it is undisputed that SST was exporting the eels. See 16 U.S.C. § 1538(d)(1)(A) (excepting "shellfish and fishery products which . . . (ii) are *imported* for purposes of human or animal

consumption") (emphasis added). However, FWS fails to include among its many citations to the Code of Federal Regulations a regulation that reads:

(a) Except for wildlife requiring a permit pursuant to Part 17 or 23 of this subchapter B, an exporter or his/her agent does not have to file a Declaration for Importation or Exportation of Fish or Wildlife (Form 3-177) for the *exportation* of shellfish and fishery products exported for purposes of human or animal consumption

50 C.F.R. § 14.64(a) (emphasis added). FWS, in other words, has extended the shellfish and fishery products exemption to exports as well as imports.

FWS cites 50 C.F.R. §§ 14.52(a) – 14.54(f), 14.63, 14.91 – 14.93. These ESA regulations, through § 14.91, support FWS's contention that a license is required for SST's business (which it has), and that an export declaration, 48-hour notice, and a presentation for inspection must precede the commercial exportation of fish, generally, from the United States. FWS concedes that the fishery products exception would make the "prior permission, wildlife declaration, and designated port requirements" inapplicable, if it applied. (Opposition Mem. at 8.) Consequently, SST can export live eels without making any export declaration to FWS if its live eels are destined for human or animal consumption and qualify as a "fishery product." The record reflects that SST is likely able to demonstrate that its live eel exports are destined for human consumption. The only remaining condition is that the live eels must be "fishery products."

FWS argues that live eels are not fishery products because the ESA defines the term "fish or wildlife" to include a "product" derived from a member of the animal kingdom. (Opposition Mem. at 9, citing 16 U.S.C. § 1532(8).) In FWS's view, this means that a "product" is a narrower term than "fish or wildlife" and, therefore, must be something produced from an animal rather than the animal itself. (*Id.*) As far as statutory construction goes, I do not find this argument

particularly persuasive. As defined by the ESA, "fish or wildlife" is a term that is obviously used to set out the scope of the Act. In this context, the purpose of the definition is to include everything derived from fish and wildlife as being within the purview of "fish or wildlife," including a "product" made from fish or wildlife. It does not logically follow that the term product cannot describe a fish when used in another part of the Act. Indeed, FWS's own understanding of the "fishery products" concept is that it includes a fish, albeit a nonliving fish. Moreover, recourse to the statutory definition of "fish or wildlife" is unhelpful to FWS for two additional reasons. First, live fish obviously fall within the definition of "fish or wildlife," so 16 U.S.C. § 1532(8) does not logically invite any general distinction between living or nonliving fish. Second, the term before the Court is not "fish product," in any event. Instead, the material term is "fishery product."

fish'er'y (fish'ə-rē) *n., pl. -ies* **1.** The industry or occupation devoted to the catching, processing, or selling of fish, shellfish, or other aquatic animals. **2.** A place where fish or other aquatic animals are caught. **3.** A fishing business. **4.** A hatchery for fish. **5.** The legal right to fish in specified waters or areas.

The American Heritage Dictionary of English Language 665 (4th ed. 2000). Although "fish products" might suggest something other than a fish, "fishery products" describes a category that can readily encompass both fish and fish products. Moreover, this case demonstrates that live eels are a product of a distinct commercial fishery. If the Court were working with a clean slate and the dispute turned entirely on judicial construction of the term "fishery products" and whether it reasonably extends to live eels, it would seem rather likely that the exemption would apply to SST's live eel exports. However, we are dealing with agency rule making authority and it is a more convoluted process to determine whether FWS's construction of the fishery products exemption had the force of law prior to the effective date of the seizure in question.

The rule is published in the Federal Register at 73 Fed. Reg. 74615 *et seq.* Page 74615 of the Register, which begins the description of FWS's final rule action, indicates under its "summary" section that the revisions are designed, among other things, "to update license and inspection fee exemptions" and "clarify" when the exemptions apply to allow FWS "to consistently apply these requirements." Page 74615 also reflects the effective date as January 8, 2009. At pages 74616 and 74617 there is the following reference:

We clarify that importers and exporters of shellfish and nonliving fishery products are exempt from the import/export license requirement. We had proposed to change the language in this section to "nonliving fish products," which reflects the historical working implementation by the Service of this exemption. The Service defines shellfish in 50 CFR 10.12 as "an aquatic vertebrate with a shell including but not limited to, (a) an oyster, clam, or other mollusk; and (b) a lobster or other crustacean; or any other part, product, egg, or offspring thereof, or the dead body or parts thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product." The Service has also long defined fishery products as nonliving fish products. However, based upon comments received, we retained the original wording of "fishery product" but accepted the change of "nonliving." This change makes it clear that the Service considers only dead fishery products to be granted the exemption. Nothing in this wording change affects how the Service implements this exemption.

Finally, page 74628 reflects amendments to 50 C.F.R. § 14.91, addressed to the issue of who must have an import/export license and, more specifically, what exemptions exist for the licensing requirement. The new amendments reflected in these passages of the final rule reiterate that FWS intends to uniformly construe the fishery products exemption as a nonliving fishery products exemption for purposes of license requirements, import and export declarations, and inspections, effective January 8, 2009. One preliminary question is whether the regulation lawfully exposes SST to criminal sanctions for an alleged violation in 2008, prior to the adoption of the final rule, based on an allegedly longstanding administrative understanding.

The APA requires publication in the Federal Register of, among other things, "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency," as well as "amendments" or "revisions" of the same. 5 U.S.C. § 552(a)(1)(D), (E). Significantly, the APA provides that a person is not to be "adversely affected by, a matter required to be published in the Federal Register and not so published," unless that person "has actual and timely notice of the terms thereof." Id. § 552(a)(1). See, e.g., United States v. Ventura-Melendez, 321 F.3d 230, 231-33 (1st Cir. 2003) (reviewing convictions for entering a prohibited temporary security zone, where the regulation reactivating the recurring zone, an established military firing range, was "signed and dated" prior to the defendant's violation, but was not published until afterward, and holding that the Coast Guard's attempt to divert the defendants from the zone gave sufficient actual notice that the ban was currently in place). FWS argues that SST's case falls apart here, because Mr. Feigenbaum and SST "were aware long before the seizure of the truck that FWS did not consider live fish to be within the 'fishery product' exemption." (Opposition Mem. at 9.) In support of a finding of notice, FWS cites paragraphs 59 through 62 of Feigenbaum's petition for remission. The impact of this testimony, in my view, is not entirely clear. I understand the testimony to relate that Mr. Feigenbaum had a debate with a FWS agent who stated that FWS took the position that the "fishery products" exemption does not apply to live fish. Although this discussion occurred well before the day on which FWS seized the truck, it does not necessarily mean that Feigenbaum, or SST through him, had actual notice of a policy, rule, or interpretation that was actually "formulated and adopted" by FWS. In other words, the evidence of Feigenbaum's conversation with the agent does not establish the actual existence of a rule officially sanctioned by FWS. For example, in Ventura-Melendez, the regulation in

question was "signed and dated" prior to the violation. 321 F.3d at 231. See also Yassini v. Crosland, 618 F.2d 1356, 1358 1361 (9th Cir. 1980) (finding that petitioner had notice of a directive issued by the Commissioner of the INS). Whether hearsay from a local agent is enough to support a finding of "notice" for purposes of APA § 552(a)(1) is unclear at this time and the parties have not deigned to brief the matter. However, there is another basis for notice, or constructive notice, that makes it unlikely that SST will be able to demonstrate a violation of § 552. In the course of formally adopting the final rule published December 9, 2008, FWS published notification of its proposed rule in the Federal Register in order to solicit public comment. 73 Fed. Reg. 9972 (Feb. 25, 2008). This publication predated the May 2008 seizure and was likely sufficient to meet the notice provision of § 552(a)(1).³ Consequently, I find that the APA is unlikely to provide any relief to SST in regard to the seizure. FWS's implementation of a fishery products exemption for *exports* likely was not mandated by the ESA exemption for *imports*. With respect to the regulatory fishery products exemption for exports, FWS presumably had the authority to restrict it to nonliving fishery products, whether or not it had the same authority to reconfigure the statutory exemption for imports. If any basis for a preliminary injunction is available based on a likelihood of success showing, it would have to exist in relation to FWS's failure to institute any post-seizure process to justify the ongoing retention of the truck pending indictment.

³ "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." Morton v. Ruiz, 415 U.S. 199, 232 (1974) (citing S. Rep. No. 752, 79th Cong., 1st Sess., 12-13 (1945); H. R. Rep. No. 1980, 79th Cong., 2d Sess., 21-23 (1946)). There is, of course, precedent to the effect that an agency may announce a new position on an *ad hoc* basis in the course of an adjudicatory proceeding, but these cases tend to demonstrate an application of specific facts to broad standards measuring, for example, what is "fair and equitable," or what is "detrimental to the public interest," SEC v. Chenery Corp., 332 U.S. 194, 208 (1947) (observing that "the very breadth of the statutory language" made the administrative adjudication reasonable), or prohibiting unspecified conduct that is "careless or reckless," Tearney v. Nat'l Trasp. Safety Bd., 868 F.2d 1451, 1452, 1454 (5th Cir. 1989).

B. The Indefinite Retention Issue

According to SST, the prolonged retention of its truck (now for over twelve months), without any hearing, violates the Due Process Clause and a provision of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. § 983. (Mot. at 9.) It is generally recognized that a warrantless deprivation of property subject to forfeiture may be tested in a preliminary hearing addressed to the "probable validity" of continued deprivation pending related legal proceedings. Krimstock v. Kelly, 306 F.3d 40, 49 (2d Cir. 2002) (citing Comm'r v. Shapiro, 424 U.S. 614, 629 (1976), and Fuentes v. Shevin, 407 U.S. 67, 97 (1972)). "The Due Process Clause of the Fifth Amendment guarantees that 'no person shall . . . be deprived of life, liberty, or property, without due process of law.' [Supreme Court] precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993) (rejecting contention that only the Fourth Amendment is implicated when forfeitable property is seized and recognizing a right to predeprivation notice and hearing before a neutral decisionmaker where the forfeiture of real property is concerned). However, the requirement of predeprivation process does not extend to forfeitable personal property like mobile conveyances. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-79 (1974) (holding that a hearing may be postponed where seizure of forfeitable mobile property is concerned). Based on Calero-Toledo, there was nothing unconstitutional about the warrantless seizure of SST's truck, assuming there was probable cause under the Fourth Amendment. I have already explained in the foregoing section why probable cause likely existed to find a violation of FWA export regulations.

Pursuant to the ESA, FWS's authorized agents "may search and seize, with or without a warrant, as authorized by law." Moreover: "Any fish, wildlife, property, or item so seized shall be held . . . pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of this subsection." 16 U.S.C. § 1540(e)(3). Paragraph 4 of § 1540 is divided into two subsections. Under the first subsection, the fish, wildlife, or plants in question "shall be subject to forfeiture to the United States." 16 U.S.C. § 1540(e)(4)(A). Under the second subsection:

All . . . vehicles . . . used to aid the . . . transporting, . . . shipping, [or] exporting . . . of any fish" in violation of [the ESA], any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States *upon conviction* of a criminal violation pursuant to [subsection (b)(1) of section 1540].

Id. § 1540(e)(4)(B) (emphasis added). Unlike the first provision, the second provision conditions forfeiture on a criminal conviction under § 1540(b)(1).

SST argues that the Defendants were obligated to follow the procedures set out in 18 U.S.C. § 983 and that their failure to do so requires that the truck be returned. (Mot. at 9-10.) The Defendants assert that § 983 is inapplicable here, because the ESA conditions forfeiture of the truck on a criminal conviction. (Opposition Mem. at 11-12 & n.4.) The Defendants are correct in this assertion. The statute in question is limited to a "nonjudicial civil forfeiture proceeding under a civil forfeiture statute." 18 U.S.C. § 983(a)(1)(A)(i). The term "civil forfeiture statute" is defined as "any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense." Id. § 983(i)(1). Here, the truck is made forfeitable under the ESA only upon conviction, so section 983 does not apply.

During the telephone conference related to the motion, the Defendants took the position that SST is not entitled to *any* prompt postdeprivation hearing because forfeiture of the truck, as compared with the eels, falls outside the purview of CAFRA. In the Defendants view, this means that the only time constraints that exist for purposes of a due process hearing are the timeframes that would apply to the deadline for instituting a criminal prosecution. Otherwise, they say, SST may seek relief in the interim by posting a bond acceptable to the Secretary, if it wants to secure the release of the truck pre-indictment. Alternatively, if SST wants to contest the legitimacy of the seizure, the Defendants argue that the onus is on SST to commence a proceeding under Rule 41(g) of the Federal Rules of Criminal Procedure. (Opposition Mem. at 12-14.)

My review of federal statutory law turned up a provision addressed to criminal forfeiture proceedings that is at odds with the representation offered by the United States.⁴ Specifically, 28 U.S.C. § 2461 provides that certain procedures of the Controlled Substances Act, 21 U.S.C. § 853, "apply to *all stages* of a criminal forfeiture proceeding," with one exception not applicable here. 28 U.S.C. § 2461(c) (emphasis added). Section 853, in turn, discusses the use of protective orders, upon application by the United States, to "preserve the availability of property . . . for forfeiture." 21 U.S.C. § 853(e). The relevant text of the protective order procedure is as follows:

(e) Protective orders.

(1) Upon application of the United States, the court may enter a restraining

⁴ The Plaintiffs also honed in on this statute, which is flagged in the Attorney General's Asset Forfeiture Policy Manual, an excerpt of which was introduced by the Plaintiffs in a supplemental filing. (Doc. 23.) The Manual suggests that the United States should recognize the applicability of 21 U.S.C. § 853, even if it hoped for it to remain buried in the context of this litigation.

order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered;

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

21 U.S.C. § 853(e) (emphasis added). As reflected in the statute, the onus is on the United States to justify the need for a protective order that is designed to preserve the availability of the property for forfeiture, which does not necessarily correlate with an order condoning an indefinite seizure for the maximum duration of a pre-indictment investigation. Indeed, although the Defendants are correct that the ESA gives FWS agents authority to "search and seize, with or without a warrant, as authorized by law," 16 U.S.C. § 1540(e)(3), it is interesting to note that the Defendants have failed to cite legal authority supporting the position that property seized as

subject to forfeiture upon conviction may be unilaterally retained pending conviction.⁵ In the absence of such authority, my understanding of federal law, based on 28 U.S.C. § 2641(c) and 21 U.S.C. § 853(e), is that indefinite retention of seized property without a hearing is contrary to procedure prescribed by Congress. Even if the property was properly seized (a Fourth Amendment issue), there is a process in place to justify indefinite retention which the Defendants have evidently ignored (a Fifth Amendment issue). As the language of section 853(e) reflects, SST does not need to negate the existence of probable cause in order to obtain its truck, contrary to the Defendant's primary position.

Conclusion

I find that SST is likely to succeed on its claim that detention of the truck, without a hearing, for in excess of one year, denied it the process it was due. The Defendants argue that irreparable harm is not demonstrated on this record, because SST could have secured the release of the truck by providing the Secretary with a secured bond. I find that argument unpersuasive. Likelihood of success is the most essential factor when it comes to the preliminary injunction standard. Moreover, continued retention of the truck is a continuing affront to due process and the proper means of balancing the relative burdens that injunctive relief—or the denial of relief—would impose on the parties is through the statutory process prescribed by 21 U.S.C. § 853(e). This final point leads me to the conclusion that the appropriate relief on the preliminary injunction motion is to order the Defendants to release the truck, without security, so that the

⁵ The Defendants would argue that Congress said otherwise in the ESA because the ESA provides that "Any fish, wildlife, property, or item so seized *shall be held . . . pending disposition of civil or criminal proceedings*," and empowers the Secretary to "hold" seized property, unless the Secretary chooses "to permit the owner or consignee to post a bond or other surety satisfactory to the Secretary." 16 U.S.C. § 1540(e)(3). The response to this is that the Secretary's authority to hold seized property is subject to the procedure set forth at 21 U.S.C. § 853(e). The Secretary can release the property administratively, upon presentation of a satisfactory bond, but may otherwise hold the property pending compliance with 21 U.S.C. § 853(e).

onus is returned to the United States to secure an adequate performance bond under the statutory procedure should it believe the same is necessary. Although Rule 65(c) is written in mandatory terms concerning the need for security, the Court retains the discretion to order injunctive relief without having the movant post a bond where the vindication of "important federal rights" is at issue. Crowley v. Local No. 82, Furniture & Piano Moving, 679 F.2d 978, 999-1000 (1st Cir. 1982), rev'd on other grounds, 467 U.S. 526 (1984). The Secretary and FWS can readily inure themselves against loss by seeking a protective order, as they should have done in the first place. Accordingly, I RECOMMEND that the Court GRANT the motion for preliminary injunction (Doc. 3) and order the release of the truck into the custody of SST or its designated agent without the requirement that it post a bond.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

June 12, 2009

DELAWARE VALLEY FISH CO et al v. FISH AND
WILDLIFE SERVICE et al
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAGISTRATE JUDGE MARGARET J.
KRAVCHUK
Cause: 16:1538 Endangered Species Act

Date Filed: 04/09/2009
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights:
Other
Jurisdiction: U.S. Government
Defendant

Plaintiff

DELAWARE VALLEY FISH CO

represented by **BRIANNE M. MARTIN**
DRUMMOND WOODSUM &
MACMAHON
84 MARGINAL WAY
SUITE 600
PORTLAND , ME 04101-2480
(207) 253-0504
Email: bmm@dwmlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

STACEY F. SOLOFF
TABAS, FREEDMAN, SOLOFF,
MILLER & BROWN
ONE FLAGLER BUILDING
14 N.E. 1ST AVENUE
PENTHOUSE
MIAMI , FL 33132
(305) 375-8171
Email: ssoloff@tfsmlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

**SOUTH SHORE TRADING
COMPANY LTD**

represented by **BRIANNE M. MARTIN**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

STACEY F. SOLOFF
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

MITCHELL FEIGENBAUM

represented by **MITCHELL FEIGENBAUM**
PO BOX 1545
PORT ELGIN
NB E4M 3Y9
CANADA
PRO SE

V.

Defendant

FISH AND WILDLIFE SERVICE

represented by **DONALD E. CLARK**
U.S. ATTORNEY'S OFFICE
DISTRICT OF MAINE
100 MIDDLE STREET PLAZA
PORTLAND , ME 04101
(207) 780-3257
Email: donald.clark@usdoj.gov
ATTORNEY TO BE NOTICED

EVAN J. ROTH
U.S. ATTORNEY'S OFFICE
DISTRICT OF MAINE
100 MIDDLE STREET PLAZA
PORTLAND , ME 04101
(207) 780-3257
Email: evan.roth@usdoj.gov
ATTORNEY TO BE NOTICED

Defendant

KEN SALAZAR

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

GALE NORTON

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

ROWAN GOULD

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

H DALE HALL

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

ROBERT ROTHE

represented by **EVAN J. ROTH**
(See above for address)

ATTORNEY TO BE NOTICED

Defendant

CHRISTOPHER DOWD

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JANE DOE

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JENNIFER IRVING

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

BRIAN LANDRY

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

PAUL CERNIGLIA

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED