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FOURTH CIRCUIT SUMMARY

The Fourth Circuit Summary, published at least once each year, provides synopses of important recent environmental decisions decided by the United States Court of Appeals for the Fourth Circuit. The summary does not cover every environmental decision of the Fourth Circuit, but only those cases that the editors believe to be of the most interest to subscribers.

CLEAN WATER ACT

UNITED STATES V. DEATON
332 F.3D 698 (4TH CIR. 2003)

Since 1989, the Deatons have owned a twelve-acre parcel of land in the middle of the Delmarva Peninsula, which separates the Chesapeake Bay from the Atlantic Ocean. The Deatons' intention was to develop the land as small, five-lot subdivisions. However, the land's development was difficult due to poor drainage and water accumulation. The drainage problem prompted the Wicomico County Health Department to deny the Deatons' application for a sewage disposal permit. A United States Soil Conservation technician advised the Deatons that part of this land contained non-tidal wetlands, thus requiring a United States Army Corps of Engineers ("the Corps") permit before any ditches were dug. Disregarding this advice, the Deatons, in an attempt to remedy the drainage problem, dug a 1,100-foot ditch that crossed the areas identified as wetlands. The ditch runs along a paved county road and the dirt from the ditch was piled to the sides, a practice called sidecasting.

This ditch has been the focus of the controversy. There is disagreement as to how much water flows through the ditch and how consistent the flow is, but the parties agree that water entering the ditch takes a twisting, thirty-two mile course and ends up in the Chesapeake Bay. The water from the Deatons' ditch drains into a culvert that passes under the road, through two different creeks, and ultimately drains into the Wicomico River and the Chesapeake Bay.

The Corps learned about the Deatons' ditch in July 1990 and issued a stop-work order, stating that the ditch put the Deatons in violation of § 404(a) of the Clean Water Act, 33 U.S.C § 1344 (1972), ("CWA") by virtue of their placement of fill material. The Corps' position was that no further work could

be done without a permit. Negotiations followed but were ultimately unsuccessful.

The federal government filed a civil complaint in 1995 alleging that the Deatons violated CWA by discharging fill material into regulated wetlands without a permit. The district court found that the practice of sidecasting did not constitute a discharge of pollutants under CWA and granted summary judgment in favor of the Deatons. The Fourth Circuit Court of Appeals reversed and remanded in *United States v. Deaton*, 209 F.3d 331, 337 (4th Cir. 2000).

Soon after the remand, the United States Supreme Court decided *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"), 531 U.S. 159 (2001). *SWANCC* held that the Corps had exceeded its statutory jurisdiction under CWA through its Migratory Bird Rule, 51 Fed. Reg. 41,217 (Nov. 13, 1986). In response to this holding, the Deatons filed a motion asking the district court to reconsider CWA jurisdiction in their case. They argued that, under *SWANCC*, CWA did not extend to the ditch, and even if it did, its extension that far would violate the Commerce Clause. The district court denied the motion, holding that the wetlands were adjacent to the ditch, which is a tributary of navigable waters; that *SWANCC* does not bar CWA jurisdiction in light of the hydrologic connection between the wetlands and navigable waters; and that protecting the Deatons' wetlands was reasonably related to Congress' authority under the Commerce Clause to protect navigable waters as channels of commerce. A remediation order was issued to the Deatons, which required them to restore their land to its pre-violation condition. The Deatons appealed.

It is undisputed that the Deatons' wetlands are adjacent to the roadside ditch. The court therefore focused on whether the Corps' jurisdiction extended to the ditch. The Deatons argued that the Corps' tributaries regulation pushed the bounds of the Commerce Clause and thereby raised a serious constitutional question. Because Congress did not clearly intend to reach tributaries so remote from navigable waters, they argued that the court should find the Corps' actions were unauthorized under CWA. Alternatively, the Deatons argued that even if the regulation was authorized by Congress, it should be invalidated for exceeding Congress' power under the Commerce Clause.

The court found that there was no constitutional question serious enough to require setting aside the Corps' regulation. Navigable waters are subject to the Commerce Clause by virtue of their being a channel of interstate

commerce. Citing *Caminetti v. United States*, 242 U.S. 470 (1917), which upheld the Mann Act's criminalization of the interstate transport of women for immoral purposes, the court affirmed the theory that Congress may regulate such channels for a variety of purposes, which need not be strictly economic. The court held that the Commerce Clause gives no less power to Congress to regulate navigable waters than it does to other channels of interstate commerce, such as highways. It also held that Congress possesses the authority to regulate non-navigable waters when such regulation is necessary to achieve legitimate Congressional goals concerning the protection of navigable waters.

As the court found that the Commerce Clause may reach to non-navigable waters such as the Deatons', it also found that Congress may delegate this power to the Corps, save only that it provide an intelligible principle to guide the Corps' discretion. The court found this principle in the purpose of CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C § 1251(a) (2000). The clear authority of Congress to delegate and the Corps to regulate non-navigable tributaries of navigable waters made it clear that such regulation did not invade an area of authority reserved to the states; thus it did not offend the federal-state balance.

The Deatons' final argument was that, even in the absence of constitutional problems, neither CWA nor the Corps' regulations extended all the way to their ditch. They argued that the ditch was not a tributary as defined in 33 C.F.R. § 328.3(a)(5) (1993) or, even if it was, such an interpretation of CWA would be unreasonable.

The court performed a *Chevron U.S.A. v. Natural Resources Defense Council* analysis. 467 U.S. 837 (1984). The court first found that the term "waters of the United States," as used in CWA was sufficiently ambiguous to allow the Corps discretion to determine what waters were covered within the range permitted by *SWANCC*. Next, because there was a dispute over the interpretation of the regulation defining tributary, the Agency's interpretation was to be given controlling weight unless the interpretation was plainly erroneous or inconsistent with the regulation. The court found that the word "tributary" as commonly defined was ambiguous enough to allow the Corps to interpret it, and that the Corps' interpretation was not plainly erroneous or inconsistent with the regulation. The court found nothing to indicate that it should not extend *Chevron* deference to the regulation in question. In addition, the court found a nexus between navigable waters and their non-

navigable tributaries. Hence the court ruled that the regulation and its interpretation by the Corps were reasonable and deferred to them.

The Deatons challenged the remediation order, which the court reviewed for abuse of discretion. The court considered three factors: whether the order would "confer maximum environmental benefits," whether it was "achievable as a practical matter," and whether it would achieve "an equitable relationship to the degree and kind of wrong it is intended to remedy." 332 U.S. at 714 (citing *United States v. Cumberland Farms of Conn., Inc.*, 826 F.2d 1151, 1164 (1st Cir. 1987)). The court found that the district judge, while not considering these factors individually, generally covered them. The Deatons' proposal to remove the dirt rather than filling the ditch would give them the benefit of their violation of CWA. The remediation order was therefore not an abuse of discretion and was upheld. This makes *Deaton* an important case because it is divergent from other federal opinions which hold only those wetlands bordering navigable water to be under the realm of CWA.

TREACY V. NEWDUNN ASSOCIATES, LLP
344 F.3D 407 (4TH CIR. 2003)

Newdunn Associates purchased forty-three acres of land in Newport News, Virginia in 1978. Thirty-eight of these acres are wetlands, as defined by the United States Army Corps of Engineers. Until Interstate Highway 64 ("I-64") was constructed, the Newdunn wetlands had a hydrologic relationship with Stony Run, a navigable waterway-in-fact. The Newdunn wetlands currently remain connected to Stony Run via a network of natural streams and manmade ditches paralleling and crossing beneath I-64.

After *Solid Waste Agency of Northern Cook County v United States*, 531 U.S. 159 (2001), Newdunn informed the Corps that it no longer believed that the Corps had jurisdiction over the Newdunn property and began filling its wetlands without obtaining a permit. The Corps initiated an enforcement action in July 2001 in federal district court, alleging a violation of CWA. The Virginia State Water Control Board ("Board") issued an Emergency Special Order demanding that Newdunn cease its stumping and grading activities on its property based on the same activities that the Corps objected to. Newdunn ignored the order, and the Board filed a civil enforcement action in state court based on state law. Newdunn removed the Board's case to federal court. The Board moved to remand, based upon the federal court's lack of jurisdiction.

The Board's motion was denied, the two cases were consolidated, and a bench trial was held in March 2002.

The trial court found that the Corps had exceeded Congress' grant of authority under CWA. In the state case, the trial court found that Virginia also lacked jurisdiction because the authority of the Board was coextensive with that of the Corps and, because the Corps lacked jurisdiction, so did the Board.

The Court of Appeals first determined whether the district court had subject matter jurisdiction over the Board's state-based enforcement action. Where state law creates a cause of action, federal question jurisdiction is only available where there is "some substantial disputed question of federal law [that] is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983). To be necessary and disputed, the "vindication of a right under state law [must] necessarily turn[] on some construction of state law." 463 U.S. at 9.

The definition of "wetlands" in both the Virginia state statute and the Corps regulations are identical. The district court used the mirrored language to conclude that the jurisdiction of the Corps and the Board were the same. The Court of Appeals, however, held that the shared "scientific" definition of wetlands could be distinguished from its "jurisdictional" definition. Because all parties conceded that the Newdunn wetlands met the shared scientific definition, there could be no disputed federal question based on Virginia's decision to match its definition to the federal one. The Newdunn property contained wetlands; thus the only question was whether they were within the jurisdiction of the Board, a question that could only be answered by reference exclusively to state law. The court therefore lacked jurisdiction over the Board's action, and remanded the state enforcement action back to state court.

The only outstanding issue requiring resolution became the Corps' civil enforcement action based on CWA. The court reviewed cases that showed the jurisdiction of the Corps extending to non-navigable waters having a hydrologic connection to navigable ones. The court read *SWANCC* as not challenging those holdings, but rather as holding that Congress never intended for CWA to extend to intrastate, non-navigable waters without any connection to navigable waters. This reading was a rejection of the Corps argument that its jurisdiction was equal with the power granted by the Commerce Clause, because such an interpretation would have read "'navigable waters' completely out of the statute." 344 F.3d 415, n.5. CWA deals with navigable waters, not the outer limits of the Commerce Clause.

Citing the *Deaton* decision discussed *supra*, the court upheld the Corps' exercise of jurisdiction over the Newdunn wetlands. It rejected Newdunn's argument that, because the I-64 culvert was manmade, it could not be considered a tributary. The court found the distinction irrelevant, in light of the fact that pollutants from either would have the same effect. The court noted that the purpose of CWA would be thwarted if human alteration alone could remove a waterway from Corps jurisdiction. The court then remanded the case for further proceedings. This opinion is important because it more clearly defined the Fourth Circuit's position on whether a junction between wetlands and a navigable water source forces the wetland to fall under the CWA.

AMERICAN CANOE ASSOCIATION, INC. V. MURPHY FARMS, INC.
326 F.3D 505 (4TH CIR. 2003)

For the second time, this case made its way to the Court of Appeals. Murphy Farms ran a series of hog farms in North Carolina. These farms share a waste system composed of lagoons, into which waste is pumped. The waste is then sent through a system of pipes and sprayed onto fields as fertilizer.

The farms were operated under a North Carolina Department of Environment and Natural Resources Animal Waste Management Plan, which prohibited the discharge of animal waste into surface water. Murphy Farms did not seek a federal National Pollution Discharge Elimination System ("NPDES") permit. On two separate occasions prior to the commencement of the initial litigation, there were unauthorized discharges of animal waste into United States waters as a result of runoff from the sprayed field. Plaintiffs, a coalition of environmental groups, filed suit under the citizen-suit provision of CWA. The district court granted Plaintiffs' motion for a preliminary injunction requiring Murphy Farms to seek a NPDES permit and also partial summary judgment on the claim that Murphy Farms violated CWA. Murphy Farms appealed. The Court of Appeals declined to review the partial summary judgment and remanded the case for a mootness determination. The parties then entered into a consent decree conditioned upon plaintiffs' success on motions related standing and jurisdiction under CWA's citizen-suit provision. The district court denied Murphy Farms' motions and entered final judgment. Murphy Farms appealed again.

After determining that the consent decree allowed the appeal, the court then turned to the district court's denial of a motion to reconsider its judg-

ment that plaintiffs had standing. While the district court characterized its decision as a declaratory judgment, the Court of Appeals held that it was actually a grant of partial summary judgment. Due to the overwhelming importance of the standing inquiry, the Court of Appeals found that the district court abused its discretion in refusing Murphy Farms' reconsideration request. The district court's judgment was made only three months after the plaintiffs filed suit. "Against whatever finality interest would inure to such a ruling is stacked the paramount importance of achieving a correct judgment on the issue of Article III standing." 326 F.3d at 516. Because the factual background was poorly developed, the district court was required to reconsider the standing question.

While the Court of Appeals called it error to refuse to reconsider the standing question, the court found standing itself and did not remand the case. Adequate standing for the plaintiffs' suit was established by individual member's affidavits concerning their aesthetic, recreational, and economic interest in the affected waterways. The court also relied on expert testimony that linked animal waste discharges to environmental harms. Together, the affidavits and expert testimony were sufficient to create Article III standing.

Despite having Article III standing, the plaintiffs still needed to meet the requirements of CWA citizen-suit standing. The court turned to *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), for guidance. In *Gwaltney*, the Supreme Court held that citizen-plaintiffs must allege ongoing CWA violations of a continuous or intermittent character. In the instant case, there had been no finding by the district court regarding continued or intermittent violations. This lack of finding caused the court to vacate the district court's decision regarding CWA standing and remand the issue for trial.

NATIONAL ENVIRONMENTAL POLICY ACT

TAUBMAN REALTY GROUP LTD. PARTNERSHIP V. MINETA
320 F.3D 475 (4TH CIR. 2003)

The Plaintiffs in this case are shopping center developers who own the Regency Square Mall in Virginia. They brought several challenges to Henrico County's approval of the Short Pump Town Center, which would become a major competitor. The Plaintiffs' case was dismissed and this appeal followed.

The Plaintiffs argued that the approval was a major federal action under the National Environmental Policy Act ("NEPA") and thus required an environmental impact statement ("EIS"). The Plaintiffs thus claimed they were denied the opportunity to participate in the preparation of this statement under the Administrative Procedure Act ("APA"). This case is relevant to environmental law because of the determination of the court of appeals that, even assuming Article III standing, the Plaintiffs were not within the prudential "zone of interest" created by NEPA. The devaluation of the Plaintiff's property was an economic loss that NEPA was not meant to cover. The court did not seem to give any weight to Plaintiff's arguments that the new shopping center would create more traffic and pollution and thus increase the risk to the works at the Plaintiffs' mall. It may be that the court was reluctant to allow the use of NEPA and APA in what appears to be a traditional economic dispute.

The court affirmed *in toto* the district court's dismissal of Plaintiffs' complaint.

WETLANDS MANAGEMENT

CRUTCHFIELD V. COUNTY OF HANOVER
325 F.3D 211 (4TH CIR. 2003)

Hanover County, Virginia was experiencing rapid population growth, which prompted it to adopt a "Smart Growth" plan in order to concentrate growth in areas with public services. The population growth, however, was beginning to strain the County's wastewater treatment infrastructure.

Hanover County satisfies its wastewater treatment needs through the use of two of its own facilities and a contract with neighboring Henrico County. Under the contract, Hanover County can send up to 5.4 million gallons of wastewater per day for treatment. When the County realized that its need for wastewater treatment would eventually expand beyond the terms of its contract with Henrico County, it began to evaluate wastewater options. The County decided to build its own wastewater treatment facility consisting of a pump station, a pipeline between the station and the treatment facility ("the Lee Davis pipeline"), an additional pipeline from the treatment facility to the Pamunkey River, and a discharge structure on the river bottom.

The plaintiffs owned nine hundred acres of farmland on the Pamunkey River adjacent to the proposed discharge structure, over which one of the proposed pipelines was to run. They filed numerous challenges to the project.

As the project would involve the placement of dredge or fill material in a wetland, Army Corps of Engineers approval was needed. Two ways exist to obtain this approval: an individual permit approved on a case-by-case basis after a resource intensive review, public notice, and comment; or to fit the project under the scope of existing permits, which act as standing authorization to undertake categories of activities deemed to create only minimal environmental impact. These general permits are designated Nationwide Permits (“NWP”) and any activities falling within their scope are automatically approved without individualized assessments. Corps regulations direct the Corps to review any individual permit applications to determine if they are eligible for approval under the less stringent NWP process.

The County’s current proposal is its second attempt to support the Smart Growth initiative. The first proposal was identical to the current one, except that instead of the Lee David pipeline, a different pipeline (“the Interceptor”) was proposed. The Interceptor would have more than a minimal effect on wetlands. The other aspects of the project were approved under the NWP process, while the proposal for the Interceptor was treated as a separate application for an individual permit.

The plaintiffs’ challenge to the first proposal succeeded. Because the Interceptor was the only way to get wastewater to the treatment facility, the district court held that its separation from the rest of the project was improper. It vacated the approvals and ordered the Corps to treat the various elements of the project as an integrated whole. The County then abandoned the Interceptor in favor of the Lee Davis pipeline and submitted a revised proposal to the Corps. The Corps assigned new staff with no previous involvement to the application and began the procedure for review of individual permits. Notice was given, comments taken, and other agencies consulted. The plaintiffs continued to maintain that the proposal was incomplete and would not meet the County’s need to remain under the limit set in the contract with Henrico County.

The Corps accumulated six thousand pages of administrative record and issued a forty-seven page memorandum. It concluded that the project could be approved under the NWP process. The plaintiffs appealed this decision to district court which applied rigorous scrutiny to the Corps decision and engaged in independent calculations. It found that the project would not meet the needs of the County and that other projects would be needed; these projects were not included in the application but needed to be included in the Corps analysis. The Corps’ decision was deemed arbitrary and capricious, the

NWP approval set aside, and the whole project was again remanded to the Corps.

The court announced that it would review both the facts and the law *de novo*. It held that the district court was mistaken when it applied heightened scrutiny to the Corps' decision. While arbitrary and capricious is the correct standard, the court could not substitute its judgments for the Agency's and must uphold reasonable Agency decisions. The district court did not grant the Corps' decision sufficient deference under *Chevron*. 467 U.S. 837, 842-45 (1984).

The court held that the procedures used by the Corps were appropriate. In light of regulations requiring the Corps to review all applications to determine whether they might be approved under NWP procedure, the Corps was justified in doing so, although the County's second proposal began life as an application for an individual permit. The district court's ruling that the Corps engaged in post-hoc rationalization by not citing to the regulation that requires all applications to be checked for NWP compliance was a misunderstanding of the regulation. The County was entitled to NWP review, and Corps compliance was a matter of obeying the law rather than a justification for a decision. The district court's alternate holding, that interested parties did not receive proper notice of potential NWP approval, also misunderstood the regulations involved because the process for individual permit approval necessarily includes review from NWP eligibility.

The court rejected Plaintiffs' contention that Corps regulations established a fifteen day deadline after receiving an individual application to determine whether the application met NWP requirements. The court thus found all the procedures used by the Corps to be lawful.

The Plaintiffs' second principal contention was that the County's proposal was not a single and complete project as required by Corps regulations. Their argument was that the proposed project would not prevent the County from exceeding the 5.4 million gallons per day that is the limit of their contract with Henrico County. Because the project could not meet this need, other projects would be needed and thus this particular project was not single and complete.

The court rejected this interpretation of the purpose of the project. Rather than staying under the contractual cap, the project's purpose was to aid implementation of the County's "Smart Growth" plan. Because this purpose would be met by the project, it was single and complete. Additionally, the judgment of whether a project is single and complete is the properly delegated job of the Corps, not that of an Article III court.

Finally, the court rejected the Plaintiffs' contention that the Corps relied exclusively on information provided by the County and should be required to independently investigate the application. The court held that such a requirement would place unreasonable burdens and unsuitable responsibilities on the Corps, which receives thousands of applications every year. The court also found that the Corps decision was not arbitrary or capricious, reversed the district court's decision, and reinstated NWP approval for the County's project.

The court concluded its opinion with some choice words regarding the effort to thwart the County's project. Calling the attempt misguided according to both the letter and spirit of the law, the court noted that not a single environmental group joined with the plaintiffs and that the project would play a crucial role in the County's environmentally sensitive "Smart Growth" plan. The case was remanded and the district court was ordered to enter judgment for the defendants.