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Fourth Circuit Summary

The Fourth Circuit Summary, begun last year, provides a summary of prevailing environmental decisions decided by the United States Court of Appeals for the Fourth Circuit since the last issue of the *William and Mary Journal of Environmental Law*. It does not cover every environmental decision of the Fourth Circuit during that time period, but only those cases which the editors believe to be of the most interest to our subscribers. The Fourth Circuit Summary will appear twice each year in the *William and Mary Environmental Law and Policy Review* for the most timely reporting.

RCRA

Owen Elec. Steel Co. of South Carolina v. Browner, No. 93-2195, 1994 WL 554656 (4th Cir. 1994)

Owen Electric Steel Company of South Carolina, Inc. ("Owen") filed suit against EPA Administrator Carol M. Browner, appealing several determinations by the Agency that a slag processing area ("SPA") owned by Owen was a solid waste management unit ("SWMU").

Owen created "slag" as a byproduct of producing steel. Slag, which contains limestone, dolomite and trace amounts of metallic oxides, is continuously produced at Owen's Cayce, South Carolina facility. When the slag is first produced, it is dimensionally unstable and must sit for six months on bare soil at the facility for tempering and weathering in a "curing" process. When the slag is stabilized, Owen sells the material to the construction industry for use as a road base material or for other commercial purposes. Because Owen's Cayce facility is one that treats, stores or disposes of hazardous waste ("TSDF"), it must comply with the Resource and Conservation Recovery Act ("RCRA") and obtain a permit from EPA. 42 U.S.C. §§ 3005, 6925. On October 6, 1989, EPA proposed a permit for the Cayce facility that identified the SPA as an SWMU. Owen disputed this classification and brought a petition against Carol M. Browner, EPA Administrator.

The issue for the Fourth Circuit was whether the slag produced by Owen as a byproduct of its steel production is "discarded" and therefore a solid waste under RCRA. 42 U.S.C. § 6903(27). Owen argued that its slag is not discarded material because it is recycled and used in roadbeds. EPA countered that the material is discarded because it lies dormant and exposed on the ground for six months before it is reused.

Under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), substantial deference is accorded to an agency's interpretation of a statute when Congress has not expressly spoken on the issue. Since Congress had not directly spoken on the issue here, the Fourth Circuit cannot invalidate the agency interpretation if it is reasonable and permissible and not an abuse of discretion. In an analysis of recent cases, the Fourth Circuit determined that EPA could classify a byproduct as discarded if it is not immediately recycled for use in the same industry. Since Owen's slag must sit for six months before being recycled and is not reused in the same industry but is instead sold to the construction industry for use in their constructive processes, the Fourth Circuit held that EPA's interpretation in determining that slag is a solid waste was reasonable and not an abuse of discretion. The court, therefore, denied Owen's petition for relief.

SUBJECT MATTER JURISDICTION

Appalachian Energy Group v. EPA, 33 F.3d 319 (4th Cir. 1994)

The Appalachian Energy Group and other oil and gas trade associations sought judicial review of an internal EPA memorandum which advised that the Clean Water Act ("CWA") requires a National Pollutant Discharge Elimination System ("NPDES") permit for storm water discharges involving oil and gas construction activities. The Fourth Circuit dismissed the application for lack of subject matter jurisdiction.

In response to an inquiry from the regional storm water coordinator, the NPDES Program Branch Chief advised in a memorandum that the CWA required an NPDES permit for "storm water discharges from construction activities involving oil and gas facilities (e.g., access roads, drilling pads, pipelines, etc.)." The oil and gas trade associations contended that the memorandum was inconsistent with the CWA and that it amounted to a new rule, adopted without proper notice under the Administrative Procedure Act. Petitioners sought to invoke the court's

jurisdiction under section 509(b)(1)(F) of the CWA, which provides for review of an EPA Administrator's action in issuing or denying any permit. Petitioners also relied on *Natural Resources Defense Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992), in which the Ninth Circuit found jurisdiction to review EPA rules that regulate the underlying permit procedures.

The Fourth Circuit stated that it could not review the memorandum because it did not issue or deny any permit, did not relate to any pending application and did not constitute any final agency action. The memorandum only provided the author's interpretation of two regulations in tension under the CWA. The Fourth Circuit stated that while the memorandum might signal a position EPA intended to take, EPA had not taken any action which triggered the court's power to review.

The Fourth Circuit also found petitioner's reliance on *Natural Resources Defense Council v. EPA* misplaced. The Ninth Circuit's ruling involved actual activities related to the issuance and denial of permits. Also, without citing any authority, it went on to state that it had the power to review rules that regulate underlying permit procedures that were at issue in that case. In contrast, the petitioners here could only state an interest in knowing whether its members must obtain permits. Therefore, the memorandum did not constitute agency action sufficient to provide subject matter jurisdiction.

Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148 (4th Cir. 1994)

Plaintiffs brought an action against Columbia Organic Chemicals Company's ("Columbia Organic") plant in Columbia, South Carolina, alleging negligent operation of the plant due to its release of hazardous substances into the soil, air and groundwater. The suit sought compensatory damages and injunctive relief. Plaintiffs were residential and commercial landowners within a one and one-half mile radius of defendant's plant.

Columbia Organic removed the action to federal district court, asserting that the complaint raised federal questions sufficient to confer original jurisdiction pursuant to 28 U.S.C. §§ 1331, 1441 (which require either diversity of citizenship between the parties or a federal question). As one part of its negligence complaint, plaintiffs asserted that defendant's violations of the Resource Conservation and Recovery Act ("RCRA"), Comprehensive Environmental Response, Compensation and Liability Act

("CERCLA"), and other federal statutes constituted negligence per se and made the defendants liable for plaintiffs' injuries.

Plaintiffs disputed removal jurisdiction. The United States Magistrate Judge recommended to the district court that the case be remanded because the mere recitation of federal statutes was not enough to confer federal question jurisdiction. The district court, however, rejected the magistrate's recommendation, finding that it could retain jurisdiction even though the federal issues were not essential to the plaintiffs' case.

The Fourth Circuit reversed the district court and remanded the case to state court for lack of subject matter jurisdiction. Because the cause of action at issue was created by state law, the Fourth Circuit stated that whether jurisdiction existed turned on whether the plaintiffs' demand depended on resolution of a *substantial question* of federal law. Analyzing two United States Supreme Court decisions, the Fourth Circuit found that when a federal statute raised by the plaintiff provides a private remedy, then jurisdiction would exist only if Congress intended that such an action, based on state law but incorporating federal law, be brought in federal court. The federal statutes at issue provided a private remedy.

The court determined Congress' intent through two findings. First, the plaintiffs sought compensatory damages and could not avail themselves of this remedy under the statutes. Second, they were either procedurally or substantively barred from proceeding under any of the statutes. Therefore, Congress must not have intended for plaintiffs in the appellants' position to pursue this action in federal court.

The Fourth Circuit also found that the claim involving the federal statutes was simply an alternative theory. Applying the Supreme Court's reasoning in a case under 28 U.S.C. § 1338(a) relating to jurisdiction over patent cases, the Fourth Circuit held that a claim supported by alternative theories in the complaint may not form a basis for subject matter jurisdiction unless the federal law is essential to each theory. Because the plaintiffs forwarded substantive theories that would not invoke federal jurisdiction, the one alternative theory based on federal law could not provide federal jurisdiction.

NATIONAL PARK SERVICE**United States v. Stephenson, 29 F.3d 162 (4th Cir. 1994)**

Defendant Mack Stephenson was prosecuted for hunting bear within the Great Smoky Mountains National Park ("the Park") in violation of 16 U.S.C. § 403h-3 (prohibiting hunting "within the limits" of a National Park). Park officers placed a decoy within the boundaries of the north shore of Fontana Lake, a reservoir located at the south end of the Park. They spotted the defendant shooting at the bear from a boat on the lake. While the National Park Service ("NPS") owns the land surrounding the north end of Fontana Lake, the lake itself is within the custody of the Tennessee Valley Authority ("TVA"). The district court dismissed the case for lack of jurisdiction because the decoy was not placed on land owned by NPS and was therefore not within the limits of the Park as required by § 403h-3.

The Fourth Circuit reversed, finding that the "within the limits" language of the statute refers to the congressionally established boundaries of the Park, not to actual agency ownership. The court focused on the language of § 403k-1, which provides that "[s]ubject to valid existing rights, all lands within the boundaries of the Great Smoky Mountains National Park, [as defined by this title], hereafter shall be a part of the national park and shall be subject to all laws, rules, and regulations applicable to the national park." The Fourth Circuit found that the language creates a strong presumption that the statutory boundaries of the Park are the boundaries which are subject to Park laws, not just those boundaries that are under the control of NPS.

The Defendant argued that because the decoy was on land owned by TVA, the area was under the "subject to valid existing rights" exception of the statute and was thus exempt from NPS jurisdiction. The Fourth Circuit found no merit to this argument because Congress permits NPS to exercise jurisdiction over lands held by other agencies pursuant to their mutual agreement under § 17j-2(b). NPS had entered into an agreement with TVA in 1948 that gave NPS the right to perform all acts "reasonably necessary to the administration and use" of the Park on the land held by TVA. The Fourth Circuit stated that both agencies agreed that this provision included the use of NPS' police powers to protect Park resources. Therefore, the district court's dismissal for lack of jurisdiction was reversed.

FREEDOM OF INFORMATION ACT**Ethyl Corp. v. EPA, 25 F.3d 1241 (4th Cir. 1994)**

Ethyl Corporation ("Ethyl") filed suit against EPA under the Freedom of Information Act ("FOIA") to compel the production of records relevant to EPA's denial of a waiver of approval application for a gasoline additive. The Fourth Circuit vacated the district court's decision to grant EPA's motion for summary judgment and remanded the case for further proceedings.

In May 1990 Ethyl initiated an administrative proceeding before EPA seeking approval of their use of a high-performance gasoline additive, HITEC 3000. Section 211 of the Clean Air Act prohibits the use of a fuel additive unless the user can show that the additive will not interfere with any emission device or system. Expecting the proceeding to be protracted, Ethyl filed a "fueled additive waiver" based on its own testing. EPA denied the waiver, and on appeal the issue was remanded to EPA for further proceedings.

In January 1992 Ethyl submitted a FOIA request for documents relating to the denial of the waiver application. In response, EPA produced approximately 450 documents but withheld an undisclosed number of documents as "personal" and another 243 documents as protected by the deliberative process exemption of the FOIA. 5 U.S.C. § 552(b)(5) (protecting recommendations, draft documents, proposals, suggestions and the subjective documents which reflect personal opinions of the writer rather than those of the government agency).

When Ethyl moved to supplement the administrative record with the documents EPA had produced, EPA produced twelve more documents which it had originally withheld. Ethyl then filed an administrative appeal of EPA's failure to provide all the documents and finally filed an action in the district court seeking an order compelling EPA to provide the remaining documents.

The district court ordered EPA to produce a Vaughn index, a list of withheld documents described in sufficient detail so that a court can determine whether the documents must be disclosed without resorting to in camera review. The district court granted EPA's motion for summary judgment on the basis of the Vaughn index and two affidavits. During the district court proceedings, EPA produced eighty previously withheld documents and identified several more.

The Fourth Circuit reversed and remanded for further proceedings, holding (1) that material questions of fact existed regarding the thoroughness of EPA's FOIA search, (2) that insufficient information was provided in the Vaughn list for the court to determine whether the withheld documents were protected by the deliberative process exemption, and (3) that the court should have reviewed the withheld documents in camera if it was satisfied that additional information could not be provided on the Vaughn list without compromising the documents' confidentiality.

The Fourth Circuit stated that questions of fact remained as to whether EPA conducted a sufficient search. The test for determining whether the agency conducted a reasonable search was whether the search was reasonably calculated to uncover all relevant documents, not whether every single document was in fact unearthed. The Fourth Circuit cited several factors as to why the search may have been inadequate. First, EPA did not properly instruct its employees conducting the search on how to distinguish personal from agency records because the EPA official in charge of the search informed the employees of only four of the ten factors listed in EPA's FOIA manual. Second, the EPA official only contacted fifty-nine employees in the search while Ethyl maintained that over one hundred employees had worked on the waiver application. Finally, seventeen documents were produced in a second, duplicative FOIA request filed by Ethyl that were not previously produced.

Because the FOIA was enacted as a check against government corruption, its exemptions are narrowly construed and the burden of proving the exemption lies with the agency. 5 U.S.C. § 552(a)(4)(B). Because the Vaughn index is a surrogate for in camera review, it is necessary that sufficient information be provided for the court to determine adequately whether the exemption applies.

Under existing case law the author's identity and position in addition to any recipients of the document should be disclosed if the deliberative process exemption is to apply. EPA's Vaughn index did not provide most of the withheld documents' authors or recipients. Furthermore, many of the documents were only summaries or geographical representations and would not qualify for the exemption. While most of the documents' descriptions did not provide enough detail for a determination of whether the documents qualified, those that were detailed enough did not satisfy the exemption criteria. The Fourth Circuit also found that not enough information was present for the court to determine whether non-protected portions of documents could be released while the protected portion was retained as required.

In conclusion the Fourth Circuit noted that the district court should have conducted an in camera review if EPA could not provide enough information on the Vaughn index for the court to make a determination as to whether EPA had satisfied its burden.