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FOURTH CIRCUIT SUMMARY

The Fourth Circuit Summary, published at least once a year, provides a synopsis 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 most interest to subscribers. The cases discussed below were decided in 2002 and 2003.

Hodges v. Abraham, 300 F.3d 432 (4th Cir. 2002)

In an opinion by Circuit Judge King (to which Judge Widener and Judge Niemeyer joined), the Fourth Circuit affirmed the decision of the United States District Court for the District of South Carolina with respect to the plaintiff's standing to maintain this action and whether the Department of Energy and its Secretary, Spencer Abraham ("DOE") failed to comply with the National Environmental Policy Act ("NEPA") in transferring surplus plutonium from Colorado to South Carolina.

In 1995, the DOE began looking for sites to store surplus plutonium. On April 19, 2002, the DOE announced that six metric tons of surplus plutonium would be transferred to the Savannah River Site ("SRS") in South Carolina. The case discusses NEPA's requirements placed upon the DOE that certain procedures be followed. On May 1, 2002, Governor Hodges brought a complaint against the DOE concerning the transfer of the surplus plutonium in the District of South Carolina. Governor Hodges sought a declaratory judgment that the DOE failed to adhere to NEPA and an injunction prohibiting the DOE from transferring surplus plutonium from Colorado to SRS. The district court granted the DOE's motion for summary judgment and declined to enjoin the transfer of the plutonium to SRS.

The Fourth Circuit denied Governor Hodges' request for an injunction pending appeal, but expedited the proceeding. Governor Hodges asserted that the DOE did not comply with NEPA before issuing its April Record of Decision and sought an injunction prohibiting the DOE from transferring any

surplus plutonium to SRS until the DOE fully complied with all applicable laws. The DOE responded that Governor Hodges lacked the standing to initiate and pursue this case, and that it had complied with NEPA.

In resolving an issue of jurisdiction, the court rejected the DOE assertion that the lawsuit of Governor Hodges was a *parens patriae* action lacking the necessary standing and held that he, in his official capacity, had a concrete interest that NEPA was made to protect.

Finally, the court held that because the DOE complied with the NEPA requirements, and the decision to transfer the surplus plutonium was not arbitrary and capricious, to affirm the district court's award or summary judgment to the DOE.

Franks v. Ross, 313 F.3d 184 (4th Cir. 2002)

In an opinion by Circuit Judge King (to which Judge Motz and Senior Judge Beezer, the Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit sitting by designation, joined), the Fourth Circuit affirmed in part, reversed in part, and remanded the decision of the United States District Court for the Eastern District of North Carolina respecting the dismissal of the plaintiffs' complaint.

Plaintiffs alleged racial discrimination in the siting process for construction of landfills and argued for injunctive relief against Wake County and officials from the North Carolina Department of Environmental and Natural Resources ("DENR"). The complaint asserted that the actions of the defendants violated Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 1982, and the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs also asserted a public policy challenge against the Wake County defendants, pursuant to N.C. Gen. Stat. § 14-234 ("State Claim").

The district court dismissed the Title VI, § 1982, and Equal Protection claims against Wake County on the grounds of untimeliness. The district court also dismissed the State Claim and the Title VIII claim for failure to state claims upon which relief could be granted. The district court also dismissed the plaintiffs' claims against the DENR defendants relying on Eleventh Amendment sovereign immunity. Finally, the district court, in disposing of the case, denied the plaintiffs leave to amend their complaint for a second time.

The plaintiffs asserted in their appeal that the district court abused its discretion in refusing to grant leave to amend, improperly dismissed their claims against Wake County, and incorrectly granted immunity to the DENR defendants. The Fourth Circuit addressed the refusal to grant leave to amend by the district court as a conclusion based on an error of material fact. This is because the plaintiffs waited less than three months to amend their complaint, contrary to the district court's understanding of the plaintiffs waiting seven months to amend their complaint. This district court believed that the Superior Court issued its Permit Reissuance Decision on October 4, 2000, and that the plaintiffs had not sought leave to amend until April 27, 2001. However, the Superior Court had issued its Permit Reissuance Decision on March 16, 2001, and the Plaintiffs had filed their motion to amend on May 29, 2001. The court also addressed the dismissal of the claims against Wake County by holding that the federal claims were timely because issuance of a permit, not siting of the landfills constituted final agency action; however, the district court did not err in dismissing the State Claim. Finally, the court addressed the plaintiffs' claims that the DENR defendants were entitled to immunity by holding that the plaintiffs adequately asserted claims for injunctive relief against the DENR under *Ex parte Young*.

The Fourth Circuit affirmed the dismissal of the State Claim against Wake County but reversed the dismissal of the Title VI, § 1982, and Equal Protection claims against Wake County. The court also reversed the district court concerning its refusal to authorize an amendment of the complaint and finding the DENR defendants were entitled to immunity. Finally, the court remanded for further proceedings as appropriate.

Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA,
313 F.3d 852 (4th Cir. 2002)

In an opinion by Circuit Judge Widener (in which Judge Motz and Howard joined), the Fourth Circuit vacated and remanded with instructions to dismiss for lack of subject matter jurisdiction the decision of the United States District Court for the Middle District of North Carolina respecting the ability to review an EPA report as reviewable agency action under the APA.

The EPA presented five arguments on appeal challenging the district court's finding that the EPA had violated its statutory obligations under the Radon Gas and Indoor Air Quality Research Act ("Radon Act"). First, the

EPA argued that the district court incorrectly held that the 1993 report that classified secondhand smoke as a known human carcinogen was reviewable final agency action under the APA, 5 U.S.C. §§ 702, 704. Next, the EPA asserted that the district court erroneously found that the plaintiffs had standing to challenge the EPA's report. Then, the EPA argued that it complied with section 403(c) of the Radon Act by appointing an industry representative to serve on an advisory group during the EPA's research program about secondhand smoke. Fourth, the EPA argued that even if it violated the Radon Act by not properly establishing an advisory committee, that the error was harmless and not grounds for vacating the EPA's report. Finally, the EPA asserted that the district court exceeded the scope of judicial review of the agency.

The Fourth Circuit held that the report was not reviewable agency action under the APA and ordered that the judgment of the district court be vacated and remanded for dismissal for lack of subject matter jurisdiction.

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003)

In an opinion by Judge Niemeyer (joined by Judge Hamilton), the Fourth Circuit reversed the United States District Court for the Southern District of West Virginia's declaratory judgment; vacated its injunction, memorandums, and orders of May 8 and June 17, 2002; and remanded for further proceedings not inconsistent with the opinion. Also, Judge Luttig wrote an opinion concurring in part and dissenting in part.

Plaintiff brought action for declaratory and injunctive relief to declare illegal the Corps of Engineers' interpretation of the Clean Water Act ("CWA") and to require the Corps to revoke a permit, issued to Martin County Coal Corporation under § 404 of the CWA, authorizing Martin Coal to place excess overburden into valley fills.

The district court held that "fill material" as used in § 404 only referred to "material deposited for some beneficial purpose," not for waste disposal, and consequently that the Corps' approval of waste disposal as fill material under § 404 was ultra vires and extended past the Corps' authority. The district court entered a prospective permanent injunction against the Corps on the basis of its conclusion that whenever the Corps issues permits for valley fills with no beneficial primary purpose it acts ultra vires.

The Fourth Circuit held that the injunction prohibiting the Corps district office from issuing any further permits approving valley fills for waste disposal was overbroad; the declaration and injunction were vacated due to reaching beyond the issues presented to the district court for resolution; the Corps permissibly interpreted the CWA as authorizing them to issue permits for the creation of valley fills in connection with coal mining activities, even when the valley fills serve no purpose other than to dispose of excess overburden from the mining activity; the Corps' 1977 regulation defining "fill material" was a permissible reading of the CWA, and the Corps' interpretation of its own regulation was not erroneous; and the Corps' issuance of the permit in this case was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law to such an extent as the plaintiffs argued in the complaint.

Judge Luttig argued that the district court's entire injunction and opinions should be vacated and the case remanded for consideration of the sole issue of the lawfulness of the Martin Coal permit under the Corps' 1977 regulations.

United States v. Newsome, 322 F.3d 328 (4th Cir. 2003)

In an opinion by Judge Niemeyer (to which Chief Judge Wilkins and Judge King joined), the Fourth Circuit affirmed the decision of the United States District Court for the Northern District of West Virginia respecting the defendants' challenges to their convictions and the amount of loss used in sentencing and for calculating restitution.

The district court found that four of the initial seven defendants were guilty of conspiracy to cut down and convert black cherry trees from the Monongahela National Forest. They also found three of the defendants guilty on various substantive counts of theft. The district court held all four defendants jointly and severally liable for the amount of \$248,459.53, based on the market value of the 95 trees that were cut down and stolen. Using the amount of loss, the district court sentenced Ernest Brant and Denzil Grant to 46 months' imprisonment. Taking into account the limited period of involvement for Dallas Newsome, the district court sentenced him to 15 months' imprisonment. Michael Newsome was sentenced as a misdemeanor and imposed a sentence of four months' home confinement.

The defendants asserted in their appeal that the district court erred in determining the amount of loss, for both the purpose of applying the sentencing guidelines and ordering restitution. The Fourth Circuit upheld the decision of the district court concerning the amount of loss for both sentencing and restitution purposes. Grant, Brant, and Michael Newsome argued that the district court improperly denied their motions for acquittal and the evidence was not sufficient to convict them of theft or conspiracy to commit theft. The Fourth Circuit rejected this argument, and found that the jury had sufficient evidence. Dallas Newsome argued that the district court erred by denying his motion to suppress evidence and that the judge demonstrated bias toward him. Also the Fourth Circuit found Dallas Newsome's argument to be without merit. The Fourth Circuit affirmed the judgment of the district court.

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