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Fourth Circuit Summary

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FOURTH CIRCUIT SUMMARY

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The Fourth Circuit Summary, published at least once each 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 2001 and 2002.

Waste Management Holdings, Inc. et al. v. James S. Gilmore III, in his official capacity as Governor of the Commonwealth et al., 252 F.3d 316 (4th Cir. 2001)

In an opinion by Circuit Judge Hamilton (to which Judge Widener wrote a concurring opinion, and in which Judge King concurred in part and dissented in part), the Fourth Circuit affirmed in part, and vacated and remanded in part, the decision of the United States District Court for the Eastern District of Virginia (87 F. Supp. 2d 536) respecting the constitutionality of certain Virginia statutes concerning the disposal and transportation within Virginia of municipal solid waste ("MSW").

The statutes in question fell into three groups: (1) the provision limiting the amount of MSW landfills could accept (the "cap" provision); (2) those provisions relating to transportation of MSW on river barges within Virginia, including a provision that proscribes the stacking of MSW on a river barge more than two containers high (the "stacking provision") and a provision that prohibits the "commercial transportation" of MSW by any vessel upon the navigable waters of the James, York, or Rappahannock Rivers in Virginia (the "three rivers" provision); and (3) lastly those provisions focused on regulation of transportation of MSW in Virginia by truck, one of which prohibits landfills from accepting MSW from a truck with "four or more axels" unless it is accompanied by a certification from the Virginia Waste Management Board ("Board") to the effect that it does not contain any substances not authorized for acceptance by the landfill (the "truck certification provision") and the other of which requires the Board to design regulations respecting transport of MSW by trucks with "four or more axels" (the "four axel" provision).

The plaintiffs in the suit were landfill operators, Virginia counties with landfills, and MSW transporters. The defendants included Virginia's

Governor, its Secretary of Natural Resources, and its Director of the Virginia Department of Environmental Quality ("DEQ").

The district court concluded that plaintiffs had standing to challenge the statutes and granted their motion for summary judgment, holding that all provisions violated the Commerce Clause and that two of them—the stacking and three rivers provisions violated, the Supremacy Clause.

The Fourth Circuit affirmed the grant of summary judgment on the cap, trucking certification, and four axel provisions on the basis that they violated the Commerce Clause. In addition, the court affirmed plaintiffs' summary judgment as to their Supremacy Clause challenge to the three rivers provision. It vacated summary judgment on the Commerce Clause challenge to the three river ban and the stacking provision and further vacated summary judgment on the Supremacy Clause challenge to the stacking provision in all three of the vacated cases because genuine issues of material fact required a remand.

The court disagreed with the defendants' various challenges to plaintiffs' standing and noted that the savings clauses in the statutes would not prevent plaintiffs' challenge because "savings clauses . . . inconsistent with the body of an act are rejected and disregarded." 252 F.3d 316, 333 (citing Looney v. Commonwealth, 145 Va. 825 (1926)).

Defendants additionally attempted to interpose sovereign immunity under the Eleventh Amendment to prevent plaintiffs' action, but the court noted that the *Ex Parte Young* (209 U.S. 123 (1908)) exception, which permits enjoinment of a state officer from enforcing an allegedly unconstitutional statute applied to bar the sovereign immunity defense.

The court also found that the Virginia Governor was not an appropriate party defendant as he was not involved in the enforcement of the statute at large.

Further the court rejected the application of the "market participant doctrine" exception to unconstitutionality under the Commerce Clause that was applied in *Camps Newfound/Owatonna, Inc. v. Town of Harrison* (520 U.S. 564, 592-93 (1997)) because Virginia, in enacting the statutes at issue, was not acting as a "market participant."

Finally, the court held that Congress' enactment of Sub. IV of the Resource Conservation and Recovery Act of 1976 ("RCRA") did not amount to an authorization to states to discriminate against MSW from outside its boundaries and thus did not trump the requirements of the Dormant Commerce Clause. Such authorization could be established only if RCRA was a "clear expression" of an intent to provide such authorization, which the court held, was not the case.

United States v. Srnsky, 271 F.3d 595 (4th Cir. 2001)

The National Forest Service relied on three federal land use statutes and the Property Clause of the United States Constitution for its authority to force plaintiffs to obtain a special use permit across the Government's forest land to access their homes. Plaintiffs refused, claiming a common law implied easement.

In addition to its detailed discussion of the distinctions between easements by implication and easements by necessity and the recognition of both under West Virginia law, the case focused on aspects of the applicability of those federal statutes and the conflict—or, as in this case, the lack thereof—between the provisions of those statutes giving the federal government exclusive control over federal forest land and the rights of individuals claiming easements over such lands under state common law.

The Government brought an action in the District Court for the Northern District of West Virginia to compel plaintiffs to apply for the special use permit. The district court granted summary judgment for the Government, rejecting plaintiffs' claim to an easement by implication and holding that, in any event, the National Forest Service Organic Act of 1897 ("Organic Act") preempted the possibility of a common law easement.

The Fourth Circuit, in an opinion by Judge Luttig in which Judges Williams and Michael joined, vacated and remanded, concluding that none of the three federal acts at issue applied in this case and that further factual development was needed to establish whether plaintiffs had in fact met all of the requirements for an implied easement.

The Organic Act did not apply, the court held, because inter alia, the Act applies only to forests reserved from public land (while the forest land at issue had instead been acquired by the government from private individuals and had been incorporated into a national forest). The court also noted that Section 551 of the Act, which appears to give the government exclusive control, is limited by the newer Section 518 that specifically provides that easements retained by a landowner conveying to the United States are subject to governmental rules—but only of same are included in the conveying instrument, which had not been done in the instant case.

As to the other two federal statutes relied upon by the government, the Federal Land Policy and Management Act of 1076 ("FLPMA") and

the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), the court found that both statutes look only forward and thus do not authorize regulation of existing easements and, further, that ANILCA does apply outside of Alaska, this latter holding being in direct conflict with the Ninth Circuit's reading of the statute.

There being no applicability, there could be no conflict with state common law and, absent such a conflict the court did not have to reach the question of whether or not, Congress had the authority under the Property Clause to preempt common law property rights.

Crofton Ventures Limited Partnership v. G&H Partnership et al., 258 F.3d 292 (4th Cir. 2001)

Plaintiff sued the former owners and operators of his land under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C.A. § 9601 et seq. for costs of cleanup of hazardous materials ("HMs") that he found on his land in leaking drums.

The United States District Court for the District of Maryland (116 F. Supp. 2d 633) found for defendants on the basis that they were not "responsible persons" under the Act because plaintiffs were unable to prove that they had caused or had knowledge of the placement, disposal, or leakage of the HMs on the property. The Fourth Circuit in an opinion written by Judge Niemeyer (in which Judge King joined, but to which Judge Michael dissented in part) held that CERCLA imposed strict liability on any owner or operator who owned or operated at a time when HMs were disposed of on the property, reading the term "disposal" in § 9607(a)(2) to include any placing of HMs on the property or the leaking or spilling of the HMs thereon whether or not the owner/operator caused or even knew of the placement or leakage.

The court vacated and remanded to enable the district court to conduct further fact finding on the issue of precisely when the drums leaked. Judge Michael's partial dissent was on procedural matters. He agreed with the substantive issues.

Bragg et al. v. West Virginia Coal Assoc. et al., 248 F.3d 275 (4th Cir. 2001)

Plaintiffs, citizens of West Virginia and environmental groups, brought suit in the United States District Court for the Southern District of West Virginia (72 F. Supp. 2d 642) under the "citizen suit provision" of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1201 et seq. against the Director of the West Virginia Division of Environmental Protection for violation of his duties under SMCRA; specifically, for his issuance of permits that allowed mining via a process of removing mountain tops and dumping the resulting debris in valleys burying many streams in the process.

The district court granted summary judgment for plaintiffs finding that West Virginia's approval of these mining practices violated state and federal law and enjoined issuance of further permits that dumped the debris within 100 feet of streams.

The Fourth Circuit vacated the injunction and remanded with instructions to dismiss without prejudice so that plaintiffs would be able to sue in a state forum, because the Fourth Circuit held that the sovereign immunity doctrine prevents citizens from suing their state in federal court. The *Ex Parte Young Exception* (209 U.S. 123 (1908)), said the Fourth Circuit, does not apply in this case because the plaintiffs' suit is based on a violation of state rather than federal law. Under SMCRA, the court pointed out, once a state's program for surfacing mining is accepted by the Federal Government, all regulation of surface mining is then transferred to the state; thus, even though the West Virginia statute may incorporate federal standards, the state regulates exclusively. Further, the provision for "citizen suits" under SMCRA specifically limits such litigation "to the extent permitted by the 11th Amendment . . ." (30 U.S.C. § 1270 (a)(2)). Nor does failure by the state to enforce its own regulations result in an automatic forfeit of exclusivity. Only federal withdrawal of approval for the state's program does that.

1000 Friends of Maryland v. Browner, 265 F.3d 216 (4th Cir. 2001)

The environmental organization 1000 Friends of Maryland (1000 Friends) sought review of a final determination by the U.S. Environmental Protection Agency ("EPA") that Maryland's revised motor vehicle emissions budget was adequate for conformity purposes under the Clean Air Act. In 1998, Maryland submitted for approval a revised attainment demonstration state implementation plan ("SIP") for the Baltimore area to the EPA. The SIP included photochemical grid modeling to show how the area would achieve attainment for ozone by 2005 and a motor vehicle

emissions budget ("MVEB") to show the portion of total emissions allotted to motor vehicle sources. The Clean Air Act ("CAA") conformity provisions require that federal funding and approval of transportation activities be consistent with approved SIPs. EPA regulations provide that if the MVEB in an attainment SIP is adequate under regulatory criteria and procedures, the MVEB may be relied upon in making the conformity determination for transportation activities even if the SIP itself has not been approved by the EPA. In 1999, the EPA determined that the MVEB was not adequate for purposes of conformity, but proposed to approve the SIP if Maryland agreed to implement additional emissions control measures and submitted a revised MVEB. The EPA approved the revised MVEB, even though a new photochemical model was not included in the submission, and the revised MVEB was higher than the original budget.

1000 Friends sought review of EPA's determination that the MVEB was adequate for conformity purposes. The court of appeals found that it had jurisdiction over the petition as a challenge to an agency action with local rather than national impact. 1000 Friends had standing because at least one of its members would have standing, with a demonstrable, imminent, concrete and particularized injury that is traceable to the EPA's final agency action. The EPA determination arguably opened the door to increased ozone emissions through ill-conceived transportation projects whose approval would be based on the allegedly inadequate MVEB.

The court denied 1000 Friends' petition for review, finding that although the CAA requires computer modeling in demonstration attainment SIPs, it does not mandate a new modeling performance with the submission of each revised SIP. The court further found that because the CAA does not specify how to make conformity determinations with an adequate MVEB but without an approved SIP, the EPA's action cannot be inconsistent with the Act. The court held the EPA determination not arbitrary and capricious, not contrary to the law, and based on sufficient evidence, because the EPA considered the affects of the control measures that it was requiring in the revised SIP in conjunction with the modeling submitted with the disapproved SIP.

Piney Run Preservation Assoc. v. County Commissioners of Carroll County, Maryland, 268 F.3d 255 (4th Cir. 2001)

The environmental group, Piney Run Preservation Association ("Piney Run"), and the County of Commissioners of Carroll County, Maryland ("county") appealed the judgment of the U.S. District Court for

the District of Maryland rendered in a citizen suit. The district court held the county liable for damages caused by the county's sewage treatment plant discharge of heat, which was not expressly authorized by the plant's NPDES permit. Applying the *Chevron* doctrine, the court of appeals supported the EPA's interpretation of NPDES requirements under the Clean Water Act ("CWA"), which differs from the positions of both the district court, that any discharge not expressly authorized in the NPDES permit is prohibited, and the county, that the permit shield defense precludes suit against a permit holder for discharge of any pollutant not listed on the NPDES permit. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

The NPDES permit provides a shield from liability if the holder of the permit "complies with the express terms of the permit" and Clean Water Act disclosure requirements and the holder does not discharge pollutants "not within the reasonable contemplation of the permitting authority at the time the permit was granted." Piney Run Preservation Ass'n, 268 F.3d at 259. During the permitting process, the county disclosed to the permitting authority that it would be discharging heat, and the heat subsequently discharged was reasonably close in temperature to that contemplated by the permitting authority. Thus the court vacated the district court's decision and remanded the case, holding that the county was shielded from liability for heat discharge by its NPDES permit.

Pye v. United States, 269 F.3d 459 (4th Cir. 2001)

A county proposed to improve a dirt road adjacent to the property of landowners Pye. The Pyes brought an action under the Administrative Procedure Act ("APA") to compel the Army Corps of Engineers to comply with the provisions of the National Historic Preservation Act ("NHPA") before issuing a permit to the county to fill the wetland on which the road was to be constructed. The Pyes' land itself had historic significance and abutted county-owned land with historic significance, to which the improved road would lead. The Corps of Engineers issued the permit, considering the impact of the road on the land it covered alone, which did not include any historically significant sites, rather than on the land surrounding the road. The District Court for the District of South Carolina granted the Corps' motion for summary judgment, finding that the Pyes did not have standing to sue in federal court.

The court of appeals stated the standard required to show standing at the summary judgment phase as a requirement that the plaintiff provide

evidence of injury in fact, concrete and particularized injury "that is fairly traceable to the defendant's conduct," the injury is "within the zone of interests" protected by an applicable statute, and that the court is capable of providing relief. The court found that adjacent landowners can be injured, stating that the directness of an action has nothing to do with whether a landowner has been injured in fact. Further, the number of people injured by an act is irrelevant in determining whether an individual has been injured. The court found that the injury alleged was "fairly traceable" to the conduct of the Corps in issuing the permit, in that the Corps failed to take into consideration input from the Pyes, as required by the NHPA. Such injury was found capable of redress in the form of requiring the Corps to comply with NHPA procedures. The court held that the Pyes, as adjacent landowners did have standing to seek Corps conformance to the requirements of the NHPA.

Safety-Kleen, Inc. (Pinewood) v. Wyche, 274 F.3d 846 (4th Cir. 2001)

A state court action pursuant to the enactment of RCRA resulted in exhaustion of the Safety-Kleen, Inc. ("Safety-Kleen") Pinewood hazardous waste facility's capacity to accept waste. The South Carolina Department of Health and Environmental Control ("DHEC") ordered Safety-Kleen to close, because its Pinewood facility could no longer accept waste. Safety-Kleen brought suit in federal court asserting its right to a federal grant of more capacity and seeking to enjoin the DHEC from enforcing its closure order.

The *Rooker-Feldman* doctrine, which bars federal court review of matters directly decided by a state court and those "inextricably intertwined" with such matters, did not preclude federal jurisdiction over Safety-Kleen's claims, because the state court action was limited to a holding that Safety-Kleen had filled its state permitted capacity. The U.S. District Court for the District of South Carolina denied Safety-Kleen's request for an injunction against the closure order, and the court of appeals affirmed holding that even if the district court had applied the less strict and improper legal standard urged by Safety-Kleen, the injunction should be denied. Safety-Kleen did not present a substantial question as to its claim that procedural and substantive due process mandated a federal grant of additional capacity, because it did not show that it had an entitlement to additional capacity. Nor was there a substantial question as to Safety-Kleen's equal protection claim, because the closure order was "rationally related to a legitimate state interest," limiting the amount of

waste a facility may accept and requiring notice and comment before altering that limit. Safety-Kleen, Inc., 274 F.3d at 862. Safety-Kleen did not present any evidence to raise a substantial question as to its First Amendment rights or its Dormant Commerce Clause claim. Finally, because the state permit scheme was "essentially identical" to federal RCRA regulations, Safety-Kleen could not raise a substantial question as to RCRA's preemption of state law. *Id.* at 863.

The DHEC also issued a bond order requiring Safety-Kleen either to obtain federally approved bonds to secure closure costs or to stop accepting waste. Safety-Kleen subsequently filed for bankruptcy, and the district court ruled that the bond order should be stayed pursuant to federal statute. The court of appeals held that because the state regulations behind the bond order had the purpose of protecting the environment by deterring misconduct and encouraging environmentally sound hazardous waste facilities, the bond order was exempt from the federal stay requirement pursuant to 11 U.S.C. § 362(b)(4). 274 F.3d at 864.

The court of appeals denied DHEC's petition to reconsider the district court's denial of DHEC's motion to dismiss Safety-Kleen's complaint, because DHEC did not timely file an application for permission to appeal the district court's order. The court, expressly limiting its holding to the facts of this case, reversed the district court's denial of a motion to intervene by a group of Safety-Kleen unsecured creditors, because neither the district court nor the DHEC, opposing the intervention, articulated any arguments against the intervenors.

The Friends for Ferrell Parkway v. Stasko, 282 F.3d 315 (4th Cir. 2002)

The Fish and Wildlife Service ("FWS"), the City of Virginia Beach ("the City"), and Lotus Creek Associates, L.P. ("Lotus"), a private land developer entered into an agreement pursuant to which the FWS would acquire two pieces of land from the City and Lotus in order to preserve the environmental benefits accruing from leaving the land undeveloped. The City and FWS also agreed that the City would acquire some land from FWS on which to build a road at some point in the future. The plaintiffs, the Friends for Ferrell Parkway, LLC (Friends) and several individual residents of Virginia, sued FWS officials alleging that failure to build Ferrell Parkway on the lands acquired by the FWS would harm them by denying them the benefits of the road, including an emergency exit from the ocean-front and access to the ocean that would decrease traffic on

outlying residential streets. The plaintiffs further alleged that the sale of the Lotus land would injure a particular individual plaintiff by depriving him of the opportunity to share costs of serving his community with future development of the town of Lotus Creek and that the acquisition of the Lotus land amounted to impermissible local land use planning by the federal government. The U.S. District Court for the Eastern District of Virginia, at Norfolk dismissed the case for lack of standing, and the court of appeals affirmed.

The court of appeals held that the plaintiffs did not have standing, because they failed to show a particularized injury "fairly traceable to the challenged action of the defendant" and that that the injury was "likely" to be "redressed by a favorable decision." 282 F.3d at 322. Friends would have standing if any of its members did. The court reasoned in part that because plaintiffs had no particularized, concrete, or actual legally protected interest, for example no state entitlement to have a road built, they did not meet their burden of proving an injury. The court also placed the burden on plaintiffs to show traceability and redressibility, which was not met. The sellers of the land rather than the FWS caused the individual plaintiff's injury, and because they were not part of the suit, plaintiffs failed to show that a remedy against a party, the FWS, would redress their alleged harms. The court suggested that the plaintiffs might have valid state claims against the City or against Lotus.

Tri-County Paving, Inc. v. Ash County and Ash County Board of Commissioners, 281 F.3d 430 (4th Cir. 2002)

The Fourth Circuit affirmed the district court's holding of summary judgment for the defendant where plaintiff, a paving contractor, alleged under 42 U.S.C. § 1983, that its procedural and substantive due process and equal protection rights were violated by defendants failure to issue plaintiff a building permit for an asphalt plant; its declaration of a moratorium on such plants and its subsequent enactment of an ordinance requiring polluting industries to obtain special use permits, and prohibiting their location near residences, schools, and the like. Plaintiff did not assert a Takings Claim.

As to due process, the Fourth Circuit held that plaintiff did not have a property interest, noting that a "unilateral expectation" of a benefit is insufficient to establish a property interest. The court also stated that "the procedures due in zoning cases and by analogy due by cases such as this one involving regulation of land use through general police powers

are not extensive" (281 F.3d 430, 436) but held that plaintiff had in fact been provided with sufficiently adequate process both before and after the deprivation. The court said that such "process" included state law remedies that plaintiff failed to utilize.

As to equal protection, the court held that "wide latitude" is permitted to a local government provided that no "fundamental right" or "suspect classification" is involved (*Id.* at 438) and further provided that the classification utilized by the local government "is rationally related to a legitimate state interest." *Id.* The court found such a legitimate interest in the state's desire to protect public health and safety as specified in the moratorium. Further the court noted that the actions taken by the state were in fact rationally related. Nor could plaintiff persuade the court that it had been treated differently than others similarly situated because no other party had applied for a permit for a plant involving similar health concerns. The court noted that an existing thirty year old plant was not a justified comparable as the ordinance aimed only at future development.

The substantive due process claim also failed. The county's action did not "fall outside the outer limits of legitimate governmental action." *Id.* at 439. Nor did the counties enactment of the moratorium and ordinance violate North Carolina law. The Plaintiff argued that land use ordinances with substantive effect on use mist be enacted under the zoning statutes rather than under special provisions of the state's zoning laws as was the case here. The Plaintiff cited *Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779 (1991) for that very proposition. However, the Fourth Circuit instead elected to follow later North Carolina cases citing, in particular, *Maynor v. Onslow County*, 127 N.C. App. 102 (1997) for its holding that local governments can pass land use regulation either under the statutory zoning procedures or pursuant to the general police powers. However, the court pointed out, that even if state law had been violated in this respect, such violation would not have been "determinative of whether [the plaintiff's] substantive due process rights were violated." 281 F.3d 441.

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