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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

American Canoe Association v. Murphy Farms, 210 F.3d 360 (4th Cir. 2000)

A coalition of conservation groups brought a citizen suit against a sow farm in North Carolina that was operated under a North Carolina Department of Environment and Natural Resources (DENR) Animal Waste Management Plan. Although the plan prohibited any animal-waste discharges to surface waters, discharges from the farm had twice reached a nearby creek as a result of runoff from fertilizing farm fields with the animal waste. The owner, D.M. Farms (the Farms), had not applied for a National Pollution Discharge Elimination System (NPDES) permit for the farm. DENR did not require the Farms to apply for an NPDES permit, as their position was that an entity could correct the discharge problem and pay fines in lieu of applying, which the Farms had done.

Plaintiffs claimed first that the Farms continuously violated the Clean Water Act (CWA) by failing to obtain an NPDES permit after making the unauthorized discharges, and secondly that it violated the CWA each time it discharged without an NPDES permit. Plaintiffs filed a motion for partial summary judgment on the latter claim, and filed a motion for a preliminary injunction to prohibit the facility's operation. The Farms filed a motion to dismiss the first claim, arguing that DENR did not require it to obtain a permit. The federal district court for North Carolina's eastern district denied the Farms' motion and granted both plaintiffs' motions. Meanwhile, DENR had changed its policy regarding issuance of NPDES permits to include facilities like plaintiffs' after this litigation was commenced.

After the Farms applied to DENR for an NPDES permit and were issued a draft permit, they appealed the district court's decision to the Fourth Circuit, which determined that its review was limited to the order granting a preliminary injunction because the appeal was interlocutory.

The court declined to consider the summary judgment motion, as it was not intimately bound up with preliminary injunction issues. Since the state program now required an NPDES permit irrespective of the court's resolution, the Fourth Circuit found that there was a reasonable likelihood of mootness, and so remanded the preliminary injunction issues to the district court to evaluate the claims.

Friends of the Earth, Inc., v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000)

Friends of the Earth (FOE) and Citizens Local Action Environmental Network (CLEAN) brought a citizen suit alleging that Gaston Copper Recycling Corporation (Gaston) had been illegally discharging pollutants into a South Carolina waterway in violation of Clean Water Act § 505, and seeking declaratory and injunctive relief as well as civil penalties and costs. Members of FOE testified that the discharges caused them to reduce their use of the Edisto River and its tributaries; one member of CLEAN who owned a lake four miles downstream from Gaston's facility alleged that the threat of pollution had adversely affected his and his family's use and enjoyment of the lake. The district court dismissed the case as to both plaintiffs, holding that they lacked representational standing because none of their members had demonstrated injury in fact that was fairly traceable to Gaston's alleged permit violations, and the groups had not presented evidence concerning chemical effects of Gaston's discharges in the waterways.

The Fourth Circuit disagreed, finding that the trial court had erected "evidentiary barriers to standing that the Constitution does not require and Congress has not embraced." 204 F.3d at 156. A well-known aim of the CWA, the court said, is to ensure that the nation's waterways are fishable and swimmable, and those health and recreational interests are constitutionally recognized as cognizable bases for injury in fact. The lake owner's harms were not hypothetical, since he was acting to protect a threatened concrete interest of his own. The court noted that the U.S. Supreme Court, in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000), had not required evidence of actual harm to a waterway, but had accepted citizen affidavits attesting to reduced use of a waterway out of reasonable fear and concern of pollution. As a result, the court reversed the district court's judgment and remanded for a determination of whether Gaston had discharged pollutants in excess of its permit limits.

U.S. v. Deaton, 209 F.3d 331, 50 ERC (BNA) 1459, 30 ELR 20508 (4th Cir. 2000)

James Deaton contracted to buy a twelve-acre parcel of land in Wicomico County, Maryland, subject to its suitability for residential development. After the county health department denied Deaton's application for a sewage-disposal permit for a five-lot subdivision, he was told by a Soil Conservation Service representative that the site's problems could be corrected by digging a ditch through the middle of the property. After Deaton purchased the land in 1989, an SCS District Conservationist who had inspected the site told Deaton that, because much of the site contained nontidal wetlands, he would need a permit from the U.S. Army Corps of Engineers (Corps) before undertaking any ditching projects. Ignoring this advice, Deaton hired a contractor who used heavy machinery to dig a 12,400-foot drainage ditch that intersected the areas that had been identified as wetlands. The contractor piled the excavated dirt on either side of the ditch, a practice known as sidecasting.

In 1990, after a Corps ecologist inspected the site, the Corps issued stop-work orders to Deaton and his contractor, warning them that the placement of fill material in a nontidal wetland violated § 404 of the Clean Water Act (CWA). Over the next few years, Deaton made incomplete attempts to file a joint state and federal application and engaged consultants to negotiate with the Corps and prepare a remediation plan. No remediation took place, however, and in 1995 the government filed a civil complaint alleging that Deaton had violated the CWA. Upon motions from both sides for summary judgment, the federal district court for Maryland granted the government's motion for partial summary judgment in September, 1997, holding that any wetlands on the property were subject to the CWA and that sidecasting excavated material into those wetlands was the discharge of a pollutant under that Act.

Two months later a panel of the Fourth Circuit decided *U.S. v. Wilson*, 133 F.3d 251 (4th Cir. 1997), which included the question of whether sidecasting in a wetland without a permit violated the CWA. The panel split three ways on the issue, with one judge concluding that sidecasting did not constitute discharge of a pollutant under the Act, another judge concluding that it did, and the third judge concurring in the judgment without reaching the sidecasting question. After *Wilson* was decided, the district court vacated its award of partial summary judgment to the United States, predicting that the Fourth Circuit would adopt the reasoning of the judge who concluded that sidecasting is not the discharge of a pollutant. The government appealed the judgment.

The Fourth Circuit holding, contrary to the district court's prediction, was that sidecasting constitutes discharge of a pollutant under the CWA. The court reviewed the definitions in the CWA of "discharge of a pollutant," which is defined as "any addition of any pollutant to navigable waters from any point source," and "pollutant," which specifically includes "dredged spoil" that has been "discharged into water." 33 U.S.C. § 1362(12)(A) and § 1362(6). According to the court, the dirt dredged up by Deaton's contractor unquestionably constituted pollutants under these definitions. The more difficult issue, however, was what it means to discharge a pollutant into the waters of the United States.

Counsel for Deaton argued that the statutory definition of discharge as an "addition of any pollutant" meant the addition of something not previously present, which should not apply to sidecasting as there was no introduction of new material into the area and no net increase in the amount of material present in the wetland. The court found this unconvincing, and noted that the activity of digging a ditch transformed some material from a nonpollutant into a pollutant. "What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before." 209 F.3d at 335-36. The court noted also that apparently harmless materials like rock, sand, cellar dirt, and biological materials are specifically designated as pollutants under CWA § 1362(6), and that nearly every circuit court that had considered the meaning of the word "addition" had come to the same conclusion as the Fourth Circuit did in this case.

CLEAN AIR ACT

New Pulaski Co. Ltd. Partnership v. Mayor & City Council of Baltimore,
217 F.3d 840 (4th Cir. 2000)

The New Pulaski Company Limited Partnership (Pulaski) had operated an incinerator for the City of Baltimore (the City) since 1981. The incinerator, which was built in 1956, required substantial renovations to comply with the federal Clean Air Act amendments of 1990, but community opposition to the incinerator prompted the City Council to enact an ordinance prohibiting construction, reconstruction, replacement, or expansion of any incinerator in the City. Pulaski brought suit against the Mayor and City Council, claiming the City's imposition of the moratorium ordinance had prevented Pulaski from building a replacement incinerator on its property in the City, and had thereby violated Pulaski's rights under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

The case was first filed in state court, but was removed to federal court as it had been brought mainly under 42 U.S.C. § 1983. The federal district judge dismissed Pulaski's complaint on statute-of-limitation grounds. On appeal, Pulaski argued that the three-year statute of limitations on its takings claims was triggered when the City Council failed to enact an ordinance exempting Pulaski from the moratorium, rather than when the moratorium was passed. The court, however, held that plaintiff's claim accrued upon the enactment of the moratorium, as that was when the City interfered with Pulaski's use of its property in a clear, concrete fashion. The court also found no tolling or justification for equitable estoppel, and affirmed the lower court in finding that the claim was time-barred.

ENDANGERED SPECIES ACT

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1081 (2001).

Plaintiffs, private landowners, and two North Carolina counties, challenged the constitutionality of a Fish and Wildlife Service regulation that limited the taking of red wolves on private land, and sought a declaratory judgment that the anti-taking regulation of the Endangered Species Act, 50 C.F.R. § 17.84(c), as applied to the red wolves on private land in eastern North Carolina, exceeded Congress's power under the Commerce Clause of the U.S. Constitution. The district court upheld the regulation as a valid exercise of federal power.

The Fourth Circuit affirmed, noting its judicial duty to evaluate whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce, and observing that recent Supreme Court cases had established that the commerce power contains "judicially enforceable outer limits." *U.S. v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995). Under the *Lopez* framework, the court found that the regulated activity substantially affected interstate commerce as understood in broad terms, since "a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national authority." 214 F.3d at 491. The taking of one red wolf on private land might not be "substantial," but the takings of red wolves in the aggregate have a sufficient impact on interstate commerce to uphold the regulation.

One substantial effect on interstate commerce, the court found, was tourism generated by the red wolves. Although the plaintiffs argued that

the tourism rationale doesn't pertain to private land, the court held that so many wolves wander onto private land that the regulation of takings on private land is essential to the entire program of reintroduction and restoration. In addition, the court found, the regulation of red wolf takings is closely connected to the interstate market in scientific research, which not only generates jobs but also deepens our knowledge of the world in which we live. Finally, the court found that the taking of red wolves was connected to interstate markets for agricultural products and livestock, and that the takings restrictions' effect on commerce qualified as a legitimate subject for regulation.

The court held that the regulation was sustainable as an integral part of a comprehensive federal program for the protection of endangered species and conservation of valuable wildlife resources, and that judicial deference to the judgment of the democratic branches was therefore appropriate.

NATIONAL ENVIRONMENTAL POLICY ACT

Citizens Concerned About Jet Noise, Inc., v. Dalton, 217 F.3d 838 (4th Cir. 2000)

A group of residents living near a naval air station in Virginia challenged the adequacy of a Final Environmental Impact Statement (EIS) conducted by the U.S. Navy pursuant to the National Environmental Policy Act, 42 U.S.C.S. § 4321 et seq. The EIS identified alternative scenarios for the reassignment of aircraft from another air station, and the Navy selected an alternative that sent 156 aircraft to Naval Air Station Oceana in Virginia Beach. The case came to the Fourth Circuit on appeal after the federal district court for the eastern district of Virginia granted summary judgment to the Navy.

Citizens Concerned About Jet Noise contended that the EIS projected economic benefits for the community without assessing or revealing reasonably foreseeable or known costs, particularly mitigation costs for sound attenuation in private residences and schools as well as property-value impacts. The Fourth Circuit found that it was not arbitrary, capricious, or unreasonable for the Navy to exclude this information. Since the Navy didn't have authority to spend federal funds on improvements to state, local, or private property, it was not required to provide specific estimates. The court also affirmed the sufficiency of the Navy's cumulative-impact analysis, holding that it would be duplicative

for the court to order a supplemental EIS since the Navy had itself acknowledged that another EIS would be required in the future.