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FOURTH CIRCUIT SUMMARY

The Fourth Circuit Summary, published at least once each year, provides synopses of important recent environmental decisions affecting the Fourth Circuit. Included are decisions by the United States Court of Appeals for the Fourth Circuit, as well as decisions from other jurisdictions that affect the Fourth Circuit. It does not cover every environmental decision affecting the Fourth Circuit, but only those cases that the editors believe to be of the most interest to subscribers.

CLEAN WATER ACT

Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 120 S. Ct. 693 (2000)

On June 12, 1992, Friends of the Earth, Inc. ("FOE") filed a citizen suit against Laidlaw Environmental Services, Inc. ("Laidlaw") under the Clean Water Act ("CWA"). In its lawsuit, FOE alleged that Laidlaw, the owner of a wastewater treatment plant, was not in compliance with its National Pollutant Discharge Elimination System ("NPDES") permit. The permit authorized Laidlaw to discharge treated water, but limited the discharge of pollutants. FOE alleged that Laidlaw was repeatedly discharging mercury into the waterways that exceeded the limits set by the permit.

In the district court, Laidlaw moved for summary judgment arguing that FOE lacked standing. Laidlaw also filed a motion to dismiss. The district court denied both motions and levied a civil penalty against Laidlaw for \$405,800.00, payable to the U.S. Treasury. The district court declined to order injunctive relief because Laidlaw had achieved substantial compliance with its permit since the initiation of the lawsuit.

FOE appealed the amount of the civil penalty to the Fourth Circuit. The Fourth Circuit vacated the district court's judgment and remanded with instructions to dismiss the case. The Fourth Circuit found that the case had become moot once Laidlaw complied with the terms of its permit and FOE did not appeal the denial of equitable relief. According to the Fourth Circuit, awarding civil penalties payable to the U.S. Treasury

would not redress any injuries suffered by FOE. The Fourth Circuit also did not award attorneys' fees.

The Supreme Court reversed the Fourth Circuit's decision and held that FOE had standing because civil penalties have a remedial effect to deter future violations and, therefore, redress injuries suffered by FOE. Additionally, the Supreme Court determined that the case was not moot just because Laidlaw came into compliance after the initiation of the lawsuit. The case would be rendered moot only if it was clear that violations could not reasonably be expected to recur. The Supreme Court also held that the Fourth Circuit wrongly considered the issue of attorneys' fees because there was no order before it either awarding or denying attorneys' fees.

CLEAN AIR ACT

State of Michigan v. EPA, 2000 WL 180650 (D.C. Cir. Mar. 3, 2000) (per curiam)

Under the Clean Air Act, the EPA promulgates National Ambient Air Quality Standards ("NAAQS"). States are then required to adopt State Implementation Plans ("SIPs"), subject to EPA approval, detailing how the NAAQS will be implemented, maintained, and enforced. Even after a SIP has received EPA approval, the EPA may later require the SIP to be revised; this is called a "SIP call." In 1998, the EPA promulgated a rule requiring significant reductions of NO_x in an effort to reduce the transport of ozone pollution formed by NO_x emissions. The rule required twenty-two states (including Maryland, North Carolina, South Carolina, Virginia, and West Virginia) and the District of Columbia to revise their SIPs to conform with the EPA's rule targeted at mitigating interstate transport of ozone.

Shortly after the EPA promulgated the NO_x SIP call, several of the affected states filed petitions with the D.C. Circuit Court. A three-judge panel issued its 2-1 opinion on March 3, 2000. The decision upheld virtually all of the EPA's actions, resulting in a major victory for the EPA. Among the issues decided, the court rejected the petitioners' claim that the EPA could not issue a SIP call without first convening a transport commission and that the EPA failed to make state-specific determination of ozone pollution contribution.

In addition, the petitioners challenged the EPA's determination of what constitutes "significant" contribution. The petitioners challenged the EPA's determination of "significance" of contribution on four grounds: 1)

the EPA acted contrary to past precedent; 2) the EPA improperly considered costs of reduction in its determination; 3) the EPA improperly imposed uniform NO_x controls, regardless of each state's contribution; and 4) the EPA's determination violated the "non-delegation doctrine." In its decision, the court rejected each of the petitioners' contentions and upheld the EPA's determination of what constitutes "significant" contribution.

The petitioners did receive a small victory. First, the court vacated the EPA's final rule with respect to three of the states—Georgia, Missouri, and Wisconsin. Second, the court held that the EPA failed to give adequate notice of the change in the definition of "electric generating unit." Third, the court found in favor of one petitioner, Interstate Natural Gas Association of America, and held that the EPA did not provide adequate notice of a change in the control level assumed for large stationary combustion engines.

CERCLA

Minyard Enterprises, Inc. v. Southeastern Chemical & Solvent, Co., 184 F.3d 373 (4th Cir. 1999)

Past and present owners of property sued Southeastern Chemical & Solvent, Co. ("Southeastern") under CERCLA and South Carolina state law for allegedly contaminating the property when it removed an underground storage tank. The district court awarded plaintiffs \$42,817.58, which equaled eighty percent of the past Response Costs and eighty percent of future Response Costs. The district court also awarded plaintiffs \$200,000.00 with respect to their breach of contract and negligence claims. Southeastern appealed contending, among other things, that the \$200,000.00 award was duplicative of the CERCLA award.

On appeal, the Fourth Circuit upheld both awards. Section 114(b) of CERCLA prohibits double recoveries; however, in the present case the Fourth Circuit found that the two awards were meant to compensate the plaintiffs for two separate and distinct harms. The \$200,000.00 was awarded in order to compensate the plaintiffs for diminution in value of the property proximately caused by Southeastern's negligence. The CERCLA award was to partially compensate the plaintiffs for past and future Response Costs.

Southeastern also argued that it should not be held liable for contribution for Response Costs because the plaintiffs did not expressly allege for the recovery of Response Costs. However, the Fourth Circuit

held that it was not error to hold Southeastern responsible for contribution despite the plaintiffs' failure to request contribution. The Fourth Circuit did find, however, that the burden of proving allocation of costs was improperly placed upon Southeastern; instead, it was the plaintiffs' burden to prove allocation. Therefore, the case was vacated and remanded with respect to contribution.