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FOURTH CIRCUIT SUMMARY

The Fourth Circuit Summary 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 Environmental Law and Policy Review*. 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 the subscribers.

CLEAN AIR ACT/FUGITIVE BENZENE EMISSIONS

United States v. Hoechst Celanese Corporation, No. 96-2003, 1997 U.S. App. LEXIS 29362 (4th Cir. Oct. 27, 1997)

In October, 1997, the Fourth Circuit Court of Appeals reversed a ruling by the U.S. District Court for the District of South Carolina that held a local chemical company not liable for violating U.S. Environmental Protection Agency ("EPA") regulations governing emissions of benzene. The district court sustained EPA's interpretation of its own regulations, by which the chemical company was deemed non-exempt from benzene emission regulations, but concluded that EPA did not provide the company with "fair notice" of its regulatory interpretation. The appellate court upheld both the lower court's deference to EPA's interpretation of its own regulations and the holding that the company initially lacked fair notice of regulatory interpretation. However, it found that the district court erred in exonerating the company for violations committed during the period after EPA had provided the company with specific notice of its interpretations.

The Hoechst Celanese Corporation ("HCC" or "Appellee") runs the Celriver chemical plant in Rock Hill, South Carolina. From 1987 through 1993, the plant was one of the largest sources in the United States of fugitive emissions of benzene, a carcinogenic pollutant that poses a significant risk to human health. The plant uses benzene as a coolant for gases and as a reflux agent to separate water and other compounds from acetic anhydride and acetic acid. In 1984, EPA ("Appellant"), by its authority under the Clean

Air Act, promulgated regulations governing fugitive emissions, or leaks, from facilities that use, produce, or otherwise have benzene in service. The National Emission Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene ("NESHAP") regulates the quantity of benzene that can be emitted into the air. Plants using benzene are required "to monitor equipment for leaks, to repair leaks promptly, and to install equipment that prevents, captures, or destroys benzene emissions." NESHAP also includes reporting and recordkeeping requirements and provides civil penalties for violations.

The crux of the litigation between HCC and EPA involved interpreting exemptions to NESHAP based on amounts of benzene used annually by a facility. NESHAP exempts from regulation plants "designed to produce or use less than 1,000 megagrams of benzene per year" (one megagram equals approximately 2200 pounds). EPA's rationale for this exemption was that the benefit achieved by regulating small-volume users was outweighed by the costs. HCC interpreted the term "use" in the EPA regulation to mean "consumption." Consequently, HCC argued that it was exempt because its "use" never exceeded 1000 megagrams, due to the fact that the Celriver Plant continually recycled benzene. Nevertheless, the plant had a very high volume of fugitive emissions. HCC further concluded that the exemption was self-executing; therefore, it neither filed reports with EPA nor complied with monitoring and other NESHAP requirements. In contrast, EPA defined "use" in much broader terms, to include the recycling of benzene through pipes and valves, which were capable of leaking. EPA calculated that the Celriver plant was designed to "use" more than a million megagrams of benzene annually, and thus HCC was not exempt from regulation or from penalties for the numerous substantive and paper violations it committed under NESHAP.

In both its trial and appellate defenses, HCC asserted that EPA's interpretation of the NESHAP exemption was flawed and did not merit deference. HCC argued that the plain language of NESHAP did not support EPA's interpretation and that the agency's interpretation did not deserve deference because EPA's definition of "use" was a post-hoc concoction designed to fill the needs of its case against HCC. Alternatively, the company argued that, even if EPA's interpretation were to be accepted, the lack of fair notice of EPA's interpretation should prevent the court from finding HCC liable.

The appeals court relied on well-settled U.S. Supreme Court case law

to conclude that an agency's interpretation of its own regulations should be accorded substantial deference, absent a Constitutional violation, or a finding of plain error or inconsistency with the regulation. Examining the plain language of the regulation, the court concluded that EPA's decision to give the term "use" a broader meaning than HCC did was consistent with the ordinary meaning of the word, with the statutory goals, and with its usage within the context of NESHAP. The court reasoned that a regulation written to reduce the risks of using benzene should apply to recycled, as well as new benzene, since recycling is just as apt to produce the risk of leakage. Similarly, the court rejected HCC's contention that EPA employed the term "use" inconsistently in the regulation itself. The court refuted HCC's assertion that EPA's application of its definition was post-hoc by examining EPA's use of the term in the rulemaking record. The court also cited numerous letters issued by EPA in the summer and fall of 1984, shortly after NESHAP was promulgated, to companies indicating that "use" did not equate to "consumption," but rather to the overall quantity of benzene used in the equipment.

The appellate court was sympathetic to HCC's argument that it had not received fair notice of EPA's regulatory interpretation before the summer of 1989. It held that due process required that a party subject to civil, criminal, or administrative sanctions have fair notice of the law. While the court recognized EPA's argument that the plain language of a regulation and its rulemaking record should put parties on notice, it also noted that in this particular case, nothing in the language of NESHAP or in the rulemaking record compelled EPA's interpretation of the word "use." Moreover, in response to EPA's argument that HCC had an obligation to seek further clarification, the court concluded that HCC had fulfilled this obligation by consulting, in 1984, with the Texas Air Control Board ("TACB") regarding one of its plants in Texas that also recycled benzene. Based on a letter from EPA's Region VI office, responsible for applying NESHAP in Texas, the TACB interpreted "use" in NESHAP to mean that the overall inventory of benzene, rather than frequency of recycling, was the determining factor. The TACB informed HCC that its Texas plant was exempt from NESHAP regulation because its plant had a total annual inventory of less than 1000 megagrams of benzene. Although apparently cognizant of TACB's letter to HCC, the EPA Region VI office never contradicted TACB's interpretation. The appellate court accepted HCC's contention that it should not be punished for applying the same interpretation to its Celriver facility in South Carolina.

Finally, with respect to the pre-1989 releases, the court rejected EPA's argument that HCC's failure to apply for an exemption prevented it from asserting a right to one. The court found that the exemption appeared self-executing under the plain language of the regulation.

The Fourth Circuit found HCC's fair-notice-of-interpretation argument unpersuasive with respect to the post-1989 violations. During that year, the Celriver plant's fugitive emissions problems came to the attention of EPA's Region IV office, which is responsible for NESHAP enforcement in South Carolina. On two occasions during that summer, the Region IV Office directly and explicitly informed HCC management responsible for the Celriver plant that the proper interpretation of "use" when benzene is recycled was calculated on the basis "of total cumulative flow through the process rather than net benzene consumption or usage." Internal memoranda of meetings among senior HCC Celriver officials evidenced their understanding that EPA did not accept the company's interpretation of "use." According to the lower court record, HCC chose to ignore the admonitions from EPA's Region IV office and continued to consider the plant exempt from NESHAP. Based on its finding of actual notice, the Fourth Circuit Court of Appeals rejected the district court's holding that after August, 1989, the Celriver plant lacked fair notice of agency interpretation of "use" in NESHAP. It remanded the case to the district court to determine what penalties should be imposed for the plant's post-1989 violations.

OIL POLLUTION ACT/DAMAGES CAP

National Shipping Company of Saudi Arabia v. Moran Trade Corporation et al., No. 96-1741, 1997 U.S. App. LEXIS 23648 (4th Cir. Sept. 9, 1997)

On the night of December 1, 1993, during redocking maneuvers in Norfolk, Virginia, a tugboat owned by Moran ("Appellee") struck a cargo vessel and tore open the vessel's fuel tank. Some 9000 gallons of fuel oil spilled into the Elizabeth River during the time that the cargo vessel moved upriver and redocked. The U. S. Coast Guard designated the owner of the cargo vessel, the National Shipping Company of Saudi Arabia ("NSCSA" or "Appellant") as the "responsible party," and NSCSA arranged and paid for cleanup operations. Its immediate bill for cleanup and damages to affected parties was almost one million dollars. NSCSA brought a negligence suit

against Moran in the U.S. District Court for the Eastern District of Virginia to recoup its cleanup and damage costs under the Oil Pollution Act (“OPA”), the Virginia Water Control Act, and state common law. The Water Control Act claim was dismissed before trial.

The district court found that Moran’s negligence was the sole cause of the spill and granted relief to NSCSA, but determined that, under section 1004(a)(2) of OPA, Moran’s damages were capped at \$500,000 and that NSCSA could not circumvent the OPA cap by claiming damages under state law. At the same time, NSCSA was awarded almost \$20,000 for lost fuel and damage to the cargo vessel’s hull. NSCSA appealed from the court’s denial of its claim for total relief and from the finding that none of the exceptions to OPA’s damages cap applied. Moran cross-appealed the district court’s finding of negligence.

The Fourth Circuit Court of Appeals first addressed Moran’s cross-appeal. OPA defines the responsible party for a spill as the owner or operator of the vessel that actually discharges the oil. However, the responsible party can pass on liability to a third party if it can prove that the discharge and the resulting removal costs and damages were caused solely by an act or omission of the third party. Upon review, the appellate court found that the lower court did not clearly err in assigning sole negligence to Moran.

Section 1004(a)(2) of OPA provides a damages cap for third party vessels other than tank vessels involved in oil spills. The cap is “\$600 per gross ton or \$500,000, whichever is greater.” Moran’s tugboat weighed only 252 gross tons; therefore, the district court limited Moran’s liability to \$500,000. NSCSA attempted to circumvent this cap by arguing for an exception under section 1002(c) of OPA, and by bringing additional claims under the Virginia Water Control Act and state common law.

In making its exception argument, NSCSA relied on that portion of section 1004(c) that renders the OPA damages cap inapplicable if the third party vessel violates a pertinent federal safety regulation. The appellant contended that Moran, through its agent-pilot, violated that portion of the Inland Navigational Rule that requires a vessel to maintain a proper lookout by sight and by hearing, according to prevailing circumstances, in order to minimize the risk of collision. Because on the night of the accident the tugboat pilot was acting as his own lookout, NSCSA argued that the Inland Navigational Rule had been violated. The appellate court reviewed the lower court’s findings of fact for clear error and concluded that, under the prevailing weather and light conditions, an additional lookout would not have

made a difference.

Attempting to recover its costs under state law, NSCSA cited the Virginia Water Control Act's provision that any person responsible for causing a discharge of oil into state waters is liable for the resulting damage to real and personal property and for loss of income. The NSCSA interpreted the language to allow it to recover its response costs under OPA as property damage or economic losses. NSCSA also relied on Virginia common law indemnity and subrogation claims to obtain reimbursement for its OPA expenses. The court, however, concluded that NSCSA could not use state law claims to collect damages in excess of the OPA cap.

Finally, NSCSA cited section 1018(a)(2) of OPA, which states that the Act does not affect or modify the obligations or liabilities of any person under state law, including common law. In rejecting NSCSA's argument, the Fourth Circuit Court of Appeals ruled that the appellant was reading section 1018(a)(2) too broadly. The section "only protects the rights of parties to bring additional claims based on liability that accrues under state law." It does not allow a claimant to use state law to collect costs it incurred as a result of claims brought under OPA. In this case, NSCSA had been sued under OPA. State law was not imposed to force NSCSA to clean up the spill or to compensate victims. By the same rationale, NSCSA was not precluded by OPA from bringing a general maritime claim against Moran for loss of fuel and damage to its ship's hull.

The Fourth Circuit concluded by explaining that the congressional intent of the OPA damages cap was to limit liability for smaller vessels involved in oil spills. It noted that the cap would be rendered meaningless if a claimant were allowed to recoup its OPA liability costs in excess of the cap through state law claims.

RCRA/CONSENT DECREE

Wheeling-Pittsburgh Steel Corporation v. United States Environmental Protection Agency, No. 97-1756, 1997 U.S. App. LEXIS 16961 (4th Cir. Jul. 8, 1997)

The Wheeling-Pittsburgh Steel Corporation ("WPSC" or "Appellant") and the U.S. Environmental Protection Agency ("EPA" or "Appellee") entered into a consent decree in October, 1989, after litigation over the closure of a surface impoundment at WPSC's coke manufacturing plant in

Follansbee, West Virginia. The dispute centered on whether the closure had occurred prior to the effective date of EPA regulations governing the closure of surface impoundments that were promulgated pursuant to the Resource Conservation and Recovery Act ("RCRA"). The consent decree established WPSC's obligations for closing the impoundment and taking steps to contain hazardous wastes. The decree represented a comprehensive settlement of claims and counterclaims between the parties.

The consent decree mandated informal dispute resolution prior to the parties seeking administrative or judicial action arising from disputes over the meaning or implementation of the terms of the decree. If negotiations failed, EPA's position would control unless WPSC filed with the court a petition describing the nature of the dispute, along with a proposed resolution. WPSC would have to prove that EPA's position was arbitrary and capricious. The consent decree also stated that the U.S. District Court for the Northern District of West Virginia would retain jurisdiction for dispute resolution under the consent decree.

After the consent decree took effect, EPA discovered significant groundwater contamination at the Follansbee plant. At the time, EPA was uncertain whether the source of the contamination came from the surface impoundment or from other areas of the plant. On September 27, 1996, EPA issued an Initial Administrative Order ("IAO") under RCRA requiring WPSC to take corrective measures relating to both the surface impoundment and to areas of the plant unrelated to the surface impoundment. WPSC objected to the order as a violation of the terms of the consent decree. Additionally, it alleged that the IAO was invalid, based on a theory of *res judicata* and on statutory grounds that the IAO exceeded EPA's authority under RCRA. WPSC petitioned the district court for dispute resolution, as provided in the consent decree. EPA responded by amending the IAO to require WPSC to take corrective measures at the plant only in areas not related to the surface compound. The agency then moved to dismiss WPSC's petition. The district court found in favor of EPA, dismissing the petition for dispute resolution and finding itself without jurisdiction to consider invalidating the IAO on WPSC's other legal theories.

Responding to WPSC's appeal, the Fourth Circuit Court of Appeals held that the district court was correct in finding that the amended IAO did not violate the terms of the consent decree. The court found nothing in the consent decree that precluded EPA from requiring corrective measures unrelated to the surface impoundment. The appellate court also reminded

WPSC that, unless it proved that EPA's interpretation was arbitrary and capricious, EPA's position would control where there was a lack of consensus between the parties as to the meaning or implementation of the consent decree. In the court's view, EPA's interpretation was "reasonable enough so as not to be arbitrary and capricious."

The Fourth Circuit also upheld the lower court's finding that it lacked jurisdiction to consider WPSC's claims against the IAO based on principles of *res judicata* and EPA's lack of statutory authority. The jurisdiction conferred on the district court by the consent decree was limited to the enforcement and interpretation of the provisions of the consent decree. Under the consent decree, the lower court could consider WPSC's argument that the amended IAO violated the decree, but it was not empowered by the decree to consider challenges to the amended IAO arising either under common law or statute.

In deciding whether the district court might have a basis for reviewing the amended IAO independent of the provisions of the consent decree, the appeals court relied on the principles of exhaustion and ripeness found in section 704 of the Administrative Procedure Act ("APA"). The court concluded that, in the absence of a statutory provision for judicial review, the lower court was prevented by section 704 of the APA from reviewing WPSC's claim unless the amended IAO constituted final agency action. Both WPSC and EPA conceded that the amended IAO was not a final agency action and WPSC could identify no independent statutory provision allowing for judicial review. Accordingly, the Fourth Circuit found that appellant had not exhausted the administrative remedies available to it under EPA regulations and that its claim was therefore not ripe for judicial review.