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## Fourth Circuit Summary

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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 our subscribers.

### SENTENCING GUIDELINES

**United States v. Jarrell**, No. 95-5718, 1996 U.S. App. LEXIS 31006 (4th Cir. Dec. 3, 1996).

Donald Jarrell appealed the decision by the United States District Court for the Southern District of West Virginia sentencing him to thirty months imprisonment. He alleged that the trial court misapplied the sentencing guidelines involving the mishandling of environmental pollutants. Jarrell was charged in a seven-count indictment for attempting to conceal repeated discharges of fecal coliform pollutants into public waters which polluted nearby residential neighborhoods. Jarrell's waste water operating permit allowed only 400 parts of fecal coliform per 100 milliliters of waste water. Samples of waste water taken in a nearby residential neighborhood by the EPA contained as much as 830,000 parts per 100 milliliters. Jarrell pled guilty to the third count of the charge which accused him of illegally discharging a pollutant above the level permitted by a National Pollutant Discharge Elimination System ("NPDES") permit.

Section 2Q1.3 of the sentencing guidelines establishes the base and specific offense levels applicable to the defendant's actions. The commentary to the guidelines permits the trial judge to enhance or reduce a defendant's specific offense level upon consideration of relevant factors such as the resulting harm from the discharge, the amount and type of pollutant, and the associated risk. In the present case, the trial court adjusted Jarrell's offense level with two 2-point increases. The district court made clear in its opinion that the nature and seriousness of the offense justified each

enhancement the court included. On appeal, Jarrell contended that the increases were unjustified and unreasonable.

The court of appeals agreed with the trial court, stating that Jarrell's egregious violations were not so minor as to compel the court to hold that the district court abused its discretion. The court further stated that, in determining the applicable specific offense characteristic, a court may consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction," as if they were grouped as multiple counts. The court held that prior actions similar to Jarrell's current conviction for discharging toxic substances should be grouped together for determining the offense level. Therefore, even though Jarrell was convicted of only one discharge violation, the court determined that the other discharges for which he did not plead guilty could be considered relevant for the purpose of establishing the applicable specific offense characteristic.

Jarrell also appealed the use of his 1975 state arson conviction in determining his criminal history. He finished serving his term in 1979. Jarrell claimed that since his present offense occurred more than fifteen years after the arson, the former offense should not be counted. The court found that for purposes of determining when the fifteen-year statutory period should run, the court should look at the earliest relevant conduct, which the court determined was the 1992 conduct of count four of the indictment. Since the court had already determined that Jarrell's actions could be grouped together, the court found that the prior offense was properly counted and that the district court's calculation of Jarrell's criminal history was correct.

#### OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

**Arch Mineral Corp. v. Babbitt**, No. 95-2793, 1997 U.S. App. LEXIS 676 (4th Cir. Jan. 16, 1997).

Arch Mineral Corporation ("Arch") instituted this action in the Southern District of West Virginia, seeking to have itself declared as not an owner or controller of Greendale Coals, Incorporated ("Greendale"). Greendale had mined coal in West Virginia under a mineral lease with a subsidiary of the Diamond Shamrock Coal Company. When Greendale experienced financial troubles in the 1980's, it was unable to pay abandoned

mine reclamation fees that had been assessed by the Office of Surface Mining Reclamation and Enforcement (“OSM”), a branch of the Department of the Interior. When the fees went unpaid, OSM imposed additional penalties. Shortly thereafter, Greendale went bankrupt and was dissolved under state law in 1987. Later that same year, Arch purchased Diamond Shamrock.

Under regulations promulgated in 1988, OSM sought to link Arch to Greendale as an owner or controller using Diamond Shamrock’s earlier mineral lease with Greendale. If this link could be made, it would allow OSM to block Arch from obtaining new mining permits or to revoke current permits and to list Arch on the Applicant/Violator System (“AVS”). After OSM notified Arch that Arch was presumed to be linked to Greendale through the ownership and control regulations, Arch responded with information attempting to rebut that presumption. OSM replied, stating that the presumption had not been rebutted by Arch’s response, and that without additional response, Arch would be entered into the AVS system. Arch sued in federal district court for declaratory and injunctive relief to prevent this link. The court granted summary judgment in favor of Arch, and Bruce Babbitt, in his capacity as Secretary of the Interior, appealed to the United States Court of Appeals for the Fourth Circuit on the following grounds.

First, OSM claimed that Arch’s statute of limitations defense initiated at the trial court was an attack on the regulations, and therefore jurisdiction should have been exclusive to the District Court for the District of Columbia. The court of appeals rejected OSM’s claim that jurisdiction was improper. The court found that Arch’s claim that the statute of limitations had run involved only the application of the ownership and control regulations and not the merits of the case. Therefore it concluded that the United States District Court for the Southern District of West Virginia properly exercised subject matter jurisdiction in hearing the case.

Second, OSM attacked the ripeness of the claim. The court of appeals found the case to be ripe for judicial review. The court determined that OSM’s last correspondence with Arch, stating that without additional rebuttal evidence, OSM would presume Arch to be controller of Greendale and list Arch on the AVS, was a final action sufficient for judicial review. The court stated that Arch’s listing on the AVS was a “foregone conclusion, simply a formality,” and that if listed, Arch would suffer punitive consequences as a result. Therefore, the court held that the controversy was ripe for review.

Finally, the court held that the statute of limitations barred OSM from “permit-blocking” Arch. The court determined that the OSM actions against

Arch constituted penalties stemming from Greendale's actions approximately seven years earlier. The court found that the accrual date of the action was 1986 and because OSM took action against Arch in 1993, the civil penalties sought by OSM were time barred by the five-year statute of limitations period. Therefore the court affirmed the findings of the lower court.