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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.

RCRA

Cavallo v. Star Enterprise, 100 F.3d 1150 (4th Cir. 1996).

The Cavallos were residential property owners in Fairfax County, Virginia, living less than a mile from a petroleum distribution terminal operated by Star Enterprise. On September 14, 1990, Star Enterprise acknowledged that a large amount of aviation fuel, diesel fuel, and gasoline had leaked into the soil and ground water. An additional spill occurred on December 9, 1991. The Cavallos claimed that since the second spill they have been continually exposed to vapors in their home. The Virginia State Water Board investigated after the first spill and requested the Environmental Protection Agency to assume responsibility, which it did, pursuant to the Resource Conservation and Recovery Act. EPA and Star Enterprise negotiated an Administrative Consent Order requiring Star Enterprise to implement corrective measures under EPA supervision. EPA then assumed control of the remediation efforts on July 3, 1991.

The Cavallos brought suit against Star Enterprise in the Eastern District of Virginia for damages associated with the 1990 and 1991 spills. In their complaint, the Cavallos alleged four causes of action: (1) "Negligence with Respect to AVJet Fuel Spill"; (2) "Negligent Petroleum Release and Negligent Abatement and Remediation of the Petroleum Release"; (3) "Common Law Trespass"; and (4) "Liability Under the State Water Control Law." The district court granted summary judgment on Count I, and determined that Counts II through IV were barred by statutes of limitation and the federal preemption doctrine.

The court of appeals reversed the dismissal of counts II, IV, and the

portion of count III containing a loss of enjoyment claim. Under *Adams v. Star Enterprise*, 51 F.3d 417, 422-23 (4th Cir. 1995), recovery is only permitted under Virginia law if “the activity or condition complained of was actually physically perceptible from the plaintiff[s’] property.” In this case, the smell of the vapors was physically perceptible from the Cavallo’s property.

The court upheld the dismissal of the portion of Count III containing the personal injury claim. Citing *Foley v. Harris*, 286 S.E.2d 186 (Va. 1982), the court stated that because “the discomfort and annoyance must be significant and of a kind that would be suffered by a normal person in the community” and because Mrs. Cavallo alleged specifically that she was highly susceptible to petroleum vapors, the claim was not cognizable under Virginia law and was properly dismissed by the district court.

Turning to the issue of federal preemption, the court determined that although the district court was correct that Star Enterprise could not be held liable for remediation activities in conformity with the EPA orders, “the fact that allegedly tortious conduct occurred within the . . . scope of an EPA order does not necessarily compel preemption of a damages claim based on that conduct.” The court also held that damages claims conflict with EPA orders only if the activities (a) were required, directed, or supervised by EPA, and (b) were performed properly. Finally, the court concluded that the complaint and the EPA orders were facially insufficient for a conclusive determination of whether damages based on the activities would conflict with EPA authority or in turn whether the preemption doctrine would apply, and remanded the case for further proceedings.

The court affirmed the district court’s summary judgment on the first count. The district court had concluded that the analytical methods used by the Cavallo’s expert witnesses were not sufficiently established to warrant admission into evidence. Using an abuse of discretion standard the court of appeals reviewed the decision to exclude the testimony and determined that the trial court properly exercised its discretion consistent with the principles set out in *Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993).

CLEAN AIR ACT/FEDERAL QUESTION JURISDICTION

Ormet Corp. v. Ohio Power Co., 98 F.3d 799 (4th Cir. 1996).

Ormet Corporation, an aluminum manufacturer, appealed a district

court dismissal of Ormet's action under the Clean Air Act ("CAA") against Ohio Power Company. Ormet claimed a right to eighty-nine percent of the emission allowances issued by EPA for Ohio Power's Kammer Generating Station. Ormet claimed that, because it paid a proportionate share of the Kammer plant's operating and maintenance costs, it was entitled, pursuant to section 408(i) of the CAA, to its proportionate share of the emission allowances issued for the Kammer plant. The court of appeals vacated and remanded the district court's order dismissing Ormet's claim for lack of subject matter jurisdiction. The court of appeals held that the district court had federal question jurisdiction over Ormet's claim, even though the CAA does not create an implied private cause of action to adjudicate disputes over emission allowances.

In 1957, Ormet entered into an agreement with Ohio Power in which Ormet became the owner of two of three fossil fuel-fired units at the Kammer plant. In 1966, the agreement was revised and a new contract was created under which Ohio Power agreed to supply Ormet with electrical power and Ormet agreed to pay for the Kammer plant's operating and maintenance costs in proportion to the amount of power taken from the plant. In 1990, under Title IV of the CAA Amendments of 1990, Ohio Power selected employees of an affiliated company as a "designated representative" for obtaining and administering an Acid Rain Permit, including holding the emission allowances issued for the Kammer station. The designated representative certified to EPA that Ohio Power was the sole owner of the Kammer plant and thus, it alone was entitled to all of the allowances. On the basis of this representation, EPA issued an Acid Rain Permit to Ohio Power for all of the allowances.

Ormet sued Ohio Power in federal district court, claiming a right to eighty-nine percent of the emission allowances issued for the Kammer plant. The district court dismissed the complaint for lack of subject matter jurisdiction, holding that Ormet's suit involved a challenge of EPA's issuance of the permit, which constituted a final agency action reviewable only by United States courts of appeals under section 307 of the CAA.

On appeal, the Fourth Circuit Court of Appeals determined that EPA's refusal to evaluate written comments submitted by Ormet to have the certificate of representation amended to reflect Ormet's ownership interest did not constitute final agency action and, therefore, the exclusive review provision of section 307 did not apply. However, the court disagreed with Ormet's contention that section 408(i) of the CAA created a private cause of

action arising under federal law, creating federal question jurisdiction. The court determined that Congress intended disagreements over the allocation of emission allowances to be resolved by existing methods of dispute resolution within the framework of commercial relationships, and not through a private federal cause of action.

The court, however, held that although section 408(i) did not create a private cause of action, the district court still had federal question jurisdiction over Ormet's claim under the rationale set forth by the United States Supreme Court in *Federal Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), and *Merrell Dow Pharmaceutical v. Thompson*, 478 U.S. 804 (1986). The court held that, because resolution of the emission allowances dispute required the interpretation and application of the CAA to the agreement between Ormet and Ohio Power, the dispute implicated a substantial question of federal law that was sufficient to invoke federal question jurisdiction under the standard established by the Supreme Court. Accordingly, the court of appeals remanded the case to the district court for further proceedings.

HAZARDOUS WASTE/DORMANT COMMERCE CLAUSE

Environmental Technology Council v. South Carolina, 98 F.3d 774 (4th Cir. 1996).

South Carolina appealed a summary judgment granted by the district court in favor of Environmental Technologies Council ("ETC"), which had filed a lawsuit challenging a series of statutes, executive orders, and one regulation, promulgated by South Carolina to limit the amount of hazardous waste generated out-of-state and buried within South Carolina's borders. The district court granted summary judgment after finding the South Carolina laws violated the Commerce Clause of the United States Constitution, and permanently enjoined all provisions of those laws. The court of appeals affirmed.

South Carolina has a number of large hazardous waste treatment and disposal facilities within its borders. A considerable volume of hazardous waste generated in other states enters the state each year for treatment and disposal. In response to growing concerns of the volume of hazardous waste entering the state, South Carolina took a series of measures to reduce this inflow of waste. The first measure taken was a statutory blacklisting

provision prohibiting entry into the state of certain out-of-state wastes. The second measure was a statute establishing annual limits on the amount of all waste buried within the state. The statute also established a capacity floor for waste generated in-state and a capacity ceiling for out-of-state waste. The third measure imposed quota preferences for in-state wastes by providing a fixed minimum capacity to be reserved for waste generated in-state and lower limits on the maximum quantity of waste to be imported from any one state. The fourth and final measure imposed an in-state needs requirement for all permits to establish or expand hazardous waste treatment or storage facilities.

In 1985, EPA approved South Carolina's hazardous waste program under RCRA despite the existence of a discriminatory fee imposed on waste generated out-of-state. In 1990, EPA approved South Carolina's Capacity Assurance Plan even though EPA expressed concern that the blacklisting statutory provision was inconsistent with RCRA. Ultimately, in 1995, EPA issued a notice that the agency intended to find that South Carolina's hazardous waste program satisfied the requirements imposed by RCRA. ETC successfully challenged the validity of the South Carolina laws in federal district court.

On appeal, South Carolina raised four arguments. First, the state argued that RCRA, CERCLA, and SARA override the dormant Commerce Clause. The court of appeals, stating that a state law can only be removed from the reach of the dormant Commerce Clause if congressional intent to authorize the discriminating law is "unmistakably clear" or "expressly stated," found that these statutes did not contain any language permitting states to burden interstate commerce. In addition, the court found that Congress had not provided any "checkpoints" under RCRA, CERCLA, or SARA, which authorized discrimination by South Carolina against other states' hazardous waste.

In applying the dormant Commerce Clause to the South Carolina law, the court used a two-tier analysis: (1) a *per se* rule of invalidity where a state law discriminates facially in its practical effect or in its purpose, and (2) the Pike balancing test which applies if a statute's burdens on commerce are "clearly excessive in relation to the local benefits." The court held that the South Carolina laws clearly discriminated against out-of-state waste either facially, in effect, or in purpose. The court found that South Carolina failed to sufficiently demonstrate that the discriminatory treatment of out-of-state waste was justified. All parts of the state's program were held to violate the *per se* invalidity test.

Finally, the court determined that the district court did not abuse its discretion in failing to defer to the EPA for primary jurisdiction. The court agreed with the district court's reasoning that the case was properly before an Article III court because there were constitutional issues at stake and the EPA's special expertise was not needed.