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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.

NEPA

Fair Woods Homeowners Ass'n v. Pena, No. 95-1155, 1996 U.S. App. LEXIS 47 (4th Cir. Jan. 3, 1996).

The Fair Woods Homeowners Association ("Fair Woods") maintains a residential development in Fairfax County, Virginia. In 1981, the Federal Highway Administration ("FHWA") and the Virginia Department of Transportation ("VDOT") completed a draft environmental impact statement ("EIS") for the Fairfax County Parkway. The Virginia State Highway and Transportation Commission approved the location of the parkway in that year, but specific design features such as interchanges were not approved until 1987. When Fair Woods was incorporated in 1983, the developer of Fair Woods was on notice of the proposed parkway because Fairfax County required the developer to dedicate thirteen acres of the property for a right of way. Additionally, there was evidence that at least one Fair Woods resident was aware of the proposed parkway when he bought his house.

The final EIS for the parkway was approved in 1984. It did not include the Fair Woods development as a site where noise barriers were to be constructed. In 1993, VDOT published the list of communities that would receive noise barriers and later denied Fair Woods' request for noise barriers on the grounds that the development did not exist at the "point of public knowledge" which, according to VDOT, was the date the parkway received location approval in 1981.

In 1994, VDOT began construction of a highway interchange which would bring traffic within 100 feet of homes in the Fair Woods development. Fair Woods brought an action against the Secretary of the Department of Transportation ("DOT"), the Administrator of the FHWA, and the Commissioner of VDOT, seeking a declaratory order that these agencies had failed to study the noise impact of the interchange and possible noise abatement measures as required by the Federal-Aid Highway Act, 23 U.S.C. § 109, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. In response, VDOT conducted a study of the future noise impact of the parkway on the Fair Woods development, and FHWA reevaluated the EIS for the parkway in consideration of the new data. FHWA

concluded that the responsibility for the noise impacts did not rest on federal aid highway funds, but on the Fairfax County authorities and the developer, who were fully aware of the parkway and located Fair Woods with that knowledge.

The United States District Court for the District of Columbia granted a temporary restraining order barring construction of the interchange. After a change of venue, however, the United States District Court for the Eastern District of Virginia dissolved the restraining order, concluding that construction of the interchange would not cause Fair Woods irreparable harm because noise barriers could be installed at a later time. The district court found that Fair Woods claims under NEPA were barred by the equitable doctrine of laches because the "community was put on sufficient and adequate notice that this particular highway . . . was going in."

The Court of Appeals affirmed the district court's ruling. The invocation of the doctrine of laches lies within the sound discretion of the district court and can only be reversed if clearly erroneous. Laches is an affirmative defense which requires the defendant to prove: (1) lack of diligence by the plaintiff, and (2) prejudice to the defendant. The Court of Appeals determined that Fair Woods received clear notice of the proposed interchange in 1987 and knew at that time that the development was not going to receive noise abatement measures. Because the Court of Appeals found that Fair Woods' seven-year delay in filing suit was "inexcusable and unreasonable," the "[d]efendants [did] not have to demonstrate the degree of prejudice required if the delay had been less aggravated." Moreover, Fair Woods' action prejudiced the defendants "by requiring the agencies to reexamine the environmental data ten years after the final EIS was released for public inspection and comment."

In addition, the Court of Appeals commented that even if Fair Woods received the relief it sought, "its position would be no different than before it commenced this litigation" because further environmental study under NEPA would be superfluous. Defendants did not dispute that the noise would harm Fair Woods but simply contended that they were not required to pay to alleviate that problem. The court agreed with FHWA that the responsibility for noise abatement measures laid with the Fairfax County authorities and the developer.

NUISANCE

Ogden v. Star Enterprise, No. 94-2488, 1995 U.S. App. LEXIS 33686 (4th Cir. Dec. 4, 1995).

In *Adams v. Star Enterprise*, 51 F.3d 417 (4th Cir. 1995), the Court of Appeals affirmed a ruling that landowners could not receive damages for speculative harm to their property from an oil spill near their property. See *Fourth Circuit Summary*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 171 (1995). This case

arose from the same facts. Plaintiffs sought damages for personal injuries and alleged contamination of their property by the spill under several tort theories (nuisance, trespass, negligence, ultrahazardous activity, civil conspiracy, and violation of state water quality law). The district court granted summary judgment for the defendants, and the Court of Appeals affirmed on the grounds that a reasonable trier of fact could not return a verdict in the plaintiffs' favor.

In 1990, residents learned of an oil spill from a tank farm near their property. The Environmental Protection Agency and Environmental Science & Engineering, Inc., monitored and remediated the underground petroleum "plume" and determined a precise location for the plume. Plaintiffs' home is nearly a quarter of a mile from the nearest boundary of the plume.

The court determined that this evidence alone would preclude recovery under *Adams*. In *Adams*, the court held that plaintiffs can recover only if they show that their property was actually contaminated or that they suffered actual physical harm. "Neither fear of harm nor diminution in property value resulting from mere proximity to the plume is enough." In this case, the plaintiffs' evidence of harm was "but a scintilla, if that." Plaintiffs noticed a rainwater puddle with an oily sheen on it, but they did not take a sample of the oily puddle which never reappeared. In addition, plaintiffs did not present a qualified medical expert to link their ailments (a skin problem and nasal congestion) to the plume. For these reasons, the Court of Appeals affirmed the district court's summary judgment ruling.