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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.

Adams v. Star Enterprise, 51 F.3d 417 (4th Cir. 1995).

Appellants ("Landowners") in this action were property owners in Mantua, a subdivision in Fairfax, Virginia. They brought this action against Star Enterprises ("Star"), owners of an oil distribution facility in the area, due to a "major discharge" of oil from the facility. Even though their properties had not been contaminated by the plume, Landowners sought damages for the diminution in value of their property due to its proximity to the plume. In addition, they asserted that they were exposed to significant health risks due to fumes and vapors from the spill, and that there was a disruption of community life because of Star's remediation efforts. The district court found that Virginia law did not permit recovery for the Landowners and dismissed each count of the complaint under Fed. R. Civ. P. 12(b)(6). The Court of Appeals affirmed the district court's ruling.

The Fourth Circuit rejected Landowners claim under a nuisance theory. Landowners alleged damages due to: (1) a fear of significant health risks, (2) a fear that the oil spill may spread onto their properties in the future, and (3) a reduction in their property value as a result of the "stigma" attached to the community because of the spill. The court stated that speculative claims do not constitute a cause of action for nuisance. Under Virginia law, in order to recover for a nuisance a property owner must show the nuisance complained of does, or will, produce physical discomfort. The court distinguished the present case from all Virginia cases permitting recovery under a nuisance theory, where the activity or condition complained of was actually and physically perceptible from the plaintiff's property.

Landowners also stated a claim under a negligence theory. The district court dismissed this claim because the oil spill was not the proximate cause of the Landowners alleged damages. The Fourth Circuit agreed with the district court, adding that "[a]bsent a physical impact on Landowners' properties . . . these damages are no more compensable in a cause of action for negligence than in a cause of action for private nuisance under Virginia law."

The final claim arose under Virginia's State Water Control Law, which imposes strict liability for discharges of oil onto private and public lands. Va.

Code Ann. § 62.1-44.34: 18(C)(4) (1992). Landowners claimed that “injury to property” extended beyond physical damage to property. Although the Supreme Court of Virginia had not addressed the statute’s definition of “injury to property,” the Court of Appeals found that a definition of the term in another statute applied. The Virginia Supreme Court held that “injury to property,” as stated in Va. Code Ann. § 8.01-223 (1992), did not encompass purely economic losses. The Court of Appeals reasoned that if the legislature had intended “injury to property” to extend to circumstances where there was an absence of actual physical impact to the property, then it would have done so in far more express terms.

NEPA

South Carolina ex rel. Campbell v. O’Leary, 1995 U.S. App. LEXIS 25590 (4th Cir. 1995).

The U.S. Department of Energy (“DOE”) appealed from an injunction stopping the receipt of 409 spent nuclear fuel rods into the country. Because the admission of the 409 spent fuel rods was an urgent matter for the United States’ nonproliferation policy, the Court of Appeals stayed the injunction pending this opinion. The Court of Appeals vacated the injunction because it found that DOE satisfied its responsibilities under the National Environmental Policy Act (“NEPA”).

In 1993, Hazel O’Leary, the Secretary of Energy, proposed a plan which involved constructing a facility to receive 24,000 spent fuel rods from European research reactors, and to immediately transport a few hundred spent fuel rods to DOE’s existing storage facility at the Savannah River Site. In April 1994, DOE released a final Environmental Assessment determining that 409 spent fuel rods were in urgent need of shipment and that there would be no significant environmental impact if these rods were shipped to the Savannah River Site. South Carolina filed this action in September 1994, seeking an injunction prohibiting receipt of the 409 fuel rods. It contended that the Environmental Assessment prepared by DOE was inadequate and that a full Environmental Impact Statement was required. The district court granted the injunction. DOE appealed, arguing the district court was incorrect in requiring the agency to prepare a full Environmental Impact Statement.

The Fourth Circuit found that the district court incorrectly interpreted the Spence Amendment as eliminating the option of preparing an Environmental Assessment for spent fuel rods shipped to the Savannah River Site. The Spence Amendment regulates the “receipt and storage of spent nuclear fuel . . . at the Savannah River Site.” Pub. L. No. 103-160, § 3151, 107 Stat. at 1949. The Court of Appeals found that the statute clearly permits the Secretary of Energy to accept and store spent nuclear fuel at the site in the absence of an emergency and without preparing an Environmental Impact Statement, as long as the number

of fuel rods does not exceed the number of available storage spaces at the site. At the time DOE decided to accept 409 spent fuel rods at the Savannah River Site, there were approximately 1,400 available storage spaces. Therefore, the Court of Appeals found that the Amendment did not apply in this case.

The district court was also incorrect in its belief that DOE was committing an improper segmentation of its larger plan to import 24,000 spent fuel rods by trying to receive and store 409 spent fuel rods. The Court of Appeals rejected the argument that DOE should be required to prepare an Environmental Impact Statement for the "segmented" urgent relief portion, notwithstanding the fact that an Environmental Impact Statement is required for the "total" shipment of 24,000 rods. Rather, the court found that there is no difference in environmental impact between 409 rods which originate in Europe, and 409 rods which originate in the United States. Because no Environmental Assessment or Environmental Impact Statement is demanded for a domestic shipment of rods to the Savannah River Site, the court held that these same standards should apply for foreign shipments.

Finally the Court of Appeals held that DOE sufficiently considered alternatives to storage at the Savannah River Site. The only alternatives involved reprocessing the fuel rods, which was inconsistent with the nonproliferation policy of the United States. The national policy sought to avoid the possibility of producing materials that may be used for fabricating nuclear weapons. The reprocessing of highly enriched uranium in the spent fuel rods would produce such materials. The Court of Appeals found that courts are not free to reject an Environmental Assessment simply because an agency refuses to change its policy.

CERCLA

Westfarm Assocs. L.P. v. Washington Suburban Sanitary Comm'n, 1995 U.S. App. LEXIS 27537 (4th Cir. Sept. 27, 1995).

Washington Suburban Sanitary Commission ("WSSC") operates a sewer system for Montgomery County, Maryland and Prince George's County, Maryland. Westfarm Associates ("Westfarm"), which owns land adjacent to one of WSSC's sewers, discovered a trace of a hazardous substance ("PCE") on its property. Westfarm concluded that the PCE was flowing from International Fabricare Institute ("IFI"), a business located on the property adjacent to Westfarm, and was contaminating the Westfarm property through leaks in the sewer system owned by WSSC. Westfarm sued WSSC for the costs of response under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). WSSC appealed from the district court's decision that it was liable for damage caused by wastes dumped in the sewers by third parties. The Court of Appeals affirmed the district court, but did not address WSSC's public

policy arguments, stating that the court was not the proper forum for them.

The court found that WSSC satisfied the definition of "facility" under CERCLA. Even though CERCLA does not expressly include "publicly owned treatment works" ("POTW") such as WSSC's sewer, the court found that Congress did not intend to exclude them from liability. They looked at the statute in its entirety and found that Congress explicitly added language to emphasize that pipes leading into sewers or POTWs are the responsibility of the owner or operator of the pipes. In addition, the court found that including POTWs under the statute best served the congressional intent that CERCLA have a remedial purpose.

In addition, the court found that the movement of PCE through cracks in WSSC's sewer onto Westfarm's land should be considered a "release" under CERCLA. WSSC argued that it should not be liable because the PCE was part of "multiple releases"—because IFI initially released the PCE, WSSC was not the first person to release the hazardous material, and therefore, should not be liable. The Court of Appeals rejected this argument by looking again to the remedial purpose of CERCLA. By limiting liability to the polluter who initially caused the release, the court believed the environment would not be cleaned up effectively. The court also looked toward the statutory scheme of CERCLA, and found that it did not take a simplistic look toward who was, and was not, a "polluter."

WSSC also argued that it was entitled to assert the "innocent landowner defense" under CERCLA. The statute provides for this defense based on a complete absence of causation. The elements of the defense are that: (1) another party was the "sole cause" of the release and damages, (2) there was no contractual, employment, or agency relationship between the defendant and the responsible party, and (3) the defendant exercised due care and guarded against the foreseeable acts of the responsible party. The Court of Appeals rejected this argument because WSSC failed to provide sufficient evidence of the "due care" element of the defense.

Finally, WSSC claimed that it had no duty to Westfarm because, as a state agency, it had sovereign immunity from common law claims of negligence. The court found that even though there was no public duty owed to Westfarm, a common law duty to exercise due care in the construction, maintenance, and operation of the sewer was not precluded by the public duty doctrine.