

# William & Mary Environmental Law and Policy Review

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Volume 18 (1993-1994)  
Issue 2 *William and Mary Journal of  
Environmental Law*

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Article 6

April 1994

## 1993-94 Fourth Circuit Summary

Editors of the William & Mary Environmental Law and Policy Review

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Editors of the William & Mary Environmental Law and Policy Review, *1993-94 Fourth Circuit Summary*, 18 Wm. & Mary Envtl. L. & Pol'y Rev. 401 (1994), <https://scholarship.law.wm.edu/wmelpr/vol18/iss2/6>

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## 1993-94 FOURTH CIRCUIT SUMMARY

The Fourth Circuit Summary is a new addition to the *William and Mary Journal of Environmental Law*, replacing the Virginia Legislative Summary. The Fourth Circuit Summary provides a summary of prevailing environmental decisions decided by the United States Court of Appeals for the Fourth Circuit during the previous year. It does not cover every environmental decision of the Fourth Circuit during the previous year, but only those cases which the editors believe to be of the most interest to our subscribers.

### CERCLA

1. **White v. County of Newberry, South Carolina, 985 F.2d 168 (4th Cir. 1993)**

Plaintiffs owned and operated a restaurant adjacent to Newberry County Public Works Maintenance Facility ("maintenance facility"). The County used the facility to service and maintain County owned vehicles. In March 1989, the South Carolina Department of Health and Environmental Control ("DHEC") found unsafe levels of trichloroethylene ("TCE") in wells located on both properties. As a result of the contamination, plaintiffs discontinued use of their well and connected their property to the public water supply at the cost of \$6,000. Both the DHEC and plaintiffs investigated the County's maintenance facility as a possible source of TCE. The DHEC concluded that the TCE contamination was not due to any County activity. While plaintiffs admitted to locating no evidence proving that the County used TCE, they suggested that the TCE could have resulted from the facility's use of a Safety Kleen apparatus and degreasing components.

Plaintiffs filed suit in federal district court against the County seeking damages for the County's alleged contamination of their ground water well. Plaintiffs' suit alleged that the County violated CERCLA and alleged state claims of inverse condemnation, negligence, strict liability and trespass. The jury awarded the Whites \$172,000 under the inverse condemnation claim. The district court, however, dismissed the negligence, trespass, and strict liability claims and entered a judgment in

the County's favor on the CERCLA claim. The district court further dismissed the County's motion for judgment as a matter of law on the inverse condemnation claim.

On appeal, the County challenged the district court's jurisdiction over plaintiffs' state law claims and the court's denial of its motion for judgment as a matter of law on the inverse condemnation claim. Plaintiffs also cross appealed the dismissal of their CERCLA claim.

The Fourth Circuit denied the County's challenge to subject matter jurisdiction. The County argued that although the district court had jurisdiction over the CERCLA claim, it lacked jurisdiction over the state claim of inverse condemnation because the CERCLA claim and the inverse condemnation claim did not arise out of the same case or controversy. The court rejected this argument and held that the district court had subject matter jurisdiction over the inverse condemnation claim because both claims shared the common element of showing that the County dumped or disposed of TCE in a manner that caused contamination.

The Fourth Circuit then reversed the district court's denial of the County's motion for judgment as a matter of law. In order to prevail on their claim of inverse condemnation, plaintiffs had to show that the County acted in an "affirmative, positive and aggressive" manner to contaminate their well with TCE. In de novo review of the issue, the court held, that the White's evidence failed to conclusively prove that the County even handled TCE. In fact, the court found that the County offered inferential evidence that the TCE could have come from plaintiffs' property. Because plaintiffs could not conclusively connect the County with the contamination of their well, the Fourth Circuit concluded that they failed to establish the first element in their claim for inverse condemnation and that judgment as a matter of law should have been granted.

Lastly, based on plaintiffs' failure to establish an affirmative act in their inverse condemnation claim, the court concluded that plaintiffs did not establish a release of a hazardous substance in their CERCLA claim. Consequently, the court affirmed the district court's judgment in favor of the County on the CERCLA claim.

## 2. **United States v. McLamb**, 5 F.3d 69 (4th Cir. 1993)

In the 1970s, defendant Skipper owned "Potter's Pits," 217 acres of land in North Carolina, and allegedly deposited hazardous waste materials on it. In 1976, the United States Coast Guard cleaned up an oil

spill on the property, and the remaining sludge was allegedly buried at the site. In 1979, Wachovia Bank and Trust Company ("Wachovia") obtained a security interest in the property as collateral for a loan made to Skipper. When Skipper defaulted in 1980, Wachovia exercised its rights and foreclosed. Wachovia bought the property as the sole bidder at the foreclosure sale and immediately sold it to the first available buyers, the McLambs and the Cains, defendants. The McLambs and the Cains immediately began a residential development on the property. The Cains conveyed their interest in the property to the Andersons, defendants, and the McLambs and the Andersons then conveyed their interests to the newly-formed Investors Management Corporation ("IMC"), defendant. Three years later, IMC learned of the oil spill and the incomplete hazardous waste clean-up. EPA commenced another clean-up operation shortly thereafter.

Pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the United States filed suit against the current and former landowners of Potter's Pits for recovery of costs incurred in the 1983 clean-up operation. The defendants in turn filed a third-party complaint against Wachovia for contribution under section 113(f)(1) of CERCLA. The district court granted summary judgment for Wachovia on the ground that the bank fell within CERCLA's security interest exemption, section 101(20)(A). The McLambs and IMC, appealed

On appeal, appellants argued that the security interest exemption provision did not apply. The provision excludes from contribution actions any person who held "'indicia of ownership [in the property] primarily to protect his security interest'" and who did not participate in the management of the property. The appellants contended that the provision did not apply to Wachovia because Wachovia obtained full title at the foreclosure sale and thus acquired more than mere "indicia of ownership." In addition, appellants maintained that the exemption did not apply because Wachovia acted in a "commercially unreasonable" manner in failing to inform the buyers about the oil spill and previous clean-up operation.

The Fourth Circuit held that the security interest exemption did apply. Wachovia met both of the provision's requirements: (1) Wachovia met the "indicia of ownership" requirement because it obtained title at the foreclosure sale solely to protect its security interest and acted with reasonable diligence in reselling the property, and (2) it did not manage or use the property in its brief period of outright ownership. The court rejected appellants' argument that Wachovia lost its exempt status by

failing to act in a commercially reasonable manner because such a requirement does not appear in the language of the security interest exemption provision.

### ENDANGERED SPECIES

#### 3. **United States v. Mitchell**, 985 F.2d 1275 (4th Cir. 1993)

Defendant, a zoologist working for the United States Department of the Interior, was charged with obstructing the "due administration of the tax laws" in violation of 26 U.S.C. § 7212(a) because he used his position at the Fish and Wildlife Service of the Department of the Interior to lobby for the delisting of endangered species and to obtain hunting privileges in China and Pakistan for big-game hunters who made charitable contributions to AEU, a tax-exempt organization the defendant had founded for the purpose of "promoting and facilitating scientific research in the area of ecology." In addition, defendant caused the big-game hunters to file income tax returns that fraudulently claimed that these contributions were tax-exempt donations.

Defendant admitted that these activities may have been criminal but denied that they violated 26 U.S.C. § 7212(a) as an "artifice and scheme to defraud the United States" and a "corrupt endeavor to impede and obstruct the due administration of the tax laws" as the government contended. The Fourth Circuit reversed the district court's narrow reading of the statute and found that the statute reached defendant's fraudulent representation of AEU as a tax-exempt organization to the Internal Revenue Service and his inducement of big-game hunters to file false tax returns.

Defendant was also charged with violating the Lacey Act, which prohibits the taking and transporting of animals in violation of foreign laws, because of his violation of the Pakistani Imports and Exports (Control) Act of 1950 and the Punjab Wildlife Act of 1974. The Fourth Circuit reviewed the evidence regarding Pakistani laws de novo and held: (1) the district court's ruling that the personal baggage exception to the Imports and Exports Act allowed defendant's unlicensed export of hides and horns of a Punjab urial and a Chinkara gazelle was in error because to apply the exception to wildlife trophies would defeat the wildlife conservation purpose of the statute's ban, and (2) the district court's ruling that section 14(2) of Punjab Wildlife Act, which prohibited the

export of any protected animal trophy out of Punjab without a permit, was unconstitutional under the Pakistani constitution's commerce clause was unnecessary because defendant had already violated one foreign law and, therefore, had violated the Lacey Act.

In addition, because only the portion of the Punjab Wildlife Act governing export of animal trophies from Punjab was determined to be unconstitutional, defendant was still guilty of violating sections 12(1) and 13 of the Punjab Wildlife Act, which prohibits the possession of any wild animal without a certificate of lawful possession and makes it illegal to receive any animal trophy unless it is accompanied by a certificate of lawful possession.

4. **United States v. Clark**, 986 F.2d 65 (4th Cir. 1993)

Defendant advertised a Siberian tiger skin rug and Bengal tiger skin for sale in a national newspaper. A prospective buyer contacted the United States Fish and Wildlife Service prior to the sale, and an undercover agent accompanied the buyer to the sale and audiotaped the transaction. Defendant was subsequently arrested and convicted of violating provision 1538(a)(1)(F) of the Endangered Species Act. The district court found that the evidence was sufficient to establish that the defendant offered a Siberian tiger skin rug and a Bengal tiger skin for sale in interstate or foreign commerce.

On appeal, defendant contends that the evidence was insufficient to support his conviction under section 1538(a)(1)(F). Section 1538(a)(1)(F) states that it is unlawful to sell or offer for sale, in interstate or foreign commerce, any endangered species listed pursuant to section 1533. The tiger has been listed as an endangered species pursuant to this section since 1972. Although the skins were pre-Act skins, the Fourth Circuit found that none of the statutory exceptions applied to defendant because his dealings were commercial. Furthermore, defendant's actions satisfied the interstate commerce requirement because he knew that the purchaser was a Georgia resident and made statements about a potential foreign buyer. The court also rejected defendant's argument that the audiotape should not have been admitted as evidence, explaining that the district court did not "abuse its discretion" when it admitted the tape because the government laid a sufficient foundation for its admission and the transcript of the tape was sufficiently accurate.

Defendant also challenged his conviction on the theory of estoppel by entrapment. The entrapment defense protects a defendant charged with committing illegal activities from prosecution when the defendant reasonably relies upon the advice of a government official that the committed activities are legal. In this situation, government officials did not tell defendant that interstate sales of pre-Act wildlife, defined to include skins, were legal. Defendant reached this conclusion after speaking with, or hearing statements from, a museum official, a taxidermist and a former Assistant Secretary of Interior for Fish, Wildlife and Parks. The evidence showed that the museum official provided the name of a taxidermist, with no mention of the legality of interstate sales; the taxidermist was not a government official and thus did not satisfy the requirements of the defense; and the former Assistant Secretary never made statements as to the legality of pre-Act skin sales. Therefore, the court held that this defense was not available.

Finally, the court held that defendant was properly fined according to sentencing guidelines. The value of the skins was based upon defendant's own statements as to their worth. The sentencing guidelines authorize an increase in offense level when the combined market value of the wildlife exceeds \$20,000. The skins were valued at \$21,000, thus, defendant's offense level was properly increased.

### CLEAN WATER ACT

#### 5. *James City County v. EPA*, 12 F.3d 1330 (4th Cir. 1993)

In 1988, the Corps of Engineers ("Corps") granted James City County ("County") a permit under section 404(b) of the Clean Water Act for the building of a dam and reservoir across Ware Creek for its local water supply. The EPA vetoed this permit under the authority of section 404(c). At trial, the district court granted the County summary judgment and ordered the Corps to issue a permit. On the first appeal, the Fourth Circuit affirmed the district court's grant of summary judgment based on its finding that the EPA did not present substantial evidence to support its determination that the County had practicable alternatives to building the reservoir, but the court remanded to the EPA to allow it to determine whether environmental considerations alone would justify a veto. On remand, the EPA again vetoed the permit based solely on environmental considerations. At a second trial, the district court again granted summary

judgment to the County and ordered the Corps to issue a permit. The EPA appealed.

The two issues on appeal were whether the EPA can veto a permit based on environmental harm alone and whether the classification by the EPA of "unacceptable adverse effects" is correct and supported by the facts.

The Fourth Circuit first reviewed section 404(b) and (c) of the Clean Water Act and found that the EPA is authorized to deny a permit based on a finding of adverse environmental effects. Second, the court examined the guidelines for making permit determinations under section 404 for permits issued jointly by the Corps and EPA, and concluded that the guidelines (1) give the EPA discretion over whether to consider non-environmental costs and (2) allow a section 404(c) veto even if no alternatives to the project exist. Third, the court found that the two tiered permit granting system between the Corps and the EPA gives the EPA final say in the permit determination, noting that Congress recognized the expertise of the EPA and thus gave them the authority to veto when there are "unacceptable adverse effects." The court, thus, held that the EPA does have the authority to veto a permit based on adverse effects without consideration of the great need for water by the County.

The Fourth Circuit then reviewed the EPA's analysis in its final determination upon remand under the "arbitrary and capricious" standard. The court found that the district court failed to give the EPA's determination due deference and erred in using the "substantial evidence" standard. Under the "arbitrary and capricious" standard, the agency must have reviewed the relevant data, explained satisfactorily its decision, and have a rational connection between the data and the decision. The court then examines the analysis to see if there was a clear error in judgment. In its determination, the EPA considered the impact of the dam and reservoir on the wildlife, the fisheries, and recreation in the area and general vicinity. The EPA found that the impact would result in a loss of 381 acres of wetlands and 792 acres of forested uplands habitat. In addition, the EPA found adverse effects on the animal population and the Chesapeake Bay. The EPA also analyzed the mitigation plan offered by the County and found that the plan would not adequately replace the types and qualities of wetlands that the dam would destroy. The court held that this analysis and determination by the EPA was supported by the record and not arbitrary or capricious, and, therefore, reversed the district court's judgment.

6. **United States v. Strandquist**, 993 F.2d 395 (4th Cir. 1993)

Defendant worked as a full-time manager for the Halle Marina and Campground ("Marina"), whose facilities include a campground, boat basin with boat slips, and a bathing beach. His duties as manager included overseeing the removal and disposal of raw sewage generated by the Marina. Defendant testified that on several occasions Marina employees under his orders dumped sewage from recreational vehicles ("RVs") and campers into a storm grate rather than pump the sewage into one of the three septic systems on Marina property as required by Marina policy. Evidence revealed at trial proved that the storm grate was connected to an underground pipe that ran beneath the road and discharged into the boat basin.

In a jury trial, defendant was convicted for illegally discharging pollutants into navigable waters of the United States in violation of the Clean Water Act ("CWA"). Specifically, he was found guilty of two counts; he violated CWA sections 301(a) and 309(c)(2) for two separate discharges into the storm grate. The district court computed his sentence by applying the United States Sentencing Guidelines ("USSG") effective November 1, 1991 for environmental offenses, in particular USSG section 2Q1.3 for the mishandling of environmental pollutants. Defendant, a first time offender, was sentenced to five months imprisonment on each count to be served concurrently, supervised release for one year, and home detention for five months during the supervised release.

On appeal, defendant challenged both his conviction and sentence. First, he contended the government failed to present sufficient evidence proving that any discharge for which he was charged reached the navigable waters of the boat basin as required for a conviction under the CWA sections 301(a) and 502(12). In challenging his sentence, defendant argued (1) that the Sentencing Commission exceeded the mandate of the enabling act when it created USSG section 2Q1.3, (2) that even if the Sentencing Guidelines for environmental offenses as applied in the instant case are valid, the district court improperly calculated his sentence when the court applied USSG section 2Q1.3(b)(1), the enhancement provision of the Sentencing Guidelines for environmental offenses, and (3) that he was entitled to a downward departure in offense level for accepting responsibility.

The Fourth Circuit reviewed the defendant's conviction to determine whether there was insufficient evidence to convict him, asking whether a rational jury member could have concluded that the government

had proven the elements of the crime beyond a reasonable doubt. It reviewed the evidence in a light most favorable to the prosecution. The evidence presented at trial consisted of (1) the observations of private citizens, FBI agents, and an EPA official of sewage on the storm grate and a similar fluid being discharged from the pipe into the basin, (2) FBI agents observing an employee dumping sewage into the storm grate, (3) tests that revealed that the fluid on the storm grate, in the pipe, and in the basin were all sewage, and (4) a dye test which showed that the storm grate connected to the basin. The court held the reasonable inferences from the evidence supported the jury's conclusion that the sewage discharged by the defendant did in fact reach the navigable waters of the United States and that circumstantial evidence may support a guilty verdict, "even though it does not exclude every reasonable hypothesis consistent with innocence."

The court then addressed defendant's argument that section 2Q1.3 of the Sentencing Guidelines exceeded the mandate of its enabling legislation and was contrary to congressional intent because the Guidelines failed to differentiate among environmental crimes of varying seriousness. The court rejected defendant's argument, relying on *United States v. Ellen*, 961 F.2d 462 (4th Cir), *cert. denied*, 113 S. Ct. 217 (1992), in which the court rejected a similar argument and upheld the sentence of a defendant, although the defendant in *Ellen* had caused greater environmental damage than the defendant in the case at issue. The court adopted the reasoning from the *Ellen* opinion, which found that the Sentencing Commission acted within its discretion when classifying the instant offense as a "serious one" because harm to the environment is a "public policy concern of the greatest magnitude." Congress stressed the importance of its environmental goals by creating severe penalties for violations of the CWA. Therefore, although the environmental damage in the instant case was not as extensive, the court found that the discharge of pollutants into navigable waters is a serious public concern and held that the sentence of a prison term for a first time offender reflects the seriousness of the offense and does not contravene the Guideline's enabling legislation.

The court then reviewed defendant's argument that his sentence was improperly calculated under section 2Q1.3(b)(1) because in order to trigger that section, which increases the base level offense by six, the prosecution must prove actual contamination and that the offense was an "ongoing, continuous, or repetitive discharge." The court held the manner of proof for contamination need not be decided here because the district court's finding of contamination was not clearly erroneous. Section 2Q1.3(b)(1)

only requires contamination and not permanent or vast contamination to be applicable. Furthermore, the Fourth Circuit held that where discharges occur on more than one occasion the discharge is "ongoing, continuous, or repetitive," making section 2Q1.3(b)(1)(A) applicable.

Finally, the court rejected defendant's contention that the district court erred in not allowing a downward departure for acceptance of responsibility. Applying the clearly erroneous standard, the court held that the district court's finding that the defendant did not fully accept responsibility was not clearly erroneous because the defendant challenged the finding that the sewage flowed into the boat basin and denied knowledge that the sewage would flow into the boat basin.

7. **Natural Resources Defense Council v. EPA**, No. 92-2520, 1993 WL 590484 (4th Cir. 1993)

Two environmental groups, the Natural Resources Defense Council ("NRDC") and the Environmental Defense Fund, filed separate suits against EPA. These suits dealt with provisions of the Clean Water Act ("CWA") and EPA's interpretation of these provisions. The suits specifically challenged both EPA's 1984 dioxin criteria document and its approval of the water quality standards adopted by Maryland and Virginia in 1990. After the suits were consolidated, the district court dismissed both complaints and a subsequent amended complaint.

On appeal, the Fourth Circuit addressed what standard of scrutiny was proper for EPA and the courts when reviewing state standards. The court rejected NRDC's assertion that EPA had a duty to take a more active role in the review process by independently ensuring that state standards meet the CWA requirements. Although both the states and EPA share the responsibilities of achieving the goals of the CWA, the states are primarily responsible for establishing the appropriate water quality standards under this statute. EPA provides guidance in setting these standards through developing criteria documents, and the standards set by the states are subject to review by EPA. The court held that EPA's duty under the CWA was to determine whether a state's decision was scientifically defensible and protective of the water's designated use. Noting that most courts are not qualified to conduct their own scientific research, the court held that the role of the court should only be to decide whether the proper legal standards were applied.

The court then decided whether the district court erred in confirming EPA's approval of the state dioxin standards. Agreeing with the district court, the court held that the proper standard of review for EPA's actions was whether they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This is a highly deferential standard which presumes the validity of the agency's action. If a rational basis exists for EPA's decision, then it is valid. Based on the lengthy scientific and technical documents supporting approval, the court found that EPA's decision was neither arbitrary or capricious.

Finally, the court affirmed the district court's decision that EPA's duty to update its water quality criteria for pollutants was discretionary. It also upheld the district court's dismissal of the amended complaint in which NRDC alleged that EPA's failure to update the criteria violated section 703 of the CWA. The court held that to violate this standard EPA's criteria document must be "final" according to the test outlined by the Supreme Court in *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980). The document was not "final" because EPA was in the process of reassessing the criteria and the use of the criteria by states in determining their standards is not mandatory.

8. **Sasser v. EPA**, 990 F.2d 127 (4th Cir. 1993)

Defendant, an owner of wetlands in South Carolina, applied to the Corps of Engineers ("Corps") for a permit to restore an embankment, which would require discharging dredged material into the wetlands. The Corps denied the permit. Several years later, defendant constructed an embankment based on a wrong assumption that a nationwide permit allowed him to undertake such activity. In 1987, the Administrator of the EPA issued an administrative order requiring defendant to stop discharging pollutants into a tributary of the Pee Dee River in South Carolina and to submit a restoration plan. After repeated noncompliance, an administrative law judge imposed fines and directed defendant to submit and implement a restoration plan. On appeal, defendant sought to set aside the Administrator's order on the grounds that the Administrator lacked subject matter jurisdiction, that the proceedings violated his Seventh Amendment right to a jury trial, and that the Administrator failed to consider his good faith in relying on the nationwide permit.

The Fourth Circuit denied defendant's motion to dismiss for lack of subject matter jurisdiction. Prior to 1987, EPA could only impose a

civil penalty for discharging pollutants into wetlands through the district courts. In 1987, however, Congress authorized the Administrator to assess civil penalties. Although the administrative complaint charges that defendant discharged pollutants into the wetlands without a permit in 1986, the court found that the Administrator's order is not a retroactive application of the amendment because defendant's violation was a continuing one that lasted well after the amendment was enacted.

The court then addressed whether the administrative proceedings violated defendant's Seventh Amendments rights. The Seventh Amendment does not apply to disputes over statutory public rights, which are disputes between the government and persons subject to government authority that involve the performance of the constitutional functions of the executive or legislative branches. The court found that the dispute between defendant and the Administrator involved statutory public rights because the goals of the Act are the "restoration and maintenance of the integrity of the nation's waters." Thus, the Seventh Amendment did not give defendant a right to a jury trial in the administrative hearing.

Defendant's final argument was that the Administrator erred in imposing the maximum penalty allowed by the Act because he relied in good faith on an attorney's advice that he could proceed under the nationwide permit. However, the court found that defendant did not fully inform the attorney or have him inspect the land before giving his opinion and did not confirm the attorney's advice with the Corps before proceeding; therefore, he was not entitled to rely on that opinion. Furthermore, although specific approval to discharge dredged material under a nationwide permit is not required, a private party bears the risk of liability if the discharge is later found to be impermissible. Lastly, defendant refused to comply with the Corps' orders to stop construction. Based on these findings and the fact that the work was impermissible under the nationwide permit, the court held that the Administrator did not abuse his discretion in finding that defendant did not proceed in good faith.

### FEDERAL TORTS CLAIMS ACT

9. **Muth v. United States**, 1 F.3d 246 (4th Cir. 1993)

A property owner brought suit against the United States under the Federal Tort Claims Act ("FTCA") for diminution of value of property that was the former site of a trinitrotoluene ("TNT") production facility. The

Fourth Circuit affirmed the district court's grant of summary judgment for the United States based on a finding that plaintiff's administrative complaint was barred by the running of the statute of limitations. The FTCA requires that plaintiffs present an administrative claim to an agency within two years of the date a cause of action accrues.

Under the FTCA, a cause of action accrues when the plaintiff knows, or through due diligence, should have known of the existence and the cause of the injury. Plaintiff argued that there was no injury until the Army refused to purchase the property, and maintained that the injury occurred when the plaintiff had knowledge that the property was "undesirable and unsafe for anything." The court rejected plaintiff's claims, holding that the plaintiff knew of both an injury to his property and the cause of the injury over two years before the claim was filed. The court found that the plaintiff's property was not contaminated by by-products of the TNT manufacturing process, but that adjacent property was rendered "hazardous and dangerous" by contamination and that the plaintiff's correspondence with the Army indicated that he knew the adjacent property was contaminated and that it had an adverse impact on the value of his property.

The Fourth Circuit also rejected plaintiff's alternative argument that the statute of limitations period should have been equitably tolled. Equitable tolling was found not to be an appropriate remedy because the plaintiff had failed to diligently protect his legal rights. The court held that plaintiff's knowledge of the former use of his property and the contamination of adjacent property created an obligation to take steps to investigate the possibility of claims against the United States, which he failed to do.

#### ATTORNEY'S FEES

10. **Roanoke River Basin Ass'n v. Hudson**, 991 F.2d 132 (4th Cir. 1993)

Prior to 1984, the Army Corps of Engineers ("Corps") issued a permit allowing the City of Virginia Beach, Virginia, to construct an 85-mile pipeline in order to supply Virginia Beach with potable water from Lake Gaston (on the Virginia-North Carolina border). In January 1984, North Carolina and others filed suit against the Corps challenging the issuance of the permit. In May 1984, the Roanoke River Basin

Association ("RRBA") intervened and sought to declare the permit null and void, listing various deficiencies in the Corps' consideration of the permit. All parties moved for summary judgment. The district court rejected all but two of RRBA's challenges and remanded these two issues, concerning the impact on the striped bass and the water needs of Virginia Beach, to the Corps for further investigation. After further study, the Corps concluded that Virginia Beach had sufficient need for the water and that the project would have minimal effect on the striped bass. Nevertheless, the Corps agreed to take measures to mitigate the impact of the pipeline on the striped bass. On review, the district court upheld the issuance of the permit, and the Fourth Circuit affirmed, concluding that the Corps had properly considered all environmental and non-environmental factors in its decision.

RRBA then filed a petition under the Equal Access to Justice Act ("EAJA") for attorneys' fees and expenses for the two remanded issues. Section 2412(d)(1)(A) of EAJA provides that courts shall award attorneys' fees and expenses to the "prevailing party" in actions "brought by or against the United States ... unless the court finds that the position of the United States was substantially justified." EAJA was intended to allow private parties, who have substantially less resources than the United States, equal access to the courts and to insure that only reasonable governmental positions on policy and rules will be enforced. The district court concluded that RRBA was the "prevailing party" on the striped bass issue but that the government's position in the litigation as a whole was "substantially justified." The district court thus refused to award attorneys' fees and expenses to RRBA. RRBA appealed.

On appeal, the Fourth Circuit addressed the question of how to determine whether the government's position was "substantially justified": Should it look at the entire litigation or focus only on the issue on which the fee petitioning party prevailed? The court considered the policy rationale behind the two requirements and concluded that they were distinct. The first prong, determining which party "prevailed," concerned only the degree of success of the fee petitioner. The second prong, whether the government advanced a "substantially justified" position, concerned the government's overall "'position in the litigation,'" not the success of the government's arguments. The second prong requires that the government's overall position be a reasonable one. Thus, in determining whether the two requirements are met, the court held that, under EAJA, courts should focus on specific issues when determining which party "prevailed" and should consider the litigation as a whole when

deciding whether the government's position is "substantially justified." In addition, the court held that the district court did not abuse its discretion in holding that the Corps' position was "substantially justified."

### RCRA

11. **Feikema v. Texaco, Inc.**, *No. 93-1649, 1994 WL 62091 (4th Cir. 1994)*

Defendant, Texaco, owns and operates a petroleum distribution terminal. Beginning in 1988, various petroleum products leaked into the soil and groundwater from storage tanks on the site, and an oil plume began moving toward the adjacent residential properties owned by the plaintiffs. In September 1990, petroleum products became visible in a creek which flows near and along the homeowners' properties. The EPA investigated the leak and found that the plume presented an imminent and substantial endangerment to health or the environment within the meaning of section 7003(a) of the Resource Conservation and Recovery Act ("RCRA"). The EPA negotiated a consent order, which required various remedial measures, including excavation and removal of contaminated soil and the monitoring of wells and storm sewers for the presence of oil.

In 1993, the homeowners filed a complaint against Texaco, alleging state claims for nuisance and trespass. In their complaint, the homeowners alleged that the remedial measures failed to remedy the leaking and that they have been, and continue to be threatened with actual petroleum pollution. The homeowners requested both injunctive relief and damages of an unspecified amount. The district court dismissed the action on the grounds that both RCRA and the consent order preempt the state claims.

The court of appeals held that the consent order preempts the claims for injunctive relief; however, it remanded the case, allowing the homeowners to pursue the damage claims for nuisance and trespass.

The Fourth Circuit affirmed the district court's ruling in part, holding that because RCRA does not regulate so pervasively as to occupy the field completely, state claims are preempted only if they actually conflict with RCRA or with the consent order. Section 7003, which authorizes the EPA to act, does not, in the absence of some EPA action, conflict with the state actions for nuisance or trespass because nothing in that section gives the EPA exclusive authority to act.

The court, however, denied the injunctive relief requested by the homeowners on the basis that such a remedy would conflict with the remedial measures required by the consent order. Because the state claims address the same site and conditions covered by the EPA order, the court held that those claims are preempted to the extent that they seek injunctive relief before the order has terminated. The court reasoned that a court adjudicating state claims could not substitute its judgment concerning the appropriate remedial measures for the authorized judgment of the EPA or usurp the review role given to the EPA by RCRA.

Finally, the court held that the neither the consent order nor section 7003 preempted the homeowners' damage claims for nuisance and trespass. It reasoned that because the order does not address compensation for damages caused by the imminent hazard, the state damage claims did not actually conflict with the order. Furthermore, section 7003, the provision under which the order was entered, only authorizes the EPA to seek injunctive relief and does not address compensation for damages caused by the imminent hazard. Thus, the state damage claims did not actually conflict with RCRA, even if section 7003 did give the EPA exclusive authority to act.