

Environmental Law News



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Rails-to-Trails After *Preseault*: A Virginia Perspective

The conversion of retired railroad beds into recreational trails has become a widespread practice in our country. Currently, the United States has over 1,000 "rail-trails" totaling over 10,000 miles.¹ However, rails-to-trails programs have not been unopposed or without controversy.² A recent proposal to add a rail-trail in Botetourt County, Virginia was no exception.³ Most of the opposition to these projects comes from the owners of property adjacent to the proposed trails. In *Preseault v. Interstate Commerce Commission* (hereafter, *Preseault II*), the Supreme Court upheld the preservation of rail rights-of-way for trail use as a valid exercise of Commerce Clause authority and ruled that it did not amount to an unconstitutional taking under the Fifth Amendment.⁴ This article focuses primarily on rails-to-trails challenges in the wake of *Preseault II*, the development of the rails-to-trails takings claim, and the viability of such a claim in Virginia. Other sources have dealt with the background of rails-to-trails and the findings of *Preseault II* at length, and this article addresses these issues only briefly.

Introductory and Background Information

Most rails-to-trails programs owe their origin to the Trails Act Amendments of 1983,⁵ which allow transfer

of rights-of-way for abandoned railroads to state and local governments and private organizations interested in sponsoring trails.⁶ Transferred rights-of-way for "interim" trail use are subject to reactivation of rail service in the future.⁷ The purposes of the rails-to-trails program include the preservation of railroad rights-of-way and the promotion of recreational trails.⁸ The Trails Act Amendments were not the first attempts at converting abandoned rights-of-way to trails; both the National Trails Act of 1968⁸ and the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act")¹⁰ attempted to create additional public trails and to protect railroad corridors that were retired from service. However, the Trails Act Amendments are unique in their

stipulation that "interim" trail use in rail corridors "shall not be treated, for purposes of law or any rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."¹¹ It was Congress' intention to prevent the abandonment of railroad corridors considered for the program and for the ICC (railways are now managed by the Surface Transportation Board or STB) to retain jurisdiction over those corridors.¹²

A rails-to-trails conversion begins when a railroad applies to the STB for abandonment or discontinuance of rail service.¹³ Parties interested in sponsoring a trail on the right-of-way notify the STB of their plans within limited time periods.¹⁴ If the STB

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Chair's Corner

By the time you get this issue of the newsletter, you may have already read it on the Environmental Law Section's website (<http://www.vsb.org/sections/en/>). We are seeking to make greater use of our portion of the Virginia State Bar website so that we may better communicate with, and serve, the members of our Section. This effort began with our posting of the registration information for the Section's biennial seminar, "Environmental Science for Lawyers and Judges," which was held in April. Shortly afterward, the April issue of *Virginia Lawyer*, dedicated to our Section, made a beautiful and substantive contribution to the State Bar's website. We would like to hear from you whether you consider having, or converting to, a web-based newsletter a valuable use of Section funds; what other internet-based services you would like the Section to provide; and whether you would like to receive updates on Section activities via e-mail. Please direct any comments to our Virginia State Bar liaison, Dolly Shaffner, at shaffner@vsb.org, and note whether you would like your e-mail address to be added to a list that the Section may use for purposes authorized by the Section's Board of Governors.

Edward A. Boling

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allows abandonment of rail service and the railroad expresses interest in negotiating with the potential sponsor, the STB issues a Certificate of Interim Trail Use (CITU) or a Notice of Interim Trail Use (NITU).¹⁵ The CITU/NITU permits the railroad to discontinue service and allows 180 days for negotiations between the railroad and the interested party.¹⁶ This 180-day negotiation period can be extended.¹⁷ If an agreement is reached, the sponsor assumes all responsibility for the right-of-way, subject to future rail reactivation.¹⁸

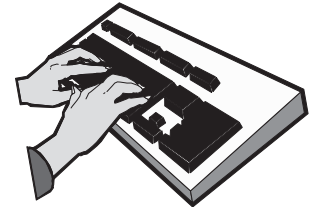
Preseault II, In Brief

Preseault II began in 1981, when landowners claiming a fee simple interest in land burdened by a railway easement brought a quiet title action in Vermont, alleging abandonment of the railway and "reversion" of their fee interests.¹⁹ As the ICC had not authorized abandonment, the Vermont trial court dismissed the landowners' claim for want of state jurisdiction.²⁰ The landowners next sought a certificate of abandonment from the ICC.²¹ The State of Vermont intervened in the landowners' action and, later, obtained ICC approval of a transfer of the easement from the railroad company to the city of Burlington pursuant to the Trails Act Amendments.²² The landowners sought review of the ICC's order in the Second Circuit Court of Appeals, claiming that the Trails Act Amendments violated the Commerce Clause and the Fifth Amendment.²³ The Second Circuit rejected both arguments²⁴ and the Supreme Court granted certiorari.

The Supreme Court rejected the landowners' contention that rails-to-trails was outside the scope of the Commerce Clause, noting that the preservation of rail corridors and the creation of a national system of trails were both legitimate interstate commerce interests.²⁵ Further, the Court

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**Articles of
General Interest**



The articles in this section are intended to provide analysis and discussion of topics that may interest environmental law attorneys. The *Environmental Law Digest* welcomes submissions and suggestions of articles and topics for future issues. Please send your articles or suggestions to the following address:

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noted that even if rails-to-trails did not serve the purpose of preserving railroad corridors, the program did serve the purpose of encouraging development of additional trails and “[t]here is no requirement that a law serve more than one legitimate purpose.”²⁶

The *Preseault II* Court did not address the issue of whether or not rails-to-trails amounted to a Fifth Amendment taking,²⁷ but did rule that Tucker Act²⁸ remedies were available for any party alleging a taking to have occurred.²⁹ Relying on *Yearsley v. W.A. Ross Construction Co.*,³⁰ the Court ruled that “the Tucker Act is an ‘implic[ed] promis[e]’ to pay just compensation which individual laws need not reiterate.”³¹ Since Tucker Act remedies were available, a claim that rails-to-trails amounted to an unconstitutional taking was premature.³² However, *Preseault II* did not rule on the lower court’s assertions that: (1) federal law determines the property rights of landowners; and, (2) so long as the ICC determines that land serves a railroad purpose it retains jurisdiction; the land does not “revert” to the owner of the underlying fee.³³ The *Preseault II* court did infer that no takings claim existed unless the right-of-way would have reverted to the owner of the fee but for the rails-to-trails program.³⁴ The application of this inference will be addressed later.

Post-Preseault II Challenges

Most challenges lodged since *Preseault II* have been unsuccessful in blocking rails-to-trails projects. Two types of post-*Preseault II* challenges are noteworthy and will be discussed in this section: loss of STB jurisdiction and collateral attempts to block implementation.

Loss of STB Jurisdiction

The STB loses jurisdiction over a railway upon its abandonment.³⁵

Thus, if a railway is abandoned the STB has no authority to issue a CITU/NITU and implement a rails-to-trails program.³⁶ A “discontinuance” of service (subject to reactivation in the future) does not constitute abandonment and allows the STB to retain jurisdiction over the right-of-way.³⁷ Since a finding that a railway is abandoned effectively precludes a rails-to-trails conversion, many challenges have alleged that railways were abandoned prior to rails-to-trails implementation. Thus, the determination of whether or not a railway has been abandoned or discontinued becomes critically important.

As a general proposition, abandonment is consummated when a rail carrier expresses intent to abandon a line at a time when such abandonment is authorized by the STB.³⁸ An indication of intent to abandon, made at a time when a carrier does not have authority to do so, does not constitute abandonment and allows the STB to retain jurisdiction.³⁹ Thus, when a CITU/NITU has been issued, the rail carrier’s subsequent intention to *not* negotiate an interim trail use agreement does not constitute abandonment until the expiration of the CITU/NITU.⁴⁰ However, this result is not the same when a CITU/NITU has not been issued.

When a railway is abandoned or discontinued, the STB can impose restrictive conditions if it determines that those railways are appropriate for public use.⁴¹ Conditions are effective for a maximum of 180 days.⁴² However, imposition of public use conditions will not stay STB jurisdiction if the rail carrier has otherwise abandoned the right-of-way.⁴³ Thus, when a rail carrier refuses to negotiate an interim trail use agreement and abandons a right-of-way with STB authority, the STB loses the ability to implement a rails-to-trails program, even if the railroad later decides to negotiate a trail use agreement.⁴⁴

The determination of whether a carrier intends to abandon or dis-

continue service does not follow a “bright-line” rule. Generally, intention is based on a “searching and functional inquiry about the actual intent of the parties.”⁴⁵ Numerous factors can be examined, including whether or not the carrier has ceased service, removed rails, cancelled tariffs, and sought exemption from the STB.⁴⁶ In spite of such actions, however, a carrier’s expressed intention to not abandon its right-of-way can prevent a determination that the railway has been abandoned.⁴⁷ Additionally, negotiations with a potential trail sponsor are generally indicative of the railway’s intent to not abandon the right-of-way.⁴⁸

In summary, STB jurisdiction (and the ability to implement rails-to-trails) is susceptible to challenge when a railway has taken actions indicative of abandonment under circumstances permitting abandonment to occur. The railway’s expressed intention to maintain the right-of-way can outweigh the railway’s actions and preserve STB jurisdiction.

Collateral Attempts to Block Implementation

Perhaps the most interesting post-*Preseault II* challenge was made by landowners in a Washington State case, *Redmond-Issaquah R.R. Pres. Ass’n v. STB*.⁴⁹ In that case, the Burlington Northern & Santa Fe Railway Company (BNSF) transferred a suspended railway to The Land Conservancy (TLC).⁵⁰ TLC sought and obtained STB approval to acquire the line under acquisition exemption procedures.⁵¹ After obtaining STB approval of the transfer, TLC filed for abandonment and notified the STB of its intention to implement a rails-to-trails program.⁵² The STB ordered that the railway be reconveyed to BNSF, noting that abandonment exemption procedures are intended “to support the continued operation of rail lines in lieu of abandoning them.... It appears...that TLC has

put into effect a plan to convert the line to trail use as soon as possible following its acquisition of the line.”⁵³ After reconveyance, the STB reinstated and granted the abandonment exemption proceeding.⁵⁴

Now armed with advance notice of the proposed trail project, Redmond-Issaquah Railroad Preservation Association (RIRPA), an association of homeowners, intervened and filed an offer of financial assistance (OFA) pursuant to 49 U.S.C. § 10904.⁵⁵ An OFA is an offer to subsidize or purchase a railroad proposed for abandonment.⁵⁶ Both BNSF and TLC argued that RIRPA did not intend to continue rail service, but rather intended to block implementation of a rails-to-trails conversion.⁵⁷ The STB rejected RIRPA's OFA and granted a NITU to BNSF to negotiate an interim trail use agreement.⁵⁸

RIRPA brought action against the STB, alleging that continuation of rail service was not a factor the STB was authorized to consider in evaluating an OFA.⁵⁹ RIRPA's contention was rejected:

The STB was persuaded by the evidence suggesting that RIRPA submitted the OFA in order to frustrate the development of a recreational trail on the right of way, taking into account newspaper articles in which RIRPA's leadership made statements indicating the organization's primary interest in purchasing the line was to preserve its members' privacy.... The critical factor, and the basis for the OFA's rejection, was the STB's determination that future traffic on the line was highly, if not totally, unlikely.⁶⁰

A finding that the STB was required to consider RIRPA's OFA would have effectively authorized objecting landowners to attempt to “outbid” potential trail sponsors through their own OFA's. *Redmond-Issaquah* is significant in that it indicates the courts' willingness to reject claims that are intended purely to frustrate rails-to-trails conversions,

even though those claims may be justified by a narrow reading of the law.

Takings Claims & *Preseault IV*

After *Preseault II*, parties affected by rails-to-trails conversions have sought takings compensation under the Tucker Act. In evaluating rails-to-trails takings claims, federal courts have applied an analysis that is primarily based upon the scope of the original easements and the foreseeability of trail conversions. Contrary to the inference of the majority opinion in *Preseault II*,⁶¹ reversion of the right-of-way upon abandonment is not necessarily the primary factor in determining whether or not a taking has occurred. However, regardless of the scope of the easement, a taking has clearly occurred if the easement would have reverted to its grantor but for the imposition of the rails-to-trails program.⁶²

Under *Preseault IV*,⁶³ the analysis of a rails-to-trails taking claim begins with an examination of the actual property rights at issue. The *Preseault IV* Court ruled that adjacent property owners have suffered no taking if the railroad right-of-way is owned in fee simple, regardless of the contemplation of trail use at the time the conveyance was made.⁶⁴ However, if the right-of-way is an easement a taking may exist if trail use is outside the easement's scope.⁶⁵

As a general premise, imposition of trail use which is outside the scope of an easement is equivalent to the taking of a new easement and entitles the owner of the underlying fee to takings compensation.⁶⁶ Determination of the scope of an easement is based on the language of the conveying instrument read in light of the common law and state laws in effect at the time of the conveyance.⁶⁷ Thus, whether trail use is within the scope of an easement is ultimately a question of state property law.

One defense advanced to rever- sionary takings claims is the princi-

ple of “preexisting limitations,” which are established state law principles restricting the use of property that render the new action alleged to be a taking moot. That is, since the parties to a railroad easement could have contemplated or reasonably foreseen a delay in abandonment and reversion due to rails-to-trails, no takings claim exists.⁶⁸ An inquiry into preexisting limitations thus becomes an inquiry into whether or not new regulations are within the scope of established state law principles.⁶⁹

Preseault IV flatly rejected government arguments that no takings claim existed because preexisting limitations encompassed “the sweep of a century of railroad regulation.”⁷⁰ It appears that such an argument will continue to be unsuccessful in the future, barring the unlikely circumstance that a state's law encompasses restrictions on rail easements comparable to trail use. Additionally, *Preseault IV* refused to consider underlying fee owners' claims in terms of a regulatory taking under a “reasonable expectations” analysis: “[t]he expectations of the individual...do not define for the law what are that individual's compensable property rights.”⁷¹

A final argument used in support of the position that rails-to-trails conversions do not amount to compensable takings claims is based on the “shifting public use” model of property rights. As expressed in *Preseault III*, it provides:

[B]oth federal regulation changes and property interests shift. The property owner is buying and selling or transferring his interest as the federal law ever more circumscribes that interest. Property rights have been created under state law in this model, but the state courts for years have not applied state law as a source independent of federal law in interpreting these rights.... Plaintiffs bought burdened properties and did so with expectations historically rooted in the evolving federal law regulating abandonments of

railroads and the state law which operated companionably with federal law.⁷²

The implication of the shifting public use doctrine is that broadening the scope of an easement, or delaying reversion of a fee interest, is foreseeable in light of the history of federal regulation. Thus, the imposition of rails-to-trails does not amount to a taking. This doctrine has no authority when state law does not indicate its adoption and its application was rejected by *Preseault IV*.⁷³

The Takings Claim in Virginia

What, then, is the viability of rails-to-trails takings claims in Virginia? Analysis begins with a discussion of property law in Virginia, and then moves to an inquiry into the scope of railroad conveyances. Last, expectations of the reversionary owner are considered.

Rail Corridors in Virginia

Most commonly, a rails-to-trails conversion occurs on lands which were granted by way of easement. Under Virginia law, an easement is extinguished when the purpose of the easement ceases.⁷⁴ Thus, when rails-to-trails use falls outside the scope of a railroad easement, and delays the reversion of property rights to the fee owner, it is clear that a takings claim would be upheld under *Preseault IV*.

There is also some indication that Virginia law would support a takings claim in the case of conversion of a fee simple corridor, but only under very limited circumstances. When land is conveyed in fee simple **without** any words of limitation it is clear that the grantee acquires full power to dispose of the land.⁷⁵ No takings claim would exist upon conversion of a fee simple right-of-way, granted without restriction, to a recreational trail.⁷⁶ However, when conveyance is made with a certain use as a condition subsequent and a proviso that the land will revert if the condition is

not met, there is a plausible argument that a rails-to-trails imposition in violation of that condition is a taking.

Virginia upholds reverter clauses in fee simple conveyances. In *Sanford v. Sims*, a parcel of land was conveyed to a railroad to “be used solely and exclusively...for the purpose of running [the railroad’s] locomotives, trains or cars, [and] for shops, sidings and depots.”⁷⁷ The conveyance stipulated that if the railroad were to “cease or fail to enjoy the said lot or parcel of land for the purpose herein set forth, then the said lot of land [would] revert to and become the property of” the grantor.⁷⁸ Some years later, after the parcel had been conveyed several times, its then-owner sought a decree removing the reverter cloud from its title.⁷⁹ The Virginia Supreme Court upheld the reverter clause, ruling that the fee simple conveyance was subject to reversion upon occurrence of the condition subsequent, use of the land outside the scope of the conveyance.⁸⁰

Though *Preseault IV* states explicitly that there is no takings claim when a fee simple rail corridor is converted to trail use,⁸¹ under the actual analysis of *Preseault IV* there is a strong argument in Virginia that such reversionary owners would be entitled to takings compensation: “[I]f [the landowners] have interests under state property law that have traditionally been recognized and protected from governmental expropriation, and if, over their objection, the Government chooses to occupy or otherwise acquire those interests, the Fifth Amendment compels compensation.”⁸² Consider the reasoning of *Glosemeyer v. United States*:⁸³

Having established that the easements would have been extinguished, and thus that, but for the application of the Rails-to-Trails act, the plaintiffs would have been seised in their lands without any restrictions, we have little difficulty concluding that a taking has occurred. In this case, the plaintiffs came into posses-

sion of their lands realizing that MoPac and MKT, or an appropriate railroad successor, had the right to operate a rail line across parts of their lands. Plaintiffs would have been secure in the knowledge that Missouri law guaranteed that only railroads had that right and that the only uses that could be made of their lands were those reasonably related to the operation of a railroad.... Those expectations have been thwarted.⁸⁴

Though *Glosemeyer* dealt with easements, it is difficult to ascertain a substantive difference between easements which revert when extinguished and fee simple estates which revert by the terms of their conveyances. In both cases, ownership of the land would have reverted to the grantor **but for** the application of the rails-to-trails program. In both cases, the grantor possesses the expectation that only certain uses will be made of the granted land, an expectation that is dashed by the implementation of rails-to-trails. Certainly, there is a strong argument that the grantor of the fee simple estate with use conditions has also suffered a taking and is entitled to compensation.

Less clear is the situation in which a grantor has conveyed a fee simple estate with the covenant that it will be used for railroad purposes only. Virginia courts have upheld such restrictive covenants on railroad deeds, affirming injunctions⁸⁵ and awards of nominal damages.⁸⁶ However, violation of a covenant is not itself grounds for ejectment or reversion.⁸⁷ Conversion of lands covenanted for railroad purposes to trail purposes is, thus, not actually a physical taking. Nonetheless, such a conversion does deprive a grantor of the expectation that the granted land would be used for railroad purposes only. Possibly a grantor has suffered a taking of this expectation and is entitled to nominal compensation for the loss of that right.

Scope of Easements

Although Virginia has not ruled specifically on the issue of whether trail use is within the scope of a railroad easement, other rulings point to a finding that it is not. *Virginia Hot Springs Co. v. Lowman* establishes a two-tiered standard of review for determining the scope of an easement.⁸⁸ Use is outside the scope of an easement when: (1) the use is a new use, not in aid of the original use; or (2) the use imposes a new or greater burden on the fee owner.⁸⁹ Based on this review, a bridlepath was within the scope of a turnpike easement⁹⁰ and a roadway easement encompassed the right to change the grade of the road.⁹¹ However, a railroad easement granted to a coal company for the purpose of shipping coal did not allow the coal company to lease the railway to a lumber company for the purpose of shipping lumber: “We do not think that the deed can naturally or fairly be constructed as passing anything but a right of way for a railroad for use in connection with the primary purpose of the coal company. To extend it...to the *wholly different and foreign purpose* for which it is now being used, would be to make a new contract between the parties.”⁹²

Under the *Virginia Hot Springs* analysis, the inquiry is simply whether the trail use is in aid of the original use, or whether the trail use imposes a new or greater burden upon the fee holder. A negative answer to either question indicates that trail use is outside the scope of a rail easement. A majority of jurisdictions have, in fact, ruled that trail use falls outside the scope of railroad easements.⁹³ The majority reasoning is well-expressed in *Preseault IV*:

Although a public recreational trail could be described as a roadway for the transportation of persons, the nature of the usage [compared with rail use] is clearly different. In the one case, the grantee is a commercial enterprise using the easement in its business, the transport of goods and people for compensation. In

the other, the easement belongs to the public, and is open for use for recreational purposes.... [T]here are differences in the degree and nature of the burden imposed on the servient estate. It is one thing to have occasional railroad trains crossing one’s land. Noisy as they may be, they are limited in location, in number, and in frequency of occurrence. Particularly is this so on a relatively remote spur. When used for public recreational purposes, however, in a region that is environmentally attractive, the burden imposed by the use of the easement is at the whim of many individuals, and, as the record attests, has been impossible to contain in numbers or to keep strictly within the parameters of the easement.⁹⁴

It seems clear that trail use is both a different use than operation of a railway, and that it imposes a new or greater burden upon the fee owner.

Even where an easement does not explicitly limit itself to rail purposes, trail use may be outside the scope of the easement if it was originally used for rail purposes. Virginia stipulates that where “the instrument creating the easement does not limit the use to be made thereof, it may be used for any purpose to which the [holder of the easement] may then, or in the future, reasonably be devoted. This rule is subject to the qualification that no use may be made of the right of way, *different from that established at the time of its creation*, which imposes an additional burden upon the servient estate.”⁹⁵ It appears that the preservation of rail corridors and the creation of a scenic trail are purposes to which the right-of-way can reasonably be devoted. However, there is a strong argument that use of the right-of-way for trail purposes imposes greater burdens on the owner of the fee, and this is precisely the finding of *Preseault IV*’s comparison of trail use and rail use.⁹⁶

Expectations of the Reversionary Owner

The “shifting public use” doctrine cited by the government in *Preseault IV*—the idea that the scope of an easement changes based on the fee owner’s expectation of changing regulation—does not appear to have any support in Virginia law. On the contrary, the Virginia cases cited in this article all analyze conveyances in light of the meanings attached to them at the time of their creation.⁹⁷ No reviewed case has relied upon a line of reasoning that indicates that a fee owner’s expectation of changing federal regulation modifies the scope of a conveyance. “Shifting public use” and related arguments are likely to fail on a Virginia takings claim just as they failed in *Preseault IV*.

¹ See Garvey Winger, *Rails-to-Trails Program Can Connect Best of Both Worlds for Outdoorsmen*, RICHMOND TIMES-DISPATCH, May 14, 1999, at D4.

² See generally Emily Drumm, Note, *Addressing the Flaws of the Rails-to-Trails Act*, 8 KAN. J.L. & PUB. POL’Y, 158 (Spring 1999).

³ See Mark Taylor, *Dispute Brews Over Craig Creek Valley Rail-to-Trail Project*, ROANOKE TIMES & WORLD NEWS, October 8, 2000, at C10; Joanne Poindexter, *Residents Rail Against Proposed 26-Mile Trail in Botetourt, Craig; Trash, Property Rights, Safety Are Issues*, ROANOKE TIMES & WORLD NEWS, October 6, 2000, at B1; Joanne Poindexter, *Proposed Trail Creates Enthusiasm, Anger; Trail Safety, Maintenance and Rights of Way Top Critics’ List of Concerns*, ROANOKE TIMES & WORLD NEWS, October 4, 2000, at B1.

⁴ 494 U.S. 1 (1990).

⁵ 16 U.S.C. § 1247 (1985).

⁶ *Id.* § 1247(d).

⁷ *Id.* § 1247(d).

⁸ *Preseault v. ICC*, 494 U.S. at 17.

⁹ National Trails System Act of 1968, Pub. L. No. 90-543, 82 Stat. 919 (codified as amended in 16 U.S.C. § 1241-1251 (1985)).

¹⁰ Railroad Revitalization and Reform Act (4-R) Act of 1976, Pub. L. No. 94-210, 90 Stat. 144 (codified as amended in scattered sections of 5, 11, 15, 31, 45, 49 U.S.C.).

¹¹ 16 U.S.C. § 1247(d).

- ¹² H.R. REP. No. 98-28, at 8-9 (1983).
- ¹³ 49 C.F.R. § 1152.29(b) (1999).
- ¹⁴ *Id.* § 1152.29(a).
- ¹⁵ *Id.* § 1152.29(c)-(d).
- ¹⁶ *Id.* § 1152.29(c)(1), (d)(1).
- ¹⁷ *Birt v. Surface Transportation Board*, 90 F.3d 580, 588 (D.C. Cir. 1996).
- ¹⁸ 16 U.S.C. § 1247(d).
- ¹⁹ *Preseault v. ICC*, 494 U.S. 1, 9 (1990).
- ²⁰ *Trustees of Diocese of Vermont v. State*, 496 A.2d 151 (Vt. 1985) (aff'g lower court's dismissal).
- ²¹ *Preseault v. ICC*, 494 U.S. 1, 9 (1990).
- ²² *Id.*
- ²³ *Id.* at 10.
- ²⁴ *Preseault v. ICC*, 853 F.2d 145 (2d Cir. 1988) (hereafter *Preseault I*).
- ²⁵ *Preseault v. ICC*, 494 U.S. 1, 17 (1990).
- ²⁶ *Id.* at 18.
- ²⁷ *Id.* at 17.
- ²⁸ 28 U.S.C. § 1491 (1994).
- ²⁹ *Preseault*, 494 U.S. at 12.
- ³⁰ 309 U.S. 18, 21 (1940).
- ³¹ *Preseault v. ICC*, 494 U.S. 1, 13 (1990) (quoting *Yearsley*, 309 U.S. at 21).
- ³² *Id.* at 17.
- ³³ *Id.* at 10 (quoting *Preseault I*, 853 F.2d at 151).
- ³⁴ *Id.* at 16.
- ³⁵ *Id.* at 5 n.3.
- ³⁶ *Birt*, 90 F.3d at 585.
- ³⁷ *Preseault II*, 494 U.S. at 5 n.3.
- ³⁸ *Birt*, 90 F.3d at 587; *Fritsch v. ICC*, 59 F.3d 248, 253 (D.C. Cir. 1995).
- ³⁹ *Birt*, 90 F.3d at 587.
- ⁴⁰ *Birt*, 90 F.3d at 587.
- ⁴¹ 49 U.S.C. § 10905 (1995) (conditions can only be imposed when the railway has not offered the right-of-way for sale for public purposes "on reasonable terms").
- ⁴² *Id.*
- ⁴³ *Fritsch*, 59 F.3d at 253.
- ⁴⁴ *Id.*; *Becker v. Surface Transportation Board*, 132 F.3d 60, 62-63 (D.C. Cir. 1997).
- ⁴⁵ *Black v. ICC*, 762 F.2d 106, 112 (D.C. Cir. 1985).
- ⁴⁶ *Becker v. Surface Transportation Board*, 132 F.3d 60, 62 (D.C. Cir. 1997).
- ⁴⁷ *Id.*
- ⁴⁸ *Birt*, 90 F.3d at 587.
- ⁴⁹ *Redmond-Issaquah R.R. Pres. Ass'n v. Surface Transportation Board*, 223 F.3d 1057 (9th Cir. 2000).
- ⁵⁰ *Id.* at 1059.
- ⁵¹ *Id.*; see also 49 U.S.C. § 10901 (1996) (governing acquisition exemption procedures).
- ⁵² *Redmond-Issaquah*, 223 F.3d at 1059.
- ⁵³ *Redmond-Issaquah*, 223 F.3d at 1059 (quoting *The Land Conservancy of Seattle and King County—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Ry. Co.*, STB Finance Docket No. 33389 at 3 (served Sept. 26, 1997)).
- ⁵⁴ *Redmond-Issaquah*, 223 F.3d at 1060.
- ⁵⁵ *Redmond-Issaquah*, 223 F.3d at 1060.
- ⁵⁶ 49 U.S.C. § 10904 (1995).
- ⁵⁷ *Redmond-Issaquah*, 223 F.3d at 1060.
- ⁵⁸ *Redmond-Issaquah*, 223 F.3d at 1060.
- ⁵⁹ *Redmond-Issaquah*, 223 F.3d at 1060; see also 49 U.S.C. § 10904(d) (1995) (requiring abandonment or discontinuance of a railway be postponed when a "financially responsible person" makes an OFA).
- ⁶⁰ *Redmond-Issaquah*, 223 F.3d at 1064 (citation omitted).
- ⁶¹ *Preseault II*, 494 U.S. at 16.
- ⁶² *Preseault v. United States*, 100 F.3d 1525, 1550-51 (Fed. Cir. 1996) (hereafter, *Preseault IV*); *Chevy Chase Land Co. of Montgomery County, Md. v. United States*, 37 Fed. Cl. 545, 585 (1997).
- ⁶³ *Preseault IV*, 100 F.3d 1525 (Fed. Cir. 1996).
- ⁶⁴ *Id.* at 1533.
- ⁶⁵ *Id.*
- ⁶⁶ *Id.* at 1550.
- ⁶⁷ *Id.* at 1534.
- ⁶⁸ *Chevy Chase*, 37 Fed. Cl. at 584.
- ⁶⁹ *Preseault IV*, 100 F.3d 1525, 1538-39 (Fed. Cir. 1996) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-1032 (1992)).
- ⁷⁰ *Id.* at 1539.
- ⁷¹ *Id.* at 1540.
- ⁷² *Preseault v. United States*, 27 Fed. Cl. 69, 90 (1992) (hereafter, *Preseault III*).
- ⁷³ *Preseault IV*, 100 F.3d at 1541.
- ⁷⁴ *American Oil Co. v. Leaman*, 101 S.E.2d 540, 552 (Va. 1958); *McCrerry v. Chesapeake Corp.*, 257 S.E.2d 828, 831 (Va. 1979).
- ⁷⁵ See *Gordon Metal Co. v. Kingan & Co.*, 111 S.E. 99, 100 (Va. 1922) (relying upon 1919 Code).
- ⁷⁶ *Preseault IV*, 100 F.3d at 1533.
- ⁷⁷ *Sanford v. Sims*, 66 S.E.2d 495, 496 (Va. 1951).
- ⁷⁸ *Id.* at 496.
- ⁷⁹ *Id.* at 497.
- ⁸⁰ *Id.* at 499 (however, the failure of the owners of the reversionary interest to assert their claim within the statute of limitations prevented reversion).
- ⁸¹ *Preseault IV*, 100 F.3d at 1533.
- ⁸² *Id.* at 1550.
- ⁸³ 45 Fed. Cl. 771 (2000).
- ⁸⁴ *Id.* at 781.
- ⁸⁵ *Virginian Ry. Co. v. Avis*, 98 S.E. 638, 641 (Va. 1919).
- ⁸⁶ *Martin v. Norfolk Redevelopment & Hous. Auth.*, 140 S.E.2d 673, 677-78 (Va. 1965).
- ⁸⁷ *Shreve v. Norfolk & W. Ry. Co.*, 64 S.E. 972, 975 (Va. 1909).
- ⁸⁸ *Virginia Hot Springs Co. v. Lowman*, 101 S.E. 326, 330 (Va. 1919).
- ⁸⁹ *Id.*; see also *Anderson v. Stuarts Draft Water Co.*, 87 S.E.2d 756, 759 (Va. 1955) (applying *Virginia Hot Springs* analysis).
- ⁹⁰ *Virginia Hot Springs*, 101 S.E. at 330.
- ⁹¹ *Stuarts Draft Water*, 87 S.E.2d at 760.
- ⁹² *Robertson v. Bertha Mineral Co.*, 104 S.E. 832, 835 (Va. 1920) (emphasis added).
- ⁹³ *Preseault IV*, 100 F.3d 1525, 1543 (Fed. Cir. 1996).
- ⁹⁴ *Id.* at 1542-43.
- ⁹⁵ *Cushman Va. Corp. v. Barnes*, 129 S.E.2d 633, 639-40 (Va. 1963) (citations omitted, emphasis added).
- ⁹⁶ *Preseault IV*, 100 F.3d at 1542-43.
- ⁹⁷ See *Virginia Hot Springs, Bertha Mineral Co.*; see also *Hermitage Methodist Homes of Va., Inc. v. Dominion Trust Co.*, 387 S.E.2d 740 (Va. 1990) (refusal to alter a trust's racial limitation).



***Bragg v. Robertson* — Section 404 of the Clean Water Act, and Mountaintop Removal: Where Do We Go From Here?**

by Christopher Luttrell

Introduction

On October 20, 1999, United States District Court Chief Judge Charles Haden shocked the coal mining community of West Virginia when he handed down his decision in *Bragg v. Robertson*.¹ By granting the Plaintiffs' motion for summary judgment on two critical issues,² Chief Judge Haden effectively destroyed the present-day practices of mountaintop removal in the State of West Virginia. Specifically, Chief Judge Haden held that the Director ("Director") of the West Virginia Department of Environmental Protection ("DEP") lacks authority to issue valley fill permits under the auspices of present valley fill permitting practices involving perennial and intermittent streams.³ Depending upon the Fourth Circuit, Chief Judge Haden's decision may reverberate throughout other states, such as Virginia and Kentucky, where mountaintop removal mining and valley fills endure under similar regulatory practices as those in West Virginia.

Undoubtedly, Chief Judge Haden's decision is one that will be debated for years. Such will be the life of any decision that so strongly affects the economic, environmental, and social interests of an industry as important as West Virginia coal mining. As the motto goes, coal mining in West Virginia is more than a job – it's a way of life.

The interests involved, however, only represent a portion of *Bragg's* enormity. Of noted importance is Chief Judge Haden's interpretation of the Clean Water Act ("CWA")⁴—an interpretation that destroyed what for years had been considered the appropriate method for issuing valley fill permits. Specifically, Chief Judge Haden held that Section 404 of the CWA, a section entitled "Permits for dredged or fill material," does not apply to valley fills.⁵ Many people have speculated as to the effects Chief Judge Haden's decision will have on more sexy issues—such as the buffer-zone rule, which will be discussed later. This paper, however, is going to examine a topic less attractive, but possibly more important: how has *Bragg* affected the regulation of valley fills under the CWA.

In order to conduct a thorough study of this issue, this paper will first give a description of the traditional permitting practices—those implemented during the pre-*Bragg* era. Then, this paper will examine Chief Judge Haden's rationale for deciding that Section 404 does not apply to valley fills. Finally, this paper will determine if, in fact, Chief Judge Haden has legislated from the bench or merely revealed the correct application of existing law.⁶

Valley Fill Permitting Under Section 404 in the Pre-*Bragg* Era

Under the pre-*Bragg* regulatory regime, there were three CWA permits that a coal operator had to obtain in order to construct a valley fill: a Section 401 permit,⁷ a Section 402 permit,⁸ and a Section 404 permit.⁹

The Section 401 permit, commonly referred to as a water-quality certification, assures that the proposed valley fill complies with all CWA requirements.¹⁰ In addition, the agency issuing the permit must also assure that all comparable state provisions are satisfied.¹¹ Section 401

permits are more or less a certification that water quality standards are met from the state where the "discharge originates or will originate."¹² In West Virginia, the Director of the DEP is authorized to issue certification of water quality standards. In the event the state does not have an agency authorized to issue Section 401 permits, the Administrator ("Administrator") of United States Environmental Protection Agency ("EPA") issues the permit.

Section 402 governs the discharge of pollutants into waters of the United States.¹³ Under Section 402, the Administrator is authorized to establish guidelines and requirements that ensure compliance under prescribed criteria established in enumerated sections of the CWA¹⁴ or to establish "such conditions as the Administrator determines are necessary to carry out the provisions of...[the CWA.]"¹⁵

The Section 402 permit is part of the National Pollutant Discharge Elimination System ("NPDES") permit program. The NPDES, which is set up to govern the discharge of pollutants from a point source into the waters of the United States, is best described as a system of cooperative federalism. A state, under Section 402(b), can propose a "full and complete description of the program it proposes to establish and administer" to govern the discharge of pollutants into the waters of the United States.¹⁶ If the state program is authorized, then the state appoints an agency to issue Section 402 permits.¹⁷ Similar to Section 401 permits, when the state does not have an authorized program, the Administrator issues the permits.¹⁸ West Virginia has an approved program, and has subsequently appointed the DEP to issue Section 402 permits.¹⁹

The Section 404 permit²⁰ is the odd-duck of the CWA. Unlike Section 401 or 402 permits which are authorize by either state agencies or the EPA, Section 404 permits are issued by the Secretary of the Army ("Secretary") acting through the

Chief of Engineers, a member of the Army Corp of Engineers (“Corp”).²¹ This section of the CWA governs the discharge of dredged or fill materials from a point source into the waters of the United States.²² Dredged material is any material that is dredged or excavated from a body of water.²³ Fill is “any material that is used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody.”²⁴ Traditionally, operators and the bureaucrats authorized to issue Section 404 permits assumed that a valley fill is composed of fill, and therefore requires a Section 404 permit. Chief Judge Haden rejected this traditional interpretation – a rejection that will be examined at length in the next section of this paper.

According to Section 404, the Secretary is bound by certain guidelines before he or she can legitimately issue a Section 404 permit.²⁵ These guidelines, which are purported “to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of dredged or fill material,”²⁶ are developed by the Administrator of the EPA²⁷ in conjunction with the Secretary.²⁸ These guidelines are composed to establish certain criteria to be followed when assessing proposed dredged and fill permits²⁹ and reflect a basic presumption of the CWA: discharge of dredged or fill material into the waterways, unless causing only minimal and acceptable adverse impacts on the ecosystem, should be prohibited.³⁰ Many times, these guidelines are referred to as 404(b)(1) Guidelines.

Specifically, 404(b)(1) Guidelines set forth enumerated criteria that must be followed when the Secretary considers a Section 404 permit. These considerations are as follows: (1) is “there is a practicable alternative to the proposed discharge which would have less adverse impact of the aquatic ecosystem;”³¹ (2) will the discharge

cause or contribute to violations of any preexisting law, either state or federal, concerning water quality, effluent standards, or protected species;³² (3) will the discharge cause “significant degradation of the waters of the United States;”³³ and (4) have “appropriate and practicable steps...been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.”³⁴

As one can see, the regime that existed prior to *Bragg* required the operator to face a myriad of qualifications in order to obtain the permit. For years, this regime existed, as both state and federal agencies and coal operators assumed that the 404 permit was a necessary section of valley fill permitting process. As the next section of this paper will illustrate, Chief Judge Haden abrogated this approach, leaving many people wondering, “What’s next?”

Bragg v. Robertson: Section 404 Does Not Apply to Valley Fills

In July 1998, the West Virginia Highlands Conservancy and a handful of West Virginia citizens (collectively, “Plaintiffs”) brought suit against a group of Federal and West Virginia state officials (collectively “Defendants”) for alleged violations under the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”).³⁵ According to the Plaintiffs, the Defendants (1) were engaged in a “pattern and practice” of issuing valley fill permits without first making necessary findings in accordance with state and federal law and (2) that the Director’s authority did not extend to issuing permits for valley fills that bury substantial portions of intermittent or perennial streams.³⁶

Through a proposed consent decree, all but two of the original claims were settled. Included within this settlement were Counts 11, 12, and 13, which, when settled, dismissed the Federal Defendants.³⁷ The

Court accepted this decree, but retained jurisdiction to “interpret and enforce the agreement until fully performed.”³⁸

When the dust cleared, only two of the original claims remained. Both of these claims were based upon the “buffer-zone” rule—a component of SMCRA promulgated by the Office of Surface Mining (“OSM”) to protect streams, stream channels, and stream ecology.³⁹ The buffer-zone rule has specific guidelines that the authorized agency must follow before issuing a permit, similar to the 404(b)(1) Guidelines.⁴⁰ In West Virginia, the Director of the DEP is authorized to issue buffer-zone permits and, by law, required to make enumerated findings under the buffer-zone guidelines.⁴¹

In response to these two claims, the Defendants offered a variety of defenses, including one that relied on a Memorandum of Understanding entered into by the DEP, the EPA, the OSM, and the Corp.⁴² The Memorandum allows “...that the findings for buffer-zone authorization are to be met through compliance with the ostensibly comparable...[404(b)(1) Guidelines] necessary to carry out dredge and fill activities under CWA § 404.”⁴³ In other words, the Memorandum states that the buffer-zone rule findings were not required to issue a buffer-zone permit. Instead, as long as the 404(b)(1) Guidelines were followed, a buffer-zone permit could be granted.⁴⁴

The Defendants’ arguments under the Memorandum relied heavily on the premise that CWA Section 404 permits valley fills.⁴⁵ This interpretation was, as stated before, the accepted interpretation within the coal mining community, both among bureaucrats and coal operators. Simply stated, it was believed that in order to obtain a valley fill permit, the coal operator had to obtain a Section 404 permit from the Corp.

As stated in a previous section of this paper, Section 404 applies to dredged or fill material discharged

into the waters of the United States. Dredged material is “material that is dredged from waters of the United States.”⁴⁶ Since “the overburden originating from mountaintop mining is not excavated or dredged from the waters of the United States,”⁴⁷ Chief Judge Haden’s analysis focused on fill material and its meaning.

The Corps and the EPA define fill material as “any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody.”⁴⁸ According to this definition, pollutants⁴⁹ that are “discharged into the water primarily to dispose of waste” are not included under Section 404. Discharge of pollutants for the primary purpose of waste is regulated by the EPA under Section 402 of the Clean Water Act.⁵⁰

The Code of Federal Regulations provides a list of activities that are regulated by Section 404. This list includes:

“Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands, property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.”⁵¹

According to Chief Judge Haden, a valley fill, in spite of the commonality of name, does not fit under the Section 404’s definition of fill. He gives two basic explanations for this conclusion. First, although a valley fill does have the effect of replacing an aquatic area with dry land and changes the bottom elevation of

land, it is not **constructed** to replace an aquatic area with dry land or to change the bottom elevation of land. Instead, a valley fill is intended to **dispose** of rock and dirt. The fact that a valley fills in a waterbody is only incidental. When a coal operator sets out to construct a valley fill, his or her intention is to create a dump for the overburden from its mining operation. This overburden is industrial waste⁵² and therefore a pollutant as defined by the Code of Federal Regulations (“C.F.R.”).⁵³ Consequently, a valley fill is regulated under Section 402 of the CWA.⁵⁴

Secondly, Chief Judge Haden states that Section 404 only applies to activities that are constructive by nature. In each example provided by the C.F.R., the intention of the listed activity is to construct or build a device or structure that has future value. For example, dams may generate electricity; levees, hopefully, will stop the free flow of water; fill for site development creates a more attractive or more workable land. A valley fill, however, provides no advantages for future land use.⁵⁵ It merely fills a hollow or a valley, destroying streams in the process. Chief Judge Haden makes note that none of the activities listed in the C.F.R. “include any sort of waste disposal.”⁵⁶ After completely his analysis of the relevant statutory law, Chief Judge Haden moved to the limited case law that attempts to provide a definition of a valley fill. In *Friends of Santa Fe County v. Lac Minerals, Inc.*, a local environmental advocacy group brought a citizen suit under a collection of state and federal environmental regulations, including the CWA.⁵⁷ According to the advocacy group, the defendants violated Section 404 of the CWA by constructing an overburden pile from a gold mine. This overburden pile resulted in acid mine drainage, thus violating Section 404 of the CWA.⁵⁸

The District Court of New Mexico rejected the advocacy group’s argument, holding that the overburden was not “dredged material” or “fill material” under CWA Section 404.⁵⁹

Instead, overburden is a “pollutant discharged into the waters of the primarily to dispose of waste.”⁶⁰ Consequently, overburden is governed by Section 402 of the CWA, and under the auspices of the EPA.

In *West Virginia Coal Association v. Reilly*, a group of coal mining associations and coal mining companies raised an argument similar to that in *Lac Minerals*.⁶¹ Here, the plaintiffs argued that permitting authority over valley fill permits rests with the Secretary and not the EPA. In other words, the plaintiffs asserted that Section 404 which covers “dredged” or “fill” material applies to valley fills. Thus, the Secretary, and not the EPA, has power to issue valley fill permits.⁶² The Court responded with the following:

“[B]ecause the [Corps’] definition of fill material included only material placed for the ‘primary purpose’ of ‘changing the bottom elevation of a waterbody,’ it would appear that the [Corp] never intended to regulate the disposal of waste or spoil in valley fills. The primary purpose of the fills...is to dispose of waste..., not to create dry land such as is need for construction of buildings, or land development, as contemplated by the [Corps’] definition above.”⁶³

In short, the Court found that the permitting of valley fill material was under the auspices of the Secretary and not the Administrator. Standing by precedent, Chief Judge Haden accepted this definition, and, in conjunction with his interpretation of relevant statutes, held that the Corps’ Section 404 authority does not apply to valley fills.⁶⁴

Bragg leaves the coal community with a thinner, more fit regulatory regime under the CWA. As discussed previously, the traditional practice under the CWA was to obtain permits under Sections 401, 402, and 404. Now, the practice will only contain Section 401 and 402 permits. Valley fills, in spite of past misunderstandings, are composed

of pollutants and thus regulated under Section 402.

In some ways, it seems as if *Bragg* may have certain favorable effects on the mining industry; the resulting regulatory regime under the CWA is simplified, and simplification undoubtedly means less procedure. Furthermore, coal operators obtained Section 402 permits under the traditional permitting process. Obtaining that same permit cannot be too hard, right?

This is not the case. Simplicity of procedure should not be confused with simplicity of substance. It is quite conceivable that the EPA under its Section 402 authority will create regulations that are more stringent than the 404(b)(1) Guidelines. Due to increased public and political awareness surrounding mountaintop removal, EPA officials, including the Administrator, now have an increased interest in protecting themselves from scrutiny. Strengthening Section 402 guidelines that govern valley fill permits is an easy and effective way to gain such protection.

Such a result occurred in *Reilly*. The underlying claims brought by the West Virginia Coal Association against the EPA were based on the EPA's adoption of a policy that generally prohibited in-stream treatment ponds and fills for coal mining wastewater.⁶⁵ This policy set up a very detailed protocol limiting when the EPA would "not object to a proposed in-stream pond or fill."⁶⁶ From 1987 until the *Reilly* decision in 1989, 41 draft permits out of a total of 700 submitted by the West Virginia Department of Natural Resources were rejected on the basis of the EPA's concerns about in-stream treatment.⁶⁷

As the *Reilly* claim illustrates, the EPA has been known to promulgate regulations under its Section 402 authority that detrimentally affect the coal industry. A similar result in the future is not inconceivable.

When the *Bragg* opinion was released, the citizens of West Virginia reacted in a variety of ways. Environmentalists commended Chief Judge Haden for taking a stand in an area of law that many judges feared. Governor Cecil Underwood, a strong advocate of mountaintop removal mining, criticized Chief Judge Haden for "effectively halt[ing]...much of the mining of coal mining in [West Virginia.]"⁶⁸ Governor Underwood also describes the actions of the Plaintiffs as the cause of "extensive human suffering."⁶⁹

Obviously, much of the fanaticism surrounding the *Bragg* decision centers on Chief Judge Haden's buffer-zone holding and resulting injunction directed against the Director of the DEP. As time progresses, however, Chief Judge Haden's CWA interpretation may garner more attention, especially if the EPA dictates stringent guidelines similar to those addressed in *Reilly*. Then, it becomes more likely that Chief Judge Haden's CWA interpretation will gain interest. Inevitably, such interest will breed criticism, criticism similar that heard today throughout the coal mining community.

The criticism, however, may be unwarranted. Chief Judge Haden did nothing more than interpret the law as it applied to valley fills. The case law, which was directly on point, defined the parameters of the Corps' authority under Section 404. The applicable CWA Sections—401, 401 and 404, are clear and unequivocal in defining their scope.

Depending upon the impending Fourth Circuit review, the predicament this paper foresees may or may not come to fruition. Taking into consideration the Fourth Circuit's reputation, Chief Judge Haden's opinion is arguably ripe for reversal, or maybe not—who knows? Only time will tell what effects, if any, Chief Judge Haden's decision will have on the coal mining community of West Virginia.

On December 7, 2000, the Fourth Circuit Court of Appeals entertained oral arguments in the *Bragg v. Robertson* case. Individuals, both for and against mountaintop removal mining, anticipate and hope that the Fourth Circuit's opinion in *Bragg* will provide some guidance in the application of the Clean Water Act to valley fills. Yet, given the intensity that inspires both advocates for and against mountaintop removal mining, the Fourth Circuit's upcoming decision will likely prove to be nothing more than another step in a long line of appeals for the valley fill issue. This paper attempts to analyze the merits behind Chief Judge Charles Haden's decision to issue the injunction halting the continued use of valley fills.

¹ *Bragg v. Robertson*, No. 2:98-0636, 1999 WL 1000181 (S. D. W. Va. 1999).

² The plaintiffs sought to enjoin the defendants from granting further valley fill permits under the present-day practices. The court, as stated above, sided with the plaintiffs and enjoined the Director of the West Virginia Department of Environmental Protection from (1) granting further buffer zone permits without first making mandatory findings as required by both state and federal law and (2) from approving further surface mining permits under current state and federal laws that would authorize the placement of excess soil in intermittent and perennial streams for the primary purpose of disposal. See *Id.* at 15-17.

³ On October 29, 1999, Chief Judge Haden stayed his decision amidst what he labeled "misunderstandings" and "egregious misrepresentations." See, *Memorandum Opinion and Order Granting Stay*, No. 2:98-0636, 1999 WL 1000195 (S. D. W. Va. 1999).

⁴ Federal Water Pollution Control (Clean Water) Act, §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994).

⁵ See 33 U.S.C. 1344.

⁶ Details of the underlying claims in *Bragg* are beyond the scope of this paper and will not be discussed unless beneficial for a more thorough understanding of Section 404 of the CWA. This paper is not intended to be a recapitulation of the entire *Bragg* opinion.

⁷ See 33 U.S.C. § 1341.

⁸ See § 1342.

⁹ See § 1344.

¹⁰ § 1341(a)(1).

¹¹ *Id.* The applicable state statutes, such as the West Virginia Water Pollution Control Act, will not be examined in this paper. See, W. VA. CODE § 22-1-6 (1994).

¹² 33 U.S.C. § 1341(a)(1).

¹³ *Id.*

¹⁴ The enumerated sections are §§ 1311, 1312, 1316, 1317, 1318, and 1348. The content of these sections are of little importance to this paper and will not be described.

¹⁵ § 1342(a).

¹⁶ § 1342(b).

¹⁷ *Id.*

¹⁸ § 1342(a)(1).

¹⁹ See W. VA. CODE § 22-1-6(d)(6) (1994).

²⁰ Under Section 404, the Secretary is authorized by Congress to issue two types of permits, individual or general. See 33 U.S.C. § 1344(a) and (e). An individual permit only applies to a specific site. A general permit can be issued for a category of activities involving dredged or fill material as long as the Secretary "determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." General permits are limited to a five year life and can be revoked or modified at any time by the Secretary.

²¹ § 1344(d).

²² The definition of "waters of the United States" has evolved over time. In 1975, the District Court for the District of Columbia held that Congress intended to assert federal jurisdiction over the nation's waters to the maximum extent permitted under the commerce clause of the Constitution. See, *N.R.D.C. v. Callaway*, 392 F.Supp. 685 (D. D. C. 1975). Since then, the Corps has extended the definition of waterways to include artificially created wetlands and wetlands physically separated from other waters. See, Lawrence R. Liebesman, *The Section 404 Dredged and Fill Material Discharge Permit Program*, in *THE CLEAN WATER ACT HANDBOOK* 136 (Parthenia B. Evans ed. 1994).

²³ Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 C.F.R. § 323.2(c).

²⁴ 33 C.F.R. § 323.2(e).

²⁵ 33 U.S.C. § 1341(a).

²⁶ 40 C.F.R. § 230.1.

²⁷ See 40 C.F.R. § 230.

²⁸ See 33 C.F.R. § 328.

²⁹ 40 C.F.R. § 230.1-80.

³⁰ 40 C.F.R. § 230.1(c).

³¹ 40 C.F.R. § 230.10(a).

³² 40 C.F.R. § 230.10(b).

³³ 40 C.F.R. § 230.10(c).

³⁴ 40 C.F.R. § 230.10(d).

³⁵ Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87 (1977), 30 U.S.C. §§ 1201-1328 (1994).

³⁶ Bragg, 1999 WL 1000181, at *2.

³⁷ The Federal Defendants were all members of the Army Corp of Engineers, including Colonel Dana Robertson, the named Defendant. See *Id.*, 1999 WL 1000181, at *2.

³⁸ *Id.*, 1999 WL 1000181, at *2, *citing* Bragg v. Robertson, 54 F.Supp. 2d 653 (S. D. W. V. 1999).

³⁹ *Id.* *citing* FED. REG. 15176.

⁴⁰ The West Virginia buffer-zone rule states: "No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will (1) not adversely affect the normal flow or (2) gradient of the stream, (3) adversely affect fish migration or (4) related environmental values, (5) materially damage the water quality or (6) quality of the stream and (7) will not cause or contribute to violations of applicable State and Federal water quality standards." W. VA. CODE ST. R. title 38 § 2-5.2 (1998). The Federal buffer-zone rule is found at 30 C.F.R. § 816.57, and states many of the same requirements.

⁴¹ W. VA. CODE ST. R. title 38 § 2-5.2 (1998).

⁴² This Memorandum was entitled "For the Purpose of Clarifying the Application of Regulations Related to Stream Buffer Zones Under the Surface Mining Control and Reclamation Act for Surface Coal Mining Operations that Result in Valley Fills."

⁴³ 33 U.S.C. § 1344.

⁴⁴ Since Section 404 Guidelines are part of a separate certification process conducted by the Corps, substituting the Section 404 Guidelines would essentially nullify all

responsibility on the part of the Director to make required findings. In other words, the Director, under the Memorandum's interpretation of the law, could find that the Corps had issued a Section 404 permit, and thus excuse himself or herself from making any substantive findings. In fact, the Director would not be required to make any substantive findings under the Memorandum's interpretation.

⁴⁵ Chief Judge Haden, however, states that the Memorandum does not rely solely on the Corps' Section 404 authority to issue valley fill permits. The Memorandum was entered into by three different agencies. The OSM, which is responsible for issuing valley fill permits, is authorized to make such a substitution, in spite of the fact that the Corp lacked the authority under Section 404 to grant valley fill permits. Therefore, Chief Judge Haden's second step for explaining the rationale behind his decision was to compare the Section 404 Guidelines with the buffer-zone guidelines. After an exhaustive study, Chief Judge Haden concluded that the Section 404 Guidelines were "more lenient, less protective" than the buffer-zone guidelines. Consequently, the Defendants' Memorandum argument was rejected. See, Bragg, 1999 WL 1000181, at *12.

⁴⁶ 33 C.F.R. § 323.3(c).

⁴⁷ Bragg, 1999 WL 1000181, at *10.

⁴⁸ 33 C.F.R. § 323.2(e).

⁴⁹ Pollutants are defined as "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials,...heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural wastes discharged into water." 40 C.F.R. § 122.2.

⁵⁰ 33 C.F.R. § 323.2(e).

⁵¹ 33 C.F.R. § 323.3(f).

⁵² Bragg, 1999 WL 1000181, at *10.

⁵³ See footnote 49.

⁵⁴ Bragg, 1999 WL 1000181, at *10.

⁵⁵ Some advocates for mountaintop removal mining will argue that valley fills do in fact provide more manageable land since the land is flatter. Chief Judge Haden, however, relies on the intention of the activity, not the effect.

⁵⁶ Bragg, 1999 WL 1000181, at *10.

⁵⁷ *Friends of Santa Fe County v. Lac Minerals, Inc.*, 892 F.Supp. 1333 (D. N. M. 1995).

⁵⁸ *Id.*, at 1337.

⁵⁹*Id.*, at 1342-43.

⁶⁰*Id.*, at 1342.

⁶¹West Virginia Coal Association v. Reilly, 728 F. Supp. 1276 (S. D. W. V. 1989).

⁶²*Id.*, at 1282.

⁶³Bragg, 1999 WL 1000181, at *11, *citing*, Reilly 728 F.Supp. at 1286-87.

⁶⁴The Fourth Circuit Court of Appeals affirmed Reilly and made its own statement in an unpublished opinion. This Court stated: "The discharge of fill material at issue here is expressly for the purpose of disposing of waste or spoil from the mining operations." Bragg, 1999 WL 1000181, *11, *citing*, West Virginia Coal Association v. Reilly, 932 F.2d 964, 1991 WL 75217 at *4 (4th Cir. 1991). This statement may prove relevant in the near future when the Bragg decision is appealed.

⁶⁵Reilly, 728 F. Supp., at 1277.

⁶⁶*Id.*, at 1280.

⁶⁷*Id.*, at 1281.

⁶⁸Cecil Underwood, Position Paper Patricia Bragg, et al., v. Col. Dana Robertson, et al. < <http://www.state.wv.us/governor/pp102999.htm>

⁶⁹*Id.*



2001 Select Environmental Bills Passed by the Virginia General Assembly and Approved by the Governor

David R. DuBose

The Virginia General Assembly adjourned February 24, 2001. Although the focus of this "short" session was the state budget, the legislature passed several environmental measures:

HB 1687 [Amending Section 10.1 -1022.1]

Land Conservation Foundation; Funds for Natural Area Protection

Removes a previous restriction that a holder or a public body must be in existence or operating in Virginia for more than five years in order to qualify for a state grant for purchasing an interest in land for the protection of a natural area. (This bill is identical to SB 1012.)

HB 1758 [Amending Section 62.1-44.33]

Boats and Vessels; Waste Discharge Regulations

Requires the Salt Water Control Board regulations controlling the discharge of waste from boats into the waterways of Virginia to become effective no later than July 1, 2002.

HB 1873 [Amending Section 10.1-1429.1]

Voluntary Remediation of Contaminated Properties

Expands voluntary remediation program for properties owned by local governments by (1) ending the requirement that local governments must pay registration fees when voluntarily remediating their properties; (2) creating the Virginia Voluntary Remediation Fund to provide grants to local governments in order to encourage remediation of contaminated properties; and (3) authorizing loans to be made from the Virginia Water Facilities Revolving Fund to local governments for remediating contaminated properties to reduce ground water contamination.

HB 1875 [Amending and reenacting Section 10.1-1142]

Open Burning

Amends the qualified restriction on open burning between Febru-

ary 15 and April 30 of each year. It allows open burning if the fire is for prescribed burning and managed by someone certified in such an activity. The State Forester must grant approval of the burn before February 1. Open burning is also permitted to control either exotic or invasive plant species, to maintain or establish wildlife habitats, or for management of heritage resources. The State Forester has the power to revoke, if any open burning presents a hazard.

HB 2177 [Amending Section 10.1-418]

Staunton Scenic River

Extends from 10.8 to 40.5 miles the portion of the Staunton River designated as part of the Virginia Scenic Rivers System.

HB 2223 [Adding Section 18.2 - 145.1]

Agricultural or Forestry Product, Facility or Animal

Provides for a misdemeanor offense or felony upon any entity that destroys a farm product grown for testing or research purposes in product development. (This bill is identical to SB 1187).

HB 2292 [Amending Chapters 1032 and 1054 of the Acts of Assembly of 2000]

Nontidal Wetlands; Effective Date

Moves up, from October 1, 2001 to August 1, 2001, the effective date for the comprehensive nontidal wetlands regulatory program for the Virginia Department of Transportation's linear transportation projects. (This bill is identical to SB 1243).

HB 2302 (Adding Section 10.1 - 2- 200.2 and Amends Section 10.1 - 202]

Littering in State Parks

Imposes a fine of up to \$250 for littering in a state park. Proceeds are to be used for park maintenance.

HB 2310 [Amending Section 62.1-44.15:1.2]

Lake Level Contingency Plans

Requires contingency plans for surface water impoundments used to cool generators that takes into account and minimizes adverse effects on beneficial uses (protection of wildlife, recreation, and cultural value) of any release reduction requirements. The reduction in the release amount would not be implemented if it adversely affects (1) the ability to meet quality water standards, (2) the ability to provide adequate water for consumption, or (3) fish and wildlife.

HB 2330 [Adding Section 10.1 - 1186.4]

Enforcement in Federal Courts of Matters within Jurisdiction of the State Environmental Agencies.

Authorizes the Virginia Attorney General to intervene on behalf of various state environmental boards pursuant to Rule 24 of the Federal Rules of Civil Procedure upon any action in federal court to resolve a litigation dispute brought by the federal Environmental Protection Agency. (This bill is identical to SB 1297).

HB 2417 [Amending Section 28.2-520]

Hydraulic Dredges; Clams

Prohibits a person from (1) using a hydraulic dredge to harvest clams, or (2) having a hydraulic dredge on board his boat, unless a permit has been issued by the Marine Resources

Commission. An exemption is provided for anyone traveling between docks for maintenance or repair, or when off loading catches made in federal waters. A violation of this section is a Class 1 misdemeanor.

HB 2601 [Amending and Reenacting Section 62.1 - 44.5]

Discharges into State Waters; Notification Required

Amends the former notification requirement to include all persons, not just those with a discharge permit from the State Water Control Board, to notify state authorities of the occurrence of an illegal discharge into state waters. (This bill is identical to SB 1285).

HB 2774 [Amending Sections 62.1-198 and 62.1-199]

Resources Authority

Adds the remediation of brownfields and contaminated properties to the list of projects that may be funded through the Virginia Resources Authority. (This bill is identical to SB 1402).

HB 2827 [Amending Section 62.1-44.19:3]

Sewage Sludge

Authorizes localities to adopt an ordinance that provides for the monitoring of the land application of sewage sludge. The Board of Health shall adopt regulations, by January 1, 2003, requiring persons whose land applies sludge to pay a fee. The fee cannot exceed the direct costs to localities for monitoring the application of sewage sludge.

SB 837 [Amending Section 28.2-1203]

Subaqueous Permit Exemption

Exempts from having to obtain a permit from the Virginia Resources

Commission certain landowners who withdraw water for agricultural, horticultural or silvicultural irrigation on riparian lands or for the watering of animals on riparian lands. Landowners qualify for the exemption if (1) they do not erect a permanent structure on the river bed, (2) they comply with requirements administered by the DEQ under Title 62.1, and (3) the activity does not adversely impact instream beneficial uses.

SB 1003 [Adding Section 10.1-1422.6 and repealing Section 10.1-1422.5]

Statewide Recycling Program

Requires the state Department of Environmental Quality (DEQ) to establish a statewide program to manage (1) used motor oil; (2) oil filters; and (3) antifreeze. The DEQ is charged with (a) maintaining a list of sites that accept these used products; (b) creating a website with information on collection sites; and (c) developing an outreach education program. Retailers who sell such products but who do not accept the return of used products must post a sign giving consumers information on collection sites. Failing to post such a sign is subject to a \$25 fine.

SB 1112 [Reenacting Section 58.1-439.7]

Income Tax Credit for Purchase of Machinery and Equipment for Processing Recyclable Materials

Extends from January 1, 2001, to January 1, 2004, the sunset date of both corporate and income tax credits allowed for purchase of machinery and equipment for processing recyclable materials.

SB 1166 [Amending Section 10.1-604]

Definition of Impounding Structure

Revises the definition of "impounding structure" to include: (1) all dams that are twenty-five feet or greater in height and that create an impoundment capacity of fifteen acre-feet or greater, and (2) all dams that are six feet or greater in height and that create an impoundment capacity of fifty acre-feet or greater.

SB 1247 [Amending Sections 10.1-563 and 10.1-566]

Regulation of Land-disturbing Activity

Requires, as a prerequisite for the approval of soil and erosion plan, a certificate of competence issued by the Board of Soil and Water Conservation to be obtained by an individual who will be in charge of and responsible for carrying out land-disturbing activities.

SB 1251 [Amending Section 10.1-2128]

Virginia Water Quality Improvement Fund

Provides that local governments are eligible for Virginia Water Quality Improvement Fund grants for point or non-point source pollution prevention, reduction and control programs or for efforts on land leased to a local government by the Commonwealth.

SB 1318 [Amending section 46.2-1304.1]

Commercial Vehicles Used to Transport Municipal Solid Waste

Allows local governing bodies to regulate commercial vehicles used to transport municipal solid waste by 1) prohibiting such vehicles from being parked at locations other than those specified in the ordinance and 2) requiring leak proof construction

of vehicle cargo compartments. Penalties for violations could be no more stringent than those allowed for traffic violations (*i.e.* up to \$200).

SB 1348 [Amending Section 62.1-44/15:3]

New Individual Pollutant Discharge Elimination Permit

Requires applications for new individual Virginia Pollutant Discharge Elimination permits authorizing the new discharge of sewage, industrial waste, or other waste into state waters to be certified by local authorities that the location and operation of the discharging facility are consistent with applicable ordinances. Reduces from 45 to 30 the number of days within which the locality must notify the applicant and the State Water Control Board of the facility's compliance or non-compliance.

SB 1386 [Amending Section 10.1-1322.3]

Air Emissions Banking Program

Requires that the banking and trading credits or allowances regulations of the Air Pollution Control Board applicable to the electric power industry promote competition in the industry; foster construction of new, clean generating facilities; and provide set-asides for new sources of emissions of five percent for the first five years and two percent per year thereafter. The initial allocation period is five years.

SB 1404 [Amending Section 62.1-44.18:3]

Permits for Private Sewerage Facilities; Waiver of Filing Requirements

Provides that the State Water Control Board may waive the requirement that an operator of a private sewerage facility file a plan to control the threat to public health or

the environment from the closure of such facility, if the operator was permitted prior to January 1, 2001 and discharges less than 5,000 gallons of effluent per day. The Board may issue the waiver upon a finding that, for at least five years, the operator has not violated any regulation or order of the Board, of a permit, or any provision of the State Water Control Law. The locality in which the facility is located must approve the waiver, and the Board may revoke the waiver in good faith. If the cessation of an operation with a waiver results in significant harm, the operator is guilty of a Class 4 felony and he is liable to the Commonwealth and any applicable subdivisions.

S.J. 373 [Resolution]

The Commission Studying the Future of Virginia's Environment

Provides that the Commission Studying the Future of Virginia's Environment shall continue to monitor the implementation of its recommendations and create opportunities for Commission members to become familiarized with environmental issues that may require legislative action. The Commission must report its findings and recommendations to the Governor and the 2002 Session of the General Assembly.

Failed Bills

Several environmental bills failed in committee, but bear watching next year. For example, SB 821, a bill to expand the geographical scope of the Chesapeake Bay Preservation Act (CBPA) was put off indefinitely by a 9 to 4 vote of the Senate Agriculture, Conservation and Natural Resources Committee on January 22nd. On the same day, a bill to establish new civil penalties for violations of the CBPA, SB 1256, was defeated by the same Senate committee.

Originally enacted in 1988, the CBPA requires, in part, that land developers and farming operations establish buffer zones to prevent agricultural runoff and other pollution sources from contaminating streams and rivers that ultimately flow into the Chesapeake Bay.

At present, the reach of the CBPA extends to geographic areas that, generally, are located to the east of Interstate 95. SB 821, the bill put off by committee, would have extended the coverage of the CBPA to some locations in western Virginia.

Other environmental legislation which failed in committee include:

HB 712

Natural Resources Policy Act

Summary as introduced:

The bill creates the Virginia Natural Resources Policy Act. The Act repeals the existing Environmental Impact Statement review process (which applies to state projects using \$100,000 in state funds) and replaces it with a natural resource impact review process. This process applies to actions utilizing \$500,000 or more of state-provided funds for the acquisition of an interest in land; for the construction of any new facility; or for the improvement, expansion, support or maintenance of an existing facility. Policies against which such actions are to be judged are expressed. The Virginia Natural Resources Council is created to review the natural resource impact reports and provide comment to the Governor. State funds are not to be disbursed for actions reviewable by the Council without the Governor's approval following his review of the Council's comments. Among the Council's other duties are to (i) foster the coordination and implementation of natural resource policies; (ii) biennially produce a report that includes a review of the state of the Commonwealth's natural resources; (iii) assist localities, when requested, in the evaluation of actions with

potential natural resource impacts; and (iv) provide staff support to meetings that are to be held at least quarterly by the Secretaries and other members of the Governor's cabinet. The cabinet-level meetings are to review programs, policies and major initiatives to (a) identify conflicts with natural resource preservation efforts and the purposes and policies set forth in the Act; (b) evaluate the natural resource benefits and burdens of each Secretariat's programs, policies and initiatives, including the expenditure of state funds; and (c) develop planning, coordination and policy decisions to achieve the purposes and policies of the Act, including measures to utilize state funding in a manner that preserves and protects the Commonwealth's natural resources. This is a recommendation of the Commission on the Future of Virginia's Environment.

HB 2384

Wetlands mitigation

Summary as introduced:

Prohibits the Commonwealth from mitigating the loss of natural wetlands by creating or restoring wetlands in areas outside the hydrologic unit in which those natural wetlands are located.

HB 2470

Electric utility restructuring; green power

Summary as introduced:

Directs the State Corporation Commission to establish guidelines for competitive service providers of electricity that desire to market their energy in Virginia as "green power." In defining what constitutes Green Power, the Commission shall consider the information on fuel mixes of electricity generators that the Commission is required to collect pursuant to the Electric Utility Restructuring Act. The designation of certain electricity as Green Power shall provide consumers thereof

with assurance that the Commission has confirmed that the provider's marketing information has been substantiated as valid. Non-qualifying electricity providers will be barred from using the "Green Power" label. This is a recommendation of the Consumer Advisory Board established pursuant to the Restructuring Act.

SB 1030

Major stationary air pollution sources

Summary as introduced:

Provides that any stationary source or group of stationary sources within a one-mile radius of each other that (i) generate, transmit, or distribute electric services and (ii) emit or have the potential to emit 50 tons per year or more of nitrogen oxides shall be considered a "major stationary air pollution source" for the purposes of the Board's Prevention of Significant Deterioration (PSD) permit program and the Board's operating permit program established pursuant to the federal Clean Air Act. The bill also requires that applicants for a permit to modify or construct a major stationary source demonstrate that they have obtained nitrogen oxides emission reduction credits, allowances or offsets in a ratio of 1.2:1 from a source within the Commonwealth prior to the issuance of a permit.





Case Digest

United States Supreme Court

CWA – Damages Assessed for Discharging Pollutants

United States v. Smithfield Foods, Inc., 191 F.3d 516 (4th Cir.), cert. denied, 121 S. Ct. 46 (2000).

by Jonathan Azano

Smithfield Foods, Inc. (“Smithfield”) appealed a grant of summary judgment in favor of the United States finding Smithfield liable for violations under the Clean Water Act (“CWA”). Finding that Smithfield submitted false Discharge Monitoring Reports (“DMRs”) and violated the CWA by discharging pollutants into the Pagan River at levels above the allowable limits of its 1992 permit, the United States District Court for the Eastern District of Virginia imposed a \$12.6 million civil penalty. The Fourth Circuit held that: (1) the district court did not err when it found that orders issued by the Virginia State Water Control Board (“VSWCB”)

did not condition, revise, or supercede Smithfield’s obligations under its 1992 water discharge permit; (2) the suit was not (a) precluded by the Supreme Court’s decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) or § 510 of the CWA, 33 U.S.C.A. § 1370 (West 1986); or (b) barred by § 309(g)(6)(A)(ii) of the CWA, 33 U.S.C.A. § 1319(g)(6)(A)(ii) (West 1986 & Supp. 1999); and (3) the district court did not err in calculating the penalty with respect to its determination of economic benefit and the denial of “good-faith” credit to Smithfield for its compliance efforts. The Fourth Circuit affirmed the district court’s grant of summary judgment on liability and remanded for correction of a four percent miscalculation of the civil penalty.

Smithfield claimed the district court erred in finding that the order issued by the VSWCB in May of 1991 did not take precedence over or alter the terms of the 1992 permit. However, the Fourth Circuit affirmed the district court’s conclusion that Smithfield did not follow the procedures required for the modification of a permit and none of the Board’s special orders and letters were issued in accordance with the permit modification requirements. Thus, Smithfield could not support its argument that the special orders or letters issued by the Board modified the terms of the permit. Furthermore, the court found it illogical that correspondence written before the 1992 permit was finalized could change the terms of a subsequently-issued document.

The Fourth Circuit also affirmed the district court’s reasoning with respect to whether the suit was barred by the CWA. Smithfield claimed that the Environmental

Protection Agency (“EPA”) could not bring suit because the CWA provides that “any violation that a State has commenced and is diligently prosecuting shall not be the subject of a federal civil enforcement action.” 33 U.S.C.A. § 1319(g)(6). However the courts concluded that Virginia’s enforcement scheme was not sufficiently comparable to § 309(g) to bar the suit. The scheme did not give Virginia the authority to assess administrative penalties without the violator’s consent and did not provide adequate procedures for notice and public participation.

Smithfield also claimed the district court’s finding was precluded by the Supreme Court’s decision in *Gwaltney*. In *Gwaltney*, the Court recognized that there would be cases where it would be counterproductive to assess penalties against violators who had agreed to take corrective actions that were not otherwise required. *Gwaltney*, 484 U.S. at 60-61. Because Smithfield agreed to take non-mandatory corrective actions, it claimed that the district court’s decision to assess administrative penalties violated *Gwaltney*. The district court acknowledged the Supreme Court’s holding in *Gwaltney*, but found the alleged corrective actions did not preclude the EPA’s enforcement action because the chosen enforcement methods were not achieving compliance. Furthermore, the district court found that once the non-mandatory corrective actions were incorporated into the 1992 permit, the CWA required the EPA to enforce them. Thus, the EPA’s enforcement action did not violate § 510 of the CWA, which allows states to adopt more stringent effluent limits than those required under the CWA. 33 U.S.C.A. § 1370. The Fourth Circuit affirmed the district court’s holding and rationale on this point.

Smithfield also contested the district court's \$12.6 million civil penalty. Smithfield claimed the penalty improperly trebled the \$4.2 million economic benefit that Smithfield received from disposing of the wastewater. Smithfield also contended that the district court "double counted" its violations by counting separately its exceedances of daily maximum limits when it had already imposed thirty days of violations for exceedances of the monthly average limit for the same substance. Violations for each counted day allowed for a penalty of up to \$25,000.

The Fourth Circuit noted that the discretionary calculations necessary to award civil penalties are reviewed for abuse of discretion and concluded that the penalty was not an abuse of discretion. The court found that the district court considered a number of factors, including economic benefit, to determine the appropriate penalty. The Fourth Circuit held the district court did not "double count" the violations because the CWA anticipated such a penalty structure. This type of penalty structure allowed the courts more flexibility in fashioning appropriate penalties because it allowed the courts to distinguish between permittees who violate a monthly average limit but do not violate daily maximum limits and those who violate the monthly average limit and also violate daily maximum limits. Despite the fact that the penalty was exactly three times the economic benefit, the court held that the civil penalty did not indicate that the district court simply trebled the economic benefit.

Lastly, the Fourth Circuit concluded that the district court did not err when it denied Smithfield good-faith credit for its efforts to

connect to a sanitation system. The district court denied the good-faith credit because it found little evidence that Smithfield made any good-faith efforts to comply with its permits. The court's conclusion was based on evidence that Smithfield did not facilitate its connection to the sanitation system or mitigate its discharges by treating its wastewater or decreasing its releases of pollutants in the interim.

Court Reserves Judgment Regarding Interpretation of Pennsylvania Hazardous Waste Statute

Fiore v. White, 120 S. Ct. 469 (1999), *cert. question answered*, 757 A.2d 842, *later proceeding*, 121 S. Ct. 38 (2000).

Petitioner William Fiore, who had been convicted in a Pennsylvania state court of operating a hazardous waste facility without a permit, filed a petition for a writ of habeas corpus. The United States District Court for the Western District of Pennsylvania granted the writ, but the United States Court of Appeals for the Third Circuit reversed. The United States Supreme Court granted certiorari and reserved judgment. The Court certified to the Pennsylvania Supreme Court the question of whether that court's interpretation of the relevant statute, as expressed in the *Commonwealth v. Scarpone* decision, stated the correct interpretation of that statute as of the date that Fiore's conviction became final.

William Fiore and David Scarpone were convicted under Pa. Stat. Ann., Tit. 35, § 6018.401(a) for operating a hazardous waste facility without a permit. Although the state conceded that the defendants did in fact possess a permit, it argued that their alteration of a monitoring pipe to conceal a leakage problem exceeded the terms of the permit to such a degree that their continued operation of the facility was "un-permitted." Each defendant appealed his conviction. The Pennsylvania Superior Court affirmed Fiore's conviction, and the Pennsylvania Supreme Court denied Fiore leave to appeal; Fiore's conviction thus became final. The Pennsylvania Commonwealth Court, however, rejected the trial court's interpretation of the statute and set aside Scarpone's conviction. The Pennsylvania Supreme Court then affirmed the Commonwealth Court, ruling that Pennsylvania had not established the key element of lack of a permit and that mere alteration of the hazardous waste facility was not enough to render the operation of that facility "un-permitted."

After the *Scarpone* decision, Fiore twice asked the Pennsylvania Supreme Court to review his conviction, but that court denied both requests. Fiore then sought collateral relief in the state courts, but the Court of Common Pleas of Allegheny County and the Superior Court both denied his request for collateral relief. These courts held that at the time of Fiore's conviction, the prevailing interpretation of § 6018.401(a) was different from the Pennsylvania Supreme Court's subsequent interpretation in the *Scarpone* case, and that Fiore was not entitled to a retroactive application of the law.

Fiore then petitioned for a writ of habeas corpus in the federal

courts. Fiore argued that he had been imprisoned for conduct that was not criminal under the relevant state statute. The district court granted the petition, but the Court of Appeals for the Third Circuit reversed. The United States Supreme Court granted certiorari.

In delivering the Supreme Court's opinion, Justice Breyer stated that Fiore's claim depended on whether the Pennsylvania Supreme Court's interpretation of the statute in the *Scarpone* case represented the true meaning of the statute at the time of Fiore's conviction. In other words, if the Pennsylvania high court's ruling – that a conviction under § 6018.401(a) could not stand if the defendant merely altered his operation of a hazardous waste facility, but still possessed the required permit – was the prevailing interpretation of the statute at the time that Fiore's conviction became final, then Fiore was wrongfully convicted. But if the Pennsylvania Supreme Court had changed the interpretation of § 6018.401(a) from the interpretation applicable at the time of Fiore's conviction, then that conviction would stand.

Therefore, the Supreme Court certified the following question to Pennsylvania Supreme Court: "Does the interpretation of Pa. Stat. Ann., Tit. 35, § 6018.401(a) (Purdon 1993), set forth in *Commonwealth v. Scarpone*, 535 Pa. 273, 279, 634 A.2d 1109, 1112 (1993), state the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final?" *Fiore v. White*, 120 S. Ct. 469, 473 (1999). The Supreme Court held that only after it received the answer to this question would it be able to rule on the federal constitutional questions raised in the case. Therefore, the Supreme Court reserved judgment

and further proceedings in the case until it received a response from the Pennsylvania Supreme Court.

CWA – Mootness and Standing in Citizen Suits

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 120 S. Ct. 693 (2000).

Friends of the Earth brought an action pursuant to the citizen suit provision of the Clean Water Act ("CWA") against the holder of a National Pollutant Discharge Elimination System ("NPDES") permit, alleging violation of mercury discharge limits. Plaintiffs sought declaratory and injunctive relief, civil penalties, costs, and attorney's fees. The United States District Court for the District of South Carolina found numerous permit violations, imposed a penalty of \$405,800, but denied a request for declaratory and injunctive relief. The United States Court of Appeals for the Fourth Circuit vacated and remanded with instructions to dismiss on the grounds of lack of standing and mootness. The Supreme Court granted certiorari. The United States Supreme Court held that plaintiffs had standing to bring a citizen suit seeking both injunctive relief and civil penalties and that the action was not rendered moot by the permit holder's compliance with permit limits or shut-down of its facility.

Defendant Laidlaw Environmental Services (TOC), Inc., ("Laidlaw") bought a facility in Roebuck, South Carolina, and applied to the South Carolina Department of Health and Environmental Control ("DHEC") for a NPDES permit under the CWA, 33

U.S.C. § 1342(a)(1). The permit authorized discharges and set limits on the amounts of the discharges. Laidlaw repeatedly exceeded the limits set by the permit.

On April 10, 1992, Friends of the Earth and Citizens Local Environmental Action Network ("FOE") notified Laidlaw of their intention to file a citizen suit under the CWA, 33 U.S.C. § 1365(a), after the expiration of the requisite 60-day notice period. Laidlaw then requested that DHEC file a lawsuit against the company. The day before the 60-day notice period ended, DHEC and Laidlaw reached a settlement requiring Laidlaw to pay \$100,000 in civil penalties and to make "every effort" to comply with its permit obligations. In part, Laidlaw was hoping this settlement would be dispositive of the impending suit by FOE.

On June 12, 1992, FOE filed a citizen suit seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved for summary judgment on the ground that FOE lacked standing to bring the lawsuit. The district court denied summary judgment and found that plaintiffs had standing. The court concluded that a civil penalty of \$405,800 was appropriate. In particular, the district court found that the judgment's "total deterrent effect" would be adequate to forestall future violations, given that Laidlaw would have to reimburse the plaintiffs for a significant amount of legal fees. The court declined to order injunctive relief because Laidlaw, after the lawsuit began, had achieved substantial compliance with the terms of the permit.

The Fourth Circuit vacated the district court's order and remanded with instructions to dismiss for

lack of standing and mootness. The court held that the case became moot once Laidlaw complied with the terms of its permit and the plaintiffs failed to appeal the denial of equitable relief. The court reasoned that the only remedy currently available to FOE would not redress any injury FOE had suffered.

The United States Supreme Court held that an association has standing to bring suit on behalf of its members when (1) its members would have standing to sue in their own right, (2) the interests are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit. The relevant showing to establish standing is not injury to the environment, but injury to the plaintiff.

The Supreme Court also held that the Fourth Circuit erred in concluding that a citizen suit claim for civil penalties must be dismissed as moot when the defendant, after commencement of the litigation, has achieved compliance with its NPDES permit. The defendant argued that its facility had been shut down and had discontinued discharges completely. The standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent. A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The court must be assured those operations and discharges could never recommence. This heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness.

The Fourth Circuit erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when, after commencement of litigation, the defendant has come into compliance. Standing doctrine ensures that the resources of the federal courts are devoted to disputes in which the parties have a concrete stake. Yet by the time mootness is an issue, abandonment of the case may prove more wasteful than frugal. The Supreme Court reversed the holding of the Fourth Circuit and remanded.

CWA – Cert. Denied on Issue of Criminal Liability for Negligence

Hanousek v. United States,
120 S. Ct. 860 (2000)
(Thomas, J., dissenting).

Petitioner Edward Hanousek, Jr. appealed his conviction under the Clean Water Act ("CWA") for negligently discharging oil into a navigable water of the United States. The Supreme Court of the United States denied petitioner's writ of certiorari. Justice Thomas dissented from the denial of certiorari in an opinion joined by Justice O'Connor.

In 1994, Hanousek was employed as the roadmaster of the White Pass & Yukon Railroad. His duties included supervision of a rock quarrying project. During rock removal operations, Hanousek was off duty and at home when an independent contractor's mistake caused a petroleum pipeline to rupture and spill between 1,000 and 1,500 gallons of oil into a river. Hanousek was indicted and convicted under criminal provisions of the CWA, 33 U.S.C. §§ 1319(c)(1)(A), 1321(b)(3), for negli-

gently discharging oil into a navigable water of the United States. He was fined \$5,000 and sentenced to sequential terms of six months imprisonment, six months in a halfway house, and six months of supervised release. On appeal, Hanousek argued that the imposition of criminal liability for ordinary negligence in discharging oil into the river violated his Due Process rights.

The Ninth Circuit Court of Appeals rejected his Due Process claim, reasoning, in part, that the criminal provisions of the CWA are "public welfare legislation" because the CWA "is designed to protect the public from potentially harmful or injurious items" and criminalizes "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Hanousek v. United States*, 176 F.3d 1116, 1121 (9th Cir. 1999) (quoting *Liparota v. United States*, 471 U.S. 419, 433 (1985)).

In dissent from the denial of certiorari, Justice Thomas noted that the issue of whether the CWA is appropriately characterized as a public welfare statute is an issue on which the circuit courts are divided. Justice Thomas argued that it was erroneous to rely on the notion that the CWA is a public welfare statute. Instead, he claimed that in order "to determine as a threshold matter whether a particular statute defined a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in responsible relation to a public danger." *Hanousek v. United States*, 120 S. Ct. 860, 861 (2000) (Thomas, J., dissenting) (quoting *Staples v. United States*, 511 U.S. 600, 613 n.6 (1994)).

Justice Thomas noted that the present case illustrates that the CWA imposes criminal liability for persons using standard equipment to engage in broad ranges of ordinary industrial and commercial activities. Thomas argued that this strongly militates against concluding that the public welfare doctrine should apply because “even dangerous items can, in some cases, be so ‘commonplace and generally available’ that we would not consider regulation of them to fall within the public welfare doctrine.” *Hanousek*, 120 S. Ct. at 861 (quoting *Staples*, 511 U.S. at 611). By adopting the public welfare doctrine in such cases, Thomas argued that the Court would be exposing construction workers and contractors to heightened criminal liability.

Thomas also criticized the Ninth Circuit’s ruling because the Supreme Court has upheld criminal statutes within the doctrine of “public welfare offenses” only with respect to public offenses where the penalties are relatively small and the conviction does not severely damage the offender’s reputation. Justice Thomas noted that the CWA’s criminal provisions allowed for punishment of up to 6 years in prison.

Attacking the Ninth Circuit’s holding, Justice Thomas’ dissent remarked that the Court has “never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community.” *Hanousek*, 120 S. Ct. at 861. Such an interpretation, according to Justice Thomas, would extend the public welfare doctrine to any criminal statute applicable to industrial activities.

United States Court of Appeals

CERCLA – Potentially Responsible Persons May Not Assert Cost Recovery Claims

Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409 (4th Cir. 1999).

by Oriana Repic

Appellant Axel Johnson brought a cost recovery and contribution action, seeking relief from expenses incurred as a former owner and operator of the Old ATC Refinery Site in connection with the cleanup of lead and other hazardous substances at the Refinery pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C.A. §§ 9601-9675 (West 1995). The action was brought against the current owner, Carroll Carolina Oil Company, Inc. (“CCO”) and Linda A. Carroll, who sold the property to CCO. After the parties filed cross motions for summary judgment, the United States District Court for the Eastern District of North Carolina granted summary judgment for CCO on Axel’s cost recovery claim. The court found that Axel was a potentially responsible person under CERCLA §107 and based its decision upon the rule that potentially responsible persons cannot bring §107 CERCLA actions. On appeal, the Fourth Circuit affirmed the dismissal of Axel’s §107 action. The only remaining question (CCO’s entitlement to a third party defense) pertained to Axel’s claim for contribution and that claim was moot by entry of a consent decree

resolving the liability of Carroll and CCO to the United States.

From 1972 through 1984, Axel or its predecessors in interest operated the Refinery property. During most of this period, Axel leased the property from Pace Oil Co. under a contract providing that Axel bore responsibility for maintenance of the property, including disposal of any hazardous waste generated on the property. From 1972 to 1975, Axel produced leaded gasoline. Lead is a hazardous substance subject to cleanup under CERCLA. 42 U.S.C.A. § 9601(14)(D); 33 U.S.C.A. § 1317(a)(1) (West 1986). Axel buried wastes from its operations at various locations throughout the property, including at least three places where EPA subsequently found elevated levels of lead. There was no evidence in the record of any subsequent party using or processing lead on the property. Neither Carroll nor CCO had performed any operations on the property.

In 1996, Axel entered into an administrative order with EPA in which it agreed to pay for removal work. Axel maintained that it was entitled to recover its cleanup costs from Carroll and CCO pursuant to CERCLA § 107, 42 U.S.C.A. § 9607(a)(1), and that it had a right to contribution from both Carroll and CCO pursuant to CERCLA § 113, 42 U.S.C.A. § 9613. The district court granted summary judgment to CCO and Carroll on the §107 and §113 claims.

The Fourth Circuit affirmed the judgment of the district court. The court considered and then rejected both of Axel’s attempts to establish its entitlement to bring a § 107 action. First, the court rejected the contention that Axel could only be held liable for cleanup costs incurred due to substances deposited at the property during its tenure. The court explained that

there is no statutory requirement that in order for an owner or operator to be held liable for cleanup costs, the hazardous substances that caused the incurrence of those costs must be the same hazardous substances that were deposited at the facility when the party owned or operated it. The court found that Axel's suggested interpretation conflicted not only with the statute's plain meaning but also with the firmly established view of § 107(a) as a strict liability section.

The court then rejected Axel's argument that even if it was a potentially responsible person, it should be allowed to bring a § 107 action because it is an "innocent" party with respect to a portion of the site. Because of CERCLA's remedial statutory scheme, courts must construe its provisions liberally. If an "innocent party" exception were even possible (and only a few circuits have recognized an exception of this kind, all but one having done so in dicta), it would be prudent to limit the applicability of such an exemption to those who can make out a defense to liability that § 107 itself provides. Axel did not attempt to prove its entitlement to any statutory defense.

Even if the court had recognized the possibility of an "innocent party" exception, the few cases that have done so have uniformly made the exception applicable only when the plaintiff is truly innocent of any pollution. The record evidence indisputably indicated that Axel bore responsibility for at least some of the hazardous material spilled at the property. The major contaminant at the property was lead and the only owner or operator to use lead in its operations was Axel.

Axel attempted to avoid its failure to fit within the "innocent party" exception by arguing that

each of the tanks and spill areas should be regarded as a separate "facility." But to accept this argument would mean that "each barrel in a landfill is a separate facility," and the court explained that the mere possibility of a division does not in itself require consideration of the site's different parts as separate facilities or make consideration of the property as a single facility impermissible. There was uncontroverted evidence of contamination throughout the property. The court continued to explain that *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) is entirely consistent with the conclusion that the entire property here is appropriately considered a single CERCLA facility.

The district court therefore did not err in ruling that Axel was a potentially responsible person who could not bring a § 107 action. Axel's claim for contribution against Carroll and COO under § 113 was rendered moot by the entry of a consent decree signed by Carroll, CCO, and the EPA.

NEPA & NFMA – U.S. Forest Service Timber Harvesting Decisions Approved

Shenandoah Ecosystems Defense Group v. United States Forest Service, 1999 U.S. App. LEXIS 23225 (4th Cir. 1999).

by Robert Jefferson

Shenandoah Ecosystems Defense Group ("SEDG") filed suit challenging the procedural adequacy of the timber harvesting decisions of the United States Forest Service ("For-

est Service") in three areas within the Jefferson National Forest. The district court granted summary judgment in favor of the Forest Service. On appeal, SEDG argued that the Forest Service's failure to (1) consider the cumulative impacts of the three projects, (2) address impacts to rare species in the area, (3) discuss an adequate range of alternatives, and (4) prepare an Environmental Impact Statement ("EIS") in addition to an Environmental Assessment ("EA") violated the National Environmental Protection Act ("NEPA"), 42 U.S.C.A. §§ 4321-4347 (West 1994 & Supp. 1999), and the National Forest Management Act ("NFMA"), 16 U.S.C.A. §§ 1600-1614 (West 1985 & Supp. 1999). Finding no evidence that the Forest Service's decision to approve the timber sales was arbitrary or capricious, the Fourth Circuit affirmed the district court's decision.

SEDG first argued that the Forest Service failed to consider whether the combined cumulative impact of the proposed projects was a violation of NEPA. NEPA requires the Forest Service to consider the cumulative impact of related federal actions on the environment. See 40 C.F.R. § 1508.25(c) (1998); See also *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). The determination of when cumulative impacts should be considered in a separate document depends on several factors, including the degree of inter-relationship between the proposed actions and practical feasibility. *Kleppe*, 427 U.S. at 412. The Supreme Court has indicated that "resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies." *Id.* Without proof of arbitrary action, the court must assume that the agency properly exercised its discretion. *Id.*

The administrative record reveals that the Forest Service addressed several potential impacts in the EA of each project, including the impact to surrounding visual and recreational resources. After finding that none of the projects impacted identical visual or recreational resources, the Forest Service concluded that a separate cumulative impact study was unnecessary. There was no evidence in the record that this analysis was arbitrary or capricious. Additionally, NEPA does not explicitly require a separate analysis of cumulative impact, and the court found that the Forest Service properly considered the effects on visual and recreational resources in each individual EA.

SEDG argued that the Forest Service acted arbitrarily and capriciously in approving one of the projects because the proposed logging could impact the Peaks of Otter Salamander ("POS") and the Forest Service lacked sufficient population data to confirm the actual range of the POS habitat and assess the impact. SEDG further argued that the Forest Service should have conducted additional population surveys specific to these projects. Under NFMA, the Forest Service is required to include site-specific Biological Evaluations regarding the effects on sensitive species as part of each project EA. The relevant NFMA regulations require only that the Forest Service make its determinations based on all available data. Only if adequate data is unavailable, and there is a high likelihood that the sensitive species occupies the proposed project area, is the Forest Service required to obtain new, site-specific population data.

The Forest Service prepared a Biological Evaluation as part of each EA, and relied on population data from a general POS popula-

tion study conducted by the Virginia Division of Natural Heritage as well as its own field studies. The record supported the Forest Service's contention that its Biological Evaluation was based on reliable, adequate, and detailed population data from all available POS field surveys.

SEDG also argued that the Forest Service violated NEPA by failing to consider a sufficiently broad range of alternatives to the proposed projects in the EAs. SEDG contended that the Forest Service acted arbitrarily by not considering (1) alternatives including "real forms" of uneven-aged management, (2) alternatives involving natural regeneration, and (3) SEDG's proposed alternative protecting "de facto" roadless areas. However, the court found that the Forest Service gave adequate and appropriate consideration to the use of uneven-aged management techniques. Additionally, SEDG failed to suggest what type of alternatives would have satisfied natural regeneration or how these options would differ from the no-action alternative discussed explicitly in each EA. Finally, the record revealed that the areas referred to by SEDG as "de facto" roadless were actually inventoried by the Forest Service and found not to qualify as roadless areas.

Finally, SEDG claimed that the Forest Service acted arbitrarily and capriciously by preparing only an EA and not an EIS. To successfully challenge an agency determination not to prepare an EIS, a plaintiff must raise substantial questions as to whether the project may cause significant degradation of the environment. *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1997). As long as the record shows that the regulating agency took a hard look at the potential environmental conse-

quences of the proposed action, the agency cannot be said to have acted arbitrarily or capriciously. *See Baltimore Gas & Elec. Co. v. National Resource Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983). An agency's determination that a project will not significantly impact the environment is entitled to substantial deference. *See Sabine River Auth. v. United States Department of the Interior*, 951 F.2d 669, 678 (5th Cir. 1992). The court found that the Forest Service addressed the environmental impact of the proposed actions in the EAs and reasonably found that they were not sufficiently significant to warrant an EIS.

NEPA – Federal Highway Administration EIS Approved

City of Alexandria v. Slater, 198 F.3d 862 (D.C. Cir. 1999).

The City of Alexandria and other parties ("Plaintiffs") brought suit against Rodney E. Slater, the Secretary of the U.S. Department of Transportation and others ("Defendants") challenging the decision of the Federal Highway Administration ("FHWA") approving a proposed twelve-lane bridge. The United States District Court for the District of Columbia agreed with Plaintiffs and remanded the case to FHWA. Defendants appealed. The court of appeals held that: (1) FHWA's failure to consider a ten-lane bridge as a reasonable alternative did not violate the National Environmental Policy Act ("NEPA"), and (2) FHWA adequately addressed the construction impacts of project.

The controversy stemmed from the FHWA's decision to look at various alternative bridge designs to

replace the Woodrow Wilson Memorial Bridge (“Bridge”). The Bridge was built in 1961 and has only six lanes. The bridge is the cause of many traffic problems in the area and is expected to become structurally unsound by 2004. In determining the best possible replacement design for the bridge, the FHWA began to examine the environmental impacts of various designs as required by NEPA, 42 U.S.C. § 4321 et seq. (1994). In 1991, the FHWA issued an initial draft Environmental Impact Statement (“EIS”) that compared the environmental consequences of five different designs. All the proposed designs increased the size of the bridge to twelve lanes. Reaction to the draft was unfavorable, with many groups criticizing it for not fully evaluating the environmental and cultural impacts of the project. The FHWA recognized its failure to coordinate all of the interests involved and began the process again.

In 1997, FHWA issued its Final EIS. This document compared seven bridge designs and a “no build” alternative, considering several different factors including cost, vehicle capacity, and environmental impact. All seven proposed bridge designs in the Final EIS had twelve lanes. The agency felt that a bridge with less than twelve lanes would be insufficient for long-term traffic capacities. Accordingly, there was not a formal comparison of a bridge design with less than twelve lanes.

Following a brief comment period, FHWA approved one of the designs. Plaintiffs filed an action in district court alleging that FHWA had violated NEPA by failing to consider all of the reasonable alternatives in evaluating the environmental consequences of the different designs. The district court ruled for the plaintiffs, reasoning

that FHWA failed to meet NEPA guidelines in not considering a ten-lane bridge as a reasonable alternative in the Final EIS. The court also found that the Final EIS’s treatment of temporary construction effects was too cursory to comply with NEPA. FHWA appealed.

NEPA mandates that an agency must “rigorously explore and objectively evaluate” the projected environmental impact of all “reasonable alternatives” to a proposed project. 40 C.F.R. § 15002.14. An analysis under this section requires the court to evaluate “an agency’s choice of ‘reasonable alternatives’ in light of the objectives of the federal action.” *Slater*, 198 F.3d at 867. The D.C. Circuit held that there should be two inquiries: “whether an agency’s objectives are reasonable, and whether a particular alternative is reasonable in light of these objectives – with considerable deference to the agency’s expertise and policy-making role.” *Id.* at 867.

The court also held that although the agency’s description of its objectives focused primarily on transportation and safety issues, this approach was not unreasonable. The court held that NEPA does not “substantively constrain an agency’s choice of objectives; to the contrary, it is those very objectives that provide the point of reference for a determination whether an alternative is ‘reasonable’ in the first place.” *Id.* at 867. The court reasoned that holding otherwise transforms NEPA “from a procedural statute into a substantive one.” *Id.* The court held that in light of the objectives of providing adequate traffic flow and safety until the year 2020, the ten-lane bridge was not a “reasonable alternative” requiring specific mention in the Final EIS.

The court found that the “Construction Impacts” section of the

Final EIS was sufficient even though it was brief. The court found that it addressed a range of possible issues and the lack of specificity was not a problem. It based this decision on the fact that each of the seven alternatives would have similar construction impacts, and the ramifications of the construction phase were “relatively modest in both scope and duration when compared to the environmental impact of the project as a whole.” *Id.* at 871.

The court emphasized that NEPA’s mandates are primarily procedural. The court based its decision in large part on the Supreme Court’s decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). The court concluded that its objective is not to “further our beau ideal of a bridge design, but merely to ensure that the procedures mandated by the statutes have been complied with.” *Slater*, 198 F.3d. at 874.

Federal District Court

LWCFA – National Park Service Approval Not Required for Construction of Public Golf Course Facility

Friends of Ironbridge Park v. Babbit, No. 98-2373, 1999 WL 519173 (4th Cir. July 22, 1999)

by Grant Waterkotte

The United States District Court for the Eastern District of Virginia

recently sustained a decision of the National Park Service (“NPS”) that NPS approval is not required for the construction of a public golf course in a park developed with funds awarded under § 6 of the Land and Water Conservation Fund Act (“LWCFA”). The Friends of Ironbridge Park (“FIP”) initiated this action, seeking a declaration that approval of the NPS was required before the golf facility could be built. FIP contended that the NPS acted arbitrarily and capriciously in determining that the construction would not bring about a change in use that would “significantly contravene the original plans for the area,” by turning land from a passive use to an active use. 36 C.F.R. § 59.3(d) (1998). On appeal, the Fourth Circuit affirmed the lower court’s ruling, concluding that the NPS acted rationally in deciding that its approval was not required for the construction of the golf course facility.

The LWCFA was designed to provide funds to assist in developing and preserving outdoor recreation. The Act limits the ability of grant recipients from using their funds for any purpose other than outdoor recreation. The applicable regulations state that any proposed changes “that significantly contravene the original plans for the area” must receive NPS approval. 36 C.F.R. § 59.3(d). In 1984, the United States awarded \$270,000 to the Commonwealth of Virginia for the development of Ironbridge Park. The development plan for the park included the construction of a large number of recreational facilities, including an amphitheater, nature center, swim and wave pool, skating rink, and others. Most of these projects are currently not constructed, and the majority of this 400-acre park sits undeveloped. This undeveloped land is pri-

marily utilized for hiking and mountain biking.

In 1998, the County decided to lease 150 acres of the undeveloped land for the construction of a public golf course. The County notified the Commonwealth and, according to the appropriate regulations, the Commonwealth notified the NPS. 36 C.F.R. § 59.3. The NPS concluded that the proposed golf course was not inconsistent with the project’s original intent and therefore, federal agency approval of the golf course was not required. FIP then initiated this action, claiming that approval of the NPS was required before the golf facility could be constructed.

The Fourth Circuit stated that it can only set aside an agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.A. § 706(2)(A) (West 1996). This highly deferential standard allows for a reversal only if the record reveals no rational basis for the agency’s decision. *See Trinity Am. Corp. v. United States EPA*, 150 F.3d 389, 395 (4th Cir. 1998). FIP argued that the construction of a golf course would “significantly contravene the original plans for the area,” and so violate 36 C.F.R. § 59.3(d). FIP contended that “area” refers only to the 150 acres that the golf course would encompass. Thus, the construction of the course would contravene the original intent for these 150 acres by converting an area from a passive to an active use.

The Secretary contended that “area” referred to the entire 400 acres of the project area, not merely the 150 acres the golf course would cover. The Fourth Circuit stated that it must defer to the agency’s construction of its own regulations unless such construction is “plainly erroneous or incon-

sistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In this case, the boundary map marked the entire 400 acres of the park. While the golf course might change the nature of that particular part of the marked area, it did not convert the entire area from passive to active use. The court held that the Secretary’s interpretation was neither erroneous nor inconsistent with the regulation, and was therefore controlling in this case. Consequently, the court affirmed the ruling of the district court and held that the NPS did not act arbitrarily and capriciously in determining that construction of the golf course did not constitute a change such that the approval of the NPS was required.

Statutes Limiting the Flow of Out-of-State Municipal Solid Waste into Virginia Disputed – Motion to Dismiss Denied

Waste Management Holdings, Inc. v. Gilmore, 64 F. Supp. 2d 537, summary judgment granted, partial summary judgment denied, 87 F. Supp. 2d 536 (E.D. Va. 2000).

by Autumn Hwang

Waste Management Holdings, Inc. and several Virginia counties (“Plaintiffs”) brought suit for declaratory judgment and to enjoin the enforcement of several Virginia statutes enacted to limit the flow of out-of-state municipal solid waste into Virginia. Plaintiffs alleged that the new laws violated the Commerce, Contracts, Supremacy, and Equal Protection Clauses of the United States Constitution. The Commonwealth moved to dismiss

on two grounds: (1) that Plaintiffs lacked standing to challenge the disputed laws, and (2) suit was barred by the Eleventh Amendment and the doctrine of sovereign immunity. In addition, the Commonwealth submitted separate motions to dismiss each of Plaintiffs' individual constitutional claims and urged that Charles City County be dismissed as a plaintiff.

The disputed statutes were likely to affect seven large regional landfills privately operated by waste disposal companies under voluntary agreements with "host" counties of Virginia. Under these agreements, the waste disposal companies constructed the regional landfills, paid the host counties a fee based on the volume of waste disposed, and performed services for the host communities. Each landfill was built with the expectation that it would accept substantial quantities of out-of-state municipal solid waste in order to meet its revenue needs and provide a reasonable return on investment.

In its motion to dismiss, the Commonwealth argued that Plaintiffs lacked standing to challenge the disputed laws because the Virginia counties did not have the authority to make agreements with municipal waste companies in regard to acceptance of interstate waste for profit. Since Plaintiffs based their suit on these unlawful host agreements, the Commonwealth insisted that the complaints must be dismissed. The Court rejected the Commonwealth's argument, stating that the Supreme Court of Virginia strongly indicated in dicta that the counties do have the authority to make such agreements. The Court also rejected the Commonwealth's second argument that the Eleventh Amendment and the doctrine of sovereign immunity barred the

suit. The Court stated that the Supreme Court and the Fourth Circuit had consistently relied upon the Ex Parte Young doctrine to ensure federal jurisdiction over cases challenging the enforcement of allegedly invalid state laws. According to the Ex Parte Young doctrine, the Eleventh Amendment does not apply to a suit to enjoin a state officer from enforcing an unconstitutional statute in the federal court, such as the case at hand.

In addition, the Court denied the Commonwealth's motions to dismiss three of Plaintiffs' individual constitutional claims. The Court refused to dismiss Plaintiffs' allegation that each of the statutes at issue violated the Commerce Clause of the Constitution. Contrary to the Commonwealth's arguments, the Court found that Congress had not expressly authorized states to interfere with interstate commerce in municipal solid waste through Subtitle D of the Resource Conservation and Recovery Act ("RCRA") and that the statutes in dispute did not fall within the "market participant" exception to the Commerce Clause because the Commonwealth, by enacting the disputed statutes, was attempting to regulate the conduct of others as a state and not as a private participant in the waste disposal market.

The Court also rejected the Commonwealth's motion to dismiss Plaintiffs' claim for relief under 42 U.S.C. § 1983. Plaintiffs alleged that the barging restrictions were void under the Supremacy Clause of the Constitution because federal law preempted the restrictions. The Commonwealth argued that the violations alleged by Plaintiffs did not give rise to the § 1983 remedy. The Court disagreed.

The Commonwealth further moved to dismiss Plaintiffs' claim that the barging restrictions on the transportation of municipal solid waste violated the Equal Protection Clause of the Fourteenth Amendment, arguing that Plaintiffs did not allege sufficient facts to show that the disputed statutes lacked a "rational basis." The Court declined to grant the Commonwealth's motion to dismiss because it was possible for Plaintiffs to gather additional evidence during the course of discovery to support their equal protection claims.

The Court did grant the Commonwealth's motion to dismiss Plaintiffs' claim that the statutes at issue violated the Contract Clause of the Constitution insofar as they impaired various contracts, such as the host agreements between Waste Management and the counties in which its regional landfills were located. The Commonwealth argued that this claim must be dismissed because (1) § 1983 does not provide a remedy for violations of the Contract Clause, (2) Plaintiffs failed to allege a violation of the Contract Clause, (3) the challenged legislation constitutes a legitimate exercise of Virginia's police power, and (4) the Contract Clause does not protect against the impairment of future contracts. The Court agreed that, under the alleged facts, the Contract Clause did not apply to the present case and therefore dismissed Plaintiffs' claims.

The Commonwealth also argued that the Court should dismiss Charles City County as a plaintiff because it lacked standing to sue. Since each of the other Plaintiffs had standing to raise the alleged claims, the Court declined to address this issue.

Statutes Limiting the Flow of Out-of-State Municipal Solid Waste into Virginia Disputed – Preliminary Injunction Granted

Waste Management Holdings, Inc. v. Gilmore, 64 F. Supp. 2d 537, summary judgment granted, partial summary judgment denied, 87 F. Supp. 2d 536 (E.D. Va. 2000).

by Matt Walden

Plaintiffs Waste Management Holdings, Inc., (“Waste Management”) brought an action in the United States District Court for the Eastern District of Virginia against the Commonwealth, seeking a preliminary injunction against the enforcement of Virginia statutes regarding the transportation and disposal of municipal solid waste. The District Court granted the injunction. The court held that: (1) Plaintiffs would suffer irreparable harm if the injunctive relief were not granted; (2) the Commonwealth would not suffer appreciable harm if the injunction were granted; (3) Plaintiffs would likely prevail on the merits of the case because the statutes are invalid under the Commerce Clause; and (4) granting the injunction would be in the public interest.

Waste Management operates several large landfills in Virginia. These landfills accept large quantities of out-of-state waste. Recently, Waste Management contracted with the New York City Department of Sanitation to dispose of New York’s municipal waste in Virginia landfills. It is also a primary contender for a 20-year contract for the disposal of 12,000 tons of residential waste per day from New

York City. Waste Management planned to transport this waste by barge on the James River to its landfills. However, Waste Management’s plans to increase its importation of out-of-state waste attracted the attention of public officials. As a result, the Governor signed into law legislation to restrict further waste importation. The legislation capped the amount of waste that a landfill may accept at either 2,000 tons per day or the average amount accepted by the landfill in 1998, whichever is greater. The legislation also contained two restrictions on the use of barges to transport solid waste. The first restriction provided that containers of waste could not be stacked more than two high. The second restriction prohibited the transport of solid waste on the Rappahannock, James and York Rivers. The capping provision and the barging restrictions of the statutes are at issue in this case.

In determining whether to grant a preliminary injunction, the Court first addressed the question of whether Plaintiffs would suffer irreparable harm if the relief were not granted. The court stated that, if the cap provision and barging restrictions were enforced, Plaintiffs would have to curtail their use of certain landfills and divert waste to other landfills. This would result in greater cost and the loss of other business opportunities. Since the Eleventh Amendment protects Defendants against a claim for money damages, Plaintiffs would be unable to recover these losses. Therefore, Plaintiffs would be irreparably harmed if the court failed to grant the injunction.

Next, the court examined the harm that the Commonwealth would suffer if an injunction were granted against the cap provision and the barging restrictions. It

determined that Waste Management’s landfills have enormous excess capacity, and therefore an injunction against the cap provision would not cause appreciable harm to the Commonwealth. Also, the court stated that the use of container barges is an environmentally safe means of transporting waste, so a preliminary injunction against the barging restrictions would not result in harm to the Commonwealth. Therefore, the harm that Plaintiffs would suffer if injunctive relief were not granted clearly outweighed the harm that the Commonwealth would suffer if relief were granted.

The court then addressed the question of whether Plaintiffs would likely prevail on the merits of the case. Specifically, the court examined the validity of the cap provision and the barging restrictions under the Commerce Clause. The court first determined that these statutes were subject to strict scrutiny because they were plainly discriminatory to out-of-state interests in both their purpose and their practical effect. The purpose of the statutes, as evidenced by the statements and actions of the General Assembly and the Governor, was clearly to impede the importation of waste from New York. Likewise, the practical effect of the statutes would be to burden the flow of solid waste into the state, but to leave in-state waste unaffected.

Since these statutes plainly discriminate against out-of-state interests in both their purpose and practical effect, they could survive judicial scrutiny only if they can be justified by a factor unrelated to economic protectionism and if there are no nondiscriminatory alternatives available to protect local interests. The Commonwealth argued that they could be

justified by Virginia's need to preserve landfill capacity and by its desire to protect the health of its citizens and environment. However, the court stated that the Supreme Court had previously rejected justifications such as these as invalid. Also, the court determined that there are nondiscriminatory alternatives available that the Commonwealth could use to further these policy objectives. The court concluded that these statutes failed to survive judicial scrutiny and were therefore invalid under the Commerce Clause. Thus, Plaintiffs would likely prevail on the merits.

Finally, the court addressed whether the public interest favored granting injunctive relief. The court determined that protecting the free flow of interstate commerce from interference was within the public interest. Therefore, the preliminary injunction was granted.

CWA – TMDL Consent Decree Affirmed

American Canoe Association, Inc. v. United States EPA, 54 F. Supp. 2d 621 (E.D. Va. 1999).

by John Buford

The American Canoe Association and American Littoral Society ("Plaintiffs") sued the Environmental Protection Agency ("EPA"), arguing that Virginia's rivers, streams, and coastlines were not recreationally or aesthetically useable due to EPA's failure to perform certain discretionary and nondiscretionary duties under the Clean Water Act ("CWA"), 33 U.S.C. § 1294. The Virginia Association of

Municipal Wastewater Agencies ("VAMWA") intervened, and the parties engaged in lengthy settlement negotiations. Plaintiffs and EPA reached a settlement and submitted a proposed consent decree. VAMWA objected to the decree as illegal, and the United States District Court for the Eastern District of Virginia overruled the objection, ruling the decree to be fair, legal, and in the public interest.

Plaintiffs claim that EPA failed to perform its duties under the CWA to identify and restore Virginia's most heavily polluted waters. Plaintiffs allege that EPA should have established total maximum daily loads ("TMDLs") of pollutants for Virginia waters. A TMDL represents the highest level at which a pollutant may be deposited into a water body without violating water quality standards. The State bears the initial burden of creating and submitting TMDLs for EPA approval for any waters that do not or will not meet water quality standards even after various enumerated controls are implemented. Virginia's deadline for TMDL submissions was initially June 26, 1979, and subsequently from "time to time." 33 U.S.C. § 1313(d)(2). Since the 1979 deadline, Virginia has submitted no more than one TMDL, and the EPA has never established a TMDL for any body of water in Virginia. In a previous opinion in this same case, 30 F. Supp. 2d 908 (E.D. Va. 1998) (denying defendants' motion to dismiss), the court held that Virginia's failure to submit TMDLs for twenty years could be construed as a constructive submission that no TMDLs were necessary, thereby creating a duty for EPA to approve or disapprove that constructive submission of no TMDLs.

The consent decree drafted by plaintiffs and EPA proposed an

eleven year schedule for the establishment of TMDLs for several hundred Virginia waterways. VAMWA objected to entry of the consent decree on two grounds. First, VAMWA contended that EPA cannot unilaterally establish a TMDL schedule without state consultation absent an EPA or judicial finding that Virginia's failure to submit TMDLs constituted a constructive submission that no TMDLs were necessary. Second, VAMWA argued that, if Virginia fails to adhere to the TMDL schedule set by the consent decree, EPA will again lack the authority to establish TMDLs since there has been no constructive submission found in this case.

The court held that, while there had been no finding of a constructive submission of no TMDLs by Virginia, the proposed consent decree was in the public interest. If EPA had to declare a constructive submission of no TMDLs by Virginia, EPA would have to approve or disapprove that submission in thirty days, with EPA TMDLs due thirty days later in the likely event of disapproval. This "tight and unforgiving schedule...would impose immediate and significant burdens on EPA and leave little or no room for Virginia's further participation in the process." *American Canoe*, 54 F. Supp. 2d at 626.

The court further held that VAMWA's argument was without merit because Virginia did actually participate in the creation of the TMDL schedule. A November 1998 Memorandum of Understanding ("MOU") was executed between EPA and the Virginia Department of Environmental Quality. The schedule proposed in the consent decree was nearly identical to the major deadlines set out in the MOU. Certain interim deadlines in the consent decree were not specified in the MOU, but the court

ruled the discrepancy “merely formalizes what is necessarily implied by any rational interpretation of the MOU.” *Id.* at 627. Furthermore, Virginia never availed itself of the opportunity to intervene in the instant lawsuit, which it could have easily done had it objected to the consent decree.

VAMWA also argued that, even if Virginia failed to meet any or all of the deadlines, as long as Virginia made some attempt to comply with the schedule, EPA could not find a constructive submission of no TMDLs. The court held that such a “miserly” construction of the CWA would allow the law to be “rendered a dead letter by state subterfuge and recalcitrance.” *Id.* at 628.

The court ultimately ruled that the consent decree was fair, adequate, and reasonable. The decree was “wholly consistent” with the requirements and purpose of the CWA and did not impose undue burdens on Virginia. It was also fair to third parties, who will have the opportunity to participate in the process, since a period of public comment is required by regulation. Overall, the court held the decree a “welcome resolution” of two decades of inaction. *Id.* at 629.

CERCLA – Retroactive Application Held Constitutional

Combined Properties/Greenbriar Limited Partnership v. Morrow, F. Supp. 2d 675 (E.D. Va. 1999)

by David A. Smith

Combined Properties/Greenbriar Limited Partnership (“Greenbri-

ar”) brought a CERCLA action against Dean E. Morrow, Marilyn R. Morrow, and the Morrow Corporation (collectively, “Morrow”). Morrow then brought a third party complaint against J. Edward Glover and Puritan Systems, Inc. (collectively, “Puritan”). Puritan responded by filing a motion for summary judgment, arguing that the Supreme Court’s decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), required the court to find that CERCLA liability could not be applied retroactively to Puritan. In denying Puritan’s motion, the district court held that the “decision in *Eastern Enterprises* does not undercut the constitutionality of retroactive liability under CERCLA.” *Morrow*, 58 F. Supp. 2d at 681.

Greenbriar owned the Greenbriar Town Center, a shopping center in Fairfax, Virginia. Between 1969 and 1992, three different entities, including the Morrow defendants and Puritan, operated dry cleaning businesses at Store No. 8 in the shopping center. Greenbriar alleged that the various owners, in conducting their dry cleaning businesses, used the toxic and hazardous chemical perchloroethylene (“PCE”) and allowed PCE to contaminate the soil and groundwater. Greenbriar further argued that it has borne, and will continue to bear, the costs of investigating and characterizing the type and extent of the environmental contamination and remediation. Greenbriar brought this action under § 7002 of the Resource and Recovery Act (“RCRA”), under §§ 107 and 113 of the Comprehensive Environmental Response Compensation, and Liability Act (“CERCLA”), and under common law causes of action. Puri-

tan’s motion involved only the CERCLA action.

The issue raised by Puritan’s motion for summary judgment was whether the Supreme Court’s decision in *Eastern Enterprises* required a finding that CERCLA liability could not be applied retroactively to Puritan. The court noted that, prior to *Eastern Enterprises*, it was clear that the retroactive application of CERCLA was constitutional. The court also noted that in *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988), “the Fourth Circuit determined that CERCLA is a retroactive liability statute, in that it creates joint and several liability for all parties ‘that played a role in creating the hazardous conditions,’ even if they played that role before CERCLA became effective.” *Morrow*, 58 F. Supp. 2d at 677 (quoting *Monsanto*). In *Monsanto*, the Fourth Circuit found that there was no violation of due process in imposing liability on a business even though its waste-handling methods were legal at the time they were performed. The court found that the system of legislation created in CERCLA was logical given the indivisible nature of conditions that create an environmental hazard. Furthermore, in *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992), the Fourth Circuit held that “[t]he trigger to liability under [42 U.S.C.] § 9607 (a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination.” Prior to *Eastern Enterprises*, waste-handling parties could be found retroactively liable under CERCLA. In *Eastern Enterprises*, the United States Supreme Court found that the Coal Industry Retiree Health Benefit Act of 1992

violated the Takings Clause of the Fifth Amendment. The Court based its opinion on three factors: (1) economic impact on Eastern Enterprises, (2) interference with Eastern's reasonable investment-backed expectation, and (3) the nature of the governmental action.

In the case at hand, however, the court concluded that, because a majority of the Supreme Court in *Eastern Enterprises* did not adopt a single theory of law, *Eastern Enterprises* carries no precedential weight and *Monsanto* remains controlling law. *Morrow*, 58 F. Supp. 2d. at 681. Furthermore, the court decided that the position of Eastern Enterprises was distinguishable from that of Puritan. Unlike Eastern Enterprises, if Puritan were to be found liable under CERCLA its liability would arise from its own conduct in disposing of the PCE, whereas Eastern Enterprises's liability was in no way based on its own conduct. The court further found that the \$1 million in potential liability did not meet the *Eastern Enterprises* criteria of a "severe and disproportionate" economic impact. *Id.* The court pointed out that potential liability must be measured against the as yet to be calculated environmental harm caused by Puritan's actions, not by the economic benefit received in its business dealings. *Id.* Finally, the court found that there was no interference with Puritan's reasonable investment-backed expectations because Puritan should have expected that some liability could arise from its actions. *Id.* at 682. Ultimately, the court denied Puritan's motion for summary judgment and held that *Eastern Enterprises* did not impact the applicability of CERCLA to the present case.

Coal Act Settlements Binding Despite Recent "Super-Reachback" Decision

Holland v. Virginia Lee Co.,
188 F.R.D. (W.D. Va. 1999)

by David Church

Plaintiffs, the Trustees of the United Mine Workers of America ("Trustees") filed a complaint in 1995 seeking judgment against defendant, Virginia Lee Company ("Virginia Lee") for past-due premiums owed under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C.A. §§ 9701-22 (West Supp. 1999) ("Coal Act").

After filing its answer, Virginia Lee, without further formal proceedings in this case, entered into a written "Settlement Agreement and Release," pursuant to which Virginia Lee paid the Trustees the sum of \$868,604, representing the estimated present value of Virginia Lee's past and future obligations under the Coal Act. A final order was tendered by the court in June 1997, dismissing the case against Virginia Lee with prejudice.

Virginia Lee brought this action pursuant to Federal Rule of Civil Procedure 60(b)(6) to vacate the final order and compel a refund of the amount paid under the terms of the settlement agreement. Virginia Lee argued that, in light of a recent Supreme Court decision reversing the constitutionality of Coal Act "super-reachback" premiums, the previous settlement agreement should be overturned. The court found that the requirements to obtain relief from the final order of settlement had not been met and denied Virginia Lee's motion to vacate the order.

Between 1933 and 1962, Virginia Lee conducted coal mining operations in Lee County, Virginia, under a series of United Mine Workers of America ("UMWA") coal wage agreements. At no time after 1962 did Virginia Lee operate as a signatory to a coal wage agreement. Virginia Lee has since maintained its corporate form, though its activities have been limited to passively investing the proceeds of its former coal operations.

In October 1993, the Social Security Administration made beneficiary assignments to Virginia Lee pursuant to the statutory scheme, naming certain of its former employees and their dependents. Consequently, Virginia Lee was assessed premium liability under 26 U.S.C.A. § 9706(a)(3), with such payments due and owing to the UMWA Combined Benefit Fund. The Combined Benefit Fund was established to ensure health benefits for retired UMWA coal miners and their dependents.

After the Trustees filed suit to compel payment in May 1997, Virginia Lee elected to settle. On July 7, 1997, less than one month after the entry of the final order in this case, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), was granted certiorari before the Supreme Court. The Court voted five to four in favor of Eastern Enterprises, the operator, holding that assessment of Coal Act premiums to a pre-1978 signatory operator was unconstitutional. Virginia Lee subsequently received a notice from the Social Security Administration stating that, pursuant to the *Eastern Enterprises* decision, the assignments made to them were void.

Virginia Lee then sought disgorgement of the sum paid pursuant to its settlement agreement

with the Trustees. This would effectuate a refund of premiums previously assigned under the Coal Act by moving for relief from the final order pursuant to Fed. R. Civ. P. 60(b).

Pursuant to Rule 60(b), the court found that the filing delay was reasonable and that there was no unfair prejudice to the Trustees. However, to succeed Virginia Lee had to show a meritorious claim or defense. A binding settlement in Virginia is judged by the presence of the essential elements of a valid contract. A binding settlement thus requires a "meeting of the minds." In Virginia, a compromise and settlement of a suit is binding unless it is shown that it was the result of fraud, mistake, or undue advantage.

The Trustees argued that the parties' settlement agreement was a valid and enforceable contract that would bar any claim or defense that Virginia Lee otherwise might have had in this case. Virginia Lee, on the other hand, argued that it only needed to present a meritorious defense to the original action for premiums under the Coal Act. Finding that Virginia Lee had presented nothing to disavow its decision to settle, the court dismissed Virginia Lee's argument. Virginia Lee failed to allege the existence of fraud, mistake, or undue advantage, as would be necessary to undercut the binding effect of settlement.

The court held that in light of its failure to sufficiently plead a meritorious claim or defense, Virginia Lee did not meet the threshold requirements for relief from judgment under Rule 60(b). The court further stated that, even without consideration of the threshold requirements, neither the extraordinary circumstances nor the

undue hardship required under subsection (6) of Rule 60(b) were demonstrated. To hold otherwise would "not only undermine the finality of judgments doctrine but also compromise the integrity of the settlement process among litigants." *Holland*, 188 F.R.D. at 257. The motion to vacate the final order was thus denied.

Search of Trailer on Private Parking Lot Was Reasonable in Criminal Prosecution of Asbestos Removal Contractor

United States v. Potter, 71 F. Supp. 2d 543 (E.D. Va. 1999).

This case involves the prosecution of an asbestos removal contractor on charges of improper disposal of regulated asbestos-containing material, in violation of 42 U.S.C. § 7413(c)(1), and failure to notify the United States Environmental Protection Agency ("EPA") of an asbestos removal project, in violation of 42 U.S.C. § 7413(c)(2). The defendant, Paul T. Potter, is Vice-President of Chelsea Environmental Corporation ("CEC"), an asbestos removal company. In April 1996, on behalf of CEC, the defendant contracted with the Fairfax County Public Schools ("FCPS") to remove asbestos-containing floor tiles from three elementary schools. In June 1996, the defendant rented a trailer from Summit Transportation Groups, Inc. ("Summit") for use in the asbestos removal. Asbestos-containing floor tiles removed from the schools were loaded onto the trailer, but did not fill the trailer. On August 22, 1996, the defendant contacted American Trailer Sales Company ("ATS") and rented a

parking space to store the trailer on a month-to-month basis. The trailer was moved to ATS's location on August 27, 1996, and was padlocked and left for storage.

ATS began billing the defendant on a monthly basis, sending monthly invoices to CEC's business address, but the defendant failed to make rental payments from September 1996 to December 1996. ATS's operations manager contacted the defendant and informed him that if he did not pay his account, ATS would remove the trailer from its lot and place it on the side of the road. In January 1997, the defendant paid his account in full. For the next year, ATS continued to send monthly invoices to the defendant, but the defendant failed to make further rental payments.

In October 1997, William Brown, ATS's division manager at the site, observed the defendant supervising several other individuals dressed in protective gear and loading trash bags into the trailer. Brown approached the group and the defendant informed Brown that he was supervising the placement of asbestos-containing materials into the trailer. Brown contacted ATS owner Buzz Hurley and reported the substance of his conversation with the defendant. Hurley contacted Waste Management, a disposal company, who visited the lot on two occasions. On the first occasion, Brown escorted the Waste Management representative to the trailer and removed the defendant's padlock with bolt cutters to allow the representative to enter. On the second occasion, the representative entered the unlocked trailer and observed its contents.

In December 1997, Hurley was concerned about the defendant's

trailer because ATS's lease on the location was due to expire at the end of the year. Hurley contacted the Fairfax Fire and Rescue Department ("FFRD") and informed them that there was an abandoned trailer at the location that he believed contained hazardous materials. Captain David McKernan from FFRD contacted the Federal Bureau of Investigation ("FBI"), the EPA, the Virginia Department of Environmental Quality ("DEQ"), and the Virginia Department of Labor and Industry ("DOLI"). On December 23, 1997, Captain McKernan arrived at the location with representatives of all of these agencies. They were met by Brown who escorted the agents to the trailer. The agents conducted a visual inspection of the trailer's contents. On January 20, 1998, FBI agent Marvin Strickland contacted Summit's owner and was given permission to search the trailer. Photographs were taken of the contents of the trailer and samples were taken.

The defendant moved to suppress this evidence as an unlawful search in violation of the Fourth Amendment. According to the district court, a defendant claiming to have been subjected to an unlawful search in violation of the Fourth Amendment must establish, as a threshold matter, that he had a legitimate expectation of privacy in the particular area searched. A legitimate expectation of privacy depends on two factors: (1) whether the defendant manifested a subjective expectation of privacy in the area searched; and (2) whether the defendant's subjective expectation of privacy was objectively reasonable. The burden of proof rests on the defendant.

To satisfy the subjective inquiry, a defendant, through his own conduct, must have demonstrated an

intention to keep his or her activities and items private, and must not have knowingly exposed them to the open view of the public. This test was satisfied in this case because the defendant did not give anyone permission to enter the trailer, the trailer was padlocked, and the contents were not open to public view.

To satisfy the requirement that the subjective expectation of privacy be objectively reasonable, the defendant's expectation must have been of a type that a reasonable person would recognize as legitimate. Applied here, the defendant's subjective expectation of privacy in the trailer was not objectively reasonable. First, the defendant failed to make rental payments to ATS and was on notice that failure to pay these rental obligations could result in severe consequences. Second, the defendant rarely visited the location, allowing others to exercise dominion and control. In light of these circumstances, the district court found that the defendant created a situation where a reasonable person would expect or predict precisely what occurred here.

Even assuming that the defendant had a legitimate expectation of privacy in the trailer at the time it was searched, the searches would still be valid if the government agents had apparent authority to conduct the searches. The standard for assessing apparent authority is whether the facts available to a government agent at the moment of a search would warrant a man of reasonable caution in the belief that the consenting party had authority over the premises. The court decided that the government agents acted reasonably in believing that they had consent to search the trailer on all three occasions. On the first occasion, the

agents found the trailer unlocked on the date of the first search and prior to conducting the search they questioned Brown, who verified that the defendant had not made rental payments to ATS in 12 months. On the second and third occasions, the government agents acted on the express consent of the actual owner of the trailer.

Thus, the district court concluded that defendant's motion to suppress must fail and the search of the trailer was reasonable.

Virginia Supreme Court

Augusta County Subdivision Ordinance Not Authorized by Land Subdivision and Development Act

*Board of Supervisors of
Augusta County v.
Countryside Investment Co.,
522 S.E.2d 610 (Va. 1999).*

Countryside Investment Company, L.C. ("Countryside Investment") was the contract purchaser of a parcel of land consisting of approximately 140 acres located in Augusta County. In 1997, the Board of Supervisors for the Augusta County Department of Community Development ("Board") tentatively denied approval of Countryside Investment's master plan for a proposed subdivision. Countryside Investment sought judicial review of the Board's disapproval of the preliminary master plan in the circuit court pursuant to § 15.2-2260 of the Virginia Code. The circuit court ruled that §§ 21-

6 and 21-7 of the County Subdivision Ordinance violated the Dillon Rule because those sections were not authorized by the enabling legislation in Code §§ 15.2-2241 and 15.2-2242. The court ordered approval of the master plan and enjoined the Board from taking any action inconsistent with the decree. The Board appealed.

The parcel of land was originally given an R-10 residential zoning classification under the Augusta County Zoning Ordinance which established minimum lot size and minimum floor space requirements. This ordinance provided for a minimum lot area of 9,000 square feet for property having an R-10 zoning classification. In 1997, Countryside Investment submitted a master plan for a proposed subdivision, and the Augusta County Department of Community Development recommended approval by the Board of Supervisors. However, the Board denied approval for three reasons: (1) such a large subdivision in a rural location should accommodate some of the needs for non-residential community-type facilities; (2) the overall density of the subdivision should not exceed a figure of about two residences per acre; and (3) some of the property may not be suitable for residential development and would result in an unacceptable increase in population. The Board looked to Ordinance §§ 21-6 and 21-7 which contain provisions for lot size and shape and give the Board power to decide suitability for subdivisions. On appeal, the Board argued that the circuit court erred in holding that these sections violated the Dillon Rule because the locality is not required to have specific authority for every provision in its ordinance. Countryside Investment argued that delegation of the State's police power to a local

governing body is subject to statutorily prescribed limitations.

The Supreme Court of Virginia agreed with Countryside Investment. While the Court recognized that the General Assembly may delegate some police power to localities, the power of a municipality, unlike that of the State legislature, must be exercised pursuant to an express grant. The Dillon Rule of strict construction provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.

The Court held that §§ 21-6 and 21-7 of the County's Subdivision Ordinance are void because the General Assembly did not authorize the Board to enact the challenged requirements in a subdivision ordinance. Neither Code section that the Board relied upon authorizes a governing body to enact provisions in a subdivision ordinance which specify the size and shape of lots or to prohibit a proposed subdivision if it is not conducive to the preservation of a rural environment. The Court explained that the Board is not permitted to ignore the requisites contained in Virginia Code §§ 15.2-2241 and 15.2-2242 and enact standards which "would effectively permit it to rezone property in a manner inconsistent with the uses permitted by the property's zoning classification." 522 S.E.2d at 614. Furthermore, the General Assembly's declaration of intent concerning subdivision of land, Virginia Code § 15.2-2200, does not give the Board power to enact an ordinance which is more expansive than the requisites contained in §§ 15.2-2241 and 15.2-2242 of the Virginia Code.

Arlington County Board of Zoning Appeals Lot Measurement Method Affirmed

Higgs v. Kirkbride, 522 S.E.2d 861 (Va. 1999).

Plaintiffs Higgs, et al. ("Neighbors") and the Arlington County Board of Zoning Appeals ("BZA") brought this appeal to challenge the trial court's reversal of a BZA decision. The Lot in question ("Lot 11-A") was a quadrilateral lot, owned by the defendants, with no parallel sides and no congruent angles. The zoning administrator approved the subdivision plat, which effectively created Lot 11-A, after calculating the average lot width using the south lot line as the rear lot line. The Neighbors appealed to BZA arguing that the lot was irregularly shaped and that the administrator erred by using the south lot line as the rear lot line. The Neighbors contended that the administrator should have calculated the average lot width in the manner prescribed for irregular lots by using "a line at least ten (10) feet in length entirely within the lot and parallel to and at a maximum distance from the front lot line" to calculate the average lot width. 522 S.E.2d at 862. BZA agreed with the Neighbors and determined that Lot 11-A was an irregularly shaped lot which failed to meet to the minimum average lot width requirements.

The defendants argued that Lot 11-A was a quadrilateral lot and not a triangle or otherwise irregularly shaped lot because the south lot line, which ran at a forty-five degree angle to the southeast, was "the most distant from, and the most nearly parallel with, the front lot line" and, thus, [was] the 'rear

lot line' as defined by the ordinance for purposes of determining the average width of the lot." 522 S.E.2d at 862. Additionally, the defendants pointed out before the trial court that there were similarly subdivided lots within Arlington County and that the administrator had consistently treated quadrilateral lots as having identifiable rear lot lines even when the rear lot line was not parallel with the front lot line.

The Neighbors and BZA argued before the trial court that BZA was not bound by the prior actions of the administrator. They also argued that the defendant's lot was different from other quadrilateral lots that had not been classified as irregularly shaped because the other quadrilateral lots had had side lot lines that were parallel to each other and perpendicular to the front lot lines.

The trial court reversed the decision of the of BZA as "plainly wrong" and stated that BZA had "applied erroneous principles of law." The court further found that Lot 11-A conformed to the zoning requirements and that the subdivision plat was valid. *Higgs*, 522 S.E.2d at 862.

In its discussion of the case, the Supreme Court of Virginia first pointed out that the decisions of BZA should only be overturned on review "if the trial court determines that BZA applied erroneous principles of law or was plainly wrong and in violation of the purposes and intent of the zoning ordinance." *Id.* at 863. The court then concluded that BZA's determination that Lot 11-A was irregularly shaped was "based on a sound reading of the ordinance" and therefore was not "plainly wrong or in violation of the purpose and intent of the ordinance." *Id.* at 864.

The court reasoned that the legislative intent behind the ordinance was to assure a minimum average lot width. Lot 11-A had a width of 60 feet nowhere except the front lot line and could only satisfy the ordinance's minimum average width requirement by way of the elongated south lot line. Therefore, a finding that the lot should be measured as an irregular lot coincided with the intent of the ordinance. The Supreme Court of Virginia found in favor of BZA and the Neighbors and reversed the judgment of the trial court.

County Maintains Zoning Authority Over Wireless Tower Construction

Board of Supervisors of Fairfax County v. Washington, D.C. SMSA L.P., 522 S.E.2d 876 (Va. 1999).

The Supreme Court of Virginia reversed a lower court decision granting summary judgment to wireless telecommunications companies Washington D.C. SMSA L.P. and Wireless PCS, Inc. ("Respondents"). The County of Fairfax brought an injunctive complaint against these two companies to prohibit them from erecting telecommunications facilities on county property until they had received approval under the county zoning ordinance. The circuit court held that, because the towers were constructed in accordance with an agreement with the Virginia Department of Transportation ("VDOT"), the towers were state property and could not be regulated by Fairfax County. The Supreme Court of Virginia reversed, holding that the telecommunications companies must sub-

mit their proposed use of this land to the County's planning commission.

In October of 1996, VDOT and Respondents entered into lease agreements that permitted Respondents to construct and operate certain telecommunications facilities along the state highway system running through Fairfax County. The lease agreements required Respondents to construct and maintain the towers, but allowed that the towers would remain Respondents' property. In exchange, VDOT would be allowed limited use of the towers. The tower sites were located on VDOT's right-of-way within the boundaries of Fairfax County. Neither of Respondents sought approval from the county zoning board before beginning construction.

In September of 1997, the County sought a declaratory judgment requiring a cease of operations until the zoning board approved construction of the towers. The County contended that the towers were public utility facilities of commercial entities located on unincorporated land within the county, and were thus subject to approval. Respondents contended that the towers were to be shared communications facilities between VDOT and Respondents and, because the County's own ordinances prohibit it from regulating VDOT property, the County had no authority to regulate the tower construction. The circuit court granted summary judgment to Respondents.

The Supreme Court of Virginia limited their decision to whether a private telecommunications company may construct a public utility facility on a leasehold property which is part of a VDOT right-of-

way without first seeking county permission. The court noted that such construction would normally require approval of the county zoning board. The distinguishing factor in this case was the fact that these towers were located on land controlled by and leased from a department of the state government. The court first rejected a contention that the zoning authority exercised by Fairfax County violated the Dillon Rule. The Dillon rule provides that the powers of a local government are fixed by statute and limited to those that are essential and indispensable. The court noted that the county did have statutory power to regulate public utility facilities under § 15.2-2232(A) of the Virginia Code. Thus, the county's regulation in this case was not inconsistent with any authority granted by statute.

The court also found that the towers were not exempt from county regulation because they were located on VDOT's right-of-way. The court noted that the towers were to be owned exclusively by respondents. Further, VDOT did not have a primary right of use to the land during the lease periods. Thus, respondents' contention that these towers were the property of the state and could not be regulated by the County necessarily failed. The fact that the towers were conveniently located on state-owned rights-of-way was found to be irrelevant in determining the County's regulatory rights. The court held that the telecommunications companies must submit their proposed use of the leased land to the County's planning commission.

Virginia Court of Appeals

Sovereign Immunity of State Water Control Board

Riverview Farm Assocs. v. Commonwealth, No. 2337-98-2, 1999 WL 1134722 (Va. Ct. App. Dec. 7, 1999).

Riverview Farm Associates Virginia General Partnership, Jearald D. Cable and Robert L. Waldrop ("Appellants") appealed a circuit court's ruling that the doctrine of sovereign immunity prevented the circuit court from hearing Appellants' appeal of a decision by the Water Control Board ("Board") issuing a modification of a Virginia Water Protection Permit ("VWPP"). The decision involved certificates for the alteration of state waters. The Virginia Court of Appeals reversed, holding that § 62.1-44.29 of the Virginia Code waived the Board's sovereign immunity from suit in this case.

The federal Clean Water Act ("CWA") requires applicants for a federal license or those proposing activities that may result in a discharge to navigable waters to provide the federal permitting agency with a certificate from the state that the discharge will comply with the CWA. Pursuant to the CWA, Virginia issues such a certification in the form of a VWPP. Weanack Land Limited Partnership ("Weanack") requested and was granted a VWPP in October of 1995 and sought a modification of the VWPP pursuant to § 62.1-44.15:5 of the Virginia Code in order to expand and enlarge a port facility. The Board issued the modification in March of 1998 after refusing a public hearing on the issue requested by Appellant Jearald D. Cable.

Appellants appealed the Board's decision to issue the modification and the denial of Cable's request for a public hearing to the circuit court. The circuit court held that the doctrine of sovereign immunity precluded judicial review of the decision to modify the VWPP. While the court recognized that § 62.1-44.29 authorized judicial review of final decisions of the Board, the court noted that the section does not specifically list § 62.1-44.15:5 as a section for which judicial review is authorized. Therefore, the circuit court reasoned that the exclusion of that section could not effectively waive the state's sovereign immunity.

The Virginia Court of Appeals noted that § 62.1-44.14(5) was specifically included in § 62.1-44.29, thus waiving sovereign immunity for this section. Under § 62.1-44.15(5) the Board has authority to issue certificates for the alteration of state waters. The court noted that in *Alliance to Save the Mattaponi v. Commonwealth*, 519 S.E.2d 413 (Va. Ct. App. 1999), the court of appeals held that a VWPP is "a certificate for the alteration of state waters" pursuant to § 62.1-44.29. *Id.* at 416. Thus, pursuant to § 62.1-44.29, the Commonwealth waived its sovereign immunity by the Board's grant or denial of the VWPP. *Id.*

The court of appeals held that the decision in *Alliance* controlled Appellants' case. The doctrine of sovereign immunity did not bar Appellants' appeal of the Board's modification of the VWPP. The court of appeals reversed the circuit court's decision and remanded the case for further proceedings in accordance with the *Alliance* decision.



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