

RECENT DEVELOPMENTS

FEDERAL CASE LAW

A. *The Comprehensive Environmental Response, Compensation and Liability Act*

Conservation Law Foundation of New England, Inc. v. Reilly, 950 F.2d 38 (1st Cir. 1991).

Plaintiffs sought injunctive relief under section 120(d) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9620-9675 (1988).

Under section 120(d), the Administrator is required to establish a Federal Agency Hazardous Waste Compliance docket. Once a disposal facility is on the docket, section 9620(d) requires evaluation action on the part of the Administrator within thirty months. The plaintiffs claimed that the Administrator had failed to act within the prescribed time period and therefore sued to obtain injunctive relief against all the noncomplying facilities under the citizen suit provision of CERCLA.

The district court denied the Administrator's motion for summary judgment based upon the belief that the plaintiffs lacked standing to pursue their claim for relief. The court held that the plaintiffs had adequately alleged injury in fact concerning the local facilities and they had standing to pursue the "legal rights of the general public" as affected by the waste disposal sites.

On appeal, the Court of Appeals held that the plaintiffs did not allege sufficient injury and lacked standing to pursue claims for the general public, since they were not affected by the nationwide waste disposal sites. The court noted that while Congress may expand the rights of persons to pursue adjudication of third party rights, it cannot expand the standing limitations imposed upon it by Article III of the United States Constitution. The court held that the plaintiffs had standing to pursue claims arising from facilities that posed a substantial threat or harm to their immediate well-being. However, allegations of general harm were not sufficient under the standing requirement.

The court further disagreed with the plaintiffs interpreta-

tion of the citizen suit provision of CERCLA, which would provide for the administration of an unnecessarily broad and abstract definition of standing. Furthermore, the court noted that the plaintiff group did not have a personal stake in all the facilities in question, but merely a direct interest in only a few of the facilities.

JEFFREY GAUGHAN

Manor Care, Inc. v. Yaskin, 950 F.2d 122 (3d Cir. 1991).

Manor Care, Inc., appealed the dismissal of its suit for declaratory and injunctive relief from a New Jersey Department of Environmental Protection directive, claiming the directive was preempted by federal action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988). The appellant objected to contributing to New Jersey's ten percent share, totaling more than five million dollars, of the cleanup costs of two landfills.

The Third Circuit affirmed the district court's finding that the statutory language and legislative history of CERCLA did not reveal a congressional plan to preempt state laws, nor were CERCLA and the New Jersey Spill Act, the authority for the directive in question, in conflict. The court noted that the plain language of CERCLA expressly declined to preempt state laws regarding the release of hazardous substances within the state. It further found congressional intent by noting the repeal of confusing CERCLA language following a Supreme Court decision in which preemption was found. The court also analyzed the two statutes to determine that CERCLA did not limit state cost recovery remedies. The effect of this determination may be increased state assistance to the hazardous substance cleanup effort, because of the states' ability to shift the cost burden to responsible parties.

GURJEEV SACHDEVA

B. The Resource Conservation and Recovery Act

Environmental Defense Fund, Inc. v. City of Chicago, 948 F.2d 345 (7th Cir. 1991).

The district court granted a motion for summary judgment which exempted ash produced by a Chicago solid waste incinerator from regulation under section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6921(i) (1988). The Environmental Defense Fund (EDF) appealed.

Section 6921(i) provides that a resource recovery facility will not be deemed to be "treating, storing, disposing of, or otherwise managing hazardous wastes" for the purposes of regulation if the facility meets certain requirements. The City of Chicago (Chicago) had owned and operated the Northwest Waste-to-Energy Facility since 1971. EDF argued that the section 3001(i) exemption should cover only very specific activities of municipal incinerators handling household and commercial wastes. EDF regarded the section 3001(i) language "otherwise managing" hazardous wastes as not including the "generation" of hazardous wastes within the exemption. Chicago argued just the opposite, claiming that "otherwise managing" should cover everything a resource recovery facility does, including the disposal of ash residue.

The court considered the history of section 3001(i), initially examining its legislative history and EPA's interpretation and influence concerning that legislative history. The court turned to a 1980 EPA statement, known as the "household waste exclusion," which would exempt ash generated from resource recovery facilities. However, this statement was never codified into section 3001(i). The court deemed later positions taken by EPA as ambiguous. Although a Senate report had sufficiently influenced the Second Circuit to grant a similar exemption for ash, the Seventh Circuit found ample evidence that congressional intent concerning section 3001(i) had been complex and conflicting. Given the nebulous legislative history and varying interpretations, the court ultimately gave the most weight to the actual language of the statute. Reasoning that every time Congress enacts legislation it is acting in context, the court considered the end product to be the definitive statement of legislative intent. "Generation" was not included in section 3001(i). The court asserted that "otherwise managing" and "generating" were not

coextensive terms. Therefore, the court reversed, and held that the ash generated from incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under RCRA.

MARK F. ALLEY

C. The Clean Water Act

North and South Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552 (1st Cir. 1991).

In 1987, the Massachusetts Department of Environmental Protection (DEP) issued an administrative order to the town of Scituate, alleging that Scituate owned and operated a sewage treatment facility that was discharging pollutants into a coastal estuary without a federal discharge permit. DEP issued the order under its authority found in the Massachusetts Clean Water Act, M.G.L. ch. 21 § 44, which closely parallels the Federal Water Pollution Control Act (the Clean Water Act or CWA), 33 U.S.C. §§ 1251-1387 (1988). The order required that Scituate take all steps necessary to plan, develop, and construct a new wastewater facility, and that the town submit for review and obtain approval from the state at all steps of planning, development, and construction. In 1989, North and South Rivers Watershed Association brought this citizen suit in the district court, alleging a violation of the Clean Water Act based on the same discharge violations as the state's order. The Association sought civil penalties, as well as declaratory and injunctive relief.

The North and South Rivers Watershed Association appealed the district court's dismissal of its suit, which had held that it was barred under section 309 of the Clean Water Act. The First Circuit affirmed this decision, holding that since the state had commenced and was diligently prosecuting an enforcement action under a state law that was comparable to the federal act that appellant was seeking to enforce, appellant's action was barred under section 309(g)(6)(a) of the Federal Water Pollution Control Act.

Section 309 of the CWA states that a citizen suit for penalties is barred if the state has commenced and is diligently prosecuting an action under a state law comparable to the administrative penalties section of the CWA. The focus of the statutory bar to citizen suits is on whether the corrective action

sought to remedy the violations alleged in the citizen suit has already been taken and is being diligently pursued by the government. Since DEP had already taken action to correct the violations upon which appellants brought its action, this enforcement action would be duplicative and would divert state resources away from remedying other violations. Furthermore, after receiving the order, Scituate hired an engineering firm, which submitted study plans for the development of the new wastewater facilities, a draft of the interim report, and a draft of the final plan for upgrading the wastewater facility to the state. The court thus held that the state was diligently enforcing its order.

TRACY E. BLITZ

Public Service Co. of Colorado, Fort St. Vrain Station v. United States Environmental Protection Agency, 949 F.2d 1063 (10th Cir. 1991).

Petitioner, Public Service Company of Colorado, appealed from a decision of the Environmental Protection Agency (EPA) rejecting petitioner's challenge to the imposition of effluent limits on internal waste streams, under the Federal Water Pollution Control Act (the Clean Water Act or CWA), 33 U.S.C. §§ 1251-1387 (1988). The requirements were imposed on those wishing to obtain National Pollutant Discharge Elimination System (NPDES) permits in order to release effluents into the "waters of the United States." The new restrictions were in line with the existing EPA standard regulating internal waste flows. Arguing before the Regional Administrator, Public Service Co. contended that the new restrictions set by EPA were a violation of its powers under the Act. The Administrator dismissed the claim and the decision was affirmed by EPA.

Under the "internal waste stream rule," codified at 40 C.F.R. § 122.45 (1990), EPA can regulate internal pipe systems carrying pollutants whenever it becomes "impractical or infeasible" to monitor such outflow "at the point of discharge" into the water. The Tenth Circuit, echoing the sentiment of the Supreme Court and other federal circuits, granted EPA "broad discretion" to regulate internal waste flows. Analyzing the text of the Act and its legislative history, the court held that the new regu-

lation was not forbidden by Congress nor was it an invalid exercise of administrative authority.

DENNIS FANG

D. National Environmental Policy Act

North Carolina v. City of Virginia Beach, 951 F.2d 596 (4th Cir. 1992).

Plaintiff, State of North Carolina, sought an injunction prohibiting defendant, City of Virginia Beach, from building a pipeline across Virginia, to the edge of Lake Gaston, situated on the border and within the jurisdiction of the two states. The pipeline was to be part of a project that would bring water from Lake Gaston to Virginia Beach, Virginia's largest metropolitan area, which was prone to shortages of fresh water. After exploring alternatives such as desalination of seawater and wastewater reuse, Virginia Beach decided the best way to solve this problem was to draw water from Lake Gaston, a man-made lake created by the Federal Energy Regulatory Commission (FERC) as part of a hydropower project. North Carolina opposed the project because it would allegedly lead to future water shortages.

Before Virginia Beach could draw water from the lake, it needed the grant of easements from Virginia Power Company (VEPCO), which in turn required approval from FERC. Because most of the project traversed the State of Virginia, federal law required approval of the Army Corps of Engineers for the in-Virginia pipeline. The Corps granted its approval after conducting a National Environmental Policy Act (NEPA) review, ruling that the pipeline would have no significant impact on the human environment. FERC, however, had yet to complete its required NEPA review. Reversing the district court, and rejecting North Carolina's plea, the Fourth Circuit held that the in-Virginia pipeline was outside of FERC's jurisdiction, and that construction could not be enjoined without a showing that allowing further construction would have a direct and substantial probability of influencing FERC's ultimate decision to approve construction.

The court's holding turned on its interpretation of earlier Fourth Circuit precedent, *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986). The *Gilchrist* court held that, when a project requires approval from two separate

jurisdictions, one which has granted approval, and one which has yet to grant approval, allowing an expensive project to go forward in advance of environmental approvals placed undue political pressure on permit-granting authorities. Here, Virginia Beach stated it was willing to absorb the multi-million dollar loss which would occur if FERC declined to grant a permit, and that further delay would add to the total cost of the project. The court distinguished *Gilchrist* partly because FERC had placed a statement in the Federal Register indicating that it would not allow Virginia Beach's expenditures to affect its decision. The dissent argued that the majority had distinguished *Gilchrist* out of existence, and had applied the wrong standard of review in reversing the district court.

DAVID AUGUST KONUCH

Save Barton Creek Ass'n v. Federal Highway Admin., 950 F.2d 1129 (5th Cir. 1992).

Appellees, Save Barton Creek Association, We Care Austin, and Austin Crossroads, sought declaratory and injunctive relief to stop two highway projects in Austin, Texas. The district court enjoined further construction pending compliance with NEPA.

Mopac South and Segment 3 are two highways partially constructed in Austin, Texas. The Texas Department of Highways and Public Transportation planned, developed, and constructed these highways solely from state funds. Although federal funding had been originally contemplated, it was never sought. Both of these highways cross over the Edwards Aquifer, an important source of water to central Texas. Appellees brought this suit to obtain a declaration that the construction of these highways constituted "major federal actions," thereby making these projects subject to NEPA and requiring the completion of an environmental impact statement. The appellees further contend that the appellant state agencies, Texas Department of Highways and Public Transportation and the Mopac South Transportation Corporation, acted deceptively by trying to avoid NEPA compliance by characterizing the most environmentally sensitive segments of the highway as state action. The district court entered an injunction from which the state agencies appeal.

The Fifth Circuit first addressed appellants' contention that this case could not be subject to judicial review because no final administrative determination had been made, and was, therefore, not ripe for review. After first determining that the finality requirement of section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704 (1988), was to be interpreted in a "pragmatic way," the court held that the case could not be dismissed on ripeness grounds because the "projects had left the drawing board and entered varied stages of construction."

The court next turned to the question of whether this construction constituted a "major federal action" for the purposes of NEPA. The court first determined that the Council on Environmental Quality regulations defining "major federal action" were subject to substantial deference. Then, after reviewing relevant case law, the court held that "early coordination or compliance with the eligibility requirements for federal funding alone does not constitute a 'proposal' for 'major federal action.'" The court found that federal involvement, supervision and control were the touchstones of slating something as a "major federal action." Therefore, because the state agencies acted without supervision, authorization, or control by the federal government, these construction projects could not be classified as "major federal actions."

Finally, the court addressed appellees' contention that because these two highways connected with a planned federal highway, and the state was involved with the federal planning, that the state was guilty of "improper segmentation." Appellees urged that the state agencies had deceptively schemed to have the state build the most environmentally sensitive sections of a federal highway plan to avoid complying with NEPA. The court applied the *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir. 1981), four-prong test, and concluded that these highways were substantially independent and had logical termini so as to avoid the characterization of "improper segmentation." The court intimated that objective compliance with the *Piedmont Heights* test was enough and that a closer look at a state's motivations should not be necessary.

SARAH C. SMITH

E. The Endangered Species Act, National Forest Management Act, Migratory Bird Treaty

Seattle Audubon Society v. Evans, 952 F.2d 297 (9th Cir. 1991).

Appellant, United States Forest Service, challenged the district court's issuance of injunctive relief enjoining appellant's sale of timber within the spotted owl's "habitat," pursuant to the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1687 (1988) and the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1543 (1988).

The appellant contended that its prior duty to preserve "a viable population" of the spotted owl ceased upon the owl's designation as a threatened or endangered species under ESA (as it was per se inviable), thus, allowing it to cease compliance with NFMA. It was, therefore, asserted that NFMA and ESA operated exclusively, rather than concurrently, of one another.

The Ninth Circuit affirmed the district court's decision, holding that NFMA does not cease to apply once a species requires ESA protection. The court was unwilling to "reward" the appellant for its inability to fulfill its mandate to preserve "viable populations of species" by allowing it to escape the requirements of NFMA. Such a decision, in the court's view, would create a disincentive to protect "wildlife," in clear contravention of the congressional intent and express purpose of ESA. Co-appellants, Seattle Audubon Society and Portland Audubon Society challenged the district court's denial of injunctive relief which allowed the Bureau of Land Management and the Forest Service to log and sell timber located within a prospectively adequate spotted owl "habitat," pursuant to the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-711 (1988).

MBTA provides, in pertinent part, that the "taking" of a "migratory bird" is unlawful and the spotted owl is classified as a migratory bird. The appellants thus contended that the logging and selling of timber within the challenged area was equivalent to a "taking," as defined by MBTA. The Ninth Circuit, once again, affirmed the district court's ruling, holding that, while the appellants may have proven the requisite "taking" under ESA, which contains a significantly broader definition of the term, MBTA's prohibition on "taking" is not equivalent to a restriction on "habitat destruction or modification." ESA's express inclusion of such a restriction, and MBTA's lack of one,

were, in the court's opinion, deliberate and intended. Thus, the court deferred to the congressionally mandated scopes of ESA and MBTA.

BRIAN RAUER