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CASE SUMMARIES

CERCLA

United States v. USX Corporation, 68 F.3d 811 (3rd Cir. 1995)

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the United States filed suit against USX Corporation (USX), Atlantic Disposal Service (ADS), the principal shareholders of ADS, Alvin White (White) and Charles Carite (Carite), and three additional White-Carite companies for cleanup costs associated with a hazardous waste disposal site. USX filed cross-claims against all other defendants for contribution, as permitted by CERCLA.

ADS transported drums of hazardous waste to disposal sites for USX. Testing at one of these disposal sites revealed a release of hazardous substances into the environment, resulting in groundwater contamination. The Environmental Protection Agency (EPA) alleged liability against USX as a generator of hazardous waste under CERCLA § 107(a)(3). USX negotiated a settlement prior to trial on the basis of EPA's proposals. EPA further sought transporter liability against ADS, and personal liability against White and Carite as the sole officers and directors of ADS under CERCLA § 107(a)(4). Finally, it also claimed transporter liability against the White-Carite companies, arguing that the companies were implicated as joint venture participants with defendant ADS. The district court granted a motion for summary judgment in favor of the government.

After reaching a settlement with USX, the only claim the United States had remaining was for declaratory judgment of liability for future costs against the remaining defendants. On appeal, the Court of Appeals for the Third Circuit held summary judgment was inappropriate on the issue of personal liability in

light of the evidence presented and remanded the case.

In challenging the summary judgment, White and Carite argued the district court erred in assessing liability on the basis of their day-to-day involvement in the business. They claimed the standard should be personal participation in the decision or actual knowledge of the selection of a disposal site and acquiescence in that decision.

The court of appeals examined case law establishing an "actual control" test for corporate officer liability as an operator of a hazardous waste facility under CERCLA § 107(a)(1) and (a)(2). The court then chose to adhere to CERCLA's "traditional concepts of limited liability" under § 107(a)(4). These traditional concepts mandate actual participation in the wrongful conduct for the imposition of personal liability on the shareholders.

The court found that White and Carite presented sufficient evidence regarding their noninvolvement with the transportation of hazardous waste that a reasonable jury could find in their favor based on the court's standards for shareholder-transporter liability. It remanded the case for determination of White and Carite's personal liability under these guidelines.

- by Rebecca J. Grosser

Macklanburg-Duncan Company v. Aetna Casualty and Surety Company, 71 F.3d 1526 (10th Cir. 1995)

In 1986, the Environmental Protection Agency (EPA) brought a civil action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against Royal Hardage, the owner and operator of a hazardous waste disposal site. The EPA named numerous other defendants, including

appellant Macklanburg-Duncan Co., the majority of which formed the Hardage Steering Committee (HSC) and stipulated to liability. The HSC then filed third-party complaints against those companies that had contributed hazardous waste to the Hardage site. The HSC sought reimbursement of the costs of its liability in the CERCLA action. While the third-party complaints were filed separately, the appeals in the instant action were joined and decided simultaneously.

Downtown Airpark, Inc., and Double Eagle Refining Company were both third-party defendants. Downtown Airpark settled HSC's claim against it. The district court entered summary judgment for HSC against Double Eagle for the remaining amount attributable to that company.

HSC then filed for a declaratory judgment, stating that the insurers of Double Eagle were liable to HSC for the proceeds of comprehensive general liability (CGL) policies issued to Double Eagle. HSC also initiated a garnishment proceeding against the insurers of Double Eagle. HSC argued that, as a judgment lien creditor of Double Eagle, it was entitled to the proceeds of the CGL and also was entitled to garnish the proceeds of the CGL policies that were in the possession of the garnishee insurers. The insurers moved for summary judgment based upon an exclusion in the CGL policies that excluded coverage for personal injury or property damage caused by pollution discharge. The policy, however, contained additional language that would make the exclusion ineffective if the discharge was "sudden or accidental." HSC argued that the discharge was in fact "sudden and accidental" and that the exclusion should not apply. The district court found that the discharge was deliberate, that the exclusion clause was not ambiguous, and held that the policies did not provide coverage.

Simultaneously, Downtown Airpark

filed a diversity action seeking a declaratory judgment against two CGL insurers stating that the insurers were required to defend and indemnify Downtown Airpark in its settlement with HSC. The insurers again moved for summary judgment based upon the clause in the CGL policies which excluded coverage for personal injury or property damage caused by a pollution discharge. As before, the exclusion would not be effective if the discharge was "sudden or accidental." Downtown Airpark argued that the discharge was "sudden and accidental" and that the exclusion should not apply. The district court found that the discharge occurred pursuant to routine business practice, that the exclusion clause was not ambiguous, and held that the policies did not provide coverage.

In examining the issue of insurance coverage, the lower court in the instant decision based its application of the term "sudden and accidental" on the facts found in the CERCLA action. The district court in the CERCLA action had found that the Hardage Waste Disposal Site caused environmental contamination. Among the activities that caused the contamination were intentional spraying of hazardous substances out of the main pit to reduce its volume, removal of main pit substances to be mixed with sludge and deposited outside of the main pit, deliberate breaching of the main pit to cause substance flow out to other site areas, and drumming of waste outside of the main pit which subsequently caused damage due to rupture. All of these activities occurred over a number of years.

Both HSC and Downtown Airpark appealed the entry of summary judgment in favor of the insurers, arguing that the district court erroneously interpreted the meaning of "sudden and accidental" under Oklahoma law. While the district court found it to mean "abrupt or quick and unexpected or unintended," HSC and Downtown Airpark argued it merely

meant "unexpected or unintended."

The Tenth Circuit Court of Appeals withheld its decision on these appeals pending an interlocutory decision of the Oklahoma Supreme Court on whether a pollution exclusion clause in a CGL applies to long-term hazardous waste disposal. The Oklahoma state courts had split on this issue. The Oklahoma Supreme Court held that the terms "sudden" and "accidental" were unambiguous in pollution exclusion clauses. That court noted that the ordinary and popular meaning of sudden involved an element of time which did not define a gradual routine disposal of waste.

The court of appeals, in light of the recently handed down supreme court decision, determined that "sudden" and "accidental" did not apply to the waste disposal at the Hardage site and that the exception to the pollution exclusion clause in the CGLs was not applicable. Accordingly, the court affirmed the district court's entry of summary judgment for the insurance companies.

The court of appeals also decided a jurisdictional issue related to the appeal of the state garnishment petition. The court noted the division among the circuits as to whether the district court's ancillary or supplemental jurisdiction extended to state causes of action brought against non-parties to the CERCLA action. The court of appeals determined that because this particular CERCLA action was brought prior to the 1990 enactment of 28 U.S.C. § 1367, which was designed to supplant the traditional concepts of ancillary and pendent jurisdiction, the Tenth Circuit's case law on ancillary jurisdiction applied. The court decided that when a garnishment proceeding was instigated on an alleged indemnity agreement between a judgment debtor and insurer, ancillary jurisdiction should not be assumed and an independent basis may be required. However, the court concluded that in this particular case, the issues in both actions were not significantly different and that

the district court had ancillary jurisdiction.

- Michael B. Hunter

Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469 (9th Cir. 1995)

Plaintiffs (the Coalition) in this case were citizens groups and individuals seeking injunctive relief requiring the Agency for Toxic Substances and Disease Registry (ATSDR) to institute a health surveillance program for the population surrounding the Hanford Nuclear Reservation (Hanford) in Richland, Washington. The Coalition sued defendant Dowdle in his capacity as Administrator of the ATSDR.

Hanford was part of the Manhattan Project, producing plutonium beginning in 1943, and continuing production for approximately thirty years. As a result of this plutonium production, radioactive iodine and other hazardous materials entered into the atmosphere, soil, and water, exposing humans to radiation and other hazardous materials.

When the Environmental Protection Agency (EPA) proposed placing Hanford on the National Priorities List in 1988, it drafted a comprehensive cleanup plan for the site. In this plan was a summary of the specific responsibilities of ATSDR. Among these duties was the task of conducting a health assessment study to determine the current or future impact on health caused by the release of hazardous substances, developing recommendations, and identifying actions needed to evaluate and mitigate adverse health effects. In 1989, ATSDR completed its preliminary draft of the health assessment report. Because information available at the time was insufficient, ATSDR planned to continue to follow the results of relevant studies, and re-evaluate when appropriate. At that time, ATSDR did not begin a health surveillance program.

In 1993, the Coalition filed suit in the United States District Court for the

Eastern District of Washington and sought injunctive relief against ATSDR. The Coalition alleged that ATSDR had a *mandatory* duty under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to begin a health surveillance program.

ATSDR filed a motion to dismiss based on CERCLA's Timing of Review provision. The relevant portion of the statute stated that "[n]o Federal court shall have jurisdiction" over "any challenges to removal or remedial action" other than in situations listed in the exceptions. The district court granted the motion to dismiss, finding that ATSDR's ongoing "health related actions" constituted removal or remedial activities as defined by CERCLA provisions. Because the Coalition's claim challenged discretionary ATSDR actions that qualified as a removal, the district court determined it did not have jurisdiction to hear the claim.

The Coalition appealed on several grounds. First, it argued that the "health assessment" and surveillance activities of ATSDR were not "removal or remedial" actions. Second, even if the court did determine that the ATSDR activities were removal or remedial actions, not all the requirements of the Timing of Review Provision were met, and the bar to jurisdiction did not apply. The two requirements allegedly not met were: 1) that the Coalition was not "challenging" ATSDR's activities, but merely seeking an injunctive order; and 2) that since the initiation of a health surveillance program was required by CERCLA, and the CERCLA Timing of Review Provision only applied to discretionary action, the jurisdictional bar did not come into play. Third, the Coalition argued that if the court did find that the Timing of Review Provision applied, the Coalition should have been allowed to sue under the citizen suit exception of the same statute. Finally, the Coalition claimed that application of the timing provision requirements denied plaintiff due process.

The Court of Appeals for the Ninth Circuit found that the CERCLA Timing of Review provision did apply, because the activities of ATSDR met the definitions of "removal" or "remedial" activities. The court determined that ATSDR's responsibility was to effectuate and implement CERCLA's health related authorities, which included a requirement that ATSDR complete a health assessment of a proposed EPA site. Only if ATSDR determined there was a significant increase in risk of health problems due to the exposure to hazardous substances must ATSDR then initiate a health surveillance program. Hence, the health surveillance program was within ATSDR's discretion.

The court of appeals found support for its conclusion in the title of the statutory section. The court pointed out that the relevant statutory section was entitled "Response Authorities." Thus, the court interpreted congressional intent to include the ATSDR health related authorities within the category of response authorities.

The instant court also held that ATSDR health assessment and surveillance activities satisfied the statute's definition of "removal action" because it found one of CERCLA's core functions was to identify and ameliorate the effects of the release of hazardous materials on the population. Since ATSDR was the mechanism to accomplish this function of CERCLA, its health assessment and surveillance activities were eligible for CERCLA Timing of Review jurisdictional protection.

The court also dismissed the Coalition's assertion that the group was not "challenging" ATSDR's activities. The court noted that case law defined "challenge" as an action which was related to the goals of a cleanup effort. The court of appeals found the Coalition's legal proceedings to meet this definition. As a result, ATSDR's activities fell under statutory protection.

Further, the court of appeals dismissed the Coalition's argument that a

health surveillance program was required at Hanford. The coalition argued that because the surveillance program was required, ATSDR's actions were unprotected by the statute. The court found that medical monitoring was necessary only if the ATSDR first determined that there was a significant health risk to an affected population. Since ATSDR had not made this determination, a health surveillance program was within ATSDR discretion.

The court also struck down the Coalition's argument that the ATSDR had "taken" action because it had conducted a health assessment and therefore could be challenged under the citizen suit exception. The court of appeals determined that the health assessment could not be separated from the "whole of the removal action." Hence, the ATSDR had not yet "taken" action to qualify the Coalition's suit under the citizen exception.

The court of appeals also disposed of the Coalition's last argument, that it was deprived of due process. The court stated that it was within the discretion of Congress to amend the statute if it wanted to allow jurisdiction of suits such as this. Since Congress had chosen to bar jurisdiction, the court could not overlook the jurisdictional provisions of the statute.

The court's final analysis was that ATSDR's health assessment was a removal or remedial action, and as such, any claim against the ATSDR for this action was barred by the jurisdictional ban of CERCLA's Timing of Review provision.

- by Cynthia Gilner

RCRA

Meghri v. KFC Western, Inc., 1996 WL 117012 (U.S. Jan. 10, 1996)

The Meghrihs, previous owners of property contaminated by petroleum, successfully defended a suit brought by respondents KFC Western (KFC) under

the Resource Recovery Conservation Act (RCRA). KFC bought the property in Los Angeles County, California, and proceeded to build a fast-food restaurant. During construction, KFC discovered that the soil was tainted with oil and subsequently spent \$211,000 to clean it. Three years later, KFC attempted to recover its costs from the Meghrijs by bringing suit under RCRA. RCRA enables private property owners to sue former owners who have contributed to soil contamination that presents an "imminent and substantial endangerment to health or the environment."

In its first amended complaint, KFC argued that the Meghrijs should pay restitution for the cleanup because, as past owners of the property, they had contributed to the handling and storage of solid waste that at one time posed a danger of imminent and substantial harm to health and the environment. The district court dismissed KFC's complaint. In a two-part decision, the court found that § 6972(a) of RCRA did not permit parties to recover for past cleanup efforts and that § 6972(a)(1)(B) authorized a cause of action only when the contaminated property posed an imminent and substantial endangerment to health or the environment *when the suit was filed*.

On appeal, the Ninth Circuit reversed, finding that RCRA gave district courts the power to order restitution for past cleanup costs. The court of appeals also found that a private property owner was entitled to bring suit under § 6972(a)(1)(B) as long as the contamination had created imminent and substantial endangerment at the time the cleanup occurred.

The Ninth Circuit's decision was in conflict with the Eighth Circuit Court of Appeals holding in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), an analogous RCRA suit involving property contaminated by underground gasoline storage tanks. The U.S. Supreme Court granted certiorari to resolve the conflict and to address the Ninth Circuit's broad

interpretation of the imminent endangerment requirement.

Writing for a unanimous Court, Justice O'Connor held that RCRA's citizen suit provision was not directed at providing remedies for past cleanup efforts. O'Connor applied a plain reading of the remedial scheme under § 6972(a)(1)(B), finding that a private party was limited to seeking either a mandatory injunction against a former property owner that required the defendant to cleanup the toxic waste or a prohibitory injunction that restrained the defendant from causing further contamination.

The Court further held that neither of those remedies provided for monetary damages or restitution in cases involving past cleanup costs. In support of the decision, O'Connor distinguished the citizen suit provisions of RCRA from that of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). O'Connor noted that CERCLA, which passed several years after RCRA was already in effect, gave the government the power to recover "all costs of removal or remedial action," and that any person may seek contribution from any other person who is responsible for the contamination. The language in RCRA did not provide for such a remedy. In addition, O'Connor stated that, unlike CERCLA, RCRA authorized a cause of action only when solid or hazardous waste posed an imminent and substantial danger to health or the environment. The Court concluded that Congress designed § 6972 of RCRA to address only imminent harm, not remedies for past cleanup costs. As a result, the Court reversed the Ninth Circuit, upholding the district court's decision to dismiss KFC's complaint as defective.

- by Douglas T. Cohen

CLEAN AIR ACT

Virginia v. United States, No. 95-2229, 1996 WL 42115 (4th Cir. Feb. 2, 1996)

The plaintiff, the State of Virginia, filed claims in the United States District Court for the Eastern District of Virginia asserting that certain provisions of the Clean Air Act (CAA) violated the Spending and Guarantee Clauses of the U.S. Constitution and the Tenth Amendment. The district court dismissed the action for lack of subject matter jurisdiction. The court held that the CAA allowed challenges to final agency action only by petition to the Court of Appeals. Virginia appealed the decision. The United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal.

The CAA authorized the Environmental Protection Agency (EPA) Administrator to create national ambient air quality standards (NAAQS). Under the CAA, an area which did not meet NAAQS was to be designated as a "nonattainment area." Title I of the CAA provides that if a state has a nonattainment area, then it must create a state implementation plan (SIP) to reduce volatile organic compound (VOC) emissions by fifteen percent. The SIP should include a vehicle inspection and maintenance program. Title I provides for three types of sanctions: 1) preventing state spending of federal highway money in nonattainment areas, 2) harsher permit requirements for private industry, and 3) initiation of a federal implementation program. Title V of the CAA provides that a state program must allow a full opportunity for judicial review of permitting decisions. The sanctions available for non-compliance with Title V are as follows: 1) restricting state spending of federal highway money and 2) initiating a federal implementation program.

Virginia's cause of action arose from two disputes between the state and the EPA. First, the EPA found that the state

failed to develop a vehicle inspection and maintenance program and a VOC reduction plan. Second, the state allegedly failed to generate an acceptable stationary pollution source operating permit program. Specifically, the proposed Virginia program restricted judicial review to those persons who proved a "pecuniary and substantial" interest in the outcome of the litigation.

Counts I and II of Virginia's cause of action stated that the CAA requirements for a VOC reduction plan, the vehicle inspection and maintenance programs, and Title V violated the Tenth Amendment and Article IV's Guarantee Clause. Count III asserted that the sanction of loss of highway funds is not rationally related to the objective of federal highway funding and thus violated Congressional authority under the Spending Clause in Article I.

The district court dismissed the action for lack of subject matter jurisdiction. It cited to CAA § 307(b)(1), which stated, "[a] petition for review of [any] . . . final action of the [EPA] Administrator under this chapter . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." The issue before the appellate court was whether Virginia, by challenging the constitutionality of the CAA, could receive direct review by the district court.

On appeal, Virginia first argued that it did not seek review of a final EPA action. However, the court of appeals held that the objective of the state's petition was to nullify final actions of the EPA. The plaintiff sought a declaration that the relevant provisions of the CAA were unconstitutional and requested a preliminary and permanent injunction preventing EPA from enforcing the sanction provisions. Thus, the court concluded that Virginia was clearly challenging a final EPA action.

Secondly, the state maintained that constitutional challenges are not limited to review only by circuit courts. Virginia

suggested that the exclusive jurisdiction of circuit courts was undermined by the CAA's citizen suit provision. The citizen suit provision provided the district court with jurisdiction over claims that the EPA Administrator had failed to perform a nondiscretionary act or duty. However, the instant court observed that Virginia's claim had been rejected by previous courts. Next, the Virginia suggested that a second component of the citizen suit provision was evidence that Congress intended concurrent jurisdiction. The provision provided "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement . . . or to seek any other relief." However, the court of appeals stated that this language simply meant that the statute did not preempt any other available remedies.

Also, Virginia argued that the court of appeals should disregard the plain language of § 307(b)(1), because its constitutional claims could not receive meaningful judicial review without factual development. The court concluded that none of the state's claims required a factual assessment, but the court did indicate that if the claims require such a factual assessment, the circuit court was authorized to remand the case to the agency for any necessary factual development. Furthermore, Virginia argued that it should not be required to elicit EPA final action in order to test its constitutional claims. The court stated that this suit was not filed until after EPA final action; therefore, the court would not consider whether review under district court general federal question jurisdiction may have been obtained in the absence of final EPA action. Finally, Virginia claimed that the policy reasons supporting direct review did not apply to constitutional challenges. The court explained that the intention of Congress in requiring such a review system was to promote prompt and conclusive review in all air quality controversies.

Consequently, the court of appeals affirmed the district court's dismissal of Virginia's complaint for lack of subject matter jurisdiction.

- by Constance S. Chandler

CLEAN WATER ACT

New Mexico Citizens For Clean Air and Water v. Espanola Mercantile Company, Inc., 72 F.3d 830 (10th Cir. 1996)

Plaintiffs, the New Mexico Citizens for Clean Air and Water (Citizens), an environmental group, along with the Pueblo of San Juan (Pueblo), an Indian tribe that owned the affected land, brought suit against defendant, Espanola Mercantile Company, Inc. (Espanola) for violations of the Clean Water Act (CWA) in conjunction with the company's operation of the Transit Mix Facility in Espanola, New Mexico. The parties agreed to binding arbitration and each side prevailed on two of the four issues. Following arbitration, the parties entered into a consent decree that required Espanola to implement and finance a clean-up plan, obtain a permit for future discharge, and pay Citizens' and Pueblo's attorney fees as awarded by the court. The District Court for the District of New Mexico, in accordance with Citizens' and Pueblo's requests, awarded \$46,003.69 in attorney fees. Espanola appealed on the grounds that Pueblo was not entitled to attorney fees, and the amount of the fees awarded was incorrectly determined.

On appeal to the United States Court of Appeals for the Tenth District, Espanola contended that Pueblo was not entitled to attorney fees because Pueblo failed to comply with a provision of the CWA requiring a party to give sixty-day notice of the alleged violation prior to commencing an action. Pueblo admitted it did not comply, but argued that Citizens' compliance was sufficient to relieve Pueblo from the notice

requirement. The court of appeals cited to case law construing a similar notice provision found in the Resource Conservation and Recovery Act, which held separate notice to be a mandatory requirement for filing suit that could not be disregarded by district courts. The instant court, in accordance with other federal courts, applied the same interpretation to the CWA, finding that Pueblo was not a proper party to the action and was, therefore, not entitled to an award of attorney fees.

Espanola challenged the amount of the award for attorney fees on several grounds. First, it argued that the limited degree of the two plaintiffs' success should be considered in the determination. Espanola relied on a case that required the district court to make a qualitative assessment to determine if plaintiff's limited success justifies a reduction in the amount of attorney fees. Citizens argued that the case Espanola cited was not on point, because the agreement between the parties required Espanola to pay all reasonable attorney fees. Citizens cited no authority for its contention and the court of appeals agreed with Espanola. The court, therefore, remanded the issue to determine to what extent the award should be reduced.

Espanola also sought to reduce the award for attorney fees where the tasks could have been delegated to a nonprofessional. These tasks included investigation of the factual basis for the claim and various secretarial duties performed by counsel. The court of appeals agreed with Espanola and remanded the case for a determination of whether the tasks in question were of the type that should have been delegated to a nonprofessional. Espanola asked for a further reduction on the basis of duplication of effort. It argued that attendance by two attorneys was not necessary at various meetings. Again the court agreed and remanded the issue for consideration by the district court. Finally,

the court also ordered reduction in the award for time spent by counsel on press related activities.

- by Tom Collins

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc., 73 F.3d 546 (5th Cir. 1996)

The Sierra Club filed an action under the citizen suit provision of the Clean Water Act (CWA) against Cedar Point Oil Company (Cedar Point), alleging a violation due to the disposal of chemically contaminated water into the Galveston Bay without a National Pollution Discharge Elimination System (NPDES) permit. Cedar Point counterclaimed that Sierra Club "threatened" it with a citizen suit and conspired with the Environmental Protection Agency (EPA) to despoil it of its constitutional rights.

In 1991, Cedar Point relocated twentyfour oil wells, which had been purchased from Chevron Corporation in 1989, to a field near Galveston Bay. One well, in addition to producing oil and gas, discharged between 500 to 1200 barrels of "produced" water per day. Produced water is a mixture of source water, which is water extracted from the ground with oil and gas, and chemicals used in the drilling process. Cedar Point discarded its produced water through a four-step process, ultimately resulting in the disposal of the remaining produced water into Galveston Bay. Although Cedar Point had succeeded in interest to Chevron's produced water permit, Cedar Point subsequently learned that an additional NPDES discharge permit would be necessary. In October 1992, Cedar Point applied to the EPA for the necessary NPDES permit, following a twelve-month period of produced water discharge without a permit.

The Sierra Club's suit in the United States District Court for the Southern District of Texas sought: 1) a finding that Cedar Point had violated the CWA, 2) a permanent injunction against further

unpermitted discharges, and 3) monetary penalties for previous unauthorized discharges. Cedar Point, in its counterclaim for abuse of process, asked for compensatory damages for the emotional distress of its officers and directors and \$10,000,000 in punitive damages. The district court granted summary judgment to Sierra Club, given that its claim was not frivolous. The court, however, denied Cedar Point's partial summary judgment motion on the issues of liability, Sierra Club's standing to sue, and Sierra Club's capacity to state a claim under the CWA. In addition, the district court granted Sierra Club's motion to strike Cedar Point's named experts, concluding that Cedar Point unsuccessfully complied with a discovery order to produce experts' written reports, and statements and reasons for experts' opinions. Both Cedar Point and Sierra Club appealed.

Cedar Point's first argument on appeal to the Fifth Circuit Court of Appeals was that Sierra Club lacked standing to bring a citizen suit because its members failed to show an "injury in fact," or that the alleged injury was "fairly traceable" to Cedar Point's discharge. The court, however, concluded that both standing requirements were met. The affidavits produced by the Sierra Club that indicated both past and future "threatened injury" to Sierra Club members was sufficient to establish an "injury in fact." Moreover, because the Sierra Club successfully demonstrated that Cedar Point 1) had discharged some pollutant in concentrations greater than allowed by its permit, 2) into a waterway in which Sierra Club had an interest that was or could be adversely affected by the pollutant, and 3) that the pollutant caused or contributed to the kinds of injuries alleged by the Sierra Club, it met the "fairly traceable" test. Although Cedar Point argued that Sierra Club was required to show that Cedar Point's discharge actually injured a Sierra Club member, the court found it

sufficient that the Sierra Club proved the discharge of produced water "contributed" to the environmental hazards which lead to Sierra Club's claimed injuries.

Cedar Point next argued that because Sierra Club failed to allege that Cedar Point was violating an effluent limitation or permit provision, it had failed to state a claim under the CWA. The court of appeals disagreed. The CWA's plain language clearly indicated that a citizen may bring suit under the Act against any person discharging produced water without a permit. Nothing limited this right to situations in which the EPA had issued an effluent limitation or a permit that covered the discharge. Therefore, the Sierra Club stated a valid claim under the CWA.

Cedar Point's third argument was that it had not violated the CWA, which regulated the release of "pollutants," because the CWA did not explicitly define either produced water or its components as pollutants. Moreover, Cedar Point argued that the EPA, not the courts, had the power to expand the definition of pollutant beyond the explicit definition given in the statute in order to avoid the confusion of numerous definitions reached by various courts. The instant court employed a two-step analysis to reach its conclusion. First, it determined that logic dictated the necessity for courts to determine whether a substance is a pollutant in order to find that a defendant had violated the statute. Cedar Point's failure to indicate contrary statutory or judicial authority supported this finding. Second, the court stated that produced water constituted a "pollutant" under the CWA for a variety of reasons: statutes included the term produced water in substances including "chemical wastes" and "industrial wastes"; the existence of a very narrow exception to the definition of produced water indicated congressional concern over the effects of the substance; EPA explicitly referred to produced water as

a pollutant; and EPA regulations deeming several components of produced water as "toxic pollutants." The court of appeals, therefore, concluded that Cedar Point had indeed violated the CWA.

Cedar Point's fourth argument claimed the district court abused its discretion by striking expert testimony as a sanction for Cedar Point's failure to comply with an accelerated discovery order. The court of appeals concluded that Cedar Point had violated the discovery order, and the striking of experts was appropriate. Cedar Point also argued that a penalty of \$186,070 and the granting of attorneys' fees was inappropriate for violating the CWA. The court affirmed the penalty, stating the district court had not abused its discretion by awarding damages equal to the savings realized by Cedar Point due to the violation. Moreover, it allowed attorneys' fees, given its conclusion that Sierra Club had standing to sue and Cedar Point had violated the CWA. Finally, the court of appeals affirmed the district court's dismissal of Cedar Point's counterclaim against Sierra Club for abuse of process.

Sierra Club also appealed, arguing that the district court lacked jurisdiction and abused its discretion by amending its final judgment to allow Cedar Point to utilize a two-year "grace period" for compliance with the "no discharge" requirement. The court held that the district court had jurisdiction to amend its original order and did not abuse its discretion by doing so.

- by Lynette McCloud

SMCRA

National Mining Association v. United States Department of the Interior, 70 F.3d 1345 (D.C. Cir. 1995)

Through appropriate administrative procedures, the National Mining Association and the Interstate Mining Compact Commission (Miners) had

petitioned for the repeal of a Department of the Interior (Department) regulation promulgated pursuant to the Surface Mining Control and Reclamation Act (SMCRA). The regulation allowed the Department to give certain notices of violation (NOV) to operators of mining operations in states considered to be "primacy" states. The Department generally permitted primacy states to be the primary enforcement body within their own borders, provided that the states operated under a state program of enforcement approved by the Department. SMCRA allowed the Department to issue NOVs to mine operators who were not satisfying permit conditions or SMCRA requirements, but only during certain types of inspections.

The rule at issue in the present case permitted the Department to issue such an NOV based upon inspections other than those enumerated in SMCRA, including inspections founded on violations of SMCRA, the relevant state's program, or a permit condition when the state did not take appropriate action within ten days of being notified of the violation by the Department. In 1983, the Miners petitioned for the repeal of this rule. The Department published the petition and sought comments in its regard. The Department denied the petition and explained its rationale. The Miners, the appellants in the present action, brought suit in the United States District Court for the District of Columbia for review of the agency's determination.

The district court granted summary judgment to the Department, and the Court of Appeals for the District of Columbia Circuit affirmed, holding: 1) that SMCRA expressly prevents judicial review of the Department's NOV rule because the Act itself bars review more than sixty days after a challenged agency action, 2) the Department's publication of the petition and a Department's statement denying the petition did not qualify it for application of the "reopener doctrine," and 3) the

Department's refusal to repeal the NOV rule was reasonable.

First, the court of appeals found that the Miners had demonstrated enough injury to establish standing. The Miners' associations claimed standing because they were "representative of mine operators caught in the regulatory crossfire between state and federal authorities," and because the members were "at best, subject to costly uncertainty as to which standards must be met in their mining operations, and [were], at worst, responsible for expensive efforts to redo or undo actions taken at the behest of the state authority with which the Department later disagrees."

Next, the court analyzed the statutory bar applicable to actions taken under SMCRA. Pursuant to the statute, the court of appeals held that to the extent the Miners' claim in regard to the NOV rule dealt with an issue in existence within sixty days of the Department's adoption of the rule, the district court lacked jurisdiction. The court based this finding on the statute's requirement that challenges to agency actions must be filed within sixty days from the date of such action. The court felt that because Congress set forth in the statute a "careful balance between the need for administrative finality and the need to provide for subsequent review," permitting a review of the Miners' petition would "thwart Congress' well-laid plan." Therefore, the court held that review was barred except and only to the extent that it was sought on grounds arising after the sixtieth day.

The Miners then relied upon the "reopener doctrine," under which the time period for judicial review could begin to run again if an agency provided a new opportunity for comment and objection through a new promulgation. In this regard, the Miners looked to the Department's procedural handling of the subject matter as a basis for application of the doctrine. The court of appeals did not permit this theory to proceed,

holding that most rulemaking will impact several other rules that are not explicitly at issue in the rulemaking at hand; as a result, allowing any such affected rule to be reopened for judicial review would be contrary to the concept of "final agency action" and would discourage administrative agencies to act positively in regard to rulemaking petitions in general. Similarly, the court held that administrative denial of the Miners' petition did not demonstrate agency reconsideration of the issue that was sufficient for application of the "reopener doctrine."

For those aspects of the case which did satisfy jurisdictional requirements, the instant court held that the Department acted reasonably when it denied the Miners' petition for rulemaking. In doing so, the court noted that the scope of review of an agency determination denying a petition for rulemaking is extremely limited, to the point of almost "non-reviewability." Therefore, given the limited scope of judicial review in these matters, the court found in favor of the Department.

- by Bryan D. Watson

CONSTITUTIONAL CLAIMS

Brown v. United States, 73 F.3d 1100, (D.C. Cir. 1996)

Plaintiffs, David and Carolyn Brown (the Browns), appealed a verdict for defendant, the United States, that rejected their Fifth Amendment claim for compensation for a taking of property. The U.S. Court of Appeals, Federal District, reversed and remanded the case, holding that there was a genuine issue of material fact.

The Browns' complaint alleged that noise from flights by the U.S. Air Force constituted a taking and required compensation of \$1.5 million. The Browns moved for a partial summary judgment, claiming that undisputed evidence proved the overflights constituted

a taking, with the only issue remaining being the value of the taken property. After a hearing, the trial court granted the United States' motion for summary judgment, and denied the Browns' partial summary judgment motion.

The court of appeals stated in its findings of fact that the Air Force started using Wizard Auxiliary Airfield, an airstrip located near the Browns' farm, for pilot training in 1991. These exercises required planes to fly low and thus produced a great deal of ground noise. The government purchased the land it built Wizard on in fee title. It also purchased an easement over land surrounding the airfield that abutted the Browns' property.

The Browns, however, refused to sell the Air Force an easement, and the Air Force did not initiate a condemnation on the property to secure the easement. Nevertheless, planes flew 500 feet or less above ground level over 100 acres or more of the Browns' property. The Browns' used their 6,858 acre ranch for hunting and raising cattle, and they kept two homes on the property. They eventually intended to sell this land on the recreational property market.

After the Browns filed a complaint in 1992 that alleged a taking and sought damages, the trial court found that the Browns had not shown substantial interference with their present enjoyment and use of the property. Rather, the court found that they only showed an adverse effect on market price, not an interference in current use.

The court of appeals noted that noise from airplane flights over private lands must meet three requirements in order to constitute a physical taking. The noise must: 1) be directly over claimant's land; 2) be low and frequent; and 3) be a substantial interference with enjoyment and use of the land. The government argued that the first two of these factors exist as to the Browns' land, but because evidence showed the cattle were not upset by the noise and receipts

from hunting remain the same, there was no showing of substantial interference. The Browns argued that economic harm in the form of decreased market value of their property created a genuine issue of material fact. The Browns argued further that since the flight exercises were a permanent activity, a taking existed.

The instant court's analysis began with a legal definition of "enjoy," which included the right to future use for investment purposes. The court pointed out that included in a landowner's bundle of rights was the right to sell land for the best price. The court then hinted that such impairment of property value due to overflights may be interference with an owner's enjoyment. Disagreeing with the trial court, the court designated the decline in market value as a present, rather than anticipated, impact.

The court of appeals ruled that affidavits concerning the marketability of the Brown ranch were factors that needed to be weighed by the trial court. The court found that the trial court erred in granting the government's summary judgment motion and remanded the case.

- by Wendy Hickey

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 71 F.3d 1197 (6th Cir. 1995)

In 1988, Michigan made two amendments to its Solid Waste Management Plan. These amendments banned the disposal of waste from any out-of-state source, or from any other Michigan county, unless the receiving county explicitly allowed for such disposal in its solid waste management plan. Fort Gratiot Sanitary Landfill, Inc., (Fort Gratiot) filed suit in the United States District Court for the Eastern District of Michigan in 1989, seeking an order declaring the ban on disposal of out-of-state waste unconstitutional under the Commerce Clause of the Constitution. It also sought a permanent injunction against the ban's

enforcement. Fort Gratiot did not attack the amendments' regulation of waste shipped from one Michigan county to another.

The district court dismissed this complaint in 1990, and the court of appeals affirmed in 1991. On June 1, 1992, the United States Supreme Court reversed and held that the amendments discriminated against interstate commerce and, therefore, violated the Commerce Clause. The court of appeals then issued an order on August 7, 1992, stating that the district court's decision was reversed and Fort Gratiot was granted costs pursuant to the Supreme Court's ruling. According to Federal Rules of Appellate Procedure 40(a) and 41(a), appellate court orders become mandates after twenty-one days, and jurisdiction should then return to the district court. However, the court of appeals in the instant case did not return the record to the district court until June 8, 1993. It was not until this time that the court of appeals fully conformed with Federal Rule of Appellate Procedure 41(a), which directs appellate courts to issue mandates, and Sixth Circuit Internal Operating Procedure 23.1, which requires appellate courts to return the record to the district court when they issue mandates.

Meanwhile, while Fort Gratiot's case was being litigated, the Supreme Court decided *Dennis v. Higgins*, 498 U.S. 439 (1991), holding that a party may receive money damages for a Commerce Clause violation. On February 10, 1994, Fort Gratiot moved to amend its complaint to include a section 1983 claim for damages, and moved for summary judgment on its complaint.

Fort Gratiot attributed its delay in filing to confusion on the part of the district court concerning which judge would take the case on remand, as the original judge recused himself. Fort Gratiot claimed that it contacted the court clerk's office twice to try to resolve the issue. When the parties were finally notified

that the case had been set for a scheduling conference with a new judge, Fort Gratiot filed its motions for leave to amend. On April 22, 1994, the court heard oral argument on both motions.

In an order dated May 2, 1994, the district court denied both motions. The court stated that the claim for damages should have been brought in Fort Gratiot's original complaint, or alternatively, Fort Gratiot should have acted more quickly to have the case reargued. The district court next stated that, although it had heard and denied the motions to amend, the case had been closed by the court of appeals' order of August 7, 1992. It reasoned that the November 8, 1993, order merely reissued the court of appeals' earlier mandate. Fort Gratiot then appealed from this decision.

On appeal to the Court of Appeals for the Sixth Circuit, the court held that because of judicial delay in returning the original record to the district court, and the resulting failure of the district court to retry the case, there was never a viable judgment on Fort Gratiot's original complaint. The court reasoned that customary procedure requires lower courts, which obtain jurisdiction by receiving mandates from appellate courts, to obey such mandates and carry them into effect. The court of appeals then stated that the lower courts must determine the scope of the appellate mandate, considering majority and dissenting opinions and issues not decided by the Supreme Court.

The court of appeals determined that an issue remained as to the scope of the Supreme Court's holding. Fort Gratiot argued that the Supreme Court's opinion invalidated the amendments to the Michigan Solid Wasted Management Plan completely. Michigan Department of Natural Resources claimed that since Fort Gratiot did not challenge the intra-state, intercounty waste regulations in its original complaint, the Supreme Court's decision only prohibited the

amendments' ban on interstate transfers of waste. The court of appeals held that it was the district court's duty to determine whether the Supreme Court's opinion operated to completely invalidate the amendments, or just those portions regulating interstate movement of waste.

The court of appeals also determined that the district court had a duty to reconsider its holding on Fort Gratiot's motions to amend its complaint. The court stated that the district court should consider its lack of jurisdiction between March 1990, when Fort Gratiot appealed from the district court's dismissal, and August 1992, when the court of appeals issued its mandate. The court of appeals suggested that the district court should not punish Fort Gratiot for what was, for the most part, the court's delay.

- by Erick Roeder

OTHER

Stupak-Thrall v. United States, 70 F.3d 881 (6th Cir. 1995)

Landowners with riparian rights to a lake challenged United States Forest Service (Forest Service) regulations that restricted surface rights to the lake. The regulations prohibited the use of sailboats, houseboats, and certain food containers on the lake. The landowners argued to the District Court for the Western District of Michigan that the restrictions exceeded the Forest Service's statutory and constitutional authority, because the Wilderness Act of 1964 instructed that such restrictions were "subject to existing private rights." The landowners contended that their riparian rights constituted "existing rights," meaning that the restriction should be invalidated. The district court held for the Forest Service, finding that the Constitutional Property Clause granted Congress the power to regulate the lake, that Congress delegated this authority to the

Forest Service in the Wilderness Act, and that the Forest Service regulation did not run afoul of the Act's express limitations deferring to state law property rights.

Plaintiffs in the consolidated suit were landowners Kathy Stupak-Thrall and Michael and Bodil Gajewski (landowners). Landowners all lived on a small portion of property bordering Crooked Lake in Michigan, which is located in the Upper Peninsula, near the Wisconsin border. About 95% of the lake is within the confines of Sylvania Wilderness Area, and Landowners lived on the only portion that was not included in the wilderness area. Because they lived adjacent to the lake, Landowners had riparian rights that allowed them to use the entire surface of the lake for their use and enjoyment. The restrictions, banning "sail-powered watercraft," "watercraft designed for or used as floating living quarters," and "non-burnable disposable beverage containers," applied only to the wilderness area and did not include the small bay on which Landowners lived.

In finding for the Forest Service, the district court first had to decide whether Congress had the authority to regulate this land, and if such power was properly delegable to the Forest Service. The court observed that the Property Clause of the Constitution allowed Congress to sometimes regulate private property as well as public property. This power over public lands may be extended to private property in order to protect public areas. The court pointed out that Congress designed the regulations at issue to protect the federal property's "wilderness character and values." Since the court concluded that the regulations would serve to meet this protective end, Congress could regulate the portion of the lake used for private purposes.

Having decided that Congress could limit the use of this private property, the lower court then held that the

power to regulate was properly delegated to the Forest Service. Landowners argued that Congress had not promulgated any statute to give Forest Service the power to make rules respecting government property. However, the court decided in favor of the Forest Service for several reasons: The Organic Act of 1897 allowed the Department of Agriculture to make rules respecting preservation of forests, the National Forest Management Act of 1976 extended this power to the Forest Service, and the Forest Service had properly made rules and regulations in the past concerning the use of vehicles in the wilderness area. The district court quickly dismissed several other claims as misinterpretations of text.

Lastly, the court addressed the extent to which the clause "subject to valid existing rights" allows state law to affect the federal government's normal exercise of power under the property clause. The district court had noted that Michigan law distinguished "natural purposes" and "artificial purposes." Natural purposes, it found, were uses that were absolutely necessary for the riparian user, such as drinking water, while artificial purposes were those that increased comfort and prosperity, such as sailing and water skiing. Artificial purposes would be permissible as long as they did not unreasonably interfere with other users' similar rights. The district court held that the Forest Service's restrictions were reasonable in light of the fact that the United States was also a riparian user. Landowners appealed on those issues.

The Court of Appeals for the Sixth Circuit held that the Forest Service's power to regulate riparian rights of the lake came not from its status as common riparian owner, but from legitimate exercise of the sovereign's police power. Thus, the only remaining impediment to validity of the regulations was that Congress had inserted into the Wilderness Act the clause protecting "existing

rights.”

The court held that the exercise of police power was permissible, because it would have been exercisable by the police power of Michigan, even over “existing rights.” The Michigan Supreme Court had explicitly decided that local government had the power to regulate riparian rights. Michigan required a rational relationship between the exercise of that power and the state’s goal of protecting the health, safety and welfare, and the preservation of wilderness. The court of appeals decided that the regulations were rationally related.

The court also found the restrictions to be reasonable. The regulations affected only “artificial” riparian uses and did not apply to the section of the lake that fell outside the wilderness area’s boundaries. Landowners did not argue that houseboats and sailboats where necessary for their life, a distinctive characteristic of the “natural purposes” requirement. The court observed that there was no evidence that houseboats or sailboats had ever been used on the lake by landowners or anyone else. Thus, since the court of appeals found that the exercise of police power was rationally related to the goal of preserving wilderness and that the regulations were reasonable, it held that the lower court’s rulings should be affirmed.

- by Kevin Murphy

State of Alaska v. Babbitt 72 F.3d 698 (9th Cir. 1995)

The United States Court of Appeals, Ninth Circuit, reviewed the term “public lands” as it was used in the Alaska National Interest Land Conservation Act (ANILCA) to decide whether that term included navigable waters. This determination was necessary after a dispute arose over federal involvement in protecting subsistence fishing under ANILCA.

Congress enacted Title VIII of ANILCA to protect subsistence hunting

and fishing in Alaska. It gave the state the initial authority to implement Title VIII, but the federal government assumed that authority in 1990, after state implementation failed. The Secretary of the Interior (the Secretary) then established temporary regulations which narrowly defined public lands by excluding navigable waters from the definition.

Two separate actions were brought against the Secretary and against the United States. Katie John, an Ahtna Athabaskan Indian of the Mentasta Village who represented the subsistence interests, challenged the narrow definition of navigable waters as defined by the Secretary. In an attempt to expand the reach of ANILCA, Katie John argued that all navigable waters were public lands under the federal navigational servitude, which is a doctrine that relates to the United States’ interest in the country’s navigable waters. Conversely, the second action was a state challenge to the involvement of the federal government in what Alaska believed was a state matter, wherein the state argued that federal public lands should never include navigable waters. The United States District Court for the District of Alaska consolidated these actions and found for Katie John, upholding federal interests in a very broad definition of public land.

On appeal, the Ninth Circuit Court of Appeals first looked to ANILCA to find a definition of public lands. It determined public lands, for ANILCA purposes only, to mean “lands, waters, and interests therein, the title of which is in the United States.” Since the navigational servitude creates no title in the United States, the court of appeals stated that those waters were not necessarily public land under ANILCA. In striking down Katie John’s argument, the court said that too much control would be given to the federal government if all navigable waters were deemed public land.

The court next looked to the

reserved water rights doctrine and the reservation of unappropriated waters. Despite a lack of title, the court found that the United States had an interest in certain unappropriated waters according to the reserved water rights doctrine. If reserving water was necessary to satisfy the reasons for the preservation of the land, the court said, then the United States would have an interest in the water as well.

The court of appeals concluded by stating that a moderate approach in which federal control over navigable waters is not absolute, but is still available to protect the government’s interest in subsistence fishing, is most appropriate. The federal agencies that have had the task of implementing Title VIII, the instant court also held, were responsible for determining what waters meet this criteria.

- by Marc Poston

Rhone-Poulenc Inc. v. International Insurance Company, 71 F.3d 1299 (7th Cir. 1995)

Rhone-Poulenc Incorporated (Rhone-Poulenc) brought suit against its insurance company, International Insurance Company (International), after Rhone-Poulenc sustained substantial clean-up costs related to environmental contamination of several sites. Rhone-Poulenc sought reimbursement under Environmental Impairment Liability (EIL) policies issued by International. International rejected the claims on the basis that the EIL policies were “excess” insurance policies and Rhone-Poulenc had not shown exhaustion of its comprehensive general liability insurance. After the refusal, Rhone-Poulenc filed suit, and the United States District Court for the Northern District of Illinois dismissed the case for Rhone-Poulenc’s failure to join its nineteen other comprehensive general liability insurers as indispensable parties.

On appeal to the Seventh Circuit Court of Appeals, the key issue was

whether the EIL policies qualified as "primary," rather than "excess" insurance policies. A primary insurance policy would have given Rhone-Poulenc the right to collect from International regardless of its other insurance. On the other hand, an excess insurance policy would have given Rhone-Poulenc the right to collect only after exhausting its other insurance. If the EIL policies were primary, then the district court's dismissal could not be upheld because primary insurers would not necessarily be indispensable parties. The court of appeals noted that parties are considered indispensable only if equity requires their presence before litigation can proceed. Therefore, if the EIL policies were primary, the case needed to be remanded to determine which, if any, of the primary insurers were indispensable parties. If the policies were excess, then the court of appeals needed to uphold the lower court opinion, because the court could not properly determine the liability of an excess insurer, such as International, without the presence of the comprehensive general liability insurers.

In determining if the EIL policies were primary or excess, the court identified a specific provision that stated the policy should "not be called upon in contribution and no liability should attach hereunder" for amounts Rhone-Poulenc could recover from other insurance. International argued that this wording alone should make the policies ones that are excess. However, Rhone-Poulenc argued that the coverage was primary, for a variety of reasons, including the fact that International's policies were not labeled "excess," and International failed to inquire as to any other insurance Rhone-Poulenc might have. International countered that if the policies were not excess by express language, they were certainly excess "by coincidence," as the type of coverage the policy provided depended on whether the insured had other existing insurance. If Rhone-Poulenc's EIL policies were in fact

excess by coincidence, the judgment of the district court would have to be upheld because Rhone-Poulenc had nineteen other insurers, thus making its policies through International excess.

The court of appeals, because of International's lack of supporting documentation on the origin and meaning of the policy, did not accept International's explanations. The court concluded that the disputed provisions made the policy ambiguous. The court was, therefore, unable to determine whether the policy was primary or excess by coincidence. The court remanded the lower court's opinion for a determination of the meaning of the policy.

- by Tom Collins

Fishermen's Dock Cooperative, Inc. v. Brown, No. 95-1002, 1996 WL 42120 (4th Cir. Feb. 6, 1996)

The Fishermen's Dock Cooperative and other commercial fishers (the Coalition) sued the Department of Commerce (the Department) over the summer flounder quota the Department established for 1994. The Coalition contended that the Department did not establish the quota in accordance with 16 U.S.C. § 1851(a)(2), which required the estimate to be calculated using the "best scientific information available."

The Coalition argued that the best scientific information available demanded nothing less than a quota based on a geometric-mean estimate, and that the Department's resulting quota was therefore "capricious and arbitrary." The district court agreed that only the geometric-mean estimate could be used to comply with the statute's requirements and it set aside the 1994 quota, replacing it with a new quota based on the geometric-mean estimate. The Court of Appeals for the Fourth Circuit reversed and reinstated the Department's previous quota.

The Department, through the Mid-Atlantic Fishery Management Council

(the Council), promulgated a yearly quota for the commercial catch of summer flounder. The Department established the quota through a series of steps, starting with the determination of the "target fishing mortality rate." Information was gathered in the form of raw data on current, Atlantic-coast, fish populations estimating the size, age, structure and other relevant characteristics. These estimates were then given to the Summer Flounder Monitoring Committee (the Committee) to make recommendations on the quota size based on the best scientific evidence. The Committee's recommendation for the quota size was based on a statutory equation employing this data.

In 1994, the Committee recommended a quota based on the figure determined by one standard deviation lower than the geometric mean, which would produce a lower quota than used previously. The Committee cited several reasons for using a standard other than the geometric mean alone, including the fact that since the Department planned to lower the target fishing mortality rate dramatically in 1996, it was best to reduce the quota slowly. The Council approved of the Committee's recommendation, and after notice in the Federal Register, the quota became final.

The Coalition did not complain about the model equation the Committee used in the quota determination. It only argued that the employment of the strict geometric-mean estimate represented the best scientific information, in contrast to the standard the Council adopted. Therefore, the Coalition argued that use of the lower deviation was arbitrary and capricious. The Department responded that the estimate "was in no way arbitrary, capricious, or otherwise illegal and that, even if it was, the district court overreached its authority in imposing a new quota rather than remanding to the agency."

In explaining its decision to reverse in favor of the Department, the court of

appeals determined that, while a certain level of arbitrariness existed in the agency's discretion to use one standard deviation below the geometric mean as the quota estimate, the determination "was conducted in good faith, pursued with a proper understanding of the law, based on the best scientific information available, and adequately justified by the agency."

- by Christopher Pickett

Virginia Properties, Inc. v. Home Insurance Company, No. 94-8452, 1996 WL 30575 (11th Cir. Feb. 12, 1996)

This case was an appeal from a grant of summary judgment from the United States District Court for the Northern District of Georgia. Plaintiff, Virginia Properties, Inc. (VPI), was a wood treatment facility appealing a verdict in favor of the defendants, the Home Insurance Company and other insurers, which barred coverage for clean-up costs associated with VPI's chemical waste discharge. The Eleventh Circuit Court affirmed the lower court's ruling.

VPI, under clean-up orders from the Environmental Protection Agency (EPA), sought indemnification and legal defense from its seven insurance companies. The district court held for defendants on the basis of a clause in the comprehensive liability policies that excluded damages arising out of pollution, unless the discharge was "sudden and accidental." VPI claimed that although its discharge of hazardous chemicals was intentional, the damages that occurred as a result were not and

hence qualified for the exception of "sudden and accidental."

The court of appeals found that from 1971 to 1986, nearly all comprehensive general liability insurance contracts were drafted by the same underwriter group, and all contracts included pollution exclusion clauses. Congress then enacted the Resource Conservation and Recovery Act of 1976 (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), both imposing a strict liability scheme for pollution clean-up. CERCLA authorizes the government to order a responsible party to clean up pollution or reimburse the government for its costs incurred during the clean-up, which has imposed great liability costs on polluters. These responsible parties have consequently appealed to their insurers for coverage, resulting in increased litigation as insurers resist indemnification.

The facts of this case involved VPI's wood treatment facility which, for thirty years, had created chemical run-off from the treatment process that had accumulated in an unlined pit in the ground. CERCLA and RCRA had designated the chemicals VPI used as "hazardous substances." The groundwater, soil and a nearby stream were contaminated.

After VPI filed a 1980 permit application with the EPA, subsequent investigations resulted in placement of the VPI site on the National Priorities List in 1989. The EPA issued two consent orders, the first in 1987 for agreement to develop clean-up methods for the site, and the second in 1992 to contain and

repair the damage. In 1993 the EPA formally demanded reimbursement from VPI. VPI initiated its action in 1992 to require its insurers to provide defense funds for the consent order proceedings and for indemnification of the clean-up. The insurers contested on the grounds that VPI did not give them timely notice, that CERCLA response costs were not "damages" under policy terms, and finally, that coverage was precluded under the policy's exclusionary language.

The standard pollution clause in each policy denies coverage for property damage arising from the discharge of toxic chemicals into or upon the land or water, with the exception of discharge that is sudden or accidental. The evidence proved, and VPI admitted, that its discharge of chemicals was intentional. VPI argued that the qualifying language of the exclusion meant the exclusion would not apply if 1) the discharge was unintentional, or 2) if the damage was unintended. The court of appeals ruled against the second point of VPI's contention.

It noted that the Georgia Supreme Court has held "sudden and accidental" means unexpected and unintended and refers to the discharge, rather than the damage. Thus, coverage is excluded if the damage is the result of intentional pollution. Ruling that the plain language of the insurance contracts was unambiguous, the court held that VPI could not recover costs of defense or indemnification from its insurers.

- by Wendy Hickey