

1994

Cases To Watch and Missouri Legislative Summary

V. Alyse Hakami

Mark A. Meyer

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Recommended Citation

V. Alyse Hakami and Mark A. Meyer, *Cases To Watch and Missouri Legislative Summary*, 2 Mo. Env'tl. L. & Pol'y Rev. 122 (1994)
Available at: <http://scholarship.law.missouri.edu/jesl/vol2/iss2/8>

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CASES TO WATCH AND MISSOURI LEGISLATIVE SUMMARIES

by V. Alyse Hakami and Mark A. Meyer

***Atlantic States Legal Found., Inc., v. Eastman Kodak Co.*, 12 F.3d 353 (2nd Cir. 1993)**

The Atlantic States Legal Foundation, Inc. (Atlantic), a not-for-profit private environmental group, attempted to bring a citizen suit against Eastman Kodak Company (Kodak) under the Clean Water Act to enjoin Kodak from releasing pollutants into the Genesee River and Paddy Hill Creek in New York. Kodak operates a wastewater treatment plant in Rochester, New York which is designed to filter out harmful waste resulting from the manufacturing of photographic chemicals before the wastewater is released into the Genesee and Paddy Hill waterways. To enable Kodak to carry out this process, Kodak was granted a permit pursuant to the State Pollutant Discharge Elimination System (SPDES) issued under the authority of the Clean Water Act. Kodak also received a federal permit in 1975 under the National Pollutant Discharge Elimination System (NPDES) authorized by the Environmental Protection Agency (EPA). Soon thereafter, the authority to create such pollutant discharge permitting programs was delegated to the states pursuant to 33 U.S.C. § 1342(b), (c) of the Clean Water Act. In 1984 Kodak received a new SPDES permit from the New York State Department of Environment Conservation which authorized Kodak to discharge certain types and quantities of pollutants. Atlantic claimed that Kodak violated the permit by discharging pollutants not listed in the SPDES permit or a quantity in excess of the limits imposed by the SPDES, and filed a citizen suit pursuant to the Clean

Water Act, 33 U.S.C. § 1365. The United States Court of Appeals, Second Circuit, held that Kodak did not violate the Clean Water Act when it discharged pollutants that were not listed in the SPDES or NPDES permits as long as Kodak complies with proper reporting requirements and acknowledges new limitations that may be imposed on such pollutants. In addition, the court held that Atlantic could not file a citizen suit under the Clean Water Act to enforce state environmental regulations. The issues on appeal are whether the Clean Water Act prohibits the discharge of unlisted pollutants, and whether a private group may bring a federal Clean Water Act citizen suit to enforce state permit limitations. Atlantic petitioned for certiorari with the United States Supreme Court on May 18, 1994.

***James City County, Va. v. Environmental Protection Agency*, 12 F.3d 1330 (4th Cir. 1993)**

The Environmental Protection Agency (EPA) appealed a lower court ruling that ordered the EPA to allow James City County (County) to build a dam and reservoir. The County received a permit from the United States Army Corps of Engineers to build the dam and reservoir in 1988 pursuant to the Clean Water Act. The EPA vetoed this permit, however, also by authority of the Clean Water Act, stating that the County had a practical alternative to building the dam and reservoir for the County's water supply. The District Court for the Eastern District of Virginia overturned the EPA's veto. The

Fourth Circuit Court of Appeals affirmed and remanded the case to the District Court, which continued to uphold its original ruling. The EPA again appealed to the Fourth Circuit, but this time the Court of Appeals reversed the District Court's ruling. The court held that in vetoing the permit, the EPA may consider the effect a new dam and reservoir will have on the environment without taking into consideration whether the County has a viable alternative in supplying water to its citizens. Further, the EPA's conclusion that construction of the dam and reservoir would cause harm to surrounding wildlife and land was justified. The issues on appeal include whether the EPA, pursuant to the Clean Water Act, may only consider adverse effect on the environment when deciding to veto a permit or whether the EPA also must consider whether there are any available alternatives to the proposed plan. The other issue is whether the EPA's determination that harm will result to the environment if the dam and reservoir are constructed is entitled to complete deference notwithstanding the fact that this finding was originally found to be unsupported and contradicted by other state and federal agencies. The County filed a petition for certiorari with the United States Supreme Court on June 22, 1994.

***Horsehead Resource Dev. Co., Inc., v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994)**

Several industry and environmental groups challenged the Burning of Hazardous Waste in Boilers and Industrial Furnaces Rule (BIF Rule) promulgated by the Environmental Protection Agency (EPA) on the basis that this rule is not in accord with the Congressional intent behind the Bevill Amendment, that the rule is invalid as a means to regulate the burning of non-waste fuel in light of RCRA, and finally that the EPA cannot regulate products of incomplete combustion which result from burning hazardous waste fuel in boilers or industrial furnaces. The BIF Rule was promulgated by the EPA pursuant to RCRA which allows the EPA to regulate "treatment" of hazardous waste, where "treat-

ment" includes the burning of hazardous waste. The Court of Appeals, District of Columbia Circuit, first held that the EPA's promulgation of the BIF rule was proper under RCRA's Bevill Amendment. Next, the court held that the EPA had the authority to regulate air emissions from burning hazardous waste with non-waste fuel as this is a "close nexus to waste treatment." Finally, the court held that under the EPA's three-tier system for regulating combustion efficiency of furnaces which burn hazardous waste as fuel, Tiers I and II relating to standards for carbon monoxide emissions and technology-based standards limiting total hydrocarbon emissions were upheld as being rational. However, the Tier III standard relating to wet kilns was severed and the issue remanded for lack of adequate notice and comment opportunities during promulgation of the standard. The issues on appeal include whether Tier III can be severed from the EPA regulatory scheme in light of precedents from other courts. Next, to determine whether Tier III should be severed, should a "presumptive severability" standard or a "substantial doubt" test be used. In addition, did the Court of Appeals err in severing Tier III, a site-specific standard, using an arbitrary standard normally used for a different class facility. Furthermore, did the court err in severing Tier III when that particular standard differentiated between the EPA's two regulatory schemes. Finally, did the court err in severing Tier III in that this relief was never sought by the parties, was against the weight of precedent since the severability issue was not briefed by any of the parties, and further that EPA impliedly admitted that Tier III could not be severed from the rest of the regulatory plan. Industry attorneys filed a petition to the United States Supreme Court for certiorari on June 6, 1994.

Missouri Senate Bill 590

AIR QUALITY ATTAINMENT ACT

Senate Bill 590 (SB 590), signed into law on June 3, 1994, creates the Air Quality Attainment Act (the Act), which was developed to bring all nonattainment areas of the state into compliance with the EPA-promulgated National Ambient Air Quality Standards by the federally-required dates.

SB 590 allows a series of new emission inspection stations to be operated by private parties under contract and supervision of the Department of Natural Resources. The new I/M 20 inspection program's criteria are set forth under SB 590, including location of facilities, operation standards, hours of operation, and the capping of inspection fees at \$24. New emissions stations are precluded from performing repair work or servicing vehicles, and all vehicles will be tested every other year.

Several vehicles are exempt from the new emission inspection program, including motorcycles, new motor vehicles, non-gasoline-powered vehicles, and vehicles weighing over 8,500 pounds.

Motor vehicles purchased by a licensed dealer which fail the required emissions inspection may be returned within 14 days for repair of the vehicle to be completed within five working days, provided that the purchaser drove no more than 1,000 miles. Failure of the dealer to return the vehicle within five days allows the purchaser to obtain a refund of the purchase price or to be provided with a comparable vehicle until the original vehicle complies with emissions standards.

Vehicles failing the emission test may be retested within 30 days without charge. In addition, vehicles may obtain waivers when repair work is performed in the amount of \$75 of pre-1981 vehicles, and \$200 for

1981 and subsequent model years.

The Act will not take effect until the attorney general files suit in federal court on behalf of the state asking for injunctive relief and challenging the constitutionality and legality of sanctions threatened by EPA pursuant to the federal Clean Air Act. The suit may allege that the standards which determined that the St. Louis metropolitan statistical area was a nonattainment area were unreasonable in relation to the threatened sanctions. The federal Clean Air Act mandates that the new, stricter provisions of the "Air Quality Attainment Act" be enacted. The provisions of SB 590 which require the lawsuit are separate from the Act.

Missouri Senate Bill 446

SEWAGE DISPOSAL SYSTEMS

Senate Bill 446 (SB 446), revising regulations for on-site sewage disposal systems, was signed into law on June 3, 1994. This law requires the Department of Health to develop a state standard for location, design, construction, installation and operation of on-site sewage disposal systems by September 1, 1995. Although each city and county may enforce or exceed the state standards, the Department of Health is responsible for enforcing the state standard within those jurisdictions not doing so themselves. Administrative penalties are assessed for non-compliance.

In addition, the Department of Health is responsible for developing training and compliance procedures for any person constructing, operating, or making a major repair or modification of an on-site sewage disposal system, including notice of such actions and inspections. Any fees collected by the Department of Health must be placed in the Public Health Services Fund.

Missouri Senate Bill 782

LIQUEFIED PETROLEUM GASES; GRAIN WAREHOUSES

Senate Bill 782 (SB 782), signed into law on June 15, 1994, modifies the responsibility for supervising liquified petroleum gas. The Department of Agriculture will now be responsible for the supervision which was previously handled by the Department of Revenue.

SB 782 additionally provides that non-resident businesses in Missouri who distribute such petroleum gases at retail, or install, repair, or service equipment using such gases must comply with Missouri statutes, rules and regulations.

Missouri House Bill 1156

UNDERGROUND STORAGE TANKS

The 87th General Assembly passed House Bill 1156 (HB 1156), which the Governor signed on July 6, 1994. Currently, the Underground Storage Tank Insurance Fund (the Fund) furnishes money for the cleanup of underground storage tank releases. HB 1156 raises the third-party bodily injury coverage from \$100,000 to \$1 million, and caps third-party property damage coverage at \$1 million per occurrence.

HB 1156 divides the Fund into an Insurance Subaccount and a Remediation Subaccount. Owners or operators are now responsible for the first \$10,000 of cleanup cost claims against the Insurance Subaccount, and for \$25,000 against the Remediation Subaccount.

The bill provides that underground storage tank operators who cooperate with required testing for releases not caused by their

tanks will be reimbursed by the Fund. The bill also provides that current or former refinery sites and petroleum pipeline terminals are not eligible for participation in the Fund.

In addition, HB 1156 extends the current law authorizing administrative fees and category taxes imposed on certain generators of hazardous waste from January 1, 1995 to the year 2000, and water pollution construction permit fees from December 31, 1995 to the year 2000.

Missouri Senate Bill 704

WATER POLLUTION CONTROL BONDS

Senate Bill 704 prescribes that the Missouri Board of Fund Commissioners may borrow an additional \$24,165,000 by issuing bonds for water pollution control projects. This authorization is pursuant to the Missouri Constitution, Article III, § 37(e). This bill, sponsored by Senator Moseley, was signed by the Governor on July 6, 1994.

Missouri Senate Bill 633

FARMING IN LEVEE DISTRICTS

Senate Bill 633 (SB 633), signed by the Governor on July 12, 1994, revises procedures for farming a levee district, as well as the procedures for providing notice of intention to form a levee district. SB 633 provides that the board of supervisors governing any levee district may issue bonds not to exceed 91% of the total taxes levied, bearing an interest rate not to exceed 6% per annum. These bonds shall be sold by the treasurer of each district to meet the payments for the works and improvements in the district.

Missouri House Bill 1178

SOLID WASTE MANAGEMENT COMMISSION

House Bill 1178 (HB 1178), relating to environmental protection, has passed the House and is presently awaiting approval of the Senate.

HB 1178 will create a Missouri Solid Waste Management Commission (the Commission) within the Department of Natural Resources (DNR). The Commission will supervise the DNR's director and review all rules, regulations, and orders promulgated under the DNR to ensure that the directors are exercising their powers consistent with the Commission's concerns.

Missouri House Joint Resolution 48

SEWER DISTRICTS IN ST. LOUIS

House Joint Resolution 48 (HJR 48) was introduced on February 1, 1994, and is presently in the House Committee on Municipal Corporations. HJR 48 proposes to amend the Constitution of the State of Missouri to state that any sewer districts established prior to January 1, 1994, in the City and County of St. Louis, Missouri, will be governed by any statutes passed by the general assembly and approved by the governor after January 1, 1994. Any provisions not specifically addressed by statutory law will be governed by the plan adopted or amended for such sewer district.