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CASE SUMMARIES

CERCLA

U.S. v. Bestfoods et al., 118 S. Ct. 1876 (1998)

The United States brought suit against former owners and operators of a chemical facility to recover the costs of cleanup of the site. Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), an operator of a polluting facility may be held responsible for these costs. The statute does not clearly define the word "operator." The issue in this case was whether a parent corporation could be liable, as an operator, for cleanup costs for pollution caused by a subsidiary's facility under CERCLA's definition. 42 U.S.C. § 9601(20)(A)(ii).

The Court stated that one way for a parent corporation to be liable for its subsidiary's facility's pollution was if the corporate veil could be pierced. The Court recognized the long-standing principle that parent and subsidiary corporations are separate legal entities, but also recognized the vulnerability of the veil under certain circumstances, such as when the corporate form is used for wrongful purposes. The Court noted that application of CERCLA does not interfere with the corporate veil and does not interfere with the excep-

tions to piercing it.

The Court then examined the liability of parent corporations themselves as operators of their subsidiary facilities. Under CERCLA, "operator" is defined circularly. Noting the statute's lack of clarity, the Court stated that an operator "must manage, direct, or conduct operations specifically related to pollution." This includes making decisions about environmental regulation compliance, as well as decisions concerning leaking waste or disposal of hazardous waste.

In analyzing the case, the Court stated that the focus should not be on the relationship between the parent and the subsidiary, but between the parent and the facility in question. The Court mentioned that if parental control over the subsidiary were extensive, this control likely created a veil-piercing issue. The Court noted that it was appropriate for parent corporation officers to be joint officers of a separate subsidiary and criticized the District Court was criticized for attributing the actions of joint officers to the parent corporation. The Court found that operator liability cannot be established solely on the grounds that dual officers made policy decisions and directed activities at a subsidiary fa-

city.

The Court cautioned that a dual officer could deviate so far from the normal behavior of a joint officer as to exert parental control over the facility. A parent corporation officer, with no position in the subsidiary, may also exert enough control over a facility to make the parent corporation liable under CERCLA. According to the Court, the key inquiry is whether the parent corporation exceeded accepted norms of "parental oversight of a subsidiary's facility," to be determined by examining the degree and detail of the parent corporation's activities involving the subsidiary's facility.

In remanding this case for further findings, the Court noted that the parent corporation had an officer at the subsidiary (not as a joint or dual officer). The Court noted that the District Court stated that this officer was involved in environmental matters at the subsidiary facility, and that the officer directed the regulatory inquiry responses of the subsidiary. The Court noted that these facts were enough to raise the issue of parent corporation control of the facility, but refused to reach a conclusion based on these facts. The case was remanded for introduction of more facts could be obtained about the parent corporation's activities at the subsidiary facility.

Fredrick J. Ludwig

LRMP/NFMA

Ohio Forestry Association, Inc. v. Sierra Club 118 S. Ct. 1665 (1998)

The Sierra Club brought suit in Federal District Court against the United States Forest Service, pursuant to the National Forest Management Act of 1976 ("NFMA"), challenging the Land and Resource Management Plan ("LRMP") for Ohio's Wayne National Forest. The Ohio Forestry Association, whose membership includes those who harvest timber from the Wayne National Forest, intervened as a defendant.

The Sierra Club brought this action challenging the LRMP on the grounds that it was based on erroneous analysis and led to wrongly favoring logging and clearcutting in Wayne National Forest, in violation of the NFMA, the National Environmental Policy Act the Administrative Procedure Act. The Sierra Club also claimed that the Forest Service violated its role as "public trustee" by permitting implementation of the plan, and that defendants failed to identify economically unsuitable lands, in violation of their authorizing statute. The Sierra Club sought relief in the form of a declaration that the plan, including below-cost timber sales, and clearcutting, was unlawful; an injunction prohibiting further timber harvesting and below-cost timber sales, pending plan revision; and costs and attorneys

fees.

The Forest Service argued that the suit was non-justiciable because the Sierra Club did not have standing to sue, and that the Sierra Club's claims were not ripe for adjudication. Supporting its defense, the Forest Service asserted that the LRMP did not authorize the cutting of any trees, although it did setting logging goals, select areas of the forest suited to time production and determine probable methods of harvest. Before permitting logging, the Forest Service must meet several requirements, including providing those affected by proposed logging notice and an opportunity to be heard. The statute further requires the Forest Service to revise the plan, as appropriate. For these reasons, the Forest Service argued that LRMPs are not final agency action and therefore are not ripe for review.

The district court granted summary judgment to the Forest Service, holding that the Forest Service acted lawfully in making the various determinations challenged by the Sierra Club. On appeal, the Sixth Circuit reversed and remanded, holding that the Sierra Club had standing to bring suit, the suit was ripe for review, and the Sierra Club should be permitted to go forward with its claim. The impact of the Sixth Circuit's holding of justiciability was that the Sierra Club need not wait for a site-specific action to occur before challenging the plan. The Sixth Circuit also held that the LRMP violated the

NFMA by improperly favoring clearcutting.

The United States Supreme Court reversed the Sixth Circuit, on appeal, holding that, while the Sierra Club did have standing, its suit was not ripe for review. The ripeness requirement protects agencies from interference in carrying out their duties until their decisions have become final and the challenging party can point to a concrete injury they suffered as a result of the agency's policy. Using the standards of (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issue presented, the Court held that the Sierra Club would not suffer significant hardship because "the Plan does not give anyone a legal right to cut trees nor does it abolish anyone's legal authority to object to trees being cut." Secondly, the Court held that judicial review would hinder the Forest Service's ability to refine its policies through revision of the LRMP. Thirdly, the Supreme Court held that Congress did not intend for LRMPs to be subject to judicial review before implementation. Such review would preempt the Congressionally mandated system by which the Forest Service makes logging decisions. Finally, the Court noted that challenges to LRMPs would require time-consuming judicial consid-

eration, which might turn out to be unnecessary, should the agency amend its plan.

The Sierra Club's argument that it had suffered immediate harm producing a claim ripe for review was rejected on procedural grounds of lateness. The Sierra Club argued that the immediate harm resulted from the LRMPs allowance of intrusive activities, such as the use of heavy machinery and the nonexistence of "affirmative measures to promote backcountry recreation" in areas the plan designated for logging in Wayne National Forest. Because this argument did not appear in the Sierra Club's complaint, the Court refused to hear it on appeal. However, the court acknowledged that, had the complaint raised this claim, the substantial harm required to meet the ripeness doctrine would have existed.

The Supreme Court's holding in this case decided a split between the circuits by holding that LRMPs are precluded from judicial review until site-specific action, causing actual and substantial harm, has occurred. It is unclear from this case, however, whether all future LRMPs will be found non-justiciable on the grounds of ripeness or whether substantial harm will be found when pleadings include facts similar to the Sierra Club's late claim of immediate harm.

Becky Cull

RCRA

Harmon Industries, Inc. v. Browner, No. -97-0832-CV-W-3, 1998 WL 574421 (W.D. Mo. Aug. 25, 1998)

Harmon Industries, Inc. ("Appellant") filed an appeal in the United States District Court for the Western District of Missouri challenging the Environmental Protection Agency's ("EPA") final order, affirming Appellant's federal penalty liability under the Resource Conservation and Recovery Act ("RCRA"). Prior to the institution of enforcement proceedings leading to the EPA's final order, Appellant discovered in November of 1987 that employees at its Grain Valley, Missouri, assembly facility unlawfully disposed of large quantities of hazardous organic solvent wastes between 1973 and 1987. Upon this discovery, Appellant's management ordered its employees to cease this disposal practice, changed its assembly process, thereby excluding the use of hazardous cleaning materials, and ordered Phase I, II, and III environmental audits of the facility's grounds.

The Phase I report not only noted the presence of hazardous wastes in the soil, but also that no danger to human health or the environment existed. Based upon this and the fact that such disposal practice ceased, the Phase II report concluded "a viable option would be to leave the organic compounds in the ground with a very small risk of future

environmental problems." Finally, the Phase III report stated that Appellant's discontinued solvent disposal practice "did not pose a threat to human health or environment." Thereafter, Appellant voluntarily notified and collaborated with the Missouri Department of Natural Resources ("MDNR") regarding the cleanup at the facility.

In conjunction with the cleanup MDNR dated May 29, 1990, and October 15, 1990, the EPA Region VII stated that MDNR should assess civil monetary penalties against Appellant. The EPA also threatened to institute a separate action against Appellant if the MDNR failed to initiate a formal enforcement action involving penalties against Appellant within 30 days. On September 30, 1991, EPA Region VII filed a four-count administrative complaint against Appellant seeking over two million dollars in civil penalties. During that same month, the Missouri Attorney General's office issued to Appellant a first draft of a consent decree, which conditionally waived civil penalties and a subsequent enforcement action provided that Appellant investigated and remedied the contamination at the site and submitted semi-annual documentation, demonstrating Appellant's attempt to obtain liability insurance in order to comply with RCRA's financial assurance and liability requirements. In addition, the decree included terms to the effect that "compliance with [the] [c]onsent [d]ecree con-

stitutes full satisfaction and release from all claims arising from allegations contained in [the State of Missouri's] petition." After some revision, Appellant and the MDNR signed the decree on November 19, 1992, and January 4, 1993, respectively. On March 5, 1993, the State of Missouri filed the consent decree along with a petition against Appellant in the Circuit Court of Jackson County, Missouri; that day, the court entered and approved the decree.

Following the state court's approval of the consent decree, the EPA's Administrative Law Judge ("ALJ") held an administrative evidentiary hearing, regarding the penalty issue, decided against Appellant on all counts, and rendered a decision imposing civil penalties against Appellant for all counts, totaling \$586,716. In imposing penalties against Appellant, the ALJ characterized Appellant's conduct as creating either major or moderate potential of harm pursuant to the EPA's RCRA Civil Penalty Policy and Civil Enforcement Policy. Appellant Harmon Industries appealed the ALJ's decision to the EPA's three-judge Environmental Appeals Board ("EAB"), which affirmed the penalty decision on March 24, 1997. Appellant then filed this action against the Director of the EPA on June 6, 1997.

Appellant challenged the EPA's interpretation that § 6926(b) and (d) do not preclude the EPA from seeking a civil penalty as authorized by § 6928.

"The EPA contends that the states can have hazardous waste programs but the EPA can always override, or overfile, the state's enforcement action." Appellant relied on the plain language of § 6926, specifically the "same force and effect" and "in lieu of" provisions, and the language of the consent decree. In contesting the EPA's statutory authority to overfile and seek a civil monetary penalty when a state with an EPA-authorized hazardous waste program has resolved the issue without a penalty, Appellant further asserted that res judicata principles estopped the EPA's subsequent imposition of liability on Plaintiff. Finally, Appellant contended that the EPA's civil penalty is time-barred under the federal statute of limitations and that the penalty is arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence.

The district court began its opinion by setting forth the standard of review employed by courts when examining final administrative decisions pursuant to the Administrative Procedure Act ("APA"). The court stated that it must defer to the EPA's construction of §§ 6926 and 6928 if such construction is consistent with the unambiguous letter of the law or represents a reasonable interpretation in the face of ambiguity.

The court found the plain language the statute determinative in finding "that the MDNR operates 'in lieu of' or instead of the federal program." In addi-

tion, the court found that the EPA's delegation of authority, the Memorandum of Agreement between the two agencies and the legislative history support the notion that the EPA and MDNR have concurrent authority over RCRA rather than co-existing equal enforcement powers. The court resolved that the EPA only has the option of withdrawing its authorization of an inactive state program under § 6926(e); not the power to reject and override part of an authorized state's settlement in a particular case when the EPA finds the penalty inadequate. Furthermore, the court found that §§ 6928(2) and 6926(e) are not inconsistent and must be read together, otherwise authorized state actions would not have the "same force and effect" as federal actions pursuant to RCRA § 6926(d). Finally, the court concluded that the EPA did not have the statutory authority to overfile because "the EPA's interpretation of RCRA [contradicts] the purposes behind authorizing state hazardous waste programs."

In determining the res judicata effect of the consent decree, the court applied the *Hickman* rule. Under Missouri law, *Hickman* embodies the rule that "estoppel by a former judgment, or res judicata, requires: (1) identity of the thing sued for, (2) identity of the cause of action, (3) identity of the persons and parties to the action, and (4) identity of the quality of the person for or against whom the claim is made." Applying this rule, the

court determined that the only issue was whether the EPA was in privity to the state court action and consent decree, to which it was not a party. The court concluded that res judicata under the federal statute barred the EPA from imposing penalties on Appellant because, under *Hickman*, MDNR and the EPA were in privity where the MDNR's actions were taken for the interests of the EPA under RCRA.

Although the Missouri district court agreed with the EPA's arguments that the statute of limitations had not run due to the continuous violations exception and that substantial evidence supported the EPA's penalty assessment, the district court reversed the EAB's decision with respect to the EPA's authority to pursue overfiling. The court found that the EPA lacked the authority to overfile because the plain language and reasonable interpretation of the statute did not lend support for the existence of such authority.

WSRA

Sierra Club North Star Chapter v. Pena, 1 F. Supp.2d 971 (D.Minn. 1998)

The Minnesota Department of Transportation ("MDOT") and the Wisconsin Department of Transportation ("WDOT") wanted to build a four-lane bridge across the Lower St. Croix River, a part of the National Wild and Scenic Rivers System under the Wild

and Scenic Rivers Act ("WSRA"). Traffic congestion and safety issues spurred MDOT and WDOT to work together to replace one of the bridges on the river and to modify the approaches to it.

To get the project under way, agencies issued an Environmental Impact Statement, which is required by the National Environmental Policy Act, and a Section 4(f) Statement required by the Federal Transportation Act. Although the statements recommended the construction, the proposed project would have significant impact on the bed and banks of the river and require extensive dredge and fill activity. The Federal Highway Administration ("FHA") approved the plans in November 1995, and the construction contracting was set to begin.

However, in June 1996, the Sierra Club North Star Chapter and Voyageurs Region National Park Association filed suit against the United States Department of Transportation, the FHA, the Department of the Interior ("DOI") and the National Park Service ("NPS") to stop construction on the project, alleging that DOI had violated Section 7(a) of the WSRA, 16 U.S.C. § 1278(a) (1994), by not determining whether the Project would have a direct and adverse effect upon the values for which the Lower St. Croix was included in the WSRA. In September 1996, the NPS instructed the United States Coast Guard and the Corps of Engineers to put MDOT's per-

mit requests on hold. Shortly thereafter, the FHA rescinded its authorization of the construction pending the outcome of the Section 7 determination. MDOT and WDOT asserted cross-claims against the Interior Secretary and NPS Director disputing the determination that the bridge was a "water resources project" within the WSRA and, therefore, required a Section 7 evaluation.

In December 1996, NPS issued a Section 7 determination, finding that the proposed bridge constituted a "water resources project" and that the project would directly and negatively affect the conditions that allowed the river to be included under the WSRA. Pursuant to this report, NPS blocked issuance of necessary construction permits or authorizations by the applicable federal agencies.

MDOT moved for an order vacating the NPS determinations. MDOT claimed the NPS decision was arbitrary, capricious, and in excess of statutory authority. The Sierra Club North Star Chapter and Voyageurs Region National Park Association, the United States, and the City of Oak Park Heights filed memoranda opposing the motion.

The United States District Court for Minnesota held that when a river is classified as part of the Wild and Scenic River System, a bridge construction project over the river would qualify as a "water resources project" under the WSRA. The court recognized the act's stated

purpose was to preserve the included rivers' "free-flowing condition ... for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271 (1994). The court began by observing that "water resources project" is not defined anywhere in the WSRA, and no case law exists on the question. In addition, the court found that no legislative history specifically addressed the issue.

The court then turned to whether the WSRA permitted the Secretary of the Interior's ("Secretary's") treatment of the bridge as a "water resource project." Because the Department of the Interior was responsible for defining the phrase, the court accepted as reasonable the Secretary's interpretation of "water resources project," which included "any type of construction which would result in any change in the free-flowing characteristics of a [wild and scenic] river."

MDOT made several arguments that revolved around what it deemed insufficient notice. MDOT claimed Section 7 had been applied inconsistently to bridge projects. However, the court found no evidence of variance in the statute's application. In addition, MDOT argued that the Secretary inconsistently applied Section 7 to the particular project at issue in this case, an argument the court refuted. In its final notice argument, MDOT said it should not be penalized because of the Secretary's failure to publish the interpretation of "water resources project" in

the Federal Register as required by the Administrative Procedure Act ("APA"). The court did not find this argument persuasive, because the evidence showed that the responsible agencies repeatedly gave MDOT notice that its proposed bridge project would be subject to the WSRA.

In addition, MDOT challenged the Section 7 determination itself. First, MDOT argued that the NPS erred because Congress did not include the Lower St. Croix in the statutory river system for its scenic qualities and, therefore, the NPS should not consider the scenic impact of the bridge. The court rejected this argument because MDOT confused the values for which a river is established under the WSRA, which rest on the river's inherent attributes, with the river's classification under the act, which is based on the amount of development in the river area.

MDOT's second basis for challenging the NPS Section 7 decision was that the determination that the construction would have direct, adverse effects on the area was arbitrary and capricious. However, the court found that the NPS made detailed findings on all issues.

MDOT also argued that the necessity of a project should be a controlling factor in an evaluation. The court rejected this proposition, stating that there is no evidence in the WSRA or its guidelines that discuss taking need into consideration. Subsequently, the court upheld the broad NPS interpretation of "wa-

ter resources project."

Lisa R. Robinett