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Case Summaries

CASE SUMMARIES

Trident Investment Management, Inc. v. Amoco Oil Company
194 F.3d 772 (7th Cir. 1999)

Under the RCRA, Trident brought a private action against Amoco seeking injunctive relief requiring Amoco to clean up the contamination and money damages for the economic impact the contamination had on Trident's ability to sell a piece of property. Amoco initially resisted the charges, but in October of 1996 stipulated to the contamination and the company's violation of RCRA with the district court.

At the trial, focused solely on damages, Trident argued that the contamination rendered the property "unsaleable." The trust further introduced evidence of a buyer's decision not to go through with the sale and a subsequent purchaser's requirement that Amoco stipulate to liability. Amoco suggested that the drop in value of the property was due to market factors unrelated to the pollution. The company pointed out that a Tax Increment Financing District ("TIF"), materialized by Deer Grove Shopping Center, was established near Palatine Plaza Shopping Center. The TIF offered lower rental rates because it was subsidized. In fact, Dominick's Grocery Store, Palatine's anchor tenant, moved to the new shopping center while retaining its lease at Palatine and leaving the space unoccupied.

The trial judge instructed the jury that damages are sometimes assessed by the difference in the fair market value of the property immediately before the discovery of damage and immediately afterward. The jury awarded $1,850,000, apparently attributing some of the reduction in value to other factors. In October 1997, Trident petitioned the court to add punitive damages to its award. The trial court initially allowed the Amendment but later granted Amoco's motion to dismiss the punitive damages claim. The District Court for the Northern District of Illinois entered judgment on the jury verdict, which Amoco appealed.

On appeal, Amoco argued that the measure of damages was erroneous as a matter of law, that the court erred in certain evidentiary rulings, and that Amoco itself was entitled to judgment as a matter of law because Trident failed to mitigate its damages. Trident cross-appealed the district court's decision to dismiss their claim for punitive damages.

In its analysis the court looked primarily at Amoco's damages arguments. It declined to overturn the verdict, stating that classification as temporary or permanent is irrelevant in determining damages. Further, the court found that Amoco misunderstood Trident's claim concerning a loss in value and that the contamination made the property unmarketable, which is a recoverable injury. It stated that the jury received accurate instructions referring to the change in fair market value proximately caused by Amoco and not a lost sales opportunity or outside forces.

The court also addressed Trident's cross-appeal claiming that the district court refused to allow it to amend its complaint requesting punitive damages. The court found that the district court had refused Trident's amendment because it feared that allowing it would be unfairly prejudicial to Amoco and that this is not an abuse of discretion.

The Seventh Circuit Court of Appeals dismissed both the appeal by Amoco and the cross appeal by Trident, concluding that no part of the District court's handling of the case constituted reversible error.

SHERRIE BLAKE

United States v. Mango
199 F.3d 85 (2nd Cir. 1999)

This case arises from the construction of a 370-mile natural gas pipeline from Ontario, Canada, to Long Island, New York, in 1991 and 1992. Defendants were an executive of the company that constructed the pipeline, the company hired by the contractor to perform environmental inspections of the

pipeline, and an executive and an employee of the inspection company. The Federal Energy Regulatory Commission ("FERC") approved the application to construct the pipeline subject to certain conditions contained in the final environmental impact statement ("FEIS"), including stream and wetland construction and mitigation procedures, and a plan for erosion control, re-vegetation and maintenance of other disturbed areas. The U.S. Army Corps of Engineers ("Corps") granted a discharge permit under the Clean Water Act ("CWA") and the Rivers and Harbors Act. The discharge permit required compliance with the environmental mitigation measures in the FEIS; a designee of the Corps' District Engineer signed it.

The defendants were indicted in October 1996 in the U.S. District Court for the Northern District of New York on one count of conspiracy to defraud the United States and violate the CWA, the mail fraud statute, and the bank false reporting statute, and on thirty counts of knowing and negligent violations of the permit conditions. The district court dismissed the latter thirty counts, ruling that the CWA forbids delegation of permit-issuing authority to anyone other than the Chief of Engineers. The court also ruled that even absent the delegation problem, it would dismiss certain of the counts because the permit conditions did not directly relate to the discharge of dredged or fill materials. The government appealed to the Second Circuit.

The Second Circuit found that the CWA does not clearly indicate an intention to prohibit the Secretary from delegating his permit-issuing authority below the level of the Chief of Engineers. Ruling that the CWA language was ambiguous on the point of delegation, the court turned to the issue of whether the Secretary's interpretation of the statute was reasonable. Because the Congress used the same language in other statutes authorizing delegation to levels below the Chief of Engineer's, because the "magnitude of the task" of issuing permits suggests Congressional intent to allow lower level Corps employees to issue permits and set permit conditions, and because the Secretary's interpretation of the CWA was longstanding and Congress had not acted to correct it, the court held that the Secretary's interpretation of the CWA was reasonable.

The court also found that the CWA did not specify how closely permit conditions must relate to the discharge. Again, the court turned to the issue of whether the Secretary's interpretation of the statute, which said that permit conditions can be directly or indirectly related to the discharge as long as they are reasonably related, was itself reasonable and not in conflict with the expressed intent of Congress. Because the Secretary's interpretation was consistent with his statutory mandate to consider the effect of discharges "on human health or welfare," ecosystem diversity," and "esthetic, recreation and economic values," and to consider the cumulative effect of a discharge on the ecosystem as a whole, the court held that the Secretary's interpretation of the CWA was reasonable. The court ruled that the record was insufficient to determine whether the permit conditions were reasonably related to the discharge and remanded to the district court for a decision on the matter.

DAVID M. KURTZ

LEGISLATIVE SUMMARIES

SB 0374 – Establishes a program of air pollution emissions banking and trading

SB 0374 forces the Missouri Air Conservation Commission to create emissions trading programs in order for Missouri to achieve the national air standards required under the Clean Air Act. The emission trading programs apply in "non-attainment areas" where the air fails to meet one or more of the national air standards. With the emissions trading program, individuals and companies that own sources of air

pollution located in the non-attainment areas may receive credits for documented permanent, measurable and enforceable reductions in emissions. Once awarded the credits, the companies and individuals may use, trade or sell them within the same non-attainment area where the reductions occurred as long as there is no adverse affect on air quality. Credits, under this bill, will only be given to reductions that occur after the act's effective date. The Department of National Resources will allow local air control authorities to certify the emissions credits but will itself register the credits and administer the Missouri emissions bank.

SB 0335 – Establishes audit privileges for voluntary internal environmental audits

SB 0335 provides for an environmental audit privilege and establishes the confidentiality of communications relating to voluntary internal environmental audits. The bill also gives penal immunity to those who voluntarily disclose environmental violations. The privilege does not apply if it has been waived. The bill allows a judicial body, if it determines that the privilege has been fraudulently asserted, that the material does not fall within the privilege, or that the party asserting the privilege has not acted in ordinary care to comply with the laws once they discover noncompliance, to force disclosure of otherwise privileged information. If the state determines through an independent source that a criminal act has been committed, it may obtain an audit report but it cannot review or disclose what the report contains until either a court orders it to do so or the privilege is waived. The report provider may request a review within thirty days of the date the state receives the audit report. The contents of a privileged report may, under conditions listed in the bill, be disclosed in a civil or administrative case and an aggrieved party may, under conditions listed in the bill, appeal a civil or administrative disclosure. Additionally, if a public entity, employee or official is found to have divulged confidential audit information, they are guilty of a class A misdemeanor. Information obtained by a regulatory agency acting in accordance with requirements of federal, state or local law or regulation, or obtained independently or directly by a regulatory agency is considered an exception to the environmental audit privilege. The act provides a definition of voluntary disclosure of information in regards to the violation of environmental law and it provides that the Department of Natural Resources cannot assess administrative penalties or seek criminal or civil penalties from any person or entity who comes forward voluntarily to disclose an environmental violation to the Department. Finally, penal immunity does not apply if the person or entity did not voluntarily disclose the information or if the person or entity has been found either by a court or administrative agency to be a repeat offender of environmental laws.

HB 609 – Environmental Rules

The Missouri Department of Natural Resources cannot promulgate rules which are more strict than federal rules regarding clean air, clean water, underground storage tanks, hazardous waste management, surface mining, land reclamation, safe drinking water or solid waste management. If there are either no federal guidelines or if those that exist are insufficient, then the Missouri Department of Natural Resources may, upon a showing of substantial evidence that there will be a negative impact on public health or the environment and upon proof that the rule is necessary to prevent or cease the problem, pass rules more restrictive than federal rules. The specific findings as to the rules necessity and justification must be publishes in the Missouri Register and the rule's fiscal note must show its effectiveness and detail how much the rule's pollution control methods will cost. Additionally, under this legislation, affected parties cannot appeal department decisions to the appropriate board or commission.

HB 423 – Low-Emissions Vehicles

A $3,000 or 25% of the cost of buying or leasing a certified super-ultra-low or zero-emissions vehicle, whichever is lesser, income tax credit is established for tax years 2002 – 2008. Eligibility for the tax credit is limited to taxpayers who live in areas of Missouri not meeting the one-hour ozone standard for air quality and such tax credits are only allowed in years when at least 70% of the gasoline sold in

Missouri contains fewer than 15 parts per million of sulfur. Additionally, the bill limits total credits to $5 million per year. These credits may be carried forward for up to five years if the taxpayer keeps up his or her vehicle registration but may not be transferred or refunded.

TANYA WHITE

Tulane Environmental Law Journal

The *Tulane Environmental Law Journal*, now in its thirteenth year of production, provides its readers with an in-depth analysis of environmental law and related issues.

Volume 13:1 includes the following:

ARTICLES:

Conrad A Fjetland	*The Endangered Species Act and Indian Treaty Rights: A Fresh Look*
Sharonne O'Shea	*Beach Access in Louisiana and the Crippling of Reclamation*
Melissa Thorme	*Clean Water Act Section 305(b): A Potential Vehicle for Incorporating Economics Into the "TMDL" and Water Quality Standards-Setting Processes*
Dean B. Suagee	*Due Process and Public Participation in Tribal Environmental Programs*

BOOK REVIEW:

Paul Boudreaux	*Environmental Costs, Benefits, and Values: A Review of Daniel A Farber's Eco-Pragmatism*

LL.M ESSAY

CASE NOTES

RECENT DEVELOPMENTS

Recent issues of the Tulane Environmental Law Journal include:

Mississippi River Symposium (12:2)
Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future (12:2)
Steel Company v. Citizens for a Better Environment Colloquium (12:1)
How "Total" Are "Total Maximum Daily Loads?" – Legal Issues Regarding the Environmental Justice Suits Under the Fair Housing Act (12:1)

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