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Ohio Valley Env'tl. Coalition v. Bulen, 429 F.3d 493 (4th Cir. 2005)

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first part evaluates the conduct to determine if it is discretionary. The second determines whether the discretionary conduct is susceptible to policy-related judgments. The district court held the Corps used discretion in determining where to place the dredged materials and in constructing a concrete wall and silt fence. The United States Court of Appeals for the First Circuit found no public policy issues required the Corps to maintain a disposal site as they did, or to protect homes from the indirect effects of the dredged materials.

Both the CWA and QSR require a certificate or waiver before discharge of dredged materials. Montijo-Reyes alleged the Corps's failure to obtain either a certificate or waiver caused damages to their property. The court held the QSR did not prescribe any specific measures for disposal site maintenance. Further, the court held Montijo-Reyes did not show a causal connection between the Corps's failure to get a water quality certificate or EQB exemption, and the damages to their property resulting from the dredged material disposal.

The court affirmed the summary judgment holding in favor of the Corps.

Amy M. Petri

FOURTH CIRCUIT

Ohio Valley Env'tl. Coalition v. Bulen, 429 F.3d 493 (4th Cir. 2005) (holding that the Army Corps of Engineers complied with section 404(e) of the Clean Water Act when it issued Nationwide Permit 21 because it identified a category of activities, determined that those activities would have a minimal environmental impact both separately and cumulatively, and provided notice and opportunity for public hearing before issuing the permit).

A coalition of environmental groups brought this action against the United States Army Corps of Engineers ("the Corps") and coal companies and associations over promulgation of a general permit under the Clean Water Act ("CWA") for discharge of dredged or fill material into waters of the United States. The United States Court of Appeals for the Fourth Circuit addressed whether the Corps exceeded its authority under the CWA when it promulgated Nationwide Permit 21 ("NWP 21"). NWP 21 is a general permit for the discharge of dredged or fill material into the waters of the United States that allows projects to proceed only after receiving individualized authorization from the Corps. The court concluded that the Corps complied with the CWA when it promulgated NWP 21.

The CWA prohibits the discharge of any "pollutant" into the waters of the United States without a permit. The Corps has the authority under the CWA to issue individual permits and general permits for the

discharge of dredged or fill material. The Corps issues individual permits under section 404(a) on a case-by case basis, and general permits under section 404(e), which authorizes certain categories of activities. Section 404(e) provides that the Corps may issue general permits on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Corps determines the activities are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only a minimal cumulative adverse effect on the environment.

NWP 21 authorized discharges of dredged or fill material associated with surface or coal mining and reclamation projects. Here, the coalition of environmental groups raised various challenges to NWP 21, which the district court did not address but rather held that NWP 21 is facially invalid under *Chevron U.S.A. Inv. v. Natural Resources Defense Council, Inc* because it conflicts with the unambiguous meaning of section 404(e). The appellate court, however, found that the United States District Court for the Southern District of West Virginia decision did not withstand scrutiny.

The court held NWP 21 plainly authorizes a “category of activities,” which consists of those discharges of dredged or fill material that: (1) are associated with surface coal mining and reclamation operations, (2) are preceded by notice to the Corps, and (3) are approved by the Corps after the Corps concludes that the activity complies with the terms of NWP 21, and that adverse environmental effects are minimal, both individually and cumulatively. Moreover, because NWP 21 incorporates the requirements of the Surface Mining Control and Reclamation Act, NWP 21 does not contain substantive requirements. Finally, nothing in section 404(e) prohibits the use of procedural or substantive parameters to define a “category,” and NWP 21 plainly sets forth both substantive and procedural requirements and standards that apply to the activities it authorizes.

The court concluded that the Corps made the required minimal-impact determinations before issuing NWP 21. The Corps reasoned that the activities authorized by NWP 21 “will not result in significant degradation of the aquatic environment.” Further, the court found that issuance of a general permit functions as a guarantee *ab initio* that every instance of the permitted activity would have only a minimal impact. The court concluded that the Corps’s interpretation – that it may use more tailored means to prevent adverse impacts on a project-by-project basis – was a permissible construction of the statute and was reasonable. Moreover, it is impossible for the Corps’s *ex ante* determinations of minimal impact to be anything more than reasoned predictions.

The court was convinced that the Corps made the minimal-impact determinations required by statute after undertaking a good-faith comprehensive, pre-issuance review of the anticipated environmental

effects of the activities authorized by NWP 21. Further, its partial reliance on post-issuance procedures to ensure minimal impacts did not make those determinations any less valid. Finally, the court concluded that section 404 does not preclude the Corps from issuing a general permit that contains a requirement of post-issuance individualized consideration or authorization by the Corps.

The court of appeals vacated the judgment of the district court and removed the injunction against NWP 21 authorizations.

Tracy M. Talbot

SIXTH CIRCUIT

City of Olmsted Falls, Ohio v. U.S. Env'tl. Prot. Agency, 435 F.3d 632 (6th Cir. 2006) (holding that (1) completion of airport expansion project did not render action moot; (2) Corps properly relied on Ohio Environmental Protection Agency's waiver of its authority to act on city's application; (3) the federal antidegradation rule only places obligations on states, not on Corps; (4) compensatory mitigation was an acceptable form of mitigation to offset environmental degradation of streams and creeks; (5) Corps's decision to issue permit was not arbitrary or capricious).

The City of Cleveland sought and obtained a "dredge and fill" permit from the Army Corps of Engineers ("Corps") pursuant to Section 404 of the Clean Water Act ("CWA"). The permit, which enabled Cleveland to construct a new runway at Hopkins International Airport, allowed Cleveland to fill and culvert 7,900 linear feet of Abram Creek and some of its tributaries, as well as to fill 87.85 acres of wetlands. As a precondition to its application to the Corps, Cleveland applied to the Ohio Environmental Protection Agency ("OEPA") for certification of the airport expansion pursuant to Section 401 of the CWA. After expressing some environmental impact concerns, OEPA expressly waived its authority to act on Cleveland's Section 401 application.

The Corps issued Cleveland's Section 404 permit after accepting OEPA's waiver, subject to extensive compensatory mitigation requirements on Cleveland. The permit's mitigation requirements mandated that Cleveland either directly preserve or contribute financially toward the preservation of 4,670 linear feet of Abram Creek, both upstream and downstream of the airport, restore 265 acres of wetlands elsewhere, and contribute at least \$1,782,000 to the restoration of nearby streams. Upon issuance of the permit, Cleveland immediately began construction. Olmsted Falls, a municipality down-river of the expansion project, filed suit challenging the permit on several grounds. The District Court for the Northern District of Ohio ruled that the Corps correctly relied upon OEPA's waiver of authority, and entered judg-