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Pepperell Assoc. v. United States Env'tl. Protection Agency, 246 F.3d 15 (1st Cir. 2001)

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Pepperell Assoc. v. United States Evtl. Protection Agency, 246 F.3d 15 (1st Cir. 2001)

Colorado's final objection challenged the value of crop losses attributable to the Compact violations. The parties disagreed over how much additional yield the missing water would have produced. Kansas' experts relied on a hypothesis of a linear relationship between water and crop yields, with an estimated reduction in yield due to environmental factors. Colorado's expert proposed a competing model, but had to withdraw it when confronted with flaws in his data. Thus, the Court overruled Colorado's objection because Colorado was unable to successfully challenge Kansas' experts and provide a plausible alternative cost estimate.

The Court remanded the case to the Special Master for preparation of a final judgment specifying the amount of damages that Colorado must pay.

John A. Helfrich

UNITED STATES CIRCUIT COURTS

FIRST CIRCUIT

Pepperell Assoc. v. United States Env'tl. Protection Agency, 246 F.3d 15 (1st Cir. 2001) (holding the Environmental Appeals Board's decision unreviewable, based on the record's substantial evidence).

Pepperell Associates ("Pepperell") operated a small business, which accidentally released 350 gallons of oil into United States navigable waterways. After the spill, the Environmental Protection Agency ("EPA") brought a three-count administrative penalty action. Both parties appealed the Administrative Law Judges' ("ALJ") decision to the Environmental Appeals Board ("EAB"). Pepperell petitioned for judicial review of the EAB's decision in the United States Court of Appeals for the First Circuit. However, the court refused the petition because EAB based its decision on the records' substantial evidence.

Pepperell asserted four issues for review. First, Pepperell argued its facility was not subject to the Clean Water Act's ("CWA") Spill Prevention Control and Countermeasures ("SPCC") regulations because the location made it unreasonable to foresee a discharge into navigable waters. Second, Pepperell argued that between November 1, 1996 and July 14, 1997, SPCC regulations did not apply to it because its underground oil capacity was less than SPCC's jurisdictional threshold. Third, Pepperell argued that its 20,000 gallon, aboveground storage tank created a new feature, and thus was not a modification. Finally, Pepperell claimed EAB miscalculated the penalty.

The court explained that EAB was entitled to substantial deference if it followed its own procedures and met statutory requirements. The court would only set aside EAB's findings if the record, taken as a

whole, failed to support a violation. The court examined the facts and concluded that EAB had based its decision on substantial evidence.

SPCC regulations apply to owners and operators of non-transportation-related on-shore and offshore facilities storing oil and oil products which, because of their location, might discharge oil in harmful quantities into navigable waters. Thus, EAB correctly concluded SPCC regulations applied to Pepperell's facility. EAB affirmed the existence of a reasonably foreseeable discharge based on Pepperell's location. In response, Pepperell argued that the facility's location in a dense, urban area, removed from navigable waters, resulted in unforeseeable discharge. Nonetheless, the court affirmed EAB's decision, which not only refuted Pepperell's narrowly construed location test, but also confirmed that it was reasonably foreseeable the facility, taken as whole, could discharge into navigable waters.

EAB also correctly concluded that SPCC regulations governed Pepperell's facility between November 1, 1996 and July 14, 1997. The CWA exempts facilities otherwise subject to SPCC jurisdiction if their storage capacity is below a specified level. Pepperell argued it was exempt under the capacity exception because some storage tanks were disconnected and other tanks lacked a foreseeable path for oil to reach navigable waters. Pepperell also argued that the regulations did not define the storage capacity. EAB asserted that a tank must be taken out of service, cleaned, capped, and altered, and the foreseeability test does not determine capacity. The court deferred to EAB's expertise and its interpretation of its own agency regulations, and rejected Pepperell's argument.

Pepperell also argued that its newly constructed aboveground storage tank was a new construction, not a modification, because it removed old storage tanks in July and did not complete the new tank until October. However, EAB said such a in gap time, particularly when the owners and operators controlled the time period, did not convert an existing facility into a new one. Pepperell asserted that this determination was arbitrary. However, the court agreed with EAB, and held that Pepperell had modified the facility.

Finally, Pepperell challenged EAB's penalty decision. Pepperell maintained that EAB failed to consider its reimbursement to the state of Maine for part of the cleanup costs. Pepperell argued that EAB must consider this factor because the statute required the penalty assessor to consider other matters, as justice required. The court reviewed the penalties under the CWA for abuse of discretion, and concluded that although Pepperell had a reasonable argument, it failed to show EAB's actions met such a threshold. Thus, the court denied Pepperell's petition for review on all points.

Kirstin E. McMillan