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## W.R. Grace & Co. v. United States Env'tl. Protection Agency, 261 F.3d 330 (3d Cir. 2001)

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W.R. Grace & Co. v. United States Env'tl. Protection Agency, 261 F.3d 330 (3d Cir. 2001)

### THIRD CIRCUIT

**W.R. Grace & Co. v. United States Env'tl. Protection Agency, 261 F.3d 330 (3d Cir. 2001)** (holding the Environmental Protection Agency's order, issued pursuant to the Safe Drinking Water Act, arbitrary and capricious due to the agency's failure to provide a rational basis for its order).

W.R. Grace & Co. ("Grace") filed a petition for review, in the United States Court of Appeals, Third Circuit, which claimed the Environmental Protection Agency's ("EPA") order, issued pursuant to the Safe Drinking Water Act ("SDWA") was arbitrary and capricious. Grace owned a fertilizer plant that polluted the Saginaw aquifer with a plume of ammonia. The Saginaw aquifer supplies drinking water to Lansing, Michigan. The Michigan Department of Environmental Quality notified the Safe Drinking Water Branch of the EPA about the problem, and the EPA issued an initial order requiring Grace to clean up the aquifer. Grace challenged the order, suggesting instead that a technical committee determine the extent of cleanup necessary. EPA agreed and withdrew its initial order. However, EPA released a new order based upon the Saginaw Aquifer Technical Evaluation Team's ("SATET") findings. EPA's new order required Grace to reduce the aquifer's ammonia concentration to 1.2mg/l, using a specific cleanup technique. In response, Grace claimed the order was arbitrary and capricious. The court agreed with Grace.

The court had jurisdiction to review EPA's final actions pursuant to SDWA section 1448(a)(2). The court determined EPA acted arbitrarily and capriciously because it failed to consider the relevant factors, and failed to articulate a rational connection between the facts found and the choices made. Specifically, EPA neglected to provide a rational basis for its conclusion that 1.2mg/l ensured the health of persons who drink water from the Saginaw aquifer. EPA also failed to provide a rational basis for its conclusion that capturing the ammonia plume and removing it before it entered the aquifer was the best method to protect the health of those who consumed water from the aquifer.

EPA argued its requirements were rational based on SATET's recommendations. SATET's technical studies maintained that cleanup to a concentration of 1.2 mg/l was required to protect human health. However, the court found SATET did not derive this number from technical studies, but instead used it as an unquestioned baseline. SATET also failed to determine if the aquifer could tolerate more than 1.2 mg/l and remain safe for human consumption. Thus, EPA's required concentration level was not based on a technical study and lacked a rational basis.

EPA also explained that it required the specific removal technique because SATET concluded this method presented the only way to

ensure the aquifer would produce safe water. The court examined SATET's recommendations and concluded that SATET supported this methodology because of the City of Lansing's opposition to other approaches, not because this constituted the only scientifically sound method. The court found that the EPA's technical recommendation was rooted in Lansing's preference, not in sound science. Also, because EPA based the numeric concentration on an unquestioned baseline, not a technical study, the EPA's order lacked a rational basis. Thus, the court vacated the EPA's order as arbitrary and capricious.

*Kirstin E. McMillan*

### FIFTH CIRCUIT

**Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001)**

(affirming summary judgment and holding the protections of the Oil Pollution Act of 1990 inapplicable to groundwater, because groundwater is not "navigable water" under the Act).

D.E. and Karen Rice ("Rices") sued Harken Exploration Company ("Harken"), alleging Harken discharged oil into or upon "navigable waters" in violation of the Oil Pollution Act of 1990 ("OPA"). The United States District Court for the Northern District of Texas granted Harken's motion for summary judgment because according to the court's interpretation of OPA and the facts of the case, the Rices could not sustain a cause of action under OPA. The Rices appealed and the United States Court of Appeals for the Fifth Circuit affirmed.

The Rices were trustees for the Rice Family Living Trust ("Trust"), which owned the Big Creek Ranch ("Ranch") in Texas. Harken leased property on the Ranch, upon which it owned and operated facilities for exploration, pumping, processing, transporting, and drilling oil.

The Rices alleged Harken discharged hydrocarbons and other pollutants onto the Ranch and into Big Creek, tributaries of Big Creek, and other independent ground and surface waters, contaminating or threatening 9,265.24 acre-feet of groundwater and over ninety noncontiguous surface acres of the ranch. The Rices alleged Harken damaged their land through a series of small discharges that occurred over a long period. Furthermore, they maintained a \$38,537,500 clean-up cost for the contaminated soil and groundwater.

The Rices sought application of OPA because it imposes strict liability for cleanup costs and damages on parties that discharge or threaten to discharge oil into or upon navigable waters. OPA defines "navigable waters" as "the waters of the United States, including the territorial sea."

The Rices argued that the district court's interpretation of "navigable waters" in OPA was erroneous. They claimed the court