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Am. Mining Cong. v. United States Army Corps of Eng'rs, 120 F. Supp. 2d (D. D.C. 2000)

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capriciously, abused its discretion, and violated the CWA and the APA when it failed to review Montana's definition of "interested person." Under the CWA's "general policies," EPA must review and approve discretionary state policies. The court found EPA's decision not to review the definition acceptable since the CWA neither requires that a state define "interested person," nor requires a state to review procedural policies.

Finally, American Wildlands asserted EPA incorporated and used Montana standards both prior to EPA approval and after disapproval. American Wildlands claimed this action was arbitrary, capricious, an abuse of discretion, and violated the CWA and the APA. Accordingly, American Wildlands asked the court for injunctive relief concerning the issue. EPA countered that since the time American Wildlands brought the action it had approved almost all of the disapproved standards at issue, so the claim was moot and the court lacked jurisdiction. The court agreed with EPA, finding the issue moot for two reasons. First, the circuit court of appeals could review a decision to issue or deny a permit under the CWA. And second, EPA had since approved most of the standards at issue.

The court denied all relief sought by American Wildlands and dismissed the action with prejudice.

Rebekah King

Am. Mining Cong. v. United States Army Corps of Eng'rs, 120 F. Supp. 2d (D. D.C. 2000) (prohibiting the Army Corps of Engineers from requiring a permit for incidental fallback).

Section 404 of the Clean Water Act ("CWA") authorizes the Army Corps of Engineers ("Corps") to issue permits for the discharge of dredged material into navigable waters. The CWA defines "discharge" as "any addition of any pollutant to navigable waters from any point source," and the definition of "pollutants" includes "dredged spoil." In 1986, the Corps issued a definition of "dredged material" that excluded "incidental soil movements occurring during normal dredging operations." In 1993, a lawsuit resulted in the "Tulloch Rule," which removed the 1986 exception and expanded the definition of "dredged material" to include redeposit. Redeposit includes incidental fallback, or dredged material that spills out of the container used to remove it and falls back into the water from which it was taken. In 1997, the National Association of Home Builders challenged the Tulloch Rule on the basis that incidental fallback does not constitute an addition under the definition of discharge. The United States District Court for the District of Columbia agreed and enjoined agencies from applying or enforcing it. In 1998, the United States Court of Appeals for the D.C. Circuit affirmed. The agencies promulgated an interim rule ("May 10th rule") removing reference to

"any redeposit" and specifically excluding incidental fallback. After the May 10th rule, the agencies began a review to provide more specific delineation of their scope of jurisdiction over dredged material.

The American Mining Congress ("AMC") brought suit on behalf of its members in the United States District Court for the District of Columbia. AMC claimed the Corps continued to enforce the Tulloch Rule in regulating False Cape Enterprises, Inc.'s ("False Cape") activities in Virginia. AMC further claimed the Corps' requirement that False Cape obtain a Section 404 permit at the site violated the court's injunction. Finally, AMC claimed the Corps asserted unqualified authority in regulating False Cape's activities. AMC asked the court to clarify the terms of its injunction against the application of the Tulloch Rule.

The court first addressed AMC's claim that the Corps asserted unqualified authority to regulate mechanized land-clearing. The May 10th rule was a result of the court's ruling that the agencies had exceeded their authority in requiring permits for activities involving incidental fallback. Since the court invalidated the Tulloch Rule based on its regulation of incidental fallback specifically, the enjoinder resulting from the court's ruling also only covered incidental fallback. Since the court's ruling was limited to incidental fallback, one type of redeposit, it did not constitute unqualified authority concerning redeposits generally.

AMC further claimed the Corps continued to enforce the Tulloch Rule at False Cape's Virginia operation. AMC and False Cape felt its operations in Virginia did not require a permit. Despite this belief, AMC did not ask the court to rule that they were not required to have a permit for those activities. AMC only requested the court clarify its original injunction to correct the Corps' misunderstanding. The court refused. In its interim rule, the Corps stated it would determine permitting requirements on a case-by-case basis until a final rule was issued. An individual determination would include a decision as to whether a particular activity fell within the definition of incidental fallback. AMC's request would require the court to determine whether a particular activity constituted incidental fall back. The court left individual decisions to the Corps.

AMC also claimed the Corps was incorrect in requiring a permit for False Cape's operations. The court's injunction only prohibited the Corps from requiring a permit for incidental fallback. A ruling from the court involving any activity other than incidental fallback would unduly expand the original intent of the injunction. Therefore, the court declined to make such a ruling.

While AMC sought a broad interpretation of the court's injunction, the court agreed with the Corps in ruling that its injunction should be interpreted narrowly. The court held the injunction only covered incidental fallback and not other unspecified

activities.

Brian L. Martin

Chlorine Chemistry Council & Chem. Mfrs. Ass'n v. Envtl. Prot. Agency, 206 F.3d 1286 (D.C. Cir. 2000) (finding Environmental Protection Agency's December 1998 rule adopting a zero maximum contaminant level goal for chloroform was arbitrary and capricious and in excess of authority, thus vacating the rule).

The Safe Drinking Water Act ("SDWA") directs the Environmental Protection Agency ("EPA") to set standards for the regulation of certain drinking water contaminants. For each contaminant, EPA sets a maximum contaminant level goal ("MCLG"), defined as the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety. Once EPA sets the MCLG, it promulgates an enforceable standard, known as the maximum contaminant level ("MCL"). The MCL reflects practical considerations while remaining as close to the MCLG as is feasible.

In 1994, respondent EPA issued a proposed rule setting at zero the MCLG for chloroform based on an absence of data at the time to suggest a level below which no potential carcinogenic effects would occur. In 1998, experts presented scientific evidence demonstrating exposure to chloroform below some threshold level posed no risk of cancer. Although EPA accepted this finding, it established the MCLG for chloroform at zero in its December 1998 final rule.

The Chlorine Chemistry Council and Chemical Manufactures Association (collectively "Council") petitioned the court to review this rule and instruct EPA to promulgate a non-zero MCLG using the best available peer-reviewed science. After briefing but prior to oral argument, EPA moved for a voluntary remand to consider its Science Advisory Board's ("SAB") pending report on chloroform. The court denied the motion. The court explained that since EPA had made no offer to vacate the rule, EPA's proposal left Council subject to a rule that they claimed was invalid.

On February 11, 2000, the day of oral argument, EPA released the SAB's draft report on chloroform. The report stated chloroform does not act directly on a cell's DNA, and thus low doses of chloroform involve no carcinogenic effects. After consideration of the draft report, EPA filed a motion to vacate the zero-level MCLG for chloroform.

In its motion to vacate, EPA claimed Council lacked standing because it failed to demonstrate actual injury from the MCLG. Council contended that a zero MCLG exposed it to greater liability under the Comprehensive Environmental Response, Compensation, and Liability Act. The court found Council's exposure to higher clean-up costs at least substantially probable with a zero MCLG, as compared