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Michigan Peat v. United States Envtl. Protection Agency, 175 F.3d 422 (6th Cir. 1999)

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assessment. Rejecting Smithfield's first two contentions, the court upheld the district court's ruling on Smithfield's affirmative liability.

The court then addressed Smithfield's final contention that the trial court incorrectly assessed $12.6 million in penalties, reversing and remanding the action to the district court for penalty recalculation. The court applied the abuse of discretion standard of review and considered factors established by the CWA for determining an appropriate civil penalty. In addition, the court gave the district court's award wide discretion.

In considering Smithfield's various claims of error in relation to the penalty, the court only disagreed with the findings of the district court on one count. The district court utilized the weighted average cost of capital to calculate the present value of interest. In doing so, the district court determined that the approximate four percent calculation error was insignificant in relation to the $12.6 million overall penalty. The court of appeals disagreed. The four percent calculation error resulted in a miscalculation of between $100,000 and $200,000. The court concluded no reason existed for an admitted error to go uncorrected. Therefore, the court reversed and remanded the penalty determination to the district court to recalculate the penalty.

Sarah E. McCutcheon

SIXTH CIRCUIT

Michigan Peat v. United States Envtl. Protection Agency, 175 F.3d 422 (6th Cir. 1999) (holding that the federal district court had subject matter jurisdiction over the Environmental Protection Agency and the State of Michigan had not waived its Eleventh Amendment immunity).

Michigan Peat engaged in business activities that included the extraction of peat within a wetland area. In 1991 and 1994, it applied for a wetland permit application under section 404 of the Clean Water Act ("CWA"). According to the combined Michigan and federal permitting process, the Environmental Protection Agency ("EPA") must review a permit application and comment on it. The EPA reviewed the application of Michigan Peat and objected to the expansion of the mining program. In response, it created a new draft permit and submitted it to Michigan Peat. The draft permit did not allow expansion into any unmined area but granted other requested actions with various conditions. Michigan Peat did not sign and return the draft permit. Instead, it accepted certain portions of the permit and contested the unacceptable elements. The Michigan Department of Environmental Quality issued Michigan Peat a state–only permit and suggested that Michigan Peat contact the United States Army Corp of Engineers ("Corps") for federal authorization. Michigan Peat

never contacted the Corps.

Michigan Peat filed for declaratory relief in federal court against the EPA and the State of Michigan. The district court dismissed the action against the EPA for lack of subject–matter jurisdiction. It also dismissed the action against the state defendants on the ground that the Eleventh Amendment barred suit. The appellate court identified two main issues in the case: (1) whether the EPA committed a final agency action allowing suit against it; and (2) whether Michigan waived immunity under the Eleventh Amendment by volunteering to enter the section 404 permitting program of the CWA.

A court may only review final agency actions. The Sixth Circuit reasoned that the draft permit was a final agency action because the EPA withdrew objections and agreed to the proposed permit. It did not matter that Michigan Peat did not sign the draft because statutorily there was nothing left for the EPA to do. Therefore, the court of appeals reversed, holding the district court erred in dismissing Michigan Peat's action against the federal defendants.

The court also held that Congress did not abrogate state immunity under the Eleventh Amendment by enacting the CWA act because the only authority under which Congress can waive this immunity is under section 5 of the Fourteenth Amendment. Congress promulgated the CWA under Article I powers. Therefore, Congress did not intend to eliminate state immunity under the CWA. As a result, the court reasoned that Michigan did not waive its immunity to federal suit by volunteering in the section 404 program.

Kristen L. Cassisa

EIGHTH CIRCUIT

Armstrong v. Asarco, Inc., 138 F.3d 382 (8th Cir. 1998) (holding that plaintiff of citizen suit was prevailing party and entitled to limited attorney's fees for actions reasonably related to results obtained after polluter settled with government authorities following commencement of citizen suit under Clean Water Act).

ASARCO began operating a lead refinery on the Missouri River in the 1870s and discharged wastewater containing lead and other pollutants directly into the river. As required by the Clean Water Act ("CWA") and the Nebraska Department of Environmental Quality ("NDEQ"), ASARCO filed an application for National Pollutant Discharge Elimination System permit in 1982. Ten years later, NDEQ had still not decided ASARCO's application, so it held a public hearing regarding the pending application in 1993. In January 1994, after receiving information regarding the facility under the Freedom of Information Act, two citizens sent ASARCO a sixty day notice of intent to sue required under the CWA and then filed suit on March 15, 1994.