

Public Land & Resources Law Review

Volume 0 Case Summaries 2018-2019

Sierra Club v. Virginia Electric & Power Company

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Recommended Citation

Mooney-Myers, Thomas C. (2019) "Sierra Club v. Virginia Electric & Power Company," *Public Land & Resources Law Review*: Vol. 0 , Article 16.

Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss9/16>

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***Sierra Club v. Virginia Electric & Power Company*, 903 F.3d
403 (4th Cir. 2018)**

Thomas Mooney-Myers

The Sierra Club alleged Dominion violated the Clean Water Act by allowing arsenic to leak from coal ash storage pits into state waters. The Fourth Circuit Court of Appeals found for the polluter, using a narrow definition of point source. Additionally, the Fourth Circuit deferred to agency interpretation of the polluter’s permit to find no violation occurred.

I. INTRODUCTION

Sierra Club v. Virginia Electric & Power Company arose from the leaching of arsenic from coal pits managed by the Virginia Electric & Power Company (“Dominion”) through groundwater into the nearby navigable waters.¹ The Sierra Club alleged this movement of arsenic violated the Clean Water Act (“CWA”) and the Dominion permits issued by the Virginia Department of Environmental Quality (“VDEQ”).²

After a bench trial, the United States District Court for the Eastern District of Virginia held that (i) Dominion coal pits were point sources as defined by the CWA and thus Dominion was liable for violations of the CWA, and (ii) Dominion complied with its VDEQ discharge permits.³ The Fourth Circuit found Dominion’s coal pits were not point sources and Dominion had not violated the CWA and affirmed Dominion’s compliance with their VDEQ permits.⁴

II. FACTUAL AND PROCEDURAL BACKGROUND

The CWA was passed in 1972 to improve and maintain the quality of navigable waters in the United States, by prohibiting the discharge of pollutants into navigable water from a point source.⁵ The CWA only allows the Environmental Protection Agency (“EPA”) to regulate point sources, defined as “any discernible, confined and discrete conveyance,” and allows for discharge in compliance with an EPA issued permit.⁶

Pollution from solid waste like coal ash is regulated under the Resource Conservation and Recovery Act (“RCRA”).⁷ RCRA distinguishes between hazardous waste, which is federally managed, and

1. *Sierra Club v. Virginia Electric and Power Co.*, 903 F.3d 403, 406 (4th Cir. 2018).

2. *Id.*

3. *Id.* at 408-09.

4. *Id.*

5. *Id.* at 406.

6. *Id.* at 406-07; *see* 33 U.S.C. § 1362 (14).

7. *Id.* at 407; *see* 42 U.S.C. § 6901.

non-hazardous waste, which is primarily managed by local authorities.⁸ For RCRA and CWA managed pollutants, facilities handling such waste must obtain a permit from the EPA or an EPA-approved state authority that requires compliance with national criteria.⁹ Dominion's permits were issued by the VDEQ, which administers programs under the CWA and RCRA.¹⁰

From 1953 to 2014, Dominion ran a coal-fired power plant in Chesapeake, Virginia.¹¹ The power plant generated waste coal ash which was stored and processed on site.¹² The VDEQ-approved disposal method involved depositing the coal ash slurry into settling ponds then pumping the excess water into the nearby navigable waters once the ash settled.¹³ Additionally, Dominion was required to monitor and test local groundwater and submit those results to the VDEQ.¹⁴

In 2002, Dominion detected arsenic in the groundwater that exceeded the conditions of their permit, and per its RCRA permit, developed and enacted a corrective plan.¹⁵ The VDEQ approved the plan in 2008, and incorporated the plan into the RCRA permit in 2011.¹⁶

Dominion halted operation of the Chesapeake plant in 2014 and stopped depositing coal ash on site in October 2015.¹⁷ In 2016, Dominion submitted a plan to the VDEQ describing their permanent shutdown plans under their RCRA and CWA permits.¹⁸

Sierra Club filed their complaint in March of 2015 under the citizen suit provision of the CWA, alleging three violations and seeking civil penalties and injunctive relief.¹⁹ Count One alleged the leakage of arsenic from the settling pits violated §1311(a)'s of the CWA prohibition against unauthorized discharge from a point source.²⁰ Count Two and Count Three alleged Dominion had violated terms of their CWA permits, respectively Condition II.R and Condition II.F.²¹ The lower court held the Dominion coal ash piles were point sources, under the CWA definition that includes a "discernable, confined, and discrete conveyance."²² Additionally, the lower court held that the CWA covered discharges into groundwater where a "direct hydrological connection" existed linking a point source to navigable waters, and that such a

8. *Id.*

9. *Id.*

10. *Id.* at 408.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 409-10 (*see* *Appalachian Power v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976)).

connection existed between the coal pits and navigable waters.²³ This case came before the Fourth Circuit on appeal by both parties; Sierra Club appealed the lower’s court’s holding on Dominion’s compliance with the VDEQ permits, and Dominion appealed the lower court’s holding that the coal pits were point sources.²⁴

III. ANALYSIS

The Fourth Circuit addressed whether Dominion’s coal settling ponds fulfilled the definition of point source and whether Dominion had complied with the terms of their CWA permits.

A. Point Source Determination

The Fourth Circuit held that the CWA is limited in the scope of its regulation to point sources, which are defined as “any discernible, confined, and discrete conveyance”²⁵ and that “[U]nchanneled and uncollected surface waters” are not considered point sources.²⁶ The Fourth Circuit affirmed the lower court’s holding regarding a “direct hydrological connection” but held this “simple causal link does not fulfill the Clean Water Act’s requirement that the discharge be *from a point source*.”²⁷ On appeal, Dominion contested that the coal pits constituted a point source.²⁸ In their analysis of this issue, the Fourth Circuit used three lines of reasoning: (1) the physical nature of the source of pollutants and the nature of the conveyance, (2) the intent of the source, and (3) the ability to measure the conveyance of pollution.²⁹

First, the Fourth Circuit considered the “carefully defined terms” of the CWA to conclude that the facility must be involved in conveyances that are discrete, not generalized.³⁰ The Fourth Circuit determined the Dominion coal pits did not fit within the given examples of point sources due to the nature of the pits and the diffuse nature of the movement of arsenic.³¹

Second, the Fourth Circuit addressed the intent of the potential point source and held that a point source need not be the source of the pollutants but does need to be the method of conveyance.³² Here, the

23. *Id.*

24. *Id.* at 409.

25. *Id.* at 410 (citing *Appalachian Power*, 545 F.2d at 1373).

26. *Id.* at 409 (see *Appalachian Power*, 545 F.2d at 1373).

27. *Id.* at 409.

28. *Id.* at 409-10.

29. *Id.* at 410.

30. *Id.* at 411 (citing *Appalachian Power Co.*, 545 F.2d at 1373).

31. *Id.* at 410-11.

32. *Id.* at 411 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004) (“[A] point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters’”)).

Fourth Circuit determined the Dominion coal pits were not discrete points and did not function in that manner.³³

Third, the Fourth Circuit considered the purpose of the CWA in terms of Congress's goal to target measurable discharges of pollutants.³⁴ Citing the CWA's enforcement scheme, the Fourth Circuit determined a point source must be measurable in order to be regulated under the CWA.³⁵ Here, where the discharge "... is diffuse and not the product of a discrete conveyance ..." and the act of measuring that discharge is "... virtually impossible," the Fourth Circuit held that the nature of the coal pit discharges was incompatible with the regulatory scheme of the CWA.³⁶

Sierra Club contended the coal pits were point sources because they acted as "containers," which are referenced as a point source in the CWA definitions.³⁷ The Fourth Circuit responded that this critically left out "conveyance," and that conveyance was still necessary to qualify as a point source.³⁸ The Fourth Circuit further distinguished the need for and relevance of conveyance from a point source,³⁹ even when the original source was from a pit or pile.⁴⁰ Thus, the Fourth Circuit reversed the holdings of the lower court and found the coal pits were not point sources, and therefore Dominion did not violate § 1311(a) of the CWA.⁴¹

B. Compliance with Terms of Permit: Conditions II.F and II.R

Condition II.F reads, "[e]xcept in compliance with this permit ... it shall be unlawful for any person to ... [d]ischarge [pollutants] into state waters."⁴² The Fourth Circuit held the phrase "discharge" in the context of the CWA specifically meant discharge from a point source.⁴³ Based on the holding that Dominion's coal pits did not constitute a point source, the Fourth Circuit held Dominion had not violated the terms of Condition II.F.⁴⁴

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (see 33 U.S.C. § 1362 (11)).

37. *Id.* at 412 (see 33 U.S.C. § 1362(14)).

38. *Id.*

39. *Id.* at 412-13 (citing *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) ("[W]hen [the pipe] system 'fail[ed] because of flaws in the construction, ... the escape of liquid from the confined system [was] from a point source.'")).

40. *Id.* at 413 (citing *Sierra Club v. Abston Const. Co.*, 620 F.2d 41, 45 (5th Cir. 1980). ("[T]he court, while recognizing that the *source* of the pollutant ... might be a spoil or refuse pile, noted that the facilities that actually transport the pollutant must be *point sources* ...")).

41. *Id.*

42. *Id.*

43. *Id.* at 413-14.

44. *Id.* at 414.

Condition II.R is a provision for all CWA discharge permits and broadly provides that “solids, sludges, and other pollutants . . . shall be disposed of in a manner . . . to prevent any pollutant . . . from entering state water.”⁴⁵ While the Fourth Circuit acknowledged this provision, read out of context, it seems to prohibit any pollutant from entering state waters.⁴⁶ However, the Fourth Circuit held the provision should be interpreted in the context of the limits of the CWA, and so is limited to the regulation of discharge from point sources.⁴⁷ Additionally, the Fourth Circuit referenced the VDEQ’s consistent interpretation of Condition II.R to apply only to point source discharges and referred to the need in contracts to hold parties to their common understanding rather than a strict meaning of the law.⁴⁸ Under this interpretation, the Fourth Circuit held Dominion had not violated Condition II.R of their VDEQ permit.⁴⁹ Neither the lower court nor the Fourth Circuit provided a test or explanation for their deference to the VDEQ interpretation.⁵⁰

C. *Role of RCRA*

Finally, the Fourth Circuit briefly discussed the relevance of Sierra Club’s claim under the CWA as compared to RCRA, because the Dominion monitoring requirements and the 2011 corrective plan were both developed under the RCRA permit.⁵¹ The Fourth Circuit stated that had the Sierra Club wanted to challenge the manner in which Dominion managed their coal ash storage method, a claim would have been more appropriate under the RCRA citizen suit provision.⁵²

IV. CONCLUSION

The Fourth Circuit relied on a narrow definition of point source to determine that Dominion had not violated § 1311(a) of the CWA or the conditions of their discharge permits. While this narrow reading makes bringing claims based on point sources cumbersome in the Fourth Circuit, the Fourth Circuit’s reference to the role of RCRA indicates environmental groups should carefully select the provision under which they bring their claim if they want to prevail.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* (citing *Ohio Valley Envtl. Coal v. Fola Coal Co., LLC*, 845 F.3d 133, 138 (4th Cir. 2017)).

49. *Id.*

50. *Id.* at 413 (“While we might have wished for more explanation from the district court in support of its decision to defer . . . we agree with both the VDEQ and Dominion that the subject Conditions must be read in context to give them their appropriate meaning and scope.”).

51. *Id.*

52. *Id.*