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## United States v. Smithfield Foods, No. 97-2709, 1999 WL 713847 (4th Cir. Sept. 14, 1999)

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In a vigorous dissent, the chief judge argued the majority had raised the threshold for establishing standing by “erecting standing hurdles so high as to effectively excise the citizen suit provision from the Clean Water Act.” He also contended that the holding required courts to litigate scientific facts as a matter of standing and that the “fairly traceable” requirement was not equivalent to a requirement of tort causation. The chief judge would have permitted the citizens’ suit upon a finding that the case satisfied the case-or-controversy requirement of Article III.

*Stephanie Pickens*

**United States v. Smithfield Foods, No. 97-2709, 1999 WL 713847 (4th Cir. Sept. 14, 1999)** (affirming the district court’s finding of plaintiff’s liability, but reversing and remanding for recalculation of penalty).

Smithfield Foods (“Smithfield”) owned and operated two swine slaughtering and processing plants that discharged wastewater into the Pagan River located in Virginia. The discharged wastewater contained pollutants regulated under the Clean Water Act (“CWA”) thus requiring a permit under a process overseen by the Environmental Protection Agency (“EPA”) and locally administered by the Virginia State Water Control Board (“Board”). In 1986, the Board issued Smithfield a permit (“1986 Permit”) for discharge of a restricted amount of pollutants into the Pagan River.

At the time of the issuance of the 1986 Permit, Virginia issued new regulations stating all permits required modification to lower the monthly average of phosphorus discharged into rivers. In 1990, the Board modified the 1986 Permit, resulting in a new permit (“1990 Permit”) that instructed Smithfield to comply with the more restrictive state phosphorus limitation within three years.

Smithfield and Virginia began negotiations that resulted in an agreement involving various accommodations (“1990 Order”). Smithfield agreed to investigate the feasibility of connecting its plants to the local sanitation system in order to resolve its wastewater treatment problem, while the Board agreed to postpone commencement of the compliance schedule for roughly one year. The Board amended the 1990 Order in May of 1991 (“1991 Order”). The 1991 Order stated that if Smithfield chose to connect its systems to the local sanitation system, it must do so within three months of the notification that the necessary equipment was operational. In addition, the 1991 Order mandated Smithfield comply with interim regulations until the connection was complete. The 1991 Order explicitly stated that it did not modify the 1990 Permit. Smithfield notified the Board of its decision to connect its facilities to the existing sanitation system on June 7, 1991.

Contemporaneous to the 1991 Order, the 1990 Permit expired. The Board composed a new permit. The proposed permit contained

the same compliance schedule as the 1990 Permit requiring compliance with the phosphorus discharge limitations by January 4, 1993. A Board environmental engineer assured Smithfield that any special order agreements approved by the Board would take precedence over the permit. The Board issued Smithfield the new permit ("1992 Permit"). Smithfield met neither the January 4, 1993 deadline for phosphorus discharge required by the 1992 Permit nor the May 13, 1994 deadline for all other substances. Smithfield eventually achieved complete connection to the local sanitation facility in August 1997.

Virginia filed an enforcement action in the state circuit court in 1996. The government filed its own suit on December 16, 1996 alleging that Smithfield violated the CWA by discharging pollutants into the Pagan River at levels exceeding those specified in the 1992 Permit. The government moved for summary judgment. The district court granted summary judgment in July 1997 in favor of the United States as to Smithfield's liability and calculated 6,982 days of violations and assessed a penalty of \$12.6 million.

On July 9, 1997 the state court, in hearing the action commenced by Virginia, determined that the 1991 Order superseded the 1992 Permit and, as a result, Smithfield only had to comply with the phosphorus limits within three months of connecting to the local sanitation system. Thus, Smithfield filed a motion to dismiss the government's action. The district court refused to reverse its finding of liability or calculation of penalty. Smithfield appealed on three grounds.

Smithfield first contended that the 1991 Order superseded the 1992 Permit. The court, in agreement with the district court, held the 1991 Order did not take precedence over the 1992 Permit. The court held that because Smithfield had not followed a formal permit modification procedure, none of the letters or statements issued by the Board after the issuance of the 1992 Permit were sufficient to constitute modification.

The court addressed both aspects of Smithfield's second contention in turn. First, Smithfield argued that the CWA provided that if a state pursued an action under state law, any sufficiently comparable federal civil enforcement action was precluded. The court, relying on the analysis of the district court, concluded that state action was not sufficiently comparable to the federal civil enforcement to bar the federal action because Virginia did not have the authority to assess penalties without the violator's consent. In addition, Virginia's statutory structure did not provide adequate procedures for notice and public participation. In the alternative, Smithfield argued that the United States Supreme Court's previous holding that in some cases a violator's corrective action would be sufficient to override the assessment of penalties precluded the federal suit. The court of appeals determined, in agreement with the previous findings of the district court, that the corrective action taken by Smithfield did not achieve compliance, thus was insufficient to overcome the penalty

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 Env'tl. 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