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Burke v. U.S. Envtl. Prot. Agency, 127 F. Supp. 2d 235 (D.D.C. 2001)

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Under the ruling, EPA could obtain such assurances for past RCRA violations regardless of whether PEC was acting in violation of the statute at the time EPA filed its complaint.

The court also found PEC's "tremendous progress" argument unpersuasive. PEC believed that because it had taken substantial steps toward remediating the contaminated soils and groundwater, the EPA could not establish irreparable injury occurred necessary to warrant an injunction. The court first noted that because PEC had not provided the financial assurances demanded by the EPA, PEC was in current violation of RCRA. Citing Tenth Circuit authority, the court found that "[w]hen the evidence shows that the defendants are engaged in . . . practices prohibited by statute . . . irreparable harm to the plaintiffs need not be shown."

PEC's laches argument rested on the premise that because the government did not act against PEC at an earlier time, the EPA had abandoned its right to do so. Recognizing an exception to the laches doctrine exists where the government seeks to protect a public interest, PEC opined that the EPA's suit served a government, rather than a public interest. Rejecting this assertion, the court reasoned that if PEC were not to provide remediation costs, the government would be forced to do so; these costs in turn would be passed to the public. Because a public interest was therefore at stake, PEC's laches argument could not stand.

Lilienthal individually asserted the final response to EPA's motion for partial summary judgment. Lilienthal argued he was not in fact the operator of the PEC facility. The court disposed of this argument by simply applying the wording of Colorado regulations to pertinent facts regarding Lilienthal's holdings. At the time the EPA brought its action, Lilienthal was president of PEC and owned over half its stock. According to PEC employee testimony, Lilienthal also made all the relevant decisions regarding PEC's environmental compliance. The court recognized other courts have used different tests to determine whether to consider an individual as an operator for RCRA purposes. However, the court declined to decide which test courts should apply since Lilienthal would be considered an operator under each of them.

Jason S. Wells

Burke v. U.S. Env'tl. Prot. Agency, 127 F. Supp. 2d 235 (D.D.C. 2001) (granting summary judgment motion in favor of the Environmental Protection Agency where a violator of a discharge permit questioned the agency's decision to debar him from business with the government).

From 1989 to 1998, Burke was the president and sole shareholder of ACMAR Regional Landfill, Inc. ("ACMAR"), which owned and operated ACMAR Regional Landfill ("the landfill") located in

Alabama. The landfill accepted residential and industrial waste, and bordered a tributary of the Cahaba River, a source of drinking water for the residents of Birmingham, Alabama. The Alabama Department of Environmental Management issued a National Pollution Discharge Elimination System permit to the landfill, which authorized the release of landfill storm water runoff that did not contain leachate, a liquid by-product produced in landfills. Leachate results when precipitation or other fluids mix with contaminants in the waste creating a biological reaction that renders the fluid harmful. In February 1998, an information was filed against Burke charging him with a violation of the Clean Water Act ("CWA") in the United States District Court for the Northern District of Alabama for negligent discharge of leachate into the Cahaba River tributary in 1993. Burke pled guilty and received a fine and prison sentence, with a one year supervised release if he continued his relationship with the landfill. ACMAR pled guilty to charges of fraud and illegal operation of the landfill and subsequently received a fine. Burke sold the landfill in March 1998.

In August 1998, the Environmental Protection Agency ("EPA") Suspension and Debarment Division debarred Burke from participating in any federal assistance program and from contracting with the federal government for five years. The EPA exercised its discretion in debaring Burke to protect the public interest and ensure the agency conducted business with only responsible persons. The EPA concluded Burke's criminal conviction provided just cause for debarment, and Burke did not provide sufficient mitigating factors or remedial measures to show debarment was unnecessary. Burke filed suit in the United States District Court for the District of Columbia seeking an injunction against the EPA in reference to the debarment order, and declaratory relief pursuant to the Administrative Procedure Act. Burke argued the EPA's decision to debar him was arbitrary and capricious given the statutory requirement for debarment, and the mitigating factors and remedial measures surrounding his offense. Both parties moved for summary judgment.

In reviewing the decision to debar Burke, the court stated the standard of review was not to determine if the decision was proper, but to determine whether the EPA had acted in an arbitrary and capricious manner looking at the entire administrative record. The court held the EPA acted within its discretion given the evidence and granted summary judgment for the EPA.

First, the court addressed Burke's claim that the EPA's interpretation of the CWA debarment provision constituted an abuse of discretion. Burke argued the relevant sections of the debarment provision neither specifically enumerated nor generally addressed the nature of his offense, but rather referred to business integrity. The court concluded Burke's actions raised considerable questions about his business integrity and the EPA's interpretation of the provision was reasonable.

Next, the court addressed Burke's argument regarding the mitigating factors and remedial measures surrounding his debarment.

Burke argued the mitigating factors surrounding his offense made debarment unnecessary, as he did not represent a business risk, and these mitigating factors made his five-year debarment period excessive. Burke maintained his offense was a single act and not a pattern of offenses, making him less of a business risk in future relationships. The court explained that the scope of its review was to decide whether the EPA acted reasonably given the facts in the record, and that the EPA had discretion in making its decision. The court held, given the nature and circumstances of Burke's offense, that EPA's decision to debar him for five years was not an abuse of discretion.

Patrick Nackley

Nat'l Wildlife Fed'n v. Browner, 237 F.3d 670 (D.C. Cir. 2001)

(holding section 509(b)(1) of the Clean Water Act determines venue, not jurisdiction).

In April 1998, the Environmental Protection Agency ("EPA") promulgated regulations, known as the "Cluster Rules," pertaining to the paper mill and pulp industry. The Cluster Rules include both effluent limitation guidelines under the Clean Water Act ("CWA") and emission standards under the Clean Air Act ("CAA"). Several environmental groups, including the National Wildlife Federation (collectively, "NWF"), filed a petition for review of the CWA portion of the Cluster Rules in the Ninth Circuit. Various paper producers (collectively, "Industry petitioners") filed a petition for review of the same portion of the Cluster Rules in the Fourth and Eleventh Circuits. Both the Fourth and Eleventh Circuits transferred the Industry petitioners to the Ninth Circuit, where the court consolidated their petition for review with NWF's claims. Industry petitioners then motioned to dismiss NWF's petition for lack of subject matter jurisdiction. Without ruling, the Ninth Circuit transferred the case to the United States Court of Appeals for the District of Columbia Circuit.

CWA section 509(b)(1) provided the basis for the Industry petitioner's lack of subject matter jurisdiction argument. This section states that review of an administrator's action in promulgating any effluent standard may be had in the "Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action." Industry petitioners argued the phrase "resides or transacts" was jurisdictional and only one of the NWF petitioners resided or transacted business in the Ninth Circuit. Industry petitioners asserted that because NWF's one valid petitioner lost standing, or its claim became moot, nine months after NWF's petition was filed, NWF's remaining petition should be dismissed. NWF countered that the "resides or transacts" language referred to venue, and argued venue was properly established.

In analyzing Industry petitioners' and NWF's arguments, the court