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## Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 179 F.3d 107 (4th Cir. 1999)

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On appeal, TGR argued that Grasmere Brook was a “municipal separate storm sewer” and a part of a “waste treatment system” and was, therefore, excluded from the CWA under 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2. In addition, TGR maintained that the brook was “designed and constructed to carry storm and other waste water runoff.”

The Second Circuit affirmed the lower court’s decision. It acknowledged the broad meaning of “waters of the United States” under the CWA and noted that several circuits have held non-navigable waterways as “waters of the United States.” However, the court largely based its reasoning on the definition of both “waters of the United States” under 40 C.F.R. § 122.2 and “municipal separate storm sewer” under 40 C.F.R. § 122.26(b)(8). Under the latter category, the sewers must be owned or operated by a public body (such as a state, city, town, borough, county, parish, district, or association). Testimony at trial established that no public body owned or operated the brook. Furthermore, the court noted that the exclusion for waste treatment systems only applied to manmade bodies of water. Testimony provided at trial demonstrated the brook was considered a “natural waterway housing aquatic life and water fowl.”

The court held that as a natural tributary of a navigable waterway, Grasmere Brook was part of the “waters of the United States” under the CWA; TGR’s discharge into the tributary violated the CWA; and thus confirmed the conviction.

*Karina Serkin*

#### FOURTH CIRCUIT

**Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 179 F.3d 107 (4th Cir. 1999)** (holding that two citizens’ environmental groups did not have standing to bring an action under the Clean Water Act).

Gaston Copper owned and operated a non-ferrous metals smelting facility on the waters of Lake Watson in South Carolina. The company received a renewed National Pollutant Discharge Elimination System Permit from the state Department of Health and Environmental Control in February 1991. In September 1991, two non-profit environmental organizations (“FOE” and “CLEAN”) brought suit on behalf of their members against Gaston pursuant to the Clean Water Act (“CWA”). The suit alleged that Gaston exceeded effluent limitations for various pollutants and failed to comply with reporting requirements. FOE and CLEAN argued these violations affected their ability to protect and improve South Carolina’s waters and also “affected the health, economic, recreational, aesthetic and environmental interests of their members,” residing in the vicinity of waters that receive runoff from Lake Watson. Gaston moved to dismiss

the case on the ground that FOE and CLEAN lacked standing. FOE and CLEAN argued that their members had suffered injury in fact and supported this with testimony of three members who were allegedly harmed by Gaston's activities.

One witness testified that he believed his lake contained mercury, based upon a news article, which stated that lakes in his area contained this element. He also had his lake tested for pollutants prior to 1991, with the final results of the test indicating that there were effluents in his lake. Due to this fact, he claimed he did not recreate in the lake often and that his property value diminished. A second witness testified to concerns of the Gaston facility polluting a nearby river thereby affecting his enjoyment of canoeing and swimming in the river. A third witness also expressed concern that nearby waters contained contaminants and, therefore, he was less likely to dive in the waters. FOE and CLEAN also argued that effluents which Gaston discharged into Lake Watson flowed downstream and adversely affected members' protected interests in the waters.

The district court determined that FOE and CLEAN failed to establish standing. It found that the testimony of the three witnesses did not, standing alone, establish that the interests of the citizens' groups were adversely affected. FOE and CLEAN appealed to the Fourth Circuit, arguing that the trial court erred in dismissing their CWA claim.

In order to establish standing, Article III requires a party to show (1) that he personally suffered some actual or threatened injury as a result of the illegal conduct of the defendant; (2) that the injury is fairly traceable to the challenged conduct; and (3) that the injury is likely to be redressed by a favorable decision.

The court of appeals held that the evidence failed to show that the waters which the witnesses used were actually or in imminent threat of being adversely affected by pollution. It stated that the witness who tested his lake failed to conduct toxicity tests on the lake during or after 1991. The interested witness should have performed toxicity tests for this period because the action arose out of Gaston's conduct since 1991. Additionally, none of the members testified that there was any observable negative impact on the waters. The court found that their concerns were "based upon mere speculation as to the presence of pollution." Furthermore, there was no evidence showing that the pollutants found in one of the members' lakes was traceable to Gaston's facility. The court stated that even assuming arguendo that FOE and CLEAN's members suffered injury in fact, they failed to establish that the waterways contained effluent directly traceable to Gaston. The court found it significant that the lake and the river about which the witnesses testified were many miles away from Lake Watson and that there were many intervening ponds and tributaries in between, however, the court mentioned in a footnote that it was not requiring a plaintiff to establish mileage limits in order to satisfy the "fairly traceable" prong of standing. Based upon the evidence, the court concluded the plaintiffs had not demonstrated standing.

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