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United States v. Interstate Gen. Co., 39 Fed. Appx. 870 (4th Cir. 2002)

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pollutant from a point source into waters of the United States. The appellate court focused on the fact that the Environmental Protection Agency (“EPA”) had not articulated a clear interpretation of current law dealing with whether pesticides used properly and released over or into waters of the United States triggered the requirement of an NPDES or SPDES permit. It determined that the question would remain open until the EPA decided the issue.

The district court acted with an incomplete record and failed to consider threshold questions of law. The court suggested that the Altmans amend their complaint to join federal and state agencies necessary to resolve this issue. The appellate court also issued five guidelines for the district court. First, the district court needed to consider whether freshwater wetlands in New York are “waters of the United States.” Second, the district court should examine whether the use of the particular pesticides in this case constituted the “deliberate discharge” of pollutants into the waters of the United States. Third, the district court must determine if Amherst properly used the pesticides for their intended purpose. Fourth, the district court needed to determine whether any of the pesticides applied, discharged, or sprayed by Amherst were pollutants as defined by the CWA. Fifth, the district court must use persuasive authority of recent case law from the United States Supreme Court and the Second Circuit.

Adriano Martinez

FOURTH CIRCUIT

United States v. Interstate Gen. Co., 39 Fed. Appx. 870 (4th Cir. 2002) (holding that a Supreme Court decision subsequent to a plea agreement and consent decree entered into by appellants and the United States did not eliminate the federal government’s jurisdiction and did not legalize the conduct underlying appellant’s criminal conviction because the decision dealt with a provision of 33 C.F.R. § 328.3(a)(3) that the government had not used to assert jurisdiction for the plea agreement or the consent decree).

This appeal arose out of a denial by the Maryland United States District Court of Interstate General Company’s (“IGC”) petition for writ of error *coram nobis* and motion to vacate. As grounds for its writ and motion to vacate, IGC argued the Supreme Court’s subsequent decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (“SWANCC”) legalized the conduct underlying IGC’s criminal conviction. Thus, appellants claimed they did not violate the Clean Water Act (“CWA”) by filling in certain wetlands because SWANCC eliminated the federal government’s jurisdiction

over those wetlands. The Court of Appeals for the Fourth Circuit disagreed, affirming the district court's ruling and holding *SWANCC* did not change the decisional law applicable to appellant's case.

In September 1995, the United States began parallel criminal and civil proceedings against IGC, St. Charles Associates ("SCA"), and James J. Wilson, chief executive officer of both companies ("IGC and SCA"). The complaints charged IGC and SCA with violating the CWA by discharging fill material onto four parcels of wetlands in St. Charles without obtaining a permit from the United States Army Corps of Engineers ("Corps"). In February 1996, a jury convicted the IGC and SCA on four felony counts of knowingly discharging fill material into wetlands protected by the CWA.

Subsequently, the Fourth Circuit reversed IGC's convictions and remanded the matter for a new trial because the district court, in instructing the jury, had relied on 33 C.F.R. § 328.3(a)(3) as a possible basis for the Corps' jurisdiction. The court concluded that the Corps had exceeded its congressional authorization under the CWA in promulgating § 328.3(a)(3). Consequently, the court held § 328.3(a)(3) was invalid and the district court's instruction based on that regulation was erroneous.

After remand, the parties settled both the criminal and civil aspects of the controversy. IGC pled guilty to a single felony count and paid \$1.5 million in fines. The parties also signed a consent decree, which required IGC to pay a civil penalty of \$400,000 and to implement a wetland remediation plan. In return, the government dismissed all charges against Wilson and SCA. The district court sentenced IGC and entered the consent decree in November 1999.

Soon thereafter, the Supreme Court decided *SWANCC*, and IGC filed a petition for a writ of error *coram nobis* and a motion to vacate the consent decree under Rule 60(b)(5) of the Federal Rules of Civil Procedure. The district court denied both applications, and IGC appealed.

Federal courts have the power under 28 U.S.C. § 1651(a) to grant a writ of error *coram nobis* vacating a conviction after completion of a sentence. However, this extraordinary relief should be granted only if an error "of the most fundamental character" has occurred, and no other remedy is available. Although historically, this common law writ was used to correct fundamental errors of fact, it may also be issued to correct fundamental errors of law. Such an error may occur when there is a significant change in the law following a conviction.

As with *coram nobis*, a threshold question under Rule 60(b)(5) is whether there has been a significant change in the law since the conviction in question. It is appropriate for a court to grant a Rule 60(b)(5) motion if the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice. According to the Supreme Court, this may occur when the party seeking relief from an injunction or consent decree can show a significant change either

in factual conditions or in law. Here, IGC argued that *SWANCC* significantly changed the law applicable to its conduct.

The Fourth Circuit held that both IGC's guilty plea and the consent decree assumed that the Corps had jurisdiction under the CWA to regulate the St. Charles wetlands. The court next noted, however, that the Corps no longer asserted jurisdiction under § 328.3(a)(3) because *United States v. Wilson* declared that subsection of the regulation invalid. Instead, the court opined, the Corps asserted jurisdiction over the wetlands because they were adjacent to tributaries of traditional navigable waters. It noted that the parties acknowledged the factual predicate for the Corps' jurisdiction—specifically, that the St. Charles wetlands were adjacent to tributaries of traditionally navigable waters.

IGC argued that *SWANCC* eliminated jurisdiction over wetlands adjacent to waters that were not traditionally navigable, even if those waters eventually flowed into traditional navigable waters. According to IGC, *SWANCC* limited the Corps' jurisdiction to: (1) traditional navigable waters; and (2) wetlands immediately adjacent to traditional navigable waters. Consequently, IGC argued that *SWANCC* eliminated the Corps' jurisdiction over the disputed wetlands, so discharging fill into them without a permit did not violate section 404(a) of the CWA.

The Fourth Circuit was not persuaded by IGC's contentions, holding the only clear change in law made by *SWANCC* was a narrow one. At issue in *SWANCC* was the Corps' jurisdiction over an *isolated* intrastate body of water. The court further held that the Corps' in *SWANCC* based its jurisdiction solely on § 328.3(a)(3), the only subsection covering isolated bodies of water. Thus, the Supreme Court declined to hold that isolated ponds wholly located within two Illinois counties fell under section 404(a)'s definition of "navigable waters" because they served as habitat for migratory birds.

The Fourth Circuit noted that the wetlands at issue were adjacent to the headwaters of small streams that flowed into Port Tobacco Creek, Piney Branch, or Mattawoman Creek, and concluded these wetlands were adjacent to tributaries of traditional navigable waters.

In sum, because the Fourth Circuit had already invalidated § 328.3(a)(3) in its entirety in *United States v. Wilson*, an opinion issued before either the plea or the consent decree, *SWANCC* effected no relevant change in decisional law in this circuit. Accordingly, *SWANCC*'s holding addressed only the validity of § 328.3(a)(3) and, in the present case, the Corps' jurisdiction did not rest on subsection (a)(3). Rather, the Fourth Circuit opined, the Corps' based its jurisdiction on §§ 328.3(a)(1), (a)(5), and (a)(7) for purposes of the guilty plea and the consent decree.

In denying IGC's writ of error *coram nobis* and motion to vacate, the Fourth Circuit stated that IGC would have had to show there had been a fundamental or significant change in the law governing the subject

case. IGC failed to do so. Thus, the Fourth Circuit affirmed the district court's order denying IGC's petition for writ of error *coram nobis* and motion to vacate the consent decree.

Gloria M. Soto

SIXTH CIRCUIT

Hamilton v. Myers, 281 F.3d 520 (6th Cir. 2002) (holding that individuals rightfully possessing prior property interests in lakes, now held in public trust, own the submerged land beneath the lake and the air above, to the low water mark point, as measured at the time the lake transferred into public trust).

Jamie and Bonnie Hamilton ("Hamilton") filed suit in the United States District Court for the Western District of Tennessee against the Tennessee Wildlife Resources Agency, its executive director, and several employees in their official and individual capacities ("TWRA"). Hamilton sought declaratory and injunctive relief against the TWRA, and compensatory and punitive damages against the employees in their individual capacities. Hamilton alleged that TWRA and its employees violated Hamilton's due process rights by unlawfully searching and seizing Hamilton's boat, duck blind, and decoys from Reelfoot Lake at the orders of the TWRA regional office. Additionally, Hamilton sought declaratory relief pronouncing that Hamilton owned a property interest in Reelfoot Lake. The district court granted summary judgment in favor of TWRA, finding sovereign immunity barred Hamilton's claims, and that in the alternative, Hamilton did not own a property interest in Reelfoot Lake because the lake was held in public trust. The Sixth Circuit Court of Appeals affirmed the ruling that the employees in their individual capacities were immune from suit because the employees' actions were reasonable and protected as a discretionary function. However, the court reversed the district court's judgment on the other claims. It held that Hamilton owned a property interest in Reelfoot Lake under Tennessee law, and remanded the case to determine whether the Hamiltons had standing to enforce their property rights, and to resolve disputed issues regarding the measurement of the property interest.

In 1788, the State of North Carolina granted Colonel Doherty, Hamilton's predecessor in interest, a deed of real property. In 1810, an earthquake caused the formation of Reelfoot Lake, thus submerging part of the land included under the original 1788 grant. Hamilton's deed extended to the ordinary low water mark of Reelfoot Lake. Since the Doherty grant included the entire portion of land described in the original 1788 deed, Hamilton asserted Doherty's riparian rights over the lakebed, 200 yards past the shore of the Lake,