Southeastern Environmental Law Journal

Volume 10 | Issue 1 Article 7

Summer 2002

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FOURTH CIRCUIT ELEVATES LIKELIHOOD OF SUCCESS ON THE MERITS IN PRELIMINARY INJUNCTION ANALYSIS

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I. INTRODUCTION

In *Safety-Kleen, Inc. (Pinewood) v. Wyche*,[1] the Fourth Circuit both bolstered the regulatory power of the South Carolina Department of Health and Environmental Control (DHEC) and revealed instability in the court's analysis for preliminary injunction. After affirming its jurisdiction in the face of the *Rooker-Feldman* doctrine, the court affirmed denial of Safety-Kleen's motion for preliminary injunction and reversed the determination barring enforcement of financial assurance requirements. Though less favorable to DHEC, the court dismissed the state's interlocutory appeal of its motion to dismiss and reversed the order denying a motion to intervene by the Official Committee of Unsecured Creditors of Safety-Kleen (Official Committee).[2]

Safety-Kleen, Inc., as owner of a commercial hazardous waste landfill, initiated this suit to enjoin DHEC from closing the Pinewood facility, which had exhausted its permitted capacity. When the District Court denied Safety-Kleen's motion for a preliminary injunction, they appealed claiming, violations of procedural and substantive due process, Equal Protection, First Amendment rights, dormant Commerce Clause and Resource Conservation and Recovery Act (RCRA)[3] preemption. DHEC cross-appealed the District Judge's determinations that the *Rooker-Feldman* doctrine was not a jurisdictional bar to the action, and that an automatic stay prevents DHEC from enforcing financial assurance requirements against a bankrupt permittee. DHEC also tried to make an interlocutory appeal from the District Court's order denying a motion to dismiss. Finally, the Official Committee appealed the denial of its motion to intervene.

II. FACTS AND PROCEDURAL HISTORY

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[1] 274 F.3d 846 (4th Cir.2001).

[2] Safety-Kleen filed for Chapter 11 bankruptcy on June 9, 2000. *Id.* at 856-857.

[3] 42 U.S.C. §§ 6901-6992 (1976).

A. Safety-Kleen and the Pinewood Landfill

Safety-Kleen is one of the nations largest environmental services companies and is based in Columbia, South Carolina. It has over 250 facilities spread across North America, four of which are in South Carolina, and eleven of which are landfills.[4]

The specific history of the landfill at Pinewood is important in understanding the progression of litigation concerning it.[5] The site is located near Pinewood in Sumter County, approximately 1200 feet from Lake Marion, "a popular recreation spot and a source of drinking water for several thousand people."[6] After concluding mining activities in 1977, the Bennett Mineral Company began waste disposal operations at the site under an Industrial Waste Permit (IWP), which was issued by DHEC without opportunity for public comment (at that time no such requirement existed).[7] The permit, IWP-145, had no express capacity limit or expiration date. S.C.A. Services, Inc. (SCA) purchased the site and DHEC transferred the permit without public involvement. In 1980, pursuant to new hazardous waste management regulations, SCA submitted an application thereby qualifying for interim status.[8] Through further change of ownership, the facility came into the hands of Laidlaw Environmental Services of South Carolina, which then changed its name to Safety-Kleen, Inc.[9] The Plaintiff will be referred to as Safety-Kleen throughout this article.

B. Legal History

In November 1988, 2500 people attended a hearing concerning a draft permit for the landfill.[10] DHEC issued a final permit in July of 1989, but Safety-Kleen appealed several terms of the permit and the issuance was challenged by several environmental organizations, including the Sierra

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[4] Safety-Kleen, Inc. <http://www.safety-kleen.com> (accessed Sept. 3, 2002).

[5] *See generally* S.C. Sen. Con. Res. 749 and 951, 1991 Reg. Sess. (Mar. 12, 1991 and May 1, 1991); James S. Chandler, Jr., Robert Guild, & Peter Tepley, South Carolina's Hazardous Waste Problem: An Environmentalist's View, 1 S.C. Envtl. L.J. 29 (1991).

[6] 274 F.3d at 855.

[7] *Leventis v. S.C. Dept. of Health and Envtl. Control*, 340 S.C. 118, 124-125 (Ct.App. 2000), cert. denied (S.C. June 13, 2000).

[8] *Id.* at 125-126.

[9] *Id.* at 126; Safety-Kleen purchased the waste operations of Laidlaw, Inc., including the Roebuck, S.C. facility at issue in *Friends of the Earth, Inc. v. Laidlaw Envtl. Services(TOC), Inc.*, 528 U.S. 167 (2000). Laidlaw Inc. owns a 44% interest in Safety-Kleen, but it too is bankrupt.

[10] *Id.* at 126.

Club.[11] Safety-Kleen and DHEC stipulated, prior to the hearing, that the landfill would have capacity limits of 2250 acre-feet of hazardous waste and 2461 acre-feet of non-hazardous waste, "ostensibly under IWP-145."[12] Ultimately, the DHEC Board upheld issuance of the permit but modified it so that both hazardous and non-hazardous waste would count towards the capacity limit of 2250 acre-feet. The Board also chose to only apply the capacity limit prospectively. Safety-Kleen and the Sierra Club filed for judicial review of the capacity limitations, among other things.

State Court

The South Carolina Circuit Court affirmed the DHEC Board's decision to issue the permit and to count non-hazardous waste towards the facility capacity.[13] Safety-Kleen again appealed the capacity determination, and the Sierra Club appealed the decision under several different theories. The South Carolina Court of Appeals evaluated three points of objection raised by Safety-Kleen: (1) erroneous application of the hazardous waste regulations to nonhazardous waste; (2) unlawful revocation of IWP-145; and (3) misinterpretation and misapplication of the mixture rule.[14]

In refuting the first of Safety-Kleen's positions, the Court of Appeals made it clear that "statutes and regulations govern hazardous waste facilities, not just hazardous waste."[15] Further in its analysis of this point, the court noted that Safety-Kleen had previously viewed the IWP-145 as rescinded due to changes in regulations by DHEC and the Environmental Protection Agency (EPA) which superceded earlier regulations.[16] The second point raised by Safety-Kleen was quickly dispatched, because the company had prior knowledge that changing regulations could significantly impact IWP-145.[17] The third issue was resolved against Safety-Kleen as well by noting that DHEC can impose more restrictive interpretations of the mixture rule than that used by the EPA.[18]

The critical holding by the Court of Appeals resolved the Sierra Club's contention that the Board acted arbitrarily in only applying the capacity

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[11] *Id.*

[12] *Id.* at 127.

[13] *Id.* at 129.

[14] *Id.* at 144. (Mixture rule: "deems solid nonhazardous waste hazardous when mixed with a listed hazardous waste." 25 S.C.Code Ann. Regs. 61-79.261.3(a)(2)(iv) (1989)).

[15] *Id.* at 145.

[16] *Id.* at 146.

[17] *Id.*

[18] *Id.* at 147.

determination prospectively. The court found the application inconsistent with the Board's application of the mixture rule and reversed the Board's order, applying the limit both prospectively and retrospectively.[19] The South Carolina Supreme Court denied a writ of certiorari on June 13, 2000. As a result, the Court of Appeals determination regarding the permit capacity limit became final and the facility instantaneously became fully permited.[20] On June 14, 2000, DHEC issued a closure order to Safety-Kleen requiring compliance within thirty days.

Federal District Court

Safety-Kleen originally filed this action for injunctive relief in Delaware bankruptcy court and had it transferred to the South Carolina District Court.[21] The Official Committee moved to intervene, but the District Court only allowed it to participate as amicus curiae.[22] In support of its motion for a preliminary injunction, Safety-Kleen asserted in its complaint that it had a "due process right to additional capacity," and that DHEC's attempts to close the facility violated the Equal Protection Clause, First Amendment, dormant Commerce Clause, and RCRA.[23] DHEC moved for dismissal under the *Rooker-Feldman* doctrine[24] and moved for a determination that enforcement of financial assurance requirements were not automatically stayed due to bankruptcy proceedings.[25] The District Court denied Safety-Kleen's preliminary injunction; held that *Rooker-Feldman* doctrine did not bar the suit; held that the automatic stay did apply; and denied DHEC's motion to dismiss on the merits but certified the issue for interlocutory review.[26] The court granted a thirty-day injunction for Safety-Kleen pending the appeal.[27]

III. JURISDICTION FOUND DESPITE THE *ROOKER-FELDMAN* DOCTRINE

Since DHEC questioned the District Court's jurisdiction, the Court of Appeals appropriately considered that question first. DHEC asserted that

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[19] *Id.* at 149-150.

[20] *Safety-Kleen*, 274 F.3d at 856.

[21] *Id.* at 857.

[22] *Id.*

[23] *Id.*

[24] See section III herein.

[25] *Safety-Kleen*, 274 F.3d at 857.

[26] *Id.*

[27] *Id.*

the *Rooker-Feldman* doctrine should bar the District Court from hearing the case because it would require review of the South Carolina Court of Appeals' decision. Although the *Rooker-Feldman* doctrine generally prevents lower federal courts from reviewing state court decisions, the doctrine only applies where the issue before the federal court has been "actually decided" or is "inextricably intertwined with questions ruled upon by a state court."[28] The measure of "inextricably intertwined" is explained as a situation where, "success on the federal claim depends upon a determination that the state court wrongly decided the issues before it."[29] Reviewing this point de novo, the Fourth Circuit distinguished the South Carolina Court of Appeals' issue from its own. The state court resolved "whether and under what conditions Safety-Kleen was entitled to a final permit to operate Pinewood," and the federal courts considered whether Safety-Kleen, having conceded that the permit was exhausted, was entitled to store additional waste under the Constitution and RCRA.[30] Therefore, the action was not barred from consideration by the District Court.

IV. PRELIMINARY INJUNCTION: THE NEW ANALYSIS

Safety-Kleen advanced two theories in appealing the denial of preliminary injunction: (1) the District Court applied the wrong standard in evaluating entitlement; and (2) even under the standard applied, the determination was wrong.[31] The Circuit Court reviewed this decision for an abuse of discretion.[32] The four-part, weighted-balancing test employed by the court evaluates: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the injunction is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest.[33] Under the *Direx* analysis, the first two elements are to be balanced first, and if the plaintiff is "decidedly" favored by the balance, a preliminary injunction is granted if the plaintiff "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for

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[28] *Id.* at 858 (quoting *Jordahl v. Democratic Party*, 122 F.3d 192, 199 (4th Cir.1997)).

[29] *Id.* (quoting *Plyler v. Moore*, 129 F.3d 728, 731 (4th Cir.1997) ("*Rooker-Feldman* doctrine bars subject matter jurisdiction unless ... for habeas corpus relief." *Plyer* at 733. State official enjoined from enforcing statute against inmates because underlying nature of claim concerned confinement.)).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 859.

[33] *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

litigation."[34] The court briefly noted that the District Court sufficiently "discussed the interplay between balance of harm to the parties and the plaintiff's likelihood of success," which has been central in prior applications of the preliminary injunction analysis.[35] Although the court acknowledged the District Court's findings that Safety-Kleen would be irreparably harmed and was not likely to prevail on the merits, it focused on the minimal requirement of a "substantial question."[36] Despite Safety-Kleen's contention that they deserved a lower threshold for likelihood of success due to showing a likelihood of irreparable harm, the court navigated around evaluating the point by concluding that Safety-Kleen failed "in any event to present a substantial question."[37] The court's maneuvering around the traditional focus on balancing harms indicates a shift in the analysis to an unordered test.

A. Underlying Claims But No Substantial Questions

The heart of this case was the court's determinations regarding Safety-Kleen's underlying claims. Each of the theories identified previously were quickly dispatched by the court.

For a claim to stand on the theory of procedural due process, two elements must be proven: (1) identify a "liberty or property interest which has been interfered with by the state;" and (2) use of constitutionally inadequate procedures in removing that interest.[38] Property interests are created by state law alone and more than an "abstract need or desire" or "unilateral expectation" is required.[39] Because the state's regulatory scheme does not create an entitlement for hazardous waste in the manner Safety-Kleen claims, the court found that no property interest existed.[40] Safety-Kleen requested a permit modification, temporary authorization, and "additional space by filing an amendment to a pending permit renewal application" in attempting to continue operation.[41] Ironically, DHEC

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[34] *Safety-Kleen*, 274 F.3d at 859. (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977)).

[35] *Id.*

[36] *Id.*; *see Blackwelder*, 550 F.2d at 195 ("[I]f a decided imbalance of hardship should appear in plaintiff's favor, then the likelihood-of-success test is displaced.").

[37] *Id.*

[38] *Safety-Kleen*, 274 F.3d at 860.

[39] *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

[40] *Cf. Conti v. U.S.*, 48 Fed. Cl. 532, 538 (2001) (federal fishing permits do not create a property interest because the government maintains the power to alter, amend or repeal the permit.).

[41] *Safety-Kleen*, 274 F.3d at 860.

would have had to violate its own procedural and substantive requirements to comply with Safety-Kleen's requests.[42] Specifically, Safety-Kleen sought to circumvent public notice and comment as well as financial assurance requirements. Generally, all official discretion in approval must be removed for a permit to create an entitlement.[43] An example of this is found in the South Carolina Mining Act, which provides that "The department shall deny an operating permit upon finding that: ... [seven express conditions omitted]. In the absence of any such finding, an operating permit must be granted."[44] Without even reaching the fact that DHEC maintains a level of discretion in issuing permits, the court found DHEC lacked authority to act in accord with Safety-Kleen's requests and that an entitlement was clearly lacking.

The substantive due process claim was quickly dispatched because a critical element for such a claim is a valid property interest. As outlined above, Safety-Kleen failed to show any liberty or property interest under state law or the Constitution.[45]

Similar to the last claim, the Court quickly resolved the Equal Protection Clause issue in favor of the state. Safety-Kleen argued that there was no rational basis for the closure order because the facility had not been proven unsafe. The court cited DHEC's obligation to perform public notice and comment, as well as the state and public interest in capacity limits for facilities, as rational bases for the order.[46]

The First Amendment right to "petition the Government for a redress of grievances" is the basis for Safety-Kleen's fourth claim that the closure order was in retaliation for the bankruptcy filing.[47] The underlying notion is that "state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in

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[42] *Id.*

[43] *Cf.* "Stated simply, 'a State creates protected liberty interest by placing substantive limitations on official discretion.'" *Ky. Dept. of Corrections v. Thompson*, 490 U.S. 454, 462 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)); "[W]hether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest." *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992) (emphasis omitted and citations omitted); "Under this standard, a cognizable property interest exists 'only when thediscretion of the issuing gency is so narrowly circumscribed that approval of a proper application is virtually assured.'" *Id.*(quoting *RRI Realty Corp. v. Inc. Village of Southhampton*, 870 F.2d 911, 918 (2d Cir. 1989)).

[44] S.C. Code Ann. § 48-20-70 (Supp. 2001).

[45] *Safety-Kleen*, 274 F.3d at 862.

[46] *Id.*

[47] *Id.*

the future."[48] Because Safety-Kleen failed to present any evidence in support of this claim and the fact that DHEC issued the order the day after the South Carolina Supreme Court denied certiorari, the Court concluded the claim did not raise a substantial question.[49]

To sustain the dormant Commerce Clause claim, Safety-Kleen would need to show DHEC's order to be "clearly excessive in relation to the putative local benefits."[50] The court found that the state's interest in limiting hazardous waste and providing public input regarding additional capacity was legitimate.[51] Furthermore, Safety-Kleen failed to prove the burden excessive relative to the benefits provided.[52]

The court also decided against Safety-Kleen's preemption claim under RCRA. The court identified the obvious principle that RCRA establishes foundational limits and the EPA may authorize states to administer their own program with requirements equivalent to or more stringent than the federal limits.[53]

In evaluating the motion for preliminary injunction, the court agreed with the District Court's view that the public has a "strong interest in the opportunity for notice and comment."[54] Although it is possible that Safety-Kleen will eventually reopen and additional hazardous waste will be buried at the Pinewood site, the rationale behind finding the potential harm to DHEC to be low is puzzling. Perhaps the court views DHEC strictly in terms of their administrative or regulatory role, rather than as a broader representative of the public. Although not discussed by the court and likely in deference to the District Judge's determination, it seems the potential economic loss for Safety-Kleen resulting from closure would be easier to remedy than the removal of waste later determined to be inappropriately added to the site.[55] Since public interest is an independent

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[48] *Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422, 1428 (8th Cir. 1986) (cause of action under section 1983 stated where commission attempted to force settlement of state court suit by offering purchase of land and threatening frivolous condemnation action).

[49] *Safety-Kleen*, 274 F.3d at 862.

[50] *Id.*

[51] *Id.*; *see Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (state permanently enjoined from enforcing statute requiring growers to package cantaloupe before transporting out of state, where grower used out of state packaging facility and court viewed statute as only protecting state reputation; "We are not, then, dealing here with state legislation in the field of safety where the propriety of local regulation has long been recognized." (internal quotations omitted) *Id.* at 143.)

[52] *Id.*

[53] *Id.* at 863.

[54] *Id.*

[55] *See Cornwell v. Sachs*, 99 F.Supp.2d 695 (E.D. Va. 2000) ("'[w]here the harm suffered by the moving party may be compensated by an award of money damages at judgment, courts generally have refused to find that harm irreparable.'" *Id.* at 703

element of the preliminary injunction test, it would be reasonable for the court to separate the two interests.

Aside from the general public interest, the permitting process gives pause for "deliberate consideration" of the environmental impact issues.[56] Therefore, the public interest favored denial of the injunction.[57] Borrowing from comments on the enforcement of the Clean Water Act, one author states, "The presumption of irreparable harm arising from failure to enforce a federal statute intended to protect the public is well established."[58] Extending this theory to the instant case, DHEC would start with a presumption of irreparable harm in their favor. However, the court did not take such a strong position.

The court avoided addressing directly Safety-Kleen's likelihood of success but found a lack of substantial questions in any of the claims, despite language in *Direx* suggesting a different analysis.[59] In conjunction with the weight of the public interest against the injunction, the court found the District Court did not abuse its discretion in denying the motion for a preliminary injunction. Another portion of the *Direx* opinion supports this conclusion by providing, "Federal decisions have uniformly characterized the grant of interim relief as an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in limited circumstances which clearly demand it."[60]

B. Concurring Opinion – An Invitation For Revision

Judge Luttig, in his concurring opinion, discusses his view that the Fourth Circuit's reliance on *Blackwelder Furniture Co. v. Seilig Mfg. Co.* and *Rum Creek Coal Sales, Inc. v. Caperton* for the preliminary injunction test is contrary to Supreme Court precedent.[61] Specifically, he contends that the four elements are not ordered, weighted, or intertwined.[62] He emphasizes the rule of *Doran v. Salem Inn, Inc.*, which stated, "The traditional standard for granting a preliminary injunction requires the

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(quoting *Hughes Network Systems, Inc. v. Interdigital Commun. Corp.*, 17 F.3d 691, 694 (4th Cir.1994)).

[56] *Safety-Kleen*, 274 F.3d at 863, 864.

[57] *Id.* at 864.

[58] Michael R. Lozeau, *Preliminary Injunctions and the Federal Water Pollution Control Act: The clean water permit program as a limitation on the courts equitable discretion*, 42 Rutgers L. Rev. 701, 710 (1990).

[59] "It is obvious error to resolve the hardship test by including in it the likelihood-of-success test." *Direx*, 952 F.2d at 817.

[60] *Id.* at 811 (internal quotation and citation omitted).

[61] *Safety-Kleen*, 274 F.3d at 868.

[62] *Id.* at 868-869.

plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits."[63] Luttig further stated, "In actual practice, even though not in formal doctrine, we have virtually without exception insisted upon a showing by the plaintiff of the likelihood of success on the merits."[64] On the point of the court's deviation from the Supreme Court precedent, he concluded, "I do not believe that the instant case presents the appropriate opportunity for this realignment, but I would like to think that we would welcome such an opportunity should one present itself."[65]

V. REMAINING ISSUES ON APPEAL: FINANCIAL ASSURANCE, INTERLOCUTORY REVIEW, AND A RIGHT TO INTERVENE

DHEC sought to enforce requirements for financial assurance against Safety-Kleen in order to have sufficient funding available for any potential closure costs and remediation expenses. The court was not satisfied with the District Court's failure to explain the conclusion that the regulatory exception to the automatic stay did not apply.[66] Generally, creditors of bankrupt debtors may not bring actions against them due to an automatic stay. An exception is created for state actions rooted in police and regulatory powers other than simple money judgments. The court identified the primary purpose of the requirement to be deterrence of environmental misconduct and promotion of safe design and operation.[67] Because the basic justification is rational, the state's intent behind enforcement is irrelevant.[68] The court concluded that the automatic stay did not prevent DHEC from issuing and enforcing the financial assurance requirement.

As for DHEC's appeal of the interlocutory review, it failed to make timely application to the Court of Appeals.[69] Although the District Court may recertify questions for review when the appellant fails to file, the court found recertification for ignorance of the deadline to be an abuse of the District Judge's discretion.[70]

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[63] *Id.* at 870 (quoting *Doran v. Salem Inn*, 422 U.S. 922 at 931(1975)).

[64] *Id.* at 871.

[65] *Id.*

[66] *Id.* at 864.

[67] *Id.* at 866.

[68] *Id.* at 865.

[69] *Id.* at 866.

[70] *Id.* at 867.

The final issue addressed by the court was the Official Committee's appeal for the right to intervene under Fed. R. Civ. P. 24(a) and (b)(2) (1999). Although DHEC opposed the motion and the District Court without explanation denied it, the court found an abuse of discretion by the District Court.[71] The Official Committee's interest in the matter is such that it may not be adequately represented without intervention.

VI. UNCERTAIN IMPACTS WITH MERIT-ORIENTED ANALYSIS

The central lesson to be drawn from this case is the analysis to be applied in deciding a preliminary injunction, particularly in the context of a regulated industry. As hinted in the majority opinion and expressly stated in the concurring opinion, the Fourth Circuit is on the verge of reforming the analysis for preliminary injunction. In regard to environmental suits, preliminary injunction is a critical legal tool because actions with irreparable effects are more common than in other areas of law. For example, rebuilding a cleared forest is more difficult than ordering payment under a contract.

It is unclear how the emergent test will affect court decisions. On one side, it releases the court to consider the merits of the case before evaluating injuries to parties, which may provide a slight improvement in judicial efficiency. The court will not have to hear arguments concerning potential injuries if the underlying claim is without merit. An alternative view is that the court will lose a facet of the analysis which it previously manipulated to achieve the desired outcome. For those seeking a preliminary injunction within the Fourth Circuit, a strong showing on the merits must be made early in the case in order to prevail on the motion. Citizen-suit plaintiffs will have to plead the merits early rather than relying on the likelihood of irreparable harm to offset the requirement. Although satisfied with the outcome of this case, environmentalists may find the rationale quite disagreeable next time they seek a preliminary injunction.

Although the court's analysis of Safety-Kleen's multiple theories is not in great depth, this case provides a current glimpse of the court's view of the legal interests of a permittee or permit applicant in relation to several powerful legal principles. Obviously, the court has outlined thresholds for the creation of property interests in a specific regulatory scheme. Both regulators and the regulated community have been reminded of the strength of procedural and substantive permit requirements. Specifically, the importance of public comment and financial assurance requirements has been reiterated.

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[71] *Id.* at 867.