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ENVIRONMENTAL LAW

I. FOURTH CIRCUIT DECLARES PROVISION OF WEST VIRGINIA SOLID WASTE MANAGEMENT ACT UNCONSTITUTIONAL

In *Geo-Tech Reclamation Industries, Inc. v. Hamrick*¹ the Fourth Circuit Court of Appeals struck down a West Virginia statute which gave the state the power to deny a permit for the construction of a solid waste disposal facility based on a showing of adverse public sentiment.² Although the court conceded that West Virginia had a legitimate goal in protecting the health, safety, morals, and general welfare of its citizens,³ the court held that the statutory language allowing a permit to be denied on the basis of adverse public sentiment was not rationally related to this legitimate state goal.⁴

West Virginia enacted the Solid Waste Management Act⁵ to regulate the state's solid waste disposal. The Act requires landfill operators to obtain a permit from the Director of the Department of Natural Resources before constructing a solid waste disposal facility.⁶ Section 20-5F-4(b) specifies that the Director may deny a permit if the proposed facility "is significantly adverse to the public sentiment of the area where the solid waste facility is, or will be, located."⁷

Geo-Tech Reclamation Industries, Inc. (GRI) and LCS Services, Inc. (LCS) applied at different times for a permit to construct a solid waste disposal facility in the same area.⁸ After the Department denied both applications because of adverse public sentiment, GRI and LCS sued to challenge the constitutionality of section 20-5F-4(b).⁹ The district court granted LCS and GRI's summary judgment motion, holding the statutory language unconstitutional on its face.¹⁰

The State of West Virginia and a citizens group, "Citizens to Fight

1. 886 F.2d 662 (4th Cir. 1989).

2. *Id.* at 663, 667.

3. *Id.* at 665.

4. *Id.* at 667.

5. W. VA. CODE §§ 20-5F-1 to -8 (1989 & Supp. 1990).

6. *Id.* § 20-5F-5(b) (Supp. 1990).

7. *Id.* § 20-5F-4(b) (1989).

8. *Hamrick*, 886 F.2d at 663.

9. *Id.* at 663-64.

10. *Id.* at 664. The district court held that the language violates the due process clause because "it allows a few citizens to deny an individual the use of his property." *Id.* (quoting *Geo-Tech Reclamation Indus., Inc. v. Potesta*, No. 2:87-0671, slip. op. at 3 (S.D.W. Va. Dec. 22, 1988)).

North Mountain Waste Site,” appealed from the district court’s decision, which held section 20-5F-4(b) facially unconstitutional.¹¹ The Fourth Circuit affirmed the district court’s summary judgment order and held that the statutory language in question “bears no substantial or rational relationship to the state’s interest in promoting the general public welfare.”¹²

The district court asserted that the statute was unconstitutional because it impermissibly delegated an administrative decision to a narrow segment of the public.¹³ The court of appeals, although it approved the district court’s analysis in dicta,¹⁴ stated that it did not need to decide the case on that issue “because the statute suffers from a more profound constitutional infirmity.”¹⁵

The Fourth Circuit first noted that “land-use regulations ‘must find their justification in some aspect of the police power, asserted for the public welfare.’”¹⁶ The court recognized that West Virginia had a legitimate goal in protecting the public welfare, and, therefore, could regulate the placement of landfills.¹⁷ Because the statute did not provide the Director with a standard to measure the quality of adverse public sentiment, the court found no “substantial or rational relationship between the statute’s goals and its means.”¹⁸

The Fourth Circuit used a simple scrutiny test to measure the statute’s constitutionality. In doing so, the Fourth Circuit relied on the United States Supreme Court’s decision in *Schad v. Mt. Ephraim*,¹⁹ which held that when zoning restrictions adversely affect property interests, the courts will sustain the regulation “if it is rationally related to legitimate state concerns”²⁰ The circuit court also examined the statute to determine whether it was “‘arbitrary and capricious

11. *Id.* at 663.

12. *Id.*

13. *See id.* at 664.

14. *See id.* at 666-67. The court noted:

The Director has been commanded, without the benefit of any legislated standard by which to separate public sentiment grounded upon reasoned considerations substantially related to civic spirit from irrational public sentiment or whim, to act upon adverse public sentiment in issuing waste facility operating permits. The potential that, by virtue of § 20-5F-4(b), sensitive administrative decisions regarding waste disposal will be made by mob rule is too great to ignore.

Id. at 667.

15. *Id.* at 665.

16. *Id.* (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)).

17. *Id.* at 665-66.

18. *Id.* at 666.

19. 452 U.S. 61 (1981).

20. *Hamrick*, 886 F.2d at 666 (quoting *Schad v. Mt. Ephraim*, 452 U.S. 61, 68 (1981)).

[sic], having no substantial relation' to its purported goal."²¹ The court ultimately concluded that the statutory language was unconstitutional because it "bears no substantial or rational relationship to the state's interest in promoting the general public welfare."²²

In South Carolina the Pollution Control Act²³ gave the Department of Health and Environmental Control (DHEC) authority to "abate, control and prevent pollution."²⁴ Pursuant to the Act, DHEC has the power to grant or deny permits for the construction of waste disposal systems. Regulation 61-66 sets forth the requirements to operate an industrial waste disposal system.²⁵ Regulation 61-70 lists the requirements to obtain a permit to design, construct, and operate a sanitary landfill.²⁶ Neither of these regulations include public opinion as a factor for DHEC's consideration when DHEC decides whether to issue a permit.

Regulation 61-79 contains the provisions governing the management of hazardous waste disposal facilities.²⁷ The hazardous waste provisions allow for the consideration of public opinion. Regulation 61-79.124 describes the permit application process. Subsection 124.6 specifies that DHEC will decide whether to issue a draft permit after the applicant has submitted a complete application. This section does not list the reasons why a draft permit may be denied, but if the draft permit is issued, DHEC will prepare a fact sheet describing the factors that it considered in issuing the draft permit.²⁸

Once a draft permit has been issued, DHEC must allow at least forty-five days for public comment.²⁹ During this period any person can submit written comments to DHEC concerning the draft permit and can request a public hearing.³⁰ DHEC must hold a public hearing "whenever the Department finds, on the basis of requests, a significant degree of public interest in a draft permit(s)."³¹ During the hearing anyone can submit oral or written statements regarding the draft permit.³² At the end of the public comment period, DHEC will make a

21. *Id.* (quoting *Euclid*, 272 U.S. at 395) (the district court in quoting *Euclid* used the word "capricious" instead of "unreasonable").

22. *Id.* at 667.

23. S.C. CODE ANN. §§ 48-1-10 to -350 (Law. Co-op. 1987).

24. *Id.* § 48-1-20.

25. S.C. CODE REGS. 61-66 (1976).

26. *Id.* 61-70.

27. *Id.* 61-79.

28. *Id.* 61-79.124.8.

29. *Id.* 61-79.124.10(b).

30. *Id.* 61-79.124.11.

31. *Id.* 61-79.124.12(a)(1).

32. *Id.* 61-79.124.12(c).

final decision to issue or deny the permit.³³ This final decision is based on the administrative record, which contains a record of all public comments.³⁴ In South Carolina, therefore, the effect of public comment on final permit decisions is unclear. Significant adverse public comment could result in the denial of a permit. It is unlikely, however, that a court would hold this statute unconstitutional.

Under Regulation 61-79.124.13, any person that protests the issuance of a draft permit must do so in writing and must include "all reasonably ascertainable issues, available arguments, and factual grounds supporting their position including any supporting materials which are not already part of the administrative record for the permit."³⁵ This regulation might eliminate the possibility that DHEC would consider protests of the "not in my backyard" variety.³⁶

The Fourth Circuit in *Geo-Tech* noted that "unreflective and unreasoned public sentiment" could not be rationally related to the legitimate goal of protecting the public welfare.³⁷ The court also stated that, although well-defined standards are not required, "the absence of any standard by which the Director must evaluate adverse public sentiment, in part, deprives section 20-5F-4(b) of any rational relation to the goal of protecting civic pride and general communal welfare."³⁸

South Carolina's statute does not suffer from the same defect because the statute does not state expressly that a permit can be denied on the basis of adverse public sentiment. Even though DHEC may consider adverse public sentiment when it decides whether to issue a final permit, the statute should pass constitutional muster.

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33. *Id.* 61-79.124.15.

34. *Id.* 61-79.124.18.

35. *Id.* 61-79.124.13.

36. See *Hamrick*, 886 F.2d at 666.

37. *Id.*

38. *Id.* at 666 n.2.