

Construction/Clean Water Act Citizen Suit Enforcement Action: Federal Appellate Court Addresses Standing Issue



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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Co-Author: Amie Alexander

The United States Court of Appeals for the Fourth Circuit affirmed a district court's dismissal of a citizen suit enforcement action on May 7, 2018 to enjoin the construction of a funeral home and mortuary in Howard County, Maryland for violations of the Clean Water Act ("CWA"). See *Alan J. Schneider v. Donaldson Funeral Home, P.A.*, 2018 WL 2095192.

The alleged violations involved the stormwater and wetland permitting requirements associated with the Clean Water Act program.

The defendant, Donaldson Funeral Home, P.A. ("Donaldson"), owns 3.2 acres of property in Howard County, Maryland. The Donaldson Property is bordered by a tributary which also borders the plaintiff Schneider's property. Despite opposition from Schneider and other community members, Howard County approved Donaldson's plans to build a 17,000 square-foot funeral home and mortuary. During public hearings, Donaldson provided a witness who testified there were no wetlands on the property.

Nontidal wetlands were discovered on the property two years later. As a result, Maryland law mandates a 25-foot protective buffer. Construction within this buffer zone requires a permit from the state, and construction in the wetlands themselves requires a CWA permit.

A permit from the County was issued in April 2016, but a CWA permit was not secured before the beginning of construction on the project on March 26, 2016. The Maryland Department of the Environment ("MDE") found Donaldson noncompliant. The project was subsequently deemed in compliance after Donaldson was issued the required CWA permit on April 19, 2016.

Schneider filed a four-count CWA citizen suit against Donaldson and Howard County in the United States District Court for the District of Maryland on April 12, 2016. He initially claimed that Donaldson and Howard County were in violation of both state and CWA regulations for not conducting an antidegradation review. An additional allegation included a claim that Donaldson was constructing the funeral home without required CWA permits both for stormwater runoff and for the construction in wetlands.

Schneider moved for a preliminary injunction and a temporary restraining order, which the district court denied. Instead it granted Donaldson's and Howard County's motion to dismiss.

The district court concluded that although Schneider had Article III standing to sue Donaldson under the citizen suit provision of the CWA, he had failed to demonstrate an “ongoing allegation.” This is required for standing because Donaldson had obtained the required permit coverage. Further, the district court reasoned that Schneider lacked Article III standing to sue the County because it had no obligation to perform an antidegradation review.

On appeal, the Fourth Circuit agreed with the district court’s analysis. Schneider did have standing on his claim that Donaldson violated the CWA by starting construction on the funeral home without a permit for the stormwater runoff. However, it was inactionable under the CWA because a claim cannot form the basis of a citizen suit if the violation is “wholly past.”

The Court stressed that while Donaldson violated the CWA in March 2016 in beginning construction without a permit, he obtained coverage on April 19, 2016. He had, therefore, not been conducting unpermitted construction activities since almost four months before Schneider filed this suit. The Court affirmed the district’s court decision to dismiss the suit.

A copy of the [opinion](#) can be downloaded here.