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V. Environmental Law

Nevertheless, there remains a genuine controversy concerning the interpretation of § 2113.

DAVID H. ALDRICH

V. ENVIRONMENTAL LAW

A. Federal Common Law for Water Pollution Nuisance Abatement Confined To Interstate Controversies

A public nuisance, such as the pollution of a stream,[1] is a "low grade common law offense"[2] which involves interference with a right common to the general public.[3] The conclusion reached in *Erie R.R. v. Tompkins*,[4] that there is no general federal common law, seemingly halted the application of any such substantive common law for public nuisance abatement in federal courts.[5] Nevertheless, when situations arose which demanded an application of a federal common law standard based on compelling national interests,[6] the federal courts adopted a "specialized" federal common law for interstate water pollution abatement.[7] In *Committee for the Consideration of the Jones*

[1] Prosser, *Private Action for Public Nuisance*, 52 U. VA. L. REV. 997, 1001 (1966) [hereinafter cited as Prosser].

[2] *Id.* at 999.

[3] *Id.* The right to abate a public nuisance traditionally belongs to the state. *But see* FLA. STAT. ANN. § 60.05 (West Cum. Supp. 1976). However, where a nuisance causes a particular injury or damage sufficiently distinguishable in kind and degree from the injury to the general public, a private individual can adjudicate the abatement of the nuisance. A particular injury or damage occurs when a nuisance substantially interferes with the use or enjoyment of an individual's rights in land. Prosser, *supra* note 1, at 1018.

[4] 304 U.S. 64 (1938).

[5] *Id.* at 78.

[6] One national interest around which federal common law developed was the abatement by a state of extraterritorial pollution. This common law was established prior to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), in Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), where the Supreme Court held that industrial air pollution originating in Tennessee and damaging the peach crop in Georgia gave rise to a cause of action under federal common law. The Court had explained in Missouri v. Illinois, 200 U.S. 496 (1906), that such a federal remedy was established to remove a *casus belli* or justification for war by providing for peaceful abatement of extraterritorial pollution. This reasoning was reaffirmed and adopted by the Court in Illinois v. City of Milwaukee, 406 U.S. 91 (1972), a post-*Erie* case. In *Illinois*, the Court cited the *Georgia* and *Missouri* decisions as establishing a basis for the federal common law. 406 U.S. at 104-07.

[7] Friendly, *In Praise of* Erie - *And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 405 (1964).

Falls Sewage System v. Train,[8] the Fourth Circuit held that the mere existence of a national interest in pollution free navigable waters does not justify the extension of a specialized federal common law to an entirely intrastate pollution controversy.

The Committee, an association of Maryland neighborhood and community organizations,[9] instituted a suit seeking injunctive relief[10] under the Federal Water Pollution Control Act Amendments of 1972.[11] The complaint alleged that the Jones Falls Sewage Plant was violating the Act by discharging excess sewage[12] into Jones Falls stream without a permit.[13] The Maryland city officials responsible for the operation of the sewage plant[14] thereafter filed a permit application[15] which, under the 1972 Act, sanctioned any discharge during the permit processing period.[16] When a permit was eventually issued, the

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[8] 539 F.2d 1006 (4th Cir. 1976).

[9] The plaintiff association was comprised of members of the Maryland residential communities through which the Jones Falls stream flows. *Id.* at 1007.

[10] Plaintiffs sought an order restraining the defendants from allowing any additional hook-ups into the Jones Falls Sewage System. They also sought to compel the Administrator of the Environmental Protection Agency (EPA) to perform his nondiscretionary duties to abate the pollution. Committee for the Consideration of Jones Falls Sewage System v. Train, 375 F. Supp. 1148, 1149 (D. Md. 1974), *aff'd,* 539 F.2d 1006 (4th Cir. 1976).

[11] 33 U.S.C. § 1251 *et seq.* (Supp. V 1975) [hereinafter cited as the '72 Act]. The '72 Act establishes a private citizen cause of action under 33 U.S.C. § 1365(a) (Supp. V 1975) which provides in pertinent part:

> [A]ny citizen may commence a civil action on his own behalf—
> (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such standard or limitation, or
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

[12] More than three million gallons of raw sewage entered the Jones Falls stream from the sewage facility. 539 F.2d at 1010.

[13] 539 F.2d at 1007. Jones Falls Stream is a tributary of the Patapsco River which flows through Baltimore Harbor into the Chesapeake Bay. Under the expansive interpretation of the EPA, a tributary of a navigable river qualifies as "navigable waters." 40 C.F.R. § 125.1(p)(2) (1976); *see* United States v. Valley Camp Coal Co., 480 F.2d 616 (4th Cir. 1973).

[14] The Jones Falls sewage plant comprised a portion of the City of Baltimore and Baltimore County sewage systems. 375 F. Supp. at 1149. Political subdivisions qualify as citizens of their respective states. Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1868); Markham v. City of Newport News, 292 F.2d 711, 716 (4th Cir. 1961).

[15] 375 F. Supp. at 1150.

[16] 33 U.S.C. § 1342(k) (Supp. V 1975) provides in pertinent part:

> Until December 31, 1974, in any case where a permit for discharge has

Committee's allegation of a permit violation would no longer support a cause of action under the Act.[17] Faced with summary dismissal, the Committee amended its complaint to allege a cause of action under the federal common law of public nuisance.[18]

The Supreme Court has recently reviewed the federal common law for pollution nuisance abatement which formed the basis of the Committee's amended complaint. In *Illinois v. City of Milwaukee,*[19] the State of Illinois[20] alleged that the City of Milwaukee[21] was pollut-

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> been applied for pursuant to this section, but final administrative deposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title or (2) section 407 of this title [River and Harbor Act of 1899] . . . . For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant . . . immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such source applies for a permit . . . within such 180-day period.

The district court in *Jones Falls* interpreted this section to provide the defendant polluters with immunity from suit under the '72 Act. 375 F. Supp. at 1151. The court additionally found that the alleged pollution was not subject to the River and Harbor Act of 1899, 33 U.S.C. § 401 *et seq.* (1970). This Act made unlawful the deposit of any refuse matter in navigable waters but did not prohibit the deposit of refuse matter flowing from "streets and sewers", passing in liquid form into any navigable waters. 33 U.S.C. § 407 (1970). Although the River and Harbor Act gained sweeping importance when the Supreme Court interpreted refuse matter to include all industrial pollutants, *see* United States v. Standard Oil Co., 384 U.S. 224 (1966), this interpretation does not negate the specific exception which removed the Jones Falls sewage from coverage under the 1899 Act. *See* D. ZWICK & M. BENSTOCK, WATER WASTELAND 285-301 (1971) [hereinafter cited as ZWICK]. The *Jones Falls* district court also held that 33 U.S.C. § 1342 (k) (Supp. V 1975) does not require permit application within the 180-day period immediately following October 18, 1972 in order for the applicant to qualify for immunity. The court declared that such an interpretation would contradict that portion of the section which states "in any case where a permit . . . has been applied for" immunity is granted. 375 F. Supp. at 1152.

[17] 33 U.S.C. § 1342(k) (Supp. V 1975) provides in part: "Compliance with a permit issued pursuant to this section shall be deemed compliance for purposes of [33 U.S.C. § 1365 (Supp. V 1975)]." *See* note 11 *supra.*

[18] 539 F.2d at 1008.

[19] 406 U.S. 91 (1972).

[20] The suit was brought under 28 U.S.C. § 1251 (a)(1) (1970) invoking the Supreme Court's original jurisdiction arising out of a controversy between two states. U.S. CONST. art. III, § 2. The Court, in denying original jurisdiction, declared that a federal common law pollution abatement suit qualified as a controversy arising under the "laws" of the United States. *Id.* at 99-101. This holding made a suit under the federal common law a valid claim under 28 U.S.C. § 1331 (a)(1970) which provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws or treaties of the United States."

ing Lake Michigan in violation of the federal common law of nuisance.[22] The Court held that the extraterritorial[23] pollution of Illinois' interstate or navigable waters qualified as a matter of federal concern which justified the application of a federal common law for the abatement of the nuisance.[24] The issue presented in *Jones Falls* was whether a similar federal question[25] cause of action may arise if the alleged pollution did not have an extraterritorial effect but rather involved solely intrastate pollution of a state's navigable waters.[26]

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[21] The suit was brought against four Wisconsin cities, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee. 406 U.S. at 93.

[22] The complaint alleged that some two hundred million gallons of raw or inadequately treated sewage were being discharged daily into Lake Michigan, an interstate and navigable body of water. *Id.*

[23] The extraterritorial nature of the pollution of Lake Michigan was not raised in the Court's actual holding in the case. 406 U.S. at 99. The Court's opinion, however, extensively discussed the creation of an "interstate" common law rather than a general federal common law for water pollution abatement. 406 U.S. at 105-06. This disparity in the Court's holding with its opinion formed the basis for the dissenting opinion in the *Jones Falls* controversy. *See* text accompanying notes 42-47 *infra*.

[24] 406 U.S. at 99.

[25] *See* note 20 *supra*.

[26] 539 F.2d at 1007. Another issue presented in *Jones Falls* but not addressed by the Fourth Circuit was whether the Committee qualified as the representative of a person or class of persons suffering a particular damage sufficiently different in kind and degree from the general public. *See* note 3 *supra*. This issue involves an analysis of the adversary nature of the litigants. U.S. CONST. art. III, § 2. The Supreme Court held in Sierra Club v. Morton, 405 U.S. 727 (1972), that an association did not have standing to sue if no member had standing to sue as an individual. *Sierra Club* involved the attempt of an environmental group to enjoin the development of a wilderness area. Since no member claimed to use the area, the Club was held to have no standing. In a more recent case, United States v. SCRAP, 412 U.S. 669 (1973), a standing was established when the association alleged that its members would be harmed individually by the ecological effects of increased freight rates for recyclable materials. This issue was not addressed by the Fourth Circuit in *Jones Falls* because the court found that no cause of action existed for any particular individual under the federal common law. However, in another recent Fourth Circuit decision, the court decided that an association of citizens similar to the committee in *Jones Falls* might qualify for standing when a valid cause of action does exist.

In Virginians for Dulles v. Volpe, 541 F.2d 442 (4th Cir. 1976), a citizens association (VFD) was created to facilitate the abatement of noise and air pollution from jet aircraft at Washington National Airport. VFD brought suit alleging that the failure of the Federal Aviation Administration (FAA) to file an environmental impact statement concerning substantial changes in the air traffic distribution between National Airport and Dulles International Airport violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1970). The court found that members of VFD were adversely affected in their use of areas near these airports because of the alleged FAA violation of NEPA. 541 F.2d at 444. The Fourth Circuit, applying United States v.

The Fourth Circuit's treatment of the specialized common law reflects the traditional "flexibility and capacity for adaptation"

SCRAP, 412 U.S. 669 (1973), found that the complaint sufficiently established the association's standing to sue.

Virginians for Dulles is important because it identifies federal agency actions and projects which will require environmental impact statements under the non-retroactive NEPA. Brooks v. Volpe, 319 F. Supp. 90 (W.D. Wash. 1972). *Cf.* United States v. Estate of Donnelly, 397 U.S. 286 (1970) (retroactive effect of federal tax statute). Under NEPA, detailed impact statements must be completed by all federal agencies proposing "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2) (1970). Agencies have traditionally had two difficulties in determining the applicability of this requirement. First, when does a project commencing prior to NEPA, but which has continued long after its enactment and vastly expanded in scope, give rise to an impact statement requirement; and second, what qualifies as a major federal action. *See* Kiser v. Butz, 350 F. Supp. 310 (N.D. W.Va. 1972).

In *Virginians for Dulles,* the FAA authorized the development of National and Dulles airports prior to the enactment of NEPA. The recent actions of the FAA included a 1972 budget allotment of twenty-six million dollars for the modernization of National Airport. 541 F.2d at 445. The FAA also forecasted a dramatic increase in the annual number of passengers utilizing these airports during the period 1972-1980. The agency asserted that prior commencement exempted this airport development from impact statement preparation.

The Fourth Circuit, in deciding *Virginians for Dulles,* provided federal agencies with three clear indices for determination of an environmental impact statement requirement. First, the agency must categorize the proposal as an ongoing or continuing project. 541 F.2d at 446. A project with no fixed termination date and which was intended to continue indefinitely is a continuing project. Lee v. Resor, 348 F. Supp. 389 (M.D. Fla. 1972). Ongoing projects are federal actions which have definite termination dates. The court held that a continuing project such as National Airport modernization almost certainly required impact statement preparation since it entailed a series of major federal actions. 541 F.2d at 446. An ongoing project could require an impact statement depending on the last two indices announced by the court. Second, the agency must evaluate the stage of completion of the project and determine whether alternatives to the current ongoing or continuing action are still economically feasible. *Id.* at 445. Since the National Airport development was easily transferable to Dulles Airport development, the court held that alternatives still existed for FAA impact statement evaluation. *Id.* at 446-47. Finally, the size of the project is measured to determine if it qualifies as a major federal action. *Id.* at 445. The court indicated that an annual budget in excess of twenty-six million dollars clearly constituted major action. *Id.* at 446.

Virginians for Dulles has already had a marked influence on impact statement preparation within the FAA. Within two months of the Fourth Circuit decision the FAA proposed an internal policy order change whereby an impact statement requirement arises despite project commencement prior to the enactment of NEPA. Proposed FAA Order 1050.1B, *Policies and Procedures for Considering Environmental Impacts* § 403, 41 Fed. Reg. 34222 (1976). The Fourth Circuit's strict interpretation and finely defined indices of pre-NEPA projects which do not require impact statements is

which marks the application or extension of the common law.[27] The common law for pollution nuisance abatement employed in *Illinois* was appropriate for the factual situation presented in that controversy. If, however, the factual situation is varied, as it was in *Jones Falls,* the court must be certain that the reasons justifying previous application of the common law continue to exist under any changed circumstances. The Fourth Circuit in *Jones Falls* found that the intrastate nature of the pollution altered the factual situation sufficiently to remove the controversy from an application of the federal common law for interstate pollution abatement.[28] The court further concluded that a second factual variation, the passage of the 1972 Act, precluded the creation of a new federal common law for intrastate pollution abatement because the Act negated the compelling nature of the national interest in pure navigable waters.[29]

The court's analysis focused on the compelling nature of the national interest which precipitates the creation of a specialized federal common law. The Fourth Circuit held that the federal common law represents an accommodation of competing state and national interests.[30] The majority opinion identified such an accommodation in the Supreme Court's *Illinois* decision.[31] Wisconsin, the state which con-

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equally applicable to all federal agencies. This decision may well make environmental impact statement preparation an unequivocable statutory requirement rather than a discretionary agency duty.

[27] Hurtado v. California, 110 U.S. 516, 530 (1884). The common law is not static law mechanically applied by the federal courts but rather is a dynamic and growing body of law developed by the courts. Barnes Coal Corp. v. Retail Coal Merchants Ass'n., 128 F.2d 645, 648 (4th Cir. 1942). Courts applying such common law are not bound to perpetuate this law when, under varying circumstances, the law is found to be neither "wise nor just." *Id.* at 649, *citing* Funk v. United States, 290 US. 371, 383 (1933).

[28] 539 F.2d at 1010.

[29] *Id.* at 1009. *See* text accompanying notes 39-41 *infra.*

[30] *Id.* at 1008-09. The accomodation of the state interest is necessitated by the interstitial nature of the federal powers. U.S. CONST. amend. X. Federal common law must be exercised "against the background of the total *corpus juris* of the states" and only when a federal interest is encroached upon by a state interest. Monaghan, *Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1, 11 (1975), *citing* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 471 (2d ed. 1973).

[31] 539 F.2d at 1009. *See* Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971). In *Pankey,* ranchers in New Mexico were using a pesticide which was polluting interstate and navigable waters flowing into Texas. The court applied federal common law to abate this extraterritorial nuisance. The Tenth Circuit found the objective of vesting such jurisdiction in the federal courts was to avoid the partiality or suspicion of partiality which might exist if Texas was compelled to resort to the courts of the state where the polluters were residents. *See* Note, *State Ecological Rights Arising Under the Federal Common Law,* 1972 WIS. L. REV. 597.

doned the pollution, had the sovereign right to police the criminal offenses of its citizens.[32] Offsetting this right was the "quasi-sovereign" right of the state adversely affected by such pollution to abate an extraterritorial nuisance.[33] The compelling national interest in averting any forceful settlement of these conflicting state rights permitted the federal court to apply federal common law for public nuisance abatement.[34] *Jones Falls,* a controversy arising between two Maryland residents, did not present a conflict of state's rights; therefore, the federal common law of interstate pollution could not be applied.[35] Approaching the extension of federal common law into an intrastate situation with traditional flexibility, the Fourth Circuit assessed the compelling nature of the federal interest presented by the Committee. The court found a federal interest clearly established in the maintenance of the purity of navigable waters.[36] In the court's assessment, however, the national interest did not outweigh the sovereign right of Maryland to settle a pollution controversy arising between two of its citizens.[37]

The 1972 Act formed the basis of this assessment. First, the court looked to the Act and found a congressional declaration that the right of the states to prevent, reduce, and eliminate pollution was primary and not secondary to any federal interest in abatement.[38] Second, the Fourth Circuit acknowledged that a court, in formulating common law, is seizing legislative initiative in an area where Congress, through the passage of adequate legislation like the 1972 Act, has reduced the compelling nature of the federal interest.[39] Thus, the 1972 Act, which legitimizes pollution up to certain federally acceptable effluent limits,[40] proscribes the need for an extension of judicial law

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[32] U.S. CONST. amend. X.

[33] Illinois v. City of Milwaukee, 406 U.S. 91, 104 (1972). *See* Texas v. Pankey, 441 F.2d 236, 240 (10th Cir. 1971).

[34] Illinois v. City of Milwaukee, 406 U.S. 91, 107-08 (1972). *See* Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971).

[35] 539 F.2d at 1009.

[36] Congress declared the federal interest in water purity in the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 (a) (Supp. V 1975).

[37] 539 F.2d at 1009.

[38] *Id. See* 33 U.S.C. § 1251 (b) (Supp. V 1975).

[39] *Id.* The federal judiciary plays a secondary role in the formation of federal policy in most areas. The secondary role is assigned as part of the doctrine of the separation of powers whereby the primary initiative for the exercise of the lawmaking powers is reserved to the Congress. Note, *The Competence of Federal Courts to Formulate Rules of Decision,* 77 HARV. L. REV. 1084 (1964). *See* Illinois v. City of Milwaukee, 401 U.S. 91, 107 (1972).

[40] *See Environmental Law,* Section B, text accompanying notes 9-17 *infra.*

based on the identical interest. Without a sufficiently compelling national interest vis-a-vis Maryland's sovereign interest, the Fourth Circuit found that the federal common law could not extend to this controversy.[41]

The Fourth Circuit decision is susceptible to criticism on two grounds. First, as the dissenting opinion of Judge Butzner asserts, the court does not properly acknowledge the holding of the Supreme Court in *Illinois*.[42] In that case, the Court held that a federal common law cause of action for pollution abatement extends specifically to the pollution of navigable waters.[43] The Court also declared that federal rather than state law must control the regulation of pollution in such waters.[44] Strictly applied, the Supreme Court holding creates a federal common law cause of action for intrastate pollution since the pollution can occur in navigable waters. This federal cause of action, in view of the *Illinois* Court's declaration, must control any established state common law remedy for pollution abatement.[45]

The initial criticism of the majority's reading of *Illinois* is itself assailable since it controverts the firmly established principle of a case by case approach to the common law. The *Illinois* opinion included a discussion of the interstate pollution which gave rise to an application of the federal common law.[46] *Jones Falls,* however, presented the significantly different factual situation of intrastate pollution. Therefore, the dissent's mechanical application of the *Illinois* common law to *Jones Falls* would deprive the common law of its traditional flexibility and capacity for growth.[47]

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[41] 539 F.2d at 1010.

[42] Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006, 1013 (4th Cir. 1976) (Butzner, J., dissenting).

[43] 406 U.S. at 99.

[44] In the *Illinois* declaration of the controlling nature of federal law, the federal law referred to was the Federal Water Pollution Control Act, ch. 758, 62 Stat. 155 (1948) *as amended* Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. No. 91-611, 84 Stat. 1818. This Act has been, for all practical purposes, replaced by the 1972 Act. *See* McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972,* 30 WASH. & LEE L. REV. 195, 202 (1973) [hereinafter cited as McThenia].

[45] The assumption necessary to reach the conclusion that federal common law for pollution abatement controls conflicting state law, is that the *Illinois* declaration of federal supremacy over state law was not limited to legislative enactments such as the Federal Water Pollution Control Act but also extended to judicially promulgated common law. *See* note 44 *supra.*

[46] 406 U.S. at 103-07.

[47] *See* text accompanying notes 27 & 28 *supra.*

The second criticism of the majority opinion is that it strictly limits the availability of a cause of action under the federal common law of nuisance to interstate pollution controversies.[48] This restriction of the federal common law to interstate controversies is analogous to the restrictive regulatory approach found in the Federal Water Pollution Control Act[49] which limited that Act's scope of control to interstate waters.[50] Congress specifically rejected this restrictive jurisdictional approach when it adopted the 1972 Act, which expanded federal statutory measures of pollution control to all navigable waters.[51] This congressional exercise of power, in an area where state law was declared primary,[52] seemingly elevates the federal interest in pure navigable waters to a level which contradicts the *Jones Falls* court's accommodation of the state interest over the federal interest. The Fourth Circuit addressed this criticism with an evaluation of the preemptive effect a federal statute has on a federal court's ability to create a new body of federal common law. Hypothesizing an extension of the federal common law to intrastate pollution controversies, the court noted that pollution legitimized by the 1972 Act could feasibly be proscribed by judicial decision.[53] This contradiction of the

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[48] The Fourth Circuit's holding that there is no federal common law cause of action in intrastate navigable water pollution situations prohibits federal judicial resolution of controversies arising in the estimated 20,000 water bodies classified as navigable waters unless such waters pass over a state border. Therefore, no federal common law can exist in areas such as Alaska, Hawaii and other coastal states where intrastate waters flow directly into the sea. *See* ZWICK, *supra* note 16, at 267-68; McThenia, *supra* note 44 at 200 n.17.

[49] *See* note 44 *supra.*

[50] The Water Quality Act of 1965, Pub. L. No. 89-234, § 5, 79 Stat. 907-08, provided:

> If the Governor of a State . . . files . . . a letter of intent that such State . . . will . . . adopt . . . water quality criteria applicable to *interstate* water . . . such State criteria . . . shall thereafter be the water quality standards applicable to such *interstate* water . . . .
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> If a State does not . . . file a letter of intent . . . the Administrator may . . . prepare regulations setting forth standards of water quality to be applicable to *interstate* waters . . . . (emphasis added)

See ZWICK, *supra* note 16, at 267-68; McThenia, *supra* note 44 at 199-200; Zener, *The Federal Law of Water Pollution Control*, FEDERAL ENVIRONMENTAL LAW 789-90 (Dolgin & Guilbert, eds. 1974).

[51] 33 U.S.C. § 1251 (a)(1) (Supp. V 1975).

[52] *See* text accompanying note 38 *supra. See generally,* Note, *Effective National Regulation of Point Sources Under the 1972 Federal Water Pollution Control Act: The Double Burden of Legislative Draftsmanship and Judicial Review,* 10 GA. L. REV. 983, 987-97 (1976).

[53] 539 F.2d at 1009.

constitutional allocation of power between the legislative and judicial branches of government[54] reinforced the Fourth Circuit's finding that no compelling interest existed justifying the creation of a federal common law for intrastate pollution abatement.[55]

The Fourth Circuit's evaluation of the effect of the 1972 Act on a federal court's ability to establish federal common law could have far-reaching implications for the federal common law concerning interstate water pollution nuisance abatement. The court declared that one factor which prohibits a federal common law remedy in intrastate pollution controversies is that pollution, lawful under federal legislation, should not be declared unlawful under federal common law. This same prohibiting factor can exist in the *Illinois* factual situation; extraterritorial pollution which is lawful under the 1972 Act might be proscribed under the common law. The *Illinois* Court was not confronted with the situation of applying a common law remedy to pollution legitimized by statute since the then existing Federal Water Pollution Control Act[56] did not contain the highly structured regulatory scheme of the 1972 Act.[57] The importance afforded this possible constitutional contradiction when compared to the federal interest in averting any forceful abatement of extraterritorial pollution[58] will determine the vitality of the *Illinois* interstate common law. Dicta in the *Illinois* decision that future legislation might preempt the federal common law[59] seemingly indicates the receptiveness of the Court to an argument that the 1972 Act removes the necessity for a federal common law for pollution nuisance abatement.

Jones Falls presented the Fourth Circuit with an intrastate pollution controversy that demanded resolution of an unprecedented common law issue.[60] The court, with its cautious conclusion that no fed-

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[54] *See* note 39 *supra.*

[55] *Id.* at 1010.

[56] *See* note 50 *supra.*

[57] *See Environmental Law,* Section B, text accompanying notes 5-16 *infra.*

[58] *See* text accompanying note 34 *supra.*

[59] The *Illinois* Court noted:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.

406 U.S. at 107.

[60] *See* Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) (intrastate pollution issue avoided by electing to apply federal statute rather than introduce federal common law with no interstate controversy); Stream Pollution Control Bd. v. United States Steel Corp., 512 F.2d 1036 (7th Cir. 1975) (private citizen intervening in inter-

eral common law for intrastate pollution exists, avoided an expansion of the common law which might have flooded federal courts with patently state controversies. This finding also averts a holding which would have necessitated a decision of the important issue concerning the preemptive effect of the Federal Water Pollution Control Act Amendments of 1972 on a federal common law for intrastate pollution abatement. The *Jones Falls* decision, therefore, leaves for future litigation arising in interstate pollution controversies the difficult issue of the preemptive effect of the 1972 Act on federal common law.

B. Adjudicatory Hearing Required for NPDES Permit Issuance

The procedures necessary for the issuance of the federal pollution discharge permit which caused the dismissal of the original complaint in *Jones Falls*[1] formed the basis for another recent Fourth Circuit decision. The Federal Water Pollution Control Act Amendments of 1972[2] establish a National Pollutant Discharge Elimination System (NPDES)[3] which requires polluters to obtain a permit for the discharge of any pollutant in the nation's navigable waters.[4] The 1972 Act requires that such permits be issued only after an opportunity for a public hearing has been afforded all interested parties.[5] This statutory requirement for a hearing, however, operates only when substantive issues are presented which establish a necessity for such a hear-

state controversy); United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110 (D. Vt.), *aff'd*, 487 F.2d 1393 (2d Cir. 1973) (interstate pollution gives rise to cause of action under federal common law); United States *ex rel.* Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973) (state cannot allege violation of state common law in federal district court).

[1] *Environmental Law*, Section A, text accompanying notes 14-17 *supra*.

[2] 33 U.S.C. § 1251 *et seq.* (Supp. V 1975).

[3] 33 U.S.C. § 1342 (Supp. V 1975).

[4] The Administrator of the Environmental Protection Agency (EPA) establishes regulations which set forth the effluent limitations allowable for various categories of point source pollution. 33 U.S.C. § 1314 (b) (Supp. V 1975). Federal control and reduction or elimination of this pollution is accomplished by a two step process whereby any discharge of a pollutant is first declared unlawful. 33 U.S.C. § 1311 (a) (Supp. V 1975). The second step entails the permit application process where the EPA authorizes certain pollution. 33 U.S.C. §§ 1341-1345 (Supp. V 1975). The Administrator, through his power to prescribe the conditions of these permits, can assure and plan for the attainment and maintenance of the water quality standards established under the '72 Act. 33 U.S.C. § 1342 (a) (Supp. V 1975).

[5] 33 U.S.C. § 1342 (a)(1) (Supp. V 1975) provides in pertinent part: "The Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants. . . .

ing.[6] In *Consolidation Coal Co. v. Environmental Protection Agency*,[7] the Fourth Circuit held that an applicant's challenge of a permit issued for a shorter period of time than requested raised an issue that demanded a hearing.[8]

Consolidation Coal applied for an NPDES permit requesting authorization to discharge pollutants, produced by the operation of a bituminous coal mine, into a navigable stream.[9] The EPA, after formulating the terms of the permit,[10] forwarded the application to the West Virginia Department of Natural Resources (DNR) for state certification.[11] The DNR, mindful of the more stringent federal effluent limitations which were to be imposed approximately three years after the effective date of Consolidation Coal's permit,[12] certified a permit

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[6] The Supreme Court has held that despite a statutory declaration of an individual's right to a full hearing, Congress never intended any agency "to waste time on applications that do not state a valid basis for a hearing." Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n., 356 U.S. 282, 287 (1958), *citing* United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). In *Denver Union*, a provision of the Packers and Stockyard Act, 7 U.S.C. § 181 *et seq.* (1970), provided for a full hearing on a claim charging unjust, unreasonable, or discriminatory practices in furnishing regulated stockyard services. 7 U.S.C. § 211 (1970). Since the charge levied against Denver Union Stock Yard Company did not allege any discrimination or unreasonable denial of stockyard services, the Court held that the denial of an evidentiary hearing was justifiable under the particular circumstances of the suit. 356 U.S. at 288.

[7] 537 F.2d 1236 (4th Cir. 1976).

[8] *Id.* at 1239. The Fourth Circuit was exercising jurisdiction under the '72 Act's direct statutory review provision. 33 U.S.C. § 1369 (b)(1)(F) (Supp. V 1975) provides:

> Review of the Administrator's action . . .
>
> . . . .
>
> (F) in issuing or denying any permit under section 1342 of this title [33 U.S.C. § 1342], may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application of such person.

This direct appeal to the court of appeals removes any necessity for jurisdiction granted by the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1970). Provisions of that Act offer judicial review to any person "suffering legal wrong because of an agency action," but does not apply if there are other adequate judicial remedies. *See* Note, *Judicial Review under the Federal Water Pollution Control Act Amendments of 1972: Which Federal Court?*, 33 WASH. & LEE L. REV. 745 (1976).

[9] The permit application was made on April 15, 1973. A permit was ultimately issued on July 31, 1974. 537 F.2d at 1237-38.

[10] Under the '72 Act the permit terms must assure compliance with federal effluent limitations established by the EPA. 33 U.S.C. § 1342 (a)(1) (Supp. V 1975).

[11] *Id.* Section 1341 (a)(1) provides that any applicant for a permit must obtain state certification of the proposed pollution. The section also provides: "No license or permit shall be granted if certification has been denied by the state. . . ." Thus, state certification is a condition precedent to federal permit issuance. *But see* note 19 *infra*.

[12] The '72 Act establishes July 1, 1977 as the target date for the achievement of

limited to a two year period so that the state might have ample opportunity to reevaluate the feasibility of attaining the more stringent federal limitations.[13] Upon receipt of this state certification, the EPA permit was limited to a two year period.[14] Consolidation Coal made a timely request for an adjudicatory hearing before the EPA seeking to lengthen the permit to the maximum statutory period of five years.[15] The EPA denied the request, indicating that under the provisions of the Act, the agency was powerless to issue a five year permit without state certification.[16] The subsequent denial of a hearing before the West Virginia Water Resources Board[17] led Consolidation Coal to seek judicial review of the EPA action of issuing the permit without a hearing.

Consolidation Coal contested the EPA's restrictive interpretation of the 1972 Act's requirement for state certification of NPDES permits and sought a hearing on the grounds that the EPA was not absolutely bound by what Consolidation Coal termed a state recommendation of a two year permit.[18] The Fourth Circuit avoided interpretation of EPA regulations[19] by deciding the controversy in terms

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the national objective of more stringent limitation of pollution. 33 U.S.C. § 1311 (b) (Supp. V 1975). The Fourth Circuit in Committee for the Consideration of Jones Falls Sewage System v. Train, 539 F.2d 1006, 1007-08 (4th Cir. 1976), identified this timetable stating: "[The '72 Act's] ultimate objective is the elimination of all water pollution. Purity however, is not to be achieved instantaneously. Instead the Act establishes a series of steps which impose progressively stricter standards. . . ."

[13] 537 F.2d at 1237. West Virginia envisioned a possible statewide revision of permits during 1976 so as to enable the state to achieve the 1977 water quality standards. *See* note 12 *supra*. The state's justification for requesting such a two year limit is lessened by the '72 Act which provides that any permit: ". . . can be terminated or modified for cause including, but not limited to, the following: . . . iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge . . . ." 33 U.S.C. § 1342 (a)(3), (b)(1)(C) (Supp. V 1975). Under this provision any five year permit could be modified to achieve the 1977 standards; however, the state would not be afforded another opportunity to certify the permit. 33 U.S.C. § 1341 (a) (Supp. V 1975).

[14] 537 F.2d at 1238.

[15] 33 U.S.C. §§ 1342 (a)(3), (b)(1)(B) (Supp. V 1975).

[16] *See* note 11 *supra*.

[17] The Water Resources Board is the Department of Natural Resources division responsible for state permit certification. W. VA. CODE § 20-5-1 (1973).

[18] 537 F.2d at 1238.

[19] The EPA asserted that state certification is a condition precedent to NPDES permit issuance. *See* note 11 *supra*. Accepting this interpretation of the '72 Act, Consolidation Coal contended that the '72 Act does not specify the substantive provisions or conditions within the EPA tentative permit which require such certification. The EPA denied a hearing, declaring that the duration of a permit is one of the conditions subject to mandatory state certification. Consolidation Coal challenged this determi-

of the due process of law afforded Consolidation Coal. The court found Consolidation Coal frustrated in every attempt to present its objection to the two year duration of the permit.[20] On the federal level, the EPA refused to grant a hearing. On the state level, a West Virginia Attorney General's opinion precluded state agency review of the permit.[21] This denial of any state administrative review by the Board also eliminated state judicial review since court access was predicated on an adverse administrative order made by the Water Resources Board after an appeal hearing.[22] The Fourth Circuit held that the administrative and state judicial lockout violated Consolidation Coal's constitutional right to an opportunity for a meaningful and appropriate hearing preceding final administrative action.[23]

Consolidation Coal clearly reaffirms the fundamental due process requirement that federal agencies cannot act without affording a per-

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nation since EPA regulations establishing procedures for the implementation of the '72 Act treated the duration of the permit as a factor not requiring state certification. 40 C.F.R. § 125.25 (b) (1976) provides: "Permits of less than five years duration may issue in appropriate cases and Regional Administrators shall give great weight to the advice of State . . . officials on the appropriate duration for particular permits." This use of the state advice on the duration of the permit as less than a condition precedent for permit issuance lends creditability to Consolidation Coal's position that it should be afforded an opportunity to challenge the "great weight" yet nonconclusive state recommendation.

[20] 537 F.2d at 1239.

[21] W. VA. CODE § 20-5A-15 (a) (Cum. Supp. 1976) provides: "Any person adversely affected by an order made and entered by the chief in accordance with the provisions of . . . [the Water Pollution Control Act] . . . may appeal to the water resource board for an order vacating or modifying such order. . . ." The West Virginia Attorney-General's opinion, dated November 24, 1975, advised the Water Resources Board that state certification of a NPDES permit did not qualify as "an order made by the Chief." 537 F.2d at 1238.

[22] W. VA. CODE § 20-5A-16 (a) (1973).

[23] 537 F.2d at 1239, *citing* Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 356 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). The Fourth Circuit's holding does not require hearings in both a state and federal forum. In Appalachian Power Co. v. EPA, 477 F.2d 485 (4th Cir. 1973), the court established that due process necessitated only one adequate hearing. *Appalachian* involved EPA approval of state clean air plans under the Clean Air Act, 42 U.S.C. § 1857 (c)(2)(a) (1970). The state had conducted extensive evidentiary hearings before submission of its plan to the EPA for approval. 477 F.2d at 502. The court held that the EPA Administrator could have extended sufficient due process to interested parties if he had adequately reviewed the state hearings. 477 F.2d at 504. The Fourth Circuit held that the record of the EPA proceeding which included a thorough review of the state hearing should be certified to the court in order to determine the adequacy of the due process extended to Appalachian Power. 477 F.2d at 507-08. Thus, in *Consolidation Coal*, a state hearing could have afforded adequate due process to the plaintiff if the Administrator had utilized the state hearing record in making his administrative decision.

son, who may suffer a loss, some essential safeguards for fair administrative judgment.[24] Due process protects an individual from an arbitrary deprivation of property and liberty rights by affording that person a right to present his objections to the administrative agency.[25] Presumably, an agency informed of all opposing positions will thereby be able to consider all relevant factors necessary to make an equitable decision.[26] In *Consolidation Coal,* no opportunity was extended to the company for a presentation of its objections to the abbreviated permit period. Therefore, the court had no difficulty in finding a denial of due process.

Due process is, however, a flexible concept and the procedural safeguards extended to agency actions necessarily vary with the importance of the particular interest involved.[27] These safeguards do not necessarily include full evidentiary hearings, but rather turn on the substantive basis of the challenge to the agency action.[28] The Fourth Circuit, in *Appalachian Power Co. v. Environmental Protection Agency,,*[29] identified three criteria for measurement of the necessity for a public hearing: the substantive importance of the issue, the possible adverse individual impact of the action, and the complexity of the pleadings.[30] In *Appalachian,* the court found that all three

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[24] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The Court in Fuentes v. Shevin, 407 U.S. 67 (1972), declared: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard. . .'." 407 U.S. at 80, *citing* Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863). Although no NPDES permit cases have been decided challenging the traditional due process requirement, an analogy can be drawn with other license issuance proceedings. *Cf.* Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (hearing required when bar admittance denied); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (hearing required for denial of liquor license); Bennett v. Board of Public Welfare, 95 Ariz. 170, 388 P.2d 166 (1966) (hearing required when license to operate child care center denied); Milligan v. Board of Registration in Pharmacy, 348 Mass. 491, 204 N.E.2d 504 (1963) (hearing required for denial of drugstore license). *See* DAVIS, ADMINISTRATIVE LAW TREATISE §§ 17.18-17.19 (1970 Supp.). *See generally* Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA,* 71 MICH. L. REV. 222 (1972); Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking,* 63 CALIF. L. REV. 886 (1975).

[25] Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

[26] *See* Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking,* 63 CALIF. L. REV. 886, 888 (1975).

[27] Goss v. Lopez, 419 U.S. 565, 578-79 (1975). *See* Hubel v. West Virginia Racing Comm., 513 F.2d 240, 242-43 (4th Cir. 1975). *See generally* Wright, *The Courts and Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375 (1974).

[28] Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).

[29] 477 F.2d 495 (4th Cir. 1973). *See* note 23 *supra.*

[30] *Id.* at 501.

factors combined to require evidentiary hearings prior to state implementation of federal ambient air quality standards.[31] However, when these three elements are not adequately raised by an agency action, courts have held that an agency may properly develop an adequate record through the use of discovery mechanisms[32] which would obviate the requirement for a hearing before a federal agency.[33] Similarly, where the issue presented would not be enhanced or developed by the receipt of any evidence, no hearing is required.[34] Due process extended to an individual may thus vary from a summary proceeding to an exacting procedure judicial in scope.[35]

The Fourth Circuit, in *Consolidation Coal,* granted a hearing without identifying the complex nature, individual impact, or substantive importance of the permit duration issue which necessitated the hearing.[36] This omission in the opinion seemingly creates an absolute right to an EPA hearing whenever the duration of a permit is challenged and no state review is obtainable.[37] This holding departs from the established practice of identifying those elements which compel the court to require an evidentiary hearing[38] or to remand the issue to the agency for a determination of other lesser due process safeguards appropriate for the challenged issue.[39]

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[31] *Id.* at 501-02.

[32] In Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (D.C. Cir. 1969), the court identified some of these discovery mechanisms as the permit application, affidavits, exhibits, and intervention petitions. 414 F.2d at 1129.

[33] *See* Retail Store Employees Local 880 v. FCC, 436 F.2d 248, 255 (D.C. Cir. 1970); National Air Carriers Ass'n. v. CAB, 436 F.2d 185, 191 (D.C. Cir. 1970).

[34] City of Lafayette v. SEC, 454 F.2d 941, 953 (D.C. Cir. 1971), *aff'd sub nom.* Gulf State Util. Co. v. FPC, 411 U.S. 747 (1973).

[35] Note, *Administrative Law - Constitutional Law - Due Process - Social Security Recipient's Right to an Oral Evidentiary Hearing Prior to a Reduction of Benefits,* 22 WAYNE L. REV. 843, 845-46 (1976).

[36] 537 F.2d at 1239.

[37] The summary treatment of the duration issue raised by Consolidation Coal leaves to conjecture whether any particular factor gave rise to the hearing requirement. Future applicants challenging an abbreviated durational permit may argue that this Fourth Circuit opinion removes any requirement of showing special circumstances which give rise to a need for a full evidentiary hearing.

[38] *See* Appalachian Power Co. v. EPA, 477 F.2d 495, 501 (4th Cir. 1973).

[39] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649-50 (D.C. Cir. 1973) (remanded to EPA for further development of basis for decision concerning "available technology" for suspension of the 1975 automobile emission standards); Retail Store Employees Local 880 v. FCC, 436 F.2d 248, 261 (D.C. Cir. 1970) (remanded to FCC for further development of the record either by discovery mechanisms or "full-dress" evidentiary hearing to determine whether radio station's license renewal was proper).

Consolidation Coal, although susceptible to this expansive interpretation, can be reconciled with the traditional accommodation of competing governmental and private interests[40] under two theories. First, the "hearing" granted by the Fourth Circuit can be liberally interpreted to include simply the comprehensive assembly of the evidentiary record and an informal review before the EPA.[41] Under such an interpretation, *Consolidation Coal* merely provides that the EPA cannot refuse to amass an ample record which would enable it to assess the merits of the controversy raised by the complaining party. The court's opinion should not therefore be read as a grant of an absolute right to a formal hearing upon submission of a challenge to permit duration. Rather, the decision affirms the principle that any party adversely affected by administrative action is constitutionally entitled to an opportunity for a meaningful presentation of his objection.[42]

Second, the court's summary grant of a hearing can be limited to the facts of the case. Consolidation Coal was denied a hearing before any forum and was forced to pursue protection of its due process rights through an extended judicial proceeding which lasted longer than the challenged two year permit.[43] This denial of a basic constitutional right, which forced Consolidation Coal to operate its mine under a restricted permit, might itself justify the Fourth Circuit's grant of a full evidentiary hearing.

Either interpretation of *Consolidation Coal* averts a result which could only expend valuable EPA resources affording an evidentiary

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[40] *See* Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

[41] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168-69 (1951); Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971). The Fourth Circuit in *Appalachian Power* cited with approval the *Holm* court's statement: "The kind of procedure required must take into account the kind of questions involved." 477 F.2d at 501. Thus, the Fourth Circuit acknowledged that not all questions presented to an agency necessitate full evidentiary hearings. *See generally* Cramton, *A Comment on Trial Type Hearings in Nuclear Power Plant Siting,* 58 VA. L. REV. 585 (1972).

[42] This interpretation of *Consolidation Coal* conforms to the EPA regulations concerning the agency procedure for granting permit hearings. 40 C.F.R. § 125.36 (c)(1) (1976) provides:

> Written [sic] ten (10) days following the expiration of the time allowed . . . for submitting a request for an adjudicatory hearing, the Regional Administrator shall grant the request and shall promptly assign the matter for hearing if he determines that the submitted request: . . . sets forth material issues of fact relevant to the questions of whether a permit should be issued, denied or modified.

[43] The permit application was submitted in April 1973 and a hearing was not finally granted until after the Fourth Circuit decision in July 1976. *See* note 9 *supra.*