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## Fourth Circuit Summary

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## FOURTH CIRCUIT SUMMARY

The Fourth Circuit Summary provides a summary of prevailing environmental decisions decided by the United States Court of Appeals for the Fourth Circuit since the last issue of the *William and Mary Environmental Law and Policy Review*. It does not cover every environmental decision of the Fourth Circuit during that time period, but only those cases which the editors believe to be of the most interest to our subscribers.

### CLEAN AIR ACT

**Virginia v. Browner**, No. 95-1052, 1996 U.S. App. LEXIS 5334 (4th Cir. Mar. 26, 1990).

The Commonwealth of Virginia petitioned to review the Environmental Protection Agency's ("EPA") final disapproval of Virginia's proposed program for issuing air pollution permits. Virginia challenged EPA's finding that Virginia failed to comply with Title V of the 1990 Amendments to the Clean Air Act ("CAA"). The court concluded that Virginia's claims were without merit and denied its petition for review.

On November 12, 1993, and January 14, 1994, Virginia submitted a proposed Title V State Implementation Plan ("SIP") to the EPA. After a notice and comment period, the EPA published notice of its intent to disapprove Virginia's proposal on June 17, 1994. Despite Virginia's response to this notice, the EPA took final action disapproving Virginia's proposed Title V program on December 5, 1994. EPA based its disapproval on five grounds: (1) the plan contained inadequate judicial review provisions in violation of CAA § 502(b)(6); (2) the plan would have allowed certain permits to be issued by default in violation of § 505(b)(3); (3) the regulations that would have been implemented under the plan had expired without being repromulgated; (4) the plan did not "require issuance of permits to the proper universe of sources required" by 40 C.F.R. pt. 70; and (5) the plan did not contain regulations meeting the requirement of 40 C.F.R. pt. 70 to "ensure issuance of permits that contain all applicable Federal requirements," and did not "correctly delineate provisions only enforceable by" Virginia.

Virginia filed a petition for review on January 9, 1995, revised portions of its original proposal, and claimed through this action that it had corrected defects (2) through (5). EPA had not made a determination at the time of trial whether the defects had been corrected. Virginia argued that because it had corrected defects (2) through (5) in its proposed SIP, the court should remand the case to the EPA for a new determination of whether the corrected version complies with the Act. In addition, Virginia brought issue with EPA's disapproval of the original proposed SIP stating it was arbitrary and capricious, and that Title V of the CAA and its sanctions provisions were unconstitutional because the CAA represents an attempt by Congress to coerce Virginia into exercising its sovereign legislative power.

The Court of Appeals first determined that a remand would be inappropriate for two reasons. First, although the EPA "Administrator may approve a program [just] to the extent that the program meets the requirements of" the CAA, the Administrator has the authority to disapprove a program on the basis of a single defect. Second, because the EPA had not yet determined whether Virginia's new submission was adequate, the court could not determine whether Virginia's new submission in fact complied with the CAA. Therefore, the court rejected Virginia's request for remand holding that it would serve no useful purpose.

Next, the court found that the EPA's disapproval was not arbitrary and capricious because it correctly determined that Virginia's proposed judicial review provisions did not comply with the CAA. The court noted that the provisions were too restrictive in limiting availability of review to those persons with "pecuniary and substantial" interests, a requirement which was more stringent than Article III's requirement of concrete and particularized injury. Therefore it was in violation of CAA § 502(b)(6)'s requirement for broad availability of judicial review necessary to ensure that the required public comment period serves its proper purpose. Because of this finding of noncompliance, the court decided that even if the EPA had based its disapproval of the proposed SIP solely on that defect, its disapproval was not arbitrary and capricious.

Finally, the court held that (1) the highway funds sanction, CAA § 179(b)(1), was a valid exercise of Congress's spending power, (2) the offset sanction's burden would fall, not on the state, but on private parties and therefore did not violate the Tenth Amendment, and (3) the Federal Implementation Program was a way to induce, not command, compliance by the state. Therefore, the court held Title V sanctions provisions were

constitutional.

Having concluded that the EPA correctly disapproved Virginia's proposed State Implementation Plan because it did not satisfy the provisions of the CAA and that the sanctions Virginia faced were constitutional, the Court of Appeals denied Virginia's petition for review.

## NEPA

**Hughes River Watershed Conservancy v. Glickman**, No. 95-3056, 1996 U.S. App. LEXIS 7578 (4th Cir. Apr. 12, 1996).

The Hughes River Watershed Conservancy, the Sierra Club, the West Virginia Rivers Coalition, and four private individuals (collectively referred to as the "Conservancy") appealed from a district court grant of summary judgment in their action seeking judicial review of the decision to approve construction of a dam on the North Fork of the Hughes River in West Virginia. The Conservancy alleged, among other things, that the Natural Resources Conservation Service ("NRCS") and the United States Army Corps of Engineers (the "Corps") violated the National Environmental Policy Act ("NEPA"). The Court of Appeals affirmed in part, vacated in part, and remanded for further proceedings.

The NRCS entered into an agreement with the Appalachian Regional Commission ("ARC") requiring the NRCS to assist in the planning, design, and construction of the North Fork Hughes River Watershed Project (the "Project"). The Project entailed the building of a multipurpose dam to curb periodic flooding, improve water supply, increase recreational opportunities, and stimulate the area's economy. The proposed dam was to be built on the North Fork, a free flowing and scenic river and the habitat of an extensive variety of fish and wildlife, including twenty-two freshwater mussels (two of which were under consideration for listing as threatened or endangered under the Endangered Species Act). The North Fork was also listed on the National Park Service's Nationwide Rivers Inventory as a possible addition to the National Wild and Scenic Rivers System.

Having determined the need for an Environmental Impact Statement ("EIS") in order to comply with NEPA, the NRCS conducted a series of public meetings then released and circulated for comment a draft EIS for the Project. The Sierra Club, the Department of the Interior ("DOI"), and the

EPA informed the NRCS that they considered the draft EIS to be deficient. In June 1994, NRCS released a final EIS, and in July 1994, the NRCS issued a record of decision approving the Project. The EPA informed the Corps that the final EIS was inadequate and that the Corps should prepare a supplemental EIS before going forward with the Project. On June 2, 1995, the Corps District Office issued a § 404 permit with a record of decision including an environmental assessment prepared by the District Office noting that the NRCS had already prepared an EIS and concluding that no new evidence or information required supplementation of the EIS.

The Conservancy argued that the NRCS and the Corps violated NEPA by failing to take a "hard look" at the problem of zebra mussel infestation before deciding not to prepare a supplemental EIS. The Project was expected to cause infestation of the North Fork by the zebra mussel, a nonindigenous mollusk that destroys native mussel populations. In addition, the Conservancy claimed that the reliance on an inflated estimate of the Project's economic benefits impaired fair consideration of the Project's adverse environmental effects. Finally, the Conservancy alleged that the NRCS and the Corps failed to comply with the Wild and Scenic Rivers Act ("WSRA").

Under NEPA, the preparation of an EIS serves the national policy of protecting and promoting environmental quality by ensuring that an agency, when deciding whether to approve a project, will carefully consider, or take a "hard look" at, the project's environmental effects. The Court of Appeals concluded that the two telephone calls made by a District Office biologist to the Corps water quality section did not constitute a "hard look" as required under NEPA. The two calls were made in response to information received from the EPA, DOI's Fish and Wildlife Service, and six experts that the zebra mussel infestation of the North Fork would have "devastating" environmental consequences and that the North Fork would not become heavily infested without the project. The court found that the Corps' reliance on the opinions of its water quality section employees was misplaced because the opinions did not address the expert evidence furnished to the Corps. The court then remanded this issue with instructions that the district court direct the Corps to take a "hard look" at the problem of the zebra mussel infestation and to determine, based on that hard look, whether to prepare a supplemental EIS addressing zebra mussel infestation.

Next, the court held that the reliance by the NRCS and the Corps on a West Virginia University ("WVU") study's inflated estimate of the Project's recreation benefits violated NEPA because it impaired fair consideration of

the Project's adverse environmental effects. The WVU study was commissioned by the NRCS to quantify the recreation benefits that would result from the project and required the WVU professors to calculate net, rather than gross, recreation benefits. The study disregarded this requirement and calculated gross recreation benefits, an inflated estimate, that was then incorporated into the EIS.

An EIS serves (1) the function of ensuring that an agency take a "hard look" at environmental effects of proposed projects, and (2) the function of ensuring that relevant information regarding proposed projects is available to members of the public for decisionmaking purposes. Misleading economic assumptions will defeat these functions by impairing an agency's consideration of the adverse effects of a proposed project and skewing the public's evaluation of the project. The court found that the inflated estimate of recreation benefits accounted for a significant portion of the economic benefits and that the NRCS and the Corps viewed the inflated estimate as crucial in their evaluations of the Project. Therefore the EIS's inflated figures impaired the ability of the NRCS and the Corps to take a hard look at the Project's adverse environmental effects when balanced against the economic benefits, as required by NEPA.

Finally, the Court of Appeals affirmed the district court's conclusion that the WSRA imposed no duties on the NRCS and the Corps to evaluate the benefits of designating the North Fork as part of the National Wild and Scenic Rivers System as an alternative to building the Project. The WSRA promotes the policy of preserving in free-flowing condition rivers with "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values." The court concluded that because the EIS and the Corps' Record of Decision both considered and discussed the North Fork's listing on the Nationwide Rivers Inventory and its potential to be included in the National Wild and Scenic Rivers System, the court did not need to conclude whether the WSRA required the same for every river on which a project is proposed. The court also concluded that the Nationwide Rivers Inventory does not impose any obligation on the NRCS and the Corps to evaluate the benefits of designating the North Fork as part of the System because the purpose of the WSRA is not to give the Nationwide Rivers Inventory any particular status that might trigger the duty by the WSRA.

The court thereby vacated those parts of the district court's judgment that held the NRCS and Corps did not violate NEPA and remanded to the district court with orders to direct the NRCS and the Corps to reevaluate the

Project. The district court judgment was affirmed in all other respects.