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# Fourth Circuit Summary

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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.

## ENDANGERED SPECIES

**United States v. Mitchell**, 39 F.3d 465 (4th Cir. 1994).

A grand jury indicted Richard Mitchell ("Mitchell"), an employee of the Fish and Wildlife Service ("FWS") of the United States Department of the Interior, for violating 18 U.S.C. § 545 by smuggling the horns and hides of illegally hunted animals into the United States. Section 545 makes it a felony to knowingly import merchandise "contrary to law." Count Nine of the indictment charged Mitchell with the failure to declare the horns and hides, complete FWS Form 3-177, and satisfactorily show to the Veterinary Service the country of origin of the horns and hides ("Agriculture regulations"). The district court convicted Mitchell of a felony under Count Nine.

Mitchell appealed the conviction, arguing that (1) the "contrary to law" provision in § 545 does not encompass violations of administrative regulations, and (2) the felony conviction could not be predicated upon a regulation for which Congress had provided a misdemeanor punishment. In response to Mitchell's first argument, the court found that the "contrary to law" provision in § 545 included, in addition to acts of Congress, substantive agency regulations. The court followed the Supreme Court's holding in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), that substantive agency regulations have the "full force and effect of law" if they (1) affect individual rights and obligations, (2) are promulgated pursuant to a congressional grant of quasi-legislative authority, and (3) are promulgated in conformity with the Administrative Procedure Act.

The FWS regulation violated by Mitchell was enacted pursuant to the Endangered Species Act of 1973 ("ESA"). The Fourth Circuit found that Congress had authorized the FWS regulation requiring persons importing game trophies to complete FWS Form 3-177 to determine if the animal was an endangered species. The Agriculture regulation was proclaimed through 21 U.S.C. § 111. Section 111 gave the Secretary of Agriculture the authority to regulate the importation of animal products to prevent the introduction of disease. The Fourth Circuit ruled that both the FWS provision and Agriculture regulations were substantive agency regulations under the *Chrysler* test and were, therefore,

enforceable under § 545.

The Fourth Circuit also rejected Mitchell's second argument that there is no "inherent difficulty" with Congress criminalizing the same conduct under more than one statute, even where violation of one statute is predicated on violation of the other. In addition, the court stated that the existence of these regulations criminalizing the same conduct as the statutes did not repeal by implication the statutes. Because the court found no irreconcilable conflict between the statutes, it affirmed Mitchell's conviction.

## NEPA

***In re* City of Virginia Beach**, 42 F.3d 881 (4th Cir. 1994).

The City of Virginia Beach, Virginia ("Virginia Beach") sought a writ of mandamus, pursuant to 28 U.S.C. § 1651, to compel the Federal Energy Regulatory Commission ("FERC") to enter a final decision regarding its review of a water pipeline project proposed by Virginia Beach. Virginia Beach claimed that FERC violated the Administrative Procedure Act, 5 U.S.C. § 555(b), by unnecessarily failing to enter a decision on the proposed pipeline within a reasonable time. The Fourth Circuit held that, notwithstanding the protracted delay, FERC's conduct was not sufficiently egregious to warrant the extraordinary remedy of mandamus. Accordingly, the Fourth Circuit denied Virginia Beach's petition for the writ of mandamus.

The proposed pipeline would connect Lake Gaston, located on the North Carolina-Virginia border, with Virginia Beach and would carry sixty million gallons of water for daily use by the people of Virginia Beach. After receiving approval to construct the pipeline from the Army Corps of Engineers in early 1984, Virginia Beach requested that Virginia Electric and Power Company ("VEPCO") file an application with FERC to transfer VEPCO's easements at Lake Gaston to Virginia Beach for use with the pipeline. VEPCO agreed to file the application but waited to do so until the courts had affirmed the Army Corps of Engineers permit in February 1991.

FERC stayed review of VEPCO's application while the Department of Commerce considered an objection by North Carolina to the proposed pipeline. In July 1993, Virginia Beach petitioned the Fourth Circuit for a writ of mandamus when FERC reversed its earlier position and ordered an environmental impact statement ("EIS") which would be completed by June 1995. Virginia Beach contended that FERC acted unreasonably in disregarding previous environmental analyses of the same issues by the Army Corps of Engineers and the Secretary of Commerce. The Secretary of Commerce had overridden the North Carolina objection four months prior to the presentation of arguments before the Fourth Circuit. Virginia Beach alleged further that neither FERC's own underlying analysis nor FERC's questions regarding the pipeline's future uses and impact on the lower Roanoke River justified the order for an EIS.

FERC argued that it had acted reasonably by following normal agency procedures to stay VEPCO's application pending review of the North Carolina objection by the Secretary of Commerce. FERC further argued that, due to FERC's own standards for environmental review and the delays resulting from VEPCO's lag in filing the application and the North Carolina objection, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2), required an updated EIS to supplement VEPCO's current application. Recognizing the need for a speedy review of the application, FERC instructed its staff to treat the VEPCO EIS as a priority matter.

Virginia Beach argued that a writ of mandamus was necessary in order to protect the health and safety of almost one million people from a public water supply crisis and to maintain the operational readiness of the Norfolk naval complex. Declining Virginia Beach's implicit invitation to review the substance of FERC's decision to order the EIS, the Fourth Circuit looked instead to FERC's duty to comply with NEPA, its adherence to established agency procedures, and its repeated assurances of expedited review of the VEPCO EIS.