

William & Mary Environmental Law and Policy Review

Volume 23 (1998-1999)
Issue 3 *Symposium 1999: Land Use for the 21st
Century: The Next Frontier for Environmental
Law*

Article 8

October 1999

Un-Neighborly Conduct: Why Can't Virginia Beach and North Carolina Be Friends?

Paul Schmidt

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Environmental Law Commons](#), and the [Water Law Commons](#)

Repository Citation

Paul Schmidt, *Un-Neighborly Conduct: Why Can't Virginia Beach and North Carolina Be Friends?*, 23 Wm. & Mary Envtl. L. & Pol'y Rev. 893 (1999), <https://scholarship.law.wm.edu/wmelpr/vol23/iss3/8>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmelpr>

UN-NEIGHBORLY CONDUCT: WHY CAN'T VIRGINIA BEACH AND NORTH CAROLINA BE FRIENDS?

PAUL SCHMIDT*

In 1997, the federal court system granted final approval for the Lake Gaston Pipeline, thereby paving the way for Virginia Beach, Virginia, to begin taking water from Lake Gaston for use in Southside Hampton Roads.¹ Virginia Beach is located in the extreme southeastern corner of Virginia, where the Atlantic Ocean meets the Chesapeake Bay. Lake Gaston sits astride the North Carolina-Virginia State Line, some one hundred miles inland. This court decision was the culmination of a long and drawn-out battle that had been raging since 1983,² and will not likely conclude until long after the turn of the millenium. Controversy always seems to surround inter-basin transfers of water, even in the water-rich East, and water rights were at the core of this particularly divisive battle.³ Although Virginia Beach is located in the Elizabeth River Basin, the Lake Gaston pipeline draws water from the Roanoke River Basin, thus reducing the supply of water available for the people living along the banks of the Roanoke River. People and societies have long held proprietary feelings about what they come to view as "their" water, even when long range population planning may dictate these types of inter-basin water transfers. This was not simply a battle between the states, but a battle between two river basins and the people who inhabit them.

A rich cast of characters has populated the legal landscape of this debate: the Governor of the State of North Carolina, the Roanoke River Basin Association (a concerned citizens' group) the Army Corps of Engineers, the Federal Energy Regulatory Commission (FERC), and

* Mr. Schmidt received his B.S. in Geology, minor in Oceanography, from Old Dominion University in 1997, and expects to receive his J.D. in May 2000 from the College of William and Mary School of Law.

¹ See Karen Weintraub, *Another Win in Gaston Water Wars*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), August 23, 1997, at B1.

² See *City of Virginia Beach v. Roanoke River Basin Assoc.*, 776 F.2d 484, 487 (4th Cir. 1985).

³ River basins are simply the lands that surround and drain into a river.

almost every city in Southside Hampton Roads, Virginia.⁴ At the center of the debate has been the legal characterization of the withdrawal of the water. If the withdrawal is a "discharge" for the purposes of the Clean Water Act (CWA),⁵ or an alteration of an existing discharge, it will fall under section 401 of the CWA.⁶ Under that section of the CWA, Virginia Beach must obtain a water quality certification from the State of North Carolina.

If the withdrawal is not a "discharge," the Clean Water Act is not implicated, and FERC and the Corps of Engineers could administratively preclude North Carolina from participating in the entire permitting process. Once this exclusion is achieved, Virginia Beach could withdraw the water with impunity.

Another major issue is the standard of review the court has applied to the decisions made by the various federal agencies involved. The court initially held in *North Carolina v. Hudson*,⁷ the Lake Gaston case, that the applicable standard of review was the "arbitrary and capricious" standard.⁸ Under this standard, the court would uphold the agency action unless it found that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁹ The court's decision, however, did not discuss whether it would review the sufficiency of the agency's fact-finding, or why it would characterize the agency action as being more like agency rulemaking than an adjudication.

Part I of this Note discusses the legal and political history of this complicated story, attempting to illustrate how litigation and political activism prolonged and complicated the process. Part II examines two crucial legal issues on which the debate centered—the definition of a discharge, and the discretion of the Corps and FERC to dispense with an environmental assessment as part of the approval process. Part III evaluates the standards of review the court applied, and Part IV speculates on the future court battles the Lake Gaston pipeline faces. Finally, Part V will conclude that the court's adoption of an incorrect standard of review rendered the permitting process highly flawed.

⁴ The term "Southside Hampton Roads" generally includes the cities of Norfolk, Virginia Beach, Chesapeake, and Portsmouth, Virginia.

⁵ Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1251-1376 (1994 & Supp. IV 1998).

⁶ See 33 U.S.C. § 1341 (1994).

⁷ 665 F. Supp. 428 (E.D.N.C. 1987).

⁸ See *id.* at 436.

⁹ *Id.*

I. HISTORY

The Roanoke River runs from its headwaters near Cave Spring, Virginia, to the Atlantic Ocean via the Albemarle Sound. On its way to the sound, it drains an approximately 10,000 square-mile basin that sits across the Virginia-North Carolina state line, as does Lake Gaston itself.¹⁰ Pursuant to licenses obtained from FERC,¹¹ the Virginia Electric and Power Company (VEPCO) operates hydroelectric plants along this waterway at both Lake Gaston and Roanoke Rapids Lake¹² pursuant to licenses obtained from FERC.

Virginia Beach is located on the lower Chesapeake Bay and is bounded by the Atlantic Ocean to the East. The city is part of a different river basin, the James River Basin,¹³ but Virginia Beach historically had no independent access to freshwater and was dependent upon a contract with the City of Norfolk, Virginia, to supply drinking water for its citizens.¹⁴ The contract, however, only obligated Norfolk to deliver its "surplus" water to Virginia Beach.¹⁵ This created obvious problems for Virginia Beach, which, rather than have its future constrained by the whims of Norfolk water policy-makers, began focusing as early as 1978 on Lake Gaston as a potential source for drinking water.¹⁶

On April 27, 1978, North Carolina and Virginia entered into a formal agreement to hold continuing discussions about the sharing of mutual water resources.¹⁷ The agreement established the North Carolina-Virginia Water Resources Management Committee.¹⁸ Virginia Beach participated in many of the Committee meetings and ultimately proposed the Lake Gaston pipeline, an 84.5 mile pipeline capable of carrying 60 million gallons per day (mgd) to Virginia Beach, Franklin and

¹⁰ See *City of Virginia Beach v. Roanoke River Basin Assoc.*, 776 F.2d 484, 486 (4th Cir. 1985).

¹¹ See *Hudson*, 665 F. Supp. at 436-39.

¹² See *id.* at 439.

¹³ See *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 598 (4th Cir. 1991).

¹⁴ See *id.* at 599.

¹⁵ See *id.*

¹⁶ See *City of Virginia Beach v. Roanoke River Basin Assoc.*, 776 F.2d 484, 486 (4th Cir. 1985).

¹⁷ See *id.* at 486-87.

¹⁸ See *id.* at 487. The Committee had no binding authority on either state, but was co-chaired by the North Carolina Secretary of Natural Resources and Community Development and the Virginia Secretary of Commerce and Resources. See *id.*

Chesapeake, all of which are located in Southside Hampton Roads.¹⁹ This pipeline, as proposed, would be constructed entirely within the Commonwealth of Virginia, at an estimated cost of \$176 million.²⁰ Its construction, city officials hoped, would render Virginia Beach self-sufficient, freeing the city from its dependence on Norfolk and a handful of emergency wells that were soon to be reclaimed by the various municipalities that had leased them to Virginia Beach.²¹

On July 15, 1983, after the Committee talks reached a stalemate, Virginia Beach applied to the Corps of Engineers for a permit to build the proposed pipeline.²² This action sparked a controversy that was to last for the next seventeen years and exemplified the intensity of feelings and rhetoric on both sides of the issue:

Over the next several months, approximately 6,000 people attended three public hearings in North Carolina and Virginia where substantial oral and written comments were presented, expressing both support for and opposition to the proposed project. On 11 October 1983 the Norfolk District Corps issued a draft environmental assessment (EA) and a preliminary finding of no significant impact (FONSI) for public review and comment. On 7 December 1983 the Corps issued its final EA and FONSI which concluded that the project would have no significant environmental impacts and therefore preparation of an Environmental Impact Statement (EIS) was not required by the [National Environmental Policy Act (NEPA)].²³

Shortly after the permits were issued, the State of North Carolina and the Roanoke River Basin Association (RRBA) filed suit against the City of Virginia Beach, and Virginia Beach counter-sued the RRBA, the State of North Carolina, and the Governor of North Carolina in his capacity as Governor, personally serving him with a subpoena to appear in a Virginia federal courthouse.²⁴ The federal district court in Norfolk, Virginia, held

¹⁹ *See id.*

²⁰ *See id.* These discussions took place from 1979 until 1983, but the two sides could not reach an agreement about the Virginia Beach proposal. *See id.*

²¹ *See* North Carolina v. Hudson, 665 F. Supp. 428, 432 (E.D.N.C. 1987).

²² *See* City of Virginia Beach v. Roanoke River Basin Assoc., 776 F.2d 484, 487 (4th Cir. 1985). It appears that this unilateral action by Virginia Beach brought the Committee discussions about the pipeline project to an end. *See id.*

²³ Hudson, 665 F. Supp. at 432.

²⁴ *See* Roanoke River Basin Assoc., 776 F.2d at 486.

that the Governor of North Carolina was amenable to service of process under the Virginia Long-Arm Statute²⁵ and that subjecting him to service of process would not violate the governor's due process rights.²⁶ The Fourth Circuit Court of Appeals, however, overturned the decision, stating that "the Governor has not transacted any business in Virginia from which the city's action arose."²⁷ Accordingly, the Court transferred the action to the Eastern District of North Carolina to be consolidated with the North Carolina action filed in that court.²⁸

After this initial showing of bad blood, the Virginia and North Carolina suits were combined.²⁹ North Carolina alleged that the construction permits issued by the Corps were invalid because of the procedure the Corps followed in assessing the impact the pipeline would have upon the downstream water quality of the Roanoke River.³⁰ North Carolina also alleged that the procedure, as followed by the Corps, was "arbitrary and capricious and in violation of NEPA, the Clean Water Act (CWA), the Rivers and Harbors Act, the Coastal Zone Management Act (CZMA), the Water Supply Act of 1958, and the federal regulations implementing those acts."³¹

²⁵ See VA. CODE ANN. § 8.01-328.1 (Michie 1992 & Supp. 1999).

²⁶ See *Roanoke River Basin Assoc.*, 776 F.2d at 487-88.

²⁷ *Id.* at 488. The court said that Virginia Beach's action did not arise out of any business transacted by the Governor of North Carolina in the State of Virginia, nor did his participation in hearings conducted in Virginia give rise to jurisdiction, as the hearings were held in Virginia for the convenience of the Corps of Engineers, not at the behest of the Governor. See *id.* at 488. See also *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 785-87 (D.C. Cir. 1983) (holding that the District of Columbia long-arm statute did not confer personal jurisdiction over a party because that party's contacts with the District were either unrelated to the claim at issue, or protected by that party's First Amendment right to petition the federal government).

²⁸ See *City of Virginia Beach v. Roanoke River Basin Assoc.*, 776 F.2d 484, 488 (4th Cir. 1985).

²⁹ See *North Carolina v. Hudson*, 665 F. Supp. 428, 433 (E.D.N.C. 1987).

³⁰ See *id.* at 436.

³¹ *Id.* at 433. See also National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1994 & Supp. IV 1998) (declaring a national policy of environmental protection, requiring Environmental Impact Statements for "all major Federal actions," and establishing the Council on Environmental Quality); Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1251-1376 (1994 & Supp. IV 1998) (declaring national goals of restoration and maintenance of the nation's waters, creating an effluent discharge permitting scheme, and establishing states' authority over their waters); Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. § 403 (1994 & Supp. IV 1998) (prohibiting the obstruction of navigable waters); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1994 & Supp. IV 1998) (declaring a national policy of preserving, developing, and restoring the nation's coastlines, and encouraging the states to take the

In contemplating the appropriate standard of review to apply to the various claims raised by the parties,³² the court first looked to the Administrative Procedures Act (APA)³³ for guidance.³⁴ Looking at section 706 of that act, the court determined that the "arbitrary and capricious"³⁵ standard was applicable to this agency action.³⁶ The court stated that in reviewing the agency's compliance with NEPA, "the only role for the court is to insure that the agency has taken a 'hard look' at the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'"³⁷ Deferring to the Corps' findings of fact, the court held that the agency's decision to issue the FONSI without first conducting an EIS was not an abuse of the Corps' discretion.³⁸

The court further held that the water reallocation contract between the City of Virginia Beach and the Corps of Engineers was a valid contract, and the Corps of Engineers had the authority to enter into the contract with Virginia Beach.³⁹ Nonetheless, the court remanded the matter back to the Corps with regard to the impact on striped bass, which are indigenous to the Roanoke River, and required that an independent assessment be made as to the necessity of the preparation of an EIS to determine the pipeline's impact on that species.⁴⁰ The agency's "hard look" at the determination that the pipeline would have no impact on the

lead in protecting their own coastlines through non-point source water pollution mitigation programs and other means); Water Supply Act of 1958, 43 U.S.C. §§ 390b-390f (1994) (recognizing that it is the primary responsibility of states and local interests to develop their own water supplies). Additionally, North Carolina was allowed to amend its complaint to include a challenge to the water storage contract that Virginia Beach had entered into with FERC. The result of the water storage reallocation contract would cause water to be stored in the Kerr Reservoir, upstream of Lake Gaston, and released during the striped bass spawning season to ensure adequate water flow to maintain optimal conditions for anadromous striped bass egg development. Apparently, the eggs have a neutral buoyancy, and require sufficient water flow to keep the eggs afloat until they harden some weeks later. *See Hudson*, 665 F. Supp. at 440-41.

³² *See Hudson*, 665 F. Supp. at 436.

³³ 5 U.S.C. § 706(2)(A), (D) (1994).

³⁴ *See Hudson*, 665 F. Supp. at 436.

³⁵ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 410 U.S. 402 (1971) (requiring a two step review process: first looking to whether the agency was acting within the scope of its authority; and second, determining whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

³⁶ *See North Carolina v. Hudson*, 665 F. Supp. 428, 436-37 (E.D.N.C. 1987).

³⁷ *Id.* at 437 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)).

³⁸ *See id.* at 444.

³⁹ *See id.* at 449.

⁴⁰ *See id.* at 450.

striped bass was upheld by the district court,⁴¹ and the case was appealed to the Court of Appeals for the Fourth Circuit.⁴² The issues raised on appeal were the impact on the striped bass population, the effect on water quality, and the Corps' alleged failures to adequately explain or consider environmental factors in issuing the construction permits.⁴³ The Fourth Circuit once again reviewed the agency action and, weighing the pressing water needs of Virginia Beach against what it considered minimal environmental impacts, upheld the lower court's decision.⁴⁴

While the Court of Appeals decision upheld the Corps of Engineers' construction permit, the project had not yet been approved by FERC, the licensor of the hydropower facility on Lake Gaston.⁴⁵ FERC project 2009 created Lake Gaston; without the dam and resulting reservoir, no lake would exist from which Virginia Beach could take water.⁴⁶ The Roanoke River Basin Association (RRBA) and North Carolina won an injunction against Virginia Beach on December 10, 1990, forbidding construction on any part of the pipeline until final FERC approval had been obtained.⁴⁷

The court in this case examined two core issues. First, would FERC be influenced by the amount of money Virginia Beach was spending on this project, money that would be wasted if FERC denied the permits? Second, if FERC were to conduct an environmental review of the project, could the court issue an injunction, pending the completion of an EIS, and prohibit construction of even the part of the pipeline that would not be within the project 2009 area?⁴⁸

The court decided that the construction projects it was being asked to enjoin were of too minor a nature to exert undue influence on FERC's decision-making process, and refused to enjoin the construction without reaching the issue of whether larger projects might be subject to court intervention.⁴⁹

The fear of undue influence upon agency decision-making was first raised in a Maryland-based case where the Maryland Conservation Council tried to enjoin the construction of a highway that was to cut

⁴¹ See generally *North Carolina v. Hudson*, 731 F. Supp. 1261 (E.D.N.C. 1990).

⁴² See generally *Roanoke River Basin Assoc. v. Hudson*, 940 F.2d 58 (4th Cir. 1991).

⁴³ See *id.* at 62-64.

⁴⁴ See *id.* at 66.

⁴⁵ See *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 598 (4th Cir. 1991).

⁴⁶ See *id.* at 599; *City of Virginia Beach v. United States Dep't of Commerce*, 995 F.2d 1247, 1249 (4th Cir. 1993).

⁴⁷ See *North Carolina v. City of Virginia Beach*, 951 F.2d at 598.

⁴⁸ See *id.* at 598.

⁴⁹ See *id.* at 599.

through Seneca Creek State Park.⁵⁰ The plaintiffs contended that all highway construction, whether inside or outside the park, should be enjoined pending the results of the EIS.⁵¹ The court found that because major federal action was inevitable, all construction should be enjoined, lest "[t]he completed segments would 'stand like gun barrels pointing into the heartland of the park.'"⁵² The concern was that the public outcry over a federal agency unilaterally squandering millions of state taxpayers dollars by denying a construction permit would place the agency under such extreme political pressure that the permit decision would be made out of political necessity, rather than concern for the environment.⁵³ The court's finding that the Lake Gaston pipeline would not "'stand like [a] gun-barrel' aimed at FERC"⁵⁴ seemed to clear the last hurdle for Virginia Beach to start construction in earnest.

North Carolina had not lost the battle yet. One year later, three of Virginia's Congressmen charged the federal agencies involved in the permitting process with collaborating with North Carolina in opposing the pipeline by reversing their opinion on the original Corps of Engineers FONSI.⁵⁵ This dispute between Virginia Beach and the National Oceanographic and Atmospheric Administration (NOAA) rapidly found its way into federal court.⁵⁶

To finalize the construction path of the pipeline, Virginia Beach needed to obtain easements across VEPCO land at Lake Gaston, the FERC Project 2009 site.⁵⁷ Because FERC would have to approve any easements across the Project 2009 site, and VEPCO knew that FERC was required by statute to consult the National Marine Fisheries Service (NMFS) prior to

⁵⁰ See generally *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986).

⁵¹ See *id.* at 1040-41.

⁵² *Id.* at 1042 (citing with approval *San Antonio Conservation Society v. Texas Highway Department*, 400 U.S. 968, 971 (1970) (Black, J., dissenting from denial of certiorari)).

⁵³ See *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 601-02 (4th Cir. 1991).

⁵⁴ *Id.* at 602 (citation omitted).

⁵⁵ See *New Misconduct is Charged in Project Plan Reviews*, ENGINEERING NEWS-REC., June 22, 1992, at 26, available in 1992 WL 2427469. Senators John W. Warner (R) and Charles S. Robb (D) were joined by Rep. Owen B. Pickett (D), all of Virginia, accused the Fish and Wildlife Service, National Oceanographic and Atmospheric Administration and other federal agencies of colluding with North Carolina to attack the legitimacy of the original Corps decision that an EIS was unnecessary. See *id.* Note that this occurred soon after the court upheld the construction permits—timing that gave new life to North Carolina's cause.

⁵⁶ See generally *Virginia Beach v. United States Dep't of Commerce*, 995 F.2d 1247 (4th Cir. 1993).

⁵⁷ See *North Carolina v. City of Virginia Beach*, 951 F.2d at 599.

granting their approval,⁵⁸ VEPCO solicited comments from NMFS ahead of time.⁵⁹ Virginia Beach, naturally, had some concerns about an EIS possibly being required, and it feared that such a requirement would send Virginia Beach back to square one. Therefore, the municipality voiced these concerns to the Director of NMFS.⁶⁰ NMFS sought an independent review of the facts, and enlisted the general counsel for NOAA to assist.⁶¹ Virginia Beach, now growing very concerned about the fact that only a few of their questions to NMFS were getting answers, sued NMFS under the Freedom of Information Act (FOIA)⁶² for documents detailing the findings of NMFS' initial fact-finding inquiry.⁶³ The impending disintegration of the pipeline project prompted Virginia Beach to try something new: it went to talk with North Carolina about a deal.

Beginning to think that the court battles might never end, Virginia Beach entered into negotiations with the Governor of North Carolina, and put together a deal that both sides would find mutually beneficial.⁶⁴ The pipeline would be built, but North Carolina could draw from it as much as thirty-five million gallons of water per day. Virginia Beach would also pay for environmental safeguards and widened highways running from the populous Hampton Roads area to the tourist destinations on North Carolina's Outer Banks.⁶⁵ The compromise would take the form of an interstate compact, and would be voted into law by both state legislatures and Congress.⁶⁶

This solution seemed ideal. It offered a compromise Virginia Beach could live with and the certainty that no more environmental lawsuits would stand between the city and Lake Gaston's water. This situation, however, was too good to last. The deal had a time limit; the states' legislatures had until July 1, 1995, to ratify the agreement or it

⁵⁸ See 16 U.S.C. §§ 662(a)-(b), 803(j)(1), 811 (1994).

⁵⁹ See *Virginia Beach v. United States Dep't of Commerce*, 995 F.2d at 1250.

⁶⁰ See *id.* at 1249-50.

⁶¹ See *id.* at 1250.

⁶² Freedom of Information Act, 5 U.S.C. § 552 (1994 & Supp. IV 1998).

⁶³ See *Virginia Beach v. United States Dep't of Commerce*, 995 F.2d 1247, 1251 (4th Cir. 1993).

⁶⁴ See Bill Geroux, *Roanoke River Group Raps Deal, It Says Only Governor Can Reach Pipeline Deal*, RICHMOND TIMES-DISPATCH, May 3, 1995, at B4.

⁶⁵ See *id.*

⁶⁶ See *id.* at B1. The final deal was reached sometime before May 1, 1995, when a copy of the agreement was filed with FERC for informational purposes. See *With a Settlement Reached in the Bitter Lake Gaston Dispute*, INSIDE FERC, May 8, 1995, available in 1995 WL 8123385 [hereinafter *Settlement Reached*].

would expire.⁶⁷ While FERC was struggling to assimilate the new agreement into the EIS it was preparing for the Project 2009 easements in time to meet the deadline,⁶⁸ internal Virginia political squabbles arose that threatened to scuttle the whole deal.⁶⁹

Some residents of Southside Hampton Roads, Virginia, were afraid that with the Virginia Beach pipeline tapping Lake Gaston water, the rural users of Lake Gaston water might have to comply with new environmental regulations, which could prove ruinously expensive to small farmers.⁷⁰ The farmers exerted pressure on their state legislators to kill the deal, and when Republicans and Democrats could not agree upon procedural rules for the special session that was to enact the interstate compact, the deal fell apart once again.⁷¹

Shortly afterwards, FERC issued the final authorization for the amendments to VEPCO's license for Project 2009, thus paving the way for VEPCO to issue the necessary easements to Virginia Beach for the pipeline.⁷² This action sparked off more controversy, because in the process of completing the EIS, FERC decided that Virginia did not need to obtain a water quality certification from North Carolina, pursuant to the CWA.⁷³ The State of North Carolina took exception to being left out of the decision-making process, and contended that downstream water quality could be affected, and therefore a North Carolina water quality certification was necessary before the license could issue.⁷⁴ A lawsuit was filed in the U.S. District Court for the District of Columbia, which granted a stay to North Carolina, preventing FERC from issuing the final order approving the project.⁷⁵ The pipeline project was stalled yet again.

North Carolina then got an additional boost from an unlikely ally, the City of Norfolk. Norfolk was still Virginia Beach's only supplier of

⁶⁷ See Geroux, *supra* note 64, at B4.

⁶⁸ See *Settlement Reached*, *supra* note 66.

⁶⁹ See Peter Baker, *Water Pact Between Va., N.C. Dries Up; Governor, Legislature Disagree Over Special Session Conditions*, WASH. POST, June 28, 1995, at D3.

⁷⁰ See Peter Baker, *Spirits Sink in Virginia Beach as Water Deal Succumbs to State Politics*, WASH. POST, July 5, 1995, at B6.

⁷¹ See *id.*

⁷² See *FERC OKs Plans for Water Project; Federal Court Challenge Anticipated*, ENERGY REP., July 31, 1995, available in 1995 WL 8063397.

⁷³ See *id.* FERC decided that N.C. water quality was not an issue because section 401 of the CWA only applied, in FERC's opinion, if a discharge is made. For a discussion of this issue, see *infra* Part II.

⁷⁴ See *FERC Approves Plan to Divert Water from Lake Gaston Hydro Project*, INSIDE FERC, July 31, 1995, available in 1995 WL 8123714.

⁷⁵ See *id.*

potable water, and it held the contract to treat all of the water from the Lake Gaston pipeline.⁷⁶ But now, in the middle of the North Carolina court battle for water quality certification, Norfolk released a new water study which showed that existing Norfolk water sources could safely pump as much as an additional eighteen mgd.⁷⁷ North Carolina was already alleging that Virginia Beach was overstating their water needs, and that Virginia Beach's true needs were only sixteen mgd.⁷⁸ With this new study, North Carolina gained valuable ammunition against Virginia Beach's license from FERC to tap into the Project 2009 water, because the license was based upon the balancing of the competing water needs of the region. Now North Carolina had compelling evidence that Virginia Beach had sufficient resources available to it via Norfolk, and therefore, no longer needed to take water from the Roanoke River basin.⁷⁹

While this issue was causing bitter political bickering between Norfolk and Virginia Beach,⁸⁰ the debate caused the Environmental Protection Agency (EPA) to take another look at the pending lawsuit. The EPA filed an *amicus* brief in the U.S. Court of Appeals for the District of Columbia in support of North Carolina's assertion that a North Carolina water quality certification was required by NEPA.⁸¹ FERC weighed in on the other side and supported its conclusion that because no discharge would occur, and the project was wholly in Virginia, no North Carolina certification was required.⁸²

Because the issue before the court would now decide whether or not a state that was downstream of a water project could influence the permitting of an upstream water project in a neighboring state, a large number of states' Attorneys General became interested in the lawsuit. By December 13, 1996, the Attorneys General of forty states had signed their names to an *amicus* brief submitted to the D.C. Circuit Court of Appeals,

⁷⁶ See Karen Weintraub, *Water Study May Affect Pipeline Battle*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), June 16, 1996, at A1.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *Virginia Beach, Norfolk at Odds Over Water Report: Steady, Everybody*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), June 20, 1996, at A12.

⁸¹ See *Agency Says N.C. Should Not Be Allowed to Veto Gaston Pipeline*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Nov. 8, 1996, at B5. EPA agreed that section 401 of the Clean Water Act, 33 U.S.C. § 1341 (1994 & Supp. IV 1998), gives the state power to regulate pursuant to a state water quality certification, even without a "discharge" as generally defined. See *id.*

⁸² See *id.*

supporting North Carolina.⁸³ Not to be outdone, the United States Justice Department also filed a brief with the court, stating that North Carolina could block the pipeline if it could demonstrate that the reduced water flow would adversely affect downstream water quality.⁸⁴ Both sides asserted that the Justice Department brief supported their positions.⁸⁵

The lawsuit was finally argued on February 4, 1997, and decided on May 9, 1997.⁸⁶ Over a vigorous dissent, the court held that without a discharge of a pollutant, or one of the enumerated types of discharges, the CWA was not invoked.⁸⁷ The result, therefore, was that no certification was necessary from North Carolina.⁸⁸ With this final review of FERC's agency action in granting the permits to VEPCO and Virginia Beach, and the Supreme Court's denial of certiorari, the last hurdle was cleared for Virginia Beach to finalize the construction of the pipeline and begin pumping water. On August 20, 1997, more than fourteen years after the first lawsuit was filed, Lake Gaston water was finally flowing to the residents of Virginia Beach, and the water restrictions the City had been living with for almost fifteen years were lifted.⁸⁹

Between the private suits⁹⁰ and the governmental suits in federal court, North Carolina was able to delay the Virginia Beach pipeline for years. This was not the most efficient use of taxpayers' money, and final

⁸³ See Karen Weintraub, *40 States Now Support N.C., The Backing Might Not Sway Judges, But It Can't Hurt, Say Legal Experts*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Dec. 14, 1996, at B1. See also *26 States Back North Carolina in Its Quest to Overturn Pipeline Permit*, WEST'S LEGAL NEWS 13359, Dec. 16, 1996, [hereinafter *26 States*], available in 1996 WL 715884 (describing the brief's argument that FERC overstepped its regulatory bounds by permitting the pipeline).

⁸⁴ See *Both Sides on Pipeline Fight Applaud Brief*, GREENSBORO NEWS & RECORD (N.C.), Dec. 25, 1996, at B5.

⁸⁵ See *id.*

⁸⁶ See generally *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997), *cert. denied*, 118 S.Ct. 1036 (1998).

⁸⁷ See *id.* at 1187.

⁸⁸ See *id.*

⁸⁹ See Karen Weintraub, *Another Win in Gaston Water Wars*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Aug. 23, 1997, at B1.

⁹⁰ By the time the pipeline had reached the operational stage, various environmental groups and waterfront landowners, alleging damages caused by the pipeline through depriving them of their riparian rights, or rights to enjoy and use the water that fronted their property, had filed countless lawsuits. See Karen Weintraub, *Beach Scores Another Legal Win in Fight Over Lake Gaston Water*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Feb. 15, 1997, at B3. Eventually, all of these cases were dismissed, either because the plaintiffs did not have standing, or because they could not prove damages. See *id.* These lawsuits were filed as collateral attacks on the pipeline project, and served to help delay the proceedings.

figures for the two states' legal bills have not been forthcoming. As this chronology attempts to illustrate, the best chance for a lasting resolution—the doomed interstate compact—was destroyed not by environmental activists or interstate rhetoric, but by political divisions within Southside Hampton Roads itself. If the Virginia legislature had exercised strong political leadership, perhaps the issue could have been satisfactorily resolved in the summer of 1996.⁹¹

II. DISCHARGES AND DISCRETION

A. Discharges

The most divisive issue in the legal controversy surrounding the pipeline centered on the definition of a “discharge,” pursuant to section 401 of the CWA.⁹² From the beginning it was clear that the legal significance of this definition would shape the debate. Section 401 of the CWA requires that any federally-permitted activity that could potentially result in a discharge into navigable water must seek a state water quality certification.⁹³ This allows states to impose their own water quality standards on federal activities within their borders.

North Carolina urged that section 401 be read expansively to allow the provisions of the CWA to apply to upstream water projects that could potentially impact downstream water quality. FERC, however, read section 401 more narrowly, urging that its application be restricted to cases where a discharge of pollutants was clearly involved. This reading would save FERC from having to deal with the different water quality standards of the fifty states when analyzing permit and licensing decisions.

The history behind this debate has been raging since 1946, when the Supreme Court handed down the *First Iowa* decision.⁹⁴ In *First Iowa*, the forerunner of FERC, the Federal Power Commission (FPC), convinced the Court that the Federal Power Act (FPA)⁹⁵ preempted all but a few state proprietary interests.⁹⁶ This decision gave the FPC, and later FERC,

⁹¹ See Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 10 (1997). The author served as law clerk to Judge Patricia M. Wald, U.S. Court of Appeals for the D.C. Circuit, the lone dissenter in *North Carolina v. FERC*.

⁹² See 33 U.S.C. § 1341(a) (1994).

⁹³ See *id.*

⁹⁴ *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946).

⁹⁵ 16 U.S.C. §§ 791(a)-825(r) (1994).

⁹⁶ See *First Iowa*, 328 U.S. at 166-67.

almost unlimited control over federal hydropower permitting and licensing, with little state interference.⁹⁷ All of that changed, however, when in 1994 the Supreme Court took a dramatically different approach to another federal hydropower permit in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (*PUD No. 1*).⁹⁸

PUD No. 1 involved a hydropower project on the Dosewallips River in the State of Washington.⁹⁹ Washington had adopted a fairly comprehensive set of water quality standards, and the Dosewallips River was designated as AA (extraordinary), the highest of Washington's five classes of water designations.¹⁰⁰ The City of Tacoma, and Jefferson County Public Utility District Number One, wanted to build a hydroelectric project on the Dosewallips.¹⁰¹ The project was to utilize a bypass reach¹⁰² that would divert some of the river's flow to a generator, and return the diverted water via a tailrace.¹⁰³ Much like the minimum flow requirements that North Carolina asserted in the Lake Gaston project, the Washington Department of Ecology determined that the residual water flow in the river would be insufficient for the steelhead trout and the coho and chinook salmon that inhabited the Dosewallips River.¹⁰⁴

Unlike the holding in *First Iowa*, the Court upheld the state's right to impose its water quality standards on FERC hydropower projects.¹⁰⁵ Citing section 401 as giving the state the power to require water quality certification prior to federal action, the court went on to note the EPA's position that with "401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards . . . and with 'any other appropriate requirement of State law.'"¹⁰⁶ Applying its interpretation of Congress' intent, the Court upheld

⁹⁷ See Liza Devon Herzog, Note, *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S.Ct. 1900 (1994): *Who Has the (Water) Power Under the Clean Water Act to Address and Protect State Hydroelectric Interests?*, 15 TEMP. ENVTL. L. & TECH. J. 101, 102-03 (1996).

⁹⁸ 511 U.S. 700 (1994).

⁹⁹ See *id.* at 708.

¹⁰⁰ See *id.* at 705.

¹⁰¹ See *id.* at 708-09.

¹⁰² See *id.* at 709.

¹⁰³ See *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 709 (1994). A "tailrace" is a race for conveying water away from a point of industrial application (as a waterwheel or turbine). See WEBSTER'S NEW INTERNATIONAL DICTIONARY 2329 (3d ed. 1961).

¹⁰⁴ See *PUD No. 1*, 511 U.S. at 709.

¹⁰⁵ See *id.* at 700.

¹⁰⁶ *Id.* (quoting EPA, WETLANDS AND 401 CERTIFICATION 23 (1989)).

the "EPA's conclusion that *activities*—not merely discharges—must comply with state water quality standards is a reasonable interpretation of §401, and is entitled to deference."¹⁰⁷

The CWA requires the states to promulgate a comprehensive set of water quality standards.¹⁰⁸ The standards must designate the usage of the waterway, the criteria by which the waterways will be protected, and an antidegradation policy.¹⁰⁹ It was in this antidegradation policy that the court found Washington's best reason for asserting its water quality standards for the hydropower project.¹¹⁰

The Washington Department of Ecology contended, and the Supreme Court agreed, that the implementation of the "antidegradation policy in a manner 'consistent' with existing uses of the stream" required a state water quality certification to ensure that the diversion of water would not reduce the stream flow to levels that would degrade the fisheries and recreational use of the Dosewallips River.¹¹¹ This is exactly the type of argument that North Carolina and the RRBA were making in the Lake Gaston battle—that the decreased stream flow could have adverse effects on the downstream fisheries, and that it was an abuse of the Corps of Engineers' discretion to discount those concerns without an EIS.¹¹²

This approach to section 401 would seem to require that all federal projects that utilize or affect navigable waters seek state certification.¹¹³

¹⁰⁷ *Id.* at 712. Note that the court granted deference to the EPA per *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the EPA is the federal agency tasked with administering the CWA.

¹⁰⁸ See Federal Water Pollution Control (Clean Water) Act § 303, 33 U.S.C. § 1313 (1994).

¹⁰⁹ See 33 U.S.C. § 1313(d)(4) (1994); 40 C.F.R. §§ 131.2, 131.6(a), 131.10 (1998). The anti-degradation policy was created by a 1987 amendment to the Clean Water Act, see Water Quality Act of 1987 § 404(b), Pub. L. No. 100-4, 101 Stat. 7 (codified at 33 U.S.C. 1313(d)(4)), to ensure that no stretch of navigable water would be allowed to degenerate below current conditions. Under this policy, Congress announced that water quality could only be maintained or improved upon. See 33 U.S.C. § 1313(d)(4).

¹¹⁰ See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 718-19 (1994).

¹¹¹ *Id.* at 719.

¹¹² See *North Carolina v. Hudson*, 665 F. Supp. 428, 438 (E.D.N.C. 1987).

¹¹³ See Katherine P. Ransel, *The Sleeping Giant Awakens: PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 25 ENVTL. L. 255, 260-61 (1995); Herzog, *supra* note 96, at 107; Alia S. Miles, Comment, *Searching for the Definition of "Discharge": Section 401 of the Clean Water Act*, 28 ENVTL. L. 191, 192 (1998). See generally Lynda L. Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests*, 47 U. PITT. L. REV. 95 (1995) (discussing private landowner rights against water consumption by upstream riparians, whose suits were dismissed in Virginia state court, and discounted in federal court).

This was certainly the EPA's stand in *PUD No. 1*. The Court specifically noted that a change in water quantity could easily be seen as a change in water quality, as so many water quality factors were quantity-dependent or -driven.¹¹⁴ But, when North Carolina attempted to utilize this logic to compel Virginia to seek a state certification from North Carolina, the EPA declined to interpret this change in water quantity as implicating any downstream anti-degradation policy North Carolina might have.¹¹⁵

B. Discretion and Deference

Discretion is closely linked to the concept of deference. Discretion is the amount of self-determination that an agency has, or the extent to which an official's actions "cannot be reviewed and reversed by any other official."¹¹⁶ Deference is the corresponding amount of freedom a court will give agency action before engaging in judicial review or fact-finding. Judge Friendly approached the concept this way: "[T]he trial judge has discretion in those cases where his ruling will not be reversed simply because an appellate court disagrees."¹¹⁷ These concepts are important because the court in *Hudson I* upheld the Corps' decision that no EIS was necessary, and that the Corps' action was not arbitrary and capricious, based on the premise that the agency was acting within its discretion.¹¹⁸

The debate over the role discretion plays in reviewing executive agency action takes a more important position when viewed in the light of the Supreme Court's opinion in *Chevron*.¹¹⁹ In that case, the Court laid out a two-part test for statutory interpretation. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹²⁰

Second, if Congress has not spoken directly to the issue, the reviewing court is to examine the agency's interpretation to see if it is a

¹¹⁴ See *PUD No. 1*, 511 U.S. at 719-20.

¹¹⁵ See *North Carolina v. FERC*, 112 F.3d 1175, 1186-87 (D.C. Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 882.

¹¹⁶ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 32 (1977).

¹¹⁷ Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754 (1982).

¹¹⁸ See *North Carolina v. Hudson*, 665 F. Supp. 428, 437 (E.D.N.C. 1987).

¹¹⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹²⁰ *Id.* at 842-43.

permissible interpretation of the statute.¹²¹ Courts have applied different criteria when analyzing the second step of *Chevron*.

The biggest battle in the unresolved war over *Chevron* ambiguity involves statutory interpretation Intentionalism, as they call it, "refers to the use of a variety of tools, including legislative purpose and legislative history, in an effort to determine the intent of the legislature when it included a particular word or phrase in a statute." Textualism, on the other hand, "refers to the use of a different set of tools, including dictionary definitions, rules of grammar, and canons of construction, in an effort to derive the putatively objective meaning of the statutory word or phrase."¹²²

The D.C. Circuit court utilized the textualist approach to statutory interpretation, and after performing the "*Chevron* two-step,"¹²³ came to the conclusion that absent a discharge of pollutants, section 401 of the CWA did not apply.¹²⁴ It mechanically applied the definition of a "discharge" to the facts and decided that no discharge had occurred; therefore, the statute did not apply.¹²⁵ North Carolina, on the other hand, argued the intentionalist viewpoint that the intention of the CWA could not be to remove downstream neighbors from the decision-making process, and argued that the withdrawal of water would result in an "altered discharge" that would invoke the statute.¹²⁶

It can be seen that intentionalism can be used to expand statutory scope and can allow judicial interpretation of statutory schemes to be very broad if the court so chooses.¹²⁷ Textualism, with its literal approach to a statute's wording, would appear to lead to a narrowing of the court's review, reducing the amount of judicial creativity that could be

¹²¹ See *id.* at 843.

¹²² Diarmuid F. O'Scannlain, *Current Trends in Judicial Review of Environmental Agency Action*, 27 ENVTL. L. 1, 6 (1997) (quoting Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995)).

¹²³ See *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), *cert. denied*, available in 1998 U.S. LEXIS 882.

¹²⁴ See *id.*

¹²⁵ See *id.* at 1187-88.

¹²⁶ See *id.* at 1188.

¹²⁷ See O'Scannlain, *supra* note 122, at 6-7.

summoned, by tying the court to using conventional definitions.¹²⁸ The D.C. Circuit, for example, quoted *Webster's International Dictionary* to support its interpretation of the statute.¹²⁹

Nonetheless, some commentators contend that textualism leads to greater agency deference as legislative history becomes largely ignored by the courts.¹³⁰ As this argument goes, certain members of the Court will merely look to see if a statute is ambiguous. If it can be found to contain ambiguity, the Justices will defer to the agency's interpretation, unless it is clearly erroneous.¹³¹ This may be exactly what the D.C. Circuit Court did in the Lake Gaston case—deferring to FERC's interpretation of the FPA.

To see if the D.C. Circuit court decided the Lake Gaston issue correctly, it must be analyzed in light of the Supreme Court's holding in *PUD No. 1*, arguably the single most important case in resolving section 401 disputes. *PUD No. 1* expanded the doctrine of statutory interpretation, in regard to section 401, beyond textualist boundaries.¹³² The Court looked to the intent of the regulatory scheme, therefore, embracing the intentionalist view.¹³³ Consequently, it was no surprise that Justice Scalia, the advocate of textualism, dissented from *PUD No. 1*.¹³⁴

C. Analysis

While the Court took an intentionalist approach in *PUD No. 1*, the agencies resisted the consequent loss of discretion. As the Court expands the judicial interpretation role, agency discretion necessarily suffers. More judicial interference intrudes on the power of the executive agency, because the court is limiting the amount of deference it will give agency

¹²⁸ See *id.*

¹²⁹ See *North Carolina v. FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 63 (3d. ed. 1961) for its definition of the word "alter").

¹³⁰ See, e.g., Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 401 (1996) (citing Justice Scalia's interpretation of the *Chevron* doctrine as protective of agencies' discretion in interpreting broad legislation).

¹³¹ See *id.* at 402-03.

¹³² See *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 712 (1994).

¹³³ See *id.*

¹³⁴ See *id.* at 724. Justice Thomas argued in a dissent joined by Justice Scalia, an outspoken textualist, that "the text and structure of section 401 indicate that a State may impose . . . only those conditions that are related to discharges." *Id.* at 728 (Thomas, J., dissenting).

action.¹³⁵ This curtailing of agency autonomy is why FERC took a textualist view of section 401 in both *PUD No. 1* and the Lake Gaston dispute.¹³⁶

This is what FERC argued in all of the preceding lawsuits, and indeed, is the basic argument it espoused in *First Iowa*.¹³⁷ The FERC argument is that Congress intended to centralize all the permitting and decision-making involved in hydropower projects into one agency.¹³⁸ Important natural resource management would be needlessly complicated and politicized if all the affected states could require that their state agencies impose restrictions on these types of projects.

The Court said in *Oregon Natural Desert Ass'n v. Thomas*,¹³⁹ however, that *PUD No. 1* stood for the principle that in order for *Chevron*-style deference to apply to agency action, the agency must have congressional delegation of administrative authority, and only the particular agency entrusted to administer the statute is entitled to deference.¹⁴⁰ This became important because FERC argued that it should be given deference, and the court agreed.¹⁴¹ This is interesting because under *ONDA* and *PUD No. 1*, only the agency tasked with administering the CWA should have been granted deference, and that agency is the EPA.¹⁴²

In the Lake Gaston case, the EPA had changed its position, from originally agreeing with FERC's position that section 401 of the CWA did not apply, to agreeing with North Carolina that it did apply.¹⁴³ Accordingly, the EPA asserted that under their new reading of the CWA section 401(d), a North Carolina water quality certification was required prior to federal action.¹⁴⁴ This meant that the EPA had taken the position

¹³⁵ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

¹³⁶ See Bernard Schwartz, "Shooting the Piano Player"? Justice Scalia and Administrative Law, 47 ADMIN. L. REV. 1, 50 (1995).

¹³⁷ See *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 721-22 (1994).

¹³⁸ See *id.* at 722.

¹³⁹ 940 F. Supp. 1534, 1540-41 (D. Or. 1996).

¹⁴⁰ See *id.* at 1540-41; Dana G. Leonard, *PUD 1, Thomas, and the Future of Section 401 of the Clean Water Act: An Expansion of State Regulation*, 18 J. LAND RESOURCES & ENVTL. L. 293, 305-06 (1998).

¹⁴¹ See *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997).

¹⁴² See, e.g., 18 C.F.R. § 4.38(a)(1) (1998) (noting that the EPA has the power to administer the CWA).

¹⁴³ See *Agency Says N.C. Should Not Be Allowed to Veto Gaston Pipeline*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Nov. 8, 1996, at B5.

¹⁴⁴ See *id.*

that the issuing of permits and easements to the City of Virginia Beach should have been conditioned upon receiving the certification from North Carolina, or North Carolina waiving the certification requirement.¹⁴⁵

FERC should have listened to and respected the EPA's position regarding the North Carolina water quality certification, because the federal regulations that govern FERC's power to issue permits under the FPA require FERC to "consult" with the EPA.¹⁴⁶ Indeed, that section of the Code specifically states that section 401 of the CWA requires not only federal agency consultations, but also water quality certification from the state.¹⁴⁷

Because the EPA has been tasked by the Congress to use its special expertise to oversee this important federal program, the EPA's expertise should have been respected in this case. At a minimum, because of the agency's administration of the CWA, the EPA's interpretation of section 401 of the CWA should have been respected by FERC.¹⁴⁸

The decision in *PUD No. 1* dictates that only the EPA's interpretation of the CWA, and not FERC's or the Corps of Engineers' interpretation, is entitled to deference by the reviewing court under the *Chevron* doctrine.¹⁴⁹ Because the EPA said that the Virginia Beach pipeline needed a North Carolina water quality certification, the court should have given deference to that position.¹⁵⁰ Using the intentionalist approach, such as in *Chevron*, *ONDA*, and *PUD No. 1*, if a court uses the broad interpretation of the word "discharge," and finds that the statute contains ambiguity, it would then be compelled to use the second prong of *Chevron*. Under that test, it would appear that the EPA's interpretation of section 401 is a reasonable reading of subsection (d), and therefore, entitled to deference.¹⁵¹

¹⁴⁵ See 26 States, *supra* note 83.

¹⁴⁶ See 18 C.F.R. § 4.38(a)(1) (1998) ("Before it files any application for . . . an exemption from licensing . . . a potential applicant must consult with the relevant Federal, State, and interstate resource agencies, including . . . the United States Environmental Protection Agency . . .").

¹⁴⁷ See *id.* "[T]he appropriate State water resource management agencies" would be the State regulatory agency that is tasked with either water resource management or environmental quality. *Id.*

¹⁴⁸ See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.").

¹⁴⁹ See *Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534, 1540-41 (D. Or. 1996).

¹⁵⁰ See *id.*

¹⁵¹ See Leonard, *supra* note 140, at 293.

Having established that under an intentionalist view, a broad reading of "discharge" is allowed, and that the EPA interpretation of section 401 requires North Carolina approval, the question is whether the textualist view would also lead to a victory for North Carolina.¹⁵² Initially, the textualist approach would seem to indicate what the Lake Gaston court said, that the "plain language" meaning of "discharge" would require an addition of some physical component to the water downstream of the Lake Gaston pipeline.¹⁵³ As water is being removed, no "discharge" takes place, and without that threshold event, section 401 is not invoked.¹⁵⁴ Because section 401 is not invoked, no North Carolina certification is needed, and the pipeline project wins.¹⁵⁵

The D.C. Circuit found two major differences between this case and *PUD No. 1*: the magnitude of the water withdrawal, and the water reallocation contract into which the Corps of Engineers and Virginia Beach had entered.¹⁵⁶ Additionally, both sides of the Lake Gaston suit stipulated that no conventional discharge would result from the operation of the pipeline, only an "altered discharge."¹⁵⁷ There does not seem to be any dispute that the amount of water the pipeline will withdraw from Lake Gaston will represent a reduction of approximately one percent of downstream water flow quantity.¹⁵⁸ Compare that reduction to *PUD No. 1*, where the amount of water diverted from the Dosewallips River was approximately seventy-five percent of the stream flow.¹⁵⁹ Also, the water quality standard articulated in *PUD No. 1* dealt not only with the quantity of water flow, but a mix of other factors such as aesthetic beauty, biodiversity, water clarity and purity, and the assurance that all recreational activity currently enjoyable on the river would continue without degradation.¹⁶⁰ It is much easier to note a deterioration of the types of recreation that can be enjoyed on a river, and the reduction of aesthetic beauty, if seventy-five percent of the river is being diverted, than if only one percent is eliminated.

¹⁵² See O'Scannlain, *supra* note 122, at 1.

¹⁵³ North Carolina v. FERC, 112 F.3d 1175, 1187-88 (D.C. Cir. 1997).

¹⁵⁴ See *id.* at 1188.

¹⁵⁵ See *id.* at 1189.

¹⁵⁶ See *id.* at 1186.

¹⁵⁷ *Id.* at 1186-87. See also *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 709 (1994) (describing an altered discharge scenario—installation of a dam, which, although it significantly alters the character of the waterway, adds nothing new to the water, only diminishes the waterway's rate of flow).

¹⁵⁸ See North Carolina v. FERC, 112 F.3d 1175, 1182-89 (D.C. Cir. 1997).

¹⁵⁹ See *PUD No. 1*, 511 U.S. at 709.

¹⁶⁰ See *id.* at 706 n.1.

Also, in *PUD No. 1*, the hydropower project did not have any mechanism like the water reallocation contract that Virginia Beach had procured from Lake Kerr.¹⁶¹ This type of contract ensures that an adequate water flow will be available during critical fish spawning seasons.¹⁶² The project in *PUD No. 1* did not have a contract of this type, and during the spawning season of the salmon, an inadequate amount of water flow might develop, thus harming the salmon hatcheries.¹⁶³

Given the significant differences between the Lake Gaston pipeline and the *PUD No. 1* hydropower project, it should not be surprising that the court distinguished the holding in *PUD No. 1*. Nonetheless, the court in Lake Gaston was not required to accept FERC's interpretation of section 401, because *some* case law existed to the effect that the word "discharge" could be read broadly.¹⁶⁴ Also, under the *Chevron* test, EPA's interpretation of section 401, not FERC's, was entitled to judicial deference.

III. STANDARDS OF REVIEW

The other major legal issue in the Lake Gaston pipeline controversy dealt with the standards of review that the North Carolina district court applied to the actions of the Corps of Engineers and FERC.¹⁶⁵ The court applied the "arbitrary and capricious" test and the "hard look" test to the Corps of Engineers' and FERC's permitting procedures in the 1987 case.¹⁶⁶ The court looked to the Federal Administrative Procedure Act (APA) for guidance in reviewing the construction permit dispute in 1987.¹⁶⁷ Specifically, the court asserted its power to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹⁶⁸

The court took its cues from two cases that discussed this most deferential of review standards, *Overton Park*¹⁶⁹ and *Kleppe*.¹⁷⁰ While

¹⁶¹ See *North Carolina v. Hudson*, 731 F. Supp. 1261, 1264 (E.D.N.C. 1991).

¹⁶² See *id.*

¹⁶³ See *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 709 (1994).

¹⁶⁴ See *North Carolina v. FERC*, 112 F.3d at 1199.

¹⁶⁵ *North Carolina v. Hudson*, 665 F. Supp. at 436-37.

¹⁶⁶ See *id.* at 440, 443.

¹⁶⁷ See *id.* at 436.

¹⁶⁸ *Id.* (quoting 5 U.S.C. § 706(2)(A) (1994)).

¹⁶⁹ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971).

these cases do indeed lay out the type of review the court should conduct in accordance with section 706(2)(A) of the APA, that standard of review is most commonly used by courts when reviewing agency rule-making procedures.¹⁷¹ Indeed, the court discussed the case as if reviewing an agency rule, quoted cases that review agency rule making processes, and used the terminology of reviewing an agency decision.¹⁷²

This was not a case about agency rule-making, but about agency permitting and licensing procedures.¹⁷³ This is an important distinction to make when reading the definitions that are used in the APA. The APA speaks of two types of agency processes: rulemaking¹⁷⁴ and adjudication. An "adjudication" is specifically defined as the process of creating an agency order.¹⁷⁵ An "order" is the APA's terminology for a license.¹⁷⁶ The plain language used in the APA when discussing licensing procedures leads to the conclusion that the agency was not making a rule when it issued a permit. Section § 551(8) of the APA says that a 'license' includes "the whole or part of an agency permit, certificate, approval, . . . or other form of permission."¹⁷⁷

From this definition, the plain language of the statute would imply that when FERC was expediting the construction permits by foregoing the

The court must consider, first, whether the agency acted within the scope of its authority and, second, whether the actual choice made by the agency was arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law. To make this finding the court must consider . . . whether there was a clear error of judgment. This standard of review is highly deferential and the agency decision is "entitled to a presumption of regularity."

North Carolina v. Hudson, 665 F. Supp. 428, 437 (E.D.N.C. 1987) (quoting *Overton Park*, 401 U.S. at 415).

¹⁷⁰ See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) ("[T]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'").

¹⁷¹ 5 U.S.C. § 706(2)(A) applies to those situations not controlled by § 706(2)(E), which controls agency action conducted subject to §§ 556 and 557. See 5 U.S.C. § 706 (1994).

¹⁷² See *North Carolina v. Hudson*, 665 F. Supp. at 436-37.

¹⁷³ See *id.* at 431.

¹⁷⁴ "[R]ule making' means agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (1994).

¹⁷⁵ See 5 U.S.C. § 551(7).

¹⁷⁶ "[O]rder' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but *including licensing*." 5 U.S.C. § 551(6) (emphasis added).

¹⁷⁷ 5 U.S.C. § 551(8).

EIS, and issuing the initial FONSI, it was involved in "licensing," as that term is defined in the APA, and therefore, issuing an agency "order."¹⁷⁸ Because FERC was issuing an "order," FERC was necessarily involved in an "adjudication."

Having established that FERC's permitting and licensing of the pipeline construction was an adjudication, the disputes that RRBA and North Carolina raised about the necessity of an EIS, the effect of the pipeline on the striped bass, and the validity of the Corps FONSI should have been conducted according to the section of the APA dealing with adjudications.¹⁷⁹ Under the APA, adjudications are not conducted like "notice and comment" rulemaking.¹⁸⁰ Adjudications are formal, trial-like proceedings,¹⁸¹ conducted on a formal record.¹⁸² These types of proceedings would have compelled the Corps of Engineers and FERC to produce evidence in an adversarial process and to have their experts cross-examined by the other parties to the dispute.¹⁸³

In addition to giving the parties different rights and responsibilities at a formal hearing, the invocation of the adjudication sections of the APA¹⁸⁴ gives rise to a different standard of review.¹⁸⁵ The standard of review to be applied in reviewing an agency adjudication is the "unsupported by substantial evidence" standard.¹⁸⁶ "Substantial evidence" review is significantly different than "arbitrary and capricious" review, or "hard look" review.¹⁸⁷

"Substantial evidence" review is a higher standard of review than "arbitrary and capricious" review and requires that the reviewing court weigh the evidence that the agency considered in making its decision.¹⁸⁸ The reviewing court will ensure that the agency based its decision on

¹⁷⁸ See *North Carolina v. Hudson*, 665 F. Supp. 428, 432-33 (E.D.N.C. 1987).

¹⁷⁹ See 5 U.S.C. § 554.

¹⁸⁰ Compare 5 U.S.C. § 553 (1994) (requiring that an agency make public announcements regarding its actions, allow time for public comments, and that the agency address those comments) with 5 U.S.C. § 554 (1994) (requiring a formal proceeding whereby the agency must defend itself in an adversarial setting).

¹⁸¹ See *id.* §§ 556-557.

¹⁸² See *id.* § 554.

¹⁸³ See *id.* § 556(d) ("A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.").

¹⁸⁴ See *id.* §§ 554, 556, 557.

¹⁸⁵ See *id.* § 706(E)-(F).

¹⁸⁶ See 5 U.S.C. § 706(E)-(F) (1994).

¹⁸⁷ See Roy A. Schotland, *Scope of Review of Administrative Action, Remarks Before the D.C. Circuit Judicial Conference* (March 18, 1974), in 34 FED. B.J. 54, 59 (1975).

¹⁸⁸ See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-78 (1951).

“such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.”¹⁸⁹ As the court held in *Consolidated Edison*, “substantial evidence is more than a mere scintilla.”¹⁹⁰

For example, compare the substantial evidence review, as discussed above, with the D.C. Circuit’s definition of “hard look” review in *Greater Boston Television Corp. v. FCC*.¹⁹¹ “Hard look” review entails the court looking for “danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.”¹⁹² The role of the court is to ensure that the agency has taken a “hard look” at the issues, not that the court should take a “hard look.”¹⁹³

The various standards of review have been referred to as “mood points” that the court should start from when analyzing agency actions.¹⁹⁴

[T]he standards may be seen as expressing the “mood point” or the critical attitude with which the court should approach the agency. . . . In terms of attitude, the reasonableness and arbitrariness standards point judicial review in emotionally opposite directions. The reasonableness standard requires the court to reach the *positive* conclusion that the agency’s decision is reasonable before it may accept that decision. The arbitrariness standard requires only that the court reach the *negative* conclusion that the agency’s decision is not arbitrary in order to accept that decision. Thus, in order to uphold the agency under the reasonableness standard, the court must to some extent approve of the agency’s determination, even if it does not reach the point of agreement. But, in order to uphold the agency under the arbitrariness standard, the court need only reach the point at which it can conclude the agency’s decision is not intolerable.¹⁹⁵

In this scenario, the court should not have looked to unreasonable action by the Corps of Engineers as it would when analyzing agency action under

¹⁸⁹ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938).

¹⁹⁰ *Id.*

¹⁹¹ 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

¹⁹² *Id.* at 851 (footnote omitted).

¹⁹³ See CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 10.5, at 39 (2d ed. 1997).

¹⁹⁴ Schotland, *supra* note 187, at 59.

¹⁹⁵ KOCH, *supra* note 193, § 10.1, at 14-15.

the arbitrary and capricious test. Rather, the court should have looked to whether the Corps of Engineers' decision not to conduct an EIS was reasonable under the totality of the circumstances.¹⁹⁶

In the Lake Gaston permit case, North Carolina and the RRBA both presented evidence and arguments that downstream water quality would be affected.¹⁹⁷ The court, having applied the most deferential of review tests, found that the Corps of Engineers' actions were not arbitrary or capricious.¹⁹⁸ If a "substantial evidence" test were applied, however, the Corps might have had to rebut the proof tendered by the state and RRBA in an administrative hearing. Applying this standard, the court would likely have found the agency action unreasonable in the face of evidence to the contrary, and should have either demanded more agency fact-finding, or that an EIS be conducted. The timing is important, because if in 1987 the court had refused to uphold the construction permits, there might not have been subsequent lawsuits over the EIS and the FERC license amendments.

Furthermore, in an agency adjudication hearing, the burden of proof is upon the applicant, or the proponent of the order.¹⁹⁹ The proponents in this case were FERC, the Corps of Engineers, and the City of Virginia Beach.²⁰⁰ A formal adjudication would have forced Virginia Beach to prove, by substantial evidence, that no adverse effects would be felt downstream. Proof of no effects, when part of a formal record, would probably have prevented some of the litigation that was to follow.

Because the court used an inappropriate standard of review, the agency's action was insufficiently scrutinized. By applying the "arbitrary and capricious" standard of review instead of the "substantial evidence" standard, the burden of proof was put on the wrong party, and the party in the best position to discover the effects of the pipeline was relieved of that responsibility. The court should have held FERC, the Corps of Engineers, and Virginia Beach to a higher standard of proof at the critical permitting stage, and North Carolina and the RRBA should have prevailed in preventing the pipeline from being built without a full-blown EIS.

¹⁹⁶ *See id.*

¹⁹⁷ *See* North Carolina v. Hudson, 665 F. Supp. 428, 438 (E.D.N.C. 1987).

¹⁹⁸ *See id.* at 440.

¹⁹⁹ *See* 5 U.S.C. § 556(d) (1994) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

²⁰⁰ *See* North Carolina v. Hudson, 665 F. Supp. 428, 431 (E.D.N.C. 1987) ("This action seeks judicial review of two decisions of the United States Army Corps of Engineers: (1) to issue a permit to the City of Virginia Beach, Virginia . . .").

IV. THE FUTURE OF LAKE GASTON

Now that the Lake Gaston pipeline has been completed,²⁰¹ has withstood judicial review,²⁰² and is in operation,²⁰³ water restrictions have been lifted.²⁰⁴ Now that the pipeline battle is over, North Carolina says that the fight over the permit renewals for VEPCO Project 2009 is just beginning.²⁰⁵ The VEPCO hydroelectric project that created Lake Gaston is acknowledged to create a discharge, and therefore section 401 of the CWA definitely applies to Project 2009.²⁰⁶

Unfortunately for Virginia Beach, VEPCO's license to operate the plant on Lake Gaston expires in 2001.²⁰⁷ At that time, VEPCO must apply to FERC to renew the license.²⁰⁸ Because section 401 will apply to the Project 2009 license as a whole, rather than a small amendment, a North Carolina water quality certification will be required before FERC can renew VEPCO's license.²⁰⁹ North Carolina has vowed never to allow VEPCO's permit to operate the Lake Gaston hydropower plant to be renewed as long as the pipeline is in operation.²¹⁰ Now that the permitting power is in North Carolina's hands, another legal battle looms.

V. CONCLUSION

The Lake Gaston permitting procedure was flawed in two major respects. First, the court interpreted the case law dealing with section 401 incorrectly. Second, the court applied the wrong standard of review to the

²⁰¹ See Karen Weintraub, *Splash! Gaston Water Rushes In. The Flow Follows 15 Years, 76 Miles and Plenty of Legal Red Tape*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Aug. 21, 1997, at A1.

²⁰² See Karen Weintraub, *Another Win in Gaston Water Wars*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Aug. 23, 1997, at B1. See generally *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997), cert. denied, 522 U.S. 1108 (1998).

²⁰³ See John Murphy, *Quenching the Thirst for Growth 76-Mile Water Lifeline Becomes a Reality at Last. New Water Systems and Partnerships will help area Nurture Development*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Nov. 7, 1997, at B1.

²⁰⁴ See John Murphy, *Beach Lifts Restrictions on Water. Most Hookups Are Still on Hold Until System Reaches Full Capacity*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Nov. 19, 1997, at B1.

²⁰⁵ See Weintraub, *supra* note 202, at B1.

²⁰⁶ See *North Carolina v. FERC*, 112 F.3d at 1186.

²⁰⁷ See Karen Weintraub, *Court Refusal Ends Gaston Battle Power Permit Fight Just Now Starting*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk), Feb. 24, 1998, at B1.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *id.*

major federal action of granting the construction permits to Virginia Beach. In the interpretation of section 401 of the CWA, the court should have followed the holding of *Chevron*, and only granted deference to the EPA's interpretation of the certification requirements of section 401. More importantly, the court should not have granted deference to FERC's and the Corps of Engineers' interpretation of the CWA. This lack of deference would have resulted in those agencies being held to a higher level of judicial review. Both the Fourth Circuit Court of Appeals and the D.C. Circuit Court of Appeals should have adopted the broader "intentionalist" doctrine of construing the "discharge" threshold requirement of the CWA espoused by the EPA, rather than the "textualist" approach that was used in the courts' holdings. This would have the result of invoking the section of the CWA that requires a water quality certification from the State of North Carolina. Additionally, this type of interpretation would be closer to the Supreme Court's interpretation of that section of the CWA, as espoused in *PUD No. 1* and *ONDA*, rather than reverting back to the *First Iowa* approach that seems to have been superceded.

The court should also have viewed the initial license and permitting procedures as an "adjudication" under the APA, rather than as an agency rule making procedure. Under an adjudication review, the court would then have applied the "substantial evidence" standard of review, as opposed to the "arbitrary and capricious" review that was applied. A substantial evidence review would have required the court to scrutinize more closely the agency record and the reasonableness of the agency decision not to conduct an EIS prior to allowing construction to begin, rather than deciding that the agency had not acted unreasonably.

If the Fourth Circuit had applied the proper levels of review and deference, North Carolina would have been allowed to require a state water quality certification prior to the pipeline being constructed. If this had happened, the pipeline might never have been built. More likely, North Carolina and Virginia would have been forced to the negotiating table instead of the courtroom, and a mutually-agreeable settlement might have been reached. This outcome would have brought finality to the Lake Gaston controversy rather than the extended skirmishing expected over the renewal of the project 2009 permit. Once again, Virginia will need to address the issue of downstream water quality certification from North Carolina, but this time North Carolina holds all the cards.