

Environmental Law News



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The End of the Migratory Bird Rule: The Beginning of the End of the Aggregation Theory?

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers

by Jason Harrington, Class of 2002
Washington and Lee University
School of Law

Summary

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"), the United States Supreme Court determined that it is unconstitutional for the United States Army Corps of Engineers ("the Corps") to assert jurisdiction over isolated intrastate waters based upon the so-called "Migratory Bird Rule." The Court determined that the Corp's use of such power conflicts with the traditional right of a state to regulate its own land and water use. Thus, the Corps' authority is limited to waters that have a significant nexus to interstate commerce, which are navigable waters and those waters

that are adjacent to navigable waters. Importantly, however, the Court did not diminish Congress' authority under the aggregation theory of the Commerce Clause. Under this theory, Congress may still retain power to regulate localized activities that affect the environment, such as the use of isolated intrastate waters, if such activities in aggregate have a substantial effect and significant nexus to interstate commerce.

The Migratory Bird Rule

Congress passed the Clean Water Act ("the Act"), 33 U.S.C § 1251 *et seq.* (1994) for the purpose of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.¹

Section 404(a) of the Act gives the Corps authority to regulate the discharge of fill material into "navigable waters."² The Corps may issue a permit to a person in order to allow the discharge of material into navigable waters or deny a permit.³

The Act defines the term "navigable waters" as "the waters of the United States, including the territorial seas."⁴ The Corps issued regulations defining "the waters of the United States" to include intrastate lakes, rivers, streams, wetlands, ponds, and other waters in which the use, degradation, or destruction could affect interstate commerce.⁵ These regulations were designed to more specifically identify and clari-

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Chair's Corner

Another active year for the Environmental Law Section is underway, with several opportunities for your participation. Our winter/spring program will offer a legislative and regulatory update on environmental protection in Virginia. In addition, the Section will co-sponsor two programs on June 14, 2002 at the Virginia State Bar Annual Meeting in Virginia Beach. A joint effort with the Construction Law Section will address "sick" buildings and mold litigation, and a second program is under development with the Administrative Law Section. I hope you will consider participating in these events. Further details will be announced as they become available.

At the 2001 Annual Meeting, the Section co-sponsored a successful program with the Local Government Section, enti-

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Prepared by the staff of
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Washington and Lee University
School of Law
Lexington, Virginia 24450

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Chair's Corner

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tled "Pitfalls and Roadblocks: Environmental Challenges Facing Virginia's Local Governments in Protecting and Serving Their Citizens." I would like to thank the speakers, Paul R. Thompson, Jr. of Woods, Rogers & Hazlegrove, P.L.C. Charles L. Williams of Gentry Locke Rakes & Moore; and Matthew L. Iwicki, now of Boeing Corporation, for their thoughtful and informative presentations.

At the annual meeting, the Section elected Board members to fill vacancies following expiration of the terms of Mary- Ellen Kendall and Dan J. Jordanger. On behalf of the Section, I would like to thank Mary- Ellen and Dan for their service, and welcome our new Board members, Ellen F. Brown and Manning "Chip" Gasch, Jr. I also wish extend our deep appreciation to Immediate Past Chair Edward A. Boling, and recent Vice Chair Matt Iwicki for their effective leadership last year.

Finally, we welcome to our team Maynard Sipe, editor-in- chief of Washington and Lee's Environmental Law Digest. He and his staff, who prepare the Environmental Law News for the Section, are interested in publishing articles by Section members. If you are interested in being published in the Environmental Law News, please contact Maynard at sipem@wlu.edu.

Christopher D. Pomeroy

Articles



The articles in this section are intended to provide analysis and discussion of topics that may interest attorneys who practice in areas of environmental law. The *Environmental Law Digest* welcomes submissions of appropriate articles. Suggestions of topics for articles and other comments are also welcomed. Please send any submissions or comments to the *Environmental Law Digest* at:

Environmental Law Digest
Washington and Lee University
School of Law
Lexington, Virginia 24450

or by e-mail at:

eld@wlu.edu

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Migratory Bird Rule

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fy the reach of the Corps' authority under § 404(a), and not intended to alter or expand its jurisdiction.⁶

Contained within the regulations is the Migratory Bird Rule. This rule refers to a longstanding interpretation by both the Corps and the United States Environmental Protection Agency ("the EPA") that their jurisdiction under § 404(a) extends to intrastate waters:

- a. Which are or would be used as habitat by birds protected by the Migratory Bird Treaties; or
- b. Which are or would be used as habitat by migratory birds which cross state lines; or
- c. Which are or would be used as a habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.⁷

Overview of SWANCC

In *SWANCC*, the United States Supreme Court had to decide whether the Corps could exert § 404(a) jurisdiction over an abandoned sand and gravel pit located solely in northern Illinois because it provided a habitat for migratory birds.⁸ The Court defined "waters of the United States" differently from the regulations issued by the Corps and the EPA.⁹ The Court stated that it would not grant deference to administrative agency interpretation when such an analysis invoked the outer limits of Congress' power by conflicting with a state's traditional right to regulate its own land and water use.¹⁰ The Court agreed with the Corps' original interpretation of the Act in 1974, which defined navigable waters as, "those waters of the United States which are subject to the ebb and flow of the tide and/or...are susceptible for use for purposes of interstate or for-

eign commerce."¹¹ The Court further agreed that, "it is the water body's capability of use by the public for purposes of transportation or commerce that is the determinative factor."¹²

The Court recognized that Congress intended the phrase "navigable waters" to include some waters that are not deemed "navigable" under the typical understanding of the term.¹³ Such waters include wetlands and tributaries that adjoin a navigable waterway.¹⁴ These waters have a significant nexus to navigable waters.¹⁵ Excluded from this definition are ponds that are not connected to open water.¹⁶ Isolated ponds are excluded even if they serve as habitats for migratory birds.¹⁷ Thus, the Court determined that wetlands and tributaries abutting a navigable waterway have a sufficient nexus to interstate commerce, whereas isolated ponds lack a requisite connection.

The Court stated that such a limitation of the word "navigable" is necessary in order to avoid "serious constitutional problems."¹⁸ Such problems arise because by exercising § 404(a) jurisdiction over wholly isolated, intrastate waters through the Migratory Bird Rule, the Corps is infringing upon the traditional role of a state to regulate its own land and water use.¹⁹ The Corps may only do so at the express will of Congress.²⁰ By using the term "navigable" in the Act, Congress did not give the Corps power to infringe upon an area of traditional state concern by regulating the use of isolated intrastate waters based solely upon the Migratory Bird Rule.²¹ "Navigable" gives the Corps and the EPA jurisdiction over "waters that were or had been navigable in fact or which could reasonably be made so."²² Otherwise, the term "navigable" is rendered meaningless.²³ The

Court focused upon 33 U.S.C. § 1251(b), in which Congress recognized that the primary responsibility for preventing, reducing, and eliminating pollution rests in the states.²⁴

Thus, because Congress did not explicitly authorize the regulation of wholly intrastate, isolated waters, the Corps and the EPA no longer have jurisdiction over waters merely via the presence of migratory birds. Rather, the Corps and the EPA may exert jurisdiction only over navigable waters and those waters adjacent to them.

Congressional Power via the Aggregation Theory Unchanged

Congress has power via the Commerce Clause to regulate activities that substantially affect interstate commerce.²⁵ The Seventh Circuit in *SWANCC* found that the presence of migratory birds alone had a substantial effect on interstate commerce.²⁶ The court mentioned that throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds.²⁷ Thus, according to the Seventh Circuit, the cumulative loss of the habitats of migratory birds has a very substantial effect on interstate commerce by limiting these commercial activities.²⁸

The Supreme Court's decision in *SWANCC* did not reach the question of whether Congress itself has the authority under the Commerce Clause to regulate isolated, non-navigable, intrastate waters.²⁹ Congress' authority in this matter stems from the aggregation theory of the Commerce Clause. That theory holds that Congress has the power to regulate a completely intrastate activity even if it has a minimal effect on interstate commerce

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New Student Editors for *Environmental Law Digest* Selected

The *Environmental Law Digest* at Washington and Lee University School of Law is proud to announce its new editorial board for the 2001-2002 school year. The new editors are:

Maynard Sipe, Editor-in-Chief

Maynard Sipe is a third-year student. Prior to attending law school, he worked for several years as a planner with the County of Albemarle. He attended the School of Architecture at the University of Virginia and received a B.A. in City Planning in 1990.

Robert Test, Associate Editor

Robert Test is a third-year student. He graduated from University of Texas at Austin in 1999 with a B.A. in Biology. His interests in environmental law relate to risk assessment and law & economics.

Jason Harrington, Managing Editor

Jason Harrington is a third-year student. He was a biology major at the State University of New York at Binghamton and graduated in 1995. Upon graduation, he will join the firm of Paul, Hastings, Janofsky & Walker, working in their Atlanta office.

David Jensen, Articles Editor

David Jensen is a second-year student. He graduated from Brigham Young University in 1998 with a B.S. in Economics. During this past summer, he worked for the firm of Cozen O'Conner in his hometown of Seattle.

John Piazza, Case Review Editor

John Piazza is a third-year student. Originally from Atlanta, he attended Columbia College and received his B.A. in Environmental Science in May 1999. This past summer, he worked for the Chesapeake Bay Foundation as a legal intern.

Anna Livingston, Legislative Editor

Anna Livingston is a second-year student. Originally from Alexandria, she graduated from Connecticut College in 1998, with a B.A. in American History.

The *Environmental Law Digest* is a student-run organization at the Washington and Lee University School of Law responsible for preparation and editing of the content for the *Environmental Law News*. ☐

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because the aggregate of all similar actions throughout the country has a significant impact on interstate commerce.³⁰

The United States Supreme Court first advanced the aggregation theory in *Wickard v. Filburn*.³¹ In *Wickard*, the Court ruled that the Commerce Clause confers power to Congress over a lone wheat farmer's production of goods not intended for commerce but wholly for consumption on the farm.³² The farmer urged that such consumption was local in character and indirectly or trivially connected to commerce.³³ The Court stated that even if the activity is local and may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.³⁴ Commerce in wheat is large and important. Consumption on the farm amounts to greater than 20 percent of average production.³⁵ That a farmer's own contribution to the demand for wheat may be trivial by itself is not enough to remove the scope of federal regulation from his contribution. If taken together with that of many others similarly situated, the contribution is far from trivial.³⁶

A variety of federal statutes, including environmental and civil rights legislation, rely heavily on the aggregation doctrine for their constitutionality.³⁷ The Court's rulings that such statutes are within the bounds of congressional Commerce Clause power greatly expanded Congress' authority.

However, recent decisions have narrowed this broad grant of power. In *United States v. Lopez*,³⁸ the Court determined that a federal statute regulating guns within a school zone was unconstitutional because Congress acted outside the

bounds of its commerce power.³⁹ The Court determined that a criminal statute by its terms has nothing to do with “commerce” or any sort of economic enterprise.⁴⁰ It is not within a class of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce.⁴¹ Congress failed to show a requisite nexus with interstate commerce.⁴² Legislative findings that showed a substantial effect on interstate commerce were lacking.⁴³ The Court reasoned that it would be difficult to perceive of any limitation on federal power if the statute were upheld, even in areas such as criminal law enforcement, family law, or education where states historically are sovereign.⁴⁴ Thus, the Court essentially determined that the aggregation doctrine only applies to economic or commercial activities that have a sufficient nexus to interstate commerce.

The Court’s federalism concerns materialized again in *United States v. Morrison*.⁴⁵ In *Morrison*, the Court struck down the civil remedy provision of the Violence Against Women Act as outside the boundaries of Commerce Clause power.⁴⁶ The Court held that Congress cannot regulate non-economic, criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.⁴⁷ The Court ruled that the Constitution mandates a distinction between what is truly local and what is truly national, and police power has always been the province of the States.⁴⁸

Thus, recent decisions limited Congress’ authority via the Commerce Clause to commercial or economic transactions. Such transactions should have a substantial effect on and significant nexus to interstate commerce. Furthermore, such regulation should not intrude into the arena of traditional state

functions. Many legal analysts feared a further reduction of congressional power in *SWANCC*.⁴⁹

The *SWANCC* decision is important, not only for what it said, but for what the Court did not decide regarding congressional commerce power via the aggregation theory. The Court did not interpret any constitutional limits upon congressional power. Detracting from Congress’ commerce power via the aggregation theory could greatly limit congressional authority. Re-evaluation and diminution of congressional authority would endanger environmental legislation that relies primarily on the aggregation theory for its constitutionality. In fact, the Court mentioned in *SWANCC* that the Clean Water Act is at the *outer limits* of Congress’ power because of its conflict with the States’ traditional task of regulating their own land and water use.⁵⁰ However, the Court did not rule on whether Congress lacked any power to regulate isolated ponds or lands within a state. Instead, it determined that the Corps had acted outside of its delegated authority.⁵¹

Truly National v. Truly Local Concerns

Justice Stevens’ dissenting opinion in *SWANCC* argues that the Act does not encroach upon the traditional state power over its land use.⁵² Rather, it is an environmental regulation that does not mandate particular uses for land, but requires only that, however the land is used, damage to the environment is kept within prescribed limits.⁵³ Justice Stevens notes that the statute is not a land use code, but is a paradigm of environmental legislation.⁵⁴ Such regulation is an accepted exercise of federal power.⁵⁵ The dissent then warns the majority that limiting the power of the fed-

eral agencies would cripple the Act’s objectives.⁵⁶

The major purpose of the Act was to establish a comprehensive federal policy for the elimination of water pollution.⁵⁷ It commanded federal agencies to give due regard to improvements necessary for the conservation of waters for fish, aquatic life, wildlife, and recreation.⁵⁸ The Corps’ mission included protecting water quality for aesthetic, health, recreational, and environmental uses.⁵⁹ Thus, Congress expanded the definition of navigable waters to include all “waters of the United States.”⁶⁰ The Act does not blur the difference between a purely local and a purely national problem.⁶¹ Protecting migratory birds is a textbook example of a national problem.⁶² Habitat destruction has benefits that are disproportionately local, but the costs are widely dispersed and often borne by citizens in other states.⁶³ The power to regulate commerce properly includes natural resources that generate commerce.⁶⁴ Migratory birds are such resources.⁶⁵ Thus, federal regulation is appropriate and necessary.⁶⁶

The Court may have implicitly endorsed Stevens’ view by declining to grant certiorari to *Gibbs v. Babbitt*.⁶⁷ The *Gibbs* case concerned a Fish and Wildlife Service (“FWS”) regulation limiting the taking of red wolves on private land.⁶⁸ FWS authority for the regulation stems from Congress’ enactment of the Endangered Species Act.⁶⁹ The red wolf rule and other FWS regulations dealing with endangered species have many of the same land-use concerns inherent in the Migratory Bird Rule.⁷⁰

The Fourth Circuit ruled that the taking of red wolves implicates a variety of commercial activities and is closely connected to several interstate markets.⁷¹ The regulation in question is also an integral part of

the overall federal scheme to protect, preserve, and rehabilitate endangered species, thereby conserving valuable wildlife resources important to the welfare of our country.⁷² Invalidating this provision would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans.⁷³ Thus, the Fourth Circuit's decision is consistent with Justice Stevens' dissent in *SWANCC* that environmental protection is a federal concern. The question remains as to how much power Congress possesses to regulate land and water use, when such regulation conflicts with the traditional power of states.

Conclusion

The Corps and the EPA no longer have jurisdiction over national waters merely because of the presence of migratory birds. The Corps and the EPA cannot exert control over isolated, intrastate ponds. The Corps and the EPA can exert jurisdiction only over navigable waters and those waters adjacent to them. If the traditional rights of a state are in question, then agencies can act only if Congress clearly grants such authority. Federal action that impinges upon the customary purview of a state is beyond the scope of the Commerce Clause if it is not an economic or commercial endeavor. Questions remain as to the extent of congressional commerce power to regulate the environment in the face of traditional state concerns.

⁷ 51 FED. REG. 41217 (1986).

⁸ 531 U.S. 159, 162 (2001).

⁹ *Id.* at 172-173.

¹⁰ *Id.* (Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988); Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837, 842-44 (1984)).

¹¹ *Id.* at 166-167 (citing 33 CFR § 209.120).

¹² *Id.* at 166-167 (citing 33 CFR § 209.260(e) (1)).

¹³ *Id.* at 172-173.

¹⁴ *Id.* (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 174.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 170.

²² *Id.* at 170-173.

²³ *Id.* at 170.

²⁴ *Id.* at 172-173.

²⁵ See Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Lopez, 514 U.S. 549 (1995).

²⁶ Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845, 849 (1999).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 531 U.S. 159, 172-173.

³⁰ *Id.* (citing Wickard v. Filburn, 317 U.S. 111 (1942)).

³¹ 317 U.S. 111 (1942).

³² *Id.* at 119.

³³ *Id.* at 120.

³⁴ *Id.* at 125.

³⁵ *Id.* at 126-127.

³⁶ *Id.* at 127.

³⁷ See Jeffrey Ghannam, *Serving Up Civil Rights*, ABA JOURNAL, Feb. 2001, at 46-48; Hughes v. Oklahoma, 441 U.S. 265 (1977); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

³⁸ 514 U.S. 549 (1995).

³⁹ *Id.* at 561.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 562.

⁴³ *Id.* at 563.

⁴⁴ *Id.* at 564.

⁴⁵ 529 U.S. 598 (2000).

⁴⁶ *Id.*

⁴⁷ *Id.* at 617.

⁴⁸ *Id.* at 618.

⁴⁹ See Jeffrey Ghannam, *Serving Up Civil Rights*, ABA JOURNAL, Feb. 2001, at 46-48.

⁵⁰ Solid Waste Agency of N. Cook County, 531 U.S. at 172-173 (emphasis added).

⁵¹ *Id.*

⁵² *Id.* at 191 (Stevens, J., dissenting).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 190 (Stevens, J., dissenting).

⁵⁷ *Id.* at 196 (Stevens, J., dissenting).

⁵⁸ *Id.*

⁵⁹ *Id.* at 193 (Stevens, J., dissenting).

⁶⁰ *Id.* at 196 (Stevens, J., dissenting).

⁶¹ *Id.* at 195 (Stevens, J., dissenting).

⁶² *Id.* at 196 (Stevens, J., dissenting) (citing Missouri v. Holland, 252 U.S. 416, 435 (1920)).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 214 F.3d 483 (4th Cir. 2000), cert. denied, 121 S. Ct. 1081 (2000).

⁶⁸ *Id.*

⁶⁹ *Id.* (citing 16 U.S.C. §§ 1531-44).

⁷⁰ See Gibbs v. Babbitt, 214 F.3d at 486-487.

⁷¹ *Id.* at 492.

⁷² *Id.*

⁷³ *Id.*



No to Non-Delegation in the Clean Air Act

Whitman v. American Trucking Associations, Inc.

by John Piazza, Class of 2002
Washington and Lee University
School of Law

Summary

In *Whitman v. American Trucking Ass'ns., Inc.*,¹ the United States Supreme Court addressed challenges to final rules issued by the Environmental Protection Agency ("EPA") revising national ambient air quality standards ("NAAQS") for ozone and particulate matter ("PM"). The Court's findings are briefly summarized as follows. The Clean Air Act ("CAA") prohibits the consideration of costs of implementation in setting NAAQS. There was no unconstitutional delegation of authority when Congress delegated authority (through the CAA) to the EPA to set NAAQS at levels "requisite to protect public health." EPA's implementation policy for revised ozone NAAQS in "nonattainment" areas was final agency action, and the issue of the legality of the NAAQS implementation policy was ripe for review. Finally, though the Court must defer to EPA's "reasonable interpretation" of silent and/or ambiguous provisions of the CAA, EPA's interpretation that nullified certain CAA provisions was not reasonable.

Procedural History

EPA promulgated and issued interim and final rules revising the primary and secondary NAAQS for

PM and ozone in July 1997.² Pursuant to 42 U.S.C. § 7607(b)(1), American Trucking Associations, Inc. ("ATA") and its co-respondents in No. 99-1257 challenged the final rules in the United States Court of Appeals for the District of Columbia.³ The Appeals Court held the EPA's construction of the CAA to be an unconstitutional delegation of legislative power.⁴ The Court also held that (1) EPA's choice of PM[10] as the indicator for coarse particular matter in the final rule was arbitrary and capricious;⁵ (2) the 1990 revisions to the CAA limited EPA's ability to enforce new ozone NAAQS;⁶ and (3) EPA must consider the possible health effects of ozone when determining NAAQS.⁷ The court rejected claims that: "§109(d) of the Act allows EPA to consider costs; that EPA should have considered the environmental damage likely to result from the NAAQS' financial impact on the Abandoned Mine Reclamation Fund; that the NAAQS revisions violated the National Environmental Policy Act ("NEPA"), Unfunded Mandates Reform Act ("UMRA"), and Regulatory Flexibility Act ("RFA")."⁸

The D.C. Circuit denied EPA's petition for rehearing.⁹ The United States Supreme Court granted certiorari to petitions filed by both the EPA and the ATA.¹⁰ Oral arguments were heard on Election Day, November 7, 2000.

Consideration of Costs of Implementation in Setting NAAQS

The Supreme Court roundly rejected ATA's argument that costs of implementation must be considered by EPA when promulgating NAAQS. In making this decision, the Court expressly upheld the D.C. Circuit decision in *Lead Industries Ass'n.,*

*Inc. v. EPA.*¹¹ In that decision, the D.C. Circuit held that, "economic consideration [may] play no part in the promulgation of ambient air quality standards under Section 109" of the CAA.¹² The Court found no language in § 109 of the CAA¹³ that supported ATA's assertions that costs of implementation must be considered in the promulgation of NAAQS.¹⁴ In addition, the Court rejected respondents' argument that EPA must consider the health effects related to the economic costs of implementing NAAQS.¹⁵ This is the so called "health-health argument." It is based on the assumption that there are measurable countervailing health effects when industries are negatively affected economically. The health-health argument requires EPA to consider these countervailing health effects in order to "protect the public health" and, as a result, must consider the economic costs of implementation of NAAQS. By rejecting this argument, the Court may very well have shut the door on economic cost analysis claims relating to § 109 of the CAA.¹⁶

Justice Breyer issued a concurring opinion for this part of the decision, disagreeing with the majority's position that any authority the CAA grants to the EPA to consider costs must be derived from a "clear" "textual commitment."¹⁷ Justice Breyer advocated reading silences or ambiguity in the language of regulatory statutes as presumptively permitting certain types of "rational regulation," such as the consideration of costs of compliance in setting NAAQS.¹⁸ However, in this case, Breyer interpreted the legislative history, along with the statute's structure, to reflect a congressional decision not to grant EPA the authority to consider costs in setting NAAQS.¹⁹

Non-Delegation

The D.C. Circuit found that the EPA's interpretation of § 109(b)(1) of the CAA constituted an unconstitutional delegation of legislative power.²⁰ The Supreme Court overruled this part of the Appeals Court decision. In doing so, the Court sided with the Solicitor General's assertion that § 109(b)(1) of the CAA requires that "for a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air."²¹ The Court agreed that requisite "means sufficient, but not more than necessary."²² In *J.W. Hampton, Jr., & Co. v. United States*, the Court stated that when Congress confers decision-making authority on agencies, it must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."²³ The Court found that Congress imposed sufficient limits

on EPA's discretion in the Clean Air Act to satisfy the "intelligible principle" criteria of non-delegation.²⁴ Further, the Court noted that the constitutional question in a non-delegation challenge "is whether *the statute* has delegated legislative power to the agency."²⁵ Thus, the D.C. Circuit's holding that EPA's construction of the CAA violated non-delegation was erroneous. If a statute impermissibly delegates legislative power, it is "internally contradictory" for an agency to attempt to correct that defect by restraining its exercise of the delegated power.²⁶ The area of non-delegation inquiry is the statute itself, not the agency's construction of the statute.

In a concurring opinion, Justice Thomas agreed with the Court that § 109 of the CAA contained an "intelligible principle" consistent with the Court's previous holdings on the issue of non-delegation.²⁷ However, Justice Thomas expressed a willingness to address the constitutional validity of the "intelligible principle" doctrine itself.²⁸ Since none of the parties in this case had

addressed this issue, Justice Thomas reserved the right to address this fundamental aspect of modern-day non-delegation doctrine when a more appropriate circumstance presented itself.²⁹

In contrast, Justice Stevens' concurring opinion, with which Justice Souter joined, advocated recognizing Congress's enactment of § 109 of the Clean Air Act as a constitutional delegation of legislative power to the EPA.³⁰ Justice Stevens argued that there is nothing inherently unconstitutional about a Congressional delegation of legislative power to an executive agency, so long as there is a sufficiently intelligible principle within the delegation.³¹

Implementation of NAAQS

The EPA argued that the Court of Appeals lacked jurisdiction over EPA's implementation policy for NAAQS,³² because the policy was not final agency action.³³ In addition, EPA argued that the issue of implementation was not ripe for review.³⁴ The Court found that EPA's implementation policy constituted final agency action under § 307 of the CAA.³⁵ Though EPA facially claimed that its implementation policy was "preliminary" and had no legal force, EPA declined to reconsider it, stating that its earlier implementation decision was conclusive.³⁶ Furthermore, EPA had accepted comments prior to issuing the implementation policy and had published the policy in the *Federal Register*.³⁷ These actions helped convince the Court that EPA's implementation policy constituted final agency action.³⁸

The Court also determined that the issue of implementation was ripe for review. In analyzing the ripeness issue, the Court determined that the issue was one of statutory interpretation "that would not benefit from further factual development."³⁹ In

Credits and Corrections for *Environmental Law News*, Spring 2001

"Rails-to-Trails After *Presault*: A Virginia Perspective" was authored by David Jensen, class of 2003, Washington and Lee University School of Law.

Christopher Luttrell, who authored the article "*Bragg v. Robertson* — Section 404 of the Clean Water Act, and Mountaintop Removal: Where Do We Go from Here?" was a third-year student at Washington and Lee University School of Law. He graduated with the class of 2001.

The summaries of "2001 Select Environmental Bills Passed by the Virginia General Assembly and Approved by the Governor" were prepared by the following *Environmental Law Digest* staff members: Ryan Becker; Steve Brinker; John Piazza; Maynard Sipe; and Robert Test. They were edited by David R. DuBose, legislative editor. ☒

addition, review would not interfere with further administrative action.⁴⁰ In addition, the Court noted that the special judicial review provision of the CAA⁴¹ provided for “preenforcement review.”⁴² It then held that the effects of the implementation issue met the lower hardship standard of the special judicial review provision of the CAA.⁴³

Next, the Court looked to the CAA to determine whether Subpart 1⁴⁴ or Subpart 2⁴⁵ of Part D, Title I applied to the revised ozone NAAQS. “Subpart 1, §§ 7501-7509a, contains general nonattainment regulations that pertain to every pollutant for which a NAAQS exists.”⁴⁶ Subpart 2 contains rules specifically addressing ozone nonattainment areas.⁴⁷ The Court applied the two-part test formulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴⁸ to determine this issue. Applying the first part of the test, the Court concluded that the statute was ambiguous concerning the applicability of Subparts 1 and 2 to revised ozone NAAQS.⁴⁹ Under the second step of the test, the Court found EPA’s interpretation of the statute to be unreasonable.⁵⁰ The EPA argued that Subpart 1 exclusively controlled classification of ozone nonattainment areas in all instances when areas were not in compliance in 1989.⁵¹ The Court held that Subpart 2 “unquestionably” provided for classification of areas that became nonattainment areas after 1989.⁵² At the same time, the Court conceded that Subpart 2 contained “gaps” in its scheme of classifying ozone nonattainment areas.⁵³ Nevertheless, the Court determined that the presence of these “gaps” did not justify EPA’s disregard of Subpart 2.⁵⁴ EPA’s construction of the interaction between Subpart 1 and Subpart 2 was not reasonable because the construction “completely nullified” clearly applicable provisions of Subpart 2.⁵⁵ After

remand to the Court of Appeals, the EPA must develop a reasonable interpretation of the ozone-nonattainment provisions.⁵⁶

Conclusion

In the wake of this decision, it seems that cost of implementation and non-delegation challenges to the CAA have been put to rest. Both the Supreme Court and the Appeals Court made clear that the EPA must not consider economic costs of compliance in promulgation and implementation of NAAQS. In addition, the CAA does contain an “intelligible principle with regard to the setting of NAAQS by EPA,” and is not an unconstitutional delegation of legislative power. Finally, the EPA cannot construe Subparts 1 and 2 of Part D, Title I of the CAA in such a way as to nullify textually-applicable provisions limiting EPA’s discretion. As a result, EPA must construct a reasonable interpretation of ozone nonattainment provisions, consistent with the express statutory language of Subpart 2.

¹ 121 S.Ct 903 (2001).

² See *National Ambient Air Quality Standards for Particulate Matter*, 62 FED. REG. 38,652 (1997); *National Ambient Air Quality Standards for Ozone*, 62 FED. REG. 38,856 (1997).

³ *Am. Trucking Ass’ns v. United States EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

⁴ *Id.* at 1034.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Opinion on Petition for Rehearing*, 1999 U.S. App. LEXIS 28109 (D.C. Cir. October 29, 1999).

¹⁰ *Whitman v. Am. Trucking Ass’ns*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted*, 2000 U.S. LEXIS 3577 (May 22, 2000).

¹¹ 647 F.2d 1130 (D.C. Cir. 1980).

¹² *Id.* at 1148.

¹³ 42 U.S.C. § 7409.

¹⁴ *Whitman v. Am. Trucking Ass’ns*, 121 S. Ct. 903, 911 (2001).

¹⁵ *Id.* at 909.

¹⁶ See *Id.* at 910 (holding that “[cost of implementation] is both so indirectly related to the public health and so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in [CAA] §§ 108 and 109”).

¹⁷ *Id.* at 921 (Breyer, J., concurring).

¹⁸ *Id.*

¹⁹ *Id.* at 922 (Breyer, J., concurring).

²⁰ *Am. Trucking Ass’ns v. United States EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

²¹ *Whitman*, 121 S. Ct. at 912 (emphasis added).

²² *Id.*

²³ 276 U.S. 394, 409 (1928).

²⁴ *Whitman*, 121 S. Ct. at 913.

²⁵ *Id.* at 912 (emphasis added).

²⁶ *Id.*

²⁷ *Id.* at 919 (Thomas J., concurring).

²⁸ *Id.* at 920 (Thomas J., concurring).

²⁹ *Id.*

³⁰ *Id.* at 920 (Stevens J., concurring).

³¹ *Id.* at 921 (Stevens J., concurring).

³² *National Ambient Air Quality Standards*, 62 FED. REG. 38421 (1997).

³³ *Whitman*, 121 S. Ct. at 914.

³⁴ *Id.*

³⁵ *Id.* at 915.

³⁶ *Id.* at 914.

³⁷ *Id.* at 914-915.

³⁸ *Id.*

³⁹ *Id.* at 915 (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586 (1980)).

⁴⁰ *Id.* at 915-916.

⁴¹ 42 U.S.C. § 7607(b).

⁴² *Whitman*, 121 S. Ct. at 916.

⁴³ 42 U.S.C. § 7607(b).

⁴⁴ 42 U.S.C. §§ 7501-7509a.

⁴⁵ 42 U.S.C. §§ 7511-7511f.

⁴⁶ *Whitman*, 121 S. Ct. at 914.

⁴⁷ *Id.*

⁴⁸ 467 U.S. 867 (1984).

⁴⁹ *Whitman*, 121 S. Ct. at 918.

⁵⁰ *Id.* at 916.

⁵¹ *Id.* at 917.

⁵² *Id.*

⁵³ *Id.* at 918.

⁵⁴ *Id.*

⁵⁵ *Id.* at 918-919.

⁵⁶ *Id.* at 919.





Case Digest

United States Supreme Court

Supreme Court Upholds Federal Preemption of State Laws Under the Ports and Waterways Safety Act

United States v. Locke,
529 U.S. 89 (2000)

by Meitra Farhadi, Class of 2002
Washington and Lee University
School of Law

The International Association of Independent Tanker Owners (“Intertanko”), a trade association of oil tanker operators, sought declaratory and injunctive relief from regulations promulgated by the state of Washington. The regulations provided and enforced the best achievable protection (“BAP”) from oil spill

damages. Petitioners claimed that Washington’s BAP standards invaded areas long occupied by the federal government and imposed unique requirements in an area that mandated national uniformity. Petitioners further argued that allowing states to impose differing regulatory regimes on tanker operations would defeat the goal of national governments to develop effective international environmental and safety standards.

The district court rejected Intertanko’s arguments and upheld the state regulations. Intertanko appealed, and the United States intervened on its behalf, contending that the district court’s ruling failed to give sufficient weight to the substantial foreign affairs interests of the federal government. The Ninth Circuit held that the state could enforce its laws, except for the law requiring vessels to install certain navigation and towing equipment.

In reversing and remanding the decision of the Ninth Circuit, the Supreme Court held that: (1) the Oil Pollution Act (“OPA”), 33 U.S.C.A. § 2718(a)(c), did not affect the preemptive impact of the Ports and Waterways Safety Act (“PWSA”), 33 U.S.C.A. § 1221, and its regulations; (2) Title I of the PWSA allows a state to regulate its ports and waterways provided the regulation is based on peculiarities of local waters that call for special precautionary measures; (3) under Title II of the PWSA, only the federal

government may regulate the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tanker vessels; and (4) the PWSA preempted Washington’s tanker regulations regarding general navigation watch procedures, English language skills, training, and casualty reporting.

The Supreme Court reviewed this case under the framework of *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978). The Court stated that the purpose of the savings clause in Title I of the OPA is to preserve state laws that establish liability rules and financial requirements relating to oil spills. *Locke*, 529 U.S. at 105. The Court declined to give broad effect to savings clauses where to do so would upset the careful regulatory scheme established by federal law. The *Ray* Court stated that the relevant inquiry for Title I preemption is whether the Coast Guard has promulgated its own requirement or has decided to impose no such requirement. *Ray*, 435 U.S. at 171-172. The *Ray* Court further explained that Title I of the PWSA preserved state authority to regulate the peculiarities of local waters if no conflict with federal regulatory determinations existed. *Ray*, 435 U.S. at 168. The Court also reaffirmed *Ray*’s holding that under Title II of the PWSA, only the federal government may regulate the “design, construction, alteration, repair, maintenance, operation, equipping, personnel qualifica-

tion, and manning” of tanker vessels. *Locke*, 529 U.S. at 111. Allowing for state laws in this area “would frustrate the congressional desire of achieving uniform, international standards.” *Ray*, 435 U.S. at 160.

In light of the prior holdings, the Court determined that federal law preempted Washington regulations regarding general navigation watch procedures, English language skills, training, and casualty reporting. *Locke*, 529 U.S. at 116. The Court remanded the remaining Washington regulations to the lower courts in order to develop the factual record.

United States Court of Appeals

Injury Requirements for Standing Under the Clean Water Act

*Friends of the Earth, Inc. v.
Gaston Copper Recycling
Corp.*, 204 F.3d 149
(4th Cir. 2000)

by Autumn Hwang, Class of 2002
Washington and Lee University
School of Law

Friends of the Earth (“FOE”) and Citizens Local Environmental Action Network (“CLEAN”)

brought an action under the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251-2387 against Gaston Copper Recycling Corporation (“Gaston Copper”). Wilson Shealy, a member of CLEAN, claimed that the Gaston Copper facility located four miles upstream from his lake released pollutants that caused his family to reduce the use of their lake. The United States District Court for the District of South Carolina held that Shealy and CLEAN lacked standing to sue because they failed to prove injury in fact. The United States Fourth Circuit Court of Appeals reversed and remanded the case for determination of whether Gaston Copper discharged pollutants exceeding permitted limits.

The CWA proscribes limits on the amount of pollutants a point source may discharge. The CWA does not require proof of injury to the environment, but rather proof that the statutory limit of a point source discharge was exceeded. Under § 402 of the CWA, the National Pollutant Discharge Elimination System (NPDES) was established to authorize the issuance of permits for the discharge of pollutants. NPDES permit holders are required to comply with effluent limitations in such permits as well as requirements for monitoring, testing, and reporting. The CWA also allows citizens to sue NPDES permit holders who have allegedly violated their permits. Citizens may sue for injunctive relief and civil penalties payable to the United States Treasury. A citizen is defined as

“a person or persons having an interest in which is or may be adversely affected.” 33 U.S.C. § 1365(g).

The Fourth Circuit determined that the plaintiffs presented enough evidence to establish an Article III case or controversy and therefore had standing to bring suit under the CWA. The plaintiffs submitted Gaston Copper’s discharge monitoring reports that allegedly showed 300 violations of the company’s NPDES permit limits. Numerous EPA studies and expert testimony on the adverse health and environmental effects of the pollutants were also included. Shealy, as a member of CLEAN, demonstrated injury-in-fact by producing evidence showing that his legally protected interest in using his lake for fishing and swimming had been injured or threatened by Gaston Copper’s actions.

The district court had required the plaintiffs to present further evidence showing (1) the chemical content of the waterways (2) increases in the salinity of the waterways and (3) any changes in the ecosystem of the waterways. The Fourth Circuit noted that however that the United States Supreme Court does not require such proof of environmental harm. *Id.* at 159. The court observed that in *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, an effect on “recreational, aesthetic, and economic interest” is a cognizable injury for purposes of standing. 528 U.S. 167, 184 (2000). Therefore, injury-in-fact may be

proven with affidavits from several citizens stating that they reduced their use of a waterway because of a reasonable fear and concern of pollution. *Friends of the Earth*, 204 F.3d at 160.

Traceability is another element of the Article III standing requirement. The court also ruled that the plaintiffs had shown the claimed injury was fairly traceable to the defendant's alleged illegal action. A plaintiff is only required to show that the pollutants discharged by the defendant are capable of causing or contributing to the kinds of injuries alleged in the geographic area at issue. The evidence offered by the plaintiffs showed that the chemicals discharged by Gaston Copper produce environmental degradation. *Id.* at 161.

Finally, the court stated that judicial action could redress the claimed injuries. Injunctive relief would remedy the plaintiffs' alleged injuries by preventing Gaston Copper from further violating its permit. *Id.* at 162.

Requirements for Joint Owner Status for Pollution Allowances under the Clean Air Act

Ormet Primary Aluminum Corp. v. Ohio Power Co., 207 F.3d 687 (4th Cir. 2000).

Appellant, Ormet Primary Aluminum Corporation ("Ormet"),

originally brought suit under the Clean Air Act ("the Act") against Ohio Power Company ("Ohio Power") to obtain rights to eighty-nine percent of the pollution emission allowances allocated by the Environmental Protection Agency (EPA) to Ohio Power's Kammer Generating Station near Moundsville, West Virginia. Ormet claimed that because of its contractual arrangements with Ohio Power (the "Power Agreement"), it became a joint owner of the generating station under the Act and was therefore entitled to a proportionate amount of the pollution allowances. Ormet argued that it purchased power from the Kammer Generating Station under a life-of-the-unit contractual arrangement as codified by 42 U.S.C. § 7651a(27) and was therefore entitled to pollution allowances under the Act. The district court entered summary judgment against Ormet.

The Fourth Circuit used a four-part test to determine if a power sales agreement makes the customer a joint owner under the Act. In order for Ormet to qualify as a joint owner, the following conditions must be met: 1) Ormet must have reserved or been entitled to receive a specified amount of percentage of capacity and associated energy; 2) the energy must be generated by a specified generating unit or units; 3) the agreement must require Ormet to pay "its proportional amount" of the total costs of the specified unit or units; and 4) the arrangement must be for a substantial

length of time relative to the life of the unit as specified in the Act. *Id.* at 690.

First, the court ruled that the Power Agreement, although providing for a range of allowable energy usage rather than a specific amount, could be read to satisfy the first criterion of its test because Ormet's power usage remained constant at 536,000 kilowatts. *Id.* at 691.

However, the court determined that the Power Agreement did not satisfy the second prong of the test. The power reservation in the Power Agreement provided that the power delivered to Ormet could be generated anywhere in the Ohio Power System and did not require that the power delivered to Ormet be generated only at the Kammer facility. Accordingly, the Power Agreement did not satisfy the court's second requirement that the power be generated by a specified unit or units. *Id.* at 692.

The court also found that Ormet did not pay a proportionate share of the Kammer facility's total costs, thus failing the third prong. Ormet's cost share of operating the Kammer units did not vary in proportion to its reservation of energy and did not bear a consistent relation to the total costs incurred by Ohio Power in operating the Kammer units. *Id.* at 693.

Regarding the fourth prong, the court did not address the durational requirements because the power reservation in the Power Agreement had already

failed two of the required four elements.

Because Ormet did not reserve energy from the Kammer generating units and did not pay a proportional amount of the costs of operating those units, the court held that Ormet's Power Agreement did not entitle it to a share of the pollution emissions allowances issued to the Kammer plant under the Act. *Id.* at 694.

Sidecasting of Dredged Material Requires a Permit Under the Clean Water Act

United States v. Deaton, 209 F.3d 331 (4th Cir.2000)

In 1988, James Deaton purchased a parcel of land in Wicomico County, Maryland, on the condition that it would be suitable for developing a small residential subdivision. Deaton later discovered that he would be unable to obtain a sewage disposal permit because the ground water levels were unacceptably high. In order to correct the problem, Deaton sought to have a drainage ditch dug through the property. Although advised by the County Soil Conservation Service that the site contained possible wetlands and may require a permit to excavate, Deaton hired a contractor to dig a 1,240-foot ditch across the property. Upon learning of the

possible Clean Water Act ("CWA") violations, the U.S. Army Corps of Engineers ("Corps") inspected the site and concluded that it contained wetlands that were protected under the CWA. The Corps immediately issued a stop work order. The United States brought a civil action and alleged that the defendants violated §§ 301 and 404 of the CWA, 33 U.S.C. §§ 1311, 1344, by sidecasting dredged material into a wetland while digging a drainage ditch.

The district court originally granted partial summary judgment to the government, holding that any wetlands on the property were subject to the CWA and that sidecasting excavated material into the wetlands was a discharge of a pollutant under the CWA. However, after an en banc panel in the Fourth Circuit split over the issue of whether sidecasting was a discharge of a pollutant in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), the district court reconsidered and vacated its award of partial summary judgment for the government and granted summary judgment in favor of the Deatons.

On appeal, the Fourth Circuit examined the issue of whether the deposit of material dredged from a wetland back into the same wetland, known as sidecasting, constitutes the discharge of a pollutant under the CWA. The court rejected the defendants' argument that soil dredged from the wetland is not a discharge of a pollutant since

there is no new material deposited in the wetland.

The court first pointed out that the CWA defines the discharge of a pollutant to mean "any addition of any pollutant to navigable waters from any point source" and that dredged spoil is included in the definition of a pollutant. *Deaton*, 209 F.3d at 335. The court determined that once material is removed from the wetland it becomes dredged spoil. *Id.* at 335. The court reasoned that Congress, in deciding to classify dredged spoil as a pollutant, had determined that plain soil, once excavated from the waters of the United States, could not be deposited into wetlands without causing harm to the environment. In the court's estimation, there is no difference between depositing soil dredged from a distant site and redepositing soil from the same site. *Id.* at 335. Congress believed that wetlands play a vital role in trapping and removing pollutants before they reach open bodies of water. When a wetland is dredged and the dredged soil is returned to the wetland, there is potential for trapped pollutants to be released into open waters. That danger exists both when off site fill material is brought in and on-site material is re-deposited. *Id.* at 336. Therefore, based on its understanding of Congress' purpose behind the CWA, the Fourth Circuit held that sidecasting constitutes the discharge of a pollutant within the meaning of the CWA and requires a permit under the CWA. *Id.* at 337.

Federal Endangered Species Regulation Upheld Under Commerce Clause

Gibbs v. Babbitt,
214 F.3d 483
(4th Cir. 2000)
cert. denied 531 U.S. 1145
(2001)

by Robert Test, Class of 2002
Washington and Lee University
School of Law

Richard Mann, a North Carolina rancher, shot a red wolf after fearing that it would harm his cattle. Mann subsequently was prosecuted under 50 C.F.R. § 17.84(c)(1998), a federal regulation governing experimental populations of animals like the red wolf, which had been introduced into North Carolina. Mann, along with other individuals and counties, challenged the regulation, alleging the federal government unconstitutionally exceeded its authority under the Commerce Clause in protecting red wolves on private land. The district court upheld the federal regulation, and the Fourth Circuit affirmed the district court's findings.

The central issue before the Fourth Circuit was whether the species protection provision of the regulation regulated economic and commercial activity under current Commerce Clause case law. Under the third prong of *United States v. Lopez*, 514 U.S. 549 (1995), "Congress' interstate commerce authority includes the

power to regulate those activities, which viewed in the aggregate, have a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558. The court concluded that under the third prong, the protection of endangered species bore a substantial relation to interstate commerce and conferred power upon Congress to regulate the animal species. *Gibbs*, 214 F.3d at 492.

Specifically, the court determined that the red wolf affected tourism since people would regularly travel to view and study such wolves. Second, the regulations governing red wolves established a scientific research component that translated into jobs on a national scale. Third, the regulation anticipated the possibility of a revitalized interstate fur pelt trade. Fourth, red wolves affected interstate markets for agricultural products and livestock due to their predatory threat. The court also noted that the red wolf was a wanderer that could potentially end up on private land.

The court determined that the regulation also could be upheld as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gibbs*, 214 F.3d at 497 (*citing Lopez*, 514 U.S. at 561). The court concluded that the "substantial effect" on interstate commerce was the danger of the extinction of the species and the purpose of the statute was to prevent such extinction. *Gibbs*, 214

F.3d at 498. Therefore, overturning the statute would directly compromise Congress' broader scheme based upon years of research and compounded environmental legislation. The court emphasized judicial deference to Congress since it could use expertise and experience to balance the harm between landowners and red wolves better than a judicial entity.

Next, the court resolved whether its Commerce Clause determination offended the notion of federalism and state sovereignty. Although historical case law emphasized state power over natural resources and wildlife, modern case law delegates more responsibility to the federal government in light of the comprehensiveness of environmental concerns. *Id.* at 499. The court also rejected the plaintiffs' police power argument, which asserted that regulation of private land infringes upon the states' traditional power to regulate land use. The federal government in previous decades had taken a more active role in conserving species and protecting the environment through statutes. Modern case law upholds such power. *Id.* at 500.

The court further substantiated its findings predicated upon the unique nature of the environment. First, individual state regulation of environmental issues was impractical since each state would have the incentive to relax its environmental laws in order to incur short-term economic gain in a "race to the

bottom.” Second, there was a need for national uniformity in environmental laws to prevent confusion among the issues and set an organized agenda that ultimately would succeed. *Id.* at 501-502.

Virginia Court of Appeals

DEQ’s Determination that Oil Company Not Entitled to Reimbursement Upheld

Holtzman Oil Corp. v. Commonwealth,
32 Va. App. 532,
529 S.E.2d 333
(Va. Ct. App. 2000)

The Holtzman Oil Corporation (“Holtzman Oil”) appealed the Department of Environmental Quality’s (DEQ) denial of its request for reimbursement from the Petroleum Storage Tank Fund (“Tank Fund”) for clean up costs incurred in removal of underground storage tanks. The circuit court affirmed the DEQ’s decision and Holtzman Oil appealed. The Virginia Court of Appeals held that DEQ’s determination that the company was not entitled to reimbursement was consistent with applicable regulations, was supported by

evidence in the record, and was not arbitrary and capricious.

In November 1993, Holtzman Oil notified DEQ of its intent to remove underground storage tanks from a gas station. Holtzman Oil then excavated approximately 2,900 tons of soil and incinerated it at a cost of \$140,705. The incineration was done without prior notice to the DEQ. Holtzman Oil then made a formal request in 1995 for reimbursement from the Tank Fund for the clean-up costs under Virginia Code § 62.1-44.34:11 claiming that the removal of the contaminated soil constituted an “abatement activity.” The DEQ denied the request for reimbursement explaining that Holtzman Oil excavated the soil without approval by its regional office. Regulations require the DEQ to determine whether the activities submitted for reimbursement were approved or would have been approved had they been timely presented to the DEQ for consideration. The DEQ concluded that the soil excavation was not a necessary correction activity and therefore was not approvable for reimbursement. The circuit court affirmed the DEQ’s decision, concluding that it could not “substitute [its] judgement” for the “factual determination[s]” by the “agency officials.” *Id.* at 337, 32 Va. App. at 539.

The Court of Appeals first explained the applicable standard of review under the Virginia Administrative Procedure Act found at Virginia Code

§ 9-6.14:17. Where the issue concerns an agency decision based on the proper application of its expert discretion, the reviewing court will not substitute its own independent judgment for that of the agency. Instead, it will reverse the agency decision only if that decision was arbitrary and capricious. The factual determinations of the DEQ found that: Holtzman Oil’s actions were not necessary to remedy hazards posed by contaminated soils; neither the soil excavation nor the subsequent disposal activity were necessary corrective action activities; and the DEQ would not have approved the abatement measure even had they been timely notified. The court, in refusing to substitute its own judgement for these factual determinations, affirmed.



**Virginia State Bar Environmental Law Section
2001-02 Board of Governors**

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Chair
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One James Center
901 East Cary Street
Richmond, VA 23219-4030

Stewart Todd Leeth
Vice Chair
McGuire Woods, LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030

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Kaufman & Canoles, P.C.
One Commercial Place
PO Box 3037
Norfolk, VA 23514

Edward Andersen Boling
Immediate Past Chair
22 East Bellefonte Avenue
Alexandria, VA 22301

Robert Joseph Kinney
Newsletter Co-Editor
2911 Edgehill Drive
Alexandria, VA 22302-2521

Ellen F. Brown
Newsletter Co-Editor
Dominion Resources, Inc.
5000 Dominion Boulevard
Richmond, VA 23219

Manning Gasch, Jr.
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Matthew Lawrence Iwicki
Boeing Company
Law Department MC13•08
Box 3707
Seattle, WA 97124-2207

Nicole Tania Roberts
McNamara, Dodge, Ney,
Beatty, Slattery & Pfalzer, LLP
1211 Newell Avenue
Walnut Creek, CA 94956

John Hines Stoodly
820 Duke Street
Alexandria, VA 22314

Robert Leonard Vance
566 Neblett Field Road
Victoria, VA 23974

Hon. Theodore J. Markow
Ex-Officio Judicial
Richmond Circuit Court
400 North Ninth Street
Richmond, VA 23219

Thomas A. Edwards
Ex-Officio
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, VA 23219-2800

Dolly Shaffner
VSB Liaison
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, VA 23219-2800

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