

RECENT FOURTH CIRCUIT ENVIRONMENTAL JURISPRUDENCE

Each year, the staff of the William & Mary Environmental Law and Policy Review provides a detailed summary of selected cases heard in the United States Court of Appeals for the Fourth Circuit that involve environmental law. This discussion is part of an ongoing commitment to serve practitioners and the academy. This summary reviews those cases heard in the Fourth Circuit in 2006 that the Editorial Board feels are most significant to the legal community.

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I. *HOLLY HILL FARM CORPORATION V. UNITED STATES*²

In May of 2006, the Fourth Circuit addressed a petition for judicial review of a Department of Agriculture decision.³ The Department of Agriculture penalized Holly Hill, a Virginian farming company, for converting wetlands into farmland without proper authority.⁴ The District Court granted summary judgment in favor of the Department of Agriculture.⁵ The Court of Appeals for the Fourth Circuit held that the Department of Agriculture's denial of benefits was not arbitrary or capricious.⁶

Holly Hill Farm Corporation owned a "650-acre estate in Caroline County, Virginia."⁷ Of this land, one acre was "designated as an illegally converted wetland" by the Department of Agriculture.⁸ Due to this designation, Holly Hill was no longer eligible for certain federal program benefits.⁹

In 1989 a representative of the Soil Conservation Service ("SCS") notified Holly Hill that the area in question contained "hydric soil, . . .

¹ Brian McNamara and T.W. Bruno are Associate Articles Editors for the *Review*. The *Review* would like to thank them for their work writing and researching this year's Summary.

² *Holly Hill Farm Corp. v. United States*, 447 F.3d 258 (4th Cir. 2006).

³ *Id.* at 258.

⁴ *Id.* at 260-62.

⁵ *Id.* at 262.

⁶ *Id.* at 270.

⁷ *Id.* at 260.

⁸ *Id.*

⁹ *Id.*

[which] indicates the possible presence of wetlands.”¹⁰ In February of 1990, the SCS “advised Holly Hill . . . to seek a determination of the wetland status . . . [prior to] the clearing of any woodland.”¹¹ In March of 1990, the SCS notified Holly Hill that Holly Hill’s woodland clearing was not approved and that the company could be in violation of law.¹² SCS also arranged to make a final “wetlands determination” on Holly Hill’s property.¹³

SCS issued a final wetlands determination for the Holly Hills property, but the acre in question was not labeled as a wetland.¹⁴ However, in 1991, the Department of Agriculture “received a whistle-blower complaint regarding possible wetland conversions on Holly Hill’s property.”¹⁵ In 1995, the Environmental Protection Agency issued an order “instructing Holly Hill to cease unauthorized filling of wetlands in violation of the Clean Water Act” after Holly Hill denied several government agencies access to the property to investigate the whistle-blower’s complaint.¹⁶

When Holly Hill applied for certain federal program benefits in 2002, the National Resources Conservation Service (“NRCS”), formerly known as the SCS, conditioned benefits on a successful inspection of the Holly Hill property.¹⁷ During the inspection, the NRCS “determined that one acre of land . . . contained wetlands converted after . . . 1990.”¹⁸ The NRCS based this determination on soil samples and “aerial photographs from 1993-2002 demonstrating a conversion from bottomland hardwoods to pastureland in or around 1994.”¹⁹ After a series of hearings, Holly Hill was declared ineligible for the program benefits.²⁰

Holly Hill sought review of the initial hearing within the Department of Agriculture.²¹ At the Department of Agriculture hearing, the hearing officer “denied all of Holly Hill’s subpoena requests” and questioned Department officials.²² The hearing officer held that the “denial

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 261.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 262.

of program benefits . . . was not erroneous,” and the hearing officer’s decision was affirmed by the Department’s appeals director.²³

Holly Hill then sought review in District Court, arguing that the Department “abused its discretion, took unreasonable action, and issued an arbitrary and capricious decision.”²⁴ The District Court held that the “[h]earing [o]fficer did not abuse his discretion” by limiting “evidence presented at the hearing to what he determined was relevant and non-repetitious.”²⁵ In addition, the District Court held that the wetlands determination for the acre at issue “was supported by substantial evidence and thus not arbitrary or capricious.”²⁶ The court awarded summary judgment to the Department.²⁷

In the Court of Appeals for the Fourth Circuit, Holly Hill advanced four arguments in claiming that the “denial of benefits was arbitrary and capricious.”²⁸ First, Holly Hill argued that since the acre in question was not considered a wetland in 1991, the Department should be “bound by this determination” so that it could not have complained when the acre was cleared.²⁹ The Fourth Circuit, however, noted that a disclaimer was present on the 1991 wetlands determination map such that the wetlands status of the acre was not yet determined, and a letter from the SCS in 1990 clearly stated that Holly Hill should seek guidance before clearing the land.³⁰

Second, Holly Hill argued that the Department of Agriculture’s determination that the acre was cleared after 1990 was “arbitrary and capricious.”³¹ The company argued that even if the acre was converted, no “on-site factual information regarding a conversion” existed other than a letter from an SCS representative “stating that removal of trees occurred . . . prior to Spring 1990.”³² The Circuit held, however, that the aerial photographs and other eyewitness descriptions of the property were

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* While the Circuit Court reviewed the grant of summary judgement *de novo*, the review of the agency action is conducted in accordance with the Administrative Procedure Act, and subject to an “arbitrary or capricious” standard. *See* *Marshall v. Cuomo*, 192 F.3d 473, 478 (4th Cir. 1999).

²⁹ *Holly Hill Farm Corp.*, 447 F.3d at 262.

³⁰ *Id.* at 264-65.

³¹ *Id.* at 262.

³² *Id.* at 265.

sufficient, and that the agency determination was not “arbitrary, capricious, or an abuse of discretion.”³³

Holly Hill also argued that “even if the wetlands were converted after . . . 1990,” the company was “entitled to a minimal effects exception under the Regulations.”³⁴ The company argued that this issue was raised in earlier proceedings.³⁵ The Circuit, however, found that this issue was not properly raised in earlier proceedings and thus did not consider the argument.³⁶

Finally, the company argued that the hearing officer during the agency level review conducted the review inappropriately.³⁷ Specifically, Holly Hill challenged the hearing officer’s denial of their subpoena requests, and ex parte communications between the hearing officer and the Department of Agriculture.³⁸ The Circuit held that the hearing officer did not abuse his or her discretion and the ex parte communications were procedural, and thus did not prejudice Holly Hill.³⁹

In summary, the Fourth Circuit affirmed the grant of summary judgment in favor of the Department of Agriculture, finding that the agency’s denial of program benefits was neither arbitrary nor capricious.⁴⁰ The core precepts of administrative law and corresponding judicial standards of deference to agency discretion drove the outcome of this appeal to a large degree. Due to the high standards for judicial review of adverse administrative decisions, private actors should seek appropriate agency determination of wetland status prior to converting that land to other uses.

II. *OHIO VALLEY ENVIRONMENTAL COALITION V. BULEN*⁴¹

In *Ohio Valley Environmental Coalition*, the Fourth Circuit denied a petition for rehearing *en banc*.⁴² The case involved a general permit

³³ *Id.* at 266.

³⁴ *Id.* at 262. See 16 U.S.C. § 3822(f)(1) (2007) (allowing conversion with a “minimal effect of the functional hydrological and biological value of the wetlands in the area”); see also 7 C.F.R. § 12.31(d) (2007) (describing NRCS consideration of minimal effects requests, which in any event must be made before converting the wetland).

³⁵ *Holly Hill Farm Corp.*, 447 F.3d at 267.

³⁶ *Id.*

³⁷ *Id.* at 262.

³⁸ *Id.*

³⁹ *Id.* at 269.

⁴⁰ *Id.* at 270.

⁴¹ *Ohio Valley Envtl. Coal. v. Bulen* (*Ohio Valley Envtl. Coal. I*), 437 F.3d 421 (4th Cir. 2006).

⁴² *Id.* at 422.

issued by the Army Corps of Engineers under the Clean Water Act (“CWA”).⁴³ Specifically, the issue raised in the case was:

[W]hether the Army Corps of Engineers (“the Corps”) exceeded its authority under the Clean Water Act (“CWA”) when it promulgated Nationwide Permit 21 (“NWP 21”), a general permit for the discharge of dredged or fill material into the waters of the United States that allows projects to proceed only after receiving individualized authorization from the Corps.⁴⁴

The Corps is authorized to issue both “general” and “individual” permits under the CWA.⁴⁵ An individual permit requires an extensive preliminary review of the environmental effects of the activity for which the permit is requested.⁴⁶ By contrast, a general permit for “categories of similar activities” requires only that the Corps make a determination “that the activities . . . will cause only minimal adverse environmental effects.”⁴⁷ Such a permit relieves the Corps of the administrative cost of issuing multiple individual permits.⁴⁸

The Corps issued the controversial NWP 21 as a general permit to allow “discharges of dredged or fill material associated with surface coal mining” into waters of the United States.⁴⁹ Under NWP 21, anyone wishing to engage in the type of discharge covered by the permit must still contact the Corps for an individual determination that the environmental effects are minimal.⁵⁰ Thus, NWP 21 differs from other general permits by allowing the Corps to make a determination of the environmental impact of an activity *after* the issuance of the general permit.

When the Fourth Circuit first heard the case, it declared that NWP 21 was not invalid because the Corps made a determination of minimal impacts before the permit was issued.⁵¹ Specifically, the court declared

⁴³ *Ohio Valley Env'tl. Coal. v. Bulen* (Ohio Valley Env'tl. Coal. II), 429 F.3d 493, 493-94 (4th Cir. 2005).

⁴⁴ *Id.* at 496.

⁴⁵ *Ohio Valley Env'tl. Coal. I*, 437 F.3d at 422 (King, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Id.* at 422-23 (citations omitted).

⁴⁸ *Id.* at 422.

⁴⁹ *Ohio Valley Env'tl. Coal. II*, 429 F.3d at 497.

⁵⁰ *Id.* (citation omitted).

⁵¹ *Id.* at 505.

that “[t]he Corps identified a category of activities, it determined that those activities would have a minimal environmental impact both separately and cumulatively, and it provided notice and opportunity for public hearing before issuing the permit.”⁵²

Although the Fourth Circuit denied the plaintiff’s petition for rehearing, Judge King and two other dissented.⁵³ According to Judge King, the Corps “failed to make the required determination of minimal environmental impact *before* it issued the general permit.”⁵⁴ In his opinion, it was inappropriate for the Corps to:

[S]et up mechanisms that would work to minimize the environmental effects of specific projects, on a case-by-case basis, *after* the general permit issued. . . . [S]ection 404(e) [of the CWA] does not bar the Corps from making post-issuance evaluations to ensure that the permitted activities cause only minimal adverse effects to the environment. The Corps’ ability to make such *post-issuance* evaluations, however, does not relieve it of the responsibility of making the *pre-issuance* determination mandated by section 404(e).⁵⁵

The dissent further argued that the issuance of NWP 21 as a general permit “undermine[d]” the CWA’s purpose and allowed the Corps to “skirt the CWA-mandated permitting process,” thus placing the “delicate ecosystem” of the Appalachian mountains in “unnecessary” danger.⁵⁶

III. *OHIO RIVER VALLEY ENVIRONMENTAL COALITION INC. V. KEMPTHORNE*⁵⁷

In this case, the Fourth Circuit affirmed a grant of summary judgment in favor of Ohio River Valley Environmental Coalition, Inc., Hominy Creek Preservation Association, Inc., and Citizens Coal Council (collectively referred to as “OVEC”).⁵⁸ These groups alleged that the

⁵² *Id.*

⁵³ *Ohio Valley Env'tl. Coal. I*, 437 F.3d at 422 (King, J., dissenting).

⁵⁴ *Id.* at 423.

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.* at 424.

⁵⁷ *Ohio River Valley Env'tl. Coal., Inc. v. Kempthorne*, 473 F.3d 94 (4th Cir. 2006).

⁵⁸ *Id.* at 97.

Secretary of the Interior, Dirk Kempthorne, had approved West Virginia's amendments to its surface coal mining regulations in violation of the Administrative Procedure Act ("APA") and the Surface Mining Control and Reclamation Act of 1977 ("SMCRA").⁵⁹

West Virginia regulates surface control mining pursuant to the SMCRA, which empowers states to do so through "a cooperative federalism approach."⁶⁰ The SMCRA establishes "minimum standards for regulating surface coal mining and encourage[s] the States, through an offer of exclusive regulatory jurisdiction, to enact their own laws incorporating these minimum standards, as well as any more stringent, but not inconsistent, standards that they might choose."⁶¹ SMCRA requires the Secretary of the Interior to review and either approve or disapprove the state regulatory scheme.⁶² The Secretary must approve any changes to a state's scheme before the State may implement it.⁶³

In 2001, West Virginia attempted to change their regulations to delete the definition of "cumulative impact" and add a provision defining "material damage."⁶⁴ The Secretary of the Interior, through the Office of Surface Mining Reclamation and Enforcement ("OSM"), filed notice of the proposed rule and provided the opportunity for public comment in the Federal Register.⁶⁵ After receiving comments from the U.S. Fish and Wildlife Service, which opposed the changes, and the Environmental Protection Agency, which supported the amendment, as well as other interested parties and agencies, the Secretary approved the amendments.⁶⁶

The Ohio River Valley Environmental Coalition challenged the final rule, alleging that the Secretary's approval of the amendments violated the APA and SMCRA.⁶⁷ The District Court for the Southern

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* (quoting *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001)).

⁶² *Id.* (citing 30 U.S.C. § 1211(c)(1) (2007)).

⁶³ *Id.* (citing 30 C.F.R. § 732.17(g) (2007)).

⁶⁴ *Id.* at 98. "Cumulative impact" refers to the affects of water flows from multiple sites, all which may be in compliance with the applicable standards but nevertheless, that commingle to create a substantial impact. *Id.* at 98 n.2. West Virginia defined "material impact" as "any long term or permanent change in the hydrologic balance caused by surface mining operation(s) which has a significant adverse impact on the capability of the affected water resource(s) to support existing conditions and uses." *Id.* at 98 (quoting West Virginia Regulatory Program, 66 Fed. Reg. 28,682, 28,683 (May 24, 2001)).

⁶⁵ *Id.* at 99. The Secretary of the Interior enforces the SCMRA through the OSM. 30 U.S.C. § 1211(c)(1).

⁶⁶ *Ohio River Valley Eenvtl. Coal.*, 473 F.3d at 99.

⁶⁷ *Id.*

District of West Virginia granted summary judgment in favor of the Ohio River Valley Environmental Coalition and enjoined West Virginia from enforcing the amendments.⁶⁸

On appeal the Secretary advanced three arguments in favor of reversal:

(1) that the APA's provisions for judicial review . . . do not apply if they overlap with those of another statute [in this case the SMCRA], (2) that approval of amendments to a state regulatory program pursuant to the SMCRA . . . does not constitute rulemaking within the scope of APA § 553, and (3) that the OSM offered an explanation for the decision that comports with all the requirements.⁶⁹

The Fourth Circuit rejected the Secretary's argument that the APA's provisions for judicial review applied only to agency actions that have not been made reviewable by another statute.⁷⁰ In doing so, the court relied on the plain language of the APA, and drew support from relevant D.C. Circuit decisions that applied APA standards to SMCRA rulemaking.⁷¹ The court found that APA § 704 permits broad review, and that its narrow exception (*i.e.* where Congress "clearly intended to restrict access to judicial review") did not apply.⁷² The court upheld the general principle that "in most administrative programs, the general APA and the specific enabling act work in concert to provide procedures and judicial review," and rejected the Secretary's claim that SMCRA preempted the APA requirement to publish written findings that lead to the approval of a state program.⁷³

The court also rejected the Secretary's second argument that approval of state program amendments does not constitute rulemaking for purposes of judicial review, noting that this argument contradicted OSM's actions throughout the process.⁷⁴ OSM issued a notice of proposed

⁶⁸ *Id.*

⁶⁹ *Id.* at 100.

⁷⁰ *Id.*

⁷¹ *Id.* at 100 and 100 n.5. The APA requires judicial review for any "[a]gency action made reviewable by statute." *Id.* at 100 (quoting 5 U.S.C. § 704 (2007)).

⁷² *Id.* at 101 (quoting *Hanauer v. Reich*, 82 F.3d 1304, 1307 (4th Cir. 1996)).

⁷³ *Id.* (quoting 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, FEDERAL PRACTICE AND PROCEDURE 8133 (2006)).

⁷⁴ *Id.* at 101-02.

rulemaking, received comments on the proposal, and promulgated a final rule that incorporated a statement of basis and purpose.⁷⁵

Finally, the court rejected the Secretary's argument that his actions were not arbitrary and capricious.⁷⁶ To survive an arbitrary and capricious challenge the agency must "explain the evidence which is available, and must offer a rational connection between the facts found and the choice made."⁷⁷ In this case, the Secretary ignored the actual effect that deleting the "cumulative impact" definition would have on West Virginia's regulatory program.⁷⁸ The court noted that OSM indicated that the change would weaken West Virginia's regulatory program, and OSM neglected to provide a reasoned explanation for adopting the lower standard.⁷⁹ OSM "avoided the question" as to how a lower standard would satisfy the minimum standards of the SMCRA, "ignor[ing] an important aspect of the problem."⁸⁰ The agency also avoided analysis of the "material damage" definition, approving it simply because there is no analogous federal definition with which it must agree.⁸¹

In sum, the Fourth Circuit struck down the Secretary's approval of West Virginia's amendments because the Secretary acted as a "rubber-stamp" in violation of the applicable APA procedures.⁸² The court held that, at a minimum, the Secretary must "address the potential effect of the amendment on the state program," and analyze the agency's decision to approve it.⁸³

IV. *KNOX V. U.S. DEPARTMENT OF LABOR*⁸⁴

In October of 2005, the Fourth Circuit heard oral arguments in this case involving the whistle-blower provision of the Clean Air Act ("CAA").⁸⁵ The court held that the plaintiff's activities were protected

⁷⁵ *Id.*

⁷⁶ *Id.* at 102-04.

⁷⁷ *Id.* at 102-03 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

⁷⁸ *Id.* at 103.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Knox v. U.S. Dept. of Labor*, 434 F.3d 721 (4th Cir. 2006).

⁸⁵ *Id.* at 721 (referring to 42 U.S.C. § 7622(a) (2007)).

under the whistle-blower provision, and remanded the case to the agency for further review.⁸⁶

William T. Knox worked as a Training Instructor at the National Park Service Job Corps Center in Harper's Ferry, West Virginia.⁸⁷ In addition to his regular instructional duties, he also served as the Center's safety officer.⁸⁸ In this role, he accompanied officials from the Occupational Safety and Health Administration ("OSHA") on regularly scheduled inspections.⁸⁹ During one of these inspections, he uncovered documents describing asbestos on the work-site and observed asbestos discharging into the air in a workshop on the site.⁹⁰

Mr. Knox reported the documents to his supervisors, who responded with threats to his job security.⁹¹ Mr. Knox then filed a whistle-blower action with the Merit Systems Protection Board, and reported his findings to members of the Department of the Interior ("DOI"), including the Secretary.⁹² Mr. Knox was fired on March 13, 2000.⁹³ When his supervisors discovered that Mr. Knox was a permanent federal employee on March 18, 2000, they "reinstated" him and "removed all reference to his firing from his record."⁹⁴

After his reinstatement, Mr. Knox filed the whistle-blower action at issue in this case.⁹⁵ The Administrative Law Judge ("ALJ") hearing the case found that Mr. Knox had engaged in protected activities under the CAA, and that "Mr. Knox experienced adverse personnel actions solely because of such activities."⁹⁶ The ALJ "ordered reinstatement, back pay, compensatory damages, exemplary damages, and attorney's fees."⁹⁷

The Administrative Review Board ("ARB") overturned the ALJ's decision and dismissed Knox's complaint, holding that "because the CAA is concerned with the pollution of 'ambient air,' *i.e.*, air external to buildings, and Knox only complained of asbestos within his work-place, he did

⁸⁶ *Id.* at 725.

⁸⁷ *Id.* at 722.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 722-24.

⁹¹ *Id.* at 723.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

not engage in protected activity under the CAA.”⁹⁸ In order for Knox to have engaged in protected activity, the ARB reasoned that he must “prove that when he expressed his concerns about the asbestos. . . he reasonably believed that DOI was emitting asbestos into the ambient air.”⁹⁹ However, the ARB found that Knox did not have a reasonable belief that DOI was emitting asbestos into the ambient air, because while he testified about the exhaust vent that allowed asbestos to escape the workshop, “[w]e have no evidence that Knox ever told DOI officials about the exhaust fan.”¹⁰⁰ Thereafter, Knox petitioned for judicial review of the ARB decision.

The Fourth Circuit reviewed the ARB decision with the deference traditionally given to administrative agency decisions.¹⁰¹ The court found, however, that the ARB’s finding that Knox must prove that he actually communicated the exhaust fan observation to his superiors *in addition to* his reasonable belief that asbestos was present was incorrect.¹⁰² The court also explained that “[w]e are not convinced that a reasonable belief of a release into the ambient air is even the correct standard in all cases under the whistle-blower provision of the CAA.”¹⁰³ In other words, if an employee reasonably believes asbestos is present, reporting those conditions is a protected activity under the CAA.¹⁰⁴ The court remanded the case to the agency for a reexamination of the facts under the appropriate test for protection.¹⁰⁵

V. *MANUFACTURED HOUSING INSTITUTE V. U.S. ENVIRONMENTAL PROTECTION AGENCY*¹⁰⁶

A trade association, representing a variety of interests in the manufactured housing industry including owners of mobile home properties, challenged the Environmental Protection Agency’s (“EPA”) reversal

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 724-25.

¹⁰¹ *Id.* at 723. “Under the Administrative Procedure Act, federal courts can overturn an administrative agency’s decision only if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,’ or ‘unsupported by substantial evidence.’” *Id.* (quoting 5 U.S.C. § 706(2) (2007)).

¹⁰² *Id.* at 724-25.

¹⁰³ *Id.* at 724 n.3.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 725.

¹⁰⁶ *Manufactured Housing Inst. v. U.S. Env’tl. Prot. Agency*, 467 F.3d 391 (4th Cir. 2006).

of a long-held policy with respect to the submetering of water.¹⁰⁷ The Fourth Circuit denied the trade association's petition for judicial review in a published opinion, which upheld EPA's actions.¹⁰⁸ The court held that EPA's actions constituted a final action of the agency, and that the action EPA took was not arbitrary and capricious.¹⁰⁹

Congress passed the Safe Drinking Water Act of 1974 to ensure that the water supply met minimum national standards and sufficiently protected public health.¹¹⁰ For almost thirty years EPA held the view that under the Safe Drinking Water Act, apartment houses that submetered water were in fact selling water and thus were subject to regulation under the Act.¹¹¹ However, savvy property owners "appear to have avoided . . . regulation, by charging tenants for water via rent or general fee, or surcharge."¹¹² Charging for water in this way avoided regulation, but discouraged water conservation.¹¹³ In August of 2003, EPA requested public comment on a proposal to permit unregulated submetering by owners of residential properties.¹¹⁴ The Agency hoped to promote water conservation by permitting owners to charge users for their actual water use.¹¹⁵ EPA's "proposal would reduce water use by anywhere from 18% to 39%."¹¹⁶

The agency received seventy-eight comments on the proposed rule, including a comment from the petitioners.¹¹⁷ After analyzing the comments, EPA promulgated a final rule that exempted apartment buildings and similar properties from regulation, thereby permitting unregulated submetering by owners of these types of properties.¹¹⁸ The final rule, however, rejected the petitioners' proposal to extend the exemption to water

¹⁰⁷ *Id.* at 394. Submetering refers to the practice of "property owners metering and billing their tenants for water purchased by the owners but distributed to and actually used by the tenants." *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 394, 397-99.

¹¹⁰ *Id.* at 394 (citing 42 U.S.C. § 300(f) (2007)).

¹¹¹ *Id.*

¹¹² *Id.* at 395.

¹¹³ *Id.*

¹¹⁴ *Id.* at 396.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 396 n.2.

¹¹⁷ *Id.* at 396.

¹¹⁸ *Id.* at 397.

systems that serve large mobile home parks and military installations.¹¹⁹ Petitioners, on behalf of mobile home landlords, challenged the final rule.¹²⁰

Before discussing the validity of the rule, the court first considered EPA's arguments that formal notice and comment rulemaking did not apply.¹²¹ The petitioners argued that because the agency permits little state discretion, the agency decision was in fact final.¹²² The Fourth Circuit found that EPA's actions constituted a final action of the agency, despite the fact that the regulation does not automatically give rise to legal rights or consequences, given the opportunity for the States to regulate differently.¹²³ Therefore, the court agreed with petitioners that notice and comment procedures applied under these facts.¹²⁴

Petitioner alleged that the final rule should be invalidated for two reasons: (1) the proposal was not the logical outgrowth of the notice and comment procedures, and (2) to exempt apartments but not mobile homes is "arbitrary and capricious."¹²⁵ The court rejected both arguments.¹²⁶ The court found that—because the agency properly framed its invitation to comment, interpreted the Act's requirements for enforcement, and listed the criteria to be considered by the states—EPA appropriately followed the applicable notice and comment procedures.¹²⁷ As to the second argument, the court noted that Congress delegated to EPA the

¹¹⁹ *Id.* Though EPA chose not to codify an exemption for these types of properties, it did not bar one either; EPA permitted the states to make determinations on whether to exempt such water systems on a case-by-case basis. EPA directed states to consider the following factors when determining whether to extend such an exemption: "backflow issues . . . , whether the majority of the plumbing is underground, and whether the property is owned by an individual or an association." *Id.* (quoting *Applicability of the Safe Drinking Water Act to Submetered Properties*, 68 Fed. Reg. 74,233, 74,235 (Dec. 23, 2003)). Under the Safe Drinking Water Act, the States may adopt the minimum national restrictions or more stringent ones. If the State does so and has appropriate enforcement capability the EPA may grant the State the right to enforce the regulations itself. *See* 42 U.S.C. § 300g-2(a) (2007). Forty-nine states have elected to enforce the Act. *Manufactured Housing Inst.*, 467 F.3d at 395.

¹²⁰ *Manufactured Housing Inst.*, 467 F.3d at 399.

¹²¹ *See id.* at 397.

¹²² *Id.* "EPA's threats levied against at least two States regarding their submetering oversight programs prove that States are not free to treat this EPA policy as a mere suggestion." *Id.*

¹²³ *See id.* at 397.

¹²⁴ *Id.*

¹²⁵ *Id.* at 399.

¹²⁶ *See id.* at 399-401.

¹²⁷ *Id.* at 400.

power to interpret and regulate under the Safe Drinking Water Act.¹²⁸ In the face of such an express delegation, an agency's decision will be upheld if it is "supported by a rational basis."¹²⁹ For the same reasons that it approved of the agency's rulemaking procedure, the court found a rational basis for the final rule.¹³⁰ Having found that the agency action was supported by a rational basis and met the requirements of notice and comment rulemaking, the court denied the petition for review.¹³¹

¹²⁸ *Id.* at 401.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*