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## West Virginia Rivers Coalition v. Env'tl. Prot. Agency, No. 03-1022, 2004 U.S. Dist. LEXIS 2574 (E.D. Pa. 2004)

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The Corps and the NMFS defended the spill curtail on the basis of mitigation measures, including a 100,000 acre foot release from the Brownlee Reservoir. The court rejected their reasoning because the mitigation plan incorrectly assumed that the water released from Brownlee Dam would be “new water” from an additional source, and not water already assumed released under the original spill program. Additionally, the court found the NMFS made an unfounded assumption that the Brownlee release occur at a uniform rate over 21 days, when in fact, no such agreement existed and prior releases of Brownlee water had not been uniform.

The court thus found the NMFS report to be arbitrary and capricious, because the NMFS based its conclusions upon unsupported data. The court weighed the danger to the salmon against public interest and enjoined the Corps from curtailing the summer spills. The court declined to order the NMFS to withdraw their report based on the court’s conclusion that enjoining the Corps alone created a sufficient remedy. Thus, the court granted in part and reversed in part the NWF’s motion for preliminary injunction.

*Kevin Kennedy*

**West Virginia Rivers Coalition v. Envtl. Prot. Agency, No. 03-1022, 2004 U.S. Dist. LEXIS 2574 (E.D. Pa. 2004)** (dismissing as moot West Virginia Rivers Coalition’s request for a declaratory judgment compelling EPA to issue water quality standards for manganese and iron; partially granting the West Virginia Rivers Coalition motion for summary judgment and ordering the Environmental Protection Agency to consider the effect of 3-methyl-4-chlorophenol on humans and fish; denying the West Virginia Rivers Coalition motion for summary judgment regarding the Environmental Protection Agency’s decisions to approve state Water Quality Standards when based on appropriate evidence; (3); and allowing the West Virginia Rivers Coalition to file a claim for attorney’s fees).

The West Virginia Rivers Coalition (“WVRC”), a nonprofit environmental group, brought this suit in the United States District Court for the Eastern District of Pennsylvania in response to the Environmental Protection Agency’s (“EPA”) approval of several Water Quality Standards (“WQSs”) proposed by the state of West Virginia. The WVRC sought summary judgment that the approval of these standards violated the Clean Water Act (“CWA”) because the approvals were arbitrary, capricious, and an abuse of discretion. The WVRC also sought a declaratory judgment to force the EPA to comply with nondiscretionary procedures of the CWA.

The first two WQSs challenged by the WVRC concern the level of manganese and iron. In October 1993, West Virginia proposed an increase in the allowable level of these pollutants and submitted the

proposals for EPA approval. The EPA initially rejected both proposals, but later approved them after this suit was filed. The WVRC claimed the subsequent approval of these standards was arbitrary and capricious, because the new standards exceeded previous standards considered safe for human and aquatic life. The court found that if the EPA relied on reasoned and reliable scientific information then their decision was not arbitrary and capricious. When approving both the manganese and the iron WQSs, the EPA relied on numerous studies supporting the new standards. Thus, the court ruled that the EPA decisions were not arbitrary and capricious.

Next, the court considered the EPA's approval, on April 17, 2003, of a new WQS for the protection of aquatic life against aluminum in the water. The WVRC claimed the method for measuring aluminum via dissolved concentration, as in the new WQS, was not as effective as measuring the total concentration. The court again found that the agency's decision was not arbitrary and capricious, even though conflicting studies exist concerning the effectiveness of the two measurement procedures. The court reasoned that an agency has discretion when choosing between the conflicting viewpoints of specialists in a technical and scientific field.

The EPA rejected a new proposed standard regulating 3-methyl-4-chlorophenol and eight other phenolic compounds on June 22, 1999. On April 17, 2003 the EPA approved revised WQS regulating phenolic compounds that did not include a standard for 3-methyl-4-chlorophenol. The WVRC argued that 3-methyl-4-chlorophenol might harm humans and make water unsuitable for drinking and aquatic life. The EPA did not consider the health effects of 3-methyl-4-chlorophenol on humans or fish because of a lack of data after an initial, inconclusive study conducted in 1986. The court found that the EPA should not allow unlimited concentrations of a potentially harmful chemical based on a lack of evidence when the EPA made no attempt to update previous studies in seventeen years. However, the court stopped short of requiring a specific timetable for the performance of studies by the EPA. The court also rejected the EPA's approval of phenolic compounds without a standard for 3-methyl-4-chlorophenol, because the EPA failed to address the impact of 3-methyl-4-chlorophenol on fish and related recreation.

The WVRC next claimed that the EPA's approval of a WQS for selenium violated the EPA's own guidance documents. The EPA relied on the opinion of one of its experts. The court found that the EPA could reverse previous decisions as long as they based the decision on a reasoned analysis.

The EPA rejected West Virginia's proposal to change site-specific water quality rules when natural conditions create a violation of the existing standard on June 22, 1999. After the State submitted a revised proposal, including all of the changes recommended by the EPA, the

EPA approved the new standard. The WVRC claimed the approval of the new standard was arbitrary and capricious, because the new standard allowed the state discretion in determining when to compel additional studies before changing a site-specific water quality rule. Since the new standard incorporated all of the EPA's recommendations, the court ruled that the approval was not arbitrary and capricious.

The last WQS challenged by the WVRC relate to measurement techniques used when pollutant concentrations drop below the Practical Quantification Level ("PQL"), defined as the lowest level detectable by current monitoring methods. West Virginia initially submitted procedures to extrapolate pollutant levels below the PQL. One of the methods used the measurement of pollutant levels in fish. The EPA rejected this standard fearing that the alternate measurement standard using pollutant levels in fish may be a separate standard. Subsequently, the EPA approved a revised proposal by West Virginia, which did not include measurements of pollutants in fish. The court allowed the approval of the revised standard, because indirect measurements are the only method to detect pollutant levels below the PQL.

The court refused to issue a declaratory judgment ordering the EPA to institute WQSs for manganese and iron. The EPA initially rejected West Virginia's proposed WQSs, and the State failed to propose revised WQSs, as required by the Clean Water Act. The court found the issue moot given that the EPA approved the West Virginia standards after this action commenced, no reasonable likelihood existed that the harm would recur, and a declaratory judgment would not make the WVRC whole. Finally, the court granted the WVRC's request to file for attorney's fees because the CWA specifically provides for such actions.

In conclusion, the court granted summary judgment on the WVRC's claim that the EPA's actions were arbitrary and capricious when it failed to consider the effect of 3-methyl-4-chlorophenol on humans and fish when approving a WQS. However, the court ruled the EPA was not arbitrary and capricious when relying on reasoned scientific opinions when approving the other WQSs. Also, the court dismissed claims requesting a declaratory judgment to force the EPA to enact statutorily mandated WQSs enacted after filing of the suit but before the final decision.

*David B. Oakley*

**Ohio Valley Env'tl. Coalition v. Bulen, 315 F. Supp. 2d 821 (S.D.W.Va. 2004)** (holding illegal segmentation occurred when a coal company submitted plans for a smaller waste disposal project that operated only to facilitate approval of a larger disposal project).

Ohio Valley Environmental Coalition ("OVEC") sought a preliminary injunction against the United States Army Corps of Engineers