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Determining a "Final Action" of the EPA for Purposes of Exclusive Jurisdiction in the Federal Courts of Appeals: Does a Constitutional Challenge Qualify? Virginia v. United States

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DETERMINING A "FINAL ACTION" OF THE EPA FOR PURPOSES OF EXCLUSIVE JURISDICTION IN THE FEDERAL COURTS OF APPEALS: DOES A CONSTITUTIONAL CHALLENGE QUALIFY?

Virginia v. United States[1]

by Rachel Craig

I. INTRODUCTION

Increased levels of ozone in the lower atmosphere can cause health problems and financial problems through harm to food and crops. The Clean Air Act[2] (CAA) authorizes the Environmental Protection Agency (EPA) to set forth National Ambient Air Quality Standards[3] (NAAQS) to combat the increased ozone levels. A nonattainment area is an area that fails to meet the minimum level of air quality promulgated by NAAQS.[4] There are various classifications of nonattainment areas, beginning with marginal and ending with severe.[5] Depending on the level of nonattainment classification for an area, states are required to implement various plans to do their part in cleaning up the nation's air.[6] Title I of the Clean Air Act requires a state with nonattainment areas of moderate, serious or severe to create a state implementation plan (SIP) to reduce Volatile Organic Compound (VOC) emissions in these areas by fifteen percent no later than three years after the date of the enactment of the CAA Amendments of 1990.[7] VOCs are pollutants that contain carbon and exist in a gaseous state at room temperature.[8] In the presence of sunlight and heat, these gases react with nitrogen oxides and create ozone.[9] Exhaust from automobiles and stationary sources like factories increase the level of nitrogen oxides in the atmosphere, thus increasing ozone levels.[10]

As a result of the declining air quality in the various states, in 1990, Congress amended the CAA in order to increase state participation in decontaminating the air.[11] These amendments extended deadlines for states to reach attainment levels satisfactory to NAAQS and imposed new deadlines for states to reduce ozone levels.[12] In addition, the 1990 amendments implemented a permit program designed to improve air quality in stationary sources such as factories and power plants.[13]

The failure of a state to create an SIP could result in sanctions under Title I of the CAA.[14] The statute authorizes the EPA to impose sanctions that would prevent states from spending highway funds in areas that did not meet the NAAQS attainment levels.[15] If the state proposes an SIP the EPA does not approve it, the state is required to produce an adequate SIP within the next 24 months or face mandatory withdrawal of highway funds.[16] The statute, however, allows the EPA to block highway funding prior to the two-year period provided the proper notice and comment proceedings have been followed.[17] For failing to propose a valid SIP, the EPA also may require more stringent permit criteria for private industry.[18] This is mandatory if an adequate revision to the previously proposed SIP has not been submitted within 18 months.[19] If a state does not propose an adequate SIP after two years from the EPA's rejection, the EPA must create a federal implementation program (FIP) in areas where there is still nonattainment.[20]

In addition to the SIP, Title V of the CAA also requires the states to

[1] 74 F.3d 517 (4th Cir. 1996).

[2] 42 U.S.C. Sections 7401 et. seq. (1989 and Supp. I 1996).

[3] 42 U.S.C. Sections 7408-7409. (1989 and Supp. I 1996).

[4] *Id.*

[5] 42 U.S.C. Section 7511(a). (Supp. I 1996). The relevant classifications codified in this section are: marginal, moderate, serious, and severe.

[6] 42 U.S.C. Sections 7511-7511f. (Supp. I 1996).

[7] 42 U.S.C. Sections 7511a(b)(1)(A)(i), 7511a(c) & 7511a(d). (Supp. I 1996).

[8] *Virginia*, 74 F.3d at 520.

[9] *Id.*

[10] *Id.* at 521. Ozone is detrimental in high concentrations in lower atmosphere or in our "breathable" air. It can cause major health problems like chest pains, coughing, nausea, throat irritation, increased susceptibility to respiratory infections, food and crop damage. As a caveat, in the upper atmosphere, ozone *prevents* cancer caused by intense exposure to the sun's ultraviolet radiation.

[11] *Id.* at 520.

[12] 42 U.S.C. Sections 7511-7511f. (Supp. I 1996).

[13] 42 U.S.C. Sections 7661-7661f. (Supp. I 1996).

[14] 42 U.S.C. Sections 7410(m), 7506(c) & 7509(b)(1) (Supp. I. 1996).

[15] *Id.*

[16] 42 U.S.C. Section 7509(b)(1) (Supp. I. 1996).

[17] 42 U.S.C. Section 7410(m) (Supp. I. 1996).

[18] 42 U.S.C. Section 7509(b)(2) (Supp. I. 1996).

[19] 42 U.S.C. Section 7410(m) (Supp. I. 1996).

[20] 42 U.S.C. Section 7410(c) (Supp. I. 1996).

implement permitting programs designed to regulate stationary sources of air pollution.[21] The EPA can approve this program only if it provides:

> an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public participation process... and any other person who could obtain judicial review of such [decisions] under State laws.[22]

If the EPA rejects the state's Title V program, the state must correct the problem within 18 months or face sanctions as provided above.[23]

II. FACTS AND HOLDING

In the instant case, the Northern Virginia area was in serious nonattainment and was thus subject to Title I and Title V of the CAA.[24] Virginia failed to implement a proper SIP within the specified time period because it had submitted only draft regulations of the plan instead of final regulations.[25] In addition, Virginia's plan under Title V of the CAA failed to fulfill the requirements of proper judicial review because the statute only allowed those who could prove a pecuniary and substantial interest to have standing to bring a suit for review.[26] The EPA took final action, stating that Virginia's program was incomplete.[27]

Pursuant to pending sanctions by the EPA, Virginia brought an action in the U.S. District Court for the Eastern District of Virginia, claiming that the Title I and Title V provisions of the CAA violated the spending clause[28] and the guarantee clause[29] as well as the Tenth Amendment of the United States Constitution.[30] Virginia argued that by requiring the ozone attainment programs, the federal government violated the Tenth Amendment by "commandeer[ing] the processes of Virginia's legislature and courts" in addition to violating the Constitution's guarantee of a republican form of government.[31] Virginia further argued that the highway fund sanction for failure to implement specified air quality programs was not "rationally related" to the proper objective of federal highway funding and is "impermissible coercion" that violates the limitations impliedly imposed by Congress under the Spending Clause of the Constitution.[32] The court dismissed the complaint for lack of subject matter jurisdiction because the Clean Air Act states:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan...or any other final action of the Administrator under this chapter...which is locally or regionally applicable may be filed only in the United States Court of Appeals for the Appropriate Circuit.[33]

The court found that a constitutional challenge to the statute was *in effect* an appeal of a final EPA action and therefore under the previous section of the CAA, the district court had no subject matter jurisdiction.[34] On appeal in the instant case, Virginia argued that the statute was unconstitutional was not an appeal of a final action, but was a federal question brought to the court pursuant to 28 U.S.C. Section 1331.[35] The Court of Appeals for the Fourth Circuit affirmed the district court's decision that though plead as a constitutional claim, Virginia's case was essentially an appeal of a final order by the EPA and was thus outside the jurisdiction of the federal district courts.[36]

III. LEGAL BACKGROUND

The issue presented in *Virginia v. United States* was whether a constitutional challenge to the 1990 amendments to the Clean Air Act was sufficient to establish an appeal of a final decision by the EPA,[37] invoking exclusive jurisdiction in the federal courts of appeals.[38] The United States has established exclusive jurisdiction of final actions by the EPA in federal courts of appeals in order to promote various policies behind the CAA.[39] Some courts have not construed a constitutional challenge to environmental statutes

[21] 42 U.S.C Sections 7661-7661(f) (Supp. I. 1996).
[22] *Virginia*, 74 F.3d at 521 (quoting 40 C.F.R. Section 70.4(b)(3)(x)).
[23] *Id.* at 521.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] U.S. Const. Art. I, Section 8, cl. 1.
[29] U.S. Const. Art. V, Section 4.
[30] *Virginia*, 74 F.3d at 521-22.
[31] *Id.* at 522.
[32] *Id.*
[33] 42 U.S.C. Section 7607(b)(1) (Supp. I. 1996).
[34] *Virginia*, 74 F.3d at 522-23.
[35] *Id.* at 526.
[36] *Id.*
[37] *Id.* at 523.
[38] 42 U.S.C. Section 7607(b)(1) (Supp. I. 1996).
[39] *Virginia*, 74 F.3d at 526.

themselves to be equivalent to a final action by the EPA.[40] In cases where the courts treat constitutional challenges as separate from final EPA actions, the district courts *do* have federal question jurisdiction.[41]

A. History of the Ambient Air Quality Provisions of the Clean Air Act

The Clean Air Act was enacted to "protect and enhance the quality of the Nation's air resources."[42] The CAA was amended in 1977 to require the establishment of a joint effort between the EPA and the individual states wherein the EPA sets out the national uniform air quality requirements and the states create State Implementation Plans which meet the EPA's standard.[43] The CAA requires states to be responsible for meeting the appropriate air quality levels within a deadline established by Congress.[44] The standards set by the EPA must "protect the public health with an adequate margin of safety, without regard to the economic or technical feasibility of attainment."[45] The states are required to develop implementation programs which estimate emission levels in the air.[46] In response to the emission levels, the states must determine whether or not control programs should be implemented in order to achieve satisfactory emission levels established by the EPA.[47]

As a practical matter, the 1977 amendments to the Clean Air Act did little to reduce ozone pollution, carbon monoxide pollution, and small particulate matter pollution.[48] There were various reasons for the failure of these amendments to achieve the desired attainment level.[49] For instance, mobile source emissions were not reduced to the extent desired because transportation control measures like gas rationing, restricted parking, and restricted freeway lanes were strongly resisted and eventually prohibited by Congress.[50] In addition, very few controls were required on stationary source categories.[51] In 1977, the deadline was extended to 1982 for achieving the appropriate levels of ozone and carbon monoxide, with options for additional extensions into 1987.[52] Various areas which failed to achieve attainment in 1982 automatically received an extension to 1987.[53] When areas failed to meet the 1987 deadline for attainment, the EPA attempted to initiate a construction ban sanction on those not in compliance.[54] Only a few of those sanctions were implemented.[55] By 1988, the list of areas in violation of the ozone standard had grown from 70 cities in 1987 to 101 cities in 1988.[56]

In response to the growing number of areas with non-complying ozone levels, the House Committee in charge of this problem requested a report by the General Accounting Office (GAO) regarding the deficiency of the current program.[57] The report, entitled "Ozone Attainment Requires Long-Term Solutions to Solve Complex Problems", revealed various inadequacies of the attainment program in effect at the time.[58] In some cases, *if* attainment measures were implemented, they were often not enforced.[59] The report also revealed that the ozone reduction plans may not have been realistic due to an understatement of hydrocarbon emission inventories because of incorrect data, deficient models, and uncertainties in tools and models used in calculating in the inventories.[60] The GAO also found that other factors such as scientific uncertainties, weather patterns, inventory sources and modeling, in addition to the magnitude of the

[40] *See* Missouri v. United States, 918 F.Supp. 1320 (Mo. Ct. App. 1996); Pacific Legal Foundation v. Costle, 627 F.2d 917 (9th Cir. 1980).
[41] 28 U.S.C. Section 1331 (1986).
[42] H.R. Rep. No. 101-490(I), 101st Cong., 2nd Sess. (1990).
[43] *Id.* The standard is the maximum allowable concentration of each of the six criteria pollutants: lead, particulate matter, nitrogen dioxide, sulfur dioxide, ozone and carbon monoxide.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* However, for certain pollutants like lead, particulate matter, nitrogen dioxide, and sulfur dioxide, the programs have been successful.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*

problem, may have contributed to the unachievable deadlines.[61] The GAO concluded that the problem could not be resolved with a single solution, but should have been addressed with a number of solutions.[62] Specifically, the GAO suggested that Congress should amend the CAA and establish a strategy that differentiates among the severity of ozone in different non-attainment areas and establishes different attainment deadlines accordingly.[63] In addition, Congress should revise the Act's sanctions and provide a clear policy regarding when the sanctions will be activated.[64] Correspondingly, Congress amended the CAA in 1990, including in Title I and Title V of the amendments a new standard for attaining the appropriate air levels of ozone, carbon monoxide pollution, and particulate matter pollution.[65]

B. Avoiding Repetitive and Attenuated Review

In order to promote the policy behind the Clean Air Act, Congress established exclusive jurisdiction of final actions by the EPA to be in the federal courts of appeal.[66] The policy underlying this provision in the CAA is to provide "prompt and conclusive review of air quality controversies."[67] Various courts note the desire to avoid duplicative review of final actions by administrative agencies such as the EPA.[68] In *Palumbo v. Waste Technologies Industries*, the court held that federal courts of appeal had jurisdiction over a claim that challenged the validity of permits for hazardous waste incinerators under the Resource Conservation and Recovery Act[69] which has an exclusive jurisdiction scheme similar to that under the CAA.[70] The court stated that Congress enacted such a provision in order to avoid "duplicative review and the attendant delay and expense involved."[71] The court also stated that "adding another layer of collateral review" could threaten the administrative process that Congress has established.[72] The court indicated that if a plaintiff were able to sue in a federal district court as well as a federal circuit court, the plaintiff could choose to sue in the district court which has a different standard of review under the Administrative Procedure Act[73]. According to the Court's rationale, the plaintiffs, by choosing to file their claim in a federal district court, also would be able to circumvent the time period for filing an appeal, which would not need be done in a district court case because so long as there is a legitimate case or controversy, the plaintiff has the discretion when and whether to bring its claim.[74]

Natural Resources Defense Council v. Reilly[75] also promoted expeditious review of EPA decisions by holding that under the Clean Air Act, an action seeking to force the EPA to initiate standards requiring vehicles to be equipped with refueling vapor recovery systems is within the exclusive jurisdiction of the circuit courts.[76] The district court in which the suit was brought held that it did not have jurisdiction after evaluating two basic policy reasons behind the jurisdictional provision of the CAA.[77] The court stated that if no further facts were to be found, the proper information was available to the appeals court via the underlying administrative record, making an action in the district court just an unnecessary layer in the review process.[78] The second policy reason propounded by *Natural Resources* is the risk of cumulative or duplicative litigation.[79] The court indicated that allowing a plaintiff to a review of a final decision by the EPA in both a district court and a circuit court would allow for inconsistent judgments and confusion.[80] For these policy reasons, the courts have upheld the provision in the CAA which requires federal circuit court review of final EPA actions.

In *Greater Detroit Resource*

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] 42 U.S.C. Section 7607(b)(1) (Supp. I. 1996).
[67] *Virginia*, 74 F.3d at 526.
[68] *See* Palumbo v. Waste Technologies Industries, 989 F.2d 156 (4th Cir. 1993); General Electric Uranium Management Corp. v. U.S., 764 F.2d 896 (D.C. Cir. 1985); Natural Resources Defense Council v. Reilly, 788 F.Supp. 268 (E.D. Va. 1992).
[69] 42 U.S.C. Section 6901 et.seq. (1994).
[70] *Palumbo*, 989 F.2d at 151 (4th Cir. 1993).
[71] *Id.* at 162 (quoting General Electric Uranium Management Corp. v. U.S. Department of Energy, 764 F.2d 896 (D.C. Cir. 1985)).
[72] *Id.* at 161.
[73] *Id.*
[74] *Id.*
[75] Natural Resources Defense Council v. Reilly, 788 F.Supp. 268 (E.D. Va. 1992).
[76] *Id.*
[77] *Id.*
[78] *Id.* at 273.
[79] *Id.*
[80] *Id.*

Recovery Authority v. United States Environmental Protection Agency[81], the court listed additional policy reasons for making review of final EPA decisions exclusive in the federal courts of appeal. The court stated that appellate courts are better suited to review a final EPA decision because they tend to develop a general expertise regarding the agencies to which they are assigned exclusive jurisdiction.[82] In addition, the *Greater Detroit* court reiterated the aforementioned policy reasons such as the risk of cumulative or duplicative judgments.[83]

One case held that the policy reasons behind the CAA would best be achieved by granting jurisdiction of final EPA decisions to the federal courts of appeal even in situations where jurisdiction is ambiguous.[84] *General Electric Management Corp. v. U.S.* asserted that in a situation where jurisdiction is unclear, the default rule should be that jurisdiction goes to the federal courts of appeal.[85] The court stated the general proposition that "where it is unclear whether review jurisdiction is in the district or the circuit court of appeals the ambiguity is resolved in favor of the latter".[86] The court explains that the policy for this rule is to expedite the review process by allowing the complaint to be reviewed only by the federal court of appeal instead of allowing the case to be brought in the district court which would allow further review in the courts of appeal.[87] In the *General Electric* case, General Electric brought suit in a federal district court challenging a fee established by the Department of Energy.[88] The suit was dismissed for lack of subject matter jurisdiction.[89] General Electric appealed and the court of appeals held that jurisdiction was ambiguous so the court should look to the most efficient way of resolving the dispute.[90] In such a situation, the Court said jurisdiction should be given to the circuit courts.[91]

C. Determining a "Final Action" Under the Clean Air Act

Though most courts agree that exclusive jurisdiction of final EPA actions in the courts of appeal helps to promote expeditious and equitable determinations of controversies, these courts have taken a narrow view of what constitutes a "final action" by the EPA.[92] *Virginia v. United States*[93] represents a departure from the general rule that constitutional challenges are not final challenges for EPA purposes. *Virginia* cites various cases which have found that the circuit has jurisdiction over review of final actions by the EPA. In *Palumbo v. Waste Technologies Industries*[94], the court found that:

> [W]hen Congress has chosen to provide the circuit courts with exclusive jurisdiction over appeals from agency decisions, the district courts are without jurisdiction over the legal issues pertaining to those decisions--whether or not those issues arise from the statute that authorized the agency action in the first place.[95]

Pertaining to the instant case, the court interpreted this to mean that the circuit courts should have jurisdiction over constitutional challenges because they arise from the statute that authorized the EPA's action.[96] The claim in the *Palumbo* case surrounded the validity of hazardous waste permits issued by the State and Federal EPA, not a constitutional challenge to the statute allowing the EPA to grant the hazardous waste permits.[97]

The *Virginia* court also relied heavily on the court in *Greater Detroit Resource Recovery Authority v. United States Environmental Protection Agency*.[98] That court suggested that no matter how the grounds for review are framed in a review of a final EPA action, the channel for review is the federal

[81]916 F.2d 317 (6th Cir. 1990).
[82]*Id.* at 321.
[83]*Id.*
[84]General Electric Management Corp. v. U.S., 764 F.2d 896 (D.C. Cir. 1985).
[85]*Id.* at 903.
[86]*Id.* (quoting Denberg v. United States R. Retirement Board, 696 F.2d 1193, 1197 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1706 (1984)).
[87]*Id.* (quoting Harrison v. PPG Industries, 446 U.S. 578 (1980)).
[88]*Id.*
[89]*Id.*
[90]*Id.* at 903.
[91]*Id.*
[92]*See* Missouri v. United States, 918 F.Supp. 1320 (E.D. Mo. 1996); Pacific Legal Foundation v. Costle, 627 F.2d 917 (9th Cir. 1980).
[93]74 F.3d 517.
[94]989 F.2d 156 (4th Cir. 1996).
[95]*Id.* at 161 (quoting Media Access Project v. FCC, 883 F.2d 1063,1067 (D.C. Cir. 1989).
[96]*Commonwealth of Virginia*, 74 F.3d at 523. That is what the court in *Virginia* is arguing.
[97]*Id.*
[98]916 F.2d 317 (6th Cir. 1990).

court of appeal.[99] In that case, an action was brought to determine whether or not the EPA exceeded its power by attempting to revoke a permit to build a solid waste incinerator for a municipality.[100] The court held that the district courts had no jurisdiction over cases arising under the Clean Air Act pursuant to federal question jurisdiction because Congress has granted exclusive jurisdiction to the federal courts of appeals.[101] The court in *Virginia* interpreted this to mean that even if a claim is framed as a constitutional challenge, it is in effect a challenge to an EPA decision and should be brought in the federal courts of appeal.[102] However, the court noted that extreme circumstances could arise which would justify an exception to the statutorily prescribed means of review.[103] The court decided that the exception did not apply because it customarily applies only in extreme circumstances of usurpation of power by a federal agency.[104]

Some courts have taken a different approach than the *Virginia* court did in determining whether constitutional challenges fall under 42 U.S.C. Section 7607 as a "final action" by the EPA. In *Pacific Legal Foundation v. Costle*, the court held that the district court did have jurisdiction over a constitutional challenge to a statute under the CAA.[105] The plaintiffs in that case filed suit to enjoin the defendants from enforcing a ban on construction or modification of air-pollution sources in California and from punishing the state for failure to comply with anti-pollution laws.[106] The plaintiffs claimed that the EPA failed to promulgate rules that would do away with the need for the construction ban and the EPA was using unconstitutional funding sanctions to force the California legislature to act.[107] The court held that the district court was without jurisdiction to hear the claim regarding the EPA's failure to promulgate appropriate rules because that dealt with a "final action" by the EPA which is exclusively under the jurisdiction of the circuit courts.[108] However, the court did find that the constitutional challenge was outside of 42 U.S.C. Section 7607(b)(1), the jurisdictional provision which limits challenges to final actions of the EPA to the federal courts of appeal, in that it was not a final action and was reviewable in the district courts pursuant to federal question jurisdiction of 28 U.S.C. Section 1331.[109]

D. *Missouri v. United States*[110]

Another significant case which decided that a constitutional challenge was outside of 42 U.S.C. Section 7607(b)(1) is *Missouri v. United States*.[111] This case, decided three days after the instant case, followed *Pacific Legal Foundation's* rationale.[112] The facts mirror the facts in *Virginia v. United States*.[113] Pursuant to the CAA requirements that each state create an SIP[114] in areas designated as serious, severe, or extreme nonattainment zones, the Governor declared the St. Louis area[115] to be an area of nonattainment sufficient to warrant an SIP.[116] In January of 1993, the EPA notified Missouri of its failure to submit certain elements of the plan as required by the EPA.[117] Missouri then modified the plan and resubmitted it to the EPA.[118] The state failed to implement an approved plan within the statutorily allowed time.[119] Missouri sought to enjoin the pending sanctions by bringing suit in the district court

[99] *Id.*

[100] *Id.* at 319.

[101] *Id.* at 323.

[102] *Virginia*, 74 F.3d at 523.

[103] *Greater Detroit*, 916 F.2d at 323. The court is referring to the "Leedom Exception" which arises from *Leedom v. Kyne*, 358 U.S. 184; 79 S.Ct. 180; 3 L.Ed.2d 210 (1958), where the Supreme Court decided that a "litigant may bypass available administrative procedures where there is a readily observable usurpation of power not granted to the agency by Congress." The "Leedom Exception" would not apply in the instant case because under 42 U.S.C. Sections 7410(m), 7506(c), & 7509(b)(1), Congress specifically grants to the EPA the power to impose the challenged sanctions.

[104] *Id.*

[105] *Pacific Legal Foundation*, 627 F.2d 917, 918 (9th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] Missouri v. United States, 918 F.Supp. 1320 (E.D. Mo. 1996).

[111] *Id.*

[112] *Id.* at 1322

[113] *Virginia*, 74 F.3d 517.

[114] 42 U.S.C. Sections 7409-10 (1989 & Supp. I. 1996).

[115] This area consists of three counties in Illinois, four counties in Missouri, and the City of St. Louis.

[116] Missouri v. United States, 918 F.Supp. at 1323.

[117] *Id.* at 1324.

[118] *Id.*

[119] *Id.* at 1324-25.

claiming that the highway funds sanctions of the CAA[120] violated the spending clause[121] of the Constitution as well as the Tenth Amendment.[122] The district court in *Missouri* held that it did have subject matter jurisdiction over the claim.[123] The court criticized the decision in the instant case stating that the authority cited by the *Virginia* court was distinguishable because those cases never addressed a constitutional challenge.[124] The *Missouri* court stated that *Virginia's* interpretation of 42 U.S.C. Section 7607 was too broad.[125] The court found that it had subject matter jurisdiction over the federal question addressed in Missouri's constitutional challenge pursuant to 28 U.S.C. Section 1331.[126] The *Missouri* court gave no policy reasons for making this distinction and refusing to follow the *Virginia* decision other than the fact that it could distinguish the authority on which the *Virginia* court relied.[127]

IV. INSTANT DECISION

In *Virginia v. United States*,[128] the court began its analysis by narrowing the issue to the question of whether by framing its claim in a constitutional vein, Virginia could overcome the jurisdictional restrictions imposed by the Clean Air Act, codified in 42 U.S.C. Section 7607(b)(1).[129] The court looked first at whether a constitutional claim could constitute a "final action" under the relevant jurisdictional statute.[130] The court found that Virginia's constitutional challenge to the validity of the highway funds sanctions in effect sought to invalidate a final EPA ruling.[131] To determine Virginia's purpose in seeking to declare the highway funds sanctions of the in violation of the spending clause,[132] the commerce clause[133] and the Tenth Amendment,[134] the court looked at the petitioner's complaint.[135] The court found that though the complaint was not framed in such a way as to challenge a final action by the EPA, the practical objective of the constitutional challenge was to nullify a final action by the EPA.[136] The court used various cases which have interpreted "final actions" very broadly in support of its contention that a constitutional challenge is a "final action".[137]

Virginia challenged the statute on various grounds.[138] The state first claimed that 42 U.S.C. Section 7607(b)(1) should not restrict final action review to the circuit courts.[139] The state argued that the "exclusivity" of the circuit court jurisdiction is undermined by the "citizen suit" provision in 42 U.S.C. Section 7604(a)(2) which gives the *district* courts jurisdiction over claims that the EPA Administrator failed to perform a non-discretionary act or duty.[140] Virginia argued that because suits regarding some actions by the Administrator of the EPA can be brought in the district courts, Congress did not intend that 42 U.S.C. 7607(b)(1) be given "expansive reach".[141] The court rejected this contention, citing various cases that held that once circuit courts obtain jurisdiction under Section 7607(b)(1), then the district courts lose jurisdiction under the citizen suit provision.[142]

Virginia also claimed that 42 U.S.C. Section 7604(e) which provides

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[120]42 U.S.C. 7509(b)(1) (1996).

[121]U.S. Const., Art. I, Sect. 8 cl.1.

[122]Missouri v. United States, 918 F.Supp. at 1320.

[123]*Id.* at 1327-1328.

[124]*Id.* at 1328.

[125]*Id.*

[126]*Id.* 28 U.S.C. Section 1331 provides: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[127]*Id.*

[128]*Virginia*, 74 F.3d 517.

[129]*Id.* at 522.

[130]*Id.*

[131]*Id.* at 523.

[132]U.S. Const., Art. I, Sect. 8, cl. 1.

[133]U.S. Const., Art. I, Sect 8, cl. 3.

[134]U.S. Const. Amend X (1791).

[135]*Virginia*, 74 F.3d at 523.

[136]*Id.*

[137]*See* Thunder Basin Coal Co. v. Reich, 114 S.Ct. 771 (1994); Palumbo v. Waste Technologies, 989 F.2d 156 (4th Cir. 1993); Greater Detroit Resource Recovery Authority v. United States EPA, 916 F.2d 317(6th Cir. 1990); Monongahela Power co. v. Reilly, 980 F.2d 272 (4th Cir. 1992); Environmental Defense Fund v. Thomas, 870 F.2d 272 (4th Cir. 1992).

[138]*Virginia*, 74 F.3d at 523-26.

[139]*Id.* at 523.

[140]*Id.* at 524.

[141]*Id. See* Indiana v. Michigan Elec. Co. v. EPA, 733 F.2d 489 (7th Cir. 1984); City of Seabrook v. Costle, 659 F.2d 1371 (5th Cir. 1981).

[142]*Id.*

that nothing in Section 7604, the citizen suit provision, "shall restrict any right which any person ...may have under any statute or common law to seek enforcement...or to seek any other relief..."[143] indicates that Congress intended to allow concurrent jurisdiction over issues brought under Section 7607(b)(1), the jurisdictional provision of the CAA.[144] The court held that Section 7604 simply meant that Congress did not intend for the citizen suit provision to preempt other available remedies and the section in question did not have any bearing on the jurisdictional provisions of the CAA.[145]

In another argument by Virginia, the state urged that the court should not validate this statute because it did not a way for petitioner's to obtain "meaningful judicial review" unless there was a factual record obtained in district court that could be re-examined in the court of appeal.[146] The current procedure only allows for those facts shown on the EPA record to be examined in the courts of appeal.[147] The court rejected this argument, stating that none of Virginia's claims required the factual record for which Virginia petitions.[148]

Virginia further alleged that withdrawal of highway funding violated federalism-based limits on Congress' spending power, showing the impact of the sanctions on Virginia's economic highway and construction programs.[149] The court rejected this argument by stating that the circuit courts could always remand to the EPA and demand spending information to be placed in the administrative record.[150]

In its final claim, Virginia stated that the jurisdictional restrictions under 42 U.S.C. 7607(b)(1) bound states in such a way that could only be undone by allowing concurrent jurisdiction in district courts.[151] The court disagreed with Virginia's contention, citing the purpose behind the statute which is to avoid "duplicative review" and the "attendant delay and expense" involved.[152] The court cited to various authority which established the policy reasons behind the statute and indicated the bad effects of having concurrent jurisdiction in the circuit courts as well as the district courts.[153] Because it disagreed with the arguments made by Virginia, the court decided to uphold the "established meaning of [42 U.S.C. 7607(b)(1)]" and affirmed the district court's decision.[154]

Counts I and II of Virginia's claim challenged the NAAQS provisions of the CAA on constitutional grounds.[155] Virginia alleged that Congress usurped its power in violation of the Tenth Amendment by requiring VOC reduction plans and I & M programs for non-attainment areas in addition to requiring broad access to the state courts.[156] Also, Virginia suggested that the sanction provisions of the CAA violate the Guarantee Clause due to their coercive nature.[157] The court avoided these issues, stating that a decision could be reached without administrative fact finding.[158]

IV. COMMENT

Virginia v. United States made a bold move by declaring that a constitutional challenge to the CAA was, in effect, a final action by the EPA, and thus under 42 U.S.C. Section 7607(b)(1), could only be reviewed in a federal circuit court.[159] That other courts like the one in *Missouri v. United States*[160] might criticize it is no surprise. Many cases have alluded to a very broad interpretation of 42 U.S.C. Section 7607(b)(1), but the court in the *Virginia* case is the first to extend the statutory jurisdictional scheme to encompass constitutional claims.[161] Clearly, the law is unsettled in this area, indicated best by the *Missouri v. United States*[162] court's criticism and disapproval of the

[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 525.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *See* Natural Resources Defense Council v. Reilly, 788 F.Supp 268 (E.D. Va. 1992); Palumbo v. Waste Technologies Industries, 989 F.2d 156 (4th Cir. 1996); Monongahela Power Co. v. Reilly, 980 F.2d 272 (4th Cir. 1992); Environmental Defense Fund v. Thomas, 870 F.2d 892 (2nd Cir.), *cert denied*, 493 U.S. 991, 110 S.Ct. 537, 107 L.Ed.2d 535 (1989).
[154] Missouri v. United States, 918 F. Supp. at 1328.
[155] *Virginia*, 74 F.3d at 524-25.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at 523.
[160] Missouri v. United States, 918 F.Supp. 1320.
[161] *Virginia*, 74 F.3d 517.
[162] Missouri v. United States, 918 F.Supp. 1320.

decision in *Virginia v. United States*[163] just three days after that case was decided in the federal circuit court.

The court in the *Virginia* case stretched the rhetoric of vaguely similar cases to establish exclusive jurisdiction over constitutional claims in the courts of appeal, regardless of the limited facts and circumstances in each case. The cases upon which the *Virginia* court relied did not address constitutional challenges, but EPA actions themselves.[164] In *Palumbo v. Waste Technologies Industries*,[165] the plaintiffs challenged the granting of hazardous waste permits by the EPA.[166] The court in that case indicated that jurisdiction in such cases lies with the federal courts of appeal, so long as the claim *arose from the statute authorizing agency authority*.[167] The *Virginia* court applied this dicta to the present case, stating that a constitutional claim, which necessarily arises from a statue, should be brought in a federal circuit court as well.[168] The distinguishing fact that the court in the *Virginia* case neglected to address was that the court in *Palumbo* was not faced with a constitutional challenge.[169] *Virginia's* interpretation is very broad and its result might not be the result intended by the court in *Palumbo*.

Virginia also relies on *Greater Detroit Resource Recovery Authority v. United States Environmental Protection Agency*.[170] In *Greater Detroit*, an action was brought in a circuit court to challenge the EPA's attempt to revoke a permit to build a solid waste incinerator and steam generating plant.[171] The court in that case suggested that no matter how the grounds for review are framed, when Congress has vested jurisdiction over particular matters in the circuit courts, the jurisdiction of those courts is exclusive.[172] The *Virginia* court stretched this concept to its limit as well, suggesting that even though the claim was framed as a constitutional challenge to the statute authorizing EPA action, it should be brought in the circuit court pursuant to the CAA's jurisdictional provision.[173] Because of the wide-reaching implications that a decision like the one in *Virginia* raises, the court in *Greater Detroit* might have decided differently if faced with a constitutional challenge.

It is difficult to justify such broad interpretations of the *Greater Detroit* and *Palumbo* cases. Not only will there be confusion in courts about constitutional claims and federal question jurisdiction, but a decision like this imposes huge costs on those wanting to challenge the statute on constitutional grounds. For example, instead of simply bringing a claim to a federal district court, the plaintiff must bring it to a court of appeal which can impose time limits for filing the claim. Once filed, the court might prolong the process by neglecting to make a decision until a factual record is established by the EPA.[174] In the mean time, the state faces serious sanctions such as withdrawal of highway funding or federally imposed implementation programs.[175] Also, by requiring that a constitutional challenge be brought in a federal court of appeal, the court imposes a more stringent standard of review on those bringing a claim in the circuit courts.

Missouri v. United States[176] established a better rule of law than did the court in *Virginia*. Those subject to the *Missouri* decision can avoid many of the problems raised by the *Virginia* case. The *Virginia* decision undermines a federal district court's jurisdiction pursuant to 28 U.S.C. Section 1331 which grants the district court jurisdiction over federal questions.[177] The court in *Virginia* seemed to overlook this aspect of its decision. There is probably no clearer case to be brought in a district court pursuant to federal question jurisdiction than whether a statute violates the constitution. The *Missouri* court got this right by affirming the long-standing rule that a constitutional challenge is a federal question, not a challenge to an agency's final decision.[178]

Practically, the *Virginia*

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[163]*Virginia*, 74 F.3d 517.

[164]*See* Palumbo v. Waste Technologies Industries, 989 F.2d 156; Greater Detroit Resource Recovery Authority v. U.S., 916 F.2d 317; Monongahela Power co. V. Reilly, 980 F.2d 272 (4th Cir. 1992).

[165]*Palumbo*, 989 F.2d at 157.

[166]*Id.*

[167]*Id.* at 161.

[168]*Virginia*, 74 F.3d at 523.

[169]*Palumbo*, 989 F.2d at 157.

[170]*Greater Detroit*, 916 F.2d 317.

[171]*Id.* at 319.

[172]*Id.* at 322.

[173]*Virginia*, 74 F.3d at 523.

[174]*Id.* at 524.

[175]42 U.S.C. Sections 7410(m), 7506(c), & 7509(b)(1) (Supp. I 1996).

[176]Missouri v. United States, 918 F.Supp 1320.

[177]*Id.* at 1327-28.

[178]*Id.*

decision has unfairly limited the forum in which a state can bring its claim, causing many potential problems. In effect, this could prevent a litigant from getting a jury trial if there were any relevant facts to be established, though the court did indicate that the circuit courts can allow the cases to be remanded to the agency for factual developments.[179] To say that the circuit court can always remand to the agency for factual developments is an extremely weak justification for not allowing the case to be brought in the district courts in the first place.[180] This justification undermines the stated policy reasons behind the jurisdictional provisions of the CAA.[181] Judicial efficiency is hardly achieved if a state has to bring a claim in the circuit court which will have to be remanded to the agency for factual development which will have to go back to the circuit court for a final decision. The court in *Missouri* eliminates this yo-yo scheme by allowing the case to be brought in the district court for the factual development and final decision.[182] Only if there are grounds for appeal will the case reach the circuit courts. The *Missouri* approach seems to be a better route to judicial efficiency than the approach that the court in *Virginia* took.

The court in *Missouri* also makes a better decision than the court in *Virginia* by allowing for a neutral party, the district court, to be the fact-finder, not the agency itself. It would be naïve to think that any entity whose power is being threatened, no matter how well-intentioned, would be unbiased in deciding the facts of the case. The *Virginia* court turns a blind eye toward this issue, in effect giving the EPA the power to decide the facts in a case against itself.

In addition, the court in *Virginia* neglected to address what would happen if a state brought a constitutional challenge to the CAA provisions *prior* to a final determination by the EPA.[183] In the instant case, Virginia *had* been sanctioned and so the court felt safe by categorizing the constitutional challenge as an appeal to the sanctions imposed by the EPA.[184] Virginia raised this issue, but the court refused to address it, stating that "[t]he dilemma that Virginia describes...is not presented in this case."[185] The court limited its holding to cases where a final decision by the EPA had been given.[186] The state raised a valid point and by failing to address it, the court weakened its case. If the constitutional claim challenging an environmental statute can be brought in the federal district courts under federal question jurisdiction when no final EPA decision has been reached, it seems untenable that an EPA decision alone can divest the federal district court of jurisdiction. Conversely, if the constitutional challenge cannot be brought at all unless a final EPA decision has been reached, Virginia might be motivated to violate the EPA laws in order to have standing to challenge the environmental statute in the first place.[187] Should this happen, the very purpose of the CAA and its 1990 amendments would be dishonored.

V. CONCLUSION

Missouri v. United States[188] followed the majority view that a constitutional challenge to an environmental statue like the Clean Air Act is separate from a final action by the EPA. The decision in *Virginia v. United States*[189] represents a departure from this rule. The *Virginia* court indicated that this would better support the policy reasons behind the jurisdictional scheme of the Clean Air Act's "ambient air quality" provisions. By stating that a constitutional challenge is *in effect* a final decision by the EPA, the Fourth Circuit is attempting to promote quick and final judicial review of environmental actions.

Though the stated purpose of its decision was to promote congressional intent by expediting the review process of final agency actions, the court in *Virginia* in no way fulfilled that purpose. It complicated matters by making constitutional challenges equivalent to a final action by the EPA. This decision brings uncertainty and inconsistency into the process of judicial review. It raises the question of whether there will be review of constitutional challenges when there is no final action. It also conflicts with 28 U.S.C. Section 1331 which provides for district court jurisdiction over federal questions. In addition, it brings potential bias and inefficiency to the judicial process by determining that the EPA itself can provide the factual record in a case threatening its power.

The court in *Missouri*, on the other hand, seems to have made a better decision. The decision provides for an efficient, unbiased procedure of review consistent with the goals behind the CAA and its amendments.

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[179] *Virginia*, 74 F.3d at 524.
[180] *Id.* at 524.
[181] *Id.* at 526.
[182] Missouri v. United States, 918 F.Supp. at 1327-28.
[183] *Virginia*, 74 F.3d at 525.
[184] *Id.* at 523.
[185] *Id.* at 525.
[186] *Id.*
[187] *Id.*
[188] Missouri v. United States, 918 F.Supp 1320.
[189] *Virginia*, 74 F.3d 517.