

JUDGE MERHIGE'S ENVIRONMENTAL DECISIONS:  
EXPERT HANDLING OF GROUNDBREAKING  
ENVIRONMENTAL RULINGS AND COMPLEX FEDERAL  
JURISDICTIONAL QUESTIONS

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It is a special privilege for me to contribute to this edition of the *University of Richmond Law Review* honoring Judge Robert R. Merhige, Jr. Here, I seek to highlight his contributions to United States environmental law. In 1988 and 1989, I was one of two recent law school graduates who clerked for Judge Merhige (“please call me by my first name; it’s ‘Judge’”). The Judge was a larger than life figure. As a federal trial judge, historically important and intellectually challenging cases seemed to find their way into his court in a volume not matched in many other federal district courts. Not surprisingly, his environmental cases were “big” and his rulings reflected his uncommon grasp of the whole of the law.

There is simply no way to talk about Judge Merhige without including anecdotes and typically, some humor. Here is my “environmental” anecdote.

Environmental practitioners who have worked under the federal “Superfund” law or Resource Conservation and Recovery Act<sup>1</sup> (or their State counterparts) on cleanups of land or groundwater contaminated with gasoline residues are aware of the significance of BTEX detected in site samples. Some seasoned environmental lawyers even know what the acronym BTEX means.<sup>2</sup>

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\* Partner and Member, King & Spalding LLP, Environmental, Health and Safety practice team. I am substantially indebted to and grateful for the work of Zachary Hennessee, a third-year law student at the Duke University School of Law and future federal judicial law clerk, who compiled an extremely thorough catalogue of Judge Merhige’s environmental cases and articulated numerous fine insights about these rulings and their import.

1. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976).

2. “When gasoline is in contact with water, benzene, toluene, ethylbenzene and the

Early one morning during my clerkship with the Judge, he brought up the topic of BTEX contamination *sua sponte*. He was a bit late getting to his chambers, meaning after 7:30 AM, which would have been the “afternoon” if it had been one of us. He came through the door loudly asking if anyone knew how to get gasoline out of a neck tie. He had stopped on the way to work to help a stranded motorist and had splashed fuel on himself after he fetched it for her at a gas station and insisted on pouring it in the tank of her car. As for his soiled necktie, one of us commented that it was a bit early in the day for Molotov cocktails, and that was the end of it. I do hope he disposed of the ruined tie in a responsible way.

I really regret that this episode was as close as I came to working with the Judge on an environmental case. He certainly left his mark on the development of federal environmental jurisprudence in the 1970s, 1980s, and into the early 1990s, but chance made it so that during my year with him, no environmental case came across his docket—unless my co-clerk handled it. The Judge and my co-clerk both knew that I planned on becoming an environmental lawyer, so this would have been very wicked of them.

I first came across Judge Merhige and his environmental jurisprudence during my first year of law school, though in a class not typically thought of as having anything to do with environmental law. My Civil Procedure casebook contained one of the Judge’s rulings in the well-known Kepone litigation. Overall, the Kepone cases were a much publicized group of related criminal and civil lawsuits against a chemical manufacturer in Virginia—Allied Chemical—and a spinoff entity. The Judge imposed a \$13,200,000 fine against Allied Chemical for violating the federal Clean Water Act, though he reduced the fine to \$5,000,000 after the company agreed to donate \$8,000,000 to the Virginia Environmental Endowment Fund—an organization whose purpose is to improve the

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xylene isomers (BTEX) account for as much as 90% of the gasoline components that are found in the water-soluble fraction.” F.X. Prenafeta-Boldú et al., *Substrate Interactions During the Biodegradation of Benzene, Toluene, Ethylbenzene, and Xylene (BTEX) Hydrocarbons by the Fungus Cladophialophora sp. Strain T1*, 68 APPLIED & ENVTL. MICROBIOLOGY 2660, 2660 (2002) (citations omitted). “BTEX is not one chemical, but are a group of the following chemical compounds: Benzene, Toluene, Ethylbenzene and Xylenes. BTEX are made up of naturally-occurring chemicals that are found mainly in petroleum products such as gasoline.” BUREAU OF ENVTL. HEALTH AND RADIATION PROT., OHIO DEPT’ OF HEALTH, BTEX 1 (2016).

quality of Virginia's environment.<sup>3</sup> The settlement produced ancillary litigation over whether the donation was tax deductible, and the Third Circuit ultimately held that it was not.<sup>4</sup>

But my introduction to *Kepone* was a case addressing class certification under the then (c. 1985) Federal Rules of Civil Procedure governing class action litigation in the federal courts. In *Pruitt v. Allied Chemical Corp.*, watermen from Maryland and Virginia sued Allied Chemical for harm to their livelihood from the environmental contamination of the Chesapeake Bay.<sup>5</sup> Judge Merhige declined to certify these groups of watermen from the two states into a single class.<sup>6</sup> Class certification rulings, save for the lawyers directly involved, are usually not historically significant and can be grounded in fairly prosaic reasoning. But the Judge's reason for denying to certify this particular class in *Pruitt* was fairly head-turning—he took judicial notice of the fact that the Maryland and Virginia watermen had been engaged in armed disputes for centuries, including an episode known as the Oyster War of 1785.<sup>7</sup>

A broad survey of Judge Merhige's environmental jurisprudence reveals interesting jurisprudential aspects apart from his particular rulings on questions of environmental law. For instance, the Judge's environmental caseload was heavily weighted with federal Clean Water Act ("CWA") matters. The Judge's CWA opinions, including their ultimate consideration by the United States Supreme Court, have had a profound impact on the law's development, interpretation, and, especially, its enforcement.<sup>8</sup>

Perhaps most importantly among his CWA rulings, the Judge held that the CWA did not imply a cause of action for citizens to sue state governments over provisions in their National Pollutant Discharge Elimination System ("NPDES") (federally authorized effluent discharge) permits, and that 28 U.S.C. § 1983 could not

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3. See *Allied-Signal, Inc. v. Comm'r*, 63 T.C.M. (CCH) 2672, 2678–79 (T.C. 1992) (describing Allied Chemical's penalty).

4. *Allied-Signal, Inc. v. Comm'r*, No. 94-7336, 1995 U.S. App. LEXIS 41283, \*26 (3d Cir. 1995).

5. *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100, 103 (E.D. Va. 1980).

6. *Id.* at 104.

7. *Id.* at 106, 106 n.3.

8. See, e.g., William Goldfarb, *Changes in the Clean Water Act Since Kepone: Would They Have Made a Difference?*, 29 U. RICH. L. REV. 603, 613–32 (1995).

be used to enforce the CWA.<sup>9</sup> The Supreme Court agreed with Judge Merhige on both issues, and, in doing so, significantly impacted citizens' ability to enforce the CWA's provisions.<sup>10</sup> On the flip side, Judge Merhige held as a matter of first impression that the CWA permitted citizen suits for wholly past violations of NPDES permits, a position the Supreme Court ultimately reversed.<sup>11</sup>

Perhaps unexpectedly, in light of Judge Merhige's reputation as the federal judge who desegregated Virginia's schools, his environmental decisions reflect a strong respect for states' rights. The Judge was very circumspect with respect to various issues that implicated federalism, including abrogating state sovereign immunity, implying private causes of action in federal statutes like the CWA, allowing § 1983 claims against states to enforce federal laws, interfering with ongoing state proceedings (*Younger* abstention), finding federal question jurisdiction in mixed claims, and allowing supplemental jurisdiction over state law claims.

On the other hand, the Judge was extremely unsympathetic to individual polluters. The Kepone litigation is a case in point. Another good example is *State Water Control Board v. Train*, where Judge Merhige held that municipal wastewater treatment works would not be exempt from complying with deadlines for effluent limitations imposed by the CWA even when the Environmental Protection Agency ("EPA") admitted that many municipalities would be completely unable to comply due to federal funding shortfalls and administrative delays.<sup>12</sup>

Perhaps not unexpectedly, Judge Merhige's environmental decisions addressed a rather bewildering array of federal jurisdictional and jurisprudential issues in addition to addressing a number of nationally important environmental principles and issues of first impression. The following sections explore this daunting array of interconnected issues sorted out by the Judge over the years.

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9. See *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1545, 1550 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 484 U.S. 49 (1987).

10. *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 65.

11. *Gwaltney of Smithfield, Ltd.*, 611 F. Supp. at 1548; see *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 64.

12. *State Water Control Bd. v. Train*, 424 F. Supp. 146, 155 (E.D. Va. 1976).

### A. *Younger Abstention*

In *Kim-Stan, Inc. v. Department of Waste Management*, a sanitary landfill operator sued to enjoin Virginia officials from enforcing an emergency special order revoking Kim-Stan's permit and prohibiting it from accepting waste from out of state.<sup>13</sup> Judge Merhige granted the State officials' motion to dismiss on *Younger* abstention grounds. Because there were ongoing State proceedings that implicated important State interests and could have resolved the federal claims, the court abstained from exercising jurisdiction over the case.<sup>14</sup>

### B. *Federal Bankruptcy Code Preemption of Environmental Laws*

In *In re Smith-Douglass, Inc.*, Judge Merhige, sitting on the Fourth Circuit by designation, addressed the interesting question of when the Bankruptcy Code preempts State environmental laws.<sup>15</sup> Section 554(a) of the Bankruptcy Code allows trustees to abandon income-draining property, but the Supreme Court in *Midlantic National Bank v. New Jersey Department of Environmental Protection* recognized an exception that trustees "may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."<sup>16</sup> In holding that the *Midlantic* exception should be narrowly construed, Judge Merhige reasoned that the purpose of the Bankruptcy Code is "the expeditious and equitable distribution of the assets," and the Code preempts state laws that evince contrary policies.<sup>17</sup> Accordingly, the Judge held that the exception only applied where the public health or safety is threatened with imminent and identifiable harm.<sup>18</sup> In the case at hand, the Judge held that the State had not demonstrated an immediate and identifiable harm, and, therefore, § 554(a) preempted the contrary state law provisions, and the trustee was entitled to abandon the property.<sup>19</sup> (It is worth noting that at the time of this ruling, Judge Merhige was deeply immersed in the

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13. *Kim-Stan, Inc. v. Dep't of Waste Mgmt.*, 732 F. Supp. 646, 648 (E.D. Va. 1990).

14. *Id.* at 652–53 (applying *Younger v. Harris*, 401 U.S. 37, 53–54 (1970)).

15. *In re Smith-Douglass, Inc.*, 856 F.2d 12, 15–16 (4th Cir. 1988).

16. *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 507 (1986).

17. *In re Smith-Douglass, Inc.*, 856 F.2d at 15.

18. *Id.* at 16.

19. *See id.* at 16–17.

Bankruptcy Code while jointly presiding with Richmond, Virginia, Bankruptcy Judge Blackwell Shelley over the A.H. Robbins bankruptcy. This bankruptcy resulted from the multitude of tort claims against A.H. Robbins related to the “Dalkon Shield” IUD. I clerked for the Judge shortly after the *In re Smith-Douglass, Inc.* ruling and enjoyed the incredible learning experience of working closely with him on the Robbins bankruptcy case).

### C. CWA Citizen Suit Provisions

In *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*,<sup>20</sup> Judge Merhige made the initial ruling in a case that has dramatically impacted citizen enforcement of the CWA. The case addressed the important issue of whether the CWA’s citizen suit provision permits suits for wholly past violations. Judge Merhige held that it did,<sup>21</sup> and the Fourth Circuit affirmed.<sup>22</sup> The United States Supreme Court, resolving a circuit split, held that § 1365 of the CWA does not permit citizen suits for wholly past violations.<sup>23</sup> The Court remanded the case to the Fourth Circuit to consider whether the plaintiffs had also alleged ongoing violations sufficient to confer subject matter-jurisdiction.<sup>24</sup> The Fourth Circuit held that the plaintiffs adequately alleged ongoing violations sufficient for standing purposes, but remanded to the district court to consider whether ongoing violations were proven at trial.<sup>25</sup> Judge Merhige held that they were and reinstated the initial penalty.<sup>26</sup> The Fourth Circuit affirmed that there were ongoing violations but reversed Judge Merhige’s reinstatement of the original penalty because it was based on both past and ongoing violations.<sup>27</sup>

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20. 611 F. Supp. 1542 (E.D. Va. 1985), *aff’d*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 484 U.S. 49 (1987).

21. *Id.* at 1548.

22. *Gwaltney of Smithfield, Ltd.*, 791 F.2d at 306.

23. *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 58–59.

24. *Id.* at 69.

25. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 170 (4th Cir. 1988).

26. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 688 F. Supp. 1078, 1080 (E.D. Va. 1988) *aff’d in part, rev’d in part*, 890 F.2d 690 (4th Cir. 1989).

27. *Gwaltney of Smithfield, Ltd.*, 890 F.2d at 695, 697.

#### D. *Multiplicitous Counts in Criminal Indictment*

In *United States v. Allied Chemical Corp.*, Judge Merhige rejected Allied Chemical's request that the United States Department of Justice elect which of the 456 counts of the indictment it intended to prosecute, or, in the alternative, that all counts be consolidated on the grounds that they were "multiplicitous."<sup>28</sup> The Judge held that there was insufficient information to rule that the counts were multiplicitous.<sup>29</sup>

#### E. *Press Confidentiality*

In *Gilbert v. Allied Chemical Corp.*, the defendant subpoenaed a radio station seeking unpublished and unaired information it had on the Kepone cases.<sup>30</sup> Judge Merhige held that the confidential information was privileged and therefore exempt from disclosure, but the non-confidential information was exempt only if it would lead directly to the disclosure of confidences.<sup>31</sup> In the much later case of *Stickels v. General Rental Co.*, the Judge abrogated this approach and adopted a qualified privilege for non-confidential materials acquired by the press in the course of their newsgathering process.<sup>32</sup>

#### F. *Class Certification in Class Action Litigation*

As noted above, in *Pruitt v. Allied Chemical Corp.*, the Judge declined to certify a class of Maryland and Virginia watermen because of the fact that the two groups engaged in armed violence with one another. To the Judge, it seemed clear that the named plaintiffs could not "adequately represent" the interests of all of the putative class members.<sup>33</sup>

#### G. *Ancillary Jurisdiction*

In *Adams v. Allied Chemical Corp.*, Judge Merhige addressed an attorney fee dispute, which arose during the course of a diver-

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28. 420 F. Supp. 122, 123–24 (E.D. Va. 1976).

29. *Id.* at 124.

30. 411 F. Supp. 505, 507 (E.D. Va. 1976), *abrogated by* *Stickels v. Gen. Rental Co.*, 750 F. Supp. 729 (E.D. Va. 1990).

31. *See id.* at 510–11.

32. *See* 750 F. Supp. at 732.

33. *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100, 106 (E.D. Va. 1990).

sity lawsuit. The Judge held that the fee dispute was not sufficiently connected to the diversity suit to justify ancillary jurisdiction and that there was no basis for federal question jurisdiction.<sup>34</sup>

#### H. *State Tort Law and Economic Damages/Implied Cause of Action in Federal Statute*

In *Pruitt v. Allied Chemical Corp.*, plaintiffs, who made their livings from the Chesapeake Bay, sued Allied Chemical for its pollution of the Bay with Kepone, and Allied Chemical moved to dismiss for failure to state a claim.<sup>35</sup> Judge Merhige considered whether Virginia tort law imposes liability for indirect economic harm, a question which had apparently never been addressed by the Virginia courts. In a candid, introspective opinion, Judge Merhige held that “indirect” economic damages were not recoverable, but acknowledged the difficult line drawing involved in determining what level of commercial activity was too indirect for recovery.<sup>36</sup> Applying a balancing test of the economic aims of tort liability with other countervailing considerations, like the principle in admiralty law that defendants only pay once for damages inflicted, the court held that boat, tackle and bait shop owners who lost business stated cognizable claims, but the plaintiffs who merely purchased and marketed seafood for commercial fishermen did not.<sup>37</sup> In addition, the court held that admiralty law dictated the same result.<sup>38</sup> The Judge also ruled that the Rivers and Harbors Appropriation Act and the Federal Water Pollution Control Act did not imply private causes of action.<sup>39</sup>

#### I. *Broad Spectrum of Jurisdictional and Procedural Issues*

In *James River v. Richmond Metropolitan Authority*, a nonprofit corporation sued federal and state officials and agencies seeking injunctive and declaratory relief enjoining the construction of an expressway in Richmond.<sup>40</sup> The plaintiffs alleged violations

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34. *Adams v. Allied Chem. Corp.*, 503 F. Supp. 253, 255–56 (E.D. Va. 1980).

35. 523 F. Supp. 975, 976 (E.D. Va. 1981).

36. *See id.* at 979–80.

37. *See id.* at 979–82.

38. *Id.* at 980–82.

39. *Id.* at 982.

40. 359 F. Supp. 611, 615–16 (E.D. Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973).

under the United States and Virginia constitutions and the federal Rivers and Harbors Act (“RHA”), National Environmental Policy Act (“NEPA”), Federal-Aid Highways Act (“FAHA”), National Historic Preservation Act (“NHPA”), the Department of Transportation Act (“DOTA”), and the Administrative Procedure Act (“APA”).<sup>41</sup> Judge Merhige’s opinion reads something like a federal courts and civil procedure treatise, addressing pendant jurisdiction, sovereign immunity, organizational standing, the laches doctrine, the extent of federal involvement in the project, and what makes a water “navigable” for the purposes of the RHA. Ultimately, the Judge refused to hear the defendants’ State constitutional claim, summarily rejected the Fifth, Ninth, and Fourteenth Amendment claims, found that the RHA did not apply because the water body at issue was not navigable, and that the other statutory claims did not apply because there was not sufficient federal action.<sup>42</sup> For a judge considered “activist” by many, Judge Merhige’s reasoning in this emotionally charged case is the picture of judicial restraint:

The protection of our environment and of our places of historical interest are of the utmost importance, yet, the decision as to how to protect them must come from the Congress of the United States and the legislatures of the various states. Where, as here, highway planners meet all of the requirements of law applicable to them nothing further is required.<sup>43</sup>

#### J. *A Highway Case with a Different Outcome*

In *Thompson v. Fugate*, Judge Merhige enjoined the Virginia State Highway Commission and Secretary of Transportation from constructing a highway through a portion of the plaintiff’s property.<sup>44</sup> The property was a registered historic landmark and had connections to Thomas Jefferson, John Marshall, and other historical figures in Virginia. The Judge held that the project could be enjoined until the defendants demonstrated compliance with NEPA, DOTA, FAHA and NHPA even though the highway was nearly complete.<sup>45</sup> This opinion came after the Fourth Circuit’s

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41. *Id.* at 616–18, 622.

42. *Id.* at 623, 628, 636, 640–41.

43. *Id.* at 641.

44. 347 F. Supp. 120, 121, 128 (E.D. Va. 1972).

45. *Id.* at 125–28.

holding that the Judge had abused his discretion in failing to enter a preliminary injunction against the condemnation of the property prior to trial.<sup>46</sup>

K. *Federal Common Law, Sovereign Immunity, Pendent Jurisdiction, Tucker Act, Parens Patriae, and the United States Constitution*

In *Board of Supervisors v. United States*, the County of Fairfax, Virginia sued the District of Columbia and certain officials for creating a public nuisance by improperly maintaining the District's Lorton prison complex in Fairfax.<sup>47</sup> (Judge Merhige heard this case in the Alexandria Division of the Eastern District of Virginia, illustrating his penchant for covering cases in a number of other federal court venues outside of Richmond). First, the court considered whether D.C. was entitled to sovereign immunity, holding that it was not because it was alleged to be exceeding its statutory authority.<sup>48</sup> Second, the court held that, at the motion to dismiss stage, the defendants had not met their burden of showing that the federal common law of nuisance was preempted by federal environmental statutes.<sup>49</sup> Next, the court held that the plaintiff could amend its complaint to show the interstate nature of the alleged pollution stemming from the prison complex, which would be sufficient to give rise to a federal nuisance claim.<sup>50</sup> But the other claim, which concerned local security risks, was based in state common law nuisance, and the Judge doubted that the court should exercise pendent jurisdiction over it.<sup>51</sup> Fourth, the court held that the county could not assert constitutional claims of its residents under the *parens patriae* doctrine.<sup>52</sup> Finally, the court held that the plaintiff's Tucker Act claim should be dismissed because there was no implied contract, but that it still could be made out as an element of damages should the plaintiff succeed on its nuisance claim.<sup>53</sup>

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46. *Thompson v. Fugate*, 452 F.2d 57, 58 (4th Cir. 1971).

47. 408 F. Supp. 556, 559 (E.D. Va. 1976), *appeal dismissed without opinion*, 551 F.2d 305 (4th Cir. 1977).

48. *See id.* at 561.

49. *Id.* at 561–62.

50. *Id.* at 562.

51. *Id.* at 565.

52. *See id.* at 566–67.

53. *Id.* at 567.

#### L. *Implied Causes of Action in Federal Statutes*

In *Chesapeake Bay Foundation v. Virginia State Water Control Board*, Judge Merhige considered whether the CWA implied a private cause of action.<sup>54</sup> Applying Justice Brennan's four-factor test in *Cort v. Ash*, Judge Merhige held it did not and dismissed the action, principally because it would be extremely intrusive into the State administrative process.<sup>55</sup> Notably, Judge Merhige's restrictiveness in this area parallels the Rehnquist Court's later significant tightening of recognition of implied causes of action after *Cort*.<sup>56</sup>

#### M. *Section 1983 as the Basis for Suing the State for Violations of CWA*

In a subsequent case, *Chesapeake Bay Foundation v. Virginia State Water Control Board*, the nonprofit plaintiffs sought to amend their complaint following the earlier dismissal, adding the Chairman of the Board as a defendant and asserting 42 U.S.C. § 1983 as the basis for their cause of action.<sup>57</sup> Judge Merhige rejected the plaintiffs' motion but grappled with an issue of first impression: whether § 1983 can be a cause of action to sue a state for alleged violations of the CWA.<sup>58</sup> In *Maine v. Thiboutot*, the Supreme Court had given an expansive reading to § 1983 and seemingly sanctioned using the provision as a hook to sue state officials for violations of any federal law.<sup>59</sup> Judge Merhige, however, found that § 1983 could not be used to sue state officials for CWA violations because of the significant federalism issues and judicial burdens it would create.<sup>60</sup> One year later, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, the Supreme Court agreed with Judge Merhige and cited his opinion

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54. 495 F. Supp. 1229, 1234 (E.D. Va. 1980).

55. *Id.* at 1234, 1237–38 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

56. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that no private right of action exists under Title VI to enforce regulations promulgated under § 602 of Title VI).

57. 501 F. Supp. 821, 823 (E.D. Va. 1980).

58. *See id.* at 825, 830.

59. *See* 448 U.S. 1, 9 (1980).

60. *Chesapeake Bay Found., Inc.*, 501 F. Supp. at 826–28.

favorably.<sup>61</sup> Later Supreme Court decisions mirrored this narrowing of *Thiboutot*.<sup>62</sup>

#### N. *Tension Between NEPA and Law Enforcement Policy*

*Ely v. Velde* was a series of cases addressing the tension between the policies of preservation and conservation in NEPA and NHPA on the one hand, and congressional policies favoring state autonomy in the use of federal funds for law enforcement purposes on the other.<sup>63</sup> Judge Merhige found for the defendant-government officials, holding that officials had reasonably approved grants to a state to fund construction of a penal facility without first completing an Environmental Impact Statement or considering provisions of the NHPA related to federal activity on property listed on the National Register for Historic Places.<sup>64</sup> The Fourth Circuit disagreed and reversed.<sup>65</sup>

#### O. *Statutory Policy Versus the White House*

In *Campaign Clean Water, Inc. v. Ruckelshaus*, Judge Merhige addressed a provision in the 1972 CWA amendments strongly opposed by President Nixon. Congress passed a water pollution appropriation bill over the President's veto which allotted \$11,000,000,000 for waste treatment plant construction grants for fiscal years 1973 and 1974.<sup>66</sup> But the EPA Administrator announced that, pursuant to the President's direction, he was only allotting \$5,000,000,000 out of the \$11,000,000,000.<sup>67</sup> The Judge held that the EPA had abused its discretion and entered a declaratory judgment that the policy was null and void.<sup>68</sup> After the case reached the Supreme Court, the Court agreed that the EPA did not have discretion to allocate less than all the sums authorized

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61. 453 U.S. 1, 20–21 (1981).

62. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

63. See *Ely v. Velde*, 321 F. Supp. 1088, 1090, 1094–95 (E.D. Va.), *aff'd in part, rev'd in part*, 451 F.2d 1130 (4th Cir. 1971); *Ely v. Velde*, 363 F. Supp. 277, 278–79 (E.D. Va. 1973).

64. *Ely*, 321 F. Supp. at 1090–91, 1094–95.

65. *Ely*, 451 F.2d at 1139.

66. *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689, 692 (E.D. Va. 1973).

67. *Id.*

68. *Id.* at 700.

by the 1972 CWA amendments.<sup>69</sup>

*P. State Non-Compliance with Federal Environmental Law Due to Lack of Funds*

In *State Water Control Board v. Train*, Virginia's Water Control Board sued the EPA to obtain relief from compliance with an effluent limitation for publicly owned treatment works imposed by the CWA 1972 amendments.<sup>70</sup> The Board argued that it was not required to comply with the limitation until federal grants were available to underwrite seventy-five percent of the costs.<sup>71</sup> Many municipalities had not received the funds guaranteed to them by the CWA, in part because of administrative delays, but also due to the EPA's withholding of \$6,000,000,000 of funds discussed in *Campaign Clean Water, Inc. v. Ruckelshaus*.<sup>72</sup> Consequently, the EPA acknowledged that many of the municipalities would not be able to comply with the effluent limitations by the deadline imposed under the CWA. Despite the harsh result, Judge Merhige held that the statute was clear and that the municipalities' compliance was required regardless of whether the funds were available.<sup>73</sup> As to the Board's contention that it could be held liable for failing to comply with a standard it could not possibly meet, the court noted that the issue was not currently before the court, but indicated that that might be the unfortunate result, suggesting that "[s]hould this result in fact come about, the fault, if any, lies with Congress."<sup>74</sup>

#### CONCLUSION

Since the emergence of the era of federal environmental regulation, federal district judges have been charged with interpreting the application of federal statutes to a variety of industrial and other activities affecting the environment and human health. Judge Merhige played his role in deciphering these emerging federal laws, but he appears to have handled a disproportionate

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69. See *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136, 137–38 (1975).

70. 424 F. Supp. 146, 147 (E.D. Va. 1976).

71. *Id.*

72. See *Campaign Clean Water*, 361 F. Supp. at 692.

73. *State Water Control Bd.*, 424 F. Supp. at 156.

74. *Id.* at 156 & n.13.

share of associated issues involving federal jurisdiction, states' rights, and constitutional issues. Against the notably low statistical odds for Supreme Court grants of certiorari in general, his rulings underwent an almost astonishing level of High Court review. In many instances, the highest court agreed with Judge Merhige's conclusions. As with many other aspects of his judicial tenure, Judge Merhige's environmental decisions were extraordinary.