

first time on appeal. The court then upheld the district court's use of the *de novo* standard for the section 9 claim, finding that the government itself had requested the *de novo* standard at trial and could not thereafter appeal the ruling. Furthermore, the court found that USFS had failed to implement its own wildlife management provisions with respect to timber harvesting in East Texas, and that such conduct constituted a taking of an endangered species within the meaning of 16 U.S.C. § 1532(19) and violated ESA section 9. The Fifth Circuit affirmed the district court's holding that USFS's harvesting practices jeopardized the existence of the woodpecker and destroyed and adversely modified its habitat in violation of ESA section 7. The court determined that the district court had acted within its statutory authority in granting an injunction and ordering an appropriate timber management plan. However, the court ruled that the district court effectively dictated the principal features of the plan, and had thereby left little room for the congressionally mandated consultation process promulgated under 16 U.S.C. § 1539(a)(1). Accordingly, the court affirmed the district court's findings, upheld the injunction, vacated the specific features of the plan and remanded the case to the district court to review USFS's current timber management plan for compliance with the ESA.

KAREN HARTMAN

G. *Clean Air Act*

Natural Resources Defense Council v. United States EPA, 937 F.2d 641 (D.C. Cir. 1991)

Petitioners sought judicial review of an Environmental Protection Agency (EPA) decision not to consider fugitive dust from surface coal mining operations when identifying major emitters of air pollution. Such an identification triggers application of the Clean Air Act's (CAA) "Prevention of Significant Deterioration" (PSD) provisions, which in turn impose strict permit requirements for "new" major emitting facilities in areas already complying with ambient air quality standards. 42 U.S.C. § 7475 (1988). The petitioners argued that (1) EPA improperly used a cost-benefit analysis when omitting surface coal mines from its list of pollution sources for which fugitive dust will be considered in identifying major sources of air pollu-

tion, and (2) even if the CAA does not impose a nondiscretionary duty on EPA to include surface coal mines, EPA's cost-benefit methodology was flawed.

The court of appeals disagreed with the petitioner, finding no statutory language within the CAA's definition of "major emitting facility," 42 U.S.C. § 7602, or within the legislative history which would require EPA to subject all sources of fugitive emissions to the PSD provisions under a uniform analysis. Moreover, the legislature provided extensive rulemaking procedures to allow participation by affected parties. Thus, without more explicit congressional intent the petitioner's argument failed.

The court also found that the EPA Administrator's weighing of socio-economic costs against environmental benefits was a permissive analysis under the language and goals of the CAA. In particular, the court noted that PSD provisions seek to prevent polluters from relocating to areas already below ambient air requirements. Here, this purpose would not be jeopardized because surface coal mining is a fairly nonmobile industry dependent upon mineral deposits. Surface coal mine fugitive dust emissions also would continue to be limited by other CAA limitations and by the Department of Interior under the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1272 (1988).

In addition, the court rejected the petitioner's second contention that the cost-benefit methodology used was inadequate. While EPA may have exaggerated costs by not considering that surface coal mine emissions will need to be controlled whenever any *other* major source triggers the PSD provisions, the court of appeals found these costs purely speculative with no real net effect. Petitioners also alleged that the benefits of including surface coal mines were deflated by EPA's erroneous reliance on the regulations under SMCRA. The court did not agree that such reliance constituted the type of deferral to another agency which would violate congressional intent, but stated that EPA had merely recognized the purported benefits from being listed could also be acquired under SMCRA. While SMCRA regulations were not intended to supersede the CAA, EPA was not arbitrary or capricious in deciding not to list surface coal mining when it considered the Department of Interior's specific authority to control air pollution from surface mining. However, if the enhancement measures available to the Department of Interior

appear unable to protect air quality in national parks, wilderness areas, and other parks, EPA should reconsider the possibility of listing.

PATRICK SHAW

United States v. General Dynamics Corp., 755 F. Supp. 720 (N.D. Tex. 1991)

Plaintiff filed its original complaint under section 113 of the Clean Air Act (CAA), 42 U.S.C. § 7413 (1988), for permanent injunctive relief and civil penalties based on defendant's alleged violations of the Texas State Implementation Plan (SIP), promulgated pursuant to the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988). The defendant operates Air Force Plant No. 4 in Tarrant County, Texas, where F-16 aircrafts are produced. Plaintiff alleged that certain operations at the facility emitted volatile organic compounds (VOCs) in excess of the limits set by order of the Texas Air Control Board (TACB). As both parties agreed that the defendant had complied with the order, the issue was whether the order was a departure from the Texas SIP. The court concluded that TACB's order was inconsistent with the Texas SIP. First, the order allowed plant-wide averaging of emissions of VOCs to determine compliance with the SIP. Relying upon *American Cyanamid Co. v. United States EPA*, 810 F.2d 493 (5th Cir. 1987), the court concluded that TACB's interpretation of the Texas SIP was unreasonable because it contradicted the specific language of the SIP requiring each distinct surface coating operation to comply with VOC emission limits. Second, the order allowed washing solvent used in the operations to be included in determining the total quantity of surface coating applied. The court found this to be both contradictory to the language of the SIP (which specifically refers to "pounds of VOC emissions per gallon of coating applied") and contrary to the intent of the SIP (which encourages the running of solvents into closed containers).

Having determined that the board order did not meet the requirements of the Texas SIP, the court then concluded that the defendant's operations failed to comply with the SIP and that the plaintiff was therefore entitled to summary judgment of the issue of defendant's liability. The court ordered General Dynamics to comply within three years to the then applicable