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Fourth Circuit Holds that a Municipal Stormwater Management Assessment is a Fee and Not a Prohibited Railroad Tax.

On February 15, the U.S. Court of Appeals for the Fourth Circuit decided Norfolk Southern Railway Co. v. City of Roanoke, et al.; the Chesapeake Bay Foundation was an Intervenor-Defendant. The Fourth Circuit held that a large stormwater management fee (stated to be $417,000.00 for the year 2017) levied by the City of Roanoke against the railroad to assist in the financing of the City's permitted municipal stormwater management system was a permissible fee and not a discriminatory tax placed on the railroad.

The Railroad Revitalization and Regulatory Reform Act of 1976 specifically provides that states and localities may not impose any tax that discriminates against a rail carrier, 49 U.S.C. § 11501. Accordingly, the issue confronting the Fourth Circuit was whether the assessment was fee and not a tax.

A 1992 decision of the U.S. Court of Appeals for the First Circuit, San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico, provides a framework by which the courts can decide these very close cases. Applying this framework, the Fourth Circuit concluded that the City's charge—levied against only local property owners and not the general public, "is part of a regulatory scheme, rooted in the Clean Water Act, whose purpose is to remedy the environmental harms associated with stormwater runoff and to hold stormwater dischargers responsible for footing the bill."

Judge Wilkinson filed a concurring opinion, noting how degraded the Chesapeake Bay has become over the years, but that effective municipal stormwater management systems established to handle large quantities of stormwater will not only ensure the City's compliance with its permit and the Clean Water Act, it will eventually enhance the overall health of the Bay, even though the City of Roanoke does not lie within the Bay's watershed. To rule otherwise would put existing Chesapeake Bay-area cleanup projects, financed by such fee systems, at risk. He writes that

> "Our rivers and estuaries are complex, interconnected ecosystems. It follows, therefore, that efforts to restore the are correspondingly complex and interconnected… Everyone… is better off when our streams run clear and estuarine flora and fauna are flourishing."

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