

The New York Environmental Lawyer

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of the New York State Bar Association

Message from the Chair

In my first "Message from the Chair" column, published in the Summer 2006 edition of *The New York Environmental Lawyer*, I wrote about the "Advocacy Policy" adopted by the Section's Executive Committee at its April, 2006 meeting. That policy now steers our Section in deciding whether to take official positions on proposed legislation, regulations or agency guidance documents. The policy was the subject of spirited debate during its gestation, with strongly held and principled views eloquently expressed on both sides of the argument. In the final analysis, however, it passed unanimously.



Under the Advocacy Policy, a proposal that the Section take an official position on legislation, rules or guidance requires a two-thirds majority of those Executive Committee members voting. The Policy was put to use for the first time during the summer of 2006. On July 5 the New York State Department of Environmental Conservation reissued its draft "Revised and Proposed New Superfund/Brownfield Regulations" for public comment (<http://www.dec.state.ny.us/website/der/superfund/fact375.html>). Our Section had commented quite extensively on the previous proposed regulations. (Indeed, controversy over those earlier comments was a factor in motivating the development of the Advocacy Policy.)

I asked our Hazardous Waste/Site Remediation Committee to review the re-proposed Brownfield Regulations, and draft any further comments they believed appropriate. All Executive Committee members

were alerted to this, and invited to volunteer for the workgroup reviewing the proposed regs. The time frame for preparing comments was tight—they were due by August 25. Since our new policy calls for at least two weeks' notice to the Executive Committee before a vote, we were constrained to circulate the proposed comments by about August 10. In the event, we were late . . . but only a little: the e-mail message went out at around noon on August 11. Executive Committee members were asked to review the proposed comments, and vote by e-mail no later than August 24. The timing was unfortunate since the second half of August is a popular vacation period and many members were unavailable. Moreover, the subject matter was complex and the proposed comments very detailed—not exactly easy summer reading. The voter "turnout" was consequently pretty thin, somewhat reminiscent of a primary election . . . but that's how democracy works. In any event, of the 17 votes cast, 4 were opposed and 13 in favor of submitting the com-

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ments. Accordingly, the required two-thirds majority having been exceeded, the comments were submitted to NYSDEC on the due date, August 25.

A concern noted by some who voted against Section adoption of the proposed comments was that the complicated—even arcane—nature of the Brownfield Regs, and the length and level of detail of the proposed comments, made it particularly difficult for non-specialists to develop an informed view. Moreover, it is possible (perhaps probable) that a knowledgeable reader would agree with some elements of the proposed comments while disagreeing with others. Several Executive Committee members expressed doubt about the wisdom of the Section taking an official position on a matter so complex and intricate. These concerns are, I think, worthy of further consideration by the Section.

As I write this, I have just set in motion another application of the Advocacy Policy. By comparison with the Brownfield comments, I expect this one will be easier for our members to digest and opine about, though it may be no less controversial. The proposal is that our Section endorse legislation to expand NYSDEC's freshwater wetlands jurisdiction from 12.4 acres down to one acre. (I don't mean to be coy, so I'll mention at the outset that I made the proposal.) The proposal was referred last February to our Coastal and Wetland Resources Committee for review, but a consensus recommendation was not forthcoming. Terresa Bakner, one of the two Co-Chairs of the Committee, drafted a memorandum presenting arguments against the proposal, but noted that the views were her own and, in fact, were not shared by her Co-Chair Drayton Grant. Another memorandum was prepared by Roberto Barbosa, a Section member who works in the NYS Department of Law (but who was also expressing his personal views), informatively analyzing the arguments *pro* and *con*.

In mid-September I circulated to the members of the Executive Committee my original proposal along with the Bakner and Barbosa memoranda. I announced that the issue would be discussed and put to a vote at the Executive Committee meeting scheduled for October 15, in conjunction with our Fall meeting in Cooperstown.

It is my personal view that extension of New York State freshwater wetlands jurisdiction is particularly important in light of two U.S. Supreme Court decisions. In *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC," 531 U.S. 159, 2001), the Court imposed certain limits on federal jurisdiction over "isolated" or non-connected wetlands (*i.e.*, wetlands that are not connected to "navigable waters of the United States"). It has been estimated by the U.S. Army Corps of Engineers (which is the federal authority for issuance of wetlands permits) that between 20% and 50% of all existing wetlands may be beyond federal jurisdiction under the SWANCC decision. While that may be an over-esti-

mate based on an early and perhaps excessively expansive reading of the SWANCC decision, there is no doubt that some wetlands of significant ecological value are no longer being afforded protection under Section 404 of the federal Clean Water Act. More recently, in *U.S. v. John Rapanos* (126 S. Ct. 2208, 165 L.Ed.2d 159, 2006), the Court considered a challenge to the authority of the federal government over remotely connected wetlands and water courses (*i.e.*, those which are tributary to navigable waters of the United States, or connected through conduits, intermittent flows, etc.). The complicated 4-4-1 decision arguably did more to confuse than to clarify the Corps' jurisdiction, but what we can be pretty sure of is that there will be more uncertainty for landowners and bureaucrats alike, and more litigation over federal wetlands delineations.

Given the ecological and economic importance of wetlands—regardless of how close or remote their connection to federally "navigable" waterways—and in light of the limits that have been imposed and may further be imposed on federal jurisdiction, I believe it is vital that states have adequate legal authority to regulate filling of such areas. I also believe that furthering appropriate protection of New York's freshwater wetlands is in the interest of, and consistent with the mission of, our Section.

This is my column, and so I have used the opportunity to express my views. Needless to say, reasonable people can and do differ. Exhibit 1 is Terry Bakner's memorandum in opposition, which was thoughtful and well written. I would be happy to share her memo, and Roberto Barbosa's, with any Section member who would like to read them.

At this writing, the Executive Committee vote on my proposal is still several weeks in the future. I'll report to you on the results in my next "Message from the Chair." (I am thus assured of something about which to write next time . . . although in the field of environmental law there is never a dearth of interesting issues, so that isn't among my chief concerns.)

By the time you read this, our Fall meeting CLE program will also have occurred. The subject was *New York's Energy Outlook*; it focused on the State's renewable energy policy, the emerging technologies that could help us achieve that policy, and some of the associated opportunities and challenges. This interesting and timely program was developed by the Co-Chairs of our Section's Energy Committee, Kevin Bernstein, Jennifer Hairie and Bill Helmer, to whom I extend my thanks for a job well done.

My attention now turns to the preparations for our Annual Meeting on January 26, 2007. The CLE program is titled *The Shape of Things to Come: Europe as the Bellwether for Environmental Regulation*. For over a quarter century, starting in 1970, America blazed the path for environmental regulation, achieving notable improvements while

other parts of the world lagged years or decades behind. More recently, however, it can be argued that the U.S. has ceded its role in the forefront of environmental regulation to the European Union. The EU has developed a new generation of environmental rules, many of which go well beyond current requirements in the U.S. These new rules are based on an explicit adoption by the E.U. of "the precautionary principle." They are important to us not only because so many American companies do business in Europe, but also because it is nearly inevitable that successful European initiatives will eventually be adopted here at home.

The program will examine some of Europe's "cutting edge" environmental regulations, consider their impact on American business, and evaluate whether and how America has addressed—or not addressed—the same environmental concerns. For example, Europe has adopted a number of product stewardship rules pursuant to which corporations are being required to take responsibility for the environmental impact of their products throughout their life cycles—from manufacture through disposal. And, of course, Europe has proceeded under the Kyoto Protocol to regulate greenhouse gas emissions, and has

established a carbon emissions trading program. In the U.S., to date, the federal government response to similar concerns has primarily been to promote voluntary improvements in product manufacturing, energy consumption and greenhouse gas emissions.

Lately, New York and several other states have taken on a "bellwether" role here at home. Perhaps the most noteworthy example is the Regional Greenhouse Gas Initiative (RGGI) spearheaded by New York. In January a new administration will take office in Albany, and it will be most interesting to see what further environmental initiatives will be undertaken. I trust we can look forward to New York continuing to serve as a laboratory for regulatory innovation, and you can be sure that the Environmental Law Section will cover any new developments.

I hope to see many of you at our Annual Meeting in January. And just to keep things exciting in the weeks and months ahead, I may present one or two more proposals for Section endorsement of legislation.

Walter Mugdan

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From the Editor

Walter Mugdan's column provides an informative example of how the Section proposes to undergo decision-making on whether or not to support or oppose legislative or regulatory proposals. As Walter notes, the exercise of such decision-making—including the question of whether we should even be involved as a Section—was seriously debated over the course of a year. There were valid concerns expressed in opposition, not the least of which was the possibly delicate position of agency lawyers on proposals affecting their agency. However, there was also sensitivity to the possibility that any such debate might be shaped by the strident advocacy of members who might not actually represent a significant consensus among Section members. The compromise reached was a good one. The current proposal for redefining state wetlands jurisdiction in New York makes for an interesting test of the process. The result, either way, should be a telling indication of where informed lawyers with an interest in environmental issues are positioning themselves. The outcome of the proposal is relevant to municipalities and real estate interests—and hence has importance for many of our Section lawyers, but also for wetlands regulation, as such, in view of what seems to be the trend in federal law.



The subject of the January meeting, *The Shape of Things to Come: Europe as the Bellwether for Environmental Regulation*, should be fascinating. American environmental law and policies over the past half century or so are bearing fruit in that so many modern countries have made environmental policy an integral part of national lawmaking but also of national cultures. Europe, that evolving network of countries that exists somewhere between a traditional alliance of nation-states and an emerging quasi-federalist novelty, has, in its community law and in national consciousnesses, especially embraced environmental norms pioneered by Americans. Unfortunately, too many parts of the world seem intent on ignoring the increasingly accepted scientific and empirical evidence in support of the dramatic need to take environmental factors into account as part of national and regional planning. It is especially ironic that American efforts, by comparison with Europe's, seem to be lagging at this time in history. Thanks to American leadership, many global environmental problems have been addressed in recent decades, and some have even been mitigated. In no small part, the sea change, if you will, in the manner in which countries cooperate on environmental matters that may impact individual states only minimally, results from visionary planning, solid scientific study, engineering problem-solving, and economic and political commitments by several generations of American leadership. Yet, the

evidence is firming up that other environmental problems are now looming to monumental, if not potentially catastrophic, proportions. American science and engineering, the wide scope for public participation in policy making at all levels of government, and our perpetually robust economy, should, one would think, position Americans at the forefront of future global environmental initiatives—including commercial responses to environmental needs. And that is not even touching on geopolitical considerations that one would have to be willfully blind to ignore. Yet, national will, political responsiveness and even clear-sightedness have been faltering. Demagoguery and small-change economic excuses too often replace clear-sighted pragmatism—that erstwhile American virtue. One can anticipate that *The Shape of Things to Come: Europe as the Bellwether for Environmental Regulation*, likely will offer very practical information to Section members who engage in international business. For that, the Section leadership and program chairs should be commended. However, to the extent that Europe's responsible statesmanship can serve as a prop to remind Americans of where we were and where we should be going, the show should be well worth the ticket price.

A good example of where federal authorities and other governmental enforcement agencies have not been investing their efforts recently is touched on in Sarah Olinger's article. Sarah proposes some legal strategies for addressing carbon dioxide emissions in the absence of effective legislation. One might note that the Supreme Court and some federal circuit courts seem to be evolving a rule of parsimony in analyzing federal agency statutory jurisdiction in environmental litigation. The article constitutes a comprehensive study of the viability of federal common law, especially using equitable doctrines, as an alternative device to invite judicial review when explicit statutory authority may be inadequate.

Dwight Kern and Maria Carlucci submit a short primer on a New York common law doctrine, the "thin skull," or "eggshell skull," doctrine, traditionally applicable in negligence and other tort cases. The authors extend the doctrine to toxic tort cases and cases arising from human exposures to harmful chemicals. They briefly take the reader from early New York law on the subject to recent cases.

I would like to draw the attention of readers to one of the Section's future initiatives, which can be found in Chris Saporita's announcement on page 23. The Section is co-sponsoring, with The Environmental Law Committee of the Association of the Bar of the City of New York, and the Environmental Law Institute, *The New York City Environmental Law Leadership Institute*. The endeavor is visionary, and pragmatic, and will draw on the contributions of some of New York's leading environmental legal scholars and practitioners.

Kevin Anthony Reilly

Statutory Void, Common Law Remedy: A Case for Federal Common Law in the Regulation of Carbon Dioxide

By Sarah N. Olinger

Introduction

In September 2005, the District Court for the Southern District of New York presided over the first federal case where plaintiffs alleged that global warming was a public nuisance. In *Connecticut v. American Electric Power Co.*,¹ eight states sued under the federal common law of public nuisance to enjoin five power companies from emitting unreasonable contributions of carbon dioxide (CO₂) into the atmosphere.² Although the court never addressed the merits and dismissed the claim as a non-justiciable political question,³ two principal issues are raised: (1) whether the Clean Air Act (CAA, the Act)⁴ preempts the federal common law of public nuisance in the regulation of CO₂; and (2) whether federal common law is a proper vehicle to mitigate the predicted nationwide harm from unregulated CO₂ emissions.

The majority of scholars maintain that federal courts lack jurisdiction to hear federal common law actions to regulate CO₂, because like the Clean Water Act (CWA)⁵ in the area of *water* pollution, the CAA “occupies the field”⁶ and thus preempts federal common law in the area of *air* pollution. This viewpoint insists that because the CAA delegates the Environmental Protection Agency (EPA) authority to control emissions which cause or contribute to air pollution, endanger public welfare, and result from numerous or diverse mobile or stationary sources,⁷ CO₂ is covered under the Act. A second rationale finds support in the CAA’s broad definition of “air pollutant,” which by inference includes CO₂.⁸ Thus at first blush, the CAA appears sufficiently comprehensive so as to regulate CO₂. However, this comment challenges the majority viewpoint by demonstrating through a textual and structural analysis of the CAA, as well as a close examination of the requirements for preemption under *City of Milwaukee v. Illinois*,⁹ that the CAA clearly does not preempt actions of federal common law nuisance to regulate CO₂. Congress never intended for the CAA to regulate CO₂,¹⁰ nor has the Supreme Court held that the CAA preempts the federal common law doctrine for air pollution.¹¹ Because the CAA is an inadequate statutory remedy, plaintiffs in public nuisance suits should enjoy the right to sue under federal common law to secure binding reductions in domestic emissions of CO₂.

This comment does not argue that global warming satisfies the elements of a public nuisance or the other constitutional tests for standing, ripeness, etc., nor does this comment suggest what remedy is most appropriate

for a global warming-public nuisance case. Rather, the federal common law of public nuisance should constitute a valid foot in the courtroom door for plaintiffs seeking a practical and efficient remedy to thwart a known and recognized threat—global warming—at least until the government takes regulatory action. The federal government has, at present, opposed any efforts to enforce the mitigation of CO₂ emissions and insists on voluntary reduction measures instead.¹² For example, Congress has not ratified the Kyoto Protocol,¹³ the Bush administration refuses to place binding limits on greenhouse gas emissions,¹⁴ and the EPA denies any statutory authority to regulate CO₂ under the CAA.¹⁵ Absent any regulatory measures at the federal level, federal common law of public nuisance should remain a valid cause of action to regulate CO₂. Unregulated emissions of CO₂ continue to cross state boundaries, shrouded in a forecast of significant environmental damage from global warming.¹⁶ The need to reduce domestic CO₂ emissions presents issues that are undoubtedly national in scope. As such, this growing federal concern warrants federal jurisdiction.¹⁷

This comment proceeds in four sections. Section I briefly highlights the United States’ contribution to greenhouse gas emissions and then provides a scientific overview of the causes and effects of global warming. Section II describes the main obstacle to effective mitigation: the lack of any federal initiative to place mandatory caps on CO₂. Section III discusses the doctrine of preemption and how this relates to the federal common law of public nuisance. Section IV argues that the CAA, as currently amended, does not preempt the federal common law of public nuisance in a sovereign’s suit to impose limits on CO₂ emissions.

I. Background

A. Status of the Union

When the terms “global warming,” “climate change,” and “the greenhouse effect” entered our national lexicon not long ago, they incited much skepticism. The idea that human-produced greenhouse gases (GHGs)¹⁸ were causing a rise in atmospheric temperature was subject to great scientific uncertainty. Yet after years of study and debate on the issue, scientists and policymakers have reached a consensus that global warming is occurring.¹⁹ Acceptance of this reality has spurred international action, reflecting the urgency to reduce GHGs to forestall further interference with the climate and the potential for widespread

environmental damage. Based on current data, this threat is unlikely to disappear anytime soon.

From 1990-2000, the United States contributed the largest percentage of CO₂ from fossil fuels internationally, emitting 24.1% of the world's anthropogenic carbon dioxide.²⁰ In comparison, the Netherlands contributed a mere 0.7% of CO₂ from fossil fuels.²¹ Even when all forms of GHG emissions are combined, the United States is still the largest source, contributing 15.8% of global emissions.²² Domestic emissions of GHGs continue to rise. In 2004, the United States emitted 7,122.1 million metric tons of anthropogenic GHGs, which was 2% greater than in 2003 and 16% greater than in 1990.²³ The United States Department of Energy also found that of the total United States GHG emissions, 82.4% consisted of CO₂ from fossil fuel combustion.²⁴ Despite the United States' significant and ongoing contribution to global emissions, only local and state authorities have responded with regulatory initiatives to reduce the emission of GHGs, and CO₂ in particular.²⁵ Comparing this federal inaction to the "steady drumbeat" of state regulation, one scholar remarked, "it is as though we live in two different countries."²⁶

B. Global Warming Overview

Without GHGs, the Earth would be very cold.²⁷ The inherent presence of GHGs in the environment initiates a natural greenhouse effect by trapping heat and warming the Earth's surface and lower atmosphere.²⁸ Prior to the Industrial Revolution, the concentration of GHGs in the atmosphere remained relatively constant.²⁹ However beginning in the late Eighteenth Century, the rapid development of industry replaced an economy previously dominated by manual labor. As a result, the concentration of GHGs in the atmosphere increased, which enhanced the greenhouse effect and caused the global average surface temperature to rise.³⁰ Most of this collective warming occurred during the twentieth century, with the 1990s recognized as the warmest decade in the millennium.³¹ In particular, the amount of CO₂ in the atmosphere rose by more than 30% and is continuing to increase at an average rate of 0.4% per year, primarily due to fossil fuel combustion³² and deforestation.³³ The global average surface temperature³⁴ likewise increased by $0.6^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$ ³⁵ and air temperature has increased 0.1°C per decade in the lowest eight kilometers of the atmosphere.³⁶ The average sea level has risen by 0.1 to 0.2 meters as well.³⁷ This is not the exclusive list of documented changes; all of the Earth's resources are affected by global warming.

The release of GHGs has primary and secondary effects on the environment and human health and welfare.³⁸ The primary effect is global warming, where warmer surface and air temperatures will alter ocean currents and air circulation, thereby affecting weather patterns.³⁹ A non-exhaustive list of secondary effects includes: reduced water for irrigation and hydroelectric power; crop damage from insects, disease, and drought;

increases in soil salinity; loss of wetlands; loss of wildlife species and habitat; the spread of infectious disease among humans; and an increased demand for electricity for air conditioning.⁴⁰ Other predicted large-scale and high-impact effects include, most famously, the melting of mountain glaciers and ice sheets, which would destroy coastal habitats and increase the salinity of wetlands, estuaries, and aquifers; an increased frequency of extreme weather,⁴¹ including higher maximum temperatures and more hot days and heat waves, as well as fewer cold days and frost days, which would cause damage to livestock and agriculture; and more intense precipitation events, which would increase floods, landslides, mudslides, and soil erosion.⁴²

Although uncertainty surrounding the magnitude of the effects of global warming still lingers, studies supporting the above predictions are quite compelling. The latest data from a two-mile long ice core sample taken from Antarctica indicates that carbon dioxide levels are 27% higher today than 650,000 years ago.⁴³ Because humans will continue to demand energy from oil, coal, and natural gas sources, and because the use of fossil fuels increases proportionately with economic growth,⁴⁴ it is unlikely that unregulated CO₂ emissions will significantly decrease in the near future.⁴⁵

II. Obstacles to the Regulation of Carbon Dioxide Emissions: The U.S. Government

A. The Executive Branch

The United States government is not entirely to blame for its failure to regulate CO₂ emissions. Recent presidents have responded to growing international concern about the impact of GHGs by signing international treaties to either stabilize or reduce emissions.⁴⁶ However, the current administration will not consider binding emissions legislation. President Bush recognizes global warming as a major national and international environmental problem,⁴⁷ but he has unambiguously declared his opposition to any regulation of CO₂.⁴⁸ In a letter to Senators Hagel, Helms, Craig, and Roberts, he wrote, "I do not believe, however, that the government should impose on power plants mandatory emissions reductions for carbon dioxide, which is not a 'pollutant' under the Clean Air Act."⁴⁹ During the Montreal Climate Conference in December 2005, the chief American negotiator actually walked out of informal discussions regarding long-term international cooperation to carry out the United Nations' 1992 treaty on climate change.⁵⁰ The United States eventually consented to "open and nonbinding" talks, but it has yet to agree to any formal commitment.⁵¹ The Bush Administration's budget does include funding for a variety of climate research and other initiatives designed to reduce GHGs.⁵² For example, in February 2003, the Department of Energy launched Climate VISION (Voluntary Innovative Sector Initiatives: Opportunities Now), a program that helps industry trade groups iden-

tify and implement cost-effective solutions to reduce GHG emissions.⁵³ Yet despite the existence of voluntary CO₂ reduction measures, they will not appreciably reduce the United States' contribution to global climate change; rather, actual regulation of CO₂ is necessary.⁵⁴

B. The Legislative Branch

The Legislative Branch has not passed any legislation that regulates CO₂. Bills introduced with language to implement some sort of mandatory program are either unable to garner enough votes in Congress or are sitting in a congressional committee. In 2003, Senators McCain (R-AZ) and Lieberman (D-CT) co-sponsored a bill entitled the "Climate Stewardship Act" (McCain-Lieberman Bill).⁵⁵ The McCain-Lieberman Bill would establish a comprehensive program to regulate GHGs by reducing annual GHG emissions from sources in the electricity, industrial, commercial, and transportation sectors to year-1990 levels by 2016.⁵⁶ Furthermore, the bill would allow regulated firms to meet their obligations through a tradeable allowance program.⁵⁷ After being rejected by the Senate on October 30, 2003,⁵⁸ the McCain-Lieberman Bill was referred back to the Senate Committee on Environment and Public Works and no action has occurred since.

A second bill, the "Clean Power Act," was introduced twice by Senator Jeffords (I-VT).⁵⁹ The Clean Power Act would actually amend the CAA to require the Administrator of the EPA to promulgate regulations to achieve specified reductions in CO₂, mercury, and other GHGs, as well as establish an emission allowance tracking and transfer system for sulfur dioxide, nitrogen oxides, and CO₂.⁶⁰ Again, this bill is sitting in committee without further action pending. It is also unlikely that the United States Senate will ratify the 1997 Kyoto Protocol, the one treaty that places mandatory limits on CO₂ emissions.⁶¹

C. The Judicial Branch

Due to the EPA's denial of statutory authority to regulate CO₂ under the CAA,⁶² courts' deference to the agency's discretion will likely be another obstacle to reducing such emissions. In August 2003, Robert Fabricant, General Counsel to the EPA, issued a memo withdrawing prior statements that the EPA had legal authority to regulate CO₂⁶³ and declared that the CAA does not give the EPA regulatory power under the statute: "Because the CAA does not authorize regulation to address climate change, it follows that CO₂ and other GHGs, as such, are not air pollutants under the CAA's regulatory provisions, including sections 108, 109, 111, 112, and 202."⁶⁴ Less than one month later, the EPA incorporated Fabricant's legal analysis into a formal rulemaking, denying any authority to regulate CO₂, because CO₂ is not an air pollutant under the CAA.⁶⁵

Under *Chevron v. Natural Resources Defense Council, Inc.*,⁶⁶ courts are likely to defer to the EPA's interpretation

of the Act. In *Chevron*, Justice Stevens invoked a two-prong test to determine whether an agency's construction of a statute is proper: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁶⁷ Where an answer to the first inquiry results in a negative, *Chevron* analysis proceeds to the second step: "If, however . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁶⁸ One theoretical justification for *Chevron* deference to a reasonable agency interpretation is based on agency expertise. As Justice Scalia explained in a lecture at Duke Law School, because of an agency's "intense familiarity with the history and purposes of the legislation at issue [and its] practical knowledge of what will best effectuate those purposes . . . [an agency is] more likely than the courts to reach the correct result."⁶⁹ As the EPA is the primary agency charged with administering the CAA, when it published that it had no authority to regulate CO₂, it dealt a severe blow to any federal plaintiff's statutory remedies to compel the agency to list CO₂ as a criteria pollutant.⁷⁰ One such circumstance was recently adjudicated in the Court of Appeals for the District of Columbia. In *Massachusetts v. EPA*, twelve states, three cities, an American territory, and numerous environmental organizations sued the EPA to compel the agency to regulate CO₂ pursuant to the CAA.⁷¹ Though the court did not apply *Chevron*, it deferred to the EPA's interpretation not to regulate CO₂, relying upon the Administrator's policy judgments.⁷²

The United States government could choose to regulate CO₂, but as evidenced above, no such initiative currently exists. Because growing concentrations of unregulated CO₂ emissions affect every state, the problem deserves federal attention. Until Congress implements a comprehensive regulatory program for CO₂, federal common law of public nuisance should remain a viable cause of action that produces a remedy to impose limits on CO₂ emissions.

III. Preemption and the Federal Common Law of Public Nuisance

A. The Doctrine of Preemption

Article VI, Clause Two of the United States Constitution declares, "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁷³ Otherwise known as the Supremacy Clause, this declaration is the origin of the doctrine of preemption.⁷⁴ Preemption generally refers to the displacing effect that federal law will have on a conflicting state law. Preemption may be either expressed or implied: "Congress' [preemptive] command

is explicitly stated in the statute's language or implicitly contained in its structure and purpose."⁷⁵ There are two forms of implied preemption: field preemption and conflict preemption.⁷⁶ Field preemption denotes a scheme of federal regulation that is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."⁷⁷ A classic example of field preemption as applied to the Clean Water Act (CWA)⁷⁸ is found in the related cases *Illinois v. City of Milwaukee (Milwaukee I)*⁷⁹ and *City of Milwaukee v. Illinois (Milwaukee II)*.⁸⁰ Before the CWA was passed, the federal common law of public nuisance existed as a viable cause of action to abate a nuisance caused by water pollution. In *Milwaukee I*, the State of Illinois sued the City of Milwaukee under the federal common law of public nuisance, alleging that Milwaukee's two sewage treatment plants inadequately treated its sewage.⁸¹ When this sewage overflowed into Lake Michigan, Illinois argued that these discharges posed a threat to the health of its citizens.⁸² The Court in *Milwaukee I* recognized the existence of federal common law as an available remedy:

As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.⁸³

Yet once Congress passed the CWA Amendments of 1972, the new regulatory system that made it unlawful to discharge pollutants into waters of the United States effectively nullified the need for a federal common law remedy.⁸⁴ The Court in *Milwaukee II* held that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears. . . . Congress . . . has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."⁸⁵ In addition to preempting common law water pollution, field preemption has formed the basis for federal preemption in other important areas, including nuclear safety, collective bargaining, and alien registration.⁸⁶ The other form of implied preemption is conflict preemption. Conflict preemption denotes a scheme "[where] compliance with both federal and state regulations is a physical impossibility."⁸⁷ Even in the absence of a direct conflict between state and federal law, a conflict exists if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸⁸

While Chief Justice Rehnquist held in *Milwaukee II* that the Clean Water Act occupies the field of the federal common law of water pollution, the Supreme Court has yet to determine: (1) whether the CAA occupies the field of the federal common law of interstate air pollution;⁸⁹ and if so, (2) whether the CAA is substantially comprehensive to specifically preempt the federal common law of public nuisance in the regulation of CO₂.⁹⁰ Before this comment explains why the CAA does not preempt a federal common law nuisance action with respect to CO₂, it is necessary to explore the substantive nuisance law and the survival of federal common law, post *Erie Railroad Co. v. Tompkins*.⁹¹

B. The Federal Common Law of Public Nuisance

1. The Substantive Law of Public Nuisance

Nuisance law is not only the "common law backbone of modern environmental and energy law," but it has also enjoyed a "remarkable stasis" throughout the centuries in many areas of decision.⁹² At its most fundamental, nuisance law is a balancing doctrine that weighs the benefit to society of enjoining the nuisance against the costs to the defendant if the nuisance is indeed enjoined.⁹³ Nuisance law is divided into two categories: private nuisance and public nuisance.⁹⁴ Private nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land."⁹⁵ To recover for private nuisance, persons have standing only if they have "property rights and privileges" in the land whereby the use and enjoyment of such land is afflicted.⁹⁶ The Restatement (Second) of Torts interprets the phrase "interest in the use and enjoyment of land" to generally mean the pleasure and comfort that a landowner derives from occupying and using land that will not depreciate in value from any physical invasion.⁹⁷ By contrast, public nuisance is "an unreasonable interference with a right common to the general public."⁹⁸ Public rights include the public health, public safety, public peace, public comfort, and public convenience.⁹⁹ When a public right is violated, a state or its representative, or a private individual¹⁰⁰ may seek to protect these rights by asserting an action in public nuisance.¹⁰¹ For an action in public nuisance to lie, the entire community does not have to be affected.¹⁰² Rather, as long as the nuisance interferes with the exercise of someone's public right or as long as it otherwise affects the interests of the community at large, the elements of the cause of action are satisfied.¹⁰³ Examples of public nuisance include maintaining a herd of cattle afflicted with foot and mouth disease,¹⁰⁴ firing explosives on a public highway,¹⁰⁵ noise from an unreasonably loud stock car raceway,¹⁰⁶ and a private business' waste dumped on city-owned property.¹⁰⁷

Public nuisance law is particularly well-suited for the resolution of many environmental problems.¹⁰⁸ For more than a century, states have exercised police power to protect their natural resources and environment. In one of the first cases to apply public nuisance law to abate the discharge of noxious gases from destroying the State of

Georgia's environment, Justice Oliver Wendell Holmes held,

[Georgia] has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. . . . It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains . . . should not be further destroyed or threatened.¹⁰⁹

Holmes' proclamation is not limited to environmental injury within Georgia's borders, but applies to all states and their respective interests in protecting their orchards, forests, and coastlines. Because nuisance law is considered a versatile, all-purpose doctrine,¹¹⁰ "the application of nuisance law to the problem of global warming . . . does not appear to be so novel an extension."¹¹¹ Much like the interstate air pollution dispute in *Georgia v. Tennessee Copper*,¹¹² unregulated CO₂ emissions, which travel across state boundaries and are alleged to effect national environmental injury, arguably create a public nuisance claim under the federal common law.

2. The Survival of Federal Common Law Post *Erie Railroad Co. v. Tompkins*

Despite the landmark ruling handed down by the Supreme Court in *Erie Railroad Co. v. Tompkins*¹¹³ that there is no federal general common law,¹¹⁴ a body of "specialized" federal common law has survived.¹¹⁵ Before *Erie*, courts were free to develop law independently of state judicial decisions.¹¹⁶ Yet *Erie* nullified federal courts' ability to develop this independent body of common law when it overruled *Swift v. Tyson*¹¹⁷ and held that "[t]here is no federal general common law."¹¹⁸ However, the very same day that Justice Brandeis decided *Erie*, he acknowledged that federal common law still exists when he issued his opinion in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*¹¹⁹ Justice Brandeis wrote, "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."¹²⁰ *Hinderlider* laid the foundation for the survival of a new, specialized kind of federal common law. The idea of a specialized body of federal common law applies "where there is an overriding federal interest in the need for uniform rule of decision or where the controversy touches basic interests of federalism."¹²¹ For example, the Supreme Court in *Byrd v. Blue Ridge Electrical Cooperative, Inc.*, chose to apply federal law over state law based on the overriding federal interest in having the issue tried by a jury.¹²² As long as there is federal competence to hear the issue,¹²³ a strong federal interest

in the matter, and no preemption by a statute, courts may apply federal common law. Nonetheless, the instances in which a court may formulate federal common law are highly limited: "[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."¹²⁴

Thirty-six years after *Hinderlider*, the first environmental case, *Texas v. Pankey*,¹²⁵ applied specialized federal common law. In *Pankey*, the State of Texas sought to enjoin various ranch owners in New Mexico from spraying a pesticide to eradicate range caterpillars, alleging that the chemical polluted the upstream Canadian River, harmed its aquatic life, and impaired Texas' right to both enjoy the water and use it as a source of water supply to eleven municipalities.¹²⁶ Because Texas chose to sue in the District Court for the District of New Mexico rather than in a state court of New Mexico, the Tenth Circuit had to decide whether there was jurisdiction under 28 U.S.C. § 1331(a).¹²⁷ Stating that *Georgia v. Tennessee Copper Co.* would have applied federal common law if it were decided at present, the court ruled in favor of Texas, holding that there is federal question jurisdiction based on federal common law:

As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.¹²⁸

Other courts soon began to recognize this rule for environmental cases.¹²⁹ In *Milwaukee I*, the Supreme Court believed that federal common law was essential to the adjudication of the violation of a state's environmental rights by outside sources.¹³⁰ When *Milwaukee II* came before the Supreme Court, although the Court held that the CWA preempted the federal common law of water pollution,¹³¹ it continued to acknowledge the existence of a federal common law in specialized circumstances:

When Congress has not spoken to a particular issue . . . and when there exists a "significant conflict between some federal policy or interest and the use of state law" . . . the Court has found it necessary, in a "few and restricted" instances . . . to develop federal common law. . . . It is resorted to "[in] absence of an applicable Act of Congress, and because the Court is

compelled to consider federal questions “which cannot be answered from federal statutes alone.”¹³²

Ultimately, the Court in *Milwaukee II* developed a two-part test to determine whether a federal statute displaces a previously available federal common law action.¹³³ First, the court must assess the scope of the legislation: is it a comprehensive regulatory program that leaves no room for any gaps to be filled?¹³⁴ Second, the court must determine whether the scheme established by Congress sufficiently addresses the problem formerly governed by federal common law.¹³⁵ As this comment argues, the CAA does not satisfy either prong of the *Milwaukee II* test. Congress intentionally incorporated a gap for CO₂, which thereby precludes any means for sufficient regulation under the Act.

IV. The Clean Air Act, Preemption, and the Regulation of Carbon Dioxide

Various academics agree that tort law is and should be preserved as an appropriate supplement to statutory regulation in climate change litigation.¹³⁶ Especially when the President, Congress, the EPA, and the courts have barred any opportunity for a plaintiff to secure a statutory or administrative remedy, federal common law must remain a viable option.¹³⁷ Only when Congress passes regulatory global warming legislation should courts rule that the CAA “occupies the field” of regulating CO₂ emissions. While the CAA is a very comprehensive statute,¹³⁸ it lacks the language, structure, and practical application necessary to reasonably regulate CO₂ emissions. Consequently, regulation is possible under federal common law. Not only do federal courts have subject matter jurisdiction to hear interstate disputes,¹³⁹ but because the regulation of CO₂ is of great federal concern, federal courts also have the power to employ federal law.¹⁴⁰ Federal common law is therefore an appropriate mechanism to fill the statutory gaps and impose binding limitations on CO₂ emissions. This section underscores this proposition with an analysis of the CAA and its comparison to the CWA and the standards for preemption under *Milwaukee II*.

A. Regulatory Void Based on a Textual Analysis of the Clean Air Act

Congress did not intend for the EPA to regulate CO₂ as the statute is currently amended. In developing the latest 1990 Amendments to the CAA, Congress considered various provisions that would authorize the EPA to regulate CO₂ and other GHGs, but expressly chose not to include them in the final version of the Act. The current CAA Subchapter VI, “Stratospheric Ozone Protection,”¹⁴¹ is the end product of a legislative history that failed in its attempt to incorporate language addressing global warming. Senate bill S. 1630 sought to limit GHGs in the CAA, recognizing that uncontrolled emissions of CO₂, CFCs, and methane were contributing to global

climate change.¹⁴² In its proposed provision entitled the “Stratospheric Ozone and Climate Protection Act,”¹⁴³ S. 1630’s goal was to “[eliminate] emissions of manufactured substances with ozone depleting potential as well as global warming potential, to reduce to the maximum extent possible emissions of other greenhouse gases, and to provide for an orderly and equitable shift to safe alternatives.”¹⁴⁴

In the House of Representatives, provisions concerning ozone and climate change were notably absent in the original bill of the 1990 Amendments, H.R. 3030.¹⁴⁵ Representative John D. Dingell (D-MI) eventually introduced language to protect the stratospheric ozone as an amendment to H.R. 3030, making the House version similar in scope to the Senate’s S. 1630.¹⁴⁶ However, Dingell’s amendment did not include any provision to regulate CO₂.¹⁴⁷ When both the House and Senate bills were combined, the final 1990 Amendments emerged from the conference committee with language addressing stratospheric ozone, but all references to CO₂ and other GHGs were removed, including the “Climate Protection” portion of Title VII.¹⁴⁸ Only one reference to climate change remains, found in section 602(e) of Subchapter VI: “One year after [enactment of the CAA Amendments of 1990] . . . and after notice and opportunity for comment, the Administrator shall publish the global warming potential of each listed substance.”¹⁴⁹ Lest the Administrator forget the nonregulatory nature of this provision, the subsequent sentence emphasizes, “The preceding sentence shall not be construed to be the basis of any additional regulation under this chapter.”¹⁵⁰ Clearly, despite the Senate’s thorough consideration of reducing GHG emissions, Congress decided that the EPA would not regulate CO₂. As Professor Reitze states, “This is strong evidence the Congress did not intend to regulate GHGs when it considered ozone-depleting substances and GHGs in the same sections of the pending legislation.”¹⁵¹

Congress’ deliberate rejection of the CO₂ regulation in Subchapter VI is not the only occasion when it considered but decided against using such language. In the original S. 1630, the Senate included a provision, section 216, which required the Administrator to set emissions standards for carbon dioxide from light duty vehicles.¹⁵² The bill authorized the Administrator to determine test procedures for compliance as well as to assess penalties against manufacturers who did not meet the average CO₂ emissions requirements.¹⁵³ As necessary and practical as this provision sounds, it was later suppressed in conference committee.¹⁵⁴ The current Subchapter II, which governs emission standards for moving sources, does not include any emissions standards for CO₂ whatsoever.¹⁵⁵

Thus, as written, the CAA only addresses CO₂ in the context of *nonregulatory* strategies. Section 103(g) directs the Administrator to “conduct a basic engineering research and technology program to develop, evaluate,

and demonstrate *nonregulatory* strategies and technologies for air pollution prevention. . . . Such program shall include . . . [i]mprovements in *nonregulatory* strategies and technologies for preventing or reducing multiple air pollutants, including . . . carbon dioxide.”¹⁵⁶ Because section 103(g) lists CO₂ along with criteria air pollutants already regulated, one could argue that Congress intended for the EPA to regulate CO₂.¹⁵⁷ However, the fact that Congress actually revised section 103(g) to include the phrase “non-regulatory strategies”—a total of five times—strongly militates against this viewpoint.¹⁵⁸ Moreover, section 103(g) concludes, “Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements.”¹⁵⁹ In 1990, a year when the United States released 5,002.3 million metric tons of CO₂ into the air,¹⁶⁰ it is highly unreasonable that Congress would have forgotten to include CO₂ in a comprehensive piece of legislation.¹⁶¹ The deliberate rejection of regulatory language in concert with the deliberate addition of nonregulatory language underscores the argument that Congress did not specifically give EPA authority to regulate CO₂: “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”¹⁶²

Because legislative history from 1990 demonstrates that Congress intended for the EPA to develop nonregulatory strategies to research the effects of CO₂, federal common law must remain a remedy until the CAA is updated. Research does not displace regulation. As one scholar states, “Statutes perceived as tentative, changing, recommendatory, and suggestive are in considerable need of judicial elaboration. Cutting down on judicial remedies and cutting back on common law rights interdicts the flow of empirical information needed for improved legislation.”¹⁶³

B. Regulatory Impossibility Based on a Structural Analysis of the Clean Air Act

In its present form, the CAA is inadequately designed to regulate CO₂. A principal goal of the CAA is to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”¹⁶⁴ While regulation of CO₂ fits nicely within the ambits of the Act’s objective, the mechanisms are ill-suited to reduce CO₂ emissions. To achieve the CAA’s goal, Congress vested the Administrator of the EPA with expansive discretion to designate criteria air pollutants, pollutants that may endanger public health or welfare and come from numerous mobile or stationary sources.¹⁶⁵ CO₂ may reasonably be considered a criteria pollutant.¹⁶⁶ Nevertheless, even if CO₂ were listed as a criteria pollutant under the current CAA, the Administrator and states would encounter many problems in regulating it effectively.

First, CO₂ falls outside the scope of the CAA’s mechanism to regulate emissions because the primary effect of CO₂—global warming—is not an ambient air problem.¹⁶⁷ Once the Administrator lists a criteria pollutant, he or she has the nondiscretionary duty to publish National Ambient Air Quality Standards (NAAQS), which specify a target level of pollution to reduce emissions.¹⁶⁸ NAAQS are divided into primary and secondary standards. Primary NAAQS are “ambient air quality standards the attainment and maintenance of which . . . are requisite to protect the public health.”¹⁶⁹ Secondary NAAQS “protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.”¹⁷⁰ NAAQS are designed to regulate criteria pollutants that accumulate near the surface of the earth and therefore affect the ambient air. By contrast, even though CO₂ initially enters the ambient air when emitted, its effect on global warming occurs much higher in the atmosphere—in the troposphere and into the lower stratosphere.¹⁷¹

Second, it would be extremely difficult under the CAA’s mandate to designate a nonattainment area for CO₂. After NAAQS are established for a pollutant, the Administrator is required to designate nonattainment, attainment, and unclassifiable areas based on the idea that ambient concentrations of pollutants differ from region to region.¹⁷² Because tropospheric concentrations of CO₂ are essentially homogenous around the world, the goal of delineating a nonattainment area for CO₂ is not practical.¹⁷³ CO₂ has a long atmospheric residence time of up to 200 years, which results in the well-mixed concentration of CO₂ throughout the atmosphere.¹⁷⁴ If a NAAQS for CO₂ was set below present atmospheric concentration, the entire United States would fall into the nonattainment category¹⁷⁵ and it would be unlikely to ever reach attainment unless the entire world adopted the same emissions standards.¹⁷⁶ Moreover, to achieve attainment, states are required to adopt a state implementation plan (SIP) to enforce the primary and secondary NAAQS at the regional level.¹⁷⁷ Any process predicated on achieving regional reductions of a pollutant that is well-mixed throughout the atmosphere is arguably ineffective.¹⁷⁸

Third, NAAQS are not aptly designed to regulate CO₂ because the Administrator would be unable to publish *primary* NAAQS; at present concentrations, CO₂ is not directly harmful to human health.¹⁷⁹ Based on the information about health effects contained in documents compiled under CAA section 108(a)(2), the EPA is required to “identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an ‘adequate’ margin of safety, and set the standard at that level.”¹⁸⁰ Because the atmospheric concentration of CO₂ was 368 ppm in 2000 and is projected to reach 540-970 ppm in 2100, well below the “safe” amount of 20,000 ppm,¹⁸¹ the NAAQS’ focus on re-

ducing the concentration to a level the public can tolerate does not apply to CO₂.

Not only does the plain language of the CAA reveal a clear nonregulatory purpose, but also the statute is inadequately designed to regulate CO₂ effectively. Indeed, if the text of the CAA “is read with a focus on the goal it is intended to achieve, Congress cannot have intended to regulate global warming using a program completely unsuited to this purpose.”¹⁸² Because the effects of global warming present interstate nuisance disputes that are national in scope, courts should apply federal common law to resolve these federal issues and help reduce the United States’ impact on the global environment: “Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.”¹⁸³

C. No Preemption Under *City of Milwaukee v. Illinois*

To determine whether a federal statute preempts a previously available common law action, a court may apply the *Milwaukee II* test.¹⁸⁴ In the regulation of CO₂, it is evident that the CAA does not satisfy either prong of the *Milwaukee II* test; the CAA is neither sufficiently comprehensive nor adequately capable of enforcing the regulation of CO₂ emissions.

To satisfy the first prong of the *Milwaukee II* test, the CAA must be comprehensive in scope, without any interstitial void. In comparison to the Clean Water Act (CWA), the CAA is much less comprehensive for the purposes of *Milwaukee II*. Courts have recognized that although both the CWA and CAA are very comprehensive statutes, a fundamental difference exists between them aside from the obvious distinction between water and air pollution.¹⁸⁵ Specifically, the extent of pollution sources regulated under the CAA is much more limited than in the CWA. In *United States v. Kin-Buc, Inc.*, the district court acknowledged,

While the [CWA] regulates every point source of water pollution, the CAA regulates only those stationary sources of air pollution that are found to threaten national ambient air quality standards. Thus, it does not necessarily follow that the CAA pre-empts the federal common law of nuisance simply because the [CWA] does so.¹⁸⁶

In addition to the scope of regulated sources, the CWA is more comprehensive than the CAA because the Supreme Court in *Milwaukee II* expressly closed all statutory gaps.¹⁸⁷ While the CWA preempts all federal common law actions, courts still have an opportunity to fill the interstices of the CAA. Even if the Supreme Court eventually holds that the CAA occupies the field

of air pollution and preempts federal common law, this ruling would be inapplicable to the regulation of CO₂, since the CAA does not regulate CO₂ nor is it adequately designed to achieve significant reductions in atmospheric concentration of CO₂. Until Congress speaks to the issue of enforceable limits on CO₂ emissions, the CAA cannot be considered sufficiently comprehensive because there will always be a gap in the statute.

To satisfy the second prong of the *Milwaukee II* test, the regulatory scheme of the CAA must sufficiently address any issues of CO₂ regulation previously governed by federal common law.¹⁸⁸ Actions in federal common law nuisance have existed in air pollution cases concurrently with the CAA.¹⁸⁹ Even before the passage of the CAA, common law nuisance actions have traditionally governed transboundary air pollution cases.¹⁹⁰ Therefore, it is reasonable to assume that interstate disputes concerning the harmful effects from CO₂ create a strong enough federal interest to employ federal common law. Professor Thomas Merrill of Columbia University Law School agrees:

Public nuisance suits brought by [Attorneys General] challenging transboundary air pollution were understood to be subject to federal common law before the [CAA] was adopted. Hence, the failure to regulate a particular type of transboundary pollution . . . should be construed to mean Congress would have wanted federal common law to continue to apply.¹⁹¹

Moreover, because there is a strong federal interest in the transboundary emissions and regulation of CO₂, courts should apply a federal rule of decision in a global warming case. The national scope of the issue underscores the importance of employing federal common law; federal courts are competent to act on interstate public nuisance claims and there is an important federal issue at stake. When Congress developed the CAA, it wrote a very comprehensive piece of legislation but expressly left out provisions to regulate CO₂. The CAA indeed mentions CO₂ and acknowledges global warming.¹⁹² Yet the Act’s clear nonregulatory focus coupled with the absence of legal remedies should not displace actions in federal common law when federal rights are violated. Congress’ conscious choice to reject specific regulatory language that would limit a widely pervasive pollutant warrants the inference that Congress intended for the remedy of federal common law to remain available.¹⁹³

D. Fashioning an Equitable Remedy

The principle of equity is rooted in the ancient maxim *ubi jus ibi remedium*, which reminds us that where the law gives a right, it also gives a remedy.¹⁹⁴ As a general

matter, the assertion that there can be no right without a remedy is not always true.¹⁹⁵ Nonetheless, the doctrine of equity continues to play a significant role in the American legal system. Various treatises on equity note, "Equity 'does not create rights which the common law denies; but it gives effectual redress for the infringement of *existing* rights, where, by reason of the special circumstances of the case, the redress at law would be inadequate.'"¹⁹⁶

The United States inherited its equity jurisprudence from the English courts of Chancery,¹⁹⁷ but the United States derives its equitable jurisdiction wholly from the United States Constitution and statutes.¹⁹⁸ As Article III, Section 2 of the Constitution states, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."¹⁹⁹ To administer the principles of equity and justice, Chancery courts were established because the tenacity of common-law procedure precluded common-law tribunals from vindicating such rights.²⁰⁰ Common-law tribunals could not grant conditional relief, nor could they prohibit or forbid a defendant from doing something; only damages were awarded as relief.²⁰¹ Moreover, common-law tribunals were unlikely to stray from precedent, even when entirely new circumstances warranted a different remedy.²⁰² Equity courts were therefore able to fashion the appropriate remedy when legal rights were violated: "One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life."²⁰³

The controlling question remains, when is equity jurisdiction appropriate? In *Boyce's Executors v. Grundy*, the United States Supreme Court provided the answer: "It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."²⁰⁴ In fashioning equitable relief, district courts must determine that the legal remedy is inadequate and that the plaintiff will experience irreparable injury.²⁰⁵ Various courts have held that irreparable injury may consist of the absence of an adequate remedy at law.²⁰⁶

Because the CAA is incapable of providing an adequate legal remedy to regulate CO₂, the statute fails to redress a sovereign's right to be free from any public nuisance. Nowhere in the CAA's regulatory scheme lies a plain, adequate, practical, and efficient remedy at law to achieve binding controls on CO₂ emissions; courts may also consider this irreparable injury to the sovereign. Therefore, redressing the public nuisance suffered from the effects of CO₂ makes an excellent case for equitable relief, especially because the regulation of CO₂ is a matter of public interest.²⁰⁷ Much like in the field of water pollution where, in the absence of a comprehensive statute, the

Supreme Court originally sanctioned a court's equitable resolution of public nuisance suits,²⁰⁸ so too should a federal court exercise its equitable jurisdiction in the field of carbon dioxide regulation: "[S]tatutory remedies which do not afford aggrieved parties at least a reasonable facsimile of the relief sought under federal common law *do not* preclude federal common law remedies."²⁰⁹ In many public nuisance suits in the field of air pollution, courts commonly order a facility to reduce its emissions of the particular air pollutant.²¹⁰ Thus, it is not unreasonable for a court to order the same with respect to anthropogenic sources of CO₂.

Conclusion

Global warming is a documented environmental problem and at the forefront of our nation's environmental policy, yet the federal government has not committed to reducing CO₂ emissions through binding legislation. If CO₂ emissions are not substantially capped, our physical and biological environments are likely to suffer grave consequences. Federal inaction coupled with the inadequacy of the CAA as a regulatory and remedial mechanism will not mitigate this threat. Therefore, federal common law, unrestricted from preemptive control, should fill the statutory void. In *United States v. Little Lake Misere Land Co.*, Chief Justice Burger declared,

[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress."²¹¹

Public nuisance law is an excellent supplement to the CAA's nonregulatory scope concerning CO₂. A strong advocate for nuisance law, Professor William Rodgers contends, "Nuisance law is uniquely able to assimilate and put to use contemporary administrative law requirements without being diverted from the basic job of doing justice between the parties."²¹² Actions in public nuisance to abate interstate air pollution problems have existed for 100 years; the circumstance should be no different in an interstate dispute alleging harm from CO₂. Especially where the typical form of injunctive relief in an environmental case imposes caps on pollutant emissions,²¹³ the regulation of CO₂ is particularly well-matched for the federal common law of public nuisance. Public nuisance is an injury, which carries a right deserving of a remedy. Because federal common law provides an available remedy, it cannot be displaced with a regulatory vacuum.

Endnotes

1. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).
2. *Id.* (Plaintiffs are: Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin. Defendants are: American Electric Power Company, Inc., American Electric Power Service Corporation, The Southern Company, Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corporation. Plaintiffs called the defendants “the five largest emitters of carbon dioxide in the United States.”).
3. *Id.* at *21, *25.
4. Clean Air Act §§ 101-618(q); 42 U.S.C. §§ 7401-7671(q) (2000).
5. Clean Water Act §§ 101-607; 33 U.S.C. §§ 1251-1387 (2000).
6. This phrase describes federal preemption of state law, even if state law does not interfere with the particular congressional act at issue. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 305 (1981); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).
7. Clean Air Act § 108(a)(1)(A)-(B); 42 U.S.C. § 7408(a)(1)(A)-(B).
8. *Id.* § 302(g), 42 U.S.C. § 7602(g) (defining “Air pollutant” in relevant part as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air”).
9. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *see infra* notes 184-193 and accompanying text.
10. *See infra* notes 141-163 and accompanying text.
11. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 310 (2005).
12. *See infra* notes 46-72 and accompanying text.
13. Kyoto Protocol to the Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22; S. Res. 98, 105th Cong. (1997) (the Senate passed a resolution 95-0 requesting the executive branch not to sign the Kyoto Protocol unless developing countries committed to emissions reductions and the Protocol was shown not to cause serious harm to the U.S. economy).
14. Juliet Eilperin, *U.S. Won't Join in Binding Climate Talks; Administration Agrees to Separate Dialogue*, WASH. POST, Dec. 11, 2005, at A01; Andrew C. Revkin, *U.S., Under Fire, Eases its Stance in Climate Talks*, N.Y. TIMES, Dec. 10, 2005, at A1.
15. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (Sept. 8, 2003).
16. *See infra* notes 27-45 and accompanying text.
17. This comment concedes that the creation of a nationally uniform federal common law regulating CO₂ is not entirely desirable, for it not only undercuts a domain formerly belonging to the states, but it would also deprive states the advantage of tailoring solutions to local conditions. *See Note, The Federal Common Law*, 82 HARV. L. REV. 1512, 1517-18 (1969). However, regulation of CO₂ touches major federal interests, which demands a federal solution. Until Congress passes such legislation, federal common law should govern the issue.
18. Greenhouse gases (GHGs) affect global temperature. Naturally occurring GHGs include water vapor, carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), and ozone (O₃). Human activities increase the levels of these gases. Sulfur hexafluoride (SF₆), hydrofluorocarbons (HFCs), hydrochlorofluorocarbons (HCFCs), chlorofluorocarbons (CFCs), and perfluorocarbons (PFCs) are non-CO₂ synthetic gases produced exclusively by industrial activity. CO₂ from fossil fuel combustion accounts for the largest percentage (59% in the year 2000) of global GHG emissions. Kevin Baumert & Jonathan Pershing, *Climate Data: Insights and Observations*, 5 fig.2, 6 (PEW CENTER ON GLOBAL CLIMATE CHANGE 2004), available at http://www.pewclimate.org/policy_center/reports/. For a list of all chemically reactive and synthetic GHGs, see WORKING GROUP I, IPCC, CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS 244-45 tbls.4.1(a), 4.1(b). (John T. Houghton et al. eds., Cambridge University Press 2001), available at http://www.grida.no/climate/ipcc_tar/ [hereinafter SCIENTIFIC BASIS REPORT].
19. The international community has largely accepted the science behind the causes and effects of global warming. The Intergovernmental Panel on Climate Change (IPCC), an international panel comprised of several hundred academic scientists and researchers, synthesizes information from thousands of peer reviewed and published scientific/technical literature to assess the current status of climate change. So far, the IPCC has produced three comprehensive scientific assessment reports which indicate that most of the warming observed over the last fifty years is attributable to human activities which have increased the atmospheric concentration of greenhouse gases (GHGs). The IPCC will publish its Fourth Assessment Report in 2007. *See generally* IPCC, <http://www.ipcc.ch> (last visited Feb. 6, 2006).
20. Baumert, *supra* note 18, at 23 tbl.3. As distinguished from naturally occurring carbon dioxide, anthropogenic carbon dioxide is a direct result of human-generated activities such as fossil fuel combustion. *See* SCIENTIFIC BASIS REPORT, *supra* note 18, at 85, 92. For the purposes of this comment, CO₂ will always refer to anthropogenic CO₂.
21. Baumert, *supra* note 18, at 23 tbl.3.
22. *Id.*
23. ENERGY INFO. ADMIN., OFFICE OF INTEGRATED ANALYSIS AND FORECASTING, U.S. DEP'T OF ENERGY, EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES: 2004, ix (2005), available at <http://www.eia.doe.gov/environment.html> [hereinafter 2004 REPORT].
24. This figure was calculated after adjusting for U.S. territories and international bunker fuels. *See id.* at ix-x (noting that the U.S. economy grew by 4.2% in 2004, the highest rate of growth since 1999, though GHG emissions per unit of real economic output decreased by 2.1%. Also, 1.5% of total United States GHG emissions included CO₂ from non-combustion sources such as methane (9%), nitrous oxide (5%) and other gases (2.2%)). *Id.* at x.
25. In December 2005, seven states from the Northeast signed a Memorandum of Understanding to implement the Regional Greenhouse Gas Initiative, the first mandatory market-based cap-and-trade program to stabilize and reduce CO₂ emissions from power plants. *See* <http://www.rggi.org> (last visited Feb. 19, 2006). For a review of other significant state and local responses to mitigate the effects of global warming, see Barry G. Rabe, Mikael Roman, & Arthur N. Dobelis, *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENVTL. L.J. 1 (2005); Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN. ST. ENVTL. L. REV. 15 (2004); David R. Hodas, *State Law Responses to Global Warming: Is it Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53 (2003).
26. Hodas, *id.* at 53.
27. Tom M. L. Wigley, *The Science of Climate Change: Global and U.S. Perspectives*, 4 (PEW CENTER ON GLOBAL CLIMATE CHANGE 1999), available at <http://www.pewclimate.org> (search “wigley”).
28. *Id.*
29. SCIENTIFIC BASIS REPORT, *supra* note 18, at 92.
30. *Id.* at 93. This is called “radiative forcing.” The IPCC explains radiative forcing as follows: “[A]n increased concentration of greenhouse gases in the atmosphere enhances the absorption and emission of infrared radiation. The atmosphere’s opacity increases so that the altitude from which the Earth’s radiation is effectively emitted into space becomes higher. Because the temperature is lower at higher altitudes, less energy is emitted, causing a positive radiative forcing.”

31. *Id.* at 2, 102.
32. See 2004 REPORT, *supra* note 23, at xii (finding that in the United States, the consumption of energy from the combustion of fossil fuels (e.g., coal, oil, and natural gas), is the largest single contributor to anthropogenic GHG emissions).
33. Deforestation is particularly problematic because forests are repositories of CO₂, containing approximately two-thirds of the amount of CO₂ present in the atmosphere. When whole forests are cut down, all of the CO₂ stored within the plants is released. See ARNOLD W. REITZE JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT, 413 (Env'tl. Law Inst. 2001).
34. SCIENTIFIC BASIS REPORT, *supra* note 18, at 2 (defining "global average surface temperature" as "the average of near surface air temperature over land and sea surface temperature").
35. *Id.*
36. *Id.* at 5.
37. *Id.* at 4.
38. REITZE, *supra* note 33, at 414.
39. *Id.*
40. *Id.*
41. In light of hurricanes Katrina and Rita that destroyed the Gulf and Florida coasts, there is great speculation as to whether global warming is at least partly responsible for an increase in severe weather activity. See Jeffrey Kluger, *Global Warming: The Culprit? Evidence Mounts that Human Activity is Helping Fuel These Monster Hurricanes*, TIME, Oct. 3, 2005, at 40. Such conjecture is not unsubstantiated, according to the United States government. See U.S. DEP'T OF STATE, CLIMATE ACTION REPORT 100-01 (2002), available at <http://www.epa.gov> (click "global warming"; then click "resource center" then click "publications"; then click "US Climate Action Report") [hereinafter CLIMATE ACTION REPORT] ("Although projections of the number of hurricanes that may develop remain uncertain, model simulations indicate that, in a warmer climate, hurricanes that do develop are likely to have higher wind speeds and produce more rainfall.").
42. WORKING GROUP II, IPCC, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY 7 (James J. McCarthy et al. eds., Cambridge University Press 2001), available at http://www.grida.no/climate/ipcc_tar/ [hereinafter IMPACTS REPORT].
43. Usha Lee McFarling, *Core Evidence That Humans Affect Climate Change; Ice Drilled in Antarctica Offers the Fullest Record of Glacial Cycles and Greenhouse Gas Levels*, L.A. TIMES, Nov. 25, 2005, at A24. For the actual study cited by this news article, see Urs Siegenthaler, et al., *Stable Carbon Cycle—Climate Relationship During the Late Pleistocene*, 310 SCIENCE 1313 (2005).
44. CLIMATE ACTION REPORT, *supra* note 41, at 8.
45. Juliet Eilperin, *World Leaders to Discuss Strategies for Climate Control; Bush Administration Shuns Conference On Strategies to Build on Kyoto Pact*, WASH. POST, Nov. 27, 2005, at A03 ("We do have a little time, but not much. . . . If we don't get a serious program in place for the long term in this second post-Kyoto phase, we will simply not make it and we will be crossing limits which will basically produce impacts that are unacceptable") (quoting Michael Oppenheimer, scientist at Princeton University).
46. In 1992, President George H.W. Bush signed the United Nations Framework Convention on Climate Change (UNFCCC), the objective of which was the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, available at http://unfccc.int/essential_background/convention/background/items/1349.php. President Bill Clinton then signed the Kyoto Protocol in 1997, which amended the UNFCCC and committed Annex I Parties to individual, legally-binding targets to limit or reduce their GHG emissions. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998), available at http://unfccc.int/essential_background/kyoto_protocol/items/1678.php.
47. George W. Bush, President of the United States, Global Climate Change Policy Book (February 2002), <http://www.whitehouse.gov/news/releases/2002/02/climatechange.html> (last visited Feb. 12, 2006).
48. See Ray Moseley, *Bush's Opposition to Clean-Air Accord Risky, Activists Say*, CHICAGO TRIBUNE, Mar. 22, 2001, at N3 (Bush stated, "I oppose the Kyoto Protocol."); See also Peter Behr & Eric Pianin, *Firms Start Trading Program for Greenhouse-Gas Emissions; Creation of Exchange Expands Voluntary Effort to Cut Pollutants; Democrats Push for Mandatory Controls*, WASH. POST, Jan. 17, 2003, at A14 ("The Bush administration opposes mandatory reduction in carbon dioxide and other greenhouse gases. Instead, the president has called for more research on global warming and new economic incentives to encourage utilities and manufacturers to gradually reduce the growth of emissions.").
49. See Kyle Danish, *Global Climate Change*, in THE CLEAN AIR ACT HANDBOOK 497 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004).
50. Revkin, *supra* note 14.
51. Eilperin, *supra* note 14.
52. See The Climate Change Research Initiative, <http://www.climatechange.gov/about/ccri.htm> (last visited Feb. 12, 2006); George W. Bush, President of the United States, President Bush Announces Climate Change Initiatives (Jul. 13, 2001), <http://www.epa.gov> (click "global warming"; then click "news and business"; then click "speeches"; then click "July 13, 2001") (last visited Feb. 12, 2006); see also Global Climate Change Policy Book, <http://www.whitehouse.gov/news/releases/2002/02/climatechange.html> (last visited Feb. 18, 2006) (including tax incentives and carbon sequestration).
53. Climate VISION, <http://www.climatevision.gov/mission.html> (last visited Feb. 12, 2006); see also The Voluntary Reporting of Greenhouse Gases Program, also administered by the Department of Energy, <http://www.pi.energy.gov/enhancingGHGregistry/index.html> (last visited Feb. 12, 2006).
54. Although the Bush administration continues to cite a brief drop in emissions after 2000 as evidence that voluntary reduction measures are indeed slowing releases of GHGs, evidence that domestic GHG emissions reached an all-time high in 2004 explicitly contradicts these statements. See Andrew C. Revkin, *Gas Emissions Reached High in U.S. in '04*, N.Y. TIMES, Dec. 21, 2005, at A30 (referring to the 2004 report issued by the Department of Energy, *supra* note 7) ("[I]t seems unlikely that the present U.S. strategy of only setting emissions targets relative to economic growth, reducing so-called greenhouse gas intensity, will be enough") (quoting Lord Rees, president of the Royal Society, an independent British scientific academy).
55. S. 139, 108th Cong. (2003).
56. *Id.*
57. *Id.*
58. S. 139, 108th Cong., 149 CONG. REC. 13572 (2003).
59. The bill was first introduced in 2003 as S. 366. See S. 366, 108th Cong. (2003). S. 366 was read twice then referred to the Committee on Environment and Public Works. The Clean Power Act was reintroduced in January 2005 as S. 150. See S. 150, 109th Cong. (2005). S. 150 met the same fate as S. 366, as it was read twice and then referred to the Committee on Environment and Public Works.
60. S. 150, 109th Cong. (2005).
61. Brian DeBose & Bill Sammon, *Global-Warming Limits Rejected*, WASH. TIMES, Jun. 23, 2005, at A01 ("[T]he Senate voted against signing the Kyoto Protocol 95-0 . . . because it would be too

- economically damaging.”). In fact, some are skeptical that the Kyoto Protocol will ever be ratified. See Veronique Bugnion & David M. Reiner, *A Game of Climate Chicken: Can EPA Regulate Greenhouse Gases Before the U.S. Senate Ratifies the Kyoto Protocol?*, 30 ENVTL. L. 491, 593 (2000) (“Securing a two-thirds majority in the Senate to ratify the Kyoto Protocol appears to be an insurmountable task under even the most favorable circumstances.”).
62. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).
 63. See Memorandum from Jonathan Z. Cannon, General Counsel, EPA, to Carol M. Browner, Administrator, EPA (Apr. 10, 1998) (to be on file with the law review).
 64. Memorandum from Robert E. Fabricant, General Counsel, EPA, to Marianne L. Horinko, Acting Administrator, EPA 10 (Aug. 28, 2003) (to be on file with the law review).
 65. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003) (“After careful consideration of petitioners’ arguments and the public comments, EPA concludes that it cannot and should not regulate GHG emissions from U.S. motor vehicles under the CAA. Based on a thorough review of the CAA, its legislative history, other congressional action and Supreme Court precedent, EPA believes that the CAA does not authorize regulation to address global climate change. Moreover, even if CO₂ were an air pollutant generally subject to regulation under the CAA, Congress has not authorized the Agency to regulate CO₂ emissions. . . .”).
 66. See *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
 67. *Id.* at 842-43.
 68. *Id.*
 69. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989).
 70. The CAA is structured around the regulation of criteria air pollutants. Criteria pollutants are a group of common air pollutants that are designated as such based on their effects on public health and welfare. The six named criteria pollutants are particulate matter, sulfur dioxide, nitrogen oxides, carbon monoxide, ozone, and lead. The Administrator of the EPA must first list a pollutant before the EPA has authority to regulate it. 40 C.F.R. §§ 50.4-12. See also Clean Air Act § 108(a); 42 U.S.C. § 7408(a) (2000).
 71. See *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir.), *reh’g denied*, 433 F.3d 66 (D.C. Cir. 2005).
 72. *Id.* at 57-58 (“In requiring the EPA Administrator to make a threshold ‘judgment’ about whether to regulate, § 202(a)(1) [of the CAA] gives the Administrator considerable discretion. Congress does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence . . . ‘policy judgments’ also may be taken into account. . . . [A] reviewing court ‘will uphold agency conclusions based on policy judgments’ ‘when an agency must resolve issues’ on the frontiers of scientific knowledge.”).
 73. U.S. CONST. art VI, cl. 2.
 74. *Gade v. Nat’l Solid Wastes Mgmt Ass’n*, 505 U.S. 88, 108 (1992).
 75. *Id.* at 98.
 76. *Id.*
 77. *Id.*
 78. Clean Water Act §§ 101-607, 33 U.S.C. §§ 1251-1387 (2000).
 79. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*).
 80. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*).
 81. *Milwaukee I*, 406 U.S. at 93.
 82. *Milwaukee II*, 451 U.S. at 309.
 83. *Milwaukee I*, 406 U.S. at 99-100 (quoting *Texas v. Pankey*, 441 F.2d 236, 240 (1971)).
 84. See Clean Water Act, § 301, 33 U.S.C. § 1311 (2000) (discharge of a pollutant is illegal except in compliance with law).
 85. *Milwaukee II*, 451 U.S. at 314, 317 (emphasis added).
 86. See *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 212-13 (1983) (nuclear safety); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 750-51 (1985) (collective bargaining); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (registration of aliens).
 87. *Gade v. Nat’l Solid Wastes Mgmt Ass’n*, 505 U.S. 88, 98 (1992) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).
 88. *Hines*, 312 U.S. at 67; *Gade*, 505 U.S. at 98.
 89. Merrill, *supra* note 11, at 310.
 90. *Id.* at 316-19.
 91. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
 92. 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 2, 3 (West Publishing Co. 1986) (“[I]t has hung on from its horse-and-buggy origins to the days of high technology.”).
 93. *Id.* at 6.
 94. While private nuisance is not the focus of this comment, it is important to distinguish between the two concepts.
 95. See RESTATEMENT (SECOND) OF TORTS: PRIVATE NUISANCE § 821D (1979).
 96. RESTATEMENT (SECOND) OF TORTS: WHO CAN RECOVER FOR PRIVATE NUISANCE § 821E (1979).
 97. *Id.*
 98. See RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821B(2) (Three circumstances help determine whether the interference is unreasonable: (1) “Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; or (2) whether the conduct is proscribed by a statute, ordinance or administrative regulation; or (3) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.”).
 99. *Id.* § 821B(2)(a).
 100. See RESTATEMENT (SECOND) OF TORTS: WHO CAN RECOVER FOR PUBLIC NUISANCE § 821C cmt. b (A private individual may assert an action in public nuisance only if that individual has suffered harm different in kind, not just in degree, from the harm suffered by the public).
 101. *Id.*
 102. See RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821B cmt. g.
 103. *Id.*
 104. *Durand v. Dyson*, 271 Ill. 382 (1915).
 105. *Jenne v. Sutton*, 43 N.J.L. 257 (1881).
 106. *New York v. Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d 40 (N.Y. Sup. Ct. 1978).
 107. *City of Chicago v. Latronica Asphalt & Grading, Inc.*, 805 N.E.2d 281 (Ill. App. Ct. 2004).
 108. *Cox v. City of Dallas*, 256 F.3d 281, 291 (5th Cir. 2001) (“The theory of nuisance lends itself naturally to combating the harms created by environmental problems.”). For examples of recent environmental nuisance cases, see, e.g., *State of Alabama v. Clayton*, 492 So.2d 665 (Ala. Cr. App. 1986) (unauthorized dump); *Sterling v. Velsicol Chemical Corp.*, 647 F. Supp. 303 (W.D. Tenn. 1986) (hazardous waste disposal site); *Galaxy Carpet Mills, Inc. v. Massengill*, 338

- S.E.2d 428 (Ga. 1986) (air pollution, noise, and vibration from coal-fired burners).
109. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 238 (1907).
 110. RODGERS, *supra* note 92, at 29, 30.
 111. David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 52 (2003).
 112. 206 U.S. 230 (1907).
 113. 304 U.S. 64 (1938); *see also Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945) (“In overruling *Swift v. Tyson*, 16 Pet. 1, *Erie* . . . did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare.”).
 114. Merrill, *supra* note 11, at 307 (Federal common law is a type of preemption of state law; “[lit] applies when important federal interests would be frustrated by the application of state law.”).
 115. The term “specialized common law” was coined by Judge Henry Friendly in his article *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964). *See Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 625 n.7 (1980); Field, *infra* note 140, at 909 (“The examples [of cases recognizing specialized common law] reveal an extensive federal common law, of many different varieties, with no coherent unifying principle, and whose current boundaries are uncertain.”).
 116. *See Swift v. Tyson*, 41 U.S. (1 Pet.) 1 (1842) (holding that the Rules of Decision Act required that questions of a general nature, which are not dependent on local law or local statutory law, be determined by general principles of jurisprudence).
 117. *Id.*
 118. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).
 119. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).
 120. *Id.* at 110.
 121. *Milwaukee I*, 406 U.S. 91, 105 n.6 (1972).
 122. *Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958) (holding that the “strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts” justified the application of a federal rule of decision).
 123. *Erie* contemplated that in order for a court to choose federal law, the first inquiry is whether the court has power to hear the case. *Erie*, 304 U.S. at 78 (“Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general’. . . . And no clause in the Constitution purports to confer such a power upon the federal courts.”).
 124. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (further explaining, “In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.”).
 125. *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971), *cited with approval by Milwaukee I*, 406 U.S. at 103, 107 n.9.
 126. *Id.* at 237-38.
 127. *Id.* at 238; 28 U.S.C. § 1331(a) (2000).
 128. *Pankey*, 441 F.2d at 240.
 129. *See, e.g., Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975); *Byram River v. Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D. Vt. 1972); *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (D. Va. 1972).
 130. *Milwaukee I*, 406 U.S. 91, 108 (1972).
 131. *Milwaukee II*, 451 U.S. 304, 333 (1981).
 132. *Id.* at 313-14 (citations omitted).
 133. *Id.* at 315 n.8.
 134. *Id.*
 135. *Id.*
 136. *See, e.g., Andrew Jackson Heimert, Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403 (1997); Gerald Torres, *Seventh Annual Lloyd K. Garrison Lecture on Environmental Law: Who Owns the Sky?*, 19 PACE ENVTL. L. REV. 515 (2002); David A. Grossman, Article, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003); Eduardo M. Penalver, Article, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, 38 NAT. RESOURCES J. 563 (1998). Professor of Environmental Law, Arnold W. Reitze Jr., writes that Congress clearly did not intend for the CAA to regulate CO₂. *See REITZE, supra* note 33 at 415-19. However, others hold the contrary viewpoint that the Clean Air Act indeed preempts the use of federal common law of public nuisance because CO₂ is a pollutant for CAA purposes and Congress delegated comprehensive authority to the EPA to regulate CO₂. For discussions upholding this viewpoint, *see Merrill, supra* note 11; Janine Maney, Article, *Carbon Dioxide Emissions, Climate Change, and the Clean Air Act: An Analysis of Whether Carbon Dioxide Should be Listed as a Criteria Pollutant*, 13 N.Y.U. ENVTL. L.J. 298 (2005); Nicholle Winters, Note, *Carbon Dioxide: A Pollutant in the Air, But is the EPA Correct That it is Not an “Air Pollutant”?*, 104 COLUM. L. REV. (1996).
 137. At present, only one district court has concluded that the CAA—in regulating air pollution, not CO₂ specifically—displaces federal common law. *See United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982) (defendant landfill operator was releasing vaporized nitric acid and polyvinyl chloride into the air).
 138. RODGERS, *supra* note 92, at 124-25 (Most environmental laws are very comprehensive: “On a spectrum of skimpy to comprehensive . . . the post-1970 environmental statutes are comprehensive, and can be described also as contemporary, complex, and complete. The statutes, especially under an occupation of the field approach, leave few caps to be filled.”).
 139. *See* U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases . . . http://www.archives.gov/national-archives-experience/charters/constitution_amendments_11-27.html#11; between Citizens of different States. . . .”); 28 U.S.C. § 1332 (2000) (diversity of citizenship).
 140. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 983 (1986) (noting that “federal law can apply whenever federal interests require a federal solution”); *see also* Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1524-25 (1969) (“The formulation of remedies by federal courts does not depend upon affirmative congressional authorization for its validity, but upon the presence of a federal interest.”).
 141. Clean Air Act § 601-618, 42 U.S.C. § 7671 (2000).
 142. S. 1630, 101st Cong. (1990); S. REP. NO. 101-228, at 377 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3760.
 143. S. REP. NO. 101-228, at 385 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3769.
 144. *Id.* at 387, 3770.
 145. H.R. 3030, 101st Cong. (1989). This bill was considered destined to be the primary source of the 1990 Amendments. REITZE, *supra* note 33, at 415.
 146. 136 CONG. REC. 11964 (1990).
 147. *Id.* at 11965.
 148. H.R. REP. NO. 101-952, at 335 (1990) (Conf. Rep.).
 149. Clean Air Act § 602(e), 42 U.S.C. § 7671(e) (2000).
 150. *Id.*
 151. REITZE, *supra* note 33, at 416.

152. S. REP. NO. 101-228, at 98-99 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3483-85. In 1990, motor vehicles produced one quarter of CO₂ emissions in the United States. *Id.* at 99, 3484. In 2004, the transportation sector was the largest source of CO₂ emissions, accounting for thirty-three percent. Ninety-eight percent was from the consumption of petroleum products. In addition, CO₂ emissions from the transportation sector increased by 3.1% relative to 2003. 2004 REPORT, *supra* note 23, at xii.
153. S. REP. NO. 101-228, at 100 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3485.
154. H.R. REP. NO. 101-952, at 336-38 (1990) (Conf. Rep.).
155. Clean Air Act §§ 202-219; 42 U.S.C. §§ 7521-7554.
156. *Id.* § 103(g)(1); 42 U.S.C. § 7403(g)(1) (emphasis added).
157. Furthermore, many argue that because section 103(g) names CO₂ as a pollutant, then the very broad definition of “air pollutant” in section 302(g) surely covers CO₂. *E.g.* Maney, *supra* note 136, at 329-33, 343; Winters, *supra* note 136, at 2005-06. For the definition of “air pollutant,” see *supra* note 7.
158. H.R. REP. NO. 101-952, at 349 (1990) (Conf. Rep.).
159. Clean Air Act § 103(g)(4), 42 U.S.C. § 7403(g)(4).
160. 2004 REPORT, *supra* note 23, at xi tbl.3.
161. REITZE, *supra* note 33, at 418.
162. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987); REITZE, *supra* note 33, at 416 (“In the normal case Congress is assumed to be conscious of what it has done, especially when it chooses between two available terms that might have been included in the provision in question”) (quoting *American Petroleum Inst. v. EPA*, 52 F.3d 113, 1120 (D.C. Cir. 1995)).
163. RODGERS, *supra* note 92, at 121.
164. Clean Air Act § 101(b)(1); 42 U.S.C. § 7401(b)(1).
165. *Id.* § 108(a)(1)(A)-(B); 42 U.S.C. § 7408(a)(1)(A)-(B).
166. As explained in Section I(B), CO₂’s effect on global warming is predicted to affect public welfare negatively and such emissions are released from numerous mobile (e.g., automobile tailpipes) and stationary (e.g., power plants) sources.
167. See 40 C.F.R. § 50.1(e) (2005) (defining “ambient air” as “that portion of the atmosphere, external to buildings, to which the general public has access”); see also Symposium, *The Role of State Attorneys General in National Environmental Policy: Welcome & Global Warming Panel, Part 1*, 30 COLUM. J. ENVTL. L. 335, 341 (2005) (“Carbon dioxide is not an ambient air problem”) (quoting Richard Blumenthal, Attorney General of Connecticut).
168. Clean Air Act § 109(a); 42 U.S.C. § 7409(a).
169. *Id.* § 109(b)(1); 42 U.S.C. § 7409(b)(1).
170. *Id.* § 109(b)(2); 42 U.S.C. § 7409(b)(2). Effects on public welfare include “effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being. . . .” *Id.* § 302(h), 42 U.S.C. § 7602(h).
171. Wigley, *supra* note 27, at 10.
172. Clean Air Act § 107(d)(1)(b), 42 U.S.C. § 7407(d)(1)(b).
173. Memorandum from Robert E. Fabricant, General Counsel, EPA, to Marianne L. Horinko, Acting Administrator, EPA 7 (Aug. 28, 2003) (*to be on file with the law review*); REITZE, *supra* note 33, at 417 n.113 (noting that concentrations are about 2 ppm higher in the northern hemisphere due to the greater amount of emissions from industrialized nations.).
174. SCIENTIFIC BASIS REPORT, *supra* note 18, at 38 tbl.1.
175. REITZE, *supra* note 33, at 417.
176. Memorandum from Robert E. Fabricant, General Counsel, EPA, to Marianne L. Horinko, Acting Administrator, EPA 7 (Aug. 28, 2003) (*to be on file with the law review*). The principle irony is that the international community is working towards adopting such standards, but the United States refuses to cooperate.
177. Clean Air Act § 110; 42 U.S.C. § 7410.
178. REITZE, *supra* note 33, at 416 (citing *Union Elec. Co. v. EPA*, 427 U.S. 246 (1975); *Natural Res. Def. Council v. Train*, 545 F.2d 320 (2d Cir. 1976)).
179. See Canadian Centre for Occupational Health & Safety, Health Effects of Carbon Dioxide Gas, http://www.ccohs.ca/oshanswers/chemicals/chem_profiles/carbon_dioxide/health_cd.html (last visited Feb. 15, 2006) (finding that exposure to CO₂ at levels below two percent (20,000 ppm) is not harmful: persons exposed to concentrations of 3.3% to 5.4% for fifteen minutes evidenced an increase depth of breathing; and at 7.5%, an inability to breathe, increased pulse rate, headache, dizziness, sweating, and other effects developed).
180. *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 465 (2001).
181. IPCC, CLIMATE CHANGE 2001: THE SYNTHESIS REPORT: SUMMARY FOR POLICY MAKERS, 8 (2001), available at http://www.grida.no/climate/ipcc_tar/.
182. REITZE, *supra* note 33, at 417.
183. *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971), cited with approval by *Milwaukee I*, 406 U.S. at 103, 107 n.9.
184. *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 n.8 (*Milwaukee II*) (The *Milwaukee II* test is: (1) whether the statute is comprehensive and leaves no gaps to be filled; and (2) whether the statute sufficiently addresses the issue formerly governed by federal common law).
185. See *New England Legal Found. v. Costle*, 666 F.2d 30, 32 (2d Cir. 1981) (recognizing a distinction between the CWA and CAA); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 701 (D.N.J. 1982) (same).
186. *Kin-Buc, Inc.*, 532 F. Supp. at 701.
187. *Milwaukee II*, 451 U.S. at 317 (“The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.”).
188. *Milwaukee II*, 451 U.S. at 315 n.8. No court has decided this issue yet. Though the appeal of *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) will hopefully produce an opinion on the issue.
189. *E.g., Tahoe Reg’l Planning Agency v. Jennings* 594 F.2d 181 (9th Cir.), cert. denied, 444 U.S. 864 (1979) (federal common law of nuisance not precluded by CAA); *United States v. Atlantic-Richfield Co.*, 478 F. Supp. 1215 (D. Mont. 1979) (same).
190. *E.g., Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (sulfur dioxide emissions enjoined because injurious to environment); *Am. Smelting & Ref. Co. v. Godfrey*, 158 F. 225 (8th Cir.), cert. denied, 207 U.S. 597 (1907) (sulfur dioxide emitted from ore smelter smokestacks enjoined because injurious to health, animals, and vegetation); *McCleery v. Highland Boy Gold Min. Co.*, 140 F. 951 (D. Utah 1904) (sulfur dioxide emissions enjoined, even though damage incurred was relatively small). But see *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975), modified on other grounds, 529 F.2d 181(8th Cir. 1976) (federal common law of nuisance not available as a basis for relief where there is no allegation or evidence of any interstate health hazards).
191. Merrill, *supra* note 11, at 313.
192. Clean Air Act § 103(g); 42 U.S.C. § 7403(g) (2000) (research and evaluate CO₂); *Id.* § 602(e); 42 U.S.C. § 7671(e) (report global warming potential for listed substances).
193. *Watson v. Sutherland*, 72 U.S. 74, 78 (1867) (stating that where a statute does not provide an adequate remedy at law, a plaintiff is entitled to equitable relief).

194. *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322) ("If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal") (quoting Lord Holt).
195. One example is that citizens cannot sue any state in federal court. See U.S. CONST. art. III, § 2, cl. 1; U.S. CONST. amend. XI. Additionally, any applicable statute of limitations that has run will extinguish a person's right to seek relief.
196. 1 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 181 n.11 (5th ed. 1941) (quoting ADAMS' EQUITY, INTRODUCTION 9 (6th ed.)).
197. See *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939) ("The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.").
198. See POMEROY, *supra* note 196, at 676.
199. U.S. CONST. art. III, § 2.
200. See POMEROY, *supra* note 196, at 36 ("[T]he attitude of the [common-law] courts [] rendered necessary a separate tribunal with an equitable jurisdiction, and a procedure capable of being adapted to a variety of circumstances, and of awarding a variety of special remedies.").
201. Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in Federal Courts*, 38 HASTINGS L.J. 665, 668 (1987).
202. *Id.* See also POMEROY, *supra* note 196, at 22 ("English common-law judges . . . set themselves with an iron determination against any modification of the doctrines and rules once established by precedent, any relaxation of the settled methods which made the rights of suitors to depend upon the strictest observance of the most arbitrary and technical forms, [and] any introduction of new principles which should bring the law as a whole into a complete harmony with justice and equity.").
203. *Bowen v. Hockley*, 71 F.2d 781, 786 (4th Cir. 1934); see also POMEROY, *supra* note 196, at 78 ("[T]here is no limit to the various forms and kinds of specific remedy which [a court] may grant, adapted to novel conditions of right and obligation, which are constantly arising from the movements of society.").
204. *Boyce's Exrs. v. Grundy*, 3 Pet. 210 (1830). Courts have frequently quoted this statement in determining the adequacy of a legal remedy. See, e.g., *Watson v. Sutherland*, 72 U.S. 74, 78 (1867); *Southern P.R. Co. v. United States*, 133 F. 651, 656 (9th Cir. 1904); *Interstate Cigar Co. v. United States*, 928 F.2d 221, 223 (7th Cir. 1991); *Leen v. Carr*, 945 F. Supp. 1151, 1157 (N.D. Ill. 1996).
205. *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641-42 (9th Cir. 2004) (citations omitted).
206. *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 94, 96 (D. La. 1984) (citing *Placid Oil Co. v. U.S. Dep't of Interior*, 491 F. Supp. 895 (D. Tex. 1980); *Brown v. Chote*, 411 U.S. 452 (1973)).
207. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould [sic] each decree to the necessities of the particular case.'") (emphasis added).
208. The court in *Milwaukee I* acknowledged that "federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972). "Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights." *Id.* n.9.
209. *Barany v. Buller*, 670 F.2d 726, 736 (7th Cir. 1982) (emphasis added).
210. See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (enjoining emissions of sulfur dioxide); *United States v. Bishop Processing Co.*, 423 F.2d 469 (4th Cir. 1970) (enjoining malodorous air pollutants); *American Smelting & Ref. Co. v. Godfrey*, 158 F. 225 (8th Cir. 1907) (same); *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58 (D. Vt. 1987) (equitable remedy to enjoin emissions from paper mill is available); *Galaxy Carpet Mills, Inc. v. Massengill*, 338 S.E.2d 428 (Ga. 1986) (enjoining air pollution, noise, and vibration from coal-fired burners); *Borland v. Sanders Lead Co.*, 369, So.2d 523 (Ala. 1979) (enjoining emissions of lead particulates).
211. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (quoting Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957)).
212. RODGERS, *supra* note 92, at 29.
213. *Id.* at 115 ("Routinely, the courts combine technological and operational limitations.").



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Eggshell Skull Doctrine: Inapplicable to Certain Chemical Exposures

By Dwight A. Kern and Maria C. Carlucci

Typically, the eggshell skull doctrine is a stringent rule that imposes complete liability on defendants. This liability often leaves defendants accountable for injuries caused by the aggravation of a plaintiff's preexisting condition, which often results in more severe injuries. Yet, in New York, are some defendants escaping from the stringent application of the eggshell skull doctrine?



Over almost four decades ago, the *Kaempfe* court carved out an exception to the eggshell skull doctrine and held that manufacturers are not liable when a user suffers from an idiosyncratic allergic condition. Throughout the years, the New York courts have continued to apply the *Kaempfe* exception in the area of chemical exposures. Thus, New York jurisprudence's continued application of this exception has led to the fragility of the eggshell skull doctrine.

A first year law student is typically taught that under the general rules of torts, a defendant may be held liable in damages for the aggravation of a plaintiff's preexisting illness or injury. The Restatement (Second) of Torts § 461 states:

The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.

This concept is known as the "eggshell skull doctrine" and the defendant must traditionally "take[] the plaintiff as he finds him."¹ But in New York, the doctrine is not without qualification. For example, if a plaintiff with a preexisting condition is injured, a defendant is only liable for the additional harm or aggravation that he caused.² Another limitation on the eggshell skull doctrine in New York is that if a defendant "succeeds in establishing that the plaintiff's preexisting condition was bound to worsen . . . , [then] an appropriate discount should be made for the damages that would have been suffered even in the absence of the defendant's negligence."³ Both of these limitations of the doctrine ensure defendants are not held liable for a plaintiff's preexisting condition.

A good example of preexisting conditions is an idiosyncratic reaction to a product. Although not expressly stated, there is another exception to the eggshell skull doctrine in New York involving idiosyncratic reactions to chemical exposures. A small, but growing body of case law has been developing since the 1964 decision in the New York State Supreme Court Appellate Division, First Department decision, *Kaempfe v. Lehn & Fink Products Corp.*⁴ This common law—or New York exception—is remarkable because, unlike others, it denies plaintiff recovery for a preexisting physical condition. Thus, a plaintiff with an idiosyncratic allergic condition who suffers physical injuries is not taken as she is found when a substantial amount of the general population does not experience the same reaction.



In *Kaempfe*, the plaintiff sued the manufacturer of a spray deodorant after suffering an allergic reaction to aluminum sulphate in the product that caused severe dermatitis. The plaintiff had never before experienced an allergic reaction to any other product. The plaintiff's medical expert admitted that although a small number of people may be sensitive to products containing aluminum sulphate, it is safe for 'normal skin' and not normally harmful.

The First Department reasoned that a manufacturer is only required to warn of the dangers of toxic exposure in allergic reaction cases where the manufacturer has actual or constructive knowledge. In order to establish knowledge on behalf of the manufacturer, the product must contain "an ingredient to which a substantial number of the population are allergic" or "an ingredient potentially dangerous to an identifiable class of an appreciable number of prospective consumers."⁵ Thus, in New York, a manufacturer has no duty to warn about an injury that "is due to some allergy or other personal idiosyncrasy of the consumer found only in an insignificant percentage of the population."⁶

In analyzing duty, in *Kaempfe*, the First Department focused on foreseeability, that is, "the reasonable foreseeability of harm and reasonable care to guard against the same." Under this concept, a manufacturer or seller must exercise reasonable care to warn of dangers associated with normal use of the product that it knows about or,

with reasonable diligence, should anticipate. However, a seller or manufacturer is not required “to anticipate and warn against a remote possibility of injury in an isolated and unusual case.”⁷ The theory behind this reasoning is that a manufacturer or seller cannot be held liable for an injury resulting from use of a product that is safe for the normal user when that party does not have actual or constructive knowledge of a class of persons who have a propensity to react negatively to a particular product.

Therefore, manufacturers do not owe a duty to a microscopic fraction of potential users who may suffer from an unexpected, rare reaction. That is because neither the class of plaintiffs nor the reaction is foreseeable. The *Kaempfe* court acknowledged that the even strict liability would be accepted under these circumstances.

Until recently, New York state and federal courts have only dealt sporadically with the *Kaempfe* rule.⁸ However, some recent New York courts recently have affirmed *Kaempfe*.

In the New York Supreme Court Appellate Division, Second Department case, *Pai v. Springs Industries, Inc.*,⁹ a plaintiff alleged that exposure to formaldehyde in bed sheets manufactured and sold by the defendants caused her to suffer severe personal injuries. The manufacturer demonstrated that the plaintiff’s reaction was caused by a rare allergy that no other consumer had experienced. The plaintiff’s toxicologist, in turn, failed to establish that the plaintiff’s allergy was shared by a substantial number of consumers or that a safer, alternative design of the sheets existed. As a result, the Second Department affirmed the decision of the trial court dismissing the negligence causes of action holding that “[a]n injury is not foreseeable if it ‘is due to some allergy or other personal idiosyncrasy of the consumer, found only in an insignificant percentage of the population.’”¹⁰

The United States District Court for the Southern District of New York granted a summary judgment motion under similar circumstances in *Smallwood v. Clairol, Inc.*¹¹ In *Smallwood*, the plaintiff developed severe anaphylactic-related reactions, typically described as closing of the throat and difficulty breathing, that led to hospitalization after using Clairol Men’s Choice hair color. The District Court found that the plaintiff’s inability to establish that any other product user, let alone an appreciable number of users, had experienced that reaction. In finding for the defendant, the *Smallwood* court agreed that a manufacturer is required to warn a consumer only of “those dangers that are known or reasonably foreseeable at the time of marketing.”¹²

New York courts have been quick to rule that this exception does not apply in cases where the potential dangers of the substance are known. For example, in *Holmes v. Grumman Allied Industries*, bus drivers suffered allergic reactions to a chemical, Toluenediisocyanate (“TDI”), a

component of the polyurethane foam used in dashboard padding.¹³ The New York Supreme Court Appellate Division, Third Department found that there is evidence that TDI is a potentially dangerous substance and the bus manufacturer might have had constructive or actual notice of an unreasonable danger from TDI exposure. Because of this knowledge, the bus manufacturers could not argue that they did not have a duty to warn based upon the relatively small population of individuals likely to become sensitized by TDI.

Another restriction on the application of *Kaempfe* can arguably be found when a toxic substance is not deliberately placed in a product. The Supreme Court, County of Onondaga recently held in *Martin v. Chuck Hafner’s Farmers Market, Inc.*, the *Kaempfe* rule inapplicable to respiratory damages allegedly caused by black mold in farm straw.¹⁴

Distinguishing *Martin*, the Onondaga court reasoned that the large quantity of mold in the straw rendered the straw non-merchantable. Relying on a case from the Supreme Court of Iowa¹⁵ for guidance, the court found defendant liable as a result of defendant’s breach of the implied warranty of merchantability.¹⁶

Although the court did not include the defendant’s knowledge in its reasoning of not applying *Kaempfe*, arguably these facts would place the case outside the realm of *Kaempfe* because the danger of injury was known in the industry—not an idiosyncratic injury.

The United States District Court for the Southern District of New York has recently ruled that the *Kaempfe* rule can be applied to such implied warranties under the right circumstances. In *Daley v. McNeil Consumer Products Co.* the Southern District found that, “the implied warranty will not be breached if only a small number of people relative to the total number of persons using the product suffer an allergic reaction.”¹⁷ The *Daley* plaintiff alleged an allergic reaction to a drug that caused discomfort from digesting dairy products. The court in *Daley* relied heavily upon the First Department case, *Hafner v. Guerlain*, where the plaintiff suffered blotches arising from wearing perfume while sunbathing.¹⁸ The *Hafner* Court dismissed the case stating, “[w]ith a product such as this one, sold widely as stated, and easily purchased, the mere fact that an infinitesimal number experienced a discomforting reaction is not sufficient to establish that the product was not fit for the purpose intended.”¹⁹

The *Kaempfe* rule has also been accepted by other jurisdictions.²⁰ The *Kaempfe* rule also seems to be expanding in New York. One court extended the rule to industrial exposure actions. In *Perkins v. AAA Cleaning*, a worker brought a negligence action against a cleaning service alleging that she had suffered reactions to carpet cleaning solutions at her workplace causing her hyperactivity to environmental irritants.²¹

In *Perkins*, the Third Department held that the information on the cleaning solution's Material Safety Data Sheet revealed that the solution was harmless. Therefore, the use of the solution by the service was not negligent because the hazards plaintiff alleged were not foreseeable. The court then went a step further saying that "even if [the chemicals] were not harmless, there is no evidence that defendant had any way of knowing of plaintiff's hypersensitivity."²²

The application of *Kaempfe* has made the eggshell skull doctrine evermore fragile. The *Kaempfe* rule is a logical solution to the reality that a small percentage of the general population may have the potential to suffer unforeseeable allergic reactions to substances that the ordinary population would not experience. *Kaempfe* emphasizes that foreseeability of harm and reasonable care to guard against the same is the fundamental test of negligence.²³ Whether a reaction occurs from exposure to a product placed in the stream of commerce or from an environmental exposure appears to be of no consequence under *Kaempfe*.

The concept of foreseeability, in theory, should have no effect on the eggshell skull doctrine. Nevertheless, those members of a minority population who may experience an allergic reaction to an otherwise safe substance logically can no longer find protection under this basic doctrine of common law.

Endnotes

1. *Maurer v. United States*, 668 F.2d 98, 99 (2d Cir. 1981).
2. *DiPirro v. United States*, 189 F.R.D. 60, 63 (W.D.N.Y. 1999).
3. *Evans v. S.J. Groves & Sons Co.*, 315 F.2d 335, 348 (2d Cir. 1963).
4. *Kaempfe v. Lehn & Fink Products Corp.*, 21 A.D.2d 197, 249 N.Y.S.2d 840 (1st Dep't 1964).
5. *Kaempfe*, 21 A.D.2d at 200-201.
6. *Kaempfe*, 21 A.D.2d at 201.
7. *Kaempfe*, 21 A.D.2d at 200.
8. See *Clarke v. Helene Curtis, Inc.*, 293 A.D.2d 701 (2d Dep't 2002); *Jarrell v. Wyckoff Heights Hospital*, 641 N.Y.S.2d 313 (1st Dep't 1996); *Chwat v. Smithkline Beecham Corp.*, 818 F. Supp. 36 (E.D.N.Y. 1993); *Young v. United States*, 542 F. Supp. 1306 (S.D.N.Y. 1982); *Drake v. Charles of Fifth Avenue, Inc.*, 33 A.D.2d 987, 307 N.Y.S.2d 310 (4th Dep't 1970); and *Glaser v. Pharmaceuticals, Inc.*, 26 A.D.2d 688, 272 N.Y.S.2d 649 (2d Dep't 1966).
9. *Pai v. Spring Industries, Inc.*, 18 A.D.3d 529 (2d Dep't 2005).
10. *Pai*, 18 A.D.3d at 530, citing *Kaempfe* 21 A.D.2d at 201.
11. *Smallwood v. Clairiol, Inc.*, Civ.A.No. 03CV8394, 2005 WL 425491 (S.D.N.Y. Feb. 18, 2005).
12. *Smallwood*, 2005 WL 425491 at *2, citing *Daley v. McNeil Consumer Prods. Co.*, 164 F. Supp.2d 367, 373 (S.D.N.Y. 2001).
13. *Holmes v. Grumman Allied Industries*, 103 A.D.2d 909, 478 N.Y.S.2d 143 (3d Dep't 1984).
14. *Martin v. Chuck Hafner's Farmers Market, Inc.*, 8 Misc.3d 1006(A) (Sup. Ct. 2005).
15. *Dotts v. Bennett*, 382 N.W.2d 85 (S. Ct. Iowa 1986).
16. On appeal, the Fourth Department reinstated the negligence claim for failure to warn because plaintiff's raised a triable issue of fact by submitting an affidavit of a pulmonologist, which defeated summary judgment. *Martin v. Chuck Hafner's*, 28 A.D.3d 1065, 443-444 (4th Dep't 2006).
17. *Daley*, 164 F. Supp.2d at 375.
18. *Hafner v. Guerlain* 34 A.D.2d 162, 310 N.Y.S.2d 141 (1st Dep't 1970).
19. *Hafner*, 34 A.D.2d at 164, quoted in *Daley*, 164 F. Supp.2d at 375.
20. *Presbrey v. Gillette Company*, 105 Ill.App.3d 1082, 435 N.E.2d 513, 550 (2d Dist. 1982).
21. *Perkins v. AAA Cleaning*, 30 A.D.3d 790, 816 N.Y.S.2d 600 (3d Dep't 2006).
22. *Perkins*, 30 A.D.3d at *2.
23. *Kaempfe*, 21 A.D.2d at 200.

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Ms. Carlucci is an associate with the New York City office of Segal McCambridge Singer & Mahoney, Ltd. She is a member of the New York Bar, New Jersey Bar and Pennsylvania Bar, and her litigation practice is concentrated in the areas of products liability, toxic tort, and environmental law. Ms. Carlucci is a member of the American Bar Association and the New York State Bar Association. Her clinical nursing and pharmaceutical work experiences are assets to the medical issues which arise during the defense of the claims.

More recently, Mr. Kern and Ms. Carlucci co-authored the winning brief to New York's highest state court regarding the nonexistence of a duty for a premises owner to a member of an employee's household for secondary exposure to a toxic substance in the precedent setting decision of *Holdampf v. A.C. & S., Inc. (In re New York City Asbestos Litigation)*, 5 N.Y.3d 486, 840 N.E.2d 115 (2005).

The New York City Environmental Law Leadership Institute: Exploring Challenges, Promoting Leadership and Cultivating Solutions

This coming Spring, the Environmental Law Section of the New York State Bar Association, the Environmental Law Committee of the Association of the Bar of the City of New York, and the Environmental Law Institute will launch the New York City Environmental Law Leadership Institute (NYCELLI). The Institute is planned as an annual seminar for a select group of new environmental attorneys committed to leadership in the field and to making a positive contribution to the City's environment. According to Gail Port, Senior Counsel with Proskauer Rose LLP, "NYCELLI will provide an important forum to identify and train the next generation of environmental leaders and will facilitate critical thinking and the exchange of ideas on key environmental issues of the day."

The Institute is designed to inform, equip and inspire new attorneys to take on key roles in the work to improve the quality of New York's environment and the health of its residents. To that end, NYCELLI participants will learn about the issues, history and trends in environmental law in New York City, connect with the City's network of environmental law practitioners, agencies and organizations and engage in collaborative dialogue to address the City's environmental challenges. "This Institute provides a unique learning experience that virtually no other CLE program can match," said Walter Mugdan, Chair of the New York State Bar Association's Environmental Law Section and Director of Environmental Planning and Protection for U.S. EPA Region 2. "The program provides attorneys who are starting their careers with an unparalleled opportunity to interact with and learn from some of the leading environmental practitioners in New York." Mugdan added it is the Section's intent and expectation that the Institute program will be replicable elsewhere in the State.

Participants will explore the special physical, social and economic dynamics of the urban environment, the relationships between sources of law and jurisdictions and the potential for solving environmental problems through law and policy. Says Elizabeth C. Yeampierre of United Puerto Ricans of Sunset Park (UPROSE), "[l]awyers planning to work on issues that have a disparate impact on NYC's low income communities and communities of color will be introduced to a community lawyering model that complements community struggles."

In order to put the course material into context, and get a close-up view of the City's environmental landscape, the program will complement the classroom experience with several tours of environmentally significant

sites throughout the City. To provide an opportunity to demonstrate and develop leadership, participants will be encouraged to develop an optional project aimed at improving the New York City environment including, but not limited to, scholarly writing, recommendations for legal reform, organizational development, issue/educational campaigns, and pro bono legal assistance to environmental organizations.

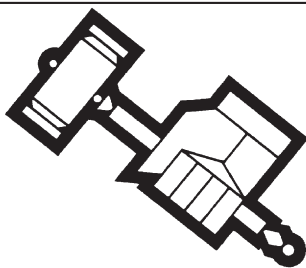
A maximum of 15 participants will be accepted, based on an open application process. The Institute will strive to have roughly equal numbers of participants from private, government and non-profit practice, with between 0 and 5 years of practice. Participants must have taken a survey course in environmental law during law school, or have at least two years' experience working in the field of environmental law. Participants must also have a commitment to environmental law and leadership as demonstrated by academic work in the environmental field, such as university and/or law school course work, independent research, law review or other writings, current or previous professional work in the field of environmental law and/or environmental protection or volunteer involvement with and work for non-governmental environmental or conservation organizations.

"NYCELLI offers a unique opportunity for new lawyers to learn exactly what they ought to know about environmental law from experienced counsel. It will enable them to practice, litigate and advise clients far more effectively, and should prove enjoyable as well," said Professor Phillip Weinberg of St. John's University School of Law.

The Institute will meet bi-weekly for eight meetings on Wednesdays from 4:00-7:00 p.m., from January 31 through May 9, 2007. Each session will provide 3.0 Continuing Legal Education credits for a total of 24 credits, which qualify as both "Transitional" CLE credits, required for attorneys in their first two years of practice, and as regular CLE credits in the "Areas of Professional Practice" category. One credit will qualify as an "Ethics" credit. The tuition for the program will be \$500 for private attorneys, \$400 for government attorneys and \$300 for non-profit attorneys. A hardship scholarship will be available to ensure that no qualified applicant is denied participation for inability to pay.

For more information, contact:

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Administrative Decisions Update

Prepared by Thomas F. Puchner

In re Proposed Department-Initiated Modification of a State Pollutant Discharge Elimination System ("SPDES") Permit Issued Pursuant to Environmental Conservation Law Article 17 and 6 N.Y.C.R.R. Parts 621, 624 and 750

-to the-
City of Plattsburgh,
Permittee

Interim Decision of the Commissioner

September 12, 2006

This decision involves the proposed modification of a State Pollutant Discharge Elimination System ("SPDES") permit for the City of Plattsburgh's ("City" or "Plattsburgh") water pollution control plant ("WPCP"). The Department of Environmental Conservation ("DEC") initiated permit modification proceedings in order to implement a phosphorus wasteload allocation for that facility pursuant to the recently adopted Lake Champlain Phosphorus Total Maximum Daily Load ("TMDL"). See 33 U.S.C. § 1313(d)(1)(A).

I. Background

A. The TMDL Process

Section 1313(d) of the Clean Water Act requires that each state must "identify those waters within its boundaries for which effluent limitations . . . are not stringent enough to implement any water quality standards applicable for such waters" as well as to establish a priority ranking thereof, "taking into account the severity of the pollution and the uses to be made of such waters." 33 U.S.C. § 1313(d)(1)(A). For those waters listed on this so-called "303(d) list," the states are further required to establish a TMDL to implement applicable water quality standards "with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C).

The TMDL establishes a limit—the total maximum daily load—of a pollutant that can be discharged into a waterbody from all sources (including point sources, non-point sources and natural background sources) while

still achieving water quality standards. The TMDL also allocates that total load among pollutant sources by establishing "wasteload allocations" for point sources and "load allocations" for non-point and natural background sources. TMDLs are subject to public review before submittal to the EPA for approval. Following EPA approval, SPDES permits must be consistent with the TMDL.

B. The Lake Champlain Phosphorus TMDL

Phosphorus pollution has been an ongoing problem for Lake Champlain, contributing to excessive algal and vegetative growth. Interim Decision, at 4 (citing Lake Champlain Steering Committee, *Opportunities Action: An Evolving Plan for the Future of the Lake Champlain Basin*, April 2003, at 11-16). As a result of these phosphorus problems, DEC and the Vermont Department of Environmental Conservation ("VDEC") identified Lake Champlain for development of a phosphorus TMDL on their respective "priority rankings." The resulting cooperatively drafted TMDL was subjected to public review and comment, including public hearings in the spring and summer of 2002. The City of Plattsburgh was among the commenters, objecting to the proposed allocation of 65.5 lbs/day for its WPCP. Interim Decision, at 4-5.

A final revised TMDL was submitted to and approved by EPA in late 2002, including implementation plans for wasteload allocations for point sources such as the City's WPCP. According to the TMDL, SPDES permits for facilities not meeting the TMDL's wasteload allocations were to be reevaluated pursuant to DEC's Environmental Benefit Permit Strategy. Significantly, neither the City, nor any other party, initiated a state or federal legal challenge to EPA's approval of the TMDL. *Id.* at 5-7.

C. Proposed Modification of the City's SPDES Permit

Following approval of the TMDL, DEC notified the City of its intention to modify the SPDES permit for the Plattsburgh WPCP. DEC proposed to set a twelve-month rolling average limit of 65.5 lbs/day for phosphorus, which is the same limit established as a wasteload allocation in the TMDL for that point source. The City requested an adjudicatory hearing and the matter was then assigned to ALJ P. Nicholas Garlick. ALJ Garlick concluded that the implementation timing of the phosphorus limit

was adjudicable but that the limit itself was not. Both the City and DEC appealed the phosphorus rulings.¹ *Id.* at 7-9.

D. The Arguments on Appeal

On appeal, the City contended that the ALJ erred in ruling that the proposed phosphorus limit was not adjudicable, arguing that DEC was not required to set the phosphorus effluent limitation for the SPDES permit at the same level as the TMDL. The City further argued that the wasteload allocation in the TMDL was technically flawed because it was not based on the WPCP's full design flow and because it failed to account for phosphorus loads contributed by septage haulers handled by the WPCP. The City also argued that, in any case, there were no current or threatened violations of phosphorus water quality standards in the Cumberland Bay portion of Lake Champlain, where its discharges enter the lake. Finally, the City argued that the proposed effluent limit would violate the terms of a 1993 Water Quality Agreement (the "Criteria Agreement") between New York, Vermont, and Quebec, which agreement was designed to establish numeric in-lake phosphorus criteria as an interim measure until consistent state water quality criteria could be formally adopted. *See generally id.* at 9-26.

II. Interim Decision of the Commissioner

A. Incorporation of the TMDL Wasteload Allocation into the SPDES Permit

The Commissioner rejected the City's arguments with respect to the propriety of incorporating the TMDL's wasteload allocation into the modified SPDES permit for the Plattsburgh WPCP. The Commissioner noted that the federal Clean Water Act and the New York Environmental Conservation Law require SPDES permits to include the more stringent of technology-based or water quality-based effluent limitations. Interim Decision, at 11 (citing 33 U.S.C. § 1311(b)(1)(C); ECL 17-0809; ECL 17-0811; and 6 N.Y.C.R.R. § 750-1.11(a)(5)(ii) & (a)(9)). The Commissioner further noted EPA's concurrence that the proposed effluent limitation "[was] required by law and [] appropriately based on the wasteload allocation in the approved TMDL." *Id.* at 13. Accordingly, the Commissioner held that there was no adjudicable issue with respect to incorporation of the TMDL wasteload allocation into the proposed SPDES permit.

B. Challenges to the TMDL

The Commissioner also rejected the City's challenges to the TMDL itself based on her conclusion that the SPDES administrative proceeding was an inappropriate forum in which to assert such a challenge. *Id.* at 14. Specifically, the Commissioner rejected the City's suggestion that wasteload allocations could be implemented through means other than numeric limits, including best management practices, finding that the City's proposed example of a Delaware River TMDL using non-numeric

best management practices for controlling PCBs was simply irrelevant. *Id.* at 15-16.

Likewise, the Commissioner held that the City's argument that the waters of Cumberland Bay were not threatened by the WPCP's discharges overlooked the purpose of the TMDL—"to protect and restore the water quality of the lake as a whole." *Id.* at 17 (citing Lake Champlain Phosphorus TMDL, at 10). The Commissioner further noted a 2002 Responsiveness Document addressing the rationale for reductions in Cumberland Bay, which stated that because "[e]ach [lake] segment directly impacts adjacent waters and indirectly impacts all waters of the lake. . . . [while] a given segment may be below its goal, continued reduction of the phosphorus input will aid in reducing the phosphorus level throughout the lake and helping all segments achieve their goals." *Id.* at 17 (quoting 2002 Responsiveness Document, at 2-3).

The Commissioner further rejected Plattsburgh's arguments that the phosphorus effluent limit: (1) must be based on full design flow; and (2) failed to account for certain hauled wastes that the City alleged accounted for approximately 32% of the phosphorus treated at its WPCP. On both points, the Commissioner held the issues to be inappropriate for the instant proceeding. In addition, the Commissioner noted that, according to the terms of the TMDL, "any changes to the sum of the nonpoint source load allocations . . . require that a revised TMDL be submitted to the USEPA for approval" through the formal TMDL amendment process. *Id.* at 18-19 (quoting Lake Champlain Phosphorus TMDL, at 14).

C. The Criteria Agreement

The Commissioner also rejected Plattsburgh's interpretation of the Criteria Agreement as prohibiting DEC from modifying the SPDES permit prior to adoption of the TMDL numeric criteria by formal rulemaking. The City's argument was based on a passage from the agreement stating that: "[m]odifications of wastewater discharge permits in New York as a result of phosphorus load allocation for Lake Champlain may not proceed until formal adoption of numeric criteria by rule in New York." *Id.* at 20 (quoting Criteria Agreement, at ¶ 2).

The Commissioner concluded that this interpretation was "too constrained" and would ultimately: (1) require that New York violate the Clean Water Act; and (2) mean that, following the City's interpretation, the Criteria Agreement itself might be invalid. *Id.* at 21 n.5. To the contrary, the Commissioner held that the Criteria Agreement's use of the phrase "formal adoption of numeric criteria by rule" encompassed establishment of numeric criteria through the TMDL process and subsequent implementation thereof by the states of New York and Vermont. The Commissioner further noted that neither Vermont nor Quebec have concluded that the TMDL violates the Criteria Agreement; rather, both parties had, in fact, supported the TMDL. *Id.* at 21-22.

D. Timing of TMDL Implementation and Modification of the SPDES Permit

The Commissioner finally rejected the ALJ's conclusion that an issue for adjudication existed with respect to the timing of the permit modification. The ALJ's ruling was based on the following passage of the TMDL, addressing implementation:

Upon issuance of the TMDL/WLA, SPDES permits in the Lake Champlain drainage basin which do not have a phosphorus limit or do not meet the WLA will be re-evaluated in accordance with NYSDEC's Environmental Benefit Permit Strategy (EBPS). The EBPS priority score will increase to reflect the requirements of the TMDL/WLA . . . the overall position of the Lake Champlain permits relative to the statewide SPDES priority ranking list will increase.

When the Lake Champlain SPDES permits fall within the top ten percent of the statewide priority ranking list, NYSDEC will institute a comprehensive modification review for those permits. As a part of this comprehensive review, SPDES conditions to implement the TMDL/WLA will be analyzed and incorporated into the permits.

. . . Based on current EBPS scores it is estimated that within three years, one-half of the permits will be brought into compliance, within five years three-quarters of the revisions will be completed, and all permits will contain the appropriate phosphorus limits within 10 years. Issues Ruling, at 7-8 (quoting Lake Champlain Phosphorus TMDL, at 111-112).

In rejecting the ALJ's determination that an adjudicable issue existed, the Commissioner recognized the TMDL's reference to the Environmental Benefit Permit Strategy pursuant to which the emphasis on "arbitrary calendar deadlines" was replaced with a priority ranking system based on "important water quality and water body improvement initiatives." Interim Decision, at 24 (quoting L. 1994, ch. 701, § 1). As stated in the above quoted passage, the TMDL expressly recognized that under the EBPS, DEC would proceed with permit modifications implementing the TMDL wasteload allocations when individual SPDES permits in the basin fell within the top ten percent on the priority ranking list. The Commissioner found that DEC's determination to commence modification proceedings on the City's SPDES permit was justified because the permit in issue had been in the top ten percent for several years. Therefore, the Commissioner held that the proper EBPS process was fol-

lowed and that the timeline language in the TMDL "represents estimates of implementation" and did not provide a basis for a permittee to delay permit modification proceedings. *Id.* at 24-25.

III. Conclusion

Accordingly, the Commissioner rejected the ALJ's ruling that adjudicable issues existed with respect to the phosphorus limit and its implementation timing. The Commissioner remanded the matter for further proceedings on the specific issues that remained for adjudication, namely CBOD, total suspended solids, and copper.

Endnote

1. The ALJ also found adjudicable issues with respect to DEC's proposed modifications of permit limits for carbonaceous biological oxygen demand ("CBOD"), total suspended solids and copper. No appeals were taken with respect to these issues. They remain for adjudication in further proceedings on remand from the Commissioner's Interim Decision.

In re Application for a Freshwater Wetlands Permit Pursuant to Article 24 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 663 to Construct Commercial Buildings in and Adjacent to Freshwater Wetland AR-7 on a Site Located on Johnson Street (Block 7207 Lot 35), Staten Island (Richmond County), New York

-by-

LINUS REALTY, LLC, Applicant

Interim Decision of the Commissioner

September 20, 2006

Linus Realty, LLC ("Linus" or "applicant") applied to the New York State Department of Environmental Conservation ("Department" or "DEC") for a freshwater wetlands permit to construct various commercial buildings and parking areas in and adjacent to a Class I wetland on its property in Staten Island, Richmond County, New York (the "site"). Linus' application was based on a previous decision of the New York State Freshwater Wetlands Appeals Board ("FWAB") which directed DEC to issue a freshwater wetlands permit to Opal Investments ("Opal"), a prior owner of the site.

In a November 2, 2005 Issues Ruling on Linus' application, ALJ Daniel P. O'Connell ruled that the FWAB decision did not "run with the land" and did not bind DEC with respect to the application submitted by Linus. The Commissioner affirmed.

I. Background

In 1981 the Department prepared a tentative freshwater wetlands map for Staten Island. A second tentative map was filed in 1986, which approximately doubled the acreage of land designated as wetlands. On September

1, 1987, a final freshwater wetlands map for Richmond County, including the additional wetland acreage, was promulgated and filed.

In response to this “double mapping,” the State Legislature in 1987 enacted ECL § 24-1104, providing relief to landowners whose property had not appeared on the tentative freshwater wetlands map filed in 1981, but subsequently appeared as wetlands in the second mapping. ECL 24-1104 authorized the FWAB to “affirm, reverse, modify, or remand, with recommendations” where a property owner had suffered unnecessary hardships arising from the designation of the property as wetlands in the second mapping. *See* ECL 24-1104(1).¹

A. Opal Investments

Developers Joseph and Frank J. Vigliarolo, the principals of Opal Investments, purchased the site, as well as additional property in the vicinity of the site, in the early 1960s. The freshwater wetlands mapping in 1981 did not identify any wetlands on the site. However, the second mapping designated a portion of the site as a freshwater wetland. Interim Decision, at 3.

Following an unsuccessful attempt by Opal to negotiate with DEC for a freshwater wetlands permit relating to the construction of a proposed commercial facility on the site, Opal petitioned FWAB for relief pursuant to the hardship provisions under ECL 24-1104. Opal Investments also appealed DEC’s designation of freshwater wetlands on the site, but later withdrew that portion of its appeal. *Id.* at 3-4.

Before FWAB, Opal indicated that they had acted in reliance on the fact that the site was not on the 1981 freshwater wetlands map. The onsite wetland, which was identified in the second mapping, was described as a ravine through which a watercourse transported water between two more valuable adjacent wetland segments. In order to preserve these wetlands, Opal proposed to pipe the watercourse as it crossed the site. In its decision, the FWAB determined, *inter alia*, that Opal had suffered unnecessary hardship due to the “double-mapping” and directed the DEC to issue a freshwater wetlands permit. *Id.* at 4-5.

Notwithstanding their success before FWAB, Opal never submitted a detailed description of the proposed project to the Department and never finished the application process. Therefore, DEC did not issue a freshwater wetlands permit to Opal. According to Linus, this was because Opal “lacked funds to proceed with the permit process and development.” *Id.* at 5 & n.3.

B. Linus’ Permit Application

After acquiring the site from its previous owners, Linus applied for a freshwater wetlands permit as part of its proposed development of the site. The application indicated Linus’ intent to fill the ravine. Following two

notices of incomplete application, DEC denied the application on the grounds that the proposed project failed to comply with regulatory standards in 6 N.Y.C.R.R. § 663. DEC also noted that the prior FWAB decision in the Opal appeal had no binding effect on Linus’ application, stating that “since the [FWAB] decision pertained to the appellants, [Opal], in that proceeding only, and since Linus Realty was not a party of the hardship appeal, Linus Realty LLC can claim no benefit from the Freshwater Wetlands Appeal Board decision.” *Id.* at 7 n.5. DEC further noted that even if the FWAB decision had been binding on Linus’ application, their proposal to fill the ravine—as opposed to Opal’s proposal to “pipe” it—required denial. *Id.* at 6-7 & n.5.

Following denial of its application, Linus requested a hearing and the matter was assigned to ALJ O’Connell. Linus then moved for an order without a hearing, contending that: (1) the FWAB decision runs with the land; (2) DEC was estopped from denying Linus’ permit application; and (3) denial of its permit application was unwarranted as a matter of law.² *Id.* at 8. On November 2, 2005 the ALJ ruled that the FWAB decision did not run with the land, and therefore, DEC was not required to issue a freshwater wetlands permit to Linus. The ALJ also rejected several other arguments asserted by Linus, including claims that FWAB decision rendered other ECL permit requirements and SEQRA inapplicable to the project, and that DEC was estopped from denying the permit application. *Id.* at 8-9, 20-22.

II. Discussion

A. Transferability of the FWAB Decision

On appeal Linus first argued that the FWAB decision ran with the land to successive owners, citing judicial decisions on various real property interests, including *In re St. Onge v. Donovan*, 71 N.Y.2d 507 (1988) (variance); *In re Holthaus v. Zoning Bd. of Appeal of the Town of Kent*, 209 A.D.2d 698 (2d Dep’t 1994) (variance); *Webster v. Ragona*, 7 A.D.3d 850 (3d Dep’t 2004) (easement); *Neponsit Prop. Owners’ Ass’n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248 (1938); *Harrison-Rye Realty Corp. v. New Rochelle Trust Co.*, 177 Misc. 776 (Sup. Ct. Westchester County 1941); *Stasyszyn v. Sutton East Assoc.*, 161 A.D.2d 269 (3d Dep’t 1990); *In re Dexter v. Town Bd. of Town of Gates*, 36 N.Y.2d 102 (1975). *Id.* at 10-11.

The Commissioner rejected Linus’ arguments that the FWAB decision ran with the land, stating that:

Linus Realty’s argument is based on several incorrect assumptions. First, the Department’s permit system to preserve and protect freshwater wetlands is based on the police powers of the State and is not simply a construct equivalent to variances, easements, or covenants as Linus Realty contends.

Second, following the issuance of the FWAB Decision, Opal Investments did not finish the permit application process and the specific details of its project are unknown. No freshwater wetlands permit was issued to Opal Investments. Accordingly, there is no permit with project specific conditions and mitigation that could be transferred to Linus Realty and upon which Linus Realty can rely for its project proposal.

Moreover, the transfer of permits are subject to the discretion of the Department, and are not automatic. Treating the FWAB Decision as a permit that could be transferred by Opal Investments to Linus Realty deprives the Department of its exercise of discretion over permit transfers. In addition, the FWAB Decision is directed to Opal Investments, and does not benefit any other party or any successor to Opal Investments.

Finally, based on the application materials including but not limited to site plans, Linus Realty's project is different from the sketchy proposal offered by Opal Investments, and Linus Realty's project would pose greater adverse impacts to the site wetlands. Accordingly, Linus Realty's proposal is not consistent with the findings of the FWAB Decision and cannot benefit from that decision. *Id.* at 11-12.

In addition, the Commissioner noted that ECL 21-1104, upon which the FWAB decision was based, "does not extend relief to successors of the affected property owner." The Commissioner found that, while Opal had detrimentally relied on the initial wetland mapping, Linus did not—their position with respect to the wetlands was "no different from any other landowner in the State." *Id.* at 16-18.

The Commissioner also stressed that Linus' plans would "potentially result in significantly greater impacts on the site's freshwater wetlands." *Id.* at 19. While Opal's plans had included piping the watercourse between wetland segments, Linus planned to fill the ravine completely resulting in adverse impacts "'severely' restricting the water flow across the site and negatively impacting the upstream and downstream wetland areas." *Id.* (quoting DEC Denial Letter, June 30, 2004, at 3.)³

B. Linus' Other Arguments on Appeal

The Commissioner also rejected Linus' contention that it need not satisfy other ECL permit requirements or environmental review under SEQRA. The Commissioner

noted that FWAB's statutory jurisdiction is limited to reviewing freshwater wetland determinations and decisions under ECL Article 24, and that other regulatory requirements are simply "outside of FWAB's purview and must still be met by the applicant." *Id.* at 21. Accordingly, Linus' application was not exempt from the requirement to obtain a stream disturbance permit pursuant to Title 5 of ECL Article 15 and 6 N.Y.C.R.R. § 608.5, as well as the requirement to comply with SEQRA.

The Commissioner rejected Linus' argument that DEC failed to timely deny the application pursuant to the timelines established in the Uniform Procedures Act. *See* ECL Article 70. Finally, the Commissioner rejected Linus' collateral estoppel argument as meritless. *Id.* at 22.

III. Conclusion

The Commissioner rejected Linus' arguments on appeal and affirmed the Issues Ruling. The matter was remanded for further proceedings below.

Endnotes

1. ECL 24-1104 expired as of June 30, 1992. Any proceeding commenced under that section prior to its expiration date was to continue until a final determination. *See* L. 1987, ch. 408 § 7, as amended L. 1988, ch. 671, § 2.
2. Linus' motion was erroneously based on 6 N.Y.C.R.R. Part 622, which governs enforcement hearings. Nonetheless, the ALJ found that the motion could be considered in the issues conference on the permit application pursuant to 6 N.Y.C.R.R. 624.4(b)(5)(iii).
3. The Commissioner dismissed a suggestion in Linus' memorandum of law that it *might* pipe the wetland because Linus provided no details on that suggestion in its site plans or at the issues conference. Interim Decision, at 19.

In re Application for a State Pollutant Discharge Elimination System Permit for the Discharge from the Shandaken Water Tunnel Located in the Town of Shandaken, County of Ulster

-by-

New York City Department of Environmental Protection, Applicant

Decision of the Commissioner

July 27, 2006

I. Background

This decision involves an application by the New York City Department of Environmental Protection ("DEP" or "City") for a State Pollutant Discharge Elimination System ("SPDES") permit for the City's discharge of water from the Shandaken Water Tunnel ("Tunnel") into Esopus Creek. The Tunnel is located in the Town of Shandaken, Ulster County, and is part of the City's water system. It conveys water from the Schoharie Reservoir, created by the Gilboa Dam, through the Tunnel, which then discharges into Esopus Creek,

which in turn flows into the Ashokan Reservoir. The water is further conveyed through the Catskill Aqueduct to a series of reservoirs and tunnels, and eventually reaches New York City. The Tunnel has discharged into Esopus Creek, without a permit, since 1926. Commissioner's Decision ("Decision"), at 1.

The water diverted from the Schoharie Reservoir through the Tunnel contains suspended solids which cause turbidity. The turbidity is the result of the design of the Schoharie Reservoir, the geology of the drainage basin, and erosion in the Schoharie watershed. The turbidity has a detrimental impact on the recreational uses of the Esopus Creek and can adversely affect the trout in that waterbody. *Id.* at 1-2.

In addition to turbidity, the diversion also affects temperature and flow in Esopus Creek. With respect to temperature, the discharge from the Tunnel to the creek is generally cooler, and these cooler temperatures are conducive to trout growth and survival. The diversion also increases the amount of water in the Esopus Creek which is beneficial to the trout population. *Id.* at 2.

Because of concerns about effects on Esopus Creek, a popular fly-fishing waterbody, the Catskill Mountains Chapter of Trout Unlimited, Inc. and other plaintiffs (collectively "Trout Unlimited"), commenced a federal lawsuit alleging that the unpermitted discharge violated the Clean Water Act. On appeal from a dismissal by the District Court, the Second Circuit Court of Appeals in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) (*Catskill I*) held that the discharge required a permit.¹ On remand, the District Court ordered DEC to make a determination on the City's application for a SPDES permit within 18 months. *Id.* at 2-3.

After issuance of several draft permits, the City requested an adjudicatory hearing. Following a legislative hearing and issues conference, ALJ Helene J. Goldberger found various adjudicable issues, including: turbidity limits; compliance schedule (including structural and non-structural measures to reduce turbidity); and phosphorus limits. Due to agreements between the parties, the adjudicatory hearing was limited to consideration of: (1) turbidity; and (2) structural measures to reduce turbidity and temperature. Hearing Report ("Report"), at 3-5; Decision, at 3.

At the hearing, the City accepted the turbidity requirements of the permit. Nonetheless, Trout Unlimited argued that the discharge resulted in turbid conditions in Esopus Creek such that it was unsafe or undesirable for fishing and that—even at levels below those in the draft permit—turbidity resulted in a "substantial visual contrast" between the discharge and Esopus Creek. Furthermore, Trout Unlimited argued that because the requirements of the draft permit were not based on any

specific technological control, they did not meet the "best professional judgment" standards of the Clean Water Act. Report, at 10; Decision, at 4-5.

With respect to structural measures, and the implementation of a timeline, the draft permit requires the City to submit a report to DEC by December 31, 2006 detailing short-term and long-term measures proposed by the City to achieve turbidity and temperature goals. Implementation is to begin within two months of DEC's approval of the report and the City is to complete the structural measures and turbidity limits within seven years of the permit's effective date. Report, at 11; Decision, at 9-10.

The City argued that it was already required, pursuant to the November 2002 U.S. Environmental Protection Agency Filtration Avoidance Determination ("FAD"), to examine and implement structural measures addressing turbidity. Specifically, the FAD sets up reporting requirements for development of turbidity control measures. Phase I of that study, previously submitted to EPA, included structural measures such as: a multi-level intake structure ("MLIS"), an in-reservoir baffle; and modification of reservoir operations. The City's Phase II report is due to be issued in December 2006 and would include preliminary designs and implementation costs. Decision, at 8-9.

Based on the FAD timeline, the City argued that the SPDES permit timeline was too short in the event that the MLIS alternative is selected—suggesting that ten years was more realistic. However, on this point the City (again) withdrew its objection based on an agreement with DEC to renegotiate the implementation schedule, and DEC acknowledged that, depending on location, implementation of the MLIS alternative could conceivably take ten years. Decision, at 10; Report, at 12. In contrast, Trout Unlimited took the position that the MLIS alternative should be implemented and that there was no reason for further delay. Trout Unlimited also argued that the Clean Water Act, 33 U.S.C. § 1251(e), requires public input on selection of the structural remedy and that the draft permit failed to include a notice and comment period. Report, at 12; Decision, at 10.

In the hearing report, ALJ Goldberger rejected Trout Unlimited's arguments with respect to turbidity and concluded that the requirements in the draft permit were appropriate, suggesting that they be reconsidered based on the further analysis required by the FAD. Report, at 26. The ALJ further recommended that DEC and DEP staff continue monitoring turbidity levels aimed at establishing numeric levels for "substantial visual contrast." *Id.* With respect to the structural measures and the timelines for their implementation, the ALJ rejected Trout Unlimited's suggestions to adopt the MLIS and a stepped-up timeframe, which suggestions were based on an Attorney

General report. Instead, the ALJ recommended issuance of the draft permit as written, while suggesting that the schedule could be reassessed based on FAD report findings. *Id.* at 28-29. Finally, the ALJ concluded that the draft permit failed to subject the selection and implementation of structural measures to the public participation requirements of the Clean Water Act, and recommended that at the time the City submits its proposed structural measures, based on its FAD studies and reporting, that DEC issue public notice of the recommendations along with a draft modified permit. *Id.* at 30-32.

II. Decision of the Commissioner

The Commissioner adopted the hearing report for her decision and, subject to a few comments where the Commissioner differed with the ALJ's recommendations, the Commissioner directed DEC to issue the SPDES permit as drafted and entered into the adjudicatory hearing record.

A. Turbidity

The Commissioner held that the turbidity requirements in the draft SPDES permit were "fully supported by the record" and satisfied water quality standards. In addition, the Commissioner found that the draft permit's exceptions to the turbidity limits and actions levels were appropriate in response to circumstances in the "complex environment relating to the City's water supply system." Decision, at 7. In so holding, the Commissioner rejected Trout Unlimited's argument that the turbidity requirements should be lowered because a substantial visual contrast occurs. Based on deficiencies in Trout Unlimited's proof as outlined by the ALJ, the Commissioner held that this argument was not supported by the evidence presented. *Id.* at 6-7.

B. Structural Measures and Their Implementation

The Commissioner agreed with the ALJ and rejected Trout Unlimited's suggestion for implementation of the MLIS alternative, stating that:

The studies that the City is now undertaking will provide critical information regarding the feasibility, cost-effectiveness and efficacy of the various structural measures under consideration.

... This information, as indicated in the record, will be essential to an informed selection of appropriate structural measures to address environmental concerns. To ignore this information would be short-sighted and imprudent. Decision, at 11-12.

In addition, the Commissioner rejected Trout Unlimited's request for an expedited schedule implementing the MLIS alternative, concluding that the record did not support altering the schedule contained in the draft permit. *Id.* at 12.

C. Other Recommendations of the ALJ

The Commissioner rejected the ALJ's recommendation that DEC and DEP perform additional turbidity monitoring in the Tunnel and Esopus Creek in order to determine what causes "substantial visible contrast." Nonetheless, the Commissioner recognized that the draft permit called for the construction of an upstream monitoring station and also required the City to monitor turbidity levels and submit results to DEC.² *Id.* at 13.

The Commissioner also rejected the ALJ's recommendation that DEC provide public notice and comment on DEP's proposed structural measure(s), as well as the ALJ's conclusion that failure to provide a public input mechanism violates the requirements of the Clean Water Act. In contrast, the Commissioner held that the permit process had allowed for meaningful public participation in establishing the permit's effluent limits and other conditions, and that regardless of what technology the City ultimately selects, it will have to meet those requirements already established through the public permitting process and incorporated into the permit. *Id.* at 14-15.

Finally, the Commissioner adopted the ALJ's recommendation that if the City's soon-to-be released reports provide a basis for DEC to modify the turbidity requirements or schedule of structural measures, that DEC should include a public comment period and public hearing on any proposed permit modification. *Id.* at 16.

III. Conclusion

Accordingly, the Commissioner ordered DEC to issue the SPDES permit to the City consistent with the Draft Permit as entered into the record at the adjudicatory hearing.

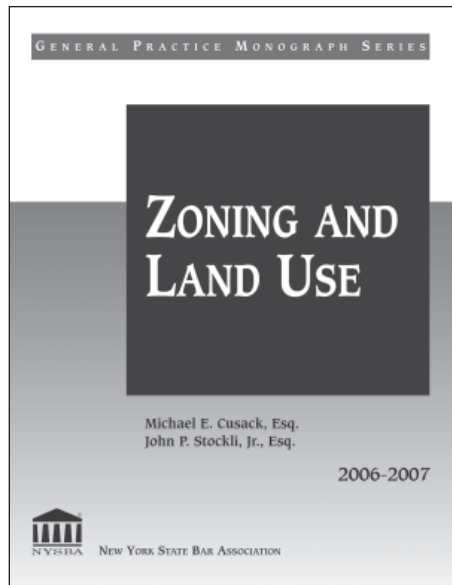
Endnotes

1. The Second Circuit reconsidered and affirmed that holding in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006).
2. The Commissioner left it to DEC's discretion to independently pursue the ALJ's recommended additional monitoring.

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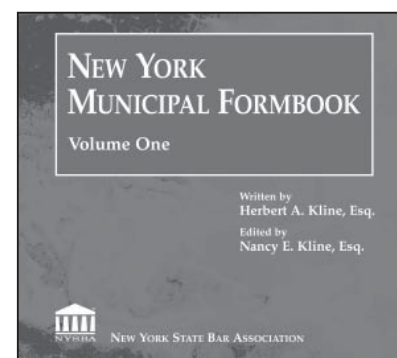
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