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Message from the Chair

Joan Leary Matthews

Greetings again from Albany. As I write this, the Capital District is expecting its first snowfall—the perfect time to write this message.

It is also a fitting time to reflect upon the legacy of our friend and colleague, **Dorothy Miner**, professor and advocate, who lost her battle with lung disease in October. Please take the time to read the article in this issue that provides a brief snapshot of her wonderful contributions to historic preservation. The biggest case that she championed, Penn Central, was truly historic. The next time that you pass through Grand Central Station, think of Dorothy. We miss her greatly.

The Leap-Year Change

We are all awaiting the beginning of the Obama Administration. This election was historic on many levels, and this president faces extraordinary challenges—two wars, a meltdown in the economy, an ever-changing climate. We know that change will occur in the federal agencies before which many of our members practice. We are also seeing a flurry of regulatory activity in the waning days of the present administration. This provides a perfect opportunity for our Section to provide suggestions for federal legislation or regulatory reform.

Please feel free to forward your ideas.

President-elect Obama is planning to roll out an ambitious public works program. Not only will this effort provide much-needed jobs, it will also shore up our infrastructure. We hope that any public works program will address our aging drinking water systems and publicly owned treatment works.

A vision that stays with me from these past few weeks was the appearance before Congress of the CEOs from the big-three automakers.

The first time they appeared, they traveled to Washington in grand, polluting style—separately and by corporate jet. As one Congressman remarked, they didn't even "jetpool." Without offering a clear plan for why they needed a handout or what they would do with the money, they went home empty-handed. The second time they appeared, they drove to Washington, some in hybrid vehicles. I would have loved to have been on one of those road trips! In my view (based on years of experience litigating against them), the automakers need to stop fighting the more stringent California low-emission vehicle (LEV) program and the corporate average fuel economy (CAFÉ) standards. For the good of the country, Congress should exact these commitments from each automaker receiving taxpayer dollars.

Let's hope, too, that the cheaper gasoline that we are currently experiencing does not cause any one of them (or us) to rethink the environmental crisis that we are in and the contribution of automobiles and vehicle miles traveled to that crisis.

Inside

NYSBA

OCA's Green Justice Plan

Just a few weeks ago, the New York State Office of Court Administration unveiled its "green justice" plan in a report entitled "Green Justice: An Environmental Action Plan for the New York State Court System." This plan seeks to reduce the environmental footprint in court operations, administrative and regulatory functions, procurement, and court facilities. OCA also pledges to engage in education and outreach of its green justice efforts, and to seek legislation where appropriate.

In her final State of the Judiciary address, Chief Judge Kaye stated that OCA's Green Justice plan is the first of its kind in the United States and "seeks to achieve more cost-effective, environmentally sustainable court operations." Some of the action items target the reduction of paper through e-filing. Other action items seek to reduce travel to court facilities through video-conferencing and payment of fines on-line. We applaud OCA for taking these necessary steps.

Fall Meeting Recap

We had a very successful Fall Meeting in Hauppauge. Special thanks go to the Fall Meeting planning co-chairs, **John Shea**, **Howard Tollin**, **Laurie Silberfeld**, and **Janice Dean**. They worked for weeks to organize and present CLE programs on interesting topics. The Track A program, geared toward experienced attorneys, presented the variety of ways that Long Island seeks to protect its open space and coastal resources. The Track B program, designed for junior attorneys, covered the basics of SEQRA, e-discovery, and hearings before the New York State Department of Environmental Conservation Office of Hearings and Mediation Services. All of these programs were very well attended. The variety of topics that the programs offered also attracted new members to the Section.

Saturday afternoon featured a number of different fun activities. Some of us toured a few wineries on the North Fork; others toured Sagamore Hill, the home of Theodore Roosevelt.

Nassau County Executive Thomas Suozzi spoke at the Saturday night dinner—addressing the environmental challenges that the county is facing, as well as the various solutions that have been advanced to address them.

The Fall Meeting was informative and fun, providing a forum to see many long-time friends (notice that I didn't say "old friends"!) and to meet new ones.

Annual Meeting

Now that the Fall Meeting is over, we are of course looking forward to the Annual Meeting. One of the most pressing issues of our day is climate change. As many of you know, the Section has been advocating for a response to the effects of greenhouse gas emissions for nearly two decades. The Annual Meeting program on January 30, 2009, continues this good work with presentations of a variety of responses to the effects of climate change by the state, localities, and industry. We are very excited that renowned NASA scientist Dr. James Hansen will open the morning program as the keynote speaker.

At the Presidential Summit, scheduled for the Wednesday during the Annual Meeting week (January 28, 2009), the New York State Bar Association's Global Warming Task Force, chaired by former Section Chair Michael Gerrard, will present its report. Not only is the work of the Task Force co-sponsored by the Section, but a number of Task Force members are also members of the Section, including **Kevin Healy** and **Virginia Robbins**, co-chairs of the Section's Global Climate Change Committee.

Reaching Out to New Members—NYSBA Membership Challenge

We continue to press forward to meet NYSBA's two-year, 10% membership challenge, which began on January 1, 2008, and ends on December 31, 2009. As of the beginning of December, we have increased our membership by 54 members, which is just about half-way to the NYSBA target of 118 new members. The challenge will be to retain all of our members in this ever-changing economy.

One thing that I have learned this year is that Section members are very eager and willing to work on defined projects. We are all busy people, but we still retain our civic interests and responsibilities, and service to the Bar Association can provide a wonderful outlet to realize those interests. For example, some members are drafting legislation on green topics that are important to them. Others are assembling lesson plans on environmental topics that our members can use to speak in classrooms around the state. These kinds of activities provide terrific experience for our younger members.

I have seen this year that the adage "many hands make light work" is well in play in the Section. So please pitch your ideas, and we will find the many additional hands that can help you see your project to fruition.

Executive Committee Changes

I am pleased to announce three additions to the Executive Committee as Members-at-Large:

- **Katherine ("Kit") Kennedy**, Special Deputy Attorney General, Environmental Protection Bureau, New York Attorney General's Office;
- **Phillip Musegaas**, Hudson River Program Director, Hudson Riverkeeper; and
- **Lawrence Weintraub**, SEQRA attorney in the Office of General Counsel, NYS Department of Environmental Conservation.

We welcome them all.

I look forward to seeing you at the Annual Meeting!

Joan Leary Matthews

From the Editor

Kevin Anthony Reilly

This issue is being prepared as our body politic takes a long, hard look at where in recent years we have been as a nation, politically and economically, and it may well decide where we anticipate going as an epochal financial storm gathers its wind. As a country, we have been much distracted in recent years by military and strategic missteps, an inchoate restructuring of the international system which few people really understand, wildly oscillating energy costs and bouts of financial intoxication. As a result of the distractions, too many Americans have failed to get grounded and to pay much attention to early warning signs in the economy, in geopolitics, in our culture, political and otherwise, and, as is increasingly evident, to the instability of our nation's and the world's reliance on an increasingly problematic energy source. The energy puzzle, of course, is the ultimate conundrum: our economy surges because of "cheap" energy, but it's not cheap; too many people in the public as well as in government seem intent on ignoring the geopolitical and environmental costs of the present energy regime, sometimes in a fatalistic concession that we don't know what else to do. And to regain our economic balance, we need, among other things, more cheap energy, and fast.

Kevin Phillips, a notable Reagan strategist who's been saying unkind things about some of his former political compatriots of late, and others have written in recent years about energy-related geopolitical paradigms during the last few centuries. History, as always, is well worth considering for the lessons which, too often, must be re-learned. Since the 17th century, nation-states accumulated power in large part because they learned how to harness a new energy source—wind, whale oil, coal, petroleum—before and better than their competitors, but they lost their lead when the older energy source became self-limiting and a new and better energy source was developed by others. The consequences went far beyond cheaper energy, though, because entire economies, and a nation's military reach, had been invested heavily in the now-obsolete energy source. Americans relied heavily on whale oil during the 18th and early 19th centuries, before domestic coal sources were discovered, which freed us from reliance on imported coal.

Of course, the whales ran out, or, more accurately, they were hunted out. Britannia may have ruled the waves in the 19th century, but it stuck with coal as the fledgling American navy moved on to petroleum, and the result, as they say, was history. Oil, first produced in Pennsylvania, then in Texas, Oklahoma and other areas within the continental United States, was a cheaper and more efficient energy source upon which our industry fastened notwithstanding still sizable coal reserves. This shift gave our industry a lift up at a time when British coal resources were dwindling and extraction of foreign coal became more expensive and, with respect to Eastern European reserves, strategically problematic. Of course, Britain and other industrialized nations soon got the idea, but not before they were outdistanced by the United States. The importance of oil, though, was recognized by Britain, which, often in cooperation with the United States, established a presence during the early 20th century in parts of the world with no obvious interest to Britain, or the United States, except for the presence of oil—Iran and Iraq, first and foremost. History, as they say, repeats itself. Ambitious economies that lacked easy access to energy supplies either became internally unstable or destabilized the international system in their desperate quest for fuel. Japan in the 1930s was a classic example of the latter. It is worth noting that Nazi power in Europe was crushed not only by the industrial might of the Allies, but also by the Allies' strategic destruction of Germany's petroleum reserves. In many areas, the Nazi war machine literally ground to a halt as recourse to horses became a temporary, but always transient, expedient for getting military supplies from one place to another.

Viewing the issue of access to energy through the prism of economics and geopolitics, and taking a long view at that, it is manifestly clear that the world is poised to turn yet again, so to speak. We still have sizable coal reserves and off-shore oil and gas deposits, so we are not in the position of Japan in the 1930s. However, neither are we mid-20th century America anymore. One cannot responsibly avoid the question: What would be the consequences of a sudden unavailability of foreign oil? It is worth looking to the mini-crisis that erupted in Europe last year when, in a bit of muscle-flexing, the Russian Federation simply shut down the gas pipelines that ran into and through Ukraine. Only the seriously somnolent would premise public policy on easy assumptions about the future stability of Saudi Arabia, Nigeria or the Gulf emirates, or on Iraq's eventual ability to turn on the spigots without destruction somewhere along the pipeline, or on Russia's acquiescence as NATO advances to its borders, or on ignoring Venezuela's flamboyant Chief Executive's regular adventures in recklessness. For these reasons alone, responsible public policy mandates that we use the current crisis to direct our economy down the path of alternative energy.

Of course, this readership is primarily focused on environmental policy. Here, too, it takes an almost deliberate policy of scientific obfuscation to ignore the risks posed

in our lifetimes, and certainly for the lives of our children, by global climate change. This past summer's thinning of Arctic ice, the greatest on record and a clear point along a continuing trajectory, is the proverbial canary in the coal mine, but not the only one. The ocean, it was posited not long ago, could act as a giant carbon sink. That was before coral reefs started dying in maritime waters acidified by carbon compounds. Water resources are already being disrupted, most dramatically but not exclusively in North Africa, as surface ecologies literally dry up. Historically arid areas of America's West have flowered with the fruits of modern agriculture by depending, in significant part, on dwindling ice-age aquifers.

Hence, policy discussions that comfortably contemplate warmer winters in the Northeast and winter wheat as far north as Canada as the benefits of global warming are preposterous. Ecological responses have never been that uncomplicated even when measured along much longer time lines, as is evidenced in ice cores, paleo-climate studies and even the patchwork of historic records.

Sudden cold spells, such as the so-called Little Ice Age during the mid-second millennium, disrupted growing seasons and measurably impacted human longevity. The sudden warming during the waning years of the first millennium displaced populations, led to massive invasions and social and political disruptions, and waves of plagues and diseases entered the historic record as exotic pathogens were pushed out of some environments and introduced into others. These larger cycles and numerous smaller cycles of climate change and the correlating environmental impacts caused ecological and social stress. However, those larger-cycle fluctuations in climate at least allowed for some adaptation. The scope and scale of the climate changes being suggested by widely accepted scientific studies and climate models for the not-distant future is unprecedented. This is occurring at a time when world population growth is following a distressing Malthusian logic, when basic food and water resources, not to mention the many natural resources that the modern world takes for granted, may face severe limits.

It seems to be beyond scientific cavil that the dramatic infusion of hydrocarbons and other greenhouse gases into the atmosphere during the last two centuries—a mere blip in time when measured against the millenia required to achieve some measure of climatic and ecological stability—has been the accelerant, to use an arson term, even if the thawing of the tundra, deforestation and other variables add fuel to the fire, so to speak. Hence, by virtue of modern industrialized world economies, we have been the agent of our own predicament. Will responsible people step forward to be the agents of beneficial change?

We are in an interesting, if disquieting, turning point in history in many respects. We have elected a man to the presidency who, if only in a purely symbolic sense, has freed us from an obsolete paradigm of what a national leader is supposed to look like. Time will tell, but he also seems to be so much more. We are only beginning to see the financial chicanery, from which we were promised cheap and easy money, for what it was: an illusion which, when ignored, led to destructive consequences beyond the perimeters of the financial markets. We are gripped with the immediate urgency of managing that destruction in ways unanticipated just a few short months ago. Sometimes crises, though long in the making, manifest themselves quickly and more dramatically as a result. Simultaneously, a critical mass of our voting public seems to be grappling with the realization that we need to be freed from an obsolete paradigm that shackled our economy, our jobs and everyday lives, and even our national security, to an exclusive reliance on a seemingly cheap energy source, in whose dark side we are actually seeing some true colors.

It is worth noting that several of our members prominently possess the combination of skills that will benefit our State and our country as we devise the energy regime for the coming century.

In this issue, Kristien Knapp, a finalist in the Section's William R. Ginsberg Memorial Essay Contest, addresses climate change in the context of state initiatives promulgated in the face of the federal government's seeming abdication of responsibility for curbing greenhouse gas emissions. The author discusses a matter that is still being played out as this issue goes to press: California's climate change legislation and EPA's refusal to waive federal standards for mobile sources in favor of the California standard pursuant to section 209(b) of the Clean Air Act. The author discusses EPA's authority and responsibilities under the waiver provision, generally, before examining California's legislation, the asserted grounds for EPA's decision in this case, and the broader legal issues which are thus presented.

Kevin Anthony Reilly

In Memoriam
Dorothy Miner

Dorothy Miner, 72, Legal Innovator, Dies

By David W. Dunlap

Dorothy Marie Miner, who developed legal protection for historic landmarks nationwide in her longtime role as counsel to the New York City Landmarks Preservation Commission, died on Tuesday in Manhattan. She was 72 and lived in Morningside Heights.

The cause was complications of lung disease, said her brother Dr. Robert Dwight Miner.

She played an important role in the critical 1978 case of *Penn Central Transportation Company v. New York City*, which upheld the landmark status of Grand Central Terminal and set national precedents.

Intimately familiar with preservation law, Ms. Miner was meticulous when making her case—another way to put it was that she was a fierce, immovable stickler—and could infuriate allies as well as adversaries with her insistence on principle and procedure.

"We spent eight hours arguing over every sentence," Leonard Koerner, the chief assistant corporation counsel of New York City, said in recalling what it was like to work with Ms. Miner at the print shop on the legal briefs in the Penn Central case.

Eventually, the United States Supreme Court upheld the landmark designation of the terminal against a challenge by Penn Central, which owned the building and asserted that landmark status effectively amounted to an unconstitutional taking of property by the government.

Because of the New York commission's victory, its "innovations became standard practice for landmarks commissions all around the country," said Nicholas A. Robinson, a professor at the Pace University School of Law, with whom Ms. Miner taught.

Ms. Miner was born on Aug. 14, 1936, in Manhattan. Her father, Dwight C. Miner, was a professor of history at Columbia University. She received a bachelor's degree from Smith College in 1958, a law degree from Columbia in 1961 and a degree in urban planning from Columbia in 1972.

She married James Edward O'Driscoll in 1970. He died in 1993. She is survived by Dr. Miner, of Montvale, N.J., and another brother, Richard Thomas Miner, of Sparta, N.J.

Ms. Miner was named counsel to the landmarks commission in 1975 and helped devise the legal framework under which it designated the 17th-century street plan of Lower Manhattan as a landmark in 1983. That stopped developers from further eradicating the neighborhood's characteristically irregular blocks.

When the commission voted in 1983 to permit the demolition of the former Mount Neboh Synagogue at 130 West 79th Street because it created a financial hardship for its owner, Ms. Miner wanted it understood that the synagogue had not been stripped of its landmark status.

"There was no finding today or at any other time that this wasn't a significant building," she said. "It will be, until the end, a designated landmark."

She helped defend the designation of St. Bartholomew's Church on Park Avenue against a challenge by the parish, which argued that landmark status unconstitutionally interfered with its freedom of religion and its property rights. The city won in the federal Court of Appeals in 1990.

After 19 years with the commission, Ms. Miner was asked for her resignation in 1994 by Jennifer J. Raab, who was then chairwoman. Ms. Raab said the commission's regulatory and enforcement work "would benefit from a fresh eye."

But preservationists took a darker view. Professor Robinson said he invited Ms. Miner to join him at Pace after Mayor Rudolph W. Giuliani "decided he would accede to the real estate industry and press to remove her as counsel." Ms. Miner also became an adjunct associate professor in the Graduate School of Architecture, Planning and Preservation at Columbia.

Although she had been in the hospital since early summer, Ms. Miner continued to collaborate on a preservation law class with Professor Robinson until a month ago, even planning an annual expedition that begins at Grand Central Terminal.

"I'll be doing the field trip this Saturday," he said, "with her tape-recorded voice."

The Legality of EPA's Waiver Denial

By Kristien G. Knapp

Introduction

Climate change is a global problem.[1] Faced with non-action on the federal level, states have taken the initiative to reduce greenhouse gas emissions to mitigate climate change.[2] In particular, California has enacted two pieces of climate change legislation, AB 1493 and AB 32.[3] Whereas AB 32 seeks to reduce greenhouse gas emissions from stationary sources, AB 1493 seeks to reduce emissions from the mobile sources. Pursuant to the federal Clean Air Act, California has the ability to set its own emissions standards from mobile sources but only if it receives a waiver of preemption from the U.S. Environmental Protection Agency (EPA).[4] For the first time since the enactment of the Clean Air Act, EPA has denied a request for waiver.[5]

This essay considers the legality of that decision. Part I describes the Clean Air Act's framework for mobile source emissions standards, including (a) preemptive federal standards, (b) the possibility that EPA may waive federal preemption for California, and (c) the legal standards used to decide past waiver requests. Part II presents California's current waiver request to set emissions standards for greenhouse gases and its subsequent denial by EPA. Then, Part III critiques the legal issues presented by EPA's denial, including (a) whether it is appropriate to consider greenhouse gas emission standards in isolation, (b) whether California has met the statutory standard for "compelling and extraordinary conditions," and (c) the validity of other considerations raised by EPA. Part IV analyzes the broader legality of EPA's decision.

I. Clean Air Act Emissions Standards

A. Preemptive Federal Standards

Title II of the Clean Air Act (CAA) authorizes EPA to set emissions standards for mobile sources.[6] Specifically, section 202(a) requires EPA's Administrator to prescribe mobile source emissions standards of air pollutants, "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[7] Pursuant to Title II, EPA regulates fuel and fuel additives by establishing national standards for all motor vehicles.[8] States are not allowed to adopt their own tailpipe emissions standards,[9] with the exception of California.[10]

B. California's Standards

California's exception lies within section 209(b)'s waiver provision. EPA can "waive" the federal standard and allow California to implement its own standard:

> The [EPA] Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that —
>
> (A) the determination of the State is arbitrary and capricious,
>
> (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
>
> (C) such State standards and accompanying enforcement procedures are not consistent with section [202](a) of this title.[11]

Any state other than California that has a CAA non-attainment area may adopt a standard that is identical to California's waived standard.[12]

C. History of Legal Standards for Waivers

In the past, EPA has always deferred to California's decisions to set its own emissions standards and granted waiver rather readily.[13] EPA's deference to California traces directly from a plain reading of the section 209(b) waiver provision.[14] Section 209(b) instructs the Administrator to grant waiver from federal preemption if California determines that its "standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[15] Once California has made that protectiveness determination, the Administrator must grant waiver unless he makes one of three specific findings. First, the Administrator can deny waiver if California's protectiveness determination was arbitrary and capricious.[16] Second, the Administrator can deny waiver if he determines that California "does not need such State standards to meet compelling and extraordinary conditions."[17] Third, the Administrator can deny waiver if California's standards and enforcement procedures are inconsistent with section 202(a).[18]

While some of California's waiver requests have been denied partially, or their effective date delayed until feasible, none had ever been entirely denied.[19] The Ad-

ministrator, then, had never made one of the three specific findings to deny waiver. As a result, the only past legal challenges to waiver decisions have been challenges to EPA waiver grants brought by the automobile industry.[20] Those cases reinforce the directive, from both section 209(b) and its legislative history, that EPA's review is to be highly deferential to California's determinations.[21]

The key legislative history is the enhancement of California's deference when the waiver provision was amended in 1977.[22] In 1977, the waiver provision was slightly restructured.[23] A previous requirement that California's standards be more stringent than federal standards was removed.[24] That requirement was supplanted in favor of the new requirement that California's standards "be, *in the aggregate*, at least as protective of public health and welfare as applicable Federal standards."[25] California, then, was given more leeway to set its own standards following its own protectiveness determinations. At the same time, EPA's role was limited; "Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight."[26] The 1977 Amendments also specifically limited the EPA Administrator's role by memorializing the three specific grounds for waiver denial in sections 209(b)(1)(A)-(C). That is, the 1977 Amendments brought sections 209(b)(1)(A)-(C) into existence. Moreover, the addition of "in the aggregate" led California and EPA to conclude that the Administrator's second inquiry, pursuant to section 209(b)(1)(B), was to focus on California's need for an emissions *program*.[27]

Section 209(b)(1)(B) instructs the Administrator to deny waiver if he finds that California does not "need *such State standards* to meet compelling and extraordinary conditions." If read in isolation, that section could require EPA to inquire into California's need for each emissions standard it seeks to impose. But a broader textual construction, supported by legislative history, permits a less intrusive inquiry into California's need for a program.[28] First, the use of the plural "standards" provided EPA and California textual guidance to inquire into California's need for a *program*, rather than its need for a particular *standard*.[29] The addition of "in the aggregate" to section 209(b), during the restructuring of the waiver provision in 1977, supports the harmonization of the two sections.[30] The textual harmony is achieved by reading "such State standards" in section 209(b)(1)(B) to refer back to "standards, in the aggregate." The effect of this interpretation provides greater deference to California's determinations, beyond protectiveness and into its needs.

On very few occasions have waiver grants prompted legal challenges.[31] On each occasion, the Administrator's decision was deemed reasonable, not arbitrary or capricious.[32]

II. California's Waiver Request to Set Greenhouse Gas Emissions Standards

A. California's Greenhouse Gas Emissions Standards and Waiver Request

On July 22, 2002, California enacted legislation to regulate emissions of greenhouse gases from motor vehicles.[33] AB 1493 announced that the "[c]ontrol and reduction of emissions are critical to slow the effects of global warming," and cited several "compelling and extraordinary" impacts that global warming would specifically impose on California.[34] To reduce those impacts, AB 1493 authorized the California Air Resources Board (CARB) to establish greenhouse gas (GHG) regulations "in accordance with any limitations that may be imposed pursuant to the federal Clean Air Act [] and [its] waiver provisions."[35] On September 24, 2004, CARB issued its final regulations for greenhouse gases to go into effect for the 2009 model year.[36] Then, on December 21, 2005, Catherine Witherspoon, Executive Officer of CARB, requested waiver pursuant to section 209(b).[37]

B. Delay of Waiver Decision

EPA delayed considering California's waiver request in anticipation of the Supreme Court's *Massachusetts v. EPA* decision.[38] The *Massachusetts v. EPA* case directly affected California's waiver request because it dealt with the regulation of greenhouse gases pursuant to Title II of the Clean Air Act. While *Massachusetts v. EPA* answered that greenhouse gas emissions are air pollutants subject to Title II regulation, California's waiver request directly attempts to regulate greenhouse gas emissions pursuant to Title II.

Massachusetts v. EPA held that greenhouse gas emissions are air pollutants within the meaning of the Clean Air Act, subject to EPA's section 202 regulatory authority.[39] So, after *Massachusetts v. EPA*, the Administrator was left to make an endangerment finding for greenhouse gases, which, if positive, would effectively require EPA to regulate greenhouse gas emissions from mobile sources.[40] At the same time, EPA renewed its consideration of California's waiver request to implement its own greenhouse gas emissions standards from mobile sources.

C. EPA's Waiver Denial

EPA re-opened its consideration of California's waiver request by holding two public hearings.[41] Then, on December 19, 2007, the EPA Administrator notified California, in the form of a letter ("Letter") to California Governor Schwarzenegger, that its request for waiver had been denied.[42] Later, on February 29, 2008, the Administrator released a more thoroughly reasoned explanation of EPA's decision to deny California's waiver request ("Notice of Decision").[43]

1. December 19, 2007 Waiver Denial Letter

EPA first notified California that its waiver request had been denied in a letter addressed to Governor Schwarzenegger on December 19, 2007.[44] The Letter described notice-and-comment proceedings, including two public hearings consisting of testimony from more than 80 individuals and thousands of written comments, as well as scientific and technical material.[45]

The Administrator's primary rationale for rejecting California's waiver request distinguished this waiver request for greenhouse gas regulations from all other past waiver requests for other air pollutants.[46] He found it critical that greenhouse gas emissions are global in nature, whereas emissions from other air pollutants remain localized.[47] Furthermore, he pointed out that the global nature of the pollutant distinguishes California's current waiver request from all of its prior requests. The Administrator viewed this request as one to set *local standards* to address a *global problem*, whereas prior requests sought to set *local standards* to address *local problems*.[48]

The Administrator also expressed his "firm[] belie[f] that, just as the problem extends far beyond the borders of California, so too must [] the solution."[49] Grounded in this belief, the Administrator announced his support for new national fuel economy standards signed into law earlier that same day as part of the Energy Independence and Security Act of 2007 (EISA).[50] He further asserted that these new standards were better because they require fuel economy of 35 miles per gallon in all states, whereas California's standards would only require 33.8 miles per gallon. The Administrator asserted that this uniform, national resolution is better than that of California and the "patchwork of other states" that had adopted California's standards.[51] There are two undercurrents driving this point. First, the Administrator announced a preference for national level action. Second, the Administrator confused fuel economy standards with Clean Air Act tailpipe emissions standards. He assumed a preemptive effect from the new fuel economy standards upon any greenhouse gas emissions standards.

In conclusion, the Administrator anchored his policy rationales in statutory language: "[i]n light of the global nature of the problem of climate change, I have found that California does not have a 'need to meet compelling and extraordinary conditions.'"[52] He also instructed his staff to draft documents further explaining the rationale for his decision.[53] That more explicit statement of the Administrator's reasoning was released on February 29, 2008, in a Notice of Decision to deny California's request for waiver of Clean Air Act preemption.[54] In the interim between the December 19, 2007 denial Letter and the February 29, 2009 Notice of Decision, California joined 15 other states and five environmental groups to challenge EPA's waiver denial in the Ninth Circuit Court of Appeals. The petition for review was filed in the Ninth Circuit, as opposed to the District of Columbia Circuit, because, the petitioners maintain, the December 19, 2007 decision was not "of national scope and impact."[55]

2. February 29, 2008 Notice of Decision

The EPA Administrator, in the Notice of Decision, found that "California does not need its greenhouse gas standards for new motor vehicles to meet compelling and extraordinary conditions."[56] This language mirrored and grounded the Administrator's decision in CAA section 209(b)(1)(B)'s requirement that emissions standards are needed "to meet compelling and extraordinary conditions."[57] The Administrator clarified that section 209(b)(1)(B) was the sole statutory basis for his decision, and that, therefore, he did not address the requirements imposed by sections 209(b)(1)(A) and (C).[58] While founded on statutory text, his decision focused on congressional intent.[59] The primary rationale for the Administrator's finding rested upon his "belie[f] [that] section 209(b)(1)(B) was [not] *intended* to allow California to promulgate state standards for emissions . . . designed to address global climate change."[60] The Administrator explained that the intent behind section 209(b) of the Clean Air Act was to allow California to continue to address local and regional air pollution problems.[61] That intent drove his conclusion that section 209(b)(1)(B) "was [not] intended to allow California to promulgate *state* standards . . . to address *global* [] problems"[62] (emphasis added). Therefore, the Administrator concluded, greenhouse gases are not subject to regulation by California through exercise of section 209(b) waiver.[63]

The Administrator's second, alternative, rationale was "that the effects of climate change in California are [not] compelling and extraordinary compared to the effects [of climate change] in the rest of the country."[64] That is, his alternative reasoning conducted the statutory inquiry by way of comparison. The precise statutory test for section 209(b)(1)(B) required California to demonstrate conditions that are more compelling and more extraordinary than the rest of the nation. Effectively, the Administrator's finding relied on a new interpretation of section 209(b)(1)(B). This new interpretation led to critical departures from EPA's own waiver precedent by decreasing the traditional level of deference given to California's policy determinations. More generally, the Administrator conducted an altogether new waiver inquiry.

III. Legal Issues Specifically Presented by EPA's Denial

A. Should Greenhouse Gas Emission Standards Be Considered in Isolation?

1. EPA's Section 209(b)(1)(B) Inquiry

In both the Letter and Notice of Decision, EPA concluded that section 209(b)(1)(B) should be interpreted differently for greenhouse gas emissions.[65] In the Letter,

the Administrator presented the rationale that greenhouse gases warrant different legal treatment because they are global pollutants. That is, because emissions of greenhouse gases are equally distributed in the atmosphere, they make equal contributions to climate change, regardless of their point of emission. So, emissions reductions in California, as a result of these standards, will not ensure any mitigation of the effects of climate change in California. This rationale was the focus of the Administrator's Letter but also appears as a policy reason to support EPA's legal rationale in the Notice of Decision.

In the Notice of Decision, EPA took three specific steps in departure from its own prior waiver precedent. Each step related to the global nature of the pollutant.[66] First, EPA separated California's greenhouse gas emissions standards from its broader regulatory program. Second, EPA imposed a causation requirement between the emissions regulations and problem addressed. Third, EPA read section 209(b)(1)(B) as ambiguous when applied to greenhouse gases.

EPA, first, separated out the GHG limits that are the subject of this waiver request from emissions standards for which California has been granted waivers as part of its comprehensive regulatory program for motor vehicle emissions.[67] In the past, EPA had considered California's waiver provision from the broader context of whether California needed its own, "separate motor vehicle *program* to meet compelling and extraordinary conditions."[68] Now, EPA did not consider, or dispute, that California needs its own motor vehicle program. Instead, EPA distinguished these standards from the rest of California's emissions program because the global nature of the pollution problem does not have "close causal ties to conditions in California."[69] Thus, EPA added a causal connection as an evidentiary requirement to California's waiver requests (the second departure).[70] This connection had never been required in the past, primarily because California's determinations were given greater deference. Now, though, the causal connection is a necessary component of EPA's section 209(b)(1)(B) waiver decision that will always serve as a barrier to waiver for greenhouse gas emissions.

EPA's third departure from past waiver precedent read ambiguity into section 209(b)(1)(B).[71] The ambiguity arises when reading section 209(b)(1)(B)'s "such State standards" in isolation from section 209(b). EPA contended that there are three permissible readings of "such State standards" from "such State does not need *such State standards* to meet compelling and extraordinary conditions." First, "such State standards" could mean the program as a whole. Second, "such State standards" could mean the standards for similar vehicles. Or, third, "such State standards" could mean those standards specifically proposed in the pending waiver request.[72]

In the past, EPA focused on the plural "standards" to mean the emissions program as a whole.[73] Here, EPA refocused its statutory inquiry based on its construction of the problem being addressed and the pollutant being regulated. That is, EPA will continue to read "such State standards" to refer to the program as whole when California is attempting to regulate traditional air pollutants for local pollution problems (the first reading).[74] But EPA will read "such State standards" to refer to those standards for the particular pollutant when the pollutant and the problem are global (the third reading).[75] EPA supported this interpretation by examining the waiver provision's legislative history wherein Congress was focused on local conditions and local pollution.[76] The ambiguity of "such State standards" is EPA's necessary hook to interpret section 209(b)(1)(B) differently for greenhouse gases and receive deference for its construction.[77]

These three departures allowed EPA to conclude that "The intent of Congress in enacting section 209(b) and in particular Congress's decision to have a separate section 209(b)(1)(B), was to require EPA to specifically review whether California continues to have compelling and extraordinary conditions and the need for state standards to address those conditions."[78]

As a result, EPA will treat greenhouse gases differently pursuant to section 209(b)(1)(B) and grant waiver only if emissions are the cause of the problem addressed.[79] So, only if California caused climate change, and could directly redress it, would California be able to address it.[80] Consequently, EPA reasoned that because

> [a]tmospheric concentrations of greenhouse gases are an air pollution problem that is global in nature, and this air pollution problem does not bear the same causal link to factors local to California . . . GHGs are not the kind of local or regional air pollution problem that Congress intended to identify in the [section 209(b)(1)(B)].[81]

Therefore, the Administrator found "that California does not need GHG standards to meet compelling and extraordinary conditions."[82]

2. Did EPA Conduct the Proper Statutory Inquiry?

While the legal standard announced by the Administrator in the Letter cannot be right, the legal standard announced by EPA in the Notice of Decision could be correct, or at least reasonable.[83] Either way, it is relevant that the Notice of Decision departed significantly from EPA's past section 209(b)(1)(B) inquiry.

The foundation for EPA's denial of California's waiver request is a policy justification that greenhouse gases, as a different kind of air pollutant, should be treated differently legally.[84] That justification cannot be directly

grounded in section 209(b) because there is no distinction among pollutants in section 209(b).[85] Additionally, there is nothing in *Massachusetts v. EPA* which prescribes less than full regulatory treatment of greenhouse gases as CAA pollutants.[86] Moreover, *MEMA I* states that "[t]he plain meaning of the statute indicates that Congress intended to make the waiver power coextensive with the preemption provision."[87] This places EPA on tenuous footing with greenhouse gases because *Massachusetts v. EPA* subjects greenhouse gas emissions to preemption pursuant to section 209(a).[88] So, because sections 209(a) and (b) are coextensive, greenhouse gas preemption must be at least capable of being waived by EPA pursuant to section 209(b). Therefore, the only statutory foundation available for constructing the waiver provision differently for greenhouse gas emissions lies within section 209(b)(1)(B)'s "such State standards."[89]

Here, for the first time, EPA reads "such State standards" as ambiguous. Previously, "such State standards" had always referred to California's emissions program as a whole without inquiry into the particular pollutant or specific standard for which waiver was being requested.[90] In a 1984 waiver determination, EPA Administrator Ruckelshaus found no ambiguity; he relied on the plain meaning of section 209(b)(1)(B) and congressional intent to determine that "such State standards" meant "State standards . . . in the aggregate."[91] Now though, EPA, in its Notice of Decision, has found textual ambiguity and identified three possible readings of "such State standards." Additionally, while Administrator Ruckelshaus' construction relied on specific legislative history regarding the language, Administrator Johnson relied on a broader, more purposive reading of legislative history regarding the waiver provision more generally. Notably, Administrator Ruckelshaus uses legislative history from the 1977 enactment of the current section 209(b)(1)(B) whereas Administrator Johnson cites legislative history from the enactment of the original waiver in 1966. The 1966 waiver provision, of course, did not include section 209(b)(1)(B). The reviewing court will have to similarly read ambiguity into clear text by relying on preexisting legislative history.[92]

This will likely be the most contentious dispute in the forthcoming petition for review for three reasons. First, because textual ambiguity is determined judicially, this is the least deferential point to EPA.[93] Second, it is the most legally forceful point, actually grounded in statute, to support the Administrator's finding. Third, it is a necessary construction for both of the Administrator's findings in the Notice of Decision. The Administrator relies on reading "such State standards" to refer to the current, proposed standards for greenhouse gas emissions to (1) conclude that greenhouse gas emissions were not intended to be regulated through the waiver provision, and (2) begin his inquiry into "compelling and extraordinary conditions."

Next, if the court agrees with EPA's construction of section 209(b)(1)(B) and finds ambiguity, it can only defer to EPA's interpretation if the interpretation is reasonable.[94] Here, there is a great deal of deference to EPA's expertise in making the correct policy judgments within permissible statutory readings. If the reviewing court does agree that section 209(b)(1)(B) is ambiguous, it is unlikely that EPA's interpretation would be deemed unreasonable. In particular, EPA's policy rationale to consider GHG emissions in isolation is almost clearly reasonable. It is at least reasonable to distinguish global pollutants causing a global pollution problem from more traditional pollutants causing local problems that can be more readily redressed through local regulation. Thus, if reading "such State standards" to mean those standards for greenhouse gases and not the broader regulatory program is determined correct, it will almost necessarily be reasonable.

B. Does California Need Greenhouse Gas Emissions Standards to Meet "Compelling and Extraordinary Conditions"?

EPA's secondary rationales rely on considering greenhouse gases in isolation but move further along the section 209(b)(1)(B) inquiry to explore whether California has "compelling and extraordinary conditions." First, in the Letter, the Administrator concluded that California does not "have a need to meet compelling and extraordinary conditions." Then, in the Notice of Decision, EPA concluded that "the effects of climate change in California are [not] compelling and extraordinary compared to the effects in the rest of the country."

1. The "Predominantly Affects" Inquiry

The Administrator's reasoning in the December 19, 2007 Letter effectively eliminated the possibility that California will ever be granted a waiver to address climate change. The Administrator characterized past waivers as dealing only with "pollutants that predominantly affect[ed] local and regional air quality," challenges that were "exclusive or unique to California."[95] This is the forceful point of differentiation between past waivers and the current request; climate change will never predominantly affect California, nor will it be an exclusive or unique problem: it is a global problem.[96] What the Administrator does not address, though, is both the in-between (from predominant affect to unique or exclusive) and the next, causally related step (after the problem is identified, one must address its effects).

While it is true that greenhouse gas emissions are global pollutants,[97] this observation does not consider the local effects of global climate change on California. The Administrator assumed that "greenhouse gas emissions harm the environment in California and elsewhere regardless of where the emissions occur."[98] This assumption ended the inquiry before seriously considering the problem. Even though greenhouse gas emissions, regard-

less of their point of emission, equally contribute to global climate change, the effects of global climate change on various nations and states are different and local. That is, a uniformly shared cause does not necessarily (and will not with respect to climate change) lead to uniform effects. For example, although similarly emitted greenhouse gases in California and Kansas will equally contribute to climate change, the effects of global climate change on California will necessarily be different than the effects of global climate change on Kansas. Thus, even though greenhouse gas emissions from both states contribute to the climate change problem, the climate change effects on each state will be significantly different because each state has a different environment, including geography, climate, ecology and land uses. The Administrator's reasoning ignores the unique effects of climate change on California.

While it will always be absurd to argue that climate change will "predominantly affect" California, it is equally absurd to claim that the *impact* of climate change on California is not "unique or exclusive" to California. The Administrator misses the causal connection between the global problem and its local effects, which will always be as clearly and necessarily unique as the obviously unique size and shape of the State of California on a map. Moreover, a "predominantly affects" standard is not the equivalent of a "compelling and extraordinary" standard. The Administrator's language does not announce or explicate a new waiver standard for climate change, nor does it apply the past standard,[99] but clearly applies a new standard. Until the Notice of Decision was issued, it remained unclear what kind of conditions California would need to demonstrate to be granted waiver for "compelling and extraordinary conditions." The standard could require California to be predominantly affected by climate change (an impossible standard). Or the standard could require California to demonstrate unique and exclusive challenges (a high, but plausibly demonstrable standard). The Notice of Decision clarified that to satisfy the "compelling and extraordinary conditions" requirement, California would need to exhibit conditions that are significantly different from, or worse than, the rest of the nation.

2. The Compelling and Extraordinary Inquiry

EPA's first rationale for denying waiver, as stated in the Notice of Decision, ended its inquiry after determining that GHGs should be considered separately (because that result was not intended by Congress). EPA's alternative rationale set forth in the Notice of Decision, though, moved beyond congressional intent to consider whether California's GHG standards are needed to meet "compelling and extraordinary conditions." Again, because EPA had never before denied a waiver request and there had never been a legal challenge grounded in section 209(b)(1)(B), the requisite "need" and the meaning of "compelling and extraordinary" remained open to interpretation. Whereas "such State standards" more clearly refers to the broader program when reading the entirety of section 209(b), "need" and "compelling and extraordinary" only appear in section 209(b)(1)(B). Additionally, the words "compelling and extraordinary" are necessarily more ambiguous than "such State standards." Whereas the "such" in "such State standards" begs for connection between the statutory sections and the specific standards it refers to, "compelling and extraordinary" are looser, subjective, patently ambiguous terms. A plain text interpretation would require California to have (1) compelling and extraordinary conditions (to be identified by the Administrator) that (2) can be redressed by emissions standards.[100] EPA focused on the "compelling and extraordinary conditions" prong to determine that California does not exhibit them, without addressing the redressability prong (which was considered within but not determinative in EPA's primary rationale).[101]

EPA found that California did not exhibit "compelling and extraordinary conditions" after comparing the local effects of climate change on California to the effects on the nation as a whole.[102] EPA relied on plain language and legislative history to determine that impacts on California must be sufficiently different or unique from the rest of the nation to qualify as "compelling and extraordinary."[103] So, to attain waiver without a section 209(b)(1)(B) finding, California would need to show its conditions are: (a) unique and (b) unique enough to distinguish itself from the rest of the nation. This is a strict interpretation of "compelling and extraordinary," beyond mere uniqueness, almost resembling the Letter's "predominantly affects" test.

EPA did not dispute comments that California's effects are unique: "declining snowpack and early snowmelt and resultant impacts on water storage and release, sea level rise, salt water intrusion, and adverse impacts to agriculture (e.g., declining yields, increased pests, etc.) forests, and wildlife."[104] EPA relied on reports by the IPCC to examine the impacts of climate change on California, both observed and projected, as exhibited by temperature change, precipitation increase, and sea rise.[105] First, EPA recognized that California has observed a greater temperature increase than the nation as a whole.[106] Second, while California has experienced increased precipitation, EPA noted that its increase is not conclusively greater than that in the rest of the nation.[107] As for sea rise, while California has exhibited rising sea levels, EPA found that those levels were roughly the same elsewhere in the United States.[108] While recognizing that California has been and will continue to be negatively impacted by climate change, EPA did not find those impacts to be sufficiently different from those impacts observed and projected in the nation as a whole.[109] Therefore, EPA did not find "compelling and extraordinary" conditions to warrant waiver.[110] That conclusion is entirely reason-

able but, of course, reliant upon considering GHG emissions in isolation both factually and legally.

C. Has EPA Raised Other Relevant Considerations?

1. Relationship Between Emissions Standards and Fuel Economy Standards

In the December 19, 2007 Letter, the Administrator suggested that EISA fuel economy standards provide better "environmental benefits" than California's greenhouse gas emissions standards.[111] The relevance of the connection between fuel economy standards and emissions standards is legally unfounded. *Massachusetts v. EPA* directly placed greenhouse gas regulation within the ambit of EPA's authority and dismissed the possibility that fuel economy standards might preempt CAA standards.[112] Additionally, two district court decisions challenging adoption of California's standards have rejected the argument that California greenhouse gas emissions standards are preempted by fuel economy standards.[113] The obvious point driving that conclusion is that fuel economy standards and emissions standards come from different statutes.

Fuel economy standards were originally established by the Energy Policy and Conservation Act (EPCA), and then amended by EISA, whereas as *emissions* standards are set pursuant to the CAA. While both standards reduce greenhouse gas emissions, their name, purpose and the standards themselves are different. The purpose of fuel economy standards is to reduce reliance on fossil fuels by promoting fuel efficiency,[114] while the purpose of CAA tailpipe emissions standards is to reduce pollution.[115] One purpose is economic with environmental benefits, while the other is purely environmental. Additionally, while fuel economy standards will likely reduce greenhouse gas emissions by requiring more efficient fuel use, emissions standards actually target air pollution. Moreover, as a matter of fact, California's greenhouse gas emissions standards do more to mitigate climate change than simply requiring greenhouse gas emissions reductions from tailpipes.[116]

The California greenhouse gas emissions standards also target air conditioning emissions and provide for alternative compliance through reductions in life cycle emissions.[117] The alternative compliance scheme assigns a fuel adjustment factor for all vehicles. The fuel adjustment factor quantifies upstream emissions for all vehicles, regardless of fuel source, so that the life cycle greenhouse gas emissions of alternatively fueled vehicles can be compared to those using fossil fuels.[118] By equating life cycle emissions, the manufacturers of alternatively fueled vehicles are given an opportunity to participate in the GHG emissions program and are rewarded not only for their lower, or non-existent, GHG emissions, but also for their lower life cycle emissions. This creates an incentive for all automobile manufacturers falling within the regulatory framework to produce alternatively fueled, low-emissions vehicles. The alternative compliance scheme, then, does more than fuel economy standards (and even emissions standards) to ensure a reduction in greenhouse gas emissions. The import is that California's standards, if effective, will actually reduce greenhouse gas emissions and mitigate climate change. Meanwhile, fuel economy standards have no scheme to reduce greenhouse gas emissions beyond those achieved as a tertiary benefit from more efficient fuel use. That is, at their most efficacious, the two different standards do not achieve a unitary goal because their purposes are not coextensive.

Furthermore, the standards themselves are incomparable.[119] First, the standards are written differently. Fuel economy standards are set based on fleet-wide sales. Meanwhile, emissions standards differentiate only by weight—sales have no impact. Second, the two standards have different enforcement regimes. The penalties are not only different, but typically, manufacturers will just pay penalties for violations of their fleet-wide fuel economy standards caused by inefficient sports cars and sport utility vehicles. That is, the market allows them to avoid the cost of compliance. Emissions standards, though, cannot be avoided by simply paying a penalty. Last, while California's GHG emissions standards were scheduled to go into effect for the 2009 model year, the new fuel economy standards do not become effective until the 2020 model year. To argue that fuel economy standards that become effective 11 years in the future are better than current emissions standards is not only prospective but somewhat speculative because they are two different regulatory regimes that will likely exhibit unequal efficacies.

As a matter of law and fact, then, fuel economy standards should play no role in EPA's waiver calculus.

The Administrator, in the December 19, 2007 Letter, while praising the enactment of EISA fuel economy standards, also suggests (a) a dislike for the "patchwork" regime and (b) a preference for a national regime of climate change mitigation.[120] Both of these considerations are legally irrelevant to his waiver findings.

2. Patchwork

The "patchwork" regime is not a true patchwork, but an emissions regime where there are two standards: the federal program and California's program. The Clean Air Act prescribes this regime by providing California the section 209(b) waiver provision and enabling other states to adopt California standards pursuant to section 177. The CAA scheme mandates, albeit permissively, this very "patchwork." So, as a matter of law, this is the regime the CAA imagines and, as a matter of fact, it is not a patchwork at all, but a regime with two standards. Therefore, the Administrator's disdain for patchwork resolutions deserves no place in his waiver decision-making process.

3. Dislike for State-Level Action

The Administrator's preference for national-level action, as opposed to state-level action, likewise warrants no place in his waiver decision-making process. The Administrator's ability to deny waiver is limited to one of the three specific findings spelled-out in section 209(b)(1). None of these specific findings reserves any room for the Administrator to shirk his statutorily mandated duties in favor of a preference for legislation. Furthermore, as described above, the waiver provision, together with section 177, preserves an honorary position for state-level action within the Clean Air Act. As a matter of fact, because climate change is a global problem, any broader, more comprehensive resolution will be a more effective solution. The Administrator's preference, then, makes a good deal of practical sense. But that preference must be limited; it can inform his statutory decision, but cannot be determinative. Therefore, while, as a matter of fact the Administrator's preference for national action makes sense, there is no legal room for him to rest his decision on these grounds.

IV. Broader Legal Issues Presented by EPA's Waiver Denial

A. Comparison of Letter to Notice of Decision

> *I give up. Now I realize fully what Mark Twain meant when he said, "The more you explain it, the more I don't understand it*."[121]

EPA used section 209(b)(1)(B)'s "compelling and extraordinary" language as a basis for its decision in both its December 19, 2007 Letter and February 29, 2008 Notice of Decision. First, the Administrator concluded in the December 19, 2007 Letter: "In light of the global nature of the problem of climate change, I have found that California does not have a '*need to meet* compelling and extraordinary conditions.'"[122] Second, the Administrator clarified, in the Notice of Decision, that:

> I do not believe section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems; nor, in the alternative, do I believe that the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country.[123]

Although these rationales are not identical, they are basically consistent. They both frame California's waiver request as regulation of local emissions to remediate a global problem. Although the Letter did very little to explain how the global nature of the pollutant relates to the statute, the Notice of Decision attempted that connection. Furthermore, the Administrator promised as much in the Letter.[124] So, the same justification is highlighted in both documents and serves as a substantial point of consistency. However, there are two major points of inconsistency between the Letter and Notice of Decision.

First, missing from the Notice of Decision are the Letter's secondary policy justifications: (1) preference for EISA fuel economy standards over emissions standards, (2) preference for a national resolution, and (3) disdain for state-level action.[125] This is a notable departure because, as above, those are weak justifications for waiver denial. The preference for national legislation is a policy preference completely divorced from section 209(b) and the preemptive effect of fuel economy standards on emissions standards was dismissed in *Massachusetts v. EPA*. The Letter having promised "further detail," one would have expected the Notice of Decision at least to mention these justifications. At minimum, and in the light most favorable to the Administrator, their absence could indicate that they played little or no role in his finding. But then, if that is the case, the Administrator would have been well served to say as much in the Notice of Decision. So, their absence, instead, leaves the impression that these justifications did play a part in the Administrator's decision-making, but once their relatively weak legal value was determined, they were dropped from the Notice of Decision. That is, the Notice of Decision seems to be a *post hoc* rationalization, which is an inadequate basis for review.[126] Whether that remaining impression can be characterized as arbitrary and capricious is unlikely,[127] but it at least raises an inference in the direction of bad faith.[128]

The second inconsistency is that there is a different legal justification for the findings presented in the Letter and Notice of Decision. The Letter did not cite directly section 209(b)(1)(B) but misquoted it to conclude that "California does not have a *need to meet* compelling and extraordinary conditions." The Notice of Decision, on the other hand, properly cited and quoted section 209(b)(1)(B). Taking the Administrator at his own word, the misquote offers a different legal standard. On its face, if the Administrator cannot even simply restate the relevant statutory text that requires him to make a determination, how can that determination be correct? A blatant misunderstanding of statutory language cannot be upheld.[129] Moreover, the language in the Letter focused on California's *needs to meet* conditions rather than California's *needs for standards to meet* conditions. These are unquestionably different legal standards; this is not just a mere misquote—it represents the sole legal justification for the Administrator's finding. The former standard is laxer and more generally permissive of waiver; applied strictly, it would only require a demonstration of a general need to control the air pollution condition. Meanwhile, the latter standard is more difficult to attain because it requires needs for emissions standards to control the pollution condition. The obvious import is that the former is not the correct legal standard imposed by the statute. This

highlights the questionable legality of the Letter standing on its own,[130] and, again, raises an inference that the Notice of Decision is a *post hoc* rationalization[131] that could rise to arbitrary and capricious decision-making.[132]

Beyond that textual inconsistency between the legal standards announced in the Letter and Notice of Decision, though, there is more legal inconsistency between the Letter's "predominantly affects" standard and the Notice of Decision's alternative reasoning. The alternative finding, in the Notice of Decision, "that the effects of climate change in California are [not] compelling and extraordinary compared to the effects in the rest of the country," is different from a finding that climate change does not "predominantly affect[]" California. There is basic consistency between these two standards because they both compare California's pollution impacts to those in the rest of the country. But "predominantly affects" is necessarily worse than "compelling and extraordinary" conditions. A "predominantly affects" standard would require California to show that its effects predominate over the effects in the rest of the nation. A "compelling and extraordinary" standard, instead, only requires a showing of unique, or worse than average conditions. Also, while the "compelling and extraordinary" standard is grounded in section 209(b)(1)(B), there is no statutory mention of "predominantly affects" anywhere in section 209(b).

The most important question regarding the inconsistencies between the Letter and Notice of Decision is the legal significance assigned each document. That is, which document is the Administrator's final decision? Or will the two documents be reviewed together as one, patently inconsistent,[133] decision? The effect of that determination will be significant. If the reviewing court considers the Letter or the combined documents to be the Administrator's final decision, he almost certainly looks less reasonable and more arbitrary and capricious.[134] Additionally, misquoting section 209(b)(1)(B) in the Letter could be damning for EPA because grounding a decision in a blatantly incorrect understanding of the statute is arguably worse than grounding a decision in policy justifications divorced from the statute.[135] Likewise, if the Notice of Decision is treated as the final decision, EPA has a much stronger argument that the Administrator's decision is deserving of *Chevron* deference, because, whatever its merits, it is at least grounded in section 209(b)(1)(B).[136]

B. Is EPA's Reasoning Consistent with *Massachusetts v. EPA*?

In *Massachusetts v. EPA*, the Court chastised EPA for making a regulatory decision based on reasoning "divorced from the statutory text."[137] The majority instructed that even if EPA had been correct to interpret section 202(a)'s text as ambiguous, its judgment must be based "within defined statutory limits" and not from a "laundry list" of policy considerations or scientific uncertainty.[138] The analog question presented here, following EPA's decision to deny California's waiver request, is whether that decision is similarly grounded in reasoning divorced from the statute.

EPA's finding in the Letter relied on policy justifications and misquoted statutory text that betrays a misunderstanding of the statute. Misquoting and misunderstanding the statute is even more tenuous agency decision-making than answering a statutory question with policy answers.[139] Consequently, it opens that decision to *Chenery* review in addition to *Overton Park* arbitrary and capricious review (invoked in *Massachusetts v. EPA*). If the Letter is taken seriously as the Administrator's final decision, or as a serious component of that decision, the Administrator's decision will be on unconvincing grounds, similar to those which rendered EPA's alternative conclusion in *Massachusetts v. EPA* arbitrary and capricious.[140]

Beyond the inferences that can be made from EPA's inconsistent reasoning, there are striking similarities between EPA's finding, as stated in the Notice of Decision, to EPA's argument in *Massachusetts v. EPA*.[141] In *Massachusetts v. EPA*, EPA argued, primarily, that carbon dioxide was not an "air pollutant" pursuant to CAA § 202(a).[142] To reach that conclusion, EPA relied on post-enactment legislative history indicating that Congress did not intend to address climate change by regulating greenhouse gas emissions.[143] Here, in the Notice of Decision, EPA relies on contemporaneous legislative history to reason that Congress did not intend section 209(b)(1)(B) to allow California to address climate change by regulating greenhouse gas emissions.[144]

While contemporaneous legislative history may be more persuasive than post-enactment legislative history to glean the meaning of statutory text,[145] that is the only divergence in EPA's method of statutory interpretation between the Notice of Decision and its interpretation of section 202(a) in *Massachusetts v. EPA*.[146] Both interpretations relied on intent rather than plain statutory text to broaden the Administrator's authority to consider policy rationales when exercising his judgment. Furthermore, EPA's section 209(b)(1)(B) reading relied on legislative intent to distinguish global pollutants and global pollution from traditional pollutants and local pollution. Critically, EPA did not point to anything in the legislative history that actually expands the section 209(b)(1)(B) inquiry into the *standard*, as opposed to the more limited inquiry into the *program* as a whole. Also, there is nothing in the legislative history that directly supports EPA's reading; EPA finds intent by way of negative inference.[147] However, both EPA's primary reasoning in *Massachusetts v. EPA*, and here, in EPA's Notice of Decision, are grounded in the statutory mandate they are required to perform. Statutory interpretation critiques aside, EPA's primary reasoning for its finding to deny waiver followed the statutory inquiry and, therein, complied with the requirements noted in *Massachusetts v. EPA*.

Similarly, EPA's alternative reasoning followed an arguably correct statutory inquiry, assuming ambiguity will be found. In *Massachusetts v. EPA*, EPA's alternative conclusion was a declination to regulate to avoid "conflict with other administration priorities."[148] That is precisely the "reasoning divorced from statute" that the Court prohibits.[149] Here, though, the alternative finding is a fact-based determination "that the effects of climate change in California are [not] compelling and extraordinary compared to the effects in the rest of the country."[150] This finding, while conducting an inquiry modeled on statutory language, imposes an additional hurdle to require California's conditions to be significantly worse than the national average.[151] Regardless if that is the correct inquiry, it is arguably reasonable and based upon EPA's interpretation of the appropriate section 209(b)(1)(B) inquiry. There is no question that it is grounded in the statute.

The specific holding from *Massachusetts v. EPA* is that greenhouse gases are air pollutants within the Clean Air Act. Once greenhouse gases are air pollutants regulateable pursuant to section 202(a), the next logical conclusion is that they are preempted by section 209(a) and waiveable pursuant to section 209(b). Instead of taking the logical path, though, EPA effectively carves an odd exception for greenhouse gases from section 209(b). EPA understands that greenhouse gases are section 202(a) air pollutants, assumes section 209(a) preemption, and then reads ambiguity into section 209(b), but only as applied to *this* pollutant. That reading remains possible, and maybe even reasonable, after *Massachusetts v. EPA*. Nonetheless, it is inconsistent with a broader understanding of *Massachusetts v. EPA*. Once greenhouse gases are placed within Title II of the Clean Air Act, it makes little sense to include them in one provision and then exclude them from another provision, especially complementary, interactive provisions. This nonsensical application of a judicial directive effectively erases greenhouse gases out of section 209(b) and more generally undermines judicial deference to agency decisions.

As discussed above, EPA's finding in its Letter as opposed to its Notice of Decision differ. While the Letter looks exactly like "reasoning divorced from statutory text," the Notice of Decision is grounded, albeit shakily, in statutory text. The inquiry here, then, depends on which document will control or how their inconsistencies will control upon judicial review.

Conclusion

EPA's decision to deny California's request for waiver of preemption relied upon three points of questionable legality. First, EPA impermissibly reads ambiguity from clear statutory text (*Chevron Step 1*) to consider this waiver request for greenhouse gas emissions in isolation from California's emissions program. Second, the Letter is almost certainly a misunderstanding of the law (*Chenery*) and reasoning divorced from the statute (*Massachusetts v. EPA*). Third, EPA boldly relies on the same reasoning that was rejected by the Supreme Court in *Massachusetts v. EPA* to distinguish this waiver request from all prior waiver requests. Those three points expose the likely illegality of EPA's waiver denial.

Endnotes

1. *See generally* Intergovernmental Panel on Climate Change [IPCC] Fourth Assessment Report, Climate Change 2007: Synthesis Report, *Summary for Policymakers* (2007) (hereinafter IPCC Report).
2. *See* Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. Penn. L. Rev. (2007); Regional Greenhouse Gas Initiative (RGGI), http://www.rggi.org (last visited May 15, 2008).
3. Assembly Bill 1493, Cal. Health & Safety Code § 43018.5 (2007) (hereinafter AB 1483); Assembly Bill 32, California Global Warming Solutions Act of 2006, Cal. Health & Safety Code §§ 38500–38599 (2007).
4. *See* Clean Air Act Title II (hereinafter CAA).
5. *See* Congressional Research Service, Report for Congress, *California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act*, December 27, 2007 (hereinafter CRS Report).
6. CAA Title II.
7. CAA § 202(a), 42 U.S.C. § 7521(a)(1).
8. CAA Title II.
9. CAA § 209(a), 42 U.S.C. § 7543(a).
10. CAA § 209(b), 42 U.S.C. § 7543(b).
11. *Id*. The only state that had adopted emissions control standards, other than crankcase emissions standards, prior to March 30, 1966 was California. Therefore, California is the only "State" that can waive the EPA-set national standards.
12. CAA § 177, 42 U.S.C. § 7507.
13. *See Motor and Equipment Mfrs. Ass'n, Inc. v. Environmental Protection Agency*, 627 F.2d 1095, 201 U.S.App.D.C. 109 (D.C.Cir. 1979) (*MEMA I*); *Motor & Equipment Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 330 U.S.App.D.C. 1 (D.C.Cir. 1998)(*MEMA II*); *U.S. v. Chrysler Corp.*, 591 F.2d 958, 192 U.S.App.D.C. 349 (D.C.Cir. 1979); *Ford Motor Co. v. Environmental Protection Agency*, 606 F.2d 1293, 196 U.S.App.D.C. 386 (D.C.Cir. 1979); *see* CRS Report, *supra* note 5.
14. CAA § 209(b), 42 U.S.C. § 7543(b).
15. *Id*.
16. CAA § 209(b)(1)(A).
17. CAA § 209(b)(1)(B).
18. CAA § 209(b)(1)(C).
19. CRS Report, *supra* note 5, at 14.
20. *MEMA II*, 142 F.3d 449 (D.C.Cir. 1998); *U.S. v. Chrysler Corp.*, 591 F.2d 958 (D.C.Cir. 1979); *MEMA I*, 627 F.2d 1095 (D.C.Cir. 1979); *Ford Motor Co. v. EPA*, 606 F.2d 1293 (D.C.Cir. 1979).
21. *See supra* note 20.
22. *Ford Motor Co. v. EPA*, 606 F.2d 1293 (CADC 1979); S.Rep.No. 95-127, 95th Cong., 1st Sess. 87 (1977); H.R.Rep.No. 95-294, 95th Cong. 1st Sess. 302 (1977).
23. *See supra* note 22.
24. *Id*.
25. CAA § 209(b).
26. *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297, 196 U.S.App.D.C. 386, 390 (D.C.Cir. 1979).

27. 49 Fed. Reg. 18892, May 3, 1984; *see* CRS Report, *supra* note 5, at 13.
28. *See supra* note 27.
29. 49 Fed. Reg. 18889–18890, May 3, 1984.
30. *Id*. ("The interpretation that my inquiry under (b)(1)(B) goes to California's need for its own mobile source program is borne out not only by the legislative history, but by the plain meaning of the statute as well. Specifically, if Congress had intended a review of the need for each individual standard under (b)(1)(B), it is unlikely that it would have used the phrase 'does not need such state standards,' which apparently refers back to the phrase 'State standards . . . in the aggregate,' as used in the first sentence of section 209(b)(1), rather than to the particular standard being considered. The use of the plural, i.e., 'standards,' further confirms that Congress did not intend EPA to review the need for each individual standard in isolation. Given that the manufacturers have not demonstrated that California no longer has a compelling and extraordinary need for its own program . . . I cannot deny the waiver on this basis.").
31. *See supra* note 20.
32. *Id*.
33. AB 1493; 13 California Code of Regulations §§ 1900, 1961.
34. *Id*.
35. *Id*.
36. *See* CRS Report, *supra* note 5; AB 1493, *supra* note 33.
37. *See* CRS Report, *supra* note 5.
38. *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).
39. *Id*.
40. *Id*.
41. 73 Fed. Reg. 12156-12169, Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, March 6, 2008 (hereinafter Notice of Decision) at 12157. One hearing was held in Washington, D.C. on May 22, 2007 and a second hearing was held in Sacramento, CA on May 30, 2007.
42. Letter of EPA Administrator Stephen L. Johnson to Governor Arnold Schwarzenegger, Dec. 19, 2007 (hereinafter Letter).
43. Notice of Decision, *supra* note 41.
44. Letter, *supra* note 42.
45. *Id*. at 1.
46. Letter, *supra* note 42.
47. *Id*. at 1.
48. *Id*.
49. *Id*.
50. *Id*.
51. Letter, *supra* note 42.
52. *Id*. at 2. *See also* CAA § 209(b)(1)(B). The Administrator appears to quote section 209(b)(1)(B) of the Clean Air Act, but does so without citing the statute and without directly quoting the statutory language. Section 209(b)(1)(B) says that no waiver will be granted if "such State does not *need such State standards to meet* compelling and extraordinary conditions." Meanwhile, the Administrator states that "California does not have a '*need to meet* compelling and extraordinary conditions.'" The difference, although slight, is that the statute requires consideration of California's *standards* whereas the Administrator is focused on California's *needs*.
53. *See* Letter, *supra* note 42.
54. *See* Notice of Decision, *supra* note 41.
55. CAA § 307. The Notice of Decision does include the D.C. Circuit jurisdiction triggering language. Thus, EPA has moved to dismiss the Ninth Circuit petition for lack of jurisdiction.
56. *See* Notice of Decision, *supra* note 41.
57. *Id*.
58. *Id*. at 12157. Section 209(b)(1)(A) requires the Administrator to deny waiver if California's determination is arbitrary and capricious. Section 209(b)(1)(C) requires the Administrator to deny waiver if California's standards and enforcement procedures are inconsistent with section 202(a).
59. *See* Notice of Decision, *supra* note 41, at 12157.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Compare* Letter, *supra* note 42 *with* Notice of Decision, *supra* note 41.
66. *See* Notice of Decision, *supra* note 41, at 12159.
67. *Id*. at 12161.
68. *Id*.
69. *Id*. at 12160.
70. *Id*.
71. Notice of Decision, *supra* note 41, at 12161.
72. *Id*.
73. *See* Notice of Decision, *supra* note 41, at 12159.
74. *Id. at* 12161.
75. *Id*.
76. *Id*.
77. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984).
78. *See* Notice of Decision, *supra* note 41, at 12161.
79. *Id*.
80. *Id*. In effect, EPA erases California's waiver provision if the condition is climate change and the pollutant is a greenhouse gas.
81. Notice of Decision, *supra* note 41, at 12163.
82. *Id*.
83. *Chevron*, 467 U.S. 837, 843 (*Chevron Step 2*).
84. See Notice of Decision, *supra* note 41, at 12160.
85. CAA § 209(b).
86. *Massachusetts v. EPA*, 127 S.Ct. 1438; CAA § 209(a) ("No State . . . shall adopt or enforce any standard relating to the control of emissions . . . *subject to this part*." Presumably, until EPA makes a positive endangerment finding (if ever), California could withdraw its request and assert the argument that greenhouse gases are *not subject to Title II* and, therefore, are not preempted. CARB, in its waiver request, reserved the right to later withdraw its waiver request if greenhouse gases were not defined as air pollutants within section 202 or, more specifically, section 209.).
87. *MEMA I*, 627 F.2d 1095 at 1107.
88. *Massachusetts v. EPA*, 127 S.Ct. 1438.
89. CAA § 209(b)(1)(B).
90. 49 Fed. Reg. 18889-18890, May 3, 1984; 71 Fed. Reg. 78192, December 28, 2006.
91. 49 Fed. Reg. 18889-18890, May 3, 1984 ("The interpretation that my inquiry under (b)(1)(B) goes to California's need for its own mobile source program is borne out not only by the legislative history, but by the plain meaning of the statute as well. Specifically, if Congress had intended a review of the need for each individual standard under (b)(1)(B), it is unlikely that it would have used the phrase 'does not need such state standards,' which apparently refers back

to the phrase 'State standards . . . in the aggregate,' as used in the first sentence of section 209(b)(1), rather than to the particular standard being considered. The use of the plural, i.e., 'standards,' further confirms that Congress did not intend EPA to review the need for each individual standard in isolation. Given that the manufacturers have not demonstrated that California no longer has a compelling and extraordinary need for its own program . . . I cannot deny the waiver on this basis.").

92. The Administrator's reading presents an interpretation that "goes beyond the scope of whatever ambiguity [the statute] contains." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994).

93. *Chevron*, 467 U.S. 837, 842 (*Chevron Step 1*). *Chevron Step 1* does not defer to an agency's determination of ambiguity but examines the text independently. It is not implausible that a reviewing court would find ambiguity.

94. *Chevron*, 467 U.S. 837, 843.

95. Letter, *supra* note 42.

96. IPCC Report, *supra* note 1.

97. *Id*.

98. Letter, *supra* note 42, at 1.

99. *MEMA I*, 627 F.2d 1095.

100. Section 209(b)(1)(B)'s inquiry bears striking resemblance to "strict scrutiny."

101. The "redressability" prong of section 209(b)(1)(B) might have been a better prong for EPA to hang its determination upon. That is, CARB can more easily argue that California has demonstrated "compelling and extraordinary conditions" than it can argue that its emissions standards (or program) will actually redress global climate change.

102. Notice of Decision, *supra* note 41, at 12168.

103. *Id.* at 12164; *see* S. Rep. No. 403, 90th Cong. 1st Sess., at 32 (1967). EPA quotes this Senate Report to support its understanding of the "compelling and extraordinary" standard. (California must demonstrate "compelling and extraordinary circumstances sufficiently different from the nation as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards.")

104. Notice of Decision, *supra* note 41, at 12164.

105. *Id.* at 12165.

106. *Id.*

107. *Id.*

108. *Id*. at 12166. But, coastline is not equivalent to "elsewhere in the U.S." The comparison for sea level, then, is not comparative to the nation, in the aggregate, but only to other coastal states, e.g., Louisiana and Alaska.

109. *Id*. at 12168.

110. *Id.*

111. Letter, *supra* note 42, at 1.

112. *Massachusetts v. EPA*, 127 S.Ct. 1438 ("EPA finally argues that it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT. See 68 Fed. Reg. 52929. But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's 'health' and 'welfare.' 42 U.S.C. § 7521(a)(1), a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. See Energy Policy and Conservation Act § 2(5), 89 Stat. 874, 42 U.S.C. § 6201(5). The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.").

113. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295 (D. Vt. 2007); *Central Valley Chrysler Jeep*, Inc. *v. Goldstone*, No. 04-6663, 2007 Westlaw 4372878 (E.D. Cal. Dec. 11, 2007).

114. Energy Policy and Conservation Act of 1975; Energy Independence and Security Act of 2007.

115. CAA.

116. AB 1493, codified at California Health and Safety Code § 43018.5; see also California Air Resources Board, Comparison of Greenhouse Gas Reductions for the United States and Canada Under U.S. CAFÉ Standards and California Air Resources Board Greenhouse Gas Regulations (February 25, 2008), *available at* http://www.arb.ca.gov/cc/ccms/reports/pavleycafe_reportfeb25_08.pdf.

117. CARB Comparison, *supra* note 104.

118. AB 1493 § 1961.1(d)-(e).

119. *Compare* 49 U.S.C. § 32901(a) *with* CAA § 202(a) *and* California Health and Safety Code § 43018.5.

120. Letter, *supra* note 42.

121. *Securities and Exchange Commission v. Chenery Corp*. (*Chenery II*), 332 U.S. 194, 214 (1943)(Jackson, J., dissenting).

122. Letter, *supra* note 42, at 2.

123. Notice of Decision, *supra* note 41, at 12157.

124. Letter, *supra* note 42, at 2 ("[I] have instructed my staff to draft appropriate documents setting forth the rationale for this denial in further detail.").

125. The Notice of Decision does state that EPCA fuel economy standards played no part in the Administrator's decision but, curiously, does not mention the EISA fuel economy standards praised in the Letter. ("[M]y decision is based solely on the statutory criteria in section 209(b) of the Act and this decision does not attempt to interpret or apply EPCA or any other statutory provision.").

126. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) ("[M]ere[] 'post hoc' rationalizations . . . have traditionally been found to be an inadequate basis for review." (internal citations omitted)); *Securities and Exchange Commission v. Chenery Corp*. (*Chenery I*), 318 U.S. 80, 87, 63 S.Ct. 454, 459 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

127. *Overton Park*, 401 U.S. 402, 416 ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one."); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. . . . "W]e must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.").

128. *Overton Park*, 401 U.S. 402, 416 ("The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. . . . [T]here must be a strong showing of bad faith or improper behavior before such inquiry may be made."); *Chenery I*, 318 U.S. 80, 94 ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. 'The administrative process will best be vindicated by clarity in its exercise.'"(citation omitted)).

129. *Chenery I*, 318 U.S. 80 ("[I]f the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.").

130. *Chenery I*, 318 U.S. 80 ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

131. *See Overton Park*, 401 U.S. 402; *Chenery I*, 318 U.S. 80.

132. *Overton Park*, 401 U.S. 402.

133. *Chenery I*, 318 U.S. 80.

134. *See Chenery I*, 318 U.S. 80; *Overton Park*, 401 U.S. 402. *See also SEC v. Chenery Corp*. (*Chenery II*), 332 U.S. 194 (1943). In fact, the Notice of Decision would likely serve as the *Chenery II* reasoned justification. So, the efficacy of challenging the Administrator's decision based on the Letter is limited. The combined inconsistency presents a more likely meritorious arbitrary-and-capricious argument.

135. *See Massachusetts v. EPA*, 127 S.Ct. 1438; *Chenery I*, 318 U.S. 80.

136. *Chevron*, 467 U.S. 837; *Massachusetts v. EPA*, 127 S.Ct. 1438.

137. *Massachusetts v. EPA*, 127 S.Ct. 1438 at section VII.

138. *Id*.

139. *See Chenery I*, 318 U.S. 80; *compare* Letter *with Massachusetts v. EPA*, 127 S.Ct. 1438 at section VII.

140. *Massachusetts v. EPA*, 127 S.Ct. 1438 at section VII.

141. *Compare* Notice of Decision *with Massachusetts v. EPA*, 127 S.Ct. 1438 at section VII.

142. *Massachusetts v. EPA*, 127 S.Ct. 1438 at section VII.

143. *Id*.

144. Notice of Decision, *supra* note 41, at 12161. While EPA relied on legislative history contemporaneous to the enactment of the original waiver provision, it did not explore more persuasive legislative history from the 1977 CAA Amendments that led to the current text of section 209(b)(1)(B). That legislative history was cited by Administrator Ruckelshaus and aided his prior interpretation of "such State standards" to refer to California's emissions program.

145. WILLIAM ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 218-22 (1994).

146. *Compare* Notice of Decision *with Massachusetts v. EPA*, 127 S.Ct. 1438.

147. Notice of Decision, *supra* note 41, at 12161 ("Congress did not justify this provision based on pollution problems of a more national or global nature in justifying this provision.").

148. *Massachusetts v. EPA*, 127 S.Ct. 1438.

149. *Id*. at section VII.

150. Notice of Decision, *supra* note 41, at 12157.

151. *Id*.

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Saving the Earth . . . for Whom? Asthma and the Political Influences Suffocating America's Most Vulnerable Populations

By Lauren C. Stabile

I. Introduction

The end of the 20th century was marked by several political initiatives that brought pediatric environmental health to the national forefront.[1] Such activity seemed to reflect a "new era of environmental protection"[2]—a period set not only on recognizing those with unique susceptibility to environmental hazards and identifying the substances that plague these populations, but also on ensuring that such vulnerability was met with increased protection.[3] The federal government implemented this progressive agenda primarily through the establishment of policies that required administrative agencies to evaluate the potential consequences of their rules on the health and safety of America's most at-risk individuals.[4] Of the governmental actions taken during this era, mandates advocating children's environmental health looked as if they would support momentous change, as the nation moved toward the new millennium.

In retrospect, however, this period of environmental health sensitivity appears to have been merely a short-lived, political phase. Now, for example, barely a decade since many of the comprehensive national initiatives advocating pediatric environmental health began, it seems that the policies set forth during that time are but a distant memory. The national stage has turned its attention to "bigger" issues—including global warming, sustainable energy and the development of "green" technology.[5] Although these current areas of focus are by no means insignificant or undeserving of the recognition they are receiving, it is unfortunate that such issues have come to overshadow the distinctive environmental interests that were prioritized in the not-too-distant past.[6] Even more troubling is that the promotion of some of these contemporary goals has yielded results that will potentially serve to the immediate detriment of those, like young children and other marginal groups, rather than promote their safekeeping.[7] This disconcerting consequence of the present federal agenda is showcased by the current rulemakings that effectively serve to phase out a medication upon which many of these susceptible groups rely.

This article will explore asthma, the special groups it afflicts, and the various factors that influence the development and control of this disease, including environmental, political and social justice concerns. Specifically, this article will address the current federal rules regarding the elimination of CFC-based albuterol inhalers and their embodiment of the current national concerns that do not reflect the environmental health sensitivities of preceding decades. Following this introduction, section two of this article will present a background to asthma, its treatment, and the past and present governmental actions affecting this disease. By way of setting up a background for comparison, section three will provide an overview of prior environmental health initiatives that have been developed at the national level, focusing principally on the pediatric environmental health movement occurring throughout the United States in the late 20th century. This section, however, is merely intended to give the reader a general foundation of the history of federal pediatric health actions and is not meant to serve as a comprehensive review. Section four will then examine the impact of earlier governmental initiatives in light of the recent federal regulation of CFC-based inhalers and address other particular environmental justice consequences that the present promulgations may have. Above all, this section will explore the possibility that much of the previous national activity concerning environmental health was merely transient and that children and other vulnerable groups are slowly fading from the vanguard of national politics. Section four will focus on the current CFC-based inhaler rulemakings' failure to consider disproportionately affected populations, despite the tremendous impact that such action will have on these groups. Section five will suggest potential recommendations for resolving the issues that federal regulatory agencies like the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA) face when taking actions such as those regarding CFC-inhalers. In particular, this section will address the difficulties in attempting to simultaneously protect the public health and environment, while not violating one of these seemingly aligned goals in this process. Section five also will propose that new policies and legislation be enacted to bolster the comprehensive environmental health initiatives of the past. The final section of this article will serve as a summation of the major ideas presented in this comment and offer any remaining, closing remarks. Among other things, this conclusion will emphasize the need for the federal government to carefully consider the groups most affected by its regulatory enactments—particularly in situations with environmental justice implications, where the public health costs seem to greatly outweigh the environmental gains.

II. Background

Asthma is one of the many adverse health outcomes associated with air pollution in the United States.[8] Over the past several decades, the federal government has

responded to this epidemic through various efforts to diminish the causal factors associated with this disorder, such as ozone and particulate air pollution, and has sought to promote the betterment of environmental health on a global scale.[9] Yet, the FDA, in conjunction with the EPA, has recently taken action that, although aimed at protecting the ozone layer, serves to simultaneously eliminate some of the very medications upon which many asthmatics' lives depend. Prior to examining the instant federal actions affecting this disease, however, it is first necessary to understand the nature of asthma and the past governmental decisions that have influenced the treatment of this disorder.

A. Asthma and Its Impact on Particularly Vulnerable Sectors of Society

Asthma is a chronic respiratory disease characterized by the inflammation of the bronchial airways.[10] This inflammation causes the airways to become increasingly sensitive and prone to reacting strongly to allergens or other irritants.[11] When the airways are exposed to these stimuli, they contract, impacting an individual's normal lung function through obstruction of the airways, chest tightness, coughing, wheezing, and the potentially fatal consequences of severe shortness of breath and low blood oxygen.[12] Although such problems usually happen in "episodes," or attacks, the inflammation underlying asthma is continuous.[13]

Asthma is on the rise in the United States and in other industrialized nations, and is particularly common in children, the largest subgroup of the population susceptible to the effects of air pollution.[14] In fact, asthma has been found to be the most common chronic disorder of childhood.[15] This is due primarily to children's greater respiratory rates than adults, their developing physiology, and engagement in vigorous daily activities.[16] During the 1980s, the frequency of childhood asthma increased nearly 40%.[17] Childhood asthma's prevalence more than doubled from 1980 to the mid-1990s and remains at historically high levels, though the factors driving this disease are still not fully understood.[18]

Asthma also plagues other susceptible groups of individuals in the United States. In particular, African Americans, Hispanics, and people living in urban areas appear to be at greatest risk for asthma due to higher rates of air pollution in these regions.[19] While dirty air is a threat to all Americans, communities of color often suffer disproportionately from air pollution.[20] This is also true of low-income communities.[21] Such communities have historically been used as "dumping grounds" for the "toxic by-products of industrial society."[22] In addition, children in low-income families are less likely to receive sufficient health care.[23]

Compounding the notion that children of color typically reside in the worst areas of air pollution is the fact that black and Hispanic children are potentially more susceptible to air pollution due to their increased rates of asthma.[24] African-American and Hispanic children have a higher incidence of asthma than white children.[25] Black children are more likely to have asthma than white children.[26] Moreover, black children aged five to 14 years are four times more likely than whites to die from asthma, and African-Americans under the age of 24 are almost three-and-a-half times more likely to be hospitalized for asthma.[27] Children of Hispanic (mainly Puerto Rican) mothers have a rate of asthma two-and-a-half times higher than whites and more than one-and-a-half times higher than blacks.[28] Accordingly, these populations are likely to be the major users of relatively inexpensive, life-saving devices like albuterol CFC-based inhalers, and hence, will be disproportionately affected by the elimination of this important medication.

Asthma has disabling effects on both the children it hinders and their families.[29] The disease not only limits one's everyday activities but also yields potentially complex and costly repercussions. Such consequences include direct medical costs, such as treatment expenses, emergency department visits and hospitalization. In addition, asthma has various indirect costs, such as missed days at school and work.[30] This absenteeism alone can have devastating effects on the economic, social and emotional well-being of asthmatics and their families, and is a significant consequence that should not be taken lightly, particularly when considering the need for adequate treatment for those affected by this potentially debilitating disease.

B. Asthma Treatment

Currently, there is no cure for asthma.[31] However, it can be controlled through various means, such as medical treatment and management of environmental triggers.[32] Within the last few years, mortality and hospitalizations due to asthma have decreased and asthma prevalence has stabilized, most likely due to better methods of disease management, such as increased use of inhaled steroids, such as those discussed below.[33] Nevertheless, the contemporary actions taken by the federal government may hinder such progress.

1. Inhalers and Albuterol

Inhalers are portable, hand-held mechanisms through which asthma medication is released.[34] Traditionally, about 90% of the 50 million inhalers sold annually used chlorofluorocarbons (CFCs) as propellants to deliver a misty dose of medicine into a patient's lungs.[35] CFCs are organic compounds that contain carbon, chlorine and fluorine atoms and have served a variety of commercial purposes throughout the 20th century.[36] Most significant, for purposes of this comment, CFCs have been used in various medical products, including metered-dose inhalers (MDIs), as propellants to carry medication to the lungs or elsewhere in a person's body.[37] MDIs are small, pressurized aerosol devices that, as their name suggests,

deliver a measured dose of a medication into an individual's mouth for inhalation into the lungs.[38] So, when an individual makes use of an inhaler, he or she incidentally breathes in CFCs along with the inhaler's corresponding medication. Despite this seeming health risk, a majority of the CFCs inhaled into the lungs from MDIs are actually immediately exhaled into the environment, leaving only minimal amounts of CFCs in the body of the user.[39] The remaining CFCs are later excreted without being broken down.[40] Thus, through this process, essentially all of the CFCs released from MDIs end up in the atmosphere. Because CFCs are a form of greenhouse gas, their release harms the stratospheric ozone layer, [41] a region that begins about 10 to 16 kilometers above the Earth's surface and extends approximately 50 kilometers high.[42] Environmental damage occurs because the breakdown of CFC molecules, through a short series of chemical reactions, results in the release of atomic chlorine.[43] One chlorine atom, in turn, can destroy more than 100,000 ozone molecules, yielding a devastating net effect— destroying ozone faster than it is naturally created, and exposing individuals to increased levels of ultraviolet (UV) radiation.[44] The amplified UV radiation reaching the Earth's surface has been found to lead to skin cancer, cataracts, suppressed immune systems, and other medical problems.[45] Thus, CFC-based MDIs, while not presenting a direct threat to asthmatics' well-being, may ultimately contribute to these potential health conditions.

Albuterol (also known as salbutamol in other places throughout the world)[46] is one of the more prevalent asthma medications currently on the market. First approved for use in the United States in 1981, albuterol is a bronchodilator that had commonly been administered through CFC-based inhalers.[47] Albuterol is capable of relieving sudden or severe asthma attacks by rapidly opening restricted airways.[48] The quick relief offered by albuterol MDIs has caused these inhalers to be used most often as "rescue" devices to save patients experiencing bronchospasms,[49] the constricting of muscles around the airways.[50]

Prior to recent federal activity, albuterol CFC-MDIs had been among the most widely used drug products for the treatment of asthma in the United States.[51] The FDA has even acknowledged the expansiveness of the albuterol MDI market, stating that

> Albuterol is the preferred, and most commonly prescribed, short-acting relief medication for asthma and is also important in the treatment of COPD [chronic obstructive pulmonary disease]. For reasons of cost, convenience, and effectiveness, MDIs are preferred, and most commonly prescribed, route of administration of albuterol.[52]

This accepted usage is further represented by FDA's estimate that in the first two quarters of 2004 alone, U.S. consumers bought approximately 23 million generic albuterol MDIs through various retail channels.[53] Nevertheless, despite the popularity of albuterol CFC-MDIs, their presence in the lives of many of America's asthmatics is quickly fading.

C. History of Governmental Activity Leading Up to the Current Phaseout

The federal government's present move toward phasing out CFC-containing medical products is part of a worldwide reduction in CFC production under the international agreement, "Montreal Protocol on Substances that Deplete the Ozone Layer" ("Montreal Protocol"), originally signed in 1987 and amended in 1990, 1992 and 1997.[54] Pursuant to this treaty, the United States must phase out the production and importation of ozone-depleting substances (ODSs), including CFCs, according to the timetables agreed to by the participating countries.[55] In fulfillment of this goal, the United States is currently phasing out medical products that were formerly exempt under the agreement, namely those CFC-based devices that were previously determined to be medically "essential."

One of the most significant essential uses of CFCs under the Montreal Protocol has been their use in MDIs for the treatment of asthma and COPD. The determination as to whether the use of CFCs in MDIs is "essential," qualifying it for this exemption, is based primarily on whether "it is necessary for the health, safety, or if they are critical for the functioning of society (encompassing cultural and intellectual aspects)"[56] and if "there are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health."[57] Prior to April 2005, albuterol MDIs were specifically exempt from the CFC ban under this qualification.

Over the past few years, however, the phasing out of the use of CFCs in MDIs for the treatment of asthma and COPD has been an issue of primary importance to the Parties of the Montreal Protocol.[58] In 2003, in one of its many decisions dealing with this transition, the Parties decided that no exemption for essential uses of CFCs would be authorized for Parties that are "developed" countries, after 2005.[59] However, several criteria must be met before a formerly "essential" product is no longer deemed to require the necessary exemption.[60] These factors include: (1) that there are sufficient non-ODS alternatives available with the same indications and approximate level of convenience; (2) there is adequate post-marketing data for the alternative products; (3) supplies are adequate to meet the demand, and (4) patients who require the product are adequately served.[61]

In April 2005, in its attempt to further implement the goals of the Montreal Protocol, the FDA released a final rule that significantly amended its regulation on the use of ODSs in self-pressurized containers.[62] This rule with-

drew the essential-use designation for albuterol used in oral pressurized MDIs and essentially prohibited this product from being legally produced and used in the United States under the Clean Air Act (CAA).[63] The FDA based its decision upon the finding that "satisfactory alternatives" exist, and stated that by December 31, 2008, the use of CFCs in albuterol MDIs would no longer be essential.[64]

Similarly, in June 2007, when the EPA published its final rule, *Protection of Stratospheric Ozone: Allocation of Essential Use Allowances for Calendar Year 2007*, it greatly curtailed the allotment of CFCs to be used in MDIs.[65] The EPA explicitly acknowledged the objective of this action in the supplementary information it provided with the promulgation of this rule. In referring to the decreased allotment for ODSs, the EPA stated that "These reductions demonstrate the U.S. commitment to decreasing the amount of CFCs allocated for essential uses. Furthermore, the . . . [2007 allotment] . . . does not include an allocation for the manufacture of CFC-albuterol MDIs, indicating that the transition to non-CFC alternatives for this application is well underway."[66] Accordingly, this action, in conjunction with FDA's enactment, has laid the foundation for the elimination of CFC-inhalers currently used by a majority of asthmatics in the United States.

The fact that these two regulatory rules seemingly operate in tandem, however, is no coincidence. Each year, the EPA is responsible for distributing essential use allowances for the production or import of ODSs to be used in the United States.[67] Yet, when making this consideration in the context of the production of medical devices, the EPA is required to seek contribution from the FDA and, as a result, is greatly influenced by the FDA in its decision-making process.[68] This relationship is further illustrated in noting that, in prior years, although the EPA prohibited the use of CFCs in its regulations—both by forbidding the production and import of CFCs and through banning the sale or distribution of products containing CFCs[69]—it also contained an exception for essential uses, such as in albuterol MDIs. The exemption, however, was only for those MDIs that are not only "intended for the treatment of asthma or COPD," but also "essential" under the Montreal Protocol.[70] In addition, if the MDI is not for sale in the United States, it must be approved by the FDA and listed as "essential" in the FDA's regulations.[71] Under these terms, by the end of 2008 when the FDA's rule becomes enforceable, the federal government will have effectively prevented albuterol CFC-MDIs from being produced, sold or marketed in the United States.

D. The Cost of "Progress" and the Problem with Eliminating CFC Inhalers at This Juncture

The current rules serving to phase out the use of CFC-based medical devices is presumably well-intended. Such regulations are undoubtedly meant to "encourage the development of ozone-friendly alternatives to medical products containing CFCs,"[72] and better protect the Earth from irreparable damage. The aspiration behind reducing the usage of ODSs that is perpetuating the drive to eliminate CFC-based medications is thus, in many ways, vital to safeguarding the environment.[73] Yet, due to the pervasiveness of asthma among particular sectors of society, the federal government's recent regulations are certain to have a disparate impact on those currently living in the United States. In addition, the alternatives the government offers to mitigate the adverse consequences arising from the elimination of this significant medication are arguably neither "satisfactory"[74] nor viable, despite the government's contrary contentions. Hence, while the overall aspiration behind this governmental activity is imperative, the effectiveness of this particular strategy—eliminating an important drug from populations that currently depend on its availability—is fairly questionable. For that reason, it is important to critically assess the costs and benefits of the implementation of the current rules enacted by the federal government.

1. Costs

The replacement of one medication with another raises questions regarding the accessibility, effectiveness and possible side effects of the new product. During the rulemaking process, the federal agencies received several comments regarding these topics. Yet, the greatest worry that was voiced regarding the elimination of albuterol CFC-MDIs was that the inhalers that are going to serve as their replacements are more expensive than their predecessors. The costliness of the new products can be tremendously detrimental, particularly in light of the fact that most asthmatics that have formerly depended on albuterol CFC-MDIs are also those who are most likely to be unable to afford the alternatives.

The alternatives—brand-name inhalers that contain hydrofluoroalkane (HFA) instead of CFCs—cost about three times as much as the generics that now dominate the market.[75] FDA-approved PROVENTIL HFA, an albuterol sulfate MDI, was introduced into the U.S. market in late 1996.[76] VENTOLIN HFA, another albuterol sulfate MDI, was approved on April 19, 2001 and subsequently introduced into the U.S. market in February 2002.[77] In addition, IVAX has also developed an albuterol HFA MDI.[78] All of these products use HFA as a replacement for ODSs.[79] As a result, these medications, unlike CFC-based MDIs, do not damage the stratospheric ozone.[80] However, because these albuterol HFA MDIs are patented, generics are unable to be marketed until such patents expire.[81] Consequently, a result of this rulemaking will be the removal of generic albuterol MDIs from the market for an extended period of time.[82] This notion was frequently addressed by commentators when the FDA's rule was initially proposed. Individuals had expressed concern that the economic burden resulting from this transition would fall most heavily on those "least able to pay the price, with a disproportionate effect on minorities, inner-city children, elderly patients on fixed incomes, and the rural

poor."[83] Other comments, such as those from patients and health care professionals, expressed fear that the elimination of the lower-priced generic albuterol MDIs would lead to the discontinuance of the use of such medications, resulting in increased hospitalizations, loss of quality of life, and other detrimental effects resulting from treatment neglect.[84]

In response to public comments, such as those mentioned above, the FDA did acknowledge the difference in cost resulting from the changeover. The FDA noted:

> The price of albuterol MDIs will rise because this rule, by ending the essential-use designation for albuterol MDIs, will effectively remove less expensive generic versions of albuterol MDIs from the market. Consumers and third-party payers, including Federal and State Governments, will spend more for albuterol MDIs as a result of the price increase.[85]

The FDA estimated that the retail cash price per MDI would increase by $27 and the average yearly cost to uninsured patients would rise $95.[86] The FDA has also stated, that, "[w]hile higher drug prices are undesirable, we do not believe that asthma and COPD patients will be forced to stop using albuterol MDIs because of price increases."[87] In support of its contention, the FDA refers to several programs, designed by pharmaceutical companies and manufacturers of the new medications, aimed at assisting lower-income patients during the transitional period of the phaseout. These programs allow certain eligible Medicare patients to purchase the new drugs at reduced prices and provide physicians with samples to distribute to their patients, along with coupons to reduce the higher costs of the HFA MDIs.[88] In addressing the financial considerations raised during the rulemaking process, the FDA also urged that patients can minimize the impact of the elimination of generic albuterol MDIs by modifying their behavior in ways that include increasing their use of other types of asthma medications.[89]

Despite the government's response and corresponding recommendations, the elevated likelihood that such a price increase will affect the many asthmatics currently dependent on CFC-based albuterol MDIs is undeniable. Of greatest concern is that the "solutions" the FDA offers—particularly the patient assistance programs outlined for the transitional period—are only temporary and cannot adequately rectify a perpetual cost problem. In fact, such strategies, in reality, may provide no relief at all. As certain commentators had noted during the rulemaking process, it is highly unlikely that such programs will be expansive enough to assist the massive numbers of uninsured individuals who are likely to be unable to afford the new medications.[90] In addition, actions such as providing free samples through physicians may do little to alleviate the difficulties encountered by lower-income patients in attempting to access the more costly HFA albuterol MDIs because such populations are likely to receive medical care in emergency departments of hospitals and clinics rather than in doctors' offices.[91]

The aforementioned scenarios support the notion that the potential realities arising from the conversion raise significant environmental justice and pediatric health concerns, particularly in light of the large population of asthmatic children in low-income communities who currently use CFC-inhalers, such as albuterol MDIs. Thus, even if the economic impact is slight, as the government implies, such action must be weighed against the prospective benefits of this regulation.

2. Benefits

Admittedly, it is difficult to fully quantify the public health gains and environmental benefits resulting from this phaseout. Yet, the government's response to public comments, acknowledging the minuscule environmental benefits of the phaseout, is quite unsatisfying, considering the quantifiable costs of this action. For instance, in response to allegations that the amount of ODSs released from albuterol CFC-based MDIs is insignificant, and eliminating their use would not provide any environmental benefit, the FDA has responded:

> Congress did not assign us the task of determining what amount of environmental benefit would result from the removal of CFC-containing medical devices, diagnostic products, drugs, and drug delivery systems from the market. Congress did instruct us to determine whether such products are essential. This rulemaking fulfills that obligation.[92]

From abrupt answers like this, followed the FDA's conclusion that "the action will not have a significant adverse impact on the human environment, and that an environmental impact statement is not required."[93]

Despite such elusive, conclusory statements, the FDA has, in fact, estimated that the final regulation will reduce CFC use by 1,200 metric tons per year after the end of 2008.[94] However, as a share of total global CFC emissions, the reduction associated with the elimination of albuterol MDIs represents only a small fraction of 1%.[95] The FDA goes so far as to admit that "the direct benefits of this regulation are small relative to the overall benefits of the Montreal Protocol" but again justifies its action with the contention that the "reduced exposure to UV-B radiation that will result from these reduced emissions will help protect in future skin cancers and cataracts associated with these reduced emissions."[96] However, the FDA then proceeds to state:

> While the agency believes that the benefits of this regulation justify its costs, we cannot estimate quantitatively the

> public health effects of the phaseout. The decreased use of albuterol MDIs may adversely affect some patients, but we lack the ability to characterize such effects quantitatively. We also are unable to estimate quantitatively the reductions in skin cancers, cataracts, and environmental harm that may result from the reduction in CFC emissions. . . .[97]

Answers such as this only provoke further questions and concerns. For, although the economic consequences of these rulemakings may have been justified by compensating environmental gains, this, unfortunately, is not the case.

The only certainty resulting from this switch seems to be that a majority of America's asthmatics will have to bear the cost of a change that *may* lead to environmental and health benefits, decades in the future. This notion has spurred much backlash, particularly by those in the medical community, beginning from the time of the proposal of such regulation. Robert Goldberg, senior research fellow at George Washington University's Center for Neuroscience, Medical Progress and Society, has insisted that the government's present actions are just "another cynical exploitation of kids for the sake of environmental correctness."[98] Others have presented the argument that the regulations will raise treatment costs, lessen competition among drug manufacturers and leave patients to suffer without viable alternatives.[99] Many have thus maintained that these consequences are not worth the prospective environmental gain. As Sallie Baliunas, an astrophysicist at Harvard University and the George Marshall Institute, has said, "[T]he amount of CFCs in inhalers is minute, so banning them won't make any improvement, and not having them will have a detrimental effect on some children."[100] In spite of these concerns, the proposal that these commentators once feared has become a reality. Moreover, with the December 2008 deadline, it seems that their voices, along with so many others expressing concern for the public health ramifications resulting from this action, have been suffocated by the voices of others, with seemingly more clout, who are promoting an alternative agenda.

It must be said at this point that this comment is not meant to imply that countries like the United States should cease to continue advancing the goals of the Montreal Protocol or that further elimination of ODSs is an unworthy cause.[101] It is, however, intended to urge that the asthmatics who are impacted by the present governmental actions are entitled to more concrete assurance that their immediate loss will be compensated by commensurate social and environmental gains. And, if nothing else, these vulnerable populations should be left with some guarantee that their needs are being considered in the federal government's decision-making processes. This has not appeared to be the reality, at least in light of the passage of the instant regulations.

Without such deliberation, one begins to wonder how such a seemingly apathetic position regarding the potentially devastating impact of an action with ostensibly minimal benefits can be taken by the federal government. The present governmental contentions are particularly alarming after contemplation of the fact that it was merely a few years ago when the government was vastly concerned with the practical effects of its decisions on its citizens. Ironically, a little more than a decade ago, the federal government even went so far as to establish safeguards meant to insure the consideration of the consequences of governmental action on some of the country's most vulnerable groups—children and minority communities—both composed of a substantial number of asthmatic members. To reconcile this disconnect, and better assess the current trajectory of the federal government, it is helpful to look at the nation's approach in past years, notably its environmental health initiatives regarding children.

III. Contemplating Past Federal Regulatory Concerns Through a Look at Prior Pediatric Environmental Health Initiatives

The first identified case of cancer in young people caused by environmental hazards dates back to London physician Percival Pott's finding of the correlation between scrotal cancer and young chimney sweeps in the late 18th century.[102] Despite this early discovery, the U.S. government failed to formally address pediatric environmental health until more than two centuries later—with the enactment of the Food Quality Protection Act[103] and the Safe Drinking Water Amendments[104] in 1996.[105] The following section serves as a general survey of the primary pediatric environmental health initiatives established by the U.S. government in the 1990s.

A. Establishing a National Agenda to Protect Children's Environmental Health

In 1996, the EPA published a report that set forth a new national agenda to protect children from health risks, and outlined how the EPA could address such threats.[106] The report outlined particular findings regarding children's special vulnerabilities and exposure to environmental threats, including that "[a]sthma deaths among children and young people increased by 118% between 1980 and 1993 . . . [and] asthma is now the leading cause of hospital admissions for children."[107] In addition, the report announced a National Agenda to be undertaken by the EPA, other government agencies, health professionals, parents, teachers, and other groups.[108] Among the goals outlined in the Agenda is the notion that:

> In setting public health and environmental standards, EPA will take into account the unique vulnerabilities of children, to ensure that all standards protect children.

> This new policy will apply to standards we set in the future—but in addition, we will review our most significant current standards and ensure that they protect children.[109]

The report concluded by stating that all the actions sought to be taken under the National Agenda will "help to ensure for our children a healthy environment and a healthy future."[110]

Several tangible actions were listed in the report to facilitate the accomplishment of these goals. The plan included "expanding research on children's susceptibility and exposure to environmental pollutants, addressing children's total exposure to toxic chemicals . . . and expanding its right-to-know and education efforts about children's environmental threats."[111] To facilitate the implementation of the National Agenda, the EPA also established the Office of Children's Health Protection (OCHP).[112]

B. Ordering Justice—The Protection of Children, Minorities and Low-Income Populations from Environmental Health and Safety Risks

Less than a year after the establishment of EPA's National Agenda, President Clinton's enactment of Executive Order No. 13,045[113] continued the trend of bringing children's health to the national forefront. Executive Order No. 13,045, *Protection of Children from Environmental Health Risks and Safety Risks*, applies to any rule that (1) is determined to be "economically significant" as defined under Executive Order 12,866,[114] and (2) concerns an "environmental health and safety risk"[115] that EPA has reason to believe may have a disproportionate effect on children.[116] If a regulatory action is found to have met both criteria, the agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.[117]

This order appeared to echo that of President Clinton's former Executive Order regarding the need for federal agencies to be cognizant of the environmental justice ramifications flowing from their actions. Executive Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,[118] commands that each federal agency make:

> Achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.[119]

Thus, when considered simultaneously, these Executive Orders alone seem to reflect the start of active policy formation that could serve to rectify the environmental injustices experienced by vulnerable populations in previous decades.

Notwithstanding the implementation of environmental health objectives, through actions like those formerly mentioned, an enduring governmental sensitivity to the needs of those disproportionably affected by environmental degradation would not be realized. Despite the surge of a national movement at the end of the 20th century, spurring action by political leaders, the children's pediatric environmental health movement seems to have dissipated in recent years, along with the government's general concern for other at-risk sectors of society. In fact, with the federal government's recent enactment of the previously discussed CFC-based inhaler regulations, it looks as though the progressive initiatives established a little over a decade ago have failed to have a lasting effect.

IV. Analysis of Past Governmental Actions vis-à-vis Current Federal Regulation of CFC-Inhalers

In considering the current federal regulation of CFC-based inhalers, there seems to be a vast distinction between the approach championed by the government in former years and the path now being taken. Although this is likely just a natural result of the political process, one would think that past governmental enactments would have some impact on current activity. For example, based on prevalence of asthma in children, it would seem that the current regulations phasing out albuterol CFC inhalers would be governed by Executive Order 13,045. Yet, unfortunately, upon closer assessment, one finds that this order fails to impose an enforceable duty upon government agencies.[120] Section 7-701 announces the discretionary nature of this promulgation, stating:

> This order is intended only for internal management of the executive branch. This order is not intended, and should not be construed to create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or its employees. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance with this order by the United States, its agencies, its officers, or any other person.[121]

Furthermore, and critically, this order has been interpreted by the EPA as applying only to those regulatory actions that are characterized by health or safety risks

of such a nature that they have the potential to be influenced by the analysis required under Section 5-501[122] of the order.[123] Here, because the instant regulation serves to implement "the phaseout schedule and exemptions established by Congress in Title VI of the Clean Air Act," the EPA has explicitly stated that its final rule, *Protection of Stratospheric Ozone: Allocation of Essential Use Allowances for Calendar Year 2007*, is not subject to Executive Order 13,045.[124] As explained earlier, this regulation specifically requires "that the FDA evaluate whether a use of an ozone-depleting substance in a drug product is, or remains, an essential use."[125] The FDA is obligated to follow this specific congressional mandate, instead of the more general policies it may typically consider during the legislative process.[126]

One may similarly urge the applicability of Executive Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,[127] to the current regulations, after taking into account their inconsistent impact on particular communities. However, despite the powerful language of this order, it too, in Section 6-609, states that this order is only intended to improve the internal management of the executive branch and does *not* create any substantive or procedural rights of enforcement.[128] Thus, the same impediments to using this order as a means of enforcement in addressing the enactment of particular regulations, such as those now governing the elimination of albuterol CFC-inhalers, exist here, as in Executive Order 13,045.

Thus, although these Executive Orders held great promise, they are rendered virtually useless by the clauses limiting their enforcement power. This is extremely unfortunate considering their seeming relevance to the albuterol regulations. If enforceable in this situation, these mandates would oblige the government to carefully consider the costs and benefits of its actions and provide more comprehensive answers for those who are affected by such changes.

V. Recommendations

It is quite simple to express disapproval of the federal government's current actions affecting the treatment of asthma in the United States and condemn it for its failure to keep efforts like pediatric environmental health at the national forefront of American politics. However, it is particularly unfair to criticize without offering more viable solutions to the problems at hand. Yet, as discussed, it is difficult to figure out how to balance competing needs, how to bring the different branches of government together and how to formulate solutions that will justly serve the interests of many diverse populations. Any solution is likely to yield difficult trade-offs. However, there are actions that can be taken to remedy the seemingly obvious obstructions to establishing necessary change, which can, presumably, give way to more reasonable results.

The current regulation of CFC-inhalers conflicts with the initiatives implemented by Executive Orders 13,045 and 12,898. As mentioned earlier, these orders would require agency consideration of disproportionate impacts to children from environmental health and safety risks and promote environmental justice by recognizing adverse health effects of agency activities on minority populations and low-income communities in the United States. However, because there are no substantive or procedural rights conferred through these orders, they remain practically ineffective in combating the ills of these present rules. Accordingly, legislation is needed to mandate the enforcement of these Executive Orders.

Fortunately, such efforts have already begun. For example, Rep. Hilda Solis [D-CA] introduced HR 1103: Environmental Justice Act of 2007[129] on February 15, 2007, which authorizes and directs the President to execute, administer, and enforce as a matter of federal law the provisions of Executive Order 12,898.[130] This law would not only more clearly define essential terms such as "environmental justice" and "fair treatment," but also would put an end to the qualification stated in Section 6-609, prohibiting any enforceable right under the Order, and thus require the Administrator of the EPA to adhere to Executive Order No. 12,898.[131] The Environmental Justice Act and similar legislation would require the federal government to consider the particular groups that will be most affected by its decisions, such as disproportionately impacted minority populations. In return, these affected populations will be able to hold the government accountable for its actions.

In addition to legislation such as the Environmental Justice Act of 2007, other laws effectuating the initiatives of the pediatric environmental movement of the 1990s are necessary. Such legislation would not only mandate that agencies, such as the FDA and EPA, take into account children's particular sensitivities, but also create an affirmative duty on such agencies to factor children into environmental decision-making and the creation of regulatory standards. It seems that without legislation that has the "legal teeth"[132] necessary to enforce the ideals of prior actions, such as Executive Order, No. 13,045, these former initiatives will continue to fall short of serving to promote pediatric environmental health efforts.

Beyond new legislation, informed policymaking is crucial to the increased betterment of environmental health for particularly sensitive populations. Effective policy depends upon a further development of the current knowledge and understanding of the many factors contributing to environmental health crises.[133] To accomplish this, more research is needed that identifies "patterns of environmental diseases in children, assesses children's exposures to environmental toxicants, determines developmental periods of vulnerability, and quantifies dose-response relationships."[134] A greater understanding of such problems will hopefully lead to improved solu-

tions, increasing the number of environmental and human health benefits that can be enjoyed by both present and future populations.

Equally vital to the establishment of effective policy creation is a comprehensive redefinition of environmental policy to include social justice assessments in environmental decision-making. This would need to be supported by a reinvigorated national commitment to resolving societal inequities through an extensive action-based agenda.[135] Such reform may be realized through the cooperation and coordination of multiple sectors of society and departments of national, state and local government.[136] Or perhaps, more effectively, regulatory change can be accomplished through the creation of a centralized, politically insulated group of individuals responsible for considering the many factors implicated in the rulemaking process.[137] Such a group may be able to diminish the vast inconsistencies existing in the history of America's regulatory agenda by dissolving the current politically driven system in which regulatory concern is generally a product of majoritarian politics, subject to the whim of heightened public concern.[138] Nevertheless, regardless of its form, a comprehensive, human-oriented system toward resolving environmental degradation is necessary. This new approach must demand policymakers to grapple with how to save the Earth for tomorrow, without leaving its current inhabitants—as in the case of the previously examined regulations—gasping for air. If nothing else, such reform is likely to be a fruitful starting place for the attainment of more equitable results in future regulatory undertakings.

VI. Conclusion

It is indisputable that Americans of the 21st century live in an environment that is, in many ways, vastly dissimilar from that of prior generations. This age of "progress," marked by "explosions in technology, information, population and material goods,"[139] is met with new challenges—particularly in the area of environmental health. In efforts to save the planet—presumably for the generations that follow—daily realities, such as the need for affordable medication to treat prevalent diseases, must be kept at the forefront of environmental efforts. National interest in pediatric environmental health must be rekindled and concern for America's most vulnerable populations must again be placed on the political trajectory.

Just over a decade ago, Carol Browner concluded her 1996 *Report on Environmental Health Risks to Children* by stating, "By protecting children, the most vulnerable among us, we protect all of us."[140] This was a poignant reminder that should not be forgotten. Instead, it must be met with action. The seeds have been planted, but will not grow if they are neglected and overshadowed by other ambitious goals. In order to guarantee that the environmental health actions of the past are not just a forgotten fragment of history, they must be supplemented by more forceful legislation. Additionally, policymakers and legislators must approach their decision-making holistically and make certain that their actions do not serve to do more immediate harm than future good. Ultimately, in looking to ensure a better environment for subsequent generations, the federal government must find a way to protect the Earth in a manner that contemplates—above all—those for whom they are saving this world.

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49. Use of Ozone-Depleting Substances; Removal of Essential-Use Designations, 70 Fed. Reg. 17,168 (Apr. 4, 2005) (to be codified at 21 C.F.R. pt. 2).
50. *Id.*
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id.*; HIRSCHMAN, *supra* note 35; EPA, Human Health Benefits of Stratospheric Ozone Protection, April 24, 2006, *available at* http://www.epa.gov/ozone/science/effects/AHEFDEC2003D3.pdf.
55. FDA, *Questions and Answers on Final Rule of Albuterol MDIs*, http://www/fda/gov/Cder/ mdi/mdifaqs.htm.
56. Use of Ozone-Depleting Substances; Removal of Essential-Use Designations, 70 Fed. Reg. 17,168, 17,170 (Apr. 4, 2005) (to be codified at 21 C.F.R. pt. 2).
57. *Id.*
58. *Id.*
59. *Id.* A Party could, however, request an essential-use allocation if it also submits an action plan. Yet, to fit into this narrow exception, the plan must specify the date by which the Party intends to cease requesting essential-use allocations of CFCs for albuterol MDIs to be sold or distributed in developed countries and must be submitted before the summer of 2005.
60. *Id*.
61. *Id*.
62. *Id.* at 17, 168.
63. *Id*.
64. *Id.*
65. Protection of Stratospheric Ozone: Allocation of Essential Use Allowances for Calendar Year 2007, 72 Fed. Reg. 32,212 (June 12, 2007) (to be codified at 40 C.F.R. pt. 82).
66. *Id.*
67. *ODS Allowances for 2007 Issued; Allowances for 2008 Proposed*, 17 No. 5 AIR POLLUTION CONSULTANT 2.44, 1-2 (2007).
68. *Id*. at 2.
69. Protection of Stratospheric Ozone: Allocation of Essential Use Allowances for Calendar Year 2007, 72 Fed. Reg. 32,212 (June 12, 2007) (to be codified at 40 C.F.R. pt. 82).
70. *Id.*
71. *Id*.
72. *Id*.
73. Use of Ozone-Depleting Substances; Removal of Essential-Use Designations, 70 Fed. Reg. 17,168 (Apr. 4, 2005) (to be codified at 21 C.F.R. pt. 2).
74. *Id*.
75. *See* Hirschman, *supra* note 35.
76. Use of Ozone-Depleting Substances; Removal of Essential-Use Designations, 70 Fed. Reg. 17,168, 17,171 (Apr. 4, 2005) (to be codified at 21 C.F.R. pt. 2).
77. *Id*.
78. *Id*.
79. *Id.*
80. *Id*.
81. *Id.*
82. *Id.* at 17,176.
83. *Id.* at 17,175.
84. *Id*.
85. *Id*. at 17,183.
86. *Id.*
87. *Id*.
88. *Id*.
89. *Id.*
90. *Id.* at 17,175.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Berlau, *supra* note 6.

99. *Id.*

100. *Id.*

101. *See* Drusilla J. Hufford and Paul Horwitz, *Fixing the Hole in the Ozone Layer: A Success in the Making*, 19 SPG NAT. RESOURCES & ENV'T 8, 9 (Spring 2005).

102. Children's Environmental Health Network (CEHN), *Chronology of Children's Environmental Health*, 2006, *available at* http://www.cehn.org/Chronology.html. CEHN is a national multi-disciplinary organization, composed of experts in medicine, research, nursing, children's issues, and policy, whose mission is to protect children from environmental health hazards and promote a healthy environment.

103. BROWN, *supra* note 1, at 199 (stating, "In August 1996, President Clinton signed into law the Food Quality Protection Act, which requires that children's special needs be taken into account in setting pesticide use standards.").

104. 1996 Amendments to the Safe Drinking Water Act, Pub. L. No. 104-182; 104th Congress ("The Administrator … shall take into consideration [in determining contaminants to be regulated], among other factors of public health concern, the effect of such contaminants upon subgroups that comprise a meaningful portion of the general population (such as infants, children, pregnant women, the elderly, individuals with a history of serious illness, or other subpopulations) that are identifiable as being at greater risk of adverse health effects due to exposure to contaminants in drinking water than the general population.").

105. *See* Jennifer C. Miner, *Do Environmental Laws Adequately Protect Children's Environmental Health? A Review of Existing Laws, Potential Legislation and Policy Considerations*, 78 OR. L. REV. 1101 (Winter 1999).

106. EPA, *EPA Establishes Children's Environmental Health Agenda*, Sept. 15, 2007, *available at* http://yosemite.epa.gov/ochp/ochpweb.nsf/content/whowe_history.htm.

107. *Id*.

108. *Id*.

109. *Id*.

110. *Id*.

111. BROWN, *supra* note 1, at 200.

112. ATSDR, *Promoting Children's Health: Progress Report of the Child Health Workgroup, Board of Scientific Counselors*, http://www.atsdr.cdc.gov/child/chw498-i.html.

113. Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 21, 1997).

114. Executive Order 12,866 defines "economically significant" as, "A rulemaking that has an annual effect on the economy of $100 million or more or would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." *Id*.

115. "Environmental health risks and safety risks" are "risks to health or to safety that are attributable to products or substances that the child is likely to come in contact with or ingest (such as the air we breathe, the food we eat, the water we drink or use for recreation, the soil we live on, and the products we use or are exposed to)." *Id*.

116. *Id*.

117. *Id*.

118. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

119. *Id*.

120. Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 21, 1997).

121. *Id*.

122. 5-501 reads, "For each covered regulatory action submitted to OMB's Office of Information and Regulatory Affairs (OIRA) for review pursuant to Executive Order 12,866, the issuing agency shall provide to OIRA the following information developed as part of the agency's decision-making process, unless prohibited by law: (a) an evaluation of the environmental health or safety effects of the planned regulation on children; and (b) an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency." *Id.* at 19,887.

123. Protection of Stratospheric Ozone: Allocation of Essential Use Allowances for Calendar Year 2007, 72 Fed. Reg. 32,212, 32,222 (June 12, 2007) (to be codified at 40 C.F.R. pt. 82).

124. *Id.*

125. Clean Air Act § 601, 42 U.S.C. § 7671 (2006).

126. Use of Ozone-Depleting Substances; Removal of Essential-Use Designations, 70 Fed. Reg. 17,168 (Apr. 4, 2005) (to be codified at 21 C.F.R. pt. 2).

127. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

128. *Id.*

129. Environmental Justice Act of 2007, H.R. 1103, 110th Cong. (2007).

130. *Id.*

131. *Id.*

132. BROWN, *supra* note 1, at 192.

133. CEHN, *An Introduction to Children's Environmental Health*, http://www.cehn.org/WhatisPEH .html.

134. *Id*.

135. David R. Williams, *Race, Health and Health Care*, 48 ST. LOUIS U. L.J. 13, 35 (2003).

136. *Id.*

137. Wendy Wager and Lynn Blais, *Regulatory Reform File: Children's Health and Environmental Exposure Risks—Information Gaps, Scientific Uncertainty, and Regulatory Reform*, 17 DUKE ENVTL. L. & POL'Y F. 249, 253 (Spring 2007).

138. *Id.*

139. *Id.*

140. Carol M. Browner, Report on Environmental Health Risks to Children National Agenda to Protect Children from Environmental Threats, Sept. 11, 1996, http://yosemite.epa.gov/opa/ admpress.nsf/a883dc3da7094f97852572a00065d7d8/a070c1862910f8cd8525701a0052e39c!OpenDocument.

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