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Message from the Chair

On June 1 of this year, Walter Mugdan turned over the Section's "gavel," at which time I assumed the position of Section Chair. It is truly a great honor to be serving in this capacity and I am looking forward to working with you in the upcoming year.

Our Section includes many of the most distinguished environmental lawyers in New York State and the nation, and has, in light of the work of past Section chairs and members, been at the forefront in addressing critical environmental issues. I look forward to continuing and building on that tradition.

I must also admit to a degree of trepidation, as the responsibilities and challenges associated with managing the Section are somewhat daunting. However, I am very fortunate to be working with an excellent and able seven-member Section Cabinet, which is the governing body for our Section. For the current term (June 1, 2007–May 31, 2008), the members of the Section Cabinet, in addition to the Section Chair, include the following officers:

Joan Leary Matthews, as First Vice-Chair;

Alan J. Knauf, as Second Vice-Chair;

Barry R. Kogut, as Treasurer; and

Philip H. Dixon, as Secretary.

In addition, the Section Cabinet includes the Section's Delegate to the House of Delegates and a representative from the Section Council (which consists of all past Chairs). I am pleased that **John Greenthal** has graciously agreed to serve as Section Delegate now that Phil has assumed the position of Secretary. I am also pleased that our colleague **Virginia Robbins** will, for the next year, be the Section Council Representative to the Cabinet. I would also like to take this time to thank **Alice Kryzan** for her participation on, and contributions to, the Section Cabinet as the Section Council's representative during the past year.

Although this is Phil Dixon's first term as an officer, his participation in the Section has been long-standing. Phil's service extends back to the 1980s, when he served as Co-Chair of the Section's Water Committee. Most recently, Phil ably served for several years as our Section Delegate to the New York State Bar Association's House of Delegates.

I can assure you that Joan, Alan, Barry, Phil, John, and Ginny will keep me on the straight and narrow over the next year!

Governmental Developments and Legislative Initiatives

This is certainly an exciting time for those who practice in the area of environmental law. With the transition

Inside

in state government in Albany, new environmental initiatives are being advanced that will rechart the course of environmental policy. Issues, such as climate change, which have been the center of concern, are taking on a new urgency in light of a greater understanding and awareness of the anticipated impacts. Furthermore, the policy debates at the early stages in the campaign for the U.S. presidency give some hope that environmental issues will be accorded serious attention at the national level.

To the extent possible, I would like to see our Section continue to take positions on key environmental issues. Walter Mugdan, in his final message in the Winter/Spring 2007 issue of *The New York Environmental Lawyer*, discussed in detail several of the Section's positions, including endorsing a legislative correction to standing under the State Environmental Quality Review Act, supporting a long-needed expansion to New York State's Returnable Container Act ("Bottle Bill"), and urging New York State to seek "assumption" of the federal freshwater wetlands program within this state.

In addition, for more than five years, Section members **Larry Schnapf** and **Dave Freeman**, together with their committee and task force members, have analyzed and recommended changes to the state's brownfields program for the Section's consideration. Their efforts have led to an active Section role in this significant debate, which encompasses both environmental and economic development concerns.

For your reference, information on the Section's recent legislative positions can be found on the NYSBA Environmental Law Section website (http://www.nysba.org/environmental), under the tab labeled "Legislative/Regulatory Policy Submissions."

Ours is a diverse Section, which includes a wide range of views on policy questions. It is not expected that the Section can achieve consensus on all the significant legislative proposals that are likely to be advanced over the coming years. However, during my term, I would like for our Section committees to continue to evaluate areas where the Section may wish to support environmental legislative or policy initiatives. In the upcoming year, such areas may include consideration of proposals to support a legislative correction to address ambiguities associated with the commencement of the statute of limitations period in SEQRA matters, to establish a process for power plant siting, and to establish new limitations governing the open burning of wastes and the use of wood boilers, among others.

Section Meetings and Field Trips

A significant part of the Section experience are the meetings and conferences that our Section sponsors. These functions provide the opportunity not only for continuing legal education, but an opportunity for Section members to interact socially as well as professionally. For the upcoming year, our Section meetings are scheduled as follows (please mark your calendars with these dates):

Fall Meeting: October 12-14, 2007 at The Gideon Putnam in Saratoga Springs, New York. The meeting will include a dinner on Friday evening (October 12), a CLE program on Saturday morning, and a Section dinner on Saturday evening. Section committees and task forces and the Executive Committee are scheduled to meet on the morning of Sunday, October 14.

Our Fall Meeting will be focusing on new directions in environmental law. As you know, with respect to the transition in state government, significant and exciting developments are occurring at the Department of Environmental Conservation. Commissioner Alexander "Pete" Grannis has assembled an experienced and forward-looking leadership team, and a wide range of organizational reforms and progressive legislative initiatives are under consideration.

At the Friday night dinner, we are fortunate to have as our speaker **Alison H. Crocker**, the General Counsel to the Department. Alison is a former member of our Executive Committee and previously served as Co-Chair of the Air Quality Committee. She will be addressing the topic of organizational changes and new directions in the Office of General Counsel.

The Saturday morning CLE program will consist of two components. The first part will include speakers from the Department who will be addressing new program and enforcement initiatives and policies. In addition, there will be a presentation on invasive species, which are posing serious if not uncontrollable destruction to ecological systems in our state. The second part of the CLE program will focus on cutting-edge SEQRA issues, including the evaluation of noise impacts in the SEQRA process and project reviews, SEQRA considerations in the alienation of parkland, consideration of climate change issues in the review of projects under SEQRA, and issues relating to SEQRA and the statute of limitations.

Saturday afternoon will be free for leisure activities. The Gideon Putnam Hotel, at which the Fall Meeting will be located, is in the heart of Saratoga Spa State Park. The Park offers a variety of recreational activities, including golf, tennis, and mineral baths and spas. We are planning to organize an environmental hike to an area of local interest. For those who are interested, we are also looking to schedule an informational walking tour of the Park. A bike tour may also be planned. In addition, numerous museums and sites of historical interest are nearby, including the National Museum of Racing and Hall of Fame, the National Museum of Dance, the Saratoga (Battlefield) National Historical Park, and the Saratoga Auto Museum, among other attractions. Downtown Saratoga Springs, which is a short ride from The Gideon Putnam,

(Continued on page 33)

From the Editor

Lou Alexander submits his introductory column in this issue. The upcoming Section meetings promise to be informative and professionally enjoyable, and, if the growing attendance recently enjoyed by the Section at its meetings is any guide, will likely be well attended. However, I would like to draw attention to one of Lou's proposals which suggests an unconventional, yet entirely professional, idea that is worthy of consideration: field trips. Lest one think that the idea lacks sufficient seriousness for serious professionals, I can personally attest that the various side trips that Section members routinely take at the time of the Fall Meetings have provided wonderful opportunities to not only become better informed about any number of topics, but also to get to know one another better. The beauty of field trips is that they can be organized around specific topics or locations that might be of significant interest to smaller and self-selecting groups of people rather than to the entire Section, and they can be counted as successes even with small numbers of participants. Think of them as outdoor seminars. This would be just another way, among many, in which the Section provides services to members and thereby enhances the value of Section membership and participation. I am sure that the Section leadership will be receptive to proposals as well as, importantly, organizers.

In this issue, Walter Mugdan submits an article on coal gasification. As I noted in my last column, Walter's ongoing discussion of alternative energy sources is timely and valuable. A consensus has clearly emerged among credible scientists and policy makers that global warming is occurring, and that greenhouse gases are an important component of the warming trend. As such, shifting our reliance away from fossil fuels is critically important, especially considering that petroleum production often takes place in some very bad neighborhoods and our economy would be dramatically affected by disruptions in supply. However, it is unrealistic to expect that the shift will be efficient or fast, especially given the early stages of research and development for energy sources that do not emit greenhouse gases, the unproven reliability of some that have been proposed, and the economic limitations of others. As Jeffrey Sachs noted in a recent issue of *Scientific American*, technological advances are a necessary and achievable means of addressing global climate change. However, the time line is uncertain for the substantial conversion to non-fossil fuel sources of energy and, in the interim, greener variations on present themes may be advisable. Coal gasification is a proposal that sparked interest of late. Walter's article provides a thorough discussion of what coal gasification is, how it operates to produce synthetic natural gas, and why the modern process is cleaner than the original process, especially as technology for carbon capture and sequestration improves. The article discusses the three major coal gasification plants that operate in the United States today, how they operate and how they might operate better. The article also lays out the legal debate over applicable standards for the technology and the manner in which EPA has approached the topic. As always, Walter's article is informative, incisive and adopts a pragmatic approach to environmental problems and solutions.

Kristen Sentoff submits an article about if, and when, to suspend environmental regulations in the face of a devastating emergency. Emergencies in environmentally explosive or environmentally sensitive locations have been on the rise of late, presenting face-offs between the immediate needs of health and safety, and environmental regulatory goals. The latter also seek to protect health and safety, yet they seem to require consistent political justification notwithstanding consistent scientific justification, and there is always the concern for emergency waivers evolving into systemic backsliding. Kristen analyzes the availability of waivers, examines them in the context of natural disasters such as Hurricanes Rita and Katrina, and skeptically discusses proposed legislation to allow additional waiver authority for EPA.

Jamie Thomas, of St. John's Law School, is the new student editor. Jamie submits case summaries prepared by St. John's students on decisions selected by Phil Weinberg. These include summaries of two rulings by the United States Supreme Court, which has shown a striking inclination recently to engage in environmental jurisprudence.

I will conclude by reminding readers about the Fall Meeting, which Lou mentions in his column, asking committees to avail themselves of the journal as a tool to facilitate and expand their activities, and alerting potential authors that they may qualify for CLE credit (see pg. 35).

Kevin Anthony Reilly

Back to the Future: Coal Gasification Comes of Age . . . Again

By Walter Mugdan

Historical Background of Coal Gasification

Over two centuries ago, in 1792, the Scottish engineer William Murdock pioneered the process of commercial coal gasification—that is, turning the solid lumps of hard, black mineral into gaseous form. Murdock, a colleague of James Watt (of steam engine fame, not the former U.S. Secretary of Interior), heated coal in the absence of air, converting most of the coal to gas and leaving a residue of coke (pure carbon).[1] The gaseous portion is very similar to the natural gas that many of us use today to heat our homes or cook our meals.

Murdock's purpose was to generate gas that could be used for lighting. Within a few years, gas lighting became common in most larger factories in Britain. By 1814, gas streetlights were being installed in London, and by 1819 close to 300 miles of pipe had been laid in that city to supply some 51,000 burners.[2] In 1816, a Murdock licensee, the Baltimore Gas Company, started the first coal gasification operation in America, also primarily for use in lighting.[3] For many decades, coal gas was the dominant fuel for indoor lighting, and for nearly a century it was dominant for urban street lighting.

In due course, gas gave way to electricity as a means of producing light, but gasification of coal continued to be important industrially. Nazi Germany, with plenty of coal but not much oil or natural gas, depended on gasification to create some of the substances on which its chemical, fertilizer and armaments industries depended. During World War II, Britain and France also used the technology, for similar reasons.[4] And indeed, the process of heating coal to produce coke and gas is still used today in the metallurgical and other industries.[5]

More than 1,500 gasification plants (or "manufactured gas" plants) operated in the U.S. in the past. Coal gasification was a messy business in those earlier times, leaving tarry residues loaded with what today we call hazardous wastes.[6] There are coal tar sites on the federal Superfund list and on comparable state lists of contaminated sites.

Coal gas is, of course, no longer used to make light. Instead, coal is burned to make electricity, which is used to make light and to operate so much else in our modern technological world. In the U.S. today, coal burning provides 57% of our electricity.[7] And whereas America is heavily dependent on foreign sources for oil (and, increasingly, natural gas), coal is abundant here. Indeed, a quarter of the world's coal reserves are in the U.S., with a total energy content exceeding that of all the world's known recoverable oil.[8] For this reason the U.S. has been dubbed "the Saudi Arabia of coal."

But just as coal gasification was a messy affair during much of its history, coal remains the dirtiest fuel burned to make electricity. The air emissions from even the best controlled coal-burning power plants today exceed the emissions from plants that burn oil or natural gas. This is true with respect to essentially all the common pollutants of concern—fine particulates, sulfur dioxide, oxides of nitrogen and mercury.

Note the use of the phrase "coal-burning power plants" in the previous paragraph. The word "burning" in that phrase is not mere surplusage, but is rather the central point of this article. For there are two ways to use coal to manufacture electricity, but only one involves burning the coal. There is the traditional or old way, in which coal is burned to make steam to spin a turbine to generate electricity; and there is a new application of an even older way, in which coal is gasified to produce "synthetic natural gas" (an oxymoron if ever there was one), which is burned to make steam to spin a turbine which generates electricity.

Modern Coal Gasification

Modern coal gasification plants are a far cry from the industry's earlier incarnation. To the untutored eye, a coal gasification plant would be indistinguishable from a chemical or petroleum refinery. And indeed, much of the internal workings of a gasification plant are strikingly similar to those in a refinery.[9]

The new approach of using gasification to turn coal into electricity actually goes one step further, using "combined cycle" power plants. Common for power plants that burn "real" natural gas, a combined cycle plant uses the gas stream itself to spin one generating turbine, then burns the gas to make steam to spin a second turbine. The combined cycle system is considerably more efficient than a traditional coal- or oil-fired plant. The synthetic natural gas manufactured in a coal gasification plant can be used just like real natural gas to run an efficient, combined cycle operation. Thus, the technology is often referred to as "Integrated Gasification Combined Cycle," or IGCC. In a traditional coal-burning plant, only about a third of the energy value in the coal is converted to electricity; in an IGCC plant, this can be increased to 50% or more.[10]

Because the combined cycle technology is more efficient than single cycle technology, it has air pollution benefits. Combined cycle emissions are lower per unit of energy produced than single cycle emissions. Furthermore, the synthetic natural gas fuel is inherently less polluting than the coal from which it was produced (just as

natural gas is inherently cleaner than either coal or oil).[11] The gasification process enables relatively easy removal of mercury, sulfur and other contaminants in coal that can become airborne pollutants when the coal is burned directly. The process also generates less solid waste and wastewater than a coal-burning plant;[12] and it can provide these energy, air pollution and waste benefits even when using very low-grade, soft coal, such as lignite.[13]

The Promise of Carbon Capture and Sequestration

What is perhaps most important and encouraging is that it is also comparatively easy and inexpensive to capture carbon dioxide (CO_2) in an IGCC plant—much easier than in a traditional power plant burning coal or, for that matter, oil or natural gas.[14] CO_2 is the most ubiquitous greenhouse gas, which is driving global warming. Once CO_2 has been captured it can be sequestered, avoiding further contribution to global climate change.

Sequestration can be accomplished by injecting the CO_2 into deep, stable underground geologic formations. Also known as carbon dioxide capture and storage (CCS), this approach holds the promise of being deployable in many different kinds of geologic formations around the globe, and yielding meaningfully large reductions in CO_2 emissions to the atmosphere.[15] It is therefore almost certain that sequestration will become one of the key strategies to address global warming, at least for as long as combustion of carbon-based fuels remains a significant source of our energy. In short, it appears to be vital that gasification of coal with separation and sequestration of the CO_2 becomes a central part of our energy and environmental goals—and this must happen *soon*.

There are three major coal gasification plants operating in the U.S. today:[16] a plant in Tennessee that yields a variety of useful chemicals used in manufacturing processes; a 250-megawatt IGCC electric power plant in Florida;[17] and a facility in North Dakota, which manufactures synthetic natural gas for distribution, along with a wide variety of other commercially useful chemical byproducts. At present, of course, there are no laws or rules in the U.S. that require carbon capture—CO_2 is not regulated as a pollutant at the federal level.[18] The Tennessee and Florida plants do not capture CO_2 , and therefore emit just as much of the greenhouse gas as would be the case if the coal were burned directly.

But the North Dakota coal gasification plant *does* capture its CO_2 , for the very best of business reasons—to make money. Starting in the late 1990s, the CO_2 from the plant has been pumped into a 205-mile long pipeline built specially for the purpose. Some 115 million cubic feet of CO_2 per day travel this way to Saskatchewan, Canada, where the gas is injected under high pressure to nearly a mile underground into an oil field that had been experiencing declining yields. The injected high pressure gas pushes additional oil toward the pumps that bring it to the surface; the CO_2 stays underground, out of the atmosphere. The Canadian oil company pays the North Dakota gasification company about $2.5 million per month for what was formerly a waste product that went up the smokestack.[19]

The potential benefits from this technology are obvious and enormous, and the "buzz" about IGCC is intense. The U.S. government, which has resisted domestic and international calls for regulation of carbon emissions, preferring the carrot of voluntary incentives to the regulatory stick, is actively promoting IGCC. In December 2006 the U.S. Department of Energy (DOE) announced an agreement with a consortium of eight private electric utility companies to spend an estimated $1 billion to construct what is being billed as the world's first "zero emissions" power plant. Known as "FutureGen," it is to be an advanced IGCC plant that will include carbon sequestration. DOE is providing $700 million of the total cost of this plant.[20] The State of New York has also taken steps to promote construction of an IGCC plant with carbon sequestration, offering to identify a "shovel ready" site for such a facility and providing $50 million in direct subsidies plus additional tax benefits to the winning bidder in a clean coal competition.[21]

Nor is private industry waiting for government subsidies, as in the FutureGen project, to move ahead with coal gasification. In 2004 American Electric Power (AEP), a major investor-owned utility, announced plans to build an IGCC plant to be placed in commercial operation by 2010.[22] The power industry's interest in IGCC likely stems from a recognition that, at some time in the perhaps not too distant future, carbon capture and sequestration will be required.

Although it appears that the time for coal gasification has come (again), it is fair to say that at this writing it remains an unfamiliar technology to most electric power industry professionals and investors, and it is therefore by definition somewhat riskier than traditional electric generating techniques. Building and running a gasification plant is qualitatively quite different from what many utilities are accustomed to. And the capital costs for an IGCC plant are undeniably high.

For these reasons, most proposals for new coal-based power plants during the past several years continue to be for traditional coal-burning facilities, and not the promising new IGCC technology. The environmental implications of this fact are significant. The life span of a new coal-burning power plant is likely to be 50 years or more. Though the newest generation of coal-burning plants are cleaner than those of the past and will have to comply with comparatively stringent pollution control requirements, they will nevertheless emit more pollutants than would a comparable plant using IGCC. And—of greater concern—if and when the U.S. finally regulates CO_2, it will be extremely expensive to retrofit these units. This would likely result in a decision to "grandfather" them

from such obligations. Thus, every coal-based plant that is now built using combustion rather than gasification technology could represent many decades of lost opportunity for potentially crucial greenhouse gas emissions reductions. And there are some 154 new coal-fired plants now being proposed in 42 states across the country.[23]

The Legal Debate About IGCC as "BACT"

This inescapable fact has fueled a legal debate over the proper application of Prevention of Significant Deterioration of Air Quality (PSD) rules under the federal Clean Air Act.[24] The PSD rules require that proposed major new sources of air pollution utilize "best available control technology," or BACT. The determination of what is BACT is made on a case-by-case basis, and involves technological, environmental, energy and economic considerations. The U.S. Environmental Protection Agency (EPA), which promulgated the PSD rule and administers the program, has issued fairly detailed guidance on how this BACT analysis is to be performed, but that guidance pre-dates the current interest in IGCC.

As will be seen, the fundamental legal question posed by the availability of viable IGCC technology is whether or not it represents the best available control technology for the conversion of coal into electricity. Answering that question requires an analysis of how the proposed emission source should be characterized or defined.

Draft EPA guidance from 1990 indicates that it is the Agency's general policy not to "redefine the design of the source" for the purpose of considering "available" control technology.[25] The example given in the guidance is that if a permit applicant proposes to build a coal-fired power plant, EPA would not require the applicant to consider building a natural gas–fired plant instead, even though emissions might be lower per kilowatt of electricity produced. On the other hand, the guidance goes on to say that there are instances where consideration of "alternative production processes" *is* appropriate in the BACT analysis.

Under this existing draft guidance the question presented is whether coal gasification, when compared to the direct burning of coal, represents a redefinition of the source or merely an alternative production process. If the proposed new source is considered to be a "facility for ***burning coal*** to make electricity," then requiring consideration of gasification in the BACT analysis would be seen as redefining the source. If, on the other hand, the proposed new source is considered to be a "facility for ***using coal*** to make electricity" then gasification might be viewed as merely an alternative production process, and could appropriately be considered in the BACT analysis.

EPA issued its answer to this question in a December 13, 2005 letter from Stephen D. Page, Director of EPA's Office of Air Quality Planning and Standards.[26] The EPA letter addressed whether a BACT analysis for proposed coal-fired power plants "must specifically include evaluation of alternative designs of coal-fueled processes," such as IGCC.

In the letter, Page cites to section 165(a)(4) of the Clean Air Act,[27] which requires that a proposed new major air emission sources apply BACT, which in turn is defined in section 169(3)[28] as follows:

> [BACT is] an emission limitation based on the maximum degree of reduction . . . which the permitting authority . . . determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques for control of each such pollutant.

The Page letter sets out EPA's view that, through the above-quoted statutory language, Congress distinguished between "production process and available methods, systems and techniques" that should be considered in a BACT analysis, and "alternatives" to the proposed source that would, in EPA's words, "wholly replace the proposed facility with a different type of facility." Page goes on to acknowledge that, in practice, it is often quite difficult to draw the precise line between an alternative "production process" or "available method, system or technique," on the one hand, and an "alternative to the proposed source," on the other. He cites the use of the phrase "innovative fuel combustion technique" in the statutory definition of BACT as a reason why, in the case of the IGCC question, the line is even more difficult to draw.

In the final analysis, however, EPA concludes that an IGCC plant is so fundamentally different from a traditional coal-fired power plant that it really would represent an alternative to a coal-burning plant, rather than merely a different production process or fuel combustion technique. Page cites an earlier EPA decision and the 1990 draft EPA guidance which indicate that it is EPA's general policy not to "redefine the design of the source" for the purpose of considering "available" control technology. As noted above, by way of example the guidance states that EPA would not require an applicant proposing a coal-fired power plant to include, in the BACT analysis, consideration of a natural gas–fired power plant instead, even though the latter would generate fewer pollutants per unit of electricity produced.

The EPA analysis rests on the fact that, at its core, an IGCC plant is arguably more like a combination of a chemical plant or a refinery plus a natural gas–burning power plant than it is like a traditional coal-burning power plant. Thus, EPA concludes that consideration of IGCC within the BACT analysis for a proposed coal-burning plant is not required by the Clean Air Act.

Page does note that there are two separate parts of the PSD permitting process in which alternative designs

or production processes are open for consideration. Under section 165(a)(2) of the Clean Air Act[29] the permitting authority (either EPA or a delegated or authorized state) must allow an "opportunity for interested persons . . . to appear and submit . . . presentations on the air quality impact of [a proposed new source], *alternatives thereto*, control technology requirements, and other appropriate considerations" (emphasis added). Page writes, "[W]e believe that an IGCC facility is an alternative to [a coal-burning] facility and therefore it is most appropriately considered under Section 165(a)(2) rather than Section 165(a)(4)."

Finally, although the inquiry to which Page was responding did not explicitly pose this question, EPA also opined on whether IGCC would need to be considered in a "LAER" (lowest achievable emission rate) analysis for new sources proposed in a Clean Air Act non-attainment area;[30] EPA's answer is the same—such consideration is not required.

As Page concedes, the issue is a arguably a close call, and a reasonable interpreter of the law might come to a different conclusion. Nevertheless, it is important to note that even if consideration of IGCC *were* required to be included in a BACT or LAER analysis, and even if it were determined (as would almost surely be the case) that an IGCC facility would have lower emissions per unit of electricity produced than a coal-burning plant, that does not mean that the applicant would in fact be forced, as a condition of the permit, to build an IGCC plant. Emission rates are a central, but not the only, element of BACT and LAER analyses. Technological feasibility and economic considerations are also included. If an applicant could show that IGCC is too expensive per ton of pollutants reduced,[31] or that the technology is still unproven,[32] it would not be required to adopt that technology even if, *arguendo*, it was required to consider IGCC in the BACT or LAER analysis.

Nevertheless, EPA's decision not to require consideration of IGCC in the BACT or LAER analysis process was seen as a serious mistake by a number of environmental and health organizations that filed petitions for judicial review of the December 13, 2005 Page letter.[33] The petitions challenged the letter on substantive as well as procedural grounds. On September 25, 2006 the parties executed a Settlement Agreement pursuant to which EPA stipulated that the Page letter is *not* a final agency action and "creates no rights, duties, obligations, nor any other legally binding effects on EPA, the states, tribes, any regulated entity or any person."[34] The Agreement also indicates that in a September 12, 2006 letter EPA informed the Petitioners and other interested parties that it intended to "establish a process that will foster a dialog [*sic*] among a balanced array of interested stakeholder groups on the deployment of advanced coal technology and result in policy recommendations to EPA on this topic. . . ."[35] Of course, this Settlement Agreement merely postpones the likely battle. It certainly does not represent a retreat from the legal position staked out in the December 2005 Page letter; on the contrary, there is every reason to assume that this remains EPA's position. And the environmental and health groups are free to renew their challenge if and when EPA (or a state managing the federal new source review program) issues a permit for a coal-fired plant without requiring consideration of IGCC as a part of the BACT or LAER review.

Coincidentally, at about the same time this settlement was being developed, the EPA's Environmental Appeals Board (EAB) issued a decision addressing, *inter alia*, the substantive question that is begged by the procedural argument over whether or not IGCC must be considered as part of the BACT analysis for a new proposed coal-fired power plant. On August 24, 2006 the EAB issued its ruling in *In re Prairie State Generating Company*,[36] an appeal from a PSD permit issued by the State of Illinois. Two elements of the ruling are relevant to the questions considered in this article:

- **Defining the source**. The applicant proposed to build a new power plant at the mouth of a new underground coal mine that the applicant also controlled, with an anticipated supply of at least 30 years. This mine provides coal with a relatively high sulfur content. A number of environmental and health groups (the Petitioners) commented that in the BACT analysis the Illinois EPA (IEPA) should have required the consideration of the use of an alternate, low sulfur coal as fuel. IEPA declined to require such consideration, determining that use of a different (lower sulfur) source of coal would fundamentally change the proposed project, which was intended to use the coal from the company's own adjacent mine. After IEPA issued the permit, the Petitioners appealed to the EAB, which held:

  > The Board rejects Petitioners' argument that IEPA improperly excluded low-sulfur coal from its BACT analysis as a method for controlling emissions of SO_2 from the proposed Facility. The statute contemplates that the permit issuer must look to the permit applicant to define the proposed facility's purpose or basic design in its application, at least where that purpose or design is objectively discernable, as it is in the present case. This approach not only harmonizes the BACT definition with the permit application process in which the definition must be applied, but also is consistent with the Agency's longstanding policy against redefining the proposed facility. In concluding that compelling use of low-sulfur coal would redefine the proposed Facility's basic design or purpose, IEPA properly considered Prairie State's objectives for the proposed Facility and concluded that the use of a particular 30-year coal supply

> under common ownership and control is an inherent aspect of the proposed project. The Board is satisfied that IEPA took a sufficiently hard look at the Facility to determine whether further emissions reductions would be achievable while still meeting Prairie State's purpose.[37]

At first blush this finding by the EAB supports, at least implicitly, the rationale underlying the Page letter of December 2005. It may be, however, that the most important element for the EAB in reaching its determination about "redefining the facility" was the business-based nexus between the proposed power plant and the adjacent 30-year supply of high-sulfur coal controlled by the same entity. If so, then a proposed power plant located independent of a specific coal supply might possibly yield a different decision. Thus, while this element of the EAB's *Prairie State* decision is certainly consistent with the Page letter, it may not be dispositive on the question of whether IGCC would represent a fundamental redefinition of a proposed coal-burning power plant.

In the context of its discussion of the low-sulfur versus high-sulfur coal issue the EAB did, however, address and dismiss one of the basic arguments against the assertion that IGCC would represent a "redefinition" of a proposed coal-burning power plant. The EAB wrote:

> We also specifically reject Petitioners' contention that an electric generating facility's purpose must be viewed as broadly as "the production of electricity, from coal." . . . We have frequently recognized that an electric generating facility's purpose may be more narrowly defined. For example, in *Kendall New Century*, we recognized that it was appropriate for the permitting authority to distinguish between electric generating stations designed to function as "base load" facilities and those designed to function as "peaking" facilities, and that this distinction affects how the facility is designed and the pollutant emissions control equipment that can be effectively used by the facility. It has also been long-standing EPA policy that certain fuel choices are integral to the electric power generating station's basic design.[38]

On the other hand, the EAB, in responding to another of Petitioners' arguments on the high-sulfur versus low-sulfur coal debate, did offer an interesting glimpse of how it might respond if and when it is presented squarely with the question of whether or not IGCC represents a "redefinition" of a proposed coal-burning power plant. As it happens, in the *Prairie State* case the IEPA *did* consider IGCC as part of the BACT analysis, although it was subsequently rejected (as discussed more fully below). In advancing their view that low-sulfur coal should have been considered in the *Prairie State* permit review, the Petitioners argued that allowing the applicant to specify the source of fuel for the plant as part of the project definition (as Prairie State had done with respect to its own adjacent coal mine) enables the applicant to manipulate the process to avoid consideration of effective and available control technologies. The EAB disagreed, citing IEPA's requirement that the applicant consider IGCC as an available control technology:

> IEPA's demand that Prairie State provide a detailed analysis of IGCC, which IEPA noted has the promise to achieve greater reductions, demonstrates that IEPA's application of the policy against redefining the design of the source through application of BACT did not treat "very few" design changes as consistent with the proposed Facility's basic design—selection of IGCC would have required extensive design changes to Prairie State's proposed Facility. Thus, we reject Petitioners' allegation that "IEPA's interpretation would allow a permit applicant to avoid all BACT review by including its preferred fuel, add-on controls, and other pollution controls and hide behind the claim that requiring anything different would unlawfully 'redefine' the proposed source."[39]

This language might be read to imply that the EAB believes IEPA was right to require the applicant to consider IGCC in the BACT analysis. If so, that would be contrary to the view expressed in the Page letter of December 2005, and might hint at how the EAB would rule if and when the question is presented directly. On the other hand, if the EAB in the above-quoted language is merely citing IEPA's decision as supportive of the proposition that an applicant can be required to consider some design changes (but not necessarily this particular one), then this language may have limited predictive value.

- **Considering IGCC in the BACT Analysis**. As noted, in this case IEPA *did* consider IGCC as part of the BACT analysis, but then rejected it. The EAB upheld that rejection. To understand the decisions by the IEPA and EAB, it is important to first understand how a BACT analysis is carried out. BACT is defined in the Clean Air Act:

> The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.[40]

Pursuant to EPA guidance (which is not binding, but is almost universally used by EPA and state agencies), BACT analysis follows a "top down" procedure. This means that all available emissions control technologies or techniques are arrayed in descending order of their effectiveness. The most effective one is analyzed first. If acceptable, it is adopted; but if rejected as not "achievable" based on applicable statutory and regulatory criteria, then the next-most effective alternative is considered. If that alternative is also rejected as not "achievable," the analysis proceeds to the third alternative on the list; and so on.

The actual analysis itself customarily follows a 5-step process. In the first step, all "potentially available" control options are listed. In Step 2, "technically infeasible" options are eliminated from the list. At Step 3 the remaining options are arrayed in descending order of effectiveness at controlling emissions. In Step 4 the energy, environmental and economic impacts of the most effective remaining option are analyzed, and that option is either selected or rejected based on the appropriate criteria. Finally, in Step 5, the most effective remaining option is selected, and the emission rates associated with that option are set as BACT for the permit.[41]

In the *Prairie State* case, the IEPA did include IGCC technology in Step 1 of the BACT analysis, identifying it as "potentially available." However, IEPA then eliminated IGCC from further analysis at Step 2. The Petitioners challenged this decision, but the EAB upheld IEPA:

> The Board rejects Petitioners' argument that IEPA erred as a matter of law when it found that . . . IGCC . . . is a potentially applicable process alternative for controlling SO_2 and NO_X, but nevertheless excluded IGCC at step 2 of the top-down method. Although [EPA] guidance generally counsels in favor of a full and detailed impacts analysis at step 4 for each control alternative found to be technically feasible at step 2, there is one narrow exception. A full analysis is not required where there are two or more alternatives with comparable control efficiencies and one is more costly than the other. IEPA's rationale in the present case for rejecting full evaluation of IGCC as a more costly, comparably efficient option falls within this guidance.[42]

With respect to conventional pollutants—specifically, sulfur dioxide and oxides of nitrogen—it may be that emissions from then-current IGCC technology would not necessarily have been judged to be significantly lower than such emissions from a modern, well-controlled, conventional coal-burning plant.[43] If so, the IEPA decision to eliminate IGCC at Stage 2 is indeed defensible. If and when carbon dioxide emissions should ever be regulated, that calculus would of course change dramatically, as discussed above.

Conclusion

In summary—stay tuned! The new age of coal is upon us, and the technological, economic and legal questions that will likely be posed and answered in the next few months and years will have a profound impact on our domestic and global environment for many decades and even centuries to come. For that reason the permit review process for any proposed power plant that is to use coal will be carefully scrutinized, and the "availability" of gasification as a control technology will be vigorously debated.

Endnotes

1. *See* Appendix for a detailed description and schematic diagram of the gasification process.
2. *William Murdock*, http://www.spartacus.schoolnet.co.uk/SCmurdock.htm.
3. *Coal Gasification*, by E.L. Clark, http://www.zetatalk.com/energy/tengy11a.htm.
4. *History of Coal Gasification*, http://www.greatpointenergy.com/coalgasificationhistory.html.
5. *Coal Gasification*, http://www.clean-energy.us/index.php. For example, coal gasification has been used since 1983 by Eastman Chemical at its Kingsport, Tennessee facility. http://www.eastman.com/NR/exeres/D3DFCEF4-996E-4BE1-8D1F-70C8E2CBA776.htm.
6. New York City alone had several dozen manufactured gas (MFG) plants. The last MFG plant in New York State closed as recently as 1972. According to the N.Y. State Department of Environmental Conservation, there are some 300 "coal tar sites" on New York State's list of hazardous waste sites. Nearly 200 of these are, have been, or are being remediated. http://www.dec.state.ny.us/website/der/mgp/mgp_faq.html#mgp. For an estimate of the number of MFG plants nationwide, *see* http://www.oru.com/energyandsafety/energyandtheenvironment/mgpsites.html.
7. http://www.powerscorecard.org/tech_detail.cfm?resource_id=2.

8. U.S. Department of Energy, http://www.doe.gov/energysources/coal.htm.

9. Not only coal can be gasified to make synthetic natural gas. Other feedstocks can be similarly processed: petroleum coke, petroleum residuals, biomass, even garbage. Indeed, St. Lucie County in Florida is planning a 3,000 ton-per-day, $425 million garbage gasification plant, the first such facility in the nation. *See* http://www.usatoday.com/news/nation/2006-09-09-fla-county-trash_x.htm.

10. *Gasification Technology R&D*, U.S. Department of Energy, http://www.fossil.energy.gov/programs/powersystems/gasification/index.html. Anticipated future improvements in the technology may yield efficiencies up to 70% or even 80%. The Electric Power Research Institute asserts there is a considerably smaller difference, with conventional coal burning at up to 41% efficiency, and current IGCC efficiency at only 42%.

11. *See* Gasification Technologies Council, citing Wisconsin Department of Natural Resources, Permit 03-RV-166: http://www.gasification.org/Docs/Penwell%202005/Childress_PGI_Presentation03.pdf.

12. *Id. See also Coal Gasification*, http://www.clean-energy.us/index.php.

13. *How to Clean Coal*, by Craig Canine, *OnEarth* magazine, published by Natural Resources Defense Council, fall 2005, vol. 27, no. 3, at p. 23. *Available at* http//www.nrdc.org/OnEarth/05fal/coal1.asp.

14. *Id.* It is easier and cheaper to capture CO_2 in an IGCC plant because it is present in the synthetic gas in high concentrations (~ 60% by volume) and at high pressure; by contrast, CO_2 in the exhaust of a traditional coal-burning plant is dilute and at atmospheric pressure.

15. *See, e.g., Carbon Dioxide Capture and Geologic Storage*, J.J. Dooley et al., Battelle Memorial Institute, April 2006.

16. There are some 20 gasification plants nationwide. Three of these, discussed in the text above, use coal as a feedstock. Others use petroleum, petroleum coke (the heavy, carbon-rich material left over from petroleum refining), and gas. The end products of most of these plants are used in chemical manufacturing, not power. Worldwide in 2004 there were some 117 operating plants with 385 gasifiers. About half use coal as a feedstock. *See* Gasification Technologies Council, http://www.gasification.org/Docs/Penwell%202005/Childress_PGI_Presentation03.pdf.

17. http://www.clean-energy.us/success/tampa.htm.

18. At this writing there is ongoing litigation about the decision of the U.S. Environmental Protection Agency not to regulate CO_2 as an air pollutant under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and specifically whether states are pre-empted from regulating CO_2 emissions from automobiles. *Massachusetts et al. v. EPA* is currently before the Supreme Court; *see* http://www.communityrights.org/LegalResources/PendingSupremeCourtCases/Mass.asp.

19. *See* Basin Electric Power Cooperative website, http://www.basinelectric.com/EnergyResources/Gas/index.html. *See also How to Clean Coal*, n. 13 above, at pages 24–25.

20. *See* http://www.fossil.energy.gov/programs/powersystems/futuregen/index.html.

21. *See* http://www.gorr.state.ny.us/Budget06cleancoal.htm.

22. *See* http://www.aep.com/about/igcc/default.htm.

23. *Plant Boom Poses Big Questions*, New York Times, Business Section, Oct. 15, 2006, *citing* the National Energy Technology Laboratory.

24. The Clean Air Act is codified at 42 U.S.C. § 7401 *et seq.* The PSD program is mandated by Part C of Title I of the Act, 42 U.S.C. § 7470 *et seq.* EPA's PSD regulations appear at 40 CFR § 52.21.

25. New Source Review Workshop Manual, U.S. EPA, Draft, October 1990. http://www.epa.gov/region7/programs/artd/air/nsr/nsrmemos/1990wman.pdf, *at* p. 88.

26. Three page letter dated December 13, 2005 from Stephen Page, Director of EPA's Office of Air Quality Planning and Standards, to Paul Plath, Senior Partner, E3 Consulting of Englewood, CO.

27. 42 U.S.C. § 7475(a)(4).

28. 42 U.S.C. § 7479(3).

29. 42 U.S.C. § 7475(a)(2).

30. The PSD permit program applies to major new air emission sources proposed for an area that is attaining the National Ambient Air Quality Standards. The Clean Air Act also imposes new source review (NSR) requirements on major new sources proposed for a non-attainment area. 42 U.S.C. § 7503. The former must apply BACT; the latter must apply LAER, which may be more stringent.

31. IGCC plants can be up to 20% more expensive to build than a conventional coal-fired power plant, although they can be more efficient—and thus less costly—to operate. *U.S. Coal Plant Boom Poses Big Questions*, New York Times, Business Section, Oct. 15, 2006.

32. In fact, there are concerns that the IGCC process might not work as well at higher geographic elevations as at lower ones. And despite the long history of gasification, the modern forms of this technology are arguably still in an early or developmental stage. BACT and LAER do not ordinarily require that experimental techniques be employed.

33. *Natural Resources Defense Council v. EPA*, No. 06-1059 (consolidated with Nos. 06-1062 and 06-1063), D.C. Circuit. Other petitioners were Environmental Defense, Montana Environmental Information Center, American Lung Association of Metropolitan Chicago, Ohio Environmental Council, Valley Watch, Inc., and the Sierra Club.

34. Settlement Agreement in *NRDC v. EPA*, *id.*, at II.1. The settlement agreement can be viewed *at* http://www.eenews.net/features/documents/2006/10/12/document_gw_04.pdf.

35. *Id.*, at page 2.

36. Before the Environmental Appeals Board, PSD Appeal No. 05-05, Slip Op., http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/241e74ce9006c36b8525706900574df1/7414685644289ceb852571d4006785e2/$FILE/Denying%20Review%2047.pdf.

37. *Id.*, at pp. 1–2.

38. *Id.* at 32, *citing In re Kendall New Century Dev.*, 11 E.A.D. 40, 50–52 & n.14 (EAB 2003).

39. *Id.*, at 35–36.

40. Clean Air Act § 169(3), 42 U.S.C. § 7479(3).

41. *See Prairie State Generating Company*, *supra* n. 36, at 16–17.

42. *Id.* at 2.

43. Most sources indicate, however, that SOx and NOx emissions from current IGCC designs *are* significantly lower than those from traditional coal-burning plants.

44. http://www.fossil.energy.gov/programs/powersystems/gasification/howgasificationworks.html.

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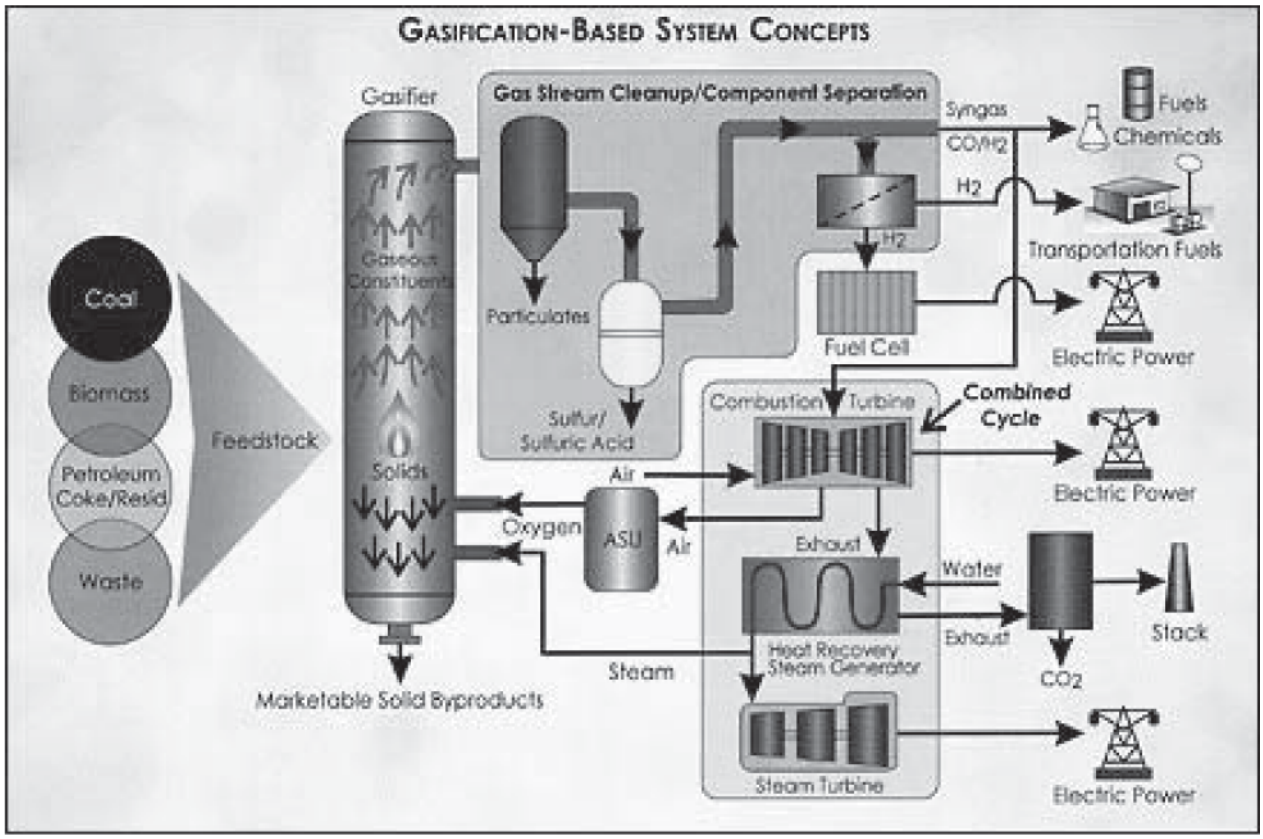
Any opinions expressed herein are the author's own, and do not necessarily reflect the views of the U.S. Environmental Protection Agency.

APPENDIX

How Coal Gasification Power Plants Work
U.S. Department of Energy[44]



The heart of gasification-based systems is the gasifier. A gasifier converts hydrocarbon feedstock into gaseous components by applying heat under pressure in the presence of steam.

A gasifier differs from a combustor in that the amount of air or oxygen available inside the gasifier is carefully controlled so that only a relatively small portion of the fuel burns completely. This "partial oxidation" process provides the heat. Rather than burning, most of the carbon-containing feedstock is chemically broken apart by the gasifier's heat and pressure, setting into motion chemical reactions that produce "syngas." Syngas is primarily hydrogen, carbon monoxide and other gaseous constituents, the proportions of which can vary depending upon the conditions in the gasifier and the type of feedstock.

Minerals in the fuel (i.e., the rocks, dirt and other impurities which don't gasify like carbon-based constituents) separate and leave the bottom of the gasifier either as an inert glass-like slag or other marketable solid products. Only a small fraction of the mineral matter is blown out of the gasifier as fly ash and requires removal downstream.

Sulfur impurities in the feedstock are converted to hydrogen sulfide and carbonyl sulfide, from which sulfur can be easily extracted, typically as elemental sulfur or sulfuric acid, both valuable byproducts. Nitrogen oxides, another potential pollutant, are not formed in the oxygen-deficient (reducing) environment of the gasifier; instead, ammonia is created by nitrogen-hydrogen reactions. The ammonia can be easily stripped out of the gas stream.

In integrated gasification combined-cycle (IGCC) systems, the syngas is cleaned of its hydrogen sulfide, ammonia and particulate matter and is burned as fuel in a combustion turbine (much like natural gas is burned

in a turbine). The combustion turbine drives an electric generator. Hot air from the combustion turbine can be channeled back to the gasifier or the air separation unit, while exhaust heat from the combustion turbine is recovered and used to boil water, creating steam for a steam turbine-generator.

The use of these two types of turbines—a combustion turbine and a steam turbine—in combination, known as a "combined cycle," is one reason why gasification-based power systems can achieve unprecedented power generation efficiencies. Currently, commercially available gasification-based systems can operate at around 42% efficiencies; in the future, these systems may be able to achieve efficiencies approaching 60%. (A conventional coal-based boiler plant, by contrast, employs only a steam turbine-generator and is typically limited to 33–40% efficiencies.)

Higher efficiencies mean that less fuel is used to generate the rated power, resulting in better economics (which can mean lower costs to ratepayers) and the formation of fewer greenhouse gases (a 60%-efficient gasification power plant can cut the formation of carbon dioxide by 40% compared to a typical coal combustion plant).

All or part of the clean syngas can also be used in other ways:

- As chemical "building blocks" to produce a broad range of liquid or gaseous fuels and chemicals (using processes well established in today's chemical industry);
- As a fuel producer for highly efficient fuel cells (which run off the hydrogen made in a gasifier) or perhaps in the future, hydrogen turbines and fuel cell-turbine hybrid systems;
- As a source of hydrogen that can be separated from the gas stream and used as a fuel (for example, in President Bush's hydrogen-powered Freedom Car initiative) or as a feedstock for refineries (which use the hydrogen to upgrade petroleum products).

Another advantage of gasification-based energy systems is that when oxygen is used in the gasifier (rather than air), the carbon dioxide produced by the process is in a concentrated gas stream, making it easier and less expensive to separate and capture. Once the carbon dioxide is captured, it can be sequestered—that is, prevented from escaping to the atmosphere, where it could otherwise potentially contribute to the "greenhouse effect."

Emergency Waivers of Environmental Regulations: Necessary Relief or Back-Door Damage?

By Kristen Sentoff

I. Introduction

On August 31, 2005, two days after Hurricane Katrina devastated the Gulf Coast, Environmental Protection Agency (EPA) Administrator Steven Johnson was among several agency and department heads who gave a joint press conference about the response to the disaster.[1] The damage and flooding caused by the hurricane, which some would argue was made worse by destruction of wetlands,[2] development of coastlines,[3] and greenhouse gas emissions,[4] is certain to have enormous environmental impacts;[5] yet the head of the agency charged with safeguarding the public from environmental harms made only a single announcement: that some of those very safeguards would be waived to ensure adequate fuel supply in the weeks following the disaster.[6]

In response to natural disasters, the first concern is, and should be, the safety of the people affected. Adequate fuel supply for emergency vehicles and transport of evacuees and supplies is certainly essential to the response. However, waiving environmental regulations in response to supply disruptions will have broader impacts on those in affected areas and the public as a whole. The waivers issued and proposed in response to Hurricane Katrina raise important questions as to the efficacy and impact of such measures, especially in light of the attacks on long-standing environmental statutes by the current administration and Congress.[7] Are waivers really the best way to expedite and improve response, or are they merely opportunistic attacks by opponents of the regulations waived? This article will explore the source of EPA's authority for these waivers, their impact on the response effort and the environment, and whether they are necessary to ensure an adequate response. Such questions must be considered in the context of EPA's actual response to Katrina to ensure that the policies in place for the next natural disaster serve both the needs of immediate responders and the long-term health of the public and the environment.

Part II of this article will examine the history and purpose of the Clean Air Act (CAA) fuel standards, which were waived in response to Katrina. Part III will address this waiver and its impact. Part IV will introduce and discuss congressional proposals for broader waiver authority introduced in response to Hurricane Katrina. Part V will discuss the propriety of such waivers and Part VI will draw conclusions as to what type of waiver authority should be granted in times of national disaster.

II. The Clean Air Act and Regulation of Motor Vehicle Fuels

Early in the brief history of federal environmental regulation, Congress recognized that motor vehicles were a significant threat to air quality and health.[8] When the Clean Air Amendments of 1970 (Clean Air Act, CAA)[9] were passed, members of the House of Representatives expressed a desire to see motor vehicle air pollution reduced through changes in automobile design and fuel formulation:

> Automotive pollution constitutes in excess of 60 percent of our national air pollution problem and such pollution is particularly dangerous in the highly urbanized areas of our country. Therefore, increased attention must be paid to that source of pollution by insisting on the kinds of motor vehicles and fuels which will reduce pollution to minimal levels.[10]

Congress hesitated to impose specific standards to achieve this goal, however, recognizing that it was "not particularly well equipped to design cars or to determine the composition of fuels appropriate towards these ends."[11]

Instead, Congress authorized the Secretary of the Department of Health, Education, and Welfare to regulate the composition of fuels if the ingredients or additives would "endanger the public health or welfare" or would interfere with emission control devices in vehicles.[12] This "residual authority" was intended to be used as a stopgap measure if automobile manufacturers and fuel suppliers failed to make improvements on their own.[13] Despite inclusion of emissions standards for vehicles and the option to regulate fuels if necessary, three committee members called the 1970 Amendments "woefully inadequate to meet the menace of motor vehicle–generated air pollution."[14]

Between 1970 and 1990, the negative effects of Congress's failure to regulate fuels were compounded by regulations limiting the use of lead as a gasoline additive.[15] Lead was replaced with other compounds that were toxic and had higher volatility, which also contributed to smog.[16] In response, the Clean Air Act Amendments of 1990 (Amendments)[17] added specific standards for motor vehicle fuels. The specific standards were added without altering the residual authority to regulate fuels that endanger public health or emissions control systems,[18]

although the EPA Administrator, rather than the Secretary of Health, Education, and Welfare, now holds this authority.[19] The Amendments limited the volatility of gasoline and the sulfur content of diesel fuel and required the use of reformulated gasoline and oxygenated fuels in areas that failed to meet National Ambient Air Quality Standards (NAAQS) for certain pollutants.[20]

The NAAQS system first appeared in the 1970 Clean Air Act.[21] The CAA directs the Administrator to promulgate regulations setting primary and secondary ambient air quality standards.[22] Primary standards represent the level of air quality "requisite to protect the public health" with an "adequate margin of safety."[23] Secondary standards are designed to protect the "public welfare from any known or anticipated adverse effects" of air pollution.[24] These effects might include damage to vegetation and buildings and harm to livestock, among others.[25] In order to meet the primary and secondary standards of the NAAQS, the Act requires each state to create a State Implementation Plan (SIP) detailing how the state will achieve these standards.[26] Non-attainment areas for a pollutant are those areas that do not meet the primary or secondary standard for that pollutant.[27]

NAAQS have been promulgated for sulfur dioxide, particulate matter,[28] carbon monoxide, ozone, nitrogen dioxide (NO_2), and lead.[29] Each standard is in the form of a maximum numerical concentration of the pollutant in the ambient air.[30] Because of these numerical criteria, the six pollutants are often referred to as "criteria pollutants."[31] The fuel standards added in the 1990 Amendments are designed to help meet the air quality criteria established under the NAAQS system by limiting fuel components that contribute to elevated levels of criteria pollutants. The regulations created under the 1990 Amendments help achieve this end.

A. State Regulations

Section 211(c)(1) of the Clean Air Act allows the Administrator to regulate a fuel or fuel additive where emissions from the fuel or additive "cause[], or contribute[], to air pollution which may reasonably be anticipated to endanger the public health or welfare" or "will impair to a significant degree the performance of any emission control device or system which is in general use."[32] Section 211(c)(4) pre-empts state regulation of fuels that the Administrator has regulated under paragraph (1) or for which the Administrator has determined that regulation under paragraph (1) is unnecessary.[33] There is, however, an exception to federal pre-emption for certain state standards contained in a State Implementation Plan.[34] If the Administrator finds that regulation of a fuel or fuel additive is necessary to achieve a primary or secondary NAAQS in a particular state, she may promulgate or approve an SIP with a state-specific fuel provision.[35] To find that state control is "necessary," the Administrator must find that there are no other means of achieving the NAAQS or that the other means are "unreasonable or impracticable."[36] California is also exempt from federal preemption of state fuels regulations.[37] Thus, in California and in other states where state-specific controls are considered necessary for air quality, fuel suppliers are subject to state as well as federal regulations.

B. Volatility

Volatility is the tendency of a liquid to evaporate, or become a gas.[38] It is measured in terms of the vapor pressure of the liquid substance.[39] Gasoline with a higher vapor pressure evaporates more readily, especially at higher temperatures, leading to greater hydrocarbon air emissions.[40] Hydrocarbons react with nitrogen oxides (NOx) to create ground-level ozone, which is the main component of urban smog.[41]

As amended in 1990, the Clean Air Act section 211(h) requires the Administrator to "promulgate regulations making it unlawful for any person during the high ozone season (as defined by the Administrator) to sell, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with a Reid Vapor Pressure in excess of 9.0 pounds per square inch (psi)."[42] The Act also authorizes the Administrator to promulgate more stringent volatility standards for fuels sold in non-attainment and former non-attainment areas.[43]

Regulations promulgated under CAA § 211(h) establish a regulatory control period, running from May 1st through September 15th, during which a "refiner, importer, distributor, reseller, or carrier" is prohibited from selling or supplying gasoline that exceeds applicable volatility standards.[44] It also establishes a high ozone season, between June 1st and September 15th, when retailers and "wholesale purchaser-consumer[s]" are prohibited from supplying gasoline exceeding volatility standards.[45] The applicable volatility standard is 9.0 psi in attainment areas and also 9.0 in non-attainment areas in many Northern states.[46] A more stringent standard of 7.8 psi applies during the high ozone season in non-attainment areas in many Southern states.[47] The regulations also have an exception for fuels containing ethanol.[48] Fuels with between nine and ten percent ethanol content may exceed the above volatility standards by up to one psi.[49]

C. Sulfur Standards for Diesel Fuel

Section 211 of the 1990 Clean Air Act Amendments also requires that "no person shall manufacture, sell, supply, offer for sale or supply, dispense, transport, or introduce into commerce motor vehicle diesel fuel which contains a concentration of sulfur in excess of 0.05 percent (by weight) or fails to meet a cetane index minimum of 40."[50] Limiting the sulfur content of diesel fuels cuts sulfur dioxide and sulfate particulate emissions.[51] The cetane index is a measure of aromatic compounds, which contribute to carbonaceous and sulfate particulate emissions from combustion of diesel fuel.[52]

The health benefit of reducing the sulfur content of fuel is derived primarily from the removal of fine particulates.[53] Diesel particulates cause cancer and genetic mutations and may also carry other carcinogenic and mutagenic chemicals into the lungs.[54] Some have estimated that the cap on sulfur content eliminated as many as 15,000 deaths per year.[55]

In addition to its health benefits, the sulfur limit, which was projected to reduce sulfur emissions by 285,000 tons each year, was imposed partly to reduce acid deposition.[56] Acid deposition is precipitation with low pH, commonly known as "acid rain," or dry deposition of acidic particles and gases caused when sulfur dioxide (SO_2) in the atmosphere combines with water to create sulfuric acid.[57] Acidic precipitation lowers the pH of lakes and streams, killing fish and deterring other wildlife, and damages forest ecosystems.[58]

D. Reformulated and Oxygenated Gasoline

The 1990 Amendments also added provisions to address the problem of ground level ozone and carbon monoxide (CO) in large urban areas.[59] Section 211(k) requires sale of only "reformulated" gasoline (RFG) in ozone non-attainment areas, which are those cities that fail to meet the NAAQS for ozone.[60] The effect of the reformulated gasoline provision is to mandate at least a fifteen percent reduction in volatile organic compounds (VOCs)[61] and toxic pollutants by 1995, and a twenty-five percent reduction by 2000 from 1990 levels.[62] The VOC reductions are required only during the "high ozone season," while toxics reductions are required year round.[63]

Section 211(m) of the CAA requires states to include provisions in their State Implementation Plans to address carbon monoxide non-attainment areas.[64] Carbon monoxide "deprives the heart and brain of oxygen," and most of it comes from mobile source emissions. [65] Adding oxygen to fuel is the most cost-effective way to reduce carbon monoxide emissions.[66] Thus, SIPs must require sale of oxygenated fuel with an oxygen content of at least 2.7 percent to be sold in and around CO non-attainment areas.[67] The higher oxygen content can be achieved by addition of ethanol or MTBE.[68]

Congress authorized the regulation of fuels because of an increasing understanding of both the significance of mobile sources' contribution to air pollution and the negative effects of such pollution on human health and ecological systems.[69] While the 1970 Clean Air Act attempted to address these problems primarily through regulation of automobile design, the 1990 Amendments reflect the realization that air quality goals could be more fully and efficiently achieved through regulation of fuels as well.[70]

III. Fuel Standard Waivers: The Energy Policy Act of 2005

A. The Boutique Fuels Problem

One of the consequences of the fuel provisions of the 1990 Clean Air Act Amendments is that many different types of fuel must be produced and distributed to comply with federal and state regulations.[71] "Boutique fuel" is a term used to describe a specialized fuel blend that is required in a particular geographic area.[72] Many unique blends are required only in "islands"—isolated urban non-attainment areas—while less stringent fuel standards apply to the rural areas in between.[73] In 2001, EPA estimated that there were fifteen different fuel blends required across the country, each of which was available in at least two grades.[74] Thus, between thirty and forty-five different types of fuel had to be produced and distributed.

Boutique fuels can contribute to price volatility by making gasoline less fungible, meaning it cannot be shifted from an area with a surplus to an area with a shortfall.[75] In 2001, the President directed EPA to study possible ways to address these concerns while maintaining environmental benefits of the fuel regulations.[76] EPA and others found that many factors contributed to the volatility of gasoline prices and that boutique fuels had the greatest impact on price volatility in places that required unique blends that could only be produced by a few suppliers.[77] The studies also concluded that boutique fuels contributed most to price volatility where other factors had already created a tight market.[78] Both EPA and the Energy Information Administration (EIA) examined the possibility of creating a "menu" of fuels to reduce the overall number of fuels being produced.[79] EPA suggested that incentives could be used to ensure that states chose a cleaner fuel from the menu than their current blend, thus reducing the number of fuels without degrading air quality.[80] EIA noted that such a shift to cleaner fuels would increase production costs, resulting in higher average prices in exchange for fewer and less severe price spikes.[81] Notably absent from any of the recommendations was the idea of waiver authority during supply emergencies.[82]

The idea that waivers of the Clean Air Act should be used to address the boutique fuels problem has been promoted by the Wisconsin congressional delegation since 2002,[83] presumably due to pressure from constituents reacting to the price spikes of 2000.[84] In 2002, Representative Sensenbrenner introduced legislation to allow the governors of Wisconsin, Illinois, and Indiana to waive RFG requirements if prices got too high or supplies too low.[85] The issue of boutique fuels remained a subject of debate throughout consideration of the failed Energy Policy Act of 2003, though proposed amendments to that bill relating to boutique fuels did not contain waiver authority.[86] In 2004, Representative Ryan of Wisconsin along with Representative Blunt of Missouri again proposed waiver

authority under a bill entitled "The Gasoline Price Reduction Act of 2004."[87] This bill authorized the EPA Administrator to waive fuel standards under an SIP in the case of a "significant fuel supply disruption" for "such period as the Administrator . . . deems necessary."[88] The bill also authorized the Administrator to give preference to SIPs that used one of the fuel blends required under federal regulations, prohibited the Administrator from approving an SIP that would increase the total number of fuel types required across the country, and required the Administrator to conduct a study of the impact of boutique fuels on fuel price and air quality.[89]

Strong opposition on the floor of the House focused on the waiver provision.[90] Opponents argued that the waiver would do nothing to alleviate gas prices and would increase air pollution-related public health problems.[91] Representative Dingell, a member of the Committee on Energy and Commerce, criticized the ambiguity and indeterminacy in the waiver provision:

> The bill allows EPA to waive Clean Air Act requirements in the event of a "significant fuel supply disruption." Yet the meaning of this term is not supplied. Nor are there limits placed on the length of the waiver or on the overall detriment to air quality that could occur. Nothing in the bill would require anyone to either analyze or ameliorate the impacts on air quality in any way, regardless of how easily or inexpensively that could be done.[92]

Representative Udall likewise expressed concern that because a waiver need only be deemed "necessary," "EPA's decision might not be subject to judicial review, or that any review would be very limited."[93] He and others also criticized the way the bill was introduced.[94] The bill was brought up for a vote without consideration or revision in committee and without any supporting studies or hearings.[95]

Despite the failure of previous attempts, waiver authority was again introduced on April 5, 2005 in the "Boutique Fuels Reduction Act of 2005."[96] This bill would authorize the Administrator to waive state and federal fuel standards during "extreme and unusual fuel or fuel additive supply circumstances."[97] The bill also contained provisions capping the number of boutique fuels at the September 1, 2004 level and requiring the EPA Administrator and the Secretary of Energy to conduct a study on boutique fuels.[98] The following day a bill entitled the "Boutique Fuels Elimination Act of 2004" was introduced, which contained the same substantive language as the earlier bill, but combined it into a single section.[99] The precise language in these bills, including the waiver provision, was subsequently inserted into the Energy Policy Act of 2005.[100]

The legislative history of the Energy Policy Act itself is scant. The House Conference Report contains no explanation of the waiver provision, and indeed, no explanations of any of the provisions of the revised bill set forth in that report.[101] The waiver was only briefly mentioned in debate on the Energy Policy Act. Representative Ryan of Wisconsin, a co-sponsor on each of the boutique fuels bills, said the provision was "very important to reducing the price spikes that we are experiencing."[102] He also emphasized the emergency and temporary nature of the waiver.[103] "If there is a problem in supply overnight, an immediate problem . . . a pipeline break or a refinery fire, the EPA has waiver authority on a 20-day basis to fix that."[104]

B. The Energy Policy Act of 2005

On August 8, 2005, President Bush signed the Energy Policy Act of 2005 into law.[105] Section 1541 of the Act amends section 211(c)(4)(C) of the Clean Air Act to include the following waiver authority:

> The Administrator may temporarily waive a control or prohibition respecting the use of a fuel or fuel additive required or regulated by the Administrator pursuant to subsection (c), (h), (i), (k), or (m) of this section . . . if, after consultation with, and concurrence by, the Secretary of Energy, the Administrator determines that—
>
> (I) extreme and unusual fuel or fuel additive supply circumstances exist in a State or region of the Nation which prevent the distribution of an adequate supply of the fuel or fuel additive to consumers;
>
> (II) such extreme and unusual fuel and fuel additive supply circumstances are the result of a natural disaster, an Act of God, a pipeline or refinery equipment failure, or another event that could not have been foreseen or prevented and not the lack of prudent planning on the part of the suppliers of the fuel or fuel additive to such State or region; and
>
> (III) it is in the public interest to grant the waiver (for example, when a waiver is necessary to meet projected temporary shortfalls in the supply of the fuel or fuel additive in a State or region of the Nation which cannot otherwise be compensated for).[106]

Thus, the Administrator is authorized to waive most of the fuel standards created under the 1990 Clean Air Act Amendments, including standards based on endangerment to public health and state standards (subsection c); volatility standards (subsection h); diesel sulfur standards (subsection i); reformulated gasoline (subsection k); and oxygenated fuel requirements (subsection m).[107] In the event the Administrator finds that the "extreme and unusual" supply circumstance exists, that it was created by one of the listed events, and that a waiver is in the public interest, then any waiver granted must meet additional requirements.[108] The waiver may only be applied "to the smallest geographic area necessary to address the extreme and unusual fuel and fuel additive supply circumstances" and may only be "effective for a period of 20 calendar days" or the "shortest practical time period necessary to permit the correction of the extreme and unusual fuel and fuel additive supply circumstances and to mitigate impact on air quality" if the Administrator finds that less than twenty days are necessary.[109]

C. Fuel Waivers Issued in Response to Hurricanes Katrina and Rita

On August 30, 2005, just twenty-two days after the Energy Policy Act of 2005 became law, Administrator Johnson waived volatility and sulfur standards in Florida, Louisiana, Alabama, and Mississippi—the states hardest hit by Hurricane Katrina.[110] In a letter announcing the waiver to the governors of the four states, Administrator Johnson stated that EPA and the states had come to the conclusion that there was a shortage in those states of gasoline with RVP below 9.0 psi and of diesel fuel with less than 500 ppm sulfur content.[111] The letter also indicates that suppliers should use available compliant fuel before selling fuel that does not meet the volatility and sulfur standards and that suppliers should submit a report containing the total volume of non-compliant fuel sold.[112] On August 31, 2005—the very next day—the waiver of volatility and sulfur standards was expanded to all fifty states, U.S. territories, and Washington, D.C.[113] The waiver was effective through September 15, 2005.[114]

In the following weeks, extensions and additional waivers of state-specific fuel standards were granted.[115] Volatility waivers were extended in some states and non-attainment areas that required sale of lower volatility gasoline beyond the September 15th end of the high ozone season.[116] EPA extended the volatility waiver through September 30th for the Phoenix area, where low volatility fuel was required through the end of the month.[117] It waived volatility standards in Texas through October 1st.[118] Three extensions of the volatility waiver were issued for the State of California, allowing use of non-compliant fuel through October 31st.[119] California's SIP required summer gasoline with low volatility through the end of October.[120]

EPA also issued waivers of the standards for sulfur content of diesel fuel in several states.[121] EPA waived the standard until October 5th in Tennessee and Petroleum Administration for Defense Districts (PADDs) I and III, encompassing the East Coast and Gulf Coast states, respectively.[122] Kentucky was added to this waiver on September 30th.[123] The waiver was extended until October 25th for Virginia, North Carolina, South Carolina, Georgia, Florida, Tennessee, Kentucky, and all of PADD III.[124] It was again extended through November 10th for Florida,[125] and November 14th for Kentucky and Mississippi.[126] EPA also waived the sulfur diesel requirements for Iowa and Nebraska from October 24th through November 15th,[127] even though those states had been required to use low-sulfur diesel since the nationwide waiver expired on September 15th.[128]

In addition to extension of the volatility and sulfur-diesel waivers, EPA also granted waivers of other fuel standards required in specific states and regions.[129] EPA issued three waivers of a requirement to sell low-sulfur gasoline in the Atlanta area, extending that exemption through October 25th.[130] EPA raised specific limits on the sulfur content of gasoline produced by the Baytown, Texas, ExxonMobil refinery from September 30th through October 6th, and the Lake Charles, Louisiana, CITGO refinery between October 11th and October 15th.[131] EPA granted several waivers allowing the use of conventional, rather than reformulated, gasoline.[132] These included a waiver for the Houston–Galveston and Dallas–Fort Worth areas that was extended twice through September 30th, a waiver and two extensions for the Richmond area allowing sale of conventional gasoline through October 20th, and a waiver and extension for the St. Louis area that was effective through October 27th.[133] It also issued two waivers delaying implementation of a new Texas program requiring low-emission diesel fuel.[134]

D. Impact of Waivers and Waiver Authority

In testimony before Congress, an EPA official stated that "[t]o date, EPA believes that its exercise of the new waiver authority contained in section 1541 of the Energy Policy Act of 2005 has not resulted in excessive emissions."[135] The example given in support of this statement, however, is that the volatility waiver was only in place for two weeks prior to the September 15th date when sale of higher volatility "wintertime" gasoline would have been permitted anyway.[136] The testimony offers no evidence concerning the effects of the other waivers on health, nor does it indicate whether temperatures during early September were low enough in metropolitan areas to mitigate the effects of an early change to winter gasoline.[137] Furthermore, the waivers were extended in many areas where state and federal officials had previously determined that later use of summer gasoline or other measures were necessary to combat air quality problems.[138]

It is difficult to quantify the overall impact these waivers have had on air quality. While available data reflect the amount of each type of fuel supplied in the months following the hurricanes, they do not provide a clear indication of what portion of any change was attributable to the waivers as opposed to other factors.[139] Such information will be essential to determining what the environmental and health impacts of the waivers were, if any. One promising sign is that EPA has required suppliers taking advantage of the waivers to provide information on the quantities of non-compliant fuel used.[140] Lawmakers should push EPA to enforce this reporting requirement and release information on the amounts of non-compliant fuels used and the associated emissions. Such information will allow Congress to more accurately assess the environmental impact and weigh it against supply needs in emergency situations.

In addition to the immediate impact of post-Katrina waivers, the provisions of the Energy Policy Act of 2005 may have long-lasting, more frightening impact. This is because the Energy Policy Act of 2005 grants the Administrator authority to waive fuel standards based on various supply disruptions.[141] The language of the waiver provision provides some safeguards in requiring that the supply circumstance be "extreme and unusual" and that a waiver is "in the public interest."[142] These terms, however, are vague and leave much to the Administrator's discretion.

The part of the waiver provision giving rise to the greatest concern, however, is the provision listing the events that may justify a waiver. In order to justify a waiver, the supply disruption must be caused by "a natural disaster, an Act of God, a pipeline or refinery equipment failure, or another event that could not reasonably have been foreseen or prevented and not the lack of prudent planning on the part of the suppliers of the fuel or fuel additive."[143] These provisions suggest that any supply disruption not caused by the negligence of suppliers might justify a waiver.[144] Thus, in addition to natural disasters and Acts of God,[145] foreign wars, acts of terrorism, or simple unforeseen equipment failures at a large refinery would allow the EPA Administrator to waive fuel standards that protect air quality.

E. Economic Analysis: Were CAA Waivers Necessary?

The fuel standard waivers issued after Katrina have been justified as an adjustment necessary to protect consumers and facilitate relief efforts.[146] The Administrator stated that the waivers were issued "to ensure that the hurricane Katrina natural disaster does not result in serious fuel supply interruptions around the country" and that the waivers were "necessary to ensure that fuel is available throughout the country to address public health issues and emergency vehicle supply needs."[147] Critics of the fuels standards have argued that they threaten a reliable fuel supply and cause price increases.[148] Oil industry representatives made similar arguments during hearings on the Energy Policy Act.[149]

Regulation of fuels may be seen as a burden on industry that reduces supply below what the market would ordinarily provide; it also, however, can be seen as means of compensating for a market failure.[150] One type of market failure is an external cost, or a cost imposed on society that is not reflected in the price of the good.[151] Air pollution is an external cost of the use of motor vehicles.[152] Because of the negative effects on health and ecosystems from use of dirtier fuels,[153] the waivers have increased the external costs of motor vehicle use in the weeks following Hurricane Katrina. People across the country may be willing to endure the additional costs of air pollution in order to ensure the availability of fuel for relief efforts. On the other hand, the costs are likely to be borne disproportionately by those in urban areas who are most affected by smog and diesel particulates.

One way to obtain the benefits of providing adequate supply without imposing additional external costs on vulnerable segments of the population would be to implement conservation measures. In a surprising reversal of its prior policies, the Bush Administration called on federal agencies to limit their use of all types of fuel after the hurricanes by cutting non-essential travel, encouraging energy-efficient commuting, and reducing peak hour electricity usage.[154] This approach has some support in the waiver provision itself, which states that a waiver should only be issued when "in the public interest . . . for example, when a waiver is necessary to meet projected temporary shortfalls . . . *which cannot otherwise be compensated for*."[155] This language, though only an example of a situation in which a waiver would be in the public interest, suggests a waiver might not be in the public interest if conservation could "otherwise compensate" for the shortage.[156]

IV. Proposals for Broader Environmental Waiver Authority

Congress has considered many legislative proposals dealing with the response to the hurricanes of 2005.[157] Thus far, only legislation appropriating funds to response and recovery has been signed into law.[158] Several proposed measures, however, would give the executive branch additional authority to waive environmental laws.[159] The proposals raise important questions about whether additional waiver authority is necessary to adequately respond to these and other disasters.[160]

A. Proposed Legislation

Of the initiatives introduced, Senate Bill 1711 has gained the most attention and generated the strongest criticism from environmentalists.[161] The proposed law would allow the EPA Administrator, "in consultation with

the Governor of any affected State, as determined by the Administrator" to "waive or modify the application of any requirement that is contained in any law (including a regulation) under the administrative jurisdiction of, or that applies to any project or activity carried out by, the Environmental Protection Agency."[162] A waiver may only be granted if the Administrator finds that its is "necessary to respond . . . to a situation or damage relating to Hurricane Katrina" and is "in the public interest, taking into consideration any emergency condition relating to Hurricane Katrina and any consequence to public health or the environment."[163] Waivers issued under the bill would initially go into effect for 120 days from August 26, 2005, but could be extended "as the Administrator determines to be appropriate" for up to eighteen months.[164]

By authorizing waivers of any law under EPA jurisdiction, the bill could impact air quality,[165] water quality and drinking water,[166] hazardous waste clean-up and disposal,[167] and reporting of emissions and toxic releases.[168] In addition to its reach across environmental media, the law, if passed, could authorize waivers in all fifty states.[169] Forty-one states were declared disaster areas and every state has at least arguably been affected by the hurricane because of higher gasoline prices and efforts to house displaced victims.[170] The proposed legislation leaves the determination of whether a state has been affected to the Administrator.[171]

Criticism of the bill has focused on the need for these environmental protections during clean-up and recovery from the disaster.[172] In response to the bill, Senator Feingold stated:

> People returning to areas devastated by the hurricane deserve to know, among other things, that their water is safe to drink and that new construction won't put them or their families in harm's way by polluting the air or destroying wetlands that can provide valuable ecological services. . . .
>
> . . . While all of us want to help those affected by hurricane Katrina, there is simply no valid reason to think that we need to erode established environmental and public health protections in order to do so. We should be focused not on efforts that could harm the very people who have already faced the unthinkable but on efforts that will safeguard the health of the public and the health of the environment.[173]

Thus, in the case of such broad environmental waivers, the benefit of expedited response may be outweighed by the cost of additional health and environmental risks.

Senate Bills 1765 and 1766, both known as the "Louisiana Katrina Reconstruction Act," also grant significant waiver authority to the executive branch.[174] Section 502 of both bills would give the President authority to grant an emergency permit to state or local governments or private enterprises for any project related to hurricane response or reconstruction.[175] A project receiving such an emergency permit would automatically be considered to be in compliance with federal law.[176] This authority would remain in place for two years from enactment of the law.[177] The proposal does contain some safeguards, such as requiring notice to Congress and agencies that would otherwise have regulatory authority over the project.[178] Thus, Congress could take legislative action to halt a project, or an agency could petition Congress to take such action.

Other proposals do not directly authorize waivers of substantive environmental regulations, but affect the application of environmental laws nonetheless. These include the Gulf Coast Infrastructure Emergency Assistance Act of 2005, which waives conditions for federal funding of water treatment system improvements;[179] the Gasoline for America's Security Act, which encourages the construction of new refineries by relaxing Clean Air Act standards and transferring approval authority from EPA to the Department of Energy;[180] and H.R. 3836, which would streamline permitting for reconstruction of refineries damaged by Katrina.[181]

B. Is Broader Waiver Authority Necessary?

In its response to proposed legislation authorizing new waivers of environmental laws after Hurricane Katrina, the American Bar Association Section of Environment, Energy, and Resources (SEER) identified over 50 exemptions in existing environmental laws that could be used during hurricane recovery.[182] These include exemptions for an "act of God," "emergency," or "disaster areas."[183] The Resource Conservation and Recovery Act, Clean Air Act, Clean Water Act, and Safe Drinking Water Act allow the President to issue one-year renewable exemptions when "in the paramount interest of the United States to do so."[184] The requirements of the National Environmental Policy Act (NEPA), including Environmental Impact Statements for federally funded projects, can be waived in an emergency situation under regulations promulgated by the Council on Environmental Quality (CEQ).[185] Finally, executive agencies also have general enforcement discretion and can choose on a case-by-case basis not to enforce environmental laws where doing so could interfere with disaster response.[186]

Given the numerous exemptions and sources of waiver authority already present in environmental statutes and regulations, additional waiver authority is superfluous.[187] SEER found no evidence that environmental regulations had impeded hurricane response and recovery efforts between August and November of 2005.[188] A Congressional Research Service study of existing and

proposed waiver authority likewise found that "what is lacking are specific examples of the types of activity that would constitute essential components of reconstruction but that might not be permitted or could be delayed under current law and regulations."[189] Furthermore, EPA Administrator Steven Johnson told members of the Senate committee considering Senate Bill 1711 that environmental laws would not be an impediment to clean-up efforts.[190] The lack of a clear necessity for broader waiver authority again suggests that such proposals may be merely opportunistic attacks on environmental laws.

V. Policy Implications: When Are Waivers Appropriate?

The primary question for policymakers in determining whether to authorize and issue environmental waivers is whether the benefit to emergency response outweighs the environmental harm of allowing the previously prohibited activity. In the case of Hurricane Katrina, the perceived threat to emergency response and the general public welfare was the limited supply and high price of motor vehicle fuels.[191] Gasoline and diesel prices spiked after the hurricanes,[192] but it is unclear how much of this increase was due to volatility caused by the boutique fuels problem or whether the waivers mitigated the impact.

One study has concluded that the price increases cannot be explained by crude oil prices.[193] This conclusion seems to support the idea that the price increases were caused by problems in the refining and distribution stages of the supply chain, where waivers of fuel specification could help. On the other hand, oil companies have reported record profits in the months following Katrina, leading some to believe that price gouging on the part of suppliers and retailers caused the high prices.[194] The impact of price gouging may have varied across the country. In New York, fifteen retailers were fined for gouging,[195] while in California, a study found that other factors were to blame for high prices.[196] Like the effect of the waivers on supply and price, further study of the environmental impact of the waivers will be needed to allow policy makers to determine whether they were justified and whether similar authority should be exercised in the future.

One way for Congress to ensure that waivers are only implemented when the benefits to response outweigh the environmental impacts is to narrowly draft waiver authority. Courts review agency action with substantial deference.[197] Deference to agency action will only be given, however, where there is an ambiguity in the statute that Congress has left for the agency to fill.[198] Thus, when Congress imposes a specific criterion for granting waivers and specific limitations on the type of waiver that may be granted, courts will review the agency action for its compliance with these mandates. If, on the other hand, the statute only requires a waiver to meet broad or ambiguous conditions, courts will likely defer to the agency's interpretation.

For example, the waiver provision of the Energy Policy Act of 2005 requires that a waiver be based on an "extreme and unusual" supply disruption that prevents distribution of "adequate" supplies.[199] Courts reviewing a waiver should give a narrow interpretation to the "extreme and unusual" language. A basic principle of statutory construction is that every word in a statute should be given meaning.[200] Furthermore, opposition to and failure of earlier proposals authorizing waivers during "significant" supply disruptions[201] indicates that something more than a "significant" disruption is required to meet the standards of the enacted statute. Still, the question of what constitutes an "adequate" supply is left to the Administrator.[202] Is an "adequate" supply one that meets the level of demand at $1.50 per gallon? Or is a supply that causes prices to increase to $2.50 per gallon, but also causes people to drive less and thereby reduce demand "adequate"? With such ambiguity in the statute, courts reviewing a waiver would be likely to defer to the agency interpretation of what constitutes an adequate supply.

The provisions of the waiver authority that limit the type of waiver that may be granted face similar problems. The waiver can only be applied to "the smallest geographic area *necessary* to address" the supply disruption.[203] It is unclear, however, what "necessary" means. This is another instance in which courts would be likely to defer to agency interpretation. On the other hand, the determinations of the agency are still subject to a reasonableness standard.[204] An arbitrary and capricious interpretation, even where Congress has delegated authority, will not be upheld.[205] Thus, granting a waiver in an area clearly unaffected by the supply disruption could still be found unlawful.

Congress provided a clearer mandate with respect to the duration of the statute.[206] The statute states that a waiver is only permissible if it "is effective for a period of 20 calendar days or, *if the Administrator determines that a shorter waiver period is adequate,* for the shortest practicable time period necessary to permit the correction of the . . . supply circumstances and to mitigate impact on air quality."[207] A close reading of this language demonstrates that Congress intended that twenty days to be the maximum length of any waiver granted. Again the vague term "necessary" is used, but here the Administrator only has authority to determine how long is necessary if that time is *shorter* than twenty days.[208] A strict reading calls into question the legality of post-Katrina waivers, some of which extended well into October and November.[209] If Congress only intended to grant authority for waivers of twenty days or less, repeated renewals of such waivers far beyond that limit are in direct contravention of that authority.

The new proposed waiver authority would likely be even more difficult to challenge. Under Senate Bill 1711, the Administrator need only determine that a waiver is

"necessary to respond" to Hurricane Katrina and "is in the public interest."[210] Under the Louisiana Katrina Reconstruction Act, the President is only required to find that a waiver would be "in the best interests of the United States."[211] Thus, each of these proposals would authorize waivers of almost any environmental regulation that would be subject to very limited judicial review.

Without such review, there will be no incentive for those issuing waivers to consider the need for the waiver as weighed against the environmental impact or alternative options for meeting response needs. During emergencies, individuals who have broad authority to waive environmental regulations will likely to be subject to political pressures to take any action within their authority that is perceived as aiding response and recovery, even if that action will be ineffective or harmful in other ways. Instead, Congress should issue specific waiver authority to address known problems. Because more narrowly drafted authority would be subject to a more searching judicial review, the agency or individual issuing the waiver would have an incentive to create a record and weigh the costs and benefits of the decision.

VI. Conclusion

Waivers of environmental regulations should be viewed with some skepticism. Because they undermine long-standing environmental policies designed to protect public health, other alternatives that can achieve similar results of ensuring adequate emergency response, such as conservation measures, should be considered. In addition, regulations may be necessary to protect those impacted by natural disasters and to ensure recovery is conducted in a way that does not create long-term problems. Proposed legislation granting broad waiver authority to the Administrator goes beyond what is necessary to ensure relief and threatens the safety of those victims emergency waivers are intended to protect. Instead, narrowly drafted legislation designed to address specific disaster response issues will ensure careful consideration by agencies and searching judicial review. This, in turn, will ensure that waivers of environmental regulations are used to ensure the safety of disaster victims while mitigating negative effects on the rest of the population, rather than being exploited by those who seek to profit from relaxed standards.

Endnotes

1. Department of Homeland Security, Press Conference with Officials from Homeland Security, the Environmental Protection Agency, and the Departments of Health and Human Services, Energy, Transportation, and Defense, http://www.dhs.gov/dhspublic/display?content=4773 (last visited Feb. 28, 2006).
2. *See* Robert Viguerie, *Coastal Erosion: Crisis in Louisiana's Wetlands*, 51 La. B.J. 85, 86 (2003) (describing how destruction of wetlands could contribute to flooding during tropical storms and hurricanes).
3. *See* Martin M. Randall, *Coastal Development Run Amuck: A Policy of Retreat May Be the Only Hope*, 18 J. Envtl. L. & Litig. 145 (2003) (discussing how a policy of retreat from coastal and barrier island development could reduce economic losses in hurricanes and other natural disasters).
4. Editorial, *Time to Connect the Dots*, N.Y. Times, Sept. 28, 2005, at A26.
5. *See* U.S. Environmental Protection Agency, Hurricane Response 2005, http://www.epa.gov/katrina/index.html (last visited Feb. 28, 2006).
6. Remarks by EPA Administrator Johnson—Waiver of EPA Standards for Gasoline and Diesel Fuels in the Wake of Hurricane Katrina, http://www.epa.gov/katrina/index.html (follow "Fuel Waivers" hyperlink, then follow "Remarks by EPA Administrator Stephen L. Johnson on August 31, 2005 regarding the issuance of fuel waivers" hyperlink) (last visited Feb. 28, 2006) (hereinafter Remarks).
7. Frank Clifford, *Q&A Bruce Babbitt: Alarmed by "Cycle of Anti-Environmentalism*," L.A. Times, Nov. 15, 2005, at B2.
8. *See* H.R. Rep. No. 91-1146 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5356, 5361.
9. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1694 (1970) (codified as amended at 42 U.S.C. §§ 7401-7671q).
10. H.R. Rep. No. 91-1146.
11. *Id.*
12. Clean Air Amendments of 1970 § 211.
13. H.R. Rep. No. 91-1146.
14. H.R. Rep. No. 91-1146 (quoting Hon. Lionel Van Deerlin, Hon. Richard L. Ottinger and Hon. Robert O. Tiernan for their views on H.R. 17255).
15. Henry A. Waxman et al., *Cars, Fuels, and Clean Air: A Review of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 1947, 1972 (1991).
16. *Id.* at 1972-73.
17. Clean Air Act Amendments, 101 Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C. §§ 7401-7671q).
18. *Id.* § 213.
19. Clean Air Act § 211(c)(1), 42 U.S.C. § 7545(c)(1) (2000).
20. Clean Air Act Amendments §§ 216-17, 219.
21. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1694 (1970) (codified as amended at 42 U.S.C. §§ 7401-7671q).
22. 42 U.S.C. § 7409(a).
23. 42 U.S.C. § 7409(b).
24. *Id.*
25. Environmental Science Deskbook § 8:9 (James W. Conrad, Jr. ed., 2005).
26. 42 U.S.C. § 7407(a).
27. 42 U.S.C. § 7407(d)(1)(A).
28. Standards for particulate matter are divided into standards for PM_{10} and $PM_{2.5}$. 40 C.F.R. §§ 50.6–50.7. PM_{10} is particulate matter with particles smaller 10 micrograms (µg), or respirable particulate matter. Environmental Science Deskbook, supra note 25, § 8:4. $PM_{2.5}$ is fine particulate matter with particles smaller than 2.5 µg. *Id.*
29. 40 C.F.R. Part 50 (2005).
30. Environmental Science Deskbook, *supra* note 25.
31. *Id.*
32. 42 U.S.C. § 7545(c)(1).
33. 42 U.S.C. § 7545(c)(4)(A); see also Environmental Protection Agency, Staff White Paper: Study of Unique Gasoline Fuel

Blends ("Boutique Fuels"), Effects on Fuel Supply and Distribution and Potential Improvements 13 (2001), *available at* http://www.epa.gov/otaq/regs/fuels/p01004.pdf (hereinafter EPA White Paper).

34. EPA White Paper, *supra* note 33.
35. 42 U.S.C. § 7545(c)(4)(C)(i).
36. 42 U.S.C. § 7545(c)(4)(C)(i).
37. EPA White Paper, *supra* note 33.
38. Environmental Science Deskbook, *supra* note 25, § 8:6.
39. *Id.*
40. S. Rep. No. 101-228 (1990), as reprinted in 1990 U.S.C.C.A.N. 3385, 3394.
41. U.S. EPA, Mobile Source Emissions—Past, Present, and Future: Hydrocarbons, http://www.epa.gov/otaq/invntory/overview/pollutants/hydrocarbons.htm (last visited Feb. 28, 2006) (Ground-level ozone can cause breathing and cardiovascular problems, while hydrocarbons themselves may be carcinogens).
42. Clean Air Act § 211(h), 42 U.S.C. § 7545(h) (2000).
43. *Id.*
44. 40 C.F.R. § 80.27 (2005).
45. *Id.*
46. *Id.* (The states where the 9.0 standard applies in non-attainment areas are Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee (Knox County only), Vermont, Washington, West Virginia, Wisconsin, and Wyoming).
47. *Id.* (The applicable standard in the following states is 9.0 psi in May and 7.8 psi in June through September: Alabama, Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Tennessee (other non-attainment areas), Texas, Utah, and Virginia). *See also* 42 U.S.C. § 7545(h)(6) (the volatility standards do not apply to Alaska or Hawaii).
48. 40 C.F.R. § 80.27(d).
49. *Id.*
50. Clean Air Act § 211(i)(1), 42 U.S.C. § 7545(i)(1) (2000).
51. Jonathon S. Martel, *Regulation of Fuels and Fuel Additives, in* ABA Section of Natural Resources, Energy, & Environmental Law, The Clean Air Act Handbook 331 (Robert J. Martineau, Jr. & David P. Novello eds., 1998).
52. *Id.*
53. S. Rep. No. 101-228 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3396.
54. *Id.*
55. Frederick G. Jauss, *A Bridge Too Far: The EPA's Diesel Sulfur Rule and the Increasing Cost of Fuels Regulation Under the Clean Air Act*, 53 Admin. L. Rev. 1021, 1035 (2001) (citing American Lung Association, *Lung Association Welcomes Diesel Proposal, Calls Clean Up of Big Trucks Critical to Protect Public Health* (May 17, 2000), *available at* http://www.lungusa.org/press/legislative/leg051700.html).
56. S. Rep. No. 101-228.
57. Kate M. Joyce, *Who'll Stop the Rain?*, 7 Alb. L. Env. Outlook J. 94 (2002). Nitrogen oxides (NO_x) also contribute to acid rain through a similar process. *Id.*
58. *Id.*
59. *See* Henry A. Waxman, *Overview and Critique: An Overview of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 1721, 1770 (1991).
60. Clean Air Act § 211(k), 42 U.S.C. § 7545(k) (2000).
61. VOCs are the carbon-based compounds, discussed *supra*, that react with nitrogen oxides in the presence of sunlight to form ground-level ozone, or smog. *See* Environmental Science Deskbook, *supra* note 25, § 8:6. Defined by exclusion, VOCs "include all carbon-based compounds, regardless of vapor pressure and potential to volatilize, with the exception of specifically listed compounds . . . that do not readily react photochemically in the atmosphere." *Id.*
62. *See* Waxman, *supra* note 15, at 1976-81. This section requires that fuel meet "the more stringent" of performance standards (percentage reductions from 1990 levels) or fuel specifications limiting the percentage of certain components of the fuel. *Id.* Because the more stringent of the two is required, reformulations will, at a minimum, achieve the percentage reductions reflected in the performance standards. *Id.*
63. *See* Waxman, *supra* note 15, at 1977-78.
64. 42 U.S.C. § 7545(m).
65. Waxman, *supra* note 15, at 1951.
66. *Id.* at 1988.
67. *Id.*
68. *Id.*
69. *Id.* at 1950-51.
70. *Id.* at 1952-53.
71. Energy Information Administration, Gasoline Type Proliferation and Price Volatility 7 (2002), *available at* http://www.eia.doe.gov/oiaf/service_rpts.htm; EPA White Paper, *supra* note 33, at 5-6.
72. *See* EPA White Paper, *supra* note 33, at 2.
73. *See id.* at 29.
74. *Id.* at 100.
75. *See* Energy Information Administration, *supra* note 71, at 5; EPA White Paper, *supra* note 33, at 3.
76. Environmental Protection Agency, Study of Boutique Fuels and Issues Relating to Transition from Winter to Summer Gasoline 1-2 (2001), *available at* www.epa.gov/otaq/regs/fuels/r01051.pdf.
77. Energy Information Administration, *supra* note 71, at 6; EPA White Paper, *supra* note 33, at 3. For example, both California and the Chicago-Milwaukee area require fuels that can only be made by a limited number of suppliers. Sharp price increases in the Chicago-Milwaukee area after a pipeline broke demonstrated how an isolated area with a unique fuel could be affected by a disruption. Energy Information Administration, *supra* note 71, at 6.
78. Energy Information Administration, *supra* note 71, at 4-5; EPA White Paper, *supra* note 33, at 2-3.
79. Energy Information Administration, *supra* note 71, at 12-14; EPA White Paper, *supra* note 33, at 22-29.
80. EPA White Paper, *supra* note 33, at 30.
81. Energy Information Administration, *supra* note 71, at 15.
82. *Id.* at 14-15; EPA White Paper, *supra* note 33, at 62.
83. 148 Cong. Rec. E322 (daily ed. March 12, 2002) (Statement of Rep. Sensenbrenner).
84. *See* note 77, *supra.*
85. 148 Cong. Rec. E322 (daily ed. March 12, 2002) (Statement of Rep. Sensenbrenner).
86. 149 Cong. Rec. H3268, H3273-77 (daily ed. Apr. 10, 2003) (Statements of Reps. Barton, Engel, Green, Ryan, and Tauzin); 149 Cong. Rec. S15217, S15252 (daily ed. Nov. 20, 2003) (Statement of Senator Feingold).
87. H.R. 4545, 108th Cong. (2004).

88. *Id.* § 2.

89. *Id.* § 3.

90. 150 Cong. Rec. H4133, H4135-39 (daily ed. June 15, 2004) (Statements of Reps. Allen, Dingell, Markey, Solis).

91. *Id.*

92. *Id.* at 4139.

93. 150 Cong. Rec. E1147, E1147 (daily ed. June 16, 2004) (Statement of Rep. Udall).

94. *Id.*; 150 Cong. Rec. H4133, H4136-37, 4139 (daily ed. June 15, 2004) (Statements of Reps. Allen, Dingell, and Solis).

95. *Id.*

96. H.R. 1459, 109th Cong. (2005).

97. *Id.* § 2.

98. *Id.* §§ 3-4.

99. H.R. 1493, 109th Cong. (2005).

100. Pub. L. No. 109-58, 119 Stat. 594 (2005).

101. *See* H.R. Rep. No. 109-190 (2005).

102. 151 Cong. Rec. H2180, H2189 (2005).

103. *Id.*

104. *Id.*

105. Statement by President George W. Bush Upon Signing H.R. 6, 41 WEEKLY COMP. PRES. DOC. 1267, *as reprinted in* 2005 U.S.C.C.A.N. S17 (2005).

106. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1541(a), 119 Stat. 594 (2005) (to be codified at 42 U.S.C. § 7545(c)(4)(C)(ii)).

107. *See id.*

108. *Id.*

109. *Id.*

110. Letter from Stephen L. Johnson, Admin., Envtl. Prot. Agency, to Jeb Bush, Governor, State of Florida; Robert Riley, Governor, State of Alabama; Kathleen Blanco, Governor, State of Louisiana; and Haley Barbour, Governor, State of Mississippi (Aug. 30, 2005), *available at* http://www.epa.gov/compliance/katrina/waiver/index.html (hereinafter Four State Waiver Letter).

111. *See id.*

112. *Id.*

113. See Letter from Stephen L. Johnson, Admin., Envtl. Prot. Agency, to Robert Riley, Governor, State of Alabama (Aug. 31, 2005), *available at* http://www.epa.gov/compliance/katrina/waiver/index.html.

114. *Id.*

115. U.S. Environmental Protection Agency, Fuel Waiver Response to Hurricanes 2005, http://www.epa.gov/compliance/katrina/waiver/index.html (last visited Feb. 28, 2006) (hereinafter Fuel Waiver Response).

116. *See id.*; 40 C.F.R. § 80.27 (2005).

117. Letter from Stephen L. Johnson, Admin., Envtl. Prot. Agency, to Janet Napolitano, Governor, State of Arizona (Sept. 13, 2005), *available at* http://www.epa.gov/compliance/katrina/waiver/index.html (explaining that Arizona's State Implementation Plan calls for use of summer gasoline in the Phoenix area until September 30th and waiving this requirement).

118. Fuel Waiver Response, *supra* note 115.

119. Letter from Stephen L. Johnson, Admin., Envtl. Prot. Agency, to Arnold Schwarzenegger, Governor, State of California (Oct. 20, 2005), *available at* http://www.epa.gov/compliance/katrina/waiver/index.html.

120. *Id.*

121. Fuel Waiver Response, *supra* note 115.

122. *Id.* Tennessee is located in PADD II. Energy Information Administration, Glossary, http://www.eia.doe.gov/glossary/glossary_p.htm (last visited Jan. 20, 2006) (hereinafter Glossary).

123. Fuel Waiver Response, *supra* note 115; *see* Glossary, *supra* note 122 (Kentucky is also in PADD II).

124. Fuel Waiver Response, *supra* note 115.

125. Letter from Stephen L. Johnson, Admin., Envtl. Prot. Agency, to Jeb Bush, Governor, State of Florida (Oct. 24, 2005), *available at* http://www.epa.gov/compliance/katrina/waiver/index.html.

126. Fuel Waiver Response, *supra* note 115.

127. *Id.*

128. *See id.*; Glossary, *supra* note 122 (stating that Iowa and Nebraska are in PADD II).

129. *See* Fuel Waiver Response, *supra* note 115.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Streamlining Refinery Permitting Process, Hearing on S. 1772 Before the S. Comm. on Environment and Public Works, 109th Cong. 11 (2005) (Statement of Brian Mannix, Office of Policy, Economics, and Innovation, U.S. Envtl. Prot. Agency).

136. *Id.*

137. *Id.*

138. See Part II.B, *supra*.

139. *See, e.g.*, Energy Information Administration, Refiner Sales Volumes of Other Petroleum Products, http://tonto.eia.doe.gov/dnav/pet/pet_cons_refoth_d_nus_VTR_mgalpd_m.htm (last visited Feb. 28, 2006) (providing total U.S. sales of high- and low-sulfur diesel for May through October).

140. Four State Waiver Letter, *supra* note 110.

141. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1541(a), 119 Stat. 594 (2005) (to be codified at 42 U.S.C. § 7545(c)(4)(C)(ii)).

142. *Id.*

143. *Id.*

144. *See id.*

145. *Id.*

146. *See* Remarks, *supra* note 6.

147. *Id.*

148. *See* Jauss, *supra* note 55, at 1034-35.

149. *Energy Policy Act of 2005: Hearing on H.R. 6 Before the H. Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Bob Slaughter, President, National Petrochemical & Refiners Association) ("For too long government actions, especially in the environmental area, have inadequately balanced energy supply impacts with other policy objectives.").

150. See Joseph P. Tomain, *Energy-Environmental Economics and Regulation*, in ENERGY LAW AND POLICY FOR THE 21ST CENTURY 2-30, 2-30 to 2-37 (James E. Hickey, Jr. et al. eds. 2000).

151. *Id.*

152. *See* Jauss, *supra* note 55, at 1026.

153. *See* Part II, *supra*.

154. George W. Bush, Memorandum for the Heads of Executive Departments and Agencies, http://whitehouse,gov/news/

releases/2005/09/print/20050926-4.html (last visited Feb. 11, 2006).

155. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1541(a), 119 Stat. 594 (2005) (to be codified at 42 U.S.C. § 7545(c)(4)(C)) (emphasis added).

156. *Id.*

157. *See* COMMENTS OF THE SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES OF THE AMERICAN BAR ASSOCIATION (2005), *available at* http://www.abanet.org/environ/katrina/Whitepaper.pdf (hereinafter SEER WHITE PAPER).

158. *Id.* at 4.

159. *Id.* at 5.

160. *See id.*

161. *See id.*; Michael Janofsky, *Bill Would Let E.P.A. Relax Rules for Cleanup*, N.Y. TIMES, Sept. 16, 2005, at 18.

162. S. 1711, 109th Cong. § 1(a)(1) (2005).

163. *Id.*

164. *Id.*

165. *See* Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000).

166. *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2005); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (2005).

167. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2005); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (2005).

168. *See* Emergency Planning and Community Right to Know Act, §§ 11001-11050 (2005); Toxic Substances Control Act, 15 U.S.C. §§ 2601-92 (2005).

169. *See* Janofsky, *supra* note 161, at 18.

170. *See id.*

171. S. 1711, 109th Cong. § 1(a) (2005).

172. 151 CONG. REC. S10231 (daily ed. Sept. 20, 2005) (statement of Sen. Feingold).

173. *Id.*

174. S. 1765, 109th Cong. (2005); S. 1766, 109th Cong. (2005); SEER WHITE PAPER, *supra* note 157, at 5.

175. S. 1765, 109th Cong. § 502 (2005); S. 1766, 109th Cong. § 502 (2005).

176. S. 1765 § 502(a)(3).

177. *Id.* § 502(a)(1).

178. *Id.* § 651; SEER WHITE PAPER, *supra* note 157, at 5.

179. SEER WHITE PAPER, *supra* note 157, at 5 (citing S. 1709, 109th Cong. (2005)).

180. SEER WHITE PAPER, *supra* note 157, at 6 (citing H.R. 3893, 109th Cong. (2005)).

181. JAMES E. MCCARTHY & CLAUDIA COPELAND, CRS REPORT FOR CONGRESS, EMERGENCY WAIVER OF EPA REGULATIONS: AUTHORITIES AND LEGISLATIVE PROPOSALS IN THE AFTERMATH OF HURRICANE KATRINA 2 (2005), *available at* http://www.gulfmex.org/reports/Waiver_EPA_Regs.pdf (citing H.R. 3836, 109th Cong. (2005)).

182. SEER WHITE PAPER, *supra* note 157, at 6.

183. *Id.* at 7-9.

184. Colonel E.G. Willard, *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DoD Training and Operational Prerogatives without New Legislation?*, 54 A.F. L. REV. 65 (2004).

185. SEER WHITE PAPER, *supra* note 157, at 8. This regulation has, however, been criticized as being outside of the scope of authority delegated to CEQ under NEPA. *See* Robert Orsi, Comment, *Emergency Exceptions from NEPA: Who Should Decide?*, 14 B.C. ENVTL. AFF. L. REV. 481 (1987).

186. SEER WHITE PAPER, *supra* note 157, at 10.

187. *See id.*; MCCARTHY & COPELAND, *supra* note 181, at 11.

188. SEER WHITE PAPER, *supra* note 157, at 7.

189. *See id.*; MCCARTHY & COPELAND, *supra* note 181, at 11.

190. *See* Janofsky, *supra* note 161, at 18.

191. Remarks, *supra* note 6.

192. Energy Information Administration, U.S. All Grades All Formulations Retail Gasoline Prices, http://tonto.eia.doe.gov/dnav/pet/hist/mg_tt_usw.htm (last visited Feb. 28, 2006); Energy Information Administration, U.S. No 2 Diesel Retail Sales by All Sellers, http://tonto.eia.doe.gov/dnav/pet/hist/ddr001w.htm (last visited Feb. 28, 2006).

193. *See* Donald A. Nichols, Economic Outlook for Late 2005 and 2006: Strong Growth with a Bit of Inflation Fed by the Katrina Boom 5-7 (2005), *available at* http://www.lafollette.wisc.edu/calendar-news/2005/outlooksep05.pdf.

194. Jad Mouawad and Simon Romero, *Big Rise in Profit Places Oil Giants on the Defensive,* N.Y. TIMES, Oct. 28, 2005, at A1.

195. John Sullivan, *Gas Stations Fined for Price Gouging,* N.Y. TIMES, Dec. 20, 2005, B4.

196. Elizabeth Douglass, *Spike in California Gasoline Prices Had External Causes, Panel Says,* L.A. TIMES, Nov. 19, 2005, C1.

197. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

198. *Id.* at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnote omitted).

199. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1541(a), 119 Stat. 594 (2005) (*to be codified at* 42 U.S.C. § 7545(c)(4)(C)(ii)).

200. *Platt v. Union P. R. Co.*, 99 U.S. 48, 58 (1878) ("Congress is not to be presumed to have used words for no purpose.").

201. *See* Part III.A, *supra.*

202. *See* Energy Policy Act of 2005 § 1541(a).

203. *Id.* (emphasis added).

204. *See Chevron,* 467 U.S. at 844.

205. *See id.*

206. *See* Energy Policy Act of 2005 § 1541(a).

207. *Id.* (emphasis added).

208. *See id.*

209. *See* Part III.C, *supra.*

210. S. 1711, 109th Cong. (2005).

211. S. 1765, 109th Cong. § 502(a)(1) (2005).

Kristen Sentoff tied for 3rd place in the New York State Bar Association Environmental Law Section 2006 William R. Ginsberg Memorial Writing Contest.

Recent Decisions in Environmental Law

Student Editor: Jamie Thomas

Prepared by students from the Environmental Law Society of St. John's University School of Law

The New Source Performance Standards and the Prevention of Significant Deterioration Provisions of the Clean Air Act May Not Be Read Together with Respect to "Modification" of Sources of Emission

Envtl. Def. v. Duke Energy Corp., __ U.S. __, 127 S. Ct. 1423 (2007)

Facts

In the 1970s Congress augmented the Clean Air Act ("Act") with two pollution control measures: New Source Performance Standards ("NSPS") and Prevention of Significant Deterioration ("PSD"), each designed to cover new, as well as modified, stationary sources of air pollution. The NSPS provisions define "modification" of sources as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."[1] The PSD measure requires a permit before a "major emitting facility" is "constructed," and defines such "construction" as including a "modification (as defined in [NSPS])."[2] Not withstanding this definition, the EPA's implementing regulations define "modification" differently for the NSPS and PSD.

The EPA's regulations implementing NSPS require sources to use the best available pollution-controlling technology[3] when a modification would "increase . . . the emission rate" that "shall be expressed as kg/hr of any pollutant discharged into the atmosphere."[4] The PSD regulations, however, require a permit only when the modification is a "major" one,[5] and when it would increase annual emissions to a level above that "actually emitted . . . during a two-year period which precedes the particular date and which is representative of normal source operation."[6] These two competing definitions were each respectively relied on by the parties in this case.

Duke Energy Corporation operates coal-fired electrical generating units at eight different plants in North and South Carolina.[7] Between 1988 and 2000 it replaced or redesigned twenty-nine tube assemblies, which extended their service life and allowed them to run longer each day.[8] The United States brought an action in 2000, alleging, *inter alia*, that Duke violated the PSD provisions by performing this work without the necessary permit. A few environmental groups intervened as plaintiffs and filed a complaint with similar charges.[9] Duke moved for summary judgment, claiming that none of its modifications were "major" or required a PSD permit because they did not increase the hourly emissions rate. The District Court agreed and entered summary judgment for Duke on all PSD claims.

The United States Court of Appeals for the 4th Circuit affirmed, but used slightly different reasoning. It held that "Congress' decision to create identical statutory definitions of the term 'modification'" in the NSPS and PSD sections of the Act "has affirmatively mandated that this term be interpreted identically" in the regulations enacted with the Act's authority.[10] This reasoning was principally taken from the Supreme Court's decision in *Rowan Cos. v. United States*,[11] wherein the Court disagreed with the government's position that the word "wages" could be defined differently in separate tax provisions.[12] Hence, the 4th Circuit found that *Rowan* requires the presumption that both PSD and NSPS regulations contain the same conditions for a "modification," which includes an increase in the hourly emissions rate.[13] Additionally, plaintiffs contended that a claim that the 1980 PSD regulation exceeded statutory authority could not be brought in an enforcement proceeding because it amounted to an attack on the validity of the regulation.[14] The 4th Circuit rejected this approach, finding that its interpretation was not an invalidation of the PSD regulations because the increases in the hourly emissions rate could still be used as an additional element of the PSD major "modification" that prompts the permit requirement.[15] The Supreme Court granted *certiorari*.[16]

Issues

1. Whether the Act's definition of "modification," which relies on increases in emissions and applies to both the NSPS and PSD programs, requires the EPA to rely on examinations of hourly increases in

emissions as well as its long-standing scrutiny of overall annual emissions.

2. Whether the 4th Circuit's decision violated section 307(b) of the Clean Air Act, which requires that the Act's regulations be challenged "only" in the D.C. Circuit within sixty days of their promulgation, and "shall not be subject to judicial review" in enforcement proceedings.

Reasoning

The Supreme Court began by acknowledging the 4th Circuit's attempt to interpret both regulations as harmonious with the Act. Nevertheless, it found that the result was an inherent declaration that the PSD regulations were invalidly written.[17]

The Court took issue with the lower court's characterizing as "effectively irrebuttable" the presumption that identical terms appearing in various locations within a statute must have the same meaning.[18] Justice Souter, writing for the majority, found that, to the contrary, the requirement that similar words used in various parts of the same statute be defined equally "is not rigid and readily yields whenever there is such a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."[19] The point stands even where the terms are commonly defined within the statute, as every part of a statute "must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute."[20] The Court did not read *Robinson* as being discordant with *Rowan* because in the latter case the government's attempt to define the same word differently was rebuffed not due to a lack of "definitional identity,"[21] but because it did not serve the "congressional concern for the interest of simplicity and ease of administration."[22] Therefore, the Court laconically noted, "context counts."[23]

The Court continued by conceding that the PSD section referred to the NSPS definition of "modification" and did not simply iterate the word, but discounted that fact because *Robinson* presented the same scenario and the case at bar presented no peculiarity that made a difference.[24] The majority also took note of there being no indication in the text or legislative history that Congress was aware of the EPA's regulatory implementation of the NSPS protocols when it enacted the PSD requirements on modification of sources.[25] Conversely, the Court provided an example of Congress's intent to do so with an unrelated provision of the Act, which specifically incorporated "the interpretative regulation of the [EPA] Administrator . . . published in 41 Federal Register 55524-30."[26] Thus, "Congress's failure to use such an express incorporation of prior regulations for modification cuts against any suggestion that 'Congress intended to incorporate' into the Act the preexisting regulatory definition of modification."[27] Therefore, absent a basis for treating PSD and NSPS "modifications" identically, the EPA's interpretation, so long as reasonable, should govern.[28]

In the second section of its opinion, the Court disagreed with the 4th Circuit's holding that the PSD and NSPS regulations may be read together to produce a congruous result. The Court found that when referencing an emissions rate, the PSD regulations invariably refer to an annual rate, measured in tons per year.[29] In addition, since the provision calls for "actual emissions [to] be calculated using the unit's actual operating hours,"[30] such emissions "must be measured in a manner that looks to the number of hours the unit is or probably will be actually running."[31] In short, the Court concluded, the point of the provisions is to calculate actual emissions over a period of time, and its charge is incompatible with a procedure that treats the "hourly rate of emissions" as conclusive.[32] Finally, the Court sharply discounted Duke's position that letters written by Edward E. Reich, EPA's Director of the Division of Stationary Source Enforcement, should sway its opinion when they are inconsistent with the wording of the regulation and a subsequent EPA declaration is contrary to the earlier position.[33]

Conclusion

The Supreme Court held that the text of the 1980 PSD regulations prevented them from being read together with their NSPS equivalents. Consequently, the 4th Circuit's interpretation of the PSD regulations invalidates them, and brings into the equation section 307(b) of the Act, which prohibits challenges to the validity of regulations during enforcement proceedings when such review was obtainable in the Court of Appeals for the District of Columbia within sixty days of the EPA's rulemaking. Since the Court of Appeals believed its analysis would be able to withstand scrutiny, it did not consider that section's applicability in this case. As such, the Court vacated and remanded for further proceedings.

Daniel Ginzburg '07

Endnotes

1. 42 U.S.C. § 7411(a)(4).
2. 42 U.S.C. § 7479(2)(C).
3. *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 846 (1984).
4. 40 C.F.R. § 60.14(b) (1976).
5. 40 C.F.R. § 51.166(b)(2)(i) (1987). In turn, a "major" change was defined as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." *Id.*
6. 40 C.F.R. § 51.166(b)(21)(ii).
7. *United States v. Duke Energy Corp.*, 411 F.3d 539, 544 (4th Cir. 2005).
8. *Id.*
9. *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1430 (2007).
10. *U.S. v. Duke Energy*, 411 F.3d at 547.

11. 452 U.S. 247 (1981).
12. *Id.* at 250.
13. *U.S. v. Duke Energy*, 411 F.3d at 550.
14. *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1431–32 (2007). The plaintiffs claimed that under section 307(b) of the Act, judicial review for validity of the regulations could only be attained by a petition to the Court of Appeals for the District of Columbia Circuit, normally within sixty days of the EPA's publication of the rule. 42 U.S.C. § 7607(b).
15. *Envtl. Def. v. Duke Energy*, 127 S. Ct. at 1432.
16. 127 S. Ct. 343 (2006).
17. *Envtl. Def. v. Duke Energy*, 127 S. Ct. at 1432.
18. *Id.*
19. *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).
20. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343–44 (1997).
21. *Envtl. Def. v. Duke Energy*, 127 S. Ct. at 1433.
22. *Rowan Cos. v. United States*, 452 U.S. 247, 255 (1981); *see also United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 218–20 (2001) (holding that the phrase "wages paid" should not be interpreted identically across the board because of "longstanding" and "reasonable" interpretations by the IRS in its regulations and Revenue Rulings).
23. *Envtl. Def. v. Duke Energy*, 127 S. Ct. at 1433.
24. *Id.*
25. *Id.*; *see also New York v. EPA*, 413 F.3d 3, 19 (D.C. Cir. 2005) ("So far as appears, . . . [this] incorporation by reference [is] the equivalent of Congress's having simply repeated in the [PSD] context the definitional language used before in the NSPS context.").
26. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 129, 91 Stat. 685 (1977).
27. *Envtl. Def. v. Duke Energy*, 127 S. Ct. at 1434 (quoting *New York*, 413 F.3d at 19) (internal quotation marks omitted).
28. *Id.*
29. *Id.* (referencing 40 C.F.R. §§ 51.166(b)(2)(i), (b)(23)(i) and (b)(3)).
30. 40 C.F.R. § 51.166(b)(21)(ii).
31. *Envtl. Def. v. Duke Energy*, 127 S. Ct. at 1434.
32. *Id.* The Court explained that the 4th Circuit, relying upon the district court's opinion, was incorrect in interpreting the PSD regulations' lack of an hourly rate as a requirement that the source's hours of operation "be held constant" when comparing pre- and post-project emissions for the function of calculating the net increase in emissions. *Id.* at 1435.
33. *Id.*

* * *

Ferry Company's Claim Remanded for Further Hearings on Dormant Commerce Clause Issue

***Town of Southold v. Town of East Hampton*,** 477 F.3d 38 (2d Cir. 2007)

Facts/History

The Town of Southold, Town of Shelter Island and Cross Sound Ferry Services, Inc. (a Connecticut company and the appellant) brought an action in the United States District Court for the Eastern District of New York against the Town of East Hampton to strike down Local Law No. 40 of 1997 as unconstitutional.

East Hampton, located on the South Fork of Long Island, has a long history as a favorite destination for vacationers, and its popularity continues to grow. In light of an escalating population during the tourist season and ever-worsening traffic congestion, in 1995 East Hampton announced a moratorium on new ferry services while the Town conducted a review of problems associated with transportation. The Town commissioned a study that it later adopted as the Transportation Element of its Comprehensive Plan. The study found that a new ferry terminal would worsen already congested conditions on the local streets and highways and that the overall increase in traffic would negatively affect the environment and character of East Hampton. As a result of the findings and public hearings held on the matter, East Hampton passed Local Law No. 40 (the Ferry Law), which prohibited high-speed ferries from docking in East Hampton except in emergencies and required special permits for the operation of all other ferries.

Cross Sound Ferry Services, Inc. (Cross Sound) operates high-speed and vehicular ferries that travel between New London, Connecticut, and Orient Point on Long Island. When the Ferry Law effectively blocked Cross Sound from expanding its high-speed operation to include East Hampton service, they brought suit, joined by the Towns of Southold and Shelter Island. The complaint alleged that the Ferry Law was an unconstitutional violation of the Dormant Commerce Clause, was in violation of the Equal Protection Clause of both the New York and federal constitutions, and that it was an abuse of East Hampton's police power under the laws of New York. East Hampton immediately moved for summary judgment dismissing the claims on the grounds that the claims lacked any merit, that the statute of limitations had run out and that the plaintiffs lacked standing to sue. The plaintiffs then made a cross motion for summary judgment on the three constitutional claims.

On December 21, 2005, the District Court granted defendant East Hampton's motion for summary judgment. The court found that the two Town-plaintiffs did not have standing, that Cross Sound had standing as a third party to bring suit on behalf of its customers and that the action was not barred by the statute of limitations. It went on to say that Cross Sound had failed to allege any disparate treatment between interstate and intrastate commerce resulting from the Ferry Law or to produce any evidence of such treatment and that this was fatal to the Dormant Commerce Clause claim. Turning to the Equal Protection claim, the court held that since the Ferry Law did not implicate the right to travel, the fact that it was rationally related to protecting the Town's residents was a purpose sufficient to pass the rational basis standard of review applicable under both the New York and federal constitutions. Only Cross Sound appealed the judgment.

Issue

The issue presented is whether the District Court erred in granting summary judgment to East Hampton, dismissing Cross Sound's substantive challenges to the Ferry Law as presenting no genuine issue of fact.

Reasoning

The Court of Appeals first turned to the Dormant Commerce Clause claim. Circuit Judge Miner identified two possible avenues of inquiry for claims brought under the Dormant Commerce Clause: (1) where the local law clearly discriminates against interstate commerce in favor of intrastate commerce and (2) where the local law has incidental effects on interstate commerce.[1] In the first instance, the Court of Appeals agreed with the District Court. Looking at whether the Ferry Law clearly discriminates against interstate commerce, the court noted that, on its face, the law applies evenhandedly to in-state and out-of-state ferry companies. Equally important was the lack of any apparent discriminatory purpose. The records of the Town Board of East Hampton's meetings and hearings showed that economic advantage for local operators was never a concern and that the primary purpose of the Ferry Law was to protect local residents from congestion and resulting increases in pollution. The Court rejected Cross Sound's contention that references to traffic from Connecticut casinos in the meeting minutes evinced a discriminatory purpose, since the minutes also referred to traffic from a number of sources, including many intrastate locales. The majority was also unmoved by Cross Sound's argument that a discriminatory effect was present in the Ferry Law's different treatment of ferries and "excursion" boats (such as sightseeing tours), noting that a discriminatory effect for Commerce Clause purposes does not exist where the in-state and out-of-state entities are not in direct competition with one another.[2]

Turning to the second line of inquiry under the Dormant Commerce Clause, referred to as the Pike Test, the Court of Appeals found that the District Court erred. The Pike Test applies when a facially non-discriminatory law has incidental effects on interstate commerce.[3] In such a case, the Court said, the law will be upheld unless the incidental burdens on interstate commerce clearly outweigh the local benefits. Looking at the District Court's treatment of this issue, the appellate court observed that the plaintiff's complaint did not address the Pike Test with particular depth, which it identified as a likely reason that the District Court was overly dismissive of the claim. The court found that plaintiffs had identified an incidental effect under the Pike Test when they argued that the law increases the cost to out-of-state travelers by forcing them to choose less direct, more expensive routes to East Hampton. The District Court, it reasoned, ignored this fact in holding that the plaintiff had failed to offer any evidence of a disparity in the way the Ferry Law affected interstate and intrastate commerce. Furthermore, the court said that there was an issue of fact regarding the affidavits of the party's respective traffic engineers. Ronald N. Hill, traffic engineer for Cross Sound, submitted an affidavit in opposition to East Hampton's findings that additional ferry service would increase traffic congestion and pollution, arguing that increased ferry service would actually decrease Vehicle Miles Traveled (VMT) and that this in turn would improve air quality standards. This fact was crucial because it potentially undermined the putative benefits that were the basis of the town's reasons for enacting the Ferry Law and might therefore tip the Pike Test balance in favor of a determination that the burdens clearly outweigh the benefits. Since the Pike Test involves weighing issues that are fact specific and depend greatly on the circumstances of the parties, the court remanded the Dormant Commerce Clause claim for further findings by the District Court.[4]

On the question of whether the Ferry Law was in violation of the Equal Protection Clauses of the New York and federal constitutions, the court affirmed the lower court's dismissal. Reasoning that the analysis is the same under the New York and federal constitutions,[5] the court held that the Ferry Law did not implicate the constitutional right to travel. The right to travel, as protected under the constitution, confers upon each citizen the right to move freely among the states.[6] The fact that the Ferry Law may have incidentally discouraged some people from traveling from Connecticut to East Hampton was insufficient to show an actual infringement on the right to travel. The court noted that the law only prohibited one type of ferry (high-speed) from making port at East Hampton and that there were many other methods of transportation available for travelers to reach the Long Island town. Additionally, the court pointed to the fact that the law would also affect intrastate travelers' access to East Hampton and that the Equal Protection Clause does not guarantee travelers access to the most convenient mode of transportation. Thus, the court declined to apply strict scrutiny, finding no constitutional infringement, and held that the Ferry Law passed the less stringent rational basis test.

Last, the court affirmed the District Court's ruling on the issue of whether the Ferry Law represented an abuse of East Hampton's police power. The Court of Appeals examined N.Y. Town Law § 130(17)(1), the source of East Hampton's power to regulate vessels, and found that a recent amendment by the New York State Legislature did not strip the Town of any of its authority to regulate "the operation of vessels, the size and horse power of their motors, the vessels' speed, and their anchoring and mooring," as Cross Sound contended.[7]

Conclusion

The case was remanded to the District Court for further proceedings on the Dormant Commerce Clause claim, because the District Court failed to consider the

plaintiff's evidence of the Ferry Law's effect on interstate commerce under the Pike Test. The Court of Appeals affirmed the judgment in all other respects.

Joshua M. Beiler '08

Endnotes

1. *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217-18 (2d Cir. 2004).
2. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997).
3. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).
4. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt.*, 261 F.3d 245, 263-64 (2d Cir. 2001).
5. *Pinnacle Nursing Home v. Axelrod*, 928 F.2d 1306, 1317 (2d Cir. 1991).
6. *Dunn v. Blumstein*, 405 U.S. 330, 338, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).
7. N.Y. Town Law § 130(17)(1)(a) (1997).

* * *

EPA Has Statutory Authority to Regulate Greenhouse Gases and Must Provide Reasoned Justification for Action or Inaction

Massachusetts et al. v. Environmental Protection Agency, No. 05-1120 (April 2, 2007), 549 U.S. __ (2007)

Facts

Petitioners, a group of states,[1] local governments,[2] and private organizations,[3] filed a petition for *certiorari* alleging that the Environmental Protection Agency ("EPA") abandoned its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases including carbon dioxide. Petitioners filed the petition after the Court of Appeals for the District of Columbia denied a petition for review of the EPA's order regarding a rulemaking petition asking the EPA to regulate "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act." The Supreme Court, in granting the writ, noted the "unusual importance of the underlying issues" that concern what Petitioners described as "the most pressing environmental challenge of our time."

On October 20, 1999, several private organizations "filed a rulemaking petition asking [the] EPA to regulate 'greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.'" Under section 202(a)(1) of the Clean Air Act, Congress mandates that

> [t]he [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emissions of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment may reasonably be anticipated to endanger public health or welfare. . . .[4]

The rulemaking petition alleged (1) that regulating carbon dioxide fell within the EPA's statutory authority[5] and (2) that "greenhouse gases"[6] have significantly accelerated climate change, which will have serious adverse effects on human health and the environment.[7]

On September 8, 2003, the EPA entered an order denying the rulemaking petition. The EPA provided two reasons for its decision. First, the EPA reasoned that the Clean Air Act does not authorize the EPA to issue mandatory regulations to address climate change. The EPA reasoned that it lacked authority because greenhouse gases cannot be "air pollutants"[8] under the Clean Air Act. Second, the EPA found that even if the agency had the authority to set greenhouse gas emissions standards, it would be unwise to do so at this time. The EPA pointed to four political and economic concerns: (a) an alleged lack of scientific certainty regarding the causal link between an increase in greenhouse gases due to human activity and increases in global surface air temperatures; (b) that regulation of motor-vehicle emissions constituted an undesirable, piecemeal approach; (c) that the President had adopted a "comprehensive approach" to the problem, including "voluntary" emissions reduction, and (d) that regulation might "hamper the President's ability to persuade key developing countries to reduce greenhouse gas emissions."

The Court of Appeals for the District of Columbia, in a 2-1 decision, denied a petition for review of the EPA's denial of the petition for rulemaking. In denying the petition for review, the court reasoned that the EPA could consider scientific uncertainty as well as non-scientific factors in reaching its conclusion and that its decision, thus, was within its statutory authority. Judge Sentelle filed a concurring opinion, arguing that Petitioners failed to satisfy Article III Standing requirements. Judge Tatel dissented.

Issues

1. Whether Petitioner, state of Massachusetts, under facts at hand, meets Article III Standing requirements;
2. whether the EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so,
3. whether its stated reasons for refusing to do so are consistent with the statute.

Reasoning

The Court held (1) that Petitioners had standing to challenge the EPA's denial of Petitioners' rulemaking petition; (2) that the EPA has statutory authority to regulate the emissions of greenhouse gases from new motor vehicles, because greenhouse gases fit well within the Clean

Air Act's capacious definition of "air pollutant"; and (3) the EPA acted in an "arbitrary, capricious" manner by offering "no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change." The Court did not reach the question "whether on remand [the] EPA must make an endangerment finding, or whether policy concerns can inform [the] EPA's actions in the event that it makes such finding." The Court, nonetheless, reversed the judgment of the Court of Appeals and remanded the case for further proceedings in which the EPA "must ground its reasons for action or inaction in the statute."

The Court found that Petitioners had standing to challenge the EPA's denial of Petitioners' rulemaking petition. The Court rooted its decision in a non-traditional standing analysis.[9] The Court, while still utilizing the familiar framework for addressing standing,[10] emphasized two unique factors. First, the Court highlighted Congress's creation of a procedural right, concomitant to its mandate that the EPA protect citizens from air pollutants that "may reasonably be anticipated to endanger public health or welfare," to challenge the EPA's rejection of a rulemaking petition as "arbitrary and capricious." Second, the Court highlighted that "States are not normal litigants for the purpose of invoking federal jurisdiction" and protection of "quasi-sovereign" state interests are "entitled to special solicitude in our standing analysis." Reviewing under this deferential standard, the Court found that Petitioner, Massachusetts, satisfied the three elements of Article III Standing.[11] First, Massachusetts alleged actual or imminent injury. As the Court emphasized, "the harms associated with climate change are serious and well recognized." These injuries, although "widely shared," the Court ruled, are sufficiently concrete and particularized, because Massachusetts risks substantial destruction of coastal property and associated costs in excess of hundreds of millions of dollars. Second, emission of greenhouse gases is indisputably causally connected to "global warming" and U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations. Third, a decision by the EPA to regulate greenhouse gases may not reverse global warming, but would "slow or reduce" global warming, and, thus, redress Petitioners' alleged injury. Accordingly, Petitioners had standing to challenge the EPA's denial of their rulemaking petition.

Having resolved the standing query, the Court looked to the merits, which involved "narrow" statutory issues. Although the Court's review of an agency's refusal to promulgate rules is necessarily "highly deferential" and "extremely limited," the Court, nonetheless, exercised its statutory authority to reverse the EPA actions, which the Court found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

As an initial matter, the Court had "little trouble concluding" that greenhouse gases are air pollutants and, therefore, fall within the EPA's regulatory authority. The broad statutory text defines "air pollutant" as "*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. . . ."[12] Since carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are "without a doubt physical [and] chemical" substances "emitted . . . into the ambient air," the "unambiguous" statute authorizes EPA regulation of greenhouse gases.

In regard to the EPA's determination that regulation of greenhouse gases would be unwise, the Court found that the determination "rest[ed] on reasoning divorced from the statutory text." The Court ruled that the use of the word "judgment" in the statutory text is not "a roving license to ignore" the text, but rather limits the agency's discretion to determining whether an air pollutant "cause[s] or contribute[s] to, air pollution which may reasonably be anticipated to endanger the public health or welfare." The Court ruled that the EPA "refused to comply with this clear statutory command" by merely offering "a laundry list of reasons not to regulate," which were divorced from the text of the statute. In particular, the EPA relied primarily on "policy judgments" regarding the existence of "voluntary executive branch programs," the possible impairment of the President's ability to negotiate with key developing countries, and its characterization of curtailing motor-vehicle emissions as a piecemeal approach. Nor could the EPA, the Court found, "avoid its statutory obligations by noting the uncertainty surrounding various features of climate change." Rather, the Court ruled, the EPA must provide "a reasoned justification" for its action or inaction with regard to the regulation of greenhouse gases. The agency's inaction was, therefore, arbitrary and capricious. The Court's holding, however, did not reach the question whether on remand the EPA must make an endangerment finding, or whether policy concerns can inform the EPA's actions in the event that it makes such a finding.

Chief Justice Roberts filed a dissenting opinion, joined by Justice Scalia, Justice Thomas, and Justice Alito, in which he argued that the case was nonjusticiable because Petitioners failed to satisfy Article III Standing requirements. Justice Scalia filed a dissenting opinion joined by the Chief Justice, Justice Thomas, and Justice Alito.

Conclusion

The Court held that the EPA offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change and, thus, reversed the judgment of the Court of Appeals and remanded for further proceedings. The Court's holding, however, did not reach the question whether on remand the EPA must make an endangerment finding, or whether policy concerns can inform the EPA's actions in the event that it makes such a finding.

Matthew Ford '08

Endnotes

1. California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.
2. District of Columbia, American Samoa, New York City, and Baltimore.
3. Center for Biological Diversity, Center for Food Safety, Conservative Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group.
4. 42 U.S.C. § 7521(a)(1).
5. The petition noted that the EPA had already confirmed its authority to regulate carbon dioxide in 1998, an opinion that the EPA's General Counsel, Gary S. Guzy, reiterated two weeks prior to the filing of the rulemaking petition.
6. Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.
7. Subsequent to the filing of the petition, the EPA requested public comment on "all issues raised in [the] petition." The White House, prior to the closing of the comment period, requested assistance from the National Research Council ("NRC"). The NRC filed a report in 2001, "Climate Change: An Analysis of Some Key Questions," which concluded that "[g]reenhouse gases are accumulating in the Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise."
8. The Clean Air Act defines "air pollutants" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g).
9. The Court noted that where Congress has "accorded a procedural right" to challenge agency action unlawfully withheld, a litigant "can assert that right without meeting all the normal standards for redressability and immediacy."
10. "[A] litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury."
11. The Court noted that "only one of the petitioners needs to have standing to permit us to consider the petition for review."
12. 42 U.S.C. § 7602(g) (emphasis added).

Jamie Thomas graduated from Northeastern University in 2002 with a BS in Civil Engineering. Currently, she is a 4th Year Evening Student at St. John's University School of Law. In addition, she currently works at the New York City Department of Environmental Protection as one of the many project managers involved in the design and activation of New York City's Third Water Tunnel. Furthermore, she is responsible for checking to see if various NYC DEP facilities are in compliance with federal and state environmental protection regulations. Upon admittance to the bar she hopes to combine her engineering background with her legal education and pursue a legal carer in environmental law/land use development.

offers a wide variety of shopping opportunities. Information on these activities will be circulated in the packet to be mailed to Section members in August on the Fall Meeting.

Regarding Saturday evening, I am very pleased to announce that the **Honorable Carol Ash**, Commissioner of the New York State Office of Parks, Recreation and Historic Preservation, has accepted our Section's invitation to be the keynote speaker. Commissioner Ash has been a long-standing advocate for the environment, and in her capacity as Commissioner, is undertaking significant new initiatives with respect to our state parks. We are very excited about her participation in our Saturday evening program.

On Sunday, there will be an opportunity for committee and task force chairs and co-chairs to meet with their committee and task force members. Following the committee and task force sessions, the Executive Committee will meet to address Section business, including possible support for various environmental policy and legislative initiatives.

I urge you to consider attending the Fall Meeting. As you know, Saratoga Spa State Park is a glorious setting in the autumn. The meeting program will offer stimulating and thought-provoking presentations and will provide important updates on new environmental initiatives. And not the least, the Fall Meeting offers a superb opportunity to interact with colleagues and friends, as well as making new acquaintances.

Annual Meeting: February 1, 2008 (Friday) at the New York Marriott Marquis. As in the past, our Section's CLE program will be held on that Friday morning. The CLE program is anticipated to focus on brownfields issues. Our Section luncheon will follow the CLE program. Section committee meetings will be scheduled for that afternoon, followed by the Executive Committee meeting.

Spring 2008: (date not yet determined) in Albany This will include our annual Legislative Forum in the morning, followed by the Government Attorneys' Luncheon. That afternoon, a meeting of the Executive Committee will be scheduled.

Field Trips. I am also looking to organize informal Section field trips. The goal is to provide opportunities, in addition to our three regularly scheduled meetings, for Section members to interact in "smaller scale" groups in visits to areas of environmental interest. Furthermore, I would like to plan some of these trips in areas of the state (such as in Central and Western New York) where we generally haven't ventured in scheduling our Fall, Annual and Spring Programs. If anyone is interested in organizing a field trip in your area, please let me know.

Committee Liaisons

As we all know, our committees and task forces are the lifeblood of our Section, and we have been very fortunate in the commitment and experience of our committee and task force co-chairs. In the upcoming year, we are looking to further enhance our committee activities, while recognizing limitations attendant to the voluntary nature of committee participation.

For the last several years, each Section officer has been assigned to be the liaison to specified committees and task forces. The liaison is responsible for interacting with the committee co-chairs on committee issues, informing committee co-chairs of upcoming Section activities and events, and providing other committee-related assistance. For the period from June 1, 2007 to May 31, 2008, the committee liaison assignments are as follows:

Joan Matthews is the liaison to the following committees: Coastal and Wetland Resources; Enforcement and Compliance; Energy; Membership; Public Participation, Intervention and ADR; Task Force on Legal Ethics; and Environmental Insurance.

Alan Knauf is the liaison to the following committees: Hazardous Waste/Site Remediation; Task Force on Petroleum Spills; Corporate Counsel; Toxic Torts; Agriculture and Rural Issues; Transportation; and Environmental Business Transactions.

Barry Kogut is the liaison to the following committees: Internet Coordinating; Essay Contest; International Environmental Law; Journal; Legislation; Pesticides; and Biotechnology and the Environment.

Phil Dixon is the liaison to the following committees: Adirondacks, Catskills, Forest Preserve and Natural Resource Management; Environmental Impact Assessment; Land Use; CLE; Historic Preservation, Parks and Recreation; and Water Quality.

I am the liaison to the following committees: Air Quality; Environmental Justice/Minority Fellowship; Pollution Prevention; Solid Waste; Global Climate Change; and Mining.

I invite the committee chairs and co-chairs to actively involve their respective liaisons in committee activities.

Ongoing Section Activities

As you know, the Section has successfully pursued a number of ongoing activities. Our Section's publication, *The New York Environmental Lawyer*, is well recognized as one of the finest of Section journals, which provides a range of perspectives on current environmental topics as well as providing up-to-date information on Section business. Our Section's annual essay contest for law students has attracted thought-provoking and well-written articles on environmental issues from the law student

community. Also noteworthy (and which has attracted attention from numerous other states) is the Section's minority fellowship program. This program places minority law students in governmental agencies and not-for-profit organizations for paid ten-week summer internships and provides an excellent introduction to the practice of environmental law.

None of this would be possible without the tireless efforts and commitment of several of our colleagues. **Kevin Anthony Reilly**, the Editor of our journal, has ensured the high quality of this publication. **Miriam Villani** has chaired the annual essay contest and has been fundamental to its ongoing success. (I also would like to thank Miriam for graciously agreeing to continue to serve as Chair of this activity.)

Peter Casper, **Luis Martinez** and **Jean McCarroll**, in their capacity as Co-Chairs of the Environmental Justice Committee, have coordinated the Minority Fellowship Program. In that regard, they have undertaken numerous activities—including, for example, conducting interviews of prospective candidates, assisting in the placement of those selected for the fellowships, and developing the mentor system. Their efforts have ensured the success of this program.

To Kevin, Miriam, Peter, Luis and Jean, our continuing thanks on a job well done.

Lastly, I would be remiss if I did not mention and encourage members of the Section to consider submitting articles (whether on Section activities or on current environmental legislative and policy issues) to Kevin for inclusion in *The New York Environmental Lawyer*. We are always on the lookout for articles to publish and invite your submissions.

Executive Committee: Comings and Goings

Several changes to the membership of the Executive Committee have occurred since the beginning of 2007. As of June 1, we welcome to the Executive Committee two new at-large members: **Janice Dean**, who is with the New York City branch of the Environmental Protection Bureau of the Attorney General's Office; and **Jeffrey Brown**, of the MacKenzie Law Firm.

I am pleased to report that Executive Committee member **Shannon Martin LaFrance** has agreed to serve as the Alternate Section Delegate to the House of Delegates, while continuing to serve as Co-Chair of the Section's Pollution Prevention Committee.

In addition, we welcome **John S. Marwell** of Shamberg Marwell David & Hollis, P.C., who will be serving as the new NYSBA Executive Committee Liaison to the Section's Executive Committee.

On the departure front, one of our Executive Committee members, **Christopher Dow**, has relocated to the West Coast. Chris, as you may recall, began his service on the Executive Committee as the representative of the Young Lawyers Section, and subsequently became a Co-Chair of the Section's Task Force on Petroleum Spills. Chris was an active member of the Executive Committee and we extend our best wishes to Chris as he exchanges the winters of upstate New York for the "seasons" of California.

Membership and Diversity

I am pleased to report that the Section is experiencing its second straight year of membership growth. Our Section has achieved some significant gains in the past few years in terms of expanding the diversity of our membership. Further efforts directed to governmental and public interest organization attorneys, younger attorneys (as well as law school students) and minority attorneys are being considered.

The New York State Bar Association is now undertaking a membership initiative to increase Association membership by ten percent, in addition to focusing on ways to attract and retain younger attorneys and achieve greater diversity within the Association. **Howard Tollin**, a Co-Chair of our Section's Membership Committee, has been appointed as our Section Liaison to that Association effort.

Before concluding, I would like to express a special thank you, on behalf of the Section and myself, to **Walter Mugdan** and **Lisa Bataille**. Walter has served this Section with distinction for many years, and has just completed a very successful year as Chair. His direction and leadership have significantly strengthened our Section both organizationally and in its leadership role in the debate on environmental issues. Above all, he has been a good friend and colleague. Lisa is the New York State Bar Association liaison to our Section, and without whom we would all be lost. Her knowledge of the ins and outs of Section activities, her organization of our programs and meetings, and her ever-present patience and goodwill are key to our Section's success and to the mental health of the Section Cabinet! So again, Walter and Lisa, our appreciation and thanks.

I am looking forward to an exciting and productive year for our Section. And let me underscore that the Section's officers are very much interested in your thoughts and comments about the Section and its activities. So, if you have any issues or topics that you would like the Section to consider or suggestions on how things might be done better, please do not hesitate to contact me or any other of the Section officers.

My best for a great summer and I hope to see you at our Fall Meeting in October.

Louis A. Alexander

NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, New York 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

Section Committees and Chairs

The Environmental Law Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

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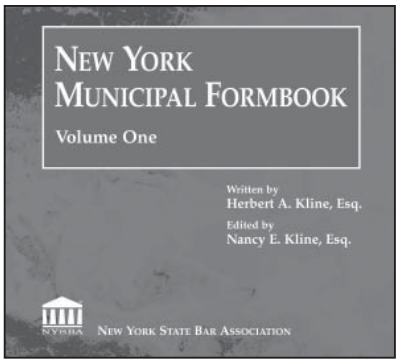

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