RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

Environmental Defense v. Duke Energy Corp., 127 S. Ct. 1423 (2007)

In the noted case, the United States Supreme Court remanded the case to the United States Court of Appeals for the Fourth Circuit for consideration of whether the EPA has been retroactively targeting twenty years of accepted practice with respect to the Supreme Court's interpretation of "modification." Environmental Defense v. Duke Energy Corp., 127 S. Ct. 1423, 1437 (2007). With a unanimous decision, there is no question about the Supreme Court's interpretation of the word "modification" as it appears in the Prevention of Significant Deterioration (PSD) section of the Clean Air Act (CAA) and its regulations governing the New Source Performance Standards (NSPS). This Recent Development will discuss the majority opinion reported by

Justice Souter and Justice Thomas's opinion concurring in part. Unanimously, the Supreme Court of the United States held that despite the fact that the word "modification" is present in both the PSD and the NSPS, they do not need to be interpreted congruently. *Id.* at 1435.

The CAA Amendments of 1970 directed the EPA to devise National Ambient Air Quality Standards (NAAQS) limiting various pollutants requiring among other things, the promulgation of standards regulating emissions from both newly constructed and modified sources of pollution at power plants (84 Stat. 392). Congress defined "modification" in the NSPS portion of the statute 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." 42 U.S.C. § 7411(a)(4) (2000). Since 1971, the EPA has promulgated NSPS regulations that defined "modification" in almost the same terms as the statute. Further, in 1975, the EPA added to the definition of "modification" by adding a regulation which referenced increases in "hourly emissions rate[s]." 40 C.F.R. §§ 60.14(h)-(j) (1987).

Despite the EPA's efforts to control air pollutants, the NSPS program was not completely effective, so Congress enacted the PSD program in 1977. The PSD program required a permit before a "major emitting facility" could be "constructed" in an area that was already covered by the scheme. 42 U.S.C. § 7475(a). The term "construction," was clarified to include "the modification of any source or facility, as defined in the NSPS statutory definition of modification." *Id.* § 7479(2)(C). Despite the definitional reference that seems to make the term "modification" identical, the EPA's promulgated regulations interpret the term one way for NSPS and another for PSD. The NSPS regulations require a source to use the best available pollution-limiting technology when a "modification" would increase the kilograms per hour output of pollutants. 40 C.F.R. § 60.14(a) (1987). However, the 1980 PSD regulations require a permit for a "modification" only when there is a "major modification" and when it would increase the actual emission of a pollutant above the actual recorded average of the previous two years. *Id.* §§ 51.166(b)(2)(i) (1987), 51.166(b)(21)(ii).

The noted case arose out of an action by Duke Energy Corp. (Duke) to replace or redesign some of its coal-fired electric generating units. *Envtl. Def.*, 127 S. Ct. at 1431. The United States filed this enforcement action, citing that among other things, Duke violated the EPA's PSD regulations by performing work on the generating units without a permit. *Id.* at 1430. Various environmental groups intervened charging similar

violations. *Id.* In the trial court, Duke moved for summary judgment, inter alia, arguing that none of its projects was a "major modification" and thus, a PSD permit was not required. *Id.* Duke further argued that a PSD permit was not required because none of the changes caused an increase in the hourly emissions rates. *Id.* at 1431. Agreeing with Duke, the district court entered summary judgment for Duke on all claims. *Id.*

The Fourth Circuit affirmed the district court's decision, stating that Congress intended to create identical statutory definitions of "modification" for both the NSPS and PSD regulations. The Fourth Circuit explained that because of the identical definitions, the EPA was affirmatively mandated to interpret the term identically under both regulations. The court referenced *Rowan v. United States*, 452 U.S. 247 (1981), which held that the different interpretations of the word "wages" could not be adopted and stated that *Rowan* created an "'irrebuttable' presumption that PSD regulations must contain the same conditions for 'modification' as the NSPS regulations, including an increase in the hourly rate of emissions." *Envtl. Def.*, 127 S. Ct. at 1431 (quoting United States v. Duke Energy Corp., 411 F.3d 539, 550 (4th Cir. 2005)). Finally, the court rejected the argument that its interpretation of "modification" invalidated the PSD regulations. The court reasoned that because the PSD regulations can be interpreted to require an increase in the hourly emissions rate as an element of a major "modification." *Id.* at 1432.

At issue in the present case is whether the improvements made by Duke constituted "modification" under the PSD regulations of the CAA. The Supreme Court held that the EPA was not required to interpret the term "modification" congruently in each of its regulations. *Id.* at 1436. The Court first looked to statutory construction and noted that the basic principles of statutory construction are "not so rigid." *Id.* at 1435. The Court noted that although courts in general tend to presume that the same term has the same meaning when it occurs in the same statute, there is no "effectively irrebuttable presumption" that they are the same. *Id.* at 1433. The Court reiterated reasoning from a previous case, *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427 (1932), and stated that the "natural presumption that identical words used in different part of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably warrant the conclusion that they were employed in different parts of the act with different intent." *Id.* at 1432. Thus, "a given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Id.*

The Court analyzed *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), in which the issue was whether the term "employees" in section 704(a) of title VII of the Civil Rights Act of 1964 covered former employees. *Envtl. Def.*, 127 S. Ct. at 1433. Despite the fact that "employee" was defined in the Act, the term could still be seen as consistent with either current or past employees. In *Robinson*, the Court found that "each section [of Title VII] must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute. *Robinson*, 519 U.S. at 343-44.

The Court further analyzed whether *Rowan* could be viewed as compatible with *Robinson*. *Envtl. Def.*, 127 S. Ct. at 1433. The Court revisited *Rowan* and noted that they held that "wages" held the same meaning under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) because there was a displayed congressional intent that they be interpreted identically. *Id.* However, the Court, in *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), refused to require uniformity in identical statutory terms.

The Court found that despite the presence of the same term "modification" in both sections and the reference to the NSPS definition of "modification," there was no legislative history that would suggest a congressional intent to interpret the terms equivocally. *Id.* The Court reasoned that "the cross-reference alone is certainly no unambiguous congressional code for eliminating the customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term, where it occurs." *Envtl. Def.*, 127 S. Ct. at 1433. The Court stated that "absent an iron rule to ignore the reasons for regulating PSD and NSPS 'modifications' differently, EPA's construction need do no more than fall within the limits of what is reasonable, as set by the Act's common definition." *Id.* at 1434. Thus, because the EPA's construction of PSD and NSPS limits was reasonable under the Act's common definition, the Court has no authority to overturn the EPA's reasonable interpretation. *Id.*

Additionally, the Court looked at the Fourth Circuit's interpretation of the term "modification" and found that in essence the court was invalidating the PSD regulations. *Id.* at 1435. The Court reasoned that if the Fourth Circuit's holding was allowed to stand, that it would violate the constraints on judicial review of EPA regulation for validity. *Id.* The Court correctly stated that any challenges to the validity of EPA regulations are limited to the United States Court of Appeals for the District of Columbia within sixty days of EPA rulemaking, which had lapsed. Finally, the Court addressed Duke's claim that the EPA has been

inconsistent in its positions and is not retroactively targeting twenty years of accepted practice. *Id.* at 1436. The Court determined that this claim had not been examined by the lower courts and to the extent that it was not procedurally foreclosed, it would be addressed on remand. *Id.*

Despite the unanimous 9-0 majority decision for Environment Defense, Justice Thomas wrote an opinion concurring with the majority in part and disagreeing with the majority's statement that the statutory cross-reference does not mandate a singular regulatory construction. *Id.* at 1437. Justice Thomas stated that the cross-reference created a strong presumption that "the same words, when repeated, carry the same meaning." *Id.* He went on to conclude that the majority has the burden of stating why the general presumption doesn't control the outcome here and they have not done so here. *Id.* at 1437-38.

This case marks an important development in the interpretation of congruent terms in related statutes. It enables the EPA to regulate air pollutants in the best way they see fit, instead of being forced to abide by one strict regulation scheme. However, this case seems to indicate that the EPA has carte blanche when determining emissions regulations provided that the reasons behind the regulations are reasonable.

Lindsay Carr

Massachusetts v. EPA, 127 S. Ct. 1438 (2007)

In *Massachusetts v. EPA*, the United States Supreme Court held that Massachusetts suffered an injury to its interests as a sovereign entity sufficient to afford Petitioners standing; the Clean Air Act's (CAA) broad definition of "air pollutant" authorizes the Environmental Protection Agency (EPA) to regulate global climate change; and the EPA unlawfully declined to regulate greenhouse gas emissions from new motor vehicles based on political concerns rather than the feasibility of making an endangerment finding under section 202 of the CAA. 127 S. Ct. 1438 (2007).

In 1999, the International Center for Technology Assessment (ICTA) and environmental groups petitioned the EPA to regulate greenhouse gas emissions from new motor vehicles under section 202 of the CAA. INT'L CTR. FOR TECH. ASSESSMENT, PETITION FOR RULEMAKING AND COLLATERAL RELIEF SEEKING THE REGULATION OF GREENHOUSE GAS EMISSIONS FROM NEW MOTOR VEHICLES UNDER SECTION 202 OF THE CLEAN AIR ACT (Oct. 20, 1999). Section 202(a)(1) of the CAA states that the EPA Administrator "shall by regulation

prescribe" standards for air pollutants emitted from new motor vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2000).

After receiving 50,000 comments on ICTA's section 202 rulemaking petition and commissioning its own study on the uncertainties in global climate change science, the EPA declined to regulate motor vehicle emissions for their contribution to global warming. *Massachusetts*, 127 S. Ct. at 1449-50. In its petition denial, the EPA argued that the CAA does not authorize the agency to regulate greenhouse gases for their contribution to global warming. *Id.* at 1450. The EPA also argued that section 202 does not require the agency to judge whether greenhouse gases endanger the public before deciding whether to regulate under the statute. *Id.* at 1451. Instead, the EPA reasoned that scientific uncertainty and the political effects of global warming regulation counseled against regulating greenhouse gas emissions from new motor vehicles at that time. Twelve states, three cities, one American territory, and numerous environmental groups sought judicial review of the EPA's section 202 petition denial in the United States Court of Appeals for the District of Columbia. Massachusetts v. EPA, 415 F.3d 50, 53 (D.C. Cir. 2005), *vacated and remanded*, 127 S. Ct. 1438 (2007). The D.C. Circuit split three ways, but a majority upheld EPA's rulemaking petition denial. Twelve states, four localities, and thirteen public interest groups (Petitioners) petitioned for certiorari, and "the unusual importance of the underlying issue persuaded [the United States Supreme Court] to grant the writ." *Massachusetts*, 127 S. Ct. at 1446-47.

The Supreme Court began by addressing the issue of Petitioners' standing to bring a suit against the EPA. *Id.* at 1452. Article III of the United States Constitution authorizes federal courts to adjudicate "cases and controversies." U.S. CONST. art. III, § 2.

A petitioner must traditionally establish all of the elements of standing—an injury in fact that is fairly traceable to the defendant and likely to be redressed by a favorable decision-to meet Article III's "cases and controversies" requirement. *Id.* at 1453 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). However, courts relax the imminence and redressability requirements for standing when Congress grants parties a procedural right to judicial review in a statute. Because section 307(b)(1) of the CAA grants judicial review of EPA rulemaking petition denials, the Court found that Congress intended to create a

procedural right to judicial review when a traditional standing injury may not exist.

The Court framed the standing issue by focusing on Massachusetts' interests as a quasi-sovereign entity within a federal framework and subject to injury by surrounding states. *Id.* at 1454. The court was primarily concerned with the loss of coastal land that Massachusetts has and will continue to suffer due to global warming. *Id.* at 1456. By acknowledging a sovereign's interests in being free from harm, the Court hearkened back to its early common law jurisprudence on transboundary pollution disputes between neighboring states. *Id.* at 1454. The Court noted that a state relinquishes its own rights to mitigate the harms of global warming to the federal government under the CAA. *Id.* "Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted." *Id.*

From this framework, the Court determined that Massachusetts has suffered an injury in fact that is directly traceable to the EPA, and is likely to be redressed with greenhouse gas regulation. The Court noted that the EPA conceded that human activity has been linked to the global warming effects that put Massachusetts' coastal territory at risk. *Id.* at 1457. However, the EPA refused to take action to mitigate the human activity and protect Massachusetts' interests. *Id.* at 1454-55. Because the federal government chose to leave Massachusetts vulnerable to a serious risk of land loss and other deleterious effects, the Court found that Petitioners established a concrete and sufficiently imminent injury that is traceable to the EPA. Additionally, the Court found redressability because a favorable decision would likely prompt the EPA to regulate new motor vehicle emissions under section 202 of the CAA. *Id.* at 1455. The Court rejected the EPA's argument that such regulations would have such an insignificant effect on global warming that they could not possibly redress plaintiff's injury. *Id.* at 1457. The Court held that EPA action need not remedy global warming; it was sufficient that reductions would slow the pace of global emissions increases. *Id.* at 1458 (citing Larson v. Valente, 456 U.S. 228, 243 n.15 (1982)).

After establishing federal jurisdiction over Petitioner's claims, the Court then turned to the two statutory issues in the case. The Court noted that review of rulemaking petition denials is "extremely limited" and "highly deferential." *Id.* at 1459 (quoting Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir.

1989)). However, a reviewing court may overturn a rulemaking petition denial found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." CAA § 307(d)(9), 42 U.S.C. § 7607(d)(9) (2000). On the merits, the Court rejected the EPA's arguments that the agency is not authorized to regulate greenhouse gases under the CAA, and, in the alternative, can decline to act under section 202 when executive policies warrant forbearance. *Massachusetts*, 127 S. Ct. at 1459-60, 1463.

The EPA's petition denial argued that global warming's political history counseled against addressing the issue until the agency received an express directive from Congress to do so. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)). Because the EPA assumed that Congress did not intend the EPA to regulate global climate change under the CAA, it concluded that greenhouse gases cannot be considered "air pollutants" under the act for their contributions to global warming.

While not expressly invoking *Chevron* deference, the Court began its statutory analysis by holding that the CAA definition of "air pollutant," while broad, is not ambiguous. *Massachusetts*, 127 S. Ct. at 1460; *see* Chevron Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (holding that courts must defer to an agency's reasonable statutory interpretations when the statute is ambiguous . . . "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect"). The CAA authorizes, and at times mandates, regulation of air pollutants, which are defined as "any physical, chemical, . . . substance . . . emitted into . . . the ambient air [which acts as a pollutant agent]." CAA § 302(g), 42 U.S.C. § 7602(g). In rejecting the EPA's argument, the Court reasoned that the CAA's simple definition of "air pollutant" was intended to grant the EPA a sufficiently broad authority to address scientific advances in the field of air pollution and maintain the CAA's predominance over all air quality issues. *Massachusetts*, 127 S. Ct. at 1460. The Court reiterated that broad statutory language, properly interpreted to incorporate action not expressly contemplated by Congress, does not amount to ambiguity; and instead demonstrates breadth. *Id.* at 1460-62 (citing Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)). Additionally, the Court found that subsequent congressional action on global warming did not evince an intent to limit the EPA's authority to regulate greenhouse gases as an air pollutant under the CAA. *Id.* at 1460-61. Because greenhouse gases are

a physical chemical substance emitted into ambient air, the Court held that the EPA has authority under the CAA to regulate greenhouse gases as air pollutants under the plain language of the statute. *Id.* at 1462.

Next, the Court rejected the EPA's argument that the agency may refuse to regulate under section 202 when it is faced with a contentious political climate and scientific uncertainty. *Id.* at 1463. The EPA contended that the statutory language "in the Administrator's judgment" grants the agency complete discretion to make or withhold that initial judgment on which the statutory mandate "shall regulate" is conditioned. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003); CAA § 202, 42 U.S.C. 7521. This interpretation would essentially give the agency complete discretion over whether to regulate, despite the mandatory language in section 202. The Court rejected the EPA's interpretation, and held that the EPA's initial judgment about the appropriateness of regulation "must relate to whether an air pollutant' cause[s], or contribute[s] to, air pollution that may reasonably be anticipated to endanger public health or welfare.'" *Massachusetts*, 127 S. Ct. at 1462 (quoting 42 U.S.C. § 7521(a)(1)). The Court reasoned that under section 202's clear terms, the EPA may only avoid regulating if it judges that greenhouse gases do not cause or contribute to global warming *or* offers a reasonable explanation for refusing to make the threshold judgment. On this basis, the Court held that executive foreign policy did not absolve the EPA of its duty to make a scientific finding. *Id.* at 1463. The Court noted, "while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Id.* The Court also determined that the EPA improperly relied on scientific uncertainty to deny the rulemaking petition. The Court reiterated that the EPA must have a statutory basis for denying a rulemaking petition under section 202 of the CAA. On these grounds, the Court held that the EPA may only rely on scientific uncertainty if it is "so profound" that the EPA *cannot* make a reasonable judgment as to whether greenhouse gases cause or contribute to global warming. The Court then reversed the decision below, and remanded to the EPA to ground its response to the 202 rulemaking petition in the text of the statute.

Chief Justice Roberts and Justice Scalia wrote dissenting opinions, which were joined by Justice Alito and Justice Thomas. Chief Justice Roberts took issue with the fact that the Majority framed its standing argument in terms of Massachusetts' rights as a quasi-sovereign entity. *Id.* at 1464-66 (Roberts, C.J., dissenting). The Chief Justice would have taken a narrow approach to the issue, set aside the procedural injury that

occurs when the federal government ignores a congressional mandate, and applied the most stringent standing requirements yet to befall Supreme Court jurisprudence. *See id.* at 1467-71 (Roberts, C.J., dissenting) (requiring Massachusetts to elaborate on its argument that global climate change leads to increased sea levels, and increased sea levels resulting from global climate change have swallowed Massachusetts' territory; arguing loss of coastal land is only a "possible future injury"; and requiring a showing that a reduction in greenhouse gas emission from new motor vehicles alone will preserve Massachusetts' coastal property). Justice Scalia agreed with Chief Justice Roberts that Petitioners did not establish standing, but addressed the merits because the Majority did so. *Id.* at 1471 (Scalia, J., dissenting). Justice Scalia would frame the issue on the merits as whether the EPA properly deferred a decision to regulate greenhouse gas emissions from new motor vehicles, rather than whether the EPA properly denied a rulemaking petition requesting regulation of such emissions. *Id.* at 1473 (Scalia, J., dissenting). Additionally, Justice Scalia would have deferred to the EPA's interpretation of what constitutes an "air pollutant" and what underlies an agency's "judgment" under the CAA. *Id.* at 1473-74 (Scalia, J., dissenting). On these grounds, Justice Scalia would have upheld the EPA's decision-making based on the agency's political concerns and its desire for unequivocal proof that greenhouse gas emissions cause global climate change. *Id.* at 1474-75 (Scalia, J., dissenting).

Environmentalists celebrate *Massachusetts* as one of the most important Supreme Court decisions in recent decades, despite the fact that the EPA is not likely to regulate greenhouse gas under the CAA any time soon. While suffering from the same agency foot-dragging maladies that have stretched this case out for eight years, *Massachusetts* has helped create a common-sense discourse about global warming that has changed the way the United States government talks and thinks about global warming.

Since *Massachusetts*, the EPA has declined to move with any expediency or purpose towards greenhouse gas emissions regulation. In June 2007, Stephen Johnson, EPA Administrator, told the House Special Committee on Energy Independence and Global Warming that the statutory term "endangerment" is a "legal term of art," and that the agency will need until late 2008 to understand and comply with the Supreme Court's directives. EPA Wordplay: What Does "Endanger" Mean? (Warming Law, Changing the Climate in the Courts) (June 12, 2007), http://warminglaw.typepad.com/my_weblog/2007/06/index.html.

In August 2007, the EPA issued an air permit to a coal-fired power plant, and declined to place any control requirements on CO_2 emissions from the plant. In doing so, the EPA determined that CO_2 is not "subject to regulation" such that control is required, because the EPA has not *yet* regulated it. Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct Permit No. PSD-OU-0002-0.400 at 5-6, United States Environmental Protection Agency Region 8 (Aug. 30, 2007), *available at* http://www.epa.gov/region8/air/permitting/ResponseToComments.pdf. The EPA has also been slow to address California's request for a preemption waiver under the CAA, so that the state can impose its own greenhouse gas emission regulation while the EPA continues to deny and decry the need for immediate action.

Although *Massachusetts* has not been the "action-forcing" decision some hoped for, its legal and political implications have affected and will continue to affect how the U.S. federal government operates. By acknowledging a state's standing to sue when the federal government has primary authority to mitigate harm to a state and refuses to do so, the Supreme Court has opened the door to states challenging federal agency inaction. Agency inaction is at the heart of *Massachusetts* and many other controversial and politicized issues. By granting Massachusetts standing based on its rights as a quasi-sovereign entity, the Supreme Court has provided state governments, and therefore state citizens, a venue to challenge agency inaction in the future. *Massachusetts* is an important case for administrative law, as well. Prior to *Massachusetts*, it was unclear whether courts had the authority to review an agency's decision to *deny* a rulemaking petition when the agency had no statutory duty to make a final decision on the petition in the first place. However, the Supreme Court adopted the Circuit Court positions on this matter, and agreed that judges can review rulemaking petition denials but that review should be very deferential. While not expressly doing so, *Massachusetts* also addresses a question of statutory interpretation that has been decided different ways in different Circuits. Courts have had difficulty interpreting statutes that combine both discretionary language (like "in his judgment") and mandatory language (such as "shall regulate"). In *Massachusetts*, the Supreme Court essentially addressed this split by holding that any decision to withhold the exercise of discretion, the judgment, must be rooted in the language of the statute.

Perhaps the most important effect of *Massachusetts* is the way the opinion changed how the U.S. federal government talks about global warming. Prior to *Massachusetts*, the EPA and President Bush

repeatedly denied that human activity caused global warming. Now that the Supreme Court has stated that even *they* can see how humans cause global warming, the executive branch cannot continue its unilateral position without looking foolish. Moreover, *Massachusetts* has vindicated the individuals, industries, organizations, and state and local governments that have been pushing for global warming regulation all along. This political momentum has already led to major changes in the U.S. global warming policy, and will continue on until the 110th Congress takes action.

Erica L. Rancilio

NRDC v. EPA,
489 F.3d 1250 (D.C. Cir. 2007)

The National Resource Defense Council (NRDC) petitioned the United States Court of Appeals for the District of Columbia arguing that two rules recently promulgated by the Environmental Protection Agency (EPA) violated the Clean Air Act (CAA). The first rule, Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 70 Fed. Reg. 55,568 (Sept. 22, 2005) (CISWI Rule), was promulgated under CAA section 129 (42 U.S.C. § 7429 (2000)). The CISWI Rule was challenged by four environmental organizations: the NRDC, the Sierra Club, the Environmental Integrity Project, and the Louisiana Environmental Action Network. These environmental petitioners argued that the CISWI Rule too narrowly defined "commercial or industrial waste" such that the term contradicted the plain language of CAA section 129. This definition is important, the environmental petitioners argued, because it is necessary in defining a "solid waste incineration unit." By narrowly defining "commercial or industrial waste," the EPA effectively shrunk the number of "solid waste incineration units" subject to the emission requirements of the CISWI Rule, instead classifying them as boilers. NRDC v. EPA, 489 F.3d 1250, 1253-54 (D.C. Cir. 2007).

The second rule at issue in *NRDC*, the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters, 69 Fed. Reg. 55,218 (Sept. 13, 2004), *as amended on recons.*, 70 Fed. Reg. 76,918 (Dec. 28, 2005) (Boilers Rule), was promulgated under CAA section 112 (42 U.S.C. § 7412). The above-mentioned environmental petitioners challenged the standards set in the Boilers Rule, as well as the methodology in reaching those

standards. The Boilers Rule also was challenged by municipal-based industry petitioners, namely six of American Municipal Power-Ohio, Inc.'s members, who argued that "EPA failed to comply with the requirements of the Regulatory Flexibility Act, 5 U.S.C. § 601, and that the [Boilers Rule] standards as applied to small municipal utilities are unlawful." *NRDC*, 489 F.3d at 1253-54.

The D.C. Circuit first examined the CISWI Rule, reviewing the environmental petitioners' argument that the EPA's definition of "commercial or industrial waste" conflicted with the language of CAA section 129. The D.C. Circuit moved directly into an analysis under *Chevron U.S.A., Inc. v. NRDC*, first determining whether Congress had spoken on the issue, and then only if the CAA was silent or ambiguous, deferring to a permissible interpretation of the statute. *Id.* at 1257 (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). The D.C. Circuit held that the EPA's CISWI Rule failed *Chevron*'s first step. CAA section 129 defines "solid waste incineration unit" as "a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels)." 42 U.S.C. § 7429(g)(1). The CISWI Rule promulgated by the EPA, however, defined the material that comes out of those units—commercial or industrial waste—only to include "solid waste . . . that is combusted at any commercial or industrial facility using controlled flame combustion in an enclosed, distinct operating unit: (1) whose design does not provide for energy recovery (as defined in this subpart); or (2) operated without energy recovery." 70 Fed. Reg. at 55,572. The EPA defined the term "energy recovery" as "the process of recovering thermal energy from combustion for useful purposes such as steam generation or process heating." *NRDC*, 489 F.3d at 1257. By narrowing the definition for "commercial or industrial waste" to exempt facilities that provide for any sort of energy recovery, the EPA effectively reduced the number of waste units to which section 129 of the CAA applied. If a commercial or industrial incinerator had any sort of thermal recovery component, CAA section 129 would not apply under the EPA's rule. Because the CAA defined "solid waste incineration unit" more broadly to include *any* unit that combusts *any* solid waste material from commercial or industrial establishments, the D.C. Circuit held that the EPA's CISWI Rule violated the plain language of the CAA. *Id.*

The EPA asserted several arguments to justify the CISWI Rule, but the D.C. Circuit rejected them all. The EPA's principal argument was that the CAA did not define the term "commercial or industrial waste";

therefore, the term was ambiguous and the EPA could promulgate its own definition. The D.C. Circuit disagreed, stating that "the lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous." *Id.* at 1258 (citing Goldstein v. SEC, 451 F.3d 873, 878 (D.C. Cir. 2006)). The court explained that the term was not ambiguous because of the clear definition of "solid waste incineration unit" in the CAA, which provides clear meaning as to what constitutes "commercial and industrial waste." *Id.*

The EPA next argued that the legislative history of CAA section 129 demonstrated that the term "any" has a narrower meaning in the Act than the term carries in common usage, and therefore provided the EPA the discretion to exempt thermal energy recovery facilities from the emission requirements of the CISWI Rule. The D.C. Circuit disagreed, noting that the EPA's evidence—"the isolated remarks of a few senators"—could not overcome the clear language of the statute. In fact, the court took the opposite position of the EPA and gave "an expansive reading to 'any' to increase the number of CISWI units subject to section 129's emission standards." *Id.* at 1258-60.

The EPA next argued that their CISWI Rule reasonably distinguished between incinerators, the primary purpose of which is to destroy materials, and boilers, which operate to recover heat. While the court acknowledged that such a distinction may be reasonable, the argument failed in this context because that distinction conflicts with the distinction made by Congress in CAA section 129 ("any facility which combusts any solid waste material"). *Id.* at 1260.

Lastly, the EPA argued that the CAA separates facilities subject to section 129's requirements from those subject to section 112's requirements, and that Congress left discretion in the hands of the EPA to draw the line and ensure that facilities are on one side of the line only. The D.C. Circuit again cited the "straightforward" directive of CAA section 129, which directs the EPA to use section 129's definition of "solid waste incineration unit" to make this distinction. In other words, Congress conferred no discretion to the EPA in this area. *Id.* at 1260-61.

The D.C. Circuit next examined the Boilers Rule. The court declined to reach the merits of the arguments presented by the environmental and municipal petitioners, agreeing instead with the EPA's oral argument that if the CISWI Rule was overturned, the EPA must revise the Boilers Rule as well. By striking down the CISWI Rule, the D.C. Circuit effectively shifted thousands of units that the EPA had placed under the Boilers Rule and put them back under the CISWI Rule, ruling that under the CAA even units with some thermal energy recovery

function were incinerators, not boilers. Because of the significant increase in the number of incinerator facilities, and the corresponding decrease in the number of boiler facilities, the court required the EPA to reconsider emissions standards for both. *Id.* at 1261. Accordingly, the D.C. Circuit vacated and remanded the Boilers Rule, as well as the CISWI Rule, in their entirety. The court acknowledged that this decision created a standardless zone, albeit a temporary one, and therefore permitted any party to "file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards." *Id.* at 1262 (citing Cement Kiln Recycling Coal v. EPA, 255 F.3d 855, 872 (D.C. Cir. 1998)).

Judge Randolph concurred in the judgment of the court, offering a separate opinion to articulate the merits of the decision not only to remand, but also to vacate. Judge Randolph argued that in non-APA § 706(2) cases such as this one, the court should not simply remand, but also vacate. Judge Randolph strongly suggested that in this particular case the court also should "entertain a motion for a stay of the mandate while the agency [takes] corrective action," thereby providing a hint to environmental petitioners as to how to deal with the potentially standardless interim period once the court's decision takes effect. *Id.* Judge Randolph reasoned that if the court simply remands then the unlawful agency action remains in place, and the agency has no incentive to move quickly and resolve the matter. The complained of injury continues to inflict harm, and the plaintiffs, the victors in the case, have the burden of bringing a mandamus petition to make it stop. Plus, a simple remand is not subject to further judicial review, while a decision to vacate in this case opens the issue for appeal to the United States Supreme Court. *Id.* at 1263-64.

Judge Rodgers, on the other hand, concurred in the judgment, but dissented as to the remedy, arguing that the court should simply remand the two rules because it was better to leave in place some environmental protections, even if inadequate, rather than no protection at all. *Id.* at 1266. Rebutting Judge Randolph's arguments, Judge Rodgers argued a stay of mandate is supposed to be for no more than ninety days, yet the agency response may take years. *Id.* at 1265 (citing D.C. Cir. R. 41(a)(2)). Therefore, the court should not rely on a stay to fix the problem of a standardless interim period for incinerator and boiler emissions. Judge Rodgers argued further that the EPA had not suggested that its response would be prompt, no party had made any mention of appealing the decision, and the environmental petitioners themselves

argued only for a remand precisely because of the potentially large gap of time in which emissions from incinerators and boilers may go unregulated. *Id.*

Somewhat surprisingly, both the deadline to request a rehearing and the deadline to request a stay expired in July 2007 with neither party making a request. Consequently, the D.C. Circuit's decision to vacate the two rules took effect when those deadlines expired. *Id.*, Judgment, No. 04-1385, *available at* www.epa.gov/ttn/atw/129/ciwi/boilers_mandate-07_30_07.pdf. Industry members affected by the CISWI and Boilers Rule are now in a standardless zone, waiting for the EPA to go through its rulemaking procedure to comply with the CAA. It is unclear when new standards will arrive, but as Judge Rogers suggested in his dissent, it may take years.

Armand M. Perry

II. NATIONAL ENVIRONMENTAL PROTECTION ACT

Northern Cheyenne Tribe v. Norton, 503 F.3d 836 (9th Cir. 2007)

The United States Court of Appeals for the Ninth Circuit upheld the district court's partial injunction proscribing coal bed methane (CBM) development on ninety-three percent of the Powder River Resource Area (PRRA) in Montana and Wyoming. Northern Cheyenne Tribe v. Norton, 503 F.3d 836 (9th Cir. 2007). "CBM is a natural gas . . . trapped in coal seams by groundwater." *Id.* at 839. The process of extracting CBM from the ground can lead to aesthetic harm due to the large equipment involved, along with groundwater pollution, and lowering of the water table. In response to a growing scarcity of natural gas, interest in developing CBM has increased in recent years.

At the district court level, a partial injunction was issued in response to a deficient final environmental impact statement (EIS) issued by the Bureau of Land Management (BLM) analyzing the development of CBM resources in the PRRA. *Id.* at 840. The district court held that the final EIS was deficient under the National Environmental Policy Act (NEPA) in that it failed to consider a "phased development" alternative. The district court held that aside from this specific omission, the final EIS was otherwise compliant with NEPA. A partial injunction issued on BLM's terms, under which phased development would proceed while BLM analyzed its efficacy and completed a supplemental EIS. On appeal, the Northern Cheyenne Tribe (NCT), along with Native Action (a

Montana-based non-profit) sought a full injunction of CBM development in the PRRA. *Id.* at 842.

The majority rejected NCT's argument that the district court was obligated to enjoin all CBM development because a valid EIS was never issued. *Id.* at 842, 846. NCT's theory was that the partial injunction was inconsistent with NEPA regulations proscribing agencies from taking major federal action pending the completion of an EIS, when doing so would limit available alternatives. *Id.* (citing 40 C.F.R. § 1506.1(c)(3) (1978)). The majority rejected this theory, holding that traditional standards in equity for injunctive relief apply to NEPA violations. *Id.* at 842 (citing High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004)). Under these standards there is no requirement mandating an automatic blanket injunction.

The majority recognized the district court's broad latitude in designing equitable relief in a manner that "balance[s] the equities between the parties and give[s] due regard to the public interest." *Id.* at 843 (quoting Idaho Watersheds Project v. Hahn, 307 F.3d 815, 833 (9th Cir. 2000)). Based on this theory, the majority held that not only was the district court free to issue a partial injunction, but that a failure to do so would violate Supreme Court precedent mandating a consideration of the effect on each party when issuing equitable relief. *Id.* (citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987)). Implicit in the majority's reasoning was the belief that a full injunction would cause undue economic harm to CBM developers.

The majority held that NCT suffered no *irreparable* harm under the partial injunction. Because the partial injunction implemented the phased development alternative, the majority reasoned that the only deficiency in the final EIS had been rectified. Further, the majority noted that the district court's decision accounted for "the public interest in clean energy development as well as the prevention of environmental harms." In sum, the majority reasoned that since a more comprehensive injunction would have led to increased harm to CBM developers with no corresponding benefit for the NCT, the district court was well within their discretion in designing equitable relief.

The majority's review of the district court's balancing excluded consideration of the possible cultural harm CBM development presented for the NCT. *Id.* at 844. The NCT argued that the EIS contained only a superficial examination of the potential disruption of important cultural sites in the PRRA and was therefore inadequate. The majority reasoned that since no actual development was possible without an additional EIA being issued for each drilling lease, the partial injunction could have no

effect on NCT cultural sites. Therefore, NCT's claim was not ripe until "a specific 'final agency action' has an actual or immediately threatened effect." *Id.* at 846 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 894 (1990)).

On the broader issue of whether a presumption of irreparable harm is necessary in environmental cases, the majority affirmed that "the environment can be fully protected without [such a] presumption." *Id.* at 844 (quoting *Amoco*, 480 U.S. at 544). The majority cited *Amoco* for the proposition "that a presumption of irreparable harm 'is contrary to traditional equitable principals.'" *Id.* (quoting *Amoco*, 480 U.S. at 544). In *Amoco*, the Supreme Court allowed oil exploration to continue pending administrative review of compliance with the Alaska National Interest Lands Conservation Act. The Supreme Court reasoned that since "injury to subsistence resources from exploration was not at all probable" and because the oil company had already committed seventy million dollars to exploration, an injunction was inappropriate. *Id.* (quoting *Amoco*, 480 U.S. at 544). In addition, the majority noted that the court in *High Sierra Hikers* held that a partial injunction was appropriate under NEPA if the potential harms on both sides of the issue were sufficiently accounted for. *Id.* (citing *High Sierra Hikers*, 390 F.3d at 642-43). The majority held that these cases demonstrate a presumption of irreparable harm is unnecessary in environmental cases, and that such a presumption would be at odds with traditional equitable principles.

In addition to the NEPA claim, NCT argued that the district court erred in dismissing its claim under the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 (2000). NCT argued that the NHPA requires BLM to consult with NCT prior to issuing leases because some portions of the PRRA contained sites of cultural importance. *Northern Cheyenne Tribe*, 2007 WL 2595476, at 844. As with NCT's NEPA claim, the majority held that the issue was unripe until BLM took action that would actually affect the NCT cultural sites. *Id.* at 846.

Chief Judge Schroeder dissented, arguing that the partial injunction failed to maintain the status quo pending BLM's compliance with NEPA. *Id.* at 846 (Schroeder, C.J., dissenting). His argument focused on the logical inconsistency of permitting BLM to implement the same alternative that BLM failed to include in the EIS. Schroeder argued that under the majority approach, major new activities, such as "mining, road construction, and water usage affecting precious underground aquifers" could take place without first satisfying NEPA. Schroeder reasoned that the central purpose of NEPA is to ensure consideration of all alternatives

prior to major government action, and that a partial injunction was contrary to this purpose. *Id.* at 847.

Schroeder attacked the majority's decision for ignoring fundamental injunction principles that stress maintaining the status quo and avoiding undue stress to the parties. *Id.* at 847. Schroeder noted that as a consequence of the district court's failure to preserve the status quo, a motions panel of the court was forced to grant an emergency motion enjoining all projects, drilling and new construction pending the Ninth Circuit's appellate decision. He emphasized that if the district court had adhered to established injunction principals as applied to NEPA, this emergency motion would not have been necessary.

Schroeder further argued that the majority misapplied *High Sierra Hikers* because that case permitted activities already taking place to continue while only proscribing new activities. Schroeder explains that in *High Sierra Hikers*, the court "enjoined issuance of new commercial packstock special-use permits, while allowing packstock operators to continue to use the special-use permits that already had been issued." Contrary to the majority's assertion, Schroeder argues that *High Sierra Hikers* emphasizes the importance of maintaining the status quo when dealing with NEPA.

The Ninth's Circuit's decision sets a problematic precedent in terms of enforcing NEPA. By allowing BLM to proceed with an alternative the agency failed to address in its initial EIS, the court permitted BLM to take action without fully complying with the statute. Although there is a strong argument that no actual harm transpired as a consequence of the deficient EIS, the possibility existed that irreparable harm could have resulted from CBM development in the PRRA. Even more troubling, the possibility now exists that agencies can take significant action affecting the environment without first completing a proper EIS, so long as a EIS is pending.

Ivan A. Watkins

III. COASTAL ZONE MANAGEMENT ACT

NRDC v. Winter, 527 F. Supp. 2d 1216 (C.D. Cal. 2008)

The United States Court of Appeals for the Ninth Circuit remanded the noted case to the United States District Court of Central California, instructing the court to consider the effect of executive measures by President George W. Bush and the Council on Environmental Quality

(CEQ) on its prior orders granting environmental protection groups a preliminary injunction and denying the Department of the Navy an immediate vacatur, or partial stay, pending appeal. NRDC v. Winter, 527 F. Supp. 2d 1216, 1219 (C.D. Cal. 2008).

I. Factual Background/Prior Precedent

The series of court decisions preceding the controversy in the noted case was set into motion when the Natural Resources Defense Council (NRDC) and other environmental protection organizations brought suit against the United States Navy for its use of mid-frequency active (MFA) sonar in planned training missions off the coast of southern California. *Id.* at 1220. The Navy became interested in MFA sonar because of its effectiveness in the detection of modern submarines. The Navy began its own analysis of the environmental impacts of using the sonar. First, it conducted an Environmental Assessment (EA), which concluded that the use of this sonar would cause injury, including hearing loss and possible death, to a substantial number of marine mammals. Despite these statistics, the Navy determined that the use of the sonar during its training exercises would not cause a significant environmental impact. *Id.* at 1221. Thus, the Navy concluded that the National Environmental Policy Act (NEPA) did not mandate the preparation of an Environmental Impact Statement (EIS). It also decided that the harm to natural resources on the California coastal zone would be trivial. Relying on this finding, the Navy submitted a "consistency determination" to the California Coastal Commission (CCC), but it failed to take into account the actual exercises utilizing the MFA sonar. Subsequently, the Navy rejected mitigation procedures that the CCC later concluded were essential for compliance with the California Coastal Management Program (CCMP). *Id.* at 1221-22.

Based upon these actions, NRDC sought declaratory and injunctive relief on March 22, 2007. It alleged that the Navy was in violation of NEPA, the Endangered Species Act (ESA), the Administrative Procedure Act (APA) and the Coastal Zone Management Act (CZMA). In June 2007, NRDC moved for a preliminary injunction seeking to prevent the Navy from using the MFA sonar until certain mitigation measures were adopted to prevent harm to marine life. The district court granted this request, finding that NRDC had demonstrated a likelihood of success on its NEPA, CZMA and APA claims. The Navy's failure to prepare an EIS in contradiction to its own scientific findings was particularly damaging. However, a Ninth Circuit panel granted the Navy an emergency stay of the injunction pending appeal in August 2007. *Id.* at 1222 (citing Natural

Res. Def. Council v. Winter, 502 F.3d 859, 865 (9th Cir. 2007)). Consequently, another Ninth Circuit panel remanded to the district court, holding that if certain mitigation measures were implemented the Navy could continue its training exercises. *Id.* (citing Natural Res. Def. Council v. Winter, 508 F.3d 885, 887 (9th Cir. 2007)). The district court was ordered to issue an amended injunction setting forth such mitigation measures.

As part of this process, NRDC suggested to the court several broad mitigation procedures which were in great contrast to the Navy's proposal to maintain the status quo. *Id.* at 1222-23. The district court rejected both plans and instead chose to tailor its own measures, which it set forth in its January 3, 2008 order. The Navy immediately sought a stay pending appeal. *Id.* at 1223. In response to the motion, the district court issued a modified injunction to reiterate its January 3rd order. The Navy filed a notice of appeal the following day, which the district court quickly denied three days later. The next day, President Bush issued a memorandum stating that CZMA compliance "would 'undermine the Navy's ability to conduct realistic training exercises,'" concluding that "the exercises 'are in the paramount interest of the United States' and exempted the Navy from compliance." *Id.* at 1223-24 n.8 (quoting Memorandum from President George W. Bush for Sec. of Def. & Sec. of Com., Presidential Exemption from the Coastal Zone Management Act, 44 WEEKLY COMP. PRES. DOC. 79 (Jan. 15, 2008)). On the same day, CEQ approved "alternative arrangements" for the Navy to meet compliance with NEPA. Citing its own regulation as its authority, CEQ found that "emergency circumstances" existed which necessitated these special arrangements. *Id.* (citing 40 C.F.R. § 1506.11 (2007)). Specifically, CEQ decided that national security issues compelled the use of MFA sonar in order to protect American lives. *Id.* (citing Letter from CEQ to Donald C. Winter, Secretary of the Navy (Jan. 23, 2007)). Basing its authority on both of these executive actions, the Navy requested that the Ninth Circuit vacate or stay the injunction, claiming that the legal foundations supporting it—specifically NRDC's likelihood of success on the merits—were no longer viable. On January 16, 2008, the Ninth Circuit remanded again to the district court in the noted case to consider whether or not to vacate or stay its injunction.

II. The Court's Decision

A. NEPA

The court first considered whether CEQ's decision to allow alternative arrangements to NEPA requirements compelled it to vacate or stay the injunction. *Id.* at 1224. It consulted 40 C.F.R. § 1506.11 to determine CEQ's authority in finding that emergency circumstances existed. The analysis began with a general discussion concerning the policy reasons for promulgating procedural CEQ regulations. The purported "goals of the regulations as a whole were to 'make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives.'" *Id.* at 1225 (quoting Exec. Order No. 11,991 § 1, 3 C.F.R. 124 (1978) (amending subsection (h) of section (3) of Exec. Order No. 11,514)). The current regulations detail the procedures for drafting an EIS, "as well as for referral of interagency disagreements." The court then noted that "emergency circumstances" were not defined in any of the regulatory or statutory provisions.

The court began the rest of its analysis by declaring that no "emergency circumstances" existed for the activity at issue. *Id.* at 1225-26. The first factor which the court cited for its conclusion was that CEQ's interpretation of its regulation was not entitled to deference. It began with the well-established principle that "if the statute is silent or ambiguous with respect to the specific issue" courts should give deference to an agency's reasonable interpretation. *Id.* at 1226 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)). However, deference should not be afforded if "an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Id.* (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). The issue presented in the noted case was whether deference should be granted to CEQ's broad interpretation of "emergency circumstances." *Id.* at 1226-27. Therefore, the court focused on the plain meaning of the regulation and the agency intent at the time of promulgation regarding to what "emergency circumstances" referred. *Id.* at 1227.

To determine the plain meaning of the statute, the court focused on the significance of the word "emergency." It considered both a dictionary definition and the California Environmental Quality Act (CEQA) definition, a statute which is based on NEPA. Both definitions

corresponded with NRDC's claim that the plain reading of the regulation revealed that its "'manifest purpose'" was to "'permit the government to take immediate remedial measures in response to urgent and unforeseen circumstances not of the agency's own making.'" *Id.* (citation omitted). The court then rejected the Navy's claim that the sonar training exercises were comparable to actions in other cases where CEQ had given "alternative arrangements" to military departments. The crucial difference to the court was that those cases had involved "circumstances of great urgency." The court specifically addressed one case in particular to highlight its reasoning. *Id.* (citing Valley Citizens for a Safe Env't v. Vest, Civ. A. No. 91-30077-F, slip op. (D. Mass. May 30, 1991)). In *Valley Citizens*, CEQ made a determination of emergency circumstances allowing alternative arrangements in the place of a supplemental EIS (SEIS) for the transport of planes out of an air force base to supply military equipment and personnel for the Gulf War. *Valley Citizens*, slip op., at 6-7. The court concluded that *Valley Citizens* was "markedly different" than the noted case. *Winter*, 527 F. Supp. 2d at 1228. CEQ and the Navy in the noted case failed to "identify any changed circumstances. . .that would justify invocation of 40 C.F.R. § 1506.11." *Id.* Instead, the court found that the emergency situation was caused by the Navy itself when it failed to comply with NEPA provisions and refused to produce an EIS.

After considering the plain meaning of the regulation, the court went on to discuss the agency's initial intent in promulgating the regulation. NRDC offered a declaration by Nicolas Yost, CEQ's general counsel from 1977 to 1981, who had helped to draft some of the regulations. *Id.* at 1228-29. The court rejected his declaration, reasoning that his statements were unreliable because they were made almost thirty years after promulgation of the regulations. *Id.* at 1229. Nevertheless, even absent support from Mr. Yost's declaration, the court found that the regulation's limited history supported a narrow interpretation of "emergency circumstances." The proposed version of 40 C.F.R. § 1506.11 initially mandated agencies "proposing to take" emergency actions to confer with CEQ regarding alternative arrangements. *Id.* (citing 43 Fed. Reg. 25,243 (June 9, 1978)). However, the final regulation contained the phrase "to take" as a replacement for "proposing to take." CEQ explained that the change was made to emphasize that agencies might not have time for a consultation in emergency circumstances. The court found this change indicative of the notion that "emergency circumstances" referred to "sudden, unanticipated events, not the unfavorable consequences of protracted litigation." *Id.* at 1224.

Therefore, the court held that CEQ's interpretation was "'plainly erroneous and inconsistent'" and thus not entitled to deference.

The court additionally found that there were other principles of statutory construction that prevented acceptance of a broad interpretation of "emergency circumstances." *Id.* at 1230. The court reasoned that such a reading was contrary to NEPA. It agreed with NRDC that it was telling that NEPA failed to contain a national security exemption. *Id.* (citing San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1035 (9th Cir. 2006)). The court stated that "it was axiomatic that there exists a presumption against reading an exemption into a statute where Congress has not authorized one." *Id.* The court was unwilling to allow CEQ to interpret such exemptions when Congress had not done so expressly. Further, to do so would be in direct conflict with NEPA's mandate that "agencies comply with their NEPA duties 'to the fullest extent possible.'" *Id.* at 1231 (citing 42 U.S.C. § 4332 (2000)). Allowing such a result would be ultra vires under NEPA. The court reasoned that CEQ's interpretation would, in essence, allow agencies to bypass NEPA by crafting their activities as "emergencies." *Id.* at 1231-32. This would allow a narrow exception to the requirements of NEPA to become the rule.

The court next expressed its constitutional concerns over CEQ's broad interpretation. The major issue to the court was that CEQ, in making its own alternatives to NEPA compliance, was circumventing the court's order denying the Navy a stay of its injunction. *Id.* at 1232. Such a separation of powers issue was disturbing, but the court stated that it "must endeavor to avoid a finding of unconstitutionality." *Id.* (citing Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1476 (9th Cir. 1994)). The court could avoid such a finding by rejecting CEQ's broad interpretation of 40 C.F.R. § 1506.11.

B. CZMA

Next, the court moved on to consider the effect of President Bush's exemption of CZMA on the injunction. The CZMA provision utilized by the President allowed him to exempt activity from compliance with the CCMP if, after a court found activity failed to comply with the plan, the President found such activity to be in the "paramount interest" of the United States. *Id.* at 1233 (citing 16 U.S.C. § 1456(c)(1)(B) (2000)). The President had complied with the statute's requirement of abstention until a court decision on whether or not the activity complied with CCMP. *Id.* at 1233.

The problem arose when the court considered the constitutionality of the exemption as applied to the Navy's sonar activity. NRDC argued that the President acted in violation of Article III of the United States Constitution by using his power to circumvent the court's decision to grant NRDC's injunction. The Navy countered that the President had accepted the court's decision, but had changed the applicable law because he felt that it was in the "paramount interest" of the country. *Id.* at 1234. The court would not question the President's determination that a "paramount interest" was involved because such a determination was not reviewable by the court. *Id.* (citing Kasza v. Browner, 133 F.3d 1159, 1173-74 (9th Cir. 1998)).

The inquiry began with the declaration that "the decision of an Article III court is subject to the review only of a higher court." The executive branch could not be delegated the power to review decisions of courts. *Id.* (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (Scalia, J.)). However, Congress was possessed with the power to change a law even if it had an effect on a pending action. *Id.* (citing *Plaut*, 514 U.S. at 214).

The inquiry was presented precisely as, "[d]id the President's exemption effectively change or amend the underlying law, or [did] it either direct the result or constitute a review of the [c]ourt's decision in [the] case?" *Id.* at 1235. If President Bush's exemption was a change to the law, then the act was constitutional. However, if he had directed a result or reviewed the court's decision, that action was unconstitutional under Article III. The court considered several cases set forth by the Navy to support their claim that the President had acted constitutionally. It first examined *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), which dealt with the Federal Water Pollution Control Act's (FWPCA) presidential exemption. In *Romero-Barcelo*, the Supreme Court had to determine whether the district court possessed the power to issue a remedy other than an injunction when the Navy dumped materials without first obtaining a permit. *Id.* at 319. The Court held that the FWPCA allowed the district court to make an exception to granting an injunction because to do so would be consistent with the presidential exemption of noncompliance in special circumstances. *Id.* The court in the noted case found *Romero-Barcelo* distinguishable because it did not involve an action of the President, and therefore the exemption was not being judged for constitutionality. *Winter*, 527 F. Supp. 2d at 1235-36 (citing *Romero-Barcelo*, 456 U.S. at 319).

The court also considered a Ninth Circuit case which dealt with the President's decision to exempt certain documents owned by the

Environmental Protection Agency (EPA) from disclosure under the Resource Conservation and Recovery Act (RCRA). *Kasza*, 133 F.3d at 1173. In *Kasza*, the President decided that the documents that were supposed to be disclosed were classified. However, the plaintiff in that case failed to bring a constitutional argument, and the Ninth Circuit held that a provision in RCRA allowed the President to exempt compliance with any RCRA "requirement." *Id.* This case was also unpersuasive to the court. The court in the noted case chose to focus on two important facets of the President's action in exempting the Navy from CZMA requirements. First was the timing of the exemption. The court found it suspicious that the President chose to act only after the court refused the Navy's stay. The Navy argued that was because it did not need the exemption until it was prohibited from conducting its training activities. The court found this to be the "inter-branch equivalent of forum shopping." The exemption was not an amendment to the underlying law, but rather an action to "strip the [c]ourt of its ability to provide effective relief." *Id.* at 1237. The second important factor was "the absence of any considerations other than those already weighed by the [c]ourt." *Id.* at 1237. It appeared to the court that the President had come in after the issuance of the injunction and had made his own assessments. The court's decision was purely advisory.

The court next recognized that deference is normally granted to the Executive Branch for issues involving national security. *Id.* (citing Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988)). It elaborated further that "deference must be tempered, however, by '[t]he established principle of every free people . . . that the law shall alone govern; and to it the military must always yield.'" *Id.* (quoting Dow v. Johnson, 100 U.S. 158, 169 (1880)). Such principles were instrumental in the court's decision. It "deferred to the Navy's representations of the interests of national security, while avoiding using deference to create a judicial exemption from the nation's environmental laws."

Following this in-depth analysis, the court concluded that it did not have to make a determination regarding the constitutionality of President Bush's action. The court was justified in denying the Navy's stay because it had failed to comply with NEPA. The Navy was required to implement the mitigation measures that the court set out in its January 3rd order. Until the Navy complied with these measures, it was prohibited from carrying out its MFA sonar training. *Id.* at 1238.

C. Equitable Relief

The only issue left for the court to address was whether an injunction was still warranted or whether the court should grant the Navy's application for a stay. Therefore, the court had to address four factors, (1) whether the Navy had shown a likelihood of success on the merits; (2) whether the Navy would suffer irreparable injury absent a stay; (3) whether NRDC would experience measurable injury if a stay is granted; and (4) public interest considerations. *Id.* at 1238 (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). Here, the court found that the factors weighed against a stay. First, the Navy failed to comply with NEPA. Therefore, it could not show that it would be likely to succeed on the merits of an appeal. Second, there was no evidence that the Navy would be irreparably injured by implementing the mitigation measures mandated in the injunction. Third, there was evidence that NRDC would be harmed substantially because it was likely that the Navy would finish its training exercises before relief could be granted. Finally, the public interest in the case favored an injunction. If a stay were granted, marine life would be affected; if the injunction stood, the Navy could continue to carry out its training, so long as it utilized the mitigation measures. Further, any other balancing of hardships weighed in favor of NRDC. As such, the court denied the Navy's request for a stay. *Winter*, 527 F. Supp. 2d at 1238-39.

III. Conclusion

During a time of increased fear about national security, the court's opinion provides strong language to support the notion that our environmental laws should not bow down to military interests at any cost. The court refused to accept the contention that CEQ or the President was acting in any way other than to review the court's decision to grant NRDC an injunction. Much of this language will be considered dicta, as the court noted that it had an obligation not to decide questions of constitutionality if possible. It may well be that in cases where the danger to natural resources is not as extreme as in *Winter* courts may give these executive actions more deference. For the time being, however, this case represents a victory for those wishing to protect not only our national security, but also our natural resources.

Catherine Adair

IV. ENERGY POLICY AND CONSERVATION ACT

Center for Biological Diversity v. National Highway Traffic Safety Administration, 508 F.3d 508 (9th Cir. 2007)

Eleven states, the District of Columbia, the City of New York, and four private interest groups, including the named Center for Biological Diversity (collectively, petitioners) challenged a National Highway Traffic Safety Administration (NHTSA) rule establishing Corporate Average Fuel Economy (CAFE) standards for model years 2008–2011. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 513 (9th Cir. 2007). Petitioners asserted that the rule was arbitrary and capricious because the NHTSA (1) failed to include critical alternative fuel benefits, (2) failed to set CAFE standards for the interim period consistent with the agency's authorizing statute, and (3) failed to close the "SUV loophole" that allows SUVs, minivans, and light trucks to qualify for lower fuel economy standards under an expansive definition of truck. *Id.* at 513-14. Petitioners further asserted that the agency was in violation of the National Environmental Policy Act (NEPA) for its failure to issue an environmental impact statement regarding the new CAFE standards. *Id.* at 514. The United States Court of Appeals for the Ninth Circuit held that the NHTSA rule was arbitrary and capricious and that the agency violated NEPA.

The court began by laying out the broad goals of the governing statutes, the Energy Policy and Conservation Act of 1975 (EPCA) and NEPA. *Id.* at 514-15, 517-18. The court began its analysis with the petitioner's arbitrary and capriciousness claim. The purpose of the EPCA as intuited from the statutory history was to develop fuel standards that would reduce fuel consumption. *Id.* at 514-15. In furtherance of this goal, the act required NHTSA to establish minimum fuel economy standards for automobiles. The statute designated a 27.5-mile-per-gallon limit for passenger vehicles, but required NHTSA to promulgate a standard for nonpassenger trucks at the maximum feasible standard achievable by the manufacturers in a model year. *Id.* at 515. Vehicles weighing over 10,000 pounds were exempt from the fuel economy standards. Light trucks, SUVs, and minivans have historically been classified as nonpassenger vehicles under NHTSA definitions, or the "S.U.V. loophole."

The court then examined the historical effectiveness of the CAFE standard, noting that prior to the consumer demand boom for SUV and minivans, average fuel economy had increased. *Id.* at 516. The court

noted, however, that because of the SUV loophole and growing demand for the vehicle type, average fuel economy had dropped. *Id.* at 516-17. The court noted further that as indicated by petitioner's evidence, the primary purpose of these vehicles was for passenger transportation. *See id.* at 517.

From these facts, the court analyzed whether the final rule violated the clear intent of Congress in enacting EPCA. *Id.* at 530. The court rejected petitioner's initial claim that the marginal cost-benefit analysis employed by the NHTSA was prohibited. The court noted that the statute gave the agency latitude in determining what the maximum feasible level for light trucks would be and that prior case history supported the economic factors relied upon by NHTSA. However, the court noted that the process could not insulate the result from review and that the standards set must be within the purpose of the statute—to conserve fuel.

The court next addressed the issue of NHTSA refusal to assign adequate value to the cost of greenhouse emission reduction. *Id.* at 531. NHTSA argued that nonmonetized factors would have no result on the final standard. The court, however, noted that the value of a benefit would greatly affect the balancing employed and the "most significant benefit" of reducing greenhouse emissions was given zero value. Thus, the court concluded the analysis was not within the purposes of the EPCA and was arbitrary and capricious. *Id.* at 533-35. The court remanded the rule to NHTSA for the development of new CAFE standards that adequately considered the benefit of green house emission reduction.

Additionally, the court held that the NHTSA refusal to draft new definitions for passenger vehicles was arbitrary and capricious. *Id.* at 540. Initially, NHTSA had noted that the definition had become obsolete and failed to properly distinguish between passenger and nonpassenger vehicles. However, in the final rule NHTSA refused to issue a new definition. NHTSA failed to provide adequate reasoning as to why a transitioned change was not possible. Additionally, the court found the NHTSA argument for a standard based upon manufactured purpose rather than consumer use inadequate because the agency failed to address its own finding that many light trucks were intended by the *manufacturer* to transport passengers.

Finally, the court turned to NHTSA obligations under NEPA. *Id.* at 545-56. NHTSA argued that it did not have the statutory authority to consider additional factors in its environmental assessment (EA) because of the constraints of EPCA. The court quickly pointed out that this

defense was counter to the wide discretion NHTSA had claimed as protection from judicial review. The court chastised the agency noting that it could not have the discretion point "both ways." The agency had argued that under the ruling from *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), it did not have to consider climate change because the agency lacked the authority to address the crisis. The court, however, rejected this argument, noting that the crisis at issue was the emission of greenhouse gases and that these emissions could be directly affected by more stringent fuel economy standards. *Id.* at 546-47.

Moving forward the court then addressed the sufficiency of the environmental assessment and the Finding of No Significant Impact issued by NHTSA. *Id.* at 548. The court focused upon the NHTSA evaluation of cumulative impacts. The EA, the court noted, failed to address the environmental effects of the incremental release of CO_2, did not actually address the environmental effects of these emissions, and did not place those effects in the context of the CAFE rulemaking. *Id.* at 549. As a result of these deficiencies the court ruled that the EA was inadequate and on remand the NHTSA was required to prepare a full environmental impact statement. *Id.* at 552-54.

The court's decision is in line with recent cases such as *Massachusetts v. E.P.A.*, 127 S. Ct. 1438 (2007), and *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007). These cases represent a movement to require agencies to recognize the climate crisis and to recognize avoidance measures as legitimate benefits that must be factored into agency cost-benefit analysis.

David L. Curry, Jr.

V. REAL ID ACT

Defenders of Wildlife v. Chertoff,
527 F. Supp. 2d 119 (D.D.C. 2007)

I. Background

On May 11, 2005, Congress passed the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (REAL ID Act), "[a]n Act Making Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, and for other purposes." REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). One of the "other purposes" for which Congress passed the Act,

found deeply embedded in the Act at section 102, included amending the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 in order to grant the Secretary of the Department of Homeland Security (Secretary) the "authority" in his "sole discretion" to waive compliance with other federal laws in order "to ensure expeditious construction of the barriers and roads." REAL ID Act of 2005, § 102(c)(1), 119 Stat. at 306.

To ensure that the Secretary could exercise his "authority" in his "sole discretion," Congress made any waivers the Secretary instituted reviewable only if a claimant could stake a constitutional claim. *Id.* § 102(c)(2)(A), 119 Stat. at 306. Furthermore, Congress mandated that any such constitutional claim must be filed within sixty days of the Secretary's exercise of the waiver authority. *Id.* § 102(c)(2)(B), 119 Stat. at 306. In order to waive any statute for the purpose of "ensur[ing] expeditious construction of the barriers and roads," the Secretary needed only publish his decision in the Federal Register. *Id.* § 102(c)(1), 119 Stat. at 306. The Secretary had occasion to exercise this authority in late 2007. *See* Notice of Determination, 72 Fed. Reg. 60870, 60870 (Oct. 26, 2007) (waiving twenty statutes in order to build a fence along the Arizona-Mexico border).

In September 2007, the Army Corps of Engineers began to construct border fencing, a road, and other drainage structures within the San Pedro Riparian National Conservation Area (SPRNCA) at the behest of the Department of Homeland Security (DHS) for the purpose of securing the border along Mexico in Arizona. Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 121 (D.D.C. 2007). SPRNCA, under the management of the Bureau of Land Management (BLM), had been described by some environmental groups as "a unique and invaluable environmental resource" and "one of the most biologically diverse areas of the United States." *Id.* at 121 (internal quotation marks omitted).

BLM granted DHS a perpetual right of way in order to construct the border fence; however, prior to doing so, BLM conducted an Environmental Assessment (EA), finding the construction of the border fence would have no significant impact when coupled with mitigation measures. *Id.* Construction of the fence along the border would require "excavation on up to 225 acres of the SPRNCA's 58,000 acres, and the proposed fence segments [would] cover approximately 9,938 feet at the border when completed." *Id.* at 121 n.1.

In order to halt construction of the fence, both the Defenders of Wildlife and the Sierra Club (collectively Defenders), two environmental organizations, protested the decision of no significant impact directly

with BLM. *Id.* at 121. When the Defender's appeal to BLM failed, the Defenders filed suit in the United States District Court for the District of Columbia in October 2007, alleging that BLM inadequately assessed the environmental impacts of the fence construction project and that NEPA required that an Environmental Impact Statement be completed. *Id.* Furthermore, the Defenders alleged that BLM's grant of the right-of-way to DHS violated the Arizona-Idaho Conservation Act of 1988 because BLM failed to manage the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area" by permitting the perpetual right-of-way. *Id.* The Defenders sought immediate emergency injunctive relief from the D.C. district court in order to stop construction of the fence, which the court granted, and construction of the fence ceased until the Secretary exercised his authority under the REAL ID Act. *Id.* at 121-22.

In late October 2007, after the Defenders successfully, albeit temporarily, halted further construction, the Secretary found that

> approximately 4.75 miles west of the Naco, Arizona Port of Entry to the western boundary of the San Pedro Riparian National Conservation Area (SPRNCA) in southeastern Arizona . . . is an area of high illegal entry. There is presently a need to construct fixed and mobile barriers . . . and roads in the vicinity of the border of the United States.

Notice of Determination, 72 Fed. Reg. 60,870, 60,870 (Oct. 26, 2007). Consequently, the Secretary exercised his authority "to ensure expeditious construction of the barriers and roads," REAL ID Act of 2005, § 102(c)(1), 119 Stat. at 306, by waiving the National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the Clean Air Act, the Archaeological Resources Protection Act, the Safe Drinking Water Act, the Noise Control Act, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Federal Land Policy and Management Act, the Fish and Wildlife Coordination Act, the Archaeological and Historical Preservation Act, the Antiquities Act, the Historic Sites, Buildings, and Antiquities Act, the Arizona-Idaho Conservation Act, the Farmland Protection Policy Act, and the Administrative Procedure Act. Notice of Determination, 72 Fed. Reg. at 60,870.

II. The Arguments

Pursuant to the limited claims available under the REAL ID Act, *see* REAL ID Act of 2005, § 102(c)(2)(A), 119 Stat. at 306, the Defenders amended their complaint to stake a constitutional claim, asserting that the broad grant of the REAL ID waiver to the Secretary was an impermissible delegation of legislative authority to the Executive Branch, thereby violating the separation of powers principles embedded in the structure of the Constitution. *Defenders of Wildlife*, 527 F. Supp. 2d at 123. More specifically analogizing to *Clinton v. City of New York*, 524 U.S. 417 (1998), the Defenders argued that the REAL ID Act was a de facto grant of power to the Secretary to repeal any law of the United States, allowing him, in his sole discretion, to circumvent the legislative process. *Defenders of Wildlife*, 527 F. Supp. 2d at 123-24. More generally, the Defenders claimed that the REAL ID Act waiver provision violated the nondelegation doctrine by granting legislative authority to the Secretary without guidance to rein his exercise of the waiver. *Id.* at 126. Finally, the Defenders argued that, even though waivers in general might be permissible in other federal statutes, the REAL ID waiver was unprecedented in scope and failed to provide the limitations embedded in other available federal law waivers. *Id.* at 128.

The Secretary, on the other hand, contended that the REAL ID Act provided an intelligible principle by which the Secretary could exercise the authority Congress had delegated. *Id.* at 123. Furthermore, the Secretary argued that Congress had considerable latitude to delegate authority related to matters involving immigration policy, foreign affairs, and national security, which were already the appropriate domain of the Executive Branch. *Id.*

III. D.C. District Court's Analysis

The D.C. district court began its analysis of the arguments by turning to the Defenders' analogy to the United States Supreme Court's decision in *Clinton*. *Id.* at 123-24. In *Clinton*, the Court struck down the Line Item Veto Act because it permitted the President to eliminate congressional spending items, thereby circumventing the legislative process, by allowing presidential amendment of congressional acts without reconsideration by the legislative branch. 524 U.S. at 448-49. The D.C. district court disagreed with the Defenders' analogy to *Clinton*, however, on the basis that "the REAL ID Act [was] not equivalent to the partial repeal or amendment" available to the President in the Line Item Veto Act. *Defenders of Wildlife*, 527 F. Supp. 2d at 124.

Rather, the D.C. district court noted that unlike the Line Item Veto Act, which gave the President unilateral power to cancel congressional spending items and circumvent the Presentment process of Article V of the Constitution, the REAL ID Act granted "no authority [to the Secretary] to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part." *Id.* at 124. The D.C. district court reasoned that, despite the authority to suspend the effects of the statutes in certain instances, the laws themselves nonetheless held "the same legal force and effect as [they] had when [they] [were] passed by both houses of Congress and presented to the President." *Id.* In effect, the D.C. court noted that to validate the Defenders argument, that the waiver constituted a partial repeal and therefore impermissible, would also render constitutionally impermissible numerous waivers available in other federal statutes. *Id.* at 124-25.

Furthermore, the D.C. district court stated that, unlike in other Supreme Court decisions, where the Court found delegations of power to be nonlegislative in nature and therefore did not supplant congressional policy with executive policy, the Court in *Clinton* found the Line Item Veto Act impermissibly did so. *Id.* at 125-26. On the other hand, the D.C. district court found that with the REAL ID Act, Congress explicitly intended for the Secretary to waive laws in the interest of national security, thereby effectuating congressional intent, rather than asking the Secretary to substitute executive policy. *See id.* at 125. Likewise, the D.C. district court found *Clinton* to be inapplicable because the REAL ID Act related to foreign affairs and immigration, "another area in which the Executive Branch ha[d] traditionally exercised a large degree of discretion," whereas the Line Item Veto Act promoted largely domestic policy, where the President lacked such broad discretion. *Id.* at 125-26. Finally, to bolster its conclusion that reasoning in *Clinton* did not apply to the REAL ID Act, the D.C. district court examined now Chief Justice Roberts's concurring opinion in a United States Court of Appeals for the District of Columbia Circuit, wherein Roberts validated one waiver provision because it resembled waivers the President could permissibly make, rather than resembling the far-reaching line item veto in *Clinton*. *Id.* at 126 (citations omitted).

The D.C. district court then turned to the Defender's more general argument that the REAL ID Act waiver violated the separation of powers principle because Congress failed to provide an intelligible principle. *Id.* at 126-27. The D.C. court recognized that Congress validly had the power to delegate legislative authority to the Executive Branch, so long as Congress provided the executive entity "an intelligible principle to

which the [entity] . . . [wa]s directed to conform." *Id.* at 127 (internal quotation marks omitted) (citations omitted). In construing the intelligible principle provided to the Secretary by Congress, the D.C. district court pointed to the requirement that the Secretary determine the necessity of the waiver for building roads and fences promptly and efficiently. *Id.* at 127. Likewise, the D.C. district court noted the specific congressional direction that the waiver may only be exercised in connection to building roads and barriers in areas near the nation's borders in order to deter illegal admission into the United States. *Id.*

The D.C. district court found that these directives from Congress met the guidance necessary to afford an intelligible principle equivalent to that required in Supreme Court jurisprudence. *Id.* Drawing on the Supreme Court's most recent opinion on the matter in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), the D.C. district court described the specificity of the intelligible principle to require only a "clearly delineated" "general policy." *Defenders of Wildlife*, 527 F. Supp. 2d at 127. Thus, the D.C. district court held the intelligible principle of determining the necessity of building barriers and roads in the vicinity of the border for the purpose of enhancing the nation's security of the REAL ID Act to be sufficient, as at least one other United States district court had previously. *Id.* at 127-28.

Finally, the D.C. district court analyzed the Defenders' argument that the waiver was unprecedented in its scope, and therefore unlike other waivers available in other federal statutes. *Id.* at 128. The D.C. district court rejected the broad characterization of the waiver because the REAL ID Act required the Secretary to limit his exercise of the waiver to situations requiring "expeditious completion of the border fences . . . in areas of high illegal entry." *Id.* (internal quotation marks omitted) (citation omitted). Furthermore, the D.C. district court noted it had no authority to "strike down an otherwise permissible delegation simply because of its broad scope." *Id.* Returning again to the nondelegation doctrine, the D.C. district court found the intelligible principle to be the measure for assessing permissibility of legislative delegation to the other branches, and therefore it concluded it could not "invalidate the waiver provision merely because of the unlimited number of statutes that could potentially be encompassed by the Secretary's exercise of his waiver power." *Id.* at 128-29.

Ultimately, the D.C. district court concluded its analysis by returning full circle to its *Clinton* analysis, affirming that the congressional delegation of legislative authority may be even broader in the matters of foreign affairs, a traditional domain of the Executive

Branch. *Id.* at 129. Thus, the D.C. district court upheld the constitutional validity of the waiver, concluding that the waiver provision of the REAL ID Act did not circumvent the Presentment process required by Article V, did not violate the nondelegation doctrine, and did not grant an impermissibly broad power to the Secretary. *See id.*

IV. Conclusion

While the claim that Congress legislates for the collective good of the nation has become more and more suspect with the rise of lobbies as a virtuoso industry, if this premise is nonetheless taken as true, the REAL ID Act still presents an overly broad delegation of authority to an entity of the Executive Branch, namely DHS, which is the single most intrusive governmental arm in the lives of the American public in a post-911 world. The slippery slope of displacing the operation of nearly all of the nation's environmental statutes can only lead to nullifying other statutes in the supposed name of national security. In reality, any connection of the suspension of the laws to this justifiable cause may be tenuous at best, thereby rendering the intelligible principle the court claimed to recognize only fictionally discernible.

Furthermore, though Congress supposedly has effectively limited the waiver provision to matters which permit the efficacious building of fences and roads at our nation's borders, failing to allow the nation's citizenry broader review of the exercise of the waiver can only lead to underhanded waivers justified under the guise of national security, permitting a chosen few to profit while our natural and constructed environments suffer. *See id.* at 127-28.

Congress has the capacity to act quickly when the need arises and certainly can act more quickly than the agencies, which undoubtedly heard the call to fortify the nation's borders in 2005 when the REAL ID Act was passed. However, they failed to implement appropriate environmental protections and mitigate environmental damages in the two years between the passage of the REAL ID Act and the construction of the fence along the Mexican border in Arizona. The solution is not to permit the impermissibly broad waiver, but rather to grease the bureaucratic wheels of agencies that make decisions regarding environmental assessments and let them know ahead of time to put measures in place, rather than eliminating the application of the laws meant to safeguard both nature and humanity. Because there is no real check on the Secretary's power and because he may capitalize on the fears of domestic invasion to render any and all laws null under the auspices of securing the nation's borders, while lining pockets of private

interests, all in the name of national security, the United States Court of Appeals of the District of Columbia should reverse the D.C. district court decision and permit government agencies to continue to comply with the environmental statutes, whose only purposes are to preserve and protect the natural and constructed environments.

Valerie R. Auger

VI. GLOBAL WARMING

Comer v. Murphy Oil USA, Inc., No. 05-436 (S.D. Miss. Aug. 30, 2007)

Plaintiff Ned Comer brought a class action in the Southern District of Mississippi against eight named oil companies, thirty-one coal named coal or energy companies, and four chemical companies for damages caused by alleged unjust enrichment, civil conspiracy and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment which significantly increased global warming. Third Amended Complaint, *Comer v. Murphy Oil USA, Inc.*, No. 05-436 (S.D. Miss. Aug. 30, 2007). The plaintiffs sought compensation under two theories of damages. First, the defendants' tortious behavior increased the intensity of Hurricane Katrina and caused or exacerbated plaintiff's personal injuries, loss of property, and business interruption. *Id.* Second, the defendants' ongoing emissions of greenhouse gases (the defendants are the largest oil, coal, gas and halocarbon producers and emitters in the United States) increase storm and flood risk to the plaintiffs' property, decreasing the plaintiffs' property values and increasing the plaintiffs' insurance premiums (as risk modelers use global warming statistics to calculate risk and premiums). *Id.*; *see also* Opposition to the Motion To Dismiss Filed by Defendant Xcel Energy, Inc., *Comer*, No. 05-436, at 41 (S.D. Miss., filed Aug. 30, 2006).

On a motion to dismiss brought by thirteen of the "coal company" defendants, Judge Louis Guirola, Jr., of the Southern District of Mississippi ruled that the plaintiffs lacked standing to assert their claims and accordingly dismissed the plaintiffs' claims against all defendants. Trial of Hearing on Defendants' Motion To Dismiss, No. 05-436, at 41 (S.D. Miss. Aug. 30, 2007). Previously, insurance defendants were dismissed without prejudice from the case on the grounds that the plaintiffs should seek recovery from the insurers through actions against each insurance company individually. Order, Comer v. Murphy Oil

USA, Inc., No. 05-436, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006). Alternatively, the court ruled that the claims raised nonjusticiable political questions that could only be addressed by the legislative or executive branches of government. Hearing, *Comer*, No. 05-436, at 36-40. Finally, the court noted that discovery in the case would be time consuming and expensive, and that it would be imprudent to allow such discovery before the standing issue could be reviewed by the Fifth Circuit. *Id.* at 40-41.

Functionally, Judge Guirola conflated standing and justiciability. In *Massachusetts v. E.P.A.*, 127 S. Ct. 1438 (2007), the standing analysis focused on the first and third prongs of the *Lujan* analysis: "To ensure the proper adversarial presentation, *Lujan* holds that 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." *Id.* at 1453 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). The Supreme Court analyzed whether the plaintiff states had suffered or would suffer an actual injury and whether the remedy they sought could redress that injury, while stipulating that the injury was fairly traceable to the EPA. *Id.* at 1453-58. But in *Comer*, Judge Guirola dismissed based on the second "traceability" prong of the *Lujan* test. He appears to have accepted that the plaintiffs have suffered actual injuries and that monetary damages would redress that injury. Trial of Hearing on Defendants' Motion To Dismiss, *Comer*, No. 05-436, at 35-36. In dismissing the case, he reasoned that "all of us are responsible for the emission of CO_2 and ultimately greenhouse gases which cause global warming. . . . I do not think that under our system of jurisprudence that is attributable or traceable to these individual defendants but is instead . . . attributable to a larger group that are not before this court." *Id.* at 36. In other words, the court determined that, because the number of greenhouse gas emitters are so numerous, it would be impossible to apportion fault amongst the *Comer* defendants, and therefore the injury is not fairly traceable to those defendants.

Judge Guirola then addressed the political question doctrine, discussing at length the actions taken by various states and international groups to try to address greenhouse gas emissions and other global warming causes and effects. *Id.* at 36-39. The court stated that Congress must pass legislation to set the standards by which courts and juries may measure reasonable conduct. *Id.* at 39. The court pointed out that there is an absence of legislation and judicial precedent applicable to this matter. *See id.* at 35, 37.

Judge Guirola's political question analysis implies that it is the court's job to tell the jury what reasonable conduct is when it comes to carbon emissions. But traditionally the standard of conduct of a "reasonable man" may be: "(a) established by a legislative enactment or administrative regulation which so provides, or (b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or (c) established by judicial decision, or (d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision." RESTATEMENT (SECOND) OF TORTS § 285 (1965, updated 2007). In other words, in the absence of legislation or judicial decision, the standard should be that the jury determines "reasonableness" within a specific set of facts to resolve a specific controversy.

The plaintiffs filed an appeal with the United States Court of Appeals for the Fifth Circuit on September 17, 2007, and have argued that, in the absence of relevant Federal legislation, it is up to the trier of fact to determine both: (1) what portion of damages can be fairly traceable to the Comer defendants and (2) whether the defendants' behavior was "reasonable conduct" in light of the specific facts and circumstances of this case. Brief of Plaintiffs-Appellants, Comer v. Murphy Oil USA, Inc., No. 07-60756 (5th Cir. Dec. 3, 2007).

Machelle Lee