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I. CLEAN AIR ACT

Climategate Scandal Ignites Challenges to EPA’s Findings that Greenhouse Gases Endanger Public Health and that Motor Vehicle Emissions Cause or Contribute to the Threat of Climate Change

A. Background

Section 202(a) of the Clean Air Act (CAA), entitled “Emission Standards for New Motor Vehicles or New Motor Vehicle Engines,” requires the Administrator of the Environmental Protection Agency (EPA) to promulgate “standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor

vehicle engines, which in [her] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2006). Under section 202(a), the Administrator must satisfy a two-step test before regulating greenhouse gases (GHGs). *Id.* First, she must decide whether the air pollution under consideration “may reasonably be anticipated to endanger public health or welfare,” and second, she must decide whether emissions of a particular air pollutant will “cause or contribute to [that] air pollution.” EPA Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,888 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch.1) (citing *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)). If the Administrator answers both questions in the affirmative, she is required to issue standards pursuant to section 202(a). *Id.* Significantly, the CAA broadly defines “air pollutant” to include “any air pollution agent . . . including any physical, chemical . . . substance . . . emitted into . . . the ambient air.” 42 U.S.C. § 7602(g).

In 1999, a group of nineteen private organizations¹ filed a rulemaking petition requesting that EPA regulate GHG emissions under CAA section 202(a). *Massachusetts*, 549 U.S. at 510. The petitioners based their argument on a 1995 report by the Intergovernmental Panel on Climate Change (IPCC), which explained that “carbon dioxide remain[ed] the most important contributor to [man-made] forcing of climate change” and warned of the serious threats climate change posed to human health and the environment. *Id.* (internal quotation marks omitted). Subsequently, EPA requested public comment on the issues raised by the rulemaking petition, particularly those related to “any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPA’s consideration of this petition.” *Id.* at 511 (citing 66 Fed. Reg. 7486, 7487 (2001)). Before the close of the public comment period, the White House sought assistance from the National Research Council (NRC). *Id.* In 2001, the NRC produced a report that relied heavily on the IPCC’s 1995 report and reaffirmed the IPCC’s conclusion that “[g]reenhouse gases [were] accumulating in Earth’s

1. Alliance for Sustainable Communities; Applied Power Technologies, Inc.; Bio Fuels America; The California Solar Energy Industries Assn.; Clements Environmental Corp.; Environmental Advocates; Environmental and Energy Study Institute; Friends of the Earth; Full Circle Energy Project, Inc.; The Green Party of Rhode Island; Greenpeace USA; International Center for Technology Assessment; Network for Environmental and Economic Responsibility of the United Church of Christ; New Jersey Environmental Watch; New Mexico Solar Energy Assn.; Oregon Environmental Council; Public Citizen; Solar Energy Industries Assn.; The SUN DAY Campaign. See *Massachusetts v. EPA*, 549 U.S. 497, n. 15 (2007).

atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise.” *Id.* (quoting COMM. ON THE SCI. OF CLIMATE CHANGE, DIV. ON EARTH & LIFE STUDIES, NAT’L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 1 (2001) [hereinafter NRC REPORT]).

On September 8, 2003, EPA entered an order denying the rulemaking petition. *Id.*; Proposed Consent Decree, Clean Air Act Citizen Suit, 68 Fed. Reg. 52,922 (Sept. 8, 2003). Further, EPA announced its view that GHGs were not air pollutants subject to regulation under the CAA and that any regulation of fuel economy standards should occur under the Department of Transportation’s authority. *Massachusetts*, 549 U.S. at 513 (citing 68 Fed. Reg. 52,922, 52,928-29). EPA argued, inter alia, that regulating GHGs would be unwise given the NRC Report’s admission that a causal link between GHG emissions and global temperatures “[could not] be unequivocally established.” *Id.* (quoting NRC REPORT, *supra*, at 17).

Following EPA’s firm denial of the rulemaking petition, several state and local governments joined petitioners’ appeal to the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 514. Although the appellate court ultimately affirmed EPA’s decision, the judges were sharply divided and each member of the three-judge panel wrote a separate opinion. *Id.* The United States Supreme Court granted certiorari to reconsider questions of standing as well as substantive interpretations of the CAA. *See generally id.* In *Massachusetts*, the Supreme Court reversed and remanded, holding on the merits that EPA had statutory authority to regulate GHGs from new motor vehicles under the CAA because such gases fell within the Act’s broad definition of “air pollutant,” and that EPA’s actions were arbitrary and capricious because the agency offered no reasoned explanation for its refusal to decide whether GHGs caused or contributed to climate change. *Id.* at 528-34.

On April 24, 2009, EPA Administrator Lisa P. Jackson responded to the Supreme Court’s decision in *Massachusetts* by issuing a proposed rulemaking concerning the effect of GHGs on global climate change. The proposed rulemaking admitted that “atmospheric concentrations of greenhouse gases endanger public health and welfare within the meaning of Section 202(a) of the Clean Air Act” and found that “the emissions of [carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons] from new motor vehicles and new motor vehicle engines are contributing to air pollution which is endangering public health and welfare under section 202(a) of the Clean Air Act.” EPA Endangerment and Cause or

Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch.1) (citing *Massachusetts*, 549 U.S. at 533). EPA relied heavily on scientific findings contained in a 2007 report by the IPCC in making its endangerment and cause or contribute to findings. *See id.*

The Supreme Court's decision in *Massachusetts* and EPA's subsequent proposal seemed powerful indications that climate change legislation would soon become a reality under President Obama's Administration.

B. Climategate Scandal and Recent Challenges to EPA's Proposed Rulemaking

In late November of 2009, thousands of private e-mails between prominent climatologists were hacked from the Climate Research Unit (CRU) at the University of East Anglia in Great Britain. Andrew C. Revkin, *Hacked E-mail Data Prompts Calls for Changes in Climate Research*, N.Y. TIMES, Nov. 28, 2009, at A8. Information contained in the e-mails quickly led to several criticisms. First, that scientists involved in the e-mails concealed raw data to prevent examination by other scientists; second, that the climatologists misrepresented their conclusions regarding global climate change to make them appear more definitive than they actually were; and third, that the climate scientists actually tried to prevent the publication of papers by climate change skeptics. *Id.* Such evidence of conspiracy among the world's most prominent climatologists generated intense public scrutiny, and the scandal was quickly dubbed "Climategate"—a reference to the Watergate scandal that led to President Richard Nixon's resignation in 1974. *See id.* Although scientists maintain that the science behind climate change is still sound and supported by independent studies at the National Aeronautics and Space Administration and the National Oceanic and Atmospheric Administration, the Climategate controversy severely undermined public confidence in many of the basic assumptions regarding climate change just as the international community was engaging in negotiations in Copenhagen to rework the Kyoto Protocol. *See id.*

Perhaps most significant was the involvement of several IPCC scientists in the Climategate e-mail scandal. This spurred a number of challenges to EPA's 2009 proposed rulemaking due to its heavy reliance on IPCC reports. Before the February 16, 2010, deadline passed, industry groups, conservative think tanks, legislators, and three states

filed more than twenty-six lawsuits opposing EPA's finding of endangerment under CAA section 202(a). Robin Bravender, *16 'Endangerment' Lawsuits Filed Against EPA Before Deadline*, N.Y. TIMES, Feb. 17, 2010, available at <http://www.nytimes.com/gwire/2010/02/17/17greenwire-16-endangerment-lawsuits-filed-against-epa-bef-74640.html>. Petitioners include the states of Texas, Alabama, and Virginia, as well as the Ohio Coal Association, the Utility Air Regulatory Group, the Portland Cement Association, the Competitive Enterprise Institute, the American Iron and Steel Institute, Gerdau Ameristeel Corporation, the American Farm Bureau Federation, the National Mining Association, Peabody Energy Company, the United States Chamber of Commerce, thirteen House lawmakers, the Southeastern Legal Foundation, the Coalition for Responsible Regulation, and a coalition comprised of the National Association of Manufacturers, the National Association of Home Builders, the National Oilseed Processors Association, the National Petrochemical and Refiners Association, and the Western States Petroleum Association. *Id.* The petitions, which will likely be consolidated, essentially request that the District of Columbia Circuit review EPA's determination that GHG emissions endanger human health and welfare. *Id.*

On the other hand, a coalition of sixteen states, including Arizona, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, along with New York City, seeks to intervene on behalf of EPA, claiming they have standing to intervene due to their direct and substantial interest in the outcome of the litigation. Robin Bravender, *States Seek To Intervene in Challenge to EPA's Endangerment Finding*, GREENWIRE, Jan. 25, 2010, <http://www.eenews.net/public/Greenwire/2010/01/25/6>. Notably, most of these states were also petitioners in *Massachusetts*, when the Supreme Court originally decided that the CAA provided for EPA's regulation of GHG emissions produced by new motor vehicles. *Id.* Other motions to intervene on EPA's behalf were filed by environmental groups such as the Natural Resources Defense Council, the Environmental Defense Fund, the Sierra Club, the National Wildlife Federation, and the Conservation Law Foundation. *Id.*

Although it is impossible to predict how the appellate court will rule, supporters of climate change legislation remain positive. Joe Mendelson, global warming policy director for the National Wildlife Federation, described petitioners' challenge as "a last-ditch effort by polluters who want to deny that we have a problem." *Id.* Similarly, Steve

Seidel, vice president of policy analysis at the Pew Center on Global Climate Change, expressed his optimism that EPA's conclusions, which were grounded in over thirty scientific studies and not just the 2007 IPCC report, will stand up against legal challenges. Jeffrey Tomich, *Peabody Energy: EPA's Global Warming Finding Flawed*, ST. LOUIS POST-DISPATCH, Feb. 17, 2010, available at <http://www.stltoday.com/stltoday/business/stories.nsf/0/0A564F83D7F71FC9862576CD000DE7A1?OpenDocument>. In Seidel's opinion, "It is very unlikely that the overwhelming body of evidence that the EPA put forward is going to be rejected." *Id.* Given the potentially devastating effects of a contrary ruling, advocates of climate change legislation should hope that Seidel is correct and that the negative press surrounding the Climategate scandal will not defeat the passage of legislation regulating GHG emissions from mobile sources under section 202(a) of the CAA.

Lara E. Benbenisty

Entergy Corp. v. Riverkeeper, Inc.,
129 S. Ct. 1498 (2009)

In *Entergy Corp. v. Riverkeeper, Inc.*, the United States Supreme Court held that the United States Environmental Protection Agency (EPA) permissibly relied on a cost-benefit analysis formula when setting the national performance standards for cooling water intake structures. *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1510 (2009). The cost-benefit analysis weighed the cost of adapting existing cooling water intake structures so that they reduce the intake and mortality rates for aquatic life versus the projected benefit of the proposed required adaptations. *Id.* at 1504. Cooling water intake structures extract water from natural sources of water to cool power generating facilities. *Id.* The EPA provided for site-specific variances in the regulations when a proposed adaptation was to cost significantly more than the proposed environmental benefit. *Id.* The regulations were promulgated under section 1326(b) of the Clean Air Act, which requires that "cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b) (2006). *Riverkeeper* and other environmental groups challenged the EPA's "Phase II" regulations, which require that the agency use a cost-benefit analysis to determine the appropriate cooling technology requirements for existing electricity producing facilities. The groups challenged the EPA's interpretation that the cost-benefit analysis would lead to

acceptable requirements under the “best technology” standard. *Riverkeeper*, 129 S. Ct. at 1505. The issue was whether a cost-benefit analysis would yield the “best technology” to reduce intake and mortality rates and whether the variance provision was acceptable under that standard. *Id.*

The EPA is charged with regulation of power producing facilities with cooling water intake structures under the Clean Water Act. 33 U.S.C. § 1326(b). The Clean Water Act regulation states that “any standard established pursuant to section 1311 . . . or section 1316 . . . and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” *Id.* Sections 1311 and 1316 employ “best technology” standards to regulate discharge into US waters. *Id.* §§ 1311-1316. After making “best technology available” decisions regarding cooling water intake structures on a case-by-case basis for over thirty years, the EPA established section 1326(b) in order to establish a more consistent standard. *Riverkeeper*, 129 S. Ct. at 1503.

The EPA utilized a phased approach in establishing standards for cooling water intake structures. *Id.* “Phase I” regulations applied to the construction of new cooling intake structures and required that those structures utilize closed-cycle cooling systems. *Id.* The regulation at issue is the application of “Phase II” standards. These Phase II standards apply the EPA “national performance standards” to certain large existing facilities. *Id.* The goal of the Phase II standards is a substantial reduction in “impingement mortality” of aquatic organisms, and for a subset of facilities, a reduction of entrainment of such organisms. 40 C.F.R. § 125.94(b)(1) (2004). In promulgating the Phase II standards, the EPA declined to mandate the same closed-cycle cooling systems or equivalent technology that Phase I requires. *Riverkeeper*, 129 S. Ct. at 1504.

The EPA did not mandate that Phase II facilities retrofit to include closed-cycle cooling systems because the estimated cost of retrofitting such facilities would have been nine times the estimated cost of compliance with the standards set for Phase II facilities. *Id.* Further, the EPA determined that other technologies could approach the performance of closed-cycle systems at less cost. *Id.* The Phase II rules also permit a site-specific variance from national performance standards. *Id.* at 1505. The variance permits require the permit-issuing authority to impose measures that produce results “as close as practicable to the applicable performance standards.” 40 C.F.R. § 125.94(a)(5)(i),(ii) (2004). *Riverkeeper* and other environmental groups challenged the variance

provision. *Riverkeeper*, 129 S. Ct. at 1505. The United States Court of Appeals for the Second Circuit found that the use of cost-benefit analysis was impermissible, and the site-specific cost-benefit variances unlawful. *Id.* (citing *Riverkeeper, Inc. v. U.S. Env'tl. Prot. Agency*, 475 F.3d 83, 114 (2d Cir. 2007)).

The Supreme Court granted certiorari and held that the EPA permissibly relied on cost-benefit analysis in setting the “national performance standards” and in providing for cost-benefit variances as a part of the Phase II regulations. First, the Court considered the EPA’s interpretation of the “best technology” requirement. *Id.* at 1506. The Court concluded that the EPA’s interpretation was reasonable, concluding that section 1326(b)’s “best technology available for minimizing adverse environmental impact” standard would permit a cost-benefit analysis of the cost of implementation versus the environmental benefits produced. *Id.*

The Court cited *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, to illustrate that considering the relationship between costs and the environmental benefits is deemed a reasonable interpretation of the statute. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). The Court noted that the EPA’s interpretation is not required to be the *only* possible interpretation nor does it have to be the *most* reasonable interpretation; being reasonable is sufficient to satisfy the requirement. *Id.* The Second Circuit interpreted “best technology” as meaning the technology that would provide the greatest reduction in environmental impact at a reasonable cost. *Id.* However, the Court held that “best technology” may also describe the technology that most efficiently produces a good, even if the quantity of the good produced is less than other potential technologies. *Id.*

The Court evaluated other Clean Water Act provisions and determined that, in previous Congressional mandates calling for the pollution reduction feasible, they used plain language to convey that intent. *Id.* at 1507. By using a less ambitious goal of “minimizing adverse environmental impact” the Court determined that section 1326(b) was intended to give the EPA some discretion. Thus, the EPA was able to consider the circumstances when determining the extent of reduction warranted. Such considerations could plausibly involve evaluating the benefits derived from the required reductions and the costs associated with achieving the reductions. *Id.*

The Court compared the text of section 1326(b) with the text and statutory factors applicable to parallel Clean Water Act provisions. *Id.* The Court concluded that the EPA was well within the boundaries of

reasonable interpretation in concluding that performing a cost-benefit analysis is not categorically forbidden. *Id.* at 1509. The EPA's Phase II rules sought to avoid extreme disparities in costs and benefits. *Id.* Variances from the "national performance standards" set in Phase II were limited to situations where costs are "significantly greater than the benefits" of compliance. 40 C.F.R. § 125.94(a)(5)(ii) (2004). In its definition of the "national performance standards," the EPA considered the application of technologies that had benefits approaching estimates for the Phase I mandated closed-cycle cooling systems. *Riverkeeper*, 129 S. Ct. at 1509. The EPA estimated that similar benefits could be achieved at a fraction of the cost of retrofitting existing facilities with closed-cycle cooling systems. *Id.*

The EPA has applied a variation of cost-benefit analysis for over thirty years in its application of section 1326(b). This somewhat arbitrary application of a cost-benefit analysis on a case-by-case basis further illustrates that it has been considered common practice. This previous application of cost-benefit analysis illustrates that it is foreseeable to interpret the application as a reasonable and legitimate application and exercise of EPA discretion. Both *Riverkeeper* and the Second Circuit ultimately recognized that some comparison of costs and benefits is permissible under the regulations. *Id.* at 1510. The Second Circuit held that section 1326(b) mandates only technologies with costs that are reasonable for the industry. *Id.* Such reasonableness often depends on the benefits derived from the application of such technology. *Id.* The respondents also concede that the EPA should not require the industry to spend excessive amounts of money to save just one more fish. *Id.* This concession indicates that there is no clear statutory basis for limiting costs and benefits to "de minimis rather than significantly disproportionate" situations. *Id.*

Justice Stevens was joined by Justices Souter and Ginsburg in his dissent. *Id.* at 1517 (Stevens, J., dissenting). The dissenting justices agreed with the Second Circuit holding, stating that the EPA was neither expressly nor implicitly authorized to use cost-benefit analysis when setting regulatory standards. *Id.* at 1518. The justices maintained that a fair reading would indicate that such analysis is prohibited. *Id.* The dissenting justices emphasized that it is often easier to find financial benefits than it is to quantify environmental benefits. *Id.* They maintained that cost-benefit analysis often does not maximize environmental protection. *Id.* at 1519. Thus, the justices found that it is important to avoid reading a provision's silence as allowing for such an analysis. *Id.* at 1520. The justices also encouraged a comprehensive

analysis of the Clean Water Act's structure and legislative history to determine the congressional intent regarding cost-benefit analysis and when the EPA is authorized to use such an evaluation. *Id.* at 1522.

While clearly controversial, it should be recognized that the EPA application of a cost-benefit analysis is more advanced than the arbitrary practices of the previous three decades. A cost-benefit analysis provides an imperfect standard that may, at times, underestimate the benefits to the environment of more costly measures. However, the cost-benefit analysis provides some decision-making structure for existing facilities, far beyond the previous decision-making standard. Given that each existing facility provides its own unique sets of costs and challenges, requiring one specific standard would be nearly impossible. The cost-benefit analysis may be the most effective method to bring existing facilities into compliance along with the modern Phase I facilities.

Benjamin J. Turpen

II. CLEAN WATER ACT

Port of Oswego Authority v. Grannis,
881 N.Y.S.2d 283 (N.Y. 2009)

The Port of Oswego Authority (Oswego) appealed a May 2009 decision by the New York Supreme Court, Albany County, which dismissed Oswego's application to review certain conditions of a water quality certification issued by the New York Department of Environmental Conservation (DEC) pursuant to the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1972). *See* Port of Oswego Auth. v. Grannis, 881 N.Y.S. 2d 283 (N.Y. 2009). On February 4, 2010, the New York Supreme Court, Appellate Division, affirmed the lower court's decision, upholding DEC's water quality standards. *Port of Oswego Auth. v. Grannis*, No. 507661, 2010 WL 375502, at *2 (N.Y. App. Div. Feb. 4, 2010).

In 2008, as a result of litigation in federal court, the United States Environmental Protection Agency (EPA) issued a proposed Vessel General Permit for Discharges Incidental to the Normal Operation of Commercial Vessels and Large Recreational Vessels (VGP) to regulate the discharge of ballast water from certain vessels operating in the waters of the United States. *See* N.W. Envtl. Advocates v. U.S. Envtl. Prot. Agency, 537 F. 3d 1009 (9th Cir. 2008); U.S. Envtl. Prot. Agency, *National Pollutant Discharge Elimination System: Vessel Discharges*, <http://cfpub.epa.gov/npdes/home.cfm?program-id=350> (last visited Apr. 6, 2010). Ballast water is "water that is taken on by cargo ships to

compensate for changes in the ship's weight as cargo is loaded or unloaded, and as fuel and supplies are consumed." *Id.* at 1012. Its use benefits vessels, helping them maintain stability, proper propeller, and bow immersion, and to compensate for off-center weights. When a ship takes in ballast water, however, organisms native to that water are also typically taken on board. When that water is discharged into another body of water, those organisms are released, sometimes to the detriment of the native species of that new ecosystem. *Id.* at 1012-13. The EPA-issued VGP authorized discharge of pollutants incidental to normal operation of all commercial and large recreational vessels beginning on or about December 19, 2008. U.S. Env'tl. Prot. Agency, Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels, Authorization to Discharge Under the National Pollutant Discharge Elimination System (Feb. 5, 2009), *available at* http://www.epa.gov/npdes/pubs/vessel_vgp_permit.pdf.

On August 6, 2008, in order for the VGP to take effect in New York's waters, the DEC issued a certification of the VGP pursuant to Clean Water Act (CWA) § 401. *See* 33 U.S.C. § 1341 (2006). The certification includes five conditions for the operation of commercial and larger recreational vessels in New York waters, applicable even if the vessels do not discharge pollutants. *Port of Oswego Auth. v. Grannis*, 881 N.Y.S.2d. 283, 284 (N.Y. 2009). The first condition requires, in pertinent part, that all ships entering New York waters with ballast water on board must (1) travel fifty nautical miles from the coastal shore into the Atlantic Ocean, where the waters are at least two hundred meters deep, in order to exchange the water in their ballast tanks with ocean salt water; (2) maintain the ability to measure salinity levels in the ballast tanks; and (3) maintain salinate levels in each ballast tank of at least thirty parts per thousand. *Id.* at 285. The second condition requires that by 2012, all existing ships covered by the VGP and operating in New York waters must be retrofitted to install ballast water treatment systems meeting specifically established standards for organism and microbe content. Exclusions are provided for vessels operating within New York Harbor and Long Island Sound, for vessels that carry only permanently sealed ballast water tanks, and for the National Defense Reserve Fleet (as in condition one). The third condition requires that all vessels constructed after January 1, 2013 covered by the VGP and operating in New York waters must include a ballast water treatment system meeting specifically established standards for organism and microbe content (as in condition two). The same exclusions apply as in condition two.

Conditions four and five concern the discharge of gray water and bilge water, but were not subject to this case. *Id.*

Appellants—a coalition of public corporations, shipping companies, and other entities with interests in maritime trade through the waters and ports of New York—commenced an action for a declaratory judgment, challenging the certification on numerous grounds. Among other things, appellants argued that the first three conditions of the certification were unlawful because in adopting them, the DEC bypassed the State Administrative Procedure Act (SAPA); exceeded the DEC's existing legislative authority; violated the State Environmental Quality Review Act (SEQRA); will impermissibly burden interstate and foreign commerce in violation of the United States Constitution Articles I and II; and unlawfully promulgated requirements that were arbitrary, capricious, and a clear abuse of discretion. Oswego also asserted that the three conditions mentioned above would give rise to two events: They will either (1) force ocean-going cargo ships to avoid Upstate New York waters altogether and to divert to other ports not in New York State, or (2) force ships to unload their cargo in New York Harbor for further land transit, rather than going up the Hudson River to the Port of Albany. *Id.* at 286. Oswego argued that this deterrence would result in significant loss of business, and environmental and economic harm to New York municipalities and residents and the already economically fragile ports on the Great Lakes and St. Lawrence Seaway. Appellants also argued that the three conditions would impact intrastate and international watercourse traffic, resulting in significant environmental and economic impacts to other Great Lakes states and Canada. Finally, they argued that technologies did not presently exist that would allow compliance with the second and third conditions. *Id.*

The DEC argued that the first three conditions were properly based on water quality standards that consisted of “broad narrative criteria set forth in State law, in addition to more narrow, numerical criteria, as may be established by State regulations.” *Id.* The DEC cited the narrative water quality criteria in N.Y. COMP. CODES R. & REGS. tit. 6, § 703.2 (2008), which establishes the water quality standard applicable to the various classifications of the State's waters. This also limits the amount of toxic and other deleterious substances to below that which will “impair the waters for their best usages.” *Port of Oswego Auth. v. Grannis*, 881 N.Y.S.2d 283, 286 (N.Y. 2009) (quoting N.Y. COMP. CODES R. & REGS. Tit. 6, § 703.2 (2008)). The DEC also cited section 701, which designates the best uses for each classification of the State's waters. Section 701.3 also provides the narrative standards for fresh

surface waters and “special” fresh surface waters, and establishes that there shall be no “deleterious substances” in those waters. Further, the DEC argued that these narrative criteria are broadly defined so as to be capable of including specific pollutants not foreseen when the regulations were enacted, such as those borne from vessel-transplanted ballast water. Because of these long-standing statutory and regulatory authorities, the DEC argued that it had the authority in existing law, without the requirement of new SAPA procedures, to adopt the conditions. It also asserted that it followed SEQRA procedures, resulting in the issuance of a negative declaration, as no significant adverse impact to the environment was anticipated by the adoption of the conditions. *Id.*

Finally, the DEC argued that appellant’s assertions—that the conditions do more harm to the environment than good and are harmful to the vessels’ occupants—are conclusory and unsupported by scientific and other expert evidence. Additionally, ballast water treatment system technologies that would allow compliance with the second and third conditions, are presently in development and extensions in the conditions allow for any delays which may occur in the marketing of these technologies. *Id.*

In its review of Oswego’s claims, the trial court stressed that it “may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether the administrative determination is rational and supported by the record.” *Id.* at 287. The court held that within the framework of the preexisting Water Pollution Control legislation, the CWA 401 Certification conditions were “rationally derived from the authority of the DEC to control ballast water pollution.” *Id.* at 289. The court also held that the DEC satisfied the procedural requirements of SEQRA; that it took a “hard look” at the environmental and economic effects of the conditions; and that the Negative Declaration and findings of no adverse environmental and economic impacts from implementing the 401 Certification were rationally based. *Id.* at 289-90. This alluded to the importance of the new regulations:

It is undisputed that ballast water on ocean-going vessels subject to the 401 Certification is a source of significant potential and actual biological pollution for the State’s water systems. . . . [T]he ballast discharge standards enunciated in the Conditions address the need to protect water quality and fish, shellfish and wildlife propagation in the State’s waters which have been and continue to be at risk from harmful [aquatic invasive species] and microbe pollution by maintaining water quality and the best usages of the State’s waters, avoiding continuing and new introduction of

harmful [aquatic invasive species] and microbes into the State's water systems and implementing the State's antidegradation policy.

Id. at 288-89.

On appeal, the New York State Supreme Court, Appellate Division, affirmed the lower court's decision, expounding that the CWA permits a state to add conditions to its 401 Certification that assign additional limitations and restrictions to ensure that CWA permittees will comply with the federal law and applicable state laws. *Port of Oswego Auth. v. Grannis*, No. 507661, 2010 WL 375502, at *1 (N.Y. App. Div. Feb. 4, 2010). The appellate court found that ample scientific evidence and expert opinion existed in the record to support the DEC's determination that the challenged conditions are vital to ensuring federal permittees' compliance with New York's existing water quality standards. These standards "aim to protect the state's waters from pollution and the conditions are reasonable restrictions intended to reduce the unintentional discharge of invasive aquatic species and other pathogens, thereby protecting the state's waters from the harm that such species and pathogens inflict." *Id.*

The dismissal of Oswego's challenges is a significant victory for environmentalists seeking to protect Great Lakes waters from invasive species. The New York Supreme Court's ruling grants states the authority to adopt ballast water rules that are more protective than federal standards, a holding that is consistent with the United States Court of Appeals for the Sixth Circuit's decision to uphold Michigan's ballast water rules against a similar shipping industry challenge. Press Release, Natural Res. Def. Council, NY Wins One for the Great Lakes (Feb. 4, 2010), <http://www.nrdc.org/media/2010/100204.asp>.

Matthew B. Miller

III. ENERGY POLICY AND CONSERVATION ACT

California Energy Commission v. Department of Energy,
585 F.3d 1143 (9th Cir. 2009)

A. Background

In the factual background of the case, the court gave special attention to the water crisis currently facing California. *Cal. Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1146 (9th Cir. 2009). The court stated that while California's population is expected to steadily increase over the next thirty years, the state's current water supplies are

decreasing. Both the surface water and groundwater resources are being overused, and saltwater contamination and environmental degradation have only exacerbated the shortage. Because California has no conventional means of increasing the water supply for its citizens, it must find alternative solutions for the crisis, including water recycling, desalination, and increased water efficiency. California has tapped increased water efficiency as the best available solution to help cope with the water crisis.

As part of the move toward increasing water efficiency, in 2002 the California Legislature required the California Energy Commission (CEC) to establish water efficiency standards for residential clothes washers.² The CEC adopted standards expressed in terms of “Water Factor” (WF), which is a “ratio of the gallons of water used per load to the capacity, in cubic feet, of the washtub.”³ *Id.* This standard applied to both front-loading and top-loading washers and was scheduled to take effect in two tiers. Tier 1, which was scheduled to take effect in January of 2007, would require all washers to perform with a WF of 8.5 or below, and Tier 2, scheduled to take effect in January 2010, would require all washers to perform with a WF of 6.5 or below. The CEC estimated the annual water savings produced by the regulations would match San Diego’s current annual water usage. *Id.* at 1146-47.

The Energy Policy and Conservation Act (EPCA) expressly preempts state regulation of energy use, energy efficiency, or water use of any products that are covered by federal regulatory standards. *Id.* at 1147 (citing 42 U.S.C. § 6297(b)-(d) (2006)). In 2001, the Department of Energy (DOE) adopted regulatory *energy efficiency* standards for residential clothes washers, but decided that it did not have the authority to prescribe *water efficiency* standards for residential clothes washers. Despite the DOE’s determination, the EPCA preempted state regulation of water efficiency. Recognizing the EPCA’s preemption, the CEC filed a petition for waiver with the DOE, which was accepted on December 23, 2005. One year later, the DOE denied the petition for three reasons.

First, the DOE claimed that the CEC’s proposed regulation did not meet the three-year minimum notice period before implementation and that the CEC did not provide information to support an alternate start date. Second, the DOE claimed that the CEC did not meet the statutory

2. It is estimated that clothes washers account for twenty-two percent of typical household water use. *Cal. Energy Comm’n*, 585 F.3d at 1146.

3. For example, a washer with five cubic feet of capacity that uses fifty gallons of water per wash would have a WF of 10.0, while a machine of the same capacity that used only twenty-five gallons per wash would have a WF of 5.0. *Id.*

standard requiring that California show “unusual and compelling water interests.” Third, the DOE claimed the CEC regulations would make a class of washers unavailable in California, which required denial of the waiver petition. *Id.*

B. Discussion

The court had to resolve two primary issues on appeal: whether the United States Court of Appeals for the Ninth Circuit properly had jurisdiction, and if the court did have jurisdiction, whether any of the DOE’s three stated reasons for rejecting the CEC petition supported that action under the standard of review. *Id.*

1. Ninth Circuit Jurisdiction

The DOE contended that the CEC should have sought review in federal district court under the Administrative Procedure Act because the EPCA does not grant the circuit courts jurisdiction to review the denial of preemption waivers. *Id.* at 1147-48. The EPCA states that “[a]ny person . . . adversely affect by a rule prescribed under section 6293, 6294, or 6295 of this title . . . may file a petition with the United States court of appeals . . . for judicial review of such a rule.” *Id.* at 1148 (quoting 42 U.S.C. § 6306(b)(1)). The DOE contended that the court of appeals lacked jurisdiction because the CEC was not challenging a rule adopted pursuant to one of the sections above, but a waiver denial made pursuant to section 6297(d). The Ninth Circuit rejected this assertion. While the DOE’s argument was facially plausible, congressional intent would be stymied if the DOE proposition was accepted.

The court found that the provisions of section 6306 of the EPCA are inconsistent with a view that Congress intended district courts to have default jurisdiction for all review *except* direct rule challenges under sections 6293, 6294, or 6295. The EPCA grants district courts jurisdiction in two categories of action: suits to determine state compliance with the EPCA and suits challenging the denial of rulemaking to amend a product standard. If Congress intended to give district courts jurisdiction to every challenge other than challenges to section 6293, 6294, or 6295, these provisions would be unnecessary. It is more likely, the court found, that one group of cases is to be decided by circuit courts and another group decided by district courts. For the unlisted matters, the court noted that efficiency, consistency with congressional scheme, and judicial economy should be considered to determine whether granting circuit courts jurisdiction best accomplishes

congressional intent. These factors, the court stated, militate in favor of circuit court jurisdiction.

First, the court determined that the denial of the CEC petition was intertwined with the DOE's authority under section 6295. The DOE's denial of the waiver left the CEC regulations preempted by the statute and subsequent DOE regulations. Thus the CEC was "adversely affected by a rule" prescribed under section 6295 within the meaning of section 6306(b). The court also held that consistency with the congressional scheme and practicality also militated in favor of review by the circuit court. *Id.* at 1149. The court examined *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), which was the only other case to examine a similar issue under the EPCA. In *Abraham*, the United States Court of Appeals for the Second Circuit rejected the petitioner's argument that review of DOE orders belonged in district court and that the EPCA specifically provides for district court jurisdiction in some circumstances, but "when there *is* a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals." *Id.* at 193. *Abraham* also emphasized the difference between rulemaking proceedings that require further factfinding and those that do not. The *Abraham* court found that "the exceptions to review by a court of appeals found in § 6303 . . . ordinarily entail additional factfinding," thus they are within the province of the district court; but if no factfinding is necessary, the circuit court should have jurisdiction. *Id.* at 193-94.

The Ninth Circuit found that here, the DOE's denial of a waiver of preemption clearly fell into the category of a rulemaking proceeding that did not "necessitate additional factfinding by a district court to effectuate the review process." *Cal. Energy Comm'n*, 585 F.3d at 1149. The DOE examined a full record and no further factfinding was necessary to determine whether rejecting the waiver petition was arbitrary or capricious. The court further held that it should not be presumed that Congress intended to establish a duplicative system of review where the district courts and circuit courts would "review the same fully-developed record under the same legal standards." *Id.* After rejecting cases the DOE relied upon as inapplicable, the court concluded that it had jurisdiction to hear CEC's petition for review.

2. DOE Rejection of CEC Petition

The Ninth Circuit began its analysis of the DOE's rejection of the CEC petition by stating that reviewing courts shall set aside agency actions it finds "arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with the law.” *Id.* at 1150 (citing 5 U.S.C. § 706(1)-(2)(a) (2006)). The court then examined the DOE’s three reasons for denying CEC’s request for a waiver of preemption.

a. Three-Year Waiting Period

The EPCA establishes a mandatory delay of three years between the grant of a waiver and the date the state regulation takes effect. *Id.* at 1151. The DOE did not accept the CEC waiver application as complete until December 23, 2005, and did not issue its ruling until December 28, 2006. Thus the DOE could not have issued a waiver for the Tier 1 regulations, but could have implemented the Tier 2 regulations without violating the three-year rule. The CEC did not dispute that the Tier 1 regulations did not comply with the three-year rule, but took issue with how the DOE should have dealt with the situation. The CEC argued that the California state regulations were drafted with a *nominal* effective date and would take effect only upon the date of a DOE waiver. The CEC further argued that the effective date of the state regulation was three years after the waiver was granted.

The DOE argued that the CEC petition would require the DOE to “sua sponte craft a different state regulation . . . and come up with its own effective date” for the regulation, and that it could not do so because the statute imposed the burden of proof on the State to demonstrate the proposed state regulation satisfies the statutory requirements. *Id.* The DOE held that the CEC did not comply with the EPCA because the CEC provided information only in context of compliance dates of the *California* regulation, and not information the DOE would need to promulgate a rule with an effective date three years after the date of waiver issuance. The court found this DOE conclusion was not supported by the record and that rejecting the CEC waiver, without considering whether the analysis would still hold force if implemented later, was arbitrary and capricious. *Id.* at 1152.

The court found that the CEC had correctly argued that a rule demanding strict parity between the timeline and analysis would be unworkable in practice. The DOE did not rule on the proposed state legislation for more than a year after the application for waiver was accepted. The court held that because states cannot predict when the DOE will approve a waiver application, flexibility in the timing process is inherently necessary. The DOE claimed that the CEC did meet its burden of proof by providing enough information to allow the DOE to determine whether a different effective date would satisfy the EPCA, but the court rendered this argument moot by observing that the DOE made

no attempt to apply the data to a permissible implementation date. Because the California regulations would take effect only upon the effective date of a DOE waiver, the court found that the DOE could reasonably assess the data in terms of a projected implementation date. The court noted that it lacked the capacity to determine whether the data and analysis were sufficient to support the CEC waiver application, but that the DOE's "wholesale rejection" of the CEC analysis because of a timeline issue was arbitrary and capricious. *Id.*

b. Unusual and Compelling Interests

The DOE's second ground for denying the CEC waiver petition was that the CEC had not established by a preponderance of the evidence that California had water interests "substantially different" than those in the United States generally *and* that state regulation was preferable to federal regulation when measuring against the "costs, benefits, [and] burdens" of such regulation. *Id.* The DOE found that while California had "substantially different" interests in water regulation than the United States generally, the CEC did not prove by a preponderance of the evidence that its proposed standards were "preferable or necessary when measured against alternative approaches." *Id.* at 1152-53.

The DOE claimed that it was unable to determine whether the CEC petition met EPCA requirements because the CEC did not provide analysis or data supporting its assertions that would justify state regulation. *Id.* at 1153. The court found that the DOE's conclusion was unsupported. In the notice soliciting comment, the DOE referred readers to the Web site where the CEC rulemaking record was found. The record contained a Pacific Gas & Electric (PGE) study, which contained a cost analysis that the DOE claimed did not exist in the CEC petition. The CEC had cited the same PGE study in its petition to the DOE. Moreover, DOE regulations state that it can only accept petitions that "contain sufficient information for the purposes of a substantive decision." *Id.* (quoting 10 C.F.R. § 430.42(f)(1) (2009)). Thus the DOE's acceptance of the petition casted further doubt on the DOE's analysis that the record was incomplete. The court therefore concluded that the CEC did provide sufficient data and analysis for the DOE to make a substantive determination on whether California standards were preferable compared to federal regulation, and the DOE's decision to deny the petition on this ground was arbitrary and capricious.

c. Unavailability

The DOE's third basis for denying the CEC waiver was its finding that a 6.0 WF standard for top-loading washers would result in the unavailability of top-loading washers in California. The DOE asserted that it was precluded from granting the waiver because it was required to deny a waiver if it were "likely to result in the unavailability in the State of any covered product type" similar to those available in the state at the time of the DOE finding. *Id.* at 1153-54 (quoting 42 U.S.C. § 6297(d)(4) (2006)). The CEC admitted that at the time of the waiver application, there were no top-loading washers that would meet the 6.0 WF standards. *Id.* at 1154. Nonetheless, it contended that the 2006 data does not support the DOE conclusion that the market would not have top-loading washers that meet the 6.0 WF in 2010.

The court ignored the CEC argument that there was no connection between the facts found and conclusions made, but found that denying a waiver on this unavailability ground, the DOE was required to find that interested parties have established by a *preponderance of the evidence* that the state regulation would likely result in unavailability. To determine whether the interested parties have met this standard, the DOE must weigh their evidence against that offered by the CEC. The DOE is allowed to use its expertise to determine whether the 6.0 WF washers would be available in 2010, but it did not. The DOE merely determined that the CEC evidence was a conclusory prediction by an insufficient expert body, but did not address the evidence in its order denying the waiver.

3. Relief

The court reversed the challenged order of the DOE and remanded it for further proceedings consistent with the opinion.

C. Analysis

California Energy Commission marks a Ninth Circuit "line in the sand" by resisting a federal scheme that denied a waiver for state regulation based on nonsubstantive reasons. The first argument the DOE advanced was that the proposed CEC regulations were invalid for a lack of notice. However, the DOE did not acknowledge the fact that it took the agency a full year to issue a ruling on the matter, or that, as the DOE rules stand, it is nearly impossible to offer a valid regulation start date without knowing when the ruling would be issued. The extensive factual background in the opinion betrays the Ninth Circuit's empathy for

California's plight. The court seemingly understood that with a federal bureaucracy standing in its path, California will not be able to effectively meet the water needs of its citizens. In *California Energy Commission*, the court both acknowledged the crisis and gave notice to the federal government that if it seeks to block hydrological progress in California, there must be a good-faith basis for doing so.

David Gibson

IV. MASSACHUSETTS OIL AND HAZARDOUS MATERIAL RELEASE
PREVENTION AND RESPONSE ACT

Boston & Maine Corp. v. Massachusetts Bay Transportation Authority,
587 F.3d 89 (1st Cir. 2009)

Massachusetts Bay Transportation Authority (MBTA) and Boston and Maine Corporation (B & M) were both involved in the operation of a railroad terminal in the greater Boston area from 1976 to 1986, during which time several oil spills occurred on the grounds of the terminal. *Boston & Me. Corp. v. Mass. Bay Transp. Auth.*, 587 F.3d 89, 91 (1st Cir. 2009). B & M had filed for bankruptcy protection in 1970, and received a discharge from all its liabilities in 1983. In 2004, MBTA demanded compensation from B & M for cleanup costs associated with oil spills that occurred prior to B & M's discharge in bankruptcy. The United States District Court for the District of Massachusetts held that MBTA's claim against B & M was not barred, because it could not have been "fairly contemplated" at the time of B & M's bankruptcy. *Id.* at 98 (citing *Boston & Me. Corp. v. Mass. Bay Transp. Auth.*, Civ. 05-11656 (D. Mass. Feb. 16, 2007) (report and recommendation)). On appeal, the United States Court of Appeals for the First Circuit rejected the "fairly contemplated" standard. *Id.* It held that because MBTA's officials had knowledge of the oil spills, any claim arising from the oil spills prior to the discharge order was barred under the 1898 Bankruptcy Act. *Id.* at 100.

B & M operated a thirty-four-acre railroad terminal in the greater Boston area from the 1920s to 1986. *Id.* at 91. In 1970, B & M filed for bankruptcy protection. In 1976, MBTA, a public transportation agency, purchased the property, but B & M continued to operate the terminal pursuant to an agreement between the two organizations. Between 1976 and 1983, MBTA collaborated with B & M in the management of the property. MBTA's officials were aware of various oil spills that occurred on the property, and MBTA financed projects to control oil leaks and

contamination. *Id.* at 94. In June 1983, B & M received a discharge from all its liabilities. The bankruptcy court's Consummation Order had declared B & M, the reorganized debtor, "free and clear of all claims." *Id.* at 97. In 1987, Amtrak took over operation of the terminal. Following another oil spill in 1989, the Massachusetts Department of Environmental Quality Engineering (DEQE) issued orders requiring emergency response and extensive cleanup of the site. A substantial portion of the cleanup expenses were allegedly due to the spills that occurred during B & M's operation of the property.

In 2004, MBTA sent a demand letter to B & M seeking compensation for those cleanup costs attributable to B & M's operation of the property prior to the bankruptcy discharge in 1983. *Id.* at 91. B & M responded by bringing suit in the federal district court of Massachusetts, seeking declaratory and injunctive relief to the effect that MBTA's claim was barred by the bankruptcy court's discharge order. *Id.* at 97. The case was referred to a magistrate judge, and B & M moved for summary judgment. *Id.* at 98. MBTA argued that because the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, MASS. GEN. LAWS ch. 21E (2002) (Chapter 21E), was passed only shortly before B & M's discharge was ordered, the claims arising from Chapter 21E should not be deemed discharged. MBTA argued that it would be inequitable for MBTA to bear the full cost of remediation when it could not have contemplated the scope of liability at the time of B & M's bankruptcy proceedings. The magistrate agreed, holding the claim was not discharged because it could not have been "fairly contemplated" at the time of the bankruptcy proceedings. The district court adopted the findings of the magistrate, and dismissed B & M's action. MBTA was therefore permitted to continue to pursue its remedies under state law in state court. *Id.*

B & M appealed the district court's denial of summary judgment. On appeal, the First Circuit reviewed the district court's denial of summary judgment *de novo* and concluded that the district court should have granted B & M's motion, and should have held that all of MBTA's pre-discharge claims were barred. The court first considered the policy underlying the 1898 Bankruptcy Act (the Act). Because B & M filed for bankruptcy in 1970, the court was required to analyze the effect of discharge under the 1898 Bankruptcy Act rather than the current provisions enacted in 1978. In particular, the court examined section 77 of the Act, which applied specifically to railroad debtors like B & M. *Id.* at 99 (citing 11 U.S.C. § 205 (repealed 1978)). Section 77 held as its paramount purposes that railroads should continue to function during

insolvency and that courts should ensure the opportunity for a “fresh start” for reorganized railroads. The court also concluded that the Act’s provision for discharge of past claims was meant to encompass a “sweeping” and “all-inclusive” category of claims, including contract claims, tort claims, and statutory obligations to the government. *Id.* at 100 (citing *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947)). The court relied on precedent in the other circuits to conclude that the broad sweep of section 77 includes contingent claims—or claims that have not accrued at the time of bankruptcy and are dependent on some future event. *Id.* (citing *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 974 F.2d 775, 781 (7th Cir. 1992)); *Id.* at 100 (citing *Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985)). This definition of claims includes claims for contribution to environmental cleanup costs, even if the claim, like MBTA’s claim, is not yet certain at the time of the bankruptcy proceedings. *Id.* at 100. Accordingly, the court concluded that MBTA’s claim had been discharged in the 1983 bankruptcy order and was thereafter barred as a matter of law. *Id.*

MBTA countered that it had no notice that it had a claim against B & M at the time of the bankruptcy, and such an unknown claim could not be discharged. In particular, MBTA cited precedent from a United States Court of Appeals for the Third Circuit holding that an environmental plaintiff’s claim under the Comprehensive Emergency Response, Contribution, and Liability Act (CERCLA) could not have been discharged in a bankruptcy when the discharge order was entered prior to the enactment of CERCLA. *Id.* at 99 (citing *In re Penn Cent. Transp. Co.*, 944 F.2d 164, 167-68 (3d Cir. 1991)). The court rejected this argument for two reasons. *Boston and Maine*, 587 F.3d at 101-02. First, the court looked to Massachusetts state law. The Supreme Judicial Court of Massachusetts held in *Reynolds Bros. v. Texaco, Inc.*, 647 N.E.2d 1205, 1208-09 (1995), that when a property owner is aware of contamination on its land and potential cleanup costs, the owner has a “claim” under Chapter 21E for purposes of the bankruptcy code. Chapter 21E was enacted about three months prior to B & M’s discharge, and MBTA was aware at that time that contamination had occurred at the railroad terminal which would result in cleanup costs. *Boston & Maine*, 587 F.3d at 102. Consequently, the court concluded that MBTA had notice that it had a Chapter 21E contribution claim against B & M, and that claim was properly discharged in the 1983 discharge order. Even if MBTA did not have sufficient notice that it had a Chapter 21E claim, however, the court supplied a second ground for holding the claim discharged. Even prior to the enactment of Chapter 21E, MBTA would

have known that it had a contribution claim against B & M for the same “type of liability.” *Id.* MBTA could have asserted a similar contribution claim against B & M under the common law of nuisance, or under CERCLA. The court recognized that CERCLA exempts petroleum, crude oil, and crude oil fractions, but stated that the application of the petroleum exception was unclear. *Id.* at 102 n.5 (citing CERCLA § 101(14), 42 U.S.C. § 9601(14) (2006)). MBTA was at the very least put on notice that it had contribution claims against B & M under these other regimes of liability, and therefore all similar contribution claims were subject to the bankruptcy discharge. *Id.* at 102.

The court also declined MBTA’s invitation to weigh the environmental policies embodied in Chapter 21E against federal bankruptcy policy. *Id.* at 99 n.1. The court acknowledged that, when faced with federal statutes of competing or conflicting goals, courts must attempt to resolve the inconsistencies and effectuate the purposes of both. The court expressed doubt that such balancing would be necessary in the noted case because any such disharmony between statutory schemes existed not between two federal statutes, but between federal bankruptcy law and a state environmental statute. Ultimately, the court concluded that the crux of the parties’ dispute was in the definition of a “claim” in section 77 of the 1898 Bankruptcy Act. Consequently, the policy of the federal bankruptcy scheme controlled. *Id.*

The dispute in the noted case exemplifies the conflict that often arises between bankruptcy law and environmental law. The court’s decision may be confined to interpretation of the 1898 Bankruptcy Act, and even more narrowly, to railroad bankruptcies. Nevertheless, the court followed a growing body of cases that hold the fresh start of a reorganized debtor to be a commanding policy goal, one which eclipses the remedial goals of federal and state environmental schemes. *See, e.g., id.* (citing *Ohio v. Kovacs*, 469 U.S. 274 (1985)). The problem with this interpretation is that it provides an incentive for polluters to abuse bankruptcy protection. On the other hand, the *ASARCO* environmental bankruptcy, confirmed just a few days before the decision in the noted case, greatly dispelled the notion of polluters’ abuse of bankruptcy protection. *In re ASARCO*, 420 B.R. 314 (S.D. Tex. 2009). In that bankruptcy case, federal and state regulators successfully obtained nearly two billion dollars in contribution claims from the debtor for remediation of mining sites throughout the United States.

Taken together, these two cases demonstrate that bankruptcy law can work with the remedial goals of environmental law as long as creditors take an active role during the pendency of the bankruptcy.

When the debtor's environmental obligations are unclear or unknown during the pendency of the bankruptcy, however, there is a greater potential that the debtor will escape liability while other responsible parties or taxpayers are stuck with the bill.

Joseph Briggett

V. NATIONAL ENVIRONMENTAL POLICY ACT

Minard Run Oil Co. v. United States Forest Service,
C.A. No. 09-125, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009)

In *Minard Run Oil Co. v. United States Forest Service*, the United States District Court for the Western District of Pennsylvania determined whether the United States Forest Service (USFS) could prohibit drilling for oil and gas in the Allegheny National Forest until individual drilling proposals were evaluated under the National Environmental Policy Act (NEPA). C.A. No. 09-125, 2009 WL 4937785, at *1 (W.D. Pa. Dec. 15, 2009). Plaintiffs, who included Minard Run Oil Company and the Pennsylvania Oil and Gas Association, sought a preliminary injunction to stop USFS from subjecting each drilling proposal to a NEPA analysis before allowing the proposals to go forward. *Id.*

The underlying reason this issue found its way to the court can be traced back to the creation of the National Forest system in the United States. Concerned with the long-term management of the U.S. timber supply and the health of the nation's watersheds, Congress began to acquire private land that contained valuable timber reserves and water flows. 16 U.S.C. § 471 (2006). In order to buy as much land as possible with the limited funds it had available, Congress primarily purchased surface rights from private land owners while avoiding purchases of the underlying mineral interests. *Minard*, 2009 WL 4937785, at *3. Congress authorized the purchase of the land that now makes up the Allegheny National Forest (ANF) and other eastern National Forests in the 1911 Weeks Act, 16 U.S.C. §§ 511-521. As a result of the federal government's policy of generally refusing to buy mineral rights, ninety-three percent of the minerals that lie below the 513,325 acres that make up the ANF are privately owned. *Minard*, 2009 WL 4937785, at *3.

The issue of what, if anything, USFS can do to restrict the ability of the mineral owners to access and extract their minerals was first addressed in *United States v. Minard Run Oil Co.*, C.A. No. 80-129, 1980 U.S. Dist. Lexis 9570 (W.D. Pa. 1980). In *United States v. Minard Run Oil Co.*, the court held that owners of mineral rights in the ANF had

an “unquestioned right” to enter the national forest and extract their minerals. *Id.* at *13. The court did acknowledge that the mineral owners had a duty to limit unnecessary disturbance of the surface, but ultimately ruled USFS only had the power to impose “minor restrictions on drilling which do not seriously hamper the extraction of oil and gas.” *Id.* The court determined that mineral owners wishing to drill in the ANF would first have to give USFS notice “no less than 60 days in advance,” provide USFS with a map showing the proposed drilling site, submit a schedule of the planned operations, draft a plan for the control and minimization of soil erosion, and provide proof of mineral ownership in the land where the drilling would take place. *Id.* at *19-20.

From 1981 to 2008, both USFS and all private individuals owning mineral rights in the ANF followed the recommendations set forth in *United States v. Minard Run Oil Co.*, 2009 WL 4937785, at *8. Typically, a mineral owner wishing to drill in the ANF would submit a drilling proposal to the USFS. USFS would quickly review the proposal to ascertain the effects the drilling would have on the surface, and then work with the drillers to remedy any concerns that existed regarding the proposal. *Id.* USFS would generally complete the review of a drilling proposal within sixty days and would then issue the driller a Notice to Proceed, which signified that USFS had no objections to the plan. *Id.*

This process changed in 2008, when Forest Service Employees for Environmental Ethics joined with the Sierra Club to challenge the review process USFS was using to issue Notices to Proceed to mineral owners seeking to drill. *Id.* at *1. That case, *Forest Service Employees for Environmental Ethics v. United States Forest Service*, 08-cv-323-SJM (W.D. Pa. May 12, 2009), ended when the parties signed a settlement agreement whereby USFS agreed to review all future drilling proposals under NEPA prior to awarding drillers a Notice to Proceed. *Minard*, 2009 WL 4937785, at *1. Plaintiffs Minard Run Oil Company and Pennsylvania Oil and Gas Association challenged the implementation of this settlement agreement in the noted case. *Id.*

Plaintiffs alleged that the implementation of the settlement agreement by USFS was contrary to law and procedurally deficient because it amounted to an arbitrary change in the process by which USFS evaluated and approved drilling proposals in the past. *Id.* USFS, on the other hand, argued that it had the power as an agency to regulate the manner by which private mineral rights owners can drill in the ANF. *Id.* USFS also argued that the plaintiffs had not suffered a true injury in fact and therefore lacked standing to bring the suit. *Id.*

The court started its analysis by researching the manner in which USFS mineral owners seeking to drill in the ANF dealt with prior to the execution of the settlement agreement. The court first explained that the private mineral rights underlying the ANF came in two forms: reserved mineral rights and outstanding mineral rights. *Id.* at *3-5. Reserved mineral rights, which constitute forty-eight percent of the mineral estates in ANF, were created when the one-time owners of the surface sold their land to the federal government but reserved the mineral estate for themselves. *Id.* at *3. Outstanding mineral rights were created when a transaction between private individuals separated the surface and mineral estates before the surface land was sold to the federal government. *Id.* at *4.

Almost all reserved mineral rights were reserved through the placement of a standard seven-paragraph set of rules in the instrument of conveyance to the federal government. *Id.* at *3. These rules made clear that the mineral owners would be allowed to prospect for their minerals as long as (1) proof of ownership was first shown to the Forest Officer, (2) disturbance to the surface would be limited to only what was necessary, (3) all trees damaged in the process would be paid for, (4) buildings would be removed within six months of the drilling's completion, and (5) due diligence would be used to prevent forest fires. *Id.* Most notably, these deeds of conveyance to the government made no mention of a permit being required in order for the mineral owner to occupy the surface and prospect for minerals. *Id.* Most of the outstanding mineral rights, on the other hand, were severed from the surface estate by using standard conveyance language of the day that gave the mineral owner the right to reenter the surface property at any time to extract minerals. *Id.* at *4-5.

The court next researched the scope of regulatory powers that USFS had come to exercise in the years since the creation of the ANF. The court first addressed the scope of USFS's ability to regulate the rights of mineral owners from drilling in the ANF, set forth in *United States v. Minard Run Oil Co.*, C.A. No. 80-129, 1980 U.S. Dist. Lexis 9570 (W.D. Pa. 1980). *Minard*, 2009 WL 4937785, at *6. In that decision, this same court ruled that the owners of mineral rights had an "unquestioned right" to prospect for minerals, but did allow USFS to impose "minor restrictions which . . . should not seriously hamper the extraction of oil and gas." *Id.* (quoting *Minard*, C.A. No. 80-129, at *13-16)). The court allowed USFS to require the mineral owners to have a map of the areas to be affected by the drilling, a plan of operations, a plan of erosion control, and proof of ownership of the minerals. *Id.* The rules established in

United States v. Minard Run Oil Co. were later codified in the Energy Policy Act of 1992, 30 U.S.C. § 226(o), 106 Stat. 3108 (1992). *Minard*, 2009 WL 4937785, at *7. Additionally, the court noted that the 1984 ANF Handbook stated that the USFS was not a regulatory agency but rather a resource management agency. *Id.* at *6. Also relevant was the 1986 ANF Forest Plan, which stated that USFS was free to make land management decisions, but conceded that these management decisions could not prevent the mineral owners from making reasonable use of the surface. *Id.* at *7.

Even though USFS had, since the creation of the ANF, allowed the owners of mineral rights to drill and explore their holdings with only minimal restrictions, USFS stopped processing new drilling requests for the ANF on January 16, 2009, in response to the suit by the Forest Service Employees for Environmental Ethics. *Id.* at *11. On April 9, 2009, USFS and the Forest Service Employees reached a settlement agreement, which stated that a NEPA analysis would be conducted before issuing a Notice to Proceed for any drilling proposals. *Id.* USFS also agreed under the settlement to conduct a forest-wide Environmental Impact Statement (EIS) under NEPA, which the agency anticipated would take several years to complete. *Id.* at *12. These sudden changes to USFS policy were not preceded by any notice-and-comment period. *Id.* at *11.

The court next recounted in detail the stories of the numerous people who testified regarding the negative impact the USFS's ban on new drilling was having on their businesses. *Id.* at *15-20. Many of these companies owned significant mineral interests in the ANF and testified that the drilling ban had slowed their businesses significantly. *Id.* For example, the Pennsylvania General Energy Company (PGE) testified that it owned 40,000 acres of mineral rights in the ANF and had seventy-five percent of its total wells located within the forest's boundaries. *Id.* at *16. Prior to the drilling ban, PGE was poised to begin drilling a well to exploit the coveted Marcellus Shale discovery, which it described as "one of the hottest oil and gas plates in the continental U.S." *Id.* at *17. Minard Run Oil Company, which claims to be the oldest independently owned oil company in the world and has been an active drilling presence in this region of the country for 134 years, owns 5700 acres of mineral rights in the ANF. *Id.* at *18. Minard Run Oil Company testified that it anticipated having to lay off employees if the ban on new drilling extended into 2010. *Id.*

After the court's recitation of the litany of harms experienced by the numerous oil and gas businesses operating in the ANF, it then addressed

the issue of standing. The court concluded that plaintiffs Minard Run Oil Company and PAG had standing because they had suffered “concrete, ascertainable, identified and particularized” harms that could be directly attributed to USFS’s ban on new drilling in the ANF. *Id.* at *21. Relying on *Lujan v. Defenders of Wildlife*, 505 U.S. 555 (1992), and *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), the court found that plaintiffs Warren County and Allegheny Forest Alliance lacked standing because they were not the objects of USFS’s settlement agreement, but were instead groups upset by “the government’s allegedly unlawful regulation (or lack of regulation) of someone else.” *Minard*, 2009 WL 4937785, at *21 (emphasis omitted) (citing *Lujan*, 505 U.S. at 562-64).

The court next addressed whether the settlement agreement entered into by USFS constituted a final agency action. *Id.* at *22. In order for an agency action to be challenged in court, the Administrative Procedure Act (APA) requires that the agency action be final. *Id.* at *22 (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990)). A settlement agreement is a final action when an agency has “exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations” in entering the settlement. *Id.* (citing *United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008)). The court noted that USFS had been evaluating and approving drilling proposals for the ANF in the same way for nearly thirty years without changes, and therefore the new settlement agreement represented a “sea change” in the process. *Id.*

Both the regulatory powers conferred upon USFS by the settlement agreement and the process used to create the settlement agreement were then evaluated by the court to determine whether the agency action was final and whether it could legally be upheld by the court. *Id.* at *23. The court first summarized the Pennsylvania case law, which holds that the mineral estate is dominant over the surface estate. *Id.* The prior decision in *United States v. Minard Run Oil Co.* was then summarized to stand for the proposition that a mineral estate owner is dominant over the surface estate and can exercise his or her right to prospect for minerals in the ANF so long as the surface is only disturbed to the extent necessary. *Id.* The court next mentioned that the Pennsylvania Supreme Court had recently affirmed the absolute right of a mineral-estate owner to enter onto the surface estate to extract minerals without the consent of the surface owner. *Id.* (citing *Belden & Blake Corp. v. Pennsylvania*, 969 A.2d 528, 532-33 (Pa. 2009)).

The court next described NEPA and illustrated the reasons why it should not be applied to individual drilling proposals in the ANF. *Id.* at *24. NEPA is only triggered by a proposal for a major federal action,

and requires that the government perform a comprehensive EIS before moving ahead with an action. *Id.* To be considered a major federal action a project must be “potentially subject to Federal control and responsibility.” *Id.* at *25 (quoting 40 C.F.R. §1508.18 (2009)). “If . . . the agency does not have sufficient discretion to affect the outcome of [an] action, and its role is merely ministerial, the information that NEPA provides can have no affect on the agency’s actions, and therefore NEPA is inapplicable.” *Id.* (citing *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001)).

To determine if NEPA should be applied to evaluate individual drilling proposals in the ANF, the court next evaluated the cases USFS cited as support for its position that processing drilling proposals constitutes a major federal action that triggers NEPA. *Id.* at *25. In *Duncan Energy v. United States Forest Service (Duncan I)*, 50 F.3d 584 (8th Cir. 1995), the USFS managing the Custer National Forest in North Dakota argued that NEPA should be applied to all drilling proposals in the forest and sought to halt all drilling until an EIS was completed. *Minard*, 2009 WL 4937785, at *26. The *Duncan I* court found that no state law was controlling, and therefore looked to two federal statutes. *Id.* First, the National Park Service Organic Act, 16 U.S.C. § 551 (2006), which gave the Forest Service broad power to regulate the national forests; and second, the Bankhead-Jones Farm Tenant Act, 7 U.S.C. § 1011(f)(2006), which directed the Secretary of Agriculture to make all necessary rules to “regulate the use and occupancy” of the acquired lands. *Minard*, 2009 WL 4937785, at *26. Despite the power given to the USFS by these Acts, the court noted that *Duncan I* still stood for the proposition that mineral owners have an absolute right to drill for minerals and the USFS’s powers to regulate the national forests does not extend to “veto authority.” *Id.* at *27 (quoting *Duncan I*, 50 F.3d at 591 n.8). The *Duncan I* court remanded to the district court, which entered a permanent injunction that required USFS to process all drilling proposals within two months. *Id.* On further appeal, in *Duncan Energy v. United States Forest Service (Duncan II)*, 109 F.3d 497, 499 (8th Cir. 1997), the court held that while the requirement that USFS process all drilling claims within two months was too inflexible, USFS must still process drilling requests in an expeditious manner. *Minard*, 2009 WL 4937785, at *27.

The court in the noted case showed, therefore, that the *Duncan* cases actually supported only limited regulatory powers of the USFS over the rights of mineral estates. *Id.* Additionally, the court pointed out that while the Bankhead-Jones Tenant Act gives USFS the power to regulate

occupancy of the Forest Service lands involved in the *Duncan* cases, the Weeks Act, which controls the land of the ANF, actually restricts the USFS's ability to regulate occupancy of the surface by the owners of mineral estates. *Id.* at *28. Additionally, the National Park Service Organic Act "applies only to forests reserved from public land," not to land purchased directly from a private party like in the ANF. *Id.* at *29 (emphasis omitted) (quoting *United States v. Srnsky*, 271 F.3d 595, 600 (4th Cir. 2001)).

After distinguishing all of the cases cited by USFS to support the agency's contention that NEPA should apply to the ANF drilling proposals, the court ruled that USFS possesses little regulatory authority to restrict proposed drilling projects. *Id.* at *31. Therefore, USFS's processing of the drilling proposals for the ANF did not amount to a major federal action which requires a NEPA evaluation. *Id.* The court concluded that the settlement agreement entered into by USFS constituted a final agency action, which is invalid because it is not in accordance with established case law in Pennsylvania and the Weeks Act. *Id.* Additionally, the settlement agreement gave USFS regulatory powers beyond the scope of the agency's statutory authority. *Id.* at *32.

After reaching this conclusion, the court ruled that the plaintiffs had shown a reasonable likelihood of success on the merits of their claims, meaning the first prong of the four-part injunction test had been satisfied. *Id.* Next, the court found that the plaintiffs easily met the remaining requirements for issuing an injunction. *Id.* at *32-34. First, the plaintiffs made a clear showing of irreparable harm as a result of the drilling ban that was put into place under the settlement agreement. *Id.* at *33. Second, upon balancing the equities of an injunction, the court found that the harm to the plaintiffs as a result of the settlement agreement has been severe, while a return to the proposal evaluation system in place before the drilling ban would not threaten the health of the ANF, because USFS had been operating under the previous system of processing drilling requests for the last thirty years. *Id.* Finally, the court evaluated whether issuing an injunction that ended the ban on new drilling in the ANF would favor the public interest. *Id.* While acknowledging the unique recreational activities the ANF offers to the public, the court held that there is also a public interest in allowing the owners of mineral estates to access their property without unreasonable interference. *Id.* The court felt that both of these public interests were appropriately accommodated under the prior rules established in *United States v. Minard Run Oil Co.*, C.A. No. 80-129, 1980 U.S. Dist. Lexis 9570 (W.D. Pa. 1980), so the court issued a preliminary injunction ending the drilling ban and the plan

to prepare a forest-wide EIS under NEPA. *Minard*, 2009 WL 4937785, at *34.

The noted case is indicative of the current struggle to define, and redefine, the role of the National Forests in the twenty-first century. While the forests were originally set aside to ensure a steady supply of timber for the growing nation, this need has become increasingly less vital in light of the widespread adoption of more sustainable logging practices and commercial tree farming. Courts, the public, and the U.S. Forest Service itself have struggled in recent years to determine how the large expanses of land that make up our National Forests can, and should, be utilized in the future to meet needs of the modern United States.

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