RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

Supreme Court Grants Stay of the EPA's Clean Power Plan Pending Judicial Review

A. Introduction

In October 2015, the Environmental Protection Agency (EPA) published a final rule—Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units—known as the Clean Power Plan, pursuant to its authority under section 111(d) of the Clean Air Act (CAA). Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

The Clean Power Plan is an integral policy measure in the Obama Administration's effort to target global warming by setting aggressive benchmarks for states to reduce greenhouse gas emissions. *Climate Change and President Obama's Action Plan*, WHITE HOUSE, https://www.whitehouse.gov/climate-change#section-clean-power-plan (last visited Feb. 1, 2016). However, the future of the Clean Power Plan—and the Obama Administration's legacy on Climate Change—is uncertain. On February 9, 2016, the United States Supreme Court ordered that the Clean Power Plan be stayed until a decision is reached on whether it is lawful. Lyle Denniston, *Carbon Pollution Controls Put on Hold*, SCOTUSBLOG (Feb. 9, 2016, 6:45 PM), http://www.scotusblog.com/2016/02/carbon-pollution-controls-put-on-hold/#more-238111.

B. The Clean Power Plan

Under the Clean Power Plan, each state (excluding Hawaii, Alaska, Vermont, and the District of Columbia) would be required to design a plan for reducing carbon dioxide emissions. The plans would reflect the "best system of emission reduction" (BSER) after taking into account their individual economic and policy concerns. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,662-65. The states would have to submit their plans by September 2016—or September 2018 with an extension—and be prepared to meet a final carbon dioxide emissions standard by 2030. *Id.* at 64,669. As a result of the recent stay, these deadlines will likely be delayed.

Overall, the Clean Power Plan seeks to reduce overall carbon dioxide emissions by 32% in the utility power sector compared with 2005 levels. *Id.* at 64,665. Interim benchmarks would take effect between 2022 and 2029, which is the timeframe when states are expected to begin phasing in their systems of emissions reductions, though this timeframe may also be pushed back due to the recent stay. *Id.* at 64,664. The Clean Power Plan would be the first set of greenhouse gas emissions guidelines for existing power plants. *Id.* at 64,663. A concurrent final rule also establishes guidelines for emissions of carbon dioxide from new, modified, and reconstructed power plants pursuant to the EPA's authority under section 111(b) of the CAA. Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60, 70, 71, 98).

C. The Litigation

On the same day that the Clean Power Plan was published, the State of West Virginia—joined by twenty-four other states and state agencies—filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit asserting that the EPA acted beyond the scope of its authority in adopting the Clean Power Plan. State Petitioners' Motion for Stay and for Expedited Consideration of Petition for Review at 6, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015). Several utility industry groups also filed petitions for review with the D.C. Circuit Court of Appeals. Andrew Childers & Anthony Adragna, *Supreme Court Halts Clean Power Plan in Blow to Obama*, BLOOMBERG BNA (Feb. 10, 2016), http://www.bna.com/supreme-court-halts-n5798 2067152/. The court denied the states' motion to stay the Rule in the interim but granted the states' motion to expedite consideration of the Rule. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016) (order granting expedited consideration).

On January 26, 2016, the petitioners filed a stay application with Chief Justice Roberts at the United States Supreme Court to reverse the judgment of the D.C. Circuit Court and order an emergency stay of the Rule. Lyle Denniston, *States Move To Block "Clean Power Plan,"* SCOTUSBLOG (Jan. 26, 2015, 9:28 PM), http://www.scotusblog.com/ 2016/01/states-move-to-block-clean-power-plan/. On February 9, 2016, the Supreme Court ordered a stay of the Clean Power Plan in a 5-4 decision. Justices Ginsberg, Breyer, Sotomayor, and Kagan dissented. Denniston, *Carbon Pollution Controls Put on Hold*, *supra*. The court did not cite any reasoning, but the petitioners presumably met the burden of proving three factors:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. . . . the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (citing *Lucas v. Townsend* 486 U.S. 1301, 1304 (1988)).

In their application, the petitioners asserted that the Clean Power Plan is an "unprecedented power grab by EPA that seeks to reorder the Nation's energy grid." Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 13, *West Virginia v. EPA*, No. 15A773 (U.S. Jan. 26, 2016).

Petitioners assert they will suffer "*per se* irreparable harm" caused by the EPA's encroachment on their sovereignty. *Id.* at 40. States also cite the resources they will expend on compliance with the Clean Power Plan in the interim as irreparable harm. *Id.* at 41. Compliance, the states argue, will require major legislative and regulatory change, and a shifting of the electric power grid in each state. *Id.* at 39. Petitioners argue that resources spent in designing a plan—even by the September 2018 deadline with an extension—will not be recoverable by the time a decision is reached on the merits. *Id.* at 14.

Petitioners cautioned that denial of the stay would allow the EPA to "circumvent judicial review" as the agency did in *Michigan v. EPA*. *Id.* at 1-2 (citing *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015)). In that case, a stay of an EPA rule regulating fossil fuel power plants under section 112 of the CAA was denied, and by the conclusion of the litigation substantial compliance had been achieved. Although the Supreme Court remanded the case to the D.C. Circuit Court of Appeals for a final decision, petitioners in the Clean Power Plant litigation suggest that the subsequent refusal of the D.C. Circuit to vacate the EPA rule in that case was based on the existing substantial compliance that had taken place during the course of the litigation, as opposed to the lawfulness of that rule on the merits. In opposition to the stay in the Clean Power Plant litigation, the government argued that the Rule does not require that the states take immediate action and thus does not threaten any immediate or irreparable harm to the states. Denniston, *Carbon Pollution Controls Put on Hold*, *supra*.

On the merits, the states challenge the legality of the Clean Power Plan on two grounds. *See* State Petitioners' Motion for Stay and for Expedited Consideration of Petition for Review at 6, 11, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015). The first claim is that the EPA does not have the authority under section 111(d) to require states to restructure their electrical grids. The second claim is that even if the Clean Power Plan could have been authorized under section 111(d), the section 1112 exclusion applies, precluding the EPA's authority to regulate emissions of existing power plants.

The states disagree with the EPA about the scope of "standards of performance" for existing sources in section 111(d). The statute provides in relevant part:

> (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that [under section 110] under which each state shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air

> quality criteria have not been issued or is not included on a list [in section 108(a)] or emitted from a source category already regulated under [section 112, as a Hazardous Air Pollutant] but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. . .

42 U.S.C. 7411(d) (2012).

The states attempted to construe "standards of performance" narrowly to exclude the prescription of emissions standards that require making changes to current electricity grids. *See* Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, *supra*, at 6-7. Based on the statutory text, the EPA may argue it more broadly to justify the imposition of such standards, further arguing that the states have plenty of time—up to three years—to propose a "best system of emissions reduction," and in the event a state cannot propose a plan to supplant the federal plan proposed for the state by the EPA, the state may defer to the federal plan. *Id.* (citing 42 U.S.C. 7411(a)(1) (2012)).

The second point of contention is whether the regulation of emissions from existing power plants under section 112—in the Mercury and Air Toxics Standards Rule in 2012—precludes the application of section 111(d) to regulate carbon dioxide emissions from existing power plants. Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, *supra*, at 7-8. These are two conflicting amendments to the Clean Air Act: one passed by the House, and the other by the Senate. States rely solely on the Congressional amendment in making their argument, whereas the EPA views amendments as not conflicting and that in this context they allow for the regulation of carbon dioxide emissions from existing power plants. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,710-11 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

The D.C. Circuit's Panel of judges is viewed as favorable to the EPA. The hearing is scheduled for June 2; a decision by fall of 2016 is probable. Denniston, *Carbon Pollution Controls Put on Hold*, *supra*. Despite the expedited schedule in the D.C. Circuit, appeal to the Supreme Court may mean the Clean Power Plan will be stayed beyond President Barack Obama's presidency. It is highly unusual for the Court to issue the stay of an administrative decision, leading to speculation as to the uncertainty of the outcome in this case. Childers & Adragna, *supra*.

Coupled with the Court's recent unfavorable treatment of the EPA, it seems that the ultimate viability of the Clean Power Plan is uncertain.

Karuna Davé

EPA Not Confined to United States Court of Appeals for the District of Columbia Circuit for Clean Air Act Section 307(b)(1) Determinations

A. Introduction

California is known for its stricter than national environmental regulations and standards. Once those standards are approved by the Environmental Protection Agency (EPA), the EPA can waive federal preemption and allow the California standard. *See* Clean Air Act § 209(e), 42 U.S.C. § 7543(e). The question arises as to which federal court of appeals should hear challenges to that waiver.

The United States Court of Appeals for the District of Columbia Circuit recently declined to limit venue to its own court over challenges to final action by the EPA regarding emissions of in-use nonroad diesel engines. *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 880 (D.C. Cir. 2015). These engines are generally used in excavators, construction equipment, agricultural equipment (including tractors), airport ground service equipment, and utility equipment such as generators. *Nonroad Diesel Engines*, U.S. EPA, http://www3.epa.gov/otaq/nonroad-diesel.htm (last updated Feb. 23, 2016). The D.C. Circuit interpreted breadth of jurisdiction and venue under section 307(b)(1) of the Clean Air Act (Act), which governs emissions of in-use nonroad diesel engines. *Dalton Trucking*, 808 F.3d at 878-89; Clean Air Act § 307(b), 42 U.S.C § 7607(b)(1).

While the Clean Air Act generally preempts states from adopting standards relating to the control of emissions from in-use nonroad diesel engines, under section 209(e) of the Act, California may adopt emission standards for those engines if it applies for and receives a waiver of federal preemption from the EPA. The EPA may grant this waiver if the standards are, in the aggregate, at least as protective of the public health and welfare as the equivalent federal standard. *See* Clean Air Act § 209(e), 42 U.S.C. § 7543(e). Once the EPA authorizes the California standard, the other states may adopt and enforce the same provisions. Clean Air Act § 209(e), 42 U.S.C. § 7543(e)(2)(B).

B. Background

Dalton Tucking Inc. and American Road and Transportation Builders Association (ARTBA) challenged a final administrative decision by the EPA that authorized "California regulations intended to reduce emissions of particulate matter and oxides of nitrogen from in-use nonroad diesel engines." *Dalton Trucking*, 808 F.3d at 877. Dalton Trucking sought judicial review of this decision in both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Ninth Circuit. The EPA moved to dismiss the case in the Ninth Circuit based on a venue provision of the Clean Air Act. The rule states that the D.C. Circuit has exclusive venue over EPA action only if, "(1) the final action taken by EPA is 'nationally applicable' or (2) found that its final action was based on a determination of 'nationwide scope or effect' and it published this finding." *Dalton Trucking*, 808 F.3d at 877 (quoting Clean Air Act § 307(b)(1), 42 U.C.S. § 7607(b)(1)). The D.C. Circuit held that the decision did not satisfy either of the requirements. Therefore, venue was not proper in its court.

On March 1, 2012, the California Air Resources Board (CARB) requested that the EPA approve California's Nonroad Fleet Requirement under section 209(e) of the Act. *Id.* at 878. On September 20, 2013, the EPA granted the waiver. Dalton Trucking filed a petition for review in both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Ninth Circuit, asserting that the EPA misapplied the statutory requirements of section 209(e) and that the EPA's decision was arbitrary and capricious. The EPA moved to have the case dismissed from the Ninth Circuit. Dalton Trucking countered that the D.C. Circuit was not the proper venue under section 307(b)(1) of the Act. That section provides that a petition for judicial review of the Administrator's action in promulgating nationally-applicable regulations or final actions by the Administrator "may be filed only in the United States Court of Appeals for the District of Columbia." Clean Air Act 307(b)(1), 42 U.S.C § 7607(b)(1). It goes on to say that

> a petition for review of certain regionally applicable actions or any other final action of the Administrator under this chapter. . .which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action is based on such a determination.

The D.C. Circuit claimed that there was no dispute as to whether this provision confers jurisdiction on the court of appeals, and that it "is apparent from its terms that the jurisdiction conferred extends both to 'the United States Court of Appeals for the District of Columbia' and to the regional 'United States Court of Appeals.'" *Dalton Trucking*, 808 F.3d at 879 (quoting *Harrison v. PPG Indus. Inc.*, 446 U.S. 578 (1980)).

The Court also concluded that it was "apparent from its terms and legislative history" that the provision is also a venue provision. The court reasoned that there is a "plethora of decisions from other circuits resolving section 307(b)(1) challenges to final agency actions having only local or regional impacts." *Dalton Trucking*, 808 F.3d at 879. The court cited its own decisions where it found itself not to be the proper venue for a 307(b)(1) action. *Id.* (citing *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455-56 (D.C. Cir. 2013) (finding that the Ninth Circuit was the proper venue for an EPA approval of a California's State Implementation Plan under the Clean Air Act); *Util. Air Regulatory Grp. v. EPA*, No. 01-1064, 2001 WL 936362, at *1 (D.C. Cir. July 10. 2001)). The court made clear with the case at hand that section 307(1)(b) conferred not only jurisdiction to the regional Circuit Courts but also venue. The court noted that "it is generally understood that courts of appeals have the 'inherent power to transfer cases over which we have jurisdiction but not venue.'" *Id.* at 880.

C. Analysis

The United States Court of Appeals for the D.C. Circuit held that the EPA's Nonroad Waiver Decision is not nationally applicable, that the EPA did not find that its Nonroad Waiver Decision was based on a determination of nationwide scope or effect nor published such a finding, and that therefore the D.C. Circuit is not the proper venue for Dalton Trucking's challenge. *Id.* at 880-82.

The EPA first argued that states may adopt California's nonroad standards without further EPA review and, therefore, the standards are nationally applicable. *Id.* at 880. The court found, however, that because there is no statutory or regulatory requirement that other states adopt California's standards and, because no state had adopted the standard, it is not common practice. The court reasoned that 307(b)(1) requires national applicability, not mere national availability. *Id.* at 880-81.

Second, the EPA argued that California's Fleet Requirements will regulate off-road diesel engines and vehicles both within and outside of California. *Id.* at 881. The court reasoned that it only had to look at the

face of the rulemaking, which only regulates nonroad engines and vehicles owned and operated in California.

Finally, the EPA claimed that the D.C. Circuit has consistently treated similar petitions for review as nationally significant actions reviewable in that court or, in the alternative, "that venue in this circuit is 'compelled by [its] published determination that its action would have a nationwide scope or effect.'" *Id.* (quoting Brief for Respondents at 34, *Dalton Trucking*, 808 F.3d 875 (D.C. Cir. 2015) (No. 13-1283). The court reasoned that the EPA itself found that its Nonroad Waiver Decision was a "final action of national applicability." *Id.* (quoting California State Nonroad Engine Pollution Control Standards; Off-Road Compression Ignition Engines—In-Use Fleets; Notice of Decision, 78 Fed. Reg. 58,090, 58,121 (Sept. 20, 2013)). The court invalidated the EPA's finding that the text of section 307(b)(1) allows the EPA to substitute a finding of "national applicability" for the required finding that a decision of local or regional applicability is based on a determination of "nationwide scope or effect." *Id.* (quoting Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1)). The Court distinguished between "nationally applicable" final action and a final action with "nationwide scope or effect." The court claims that "Congress left no doubt that" these terms "are not the same." *Id.* at 882. Having found the EPA's decision not to have national scope or effect, the court divested jurisdiction and venue from the D.C. Circuit.

D. Conclusion

At first glance, it seems that the D.C. Circuit's determination is contrary to the plain meaning of the statute because other states can adopt California's provisions, and therefore the EPA's determination does have nationwide scope and effect, is nationally applicable, and the EPA published its findings. Further, engine emissions are not confined to the state in which they are emitted. Thus, an initial assessment would lead to the conclusion that the United States Court of Appeals for the District of Columbia Circuit does have exclusive jurisdiction and venue under section 307(b)(1) of the Act. When considered under a wider context, however, the court's decision makes more sense. The waiver program applies only to California. The engines will be imported, constructed, or registered only in California. Therefore, the D.C. Circuit made the

proper determination to divest itself of jurisdiction and venue for a case that was better suited for the regional court of appeals, the Ninth Circuit.

Rachael Ruiz

Michigan v. EPA, 135 S. Ct. 2699 (2015): *Agency Determination of Whether Regulation Is Appropriate and Necessary Requires the Consideration of Costs*

On June 29, 2015, the United States Supreme Court held that the Environmental Protection Agency's (EPA) refusal to consider costs when it determined that a regulation was "appropriate and necessary" was unreasonable. *Michigan v. EPA*, 135 S. Ct. 2699, 2707, 2712 (2015).

A. Background

The 1990 Amendments to the Clean Air Act (CAA) contain a provision that allows for the regulation of electric utility steam generating units (EGUs) under the hazardous air pollutant (HAP) guidelines. Clean Air Act, Amendments, Pub. L. No. 101-549, 104 Stat. 2399, 2531 (codified at Clean Air Act, 42 U.S.C. § 7412(n)(1) (2012)). To list EGUs as a source category, the EPA must conduct a study of the health risks of pollutants emitted from EGUs and submit the results along with an explanation of how EGUs could be regulated to Congress. The EPA Administrator must regulate EGU emissions if he or she finds that it is "appropriate and necessary."

In *Whitman v. American Trucking Ass'ns*, the Supreme Court held that the EPA was prohibited from considering costs when promulgating the initial national ambient air quality standards (NAAQS). 531 U.S. 457, 486 (2001). The provision of the Clean Air Act (CAA) under which the NAAQS are set requires that levels are "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). In *Whitman*, the Court found that when Congress mandated that levels be set at a level requisite to protect the public health, the consideration of costs was inappropriate. *See Whitman*, 531 U.S. at 471.

If the consideration of costs is not required by the statute, an agency *may* consider costs. *E.g.*, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1607 (2014). In *EPA v. EME Homer City*, the Supreme Court held that the EPA's decision to consider costs when determining how to allocate responsibility among the states under the Transport Rule was reasonable. Essentially, the Court determined that when interpreting the term "amount," using costs was reasonable. It should be noted that in

his dissent, Justice Scalia argued that the consideration of costs should be prohibited under *Whitman*. *Id.* at 1611-13 (Scalia, J., dissenting).

In December 2000, the EPA concluded that the regulation of EGUs was "appropriate and necessary." Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000). The agency added power plants to the source category list under section 112(c) of the CAA. *Id.* at 79,826. However, on March 29, 2005, the EPA reversed its decision to add power plants to the CAA section 112(c) source category list. Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List, 70 Fed. Reg. 15,994 (Mar. 29. 2005) (to be codified at 40 C.F.R pt. 63). Following this decision, several states and environmental groups petitioned the EPA for review of its decision to remove power plants from the source list. *New Jersey v. EPA*, 517 F.3d 574, 577 (D.C. Cir. 2008). The United States Court of Appeals for the District of Columbia Circuit held that the EPA's decision to "delist" power plants was unlawful because section 112(c)(9) required the EPA to make certain findings before delisting, which the EPA failed to make. *Id.* at 581 (citing Clean Air Act, 42 U.S.C. § 7412(c)(9) (2012)).

In May 2011, the agency again reconsidered. National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial Institutional, and Small Industrial Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 24,976, 24,977 (May 3, 2011) (to be codified at 40 C.F.R. pt. 60, 63). There, the EPA determined that regulation of power plants was necessary and appropriate. Further, the EPA found that Congress did not require the agency to consider costs when determining if a regulation was "appropriate and necessary." *Id.* at 24,987.

Finally, in 2012, the EPA reaffirmed that it was appropriate and necessary to regulate power plants and that it was not required to consider costs at this phase of regulation. 77 Fed. Reg. 9304 at 9327, 9363. Following this decision, state, industry, and labor organizations challenged the Final Rule. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229 (D.C. Cir. 2014), *rev'd sub nom Michigan v. EPA*, 135 S. Ct. 2699 (2015). In *White Stallion Energy Center, LLC v. EPA*, the District of Columbia Circuit upheld the EGU Final Rule holding that the EPA's interpretation of "appropriate and necessary" and its decision not

to consider cost was reasonable. *Id.* at 1241. The industry petitioners sought, and were granted, certiorari by the Supreme Court. *Michigan v. EPA*, 135 S. Ct. at 2706.

B. Court's Decision

The Supreme Court, in a 5-4 opinion authored by Justice Scalia, reversed the decision of the circuit court and remanded the case for further proceedings. *Id.* at 2702, 2712. First, the Court briefly noted agency deference. *Id.* at 2706-07. Second, the Court detailed why the EPA was arbitrary. *Id.* at 2707-08. Third, the Court countered each of the EPA's reasons for determining that the consideration of cost was unnecessary. *Id.* at 2708-10. Finally, the Court addressed the contentions made by the dissenters. *Id.* at 2710-11.

First, the Court recognized the deference that agencies are afforded in making statutory interpretations. *Id.* at 2706-07 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)). Despite *Chevron* deference, the Court found that the "EPA strayed far beyond [the bounds of reasonable interpretation] when it read § 7412(n)(1) [of the CAA] to mean that it could ignore cost." *Id.* at 2707.

Second, the Court found that the EPA's determination that it was not required to consider costs when deciding if regulating EGUs was "appropriate and necessary" was arbitrary. *Id.* at 2707-08. The Court reasoned that the CAA regulates EGUs, under the HAP program, special. *Id.* at 2707. Congress provided the EPA with specific guidelines, like "numerical thresholds," when determining whether to regulate other sources. However, for EGUs, Congress left the determination to the EPA when the Administrator found that regulation was "appropriate and necessary." *Id.* at 2707 (citing 42 U.S.C. § 7412(n)(1)(A)). The Court stated that the agency was prohibited from "entirely fail[ing] to consider an important aspect of the problem." *Id.* at 2707 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (defining arbitrary)). The Court then reasoned that when the EPA decided that it was not required to consider costs, it failed to consider an important aspect of regulating EGUs and was, therefore, arbitrary.

The Court went on to reason that Congress specifically required the EPA to consider costs in the regulation of other provisions of the CAA. *Id.* at 2708 (citing Clean Air Act, 42 U.S.C. § 7412(n)(1)(A) (2012)). The Court noted that the EPA argued that this was an indication that because Congress specifically called for consideration in other sections Congress did not require the consideration of costs in determining whether to regulate EGUs under the HAP program. The Court did not

find this argument compelling. Instead, the Court stated that *Chevron* permits an agency to choose between "reasonable interpretations" of a statute but does not allow an agency to simply retain the parts of statute it likes while disregarding other parts. *Id.* at 2708 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

Third, the Court addressed the EPA's arguments for finding the consideration of cost irrelevant. *Id.* at 2708-10. The EPA cited *Whitman*, for precedence that the consideration of cost was prohibited. *Id.* at 2709 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001)). The Court responded by reminding the Agency that *Whitman* concerned the initial setting of the NAAQS. The NAAQS provision of the CAA specifically calls for the standards to be set at a level necessary to "protect the public health," which made the consideration of costs inappropriate. *Id.* at 2709 (citing 42 U.S.C. § 7409(b)).

The Court goes on to state that the EPA reasoned that it did not need to consider costs at the initial determination phase because it would be able to consider costs later when determining how to regulate EGUs. The Court, however, determined that the question before it was whether the "'appropriate and necessary' standard," which governs the initial determination phase, required the consideration of costs. The Court continued by addressing the EPA's argument that because EGUs are treated differently, the agency did not need to consider costs. *Id.* at 2710. However, the Court determined that this is precisely why it should consider costs. Further, the EPA decided that the "appropriate and necessary" decision must be "understood in light of all three studies required by" the provision. The Court responded by noting that one of those required studies mandated the consideration of costs.

Finally, the Court identified and responded to the concerns of the dissent. For one, the Court noted that even the dissent did not "embrace EPA's far reaching claim that Congress made cost altogether irrelevant to the decision to regulate" EGUs. However, the Court reasoned that the dissent exaggerated the importance of considerations of costs at later phases of EGU regulation. Further, the dissent determined that the consideration of costs is not necessary because EGUs are regulated under other state and federal laws. *Id.* at 2711. The Court noted that these reasons were not included in the EPA's findings. Additionally, because none of the dissent's arguments "ensure cost-effectiveness," and because the EPA did not rely on any of these cost-mitigating considerations, the Court determined that it was not permitted to take into account these factors.

C. Analysis

Michigan v. EPA is another case in a long line of Supreme Court precedence that shapes the way agencies make regulatory determinations. So far, an agency cannot consider costs if the statutory provision it is interpreting specifically calls for the consideration of public health. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001). Additionally, if the agency is interpreting a provision that is silent on whether to consider costs, and whether considering costs would be reasonable, the agency may consider costs. *See, e.g.*, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1607 (2014). Now, after *Michigan v. EPA*, an agency must consider costs when determining whether regulation is "appropriate and necessary." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015).

It seems to be a logical decision that agencies must consider costs when determining whether a regulation is "appropriate and necessary." If the failure to regulate would cost lives or result in public health problems, the benefits will clearly outweigh the costs. Further, Congress presumably would not delegate to an agency to determine whether it is "appropriate and necessary" to regulate if failure to regulate would result in the loss of life. However, as technology changes and new dangers are discovered, it may be important for an agency to have the ability to regulate without consideration of monetary costs. Only time will tell how the Court's decision will shape the future of regulation by public health agencies.

Amanda Serfess

II. ENDANGERED SPECIES ACT

Order Denying Plaintiff's Motion for Preliminary Injunction,
Western Exploration LLC v. Department of the Interior,
No. 3:15-cv-00491-MMD-VPC (D. Nev. Dec. 8, 2015)

A. Background

In March 2010, the U.S. Fish and Wildlife Service (FWS) listed three entities of the greater sage-grouse as a threatened or endangered species under the Endangered Species Act. Order Denying Pl.'s Mot. for Prelim. Inj. at 1, *W. Expl. LLC v. Dep't of the Interior*, No. 3:15-cv-00491-MMD-VPC (D. Nev. Dec. 8, 2015). FWS found that regulatory mechanisms available to the Bureau of Land Management (BLM) and

the U.S. Forest Service (USFS) (together, "agencies") were inadequate to protect the sage-grouse species and their habitat. *See id.* at 2 (citing Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions To List the Greater Sage-Grouse (*Centrocercus Urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13,910 (Mar. 23, 2010)). In response, BLM and USFS issued amended land management plans that incorporated protection measures for the sage-grouse. The management-plan amendments govern 67 million acres of federal lands across ten states.

On September 23, 2015, plaintiffs Elko County, Eureka County, Western Exploration LLC, and Quantum Minerals LLC filed suit, seeking judicial review of the Agencies' actions under the Administrative Procedure Act. *Id.* (citing 5 U.S.C. § 706 (2012)). Specifically, "Plaintiffs challenge Defendants' decisions to adopt the portions of the plan amendments that cover over 20 million acres of federal lands in Nevada ('Plan Amendments')." The plaintiffs initiated a motion for preliminary injunction to enjoin the agencies from implementing certain restrictions in their Plan Amendments, pending a decision on the merits. The United States District Court for the District of Nevada denied the plaintiff's motion, holding that the Plaintiffs failed to meet their burden of demonstrating a likelihood of irreparable harm in the absence of the requested preliminary injunction. *Id.* at 1.

B. The Court's Decision

The court began by setting out the legal standard for a preliminary injunction. *Id.* at 3. To qualify for a preliminary injunction, a plaintiff must demonstrate: 1) a likelihood of success on the merits, 2) a likelihood of irreparable harm, 3) that the balance of hardships favors the plaintiff, and 4) that the injunction is in the public interest. *Id.* (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The court noted that in the United States Court of Appeals for the Ninth Circuit, alternatively, "an injunction may issue under a 'sliding scale' approach if there are serious questions going to the merits and the balance of hardships tips sharply in the plaintiff's favor." Order, *supra*, at 3 (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011)). The plaintiffs were concerned with several aspects of the Plan Amendments including restrictions on travel and grazing, and mining and local land-use planning. *Id.* at 4. Specifically, the plaintiffs argued that the Plan Amendments could harm the environment by "creating an increased risk of wildfire, impede the [c]ounties' ability to maintain and repair roads by restricting travel to existing routes, diminish grazing

allotments, and dissuade investors from Quantum's and Western's mining interests." *Id.* at 4-5 (citing Pls.' Mot. for Prelim. Inj. at 24-28, *W. Expl. LLC v. Dep't of Interior*, No. 3:15-cv-00491-MMD-VPC (D. Nev. Sept. 28, 2015)).

The court began by examining the plaintiffs' claims that the Plan Amendments impede decisions on travel and transportation. *Id.* at 5. BLM's amendment states that "in areas where travel planning has not been completed, limit off-highway vehicle (OHV) travel to existing routes in [Priority Habitat Management Areas ('PHMAs')] and [General Habitat Management Areas ('GHMAs')] until subsequent implementation-level travel planning is completed and a designated route system is established." *Id.* (alteration in original). The FWS Amendments also limit travel on National Forest System (NFS) lands "to designated roads and trails within the forest transportation system." The plaintiffs argued that these travel plans affect thousands of miles and include routes "to which the Counties' rights have not been adjudicated." The court determined that the plaintiffs' concerns about the travel restrictions did not amount to the likelihood of irreparable harm because there must be the demonstration of an "immediate threatened injury." *Id.* at 6 (quoting *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988)). As stated by the defendants, the Plan Amendments did not close existing routes and left open the exemption for emergency vehicles. *Id.* at 5. The court noted that the future need of adjudication about the roads created the possibility, but not a likelihood, of irreparable harm.

The plaintiffs next argued that the Plan Amendments would increase the risk of wildfire by restricting grazing. *Id.* at 6. Specifically, the Plan Amendments state that BLM must "prioritize reviewing grazing permits and processing new permits or leases in the [Sagebrush Focal Areas (SFA)] before processing permits outside the SFA." *Id.* at 7. The plaintiffs asserted that the land health assessments created a likelihood for irreparable harm by potentially limiting the grazing allowed under the review permits, thus increasing the risk of wildfires. Again, the court stated that this was a potential harm and was too speculative to rise to the status of likelihood of irreparable harm. The plaintiffs' witnesses stated that the Plan Amendments do not actually modify grazing permits and no current permit holders have yet been affected by the new plan.

The BLM Amendments recommend withdrawing lands within the SFA from the Mining Act of 1872. *Id.* at 8. Following that recommendation, the U.S. Department of the Interior issued a notice of approval of an application to withdraw the SFA, which temporarily

segregates the lands while the application is processed. *Id.* at 8-9. "During the segregation period and 'subject to existing rights, the [SFAs] will be segregated from location and entry under the United States mining laws." *Id.* at 9 (quoting Notice of Proposed Withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and Notice of Intent to Prepare an Environmental Impact Statement, 80 Fed. Reg. 57,635, 57,637 (Sept. 24, 2015), *amended* by 80 Fed. Reg. 63,583 (Oct. 20, 2015) (alteration in original)). The government has the authority to examine the validity of any claim that is located on public lands and later excluded. Order, *supra*, at 9 (quoting *Ernest K. Lehmann & Assocs. v. Salazar*, 602 F. Supp. 2d 146, 150 (D.D.C. 2009)).

With this potential, the plaintiffs, Quantum and Western, claimed that the Plan Amendments created irreparable economic injury. Specifically, the plaintiffs stated that the Amendments created a "cloud of uncertainty" over their mining prospects and detrimentally affected Western's ability to raise funds. The court found that neither claim was substantiated by evidence of a likelihood of irreparable harm, as no evidence showed the amendments would disrupt mining prospects. *See id.* at 10. The court noted that the mining industry is highly regulated and that Quantum and Western "must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests." *Id.* (quoting *United States v. Locke*, 471 U.S. 84, 105 (1985)). The court further noted that the Plan Amendments did not affect the normal approval process for mining claims made by either Quantum or Western. *Id.* at 11. Moreover, the court found that Western's claims of lost fundraising from investors was a reaction to third parties and thus "insufficient to support a finding of imminent irreparable harm." *Id.* at 12. Western claimed that it did not have the financial resources to survive a protracted claim-validity examination. However, the court noted that Western received no formal notice of such an examination. Western's claimed harm rested on the results of hypothetical scenarios, which the court found to be an articulation of a possibility of harm, not the likelihood of irreparable harm.

Finally, the court analyzed the plaintiffs' claim that the Plan Amendment would affect lands identified for disposal. *Id.* at 14-15. Washoe County and Humboldt County were in the process of acquiring federal lands suitable for disposal. The plaintiffs argued that the Plan Amendments would interrupt the land-disposal process and thus cause irreparable harm. Again, the court held that such harm was not immediate, and therefore not suitable to lead to a preliminary injunction.

The court stated that "even assuming that those lands will be withdrawn from disposal, such a withdrawal is nevertheless not immediate. . . . The land disposal process is lengthy, the two Counties have not completed this process, and the planned projects do not have a clear or certain start date in the near future." *Id.* at 16.

C. Analysis

The court correctly held that the plaintiffs failed to meet their burden of demonstrating a likelihood of irreparable harm. The requested preliminary injunction by Quantum and Western was an attempt to hedge their bets against potential future harm. Quantum and Western cited to hypothetical scenarios and jumped the gun on proof of there being actual imminent harm.

Jessica Marsh

III. PLASTIC POLLUTION

Microbead-Free Waters Act: U.S. Bans Plastic Microbeads as a Means To Combat Ocean Pollution

Most people are aware of the connection between climate change and the world's dependency on fossil fuels for transportation and energy purposes, but some may not realize how the use of fossil fuels in the form of plastic is finding its way into the oceans and the species living within them. In fact, the world's oceans are inundated with 5.25 trillion pieces of plastic garbage. Claire Groden, *Report: Plastic Pollution in the Ocean Is Reaching Crisis Levels*, FORTUNE (Oct. 1, 2015, 4:03 PM), http://fortune.com/2015/10/01/ocean-plastic-pollution/. One contributor to this pollution is the cosmetics industry, specifically via face and body scrubs and toothpaste that feature tiny exfoliating agents that have the following ingredients: polyethylene or polypropylene. *Microbeads*, 5 GYRES, http://www.5gyres.org/microbeads/ (last visited Jan. 27, 2016). With the purpose of reducing the amount of plastics entering the ocean, Congress enacted the Microbead-Free Waters Act of 2015 on December 28, 2015. Pub. L. No. 114-114, 129 Stat. 3129 (2015) (to be codified at 21 U.S.C. 331).

A. Background

Global consummation of plastics has continued to grow since they were introduced commercially in the 1930s and 1940s. Jenna R.

Jambeck, et al., *Plastic Waste Inputs from Land into the Ocean*, 347 SCI. 768, 768 (2015). Currently, only 5% to 10% of plastic products are recovered. *The Plastic Problem*, 5 GYRE, http://www.5gyres.org/microbeads/ (last visited Jan. 27, 2016). Fifty percent of the recovered plastic products are sent to landfills and some are recycled, while much of the remainder makes its way to the ocean. Reducing the plastic that comes into contact with the ocean is a problem of waste management. China, Indonesia, the Philippines, Thailand, and Vietnam are responsible for "more than half" of the plastic in the ocean due to weak waste-management infrastructure that has failed to grow in pace with these countries' industrialization. Groden, *supra*. The issues surrounding waste management are particularly challenging for addressing plastic microbeads.

In the United States, wastewater is filtered at a waste treatment facility before it is recycled or discharged into the ocean. Erin Brodwin, *Here's Why the US Government Banned a Bunch of Soaps, Bodywashes, and Toothpastes*, BUS. INSIDER (Jan. 2, 2016, 12:00 PM), http://www.businessinsider.com/why-obama-banned-microbead-soap-2015-12. However, smaller particles, specifically microbeads, are not contained during the filtration process and thus, directly enter into various waterways from the oceans to the Great Lakes. In fact, researchers estimate that 8 trillion microbeads are entering U.S. rivers and oceans every day, which amounts to having enough "tiny plastic balls to cover more than 300 tennis courts," and that is only 1% of the total amount of microbeads discharged daily. Zoë Schlanger, *The U.S. Just Banned Microbeads, Those Tiny Plastic Environmental Disasters in Your Face Wash*, NEWSWEEK (Dec. 31, 2015, 3:09 PM), http://www.newsweek.com/united-states-just-banned-microbeads-those-tiny-plastic-disasters-your-face-410617. The remaining 99% remains in sewage sludge due to the inability to properly filter out microbeads during the waste treatment process, and this sludge is commonly used as fertilizer. Therefore, these miniscule plastic pieces are introduced to crops via irrigation and continue to travel to waterways, accumulating fertilizers and pesticides along the way.

The most critical problem with plastics is that they are persistent in the ecosystem, meaning they do not biodegrade. Jambeck, *supra* (citing Richard C. Thompson et al., *Our Plastic Age*, 364 PHIL. TRANSACTIONS ROYAL SOC'Y B. 1973, 1975 (2009)). Exposure to the elements causes the plastics to break into smaller particles and, as such, can be ingested by a variety of species along the trophic scale. *Id.* (citing Miriam C. Goldstein & Deborah S. Goodwin, *Gooseneck Barnacles* (Lepas spp.)

Ingest Microplastic Debris in the North Specific Subtropical Gyre, 1 PEER J. 184 (2013)). Marine organisms often cannot distinguish between plastic pieces and their regular meals, and if they ingest the microbeads, they can get stuck in the animal's intestines or stomach. This can result in starvation or other health complications. Brodwin, *supra*. Another concern is pesticides and other toxics entering into the food chain through the stomachs of plankton, fish, and other larger organisms as well as humans. Jordan Weissmann, *Why the Government Just Banned Those Plastic Microbeads in Your Face Wash*, SLATE: MONEYBOX BLOG (Dec. 30, 2015, 12:43 PM), http://www.slate.com/blogs/moneybox/2015/12/30/obama_signs_law_banning_plastic_microbeads_in_bath_products.html; *see generally* Marcus Eriksen, *The Plastisphere—The Making of a Plasticized World*, 27 TUL. ENVTL. L.J. 153, 157-161 (2014) (discussing the impact of plastic on the digestive systems of animals and humans). Thus, this plastic pollution not only has ecological implications but also poses a serious threat to the security of global food supply. Groden, *supra*.

B. Legislation

Several states including California and Illinois previously passed laws banning plastic microbeads. Rachel Abrams, *California Becomes Latest State To Ban Plastic Microbeads*, N.Y. TIMES (Oct. 8, 2015), http://www.nytimes.com/2015/10/09/business/california-bans-plastic-microbeads.html?_r=0. The federal government quickly followed suit. The Microbead-Free Waters Act of 2015 met little-to-no resistance as Congress welcomed the ban with bipartisan support, and the cosmetics industry readily approved of the effort to curb plastic pollution. Weissmann, *supra*. The Act is an amendment to the Federal Food, Drug, and Cosmetic Act that prohibits the "manufacture or the introduction or delivery for introduction into interstate commerce of rinse-off cosmetic that contains intentionally-added plastic microbeads." Microbead-Free Waters Act of 2015, Pub. L. No. 114-114, 129 Stat. 3129, 3129 (2015) (to be codified at 21 U.S.C. 331). A plastic microbead is defined as "any solid plastic particle that is less than five millimeters in size and is intended to be used to exfoliate or cleanse the human body or any part thereof." The Act calls for the discontinuance of the manufacture of microbeads on July 1, 2017, and bans the introduction or delivery for introduction of microbeads into interstate commerce on July 1, 2018.

C. Analysis

This ban marks a positive step in the direction of reducing the pollution in the world's oceans. Nongovernmental organizations, such as the 5 Gyres Institute and Ocean Conservancy, have been at the forefront of raising awareness of the plastic microbead and general plastic-pollution problem. *See* Lisa Kaas Boyle, *Journey of the Plastic Microbeads: From Science to Legal Policy*, HUFFPOST GREEN: BLOG (Jun. 11, 2015), http://www.huffingtonpost.com/lisa-kaas-boyle/journey-of-the-plastic-mi_b_7426584.html. New York State, alone, contributes nineteen tons of microbeads to the oceans via drains every year. Brodwin, *supra*. Thus, national legislation is necessary to ensure that states and industry work in conjunction to reduce and ultimately eliminate microbead pollution. The practical effect of the ban is not to remove products from consumption or dismantle industry, but rather to eliminate plastic from consumer products through the substitution of the ingredient comprising the exfoliating agent. Due to public awareness, industry support, and Congressional leadership, the United States will no longer contribute to microbead pollution, whether through agricultural use via irrigation or personal use via the sink or shower drain.

Catherine Simon

Proposed Plastic Bag Restrictions in New Orleans: New Orleans, La., Carryout Bag Regulations (Proposed Nov. 19, 2015)

A. Introduction

Approximately 225 million plastic bags are used every year in New Orleans. Jade Cunningham, *Plastic and Paper Bags Could Come with an Extra Fee*, WWLTV.COM, http://www.wwltv.com/story/news/2015/12/15/plastic-and-paper-bags-could-come-extra-fee/77384552/ (Dec. 15, 2015, 6:40 PM). At a population of 384,320 as of July 2014, that means that the average New Orleanian consumes approximately 585 plastic bags per year, or between one and two plastic bags per day. *QuickFacts: New Orleans City, Louisiana*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/2255000 (last visited Apr. 20, 2016). New Orleans' high plastic bag consumption rate combined with its location on the Mississippi River and close proximity to the Gulf of Mexico poses a threat of environmental harm to an area much larger than one confined to the city limits.

Plastic, especially in the form of plastic bags, is harmful to marine life. Laura Beans, *Silent Killers: The Danger of Plastic Bags to Marine Life*, ECOWATCH (Aug. 6, 2013), http://ecowatch.com/2013/08/06/the-danger-of-plastic-bags-to-marine-life/. Many marine animals, including fish, sea turtles, seabirds, and marine mammals, confuse plastic pollution for food. *Id.*; *Plastics Pollution: A Global Tragedy for Our Oceans and Sea Life*, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biological diversity.org/campaigns/ocean_plastics/ (last visited Jan. 27, 2016). The sealife cannot properly digest it, and this causes a myriad of health effects. Beans, *supra*. Plastic bags break down after a period of time, but they do not biodegrade. As they break down, toxins including flame retardants, antimicrobials, and plasticizers are released into the environment. In the case where an animal has eaten the plastic bag or particles of plastic, those toxins build up in the animal's system. *See id.* The toxins then are passed up the food chain, often ending up in our poboys, gumbo, pecan-crusted redfish, and other seafood dishes. *Plastics Pollution: A Global Tragedy for Our Oceans and Sea Life*, *supra*.

B. The Proposed Ordinance

On November 19, 2015, New Orleans City Councilmembers Susan G. Guidry and LaToya Cantrell proposed a citywide ordinance to limit the distribution and sale of single-use carryout bags and reusable carryout bags in New Orleans. New Orleans, La., Carryout Bag Regulations (proposed Nov. 19, 2015). The councilmembers listed seven supportive rationales behind the plastic bag restrictions. *Id.* at 1. First, single-use carryout bags increase the City's expenditures for waste removal due to their sizable contribution to the City's waste. Second, "single-use carryout bags contribute to the general litter problem" in New Orleans. Third, the general litter problem "damages the aesthetics" of New Orleans, a harm that may decrease tourism and, in turn, decrease revenues gained by tourism within the City. Fourth, "single-use plastic bags are not biodegradable, and cause permanent environmental hazards to New Orleans' water, soil, and air, and otherwise harm local wildlife." Fifth, there are many alternatives to single-use plastic bags that are safe and affordable. The proposed ordinance lists three such alternatives: "reusable cloth bags, durable plastic bags, [and] recyclable single-use paper bags." Sixth, the environment and New Orleans community would benefit from restrictions on single-use carryout bags. Seventh, the proposed ordinance mirrors similar "minimum price regulations on single-use bags" in New York City and Washington D.C., the latter of

which has effected a 50%-70% decrease in single-use carryout bag utilization. *See id.*

1. Single-Use Plastic Bags

The proposed ordinance defines "single-use plastic bag" as "any carryout bag made primarily of plastic or plastic-like material that does not meet the requirements of a reusable carryout bag." *Id.* at 2. It further explains that "[b]iodegradable plastic bags and compostable plastic bags are both considered single-use plastic bags unless they meet the requirements of reusable carryout bags." In regard to single-use plastic bags, the proposed ordinance prohibits business establishments within the New Orleans city limits from supplying single-use plastic bags to any person for free. *Id.* at 3. "Business establishment" is defined in the proposed ordinance as "any enterprise that provides carryout bags to its customers, including sole proprietorships, joint ventures, partnerships, corporations, or any other legal entity whether for profit or not for profit and includes all employees of the business and any independent contractors associated with the business." *Id.* at 2. Business establishments may sell single-use plastic bags to its customers for a minimum of ten cents per bag, and each customer's receipt "must specify the number of single-use plastic bags provided to that customer and the total amount charged to the customer for those bags." *Id.* at 3. Business establishments are excepted from the ten-cent minimum for customers participating in the Supplemental Nutrition Assistance Program, the Women, Infants, and Children Program, and/or the Louisiana Combined Application Project.

2. Single-Use Paper Bags

The proposed ordinance provides similar restrictions for single-use paper bags. Under the proposed ordinance, a "reusable carryout bag" is (1) "[a] bag made of cloth or other machine washable fabric that has handles," or (2) "[a] durable plastic bag with handles that is at least 2.25 mils thick and is specifically designed and manufactured for multiple reuses." *Id.* at 2. Like single-use plastic bags, the proposed ordinance prohibits business establishments within the New Orleans city limits from supplying single-use paper bags for free. *Id.* at 3-4. Business establishments may sell customers 100% recyclable single-use paper bags composed of a minimum of 40% post-consumer recycled material for a minimum of five cents per bag. Again, like the single-use plastic bag restrictions, business establishments must specify the number of

bags sold and the amount charged for the bags on each customer's receipt. *Id.* at 4. Again, business establishments are excepted from the five-cent minimum single-use paper bag price for customers participating in the Supplemental Nutrition Assistance Program, the Women, Infants, and Children Program, and/or the Louisiana Combined Application Project.

3. Exemptions

The proposed ordinance targets grocery stores and retail stores, as illustrated in its sizable list of exemptions. *Id.* at 2-3. In addition to business establishments' customers participating in the Supplemental Nutrition Assistance Program, the Women, Infants, and Children Program, and/or the Louisiana Combined Application Project, the proposed ordinance contains several over-arching exemptions. *Id.* at 3-4. The proposed ordinance does not apply to dry-cleaning bags, door-hanger bags, umbrella bags, newspaper bags, packages of multiple bags intended for use with waste (such as garbage, pet waste, or yard waste), bags provided by pharmacists or veterinarians to contain medical necessities, to-go bags in restaurants, bags used by consumers inside business establishments, bags used to contain Mardi Gras-related items, or bags used by nonprofit corporations or other hunger-relief charities.

4. Enforcement

The proposed ordinance bestows enforcement power of the ordinance on the Department of Safety and Permits, a power "including but not limited to investigating violations, issuing fines and entering the premises of any business establishment during business hours." *Id.* at 4. Once the Department determines that a business establishment is in violation of the ordinance, "it will issue a written notice to the operator of the business establishment that a violation has occurred and the potential penalties that will apply to future violations." If a business establishment continues to violate the ordinance after the Department has issued a written notice, the establishment will be subject to a fine of $100 for a first-time violation, or a fine of $500 for each subsequent violation after the first. *Id.* at 4-5.

C. Analysis

Although praised by many New Orleanians, others have met the proposed ordinance with criticism. One source compares the proposed New Orleans ordinance to a plastic bag ordinance in Austin, Texas. John Binder, *The Liberals of New Orleans Are Waging a War Against Plastic*

Bags and You're Going To Pay for It, HAYRIDE, http://thehayride.com/2015/11/the-liberals-of-new-orleans-are-waging-a-war-against-plastic-bags-and-youre-going-to-pay-for-it/ (Nov. 24, 2015, 3:05 PM). That source hints that the New Orleans plastic bag ordinance, if passed, would be unsuccessful in reducing negative environmental impacts, and that it would cause revenue losses to business establishments that use single-use plastic bags for their customers to carry out their purchases. *See id.* It also criticizes advocates for the proposed ordinance for not referring to the five- to ten-cent sales fee as a tax.

However, the New Orleans proposed ordinance differs from the Austin ordinance in two key ways. First, while the New Orleans ordinance would require business establishments implement a sales price for single-use plastic bags under 2.25 mils (or two-and-a-quarter thousandths of an inch) thick, the Austin ordinance imposes a complete ban on all plastic carryout bags less than 4 mils (four thousandths of an inch) thick. *Compare* New Orleans, La., Carryout Bag Regulations (proposed Nov. 19, 2015), at 2-3 *with* Austin, Tex. Code of Ordinances ch. 15-6, art. 7, §§ 121(3)(c)(ii), 122 (2013). This means that consumers in Austin who do not wish to reuse bags have two options: they can buy the reusable four-mil bags at checkout, or they can shop outside of the city limits, where the ordinance does not apply. At H-E-B, a Texas-based grocery store, the first reusable plastic bag is free (or funded by H-E-B), and additional bags cost twenty-five cents each. *Austin Disposable Plastic Bag Ban Takes Effect*, NACS ONLINE (Mar. 5, 2013), http://www.nacsonline.com/news/daily/pages/nd0305136.aspx#.VrQus165duY.

Single-use plastic bags are about 0.5 mils (one-half thousandth of an inch) thick. *"Reusable Bag" the New Definition*, WATSONVILLE PUB. WORKS & UTIL., http://cityofwatsonville.org/public-works-utilities/reusable-bag-the-new-definition (last visited Jan. 29, 2016). Therefore, for every reusable bag that is thrown away under the Austin ordinance, it takes up as much landfill space as eight single-use plastic bags. In contrast, New Orleanian consumers who do not wish to reuse bags or purchase paper bags under the proposed ordinance will purchase single-use plastic bags (at 0.5-mil thickness) at the ten-cent sales price or will choose to shop outside of the New Orleans city limits. Either way, the individual bags that are discarded under the proposed ordinance will take up the same amount of space in the landfills that individual bags did before: 0.5 mil each. The difference under the proposed ordinance is that some consumers will opt to purchase and use reusable bags, thereby lessening the number of plastic bags that go into landfills.

The second key way that the New Orleans proposed ordinance differs from the Austin ordinance is that the proposed ordinance is less likely to cause revenue losses to business establishments. For one, under the New Orleans proposed ordinance, consumers are less likely to go out of their way to shop outside of New Orleans's city limits because the proposed ordinance only restricts single-use plastic bags instead of banning them entirely, unlike the Austin ordinance. *Compare* New Orleans, La., Carryout Bag Regulations (proposed Nov. 19, 2015), at 3 *with* AUSTIN, TEX. CODE OF ORDINANCES ch. 15-6, art. 7, § 122 (2013). In addition, the proposed ordinance requires a sales price of ten cents per single-use plastic bag, whereas some grocery stores in Austin charge twenty-five cents per bag. New Orleans, La., Carryout Bag Regulations (proposed Nov. 19, 2015), at 3; *Austin Disposable Plastic Bag Ban Takes Effect*, *supra*. Therefore, New Orleanians who do not wish to use reusable bags are less likely to feel social or financial pressure to shop outside of the city limits. Moreover, the five- to ten-cent sales price required under the proposed ordinance will provide added revenue for the business establishments and is therefore not a tax because it is not collected by the city. If the proposed ordinance is passed, it will result in a positive environmental impact for New Orleans and beyond.

Carra Smith