

ADMINISTRATIVE & REGULATORY LAW NEWS

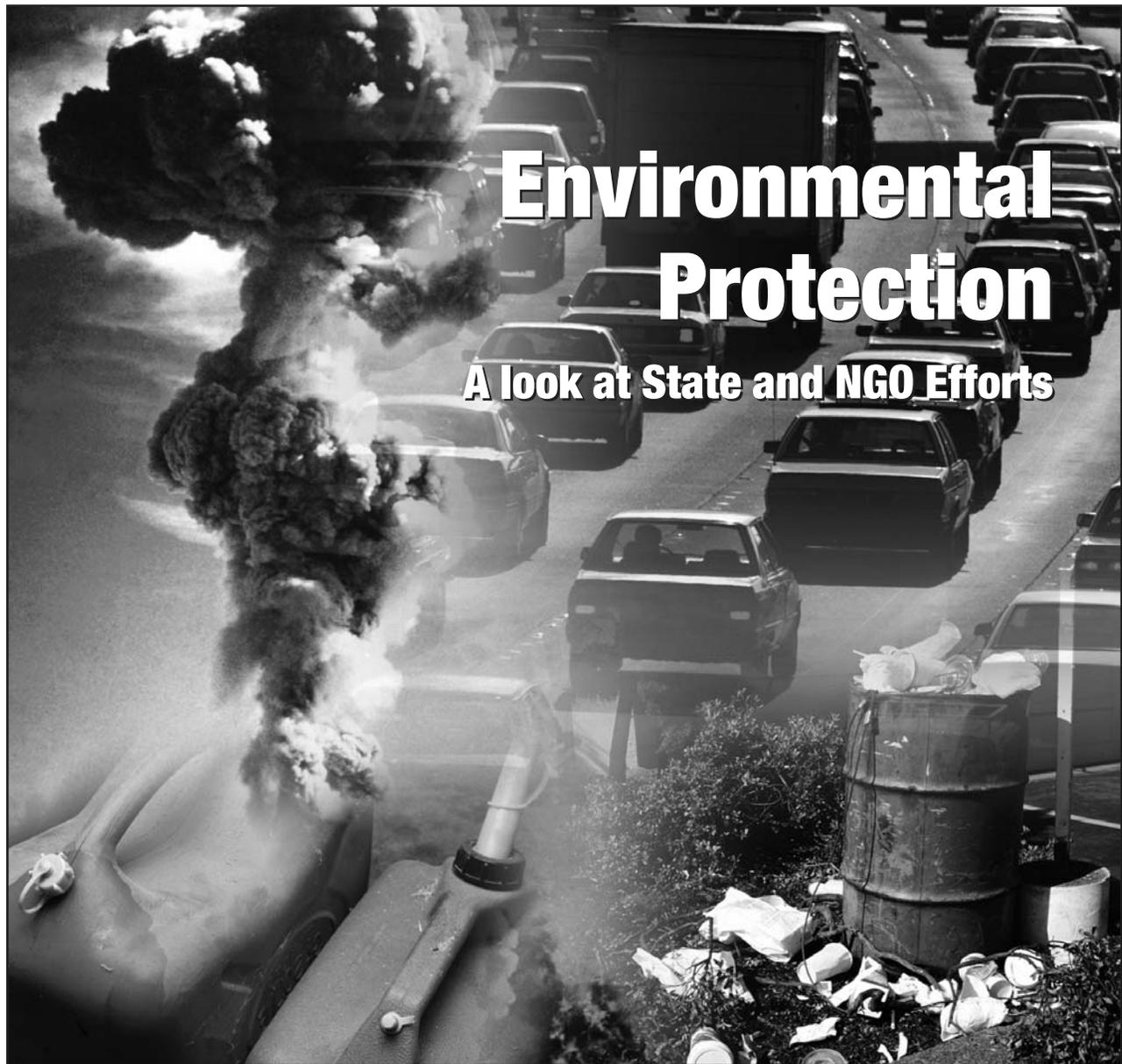


Section of Administrative Law & Regulatory Practice

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Chair's Message



Daniel E. Troy

It is hard for me to imagine, but this is (already) my last message as Section Chair. It seems just the other week that I was writing about the many benefits of Section membership, and looking forward to a year of exciting programs. I have come to realize that the Section is far greater than any individual; that anything we accomplish requires teamwork; and that, although individual leaders or members may come and go, the Section endures. Its whole is greater than the sum of its parts.

In large part, though, that whole is due to the efforts of individuals — many individuals — over the years. The myriad judges, academics, practitioners, and government lawyers who have contributed to the Section's vast array of programs and publications have helped to create an institution with a reputation for intellectual vigor and rigor, tolerance, conviviality, and fellowship.

Those characteristics were certainly on display during our Spring Meeting in Austin, Texas. Texas has been the location of world-shaking and -shaping redistricting "debates." And so it was a particularly appropriate place to entertain measures to reform the redistricting process. Indeed, so famous are these debates that the European Community is going to hold a special workshop on redistricting, focusing on the Texas experience.

Redistricting is an example of the type of issue that might not initially seem to be one that would naturally fall within the bounds of administrative law and regulatory practice. But redistricting is a process, and the Section is, of course, primarily concerned with process. Designing, or at least reforming, a process that could channel and rationalize the inevitably political nature of redistricting would be a major contribution to our politics. In the coming months, the Section will be looking hard at some recommendations that have been made to improve redistricting.

In addition, we heard a fascinating debate about the requirements for citizenship, a particularly timely topic given the intense immigration debate currently roiling the Hill, as well as the country. Is it enough merely to be born on American soil, even if that birth were to take place by accident (the example cited was a Belgian couple traveling here for a brief vacation)? Does such a policy encourage pregnant women to travel here for the birth of their child? And is such a policy constitutionally compelled?

Immigration is yet another topic that might not naturally be thought to be within our Section's bailiwick, yet the immigration issue is suffused with administrative law issues. In fact, one of the stated justifications for immigration reform is the overly slow nature of the process, which is so overtaxed and complex that many consider it broken.

Although not quite in as bad shape as immigration specifically, administrative law generally is also in need of reform. These reforms were the focus of the roundtable discussion on ideas for the 2008 report to the President-Elect. This project, which is open to all comers and about which I have written before, provides an opportunity to showcase the Section at its best — experts coming together, in a non-partisan manner, to forge consensus recommendations about how to improve the regulatory process that touches on so many aspects of our lives. The report will address, among other things, the utility of the centralized review process, the challenges facing agencies being asked to do more and more with less and less, and the Section's recommendations for reforming the Administrative Procedure Act (APA) provisions governing adjudication, which incoming Section Chair and UCLA law professor Michael Asimow championed. (A separate process is underway to assess whether the Section can forge a consensus around suggesting changes to the APA's regulation of the rule-making process.)

The substantive program we incorporated into the Council meeting further shows the Section's intellectual breadth.

Professor Asimow and former Section Chair and current Section nominee to the Board of Governors Jack Young joined former Election Assistance Commission member Ray Martinez III in a discussion moderated by former FEC Chairman Scott E. Thomas about what it means for a nation to be governed by the rule of law. Professor Asimow provocatively sketched out "thin" and "thick" versions of the rule of law, and posited that the ABA should use its limited resources to promote the "thin" version of the rule of law. That vision focuses primarily on whether there are adequate processes in place to ensure that laws and regulations are made properly and enforced fairly. The "thin" version is distinguished from a "thicker" rule of law, which involves substantive components such as free elections or freedom of expression. Provocatively, but practically, he suggested that even helping to promote the thin, more process-oriented rule of law was a tall enough order. He contended that forging a consensus around the "thick" rule of law was probably futile. Jack Young asked: what does the "rule of law" mean in a democracy for substantive rights, such as the right to a jury trial, to be free from the death penalty, and to have the guarantees under the Universal Declaration of Human Rights?

At the end of the day, what I find so compelling about our Section is the fact that its activities and concerns touch on almost every area of the law. Any practice that involves any level of government in any way, shape, or form — and what lawyer

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ADMINISTRATIVE & REGULATORY LAW NEWS

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Section Chair (automatic succession by operation of the bylaws):

Michael Asimow. Michael, currently Section Chair-Elect, is a Professor of Law Emeritus at the University of California at Los Angeles and co-author of a leading textbook on administrative law. He is a former liaison to the Section's Council for

State Administrative Law and a former Council Member. He is the editor and a co-author of the Section's *A Guide to Federal Agency Adjudication*, the drafter of the 2005 ABA resolution on adjudication, a past chair of the Adjudication Committee, and a co-reporter for the EU administrative law project.



Section Chair-Elect (automatic succession by operation of the bylaws):

H. Russell Frisby. Russell, currently Section Vice Chair, is a partner at the law firm of Fleischman & Walsh LLP. Before joining his current firm, Previously, Russell was a partner at Kirkpatrick Lockhart, served as President of CompTel/Ascent, a

telecommunications trade association, and served as Chairman of the Maryland Public Service Commission. Russell is a former Section Budget Officer and he has served as the Section's representative to the ABA Commission on Racial and Ethnic Diversity in the Profession.



Vice Chair

William V. Luneberg. Bill is a Professor of Law at the University of Pittsburgh School of Law. His areas of specialization are: Administrative Law; Environmental Law; and Civil Litigation. Bill's scholarship has been published widely in leading law journals. Bill's longstanding involvement with

the Section includes service on the Section's Council, chairing the Legislative Process and Lobbying and the Rulemaking Committees, serving on the Nominating and Scholarship Committees, and most recently co-editing the third edition of Section's *Lobbying Manual* book. In addition, Bill has played a leading role in developing several Section resolutions, and he has chaired and participated in many Section CLE programs.



Last Retiring Chair (automatic succession by operation of the bylaws):

Dan Troy. Dan is a partner at the law firm of Sidley Austin LLP in Washington, DC. Dan is former Chief Counsel of the Food and Drug Administration. Dan has served as co-chair of the Constitutional Law and Separation of Powers Committee and a

member of the Section's Council.

Budget Officer

William Morrow. For the past year, Bill has served as the Budget Officer. Bill is the Executive Director and General Counsel of the Washington Metropolitan Area Transit Commission. He is currently Editor-in-Chief of the Section's Administrative and Regulatory Law News as well as a co-chair of the Section's Interstate Compacts Project and a former chair of the Transportation Law Committee.

Secretary

James Conrad. Jamie is an Assistant General Counsel at the American Chemistry Council. He has served as co-chair of the Section's Regulatory Policy Committee and Vice-Chair of the Homeland Security Committee, and has organized and spoken at many programs for the Section. He also has been a Vice Chair of several committees of the Section of Environment, Energy & Resources. Jamie currently serves as Section Secretary.

Council Members:

Cary Coglianese. Cary is a Professor of Law and Professor of Political Science at the University of Pennsylvania Law School. He is also a Senior Research Fellow at Harvard University's John F. Kennedy School of Government and founder and co-chair of the Law & Society Association's international collaborative research network on regulatory governance. Cary is Vice-Chair of the Section's E-Rulemaking Committee and a frequent participant in Section programs on regulatory affairs. He is also Vice Chair of the Innovation, Management Systems, and Trading Committee of the ABA's Section on Environment, Energy, and Resources.

Richard Murphy. Richard Murphy is Professor of Law at William Mitchell College of Law. He co-chairs the Section's Judicial Review Committee. For the past several years, Richard has co-written the Judicial Review chapter of the Section's annual *Developments* book, and he has participated in many Section programs. He is a past editor of the Minnesota State Bar's *Administrative Law News*.

Paul Noe. Paul is the Vice President of Regulatory Affairs for the Grocery Manufacturers/Food Products Association. From 2001-2006, Paul served as Counselor to the Administrator of OMB's Office of Information and Regulatory Affairs. Prior to that, he served as Senior Counsel to the Senate Committee on Government Affairs. Paul has collaborated closely with the Section and its leadership on a broad range of issues over the past several years and has been a speaker at numerous Section programs.

Joe Whitley. Joe is a partner at Alston & Bird LLP. Joe served as the first General Counsel of the U.S. Department of Homeland Security. He has also served as Acting Associate Attorney General of the U.S. Department of Justice and as the U.S. Attorney of two different districts in Georgia. Joe is co-chair of the Section's Homeland Security Committee and helped initiate and co-chair the Section's first and second annual Homeland Security Institutes.

Clearing the Air: One Region at a Time

By William S. Morrow, Jr. ★

Maryland is the latest state to join the Regional Greenhouse Gas Initiative (RGGI), a multistate agreement aimed at reducing CO₂ emissions in the Northeast and Mid-Atlantic states. The initial objective is to curtail emissions from fossil-fueled power plants through a regional cap-and-trade program.

Some might argue that global warming remediation is a task best left to the federal government. Others might say that regulation of power plants is a matter traditionally relegated to the states.

This article will not settle that debate. Instead, I will look at certain legal attributes of interstate agreements, the use of such agreements by the states in the past to address common environmental concerns, and how these considerations might inform us as to the ultimate utility of the RGGI as presently incarnated in possibly bringing the two camps together.

Interstate Compacts Generally

When the thirteen original States ratified the Constitution, they ceded some of their sovereignty to the republic, but not all. One inherent attribute of sovereignty is the power to enter into agreements with other sovereign States. Indeed, the Constitution itself is evidence of that. On the other hand, the Compact Clause, Art. I, 10, cl. 3, provides that “No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State . . .”

Read literally, the Compact Clause would require congressional consent for all multistate agreements, but the Court has not interpreted the clause this

narrowly. Early on, the Court held that “the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.” *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Perhaps relevant to the RGGI agreement is the Court’s observation that:

If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So, in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of congress, which might not be at the time in session. *Id.* at 518.

A subsequent decision relevant here further defines which agreements need no consent. In *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978), the Court upheld the Multistate Tax Compact notwithstanding a lack of congressional approval because the compact did not “purport to authorize the member States to exercise any powers they could not exercise in its absence.” *Id.* at 473. The member States were free to accept or reject the recommendations of the Commission as to the adoption of uniform rules for the taxation of multistate taxpayers and could withdraw from the compact at any time. *Id.* The Commission was composed of tax administrators from the member States and was authorized to perform audits, but only upon request by a

member State, only in accordance with the laws and regulations of the requesting member, and with powers enforceable only in the courts of an expressly consenting member. *Id.* at 457.

On the other hand, “where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.” *Cuyler v. Adams*, 449 U.S. 440 (1981).

Environmental Protection Compacts Particularly

There are numerous compacts with broad mandates that to one degree or another encompass the remediation of man-made pollutants. Many of the river basin compacts, for example, have been struck not just for the purpose of managing scarce water supplies but ensuring water quality, as well. These multi-purpose compacts are too numerous to mention, but a comprehensive list of compacts may be found at the National Center for Interstate Compacts: www.csg.org/programs/ncic/. In addition, *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER’S GUIDE* neatly categorizes many of them. (See back cover ad this issue).

Of greater interest here are the compacts designed to address environmental nuisances in particular. For instance, several interstate compacts have been enacted to specifically target water pollution, including

- New England Interstate Water Pollution Control Compact
- New Hampshire-Vermont Interstate Sewage and Waste Disposal Facilities Compact
- Ohio River Valley Water Sanitation Compact

★ Executive Director/General Counsel, Washington Metropolitan Area Transit Commission; Co-Chair, Interstate Compact APA Project; Editor-in-Chief, *Administrative & Regulatory Law News*.

- Tennessee River Basin Water Pollution Control Compact
- Tri-State Sanitation Compact (CT, NJ & NY)

Similarly, the following compacts have as their sole purpose the safe disposal of low-level radioactive waste produced by nuclear power plants and other industrial and commercial facilities.

- Appalachian States Low-Level Radioactive Waste Compact
- Central Interstate Low-Level Radioactive Waste Compact
- Central Midwest Low-Level Radioactive Waste Compact
- Midwest Low-level Radioactive Waste Compact
- Northeast Interstate Low-level Radioactive Waste Compact
- Northwest Interstate Compact on Low-level Radioactive Waste Management
- Rocky Mountain Low-level Radioactive Waste Compact
- Southeast Interstate Low-level Radioactive Waste Compact
- Texas Low-Level Radioactive Waste Disposal Compact

As for active air pollution compacts, the Ozone Transport Commission is a multi-state organization responsible for advising EPA on ozone transport issues and for developing and implementing regional solutions to the ground-level ozone problem in the Northeast and Mid-Atlantic regions.

The Interstate Sanitation Commission created under the Tri-State Sanitation Compact (see above) had its water pollution mitigation mission enlarged in 1960–61 to include air pollution abatement. It is now known as the Interstate Environmental Commission. Its role with respect to air quality management is confined to conducting studies, sharing information and making recommendations to member States.

Some natural resource management compacts play a part in air quality management, as well. The Columbia River Gorge Commission, a creature of the Columbia River Gorge Compact between Washington and Oregon, approved an amendment to the Gorge management plan in 2000 that calls for the member states to continue

monitoring air pollution and visibility levels in the Gorge, to identify emissions sources affecting the Gorge, and to develop and implement a regional air quality strategy.

The Great Lakes Basin Commission has initiated a plan under the Great Lakes Basin Compact to monitor mercury in the atmosphere and precipitation in the Great Lakes area.

Finally, under the Tahoe Regional Planning Compact, the Tahoe Regional Planning Agency is charged with developing a regional plan for, among other things, “attaining and maintaining Federal, State, or local air and water quality standards, whichever are strictest, in the respective portions of the region for which the standards are applicable.” TRP Compact, art. V, § d. The agency may also adopt more stringent standards “if it finds that such additional standards or control measures are necessary to achieve the purposes of [the] compact.” *Id.* The compact also sets a specific goal of reducing air pollution caused by motor vehicles in the management area, to the extent feasible. Art. V, § c(2)(B).

The RGGI Specifically

The RGGI appears to fit the *Multistate Tax Comm’n* mold. The agreement is in the form of a Memorandum of Understanding (MOU) between the governors of the member states. Under the MOU:

The Signatory States commit to propose for legislative and/or regulatory approval a CO₂ Budget Trading Program (the “Program”) aimed at stabilizing and then reducing CO₂ emissions within the Signatory States, and implementing a regional CO₂ emissions budget and allowance trading program that will regulate CO₂ emissions from fossil fuel-fired electricity generating units having a rated capacity equal to or greater than 25 megawatts.

The MOU also provides for the creation of a regional organization (RO) to be headed by representatives of the member States. The RO’s mission is to:

1. Act as the forum for collective deliberation and action among the Signatory States in implementing the Program.

2. Act on behalf of each of the Signatory States in developing, implementing and maintaining the system to receive and store reported emissions data from sources and track allowance accounts for the Program.

3. Provide technical support to the States for the development of new offset standards to be added to state rules.

4. Provide technical assistance to the States in reviewing and assessing applications for offsets projects.

The MOU stipulates that “The RO is a technical assistance organization only. The RO shall have no regulatory or enforcement authority with respect to the Program, and such authority is reserved to each Signatory State for the implementation of its rule.”

Finally, a member State may withdraw from the MOU upon 30 days written notice.

As noted above, the New England states and some Middle Atlantic states have a good track record of reaching regional environmental accords. And the MOU appears to offer some potential for producing the desired result without congressional involvement. But the common denominator of the environmental protection compacts listed above, aside from their remedial purpose, is that they are all congressionally approved. Further, some Commerce Clause issues may be lurking in the MOU’s provisions making in-region offset projects worth more than out-of-region offset projects.

The MOU, however, does include the following provision for federal involvement at a later date: “When a federal program is proposed, the Signatory States will advocate for a federal program that rewards states that are first movers. If such a federal program is adopted, and it is determined to be comparable to this Program, the Signatory States will transition into the federal program.”

Why wait? Why not insert a proactive provision in the MOU calling for a cooperative lobbying effort to obtain congressional consent? The Clean Air Act certainly encourages states to move in this direction. (See 42 U.S.C. § 7402).

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The Politics of Local Climate Change Initiatives

By Kirsten H. Engel^{*} and Barak Y. Orbach^{**}

The Puzzle

A prevailing view of governments characterizes politicians as rational economic players with human weaknesses. Self-interest motivates players in the public sphere, just as it motivates players in the private sphere. Thus, according to this view, politicians and regulators act mostly to promote their own self-interest.

From this perspective, recent state and local government actions to mitigate climate change (“local climate change initiatives”) are nothing less than a complete enigma: why would a government impose costs upon its citizens for no apparent gain?

Greenhouse gases are truly global pollutants. The actual geographic location of local emissions is meaningless, because such gases mix in the atmosphere. Thus, when a local government limits emissions in its jurisdiction, it reduces only marginally the global risks of climate change. At the same time, such a government shares the benefits of its regulation with other governments that do not participate in sponsoring the costs of reducing emissions.

In such situations, a rational player would presumably be better off free riding on the greenhouse gas reductions of others and have no incentive to cooperate with those who regulate emissions. Nevertheless, in practice, many states and

localities are working either independently, or in cooperation with others, to address climate change through a variety of regulatory mechanisms. The Supreme Court’s recent landmark decision in *Massachusetts v. Environmental Protection Agency*,¹ addressed below, represents an important accomplishment of state and local governments in this regard.

The puzzle, therefore, is why local governments invest political and fiscal capital in initiatives that supposedly do not serve their self-interest.

The answer to this puzzle offers some old news with a positive spin. The old news is that political self-interest indeed serves as a primary motivation for governments. The local regulation we describe is a testament to the ability of local politicians to benefit from action on a global problem that cannot be solved on the local level. The positive spin is that local climate change initiatives demonstrate that self-interest may motivate public agents to choose a course of action that serves society’s larger interests.

In this article we explain how *political entrepreneurship and regulatory cascades* could lead politicians to adopt policies whose direct benefits are shared with other states and localities. Our discussion is focused on local climate change initiatives, but could be generalized to other regulatory contexts. We start by presenting the large scope of local climate change initiatives and continue with two major explanations for these initiatives.

Highlights of State and Local Action on Climate Change

Local climate change initiatives span a large and diverse set of government

programs.² For simplicity, we briefly describe only some of the major initiatives.

California Global Warming Solutions Act of 2006. Under this law, California has committed to a 25 percent cut in state greenhouse gas emissions by 2020 in order to lower the state’s emissions to 1990 levels.

California Greenhouse Gas Vehicle Emission Standards. In 2004, California became the first state to adopt limits upon the emission of greenhouse gases from passenger cars and light duty trucks. The California Air Resources Board estimates that this regulation will reduce greenhouse gases emitted from regulated vehicles by 18 percent in 2020 and 27 percent in 2030. The California standards have been or are in the process of being adopted by eleven other states: Arizona, Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. Legal challenges filed by the automobile industry presently delay the implementation of these state standards.

Electric Power Plant Carbon Dioxide Emission Standards. Several states are implementing emission standards related to electric power plants. California, Massachusetts, and New Hampshire cap carbon dioxide emissions of power plants, while Oregon and Washington require power plants to offset a percentage of their carbon dioxide emissions.

State Renewable Portfolio Standards. Twenty-four states and the District of Columbia presently require electric utility companies to generate a certain percentage of electricity from qualifying renewable technologies. The stringency of the renewable portfolio standards (“RPS”) varies greatly from state to state, with Maryland presently holding the most modest standard (9.5 percent by 2022) and California holding the strictest

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¹ 127 S.Ct. 1438 (2007).

² For a more comprehensive listing of state climate change initiatives see Pew Center on Global Climate Change at www.pewclimate.org.

standard (20 percent by 2017). Many of these states have already reached their initial RPS goals and enacted a second round of RPS legislation. In addition, more than 26 states allocate funds, often called “public benefit funds,” to support renewable energy projects and energy efficiency programs.

State Emission-Reduction Plans. Most states have finalized or are in the process of drafting plans for greenhouse gas emission reductions. These planning efforts take many forms. The most aggressive plans lay out specific greenhouse gas mitigation policies and programs designed to meet clear targets for reductions on specified timetables. Fourteen states adopted plans with targets, while another fifteen states adopted plans with no targets. Greenhouse gas registries are an important implementation tool for such plans, because they could allow states to track progress in emission reductions and open markets for trade in emission rights.

Regional Mitigation Programs. One of the more interesting developments in local climate change initiatives is regional collaborations among states. The most advanced regional collaboration is the Regional Greenhouse Gas Initiative (“RGGI”). Established by eight Northeastern states, RGGI caps carbon dioxide emissions and create a framework for trade in emission rights in the electric power generation sector. The eight RGGI states (Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, and Vermont) are in the process of adopting a binding model rule. Under the model rule’s plan, greenhouse gas emissions from the electric power sector will be capped at levels of the plan’s start date in 2009 and will be reduced by 10 percent by 2019. Maryland is in the process of joining RGGI. In February 2007, the governors of Arizona, California, New Mexico, and Oregon established the Western Regional Climate Action Initiative, to which the Canadian Province of British Columbia joined two months later. Unlike RGGI, this initiative is not focused upon the emissions of electric power plants. This initiative creates a framework to set regional emission

targets and to form markets for trade in emission rights for multiple sectors.

Cities Committing to Greenhouse Gas Reductions. Cities across the country and around the world actively develop and implement plans to reduce greenhouse gases. In June 2005, the U.S. Conference of Mayors adopted the Mayors Climate Action Protection Agreement that urges cities to adopt the greenhouse gas emissions reduction target and timetable found in the Kyoto Protocol – a reduction of 7 percent below 1990 levels by the year 2012. As of May 15, 2007, 514 mayors had signed this agreement.

Local Governments’ Actions for Federal Regulation. Some local governments have invested resources in lobbying and litigating for federal climate change regulation. The most celebrated action in this category is *Massachusetts v. Environmental Protection Agency*.³ In this case, the Supreme Court held that the federal Clean Air Act applies to climate change. Further, the Court directed the EPA to determine whether the conditions mandating federal regulation — reasonable anticipation of endangerment — are triggered with respect to motor vehicle greenhouse gas emissions. Local government efforts to prompt federal climate regulation present the same puzzle as other local climate change initiatives do. When a local government lobbies or litigates for federal regulation, it incurs the full cost of such activities and shares any benefits accrued with other governments. The costs and benefits resulting from actions for federal regulation may differ in magnitude from the costs and benefits generated by local climate change initiatives sponsored by the locality itself. Still, rational behavior presumably should instruct local governments not to act.

What Is Going on?

The number of local climate change initiatives indicates that, despite the apparent net costs of adopting such initiatives, their adoption is appealing to at least some politicians.

At the outset, it is important to emphasize that politicians’ own prefer-

ences for fighting climate change offer a very partial explanation. Devising and implementing climate change initiatives are costly. In a world of limited resources, the spending of political and fiscal capital on climate change initiatives comes at the expense of other desirable goals. Thus, the observed willingness to invest precious political and fiscal capital in climate change initiatives must mean that politicians anticipate capturing some benefits from these initiatives.

Our analysis of the existing initiatives suggests that the political capital offered by environmental constituencies allows politicians to implement their own environmental preferences against climate change and possibly motivates some neutral politicians to invest in local climate change initiatives.

Constituencies favoring climate change regulation include environmental groups that are motivated by environmental concerns, but also financial interests of certain industries. Examples of such industries include clean industries in competition with fossil fuel-based industries, such as wind power companies and industries that could lose business due to climate change, such as coastal real estate developers and seasonal tourism businesses.

Like any other type of social preferences, environmental preferences are not homogeneous and vary geographically and over time. The existence of such preferences, regardless of their motivation, together with anticipated trends in such preferences, offer politicians political capital for investing in local climate change initiatives.

We identify two major forces that explain local climate change initiatives: Political entrepreneurship and regulatory cascades.

Political Entrepreneurship. A lucky politician endorses policies that promote social goals before they become popular. An opportunistic politician identifies trends in social preferences and starts promoting social goals that are anticipated to become popular. Polling data demonstrates that climate change is an attractive agenda issue for politicians. The issue

continued on next page

³ 127 S.Ct. 1438.

offers politicians an opportunity to distance themselves from big oil and gas interests, whose public popularity is currently low, without appearing to be anti-business. Furthermore, the absence of an aggressive federal response to climate change only enhances the political capital generated by endorsing climate change initiatives. State and local politicians championing climate change regulation receive disproportionate media coverage, in part because of the contrast between their aggressive stance and the federal government's passive stance.

Regulatory Cascades. A politician, who is not lucky or opportunistic enough to endorse a social goal before it becomes popular, may find herself politically disadvantaged by her inaction. Such politicians often try to regain political strength by adopting a popular policy that luckier or more opportunistic politicians have already adopted. In other words, the endorsement of a local policy by some governments can create a regulatory cascade that pushes slow politicians to endorse similar policies in order "to keep up with the neighbors." In the environmental context, this is true especially for politicians whose constituencies are more sensitive to climate change, such as those in coastal states, or have financial interests in industries that compete with polluting industries. Moreover, regulatory cascades partially explain why somewhat passive politicians may seek to join climate change collaborations, even though other politicians will reap the lion's share of the public

credit. Put simply, once a regulatory trend is created, not jumping on the bandwagon may be politically risky.

A more detailed analysis of political entrepreneurship and regulatory cascades offers some insights into the aggressiveness of local initiatives, the likelihood of collaborations between state politicians, and the origins of initiatives within administrative ranks. For the purpose of this article, it is worth noting that politicians in populous states, such as California, can spearhead changes in national industrial standards, because it may be too costly for manufacturers to produce goods in multiple standards. A success in changing industrial standards could offer great political benefits for political entrepreneurs.

Political entrepreneurship and regulatory cascades provide some explanation for the adoption of local climate change initiatives, but they do not necessarily guarantee *effective* initiatives. As described above, some of the existing local initiatives lack effective enforcement mechanisms since they do not specify emission reduction targets and timelines. The variance in the effectiveness of local climate change initiatives is largely explained by differences in the size, power, and sophistication of local environmental constituencies, individuals and clean industries. In some states, such as Kansas, low-cost signaling of environmental sympathy is sufficient to collect the potential political gains, while in other states, such as California, environmental activism is required to survive politically.

Ineffective climate change initiatives have two potential effects that operate in opposite directions: a placebo effect and an expressive effect. On the one hand, an ineffective initiative may create the impression that something is done (the placebo effect). On the other hand, the mere existence of an initiative regardless of its effectiveness could strengthen pro-environmental public preferences (the expressive effect). The balance between the placebo and the expressive effects is subtle and complex, but in the long run the expressive effect is likely to be stronger because the impact of the placebo effect depends on public misunderstanding and ignorance. The long-term prospects may offer little comfort, however, given the severity of the predicted climate change problem and the need for an immediate action.

Conclusion

Local climate change initiatives pose a puzzle: Why do politicians invest in policies whose direct benefits are shared with other states and localities?

Our analysis suggests that political entrepreneurship and regulatory cascades offer some rationale for politician's investments in local initiatives that have only marginal effects upon the global problem of climate change. These forces, however, may be insufficient to motivate the adoption and implementation of effective actions, although the analysis suggests that effectiveness will increase over time. ○

Chair's Message *continued from page 1*

can completely ignore the government? – must inevitably be concerned by the manner in which those rules and regulations are made and administered. Viewed that way, our largest challenge may be deciding what not to focus upon.

Samuel Johnson famously said that "when a man is tired of London, he is tired of life." I would say that when a lawyer is tired of administrative law, he or she is tired of all of the law. By

choosing to remain (or become, if you are not yet a member) a part of this Section, you are making a powerful statement that you remain energized by the law. You are interested in the law as it is and as it should be. In the years ahead, I look forward to continuing to work with all of you to bring the Section's vast expertise to bear in making our government work just a little bit better for those it regulates. ○

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Greenwash

By Thomas P. Lyon* & John W. Maxwell**

Introduction

Environmental issues have been on the corporate radar screen for years. Thousands of firms participate in the Environmental Protection Agency's partnership programs, and many more participate in industry-led environmental programs such as the Council of Great Lakes Industries or the American Chemistry Council's "Responsible Care" program.

Despite these efforts, large portions of the public continue to view business as an enemy of the environment. Furthermore, although there are many reasons why companies should want to publicize their environmentally-friendly actions, firms are often surprisingly hesitant to do so, or to issue detailed environmental reports.

One important reason companies hesitate to spotlight their environmental good deeds is for fear those deeds will be dismissed as "greenwash" by non-governmental organizations (NGOs). Often these NGOs attempt to punish companies they view as greenwashers by embarrassing them in the media, and encouraging consumers to boycott them. At the 2002 Earth Summit in Johannesburg, a group of NGOs held a Greenwash "Academy Awards" to criticize companies that falsely promote themselves as environmentally responsible and to "recognize these companies for what they are: hypocrites." Winner for Best Greenwash was "BP for their Beyond Petroleum rebranding campaign." Among the other awards, South African electricity firm Eskom was

Runner up for Best Picture "for being a key member of Business Action for Sustainable Development while generating electricity from coal and nukes." Monsanto was Runner Up for the Lifetime Achievement Award for its "tireless promotion of Roundup Ready GM crops as a solution to world hunger."

What is Greenwash?

Before we can discuss effectively the phenomenon of corporate greenwash, we need a clear notion of what the term actually means. It turns out to be surprisingly hard to pin down the meaning of the term based on its popular usage. NGOs often use the term "greenwash" in such a broad way that no oil company that promotes its own environmental improvements could possibly avoid the label. Webster's New Millennium Dictionary of English defines greenwash as "The practice of promoting environmentally friendly programs to deflect attention from an organization's environmentally unfriendly or less savory activities." The Concise Oxford English Dictionary (10th Edition) defines it as: "Disinformation disseminated by an organization so as to present an environmentally responsible public image; a public image of environmental responsibility promulgated by or for an organization etc. but perceived as being unfounded or intentionally misleading." Both these definitions emphasize the idea that the public has limited information about corporate environmental performance, and that corporations therefore can manipulate the dissemination of information to mislead the public.

The focus on greenwash is striking insofar as it targets corporations that report some good deeds, rather than companies that report nothing at all. It may be that activist groups are offended by the apparent hypocrisy of firms that trumpet small successes while failing to own up to their significant shortcomings.

Perhaps these groups fear that environmentally-malignant firms will capture market share fraudulently, thereby exacerbating environmental problems rather than alleviating them. Alternatively, it is possible that companies that enhance their public visibility by promoting their successes become easier targets for activist groups with limited budgets, much as Nike and Starbucks are easier to attack than companies that are not household names. In this paper, we do not attempt to assess the underlying motives of the activists who focus on greenwash; rather, we offer an analysis of the consequences that may follow when activists take this approach.

Using the term "disinformation" to define greenwash implies that companies employ deliberately false messages. When examined carefully, however, corporate greenwashing does not seem to fit this definition. Instead, the typical concerns raised by NGOs are that companies present positive information out of context in a way that could be misleading to individuals who lack background information about the company's full portfolio of activities. Consider the following example, taken from *Don't Be Fooled: The Ten Worst Greenwashers of 2003*¹:

"Royal Caribbean points to its advanced wastewater treatment systems as a sign of environmental progressiveness, yet they are installed on just 3 of the company's 26 cruise ships. The advanced systems are only found on its Alaskan fleet, which due to Alaskan law are subject to the strictest environmental standards in the industry. Royal Caribbean deems them unnecessary on cruise ships that travel other routes."

¹ By Johnson, Geoff. Available at <http://www.thegreenlife.org/dontbefooled.html>.

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Thus, we will define greenwash as the selective disclosure of positive information about a company's environmental or social performance, without full disclosure of negative information on these dimensions. Note that this is not the same as having a poor record of environmental performance. A firm can have a poor record without presenting any positive information about itself, in which case it would not be accused of greenwashing. On the other hand, it can have a good record while simultaneously promoting its positive actions publicly and failing to discuss its (few) negative environmental impacts, in which case it would be accused of greenwashing. Note also that greenwash is not the same as simply failing to report negative information; greenwash involves the additional step of selectively choosing to report positive information.

Key Results

In a recent paper, (Lyon, Thomas P. and John W. Maxwell. 2007. *Greenwash: Corporate Environmental Disclosure under Threat of Audit*, Working Paper, University of Michigan), we undertook a detailed analysis of corporate incentives for environmental disclosure, and how they are affected when NGOs may investigate and penalize companies for greenwashing, e.g., by launching a boycott or undertaking a negative information campaign. Here we discuss our key findings.

Who Greenwashes?

We find that the types of firms most likely to engage in partial disclosure are those with an intermediate probability of producing positive environmental and social outcomes. Firms viewed as poor environmental stewards might as well fully disclose: they gain a lot from trumpeting a success, and lose little by withholding information about a failure (since they are already expected to fail); thus, there is little value in risking public backlash by refusing to disclose their failures. At the other extreme, firms seen as environmental leaders do not need to disclose anything; they gain little by disclosing information about successes (since they are already expected to succeed), and lose a lot by disclosing a

failure; thus, there is little value in risking public backlash by disclosing a success while hiding failures. However, for firms with moderate reputations, partial disclosure is attractive: disclosing a success can produce a significant improvement in public perception, and withholding information about a failure can prevent a significant negative public perception; thus, they are willing to risk public backlash by disclosing only partially.

Environmental Reputation and Disclosures

We also find that when there is a decline in a firm's likelihood of producing environmental successes, it tends to increase its disclosures. As the foregoing paragraph argued, firms with strong environmental reputations have little need to disclose, while those with poor reputations have little to lose by disclosing. Our analysis shows that when a firm's environmental reputation falls, it never has incentives to decrease its environmental disclosures, and in many cases it will increase them.

A natural experiment for testing this hypothesis was provided when the Exxon Valdez struck a reef in Prince William Sound, Alaska, on March 24, 1989. The 11 million gallon spill caused oil company stakeholders, including citizens and shareholders, to re-evaluate the environmental risk of oil company operations. As one might expect, the incident also had a strong negative impact on the company's finances: within a year of the accident, Exxon had already spent over \$2 billion to clean up the spill. Accounting research has found that on average major oil companies more than doubled their environmental disclosures in the wake of the Valdez accident. This increase in disclosures was virtually required for Exxon, which had to describe the event to shareholders. The interesting finding was that other major firms in the industry also increased their disclosures.

Lessons for NGOs

We find that an increased threat of NGO audits does not necessarily motivate firms to become more open and transparent. There is a real possibility that the fear of public backlash for greenwash will cause firms to "clam up" rather than

become more forthcoming. In particular, such a response is likely from socially-responsible firms with a high probability of successful projects who are not fully informed about the environmental impacts of their actions. In an environmental context, one might characterize such firms as "poorly informed firms in clean industries." Because they are in clean industries, such firms tend to receive the benefit of the doubt if they make no disclosures. Yet because they are not well informed about the impacts of their actions, they are likely to lack the information needed to provide full disclosure, and hence they may well fear an NGO audit. For firms such as this, activist pressures designed to increase disclosure may backfire and produce exactly the opposite of the intended results.

The threat of NGO audits is more likely to increase disclosures from "well informed firms in dirty industries." Because they are in dirty industries, these firms tend to be viewed with skepticism if they make no disclosures. And because they are well informed, they are likely to be in a position to fully disclose. Hence, activist pressures are best focused on firms of this type. Fortunately, this description fits quite well with the types of firms typically singled out for scrutiny and outrage by activists, such as large firms in the oil and chemical industries.

The Role of Environmental Management Systems

As mentioned above, the threat of NGO auditing is more likely to induce a firm to become more open and transparent if the firm operates in an industry that is likely to have socially or environmentally damaging impacts, and if the firm is relatively well informed about its environmental or social impacts. In turn, a firm is more likely to be well-informed about its environmental impacts if it has adopted an environmental management system (EMS). An EMS is a set of management processes and procedures that allows an organization to integrate environmental issues into day-to-day decisions. Of course, a necessary

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Policy Analysis for Natural Hazards: Some Cautionary Lessons from Environmental Policy Analysis

By Matthew D. Adler*

How should policy analysis for natural hazards be structured? Academics have given relatively little systematic attention to this question, by contrast with policy analysis for so-called “environmental” hazards (that is, chemical toxins and radiation). Turning from academic work to governmental practice, there certainly *are* agencies that have well-developed policy-analytic protocols for addressing natural hazards—in particular, the U.S. Army Corps of Engineers (ACE). But expertise in policy analysis varies widely among natural hazards agencies. Compare ACE with the Federal Emergency Management Agency (FEMA), which has only fairly recently begun to develop risk assessment models. By contrast, all the leading federal agencies that focus on chemical toxins and radiation have adopted risk assessment as a key component of their decisionmaking.

Academics and policymakers need to engage in more sustained discussion about how to evaluate the threats that natural hazards pose to human life, health, property, and other human interests, and the desirability of governmental policies for reducing those threats. The particular strategy I adopt here is to draw from the U.S. experience with environmental hazards policy analysis in suggesting *cautionary* lessons for natural hazards policy analysis. I focus here on cautionary lessons as a heuristic device, designed to structure the learning exercise.

It is important to distinguish, at the outset, between *policy analysis* and *policy tools*. Natural hazards *policy tools* are the various kinds of interventions by which governmental bodies can reduce the

harms caused by earthquakes, floods, hurricanes, tornadoes, and other natural hazards — for example, constructing levees or floodwalls; improving building codes; reinforcing existing buildings; relocating buildings from the floodplain; requiring individuals in high-risk areas to purchase insurance; evacuating individuals in advance of a specific flood or hurricane; or providing emergency food, medical care, shelter, and social services to an area hit by a natural hazard. By contrast, *policy analysis* means the application of some decisionmaking technique for choosing among policy tools, such as cost-benefit analysis or competitor techniques.

In the full Article from which this discussion is drawn, I argue for the following list of lessons for natural hazards policy analysis, analyzing each in detail. Rather than providing even a summary discussion of each lesson here, I choose a few so as to provide a flavor of the analysis.

What can natural hazards policy makers learn from environmental policy analysis?

Nine cautionary lessons:

- (1) Do not give priority to safety or any particular aspect of well-being (AGIR)¹
- (2) Do not use proxy tests (AGIR)
- (3) Do not ignore population size (AGIR)
- (4) Do not use arbitrary non-zero numerical cutoffs
- (5) Do not conflate moral rights infringements with welfare setbacks (even to vital interests)
- (6) Develop risk assessment techniques suitable for multidimensional, population-size sensitive policy analysis
- (7) Do not exclude relevant information (AGIR)

(8) Use probabilistic rather than deterministic risk assessment (AGIR)

(9) Do not adopt a global posture of “conservatism” in handling uncertainty

Nontrivial normative advice about policy matters is invariably somewhat controversial. I do not pretend that my recommendations for natural hazards policy analysis are robust across all plausible moral views. On the other hand, giving useful advice does not entail adopting some fully specified and therefore highly controversial moral view. My general moral framework for this discussion, one that I have adopted in other work,² is “weak welfarism.” Weak welfarism is a pluralistic framework that recognizes overall well-being as a morally relevant consideration, but also allows for distributive considerations and moral rights.

Lesson 1: Do not give priority to safety or any particular aspect of well-being (AGIR)

Environmental policy analysis often prioritizes safety (longevity and health) over other aspects of human well-being. Paradigm cases are the Delaney Clause, which requires FDA to refrain from licensing carcinogenic food additives, notwithstanding the nutritive or hedonic benefits of those additives or, for that matter, their benefits in preventing diseases; the general provision for food additives, which demands that they be “safe”; and section 109 of the Clean Air Act, which requires EPA to issue standards for certain major air pollutants at a level that “protect[s] the public health” with an “adequate margin of safety,” notwithstanding economic costs.

² See Matthew D. Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis* (2006).

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¹ “AGIR” means “absent good institutional reason,” an idea to be discussed in a moment.

continued on next page

The fact that environmental policy-makers regularly give priority to safety over other human interests is worrying from the perspective of weak welfarism. Human well-being is multidimensional. Martha Nussbaum has defended a plausible list of intrinsic human interests which runs as follows: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; control over one's environment. Of course, one might quarrel with the details of Professor Nussbaum's list, but no plausible list counts longevity and health as the sole human interests, or as interests that have a categorical priority over others.

However, it is possible, at least in theory, to provide an "institutional" justification for safety-prioritizing policy-analytic tests — one that sounds in administrative decision costs and the possibility of administrative error. In particular, it is possible that a provision which instructs an environmental agency to set pollution levels using a safety-maximization criterion is a better way to implement the criterion of overall well-being than a provision instructing the agency to set pollution levels using cost-benefit analysis. Why? The safety-maximization criterion has some (albeit quite imperfect) correlation with the construct of overall well-being. Safety-maximizing projects are likelier to increase overall well-being than projects identified through a coin flip. Further, although the cost-benefit criterion is better correlated with overall well-being, cost-benefit analysis may have higher decision costs, and/or be associated with a higher rate of bureaucratic error, than safety maximization. Decision costs include both direct costs and delay costs. As for errors, the cost-benefit criterion might lead to a higher error rate either because administrators who are fully motivated to employ the criterion misapply it, or because it is more difficult for agency overseers (such as courts, legislators, and the President) to oversee compliance with the criterion by administrators motivated by other goals.

In point of fact, I very much doubt that institutional considerations *do* make safety-prioritizing procedures a better mechanism for advancing overall well-being than cost-benefit analysis. But this

is an empirical question, having to do with the capacities and motivations of agency staff and overseers.

How relevant are these observations about the multidimensionality of well-being to natural hazards policy analysis? To begin, it is quite obviously true as an empirical matter that natural hazards not only kill or injure humans, but produce a variety of other sorts of welfare setbacks. They cause property damage, business interruptions, and resultant losses of wealth. Beyond that, they produce temporary or even protracted homelessness, psychological trauma, unemployment (often coupled with distress, anxiety, or anger), the disruption of families and communities, the interruption of schooling, and the destruction of cultural heritage.

Natural hazards decisionmakers, like their environmental counterparts, do sometimes employ choice criteria that give special priority to certain aspects of well-being. The clearest example is ACE's procedures for determining whether and how to build flood control structures. ACE has often relied on cost-benefit analysis in making these decisions. However, this is a truncated kind of cost-benefit analysis, which includes economic costs and benefits, but not safety or ecological effects (other than recreational values). So there is an inversion from the environmental case, in which regulators often give priority to safety over economic costs.

It is hard to see what the institutional justification for ACE's truncated cost-benefit analysis would be. Consider safety benefits. The marginal decision costs of predicting both the safety and economic benefits of flood control structures, rather than simply the economic benefits, would seem to be low. Further, given that there are now well-accepted techniques for pricing safety, it is not clear why adding safety to the list of monetized impacts would substantially increase bureaucratic shirking or error by ACE staff. To be sure, decisions about how to build flood control structures may typically have a small effect on the sheer number of flood fatalities and injuries, because the government can warn and evacuate in advance of a flood. However, the warn-and-evacuate strategy is not perfect at preventing fatalities and

injuries (as Hurricane Katrina evidences) and the overall welfare value of saving even a single life is large. Thus information about safety impacts, which can be incorporated in ACE's cost-benefit analysis at low marginal decision costs, would seem to be worth incorporating.

What about the valuation of ecological effects? Here, ACE is on slightly firmer ground. Many applied economists believe that "non-use" values should be incorporated in cost-benefit analysis, but I have argued elsewhere that this position is incorrect.³ On the other hand, it is hard to see why ACE would be justified in excluding use values from its cost-benefit analyses—namely, changes to the well-being of those who physically interact with some ecological resource, including not merely recreational values such as hunting, fishing, boating, hiking, and camping, but also the benefits of clean, potable water and good visibility; scenic values; and so on. There is now a large literature in ecological economics on monetizing use values, and so the decision and manipulability costs of incorporating these in ACE's cost-benefit procedure would seem to be lower than the benefit (in more accurately identifying welfare-maximizing flood control projects).

Lesson 2: Do not use proxy tests (AGIR)

Environmental provisions often make reference to technological "feasibility" or "availability." For example, Section 112 of the Clean Air Act requires that the EPA set the emissions level for a new pollution source at a level which is no higher than "the emission control that is achieved in practice by the best controlled similar source." The Occupational Safety and Health Act instructs OSHA to set a standard for workplace toxins at a level which "most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity . . ."

Technological availability or feasibility might be a matter of what is physically possible, given current science and engineering, or rather a matter of norms and practices among some group of actors. It is hard to imagine the first sort of

³ See *id.*

approach having much role in natural hazards policy analysis. Consider levee design: the largest physically possible levee would be hundreds of feet high and massively thick and strong. Surely ACE should (always!) stop well short of this point in building its levees. Parallel points could be made about the construction of hazard-resistant buildings and structures.

Technological availability in the second, norms-and-practices sense, is more thinkable. For example, seismic codes could be specified with reference to current building practices. New construction could be required to be as protective as some percentile of existing construction.

A different sort of technology-based approach to policy analysis, exemplified by ACE practices, employs specific technological rules of thumb. Until the 1990s, ACE traditionally added 3 feet of freeboard to the design height of its levees, so as to prevent overtopping caused by higher water than was forecast for the design flood.

Closely related to technology-based policy analysis, and an important tool in current natural hazards decisionmaking, is reliability-based analysis. An excellent example is the approach used by governmental or quasi-governmental bodies in drafting seismic building codes. These bodies typically aim to write codes that will avoid building collapse in the event of any nonextreme earthquake (for example, any earthquake smaller than the 475-year earthquake). The decisional criterion employed by the code drafters is “prevent building collapse in nonextreme earthquakes” rather than “maximize net benefits, including both economic and safety impacts” or “maximize safety benefits.” A similar approach has been traditionally used in designing dams, specifically in deciding how low the risk of dam failure (collapse or overtopping) should be. The goal has traditionally been to design the dam so that it will not fail except in an extreme precipitation event.

To sum up: a variety of proxy tests are currently used, or might conceivably be used, by environmental and natural hazards decisionmakers. These are proxy tests insofar as they focus the decisionmaker’s attention on some feature of available choices *other than* their impact on well-being or some of its dimensions. Proxy tests might be technology-based tests (of

various kinds), or, a close cousin, reliability tests. Or they might take some other form.

Are proxy tests an appropriate policy-analytic tool for environmental or natural hazard regulators? The answer should have a familiar ring: proxy tests are justifiable, if at all, on institutional grounds.

To begin, it is clear that proxy tests will, at some rate, select suboptimal policies—policies that are worse than alternatives with respect to overall welfare, equity, and rights. The critical literature on technology-based tests in environmental law makes this point, showing how a requirement that firms employ “feasible” pollution-reducing measures can lead to inefficient overregulation (if, for example, small firms are required to employ high-fixed-cost technologies) or underregulation (if it would be most efficient to reduce pollution beyond the point that is technologically feasible given continued production of the good, for example by shutting down production entirely).

Similar observations can be made about proxy-based criteria for natural hazards policymaking. Consider ACE’s three-foot-of-freeboard rule. The rule was meant to provide an extra margin of protection for communities at risk of flooding. But the protection provided by the rule varies from community to community. A recent study by the National Research Council found that the annual probability of flooding in communities protected by levees built to the one hundred-year flood plus three feet of freeboard varied widely. Or consider the proxy test used to write seismic building codes: ensure that buildings do not collapse except in extreme earthquakes. This maps, roughly, onto a safety-focused test, which says to construct buildings to avoid fatalities except in extreme earthquakes—since fatalities caused by building shaking in earthquakes mainly occur when buildings collapse. But the mapping is not perfect, because some damage to buildings short of collapse may cause fatalities (for example, when ceilings or lights fall on occupants). Further, much economic loss can occur when buildings are shaken without collapsing: direct economic loss by virtue of damaged building components, systems, or contents, indirect economic loss by virtue of business interruption, and other indirect effects.

Even though proxy-based tests pick out suboptimal policies at some nonzero rate, instructing agencies to employ proxy tests can be optimal if they are sufficiently accurate in tracking overall well-being, equity, and moral rights, and if the decision costs and rate of bureaucratic error under alternative tests is sufficiently high. But is this possibility in fact realized? In the domain of environmental policy, the answer is difficult and contested, and may well depend on context. Technology-based proxies may not require a risk assessment, whereas a cost-benefit or safety-maximization procedure will. So technology-based proxies may have lower decision costs. But, given advances in computational speed, software, and data availability, which facilitate risk assessment, the decision-cost gap, here, is shrinking. Technology-based proxies may also be clearer in their requirements, hence less manipulable by bureaucrats (or interest groups). The shift from a safety-maximization approach to a technology-based approach *does* seem to have revived the regulation of air pollutants under section 112 of the Clean Air Act. On the other hand, FDA has long regulated food additives using risk assessment, under the general requirement that food additives be “safe.” I am not aware of evidence that the FDA has regularly subverted this safety requirement to serve nonsafety goals.

Scholars need to think about proxy-based natural hazards tests in similar terms—by looking to the decision costs and bureaucratic error rates associated with these tests, as compared to alternative policy-analytic tests. In some instances, it will pretty clearly emerge that a proxy-based test is unjustifiable. This is the case, I suggest in the Article, for ACE’s traditional three-foot-of-freeboard test. By contrast, the use of no-collapse tests in designing building codes plausibly has substantial institutional advantages as opposed to, for example, cost-benefit analysis. Determining the no-collapse level, by contrast with cost-benefit analysis, does not require determining the lives saved or direct or indirect economic costs avoided by various possible degrees of building strength. So there is some

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apparent economy in terms of decision and manipulability costs.

Lesson 3: Do Not Ignore Population Size (AGIR)

A policy-analytic criterion is insensitive to population size when it chooses a policy without reference to the number of individuals harmed by, or exposed to, the environmental or natural hazard that the policy is redressing. In the area of environmental and natural hazards policy, this typically occurs in two ways. First, the agency might employ a proxy test for selecting policies. Second, the agency might employ a policy-analytic criterion that does focus on some or all of the dimensions of well-being, but is structured in a population-size-insensitive way.

An environmental-policy example of the first, proxy-based variant of population-size insensitivity would be a requirement that the agency set emissions levels for new sources in each industrial category at a level achievable by the best available technology, or by the top quartile of polluters. This criterion makes no reference to the safety impacts of a given industrial category's emissions and, in particular, to the number of individuals exposed to or killed by its pollutants.

A natural-hazards example of the population-size insensitivity that flows from a proxy test would be a reliability-based criterion for designing structures which stipulates that the structure must not fail except in a specified extreme event. Consider, for example, the criterion that seismic codes should ensure that no building collapse except in a 475-year earthquake. This criterion does not attend to whether the building being strengthened will contain a few individuals, a few dozens, hundreds, or thousands.

Population-size insensitivity of the second kind routinely occurs in environmental law, by virtue of "individual risk" tests. These tests characterize an environmental hazard's safety impact by looking to the incremental individual fatality risk borne by some individual in the exposure distribution, rather than to the number of deaths caused by the hazard. For example, the EPA's rules for remedying hazardous waste sites under the Superfund statute mandate that a site cleanup must occur whenever the maximally

exposed individual incurs an incremental lifetime fatality risk exceeding one in ten thousand. This is true regardless of whether the site is in a remote or settled area.

"Individual risk" tests seem not to have been explicitly used by natural hazards regulators. But they have a very close analogue in a criterion that is sometime used in deciding how to design policies, such as building levees and floodwalls, to protect settled areas from floods and hurricanes. Call this the "area-protection" criterion. It says that a policy must be chosen that protects the settled area from all but extreme events (from all but the one hundred-year flood, the one hundred-year hurricane, the probable maximum flood, the probable maximum hurricane). Although ACE's current stated policy is not to use the area-protection criterion in selecting its preferred projects, relying instead on cost-benefit analysis, the area-protection criterion is important under the National Flood Insurance Program and has been employed in other contexts as well. In effect, the area-protection criterion says that the annual risk of physical harm or property damage to anyone in the settled area must not exceed one in one hundred (if the one hundred-year cutoff is used) or zero (if the probable maximum event is used), regardless of the number of individuals living in the settled area or owning property there.

Should weak welfarists be troubled by policy-analytic criteria that are insensitive to population size? I suggest that they should be. A plausible case can be made that all the moral criteria subsumed under weak welfarism are sensitive to population size. This is clearly true of overall well-being. Increase the size of the population that occupies some building, or that is endangered by a flood or hurricane, and the expected benefit to overall welfare of strengthening the building or constructing a protective levee increases as well. In the Article from which this discussion is drawn, I argue that equity and moral rights are population-size sensitive as well.

Can an "institutional" justification be provided for population-size-insensitive policy-analytic tests? It would seem that proxy tests can, sometimes, meet this burden of justification. Proxy tests focus

the decisionmaker on some feature of policies other than well-being, and population-size insensitivity is one consequence of this refocusing, but the refocusing may be warranted, if the proxy test has sufficient advantages in terms of decision costs and bureaucratic error. Still, it is important for agency overseers and academics to be attentive to the disadvantages of proxy tests, including population-size insensitivity. Note also that a proxy test might incorporate administrable proxies for population size—for example, using a more extreme earthquake in defining the no-collapse criterion for large as opposed to small structures.

What about the second kind of population-size insensitivity, exemplified by "individual risk" tests in environmental law or by the closely analogous "area protection" criterion for natural hazards? "Individual risk" tests are quite problematic, and I suggest in the Article that the "area protection" criterion is also difficult to justify.

Conclusion

The tools developed, over the last thirty-some years, to quantify and evaluate the risks of environmental hazards — chemical toxins and radiation — are, in many ways, impressive. But these techniques have their limitations, and should not be unthinkingly imitated by natural hazards regulators. In particular, we should recognize that the foundational moral constructs which drive policy choice — overall well-being, moral rights, and distributive considerations — are multidimensional and sensitive to population size. Policy criteria which focus simply on one aspect of well-being (such as safety), or do not directly attend to well-being at all (as with technology or reliability-based proxy tests), should be viewed skeptically — as should "individual risk" tests, a criterion which demands that any settlement be protected from an X-year flood or hurricane, and other population-size-insensitive criteria. We should view such criteria as second-best tools, warranted (if at all) by the need to control administrative discretion and limit the expense and delay of administrative decisionmaking, and often not warranted even on these "institutional" grounds. ○

Effective Written Comments in Informal Rulemaking

Richard G. Stoll*

What Is This Article About?

I moderated a panel called “Rulemaking – An Insider’s Guide to Writing Effective Comments” at a recent Administrative Law Conference in Washington, D.C. sponsored by the ABA Section of Administrative Law and Regulatory Practice. This article began with program notes for that session prepared jointly by Michael E. Herz, Professor of Law at Cardozo School of Law, and myself.

I have adapted and expanded upon those program notes, and have included thoughts expressed by the panelists: Caroline H. Wehling, of the U.S. Environmental Protection Agency, Ann H. Wion, of the U.S. Food and Drug Administration, and Jonathan E. Neuchterlein, of Wilmer Hale LLP, Washington D.C.

The focus of this article is on preparing effective written comments during informal notice-and-comment APA rulemaking. You should recognize that in rulemaking advocacy, written comments are only one of many vehicles for influencing the agency. The broader issues, however, are beyond the scope of this article.

In the Federal Register preamble style now in vogue, I am phrasing my subject headings in the form of questions and am using the words “you” and “your” a whole lot.

What Are Your Purposes?

Based on your review of an agency’s proposed rule, you may believe that the entire proposal is a disaster and not a word of it should survive. Or you may love every detail. Or, more likely, the proposal might contain elements you support and elements you oppose.

Wherever you are on the love-hate scale, you need to be realistic. These days,

the public comment stage of a proposed rule is, for most rules, pretty much the 11th hour. If the agency were to make a dramatic change in direction, it would either have to abandon years of work or, at a minimum, go through another (arduous) round of notice and comment. Therefore, achieving fundamental change at this stage is often an enormous uphill battle.

So what are your purposes in filing written comments? You should consider the three principal roles your comments may play. First, they may be useful in convincing the agency to shape its final rule a certain way. Even if securing truly fundamental changes from the agency may be an uphill battle, sometimes it happens. Moreover, even where fundamental changes may not be in the cards, you may often convince the agency to make improvements in details (where the devil is often ensconced).

Second, your comments may be critical in laying the groundwork for judicial review of the final rule. So even if you can’t get what you want from the agency, you might get it from a reviewing court. Among the most critical issues to the court will be the content of the comments before the agency and the agency’s response to those comments. And remember, one cannot seek judicial review based on an issue that was not raised first before the agency.

Finally, approaching your comments from a *defensive* point of view can often be critical. If you like the proposal (or certain parts of it) and hope the parts you like survive at the agency and/or in judicial review, it may be important for your comments to play a supportive or even buttressing role to the agency’s position.

What Should Your Strategy Be?

In trying to match your purposes with a strategy for preparing comments, you should consider the following fundamental points.

1. Discretion Over Valor. Unless you find the proposal utterly unacceptable in any form, you should suggest improvements that would be better than nothing. Some advocates (particularly fight-to-the-death litigators) might feel that suggesting improvements – after arguing that an entire proposal should be totally nixed – flashes a sign of weakness and that agency personnel (or a reviewing court) would therefore take your “totally nix” position less seriously.

Considering your heavy burden in convincing an agency to do a 180 and your almost-as-heavy burden to secure a judicial vacatur – as courts will almost always give some form of deference to the agency – the better view is that discretion should prevail over valor. Agency personnel will appreciate the fact that you are simply being smart and realistic to “plead in the alternative.” They certainly see parties do this all the time. Appellate judges are also sophisticated on these matters and appreciate that such pleading in the alternative is more a sign of wisdom than weakness.

In other words, no matter how much you feel wronged by a proposal, there is a very good chance you won’t be able to convince the agency to drop it. And there is also a good chance you won’t be able to convince a court to vacate it. If you are going to have to live with a final rule after it survives judicial review, you might as well try to make it as palatable as possible.

2. Frame Opposition Comments to Anticipate Judicial Review. If you are seeking substantial changes or a major turnaround in the proposal, make your comments look and sound like a legal brief (more on style and tone later). The more your comments look like you are seriously geared up for a legal challenge, the more seriously agency personnel will take your comments.

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In this regard, carefully consider the caselaw on judicial review of agency rules, and prepare to attack any element of the proposal where there may be weakness. This would include arguments regarding statutory authority and interpretation as well as adherence to all prescribed procedures.

Perhaps more importantly, attempt to hold the agency's feet to the fire on "reasoned decisionmaking" requirements. For each and every logical underpinning of the agency's reasoning, consider questions and criticisms that will force the agency to "connect the dots" logically. For every key assumption based on fact, data, studies, consultants' reports, etc. (technical, legal, economic, etc.), consider filing comments pointing out flaws, inconsistencies, and "unconnected dots." Equally important, supply your own authenticated facts, data, etc. that buttress your arguments. And where there are gaps in the agency's logic and backup support, be sure to point that out.

3. Consider Framing Supporting Comments to Anticipate Opponents' Judicial Review. If you are happy with all or most of the proposal, do *not* sit back and relax! The only possible exception might be where you are supremely (and rationally) confident that there are no parties on the other side who will be opposing the proposal before the agency or a reviewing court. The main point here is that the proposal you like may have logical holes or data gaps, and/or may need beefing up in terms of legal analysis or reasoning. In this situation, you may through your comments supply ammunition for the agency to react to, explain, and incorporate in its final rule, possibly shoring up its defenses against your opponents on judicial review.

What Are Your Key Considerations for Content?

After you have considered your purposes and adopted a strategy to complement your purposes, you might consider the following points about content.

1. Specificity is golden. Instead of just saying a proposed rule provision would cause pain or suffering or be impractical, provide real life examples with back-up data and verification for the record. The more actual, verifiable, factual material

you can provide, the better. If the agency estimates that a proposal will cost \$x per facility and you say it will cost \$2x per facility, explain why with as much backup data as possible how you reached your \$2x estimate.

An agency's decision to go your way on a point will be much more defensible if it is based on solid, specific facts in the record. Conversely, an agency will have to go to more trouble in maintaining a position you don't like the more you can provide solid, specific facts that undercut that position. If all you have are vague, unsubstantiated complaints, an agency will have little trouble giving them short shrift.

Equally important: be specific on what you want the agency to do. After you have spent 30 pages explaining how a proposed standard of 0.0873 ppm is wrongheaded for 86 reasons, you will gain credibility with the agency if you then explain what standard would be correct and why.

A panelist made another good point about specificity in comments. An agency proposal these days might rely on background documents that might contain hundreds or even thousands of pages. Whenever you refer to and/or criticize something in these documents, be as precise as possible with your references. It does little good for you to say simply that the calculations in the economic background document are flawed when the economic background document has 400 pages of calculations. Exactly *which ones* on *which pages* are flawed – and *why*?

2. Authenticity is also golden; both for your sources and yourself. For all the great new and specific data and information you are going to provide, be sure to identify the source of your information, and include the best documentation that attests to the authenticity of the source and the information. In other words, don't just submit an unlabeled spread sheet with a bunch of numbers on it with your comments. And where you are relying on the opinions of individual experts or corporate consultants, be sure to include whatever backup information is necessary to qualify the sources as reputable and credible.

Equally important: authenticate yourself. Make clear who you are, what your interest in the proposal is, how exactly you would be affected by the proposal, and how and why the agency should

respect your opinions. For instance, if a proposal relates to a prescribed way of securing a chemical facility's perimeter from terrorists, if you explain (and document) how your company has provided security for chemical facilities for 25 years in 38 states, your comments will probably move up several notches in credibility and tend to be taken seriously. If you represent the local garden club, while you might have some very good and relevant points to make, it would be wise to explain at the outset how and why you have the interest and expertise to comment.

This self-authentication can also become critically important in judicial review, as "standing" to sue is an ever-present bugaboo for would-be suitors in federal courts, and some federal courts have been extraordinarily picky on this issue lately. (Another article, perhaps.)

3. Err on the side of inclusion. If you raise nine separate arguments before a court on judicial review, you do not have to win on five to get the rule vacated; often winning on one issue is all you need. So for a proposal you do not like, raise as many relevant issues as you can, with as much factual, legal, policy backup as you can, to show problems with the proposal. The agency will either have to agree with you when it cannot come forward with straight-face defenses, or will be put to a lot more trouble to explain its basis and purpose in the record in order to survive judicial review. The more relevant and bona fide arguments against a proposal that you can raise in comments, the more points the agency will have to deal with in its final statement of basis and purpose, and the greater you increase the chance of finding a hook to convince a reviewing court to vacate the final rule.

4. Respond to your opponents. With e-docketing, it is becoming increasingly easy to read, and, thus, to comment on, others' submissions. Some agencies are considering or have experimented with "reply periods" after the due-date for comments. Even if there is no official reply period and the deadline for comments has passed, there is no harm in sending in a response to someone else's comments. Particularly if you could not have submitted the response earlier, because the comment to which you are responding was only

submitted at the deadline, the agency may well consider your response. Do not respond just so you have the last word or for the sake of responding; but if there is something specific in someone else's submission that is both consequential and incorrect, go ahead and correct it.

What Are Your Key Considerations for Style, Organization, and Presentation?

First, you have an "overarching" point (another word federal agencies love to use these days). Just as "location, location, location" is everything in real estate, to be truly effective your written comments should be "professional, professional, professional." It may sound silly to remind you, but take extra time to make sure your comments are polished, free of typos, neatly formatted, and clearly written in crisp, grammatically correct style. Additional points:

1. Follow directions. The agency's proposal will tell you how to label your comments (usually by some docket number), how many copies to send, what format(s) may be options (electronic, fax, hand delivery), exactly where to send your comments depending upon format, and set the deadline. Whatever they say, do it. (As explained below, when it comes to distribution, you should do more than they say; but never do less than they say.)

2. Cool it. Vent and be sarcastic all you want – in your first draft. Then sleep on it and delete all the venting and sarcasm. It may feel good to write nasty when you are feeling like the proposed rule is a travesty of all that is good and fair, but agency personnel will not be moved in your direction one iota by a mean tone and just may well be moved the other way. Also, on judicial review, judges and their clerks will probably need to focus on your written comments and they would likely have the same reaction to nastiness as the agency personnel. One panelist's advice was also well-taken: "avoid profanity and personal threats."

3. Make it easier for any reader to follow. Bear in mind that your comments may be one submission among thousands. Therefore it is essential to make your comments clear and accessible. Lengthy comments should begin with a quick summary of the main points;

different sections should have headings to serve as guideposts; major, essential points should be distinguished from minor, technical ones. It should be as easy as possible for the reader immediately to grasp your essential concerns.

4. Make it easier for each reader to find the parts of interest to him/her. The need for clear headings and separate treatment of distinct points is especially critical in rulemakings on complex subjects, where several different components of an agency might cover discrete issues and personnel in those components will have separate and distinct roles to play in formulating the agency's response to comments and the final rule. For instance, a Clean Air Act proposed rule will likely involve questions of cost-effectiveness, economic impact, availability of technology, public health effects, and/or environmental impacts, each of which will lie within the jurisdiction of different offices or individuals within EPA.

In such settings, it is especially important to separate your distinct points clearly, and use headings and subheadings liberally. You need to make it easy for the economists in the agency to find your economic arguments, and the health effects people to find your health effects arguments. Assume nobody wants to wade through a bunch of pages they don't find interesting or relevant looking for parts they might be interested in.

5. If the agency asks for certain questions/issues to be addressed in a certain order or with a specific labeling scheme, do it. Sometimes an agency's proposal will ask commentors specifically to address some number of questions or issues, and the preamble may contain a lettering or numbering sequence for these questions or issues. If so, be sure to include a section in your comments that provides your comments or answers to any of these questions or issues clearly labeled in the same format that the agency has asked for.

You may think this is silly or unnecessary if, for instance, you believe that there are portions of your beautifully written prose that already answer some or all of these questions. But recognize that in many agencies, *contractors* are hired to read, summarize, and digest and categorize written public comments issue by issue. If you want your distinct point on a

certain issue to end up in the right place in this summary and categorization, it is safer to make the contractor's job easier by leading him or her to the right place in your comments. If you want the contractor's digest to include your points on a specific issue (and this digest may be all that key agency personnel ever bother to read), you had better follow the format the agency has specified.

6. Summarization is also golden. Prepare a short summary (or targeted summaries) of your key points. Busy people hate to read long documents and agency personnel are busy. Also, the higher up you go in the agency, the person you may want to influence is even less likely to want to read very much of what you write. Therefore, always have a very sharp and short summary prepared covering your most important points. On complex rules where your comments might deal with legal, policy, economic, health effects, etc. issues, you might consider separate sharp and short summaries of each section.

What Are Some Pointers on Distribution?

1. Send to Key Staff. Rule number 1 on distribution: do *not* simply send your comments to the address specified in the proposed rule. If so, the only people who may actually read your comments will be the contractors hired to digest all the submissions. Rather, it is critical to send copies of your comments directly to the key people in the agency at the staff level who will be working on the final rule, perhaps with separate cover letters for personnel handling separate issues, in which you can summarize and highlight your main points on those issues for such personnel.

2. Send at Least Summaries to Key Leadership. Also consider sending short, punchy summaries of your main points to higher level agency personnel. (Again, these might be separately tailored for different components.) Key decision makers are rarely going to read a 100-page public comment document; they might read your one or two page punchy summary.

What is the Conclusion?

If commenting is worth your time, it is worth your time to make your comments effective, and we hope this helps. ○

ABA 2007 ANNUAL MEETING

● Section of Administrative Law and Regulatory Practice ●

Dan Troy, Section Chair

Katy Basile, Program Chair



The Palace Hotel
2 New Montgomery Street
San Francisco, CA 94105-3402



SAN FRANCISCO, CA



Dear Colleagues:

The Administrative Law and Regulatory Practice Section meeting, during the 2007 ABA Annual Meeting will convene on **August 10-12, 2007** in San Francisco, CA to conduct important Section business as well as provide educational programs and an insider's look at the administrative and regulatory process.

The host hotel for the Section will be **The Palace Hotel**, located in the heart of downtown San Francisco. "Experience the luxury and beauty of this grand hotel, located blocks from Union Square, China Town and the Embarcadero with an exclusive getaway with unique dining, cultural exhibits and extravagant pampering."

You may register for the ABA meeting and make hotel reservations, by going to the ABA website:

<http://www.abanet.org/annual/2007/>.

We look forward to seeing you in San Francisco!

Dan Troy, **Section Chair**

Katy Basile, **Program Chair**

TENTATIVE SCHEDULE

Friday, August 10, 2007

Time	Title	Location
8:30am – 10:00am	The Proposed Model State Administrative Procedure Act: Now is the Time For All Good People to Review and Recommend Modifications	Moscone Center West Room 2005, 2nd Fl.
2:00pm – 3:30pm	Homeland Security 5 Years Later: Has it Helped or Hurt Your Clients?	Moscone Center West Room 2005, 2nd Fl.
2:00pm – 3:30pm	What The Roberts/Alito Supreme Court May Mean To Public School Districts: An Early Response To Cases Involving Free Speech and Special Education	Moscone Center West Room 2011, 2nd Fl.
3:45pm – 5:15pm	From Victoria's Secret to Louis Vuitton: What everyone should know about famous marks and the brands that would dilute them	Moscone Center West Room 2005, 2nd Fl.
6:30pm – 9:30pm	Section Reception and Dinner	(TBD)
10:00pm – 11:30pm	Chairman's Hospitality	Palace Hotel Chairman's Suite

Saturday, August 11, 2007

Time	Title	Location
8:00am – Noon	REGISTRATION	Palace Hotel
8:00am – 9:00am	Section Continental Breakfast	Palace Hotel Gold Ballroom, 1st Fl.
9:00am – 10:30am	Section Council Meeting	Palace Hotel Gold Ballroom, 1st Fl.
10:30am – 10:45am	BREAK	Palace Hotel Gold Ballroom, 1st Fl.
10:45am – Noon	OMB and the Future of Regulatory Analysis	Palace Hotel Gold Ballroom, 1st Fl.
Noon – 1:30pm	Publications Committee Meeting	Palace Hotel Presidio, 2nd Fl.
5:30pm– 7:00pm	ABA Opening Assembly	Davies Symphony Hall
7:00pm – 9:00pm	President's Reception	Moscone West Convention Center
9:30pm– 11:00pm	Chairman's Hospitality	Palace Hotel Chairman's Suite

Sunday, August 12, 2007

Time	Title	Location
8:00am – 9:00am	Section Continental Breakfast	Palace Hotel Gold Ballroom, 1st Fl.
9:00am – Noon	Section Council Meeting	Palace Hotel Gold Ballroom, 1st Fl.

Visit <http://www.abanet.org/adminlaw> for program updates.

Direct questions to Jenny Abreu via email at abreuj@staff.abanet.org or 202-662-1528.

by Robin Kundis Craig*

The U.S. Supreme Court decided a number of important cases for administrative law practitioners this quarter. These include two expositions on federal court standing, two explorations of federalism, and several decisions involving issues of statutory interpretation and judicial review. In addition, Justice Alito displayed willingness to join the moderate left of the Court in some divided decisions.

Federalism Decisions

The Supreme Court concluded, in *Watters v. Wachovia Bank*, — U.S. —, 127 S. Ct. 1559, 1566–73 (April 17, 2007), in a 5–3 decision authored by Justice Ginsburg (Justice Thomas did not participate), that the National Banking Act (NBA) preempts state-law regulation of a national bank’s state-law chartered operating subsidiaries. *Id.* at 1570–71 (citation omitted). As a result, the Office of the Comptroller’s (OCC’s) regulation stating the same principle of preemption did not violate the Tenth Amendment or principles of federalism. *Id.* at 1573.

More interesting for administrative law, federalism analyses, and statutory interpretation was Justice Stevens’ dissent, joined, unusually, by Chief Justice Roberts and Justice Scalia. Arguing that “the Court endorses an agency’s incorrect determination that the laws of a sovereign State must yield to federal power,” resulting in a “significant impact . . . on the federal-state balance,” *id.* (J. Stevens, dissenting), the dissenters reviewed the history of the NBA to conclude that “Congress itself has never authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions. Nor has it authorized OCC to ‘license’ any state-chartered entity to do so.” *Id.* at 1578 (J. Stevens, dissenting). As such, the OCC’s regulation was not entitled to *Chevron* deference because of the federalism implications of that regulation. *Id.* at 1584 (J. Stevens, dissenting). Moreover, the dissenters explicitly linked statutory preemption to the Tenth Amendment and to principles of constitutional federalism, *id.* at 1585 (J. Stevens, dissenting), concluding that “[n]ever before have we endorsed administrative action whose sole purpose was to preempt state law rather than to implement a statutory command.” *Id.* at 1586 (J. Stevens, dissenting).

While state-chartered operating subsidiaries of national banks might be subject to federal law, state- and local government-owned solid waste facilities are entitled to special consideration under the dormant Commerce Clause, according to a 5–1–3 decision authored by Chief Justice Roberts in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, — U.S. —, 127 S. Ct. —, 2007 WL

1237912 (April 30, 2007). The latest in a long series of dormant Commerce Clause/solid waste decisions by the Supreme Court, *United Haulers* specifically addressed the issue of whether the public ownership of the destination waste processing facility changed the constitutional validity of county flow-control ordinances. In *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), the Court had held that flow-control ordinances that required trash haulers to deliver solid waste to particular privately-owned waste processing facilities violated the dormant Commerce Clause. *United Haulers*, 2007 WL 1237912, at *3.

The *United Haulers* Court concluded that the ordinances at issue did not facially discriminate against interstate commerce because “[t]he flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same.” *Id.* at *8. According to the Court, “States and municipalities are not private businesses – far from it,” and hence “it does not make sense to regard laws favoring local governments and laws favoring private industry with equal skepticism,” particularly because “[l]aws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism.” *Id.* In contrast, “[t]he contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government.” *Id.*

Because there was no facial discrimination, the Court applied the test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *United Haulers*, 2007 WL 1237912, at *9. Concluding that “any arguable burden does not exceed the public benefits of the ordinances,” *id.*, the majority emphasized that “[t]he ordinances give the Counties a convenient and effective way to finance their integrated package of waste disposal services” and “increase recycling in at least two ways, conferring significant health and environmental benefits upon the citizens of the Counties.” *Id.* at *10.

Justice Scalia refused to join this *Pike*-balancing analysis and concurred to argue that the dormant Commerce Clause is a judicial invention. *Id.* at *11 (J. Scalia, concurring). Justice Thomas concurred in the judgment but argued that the *C&A Carbone* decision should be overruled. *Id.* at *11–*15 (J. Thomas, concurring). Justices Alito, Stevens, and Kennedy dissented, arguing that the *C&A Carbone* rule should apply with equal force to the ordinances at issue in *United Haulers*. *Id.* at *15–*25.

Standing Decisions

In March 2007, the Supreme Court analyzed the standing of four citizens to challenge, pursuant to the Elections Clause of the U.S. Constitution, both a Colorado state court’s redrawing of congressional districts after the Colorado legislature failed to do so after the 2000 census and the Colorado Supreme Court’s

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injunction against a subsequent 2003 legislative redistricting. Plaintiffs asserted that the Colorado Supreme Court's decision denied them their federal constitutional right to control of elections by the Colorado legislature.

In a unanimous *per curiam* decision, the Court decided that the plaintiffs lacked standing because they failed to assert a particularized stake in the litigation. *Lance v. Coffman*, — U.S. —, 127 S. Ct. 1194, 1198 (March 5, 2007). Using the framework of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), and providing a thorough review of the Court's taxpayer standing decisions, the *Lance* Court emphasized that “[o]ur refusal to serve as a forum for generalized grievances has a lengthy pedigree.” *Lance v. Coffman*, 127 S. Ct. at 1197. The four plaintiffs failed to allege anything other than a generalized grievance because “[t]he only injury plaintiffs allege is that the law — specifically the Elections Clause — has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing.” *Id.* at 1198.

Standing was far more contentious in *Massachusetts v. Environmental Protection Agency*, — U.S. —, 127 S. Ct. 1438 (April 2, 2007), the so-called “global warming” case. In this case, 12 states, four local governments, and 13 public interest organizations challenged the EPA's refusal to regulate greenhouse gas emissions from motor vehicles pursuant to § 202 of the federal Clean Air Act. The EPA challenged the plaintiffs' standing to bring the lawsuit. The D.C. Circuit panel split three ways on the standing issue. *Id.* at 1451–52 (quoting and citing *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005)).

In a 5–4 decision by Justice Stevens, the majority of the Court concluded that at least the State of Massachusetts had standing to bring its action. Quickly dismissing arguments that the case involved a political question, an advisory opinion, or a mooted issue, the majority, like the *Lance* Court, announced that *Lujan v. Defenders of Wildlife* provided the proper analytical framework to assess standing. *Id.* at 1452–53.

Nevertheless, the majority emphasized Justice Kennedy's concurring opinion from *Lujan*, especially Justice Kennedy approval of Congress' power to define new injuries. *Id.* at 1453 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 580, 581 (J. Kennedy, concurring)). The majority noted that the Clean Air Act itself provided plaintiffs with “the right to challenge agency action unlawfully withheld,” *id.* (citing 42 U.S.C. § 7607(b)(1)), and that “[w]hen a litigation is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” *Id.* (citations omitted).

However, the majority's treatment of state standing will most likely generate more litigation. Despite its alleged adherence to

the *Lujan* analysis, the majority stressed “the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.” *Id.* at 1454. Citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), for the proposition “that States are not normal litigants for the purposes of invoking federal jurisdiction and may sue to protect their territory from outside harms,” the majority emphasized “[t]hat Massachusetts does in fact own a great deal of the ‘territory alleged to be affected’ [which] only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.” *Massachusetts*, 127 S. Ct. at 1454.

The majority then proceeded through the *Lujan* three-part test for standing. With respect to injury, the majority emphasized that “[t]he harms associated with global climate change are serious and well-recognized,” *id.* at 1455, and that Massachusetts' unchallenged evidence showed that climate change was causing sea level rise that has “already begun to swallow Massachusetts' coastal land.” *Id.* at 1456. As for causation, “EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming,” *id.* at 1457, and while regulating car emissions in the United States might not solve the entire climate change problem, “[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.” *Id.* Moreover, “reducing domestic automobile emissions is hardly a tentative step,” because, [c]onsidering just emissions from the transportation sector, which represents less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China.” *Id.* Finally, regarding redressability, the majority concluded that “[w]hile it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it.” *Id.* at 1458. As a result, Massachusetts had standing.

Writing for the four dissenters on the standing issue, Chief Justice Roberts began by arguing that “[r]elaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence . . .” *Id.* at 1464. As for application of the *Lujan* test, the dissenters argued that if the majority was going to accept Massachusetts' “asserted loss of coastal land as the injury in fact,” then “they must ground the rest of the standing analysis in that specific injury.” *Id.* at 1467. The dissent questioned whether Massachusetts' injury was either “actual” in the face of debates over the extent of sea level rise or “imminent” given that the seas would continue to rise through 2100. *Id.* at 1467–68. Moreover, the complexities of

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climate change made direct causation next to impossible to prove. *Id.* at 1469 (C.J. Roberts, dissenting. Finally, “[r]edressability is even more problematic,” given the long causation chains and the fact that 80% of greenhouse gas emissions originated in other countries. *Id.* Overall, according to the dissent, the majority had engaged in “sleight-of-hand” by “failing to link up the different elements of the three-part standing test.” *Id.* at 1470.

Statutory Interpretation

Two of the most interesting aspects of the Court’s interpretation of the Clean Air Act in *Massachusetts v. EPA*, 127 S. Ct. 1438 (April 2, 2007), were the explicit debate over when and whether statutory terms are ambiguous and the implied debate over the relative roles of *Chevron* deference and “arbitrary and capricious” review. In this case, the EPA denied a rulemaking petition to regulate greenhouse gas emissions from motor vehicles pursuant to § 202 of the Clean Air Act, which requires the EPA Administrator to “prescribe . . . 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 his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare . . .” 42 U.S.C. § 7521(a)(1). The EPA denied the petition primarily on two grounds. First, relying on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the EPA concluded that, given Congress’ many other statutes addressing climate change and its awareness of the issue during amendments of the Clean Air Act, Congress’ decision not to explicitly address climate change in the Clean Air Act meant that greenhouse gases were not “air pollutants” within the EPA’s authority to regulate. *Massachusetts v. EPA*, 127 S. Ct. at 1450–51. Second, the EPA concluded that, for policy reasons and in deference to the Bush Administration’s other programs for addressing climate change, it would refuse to regulate greenhouse gases under the Clean Air Act even if it did have the authority to do so. *Id.* at 1451.

Writing for the five-Justice majority, Justice Stevens rejected both rationales. First, the majority concluded that the Clean Air Act’s “arbitrary and capricious” standard, 42 U.S.C. § 7607(d)(9), applied to the Court’s review, although it also noted the potential role of *Chevron* deference. *Massachusetts v. EPA*, 127 S. Ct. at 1459. Second, the majority used the plain meaning of the Act’s definition of “air pollutant” — “any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air,” *id.* at 1460 (quoting 42 U.S.C. § 7602(g), emphasis added by Court) — to conclude that “[t]he statute is unambiguous” and “embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ‘any.’” *Id.* As a result, the Act extends to greenhouse gases. Third, the majority concluded

that regulation of greenhouse gases through the Act differed in two significant respects from the attempted regulation of tobacco pursuant to the Food, Drug, and Cosmetic Act (FDCA) that was at issue in *Brown & Williamson*: first, the Food & Drug Administration would have had to ban tobacco under the FDCA, which clashed with common sense, while the EPA would only have to regulate greenhouse gases under the Clean Air Act; and second, no congressional action regarding climate change actually conflicted with the EPA’s regulation of greenhouse gases. *Id.* at 1461–62. As a result, the EPA had regulatory authority.

Finally, the majority used a standard “arbitrary and capricious” analysis to conclude that the EPA’s refusal to regulate was invalid. According to the majority, “[u]nder the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” *Id.* at 1462. Because the EPA’s explanation addressed policy issues rather than these statutory factors, that explanation was arbitrary and capricious and the EPA’s decision had to be reversed. *Id.* at 1463. However, the majority declined to conclude that the EPA was bound to make an endangerment finding on remand.

In an opinion by Justice Scalia, the four dissenting Justices would have accorded the EPA far more discretion and decided the case entirely on the basis of *Chevron* deference. Specifically, the dissenters would have accorded *Chevron* deference to the EPA’s interpretation of the “in his judgment” language of § 202 and allowed the EPA to assess the decision to regulate in terms of policy as well as potential endangerment, *id.* at 1473–74; would have considered the term “air pollutant” to be ambiguous, *id.* at 1475–76; and would have focused more on the term “air pollution,” which is not defined in the Clean Air Act, and would have accorded *Chevron* deference to the EPA’s conclusion that climate change is not “air pollution” for purposes of the Clean Air Act. *Id.* at 1476–77.

In contrast, interpreting the Clean Air Act in *Environmental Defense v. Duke Energy Corp.*, — U.S. —, 127 S. Ct. 1423 (April 2, 2007), produced a far more unified Court willing to stress both deference to the EPA and contextual understandings of statutory terms. *Duke Energy* involved the Act’s new source review (NSR) requirements — specifically, the requirement that owners of existing sources who “modify” their facilities install “the best technology for limiting pollution.” *Id.* at 1428. There are two NSR requirements in the Act, one in the provisions governing new source performance standards (NSPS) and one in the provisions creating the Prevention of Significant Deterioration (PSD) program. The issue for the case, while fairly technical, was essentially whether the EPA could define “modification” differently for the two NSR requirements. *Id.* at 1430.

Writing for eight Justices (Justice Thomas concurred on this point), Justice Souter concluded that “principles of statutory interpretation are not so rigid” as to require the EPA to interpret “modification” exactly the same way in all sections of the Clean Air Act. *Id.* at 1432. The presumption in favor of identical meanings is rebuttable, because “[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Id.* Moreover, all nine Justices agreed that the D.C. Circuit erred in trying to force the PSD modification regulations to track the NSPS modification regulations. *Id.* at 1434–36.

The Clean Air Act decisions notwithstanding, it was a fairly obscure provision of the federal Impact Aid Act that served as a flashpoint for the Supreme Court’s ongoing debates regarding statutory interpretation methodology. In *Zuni Public School District No. 89 v. Department of Education*, — U.S. —, 127 S. Ct. 1534 (April 17, 2007), the Court addressed the issue of how the Secretary of Education should assess whether a State’s public school funding program “equalizes expenditures” throughout the state, as the Act requires. Specifically the issue for the Court was whether the Secretary should look at the number of pupils as well as the size of the expenditures when deciding which school districts to disregard because they had “per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures . . . in the State.” *Id.* at 1538 (quoting 20 U.S.C. § 7709(b)(2)(B)(i)).

In a 5–4 decision authored by Justice Breyer (and including Justice Alito), the Court concluded that the number of pupils was properly included within the statutory language. The Court considered *Chevron* deference to be the appropriate framework for assessing the Secretary’s regulations interpreting the relevant statutory provision. *Id.* at 1540–41. However, it reversed the normal procedure for assessing whether the language was ambiguous, addressing the plain meaning of the

statute only *after* it reviewed the background, history, and basic purposes of the Act and concluded that “[c]onsiderations other than language provide us with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us and that the Secretary’s chosen method is a reasonable one.” *Id.* at 1541. Its examination of the literal language of the statute, in contrast, was forced and hypertechnical, a contorted act of interpretation fairly obviously engaged in only so that the majority could conclude “that the language of the statute is broad enough to permit the Secretary’s reading.” *Id.* at 1546.

Justice Stevens concurred specially to emphasize the legitimacy of using legislative history to interpret statutory language as part of the first step of the *Chevron* analysis. *Id.* at 1549–50. Justices Scalia, Roberts, Thomas, and Souter dissented (Justice Souter joining only Part I of the dissent), arguing that the majority’s opinion “is nothing other than the elevation of judge-supposed legislative intent over clear statutory text,” *id.* at 1551, and referring to the majority’s plain meaning reading as “sheer applesauce.” *Id.* at 1554. “This case will live with *Church of the Holy Trinity* as an exemplar of judicial disregard of crystal-clear text. We must interpret the law as Congress has written it, not as we would wish it to be.” *Id.* at 1559.

Less contentiously, the Court also examined regulatory history to evaluate the Federal Communications Commission’s (FCC’s) interpretation of § 201(b) of the Communications Act of 1934. *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, — U.S. —, 127 S. Ct. 1513, 1516–17 (April 17, 2007). In an opinion by Justice Breyer, seven Justices agreed (Justices Scalia and Thomas dissented) that the FCC’s interpretation of “unreasonable practice” for purposes of § 201 was entitled to *Chevron* deference and was a reasonable interpretation of the statute, emphasizing both the plain meaning of the language and the purpose of the Act. *Id.* at 1520–22. ○

Clearing the Air: One Region at a Time *continued from page 5*

That approach is surely more likely to generate a “federal program” that is acceptable to these States. Once approved, the compact becomes federal law. This may not silence all critics, but the outcome should hew closer to what the States are endeavoring to craft on their own, and congressional consent will nip the potential Commerce Clause issues in the bud. Wait too long and

you just might find the MOU preempted.

And while we are at it, how about improving the transparency of the RO by dictating some rules of procedure like those in Section 10 of the Federal Advisory Committee Act, 5 U.S.C. App, regarding: public notice of meetings; acceptance of public comments; public access to records; and meeting minutes.

Conclusion

These governors, these States, should be lauded for taking a leadership position on a critical quality of life issue that affects us now and will continue to affect the world for generations to come. It is a good first step. Make that a very good first step. But more could be done, as suggested above, to unite us all under one sky blue tent. ○

By William S. Jordan III*

9th Circuit: No Chevron Deference for Commerce's Flawed Dolphin Study

As a general proposition, courts tend to defer to agency choice of study methodology, and they are wary about interfering in issues affecting international relations. *Earth Island Institute v. Hogarth*, 2007 WL 1227559 (9th Cir. 2007), demonstrates that there are limits to this judicial indulgence. The decision involves the use of purse-seine nets to corral dolphins, which apparently swim above the target schools of tuna. With the dolphins moved away, the tuna can be caught and brought to market. As dolphin populations dwindled and the public demanded “dolphin-safe” tuna, Congress prohibited “dolphin-safe” labels on tuna caught using this method. After much pressure, primarily from Mexico and other South American countries, American diplomats agreed to ask Congress to weaken the restriction. Congress agreed, but only if the Secretary of Commerce determined whether or not the “intentional deployment on or encirclement of dolphins with purse seine nets” is “having a significant adverse impact on any depleted dolphin stock in the” fisheries in question. Congress also dictated that Commerce had to undertake several studies in making this determination, including “a 3-year series of necropsy samples” from dolphins caught by commercial fishermen.

In its first round of decision making, the agency found that there was “insufficient evidence” that the use of purse-seine nets was significantly affecting the dolphin populations at issue. The courts threw out this finding because it was inconsistent with the statutory requirement to determine whether the nets were actually “having a significant adverse impact” on the dolphins. Moreover, the agency had failed to conduct all of the required studies. On remand, the agency reached the required conclusion that the nets were “not having a significant adverse impact on depleted dolphin stocks.”

On review, the court 9th Circuit once again flayed the agency. The first question was whether the agency had complied with the statutory requirement to study a “series of necropsy samples.” Having examined 56 dolphins, the agency argued that it had met this requirement. But the agency also admitted that it would need to study 300 dolphins from each of two distinct populations to be able to extrapolate the results to the dolphin population as whole. The court rejected *Chevron* deference to the agency’s narrow interpretation of the statute and held that “Congress asked for a scientifically-sound determination of the fishery’s impact on dolphins.” Thus the agency failed in its attempt to cloak its distortion in the mantle of

methodology expertise. Similarly, the 9th Circuit upheld the District Court’s finding that the agency’s holding was contrary to the overwhelming scientific evidence. In so doing, the court rejected the agency’s attempt to rely upon an absence of evidence to support a conclusion that the dolphins were not at increased risk. Noting that the number of dolphin kills caused directly by use of the nets was only one-third of the number needed to threaten the dolphin populations, agency concluded that the nets did not have a significant impact on the dolphins. But there was a serious question about dolphin deaths indirectly caused by the nets, through separation of parents from young and other causes. This was a classic failure to consider all relevant factors.

Perhaps the juiciest aspect of the decision involved the agency’s response to pressure from the State Department and foreign policy establishment. A trail of inter-agency contacts and memos demonstrated that a draft conclusion that net use was “not supported by science” was altered to a more benign conclusion with emphasis on “continued international cooperation.” A document suggesting that the agency could “package either decision to demonstrate that we are conservation minded, pro-active, and are dedicated to recovering dolphins as well as cooperating with our international partners,” probably did not help the agency’s credulity. Thus, the agency had based its decision upon concerns that were not relevant to the scientific conclusion required by congress. Shades of *D.C. Federation of Civic Associations v. Volpe*, 459 F2d 1231 (D.C. Cir. 1971).

Finally, the court took the unusual step of refusing to remand to the agency. After two rounds of agency intransigence, the court simply vacated the agency decision. Since statutory deadlines had passed, the result was that the agency could not revisit the issue without further congressional authorization. Surely there is a lesson here for agency counsel and administrators.

6th Circuit: Ongoing Regulatory Obligation Prolongs Limitations Period

In *National Parks Conservation Association, Inc. v. Tennessee Valley Authority*, 480 F3d 410 (6th Cir. 2007), the Sixth Circuit split on the question of when a statute of limitations on enforcement actions begins to run – upon the construction of the facility without the required permit, or with every day that the facility operates in violation of the permit. The majority held that every day of operation in violation of the permitting requirement is a new violation, while the dissent argued that there is only one violation, which occurred when the facility was constructed and began operating in violation of the permit requirement.

In 2001, Plaintiffs brought a citizen suit seeking civil penalties against the TVA for violating a permit requirement that allegedly applied to a major plant modification that had occurred in 1988. The action was subject to a five-year statute of limitations, and the Clean Air Act provided for civil penalties

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to a maximum of \$25,000 per violation per day. The TVA moved to dismiss on the ground that the single discrete violation had occurred in 1988, upon construction and operation of the facility without a permit.

The majority considered the “continuing-violation doctrine” under which all violations would be relevant, even those that would otherwise be time-barred. Suggesting that there was no principled reason not to apply this doctrine to environmental disputes, the majority nonetheless did not do so. Instead, it held that the matter could be characterized as involving “repetitive discrete violations, which constitute independently actionable individual causes of action,” citing decisions that had involved payments in violation of the Fair Labor Standards Act and continuing but similarly discrete actions in violation of the laws against discrimination. In so doing the court emphasized the need for “careful examination of the specific conduct prohibited by the statute at issue.” As one would expect, those statutes prohibited such things as unequal payments, which would occur each time payments were made.

Turning to the provisions of the Clean Air Act, the court noted that the citizen suit provision authorizes actions against both those who “have violated” various limitations and also those who are “in violation” of the limitations. Moreover, the limitations in question included “*any requirement to obtain a permit as a condition of operations.*” Finding that these and other provisions created “an ongoing obligation” to comply with certain requirements, the majority held that each day of operation was a discrete violation of the statute and regulations. The majority bolstered this conclusion with the observation that the applicable state regulations created an ongoing duty to obtain the required permit.

Judge Batchelder was not convinced. She found only a single violation, the permitless construction and commencement of operation in 1988. In so doing, she distinguished between the one-time violation and any harm that might later be caused by that violation. Since the statute runs from the violation, not from any new harm, the statute expired in 1993. She, too, emphasized the need for care in construing the particular statute on the particular facts. She suggested, for example, that there might be a claim against emitting pollutants in violation of applicable regulatory levels, but that the present claim was not that broad.

D.C. Circuit: FTC’s “Funeral Rule” Letter not Legislative Rule

As with all businesses (indeed, all humans), some funeral directors are scrupulous, and some are not. To address those who are not, the FTC issued the so-called “Funeral Rule.” Among other things, the Funeral Rule provides that funeral homes may not earn any profit on charges that it characterizes as “cash advance items” unless the home explicitly reveals the

markup. The reason is that a consumer would not expect to pay markup on something termed a “cash advance,” while a consumer presumably would expect to pay a markup on other items provided as part of a generally described funeral service. Since this restriction can be avoided by eschewing language suggesting a cash advance, the FTC also prohibited markups on “items obtained by the funeral provider from a third party ‘on the purchaser’s behalf.’”

In a letter, the full Commission later clarified the latter prohibition as limited to items that the funeral home “represents by implication to be procured on behalf of a particular customer and provided to that customer at the same price the funeral provider paid for them.” Thus, the provision does not extend to all items obtained for a funeral purchaser, only to those as to which the funeral home created an impression that the item was to be provided at cost. The logic was that customers normally expect markups, so undisclosed markups are deceptive only when customers have been given a reason to believe there would not be a markup.

Whatever the logic, consumer interests challenged the FTC’s letter under statutory provisions granting the Court of Appeals jurisdiction over “rule[s]” and “substantive amendments” within sixty days of promulgation. The question was whether the letter constituted either of those. The answer, applicable also to actions brought under § 702 of the APA, is a relatively clear example of the distinction between legislative rules (to which notice-and-comment requirements apply), and interpretive statements (which are exempt from notice and comment). The court held that the agency had appropriately construed the second aspect of the rule to achieve the same purposes as the first – to prevent deception. In reading the two together and relying upon the purposes underlying the rule, the FTC had not “repudiated” or “supplemented” the rule, but simply engaged in a legitimate exercise in interpretation.

There are two lessons here for agencies. The first is that a true interpretation of a previously issued rule is not a rule under jurisdictional provisions such as this one or for the purpose of the notice and comment requirements of the APA. The second is that an agency can establish that its statement is an interpretation if it can show how it was developed from the underlying rule or statute using interpretive methods.

2d Circuit: No Enhanced Medicare Litigation Fees Under EAJA

Attention Medicare lawyers: your work is not as specialized as that of patent lawyers, so your EAJA fee recoveries may not exceed the statutory maximum. So held the Second Circuit in *Healey v. Leavitt*, 2007 WL 1119816 (2d Cir. 2007). The case involved a two-pronged attack on the lack of procedures for notifying or hearing from home-bound Medicare recipients

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whose home health agencies (HHAs) either reduced or terminated their home care services under the Medicare program. Typical of such procedural attacks, the first prong was statutory (in this case asserting a notice requirement), while the second was constitutional (a due process hearing argument). Plaintiffs prevailed on the first, but not the second.

As to the statutory notice question, there was apparently no doubt that the government's pre-litigation position was unreasonable. Nonetheless, the government argued that fees should not be awarded because it had "quickly improved its policies in response to the initiation of this litigation." Although the government's improved notice requirement came some four months after the District Court's decision, the Second Circuit wrote as if it could base its decision on the government's pre-litigation position alone: "To deny the plaintiffs fees on the basis that the Government responded quickly would undermine the EAJA's fundamental objective to encourage individuals to challenge governmental policies that are not 'substantially justified.'" There is considerable tension between the Second Circuit's assertions here and the Supreme Court's rejection of "catalyst theory" in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). On the facts, however, the decision is correct because the government's action followed a binding decision by the District Court.

Although the fee determination begins with the "lodestar" of the hours reasonably expended times a reasonable hourly rate, the Second Circuit upheld the lower court's decision to reduce the recovery because the plaintiffs had not prevailed on the "legally distinct" constitutional claim despite having spent many hours in that effort. Emphasizing that "[i]n determining whether a fee reduction is appropriate, the most critical factor is the degree of success obtained," the Second Circuit sustained the fee reduction.

Although many of us would probably shudder at the complexity of the Medicare statutes and regulations, advanced expertise in that area is not enough to be a "special factor" justifying a fee enhancement beyond the statutory maximum. Under Supreme Court precedent, the fee enhancement provision is to be interpreted narrowly. A fee enhancement requires "distinctive knowledge or *specialized skill* *needful* for the litigation in question." An "identifiable practice specialty such as patent law, [and] knowledge of foreign law or language" are "examples of the 'distinctive knowledge' that would justify an enhanced award under the statute." Although Medicare litigation is complex, it is within the potential grasp of most well-trained lawyers. It seems the key is not specialized experience in a given area, but specialized training that (as with foreign language or the technical training that underlies patent practice) goes beyond the training that most lawyers have received. ○

Greenwash *continued from page 10*

component of an EMS is a reliable system for measuring a firm's environmental impacts. Thus, whether NGO auditing is likely to increase disclosures depends on the presence of EMSs within the audited firms. Furthermore, the complementarity between EMSs and NGO auditing of greenwash points to a benefit from public policies that mandate the adoption of EMSs.

Our results suggest that public policy pressures may be justified to induce a broad cross-section of firms to adopt EMSs. Interestingly, Coglianesi and Nash² find that there has been "an explosion of programs in the United

States that offer financial and regulatory incentives to firms that implement EMSs." These programs are being implemented at both the federal and state levels. Whether these programs are likely to achieve their objectives is unclear. Coglianesi and Nash³ point out that "[a]ll of these policy initiatives are premised on the assumption that EMSs make a difference in environmental performance. Yet this question merits research and evidence rather than untested optimism."

Our results point to a rationale for encouraging firms to adopt EMSs which is independent of whether EMSs affect actual environmental performance. We do not presume that an EMS makes any

difference in environmental performance, but instead simply assume an EMS improves the firm's internal information about its environmental performance. In this capacity, an EMS operates as a complement to NGO auditing of environmental disclosure and greenwash. An EMS increases the likelihood that management is well informed about its environmental liabilities. Thus, where a firm has adopted an EMS but discloses nothing about its environmental performance, the market infers that the firm is failing to disclose some negative information, and thus downgrades its rating of the company's value. In turn, this means that an NGO's threat to punish greenwash is more likely to drive the firm with an EMS to disclose fully rather than to not disclose at all. ○

² Coglianesi, Cary and Jennifer Nash. *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?* at 15, Resources for the Future Press, 2001.

³ Id. at 16.

Precedent Decisions, Meet Underground Regulations

By Michael Asimow*

California's recently adopted APA encourages agencies to identify important adjudicatory opinions as "precedent decisions," meaning that the opinion states important principles of law or policy. Precedent decisions are easily accessible to private lawyers and help build agency case law by the traditional common law precedent method. California law also prohibits the adoption of interpretive rules without full-fledged notice and comment (so-called "underground regulations"). The Office of Administrative Law (OAL) has the duty of identifying and invalidating underground regulations.

Precedent decisions are a way that agencies can state law and policy without going through the slow and costly rulemaking process, but they could undermine the policy against adoption of underground regulations. However, the normal due process-type protections that accompany agency adjudication seem like a fair substitute for notice and comment.

The Insurance Commissioner decided to push the envelope. The Department of Insurance settled an adjudicatory dispute against a group of insurance brokers. The settlement agreement contained a set of important legal principles concerning broker regulation. The Department then designated the settlement as a precedent decision, meaning that its ALJs would be required to follow the decision and it could be cited as a precedent in future decisions.

However, the settlement was never litigated and therefore was not surrounded by the normal adjudicatory protections. The brokers just wanted to settle their case and escape, so they were indifferent to the legal principles embodied in the settlement. Recently, OAL ruled that the designation of a precedent decision in a settlement agreement was an illegal underground regulation and invalidated it as a precedent. 2007 OAL Determination No. 6. OAL's decision seems correct, since the whole idea was to encourage agencies to designate true adjudicatory opinions as precedents, not to allow them to establish law or policy through a device that lacks either rulemaking or adjudication protections.

Florida Amends APA

By Larry Sellers**

The Florida Legislature recently enacted a measure that makes a number of changes to Florida's Administrative Procedure Act (APA). Here's a brief summary of some of the key provisions in "The Open Government Act," HB 7183.¹

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¹ As of this writing, HB 7183 has been presented to the Governor. After the bill is presented, the Governor will have the opportunity to sign it, veto it or allow it to become law without his signature.

Defines "Rulemaking Authority." HB 7183 adds new definitions, including a definition of "rulemaking authority." The term is defined to mean "statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of 'rule.'" The purpose of defining the term reportedly is to make clear that agencies have the duty or authority to adopt rules pursuant to the APA in cases where the statutory language directs or authorizes them to "adopt policies," or "establish criteria" or the like, even though the word "rule" is not used in the authorizing statute.

Restricts Delegation of Rulemaking Responsibilities. The Act provides that certain rulemaking responsibilities of an agency head may not be delegated or transferred. These include approval of the notice of intended action and the filing of the approved rule with the Department of State.

Requires Certain Collegial Boards to Conduct Public Hearings. Florida's APA provides that, if the proposed rule concerns any rule other than one relating exclusively to procedure or practice, the agency must give affected persons the opportunity to present evidence and argument, if requested. In addition, the agency must, if requested by an affected person, schedule a public hearing on the proposed rule. The Act provides that, if the agency head is a board created within the Department of Business and Professional Regulation or the Department of Health, Division of Medical Quality Assurance, the board shall conduct the requested public hearing itself and may not delegate this responsibility without the consent of those persons requesting the public hearing.

Requires SERC to be Made Available to the Public. The Act provides that a proposed rule may not be filed with the Department of State (and therefore may not become effective), until the Statements of Estimated Regulatory Costs (SERC) has been provided to all persons who submitted a lower cost regulatory alternative and made available to the public.

Expands JAPC Authority. The Act makes a number of changes to the duties and powers of the Joint Administrative Procedures Committee (JAPC). Among other things, JAPC is now authorized to review and object to unadopted agency statements. JAPC also is authorized to consider whether a SERC complies with all applicable requirements and to object to proposed rule where the accompanying SERC does not comply.

Clarifies Cross References to Other Rules of the Same Agency. Florida's APA provides that a rule may incorporate material by reference but only as to material that exists on the date the rule is adopted; for purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes. As such, questions have arisen as to whether an agency rule that incorporates by specific reference another rule of that same agency automatically incorporates subsequent amendments to the referenced rule. The Act clarifies this by providing

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that an agency rule that incorporates by specific reference another rule of that same agency automatically incorporates subsequent amendments to the referenced rule, unless a contrary intent is clearly indicated in the referencing rule. Any notice of amendments to a rule that has been incorporated by specific reference in other rules of that agency must explain the effect of the amendments on the referencing rules.

Limits Materials that may be Incorporated by Reference. The Act provides that material incorporated by reference in a rule may not incorporate additional material by reference unless the rule specifically identifies the additional material. For rules adopted after 2008, material may not be incorporated by reference unless the full text of the material can be made available for free public access through an electronic hyperlink from the rule in the *Florida Administrative Code* making the reference, unless the agency has determined that posting of the material would constitute a violation of federal copyright law, in which case a statement to that effect, along with the address of locations at the Department of State and the agency at which the material is available for public inspection and examination must be included in the notice.

Requires Electronic Publication of Code. Effective December 31, 2008, the Department of State is required to publish electronically the *Florida Administrative Code* on an Internet website managed by the department. The electronic code is to display each rule chapter currently in effect in browse mode and must allow full text search of the code and each rule chapter.

Agencies May Not Rely on Unadopted Statements. The Florida APA currently allows an agency to rely upon a challenged unadopted statement if the agency is proceeding expeditiously and in good faith to adopt rules that address the challenged unadopted statement. However, effective January 1, 2008, the Act expressly provides that an agency or an administrative law judge may not enforce any agency policy that constitutes an unadopted rule when the agency fails to prove that rulemaking is not feasible or practicable. This requirement does not preclude application of adopted rules and applicable provisions of law to the facts.

Clarifies Deadlines for Filing Rule Challenges. The Act clarifies deadlines for filing challenges to proposed rules when a public

hearing has been held or the agency is required to prepare a SERC.

Increases Limits on Attorney's Fees. The Act increases from \$15,000 to \$50,000 the limit on attorney's fees that may be awarded to the prevailing party in challenges to proposed and existing rules. The Act also makes clear that attorney's fees are available in challenges to emergency rules.

Revises Attorney's Fees in Challenges to Unadopted Rules. While the Florida APA always has included a limit on the attorney's fees that may be awarded in cases involving challenges to *proposed* or *existing* rules, the Legislature did not establish any limits on attorney's fees that may be awarded in cases involving challenges to *unadopted* rules. However, agencies typically avoided the risk of paying attorney's fees in such cases by initiating rulemaking to adopt the challenged unadopted statement. The Act makes two changes to the provision governing attorney's fees in cases involving challenges to unadopted rules. First, the Act provides that, if prior to the final hearing the agency initiates rulemaking and requests a stay of the proceedings pending rulemaking, the administrative law judge shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the agency filed its request for a stay pending rulemaking, providing the agency adopts the statement as a rule. However, a request for attorney's fees and costs may be granted only upon a finding that the agency knew or should have known at the time the petition was filed that the agency statement was an unadopted rule, and no award of attorney's fees may exceed \$50,000. Second, the Act provides that, if the agency prevails in the proceedings, the administrative law judge shall award reasonable costs and attorney's fees against the party if the party participated in the proceedings for an improper purpose.

Effective Date. The Act takes effect July 1, 2007, except as otherwise expressly provided. Several of the provisions have delayed effective dates. For example, the provisions governing challenges to agency statements defined as rules, reliance on unadopted rules, and changes to attorney's fees all become effective January 1, 2008. The provision requiring the publication of an electronic version of the *Florida Administrative Code* becomes effective December 31, 2008. 

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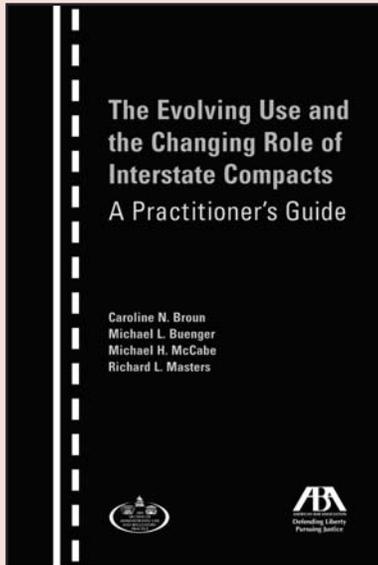
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