ARTICLE

POLICY FORMULATION VERSUS POLICY IMPLEMENTATION UNDER THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT: INSIGHT FROM THE NORTH PACIFIC CRAB RATIONALIZATION

Scott C. Matulich, Richard H. Seamon, Monica Roth & Ritchie Eppink

Abstract: The Magnuson-Stevens Fishery Conservation and Management Act (MSA) governs management of fisheries located three to 200 miles off the coast of the United States. The MSA is unique in administrative law in that it devolves policy formulation to eight Regional Fishery Management Councils rather than to a federal agency. That agency, the National Marine Fisheries Service (NMFS), is relegated primarily to developing regulations that implement the councils’ policies. NMFS can review the councils’ policies only to ensure that they are consistent with existing laws. NMFS has no authority to revise policy to suit its own preferences, or to write regulations that undercut council policy intent, except when conflicts with other applicable laws arise. The MSA’s legislative history reveals NMFS routinely undercuts this special administrative process through the regulations it writes. We review a recent example in which NMFS attempted to undermine the North Pacific Fishery Management Council’s crab rationalization policy through the regulation-writing process. We offer a simple solution to help avoid future abuse of administrative authority. This solution may have utility in other areas of administrative law in which authority to formulate policy is separated from the power to implement it.
NOTES

EMINENT DOMAIN AND ENVIRONMENTAL JUSTICE: A NEW STANDARD OF REVIEW IN DISCRIMINATION CASES

Catherine E. Beideman

[Pages 273–302]

Abstract: Government takings of private land for public purposes are permitted by the United States Constitution. Recently, more takings have occurred that largely benefit private individuals rather than the general public. The land taken for private benefit has primarily been that of low-income and minority individuals. Similarly, toxic waste sites are most often placed in low-income and minority neighborhoods. The modern environmental justice movement helps to shed light on why low-income and minority property owners are targeted in this way. The U.S. Supreme Court should adjust its analysis of both takings cases and environmental justice cases to account for the inability of the victims of these government actions to prove discriminatory intent. Without this adjustment, the blatant disparate impact of these decisions will continue to disproportionately burden low income and minority individuals.

A GREEN BIRD IN THE HAND: AN EXAMPLE OF ENVIRONMENTAL REGULATIONS OPERATING TO STIFLE ENVIRONMENTALLY CONSCIOUS INDUSTRY

Robert Frederickson

[Pages 303–334]

Abstract: In the past, there was a constant strain between industry and the United States Environmental Protection Agency (EPA). Industry, with its relentless pursuit of profitability, would spare no expense—environment included—to achieve its objectives. EPA, on the other hand, often levied hefty fines on industry in order to ensure compliance with environmental regulations. In recent years, however, many companies have taken a more proactive approach toward environmental compliance. While some companies use an image of environmental responsibility only in their marketing campaigns, others have realized that it is cheaper to take preventive action than be forced to pay for remediation. The new paradigm of environmental law recognizes that industry makes a better partner than adversary. This Note discusses the attempts of Texas Instruments, Inc. to transfer ownership of a state-of-the-art waste water treatment plant to an industrial redevelopment company. The plan would create an industrial park, create hundreds of jobs, and allow small industrial companies to dis-
charge their hazardous waste to an on-site facility at a greatly reduced cost. However, because of a narrow reading of the exceptions to the extensive permitting requirements of the Resource, Conservation, and Recovery Act (RCRA), the plant is currently unable to treat hazardous waste. This Note examines several of the relevant RCRA exceptions and argues that it benefits all parties for this plant to operate at full capacity.

ENVIRONMENTAL RESPONSIBILITIES OVERSEAS: THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE EXPORT-IMPORT BANK

Maura M. Kelly

[Pages 335–360]

Abstract: The National Environmental Policy Act (NEPA) serves to regulate the environmental impacts of the activities of federal agencies. One such agency, the Export-Import Bank, aids the growth of United States exports in international markets by funding projects where private banks are unwilling. The courts have been selective in applying NEPA requirements to extraterritorial U.S. activities, but the Ex-Im Bank’s activities fall within the categories created by prior cases. Therefore, the Ex-Im Bank should apply NEPA to the projects it considers for funding.

RENT CONTROL AND RENT STABILIZATION AS FORMS OF REGULATORY AND PHYSICAL TAKINGS

Christina McDonough

[Pages 361–386]

Abstract: The Fifth Amendment of the United States Constitution prohibits the government’s taking of private property without adequate compensation. Rent controls and rent stabilization unduly burden property owners by depriving them of market rate rental revenue. Furthermore, these methods of producing artificially low rents are often ineffective, failing to alleviate the financial hardships of the programs’ intended beneficiaries. Due to these dual aspects of rent control and rent stabilization programs—as well as by analogizing the programs to more classically recognized forms of regulatory takings, such as where the government deprives a property owner of all reasonable uses of his land—this Note reasons that rent control and rent stabilization measures also constitute unconstitutional takings.
Abstract: As it becomes clear that global warming is a reality, states are increasingly taking measures to regulate the emission of greenhouse gases such as carbon dioxide (CO₂). These efforts come largely in response to the federal government’s failure to regulate CO₂ emissions. Perhaps the most significant and novel example of states’ efforts to combat this problem is the Regional Greenhouse Gas Initiative (RGGI), a multi-state attempt to establish a regional cap-and-trade program targeting CO₂ emissions produced by fossil fuel-fired power plants. RGGI faces significant obstacles in its path to full implementation, including the possibility that it violates the Compact Clause of Article I of the United States Constitution. This Note argues that in its current iteration, RGGI likely does not conflict with the federal government’s Compact Clause power as delineated by the Supreme Court in *U.S. Steel Corp. v. Multistate Tax Commission*. If RGGI’s administrative body is ultimately vested with greater regulatory and enforcement powers, however, this Note concludes that the outcome under *U.S. Steel* could be much different.
POLICY FORMULATION VERSUS POLICY IMPLEMENTATION UNDER THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT: INSIGHT FROM THE NORTH PACIFIC CRAB RATIONALIZATION

Scott C. Matulich, Richard H. Seamon, Monica Roth & Ritchie Eppink*

Abstract: The Magnuson-Stevens Fishery Conservation and Management Act (MSA) governs management of fisheries located three to 200 miles off the coast of the United States. The MSA is unique in administrative law in that it devolves policy formulation to eight Regional Fishery Management Councils rather than to a federal agency. That agency, the National Marine Fisheries Service (NMFS), is relegated primarily to developing regulations that implement the councils’ policies. NMFS can review the councils’ policies only to ensure that they are consistent with existing laws. NMFS has no authority to revise policy to suit its own preferences, or to write regulations that undercut council policy intent, except when conflicts with other applicable laws arise. The MSA’s legislative history reveals NMFS routinely undercuts this special administrative process through the regulations it writes. We review a recent example in which NMFS attempted to undermine the North Pacific Fishery Management Council’s crab rationalization policy through the regulation-writing process. We offer a simple solution to help avoid future abuse of administrative authority. This solution may have utility in other areas of administrative law in which authority to formulate policy is separated from the power to implement it.

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INTRODUCTION

The Magnuson-Stevens Fishery Conservation and Management Act (MSA)\(^1\) governs management of fisheries\(^2\) within the Exclusive Economic Zone (EEZ) of the United States, which includes waters three to 200 miles off the nation’s coasts.\(^3\) The centerpiece of the MSA’s fishery management framework is devolution of fishery policy to local stakeholders and experts—those most familiar with the unique circumstances and needs of local and regional fisheries—through the establishment of eight Regional Fishery Management Councils.\(^4\) The councils, which are required to seek broad public input from individuals with local knowledge and interest in the fisheries,\(^5\) are unique in the federal regulatory system.\(^6\)

The MSA grants the councils enormous authority over federal fisheries management, bestowing on them the primary responsibility for developing and amending fishery management plans (FMPs) for each fishery in the council’s jurisdiction that requires management.\(^7\) In addition, the MSA grants councils the authority to propose regulations to implement each FMP.\(^8\) Under the MSA management framework, an FMP and the regulations that implement it go hand-in-hand.\(^9\) The FMP serves as a foundational policy document, setting out the basic policies that will govern the fishery,\(^10\) while the implementing regulations give the force of law to those policies.\(^11\)

Although the MSA does not grant the councils authority to actually promulgate regulations, it contemplates only limited agency review of

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\(^2\) Id. § 1802(13)(A). A “fishery” under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) is a stock of fish that is treated as a unit, based on geographical, scientific, technical, recreational, and economic characteristics. Id.

\(^3\) Id. §§ 1802(11), 1811(a); Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).


\(^5\) See id. § 1852(h)(3).

\(^6\) H.R. Rep. No. 104-171, at 45 (1995). The Department of Justice (DOJ), in a 1995 letter to the House Resources Committee, described the councils as “unique creations within the federal government [that] present very difficult constitutional questions regarding their structure and functions.” Id.

\(^7\) 16 U.S.C. § 1852(h)(1).

\(^8\) Id. §§ 1853(c), 1854(b).

\(^9\) See id. § 1854(b).


the policy determinations, FMPs, FMP amendments, and proposed regulations developed by the councils. The U.S. Secretary of Commerce, who has delegated his review authority under the MSA to the National Marine Fisheries Service (NMFS)—a division of the National Oceanic and Atmospheric Administration—ultimately promulgates management measures and regulations. NMFS’s review is limited by statute to ensuring that each FMP, FMP amendment, and proposed regulation is consistent with the MSA and other applicable laws. NMFS has no authority to revise a council-submitted FMP, amendment, or proposed regulation to suit its own policy preferences, or to write regulations that undercut council policy intent, except when they conflict with other applicable laws. Nevertheless, NMFS has demonstrated either a misunderstanding of this special administrative process, or has attempted to seize traditional, lead-agency federal regulatory powers not accorded it under the MSA. The MSA’s legislative history reveals several attempts by Congress to address NMFS’s usurpation of council authority. None of Congress’s efforts has eliminated the problem.

The tendency of NMFS to overstep its authority was made abundantly clear when it recently failed to follow council policy decisions, even when explicitly directed by Congress to adopt a particular council-

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14 See 16 U.S.C. § 1854(a), (b). The National Marine Fisheries Service (NMFS) may make “technical changes as may be necessary for clarity” to proposed regulations submitted by a council, but must publish in the Federal Register an explanation of any changes made. Id. § 1854(b)(1)(A).
15 See id. § 1854. In practice, the fishery management plan (FMP) and proposed regulation process is decoupled. Telephone Interview with Chris Oliver, Executive Dir., N. Pac. Fishery Mgmt. Council (Aug. 11, 2006) [hereinafter Interview with Oliver]. Councils typically defer the proposed regulation writing to NMFS. Id. Limited council budgets and staffing, and the fact that NMFS ultimately must enforce the regulations, underpins this convention. Id.
18 See Oceana, 2005 U.S. Dist. LEXIS 3959, at *92 (“In light of the Secretary’s improper substitution of his own recommendation in place of the Council’s, the Court is constrained to hold that the [provision] was adopted in violation of the MSA and therefore cannot be enforced.”); Associated Fisheries, 350 F. Supp. 2d at 253 (“The Court is troubled by the Government’s clear and inexplicable failure to comply with the procedural requirements of . . . the Magnuson-Stevens Act . . . .”).
approved management program. Following unanimous approval of a Bering Sea and Aleutian Islands (BSAI) crab rationalization program by the North Pacific Fishery Management Council (North Pacific Council)—which, among other elements, envisioned the use of both Fishermen’s Collective Marketing Act (FCMA) and non-FCMA cooperatives—Congress and the President enacted a January 2004 appropriations rider instructing the Secretary of Commerce to implement “all parts of the Program.” Ten months later, NMFS issued a proposed rule that deviated from the policy embodied in the program that the North Pacific Council had approved and that Congress had directed NMFS to implement. Only after a nearly unprecedented, thorough review and comment by the North Pacific Council and stakeholders in the fishery, and ultimately a letter to NMFS from Senator Ted Stevens, did the agency correct the rule to conform to the council motion.

This Article uses the BSAI crab rationalization program to examine NMFS’s apparent confusion over the MSA’s subtle, but clear, distinction between policy formulation (which lies with the councils) and policy implementation (which lies with the Secretary, acting through

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21 “Rationalization” is a term used to describe many different dedicated access management approaches to fishery management, but primarily refers to market-based programs involving individual transferable quotas or fishery cooperatives. See Shellfish Fisheries of the Exclusive Economic Zone Off Alaska, 69 Fed. Reg. 63,260, 63,262 (Oct. 29, 2004) (to be codified at 50 C.F.R. § 680.2).
23 15 U.S.C. § 521. The Fisherman’s Collective Marketing Act (FCMA) grants a limited antitrust exemption to fishing industry cooperatives that meet certain requirements. See id.
NMFS). The result is a council-agency relationship that frustrates the Act’s philosophy of devolving policy formation to local stakeholders and experts familiar with unique fishery circumstances. Following an overview of some of the major differences between NMFS’s proposed rule and the North Pacific Council’s motion, we speculate about whether the deviation between the motion and the proposed rule was inadvertent, or the result of confusion about whether NMFS’s responsibility is only to implement policy or also extends to reformulating policy established by regional councils. We conclude that regardless of the reason(s), legislative adjustments—possibly through MSA reauthorization—should confront this issue squarely, with the ancillary benefit of lessening the risk of subsequent litigation.

Part I of this Article reviews the legislative history of the council-NMFS relationship under the MSA, focusing on the procedures for NMFS’s review of FMPs, FMP amendments, and implementing regulations. Part II juxtaposes the North Pacific Council’s BSAI crab rationalization motion with NMFS’s proposed rule, first setting out the major elements and policy intent of the motion and then highlighting four major points of deviation between the twenty-six page motion and the 398-page, double-spaced proposed rule. Part III discusses NMFS’s unwillingness to heed the councils’ policymaking authority. Finally, the Recommendation and Conclusion section proposes legislative additions to improve congruence of policy and regulation under the MSA regional council system. The proposal can be used in other administrative law regimes that separate the power to formulate policy from the power to implement it.

I. THE COUNCIL-NMFS RELATIONSHIP

Congress has maintained an abiding confidence in the regional council management scheme for our nation’s federal fisheries, beginning with the passage of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) in 1976 and continuing throughout the past thirty years. The original act unilaterally and instantaneously declared federal management authority over a zone running from three

28 See discussion infra Part II.C.
29 See discussion infra Part I.B.
30 See discussion infra Part II.
31 See discussion infra Recommendation and Conclusion.
miles offshore to 200 miles offshore, leaving the nation with over two million square miles of fisheries to manage. In 1976, Congress faced the problem of comprehensively managing this vast new fisheries jurisdiction, and sought to enlist federal resources while simultaneously gaining the cooperation of fishermen, consumers, and members of the general public—all groups more sensitive to local issues than a federal agency based in Washington, D.C. Congress’s solution was the regional fishery management councils, an attempt “to balance the national perspective with that of the individual States,” determined to be “the best hope we can have of obtaining fishery management decisions which in fact protect the fish and which, at the same time, have the support of the fishermen who are regulated.”

A. The Current Relationship

The current relationship between the councils and the National Marine Fisheries Service (NMFS), in place since 1996, is the product of twenty years of congressional tinkering, and both unmistakably and tightly limits the scope of NMFS’s review of council determinations. Under the MSA, policy to govern a particular fishery can be made or changed in only three ways: (1) the issuance or amendment of a fishery management plan (FMP) for the fishery; (2) promulgation of regulations to implement a new FMP or FMP amendment; or (3) amendment of existing regulations governing a fishery without a corresponding change in the FMP. In each case, the current MSA process contemplates

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39 See id.
41 See id. § 1853(d) (5).
42 See id. § 1852(h) (5).
that the initiator and formulator of policy change should be a regional council.\textsuperscript{43}

1. FMPs and FMP Amendments

FMPs and FMP amendments, which set the foundations for policy in a particular fishery, are the core function of the regional councils.\textsuperscript{44} Councils submit FMPs and FMP amendments to NMFS, which must immediately begin reviewing the FMP or amendment, provide a sixty-day public comment period, and then approve, disapprove, or partially approve the FMP or amendment within thirty days of the end of the comment period.\textsuperscript{45} NMFS must fully approve an FMP or amendment, unless it discovers a clear inconsistency with the MSA or other applicable law.\textsuperscript{46} If it extends less than full approval, it must allow the submitting council to try again with a revised FMP or amendment, after giving the council a detailed “notice of disapproval” specifying the inconsistencies, and recommending actions that the council could take to gain approval.\textsuperscript{47} Moreover, NMFS has no “pocket veto”—if it does not validly act on an FMP or amendment within thirty days of the end of the comment period, the FMP or amendment will take effect as if NMFS had approved it.\textsuperscript{48}

Except in an emergency, NMFS may prepare its own plan only if the relevant council fails to develop a needed FMP or amendment within a reasonable time.\textsuperscript{49} If NMFS does so, it must hold local public hearings\textsuperscript{50} and submit its proposed FMP or amendment to the public and the relevant council for a sixty-day comment period.\textsuperscript{51} Furthermore, NMFS cannot repeal or revoke an FMP without three-quarters majority approval from the relevant council.\textsuperscript{52}

\textsuperscript{43} See id. §§ 1852(h), 1853(d).
\textsuperscript{44} Id. § 1852(h)(1).
\textsuperscript{45} Id. § 1854(a).
\textsuperscript{46} 16 U.S.C. § 1854(a)(1)(A); see H. Rep. No. 97-549, at 28 (1982), as reprinted in 1982 U.S.C.C.A.N. 4320, 4341 (“The Secretary can disapprove a plan only if it is found to be in clear violation of the national standards or a clear violation of law.”).
\textsuperscript{48} Id. § 1854(a)(3).
\textsuperscript{49} Id. § 1854(c)(1)(A), (B); see id. § 1855(c). NMFS may also prepare its own plan with respect to certain fisheries over which Congress has given the Secretary of Commerce primary authority. Id. § 1854(c)(1)(C); see id. § 1854(g).
\textsuperscript{50} Id. § 1854(c)(2)(A).
\textsuperscript{51} Id. § 1854(c)(4). Furthermore, NMFS cannot include any limited access system in an FMP or FMP amendment it prepares itself unless it obtains majority approval from the appropriate council. Id. § 1854(c)(3).
\textsuperscript{52} Id. § 1854(h).
As a practical matter, however, the FMP and FMP amendment process has become a closely collaborative one, involving both the council and NMFS throughout preparation and review. Conceivably, NMFS could exploit this cooperation to influence council policy decisions. But the more likely area where NMFS might influence policy is in the development of implementing regulations. NMFS has greater familiarity with the regulatory process, in part because it assumes subsequent enforcement responsibility; it also has a much larger staff, including members of the National Oceanic and Atmospheric Administration’s General Counsel Office, and it controls the budgets of regional fishery management councils.

2. Implementing Regulations and Regulatory Amendments

Whenever a council submits an FMP or FMP amendment to NMFS, the council must simultaneously submit proposed regulations to implement the FMP or amendment. In practice, the regulations are drafted by NMFS and submitted by the council as part of the package. Also, if a council determines that an existing regulation requires amendment without a corresponding change in the underlying FMP, the council can submit a standalone regulatory amendment to NMFS, or ask NMFS to prepare the regulatory amendment and submit that to NMFS. In either case, the scope of NMFS’s review (or drafting of the proposed regulation) is strictly limited, just as with FMPs and FMP amendments. Upon submission by the council, NMFS must immediately begin evaluating the proposed regulation or regulatory amendment and must approve it within fifteen days unless it is inconsistent with the underlying FMP, the MSA, or other applicable law. If NMFS disapproves the regulation or amendment as inconsistent with applicable law, NMFS must provide a notice specifying the inconsistencies, recommending revisions, and

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56 Interview with Oliver, supra note 15.


and giving the submitting council an opportunity to resubmit.\footnote{Id. § 1854(b)(1)(B), (2).} If NMFS approves the submission, it must publish the proposed regulation or amendment for a fifteen- to sixty-day public comment period.\footnote{Id. § 1854(b)(1)(A).} NMFS may not make any substantive changes to the council’s submission without council approval.\footnote{Id. § 1854(b)(3).} Before publication of the proposed regulation or amendment for public comment, NMFS may not change the council’s proposed regulation or amendment except to make “technical changes as may be necessary for clarity.”\footnote{Id. § 1854(b)(1)(A).} Even subsequent to the public comment period, NMFS may make changes to the council’s submission only after consulting with the council.\footnote{Id. § 1854(b)(3).} In both cases, NMFS must publish an explanation of the changes.\footnote{16 U.S.C. § 1854(b)(1)(A), (3).}

The councils seem to be due great deference in proposing federal rules; one court noted that NMFS’s review “is not \textit{de novo} . . . but analogous to an ‘abuse of discretion’ or ‘clear error’ standard.”\footnote{J.H. Miles & Co. v. Brown, 910 F. Supp. 1138, 1159 (E.D. Va. 1995).} In practice, however, nearly all regulations and regulatory amendments are drafted by NMFS after the councilformulates the policy.\footnote{Interview with Oliver, \textit{supra} note 15. One exception is the Gulf of Mexico Fishery Management Council, which contracts for regulation drafting with a former NMFS staff member. \textit{Id.}} Since 2001, NMFS has exercised its budgetary control over councils to require that councils notify NMFS before seeking legal advice, and to prohibit them from retaining continuing counsel.\footnote{Regional Fisheries Management Council’s Employment Practices, 50 C.F.R. § 600.120(g) (2005); \textit{see Magnuson-Stevens Act Provisions}, 66 Fed. Reg. 57,885, 57,887 (Nov. 19, 2001).} In addition, NMFS has argued with mixed success that loopholes in the MSA allow NMFS to make and modify fishery management rules on its own, out of whole cloth and without council involvement.\footnote{In \textit{Oceana, Inc. v. Evans}, for instance, the Secretary of Commerce relied on 16 U.S.C. § 1855(d)—which authorizes him to “promulgate such regulations . . . as may be necessary” to carry out FMPs and FMP amendments—to justify a substantive addition NMFS made to a council-submitted proposed regulation. No. 04-0811, 2005 U.S. Dist. LEXIS 3959, at *87–89 (D.D.C. Mar. 9, 2005). The court rejected the Secretary’s argument, saying that the MSA “is clear that when the Secretary is presented with proposed amendments and regulations, he does not have the independent authority to, \textit{sua sponte}, add a regulation that is inconsistent with the proposal from the Council.” \textit{Id.} at *89. (quoting Con-
Any significant influence that NMFS might obtain over councils’ decisions is contrary to the intent of the MSA to devolve federal fisheries policymaking to regional experts. The legislative history of the FMP and regulation review process only reinforces this conclusion, as it reveals a series of efforts by Congress to tighten and close loopholes in the original MSA that have allowed NMFS to circumvent council policymaking.

B. Legislative History of the Relationship

From the MSA’s outset, Congress has made it clear that the councils were to be independent, and function as the policymakers in federal fisheries management. Senator Warren Magnuson, a sponsor of the original MSA in the Senate, described the councils as unique and “relatively independent” institutions whose “powers are derived from the constitutional authority of the federal government, yet . . . are self-determinant in their own affairs.” And although the 1976 act gave NMFS—as the delegate of the Secretary of Commerce—the ability to approve or disapprove any council FMP, prepare its own FMP when councils failed to prepare their own, and promulgate its own regulations to implement plans, nothing in the legislative record suggests that Congress intended NMFS to use that power to infect the councils’
policymaking with its own agenda. First, as to whether the FMPs or the implementing regulations were to be the principal policy document for fisheries management, the conference committee made it clear: “[T]he fishery management plan is the comprehensive statement of how the fishery is to be managed . . . . ‘Regulations’, as used in this Act, means the regulations promulgated to implement what is contained in the fishery management plan.” And the House Merchant Marine and Fisheries Committee, once “mak[ing] it clear” in its report on the MSA legislation “that the final decision as to . . . whether [an FMP] will enter into force and effect rests with the Secretary,” went on to declare its expectation “that, in most cases, after a plan has been thoroughly considered by a Council and there appears to be justification for such a plan, the Secretary will adopt the plan.” Echoing the House committee’s view, Senator Magnuson, Commerce Committee chair, reported on the Senate floor that the committee “feel[s] that use of the veto by the Secretary of Commerce would be rare and that for the most part, primary management decisions would be lodged in the regional councils.” A Senate colloquy later that day made it clear that the legislation’s proponents intended the council’s will to be circumvented only in emergency cases.

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79 H. Rep. No. 94-445, at 68 (1975), as reprinted in 1976 U.S.C.C.A.N. 593, 636, and in Legislative History, supra note 37, at 1051, 1121; see also id. at 61 (“[T]he Committee expects the Councils, to the maximum extent possible, to be utilized by the Secretary.”).

80 122 Cong. Rec. 114, 115 (1976) (statement of Sen. Magnuson), reprinted in Legislative History, supra note 37, at 455. The sentiment was the same on the House floor, where Representative Robert Leggett reported for the House Committee on Merchant Marine and Fisheries:

[B]efore exercising [the] veto authority or drawing up a management plan, on his own initiative, the committee intends for the Secretary of Commerce to make every effort to see that whenever possible the views of the States or the Councils are honored. It is only in these unusual situations, where the fishery concerned would be substantially and adversely affected, that the Secretary would not honor such views or recommendations.

121 Cong. Rec. 32,532, 32,541 (1976), reprinted in Legislative History, supra note 37, at 846.

81 Senator Mike Gravel queried Senator Ted Stevens: “Can the Secretary disregard all other actions of the council or should we pass a technical amendment here that would require any decision made by the Secretary to first receive approval of the council?” Stevens replied: “Normally, if the Secretary does not agree he must send it back. But in an emergency
Yet, before the 1970s were over, Congress was hearing testimony that NMFS was routinely circumventing the will of the councils.82 The executive director of the Mid-Atlantic Council testified, succinctly, that “[i]t seems the result of every plan we send through is either a change [in] the policy, clarification of policy, or a new policy is established.”83 This and similar comments from the councils and stakeholders prompted congressional reports strongly emphasizing the councils’ independence and NMFS’s limited role in formulating fishery management policy,84 which culminated in the 1983 enactment of amendments overhauling the MSA FMP review process.85 This rewrite of the council-NMFS relationship aggressively protected the councils’ policymaking authority by: (1) requiring NMFS to “immediately” commence review of all council-submitted FMPs;86 (2) requiring NMFS to provide a specific explanation of all problems with any FMP it rejected;87 (3) providing for automatic approval of an FMP if NMFS did not approve or disapprove it within certain short deadlines;88 (4) giving councils a

there is an opportunity for the Secretary to promulgate ad hoc, temporary short-term type regulations.” 122 CONG. REC. 114, 129 (1976), reprinted in LEGISLATIVE HISTORY, supra note 37, at 494.


83 Id. at 589 (statement of John Bryson, Executive Director, Mid-Atlantic Regional Fishery Management Council); see also id. at 238 (statement of Richard N. Sharood, National Federation of Fishermen) (testifying that “there has been a lot of backdoor rejection of plans as when the Fishery Service will tell the council members off the record, do not submit that plan” and that “[v]irtually nothing is done by the Fishery Service today to implement a management plan that is not done on an alleged emergency basis”), 592–93 (statement of Clement Tillion, Chairman, North Pacific Regional Fishery Management Council) (“Our biggest problem is some of the nitpicking by NMFS . . . . We have very little difficulty conforming to the [MSA], but not necessarily to the wishes of NMFS.”).

84 See, e.g., H.R. REP. No. 97-438, at 9 (1982) (“The fact that the Secretary would have reached a different conclusion on how to manage a fishery does not justify the Secretary in substituting his judgment for that of the Council and disapproving the plan. The Councils, not the Secretary, are to manage fisheries within their respective areas.”). In a later report, the House Merchant Marine and Fisheries Committee stated that it was responding to “concern that the federal review of management decisions taken by the Councils too often resulted in undesirable alterations to those decisions” and “re-emphasized that the Secretary is not to substitute his judgment for that of the Councils regarding how to manage a fishery. The Secretary can disapprove a plan only if it is found to be in clear violation of the national standards or a clear violation of law.” H.R. REP. No. 97-549, at 9, 28 (1982), as reprinted in 1982 U.S.C.C.A.N. 4320, 4322, 4341.


86 Id. § 7(a)(1), 96 Stat. at 2487.

87 Id. § 7(a)(1)(C)(2), 96 Stat. at 2488.

88 Id. at § 7(b)(1)(A), 96 Stat. at 2489.
longer time to review FMPs that NMFS prepared on its own;\(^89\) (5) requiring NMFS to publish an explanation of any substantive changes to implementing regulations proposed by councils;\(^90\) and (6) granting each council authority to require NMFS to adopt emergency management regulations.\(^91\) These provisions were enacted despite specific and general objections from the Department of Commerce.\(^92\) Coupled with three more minor changes enacted in 1986,\(^93\) they show that Congress’s confidence in the regional council strategy persisted well into the 1980s and provide a strong indication of congressional intent on the balance of policymaking power between the councils and NMFS.

After 1983, Congress made no significant changes to the MSA council-NMFS relationship until reauthorization in 1996.\(^94\) By that time, however, the legislative record manifested a growing concern over whether the regional councils were representing the broad public interest.\(^95\) Congress responded to the concern with amendments to improve

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\(^89\) Id. § 7(a)(2)(B), 96 Stat. at 2489.

\(^90\) Id. § 7(a)(1), 96 Stat. at 2487.


\(^93\) Congress added a preliminary review phase to the FMP review process in 1986, requiring NMFS to make an immediate determination on the likelihood of approval for a council-submitted FMP. Act of Nov. 14, 1986, Pub. L. No. 99-659, § 106(1)(C), 100 Stat. 3706, 3712 (1986). In the same round of amendments, Congress also granted councils authority to comment on and demand a response concerning actions by federal and state agencies that could affect fish habitats, and mandated that NMFS cooperate with the councils on fishery research. Id. §§ 104(b)(2), 106(4), 100 Stat. at 3710, 3713.


\(^95\) For example, Representative Jolene Unsoeld placed these extended remarks in the Congressional Record in 1994:

Mr. Speaker, over the past 18 months our Fisheries Management Subcommittee has held numerous oversight hearings on our Federal fisheries management system in anticipation of reauthorization of the [MSA]. Numerous witnesses—representing every aspect of the Council management spectrum—testified before our committee. Nearly all suggested some type of reform was needed to restore the credibility of the decisions made by the Councils. Some suggested that allowing industry representatives to manage themselves creates a system rooted in conflicts of interests. An editorial in the Anchorage Daily News summed up this concern this way: “The Council system is ethically bankrupt. We don’t let Exxon, ARCO, and BP run the Alaskan State Department of Environmental Conservation. We don’t put people from phone and electric companies in charge of the state public utilities commission. We shouldn’t turn federal fisheries over to fishermen whose decisions directly affect their personal fortunes.”
the MSA’s provisions governing council composition, member selection, and conflicts of interest.\textsuperscript{96} Although Congress also substantially streamlined the FMP review process, it by and large did not heed calls to centralize fishery management in NMFS.\textsuperscript{97} The amendments gave NMFS management authority over highly migratory fish in the Atlantic,\textsuperscript{98} but otherwise the councils retained all of the policymaking authority they had always enjoyed, and even gained additional protections against NMFS usurpation, again over executive branch objection.\textsuperscript{99} Most notably, the amendments included provisions expressly giving councils authority to propose regulatory amendments\textsuperscript{100} and strictly limiting NMFS’s scope of review over all proposed regulations and amendments submitted by councils.\textsuperscript{101}

Since Congress’s last MSA reauthorization and amendments in 1996, calls to strip councils of their near-plenary policymaking authority have continued.\textsuperscript{102} Congress, however, has not changed its regional fishery management philosophy, and congressional testimony from council members suggests that Congress could further improve the MSA to pre-

\begin{itemize}
\item \textsuperscript{97} See Boledovich, supra note 95 ("Such proposals have not gotten strong support, probably because the apparent intent of Congress in creating regional councils was to decentralize fishery management by giving regional councils (and the states that appoint the members) the primary role in designing FMPs.").
\item \textsuperscript{98} § 109(g), 110 Stat. at 3585–86.
\item \textsuperscript{100} § 108(d), 110 Stat. at 3576.
\item \textsuperscript{101} § 109(b), 110 Stat. at 3581–82. Also enacted with the 1996 amendments were provisions preventing NMFS from repealing or revoking an FMP without three-quarters majority approval from the involved council, and requiring NMFS to hold local hearings before adopting an FMP on its own. § 109(a), (i), 110 Stat. at 3582, 3587.
\end{itemize}
vent NMFS from improperly interfering with the councils’ intended autonomy.\textsuperscript{103}

The recent legislative and regulatory repartee among Congress, NMFS, and the North Pacific Fishery Management Council over Alaska’s crab fisheries illustrates how inconsistent the real-life council-NMFS relationship is with the MSA. NMFS balked at its restricted role even after explicit congressional directive and congressional reinforcement of its limited role throughout the thirty-year history of the MSA.

II. BERING SEA AND ALEUTIAN ISLANDS CRAB RATIONALIZATION

Nothing in the MSA, of course, prevents Congress from using the councils and NMFS outside of the ordinary fishery management process by mandating them to develop and implement specific management measures, and that is exactly what Congress did in this case of the Bering Sea and Aleutian Islands (BSAI) crab fisheries rationalization.\textsuperscript{104}

After six years in development by the North Pacific Fishery Management Council (North Pacific Council), Congress and President George W. Bush enacted an amendment to the MSA mandating “the Secretary shall approve and hereafter implement by regulation the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Council.”\textsuperscript{105} NMFS’s response to this mandate—proposal of a regulation that differed substantively and significantly from the program passed by the North Pacific Council—is pointed evidence that NMFS is unwilling to accept its limited role under the MSA.\textsuperscript{106}


\textsuperscript{104} See Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 69 Fed. Reg. 63,199, 63,200 (proposed Oct. 29, 2004) (to be codified at 50 C.F.R. pts. 679, 680); Council Motion, supra note 25, at I.


\textsuperscript{106} See Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 69 Fed. Reg. at 63,200; see also discussion infra Part II.C.
A. Background

Shortly after a 1998 instruction from Congress to recommend management measures for BSAI crab fisheries off the coast of western Alaska, the North Pacific Council sponsored industry development of a policy to rationalize those fisheries. By May 2000, the industry committee had settled on a solution involving allocation of separate harvesting (fishing) and processing rights and explicit community protection elements. That fall, more than half of the BSAI crab fleet petitioned Congress to pass emergency legislation that “authorizes the [North Pacific Council] to adopt by September 1, 2001, individual fishing quotas (IFQs) for BSAI crab fishermen . . . and individual processing quotas (IPQs) for BSAI crab processors.” Congress responded by instructing the North Pacific Council to “analyze individual fishing quotas, processor quotas, cooperatives, and quotas held by communities” and directing that “[t]he analysis should include an economic analysis of the impact of all options on communities and processors as well as the fishing fleets.” On June 10, 2002, the North Pacific Council voted unanimously in favor of a so-called “three-pie voluntary coop-

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108 Following implementation of the American Fisheries Act (AFA) and the September 8, 1999 announcement of severely depressed crab stocks, an ad hoc industry group met in Seattle on September 17, 1999, to discuss the possible application of AFA-cooperatives to rationalize crab fisheries. During the October 1999 North Pacific Council meeting, Rick Lauber (the Council Chairman) appointed two members as North Pacific Council liaisons to facilitate subsequent workshops and meetings. The ad hoc industry meetings were formalized under the North Pacific Council mantle on April 26, 2000 as the “Bering Sea Aleutian Islands (BSAI) Crab Co-op Committee.” See generally Nat’l Marine Fisheries Serv., Bearing Sea Aleutian Islands Crab Fisheries, Final Environmental Impact Statement, at app. I-1 (Aug. 2004), available at www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Appendix1_1.pdf (detailing the creation of the committee).

109 Professor Matulich was invited by three harvester associations to present an industry-wide seminar on May 11, 2000, at Lief Erikson Hall in Ballard, WA, regarding the economics of “a two-pie allocation of [individual fishing quotas (IFQ)] and [individual processing quotas (IPQ)].” One week later (May 18, 2000), the BSAI Crab Co-op Committee abandoned cooperatives in favor of IFQs and IPQs, and also accepted the St. Paul regionalization proposal.


“Iterative” approach to crab fishery rationalization that was designed to benefit crab harvesters, processors and fishery-dependent coastal communities—a win-win-win policy intent. Members of industry took the unanimous council policy recommendation, embodied in a motion by the council, to Congress for immediate legislation.

In January 2004, Congress enacted legislation that explicitly instructed the Secretary of Commerce to implement the North Pacific Council’s motion through an amendment to the MSA:

By not later than January 1, 2005, the Secretary shall approve and hereafter implement by regulation the Voluntary Three-Piece Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003.

Congress further stated that “[n]othing in this Chapter shall constitute a waiver, either express or implied, of the antitrust laws of the United States.” NMFS published a proposed rule for public comment on October 29, 2004, and it deviated substantially from the North Pacific Council’s motion and policy intent.

B. Council Intent

Kevin Duffy, North Pacific Council member and then-Deputy Commissioner of the Alaska Department of Fish & Game, articulated the intent of the council’s motion when he introduced it to the full council:

Rationalization is the path to re-vitalize the economic health of [Alaska crab fisheries] . . . provided the policy recognizes this partnership among harvesters, processors and communities is like a three-legged stool. Cut out any leg and the stool tips over.

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114 Id.
115 Id. § 1862(j)(6).
The solution is to ensure that any rationalization program maintains the integrity of this partnership by providing an incentive for all parties to work toward a mutually beneficial goal. This motion advances a voluntary three-pie cooperative, designed to recognize the prior economic interests and importance of the partnership. The plan addresses conservation and management issues associated with the open access fishery. It includes mechanisms to reduce the excess harvesting and processing capacities of the industry. It increases economic returns and hence, stability for harvesters, processors and communities. It enhances efficiencies by encouraging voluntary industry cooperation, because each of the three partners looks beyond simple self-interest to the synergistic benefits of mutual interests.\footnote{Audio tape: Kevin Duffy, Deputy Commissioner, Alaska Department of Fish & Game, Statement for the Record After Making the Council Motion (June 8, 2002) (North Pacific Fisheries Management Council) [hereinafter Duffy Speech]; see Bering Sea/Aleutian Island Crab Rationalization Plan: Hearing on S.R. 253 Before the S. Comm. on Commerce, Science, & Transportation, 108th Cong. (2003) (testimony of Kevin Duffy, Commissioner, Alaska Department of Fish & Game), available at http://commerce.senate.gov/hearings/testimony.cfm?id=768&wit_id=2107.}

The integrated motion comprises several key elements: quota share allocations to harvesters and processors, regional landing and processing requirements, voluntary cooperative formation, a binding arbitration system (BA), and community protection measures such as community development quota (CDQ).\footnote{See Council Motion, supra note 25, at 2–5, 6, 11, 18–20; Duffy Speech, supra note 117.} The initial allocation of harvester quota shares (QS)—in the form of individual fishing quotas (IFQ)—and processor quota share (PQS)—in the form of individual processing quotas (IPQ)—represents an exclusive but revocable privilege to harvest or process a history-based percentage of the total allowable catch for each fishery.\footnote{See Council Motion, supra note 25, at 1–3.} Fully transferable IFQ is allocated annually and designated by north or south landing region, and as Class A or Class B quota.\footnote{See id. at 2.} Class A IFQ (ninety percent of the catch history) requires delivery to processors holding uncommitted IPQ in the designated region.\footnote{See id.} Class B IFQ (ten percent of the catch history) has no delivery requirement.\footnote{Id.} This unbalanced quota allocation between sectors was fiercely negotiated and intended to give harvesters ex-vessel...
price negotiating leverage over processors, while allowing both sectors and fishery-dependent communities to benefit from rationalization.\footnote{See Nat’l Marine Fisheries Serv., Bering Sea Aleutian Islands Crab Fisheries Final Environmental Impact Statement 4-147, 4-162 (Aug. 2004), available at www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Chapter4.pdf [hereinafter NMFS, ch. 4]; NMFS, Executive Summary, supra note 112, at 4.} Use caps are imposed to prevent excessive consolidation of QS and PQS.\footnote{See Council Motion, supra note 25, at 23–24.}

To assure broad distribution of rationalization benefits across harvesters, processors and communities, the North Pacific Council envisioned two types of cooperatives: (1) price bargaining cooperatives, which seek limited antitrust exemption under the Fishermen’s Collective Marketing Act (FCMA);\footnote{15 U.S.C. § 521 (2000).} and (2) operational cooperatives, which seek no limited antitrust exemption but are intended to improve operational efficiencies across multiple species, multiple harvesters and even multiple processors.\footnote{See Council Motion, supra note 25, at 20; Letter from David Bedford, Deputy Comm’r, Alaska Dep’t of Fish & Game, to Sue Salveson, Assistant Reg’l Adm’r, Alaska Region, Nat’l Marine Fisheries Serv. 2 (Dec. 12, 2004) (on file with author) [hereinafter Dec. 12 Bedford Letter]. See generally Mark Fina, Rationalization of the Bering Sea and Aleutian Islands Crab Fisheries, 29 MARINE POL’Y 311, 315–16 (2005) (describing the benefits of processor-associated cooperatives).}

BA is included in the North Pacific Council’s motion, at the insistence of harvesters.\footnote{See NMFS, Executive Summary, supra note 112, at 15–16.} BA is conceived as a voluntary framework of last resort to resolve any outstanding price and/or delivery disputes between harvesters and processors.\footnote{See id. at 15–16.} The BA process is built on distinct, independent arbitrations, so as to prevent behavior that could violate antitrust laws.\footnote{See Duffy Speech, supra note 117.}

Community protection is vital to the State of Alaska and arises in three elements of the North Pacific Council’s motion.\footnote{See id. at 15–16.} It was apparent to everyone involved that fishery-dependent communities on the doorstep of the historically largest license-limited access crab fishery (the opilio snow crab fishery) would be rendered inefficient and redundant under rationalization.\footnote{See id.; Council Motion, supra note 25, at 12–13.} Yet, these are communities with a single eco-
conomic base, dependent almost exclusively on crab processing. For example, the Pribilof Islands communities of St. George and, more importantly, St. Paul, are located in the middle of the Bering Sea, adjacent to the principal opilio fishing grounds. Approximately forty percent of the opilio crab are landed in these two island communities. Processors located there because it was an efficient location under license-limited access derby conditions. By eliminating the race-for-fish and the consequential race-to-process, the license-limited access location advantage would be lost to more distant ports like Dutch Harbor, threatening community viability. Variable processing costs are much lower in Dutch Harbor and Akutan, more than offsetting the $0.10 per pound cost of a roundtrip from the fishing grounds.

The first element of community protection is to mirror historic north-south landings by tagging IFQ and IPQ with regional designations for the purpose of protecting the only two northern communities: St. George and St. Paul. The second element allocates ten percent of all QS to eligible Alaska-native CDQ communities as community development quota. In so doing, it encourages investment in vessels. The third element encourages communities to maintain their PQS, in the event a processor wishes to leave. A right of first refusal is given to the community to purchase PQS that arose in that community. For those communities where a CDQ group exists, the CDQ group is given the right of first refusal; otherwise a governmental entity is given the entitlement.

133 See id. at 151.
134 See NMFS, app. 1, supra note 127, at 362 tbl.3.6-1.
135 See id. at 39.
136 See Letter from David Benton, Chairman, N. Pac. Fishery Mgmt. Council, to Congress (Aug. 5, 2002) [hereinafter Aug. 5 Benton Letter]. Regionalization was based on avoiding adverse community impacts by protecting historical landings. See id. There are only two communities in the northern region—St. Paul and St. George. See NMFS, app. 3, supra note 132, at 17–21. The north/south region designation was designed primarily to benefit the Pribilofs Islands, of which St. Paul is the largest. See NMFS, app. 3, supra note 132, at 156.
137 See NMFS, ch. 4, supra note 123, at 4-167 to 4-169.
138 See Council Motion, supra note 25, at 2.
139 See NMFS, app. 3, supra note 132, at 17–21.
140 See Council Motion, supra note 25, at 18–19.
141 See id. at 16–18.
142 Id.
143 Id. at 16–17.
C. North Pacific Council’s Motion Versus NMFS Proposed Rule

After NMFS published its proposed rule in October 2004,\textsuperscript{144} the North Pacific Council, in a rare action, conducted a very thorough review of the proposed rule.\textsuperscript{145} An extensive review was deemed necessary by the State of Alaska and a broad cross-section of industry, after concern arose that the NMFS’s proposed rule might undermine the policy embodied in the North Pacific Council’s motion.\textsuperscript{146} In particular, there was concern that the proposed rule would vitiate the intended purpose of PQS.\textsuperscript{147} The North Pacific Council staff, the State of Alaska, and members of the public contributed extensive comments.\textsuperscript{148} This subsection addresses the four most important and fundamental inconsistencies between the proposed rule and the North Pacific Council motion—those that would impair the North Pacific Council’s win-win-win intent.\textsuperscript{149} These four issues were identified in comments prepared by the authors and directly incorporated into the State of Alaska’s comments to the NMFS.\textsuperscript{150} Similar comments from three associations are included: the North Pacific Crab Association, an association of crab processors; the Central Bering Sea Fishermen’s Association, a CDQ group from St. Paul; and the Alaska Crab Coalition, the oldest associa-

\textsuperscript{145} See Dec. 12 Bedford Letter, supra note 126, at 1.
\textsuperscript{146} See id. Kevin Duffy, Deputy Commissioner of the Alaska Department of Fish & Game, directed Scott Matulich to conduct a comprehensive review of the proposed rule on September 9, 2004.
\textsuperscript{147} Id.
\textsuperscript{148} Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 70 Fed. Reg. 10,174, 10,174 (Mar. 2, 2005) (to be codified at 15 C.F.R. pt. 902 and 50 C.F.R. pts. 679, 680). NMFS received forty-nine letters of public comment on the proposed rule. Id. Those letters were summarized into 234 distinct comments that NMFS responded to in the preamble to the final rule. See id. at 10,179–226.
\textsuperscript{149} Dec. 12 Bedford Letter, supra note 126, at 1.
\textsuperscript{150} See id.
tion of North Pacific crab harvesters. Each of the three groups did not comment on all four issues. The four central issues are:

- The definition, and limited scope, of cooperatives;
- the incorrect application of the affiliation standard, particularly as it pertains to B-shares;
- potential antitrust and anti-competitiveness issues related to the design of binding arbitration and sharing of data and other information; and
- a flaw in the right of first refusal design.

1. Cooperatives

The proposed rule took a conservative, zero-risk approach to antitrust that was inconsistent with council intent. In so doing, the proposed rule defined the entire universe of cooperatives as only program-compliant FCMA (bargaining) cooperatives that need limited antitrust exemption. For example, “[a] crab harvesting cooperative is a group of crab QS holders who have chosen to form a cooperative under the 1934 Fisherman’s Collective Marketing Act (15 U.S.C. 521) in order to combine and collectively manage their crab IFQ through a crab cooperative IFQ permit issued by NMFS.”

Yet, the North Pacific Council also envisioned non-FCMA operational cooperatives comprised of non-processor affiliated vessels, processor-affiliated vessels and one or more processors. Both cooperative structures were envisioned as essential “to maximize operational efficiencies and net national benefits, and to broadly distribute those rationalization benefits across harvesters, processors and fishery-depend-
Cooperatives may be formed through contractual agreements among fishermen who wish to join into a cooperative associated with one or more processors . . . .” Non-FCMA operational cooperatives need no limited antitrust exemption because they involve neither market segmentation nor price formation and they pose no significant anti-competitiveness risk of violating antitrust laws of the United States.

The U.S. Department of Justice (DOJ) and National Oceanic and Atmospheric Administration (NOAA) general counsel ruled that vertically integrated factory trawlers in the Pacific Whiting fishery are allowed to form a non-FCMA cooperative for the purpose of improving operational efficiency. The Pacific Whiting Cooperative only needed to file a Business Review letter with DOJ. American Fisheries Act (AFA) cooperatives were similarly justified; section 210(b) of the AFA permitted processor-affiliated vessels to participate in AFA-authorized fishery cooperatives. The justification in both contexts is identical to that of North Pacific crab rationalization—improving operational efficiency.

NOAA general counsel received numerous complaints that its narrow interpretation that all crab cooperatives must be limited antitrust-exempt cooperatives under the FCMA was untenable and fundamentally undermined the North Pacific Council’s intent. Nearly one month after the proposed rule was released to the public and just nine days prior to the end of the public comment period, NOAA general counsel for the Alaska Region released an opinion that non-FCMA cooperatives intended by the North Pacific Council motion were not ille-

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157 Id.
158 Council Motion, supra note 25, at 20.
161 See id.
Thus, their exclusion could not be justified as necessary to ensure that the program proposed by the council complied with relevant laws. Unequal application of the law in the whiting and crab contexts was even more egregious. Market segmentation in the form of crab IFQ and IPQ occurred by statute in the North Pacific crab rationalization. Market segmentation in the Pacific Whiting Cooperative—issuance of IFQ to vertically integrated factory trawlers—was conditional on the formation of a non-FCMA cooperative and subject only to filing a Business Review letter with DOJ.

The North Pacific Crab Association raised a related concern with the proposed rule’s description of cooperatives:

The proposed regulation limits a holder of QS from joining more than one crab-harvesting cooperative. (§ 680.21(b)(4) and (5)). Instead the holder of QS must either join only one cooperative or not participate at all in cooperative operation. We believe this is inconsistent with Council intent and will greatly hinder the ability to achieve the maximum operational efficiencies available to harvesting cooperatives. All of the vessels receiving QS will receive differing amounts of species and regional designations. The limitation to only a single cooperative will require a high number of intercooperative transfers to match up species and regional designations with appropriate locations of PQS holders. This will significantly add to the burden of managing these transfers.

The Alaska Crab Coalition offered a similar comment:

There is no evidence of intent on the part of the Council that a QS holder be prohibited from simultaneous membership in more than one cooperative. Restricting flexibility to transfers among coops would not be as efficient as also allowing QS holders to join more than one coop . . . .

. . . The final regulations should allow QS holders to be members, simultaneously, of different coops in different fisheries or in the same fisheries, and of different kinds of coops

165 Lindeman Memorandum, supra note 164.
166 Id.
167 See Dec. 12 Bedford Letter, supra note 126.
168 Id.
169 See Sullivan, supra note 160, at 5.
170 Dec. 13 Iani Letter, supra note 151.
(FCMA and non-FCMA), in order to maximize economic efficiency and achieve other benefits.\textsuperscript{171}

Prohibiting non-FCMA cooperative formation would have undermined the North Pacific Council’s explicit intent to benefit harvesters, processors and fishery-dependent communities.\textsuperscript{172} Any holder of IPQ or any harvester affiliated with an IPQ holder would be prohibited from participating in operational cooperatives, thereby denying roughly half of the BSAI crab industry the safety and operational efficiencies that voluntary non-FCMA cooperatives provide.\textsuperscript{173}

2. Affiliation

Affiliation with a processor became the source of enormous confusion, in part because the North Pacific Council motion used a context-specific definition.\textsuperscript{174} Affiliation with a processor was defined according to a ten percent ownership standard in the context of QS leasing,\textsuperscript{175} ownership caps,\textsuperscript{176} and price bargaining and binding arbitration.\textsuperscript{177}

However, the motion applied a different, less determinate standard to define “processor affiliation” in the context of who is to be denied the more valuable B-shares:

Independent (non-affiliated) harvesters will receive class B IFQ pro rata, such that the full class B QS percentage is allocated to them in the aggregate. “Affiliation” will be determined based on an annual affidavit submitted by each QS holder. A person will be considered affiliated, if an IPQ processor controls delivery of a QS holder’s IFQ.\textsuperscript{178}

The council adopted a control-of-delivery standard, not ten percent ownership, in this context presumably because the purpose of B-shares was to provide harvesters ex-vessel price leverage through the ability to move fish to a higher price offer.\textsuperscript{179}

\textsuperscript{171} Dec. 9 Thomson Letter, supra note 151, at 4.
\textsuperscript{172} Dec. 12 Bedford Letter, supra note 126.
\textsuperscript{173} Dec. 9 Thomson Letter, supra note 151, at 2.
\textsuperscript{174} Dec. 13 CBSFA Letter, supra note 151.
\textsuperscript{175} Council Motion, supra note 25, at 5.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 11.
\textsuperscript{178} Id. at 5 (emphasis added).
\textsuperscript{179} See Madsen Letter, supra note 25, at 12.
NMFS’s proposed rule, however, provided a single, ten percent ownership definition of processor affiliation, rather than following the council’s context-specific intent:

Affiliation means a relationship between two or more entities in which one directly or indirectly owns or controls a 10-percent or greater interest in, or otherwise controls another, or a third entity directly or indirectly owns or controls a 10-percent or greater interest in, or otherwise controls both.\(^{180}\)

Thus, the proposed rule failed to ensure broad distribution of rationalization benefits.\(^{181}\)

Applying the ten percent ownership standard across the board would have several unintended, adverse effects.\(^{182}\) First, it would deny crew on processor-affiliated vessels a share of the greatest possible B-share price, or alternatively it would cause vertically owned vessels to become less competitive.\(^{183}\) Vertically owned vessels would be obliged to offer higher crew shares in order to mitigate lost crew payments.\(^{184}\) Second, processor-affiliated vessels would have every incentive to maximize rents by releasing control of B-share deliveries to the skipper, and the skipper would have the incentive to seek the highest possible B-share price.\(^{185}\) Only one other instance of “affiliation” can be found in the motion.\(^{186}\) A ten percent ownership standard (with a harvester) was used to clarify the rules on cooperative formation.\(^{187}\)

Each of the three industry associations had similar comments on this point. The Alaska Crab Coalition, for example, highlighted how the proposed rule’s ten percent affiliation standard needed to change to conform to the motion’s intent:

The Proposed Rule should allow for affiliated QS holders to participate in non-FCMA “operational cooperatives” for purposes of economic efficiency, but affiliated QS holders should


\(^{181}\) Dec. 12 Bedford Letter, supra note 126, at 3.

\(^{182}\) Id. at 4.

\(^{183}\) See id.

\(^{184}\) See id.

\(^{185}\) Id.

\(^{186}\) Council Motion, supra note 25, at 5.

\(^{187}\) Id. at 26.
be prohibited from participation in price formation negotiations.\textsuperscript{188}

This association of harvesters also noted:

An affidavit requirement [should be] set forth in the Proposed Rule as a criterion for the issuance of B shares, as specified in the Council motion (at 1.6.4) and is an important element of accountability and enforceability of the system devised by the Council, and should be preserved.\textsuperscript{189}

Communities echoed the comments by the Alaska Crab Coalition. CDQ communities, in particular, saw the narrow affiliation interpretation as an explicit denial of program benefits intended for CDQ groups.\textsuperscript{190}

3. Binding Arbitration

Fleetwide arbitration was considered and rejected by the North Pacific Council in favor of a “last best offer” system built on distinct, independent arbitrations.\textsuperscript{191} Yet, NMFS’s proposed rule allowed a binding arbitration (BA) system that mirrors fleetwide arbitration, thereby violating council intent concerning the sharing of confidential data.\textsuperscript{192}

The motion unambiguously stated:

Subject to limitations of antitrust laws and the need for proprietary confidentiality, all parties to an arbitration shall have access only to information provided to the arbitrator(s) or panel for that arbitration directly by the parties to that arbitration.\textsuperscript{193}

And the motion also stated:

Data collected in the data collection program may be used to verify the accuracy of data provided to the arbitrator(s) in an arbitration proceeding. . . . Any data verification will be un-

\textsuperscript{188} Dec. 9 Thomson Letter, supra note 151, at 2.
\textsuperscript{189} Id. at 2–3.
\textsuperscript{190} See infra Part II.C.4.
\textsuperscript{191} See Council Motion, supra note 25 at 13–15.
\textsuperscript{193} Council Motion, supra note 25, at 12.
dertaken only if the confidentiality protections of the data collection program will not be compromised.194

Yet sharing of BA data was manifest in the proposed rule.195 For example, the contract arbitrator was allowed to share information with parties other than those engaged in the BA, violating the North Pacific Council’s unambiguous confidentiality requirements.196 In fact, the proposed rule required the contract arbitrator to provide NMFS with:

[a] copy of any information, data, or documents given by the Contract Arbitrator to any person who is not a party to the particular arbitration for which that information was provided. The Contract Arbitrator must identify the arbitration to which those information, data, or documents apply, and the person to whom those information, data, or documents were provided.197

Furthermore, the proposed rule provided that the contract arbitrator “must receive and consider all data submitted by the parties,” including data that are not germane to the bilateral dispute.198 This requirement provided compelling economic incentive for harvesters to structure a fleet-wide system of mandatory binding arbitration in order to capture cost of production data from all processors.199 The North Pacific Crab Association commented, “Although an FCMA cooperative is allowed under the antitrust laws to negotiate prices collectively, the FCMA does not condone all activity that might otherwise be in violation of the antitrust statutes.”200 Fleetwide arbitration posed serious antitrust and anti-competitiveness risks and clearly violated the North Pacific Council’s intent that binding arbitration was the last resort “to resolve failed price negotiations.”201

In sum, the proposed rule allowed and promoted: (1) fleetwide BA that was rejected by the Council; (2) sharing of proprietary and

194 Id.
196 Id. at 63,203.
197 Id. at 63,285.
198 See id.
199 See id.
200 Dec. 13 Iani Letter, supra note 151, at 8.
confidential data that posed serious antitrust and anti-competitiveness risks; and (3) dispute resolution between two parties based on information regarding disputes between other parties.  

4. Community Protection

The North Pacific Council motion gave CDQ communities explicit protections in the form of both CDQs and the right of first refusal. The first encouraged investment in the harvesting sector, and the second encouraged retention of community-based processing. However, the narrow, ten percent ownership standard of “affiliation” in the proposed rule deprived the dual community protection benefits intended by the North Pacific Council. As the Central Bering Sea Fishermen’s Association commented:

It was the Councils’ intent to allow CDQ groups the ability to purchase both harvest assets and—as a form of community protection—to enter into Rights of First Refusal (ROFRs) for processor quota that originated in our communities.

Thus, the proposed rule created a Gordian knot: if any CDQ community were to exercise the right of first refusal, it could do so only by devaluing its CDQ crab harvesting quota; exercising its ROFR would render the CDQ group affiliated, requiring it to give up the more valuable B-shares, in exchange for A-shares.

III. NMFS Failure to Respect MSA’s Devolution Policy

Complex policies, like the North Pacific Fishery Management Council’s (North Pacific Council) crab rationalization motion, often

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203 Council Motion, supra note 25, at 18.
204 Id. at 16.
205 See id. at 18.
206 See id. at 16.
207 See supra Part II.C.2.
209 Cf. Dec. 12 Bedford Letter, supra note 126 (making substantially the same observation as is made in the text).
create unintentional ambiguity. This ambiguity leaves the regulatory agency with the job of ferreting out policy intent and drafting regulations to advance intent, while conforming to federal laws. Some minor inconsistencies will naturally arise due to these ambiguities. The role of public debate is to help formulate policy intent and policy detail; public comment on the proposed rule—among other things—helps assure congruence between policy intent and regulations.

In one sense, the process appears to work. Following public comment and the uncharacteristically detailed North Pacific Council review, National Marine Fisheries Service’s (NMFS) final rule\textsuperscript{210} embraced all but one of the major concerns raised above, along with countless lesser concerns. Yet, in another sense, the fact that the proposed rule deviated so fundamentally from the North Pacific Council’s motion, despite Congress’s unambiguous direction to implement the motion, raises a serious question about administrative process. The review conducted by the North Pacific Council, the State of Alaska, and members of industry was unprecedented. It was done because the proposed rule deviated in fundamental ways from specific council policy intent.

It would appear that National Oceanic and Atmospheric Administration (NOAA) and Department of Justice (DOJ) attorneys overstepped their limited policy implementation responsibilities and inserted themselves as policymakers. Nothing in the North Pacific Council’s motion could be construed as limiting cooperatives to only Fishermen’s Collective Marketing Act (FCMA) cooperatives. Nothing in the motion could be construed as limiting B-shares only to those vessels having no more than ten percent ownership affiliation with a processor.\textsuperscript{211} Nothing in the motion could be construed as requiring mandatory, fleetwide binding arbitration or as providing anything less than strict confidentiality of cost data. Nothing in the motion could be construed as depriving community development quota (CDQ) groups the dual community protection benefits of quota ownership, including B-


\textsuperscript{211} Interestingly, the North Pacific Council was silent on this issue during its review and comments to NMFS. Madsen Letter, \textit{supra} note 25 (lacking any mention of this issue). The Final Rule ultimately denied B-shares to owners of vessels in excess of the ten percent vertical integration standard. Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Island King and Tanner Crab Fishery Resources, 70 Fed. Reg. at 10,175. Ambiguity of motion language, or at least the existence of a context-specific ownership standard, appears to lie at the heart of the decision. \textit{See id.} at 10,182–83.
shares, and the ability to retain community-based processing. And nothing in the motion was determined by NOAA General Counsel to be in violation of federal law.

Yet, each of the four major instances in which the proposed rule deviated from the motion potentially undermined the North Pacific Council’s win-win-win policy intent. This potential effect should have been obvious to NMFS. In particular, the deviations undermined the North Pacific Council’s intent of broadening the distribution of rationalization benefits through the use of transferable processing quota where the North Pacific Council had found no other vehicle to accomplish this distributional goal. The proposed rule denied rationalization benefits to processing quota holders and processor affiliates. Without the ability to protect and benefit all stakeholders, rationalization could not proceed.

In a pointed letter to NOAA Administrator Conrad Lautenbacher sent the day the public comment period closed, Senator Ted Stevens expressly concluded that NMFS overstepped its straightforward policy implementation responsibility by failing to implement the Council’s motion:

> It has been brought to my attention that the proposed regulations published by NMFS deviates substantially from the program crafted by the North Pacific [Fishery Management] Council . . . . I specifically referenced the North Pacific Council’s program in the law and directed NMFS to implement “all parts of the Program.” It was the North Pacific Council that had the expertise to develop such a comprehensive rationalization program and the regulations should closely reflect their intent and purpose.212

> It is not surprising that NOAA General Counsel or DOJ raised concerns over the innovative use of processing quota213—Congress had singled out antitrust concerns when it stated that “[n]othing in this Act shall constitute a waiver, either express or implied, of the antitrust laws of the United States.”214 A zero-risk approach, however, was not necessary to comply with this admonition, and is an extraordinary application of antitrust law.215

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212 Letter from Stevens, supra note 26.
213 Aug. 27 Pate Letter, supra note 201, at 7–8.
215 It was not necessary for the DOJ’s Antitrust Division to “urge [the National Oceanic and Atmospheric Administration] to request that the Council develop a rationalization
Ignoring or changing policy intent outside of the council process, however, raises the obvious question: who has authority to make federal fishery policy? The MSA and its legislative history make it clear that Congress has not intended—except in extraordinary circumstances—for NMFS to change unilaterally the management tacks set by the regional management councils.\textsuperscript{216} This is especially true, as in the Bering Sea and Aleutian Islands (BSAI) crab rationalization case, when Congress and the President explicitly direct NMFS to implement particular, council-developed policies. Moreover, policy revision by NMFS after council deliberation undermines the public participation components of the regional council process and the Administrative Procedure Act, exposing NMFS and the Secretary of Commerce to a risk of litigation.\textsuperscript{217}

The complexity of the real life of federal administrative agencies makes it difficult to determine why NMFS has not respected the MSA’s devolution philosophy. We wonder, however, whether the regional councils are so unique that NMFS is unwilling to accept the concept of policy formulation occurring outside of Washington, D.C. Regardless, it seems that the agency is having a hard time adjusting to its limited role.\textsuperscript{218} Representative Gerry Studds, primary sponsor of the original MSA in 1976, articulated this suspicion during Congress’s first round of oversight hearings on the new regional councils:

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\textsuperscript{216} See supra Part II.

\textsuperscript{217} See Associated Fisheries of Me. v. Evans, 350 F. Supp. 2d 247, 253–54 (D. Me. 2004) ("Significant changes to a rule after the comment period can deprive the public of meaningful participation in the rulemaking process.").

\textsuperscript{218} It is a principle of administrative law that federal agencies make policy. See, e.g., Whitman v. American Trucking Ass’ns, 531 U.S. 457, 474–75 (2001) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.") (internal quotations omitted); Mistretta v. United States, 488 U.S. 361, 378 (1989) (recognizing that delegation of rulemaking power to federal agencies may carry with it "the need to exercise judgment on matters of policy").
[I]t seems to me the inevitable is happening, given the institutional makeup of this city, this Government, which is to say, “Well, nobody’s looking, let’s just creep out there and get a hold of this one and that one and bring them all back in here and make it fit.” And we are going to end up . . . with a nice convenient, conventional pattern of people working for the Department of Commerce, or whatever its name is, at any given time.

That is not what we intended in the Congress. And I think that from time to time it has been necessary for the councils particularly, and some members of this committee, to point out to the National Marine Fisheries Services . . . that in our judgment you have strayed from time to time or somehow lost sight of the overriding intention of this committee and of the Congress . . . to do something new under the Sun. We did not intend to establish yet another set of traditional bureaucratic procedures.

. . . [T]here is an innate, given the nature of the beast of this Government in Washington . . . almost unconscious, irresistible urge to reach out and pull back in and regularize . . . and to make these creatures recognizable and conventional and just nice, the way everything is supposed to fit in little boxes around here. They do not. The act was not written that way . . . .

Even if, as is likely, the problem is not so straightforward, legislative adjustments that seek to focus NMFS’s attention on the councils’ policy intentions could go a long way toward alleviating longstanding legal tension in the council-NMFS relationship.

**Recommendation and Conclusion**

This tension, between policy formulation and policy implementation, challenges the very core of the MSA: devolution of policymaking to regional fishery management councils. That core MSA principle might be better served if all proposed rules were required to begin with a general statement of council intent underlying the motions. Then, an explanation of how each element of the proposed rule implements the

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element-specific council intent should occur in the proposed rule pre-ambles. Such a requirement would also serve to lessen the government’s exposure to potential litigation.

Currently, the MSA does not require NMFS to publish a comparison of proposed rules and associated policies—it only requires explanations of any differences between the proposed and final regulations that it publishes.\textsuperscript{220} Even though an explanation of policy changes would only appear in the preamble, this simple addition might remind NMFS that Congress has not empowered it to change council policies and help the councils and public participants identify unauthorized revisions. But the recommendation is a double-edged sword—councils should also be required to clearly articulate both broad policy intent and element-specific intent.\textsuperscript{221}

Ambiguity is never likely to disappear from complicated policies, such as crab rationalization. But there should be little reason for such conflict between policy formulation and policy implementation.


\textsuperscript{221} This requirement should be added to the Councils’ existing obligation to keep detailed records of their proceedings. See 16 U.S.C. § 1852(i)(2)(E) (“Detailed minutes of each meeting of the Council, except for any closed session, shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all statements filed.”).
EMINENT DOMAIN AND ENVIRONMENTAL JUSTICE: A NEW STANDARD OF REVIEW IN DISCRIMINATION CASES

Catherine E. Beideman*

Abstract: Government takings of private land for public purposes are permitted by the United States Constitution. Recently, more takings have occurred that largely benefit private individuals rather than the general public. The land taken for private benefit has primarily been that of low-income and minority individuals. Similarly, toxic waste sites are most often placed in low-income and minority neighborhoods. The modern environmental justice movement helps to shed light on why low-income and minority property owners are targeted in this way. The U.S. Supreme Court should adjust its analysis of both takings cases and environmental justice cases to account for the inability of the victims of these government actions to prove discriminatory intent. Without this adjustment, the blatant disparate impact of these decisions will continue to disproportionately burden low income and minority individuals.

Introduction

In recent years, citizen groups have made numerous attempts to resist efforts of local and state governments to take private property for public use. Each of these cases involves a similar pattern: government condemns land for public use, and homeowners subsequently claim that the attested public use is not justifiable or that the compensation offered as remittance for their loss is not sufficient. An equally important—although less frequently acknowledged—similarity between these eminent domain cases is that the condemned land is typically owned by low-income or minority citizens who live in economically depressed areas, while the “public use” to which the land is dedicated often bene-

3 See Kelo, 843 A.2d at 510; Poletown, 304 N.W.2d at 465 (Ryan, J., dissenting).
fits middle or high-income citizens and/or politically favored groups or corporations.\(^4\)

Taking from the poor to give to the rich is not a new issue in environmental law, and the environmental justice movement was founded in part to oppose this trend.\(^5\) For many years, toxic waste sites and pollution hot-spots have been located in poor and minority areas where residents do not have the political or economic clout to protest effectively.\(^6\) As a result, most U.S. citizens now living on or near environmental toxins belong to low-income and minority groups.\(^7\)

Typically, environmental justice cases address the location of undesirable environmental hazards such as toxic waste sites.\(^8\) However, taking the land of low-income minority groups in order to transfer ownership to private businesses or developers under a public use theory raises equally substantive environmental justice issues as does the discriminatory siting of environmental hazards.\(^9\)

Part I of this Note discusses recent cases and scholarship on the government’s power of eminent domain. Part II reviews the history of the environmental justice movement in the United States and how this case law has evolved. Part III compares recent eminent domain cases with the framework established by current environmental justice theories. Finally, Part IV argues that a new standard should be developed that will take into account the realities of environmental and land use injustice in an effort to equalize the effect of both environmental hazards and takings on different demographic groups.

I. EMINENT DOMAIN: HISTORY & RECENT DEVELOPMENTS

The constitutional power to take, or condemn, private land for public use has long been recognized as essential to the smooth operation of both the federal and state governments.\(^10\) However, the Fifth Amendment of the U.S. Constitution provides specific limitations on

\(^4\) See Poletown, 304 N.W.2d at 462 (Fitzgerald, J., dissenting); 769 Assocs., 800 A.2d at 93.


\(^7\) Colopy, supra note 5, at 130–34; Knott, supra note 6, at 71; Yang, supra note 5, at 5–6.

\(^8\) See Knott, supra note 6, at 71–72; Yang, supra note 5, at 5–6.

\(^9\) See Colopy, supra note 5, at 135 (discussing discriminatory impact of siting decisions).

how and when a seizure of land may occur.\textsuperscript{11} Specifically, the government may only take land for public use, and when land is taken, just compensation must be paid to the rightful owner.\textsuperscript{12} The Fifth Amendment’s due process requirement is another limitation on the government’s ability to take land through the power of eminent domain.\textsuperscript{13}

As sovereign or quasi-sovereign entities, state and local governments may use eminent domain, but these seizures are similarly constrained by the Fifth Amendment through the application of the Fourteenth Amendment to state actions.\textsuperscript{14} Thus, the public use and just compensation provisions of the Fifth Amendment are the main constraints on the government’s ability to take property from private citizens.\textsuperscript{15} The due process limitation is less frequently invoked, but is still a fundamental constraint on the government’s power.\textsuperscript{16}

\textbf{A. The Public Use Limitation to Government Takings}

The main limit on the government’s ability to take private property is that the property must be used for a proper public purpose after it is taken from its original owner.\textsuperscript{17} This doctrine has undergone expansion and liberalization in meaning since its inception.\textsuperscript{18} There are at least two interpretations of public use: use by the public and use for public advantage.\textsuperscript{19} The latter interpretation is more expansive and includes anything that “tends to enlarge resources, increase industrial energies . . . [and] manifestly contributes to the general welfare and the prosperity of the whole community.”\textsuperscript{20} Courts have moved increasingly away from the former view toward the latter be-

\textsuperscript{11} See U.S. Const. amend. V.
\textsuperscript{12} See id.
\textsuperscript{13} See 1A Nichols on Eminent Domain § 4.3 (Julius Sackman ed., 3d ed. 2005) [hereinafter 1A Nichols].
\textsuperscript{15} See U.S. Const. amend. V; Durham, supra note 2, at 1277–78; 1A Nichols, supra note 13, § 4.3.
\textsuperscript{16} 1A Nichols, supra note 13, § 4.3.
\textsuperscript{18} Kelo, 843 A.2d at 524–25.
cause “use by the public” is too narrow and requires condemned land to be used directly by the public.\textsuperscript{21}

Under the “use by the public” interpretation, land taken from an individual must be used by many and must be common to all.\textsuperscript{22} This interpretation is typically employed by the courts in the absence of legislative intent to the contrary.\textsuperscript{23} When there is no apparent legislative intent, courts are more likely to “sustain the rights of the property owner against the public.”\textsuperscript{24} However, when legislative intent suggests using the broader construction of public use, courts have done so.\textsuperscript{25}

Some state courts have recently accepted the expanded definition of public use: “The test of public use is not how the use is furnished but rather the right of the public to receive and enjoy its benefit.”\textsuperscript{26} Increasingly, various state courts—and even federal courts, including the Supreme Court—have allowed government takings that directly benefit private interests because they have the potential to benefit the community at large via increased economic activities.\textsuperscript{27} This is not the traditional narrow view of public use, but it has become the widely accepted view, mostly due to broad statutory interpretations of takings laws to which the courts give great deference.\textsuperscript{28} Under the broader view, any use that could be perceived to have a public purpose shall be permitted.\textsuperscript{29} Anything that would tend to increase the economic activities of an area or “promote the productive power” of any community is included as a public use.\textsuperscript{30} This has now become the prevailing interpretation of public use.\textsuperscript{31}

One of the most cited examples of a court allowing the government to take private property and give it to another private interest is the infamous case of \textit{Poletown Neighborhood Council v. City of Detroit}.\textsuperscript{32} In

\begin{footnotes}
\item[21] \textit{Kelo}, 843 A.2d at 524–25; Klemetsrud, \textit{supra} note 19, at 785.
\item[22] See 2A Nichols, \textit{supra} note 20, § 7.02[2].
\item[23] See id.
\item[24] \textit{Id.}
\item[25] See id. § 7.02[2], [3].
\item[26] \textit{Kelo}, 843 A.2d at 525.
\item[28] See \textit{Kelo}, 843 A.2d at 555; \textit{769 Assocs.}, 800 A.2d at 93; 2A Nichols, \textit{supra} note 20, § 7.02[3]; Klemetsrud, \textit{supra} note 19, at 786.
\item[29] 2A Nichols, \textit{supra} note 20, § 7.02[3].
\item[30] \textit{Id.}
\item[31] See id.
\end{footnotes}
In this case, the City of Detroit condemned a large tract of land which was home to a tight-knit interracial community of lower and middle class African-Americans and immigrants, largely from Poland.\(^{33}\) The land was condemned in order for the city to provide General Motors with a large piece of land on which to build a new factory.\(^{34}\) Without this land, General Motors threatened to leave Detroit, taking with it all the jobs that go along with operating a large automobile factory.\(^{35}\) At the time, Detroit was steeped in an economic crisis and faced higher unemployment levels than the rest of the country.\(^{36}\) To prevent General Motors from leaving, the city offered it a piece of land in politically disenfranchised Poletown.\(^{37}\)

The majority in Poletown determined that the increase in jobs and economic development for Detroit was enough to find that there was a public use for the land that was given to General Motors.\(^{38}\) The court noted that “[t]he power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community.”\(^{39}\) The majority even went so far as to say that the benefit derived by General Motors through operating this multimillion dollar facility, which was subsidized by the city, is “merely incidental” to the public purpose of economic development.\(^{40}\) What the majority failed to note, however, is that the “public cost of preparing the site agreeable to . . . General Motors [was] over $200 million” while General Motors was required to pay the city only $8 million for the land.\(^{41}\)

Poletown laid the groundwork for other courts around the country to find it acceptable for governments to take private land through eminent domain for the benefit of private enterprises.\(^{42}\) The Poletown court

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\(^{34}\) Poletown, 304 N.W.2d at 460–61 (Fitzgerald, J., dissenting); see Nader & Hirsch, *supra* note 32, at 218.

\(^{35}\) *See* Poletown, 304 N.W.2d at 460 (Fitzgerald, J., dissenting).

\(^{36}\) *Id.* at 465 (Ryan, J., dissenting).


\(^{38}\) Poletown, 304 N.W.2d at 459–60.

\(^{39}\) *Id.* at 459.

\(^{40}\) *Id.; see* Nader & Hirsch, *supra* note 32, at 219.

\(^{41}\) Poletown, 304 N.W.2d at 469 (Ryan, J., dissenting).

\(^{42}\) *See* Twp. of W. Orange v. 769 Assocs., 800 A.2d 86, 88 (N.J. 2002).
clearly took the view that anything that would enlarge the resources of
the community was a public purpose. 43

Similarly, in Township of West Orange v. 769 Associates, a dispute arose
over an action by the township to condemn part of 769 Associates’
property for use as a road to provide ingress and egress to a third
party’s housing development. 44 769 Associates claimed that this taking
violated the constitutional requirement that any land taken by eminent
domain be for the public use. 45 The trial court rejected their claim, but
the appellate division found that the proposed use of the land did vi-
olate the public use clause and was thus unconstitutional. 46 The appel-
late division decided that the “primary purpose of the proposed right-
of-way . . . is to serve the private interest” of the developer. 47 On appeal,
the Supreme Court of New Jersey reversed the appellate division’s deci-
sion and found that the intended use as a road to a housing develop-
ment satisfied the constitutional requirement that the land be for pub-
lic use. 48 The court commented on the expansive definition of public
use: “Given the broad definition of ‘public use,’ it is not essential that
the entire community or even any considerable portion of the commu-
nity directly enjoy or participate in the condemned property for the
taking to constitute a ‘public use.’” 49 The ruling implied that even
when a private party benefits from an eminent domain action, the pub-
lic use requirement is not violated. 50 The New Jersey court accepted the
rationale of the Poletown majority and determined that taking land from
private citizens for the primary benefit of another private entity fits
within the purview of the public use clause. 51

There has been a backlash to these decisions recently, specifically
in County of Wayne v. Hathcock. 52 In this case, a court in Michigan, where
Poletown was decided, found an eminent domain action unconstitu-
tional because it was not for the public use. 53 This case involved an
eminent domain action by Wayne County against the owners of nine-

43 See Poletown, 304 N.W.2d at 465 (Ryan, J., dissenting); 2A Nichols, supra note 20,
§ 7.02[2], [3].
44 800 A.2d at 88.
45 Id. at 89.
46 Id. at 89–90.
47 Id. at 90.
48 Id. at 88.
49 Id. at 91.
50 769 Assocs., 800 A.2d at 91.
51 See id.; see also Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455,
52 684 N.W.2d 765, 770 (Mich. 2004); 2A Nichols, supra note 20, § 7.02[2].
teen parcels of land located near the county’s airport in an economically distressed area. The county determined that it needed these parcels, spread out over a thousand-acre tract, for the completion of “Pinnacle Project,” a state-of-the-art business and technology park. The county had already purchased a vast majority of the land and needed these last few parcels to complete the project. The homeowners claimed that the eminent domain action was unconstitutional because Pinnacle Project “would not serve a public purpose.”

In this instance, the Michigan Supreme Court determined that the proposed use was not public in nature, and thus could not be upheld under constitutional scrutiny. The court noted that although there was legislative intent for a broad interpretation of the public use requirement, the court is not required to defer to the legislature on this issue. The court also noted that a stricter interpretation of the public use requirement was necessary to ensure the continued security of private property ownership. This overturned the previous ruling in Pole-town and utilized the narrower interpretation of the public use requirement.

Despite this shift in the Michigan Supreme Court’s eminent domain jurisprudence, the Supreme Court of the United States held, in Kelo v. City of New London, that land could be taken from private citizens to create a waterfront hotel and business area consisting primarily of private industries. This planned business area would also contain new homes once the homes of the old owners were removed. With this decision in the summer of 2005, the Supreme Court accepted the broader definition of public use, and recognized that private land may be taken for what is not, by traditional definition, a public use.

The definition accepted by the Court allows anything which could be deemed to have a “public purpose” to meet the public use requirement. Allowing land to be taken for a “public purpose” grants much
more deference to the local or state government in deciding what constitutes an appropriate use for the land.\textsuperscript{66} The Supreme Court has found that this deference is warranted in eminent domain cases.\textsuperscript{67} The Court also specified that an economic development project satisfied the conditions of a public purpose for the land and was thus an acceptable result under the public use doctrine.\textsuperscript{68}

Economic development projects were deemed acceptable by the Court because “promoting economic development is a traditional and long accepted function of government.”\textsuperscript{69} The City of New London claimed that the project would lead to the creation of new jobs and increased tax revenue for the city.\textsuperscript{70} The city hoped to “coordinate a variety of commercial, residential, and recreational uses of land with the hope that they will form a whole greater than the sum of its parts.”\textsuperscript{71} The Supreme Court upheld the statute which authorized the use of eminent domain as an appropriate means for achieving the public purpose of economic development.\textsuperscript{72}

B. The Just Compensation and Due Process Limitations to Government Takings

A further constitutional limitation to the government’s power of eminent domain is that for all private land taken by the government, the previous owner must be paid just compensation.\textsuperscript{73} The just compensation limitation requires the government to pay a fair price for the land it takes through eminent domain.\textsuperscript{74} There has been much debate on what constitutes fair payment to an owner who does not want to part with their property in the first place.\textsuperscript{75} The consensus is that compensation for land taken by the government is a natural and absolute right.\textsuperscript{76}

\textsuperscript{66} See id.

\textsuperscript{67} See id.


\textsuperscript{69} Kelo, 125 S. Ct. at 2665.

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} See id.

\textsuperscript{73} U.S. Const. amend. V; 3 Nichols on Eminent Domain § 8.03 (Julius Sackman ed., 3d ed. 2005) [hereinafter 3 Nichols].

\textsuperscript{74} Nader & Hirsch, supra note 32, at 207.

\textsuperscript{75} Errol E. Meidinger, The “Public Uses” of Eminent Domain: History and Policy, 11 Envtl. L. 1, 2 (1980).

\textsuperscript{76} 3 Nichols, supra note 73, § 8.03.
This right has been viewed both in terms of a natural right and as a constitutional right.\textsuperscript{77} An individual has a basic right to remuneration if his land is seized by the government in an eminent domain action.\textsuperscript{78} This right would exist even without a specific provision in the U.S. Constitution requiring just compensation.\textsuperscript{79} Since the eighteenth century, American courts recognized a natural right to own and keep property.\textsuperscript{80} This natural right prevents the government from taking property from individuals without compensation.\textsuperscript{81}

In addition to this natural right guarantee, the Constitution also ensures that just compensation will be paid when the government exercises its eminent domain power.\textsuperscript{82} It is widely understood that the Constitution provides a cause of action for individuals to recover from the government if their land has been taken or damaged, and no compensation has been provided.\textsuperscript{83} These claims are typically referred to as inverse condemnation suits.\textsuperscript{84} The Constitution, however, does not provide a private right of action when a plaintiff claims that the compensation paid was not adequate.\textsuperscript{85}

Along the same lines, the Constitution imposes two other limitations on exercises of eminent domain: due process and equal protection.\textsuperscript{86} The Fifth Amendment states that “no person shall be deprived of life, liberty, or property without due process of law.”\textsuperscript{87} This limitation was extended and applied to the states through the Fourteenth Amendment.\textsuperscript{88} The right of the individual not to be deprived of his private property is in conflict with the right of the government to take land through eminent domain.\textsuperscript{89} This conflict is resolved by the Due Process Clause, placing the burden on the government to satisfy the

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\textsuperscript{77} Id. § 8.01[1], [2].  \\
\textsuperscript{78} Id. § 8.01[1].  \\
\textsuperscript{79} See id.  \\
\textsuperscript{80} See id.  \\
\textsuperscript{81} Erwin Chemerinsky, Constitutional Law: Principles and Policies 585 (2d ed. 2002).  \\
\textsuperscript{82} See id.  \\
\textsuperscript{83} 3 Nichols, supra note 73, § 8.01[2].  \\
\textsuperscript{84} Id.  \\
\textsuperscript{85} Id.  \\
\textsuperscript{87} U.S. Const. amend. V.  \\
\textsuperscript{88} Id. amend. XIV, § 1; see Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).  \\
\textsuperscript{89} 1A Nichols, supra note 13, § 4.1–4.3.
\end{flushright}
conditions of due process before acting.\textsuperscript{90} Thus, there is a presumption in favor of private property rights, and it is the government’s duty to satisfy the requirements of due process before a taking may be considered legitimate.\textsuperscript{91}

Plaintiffs have also attempted to bring claims based on a theory that the government has violated their civil rights under 42 U.S.C. § 1983—as well as their right to equal protection under the Constitution—by condemning land in a mostly minority neighborhood.\textsuperscript{92} Section 1983 and the Equal Protection Clause ensure that anyone who unlawfully violates the rights of any member of society, particularly through discrimination, shall be liable to the injured party.\textsuperscript{93} However, the intent requirement for a finding of discrimination has typically prevented this type of claim from being successful.\textsuperscript{94}

These two constitutional arguments are invoked less frequently because of the more specific clause in the Fifth Amendment prohibiting the seizure of private property unless it is for public use and with just compensation.\textsuperscript{95} As long as the acting government entity fulfills these constitutional requirements by taking property only for public uses, paying just compensation, and not violating due process or equal protection, it may take land from private citizens.\textsuperscript{96}

\textsuperscript{90} Id. § 4.3. Courts have found that while the government’s right of eminent domain and an individual’s right to private property can be diametrically opposed, the Constitution has resolved this issue in favor of the individual by requiring the government to satisfy due process limitations before deprivations of private property will be permitted. Id.

\textsuperscript{91} See id.

\textsuperscript{92} Case Comment, Civil Rights—Urban Renewal—Allegation of Conspiracy To Use Eminent Domain Power for Racially Discriminatory Purpose in Urban Renewal Programs Does Not State a Federal Claim Under Civil Rights Act, 42 U.S.C. § 1983, 81 HARV. L. REV. 1568, 1568 (1968) [hereinafter Case Comment, Civil Rights]; see Green Street Ass’n v. Daley, 373 F.2d 1 (7th Cir. 1967). The court in Green Street Ass’n dismissed the plaintiff’s equal protection claim because the plaintiff failed to assert that the taking was not for public use, in addition to their equal protection claim. Id. Defendants cannot bring equal protection claims for economic discrimination; therefore these claims are typically brought under a theory of racial discrimination. CHEMERINSKY, supra note 80, at 648–49.

\textsuperscript{93} U.S. Const. amend. XIV, § 1; 42 U.S.C. § 1983 (2000). Section 1983 states:

Every person, who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.


\textsuperscript{94} See Case Comment, Civil Rights, supra note 92, at 1568–69.

\textsuperscript{95} See id. at 1568.

\textsuperscript{96} See Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001); Nader & Hirsch, supra note 32, at 207–08.
C. Purposes of Limiting the Government’s Power of Eminent Domain

The reason for limiting the ability of the government to take land in particular circumstances, and only when certain conditions are met, is to prevent specific groups of individuals from bearing “public burdens which, in all fairness and justice, should be borne by the public as a whole.”\(^97\) Requiring that the land taken be for a public use or public benefit is an attempt to prevent the government from taking land to help its friends or political allies at the expense of its enemies or those who do not have the power to protest effectively.\(^98\) The just compensation limitation requires the government to pay for land it takes in an effort to make the original owner whole after the government action.\(^99\) While complete compensation for emotional loss is not always possible—for instance, with the taking of a family home with sentimental value—this limitation attempts to prevent gross injustice.\(^100\) The just compensation requirement ensures that one person or group is not responsible for subsidizing a public project.\(^101\)

The due process limitation is in place to protect individuals from the arbitrary exercise of government powers.\(^102\) Limiting the power of the government to take private land also protects the fundamental constitutional right to private property.\(^103\) The right of the government to take private property is required for the smooth functioning of the government.\(^104\) However, the value that the Constitution places on private property rights requires these limitations on the power of the government to ensure that the government’s eminent domain authority does not undermine the constitutional right to own property.\(^105\)

Unfortunately, poor and minority populations still tend to bear the burden of eminent domain actions, despite these safeguards.\(^106\) Typically, when the government decides to take private land for redevelopment, the targeted communities have little political influence and are

\(^97\) *Palazzolo*, 533 U.S. at 618 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

\(^98\) See *Nader & Hirsch*, *supra* note 32, at 207.

\(^99\) See 3 *Nichols*, *supra* note 73, § 8.06.

\(^100\) See id.

\(^101\) See id. § 8.01[2].

\(^102\) 1A *Nichols*, *supra* note 13, § 4.4.

\(^103\) See *Nader & Hirsch*, *supra* note 32, at 208.

\(^104\) See *Kohl v. United States*, 91 U.S. 367, 371–72 (1875); *Nader & Hirsch*, *supra* note 32, at 207.

\(^105\) See *Kohl*, 91 U.S. at 371–72; *Nader & Hirsch*, *supra* note 32, at 207–08.

\(^106\) See *Gallagher*, *supra* note 68, at 1837–38; *David M. Herszenhorn, Residents of New London Go to Court, Saying Project Puts Profit Before Homes, N.Y. Times*, Dec. 21, 2000, at B5.
comprised of low-income and minority populations. In some cases, governments go as far as to remove blighted communities to make way for more economically viable redevelopment projects, and this is permitted despite the safeguards of the Constitution.

II. Environmental Justice: History & Recent Development

Minorities and the poor in the United States are much more likely than middle and upper class white populations to be exposed to environmental hazards where they live. Studies of this phenomenon have found that “three out of every five African-Americans and Latinos live in communities with uncontrolled toxic waste sites.” Neighborhoods that contain hazardous waste incinerators have eighty-nine percent more people of color than average neighborhoods. Overall, poor and minority populations bear the burden of environmental hazards within the United States.

Traditionally, the environmental movement was focused on “wilderness and species preservation issues, [which] have had little relevance for poor and minority communities” in the United States. It took longer to bring the effects of environmental racism and environmental injustice into the main stream, but this doctrine has now been accepted, and there have been legislative efforts and judicial cases that attempt to rectify this injustice. The desire to achieve equality in bearing environmental hazards has been termed environmental justice.

Though originally the environmental justice movement centered on exposure to toxic waste sites, the doctrine has its parallel in the issues surrounding eminent domain.

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107 See Gallagher, supra note 68, at 1837–38; Herszenhorn, supra note 106, at B5.
108 See Nader & Hirsch, supra note 32, at 217–18 (discussing the Poletown decision’s effect on a politically disenfranchised community); Gallagher, supra note 68, at 1837–38.
110 Colopy, supra note 5, at 130.
111 Id. at 131.
112 Id. at 133; Knorr, supra note 6, at 71.
113 Yang, supra note 5, at 6.
114 See Knorr, supra note 6, at 72; Pinney, supra note 109, at 360–61.
A. Evolution of the Environmental Justice Movement

The environmental justice movement is a relatively recent development compared to other social justice movements. In the 1970s, the environmentalist movement sprung out of the success of the civil rights movement a decade earlier. In the early 1980s, issues associated with environmental justice gained attention with the Warren County protest.

In 1982, Warren County was chosen by the State of North Carolina to house a toxic landfill. The landfill was to hold 32,000 cubic yards of polychlorinated biphenyl, a highly hazardous chemical. Officially, Warren County—specifically the town of Afton—was chosen because it was a secure site for the toxics. Upon closer examination, however, it was determined that the site was too close to the nearby water table, and thus was not appropriate for a toxic waste site. The residents of Warren County argued that their county had been chosen not because it provided the safest location, but because it was politically disenfranchised and thus would not be able to challenge the placement effectively.

Warren County was the poorest county in the State of North Carolina and its population was sixty-five percent African-American. The situation eventually gained national attention when civil rights groups and environmental leaders joined the protest. The protest was unsuccessful in preventing the placement of the site in Warren County, but it did bring national attention to the issues of environmental justice.

Congressman Walter E. Fauntory, a participant in the protest, commissioned the General Accounting Office to do a study to determine whether there was a relationship between the location of hazardous waste facilities and the racial and economic circumstances of com-

116 See Knorr, supra note 6, at 73–74.
117 Id.
118 Colopy, supra note 5, at 140–41; Knorr, supra note 6, at 74; Pinney, supra note 109, at 355–56.
119 Pinney, supra note 109, at 356.
120 Collin, supra note 115, at 132; Yang, supra note 5, at 5.
121 Pinney, supra note 109, at 356.
122 Id.; see Collin, supra note 115, at 132.
123 Pinney, supra note 109, at 356.
124 Id.
125 Id.
126 See id. at 356–57.
munities who are chosen to house them.127 The report found that of four off-site hazardous waste landfills within the eight-state region of the U.S. Environmental Protection Agency’s (EPA) Region IV—the region to which Warren County belongs—three were located in predominantly African-American communities.128 Despite the fact that African-Americans only accounted for twenty percent of the population of the region, hazardous waste landfills were much more likely to be found in African-American communities.129 Similarly, the report found that of the people living in areas with hazardous waste landfills, between twenty-six and forty-six percent were living below the poverty line.130 These statistics presented a very strong correlation between race, socio-economic status, and the placement of hazardous waste landfills.131

At the time of this study, some claimed that the sites had not been populated by minorities at the time of the siting, but that the placement of a toxic waste facility lowered property values and thus encouraged higher proportions of poor and minority people to move into those areas.132 Congressman Fauntory’s study found, however, that the proportion of African-Americans living at each of the four sites studied actually decreased between the time that the facility was placed in the area and the time the study was conducted.133 His research defeated the so-called “market dynamics” theory, which stated that the communities were composed of minorities because the waste facility was located there, not that the waste facility was located in the area because the community was composed of minorities.134

After Fauntory’s study, citizen groups began calling for further investigation into the phenomenon, and the United Church of Christ undertook a major study in 1987 to determine the relationship between race, class, and environmental hazards.135 The results of this study were equally staggering: the final report showed that poor people of all races were more likely than middle and upper class groups to live near haz-

127 Collin, supra note 115, at 132; Pinney, supra note 109, at 357; Yang, supra note 5, at 5.
128 Pinney, supra note 109, at 357; Yang, supra note 5, at 5.
129 Yang, supra note 5, at 5.
130 Pinney, supra note 109, at 357.
131 See Collin, supra note 115, at 132.
133 Id.
134 See id.
135 Id. at 1393; Collin, supra note 115, at 133; Pinney, supra note 109, at 358.
ardous waste sites.\textsuperscript{136} Even more significant, however, is that the study found race to be “the single most significant factor associated with the location of licensed or abandoned hazardous waste facilities.”\textsuperscript{137} It also determined that the probability that the sites were located so close to African-American communities by chance was one in ten thousand.\textsuperscript{138}

A 1992 study by the \textit{National Law Journal} looked at government enforcement of environmental laws at Superfund toxic waste sites.\textsuperscript{139} Approximately 1200 sites were studied, and the journal concluded that penalties incurred for violating environmental laws at sites with the greatest white population were 500 times higher than penalties incurred at sites with the greatest minority population.\textsuperscript{140} Similarly, the study found that for all laws aimed at protecting citizens from pollution, penalties for violations were forty-six percent higher in white communities compared to minority communities.\textsuperscript{141} Also, a study done in Houston, Texas, found that “although African-Americans made up only [twenty-eight percent] of the Houston population in 1980, six of Houston’s eight incinerators . . . and fifteen of seventeen landfills were located in predominantly African-American neighborhoods.”\textsuperscript{142} Thus, not only are hazardous waste sites located more frequently in minority neighborhoods, those that are located in predominantly white neighborhoods are more strictly regulated to the benefit of nearby populations.\textsuperscript{143}

Some commentators have noted that poor and minority communities are often economically coerced into accepting environmental hazards as a way to make revenue for the community.\textsuperscript{144} Low-income, minority neighborhoods have been found to be “more likely to tolerate environmental dangers in the hope that the facilities will generate economic benefits.”\textsuperscript{145} When alternative ways of procuring these benefits are not available to these communities, they often have no choice but to “accept the facilities that no one else wants.”\textsuperscript{146} When environmental hazards are forcibly placed in low-income communities, these commu-

\begin{footnotes}
\footnotetext{136}{Collin, \textit{supra} note 115, at 133.}
\footnotetext{137}{\textit{Id.}; Pinney, \textit{supra} note 109, at 358.}
\footnotetext{138}{Collin, \textit{supra} note 115, at 133.}
\footnotetext{139}{See Yang, \textit{supra} note 5, at 6.}
\footnotetext{140}{\textit{Id.}}
\footnotetext{141}{\textit{Id.}}
\footnotetext{142}{Been, \textit{supra} note 132, at 1395.}
\footnotetext{143}{See \textit{id.} at 1399; Collin, \textit{supra} note 115, at 133; Yang, \textit{supra} note 5, at 6 (addressing the penalties imposed upon nonconforming sites in communities of different racial compositions).}
\footnotetext{144}{See Colopy, \textit{supra} note 5, at 135.}
\footnotetext{145}{\textit{Id.}}
\footnotetext{146}{\textit{Id.}}
\end{footnotes}
nities are also compelled to sacrifice their own well-being in exchange for exiguous economic benefits.147

Recently, EPA has tried to rectify this disparity in treatment.148 First, EPA formed a working group to determine whether it had been “insensitive to socio-economic concerns affecting both minority and low-income neighborhoods.”149 Upon finding that they had been insensitive to these concerns, EPA formed the Office of Environmental Equity—now the Office of Environmental Justice—in order to “implement environmental justice initiatives.”150 Additionally, two environmental justice bills were introduced in Congress—although not passed—and President Clinton issued Executive Order Number 12,898 stating “each Federal agency shall make achieving environmental justice part of its mission.”151

B. Cases Litigated Under an Environmental Justice Theory

The history of the environmental justice movement is key to understanding the issues in some of the seminal environmental justice cases.152 In most cases, communities seek to enjoin the placement of a waste facility near their neighborhoods using an equal protection theory.153 The plaintiffs, however, usually do not prevail because they lack proof of the defendant’s intent to discriminate.154

One of the earliest environmental justice cases was Bean v. Southwestern Waste Management Corp.155 This case involved a claim by a predominantly African-American community against the Southwestern Waste Management Corporation contesting the decision of the Texas Department of Health to grant a permit to the defendants to locate a Type I solid waste facility near their community.156 Specifically, this facility was to be located “within 1,700 feet of a predominantly African-American high school and only slightly farther from an African-American residential neighborhood.”157

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147 See Been, supra note 132, at 1399; Colopy, supra note 5, at 135; Yang, supra note 5, at 6.
148 Pinney, supra note 109, at 360.
149 Id.
150 Id.
151 Id. at 360–61.
152 See id. at 356–59.
153 See Collin, supra note 115, at 134–39; Colopy, supra note 5, at 147.
154 See Collin, supra note 115, at 138; Colopy, supra note 5, at 147.
156 Id. at 674–75; Colopy, supra note 5, at 147.
157 Colopy, supra note 5, at 147; see Bean, 482 F. Supp. at 677.
The plaintiffs claimed that the location of the facility violated their constitutionally guaranteed equal protection rights.\(^{158}\) To prove this assertion, the court noted that the plaintiffs “must show not just that the decision to grant the permit [allowing the facility] is objectionable or even wrong, but that it is attributable to an intent to discriminate on the basis of race.”\(^{159}\) The court found that the evidence offered by the plaintiffs did not demonstrate an intent to discriminate against them.\(^{160}\) Thus, the plaintiffs did not meet their burden for securing a preliminary injunction against the placement of the facility.\(^{161}\)

To win the injunction, the plaintiffs would have had to demonstrate that they were substantially likely to succeed on the merits of their claim of purposeful discrimination, but the court found such likelihood was lacking.\(^{162}\) The court did note, however, that had it been the court’s decision to grant the permit in the first place, it would not have done so.\(^{163}\) Similarly, the court expressed sympathy towards the plight of the plaintiffs and called the decision to place the facility near their school and neighborhood both “unfortunate and insensitive” and “insensitive and illogical.”\(^{164}\) Although the court sympathized with the plaintiffs, it still found that the plaintiffs had not satisfied their burden of proving that the government officials had the requisite discriminatory intent.\(^{165}\)

A more recent example of an environmental justice case is *R.I.S.E., Inc. v. Kay.*\(^{166}\) This case also involved an equal protection claim by a group of plaintiffs who asserted that a county siting decision was discriminatory.\(^{167}\) Since the proposed solid waste landfill would affect both whites and African-Americans living in the vicinity of the site, a racially heterogeneous community organization brought the case.\(^{168}\) As evidence, the group offered information about three other landfills in the area, sited in communities with at least ninety-five percent African-American populations.\(^{169}\) Once again, the court found that the plain-
tiffs did not meet their burden of establishing that the government officials had intentionally discriminated against minority groups. The court held: “[T]he Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups.” Rather, the only behavior prohibited by the Equal Protection Clause was purposeful discrimination on the basis of race.

The intent requirement has also been a major hindrance to plaintiffs in other cases raising environmental justice claims. In *NAACP v. Gorsuch*, the court stated that there was “not one shred of evidence that race has . . . been a motivating factor” in the siting decision. Scholars have noted that the intent requirement facilitates implicit racism by ensuring that only the most blatant cases of discrimination will be found to violate the Equal Protection Clause.

The controlling case on intent to discriminate is *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which held that disproportionate impact is not sufficient to find discrimination. Thus, based on this precedent, it is almost impossible for plaintiffs in cases of environmental justice to effectively prove discrimination despite clear disparate impact.

### III. The Intersection of Eminent Domain and Environmental Justice

The issues surrounding cases of environmental injustice are strikingly similar to those surrounding government takings. First, residents in areas targeted for both the siting of environmental hazards and for government takings for economic improvement are more likely to be low-income and minority. Second, the government justifies its action in both instances by potential economic improvement for a

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172 *Id.*
173 Colopy, *supra* note 5, at 149.
174 *Id.*
175 Collin, *supra* note 115, at 139.
177 *See id.*
178 *See Collin, supra* note 115, at 133; Colopy, *supra* note 5, at 135; Epstein, *supra* note 32, at 235.
Finally, the remedy left open to the victims—judicial intervention—is unsatisfactory because the standard used to review these cases makes it impossible for the courts to enforce and protect the rights of the victimized population against discrimination.\textsuperscript{181}

The similarities between these two types of cases call for the creation of a new judicial standard which would encompass both environmental justice and eminent domain cases.\textsuperscript{182} It is socially desirable to do away with the discriminatory intent standard for environmental justice cases and to support a new standard that could be used to examine the discriminatory effect of both environmental hazard sitings and eminent domain actions.\textsuperscript{183} This new standard would create a rebuttable presumption of the defendant government’s discriminatory intent, and then allow the government to demonstrate that its decision was not motivated by an intent to discriminate.

\section*{A. Victimization of Low-Income and Minority Populations}

The homeowners and residents targeted for both takings actions and environmental hazard sitings are typically politically isolated, low-income, and minority groups.\textsuperscript{184} Local governments choose these groups to bear the brunt of these decisions because they “lack the resources and access to political decisionmakers” necessary to defend themselves against such decisions.\textsuperscript{185} In contrast, local governments are very unlikely to decide to place a toxic waste facility in the middle of a high-income suburb, or to decide to condemn a street of waterfront mansions in order to build a hotel and conference center.\textsuperscript{186}

Just as environmental hazards are much more likely to be located in communities comprised of low-income and/or minority populations,\textsuperscript{187} to a slightly less noticeable extent, the same is true of communi-

\textsuperscript{180} See Colopy, \textit{supra} note 5, at 135; Epstein, \textit{supra} note 32, at 235; Gallagher, \textit{supra} note 68, at 1839.


\textsuperscript{182} See Bean, 482 F. Supp. at 680 (requiring a standard of purposeful discrimination); Collin, \textit{supra} note 115, at 133; Colopy, \textit{supra} note 5, at 135; Epstein, \textit{supra} note 32, at 235.

\textsuperscript{183} See R.I.S.E., Inc., 768 F. Supp. at 1149; Bean, 482 F. Supp. at 680.

\textsuperscript{184} See Colopy, \textit{supra} note 5, at 135; Gallagher, \textit{supra} note 68, at 1837; Herszenhorn, \textit{supra} note 106.

\textsuperscript{185} Colopy, \textit{supra} note 5, at 135.

\textsuperscript{186} See id.; Gallagher, \textit{supra} note 68, at 1837; Herszenhorn, \textit{supra} note 106.

\textsuperscript{187} Been, \textit{supra} note 132, at 1395; Yang, \textit{supra} note 5, at 5–7; see \textit{supra} Part II.A and accompanying notes.
ties targeted for governmental takings when the targeted area includes personal homes, and the reason for the taking is economic redevelopment. Similar to the siting of environmental hazards, when large economic redevelopment projects are involved, the land to be used for these endeavors is typically found in low-income, politically disenfranchised areas. However, there are cases where land has been seized from private companies for questionable public purposes, but these cases typically do not involve large economic development projects.

Poletown Neighborhood Council v. City of Detroit and Kelo v. City of New London are demonstrative of the cases where a large group of homes, typically comprising an entire neighborhood, is condemned by the government and the land is then given to private developers in hopes of future economic benefits for the greater community. In these cases, minority or low-income neighborhoods were chosen to sacrifice their homes for the good of the larger community to which they no longer belong. These cases parallel the environmental justice cases where hazardous facilities are sited in low-income or minority areas in an effort to prevent effective political opposition.

Typically, low-income and minority groups have less political influence than wealthier groups. This makes them more susceptible to undesirable government action, which often comes in the form of siting environmental hazards and eminent domain actions. The fact that similar groups are targeted both in cases of environmental injustice and in cases of unfair takings demonstrates that a similar legal framework could be established to review governmental decisions in both cases.

B. Justification of Public Benefit

In many cases, poor neighborhoods are the target of hazardous environmental sitings and eminent domain actions because it is claimed

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188 See Nader & Hirsch, supra note 32, at 218; Gallagher, supra note 68, at 1837–38.
189 See Nader & Hirsch, supra note 32, at 218; Gallagher, supra note 68, at 1837–38.
190 See, e.g., Twp. of W. Orange v. 769 Assocs., 800 A.2d 86, 88 (N.J. 2002).
192 See Nader & Hirsch, supra note 32, at 218; Gallagher, supra note 68, at 1837–38.
193 Been, supra note 132, at 1406; Nader & Hirsch, supra note 32, at 218.
194 See Colopy, supra note 5, at 135.
195 See id.
that these government actions will provide some benefit to the greater community. Typically, this benefit comes in the form of economic advantages reaped by the community at large. In both cases, the desire for economic improvement or development leads government officials to sacrifice the health or property rights of the residents most affected by the decision.

Although these government decisions have similar results, they are often motivated by dissimilar factors. Sometimes, local governments will decide to site an environmental hazard in its jurisdiction because it has few other ways of bringing in revenue. In this sense, communities may be coerced into accepting environmental hazards because of their economic situation. Some have argued against allowing payments to communities that host landfills and hazardous waste facilities because these payment systems “take unfair advantage of the existing unequal distribution of wealth.”

When the decision is in the hands of the local government, it is able to weigh the options and at least make a choice for the community. Local governments may agree to site a hazardous facility that no one else wants in order to “raise revenue for schools, roads, and other public necessities.” In a “small, poor, and mostly minority community” in Mobile, Alabama, the owners of a local landfill helped the community to install air conditioning in the local school and establish an educational fund. The economic benefits of this siting decision were tangible to the community, and even those most affected by proximity to the site were able to reap the benefits in their schools.

On the other hand, there are some cases where the community has no voice in the siting decision and the local government makes a decision with absolutely no sensitivity to local needs. In Bean v. South-
west Waste Management Corp., the government decided to place a solid waste facility, which would presumably bring some benefit to the wider community, in a predominantly African-American neighborhood approximately 1700 feet away from a predominantly African-American school.\textsuperscript{209} Despite the fact that the court itself noted that this decision was both “unfortunate and insensitive,” the court ultimately found that it must defer to the legislature’s decision because the plaintiffs were unable to prove discriminatory intent.\textsuperscript{210}

Eminent domain cases are similar: the government makes a decision about the economic well-being of the community as a whole.\textsuperscript{211} However, in these cases the burdened portion of the community is unable to reap the benefits of the economic improvement.\textsuperscript{212} In this instance, the groups most affected by the eminent domain will not have the opportunity to benefit from the economic improvements since their relocation is a prerequisite for development.\textsuperscript{213} It is unlikely that the citizens of the “ramshackle waterfront neighborhood” of New London, “one of Connecticut’s poorest cities,” will have the opportunity to benefit from the waterfront hotel, conference center, and eighty new homes planned for the area once the current residents vacate.\textsuperscript{214}

The desire for economic rejuvenation of depressed areas is a reasonable goal for any local government; however, economic development at the expense of the poorest and most vulnerable portions of a community is unreasonable.\textsuperscript{215} When a local government decides to host an environmental hazard, their object is to gain the economic benefits and resources available to communities of wealthier citizens with more political clout.\textsuperscript{216} Eminent domain actions seek to physically destroy the unwanted and economically depressed areas of a community and replace them with profitable hotels and factories, despite the effects on the local community and local homeowners.\textsuperscript{217}

The justification of public benefit works with varying degrees of success.\textsuperscript{218} Both in eminent domain and environmental justice cases,

\begin{footnotesize}
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  \item \textsuperscript{209} \textit{Id.} at 677.
  \item \textsuperscript{210} \textit{Id.} at 680.
  \item \textsuperscript{211} \textit{See} Herszenhorn, \textit{supra} note 106.
  \item \textsuperscript{212} \textit{See id.}
  \item \textsuperscript{213} \textit{See} Gallagher, \textit{supra} note 68, at 1838; Herszenhorn, \textit{supra} note 106.
  \item \textsuperscript{214} \textit{See} Gallagher, \textit{supra} note 68, at 1837–39; Herszenhorn, \textit{supra} note 106.
  \item \textsuperscript{215} \textit{See} Colopy, \textit{supra} note 5, at 135.
  \item \textsuperscript{216} \textit{See id.}
  \item \textsuperscript{217} Nader & Hirsch, \textit{supra} note 32, at 217–18; Gallagher, \textit{supra} note 68, at 1837–38.
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governments claim that the benefits of the project will outweigh the costs.\textsuperscript{219} One of the leaders of the New London development plan reportedly announced: “We all need to sacrifice.”\textsuperscript{220} However, the sacrifices demanded by this type of redevelopment plan are inequitable, as are the burdens borne by communities who are either forced or coerced into accepting environmental hazards for the purposes of economic improvement.\textsuperscript{221}

Since the government justifies its decisions in both environmental siting situations and eminent domain circumstances in similar ways, the same judicial standard may be used for reviewing these decisions.\textsuperscript{222} The intent of economic improvement is a valid one, but courts should not continue to consider it valid when the action has a clearly disproportionate impact on a particular group or groups within the community.\textsuperscript{223}

C. Inadequacy of the Current Judicial Standard

Eminent domain cases can fit within the judicial framework established by environmental justice cases and be litigated under a similar constitutional theory.\textsuperscript{224} Since these two types of cases have so many similarities, it is possible that the victims of eminent domain actions could use the theories behind environmental justice cases to more fully articulate their legal claims against unjust takings.\textsuperscript{225} The current legal standard of intentional discrimination used in environmental justice cases is unsatisfactory, however, and a new standard should be developed to encompass both environmental justice and eminent domain actions.\textsuperscript{226}

The residents of Poletown could have made a claim that the decision to tear down their homes and build a car factory to benefit the City of Detroit was discriminatory and violated their Fifth Amendment

\textsuperscript{219} See Herszenhorn, supra note 106.
\textsuperscript{220} Id.
\textsuperscript{221} See Gallagher, supra note 68, at 1837–38; Herszenhorn, supra note 106.
\textsuperscript{224} See Case Comment, Civil Rights, supra note 92, at 1568.
\textsuperscript{225} Id.
rights. In order to prove this, the plaintiffs would have had to demonstrate that there was a discriminatory result, and that the government based its actions on discriminatory intent. The plaintiffs would not have to prove that discrimination was the only motivating factor, or even a primary one, but they would have to prove specific intent or motivation to discriminate in order to succeed on the merits of their claim. Proving intent in these circumstances is practically impossible in the absence of an incriminating document outlining a discriminatory intent, especially since the government is able to claim economic improvement as a presumptively valid intent. Evidence of past and current disparate impact on low-income or minority groups has not been considered sufficient in these cases to prove discrimination.

The African-American residents of King and Queen County tried to demonstrate city planners’ discriminatory intent in locating a landfill in their primarily African-American community based on evidence of previous disparate impact. The proposed site was to be in a community with an approximately two-thirds African-American population, when the population of the county was fifty percent white and fifty percent African-American. The plaintiffs proved that one of three other landfills in the county was in an area where approximately ninety-five percent of the population living in the immediate vicinity of the landfill was African-American. The other two were in areas where a full one hundred percent of the people living within a mile or half-mile radius of the sites were African-American. Despite this evidence that African-American communities in the county were clearly over-burdened with their share of landfills, the court found no motive or specific intent to discriminate, and dismissed the plaintiffs’ complaint accordingly.

The residents of areas targeted for condemnation proceedings could use these same types of suits to draw greater attention to their

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227 See E. Bibb, 706 F. Supp. at 884; Bean, 482 F. Supp. at 675.
228 E. Bibb, 706 F. Supp. at 884.
229 Id.
230 Id.
233 Id. at 1148.
234 Id.
235 Id.
236 Id.
237 Id. at 1149–50.
plight and to frame the issue as a type of environmental justice.\textsuperscript{238} The similarities between the types of people targeted—and the reasoning behind the judicial decisions—in both environmental injustice and eminent domain cases make this possible, and would allow for plaintiffs to draw attention to their cause even if their suits are unsuccessful.\textsuperscript{239}

IV. THE NEW STANDARD: DOING AWAY WITH DISCRIMINATORY INTENT

A new standard should be developed for evaluating discriminatory governmental actions in environmental justice and eminent domain cases.\textsuperscript{240} Because takings may have a discriminatory effect similar to sittings of environmental hazards, a new standard which fully encompasses both of these situations should be considered.\textsuperscript{241}

Early on, plaintiffs challenging eminent domain actions undertaken for the purpose of urban redevelopment attempted—unsuccessfully—to use section 1983 of the Civil Rights Act to claim violation of equal protection and discrimination based on race.\textsuperscript{242} Plaintiffs in environmental justice cases often invoke section 1983 also, but to similar effect.\textsuperscript{243} Section 1983 of the Civil Rights Act is the best alternative for these cases, and should be open to plaintiffs in both circumstances to claim discrimination.\textsuperscript{244} The standard used to judge violations of this section of the Civil Rights Act should similarly be adjusted to allow plaintiffs to recover in cases that result in clear discrimination, but where it is impossible to prove intent or motive to discriminate.\textsuperscript{245}

The pertinent provision of the Civil Rights Act states:

Every person who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.\textsuperscript{246}

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\textsuperscript{238} See R.I.S.E., Inc., 768 F. Supp. at 1148–49.
\textsuperscript{239} See id.; Case Comment, Civil Rights, supra note 92, at 1568–69.
\textsuperscript{241} See R.I.S.E., Inc., 768 F. Supp. at 1148–49; Case Comment, Civil Rights, supra note 92, at 1568–69.
\textsuperscript{242} See Case Comment, Civil Rights, supra note 92, at 1568–69.
\textsuperscript{244} See 42 U.S.C. § 1983 (2000); Case Comment, Civil Rights, supra note 92, at 1568–70.
\textsuperscript{246} 42 U.S.C. § 1983.
\end{flushright}
Plaintiffs have used this language to claim that the defendant governments have violated their rights to equal protection in a racially discriminatory fashion, and that they therefore have the right to a civil remedy—typically an injunction—against the defendants. Historically, courts have not upheld these claims, in part due to the requirement that the plaintiffs prove a motive or intent for discrimination on the part of the government officials.

Claims under section 1983 would be better able to address the concerns of plaintiffs in eminent domain cases whose homes are taken and given to private interests under the auspices of economic redevelopment. Since courts have recently demonstrated an unwillingness to question legislative decisions about what constitutes “public use” of taken land, an equal protection claim under the Civil Rights Act could give plaintiffs a second weapon in their judicial arsenal for use against unjust takings. If this tactic were permitted, plaintiffs in eminent domain cases could move beyond the fact that courts are permitting private land to be taken for mostly private purposes and claim discrimination based on socioeconomic status and race.

Courts have previously decided that these civil rights claims are not valid in eminent domain cases. Typically, this decision is reached because plaintiffs have the opportunity to state their claims in condemnation proceedings. The decision to prohibit civil rights claims fails to take into account the fact that while land might be taken for a stated public purpose and with compensation, some of these takings might still be blatantly discriminatory. Allowing plaintiffs to assert civil rights claims in eminent domain cases that result in discrimination advances the same purposes as allowing plaintiffs in environmental cases to bring a civil rights claim.

Permitting plaintiffs in condemnation proceedings to bring civil rights claims is not wholly sufficient to ensure that discrimination will

247 See Bean, 482 F. Supp. at 675; Case Comment, Civil Rights, supra note 92, at 1568–69.
248 See, e.g., Bean, 482 F. Supp. at 675; Case Comment, Civil Rights, supra note 92, at 1568–70.
251 See Kelo, 843 A.2d at 510; Poletown, 304 N.W.2d at 460–61.
252 Case Comment, Civil Rights, supra note 92, at 1568–70.
253 Id. at 1568.
not take place. A new standard of review for both eminent domain and environmental justice cases needs to be developed to ensure that discrimination is effectively avoided. The controlling case on this subject, Arlington Heights v. Metropolitan Housing Development Corp., held that “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” Specifically, the court stated that although “[d]isproportionate impact is not irrelevant . . . it is not the sole touchstone of an invidious racial discrimination.” This decision requires that plaintiffs prove that the government officials operated with an intent or motive to discriminate against the plaintiff in order to succeed.

The intent standard, which is still in use, makes it practically impossible to prove racial discrimination with the resources available to plaintiffs. If the goal of the Equal Protection Clause is to prohibit racial discrimination, a new, less strict standard needs to be applied to these cases. In the absence of this new standard, cases of obvious discrimination will go unchecked because of the inability of plaintiffs to effectively prove discriminatory intent.

In many recent environmental justice cases, equal protection claims have not been successful. The result in many environmental justice cases is inequitable, and the same inequitable outcome would likely result in eminent domain actions if plaintiffs had been permitted to bring equal protection suits. In one environmental justice case, the plaintiffs were able to prove that of four landfills placed in a county with an equal percentage of white and black residents, all four were placed in areas with a majority of African-American residents, and three were placed in areas with ninety-five percent or more African-American residents. Despite this overwhelming finding of disparate impact, the

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257 See id.; Kelo, 843 A.2d at 510; Case Comment, Civil Rights, supra note 92, at 1568–70.
259 Id.
court was forced to conclude that no discrimination existed because of the plaintiffs’ inability to prove intent.\textsuperscript{267}

In the case of \textit{Green Street Ass’n v. Daley}, the court found that plaintiffs could not even bring an eminent domain case under the Civil Rights Act.\textsuperscript{268} In this case, groups of plaintiffs claimed that the decision to take their homes to facilitate an urban renewal project was discriminatory because eighty-five percent of the affected homeowners were African-American, and that the reason for the taking was to create an African-American-free zone between a new shopping mall and the residential neighborhood.\textsuperscript{269} The court found that because the plaintiffs did not claim that discrimination was the sole purpose of the decision to take their homes, a lawsuit based on a discrimination theory could not be permitted.\textsuperscript{270} Although the plaintiffs claimed that the “actual purpose” of the action was discriminatory, their discrimination suit was thrown out in the absence of proof of intent and “sole purpose.”\textsuperscript{271}

These two cases are indicative of cases in which there is an obvious disparate impact on minority and low-income communities.\textsuperscript{272} However, up to this point, courts have been unwilling to find evidence of disparate impact sufficient to prove discrimination.\textsuperscript{273} The courts should begin to allow evidence of disparate impact to prove discrimination in these cases.\textsuperscript{274} If disparate impact evidence were permitted to conclusively demonstrate discrimination, the evil that the Equal Protection Clause and Civil Rights Act aim to prevent would be much more effectively limited.\textsuperscript{275} According to the court in \textit{Arlington Heights}, the Equal Protection Clause is focused on eliminating “invidious discrimination.”\textsuperscript{276} Invidious racism and discrimination, however, cannot be eliminated when the current judicial standard makes it impossible for plaintiffs to prove discrimination.\textsuperscript{277}

The court also notes in \textit{Arlington Heights} that the judiciary must be deferential to the legislature in its decision to condemn homes—and

\begin{thebibliography}{9}
\bibitem{267} Id. at 1149.
\bibitem{268} 373 F.2d 1, 7 (7th Cir. 1967); Case Comment, \textit{Civil Rights, supra} note 92, at 1568.
\bibitem{269} Case Comment, \textit{Civil Rights, supra} note 92, at 1568.
\bibitem{270} Id.
\bibitem{271} Id.
\bibitem{272} See, \textit{e.g.}, Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 680 (S.D. Tex. 1979); Case Comment, \textit{Civil Rights, supra} note 92, at 1568.
\bibitem{274} See, \textit{e.g.}, \textit{id}.
\bibitem{277} See, \textit{e.g.}, \textit{R.I.S.E., Inc.}, 768 F. Supp. at 1148–49.
\end{thebibliography}
presumably to site toxic waste facilities in communities—unless the plaintiffs can show discriminatory purpose.\textsuperscript{278} If plaintiffs are unable to show discriminatory purpose, the courts must defer to the stated intent of the legislature.\textsuperscript{279} This presents plaintiffs with a composite and difficult problem as it is almost impossible for plaintiffs to prove the requisite intent; in the absence of their ability to do so, the courts are required to defer to the stated intent of the legislature.\textsuperscript{280} This essentially gives the government free reign to state a purpose of public benefit for any project that has discriminatory intent or impact.\textsuperscript{281} Plaintiffs are then unable to prove otherwise because of their virtually insurmountable burden of proof.\textsuperscript{282}

Nonetheless, intent is clearly an important aspect of any governmental decision. However, if plaintiffs are able to demonstrate a significant disparate impact, the government should then be required to prove that its intent was specifically non-discriminatory.\textsuperscript{283} This type of “burden-shifting” mechanism has been used in cases where it has been determined that the burden of proof on plaintiffs is too high.\textsuperscript{284} Proving intent to discriminate in environmental justice and eminent domain cases places too high a burden on the plaintiff, and if the plaintiff can demonstrate significant disparate impact, then the court must shift the burden to the defendant and allow it the opportunity to prove it had only legitimate, non-discriminatory intent.\textsuperscript{285} Insulating the government from judicial scrutiny by making it impossible to prove discrimination sacrifices the rights of some for the benefit of others.\textsuperscript{286} This was not the intention of the Equal Protection Clause or the Civil Rights Act.\textsuperscript{287}

\textbf{Conclusion}

Eminent domain actions involving the transfer of property from private citizens to other private interests under the auspices of eco-

\textsuperscript{278} See Arlington Heights, 429 U.S. at 265.
\textsuperscript{279} See id.
\textsuperscript{280} See id.
\textsuperscript{282} See Arlington Heights, 429 U.S. at 265; R.I.S.E., Inc., 768 F. Supp. at 1148–49; Bean, 482 F. Supp. at 680.
\textsuperscript{283} See Summers v. Tice, 199 P.2d 1, 5 (Cal. 1948).
\textsuperscript{284} Id.
\textsuperscript{285} See id.
nomic growth or development raise the same discrimination concerns as environmental justice cases. Both takings and environmental justice cases often involve targeted groups of low-income minority citizens who bear the brunt of the government’s desire to stimulate economic activity at any cost. These groups are left without an appropriate judicial remedy because of the requirement that plaintiff groups prove that local government officials acted with an intent to discriminate.

Since it is nearly impossible for plaintiffs to meet this high standard, governments are not held accountable for the disparate impact their actions have on low-income and minority groups. Although our nation has come far in its fight against racism, if governments are allowed to continue to disproportionately burden minority groups with unjust land use decisions, neither economic, political nor social equality will ever be realized. The courts need to adopt a new standard for judging these cases. Courts should look not only at the intent of the government officials, but also at the historical impact of similar governmental decisions in the same area, and how those decisions have affected the group, or groups, in question. Once these issues are taken into account by the courts, it will be much more likely that minority communities will enjoy the protections guaranteed to them by the Constitution.
A GREEN BIRD IN THE HAND: AN EXAMPLE OF ENVIRONMENTAL REGULATIONS OPERATING TO STIFLE ENVIRONMENTALLY CONSCIOUS INDUSTRY

ROBERT FREDERICKSON*

Abstract: In the past, there was a constant strain between industry and the United States Environmental Protection Agency (EPA). Industry, with its relentless pursuit of profitability, would spare no expense—environment included—to achieve its objectives. EPA, on the other hand, often levied hefty fines on industry in order to ensure compliance with environmental regulations. In recent years, however, many companies have taken a more proactive approach toward environmental compliance. While some companies use an image of environmental responsibility only in their marketing campaigns, others have realized that it is cheaper to take preventive action than be forced to pay for remediation. The new paradigm of environmental law recognizes that industry makes a better partner than adversary. This Note discusses the attempts of Texas Instruments, Inc. to transfer ownership of a state-of-the-art waste water treatment plant to an industrial redevelopment company. The plan would create an industrial park, create hundreds of jobs, and allow small industrial companies to discharge their hazardous waste to an on-site facility at a greatly reduced cost. However, because of a narrow reading of the exceptions to the extensive permitting requirements of the Resource, Conservation, and Recovery Act (RCRA), the plant is currently unable to treat hazardous waste. This Note examines several of the relevant RCRA exceptions and argues that it benefits all parties for this plant to operate at full capacity.

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INTRODUCTION

Texas Instruments, Inc. (TI) calls itself the “world leader in digital signal processing and analog technologies, the semiconductor engines of the Internet age.”¹ The company is headquartered in Dallas, Texas, and has manufacturing, design, and sales operations in more than twenty-five countries.² In 1959, TI acquired the Metals & Controls Corporation in Attleboro, Massachusetts, which later became Sensors & Controls.³ Sensors & Controls makes custom engineered, application-specific sensors and controls for automotive, heating, ventilation, and air-conditioning products.⁴ The site at Attleboro served as one of TI’s manufacturing campuses for decades, and in 1997 it occupied fifteen buildings with 1.4 million square feet of space.⁵ The site was fitted with a hazardous wastewater treatment plant (WWTP), public utilities, and a freight-rail spur.⁶ The future of this WWTP is the focus of this Note.

Because TI owned and operated all of the buildings in the Attleboro manufacturing campus, it was able to avoid regulation under Massachusetts’s implementation of the Resource, Conservation, and Recovery Act (RCRA) for the operation of its hazardous WWTP.⁷ RCRA is the

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⁶ Id.

principle federal statute regulating the generation, transportation, storage, and treatment of solid waste.\(^8\) Instead, TI operated its WWTP pursuant to an Industrial User Permit issued by the City of Attleboro.\(^9\) This permit was issued to TI as the result of Massachusetts’s implementation of the Clean Water Act (CWA).\(^10\) Accordingly, the wastewater unit exemption allowed TI to avoid any further regulation under RCRA.\(^11\)

In 2005, however, TI announced plans to consolidate its Attleboro operations.\(^12\) TI sold the land to Preferred Real Estate, Inc. (PREI)—a developer specializing in reusing industrial properties—and leased from PREI just two of fifteen buildings it once occupied.\(^13\) PREI then sought primarily smaller business tenants to fill the vacant buildings.\(^14\) The state of the art hazardous WWTP would serve to benefit both the smaller companies who could not afford typical hazardous waste treatment, and PREI, who should have had an easy time filling the empty buildings.\(^15\) The development of the Attleboro Corporate Campus was also aimed at providing needed jobs to Attleboro’s high-skilled workforce.\(^16\) However, the Massachusetts Department of Environmental Protection (DEP) and the U.S. Environmental Protection Agency (EPA) intervened.\(^17\) Because TI no longer owned all of the property at the Attleboro site, the WWTP had to comply with all RCRA regulations to treat hazardous waste, which differed significantly from the Industrial User Permit under which it had previously operated.\(^18\)

This Note will analyze whether it is possible to avoid a lengthy and expensive re-permitting process to treat hazardous waste when control of a WWTP changes ownership.\(^19\) It will also analyze the effect of PREI’s

\(^11\) See discussion infra Part II.B.3.
\(^12\) TI Consolidates Its Shrinking Attleboro Operations, supra note 5.
\(^13\) Id.
\(^14\) Id.
\(^15\) Id.; see Letter from Francis J. Veale, Jr., Envl. Safety & Health Manager, Texas Instruments, to Christopher Tilden, Reg’l Eng’r, Mass. Dep’t of Envl. Prot. (Sept. 28, 2004) (on file with author) [hereinafter Sept. 28 Letter from TI].
\(^16\) TI Consolidates Its Shrinking Attleboro Operations, supra note 5.
\(^17\) See Notice of Noncompliance, supra note 7.
\(^18\) See Sept. 30 Letter from DEP, supra note 7.
\(^19\) See discussion infra Part IV. The plant has the ability to treat hazardous and nonhazardous wastewater, recycle water, manage solid hazardous waste, and provide high-purity water to other tenants on the site. Brad Kelly, South Shore Entrepreneur; Love That Dirty Water; Wastewater Treatment Plant Fills a Need, PATRIOT LEDGER (Quincy, MA), May 29, 2006, at 9. It
plan to have multiple companies discharge hazardous waste to the WWTP, and the DEP’s decision to not grant a section 307(b) pretreatment permit under the CWA, which appears to require a stricter interpretation of the Act than EPA has given.\textsuperscript{20} Part I provides a brief history of the Attleboro campus and the debate over the WWTP permitting process. Part II discusses the federal law under RCRA and the wastewater treatment exemption. Part III examines the CWA and pretreatment permits for the introduction of pollutants into treatment works that are publicly owned. Part IV analyzes potential solutions to avoid decommissioning the plant under RCRA, and Part V identifies how section 307(b) can operate to regulate the plant under the CWA.

I. History of the Attleboro Corporate Campus

For the last few decades, Texas Instruments has used an industrial park in Attleboro, Massachusetts, as one of its primary manufacturing campuses.\textsuperscript{21} The park has over fifteen buildings on 264 acres and is outfitted with a state of the art wastewater treatment plant, public utilities, and a freight-rail spur.\textsuperscript{22} Since 1997, TI has moved much of its manufacturing abroad.\textsuperscript{23} As TI gradually moved its operations offshore, its WWTP no longer received sufficient wastewater from on-site manufacturing operations to make the plant viable.\textsuperscript{24} TI hoped to salvage the WWTP and its manufacturing campus by allowing smaller companies to occupy the emptied buildings and help create a new industrial base in Attleboro.\textsuperscript{25}

In late 2004, TI informed the DEP that it would no longer be operating its WWTP.\textsuperscript{26} In order to avoid decommissioning the facility, TI proposed a redevelopment strategy in which it would sell its land and buildings in Attleboro to PREI who would, in turn, seek business ten-
nants to occupy the other buildings in the park—now called the Attleboro Corporate Campus.\(^\text{27}\) In its letter, TI informed the DEP that NewStream, LLC would operate the WWTP and have full dominion and control over the piping and existing systems that are integral to its operation for the on-site business.\(^\text{28}\) Furthermore, TI retained a perpetual easement in all of the pipes leading to and from the WWTP from the other buildings on the Campus.\(^\text{29}\) TI believed that by reserving an easement in the pipes, the WWTP would be considered “on-site”—one of Massachusetts’s requirements to avoid RCRA permitting.\(^\text{30}\) The letter also informed the DEP that another company, Engineered Materials Solutions, Inc. (EMSI), had a direct discharge to the WWTP.\(^\text{31}\) To accomplish this plan, TI proposed to transfer its Industrial User Permit pursuant to DEP regulations.\(^\text{32}\)

The DEP and EPA quickly responded.\(^\text{33}\) The DEP alerted TI that direct sewer connection permit transfers do not apply to TI’s proposed redevelopment plan.\(^\text{34}\) Furthermore, the DEP indicated that TI’s arrangement with EMSI “may jeopardize the exemption TI maintains from [Treatment, Storage, and Disposal Facility licensing] insofar as TI is properly licensed . . . to only treat its own hazardous waste.”\(^\text{35}\) According to the DEP, “[d]irect sewer connection permit transfer, in lieu of permit modification or re-permitting is intended to apply only when changing ownership and/or operation from one single entity to another single entity for like operations.”\(^\text{36}\) In its response, EPA analyzed several possible exemptions from Treatment, Storage, and Disposal Facility
(TSDF) licensing. 37 Most notably, EPA examined the wastewater treatment unit exemption from RCRA. 38 In order for the RCRA exemption to apply, NewStream must apply to Attleboro for a pretreatment permit under section 307(b) of the CWA. 39 Furthermore, the DEP sent TI an Administrative Consent Order with Penalty and Notice of Noncompliance for its arrangement with EMSI. 40 Interestingly, the findings of fact noted that both the nature of the manufacturing operation and the characteristics and volume of the wastewater had not changed materially since the property transfer. 41 However, TI was still fined for violating the terms of its Industrial User Permit. 42

II. THE RESOURCE, CONSERVATION, AND RECOVERY ACT (RCRA)

A. Permitting the Treatment, Storage, and Disposal of Hazardous Waste Under RCRA

RCRA is the principal federal statute regulating solid wastes. 43 The term solid waste is broadly defined as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material.” 44 It uses a comprehensive “cradle-to-grave” system encompassing the generation, transportation, storage, and treatment or disposal of hazardous waste. 45 For the purposes of this analysis, the focus will be on the treatment, storage, and disposal of hazardous waste. 46

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37 Nov. 17 Letter from EPA, supra note 33.
38 42 U.S.C. § 6924(a) (2000) (outlining the standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities).
40 Notice of Noncompliance, supra note 7.
41 Id.
42 Id.
46 The relevant statute states:

“[H]azardous waste” means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health
1. Hazardous Waste Treatment, Storage, and Disposal Facilities Under RCRA

In its regulation of wastewater treatment plants (WWTPs), RCRA broadly defines both treatment and disposal.\textsuperscript{47} Hazardous waste treatment, storage, and disposal facilities (TSDFs) attract by far the most attention in the RCRA regulation system.\textsuperscript{48} RCRA requires that TSDFs: (1) maintain records of hazardous waste handled by the facility; (2) report, monitor, and inspect, as well as comply with the manifest system for tracking the movement of hazardous waste; (3) operate and be built in a manner consistent with EPA directives and standards; (4) create a contingency plan for minimizing unanticipated damage from TSDF activities; (5) monitor the site for releases of hazardous waste; and (6) take financial responsibility for corrective action in the event of a release of hazardous materials.\textsuperscript{49} Section 3004(a) of RCRA directs EPA to promulgate regulations that establish performance standards for TSDFs,\textsuperscript{50} and section 3005 outlines how EPA is to issue TSDF permits.\textsuperscript{51}

There are four primary ways to obtain a RCRA permit to operate a TSDF.\textsuperscript{52} First, anticipating that the process of obtaining a permit would be time consuming, Congress created “interim status”—a designation for a facility that has applied for, but has not yet received, an operating permit.\textsuperscript{53} Also included in interim status are facilities that were in existence on November 19, 1980.\textsuperscript{54} In 1984, Congress set firm deadlines to

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\textsuperscript{42} U.S.C. § 6903(5).

\textsuperscript{47} See id. § 6903(3) (defining disposal as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste . . . may enter the environment”); id. § 6903(34) (defining treatment as “any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous”).

\textsuperscript{48} Plater, supra note 45, at 860; Massachusetts Environmental Law, supra note 45, at 21-12 to -13; John C. Dernbach, The Unfocused Regulation of Toxic and Hazardous Pollutants, 21 Harv. Envtl. L. Rev. 1, 10 (1997) (noting that “[m]ost of RCRA’s regulatory apparatus governs the treatment, storage, and disposal of hazardous waste”).

\textsuperscript{49} See 42 U.S.C. § 6924(a).

\textsuperscript{50} Id.

\textsuperscript{51} Id. § 6925.

\textsuperscript{52} Id.; The Law of Hazardous Waste, supra note 43, § 5.01.


\textsuperscript{54} 42 U.S.C. § 6925(e)(1)(A)(i).
retire all such facilities, the last of which fell due in 1992. Second, the operator of a TSDF can apply for an individual permit. At a minimum, this permit must contain estimates with respect to the composition, quantities, and concentrations of any hazardous waste treated, as well as the location of the facility. Third, a facility can obtain a “permit-by-rule.” A permit-by-rule is available to a TSDF that is regulated by other environmental permit programs such as the CWA. Under a permit-by-rule program, the facility must meet certain additional mandates pertaining to its hazardous waste management activities. Finally, the permit requirement can be satisfied by procuring a permit from a state that has been delegated authority to administer the RCRA permit program. Massachusetts, for example, has been delegated authority to issue RCRA permits by EPA, and many of its procedures, requirements, and exemptions parallel the federal RCRA permitting program. Estimated costs of the permitting process have been in excess of $1 million and it can take over one year to complete.

2. TSDF Permitting

Applying for a RCRA permit is a two-phase process. The first phase requires that the facility provide EPA—or the state delegated agency—basic information about the facility. With a Part A application, the facility may operate under interim status for a limited period of time. A Part A permit requires at least the following information: The facility name and address; design and capacity of the facility; types and quantities of hazardous waste managed; description of waste management practices; and drawings or photographs of hazardous waste.

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56 The Law of Hazardous Waste, supra note 43, § 5.01(2).
57 42 U.S.C. § 6925(b).
58 The Law of Hazardous Waste, supra note 43, § 5.01(2).
59 Id.
60 Id.
61 Id.
63 See Plater, supra note 45, at 862; Feder, supra note 53 at 676–80 (detailing the time and expense of the permitting processing, noting that it “can consume tremendous resources and produce many frustrations”).
65 Id.
66 Id.
management activities.\textsuperscript{67} The Part B application expands on this descriptive material.\textsuperscript{68} Additionally required information includes a hazardous waste analysis, tracking, and manifest system; hazardous waste packaging, labeling, and transport provisions; facility standards covering storage and treatment design and operation; contingency plan and emergency response procedures; and groundwater monitoring.\textsuperscript{69}

In order to obtain all this data, an applicant typically will hire engineering consultants to prepare the required plans, underlying calculations, and drawings.\textsuperscript{70} EPA regulations contemplate that it takes at least six months to complete Part B of a hazardous waste facility’s permit application,\textsuperscript{71} but private companies have estimated the process can take up to two years.\textsuperscript{72} After submittal, a facility may still be a long way from obtaining a permit.\textsuperscript{73} EPA will review the application and return it with notices of deficiency.\textsuperscript{74} Some of these deficiencies can take as long as 90 to 120 days to address.\textsuperscript{75} Finally, after all deficiencies have been corrected, the “draft permit”\textsuperscript{76} must receive public notice and may also be the subject of a public hearing.\textsuperscript{77} When these requirements were first promulgated, they were so cumbersome and disfavored that many existing TSDFs took application filing deadlines as “an invitation to leave the business.”\textsuperscript{78} In fact, it appears there is no effective way to currently site a TSDF in Massachusetts.\textsuperscript{79}

\begin{itemize}
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Feder, supra note 53, at 677.
\item \textsuperscript{71} EPA Administered Permit Programs: The Hazardous Waste Permit Program, 40 C.F.R. § 270.10(e)(4) (2005).
\item \textsuperscript{73} Feder, supra note 53, at 677.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id. (noting that “[e]ach series of deficiencies noted by the agency can easily take six months from the time the notice is sent to the applicant”).
\item \textsuperscript{76} Id. at 678.
\item \textsuperscript{77} Id.; Specific Procedure Applicable to RCRA Permits, 40 C.F.R. § 124.31–.32 (2005).
\item \textsuperscript{78} Feder, supra note 53, at 680; see MASSACHUSETTS ENVIRONMENTAL LAW, supra note 45, at 21-13 (“The Massachusetts siting process proved to be labyrinthine and extraordinarily expensive, and no proposed facility survived the process.”).
\item \textsuperscript{79} MASSACHUSETTS ENVIRONMENTAL LAW, supra note 45, at 21-13.
\end{itemize}
B. Exemptions to Avoid a RCRA Permit

In light of the difficulties presented, many facilities seek to avoid the expensive and time consuming process of obtaining a RCRA permit.\(^{80}\) Congress and EPA, responding to this problem, have recognized several exemptions from TSDF permitting requirements and standards.\(^{81}\) Included in these exemptions are facilities that store hazardous waste for generators and transporters,\(^{82}\) conditionally exempt small quantity generators,\(^{83}\) and elementary neutralization units.\(^{84}\) Most relevant to the present analysis, however, are the exemptions for totally enclosed treatment facilities,\(^{85}\) domestic sewage,\(^{86}\) and wastewater treatment units.\(^{87}\) It is these three exemptions that TI argued applied to its facility, and only these three exemptions are broad enough in scope to possibly cover the facility at the Attleboro Corporate Campus.\(^{88}\)

1. Totally Enclosed Treatment Facilities

A totally enclosed treatment facility is a “facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment.”\(^{89}\) EPA has interpreted a totally

\(^{80}\) See, e.g., Rosenberg, supra note 72, at 846–47.

\(^{81}\) See generally The Law of Hazardous Waste, supra note 43, § 5.02(5) (noting that “[t]hese exemptions cover certain facilities whose activities are regulated by other federal or state regulatory programs that do not present sufficient health or environmental risk to warrant imposition of the full panoply of TSDF requirements”).

\(^{82}\) Pre-Transport Requirements, 40 C.F.R. § 262.34(a) (2005) (noting that “a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status”); id. § 263.12(a) (same, except a transporter may only store hazardous waste for ten days or less).

\(^{83}\) Id. § 261.5(a) (stating that “a generator is a conditionally exempt small quantity generator in a calendar month if he generates no more than 100 kilograms of hazardous waste in that month”).

\(^{84}\) Id. § 264.1(g)(6). An elementary neutralization unit is a device which: (1) is used for neutralizing wastes that are hazardous only because they exhibit corrosivity characteristics; and (2) meets the definition of tank, tank system, container, transport vehicle or vessel. Id. § 260.10.

\(^{85}\) Id. § 264.1(g)(5).

\(^{86}\) Id. § 261.4(a)(1) (excluding “(i) domestic sewage and (ii) any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment”).

\(^{87}\) Id. § 264.1(g)(6).

\(^{88}\) See Oct. 8 Letter from TI, supra note 29; The Law of Hazardous Waste, supra note 43, § 5.02(5) (explaining exemptions from TSDF permitting requirement).

\(^{89}\) 40 C.F.R. § 260.10 (“An example is a pipe in which waste acid is neutralized.”).
enclosed treatment facility as having two defining characteristics. First, a totally enclosed treatment facility must “not release any hazardous waste or constituent of hazardous waste into the environment during treatment.” Second, it “must be directly connected to an industrial production process.” Therefore, while many facilities may be completely on-site using hard piping, they may still not be totally enclosed for the purposes of the RCRA exemption.

Massachusetts has been authorized to implement its own state hazardous waste program to operate in lieu of the federal program. The analogous exemption in Massachusetts is “treatment which is integral to the manufacturing process.” Such treatment is defined in part as any treatment method or technique which is at the site of generation of the waste, is not primarily for the purpose of recycling hazardous waste, and is “(a) [d]irectly connected via pipes or the equivalent from an industrial production process . . . ; and (b) [t]otally enclosed so that it is designed, constructed and operated to prevent spills, leaks or emissions of hazardous materials to the environment.” However, the Massachusetts definition is further limited by an implicit requirement that a facility may maintain an exemption from TSDF licensing only if the facility treats its own hazardous waste.

TI first argued that that its WWTP qualified as a totally enclosed facility. More specifically, under the Massachusetts requirements, TI argued that it was “treatment which is integral to the manufacturing process.” TI believed this to be true because its WWTP is directly connected by pipes to all surrounding buildings and is totally enclosed so as

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91 Id.
92 Id.
93 See, e.g., Nov. 17 Letter from EPA, supra note 33 (noting that all pipes must be interconnected to all outdoor pipes and in turn connected to all treatment tanks).
94 55 Fed. Reg. 25,467 (“Thus, if a facility leaks, spills, or discharges waste or waste constituents, or emits waste or waste constituents into the air during treatment, it is not a totally enclosed treatment facility within the meaning of these regulations.”) (emphasis added).
98 See Sept. 30 Letter from DEP, supra note 7 (indicating a unitary ownership requirement).
99 Oct. 8 Letter from TI, supra note 29.
100 Id.
to prevent spills, leaks, or emissions.\textsuperscript{101} Furthermore, TI retained ownership of all the utilities and power servicing the property, and thereby retained control of the pumps, valves, and electrical power that controlled individual company wastewater discharges.\textsuperscript{102} TI also reserved perpetual easements for the operator of the WWTP in all of the piping and other connections to the WWTP; as such, the entire system is located on geographically contiguous property under common ownership.\textsuperscript{103} Because there is no express regulatory requirement that there be unity of ownership, TI concluded that it was operating a facility that fell within this exemption.\textsuperscript{104}

However, neither the DEP nor EPA thought that TI’s WWTP qualified as a totally enclosed treatment facility.\textsuperscript{105} According to EPA, TI’s WWTP “has at least some potential for having fugitive or other air emissions.”\textsuperscript{106} Such emissions were enough for EPA to conclude that “[t]he material submitted by TI falls well short of establishing that the entire proposed operation will be totally enclosed.”\textsuperscript{107}

2. Domestic Sewage Exemption

EPA also briefly analyzed whether the WWTP could operate under the domestic sewage exemption.\textsuperscript{108} Domestic sewage is untreated sanitary waste that passes through a sewer system.\textsuperscript{109} When first promulgated, commentators believed the domestic sewage exclusion was based on the notion that “an individual POTW [Publicly Owned Treatment Works] is in the best position to determine which industrial discharges it can safely address and still meet the discharge limits placed in its [National Pollutant Discharge Elimination System] NPDES permit.”\textsuperscript{110} However, EPA has taken the position that the domestic sewage exclusion should only apply under limited circumstances, including: (1) where the source and water stream are subject to a categorical pretreatment standard; (2) where the pollutant and source are subject to a

\textsuperscript{101} Id. (noting that “[a]ll of the piping is lined or double-walled and located above-ground for easy inspection”).

\textsuperscript{102} Id.

\textsuperscript{103} Id.

\textsuperscript{104} Id.; see 314 Mass. Code Regs. 8.03(3)(d) (1993).

\textsuperscript{105} Nov. 17 Letter from EPA, supra note 33; see Sept. 30 Letter from DEP, supra note 7.

\textsuperscript{106} Nov. 17 Letter from EPA, supra note 33.

\textsuperscript{107} Id.

\textsuperscript{108} Id.


technically-based local limit developed by EPA or the state; (3) where
the waste is generated in de minimis amounts by a household or similar
non-commercial entity; or (4) where the source and waste stream are
covered by a Toxicity Reduction Action Plan. Such an exemption
represents the natural tension between the government’s desire to en-
sure that a polluter is properly regulated under the CWA before issuing
a RCRA exemption and the facility’s desire not to be subjected to
RCRA when it already complies with the CWA. The effect of this ex-
emption is that facilities with industrial discharge permits, which dis-
charge hazardous waste into sewers also carrying domestic sewage, are
not subject to RCRA requirements. However, EPA concluded that
this exemption does not apply to TI. It concluded that the “exemp-
tion applies only from the point where industrial wastes mix with do-
mestic sewage upon and after being discharged into a municipal sewer
line.” Therefore, it does not apply “while the wastewater remains
within the site.” Thus, EPA’s interpretation of its requirement is that
the facility must still comply with RCRA requirements regarding treat-
ment and storage.

3. Wastewater Treatment Units

Finally, federal RCRA regulations exempt wastewater treatment
units from TSDF permitting requirements. To qualify as a wastewater
treatment unit, the WWTP must meet three requirements. First, the
facility must be part of a wastewater treatment facility that is subject
to regulation under either section 402 or 307(b) of the CWA. Second,
the facility must receive and treat, or store, influent wastewater that is
either defined as a hazardous waste or generates and accumulates
wastewater treatment sludge. Third, the facility must meet the defini-

112 Nagel, supra note 110, at 213; see, e.g., Nov. 17 Letter from EPA, supra note 33 (recognizing that the CWA can substitute for RCRA regulations).
113 TOUCHSTONE ENVTL., supra note 43, at B3-4.
114 Nov. 17 Letter from EPA, supra note 33 (citing a Region I regulatory interpretation letter dated April 19, 1999).
115 Id.
116 Id.
117 Id.
119 Id. § 260.10.
120 Id.
121 Id.
tion of a tank, or a tank system.\textsuperscript{122} This exemption represents an example of permit-by-rule. The rule is primarily intended to exempt wastewater treatment units at facilities already subject to the NPDES or pretreatment CWA requirements from certain RCRA requirements.\textsuperscript{123}

TI argued that it met both the federal and analogous Massachusetts exceptions to RCRA permitting.\textsuperscript{124} Hazardous waste facility management standards—that is, RCRA standards—do not apply to “industrial wastewater treatment facilities permitted pursuant to [the Massachusetts Clean Water Act].”\textsuperscript{125} Such facilities are defined to include a wastewater treatment unit which treats, or treats and accumulates incidental to such treatment, hazardous influent wastewater.\textsuperscript{126} The definition continues to provide that “[i]f treatment works receives hazardous waste from one or more off-site sources, all treatment, storage, and disposal units, and all accumulation at the site of the treatment works, are . . . not part of a ‘municipal or industrial wastewater treatment facility.’”\textsuperscript{127} TI maintained that there is no requirement for unitary ownership for the facility to be considered “on-site.”\textsuperscript{128}

On-site is defined as “the same or geographically contiguous property in single ownership which may be divided by a public or private right-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along the right-of-way.”\textsuperscript{129} This single ownership requirement is a noticeable difference from EPA’s position.\textsuperscript{130} However, TI still maintained that because it retained a perpetual easement in all of the pipes leading to and from the WWTP, and the term “on-site” necessarily includes contiguous land over which there is common ownership,\textsuperscript{131} it qualified for

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\textsuperscript{122} \textit{Id.} (“Tank means a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials . . . which provides structural support. Tank system means a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system.”).


\textsuperscript{124} Oct. 8 Letter from TI, \textit{supra} note 29.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.}; \textit{see} 310 Mass. Code Regs. 30.010 (2005).

\textsuperscript{127} 310 Mass. Code Regs. 30.010.

\textsuperscript{128} \textit{See} Oct. 8 Letter from TI, \textit{supra} note 29.

\textsuperscript{129} 310 Mass. Code Regs. 30.010 (emphasis added). Compare this with the federal wastewater unit exemption in which there is no single ownership requirement. \textit{See} discussion \textit{infra} Part III.B.

\textsuperscript{130} \textit{See infra} notes 154–61 and accompanying text.

\textsuperscript{131} \textit{See} Oct. 8 Letter from TI, \textit{supra} note 29. TI cited two Massachusetts Supreme Court cases to support the proposition that easements constitute a broad ownership right in
the wastewater treatment exemption.\textsuperscript{132} The DEP disagreed and stated, “ownership, through easements or otherwise, of piping alone is not sufficient to create ‘site’ as defined by 310 CMR 30.000 regulations.”\textsuperscript{133}

Thus, the DEP and EPA thought TI’s proposed redevelopment plan did not qualify for any of the aforementioned exemptions to RCRA.\textsuperscript{134} It was the DEP, however, that read a unitary ownership requirement into the wastewater treatment unit exemption—the most applicable RCRA exemption for the WWTP.\textsuperscript{135} In order to understand DEP’s position, it is necessary to examine the source of the wastewater unit exemption, the CWA.\textsuperscript{136}

III. Pretreatment Permits under the CWA

The modern CWA took form in 1972 after major amendments to the Federal Water Pollution Control Act.\textsuperscript{137} Its declared purpose is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”\textsuperscript{138} To achieve this end, all facilities discharging pollutants from point sources into navigable waters of the United States must obtain a National Pollutant Discharge Elimination System (NPDES) permit.\textsuperscript{139} Included in this requirement are publicly owned treatment works (POTWs).\textsuperscript{140} Because they discharge wastewater from treated sewage from a point source at the facility to a nearby water body, they must apply for a NPDES permit.\textsuperscript{141} Industrial discharges wishing to...

\textsuperscript{132} Oct. 8 Letter from TI, \textit{supra} note 29.
\textsuperscript{133} Notice of Noncompliance, \textit{supra} note 7.
\textsuperscript{134} See Nov. 17 Letter from EPA, \textit{supra} note 33; Sept. 30 Letter from DEP, \textit{supra} note 7.
\textsuperscript{135} See Sept. 30 Letter from DEP, \textit{supra} note 7.
\textsuperscript{136} See discussion \textit{infra} Part III.
\textsuperscript{137} PLATER, \textit{supra} note 45, at 620; see 32 U.S.C. § 1251 (2000). The Massachusetts Clean Water Act largely mirrors the federal act; however, in several major respects it is thought to reach beyond the CWA. MASSACHUSETTS ENVIRONMENTAL LAW, \textit{supra} note 45, at 15-4; see MASS. GEN. LAWS ch. 21, §§ 26–53 (2002).
\textsuperscript{138} 32 U.S.C. § 1251(a).
\textsuperscript{139} TOUCHSTONE ENVTL., \textit{supra} note 43, at B3-1 (“Under CWA, discharges from POTWs are unlawful unless they conform with applicable effluent limitations set by EPA and the state water quality agency.”). \textit{See generally The Clean Water Act Handbook} (Parthenia B. Evans ed., 1994).
\textsuperscript{140} TOUCHSTONE ENVTL., \textit{supra} note 43, at B3-1.
\textsuperscript{141} \textit{Id.}
avoid the NPDES permit requirements could send wastewater to a POTW.\textsuperscript{142} However, in order to ensure that a POTW does not violate the terms and conditions of its own NPDES permits, all “indirect dischargers” must comply with pretreatment standards.\textsuperscript{143}

A. \textit{Section 307(b): Pretreatment Standards}

Congress, in section 307(b) of the CWA, required EPA to establish pretreatment standards for the “introduction of pollutants into treatment works . . . which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works.”\textsuperscript{144} Essentially, the pretreatment standards are to apply to industrial facilities that discharge wastewater into a sewer system that leads to a POTW.\textsuperscript{145} National pretreatment standards can take two forms: prohibitions on discharges to POTWs and categorical standards.\textsuperscript{146} Prohibitions can be either broadly defined as any pollutant that interferes with POTW operations or specifically enumerated from a list of pollutants.\textsuperscript{147} National categorical pretreatment standards apply to all facilities in a particular industry.\textsuperscript{148} They are based upon the pollutant removals that can be achieved using the best available demonstrated control technology (BADT)\textsuperscript{149} for new point sources, and they specify the


\textsuperscript{143} 40 C.F.R. § 403.3(g) (2003) (“[T]he introduction of pollutants into a POTW from any non-domestic source regulated under section 307(b), (c) or (d) of the [CWA].”); Touchstone Envtl., \textit{supra} note 43, at B3-2 (noting that industrial facilities are “commonly referred to as ‘indirect dischargers’ because they do not directly discharge into receiving waters, but instead discharge through POTWs to receiving waters”).

\textsuperscript{144} 33 U.S.C. § 1317(b)(1) (2000). “Pretreatment means the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW.” 40 C.F.R. § 403.3(q).

\textsuperscript{145} Touchstone Envtl., \textit{supra} note 43, at B3-1 to -2; see The Clean Water Act Handbook, \textit{supra} note 139, at 121–23.

\textsuperscript{146} Touchstone Envtl., \textit{supra} note 43, at B3-2 to -4.

\textsuperscript{147} \textit{Id.} at B3-2. The list of specific pollutants includes pollutants that would cause fire or explosion, are corrosive, petroleum oil, and pollutants that would produce toxic gases and vapors. \textit{Id.}


\textsuperscript{149} The Clean Water Act Handbook, \textit{supra} note 139, at 122; Murchison, \textit{supra} note 142, at 540–41 (noting that industrial discharges whose construction commenced after the publication of proposed regulations would have to comply with BAT standards as opposed to best available control technology economically achievable (BAT)).
quantities and concentrations of pollutants that may be discharged into POTWs.\textsuperscript{150}

Generally, a nondomestic source may not discharge to a POTW any pollutant which would cause pass-through or interference.\textsuperscript{151} Pass-through is “discharge which exits the POTW into the waters of the United States in quantities or concentrations which . . . is a cause of a violation of any requirement of the POTW’s NPDES permit.”\textsuperscript{152} Interference, as the name suggests, is discharge which “inhibits or disrupts the POTW” such that it is a cause of a violation of the POTW’s NPDES permit.\textsuperscript{153}

**B. Wastewater Treatment Facility—Clarified**

In 1988, EPA responded to several inquiries regarding the meaning of the term “wastewater treatment facility.”\textsuperscript{154} EPA explained that it used a “property-boundary” interpretation of the term “facility,” and the wastewater treatment unit must be “on-site” to satisfy the purpose of the exemption.\textsuperscript{155} This definition of on-site, however, was no more clear than its previous definition.\textsuperscript{156} EPA did, however, make it clear that “any tank system that was employed in managing wastewater at a facility prior to its off-site transfer to another location . . . is not covered by this exemption.”\textsuperscript{157} In order to further clarify the definition, the Chemical Manufacturers Association requested that EPA rule on a number of hypothetical situations.\textsuperscript{158} Most importantly, example number two provided:

Companies A and B, located within the same RCRA facility-boundaries, use a common sewer to send wastewater from each of their respective units to an on-site NPDES permitted waste-

\textsuperscript{150} Touchstone Envtl., supra note 43, at B3-3.
\textsuperscript{151} Id. at B3-2; Murchison, supra note 142, at 543.
\textsuperscript{152} 40 C.F.R. § 403.3(n).
\textsuperscript{153} Id. § 403.3(i).
\textsuperscript{155} Id.
\textsuperscript{158} June 1 Letter from EPA, supra note 156.
water treatment facility owned by Company A. The NPDES permit limits are based on the waste loads from both companies’ units.\textsuperscript{159}

In its analysis, EPA focused primarily on the ability of CWA authorities to prescribe and enforce tank system requirements at both companies.\textsuperscript{160} To do so, both companies needed to be co-signatory to a NPDES (or in TI’s case, pretreatment) permit under the CWA.\textsuperscript{161}

Therefore, it is clear that EPA does not require single ownership of a TSDF located on a contiguous site.\textsuperscript{162} In order for this exemption to apply, however, all companies involved in handling hazardous wastewaters must be made subject to the CWA.\textsuperscript{163} According to EPA, the CWA regulation substitutes for RCRA regulations in two distinct ways.\textsuperscript{164} First, the pretreatment permit will regulate the treatment process and discharge itself through numerical effluent limitations, and therefore it would be redundant to regulate it through RCRA.\textsuperscript{165} Second, a pretreatment permit will also regulate the connecting pipes between companies and the WWTP, and ensure there are operation and maintenance standards.\textsuperscript{166} This will justify not regulating those companies under RCRA generator or other requirements.\textsuperscript{167}

With these two justifications in mind, EPA provided TI with two minimum permit requirements that would satisfy the federal RCRA exemption.\textsuperscript{168} First, NewStream—the operator of the WWTP—must be specified in the pretreatment permit as responsible for the operation and maintenance of the pipes, as well as responsible for the operation and maintenance of the treatment facility.\textsuperscript{169} Second, the permit must specify that each individual company on the Attleboro Corporate Campus is responsible for the pipes that are operated within their own buildings.\textsuperscript{170} Ultimately, for the RCRA exemption to apply, EPA requires that

\begin{itemize}
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} See id.
  \item \textsuperscript{162} Nov. 17 Letter from EPA, \textit{supra} note 33 ("[T]he EPA has applied the wastewater treatment unit exemption to operations involving more than one company located on a contiguous site . . . .").
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id.
  \item \textsuperscript{165} Id.
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} Nov. 17 Letter from EPA, \textit{supra} note 33.
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Id.
\end{itemize}
“CWA authorities can prescribe and enforce tank system requirements” at both companies.\textsuperscript{171} Even though all the pipes, whether they were inside or outside of buildings, were to be owned and operated by TI, EPA concluded, “only the inclusion in a CWA permit of [TI] as being responsible for the pipes [outdoors] and the inclusion of [other companies] being responsible for their indoor pipes will achieve that objective.”\textsuperscript{172}

C. Water Quality Trading: An Indication that EPA Is Moving in the Right Direction

Although not directly relevant to pretreatment permits under section 307(b) of the CWA, EPA’s Water Quality Trading Policy may serve as a helpful example in the evolving nature of environmental law.\textsuperscript{173} Water Quality Trading (WQT) is a market-based approach to pollutant control actions, taken at different geographic locations, often by a party different from the source obligated to achieve the pollution reduction.\textsuperscript{174} The commodities in the WQT market are pollution reduction “credits,” which represent a unit of pollution control beyond a defined baseline.\textsuperscript{175} EPA states that “market-based approaches such as water quality trading provide greater flexibility and have potential to achieve water quality and environmental benefits greater than would otherwise be achieved under more traditional regulatory approaches.”\textsuperscript{176} WQT programs would also hopefully “create economic incentives for innovation, emerging technology, voluntary pollution reductions and greater efficiency in improving the quality of the nation’s waters.”\textsuperscript{177}

The threshold condition for implementing a WQT is that the nature and the extent of the water quality problem is understood, and a Total Maximum Daily Load (TMDL) or consensus reduction target

\textsuperscript{171} Id. (quoting June 1 Letter from EPA, \textit{supra} note 156).

\textsuperscript{172} Id.


\textsuperscript{174} \textit{See id.}; Lynda Hall & Eric Raffini, \textit{Water Quality Trading: Where Do We Go from Here?}, 20 Nat. Resources & Env’t 38, 38 (Summer 2005).

\textsuperscript{175} Environmental Protection Agency; Water Quality Trading Policy; Issuance of Final Policy, 68 Fed. Reg. at 1609 (“[Trading] allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has with lower pollution control costs.”); Hall & Raffini, \textit{supra} note 174, at 38.

\textsuperscript{176} Environmental Protection Agency; Water Quality Trading Policy; Issuance of Final Policy, 68 Fed. Reg. at 1609.

\textsuperscript{177} Id.
based on water quality is set.\textsuperscript{178} The basic theory is that different discharges can use economies of scale to reduce costs while at the same time lowering the overall level of pollution in a particular watershed.\textsuperscript{179} By focusing on the overall water quality in a particular shed, one effect of WQT is the reduction of nonpoint source pollution—such as agricultural runoff, which is completely outside the scope of the CWA—allowing point sources to technically violate the effluent limits of their NPDES permits while at the same time increasing the overall quality of the particular watershed.\textsuperscript{180}

IV. POTENTIAL SOLUTIONS TO TT’S WASTEWATER TREATMENT PLANT PROBLEM UNDER RCRA

TI’s situation in Attleboro represents a novel problem in environmental law. The permitting requirements and procedures promulgated by the Massachusetts DEP and U.S. EPA are not working in the best interests of the environment or the community at large.\textsuperscript{181} Logic demands that NewStream should be able to continue to operate its state of the art WWTP.\textsuperscript{182} The redevelopment of the Attleboro Corporate Campus would allow smaller companies to reduce costs by moving into a park that already has a facility to handle hazardous waste.\textsuperscript{183} The development would undeniably bolster the local economy, and the presence of diverse businesses would not leave it vulnerable to the decisions of one company.\textsuperscript{184} However, the permits required by the DEP may prove to be prohibitively expensive and time consuming.\textsuperscript{185} As the first generation of environmental regulation comes to an end, it is time for state and

\textsuperscript{178} Hall & Raffini, supra note 174, at 40. While the CWA primarily requires technology-based effluent limits, water quality based limitations are used to meet water quality standards in receiving waters. See MASSACHUSETTS ENVIRONMENTAL LAW, supra note 45, at 15-3. A TMDL is the amount of a pollutant that can be discharged into water that failed to meet the CWA’s water quality standards. Murchison, supra note 142, at 546.

\textsuperscript{179} Hall & Raffini, supra note 174, at 38.

\textsuperscript{180} Id.

\textsuperscript{181} See Seidenfeld, supra note 33, at 451 (representing a good example of an “agency us[ing a decision-making] norm to avoid having to devote resources to thinking through the particular decision in light of every factor that potentially might bear on its wisdom”); Sept. 28 Letter from TI, supra note 15.

\textsuperscript{182} See Sept. 28 Letter from TI, supra note 15.

\textsuperscript{183} See TT Consolidates Its Shrinking Attleboro Operations, supra note 5.

\textsuperscript{184} See id.

\textsuperscript{185} Cf. Murchison, supra note 142, at 582–83 (criticizing EPA’s use of formal cost-benefit analysis promulgating water quality standards. However, EPA and DEP refused to recognize the overall economic benefit to the continued operation of the WWTP). See generally Feder, supra note 53.
federal environmental agencies to focus less on the letter of the procedure and more on the overall effect.\footnote{See Murchison, \textit{supra} note 142, at 586–87 (noting that regulatory paradigms can become too entrenched in a continually evolving environmental arena); Seidenfeld, \textit{supra} note 33, at 439–40 (noting that the traditional model of administrative law sought to balance the tension between discretion and constraint by requiring agencies to limit their own discretion, but that this model forces agencies to conform with rules that may be unwise in the particular context); see, e.g., Hall & Raffini, \textit{supra} note 174 (discussing Water Quality Trading (WQT) as one way to incorporate some flexibility into the CWA).}

\section*{A. Broaden the Definition of Totally Enclosed Treatment Facility}

\subsection*{1. The Federal Totally Enclosed Treatment Facility Requirement}

At first inspection it appears that the WWTP at the Attleboro Corporate Campus is a totally enclosed facility.\footnote{See 40 C.F.R. \textsection 260.10 (2005).} The WWTP, however, must meet the three parts of the definition in order to qualify as a totally enclosed facility.\footnote{Id.} First, the facility must be directly connected to an industrial production process.\footnote{Id.} Second, the WWTP must be connected to all surrounding buildings by a hard-pipe system.\footnote{Id.} Third, it must be constructed and operated in a manner that prevents the release of any hazardous waste or any constituent thereof into the environment during treatment.\footnote{Id.}

The WWTP at the Attleboro Corporate Campus would easily satisfy the first requirement, as it is a totally enclosed facility.\footnote{Oct. 8 Letter from TI, \textit{supra} note 29.} The entire purpose of the project is to create an industrial park where smaller companies can discharge their industrial waste directly to an on-site WWTP.\footnote{40 C.F.R. \textsection 260.10.} Second, the piping would be on a geographically contiguous property under common ownership, with different companies discharging their industrial waste into the pipes that run into the WWTP.\footnote{Id.} Third, it is possible to consider the WWTP as a facility that is constructed and operated in a manner that prevents the release of any hazardous waste or any constituent thereof into the environment during the treatment.\footnote{Oct. 8 Letter from TI, \textit{supra} note 29.} This system of pipes is above ground for easy inspection in order to prevent
spills, leaks, or emissions.\textsuperscript{196} NewStream—as the operator—would have full dominion and control over the piping and existing systems integral to operating the WTTP, including ownership of all the utilities and power servicing the property.\textsuperscript{197} Given the physical layout of the plant and the retention of property rights in the piping and systems integral to operation, it can be concluded that NewStream’s WWTP is a “totally enclosed facility.”\textsuperscript{198}

EPA’s definition of a totally enclosed facility, however, is much narrower than its logical reading.\textsuperscript{199} EPA regulations state, “[I]f a facility leaks, spills, or discharges waste or waste constituents, or emits waste or waste constituents into the air during treatment, it is not a totally enclosed treatment facility.”\textsuperscript{200} Within the definition itself, EPA asserts, “An example is a pipe in which waste acid is neutralized.”\textsuperscript{201} The use of the term “neutralized” indicates that no emissions of any kind are allowed in order for the facility to be totally enclosed.\textsuperscript{202} This interpretation completely ignores the characteristics of the waste itself—including whether it is hazardous.\textsuperscript{203} Thus, if a company later discharges the acid it neutralized in a pipe, under this definition the company would no longer be exempt from RCRA regulation.\textsuperscript{204}

Interestingly, EPA’s decision does not indicate that it was the discharge of the treated waste into Attleboro’s sewers that was fatal to TI’s attempt at defining its WWTP as totally enclosed.\textsuperscript{205} Rather, EPA cited that “this kind of operation has at least some potential for having fugitive or other air emissions.”\textsuperscript{206} Granted, this interpretation of totally enclosed facility has been accepted for over fifteen years.\textsuperscript{207} However, the possibility of fugitive or other air emissions is best left outside the

\textsuperscript{196} Oct. 8 Letter from TI, \textit{supra} note 29.
\textsuperscript{197} \textit{Id.} (noting that NewStream would therefore be able to control the pumps, valves, and electrical power that controls individual company wastewater discharges); Sept. 28 Letter from TI, \textit{supra} note 15.
\textsuperscript{198} \textit{See} 40 C.F.R. § 260.10
\textsuperscript{199} \textit{See} Nov. 17 Letter from EPA, \textit{supra} note 33.
\textsuperscript{201} 40 C.F.R. § 260.10.
\textsuperscript{202} \textit{See id.}
\textsuperscript{203} \textit{See id.}
\textsuperscript{204} \textit{See id.}
\textsuperscript{205} Nov. 17 Letter from EPA, \textit{supra} note 33.
\textsuperscript{206} \textit{Id.}
scope of RCRA, so that state-of-the-art facilities such as the WWTP in question can operate to their full capabilities.\(^{208}\) RCRA has been described as a cradle-to-grave system of regulation of hazardous waste; however, when the cradle and the grave are on geographically contiguous property, it seems excessive to require companies to go through a substantial permitting process.\(^{209}\)

2. The Massachusetts Analog

The analogous exemption under Massachusetts law excludes discharge of a treatment process which is integral to the manufacturing process from its RCRA requirements.\(^{210}\) Treatment which is integral to the manufacturing process is defined as:

\begin{quote}
[A]ny treatment method or technique which is at the site of generation of the waste, is not primarily for the purpose of recycling hazardous waste, and is: (a) Directly connected via pipes or the equivalent from an industrial production process . . . ; and (b) Totally enclosed so that it is designed, constructed, and operated to prevent spills, leaks, or emissions of hazardous materials to the environment.\(^{211}\)
\end{quote}

The WWTP is directly connected by above-ground pipes to all of the buildings on the corporate campus.\(^{212}\) All of the piping is lined or double-walled and is located so as to allow for easy inspection.\(^{213}\) Furthermore, NewStream has ownership of the utilities and power servicing the other buildings, and would thereby retain control of the pumps, valves, and electrical power that controls the wastewater discharge.\(^{214}\) Therefore, as opposed to EPA requirements, the WWTP is totally enclosed as it is designed, constructed, and operated to prevent spills, leaks, or emissions of hazardous materials to the environment.\(^{215}\) Finally, the treatment takes place at the site of generation and is not primarily

\(^{208}\) See, e.g., Murchison, supra note 142, at 586–87 (discussing the continually evolving environmental arena).

\(^{209}\) See PLATER, supra note 45, at 845.


\(^{211}\) Id. at 30.010.

\(^{212}\) Oct. 8 Letter from TI, supra note 29.

\(^{213}\) Id.

\(^{214}\) Id.

\(^{215}\) See 310 MASS. CODE REGS. 30.010. Compare this to the EPA requirement, in which a totally enclosed facility can emit nothing into the environment at all, regardless of its non-hazardous character. 40 C.F.R. § 260.10 (2005).
for the purpose of recycling hazardous waste. Given this analysis, under Massachusetts law the WWTP should qualify for the exemption to obtaining a RCRA permit.

B. The Federal Solution: Allow NewStream to Operate the WWTP Under the Wastewater Treatment Unit Exemption to RCRA

EPA has stated that in order for an owner or operator to qualify for the wastewater treatment unit exemption, the WWTP must meet the three tests spelled out in the definition of “wastewater treatment unit.” The facility must be part of a wastewater treatment facility that is subject to regulation under either sections 402 or 307(b) of the CWA; it must receive and treat or store influent wastewater that is defined as hazardous waste; and the facility must meet the definition of a tank or a tank system. This exemption is essentially intended to exempt wastewater treatment units at facilities that are subject to the NPDES or pretreatment requirements under the CWA.

EPA conceded that the WWTP at the Attleboro Corporate Campus met the second and third test set forth in the regulation. All wastewaters are either being treated or stored as influent wastewaters. EPA explicitly stated that wastewater traveling through outdoor pipes between two separately owned companies was within the definition of “storage.” Furthermore, EPA agreed that all the wastewater could be contained in a tank system, so long as the system remained hard-piped. Thus, despite being owned by separate companies, if all the pipes within the separate buildings remained connected to outdoor pipes, and those outdoor pipes in turn remained connected to treatment tanks, “the entire system will be a inter-connected ‘tank system.’”

EPA, however, had a problem applying the wastewater treatment unit exemption to TI’s WWTP because it remained unclear whether it was properly permitted under the pretreatment requirements of sec-

217 Nov. 17 Letter from EPA, supra note 33; see 40 C.F.R. § 260.10.
218 See 40 C.F.R. § 260.10.
219 See Nov. 17 Letter from EPA, supra note 33.
220 Id.
221 Id.
222 See id.
223 Id.
224 Id. (EPA further stated that as new companies “locate on site and generate hazardous wastewaters, their discharges similarly will need to go through an inter-connected hard-piped system in order to maintain the exemption”.)
tion 307(b) of the CWA. In its pretreatment permit, EPA stated that: (1) NewStream must be specified as responsible for both the operation and maintenance of the pipes it leases to other companies, as well as the municipal sewer discharges; and (2) the individual companies must be specified in the permit as being responsible for the operation and maintenance of the pipes they operate within their building. These conditions properly ensure that responsibility under the CWA for the operation and maintenance of the pipes is delegated to the appropriate parties. However, a lengthy re-permitting process is not necessary each time a new company moves onto the Attleboro Corporate Campus. In fact, EPA implied that the new companies can enter into a contract if NewStream accepts full and unconditional responsibility under the CWA for the operation and maintenance of the pipes. Allowing NewStream to contract individually with new arrivals would avoid the need to undergo a lengthy re-permitting process every time a new company moves onto the campus.

Furthermore, independent contracting between NewStream and arriving companies would be consistent with the spirit of the wastewater treatment unit exemption. First, by regulating the discharge under the CWA, it would be superfluous to also regulate the treatment process under RCRA. Second, pretreatment permits under section 307(b) of the CWA typically include requirements for proper operation and maintenance. Thus, by ensuring that at least the operation and maintenance of the pipes and the character of the discharge is already regulated under the CWA, any further regulation would be unnecessary. However, in its closing remarks, EPA reminded TI that the DEP was free

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225 Nov. 17 Letter from EPA, supra note 33.
226 Id.
227 See id.
228 See id.
229 See id.
230 See id. While NewStream may have to accept “unconditional responsibility under the CWA,” nothing in EPA’s letter precludes NewStream from imposing strict compliance procedures and an indemnification clause in its “side agreements.” See id.
231 See Seidenfeld, supra note 33, at 454 (arguing that agencies should be structured to guard against the use of decision-making norms that implement values inconsistent with those shared by the polity generally); Nov. 17 Letter from EPA, supra note 33.
232 See Nov. 17 Letter from EPA, supra note 33.
234 See Nov. 17 Letter from EPA, supra note 33.
to apply the wastewater treatment unit exemption in a more stringent manner—an invitation the DEP wholeheartedly accepted. 

C. The Massachusetts Solution: Remove the Implied Unitary Ownership Requirement

Similarly, under the analogous exemption from Massachusetts RCRA requirements, industrial wastewater treatment units are exempt from hazardous waste facility licensing. According to the regulations, a wastewater treatment unit is a facility which treats, or treats and accumulates incidental to such treatment, influent wastewater that is hazardous. On its face, it again appears that the WWTP at the Attleboro Corporate Campus meets this definition. Industrial companies transport, through a hard-pipe system, industrial waste that is a byproduct of their industry. However, the regulations also note that if the treatment plants receives hazardous waste from one or more off-site sources, the WWTP is not considered an industrial wastewater treatment facility. Therefore, it is necessary to examine the definition of on-site to see if there is a requirement for unitary ownership. Accordingly, in order to be considered on-site, the regulations explicitly require the facility to be on “the same or geographically contiguous property in single ownership.” Essentially, Massachusetts requires that the wastewater treatment unit exemption applies only if the generator is treating its own waste.

This requirement is too narrow for several reasons. While EPA allowed Massachusetts to adopt stricter compliance standards, it is important to recognize that Massachusetts’s program is inconsistent with EPA’s standards. EPA does not have a unitary ownership requirement, and, in fact, explicitly allows for multiple companies to discharge hazardous waste to the WWTP while still allowing it qualify for the wastewater treatment exemption. Massachusetts’s requirements run contrary to the very purpose of the exemption—they force companies

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235 See id.
236 See discussion infra Part V.
238 Id. § 30.010.
239 See Oct. 8 Letter from TI, supra note 29.
240 See 310 MASS. CODE REGS. 30.010.
241 See id.
242 Id.
243 See id.
244 See Nov. 17 Letter from EPA, supra note 33.
245 Id.
to go through the time-consuming and superfluous process of double permitting.\textsuperscript{246} In fact, the Massachusetts regulations actually require double permitting in these situations.\textsuperscript{247} A literal reading of this requirement would also allow for the possibility of creating a dummy corporation to “own” all of the companies on the property.\textsuperscript{248} This additional paperwork would allow companies at the Attleboro Corporate Campus to operate the WWTP; however, the whole point of EPA’s wastewater treatment unit exemption is to avoid additional bureaucracy.\textsuperscript{249}

Another approach is to examine the property interest that TI, and then NewStream, reserved in the pipes, and find that all the sources of the WWTP are on-site.\textsuperscript{250} Massachusetts regulations do not limit the nature of the ownership interest required.\textsuperscript{251} Ownership can include property interests held by easement.\textsuperscript{252} NewStream maintained a perpetual easement in all piping throughout the system.\textsuperscript{253} Several Massachusetts Supreme Judicial Court cases have upheld easements that constitute a broad ownership right in property.\textsuperscript{254} Therefore, there are no “off-site sources” within the definition of the term because NewStream has an ownership right in the pipes where the hazardous waste is generated.\textsuperscript{255} The DEP summarily dismissed this contention in its finding of fact by asserting that easements do not constitute the requisite property interest to qualify for the exemption.\textsuperscript{256}

\textsuperscript{246} See supra notes 230–36 and accompanying text.
\textsuperscript{247} See 310 Mass. Code Regs. 30.010 (noting that facilities that accept waste from off-site sources do not qualify for the wastewater treatment unit exemption and that they must also be regulated under the Massachusetts analogs to section 307(b) of the CWA).
\textsuperscript{248} See id. TI considered this possibility, but later discarded it because it would be too troublesome. \textit{Id.}
\textsuperscript{249} See supra notes 230–36 and accompanying text (discussing the superfluous nature of the requirement of double permitting).
\textsuperscript{250} This is the approach that TI took. See Oct. 8 Letter from TI, supra note 29 (arguing for all land being considered under “common ownership”).
\textsuperscript{251} See \textit{id.}; 310 Mass. Code Regs. 30.010.
\textsuperscript{252} Oct. 8 Letter from TI, supra note 29.
\textsuperscript{253} \textit{Id.}
\textsuperscript{255} See Oct. 8 Letter from TI, supra note 29.
\textsuperscript{256} See Notice of Noncompliance, \textit{supra} note 7.
V. POTENTIAL SOLUTIONS TO TI’S WASTEWATER TREATMENT PLANT PROBLEM UNDER THE CWA

The CWA has been criticized by commentators as being inefficient and forcing “treatment for treatment’s sake.”257 However, in this instance the CWA can operate to promote both efficiency and cost-reduction. As EPA indicated, in order to qualify for a wastewater treatment unit exemption, the plant must be regulated under section 307(b) of the CWA.258 The pretreatment standards of section 307(b) require all indirect discharges—industrial facilities that discharge wastewater into a sewer system that leads to a POTW—to comply with local standards so that the POTW does not violate its NPDES permit.259 Given this purpose, POTWs and the local municipalities are clearly in the best position to determine the relevant pretreatment standards, as they are more familiar with the capabilities of their plant.260 In addition, these regulations should apply more to the characteristics of the discharged waste from the WWTP facility and not to who owns the plant.261 The Massachusetts DEP clearly disagrees, and such a rigid position is detrimental to achieving the articulated goals of the CWA.262

The increasing success and popularity of Water Quality Trading (WQT) serves as an example of the novel approaches EPA is taking in order to adapt to evolving attitudes and expectations in environmental law.263 Point source discharges that violate the effluent limits of their National Pollutant Discharge Elimination System (NPDES) permits need not close operations or spend excessive amounts of money to

257 See Murchison, supra note 142, at 580. Furthermore, this is not a situation in which Congress has limited EPA’s discretion by attempting to micro-manage EPA’s policy. See Seidenfeld, supra note 33, at 442–43 (noting that some aspects of federal environmental law promote the adoption of unrealistically strict standards).

258 See Nov. 17 Letter from EPA, supra note 33.

259 See TOUCHSTONE ENVTL., supra note 43, at B3-2.

260 See id. at B3-1 to -3; Murchison, supra note 142, at 597–98 (noting that individual controls can even achieve better water quality because some facilities are capable of reducing discharge beyond national categorical standards). For an argument explaining why and how the city should be the environmental enforcer, see generally Peter H. Lehner, Act Locally: Municipal Enforcement of Environmental Law, 12 STAN. ENVTL. L.J. 50 (1993).

261 See Notice of Noncompliance, supra note 7.

262 Sept. 30 Letter from DEP, supra note 7 (“[T]his arrangement may jeopardize the exemption TI maintains from . . . [TSDF licensing] insofar as TI is properly licensed under [Massachusetts’ CWA] to treat only its own hazardous industrial wastes.”); see Murchison, supra note 142, at 580 (noting that a lack of political will to pursue the principal ambitions of the CWA is responsible for the imperfections in the Act); Seidenfeld, supra note 33, at 454.

263 See Hall & Raffini, supra note 174, at 38.
come into compliance.\textsuperscript{264} Rather, they can enter into agreements with other point and nonpoint sources in a better position to reduce their pollutant discharge.\textsuperscript{265} The win-win situation is obvious—the company can continue operating, and the goals of the CWA are met—namely overall pollution is reduced.\textsuperscript{266} Furthermore, WQT programs emphasize the importance of a watershed-specific decision-making process, indicating EPA’s recognition that some water quality decisions are best made at the local level.\textsuperscript{267}

In 1990, even before EPA recognized the need for flexibility, and under a much more environmentally friendly administration, it ruled on a hypothetical situation that is very similar to the circumstances of this case.\textsuperscript{268} Two different companies (indicating separate ownership) sent wastewater to an on-site NPDES permitted wastewater treatment facility owned by Company A.\textsuperscript{269} In its analysis, EPA focused primarily on the ability of CWA authorities to prescribe and enforce tank system requirements at both companies.\textsuperscript{270} Ownership of the companies was irrelevant; in its letter to TI, EPA explicitly stated that it “has applied the wastewater treatment unit exemption to operations involving more than one company located on a contiguous site.”\textsuperscript{271}

Massachusetts regulations are already equipped with the mechanism to allow TI to transfer its pretreatment permit to NewStream.\textsuperscript{272} Section 7.13(b) explicitly provides that the permit transfer must include “a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them.”\textsuperscript{273} TI’s transfer of operation of the WWTP to NewStream would necessarily have to include a statement of the transfer of permit responsibilities that EPA required.\textsuperscript{274} The DEP asserted that sec-

\textsuperscript{264} See id.
\textsuperscript{265} See id. at 38–39.
\textsuperscript{266} See id. at 42.
\textsuperscript{267} See id. at 39. In fact, one recognized constraint on WQT activity is that unlike air emissions trading—which typically operates in national or large regional markets—decisions to proceed with WQT must be made watershed-by-watershed. \textit{Id.} The obvious reasoning behind this is that the effects of water pollution control are more confined by geographic areas, and in order for WQT to be effective the pollution control credit must actually reduce the pollution in the relevant watershed. \textit{Id.} at 39–40.
\textsuperscript{268} See June 1 Letter from EPA, supra note 156.
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.}
\textsuperscript{271} Nov. 17 Letter from EPA, supra note 33.
\textsuperscript{273} \textit{Id.} (emphasis added).
\textsuperscript{274} See id.; see also Nov. 17 Letter from EPA, supra note 33.
tion 7.13 only applies when “changing ownership and/or operation from one single entity to another single entity for like operations.”

This assertion does not come from any specific language of section 7.13 but rather from the general principle that pretreatment permits are only issued under section 7.00 to companies that “treat [their] own hazardous industrial waste.” If Massachusetts could abandon this unitary ownership requirement, and attempt to work with NewStream, there would be no problem.

There are two overriding implications in this CWA analysis. First, the addition of a new company to the Attleboro Corporate Campus (EMSI) did not affect the character or composition of the discharge of the WWTP. Therefore, it was not the discharge itself that resulted in the violation of the pretreatment permit but rather the ownership of the company that created the treated waste. As the City of Attleboro is in the best position to set the pretreatment standards for its POTW, it is likewise in the best position to determine whether the addition of other companies to the Corporate Campus would result in a violation of its NPDES permit. Given the purpose of the pretreatment permit—to ensure that industrial discharge does not result in a POTW violating its NPDES permit—the character and composition of the waste should be considered in determining the applicability of section 307(b).

Second, CWA regulations operate primarily on technology-based standards. These standards should operate to encourage the operation of state of the art facilities like the one in Attleboro, and not be read to have implicit unitary ownership requirements.

**Conclusion**

In 1997, the Attleboro Corporate Campus had fifteen manufacturing buildings operating and disposing hazardous waste to a state of the art WWTP. Presently, all fifteen buildings are not occupied, and no one

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276 See *id*.
277 See *id*.
280 See Nagel, *supra* note 110, at 216 (asserting that “an individual POTW is in the best position to determine which industrial discharges it can safely address and still meet the discharge limits placed in its NPDES permit”).
281 See discussion *supra* Part III.A.
283 See Murchison, *supra* note 142, at 540–43.
is allowed to use the WWTP to treat hazardous waste.\textsuperscript{284} The only difference in the two years seems to be that one company does not own all of the buildings on the corporate campus.\textsuperscript{285} The recent evolution of environmental law has increased air quality, water quality, and most importantly, public consciousness. The next generation of environmental law, however, need not rely on tough regulations and extensive permitting to achieve its goal.\textsuperscript{286} Rather, it should focus on EPA working with industry to achieve the common good.

The story of the struggle between industry and environmental agencies is nothing new. For years, the law has acted to prevent greedy industrialists from taking advantage of the environment. The new paradigm is that some industrial companies have accepted environmental regulation, and now over regulation in environmental law serves as a barrier to environmentally conscious companies like TI.\textsuperscript{287} TI had nothing to gain by ensuring the continued operation of the WWTP. Yet, it developed a plan to save the plant, offset the effect its consolidation would have on the Attleboro workforce, and provide smaller manufacturing companies with all the facilities they would need at one location. That plan was met with a Notice of Noncompliance and an administrative penalty—a response that surely will only perpetuate the strain between environmental agencies and industry.

\textsuperscript{284} At the time of this writing, the WWTP was not decommissioned, but only allowed to treat nonhazardous waste produced in the Attleboro Corporate Campus.

\textsuperscript{285} See Notice of Noncompliance, supra note 7.

\textsuperscript{286} At least one commentator has argued that in order to increase agency discretion, it may be necessary to limit \textit{ex-post} review of agency decisions. See Seidenfeld, supra note 33, at 455–59. Limiting that review creates the obvious problem of making agency policy vulnerable to domination by interest groups, other forms of unwarranted political influence, and idiosyncratic agency biases. See id. at 459–79. But the possibility of these problems alone should not bar encouraging discussion of reforming procedures to allow agencies to make decisions consistent with their policy. See id. at 479–95.

\textsuperscript{287} In fact, TI’s Sensors and Controls (now Sensata Technologies) is a member of EPA’s National Performance Track Program. Performance Track is a mechanism that enables voluntary partnerships between EPA and individual facilities to attain environmental results by exceeding regulatory requirements. “Performance Track is showing that many private sector New Englanders understand that doing what’s good for the environment is also good for business . . . .” Press Release, EPA Region 1, Six New England Facilities Accepted Into EPA’s National Performance Track Program (May 9, 2006) (quoting Robert W. Varney, regional administrator for EPA’s New England Office), \textit{available} at http://epa.gov/newsroom/news-releases.htm (follow “2006” hyperlink; then follow “Earlier Releases” hyperlink; then follow “05/09/06” hyperlink).
ENVIRONMENTAL RESPONSIBILITIES
OVERSEAS: THE NATIONAL
ENVIRONMENTAL POLICY ACT AND THE
EXPORT-IMPORT BANK

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Abstract: The National Environmental Policy Act (NEPA) serves to regulate the environmental impacts of the activities of federal agencies. One such agency, the Export-Import Bank, aids the growth of United States exports in international markets by funding projects where private banks are unwilling. The courts have been selective in applying NEPA requirements to extraterritorial U.S. activities, but the Ex-Im Bank’s activities fall within the categories created by prior cases. Therefore, the Ex-Im Bank should apply NEPA to the projects it considers for funding.

Introduction

Congress enacted the National Environmental Policy Act (NEPA) in 1970 as a means of regulating the environmental impacts of federal actions. The stated purposes of NEPA are:

[T]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

By passing this statute, the federal government sought to make environmental management a priority on a national level.

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Under NEPA, all federal agencies must consider the potential environmental impacts of their actions. An agency must create and submit an Environmental Impact Statement (EIS) when it undertakes a major action which may significantly affect the environment. An EIS must include a “detailed” account of the environmental effects of the proposed project, possible alternatives, and other considerations. NEPA’s regulatory scheme revolves around the EIS requirement. If the agency is unsure whether its proposed action is a major federal action that requires an EIS, it must prepare an Environmental Assessment (EA). An EA must put forth the need for the project, possible alternatives, potential environmental impacts, and a list of the entities consulted in the creation of the EA. Unlike an EIS, this discussion need only be “brief.” After reviewing the EA, the agency must then issue either a statement of intent to prepare an EIS or a Finding of No Significant Impact (FONSI) detailing why no EIS is necessary.

There has been much debate regarding the scope of this EIS requirement. Courts “provided some guidance . . . in the domestic context.” However, NEPA’s application to U.S. actions overseas brought

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5 See id. at 2196.  
6 42 U.S.C. § 4332(2)(C). The relevant statutory language states:  

The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall—  

. . . .  
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—  

(i) the environmental impact of the proposed action,  
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,  
(iii) alternatives to the proposed action,  
(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and  
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

7 Id.  
8 Smith, supra note 2, at 751.  
10 Id. § 1508.9(b).  
11 Id.  
12 Id. §§ 1501.4(e), 1508.13.  
14 Id.
new, and more complex, inquiries into the statute’s requirements. Because NEPA does not specifically state that its requirements extend to actions outside the United States, such actions are often not held to be subject to the statute. In fact, most federal agencies have refused to apply NEPA to their activities outside the United States.

In particular, NEPA’s application to the Export-Import Bank (Ex-Im Bank) raises concerns. The Ex-Im Bank serves “to assist in financing the export of U.S. goods and services to international markets.” The Ex-Im Bank finances projects when private sector banks and financers are unwilling to do so. The very purpose of the Ex-Im Bank—to support projects with greater risks than a private source is willing to assume—raises concerns about potential environmental impacts. Many of these projects affect developing nations that do not have NEPA-like environmental policies in place. It therefore becomes important to consider whether the Ex-Im Bank’s actions trigger NEPA’s EIS requirement. This inquiry is further complicated by the international nature of most actions taken by the Ex-Im Bank.

This Note asserts that the Ex-Im Bank should be required to apply NEPA when reviewing applications for financial support. Part I explores the historical approach to applying NEPA extraterritorially. Part II provides an overview of the Ex-Im Bank, its activities, and its existing environmental guidelines. Part III argues generally that NEPA should be applied extraterritorially. Finally, Part IV considers NEPA application in context of the Ex-Im Bank, arguing that the Ex-Im Bank should be subject to NEPA requirements.

15 Id.
19 Id.
20 See id.
21 See Carroll, supra note 13, at 25.
23 See Ex-Im Bank, Mission, supra note 18.
I. Application of NEPA Requirements to Extraterritorial Projects

A. Congressional Response to NEPA Application

In order for a statute to have extraterritorial application, Congress must intend for the statute to have such application, and the application must not violate principles of international law.\(^{24}\) NEPA lacks any explicit language regarding its scope.\(^{25}\) Without a clear statement of congressional intent to apply the statute extraterritorially, it is presumed to apply only within the United States.\(^{26}\) However, other evidence indicates that the intent of extraterritorial application is implicit in the statute.\(^{27}\)

At the time of NEPA’s enactment, there was little congressional debate; therefore, the legislative history for the statute is not helpful in determining what Congress intended its scope to be.\(^{28}\) However, documents from the joint House-Senate colloquium on environmental policy from which NEPA emerged shed some light on congressional intent.\(^{29}\) After the conclusion of the colloquium, Congress summarized its activities in a White Paper on a National Policy for the Environment (White Paper).\(^{30}\) The White Paper acknowledged the inter-connectedness of the world’s environment and recognized “the importance of considering environmental impacts” when evaluating projects with an international scope.\(^{31}\) Furthermore, the House Report on the original House version of the bill explicitly stated that the consideration of “the international implications” of U.S. activities was implicit in the required assessment.\(^{32}\)

Over the years, Congress has considered amending NEPA explicitly to include extraterritorial application.\(^{33}\) One such attempt took place in 1989, when Congress sought to specify that “major federal ac-

\(^{24}\) Lewis, supra note 4, at 2165.
\(^{25}\) See 42 U.S.C. §§ 4321–4370 (2000); Lewis, supra note 4, at 2167.
\(^{26}\) Lewis, supra note 4, at 2167.
\(^{27}\) See infra notes 194–214 and accompanying text.
\(^{28}\) See Goldfarb, supra note 16, at 556.
\(^{29}\) Id. at 556–57.
\(^{30}\) See id. at 556 (citing Congressional White Paper on a National Policy for the Environment, 115 Cong. Rec. 29,078 (1969)).
\(^{31}\) Id.
\(^{33}\) Lewis, supra note 4, at 2148.
tions” included extraterritorial actions. Specifically, the bill sought to “clarify that NEPA applies to all Federal actions, not just those in the United States.” Given NEPA’s silence on its applicability overseas, few federal actions outside the United States have been subject to the EIS project. According to the bill’s sponsors, this lack of consideration for environmental impacts overseas “is inconsistent with the goals and policies of NEPA.” Despite this call to “strengthen the NEPA process,” the bill did not pass in Congress. Another bill, authorizing appropriations for the Office of Environmental Quality, provided for consideration of the global environmental impacts of federal actions. This provision also failed to pass through Congress. In fact, none of the proposed amendments have been successful.

B. The Executive Weighs In: Executive Order 12,114

After NEPA’s enactment, government agencies issued conflicting interpretations of the statute’s requirements. The Council on Environmental Quality (CEQ) issued a memorandum stating its belief that NEPA’s EIS requirement applies to federal actions both in the United States and outside of its jurisdiction. Alternately, the U.S. Department of State (State Department) interpreted the requirement as applying to actions in the United States and in the global commons, but not to actions within the jurisdiction of other nations. The State De-

35 Id. The bill sought to clarify the definition of “major Federal actions” in NEPA by adding: “[I]ncluding extraterritorial actions (other than those taken to protect the national security of the United States, actions taken in the course of armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions).” Id.
36 Id.
37 Id.
38 Id.; Lewis, supra note 4, at 2148.
40 See id.
41 Lewis, supra note 4, at 2148.
43 Id. (citing U.S. Council on Envtl. Quality, Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions (1976), reprinted in 42 Fed. Reg. 61,068 (1977)).
44 Id. (citing Administration of the National Environmental Policy Act: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation of the H. Comm. on Merchant Marine and Fisheries,
partment based its view on the idea that applying a U.S. law extraterritorially could have adverse impacts on the relationship between the United States and other countries.\(^\text{45}\)

In response to these questions about the applicability of NEPA in the international arena, President Jimmy Carter issued Executive Order 12,114 (the Order) in 1979.\(^\text{46}\) Both the State Department and CEQ contributed to the drafting of the Order, taking into consideration environmental and foreign policy concerns.\(^\text{47}\) The Order mapped out the use of NEPA with respect to different international situations, and stood as “the United States government’s exclusive and complete determination of the procedural and other actions to be taken by the Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.”\(^\text{48}\) In the wake of the Order, NEPA’s potential role in extraterritorial projects was severely limited.\(^\text{49}\)

The Order delineates four categories of international projects to which it applies.\(^\text{50}\) First, there are “major Federal actions significantly affecting the environment of the global commons.”\(^\text{51}\) Second, the Order applies to any “major Federal action significantly affecting the environment of a foreign nation . . . not involved in the action.”\(^\text{52}\) Third, the Order includes “actions significantly affecting the environment of a foreign nation which provide to that nation . . . a product, or . . . project producing a principal product or an emission or effluent, which is prohibited or strictly regulated” by the U.S. government because of its toxic environmental effects or radioactivity.\(^\text{53}\) Fourth, the Order includes extraterritorial actions “which significantly affect natural or ecological resources of global importance.”\(^\text{54}\) The Order provides for several exemptions, many of which reflect State Department concerns.

\(^{45}\) Lewis, supra note 4, at 2149.


\(^{47}\) Lewis, supra note 4, at 2151.

\(^{48}\) Executive Order 12,114, supra note 46, § 1-1.

\(^{49}\) See Executive Order 12,114, supra note 46; Carroll, supra note 13, at 4–6; Comment, supra note 42, at 365.

\(^{50}\) Executive Order 12,114, supra note 46, § 2-3.

\(^{51}\) Id. § 2–3(a). The global commons are those areas outside of the specific control and jurisdiction of any nation, such as Antarctica. Id.

\(^{52}\) Id. § 2-3(b).

\(^{53}\) Id. § 2-3(c).

\(^{54}\) Id. § 2-3(d).
about foreign policy implications. Most of these exemptions are consistent with the requirements of NEPA.

The Order sets forth the necessary documents in the situations described. EISs, bilateral or multilateral environmental studies related to the proposed actions, and concise environmental reviews of the project are all accepted under the Order. Which of these documents are necessary depends upon the nature of the project, as does the scope of the environmental review performed therein. In general, the Order appears to weaken the requirements on federal agencies acting outside of the United States. Furthermore, the Order also denies a private cause of action based on the Order, preventing concerned citizens from forcing review of an agency’s actions under the Order.

C. Extraterritorial Application of NEPA in the Courts

The courts have been called on to consider the application of NEPA to federal actions outside the United States on several occasions. This question was considered in light of the presumption against extraterritoriality—"[a] longstanding judicial principle . . . that, unless Congress has indicated otherwise, statutes are meant to apply only within American borders." The courts have responded by carving out different situations and applying different standards to each scenario.

People of Enewetak v. Laird first raised the issue of the proper application of NEPA outside the territory of the United States in the courts in 1973. The U.S. government was performing a high explosive detonation—as nuclear blast simulation—on Enewetak, a trust territory of the United States. The people of Enewetak sought an injunction

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55 Id. § 2-5; see Lewis, supra note 4, at 2151–52. These exemptions include actions taken by the President or at the direction of the President or Cabinet officer when national security is at issue, and include any “intelligence activities and arms transfers.” Executive Order 12,114, supra note 46, § 2-5(a).
56 Comment, supra note 42, at 365. For example, presidential actions are exempt under the Order, and also do not fall under NEPA. Id. at 365 n.86.
57 Executive Order 12,114, supra note 46, § 2-4.
58 Id.
59 Carroll, supra note 13, at 5.
60 See id. at 5–6; Comment, supra note 42, at 364–65.
61 See Carroll, supra note 13, at 6; Comment, supra note 42, at 365.
63 Lewis, supra note 4, at 2152.
64 See Carroll, supra note 13, at 7–15.
66 Id. at 813.
against the Secretary of Defense, Secretary of the Air Force, Assistant Secretary of the Air Force, Commander in Chief of the U.S. Military Forces in the Pacific Ocean, and Director of the Defense Nuclear Agency.\textsuperscript{67} The U.S. District Court for the District of Hawaii found that NEPA did apply to trust territories.\textsuperscript{68} Since federal laws do not automatically apply to a trust territory, the court examined whether Congress “manifest[ed] an intention to include the Trust Territory within the coverage of” NEPA.\textsuperscript{69} The court concluded that the broad language employed in NEPA indicated that Congress intended to include the trust territories under the statute.\textsuperscript{70} In NEPA, “United States” is left undefined, and furthermore appears only twice in the statute.\textsuperscript{71} Instead, NEPA applies to “the Nation.”\textsuperscript{72} By using the term “Nation” rather than “United States,” the court reasoned, Congress expressed an intent for NEPA to apply beyond the boundaries of the fifty states.\textsuperscript{73} In fact, the court indicated that the language used in NEPA was so expansive that it “clearly evidences a concern for all persons subject to a federal action which has a major impact on their environment,” whether inside or out of the United States.\textsuperscript{74}

After examining the statute’s language, the court also considered NEPA’s legislative history.\textsuperscript{75} The court first points to the comments of the statute’s sponsor, and then mentions various reports, including the Conference Committee Report and the House Report.\textsuperscript{76} All of these reports indicate an intent to apply the statute broadly.\textsuperscript{77} In particular, the House Report indicates that Congress recognized the global scope of environmental concerns.\textsuperscript{78} Finally, the court noted that since a trust territory does not exist under its own government, and will not be independently protected from U.S. actions, it should be afforded the pro-

\textsuperscript{67} Id. at 812–13.
\textsuperscript{68} Id. at 814.
\textsuperscript{69} Id. at 815.
\textsuperscript{70} Id. at 815–16.
\textsuperscript{72} Enewetak, 353 F. Supp. at 816; see 42 U.S.C. §§ 4321, 4331(b), 4342, 4344.
\textsuperscript{73} Enewetak, 353 F. Supp. at 816.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 817–18.
\textsuperscript{76} Id.
\textsuperscript{77} See Id.
\textsuperscript{78} Id. at 817. International considerations are implicit in NEPA, according to the House Report, which noted that they are “inseparable . . . from the purely national consequences of our actions.” Id. at 817 (quoting H.R. Rep. No. 91-378, at 4 (1969), as reprinted in 1969 U.S.C.C.A.N. 2751, 2759).
tection provided to other areas under U.S. jurisdiction. The court therefore concluded that NEPA’s requirements apply to federal actions taken in a trust territory.

Soon after Enewetak, a transborder project confronted the court in Sierra Club v. Adams. The United States had agreed to contribute two-thirds of the funding to the construction of the Darien Gap Highway in Panama and Colombia. This highway would complete the Pan American Highway, spanning from Alaska to Chile. The Sierra Club first brought suit against the Secretary of Transportation and the Administrator of the Federal Highway Administration for failing to prepare an EIS for the project. The district court issued a temporary injunction until the agency prepared an EIS in compliance with NEPA. The agency then issued an EIS for the project. The district court refused to lift the injunction, finding the EIS insufficient. The court pointed to the EIS’s failure to adequately consider three issues: “1) the control of aftosa, or foot-and-mouth disease; 2) possible alternative routes for the highway; and 3) the effect on the Cuna and Choco Indians inhabiting the area that the highway is expected to traverse.” The government prepared an EIS on the district court’s order, and assumed itself to be subject to NEPA. Therefore, on appeal, the U.S. Court of Appeals for the District of Columbia Circuit in turn assumed that NEPA applied to this project, only considering the merits of the EIS.

Similarly, that same year, the D.C. Circuit assumed that NEPA applied to United States participation in a heroin-eradication program involving spraying Mexican marijuana and poppy plants with herbi-

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79 Enewetak, 353 F. Supp. at 818.
80 Id. at 819. The application of NEPA to trust territories was upheld soon after this decision in Saipan v. U.S. Dep’t of Interior, where the U.S. government sought to build a hotel in Saipan. Goldfarb, supra note 16, at 559 (discussing the merits of Saipan, 502 F.2d 90 (9th Cir. 1974)). The court held that NEPA requirements must be followed in the construction of the hotel. Id.
81 578 F.2d 389 (D.C. Cir. 1978).
82 Id. at 390.
83 Id.
84 Id.
85 Id.
86 Id. at 391.
87 Adams, 578 F.2d at 391.
88 Id.
89 Id.
90 See id. at 392–93. The court’s focus on the domestic effects of the project may have contributed to the government’s willingness to prepare an EIS rather than oppose the application of NEPA. Lewis, supra note 4, at 2154.
The National Organization for the Reform of Marijuana Laws (NORML) sought judgment against the State Department, the Agency for International Development (AID), the Drug Enforcement Administration (DEA), and the Department of Agriculture for their roles in the program. United States entities provided financial and other types of assistance to a program spraying the herbicides Paraquat and 2,4-D on marijuana and poppy fields. Despite arguing that NEPA did not apply to a project taking place entirely outside of the United States, the U.S. government had agreed to prepare an EIS regardless of the outcome of the case. The court, therefore, did not have to expressly address whether NEPA applied. It noted, however, that although the means by which the herbicide-spraying program would have effects in the United States—smoking marijuana illegally imported from Mexico—certain actions by federal agencies indicate an awareness of and potential for this activity to occur. For example, the National Institute on Drug Abuse undertook a study examining “the potential health hazards associated with [P]araquat-contaminated marijuana.” The court also cited a public notice issued by the Department of Health, Education, and Welfare warning of the potential health effects of smoking Paraquat-contaminated marijuana. This activity indicated an interest on the part of federal agencies to inform U.S. citizens of this particular potential hazard.

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92 Id. at 1228. The Drug Enforcement Administration and the Department of Agriculture both provided technical assistance for the first few years of the program. Id. at 1231. The Department of State was the primary administrator of U.S. involvement in the eradication program. Id. The Agency for International Development assisted Mexico in selecting equipment for the program, and developing the U.S. support system for the program. Id.
93 Id. Paraquat is a highly toxic herbicide and exposure may occur through ingestion, absorption, or inhalation. Centers for Disease Control and Prevention, Facts About Paraquat, http://www.bt.cdc.gov/agent/paraquat/basics/facts.asp (last visited Mar. 31, 2007). The pesticide known as 2,4-Dichlorophenoxyacetic acid (2,4-D) may be ingested, absorbed, or inhaled, and has been linked to cancer, endocrine disruption, and kidney and liver damage. BEYOND PESTICIDES, CHEMICALWATCH FACTSHEET: 2,4-D (July 2004), available at http://www.beyondpesticides.org/pesticides/factsheets/2,4-D.pdf.
94 NORML, 452 F. Supp. at 1229.
95 Id. at 1232.
96 Id.
97 Id.
98 Id.
99 Id.
The courts next considered NEPA requirements where impacts were felt exclusively in foreign nations.100 In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, the court determined that the Nuclear Regulatory Commission (NRC) was not subject to NEPA in its review of a nuclear export application to the Philippines.101 In 1974, the Philippine Government sought to acquire its first nuclear generator from Westinghouse Electric Corporation (Westinghouse).102 Accordingly, Westinghouse petitioned NRC for approval to export a nuclear reactor and corresponding nuclear materials.103 NRC approved this export in 1980, and the Natural Resources Defense Council in turn sought to enjoin the shipment.104 In light of the Order—issued two years earlier—the court considered the NRC’s duties with deference to the executive’s analysis.105 Concluding that the statute’s legislative history provided no insight into extraterritorial application, the court distinguished the situation before it from preceding cases.106 In particular, the court noted that the export of nuclear reactors was a one-time activity which would not require continuing supervision by the United States.107 Also, there would be no direct domestic repercussions from this activity, unlike the proposed highway in *Adams*.108 Ultimately, the court concluded that no NEPA requirement for an EIS existed where the impact from an action fell exclusively within the jurisdiction of a foreign nation.109 However, the court was careful to note that it held only that NEPA requirements were not applicable to NRC nuclear export licensing decisions, allowing that they may be necessary for other extraterritorial federal actions.110

The court in *Greenpeace v. Stone* also held federal action to be outside the scope of NEPA where the actions was performed under presidential agreements with foreign nations.111 In that case, the U.S. Army had sought to transport “approximately 100,000 rounds of nerve gas [that had] been stored in the Federal Republic of Germany” for almost

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101 647 F.2d at 1347–48.
102 Id. at 1348, 1351.
103 Id. at 1348.
104 Id.
105 See id. at 1364–65.
106 See id. at 1367, 1368.
107 NRDC, 647 F.2d at 1367–68.
108 See id. at 1368.
109 Id. at 1365–65.
110 Id. at 1366.
The munitions were loaded in steel containers, placed in shipping containers, and transported by truck, then transferred to railcar. The shipping containers were then transferred to ships for transport to the Johnston Atoll, a U.S. territory in the Pacific Ocean, for incineration. In considering the U.S. government’s obligations in this transport, the court again pointed to the Order. The court found that applying NEPA to actions in Germany “would result in a lack of respect for [Germany’s] sovereignty, authority and control over actions taken within its borders . . . [and] would encroach on the jurisdiction of [Germany] to implement” its own balancing of environmental and public concerns. The transport of the munitions within Germany were deemed outside of NEPA’s reach. However, again, the court was careful to state that this decision did not preclude NEPA application to other federal actions abroad, noting in particular the possibility of situations where federal actions abroad may have domestic environmental effects, “or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved.”

The court therefore only considered the Department of Defense’s NEPA obligations with respect to the transportation of the missiles across the oceans. The Army had prepared an environmental evaluation considering the effects of this action, which the court deemed sufficient under the Order. The court held that no NEPA EIS requirement applied, stating that this leg of the transport was still connected to the actions within Germany. Furthermore, the court expressed concern regarding the implications that subjecting this project to NEPA might have on foreign policy. First, using NEPA would interfere with an existing agreement between U.S. President Ronald Reagan and German Chancellor Helmut Kohl. Second, the court noted that employing NEPA could have great political impact when the action in

\[112\] Id. at 752.
\[113\] Id. at 753.
\[114\] Id. at 753, 752.
\[115\] Id. at 762.
\[116\] Id. at 760.
\[117\] Greenpeace, 748 F. Supp. at 761.
\[118\] Id.
\[119\] Id. at 761–65.
\[120\] See id. at 761–63.
\[121\] Id. at 763.
\[122\] Id. at 757–58.
\[123\] Greenpeace, 748 F. Supp. at 757–58.
question takes place entirely within a foreign sovereign nation which had already approved the activity.\textsuperscript{124}

The court finally upheld NEPA’s requirements with respect to actions taken outside the jurisdiction of any nation in \textit{Environmental Defense Fund, Inc. v. Massey}.\textsuperscript{125} The National Science Foundation (NSF) incinerated food wastes in Antarctica and failed to prepare an EIS for this action.\textsuperscript{126} The court analyzed the issue by first asking whether an extraterritorial problem even existed.\textsuperscript{127} An extraterritorial problem arises where a U.S. statute is used to regulate conduct in another sovereign country.\textsuperscript{128} Because the extraterritoriality of the action caused effects in Antarctica—“an international anomaly”—the presumption against extraterritorial application of federal statutes did not apply.\textsuperscript{129} Antarctica is outside the jurisdiction of any one nation, and is also “an area over which the United States has a great measure of legislative control,” and therefore NEPA could attach to actions undertaken there.\textsuperscript{130} Furthermore, because the NSF decision-making process took place in the United States, NEPA applied to this process without any consideration of extraterritoriality.\textsuperscript{131} Notably, the court concluded by specifying that it did not decide how NEPA should apply to actions “involving an actual foreign sovereign,” nor does its holding extend to the applicability of other federal statutes in Antarctica.\textsuperscript{132}

Overall, the court has been sparing in its application of NEPA to extraterritorial actions.\textsuperscript{133} Federal agencies are only held to the EIS requirements imposed under NEPA in limited circumstances, including when the action takes place in the global commons.\textsuperscript{134} NEPA requirements may also be imposed when the agency retains control over the project in question.\textsuperscript{135} When the project may directly affect the environment within the United States, NEPA may apply.\textsuperscript{136} This interpretation of the appropriate application of NEPA leaves federal agen-

\textsuperscript{124} See \textit{id.} at 759–60.
\textsuperscript{125} Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993).
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.} at 530–32.
\textsuperscript{128} \textit{Id.} at 530.
\textsuperscript{129} \textit{Id.} at 529.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Massey}, 986 F.2d at 532.
\textsuperscript{132} \textit{Id.} at 537.
\textsuperscript{133} See supra text accompanying notes 65–132.
\textsuperscript{134} See \textit{Massey}, 986 F.2d at 536–37.
cies with great discretion when acting overseas.\textsuperscript{137} As federal agencies continue to interact with developing nations, the refusal to apply NEPA extraterritorially causes major concerns.\textsuperscript{138}

II. FEDERAL ACTIVITY IN DEVELOPING NATIONS: THE EXPORT-IMPORT BANK

Congress created the Ex-Im Bank in 1945 to aid the growth of exports from the United States in the international market.\textsuperscript{139} The Ex-Im Bank provides loans, loan guarantees, and export credit insurance to U.S. entities looking to export to developing markets when private loans are unavailable.\textsuperscript{140} It also works to match the government support provided to similar foreign entities, seeking to “level the playing field” for U.S. companies acting internationally.\textsuperscript{141} In considering projects to fund, the Ex-Im Bank considers the potential success of the project according to three criteria: “1) to promote U.S. employment; 2) to complement, but not compete with, private sector sources of trade financing; and 3) to have a reasonable assurance of repayment for every transaction.”\textsuperscript{142} In fiscal year 2004, the Ex-Im Bank provided support to over 3000 U.S. export sales, authorizing $13.3 billion in loans, guarantees, and export credit insurance.\textsuperscript{143} As a self-sustaining agency, the Ex-Im Bank does not rely on federal funding for its budget.\textsuperscript{144}

In its pursuit of facilitating U.S. trade overseas, the Ex-Im Bank often interacts with other entities, both government and private.\textsuperscript{145} The Ex-Im Bank collaborates with the U.S. Department of Commerce, the Trade Development Agency, and other federal agencies to develop a range of assistance programs and to provide solutions to a variety of applicant problems.\textsuperscript{146} In addition, the Ex-Im Bank sometimes provides assistance to projects which also receive funding from multilateral and

\textsuperscript{137} See Carroll, \textit{supra} note 13, at 23–24.

\textsuperscript{138} See id. at 22–25; Comment, \textit{supra} note 42, at 353–54.


\textsuperscript{141} \textit{Id}.

\textsuperscript{142} \textit{Id}.

\textsuperscript{143} \textit{Id}. at 18.

\textsuperscript{144} Burhans, \textit{supra} note 22, at 2.


\textsuperscript{146} \textit{Id}.
regional banks such as the World Bank and the African Development Bank.147

A. Application to the Export-Import Bank

Applicants may reach the Ex-Im Bank in a number of ways.148 An exporter in contact with a buyer, or a buyer in contact with an exporter, may be referred by their counterpart’s bank.149 Alternately, an interested exporter or buyer may be referred to the Ex-Im Bank by other public and private sector partners, or simply by contacting Ex-Im Bank regional offices.150

An applicant may apply for a Letter of Interest (LI), a Preliminary Commitment (PC), or a Final Commitment (AP).151 Any responsible party may apply for an LI during the bidding or negotiating stage of a sale.152 An LI, when issued, simply indicates that the Ex-Im Bank will consider financing the specified transaction.153 They are typically issued within seven business days of receipt of the application, and are valid for six months.154 Where a formal competitive bidding process accompanies an export contract, any responsible party may apply for a PC.155 A PC is a commitment by the Ex-Im Bank for financing, it is subject to awarding of the contract, and final Ex-Im Bank review of the transaction.156 Because it involves a more concrete commitment by the Ex-Im Bank, PC applications require more specific information than LI applications, including an examination of environmental effects of the pro-


149 Id.

150 Id.


152 Id.

153 Id.

154 Id.

155 Id.

156 Id.
An applicant may choose either a four-month PC with an interest rate cap, or a six-month PC with no cap.158

Eligible parties may apply for an AP after the export contract has been awarded.159 For an AP for a direct loan, only the foreign borrower is eligible to apply, but a guaranteed borrower may also submit an application related to a guarantee.160 After performing “a comprehensive evaluation of the transaction,” the Ex-Im Bank may grant an AP, authorizing financing of the project.161 An applicant may request an AP even without having received an LI or a PC.162

B. Environmental Review in the Export-Import Bank

The very nature of the Ex-Im Bank’s activities—funding and encouraging projects in developing nations—raises environmental concerns.163 The federal Council on Environmental Quality (CEQ) issued regulations requiring the Ex-Im Bank to adhere to NEPA requirements when its actions have potentially adverse environmental impacts within the United States, but no such requirement exists for projects without domestic impacts.164 For projects proposed with solely extraterritorial impacts, it is necessary, therefore, to look at the Ex-Im Bank’s internal procedures.165

Under its charter, the Ex-Im Bank is required to establish procedures for the consideration of “the potential beneficial and adverse environmental effects of goods and services for which support is requested.”166 The Board of Directors may then take this report into account when choosing to grant or withhold support for a project.167 Accordingly, the Ex-Im Bank has adopted the goal of requiring “only the extent and detail of environmental information that is necessary to

157 Ex-Im Bank, How to Apply, supra note 151.
158 Id.
159 Id.
160 Id.
161 Id.
162 Id.
163 See 2004 Annual Report, supra note 140.
164 12 C.F.R. § 408.3 (1979). The Council on Environmental Quality (CEQ) has the authority to issue binding regulations regarding NEPA procedures under Executive Order 11,991. Lewis, supra note 4, at 2150.
166 Ex-Im Bank, Procedures and Guidelines, supra note 165.
167 Id.
enable the Board of Directors to evaluate the environmental effects” of the project before it. Interim environmental guidelines were first implemented in October 1993, followed by the first issuance of the Ex-Im Bank’s Environmental Procedures and Guidelines (Procedures and Guidelines) in February 1995. The Procedures and Guidelines were created with input from other government agencies, non-governmental organizations, and U.S. exporters, and were most recently revised in July of 2004.

The applicability of the Procedures and Guidelines depends on the nature of the project in question. Applications are split into three categories: long-term, medium-term, and short-term transactions. Long-term transactions are those for which the Ex-Im Bank would contribute more than $10 million, or which have a repayment term of longer than seven years. These transactions are screened and categorized according to their potential environmental impact. Accordingly, candidates must submit an “Environmental Screening Document” — a form available from the Ex-Im Bank—with their application. Any long-term transaction involving a physical project deemed to have potential adverse environmental impacts is also subject to environmental review. The majority of Ex-Im Bank activities fall under this category. Medium-term transactions have a potential contribution of no more than $10 million, most with a repayment term of seven years or less. When such a project is determined to be likely to have an adverse environmental impact on a sensitive area, it will be subject to an environmental review. Short-term transactions are not subject to either screening or review.

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168 Id.
169 Id.
170 Id.
171 See id.
172 Ex-Im Bank, Procedures and Guidelines, supra note 165.
173 Id. Certain projects for which the Ex-Im Bank will commit less than $10 million will have a repayment period of longer than seven years because of financing enhancements; these transactions are deemed medium-term, not long-term, transactions. Id.
174 Id.
175 Id.
176 Id. A physical project is defined as “any commercial, industrial or infrastructure undertaking that results in the construction or the extraction of a tangible asset at an identified location.” Id.
177 Id.
178 Ex-Im Bank, Procedures and Guidelines, supra note 165.
179 Id.
180 Id.
After an applicant submits its Environmental Screening Document, the Ex-Im Bank’s Engineering and Environment Division (E&E) reviews the project and places it in one of four categories.\textsuperscript{181} These four categories, as set forth by E&E, are: (A) large greenfield projects or projects located in, or impacting a sensitive site; (B) expansions, upgrades and projects having limited environmental impact; (C) categorical exclusions; or (N) nuclear.\textsuperscript{182} The type of environmental information necessary, and the extent of environmental review, for the project depends upon this categorization.\textsuperscript{183} Applicants for Category A projects must submit an Environmental Impact Assessment (EIA) and related information.\textsuperscript{184} These documents should “identify the environmental impact of the project and measures needed to mitigate the adverse environmental effects,” as well as review relevant host-country and international environmental requirements and guidelines.\textsuperscript{185} Category B projects require only information relevant to the expansion or upgrade to an existing plant.\textsuperscript{186} If, in the process of review, it is determined that the project is more appropriately placed in Category A, it may be re-categorized, and an EIA will be required.\textsuperscript{187} Those transactions classified as Category C require no additional environmental information.\textsuperscript{188} Category N projects are governed by Ex-Im Bank Nuclear Procedures and Guidelines.\textsuperscript{189}

In 2004, the Ex-Im Bank approved six projects categorized as environmental Category A, including a natural gas liquefaction plant in Qatar, a gas fired combined cycle power plant in Turkey, and an open pit gold-mining project in Argentina.\textsuperscript{190} Among the eleven environmental Category B projects approved in 2004 are a cocoa bean processing plant in Ghana, a petroleum refinery in Nigeria, and construction

\textsuperscript{181} Id. \\
\textsuperscript{182} Id. \\
\textsuperscript{183} Id. \\
\textsuperscript{184} Id. \\
\textsuperscript{185} Id. \\
\textsuperscript{186} Id. \\
\textsuperscript{187} Id. \\
\textsuperscript{188} Id. Category C transactions are those “related to the export of a product (or products) not identified with a physical project; or exports relating to projects of the type that have little or no potential to cause environmental effects and do not impact sensitive locations.” Id. \\
\textsuperscript{189} Id. \\
of a commercial and residential complex in Azerbaijan. Projects for which EIAs have recently been prepared include: a gas fired combined cycle power plant in India; modernization and expansion of an oil refinery in Mexico; and a simple cycle gas turbine power plant in Uruguay. Additionally, projects for which the need for an EIA was still under consideration in the spring of 2006 include: a corrugated box manufacturing plant in Chile; two semiconductor fabrication facilities in China; rehabilitation and construction of an airport in the Dominican Republic; and a direct reduction iron plant in Malaysia.

III. A Case for Applying NEPA to Extraterritorial Projects

The language of NEPA indicates an intent to apply the EIS requirements overseas. Generally, the statute seeks to “prevent or eliminate damage to the environment.” This stated purpose makes no reference to limiting the scope of concern to the environment of the United States. Particularly in light of growing recognition that environmental impacts are felt globally, the congressional aim of mitigating damage to the environment includes an implicit applicability of NEPA requirements to extraterritorial federal actions. Looking specifically to the EIS requirements further encourages an extraterritorial application of NEPA. The only qualification stated for actions to fall under the requirements is that they be “major.” A federal action may be major whether it occurs within the jurisdiction of the United States or outside of it. The statute does not limit its requirements to domestic projects, and its application should not be so limited. In addition, an EIS is required where a project “significantly affect[s] the quality of the human environment.” Again, this language does not limit the EIS

191 Id.
193 Id.
195 Id. § 4321.
196 See Goldfarb, supra note 16, at 554 (noting that “[m]any of the provisions . . . imply concern for environmental problems throughout the world”).
197 Id. at 554, 575–77.
199 Id.
201 See 42 U.S.C. § 4332(2)(C); Goldfarb, supra note 16, at 554.
requirements to domestic projects. In fact, by calling into concern the entire human environment, Congress actually opened the statute to a much broader arena than simply the national environment. This reading of the statute is further supported by the congressional White Paper issued prior to the enactment of NEPA. Congress considered and enacted NEPA with an understanding of the importance of the international environmental implications of its actions.

Congress has not passed any of the proposed amendments clarifying the scope of NEPA to include extraterritorial projects. This failure does not necessarily mean that NEPA should not be applied extraterritorially. The existence of other congressional priorities may have drawn attention and energy away from the NEPA amendments. For example, at the time of the 1989 proposed amendment, the Senate was likely preoccupied with the immediate and direct repercussions of the Exxon-Valdez oil spill in Alaska, and NEPA applicability was likely not at the forefront of congressional debate. Therefore, extraterritorial application of NEPA is not necessarily against congressional intent, and should not be ruled out on this ground. Furthermore, it could be inferred that Congress’s reluctance to enact any of these amendments actually reflects a belief that extraterritorial application is already implicit in the statute.

Despite a lack of explicit language making NEPA applicable to extraterritorial federal actions, the statute should not be limited to solely domestic projects. The language of the statute itself, considered in conjunction with the legislative history and the historical context of the statute, indicate an implicit intention to apply NEPA extraterritorially.

203 See id.
204 See id.
206 See Goldfarb, supra note 16, at 556.
207 See supra notes 34–42 and accompanying text.
208 See Lewis, supra note 4, at 2149.
209 Id. at 2148–49.
210 Id. at 2149.
211 Id. at 2148–49.
212 See id.
213 See supra notes 194–206 and accompanying text.
214 See supra notes 208–12 and accompanying text.
IV. NEPA AND THE EXPORT-IMPORT BANK

The United States regularly contributes to activities outside its own jurisdiction through the Ex-Im Bank. These activities should be subject to NEPA and its EIS requirement.

A. The Need for Environmental Review of Export-Import Bank Activities

The Ex-Im Bank, which funds projects that private banks are reluctant to support, often becomes involved in activities taking place in unstable and developing markets. Often, the issue of environmental protection becomes more complicated in these nations. The governments of developing nations may be reluctant to implement environmental assessment procedures. Such considerations may be seen as impediments to progress. Also, nations may be unwilling to invest the time required to complete an environmental impact inquiry. Performing a full environmental assessment prior to authorizing and commencing a project will simply postpone progress for these nations. Furthermore, requiring consideration of environmental impacts may impede the use of certain technologies. By preventing developing nations from using inexpensive processes and technologies with greater environmental impacts, an environmental assessment process would make it more difficult for these nations to grow and compete with other nations.

Developed nations contribute most to the degradation of the global environment. Taking this fact into account strengthens the argument for NEPA applicability to Ex-Im Bank activities overseas in two ways. First, just because a nation does not currently contribute heavily to pollution and environmental degradation does not mean that it should be allowed to do so. By bypassing NEPA requirements, the Ex-Im Bank

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215 2004 Annual Report, supra note 140, at 3.
216 See id.
217 See Goldfarb, supra note 16, at 587.
218 Id.
219 Id.
220 See id.
221 See id.
222 See id.
223 See Goldfarb, supra note 16, at 587.
224 Id. “[W]hile we are only 6% of the world’s people, we actually produce 40% of the world’s pollution.” Id. at 587 n.333 (quoting U.N. Conference on the Human Environment: Preparations and Prospects: Hearings Before the S. Comm. on Foreign Relations, 92d Cong., 2d Sess. 17 (1972) (statement of Sen. Claiborne Pell)).
225 See id. at 587–88.
would essentially be encouraging increased pollution in the nations in which it operates. Second, developed nations already contributing to global environmental damage should not be able to avoid answering for that harm simply by locating their projects outside their borders. By authorizing and funding projects outside of the United States without compliance with NEPA requirements, the Ex-Im Bank is, in essence, allowing U.S. entities to “outsource” their pollution.

B. Applying NEPA to the Export-Import Bank: The Case Law Approach

Even without a blanket application of NEPA to extraterritorial federal actions, the Ex-Im Bank’s activities should nonetheless be subject to EIS requirements under judicial precedent. Previous case law has held NEPA to apply to federal actions outside the United States in certain situations. Such instances include where federal control over a project is ongoing, where a project outside the United States may have environmental impacts inside the United States, and where the project is situated in the global commons. Projects funded by the Ex-Im Bank likely fall within at least one of these categories.

For any projects occurring in the global commons and funded by the Ex-Im Bank, the NEPA process will apply. In fact, the Ex-Im Bank explicitly acknowledges that NEPA applies where a project under consideration “may significantly affect the quality of the human environment of . . . Antarctica.” This use of the stricter environmental analysis requirements of NEPA extends beyond those projects proposed in Antarctica. Any application the Ex-Im Bank receives for a project affecting any global common—Antarctica, the world’s oceans, or other—should be subject to NEPA’s EIS requirements. Where the United States “has substantial interest and authority,” it should be able to regu-

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226 See Burhans, supra note 22, at 2–3.
228 See id.; Burhans, supra note 22, at 2–3.
229 See infra notes 235–62.
230 See supra notes 66–132.
234 See Burhans, supra note 22, at 1–3.
235 See Massey, 986 F.2d at 529.
236 Ex-Im Bank, Procedures and Guidelines, supra note 165, at I(12).
237 See Massey, 986 F.2d at 536.
238 See id.
late the environmental impacts of its actions without concern for foreign policy ramifications. In particular, projects with resulting water emissions may affect the world’s oceans, and therefore are subject to NEPA. Similarly, certain projects with significant air emissions may affect the atmosphere—a global common—and the NEPA requirements should apply.

It can be argued that the Ex-Im Bank retains control over the projects it funds. The application, approval, and issuance of a loan occurs only once. This distribution of funds does not end the relationship, however. The loan still must be paid back. In some instances, the repayment period exceeds seven years. Therefore, in many situations, Ex-Im Bank involvement in the project continues for at least seven years. As long as the Ex-Im Bank is fiscally involved in the project, and as long as the proponents of the project are indebted to the Ex-Im Bank, involvement and control lingers. Under the reasoning of National Organization for the Reform of Marijuana Laws (NORML) v. U.S. Department of State, the Ex-Im Bank’s continuing engagement in projects until the loan is fully repaid triggers NEPA applicability to the project. Although the court in NORML simply assumed that NEPA applied to the pesticide spraying program in Mexico, it specifically noted that U.S. agencies continued to provide “significant financial aid and other assistance” to the program. Until the loan is repaid, the Ex-Im Bank is still financially attached to a project. The NORML court’s focus on the financial aid provided indicates that it would apply NEPA’s requirements to Ex-Im Bank-funded projects.

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239 Id.
241 See Massey, 986 F.2d at 536; Bromley & Cochrane, supra note 240.
242 See Ex-Im Bank, Procedures and Guidelines, supra note 165.
243 Id.
244 Id.
245 Id.
246 Id.
247 Id.
248 See Ex-Im Bank, Procedures and Guidelines, supra note 165.
250 Id. at 1232.
251 See Ex-Im Bank, Procedures and Guidelines, supra note 165.
252 See NORML, 452 F. Supp. at 1232; Ex-Im Bank, Procedures and Guidelines, supra note 165.
The environmental effects of projects funded by the Ex-Im Bank are likely felt outside the nation in which the project is located. Very few environmental impacts are felt wholly locally. It is possible that the effects of these projects will be felt within the United States. Where these domestic effects can be shown, under the reasoning in Sierra Club v. Adams, the Ex-Im Bank is subject to the EIS requirements under NEPA. According to the court, the possibility of the spread of aftosa to the United States was “undoubtedly the most significant consideration” associated with the project. The potential for environmental effects to carry into the United States weighs heavily in the determination of whether NEPA should apply to an extraterritorial project. The Ex-Im Bank should consider possible domestic effects of any project it funds. If it has the potential to have environmental impacts within the United States, then the Ex-Im Bank must fulfill the NEPA requirements. This means NEPA will most likely apply to projects located in nearby locations, such as the Mexican oil refinery approved in 2004. It is possible, however, that other, more remote projects will have far-reaching effects and also fall under this category.

The courts have limited the application of NEPA to extraterritorial projects. Even where the court has refused to extend NEPA applicability to an extraterritorial project, it has specifically noted that its decision does not preclude extraterritorial application of the statute in other circumstances. In context of this conditionally restricted use of the statutory requirements, the Ex-Im Bank should apply NEPA to the projects it considers. The projects which the Ex-Im Bank funds will likely affect the global commons, and therefore requires NEPA consideration. Furthermore, the Ex-Im Bank’s participation in these pro-

254 See id.
255 See id.
257 Id. at 394.
258 See id.
259 See id.
260 See id.; Ex-Im Bank, Transactions Pending, supra note 192.
261 See Adams, 578 F.2d at 394.
262 See discussion supra Part I.C.
jects extends beyond a single transaction. The ongoing involvement of the Ex-Im Bank in its funded projects requires application of NEPA requirements to the projects. Finally, given the interconnectedness of the world’s environment, it is possible that the environmental effects of extraterritorial projects funded by the Ex-Im Bank will be felt domestically in the United States. Therefore, NEPA’s environmental guidelines should apply to the consideration of these projects.

**Conclusion**

The Ex-Im Bank must apply NEPA requirements to the projects it funds. NEPA seeks to create harmony between man and his environment, and simply acting outside of the domestic environment should not exempt the Ex-Im Bank from abiding by the statute’s guidelines. First, NEPA’s language indicates a need for its application even in extraterritorial projects. The broad language of the statute implies that its requirements should not be limited to projects occurring within the United States.

Second, the Ex-Im Bank should be subject to NEPA even in light of the court’s limited application of NEPA to extraterritorial projects. The environmental impacts of the projects the Ex-Im Bank funds are unlikely to be localized to the foreign jurisdiction in which the project is located. The potential for these effects to be felt within the United States indicate that NEPA should apply to the projects. Furthermore, continuing involvement in the projects—in the form of indebtedness of the project proponents—requires the Ex-Im Bank to apply NEPA to its applications. This retention of a certain amount of control over the project triggers NEPA applicability to the projects financed by the Ex-Im Bank.

A consideration of the statutory language encourages NEPA applicability to the Ex-Im Bank. However, even if this approach is rejected, the judicial treatment of extraterritorial NEPA application further indicates that the Ex-Im Bank is subject to the EIS requirements of NEPA. Therefore, the Ex-Im Bank must abide by these requirements when considering the projects before it, and before approving funding for them.

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267 See Ex-Im Bank, Procedures and Guidelines, supra note 165.


269 See Goldfarb, supra note 16, at 576.

RENT CONTROL AND RENT STABILIZATION AS FORMS OF REGULATORY AND PHYSICAL TAKINGS

Christina McDonough*

Abstract: The Fifth Amendment of the United States Constitution prohibits the government’s taking of private property without adequate compensation. Rent controls and rent stabilization unduly burden property owners by depriving them of market rate rental revenue. Furthermore, these methods of producing artificially low rents are often ineffective, failing to alleviate the financial hardships of the programs’ intended beneficiaries. Due to these dual aspects of rent control and rent stabilization programs—as well as by analogizing the programs to more classically recognized forms of regulatory takings, such as where the government deprives a property owner of all reasonable uses of his land—this Note reasons that rent control and rent stabilization measures also constitute unconstitutional takings.

Introduction

Lingle v. Chevron U.S.A. Inc. overruled more than twenty years of regulatory takings analysis by declaring that a regulation’s ability to substantially advance its stated purpose was improperly analyzed under a regulatory takings claim.¹ Prior to Lingle, courts had often declared regulatory takings unconstitutional when they failed to advance their stated goal.² Instead of a “substantially advances” analysis, the Court declared a better analysis to examine the burden placed on an individual by a regulation.³ The Court determined that when a burden is unduly high, the regulation is unconstitutional.⁴ In order to assess the burden imposed by the regulation, the character of the government action is to be scrutinized.⁵

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⁴ See id.
⁵ Id.
Rent controls have been particularly affected by the recent developments in regulatory takings jurisprudence. Under a “substantially advances” analysis, rent controls were on the cusp of extinction. Rent controls often fail to provide affordable housing for low income individuals. Instead, they provide a flood of under-priced apartments for middle- to high-income individuals.

Part I of this Note discusses the background of the Fifth Amendment’s Takings Clause. Part II examines the status of rent controls under a physical takings analysis, and also how rent controls have historically been analyzed under regulatory takings. Part III considers how numerous state court decisions on the constitutionality of rent controls as a regulatory taking would differ after *Lingle*. Finally, Part IV discusses many of the problems with the *Lingle* decision, particularly the ambiguity of the “character of the government action” prong. This Part argues that the “character of the government action” test can act as a proxy for the “substantially advances” inquiry. In effect, the *Lingle* standard could assume a similar shape to the older “substantially advances” analysis. Viewed through this angle, rent controls could still be declared unconstitutional in a post-*Lingle* world.

I. BACKGROUND OF THE FIFTH AMENDMENT’S TAKINGS CLAUSE

A. The Fifth Amendment and Regulatory Takings

The Fifth Amendment to the United States Constitution prohibits the taking of private property, either physically or by regulation, for public use without just compensation. In physical takings, the government is deemed to have physically occupied the land, “whether the government is itself the occupier or enacts a law that allows third-party occupation.” Therefore, land is considered taken when the landowner “has no power to exclude the occupier from possession and use of the space.” The “power to exclude” is a revered and fundamental right

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8 See id. at 3.
9 Id.
within “an owner’s bundle of property rights.” The Fifth Amendment explicitly protects this right to exclude. Therefore, any government action which violates this right is unconstitutional.

Unlike physical takings, regulatory takings do not require the government’s actual occupation of property. Instead, a regulation effects a taking when it goes “too far.” A regulation is often found to have gone too far when the regulation targets an individual property owner, requiring him to bear a burden that would be more appropriately shared by the public. In ascertaining if an individual is inappropriately burdened, three factors are examined: (1) the “regulation’s impact on the claimant;” (2) “the extent to which it interferes with distinct investment backed expectations;” and (3) “the character of the government action.” The first and second of these factors together determine whether the claimant is left with an economically viable use of his land.

This test for a regulatory taking is relatively new, established in 2005. More than twenty years ago the Supreme Court announced a different test. In Agins v. City of Tiburon, the Court determined that a regulatory taking occurred whenever the law fails “to substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.” This “substantially advances” test would only be satisfied when the regulation successfully achieved its stated goal. However, in Lingle v. Chevron U.S.A. Inc., the Supreme Court ruled that “the ‘substantially advances’ formula is not a valid method of identifying compensable regulatory takings.” Instead, the Court found that claims that a regulation failed to substantially advance its stated pur-

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13 Id.
14 See id.
15 See id.
21 See Lingle, 544 U.S. at 538–39.
23 Id.
24 Id.
25 Lingle, 544 U.S. at 529.
pose were due process claims, not regulatory takings claims.\textsuperscript{26} Takings analyses must be focused on the burden placed on the property owner through the regulation, and not on whether the regulation accomplished its broader societal goals.\textsuperscript{27}

B. Fifth Amendment Takings and Rent Control

Rent control is a recurring theme in physical and regulatory takings cases.\textsuperscript{28} It is often argued that rent controls are a form of physical or regulatory takings.\textsuperscript{29} Rent control is the means by which the government places a ceiling on the amount that a landlord can charge tenants.\textsuperscript{30} The Supreme Court has explicitly stated that rent control is designed to “protect persons with relatively fixed and limited incomes, consumers, [and] wage earners . . . from undue impairment of their standard of living . . . .”\textsuperscript{31} With only one exception, the Supreme Court has uniformly held that rent controls are constitutional, creating neither a physical nor a regulatory taking.\textsuperscript{32} Rent controls have been upheld because they do not force an individual to become a landlord.\textsuperscript{33} The rent controls merely place a ceiling on the amount of rent a landlord can charge once he has personally decided to accept a tenant.\textsuperscript{34} Courts have found that it is properly within a state’s police power to create and enforce such a regulation.\textsuperscript{35}

II. Supreme Court Precedent

In \textit{Chastleton Corp. v. Sinclair}, the Supreme Court found that rent controls constitute a regulatory taking.\textsuperscript{36} In \textit{Chastleton}, the Court overturned rent controls because the purpose for the control ceased to exist.\textsuperscript{37} The control at issue was enacted during World War I in order to

\begin{itemize}
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} See \textit{Chastleton Corp. v. Sinclair}, 264 U.S. 543, 546 (1924).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} \textit{Bowles v. Willingham}, 321 U.S. 503, 513 (1944).
\item \textsuperscript{31} Id.
\item \textsuperscript{32} \textit{Id.; Chastleton}, 264 U.S. at 547–48.
\item \textsuperscript{33} \textit{Chastleton}, 264 U.S. at 547–48.
\item \textsuperscript{34} See id.
\item \textsuperscript{35} \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 440 (1982) (“States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.”).
\item \textsuperscript{36} 264 U.S. at 549.
\item \textsuperscript{37} \textit{Id.} at 548.
\end{itemize}
make suitable housing more available during wartime.\textsuperscript{38} After the war ended, the controls were no longer justified.\textsuperscript{39} Interestingly, the Court found that when a law is passed in response to wartime conditions, and those conditions cease, not even an increased cost of living justifies the maintenance of rent control.\textsuperscript{40} Moreover, the Court acknowledged the landowner’s right to set rent as an “ordinarily existing private right[]” and that only extenuating circumstances such as a war could allow termination of that right.\textsuperscript{41} Interference with that right for more minor reasons could constitute an infringement of landowners’ Fifth Amendment rights.\textsuperscript{42}

Even though \textit{Chastleton} preceded \textit{Agins v. City of Tiburon}, the \textit{Chastleton} Court applied a “substantially advances” test.\textsuperscript{43} The price control in \textit{Chastleton} would be allowed so long as its effect was to accomplish the control’s purpose of keeping rental values down during wartime.\textsuperscript{44}

\textbf{A. Rent Controls and Physical Takings}

The more recent case of \textit{Yee v. City of Escondido} accurately reflects the Supreme Court’s sentiment that rent controls do not pose constitutional difficulties, at least with regard to physical takings.\textsuperscript{45} \textit{Yee} involved a combination of termination and rent control clauses concerning mobile homes.\textsuperscript{46} Under the California Mobile Home Residency Law, a mobile home park owner may only terminate a tenant’s lease due to either delinquency in rental payments or the park owner’s wish to put the land to another use.\textsuperscript{47} Furthermore, should a tenant sell his mobile home, the park owner may not evict the new mobile home owner during or after the sale.\textsuperscript{48} This state law was coupled with a local Escondido rent control ordinance mandating that the rent in mobile home parks not rise above 1986 rent levels.\textsuperscript{49} The owners of the mobile home parks contended that the combination of these two laws effectuated a physi-

\begin{footnotesize}
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\item \textsuperscript{38} \textit{Id.} at 545, 548.
\item \textsuperscript{39} \textit{Id.} at 548.
\item \textsuperscript{40} \textit{Id.} (noting that “if . . . all that remains of war conditions is the increased cost of living that is not in itself a justification of the [rent controls]”).
\item \textsuperscript{41} \textit{Id.} at 546.
\item \textsuperscript{42} \textit{See Chastleton}, 264 U.S. at 548.
\item \textsuperscript{43} \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980); \textit{Chastleton}, 264 U.S. at 549.
\item \textsuperscript{44} \textit{Chastleton}, 264 U.S. at 549.
\item \textsuperscript{45} \textit{See} 503 U.S. 519, 519 (1992).
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{CAL. CIV. CODE} § 796 (West 1982); \textit{Yee}, 503 U.S. at 519.
\item \textsuperscript{48} \textit{Yee}, 503 U.S. at 519.
\item \textsuperscript{49} \textit{Id.}
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\end{footnotesize}
They reasoned that because California law would not allow them to evict new tenants, the law essentially created perpetual tenants. Such behavior was analogous to an actual physical takeover of the land by the government; the mobile park owners were deprived of all control over their land. They could no longer choose their incoming tenants, evict current tenants, or set the lease prices.

The Supreme Court rejected this argument, finding that while such an abrogation of landlord rights may be relevant for a regulatory takings claim, it was not relevant for a physical takings claim—the only claim presented in the case. The Court found that no physical taking had occurred because it was the owners of the mobile park, not the government, who made the decision to rent the land to tenants. The original tenants were “invited by the [park owners]” and were not forced upon the park owners by the government. Furthermore, while the Court acknowledged the idea that the right to exclude was a fundamental right of property owners, the Escondido rent control did not inhibit that right for two reasons: (1) the park owners had voluntarily invited tenants onto their land; and (2) if they wished to exclude tenants, they could do so by merely changing the use of the land.

The Yee Court focused on the fact that the park owners had first decided to open their land to tenants, and that this decision was independent of any government regulation or intervention. Therefore, the Court found that after choosing to open its doors, the park owners did not have the right to select their tenants at will, free from government regulation.

B. Recent Supreme Court Interpretations of Rent Controls as Regulatory Takings

The dissenting opinion in Pennell v. City of San Jose is significant because it established instances in which rent control would be considered.

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50 Id.
51 Id. at 526–27.
52 Id. In essence, the combination of the laws vests in tenants “the right to occupy the land indefinitely at a submarket rent . . . .” Id. at 527.
53 Id.
54 See Yee, 503 U.S. at 527–28.
55 Id. at 529.
56 Id. at 528.
57 Id.
58 Id. at 531.
59 See id.
unconstitutional regulatory takings.60 In that case, a rent control ordinance was in place in order to prevent excessively high rents in the city of San Jose.61 The rent control ordinance contained a provision allowing the landlord to request a rent increase.62 Upon receiving a rent increase request, a San Jose city official would examine certain objective factors to determine if the rent increase was “reasonable,” or excessive and in violation of the rent control laws.63 In addition to these objective factors, the officer would also consider one subjective factor: the amount of “hardship to tenant” that would result from the rent increase.64 This factor would account for a tenant’s ability to pay the rent, without considering whether the rent increase was objectively reasonable.65

While the majority found no evidence to suggest that the “hardship to tenant” factor had ever affected a rental amount,66 thus finding the case premature, two justices disagreed.67 Not only did the two justices determine that the issue was ripe, they also found that the “hardship to tenant” provision constituted a regulatory taking because it “imposes a public burden on individual landlords.”68

The dissent first recognized that rent controls do not normally constitute a regulatory taking because landowners generally contribute to the social problem of excessively high rents.69 Therefore, rent controls do not unfairly single out such property owners, since these very property owners are the ones creating the problem.70 However, when the rent is dropped below a “reasonable rent” merely because the tenant cannot afford to pay reasonable rent, then the landlords are being singled out and forced to personally subsidize these individuals.71 While the landlords may have contributed to the problem of excessively high rents, they did not contribute to the plight of individuals who cannot

60 485 U.S. 1, 16–18 (1988) (Scalia, J., concurring in part and dissenting in part). The majority opinion determined it was premature to consider the appellants claims under the Takings Clause. Id. at 15 (majority opinion).
61 Id. at 4–5 (majority opinion).
62 Id. at 5.
63 Id.
64 Id. at 6.
65 Id.
67 Id. at 14–15 (Scalia, J., concurring in part and dissenting in part).
68 Id. at 15–16.
69 Id. at 20–21.
70 Id.
71 Id. at 22.
afford “reasonable rents.” Therefore, “the city is not ‘regulating’ rents in the relevant sense of preventing rents that are excessive; rather it is using the occasion of rent regulation to establish a welfare program privately funded by those landlords who happen to have ‘hardship’ tenants.” By forcing these landlords to shoulder the burden of subsidizing the poorer members of society, the San Jose rent ordinance required these landowners to “alone bear a public burden, which in all fairness and justice, should be borne by the public as a whole.” Even though this was a dissenting opinion, it does illustrate that forcing landowners to subsidize the poor or shoulder any problem which they did not create could be unconstitutional. Interestingly, one of the authors of this dissenting opinion was Justice O’Connor, who returned in 2005 to write the majority opinion in *Lingle v. Chevron U.S.A. Inc.* Her dissent in *Pennell* laid the foundation for her *Lingle* argument that a regulatory taking must focus on the burden imposed on the property owner.

III. STATE CASES INTERPRETING THE CONSTITUTIONALITY OF RENT CONTROLS

Aside from the Supreme Court cases, a large number of rent control jurisprudence springs from New York, due to the state’s extensive use of rent control. New York’s highest court, the Court of Appeals, has provided an illustrative example of a rent control rising to the level of a regulatory taking. In *Manocherian v. Lenox Hill Hospital*, the plaintiff challenged the constitutionality of a New York law that required apartment owners to offer renewal leases on rent-stabilized apartments to not-for-profit hospitals. The apartments were used to house some of the hospital’s employees. This law was found unconstitutional for failing the valid public purpose prong under the old regulatory takings test from *Agins v. City of Tiburon*. The court found that New York’s rent control measures were aimed at protecting renters “who could not compete in an overheated rental market, through no fault of their

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72 *Pennell*, 485 U.S. at 22.
73 Id.
75 *Pennell*, 485 U.S. at 22–23 (Scalia, J., concurring in part and dissenting in part).
76 544 U.S. 528 (2005); *Pennell*, 485 U.S. at 22–23.
77 *Lingle*, 544 U.S. at 529; *Pennell*, 485 U.S. at 22–23.
79 Id. at 480.
80 Id.
81 Id. at 484.
The rent control laws were broad, with their scope encompassing all people during New York’s acute housing shortage. However, the scope of the not-for-profit hospital provisions was not as broad, only encompassing employees of not-for-profit hospitals. Such a housing subsidy was more similar to a valuable employment perk than a means of effectuating the valid state purpose of providing housing during a statewide shortage. Therefore, this law actually required owners who had previously rented to hospitals to subsidize an employment perk. The court found that this law was unconstitutional not only due to a lack of a valid public purpose, but also because it singled out certain property owners to shoulder a burden that was not related to the general problem of excessively high rents in New York City.

Moreover, the court distinguished this case from *Yee v. City of Escondido* by first asserting that *Yee* was concerned with a physical, not a regulatory, taking. In addition, the holding in *Yee* related to a rent control that applied uniformly to all mobile homes, not merely to a disparate subset, as in *Manocherian*. Therefore, in *Yee*, all of the mobile park owners were asked to uniformly share the problem created when mobile tenants were frequently evicted and asked to move. Here, only a small subset of New York City landlords was asked to subsidize these hospitals.

A. **Defining the Boundaries of Rent Controls: Seawall Associates v. City of New York**

Another New York case that helped to delineate the constitutional boundaries of rent controls was *Seawall Associates v. City of New York*. This case stands for the proposition that a taking is more likely to have occurred where the state chooses to intervene before a landlord-tenant relationship has developed. In *Seawall*, the court determined that mandatory “rent-up” provisions violated the Fifth Amendment under

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82 Id. at 480.
83 Id.
84 *Manocherian*, 643 N.E.2d at 483.
85 Id. at 484.
86 Id.
87 Id.
88 Id. at 486.
89 Id.
90 *Manocherian*, 643 N.E.2d at 486.
91 Id.
93 Id. at 1064.
both a physical takings and a regulatory takings analysis.\textsuperscript{94} The “rent-up” provisions banned owners of single-room occupancy housing from demolishing such housing, and required upgrading all such housing to a habitable condition in which homeless individuals could reside.\textsuperscript{95} Such “rent-ups” constituted a physical taking because “owners [were] forced to accept the occupation of their properties by persons not already in residence.”\textsuperscript{96} The Court of Appeals focused on the fact that this was not an instance of the government using its police powers to regulate an \textit{existing} landlord-tenant relationship, but rather that the government created a landlord-tenant relationship and thereby effec-
tuated a physical taking.\textsuperscript{97} Actions where “the government authorize[d] the permanent occupation of the landlord’s property by a third party” were found to be unconstitutional.\textsuperscript{98}

Furthermore, the landowners had not “voluntarily put their properties to use for residential housing.”\textsuperscript{99} The government forced this use on the landlords, effectively denying them the ability to use their land as they found appropriate.\textsuperscript{100} The court found that the government was violating two of the most basic property rights: the right to possess and the right to exclude.\textsuperscript{101} Further, the court made clear that a physical taking does not require “actual displacement of the owner’s possession through a fixed encroachment.”\textsuperscript{102} Rather, allowing strangers to occupy the landowner’s space was sufficient.\textsuperscript{103}

The court found that even if a physical taking had not occurred, a regulatory taking most definitely did occur.\textsuperscript{104} “Rent-ups” not only denied property owners the economically viable use of their property, but the provisions also failed to substantially advance legitimate state interests, as specified under the old \textit{Agins} test.\textsuperscript{105} The “rent-ups” denied the owner an economically viable use of his property because they prohibited the “sole use—entirely permissible before the enactment of the law—for which investment properties are purchased: commercial de-

\textsuperscript{94} \textit{Id.} at 1061.
\textsuperscript{95} \textit{Id.} at 1059.
\textsuperscript{96} \textit{Id.} at 1063.
\textsuperscript{97} \textit{Id.} at 1064.
\textsuperscript{98} \textit{Loretto} v. \textit{Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 440 (1982).
\textsuperscript{99} \textit{Seawall}, 542 N.E.2d at 1064.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.} at 1063.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.} at 1065.
\textsuperscript{105} \textit{Seawall}, 542 N.E.2d at 1065.
velopment.” The law failed the public purpose prong of the test for lack of a nexus between the stated purpose and the means to accomplish that purpose. The purpose of the “rent-up” provisions was to provide and guarantee housing for the homeless. However, the single-room occupancy housing was not specifically earmarked for homeless people. Thus, while this law may have helped alleviate the general problem of expensive housing in New York, it did nothing to specifically ameliorate the housing shortage for homeless citizens.

B. The Effect of Greystone Hotel Co. v. City of New York

A subsequent case, Greystone Hotel Co. v. City of New York, reiterated the point that the government has the authority to impose a rent control once an individual has made the decision to rent rooms. This case also illustrates the emphasis courts place on whether a landlord voluntarily opened his doors to business or was forced to do so.

In Greystone, a hotel challenged a mandatory lease provision specifying that “any occupant of [a] hotel may request a lease, and the hotel must grant a lease, with a term of at least six months for a rent not exceeding the legal regulated rent.” The U.S. District Court for the Southern District of New York distinguished this case from Seawall by explaining that the mandatory lease provision requires that the hotel already have accepted the requestor-tenant as an occupant. Therefore, unlike in Seawall—where a landlord-tenant relationship was being forced by the state actor—here the relationship was already created by the hotel owner. The court further found that the government’s regulation of the amount that the hotel owner could charge was a valid regulation of the landlord-tenant relationship as specified by New York’s police powers. Additionally, once a hotel owner opens his doors, he does not necessarily have the right to select his tenants.

\[\text{\textsuperscript{106}} \text{Id. at 1067.}\]
\[\text{\textsuperscript{107}} \text{Id. at 1068.}\]
\[\text{\textsuperscript{108}} \text{Id.}\]
\[\text{\textsuperscript{109}} \text{Id.}\]
\[\text{\textsuperscript{110}} \text{Id.}\]
\[\text{\textsuperscript{111}} \text{See generally 13 F. Supp. 2d 524 (S.D.N.Y 1998).}\]
\[\text{\textsuperscript{112}} \text{Id.}\]
\[\text{\textsuperscript{113}} \text{Id. at 526.}\]
\[\text{\textsuperscript{114}} \text{Id.}\]
\[\text{\textsuperscript{115}} \text{Id.}\]
\[\text{\textsuperscript{116}} \text{Id.}\]
\[\text{\textsuperscript{117}} \text{Greystone Hotel, 13 F. Supp. 2d at 527.}\]
which tenants to house, after the landlord has made the decision to house tenants. Therefore, the court found that none of New York’s actions rose to the level of a physical taking.

The court further examined the regulatory takings issues, finding that no regulatory takings had occurred either. The court found a sufficient nexus between the state purpose of increasing affordable housing and the effect of the mandatory lease provisions. Moreover, the hotel owner was not deprived of an economically viable use. The court found that the hotel was still profitable, and that fact alone revealed that the property still had an economically viable use.

The fact that the Greystone Hotel was not as profitable as it would have been had all of the rooms remained hotel rooms was inconsequential, because “it is clear that the plaintiff has no constitutional right to what it could have received in an unregulated market.” Greystone’s holding appears to be in direct contravention to Seawall, where the court found that a regulatory taking had occurred because the landowner was preempted from using the land for the reason he purchased it, regardless of whether his use of it was still profitable. This juxtaposition of the cases illustrates that courts will be more willing to find rent controls constitutional when they take on their traditional form: imposing a regulation after a landlord-tenant relationship has been established. However, courts are more likely to find controls unconstitutional when they take on any new, expanded form, such as providing housing for hospital employees as in Manocherian or establishing a landlord-tenant relationship as in Seawall.

C. The Anticipated Demise of Rent Controls

As the above history of cases illustrates, courts have found rent controls and variations thereof unconstitutional under the Fifth

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118 Id. (finding that “because [hotel owners] voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude”).
119 See id.
120 Id. at 529.
121 Id. at 528.
122 Id. at 528–29.
123 Greystone Hotel, 13 F. Supp. 2d at 527.
124 Id. at 528.
126 Greystone Hotel, 13 F. Supp. 2d at 527.
Amendment for a variety of reasons. Yet, the Supreme Court has overruled much regulatory takings analysis through the rejection of the “substantially advances” test. The “substantially advances” test was hailed by many as the means by which rent controls would be considered unconstitutional, in recognition of the dire effects rent controls can have. Rent controls failed to “substantially advance” their stated goal of providing reasonably priced rental units for people with a low income. For example, many economists believe that a “disproportionate share” of the benefits of rent-controlled apartments go to the upper and middle class, not to the intended beneficiaries. Additionally, rent controls often do not meet the goal of increasing the number of affordable housing units. For example, one study found that cities without rental controls typically increased their rental stock by five percent to twenty percent over a ten-year period. Conversely, cities with rental control measures in place typically decreased their rental stock by eight percent to fourteen percent. In New York City, where housing is a consistent problem, rent controls have caused abandonment of many city properties along with a less plentiful and “more dilapidated” housing stock.

D. Rent Controls in Hawaii: Richardson v. City and County of Honolulu

Due to rent controls often failing to meet their intended purpose, many were anxiously awaiting the demise of rent controls under the “substantially advances” regime. In fact, the State of Hawaii had already abolished rent controls in Richardson v. City and County of Honolulu. In that case, a rent control ordinance put a ceiling on the amount of rent the owner of land could charge the owner of a condominium. As is often the case in Hawaii, the owner of a condominium may differ from the owner of the land on which the condominium

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128 See, e.g., Seawall, 542 N.E.2d at 1063.
130 Radford, supra note 7, at 1–4.
131 Id. at 3.
132 Id.
133 Id. at 4.
134 Id.
135 Id.
137 See generally Radford, supra note 7.
138 124 F.3d 1150, 1166 (9th Cir. 1997).
139 Id. at 1163.
sits. The court found the rent control unconstitutional, relying on the Agins “substantially advances” test. The control did nothing to alleviate the housing shortage in Hawaii. Instead, because the rent control failed to “regulate resales,” the owners of the condominiums could essentially charge above market rates when they sold their condominiums, because the buyers were assured that the rental rates for the land would not increase. Therefore, condominium sellers were “capturing the net present value of the reduced land rent in the form of a premium . . . .” Because the cause-and-effect relationship was essentially vitiated, the rent control was found unconstitutional.

E. Problems with Lingle v. Chevron U.S.A. Inc.

Lingle is ripe with its own bevy of problems. For example, one of the factors it cites as necessary to determining whether a taking has occurred is the “character of the government action . . . .” This factor was first established not in Lingle but in Penn Central Transportation Co. v. New York City, where the court specified that “a taking may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” Such a definition was supposed to elucidate the concept of “character of government action.” However, this definition does not seem particularly determinative. Furthermore, four years after the Penn Central decision, the Supreme Court declared that physical takings were per se unconstitutional, no longer requiring the application of the Penn Central balancing test and leading to further confusion over the meaning of “character of government action.”

140 See id. at 1163–64.
141 Id. at 1166.
142 See id. at 1165.
143 Id.
144 Richardson, 124 F.3d at 1166.
145 Id.
146 Id.
147 Id.
149 Id.
150 See id.
1. The “Character of Government Action” Factor Is Equivalent to the “Substantially Advances” Test

The “character of government action” test may be fundamentally concerned with ideas of justness and fairness, echoing Lingle’s warning that a regulatory taking analysis is fundamentally focused on “the severity of the burden that government imposes upon private property rights.”152 Alternatively, the “character of government action” test may be evaluating the “worthiness of the government’s regulatory purpose.”153 Reciprocity, however, may be the key to a character of government action analysis because one of the Court’s concerns is that one entity should not have to disproportionately shoulder a burden.154 The reasoning is that as long as an individual is either receiving a benefit or is being regulated for a problem that he helped to create, then a taking has not occurred.155 However, rent controls are often riddled with a lack of reciprocity; they “primarily . . . capture and transfer financial windfalls between private individuals.”156 Therefore, the character of the government action is void of all reciprocity, since the landlord gains nothing.157

2. “Character of Government Action” Is Different from the “Substantially Advances” Test

However, opponents of the idea that the “character of government action” should adopt the “substantially advances” test reason that making policy decisions, such as the effectiveness of rent control, is better left to the legislatures.158 Moreover, some applaud the Lingle decision as providing a much needed distinction between the Fifth Amendment’s Takings Clause and the Due Process Clause.159 The Due Process Clause protects “life, liberty and property” and further specifies that no person shall be deprived of property without due process of the law.160 The


153 Radford, supra note 7, at 222.

154 Id.

155 Id.

156 Id.

157 See id.

158 Case Comment, Regulatory Takings—“Substantially advances” Test, 119 HARV. L. REV. 297, 303 (2005) [hereinafter Regulatory Takings].

159 Id. at 301.

160 Id.
Due Process Clause has been widely held to prevent government behavior that is arbitrary or does not pass a means-related-to-ends test.\textsuperscript{161}

Therefore, before \textit{Lingle}, there was no clear line demarcating the difference between the rights protected under the Takings Clause and those protected under the Due Process Clause, since both protected property against irrational government behavior.\textsuperscript{162} This problem was further compounded by the fact that different standards of review were applied to takings claims and due process claims.\textsuperscript{163} Takings claims are typically reviewed under the non-deferential standard of heightened scrutiny, and the government’s eminent domain claims are subjected to rigorous judicial review.\textsuperscript{164} Conversely, substantive due process claims are reviewed under the very deferential “arbitrary and capricious” standard.\textsuperscript{165} This further confused the differences between the two clauses—since they both were claimed to protect the same right, but they essentially reviewed the government’s claims under different standards.\textsuperscript{166}

3. \textit{Lingle}'s Focus on Individual Rights

Essentially, the \textit{Lingle} ruling suggests that compensation is only necessary when \textit{individual} rights have been harmed; that is, the government’s regulation has risen to the level of eviscerating “the owner’s right to exclude others from entering and using her property.”\textsuperscript{167} In focusing on the individual, the court found that the “substantially advances” test provides no indication of how a “burden is \textit{distributed} among property owners.”\textsuperscript{168} Thus, only when the burden is higher on one individual than on the rest should compensation be provided.\textsuperscript{169}

IV. Ambiguity of the \textit{Lingle} Standard

In \textit{Lingle v. Chevron U.S.A. Inc.}, the Supreme Court mandated that in evaluating if a regulatory taking had occurred, the “character of government action” was to be evaluated, not whether the regulation sub-

\begin{small}
\begin{itemize}
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Regulatory Takings, supra note 158, at 301.
\item \textsuperscript{165} Radford, supra note 7, at 220.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).
\item \textsuperscript{168} Id. at 542.
\item \textsuperscript{169} Id.
\end{itemize}
\end{small}
stantially advanced the government’s stated purpose.\textsuperscript{170} However, the Court failed to provide a sufficiently clear definition for the “character of government action” test.\textsuperscript{171} In describing how to evaluate the character of such an action, the Court merely stated that it should consider “whether [the government action] amounts to a physical invasion or instead merely reflects property interest through ‘some program adjusting the benefits and burdens of economic life to promote the common good.’”\textsuperscript{172} However, since a regulatory taking by definition is not a “physical invasion,” the only relevant guidance for a regulatory taking is whether the action promotes the common good.\textsuperscript{173} After looking at why the Court rejected the \textit{Agins v. City of Tiburon} “substantially advances” test, this Note argues that no substantive difference exists between the “character of government action” test and the “substantially advances” test.

The Court’s rejection of the “substantially advances” test is rooted in its reasoning that a regulatory takings analysis must be focused on individuals, not society.\textsuperscript{174} \textit{Agins}’ “substantially advances” test was focused on society, not an individual, because the test looked to see if the government’s action substantially advanced its purpose in terms of societal goals.\textsuperscript{175}

\textbf{A. Political Process Failure}

\textit{Lingle}’s rejection of the \textit{Agins}’ standard is often cited to support the proposition that the Fifth Amendment should not be employed to correct political process failure.\textsuperscript{176} However, while one could argue this proposition, in practice the result of the \textit{Lingle} and \textit{Agins} tests are functionally equivalent.\textsuperscript{177}

Political process failure is when a government action fails to “protect a small group from exploitation by a larger number of beneficiaries.”\textsuperscript{178} Arguably, rent controls could exhibit political process failure since they have the potential to exploit a small group—the property

\textsuperscript{170} Id at 539.

\textsuperscript{171} See id.

\textsuperscript{172} See id.

\textsuperscript{173} \textit{Lingle}, 544 U.S. at 539–40.

\textsuperscript{174} See id. at 539–45.

\textsuperscript{175} \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980).

\textsuperscript{176} See \textit{Regulatory Takings, supra} note 158, at 305.

\textsuperscript{177} Id.

\textsuperscript{178} Id.
owners—for the good of the beneficiaries of rent controls.\textsuperscript{179} The “substantially advances” test does address the problem of political process failure, since the scope of its view is broader than just the individual.\textsuperscript{180} The test examines whether the control reaches a stated societal goal or if it exploits landlords by forcing them to shoulder a burden that society as a whole should carry.\textsuperscript{181}

However, \textit{Lingle}'s rejection of political process failure is difficult to reconcile with the Court’s preoccupation of fairness, as evidenced by their continuous reference to burdens, explicitly stating that a takings analysis should focus on the “severity of the burden” the government imposes on individual landowners.\textsuperscript{182} However, political process failure often exhibits unfairness on an individual level. Even if political process failure and individual burden are theoretically different, in practice they are extremely similar because of the unfair effects upon a small societal group will migrate down to the individual members. This migration has the effect of disproportionally burdening individuals, which is a valid basis for finding a taking under \textit{Lingle}.\textsuperscript{183}

\textbf{B. The Holding of Chastleton After Lingle}

In \textit{Chastleton Corp. v. Sinclair}, the Supreme Court overturned rent controls which were enacted to lower rental values during World War I.\textsuperscript{184} At the end of the war, the Court found that the rent controls were no longer justified, stating “if all that remains of war conditions is the increased costs of living that is not in itself a justification of the [rent controls.]”\textsuperscript{185} Even though \textit{Chastleton} preceded \textit{Agins}, the Court’s message was clear: rent controls are only to be allowed when furthering some societal goal.\textsuperscript{186} Moreover, the Court did not let the rent control stand under a state’s general police powers.\textsuperscript{187} The Court even went further to lay the foundation for \textit{Agins}, finding that when a law is justified by a set of facts, the law is no longer justified if the facts on which it rests change.\textsuperscript{188} Therefore, as early as 1924, the Supreme Court had

\begin{itemize}
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).
\item \textsuperscript{183} See id.
\item \textsuperscript{184} 264 U.S. 543, 548 (1924).
\item \textsuperscript{185} Id.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S 419, 440 (1982).
\item \textsuperscript{188} \textit{Chastleton}, 264 U.S. at 547.
\end{itemize}
set forth the precedent that rent controls cannot be established ad hoc; they must be justified by some social condition or emergency.\textsuperscript{189}

By rejecting \textit{Agins’ “substantially advances” test}, the \textit{Lingle} Court found that rent controls do not have to be justified by social conditions.\textsuperscript{190} However, the character of the government action must be taken in account.\textsuperscript{191} \textit{Lingle’s} standard is whether the regulation is a public program “adjusting the benefits and burdens of economic life to promote the common good.”\textsuperscript{192} The crucial word in this standard is “common,”\textsuperscript{193} which suggests that rent controls must be evaluated in light of what is good for all parties involved: both landlords and tenants.\textsuperscript{194} Furthermore, the word “common” invokes images of reciprocity and fairness, because “common good” means that the good of more than one party is being considered.\textsuperscript{195} The \textit{Lingle} Court was obviously quite concerned with fairness, since it explicitly mentions that property owners should not be forced to shoulder severe burdens.\textsuperscript{196}

Therefore, if the \textit{Lingle} standard were to be applied to \textit{Chastleton}, the outcome of \textit{Chastleton} would be the same.\textsuperscript{197} The rent controls in \textit{Chastleton} were implemented to promote the common good of ensuring available housing during wartime.\textsuperscript{198} However, when the war ended, the rent controls were essentially being used to promote nothing, since the common good of having housing during wartime had ceased to exist.\textsuperscript{199} When viewed in this light, the “character of government action” test conforms to the “substantially advances” test.\textsuperscript{200}

Moreover, even though the \textit{Lingle} Court declared that they were only concerned with a regulation’s effect on individual property rights, they still employed a “common good” analysis.\textsuperscript{201} If the Court was so concerned with individual rights, they could have simply redefined the regulatory test to only be concerned with the government’s impact on the property owner, and the extent to which it interferes with her in-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{189} See id.
\item \textsuperscript{190} See \textit{Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528, 539–44 (2005).
\item \textsuperscript{191} See id. at 539.
\item \textsuperscript{192} Id.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} See id.
\item \textsuperscript{195} See id.
\item \textsuperscript{196} \textit{Lingle}, 544 U.S. at 537, 542.
\item \textsuperscript{197} \textit{Chastleton Corp. v. Sinclair}, 264 U.S. 543, 549 (1924).
\item \textsuperscript{198} Id. at 547.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} See \textit{Lingle}, 544 U.S. at 539; \textit{Chastleton}, 264 U.S. at 549.
\item \textsuperscript{201} \textit{Lingle}, 544 U.S. at 539.
\end{itemize}
\end{footnotesize}
vestment-backed expectations. There was no need to insert the “common good” language, thus making the “character of government action” analysis very similar to a “substantially advances” one.

C. Penn Central’s Definition of “Character of Government Action”: Promotion of General Welfare

Penn Central defines the “character of government action” prong to be the ability of the action to generally promote societal welfare. In defining the “character of government action,” Penn Central recognizes the need to assess whether the government action accomplishes a broader good. Penn Central Transportation Co. v. New York City explicitly states that the character of the government action should be evaluated to ascertain if the “health, safety, morals or general welfare would be promoted” by regulations. The word “promote” is synonymous with “advance.” Therefore, Penn Central’s use of the word “promote” implies that the government action must advance a purpose, that purpose being health, safety, morals or general welfare. However, Penn Central sets a lower standard for measuring the successfulness of a regulation. The regulation need only promote, not substantially promote, general welfare. Although promote is a weaker standard than “substantially advance,” promotion of general welfare is easier to accomplish than promotion of a stated, narrow goal. Penn Central explicitly specifies that the statute must “substantially further important public policies.” Therefore, while Lingle quotes Penn Central’s use of the term “character of the government action,” the Lingle Court fails to recognize Penn Central’s requirement that the regulation promote some end, even if its standard is quite low. Lingle seems to imply that the character of the government action should be viewed in a vacuum, independen-

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202 Id.
203 Id.
205 Id.
206 Id.
208 See Penn Cent. Transp., 438 U.S. at 125.
209 See id.; Thesaurus.com—Promote, supra note 207.
210 Penn Cent. Transp., 438 U.S. at 125.
211 Id.
212 Id. at 127.
ent of the action’s ability to promote general welfare.\textsuperscript{214} Upon close examination of \textit{Penn Central}, this is false.\textsuperscript{215}

1. \textit{Seawall} Under \textit{Penn Central}'s Weaker Standard

The “means-end” test as specified in \textit{Penn Central} does not require as close a nexus as the \textit{Agins} “substantially advances” test, because \textit{Penn Central} merely requires that the regulation generally promote welfare, not the stated purpose of the regulation.\textsuperscript{216} Using this standard, the holding of \textit{Seawall Associates v. City of New York} would not be different, because while the \textit{Seawall} regulations failed to accomplish their stated purpose, they did promote the general public good.\textsuperscript{217}

In \textit{Seawall}, mandatory “rent-up” provisions forced property owners to make available vacant apartments for homeless housing.\textsuperscript{218} However, these units were put into a general pool for single room occupancy units and were not specifically earmarked for homeless people.\textsuperscript{219} Due to this lack of earmarking, the regulation failed to accomplish its stated goal, thus effectuating a taking.\textsuperscript{220}

Under \textit{Lingle}, \textit{Seawall}'s regulations must be evaluated without considering whether it advances the purpose of providing housing for the homeless.\textsuperscript{221} \textit{Lingle} would reason that such an inquiry of advancement is better left for a due process claim.\textsuperscript{222} However, under a \textit{Penn Central} analysis, the question would seem to be whether the regulation in \textit{Seawall} substantially furthers an important public policy.\textsuperscript{223} The meaning of an “important public policy” is unclear.\textsuperscript{224} If important public policy is defined as the stated goal of the regulation, then \textit{Seawall} would be no different after \textit{Lingle}.\textsuperscript{225} However, if “important public policy” is any important public policy, then by generally providing affordable hous-

\textsuperscript{214} See \textit{Lingle}, 544 U.S. at 539.
\textsuperscript{215} See \textit{Penn Cent. Transp.}, 438 U.S. at 125.
\textsuperscript{216} See \textit{id}.
\textsuperscript{217} 542 N.E.2d 1059, 1069 (N.Y. 1989).
\textsuperscript{218} \textit{Id.} at 1059.
\textsuperscript{219} \textit{Id.} at 1068.
\textsuperscript{220} \textit{Id}.
\textsuperscript{221} See \textit{Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528, 539–40 (2005); \textit{Seawall}, 542 N.E.2d at 1069.
\textsuperscript{222} See \textit{Lingle}, 544 U.S. at 540.
\textsuperscript{224} See \textit{id}.
\textsuperscript{225} \textit{Seawall}, 542 N.E.2d at 1068.
D. Manocherian After Lingle: Burden Is a Relative Term and “Character of Government Action” Examines Individual Burdens

*Manocherian v. Lenox Hill Hospital* highlights the fact that a regulation’s purpose and the burden it places on individual landowners are often inextricably intertwined. In *Manocherian*, a New York regulation required property owners to offer renewal leases on rent-stabilized apartments to employees of not-for-profit hospitals. The court distinguished this regulation from general rent control and stabilization regulations by finding that these hospital-specific regulations failed to advance a “closely and legitimately connected State interest.” These regulations did not protect apartment dwellers from an overheated rental market. Instead, they provided an employment perk to a very small segment of the rental population, employees of not-for-profit hospitals.

The court found that not only was the regulation’s purpose invalid, but also the landowners were forced to shoulder the burden of the hospitals. The court reasoned that employers should provide employment perks, not individual landlords. The court’s reasoning was clear: because the purpose of the regulation was not valid, the burden it placed on the landowners was excessive. If the regulation’s purpose had been to provide rent-stabilized units to the general population that could not otherwise afford such units, the court would have deemed such a purpose valid. In that case, the burden on the individual property owners would not have been excessive. The different outcomes illustrate that a property owner’s burden must not be viewed in absolute terms. The same burden may rise to the level of a taking.

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226 *See Penn Cent. Transp.*, 438 U.S. at 125; *Seawall*, 542 N.E.2d at 1068.
228 *Id.* at 480.
229 *Id.*
230 *Id.*
231 *Id.*
232 *Id.*
233 *Manocherian*, 643 N.E.2d at 484.
234 *See id.*
235 *See id.* at 480.
236 *See id.* at 484.
237 *See id.*
depending on the reason behind the imposition of the burden. The burden on the individual is colored by the purpose of the regulation.\textsuperscript{238}

In a post-\textit{Lingle} world, the \textit{Manocherian} ruling would not be affected because \textit{Manocherian} examines the nature of the stated purpose, not whether that purpose substantially advances a stated goal.\textsuperscript{239} \textit{Manocherian} examines the burden placed on the individual landowners, a perspective that \textit{Lingle} clearly condoned.\textsuperscript{240} Therefore, \textit{Manocherian} provides one possible interpretation for \textit{Lingle}'s “character of government action” factor, namely whether the government action constitutes a valid public purpose.\textsuperscript{241} Such an interpretation would be consistent with \textit{Lingle}'s mandate that a determination of the character of the government action should be based on whether it promotes a “common good.”\textsuperscript{242}

\section*{E. Lingle and Untraditional Rent Controls}

Courts have been more amenable to overturning non-traditional rent controls: those that differ from the model of imposing a rent ceiling once the landlord has already made the decision to rent out his units.\textsuperscript{243} This tendency is the result of a judicial recognition that using traditional rent controls to protect consumer welfare is a valid use of a state’s police power.\textsuperscript{244} In contrast, non-traditional rent regulations have typically been held unconstitutional because they often impose a greater burden on landowners.\textsuperscript{245} For example, the \textit{Seawall} regulation was found unconstitutional because it forced landowners to accept tenants, thus straying from the accepted model of policing rental amounts once a tenant was already accepted.\textsuperscript{246} This non-traditional form of rent control imposed a very high burden on the individual landowners.\textsuperscript{247} Additionally, in \textit{Richardson v. City and County of Honolulu}, a regulation that imposed a ceiling on the amount of rent that could be charged for the land on which condominiums sat was found to be unconstitutional

\begin{itemize}
\item \textsuperscript{238} See \textit{Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528, 542–44 (2005).
\item \textsuperscript{239} \textit{Manocherian}, 643 N.E.2d at 484.
\item \textsuperscript{240} \textit{Lingle}, 544 U.S. at 539; \textit{Manocherian}, 643 N.E.2d at 484.
\item \textsuperscript{241} \textit{Lingle}, 544 U.S. at 539; \textit{Manocherian}, 643 N.E.2d at 484.
\item \textsuperscript{242} \textit{Lingle}, 544 U.S. at 539.
\item \textsuperscript{243} \textit{Richardson v. City of Honolulu}, 124 F.3d 1150, 1166 (9th Cir. 1997); \textit{Seawall Assocs. v. City of New York}, 542 N.E.2d 1059, 1067 (N.Y. 1989).
\item \textsuperscript{244} \textit{Pennell v. City of San Jose}, 485 U.S. 1, 13–14 (1988).
\item \textsuperscript{245} See \textit{Seawall}, 542 N.E.2d at 1067.
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} See \textit{id.} at 1068.
\end{itemize}
because it failed to have the effect of actually making the rent of the condominiums more affordable.\textsuperscript{248}

A regulation imposes a greater burden on an individual when that regulation fails to accomplish its stated purpose.\textsuperscript{249} If the “character of government action” were interpreted simply to mean a valid public purpose, without regard to individuals, then presumably the cases of Seawall and Richardson would turn out differently.\textsuperscript{250} However, Lingle explicitly mandates that the burden on an individual property owner must be considered.\textsuperscript{251} In Seawall, the public purpose of providing more housing for the homeless is considered valid.\textsuperscript{252} Furthermore, in Richardson, the public purpose of providing more affordable housing is considered valid.\textsuperscript{253} Yet, the Seawall and Richardson regulations, while having a valid public purpose, were held unconstitutional because they failed to accomplish their stated purpose.\textsuperscript{254} Uncoincidentally, these cases involve variations of the classic form of rent control.\textsuperscript{255} Courts have implicitly reasoned that when a regulation fails to accomplish its stated purpose the burden imposed on the individual landowner is greater than if the regulation were successful.\textsuperscript{256} The burden in absolute terms is the same regardless of whether the regulation substantially advances its stated purpose.\textsuperscript{257} That is, independent of a regulation’s success, if a landowner has a rental ceiling of seven hundred dollars a month, then that burden is constant.\textsuperscript{258} However, if the burden placed on the landowner is viewed not in absolute terms but in qualitative ones, then a burden is greater if it is being created for no reason.\textsuperscript{259} Therefore, Lingle’s focus on an individual’s burden implicitly evaluates a regulation’s effectiveness, because ineffective regulations place a higher burden on individuals.\textsuperscript{260}

The crux of the Lingle argument is that the constitutionality of regulatory takings should focus on the burdens the regulations im-

\begin{footnotesize}
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\item \textsuperscript{248} Richardson, 124 F.3d at 1166.
\item \textsuperscript{249} See Richardson, 124 F.3d at 1166; Seawall, 542 N.E.2d at 1067.
\item \textsuperscript{250} See Richardson, 124 F.3d at 1166; Seawall, 542 N.E.2d at 1067.
\item \textsuperscript{252} Seawall, 542 N.E.2d at 1068.
\item \textsuperscript{253} Richardson, 124 F.3d at 1165.
\item \textsuperscript{254} See Richardson, 124 F.3d at 1166; Seawall, 542 N.E.2d at 1067.
\item \textsuperscript{255} See Richardson, 124 F.3d at 1166; Seawall, 542 N.E.2d at 1067.
\item \textsuperscript{256} See Richardson, 124 F.3d at 1166; Seawall, 542 N.E.2d at 1067.
\item \textsuperscript{257} See Richardson, 124 F.3d at 1166; Seawall, 542 N.E.2d at 1067.
\item \textsuperscript{258} See Richardson, 124 F.3d at 1166; Seawall, 542 N.E.2d at 1067.
\item \textsuperscript{259} Richardson, 124 F.3d at 1166; Seawall, 542 N.E.2d at 1067.
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\end{footnotesize}
posed on individual landowners.\textsuperscript{261} Regulations which inappropriately and overly burden landowners are unconstitutional.\textsuperscript{262} Therefore, regulations that fail to accomplish their stated purpose place a disproportionately large burden on landowners.\textsuperscript{263} As such, these regulations must be declared unconstitutional.\textsuperscript{264} Under this reasoning, the character of the government action in imposing rent controls may be invalid because rent controls often fail to accomplish their goal of providing affordable housing for lower income individuals.\textsuperscript{265} This failure results in a larger burden imposed on owners of rent-controlled buildings.\textsuperscript{266} Accordingly, when this burden becomes disproportionate, rent controls should be considered unconstitutional.\textsuperscript{267}

**Conclusion**

*Lingle v. Chevron U.S.A. Inc.* mandates that a regulatory taking which disproportionately burdens an individual must be considered unconstitutional. The character of the government’s action is central to the burden inquiry. Part of the character of the government action inquiry should focus on whether the regulations accomplish their goals. Further, regulations that fail to accomplish their stated purpose impose a larger burden on individuals than regulations that accomplish their goals. Burdens must therefore be viewed in relative, not absolute, terms. This burden should also be considered when examining the character of the government action. Regulations which fail to accomplish their stated purpose must be declared unconstitutional, because they impose large burdens on those they regulate.

Rent controls often fail to accomplish their stated purpose of providing affordable housing to lower income individuals. As such, the relative burden that the regulations impose on landowners whose buildings are subject to rent controls is disproportionately large. This burden necessitates the result that the character of the government action is unacceptable. Due to this burden, rent controls may be found unconstitutional.

\textsuperscript{261} Id.
\textsuperscript{262} Id.
\textsuperscript{263} See Regulatory Takings, supra note 158, at 305.
\textsuperscript{264} See Lingle, 544 U.S. at 538–39.
\textsuperscript{265} See id.
\textsuperscript{266} See Regulatory Takings, supra note 158, at 305.
\textsuperscript{267} Id.
MURKY PRECEDENT MEETS HAZY AIR: THE COMPACT CLAUSE AND THE REGIONAL GREENHOUSE GAS INITIATIVE

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Abstract: As it becomes clear that global warming is a reality, states are increasingly taking measures to regulate the emission of greenhouse gases such as carbon dioxide (CO$_2$). These efforts come largely in response to the federal government’s failure to regulate CO$_2$ emissions. Perhaps the most significant and novel example of states’ efforts to combat this problem is the Regional Greenhouse Gas Initiative (RGGI), a multi-state attempt to establish a regional cap-and-trade program targeting CO$_2$ emissions produced by fossil fuel-fired power plants. RGGI faces significant obstacles in its path to full implementation, including the possibility that it violates the Compact Clause of Article I of the United States Constitution. This Note argues that in its current iteration, RGGI likely does not conflict with the federal government’s Compact Clause power as delineated by the Supreme Court in U.S. Steel Corp. v. Multistate Tax Commission. If RGGI’s administrative body is ultimately vested with greater regulatory and enforcement powers, however, this Note concludes that the outcome under U.S. Steel could be much different.

Introduction

Global warming is a growing threat, one that humans have an interest in addressing promptly and effectively.¹ A major cause of the alarming rise in global temperatures is the emission of greenhouse gases, namely carbon dioxide (CO$_2$), which is emitted in frighteningly large quantities by fossil-fuel burning power plants.² In recent years, the second Bush Administration has avoided regulating greenhouse

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gas emissions. In 2001, the Administration rejected the Kyoto Protocol, which seeks to establish international standards for the reduction of greenhouse gases. The Environmental Protection Agency (EPA), meanwhile, has declined to list CO₂ as a criteria pollutant under the Clean Air Act (CAA). This determination contradicted the decisions of two prior EPA general counsels.

In response to this federal abandonment of the regulation of greenhouse gases, numerous states have taken the initiative in developing their own methods of regulating and reducing greenhouse gas emissions. One of the most promising of these plans is the Regional Greenhouse Gas Initiative (RGGI), a multi-state cooperative effort to establish a regional cap-and-trade program targeting CO₂ emissions produced by fossil fuel-fired power plants. RGGI is currently in its early stages, and while seven states have signed a Memorandum of Understanding (MOU) committing themselves to the program, the initiative will not become effective until 2009. Although this ambitious program is a promising sign that states are taking the threat of global warming seriously, RGGI is not without its potential problems. One of the possible roadblocks facing the initiative is the Compact Clause found in Article I of the U.S. Constitution.

An interstate compact is a legally binding agreement between states, created when states pass reciprocal statutes. As compacts have become increasingly common, their relationship to the Compact Clause

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5 McKinstry, supra note 3, at 73–76.
6 Id. at 75.
7 Hodas, supra note 2, at 55 ("[A]s states have become frustrated with the failure of the Bush Administration [to deal with the threat of global warming, the] drumbeat from the states has become louder and more insistent."); see McKinstry, supra note 3, at 26–54 (noting greenhouse gas initiatives in California, Massachusetts, Maine, New Hampshire, New Jersey, New York, Oregon, Wisconsin, and eastern Canada).
9 CLF, RGGI, supra note 8.
10 See U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ").
has become the topic of significant debate.\(^\text{12}\) Although the plain language of the Compact Clause suggests that all interstate agreements and compacts require congressional consent, the Supreme Court has not interpreted it that way.\(^\text{13}\) The Court has provided scarce precedent with respect to the congressional consent requirement, but it has adopted a standard under which only interstate compacts that increase state power at the expense of federal supremacy require congressional consent.\(^\text{14}\) The Court decided the controlling case, \textit{U.S. Steel Corp. v. Multistate Tax Commission}, in 1978, and has rarely returned to this subject in the years since that decision.\(^\text{15}\)

The issue RGGI faces under \textit{U.S. Steel} is whether it increases the power of its member states against that of the federal government.\(^\text{16}\) In dicta, the Court seemed to suggest a three-part inquiry that would result in a compact’s falling outside the scope of the Compact Clause’s congressional consent requirement.\(^\text{17}\) Under this inquiry, an agreement will not require congressional consent if it: (1) does not authorize member states to exercise powers unavailable to them in the compact’s absence; (2) does not delegate sovereign power to the administrative body established by the compact; and (3) reserves in each state the power to withdraw from the compact at any time.\(^\text{18}\) These three characteristics do not seem to constitute a determinative test, however, as the opinion does not suggest that agreements not marked by these traits necessarily require congressional consent.\(^\text{19}\)

In its current iteration, RGGI is likely to satisfy this inquiry and thus avoid the Compact Clause’s congressional consent requirement.\(^\text{20}\) However, if the member states decide to vest regulatory and enforcement powers in RGGI’s administrative body, the outcome would likely be different.\(^\text{21}\) It is unclear how the Court would approach such an agreement in light of the Compact Clause.\(^\text{22}\)


\(^{13}\) \textit{U.S. Steel}, 434 U.S. at 459, 471.

\(^{14}\) See \textit{id.} at 471.

\(^{15}\) See Greve, \textit{supra} note 12, at 287–88, 308.

\(^{16}\) See \textit{U.S. Steel}, 434 U.S. at 471.

\(^{17}\) See \textit{id.} at 473.

\(^{18}\) \textit{Id.}

\(^{19}\) See \textit{id.} at 479.

\(^{20}\) See \textit{infra} Part IV.A.

\(^{21}\) See \textit{infra} Part IV.B.

\(^{22}\) See \textit{id.}
Part I of this Note provides an overview of the Compact Clause and a brief history of interstate compacts. Part II details the Court’s holding in *U.S. Steel Corp*. Part III discusses the structure of RGGI and the reasons underlying its creation. Part IV explores RGGI’s likely status under *U.S. Steel*, both in its current form and in the likelihood of the initiative’s administrative agency being granted regulatory and enforcement powers. Part IV concludes that RGGI, in its current form, does not require congressional consent under *U.S. Steel*, but that an empowered administrative agency would likely change that conclusion.

I. THE COMPACT CLAUSE AND THE HISTORY OF INTERSTATE COMPACTS

A. The Compact Clause

The Compact Clause of Article I of the United States Constitution provides that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.” 23 This language suggests a virtual ban on agreements or compacts between states. 24 However, the true meaning and scope of the Compact Clause has been the subject of debate for quite some time. 25 The “broad and unqualified” language of the clause has resulted in much ambiguity concerning its purpose and reach. 26

B. An Overview of Interstate Compacts

A compact is “basically an agreement between two or more states, entered into for the purpose of dealing with a problem that transcends state lines.” 27 Functioning simultaneously as contracts and statutes, these legally binding agreements come into existence when two or more states enact highly similar, if not identical, statutes that “establish and define the compact and what it is to do.” 28 These statutes also serve

23 U.S. Const. art. I, § 10, cl. 3. The Compact Clause is “the only provision of the U.S. Constitution that provides a mechanism for formal cooperation among states.” HARDY, supra note 11, at 2.

24 U.S. Steel, 434 U.S. at 459 (stating that, if read literally, the Compact Clause would require states to obtain congressional approval before entering into any agreement among themselves); see Greve, supra note 12, at 297–98.

25 Note, Charting No Man’s Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts, 111 HARV. L. REV. 1991, 1992 n.11 (1998) (“Courts and commentators differ over how the scope of the clause was intended to be, or should be, limited.”).

26 See Greve, supra note 12, at 297.

27 HARDY, supra note 11, at 2.

as elements of a contract: the enactment of the compact statute by one state is the offer, and the passage of the same or an equivalent statute by the other states comprises the acceptance. Accordingly, courts interpret compacts as both contracts and statutes, and they therefore must meet the legal requirements of both. They are binding on the signatory states to the same extent as contracts between individuals or corporations are on the parties involved. As such, “[a] transgressing state can be sued in federal court, with specific performance an available remedy.” In addition to being governed by contract law, compacts are also subject to the same legal principles that govern statutory interpretation.

The creation and design of interstate compacts has developed with little or no guidance from the federal or individual state constitutions, none of which contain procedural requirements that govern such agreements. Over time, however, the process for enacting contracts has remained mostly consistent. Generally speaking, the process “begins with some form of negotiation between the states considering creation of and membership in the compact.” Eventually, the negotiating states determine the purpose of the compact and the manner in which that purpose will be met. At the completion of the negotiation stage, the signatory states draft a document that lays out the ways and means by which the expectations established during the negotiations will be carried out. Then, each member state must ratify “the specific

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29 Hardy, supra note 11, at 2; see Hasday, supra note 28, at 2 (“More than mere statutes, compacts are contracts that are binding on the member states and their citizens.”).


31 Hardy, supra note 11, at 3. They are binding even to the extent that “a state may not withdraw from a compact on the ground that its highest court has found the agreement to be contrary to the state constitution.” See Hasday, supra note 28, at 3.

32 Hasday, supra note 28, at 3.

33 Hardy, supra note 11, at 3. Other terms of a compact would provide for “enactment and amendment, and procedures for termination or withdrawal.” Note, supra note 25, at 1993.


35 Hardy, supra note 11, at 6.

36 Id.

37 Id. The negotiation process varies, depending on the compact. See Zimmermann & Wendell, supra note 34, at 16–19.

38 Hardy, supra note 11, at 6.
document containing the provisions of the agreed-to compact.” 39 This ratification process requires passage in the state legislature and the signature of the governor. 40

The final step in the creation of some compacts—one that is only required in certain circumstances—is the obtainment of congressional consent. 41 Historically, Congress has been willing to consent to compacts “almost automatically.” 42 The Supreme Court has held that Congress may consent in advance to compacts, and will “imply consent from congressional action, making formation of a compact even easier.” 43 However, Congress has the power to amend or terminate compacts to which it has granted consent, giving it power markedly asymmetrical to that of the states. 44 Even more noteworthy, perhaps, is the fact that the Court has also imputed to Congress the right to grant conditional consent. 45 Thus, when Congress does invoke its authority under the Compact Clause, it wields immense power over the proposed compact. 46

C. The Historical Development of Interstate Compacts

For many years, interstate compacts were rare; only twenty-one became effective between 1789 and 1900. 47 These early interstate compacts were enacted almost exclusively for the purpose of defining state boundaries. 48 This trend eventually changed, though, as “states began to recognize in the compact clause a tool for the resolution of other,

39 Id. “Although recent data is sketchy, writers frequently cite studies indicating that compacts take between four and nine years to enact and lament that the states and Congress have not been able to proceed more rapidly.” Hasday, supra note 28, at 19. Hasday argues, however, that the time-consuming nature of the compact negotiation process is not necessarily a flaw given compacts’ permanency. Id. at 20.

40 HARDY, supra note 11, at 6.

41 Note, supra note 25, at 1992–93. One commentator posits that the Compact Clause’s congressional consent requirement should be interpreted to apply to a far broader range of interstate agreements. See generally Greve, supra note 12.

42 Hasday, supra note 28, at 14.

43 ZIMMERMANN & WENDELL, supra note 34, at 21 (“Clearly, when a compact is brought before it for its consideration, Congress can indicate by a variety of means its legislative intent that consent is not necessary.”); Hasday, supra note 28, at 13 (noting, however, that although Congress can grant consent in advance, it rarely does so).

44 Hasday, supra note 28, at 12.


46 See Hasday, supra note 28, at 12.


48 Note, supra note 25, at 1992. In fact, “all but one of the thirty-six compacts enacted before 1921” were devoted to boundary disputes. Hasday, supra note 28, at 3–4.
more complex, problems.” Rapid industrialization and the states’ increasing interdependency led to a heightened desire for “improvisation, experimentation, and cooperation,” and compacts provided what seemed to be the answer.

A prime example of this developing recognition of the benefits of interstate compacts was the establishment in 1917 of the Port Authority of New Jersey and New York. The Port Authority was created to “administer efficiently a multitudinous array of issues that confronted the Port of New York,” and the federal government accordingly delegated to it the power to regulate one of the most important harbors in the United States. After eighty years of feuding between the two states, only an interstate compact proved successful at bringing the two sides into agreement. This ceding of the federal government’s power to regulate interstate commerce heralded a new approach to compacts. Inspired by the success of the Port Authority, other interstate compacts similarly unrelated to boundary disputes were enacted.

This trend toward more frequent use of the Compact Clause to deal with increasingly complex interstate issues was accelerated by an influential article authored by Felix Frankfurter and James M. Landis in 1925. The authors wrote, “The imaginative adaptation of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by the growing interdependence, social and economic, of groups of States forming distinct regions.” Using the issue of electric power as an example, the two authors strongly sug-

50 See Greve, supra note 12, at 291–92.
51 Briggett, supra note 49, at 757.
52 Id.
53 Leach & Sugg, supra note 47, at 7.
54 See Briggett, supra note 49, at 758 (“The formation of the Port Authority of New York and New Jersey piqued interest in the interstate compact as an effective device for regulation.”); see also Note, supra note 25, at 1992.
55 See Leach & Sugg, supra note 47, at 7. For example, two subsequent—and successful—interstate compacts were the Interstate Sanitation Commission (1935), and the Palisades Interstate Park Commission (1937). Id.
56 See Briggett, supra note 49, at 758 (referring to the significance of the “landmark” Frankfurter and Landis article). See generally Frankfurter & Landis, supra note 34.
57 Frankfurter & Landis, supra note 34, at 729; see Leach & Sugg, supra note 47, at 8–9 (discussing the new light cast on interstate compacts by Frankfurter and Landis, and the subsequent shift in the prevailing wisdom regarding the scope and utility of compacts).
gested that compacts “furnish[] the answer” to such regional problems.  

This new view of compacts—that they are useful tools applicable in a wide range of different situations—resulted in a sharp spike in the number of compacts in force.  

From 1920 to 1940, the states adopted approximately twenty compacts.  

This trend continued into the 1970s, with over 100 compacts created between 1940 and 1975.  

There are currently approximately 200 interstate compacts in effect, varying greatly with respect to their subject matter.  

Over time, compacts have evolved to serve three main functions.  

As previously mentioned, the first of these functions is to resolve boundary disputes, an endeavor to which nearly all early compacts were committed.  

The second function involves institutionalizing one-shot interstate projects, such as the allocation of water resources or the building of a bridge.  

Finally, and of primary concern for this Note, “[some] compacts create ongoing administrative agencies with jurisdiction over such varied and important domains as resource management, public transportation, and economic development.”  

The proposed RGGI discussed at length below is an example of this third category of interstate compacts.  

The history of interstate compacts shows an evolution from fairly simple tools used to resolve interstate boundary disputes to complex agreements dealing with a wide range of issues.  

Despite the promulgation of hundreds of these agreements over the last seventy-five years, compacts have continued to evolve in response to changing needs and priorities.  

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58 Frankfurter & Landis, supra note 34, at 708.  
59 See Hardy, supra note 11, at 5; Frankfurter & Landis, supra note 34, at 729; Hasday, supra note 28, at 4 n.18.  
60 Hardy, supra note 11, at 5.  
61 Id.  
62 Greve, supra note 12, at 288; see also Hasday, supra note 28, at 4 n.18 (noting that the pace of compact creation dramatically quickened in the twentieth century, but began to slow in the 1970s). Hardy provides a list of areas for which compacts have been created, including, among others: fisheries conservation, land and water resources, mining practices, corrections, educational facilities, mental health, taxation, vehicle safety, nuclear energy, pest control, parks and recreation, regional planning and development, mass transit, and flood control. Hardy, supra note 11, at 5.  
63 Hasday, supra note 28, at 3; see Leach & Sugg, supra note 47, at 5–6.  
64 Hasday, supra note 28, at 3–4.  
65 See id. at 4. Other examples of this type of compact are included in the Hasday article. Id. at 4 n.16.  
66 Leach & Sugg, supra note 47, at 6; Hasday, supra note 28, at 4.  
67 See infra Parts II.B, III.A–B; see also Hasday, supra note 28, at 4 n.17.  
68 See Hardy, supra note 11, at 4–5; Greve, supra note 12, at 288; Hasday, supra note 28, at 3–4.
years, a major question mark still looms over this form of interstate problem-solving. Due largely to the fact that there is very little case law concerning interstate compacts, the issue of when congressional consent is required is the subject of much debate.

II. The Compact Clause, Congressional Consent, and the Court: Scant Attention and Scarce Precedent

A. Precursors to U.S. Steel Corp. v. Multistate Tax Commission

Very few Supreme Court cases have dealt directly with the Compact Clause, resulting in much uncertainty regarding the requirement that some interstate compacts be granted congressional consent before going into effect. A brief line of cases, culminating in *U.S. Steel Corp. v. Multistate Tax Commission*, is virtually all that exists of Court precedent regarding the congressional consent requirement. Some authors assert that this scarce precedent makes the Court’s Commerce Clause jurisprudence ambiguous and perhaps unreliable.

In *Virginia v. Tennessee*, an 1893 case involving a border dispute between the two states, the Court for the first time distinguished between interstate compacts that require congressional consent and those that do not. In dicta but writing for a unanimous Court, Justice Field declared that the Compact Clause cannot be read to apply to all agreements and compacts. Rather, he wrote:

> Looking at the clause in which the terms “compact” or “agreement” appear, it is evident that the [clause’s] prohibi-

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69 See Greve, *supra* note 12, at 288 (noting the increase in the number of compacts formed, and highlighting the perceived complexities in their relationship to the congressional consent requirement).

70 See Greve, *supra* note 12, at 308 (pointing out that the controlling case on this subject has subsequently been neither questioned nor relied upon by the Court); Hasday, *supra* note 28, at 11 (stating that “[t]he jurisprudence on compacts is aged” and “this body of law is likely to be revisited”); Note, *supra* note 25, at 1992–93 (noting that original intent with respect to the Compact Clause is contested).


74 See 148 U.S. at 518–19; Briggett, *supra* note 49, at 757–58 (“In *Virginia v. Tennessee*, the Supreme Court distinguished between compacts that do not encroach upon federal power and those that might interfere with federal power.”).

75 *Virginia v. Tennessee*, 148 U.S. at 519.
tion 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.\footnote{Id.}

Thus, according to Justice Field, there are two categories of interstate compacts.\footnote{See id.} The first consists of compacts that increase the member states’ political power vis-à-vis the federal government, and therefore require congressional consent under the Compact Clause.\footnote{See id. at 518–19.} The second is comprised of those compacts that do not “encroach upon or interfere with the just supremacy of the United States,” and therefore do not require congressional approval.\footnote{See id.} Justice Field proposed that the proper inquiry is whether “the establishment of the [compact] may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.”\footnote{Id. at 520.}

The next major case to deal directly with the congressional consent requirement was \textit{New Hampshire v. Maine}, decided in 1976.\footnote{See 426 U.S. 363, 370 (1976) (finding that a consent decree regarding a border dispute between the two states was not an agreement or compact under the Compact Clause and thus did not require congressional consent).} While that case’s subject matter is irrelevant to this discussion, the Court—in declaring that the agreement in question did not require congressional consent—utilized the language found in \textit{Virginia v. Tennessee} regarding the two categories of interstate compacts.\footnote{\textit{New Hampshire v. Maine}, 426 U.S. at 369–70; see \textit{Virginia v. Tennessee}, 148 U.S. at 519.} Justice Brennan, who authored the opinion for a six-member majority, first quoted directly from the “just supremacy of the United States” language of \textit{Virginia v. Tennessee}.\footnote{\textit{New Hampshire v. Maine}, 426 U.S. at 369 (“The application of the Compact Clause is limited to agreements that are ‘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.’” (quoting \textit{Virginia v. Tennessee}, 148 U.S. at 519)).} Then, again quoting from \textit{Virginia v. Tennessee}, he wrote that the outcome of Compact Clause cases depended upon whether the interstate agreement “may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.”\footnote{Id. at 369–70.} This decision represented
the first time that the Court had “occasion expressly to apply [Justice Fields’s language] in a holding [rather than in dicta].” 85 Just two years later, the Court would deliver its most significant Compact Clause opinion to date. 86

B. An Analysis of U.S. Steel Corp. v. Multistate Tax Commission

The last, and most important, of this line of Compact Clause congressional consent cases was U.S. Steel Corp. v. Multistate Tax Commission. 87 Coming close on the heels of the Court’s opinion in New Hampshire v. Maine, U.S. Steel stands as the most recent and most significant Court ruling regarding the Compact Clause. 88 In the twenty-eight years since the opinion was handed down, the Court has rarely revisited this area of law. 89

At issue in U.S. Steel was the Multistate Tax Compact (Compact)—an agreement enacted by the legislatures of seven states—and the agency it created, known as the Multistate Tax Commission (Commission). 90 In response to the difficulty member states encountered with respect to taxing multistate businesses, the Compact was formed to facilitate proper determination of the state and local tax liability of multistate taxpayers, promote uniformity and compatibility in state tax systems, facilitate taxpayer convenience and compliance in the filing of tax returns, and avoid duplicative taxation. 91 The Commission, com-

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86 See generally id.
87 See id. at 454.
88 See Greve, supra note 12, at 308.
89 See id. The Court has subsequently dealt with the Compact Clause, but has not altered its holding in U.S. Steel regarding compacts that do not require congressional consent. Id. In fact, only two subsequent cases have dealt with U.S. Steel in any meaningful way. See, e.g., Cuyler v. Adams, 449 U.S. 433 (1981) (holding that an interstate agreement is federal law under the Compact Clause where Congress has authorized the states to enter into it and the subject matter of the agreement is an appropriate subject for congressional legislation); Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159 (1985) (holding that the agreement in question likely was not an interstate compact for purposes of the Compact Clause, and even if it were, it would not increase state power quoad the federal government). Northeast Bancorp is particularly pertinent to this Note because of the majority’s declaration that the agreement likely was not a compact to begin with, and even if it were, not all such agreements required congressional consent. See 472 U.S. at 175–76.
90 434 U.S. at 456. By the time the Court heard the case, twenty-one states had become members. Id. at 454.
91 Id. at 456.
posed of the tax administrators from all member states, was created for the purpose of achieving these four goals.\footnote{92}{Id.; see Greve, supra note 12, at 303.}

The Commission was endowed with “regulatory authority to determine rules for the allocation and apportionment of business income among member states and other multistate tax issues.”\footnote{93}{Greve, supra note 12, at 303.} This regulatory authority was subject to the member states participating in the proceedings in which the rules were determined, and to the states subsequently approving the regulations.\footnote{94}{Id. The regulations were to have “no force in any member State until adopted by that State in accordance with its own law.” U.S. Steel, 434 U.S. at 457.} Furthermore, the Commission had the executive authority to conduct its own tax audits either of its own volition or upon request by a member state.\footnote{95}{Greve, supra note 12, at 303.} The powerful Commission also was granted “authority to adjudicate disputes, through compulsory arbitration, over the allocation of business income in disputes between taxpayers and member-states’ tax authorities.”\footnote{96}{See id.}

In response to this multistate tax scheme, several business interests sued in state and federal court to challenge the Compact’s constitutionality under the Compact Clause.\footnote{97}{Id. at 304.} Before attacking the business interests’ substantive arguments, Justice Powell affirmed the Court’s prior holding in \textit{New Hampshire v. Maine} establishing the test suggested in \textit{Virginia v. Tennessee}.\footnote{98}{U.S. Steel, 434 U.S. at 471.} In dicta, he then offered what appears to be an informal three-part guide to determine whether a compact requires congressional consent:

\begin{quote}
On its face the Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States. There well may be some incremental increase in the bargaining power of the member States \textit{quoad} the cor-
\end{quote}

\section{References}

\footnote{92}{Id.; see Greve, supra note 12, at 303.}
\footnote{93}{Greve, supra note 12, at 303.}
\footnote{94}{Id. The regulations were to have “no force in any member State until adopted by that State in accordance with its own law.” U.S. Steel, 434 U.S. at 457.}
\footnote{95}{Greve, supra note 12, at 303.}
\footnote{96}{See id.}
\footnote{97}{Id. at 304.}
\footnote{98}{U.S. Steel, 434 U.S. at 471. Justice Powell wrote:}

In [\textit{New Hampshire v. Maine,}] we specifically applied the [\textit{Virginia v. Tennessee}] test. \ldots We reaffirmed Mr. Justice Field’s view that the application of the Compact Clause is limited to agreements that are 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. This rule states the proper balance between federal and state power with respect to compacts and agreements among States.

\textit{Id.} (citations and internal quotations omitted).
porations subject to their respective taxing jurisdictions. Group action in itself may be more influential than independent actions by the States. But the test is whether the Compact enhances state power *quoad* the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover . . . each State is free to withdraw at any time. Despite this apparent compatibility of the Compact with the interpretation of the Clause established by our cases, appellants argue that the Compact’s effect is to threaten federal supremacy.99

Under this apparent test, an interstate agreement does not increase state power at the expense of federal power and thus does not require congressional consent if it: (1) “does not purport to authorize the member States to exercise any powers they could not exercise in its absence”; (2) does not delegate sovereign power to the administrative body created by the compact, allowing each state to retain “complete freedom to adopt or reject the rules and regulations of the Commission”; and (3) reserves in each state the power to withdraw from the Compact at any time.100 All of these factors contribute to a compact’s “apparent compatibility . . . with the interpretation of the [Compact] Clause established by [precedent].”101

After laying out this putative test in dicta, the Court proceeded to dismantle the specific challenges to the Compact’s legality.102 The first theory the appellants offered sought to limit the *Virginia v. Tennessee* rule to agreements that did not involve an independent administrative body.103 However, the Court rejected this argument.104 Writing for the majority, Justice Powell stated, “It is true that most multilateral compacts have been submitted for congressional approval. But this historical practice . . . is not controlling.”105 Justice Powell declared that the pertinent inquiry is one of potential, not actual, impact on

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99 Id. at 472–73.
100 Id.; Greve, *supra* note 12, at 306–07.
101 *U.S. Steel*, 434 U.S. at 473.
102 See id.
103 Id. at 471. The argument was based on the fact that the Court had never upheld a multilateral agreement involving such a body without congressional consent. *Id.*
104 *Id.*
105 *Id.*
federal supremacy.\textsuperscript{106} He noted that the number of parties to an agreement is irrelevant.\textsuperscript{107} Rather, all that matters is whether there is impermissible enhancement of state power vis-à-vis federal power.\textsuperscript{108}

After rejecting the business interest appellants’ contention that the rule established in \textit{Virginia v. Tennessee} should be limited, the Court dispensed with the rest of their argument.\textsuperscript{109} The second theory behind the suit was that the Compact encroached upon the power of the federal government, and thus it required congressional approval.\textsuperscript{110} In making this argument, appellants offered three main contentions: (1) the Compact encroached upon federal supremacy with respect to interstate commerce; (2) the Compact encroached upon the power of the United States with respect to foreign relations; and (3) the Compact impaired the sovereign rights of nonmember states.\textsuperscript{111} All of the appellants’ arguments were dashed by the seven-Justice majority.\textsuperscript{112}

The first claim regarded the Compact’s purported interference with interstate commerce.\textsuperscript{113} The business interest appellants argued that the Compact affected interstate commerce in four ways.\textsuperscript{114} Two alleged effects on interstate commerce involved the risk of multiple taxation: first, a risk was allegedly created by the Commission’s auditing techniques, and second, by its apportionment of nonbusiness income.\textsuperscript{115} The third alleged effect on interstate commerce stemmed from the Compact’s requirement that multistate businesses under audit file data concerning affiliated corporations, and the fourth was that the Compact conferred upon the Commission enforcement powers that exceeded the power wielded by each state acting individually.\textsuperscript{116} The Court rejected each of these claims, making the particular point of rejecting the claim concerning enforcement power.\textsuperscript{117} Justice Powell wrote, “Appellees make no showing that increased effectiveness in the administration of state tax laws, promoted by [this reciprocal legislation], threatens federal supremacy.”\textsuperscript{118} In short, the Com-

\textsuperscript{106} \textit{Id.} at 472.
\textsuperscript{107} \textit{U.S. Steel}, 434 U.S. at 472.
\textsuperscript{108} \textit{Id.}; see Greve, \textit{supra} note 12, at 304.
\textsuperscript{109} \textit{U.S. Steel}, 434 U.S. at 472.
\textsuperscript{110} \textit{Id.} at 473.
\textsuperscript{111} \textit{Id.} at 473–78.
\textsuperscript{112} \textit{See id.} at 479.
\textsuperscript{113} \textit{Id.} at 473.
\textsuperscript{114} \textit{Id.} at 473–76.
\textsuperscript{115} \textit{U.S. Steel}, 434 U.S. at 473–75.
\textsuperscript{116} \textit{Id.} at 475–76.
\textsuperscript{117} \textit{See id.}
\textsuperscript{118} \textit{Id.} at 476.
pact did not encroach upon federal power simply by increasing states’ ability to strengthen their own laws by way of cooperating with one another.\footnote{See id. at 475–76.}

The Court viewed the second argument with an equally critical eye.\footnote{Id. at 476–77.} Appellants argued that the Commission “conducted multinational audits . . . [which conflicted] with federal policy concerning the taxation of foreign corporations.”\footnote{U.S. Steel, 434 U.S. at 476.} In sternly rejecting this argument, Justice Powell wrote, “To the extent that [the auditing method in question] contravenes any foreign policy of the United States, the facial validity of the Compact is not implicated.”\footnote{Id. at 477 (noting further that “[t]his contention was not presented to the court below and in any event lacks substance”).}

The third and final Compact Clause argument offered by the business interests charged that the Compact impaired the sovereign rights of nonmember states.\footnote{Id.; see Greve, supra note 12, at 305.} This contention was based on the belief that if the particular auditing methods employed by the Commission were to spread throughout the region, unfairness in taxation could only be avoided by way of a coordinating body.\footnote{U.S. Steel, 434 U.S. at 477.} That coordinating body, argued appellants, would naturally be the Commission.\footnote{Id.} Thus, they claimed, the Compact exerted “undue pressure to join upon nonmember States in violation of their ‘sovereign right’ to refuse.”\footnote{Id.}

The Court unequivocally—and rather aggressively—rebutted and rejected this line of argument.\footnote{See id.; Greve, supra note 12, at 306.} Justice Powell first pointed out that each member state was free to adopt the auditing procedures it thought best—the same situation that would exist had the Compact never been enacted.\footnote{Id. at 478.} Furthermore, even if the Compact did create economic pressure, it was not an affront to state sovereignty.\footnote{Id. at 477–78.} Justice Powell wrote, “Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result.”\footnote{Id. at 478.} As long as this pressure does not violate the Commerce Clause or the Privileges and Immunities Clause, he wrote,
“it is not clear how our federal structure is implicated.”131 In essence, a compact does not impair the sovereign rights of nonmember states, and thus encroach upon the just supremacy of the United States, merely by virtue of the fact that it places one state at a disadvantage to another.132

As it stands now, U.S. Steel is the controlling case regarding the congressional consent requirement of the Compact Clause.133 Despite this stature, some commentators suggest that its hold on the congressional consent requirement is tenuous.134 In light of the recent judicial shift in favor of state power, and the paucity of cases either supporting or questioning U.S. Steel since that opinion came down, “this body of law is likely to be revisited.”135 Until then, however, the congressional consent requirement is firmly under the sway of U.S. Steel.

III. The Regional Greenhouse Gas Initiative

A. Why the Need for a Regional Initiative?

The Regional Greenhouse Gas Initiative (RGGI) came about as a state response to inaction at the federal level regarding greenhouse gases, particularly CO₂.136 Greenhouse gases, of which CO₂ is the most prevalent, are so called because they trap the thermal radiation emanating from the surface of the earth, resulting in global temperature increases.137 CO₂ concentrations have increased by approximately thirty-one percent since the pre-industrial age, with electricity generators serving as one of the most significant contributors to the increase

131 Id.
132 See id. Justice Powell also explained:

Appellants do not argue that an individual State’s decision to apportion non-business income—or to define business income broadly, as the regulations of the Commission actually do—.touches upon constitutional strictures. This being so, we are not persuaded that the same decision becomes a threat to the sovereignty of other States if a member State makes this decision upon the Commission’s recommendation.

Id.
133 See Greve, supra note 12, at 308; Hasday, supra note 28, at 11.
134 See Greve, supra note 12, at 308; Hasday, supra note 28, at 11.
135 See Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 178–79 (2004) (noting the Supreme Court’s recent shift towards a more restrictive view of the federal government’s commerce power and a more expansive view of state autonomy); Hasday, supra note 28, at 11.
136 See McKinstry, supra note 3, at 26 (“[M]any states, localities and private industry groups have taken action to fill the void left by the federal government.”).
137 Scott, supra note 1, at 58.
in recent times.\textsuperscript{138} Despite this alarming trend, the federal government has taken little action.\textsuperscript{139}

Shortly after taking office in 2001, the Bush Administration made headlines the world over by declaring that it would not support U.S. ratification of the Kyoto Protocol (Protocol).\textsuperscript{140} The Protocol was negotiated and signed by the parties to the United Nations Framework Convention on Climate Change (Framework Convention), which included the United States.\textsuperscript{141} Negotiated in 1998, the Protocol “defined the specific greenhouse gas emissions reductions required by the Framework Convention.”\textsuperscript{142} Though the Clinton Administration made the United States a signatory to the Protocol in 1998, it has never been ratified by the Senate, and the Bush Administration has made it clear that it does not support the measure.\textsuperscript{143}

In 2003, several states “petitioned the EPA to list carbon dioxide . . . as a criteria pollutant under the Clean Air Act.”\textsuperscript{144} EPA declined, stating that it lacked authority to regulate greenhouse gases under the CAA.\textsuperscript{145} This determination was contrary to that made by two prior EPA general counsels.\textsuperscript{146} Indeed, the question of whether EPA has implied authority under the CAA to regulate greenhouse gases is “the subject of vigorous debate.”\textsuperscript{147} The CAA requires electricity generators to monitor and report their CO\textsubscript{2} emissions, but does not directly control such greenhouse gas emissions or explicitly authorize such regulation.\textsuperscript{148}

\begin{itemize}
\item\textsuperscript{138} See Hodas, \textit{supra} note 2, at 61 n.44; Nordhaus & Danish, \textit{supra} note 2 (stating that electricity generators account for about one-third of U.S. greenhouse gas emissions).
\item\textsuperscript{139} See generally McKinstry, \textit{supra} note 3.
\item\textsuperscript{140} See generally Global Warming, \textit{supra} note 4.
\item\textsuperscript{141} McKinstry, \textit{supra} note 3, at 17. The Framework Convention was the international community’s response to concerns about global climate change. \textit{Id.} It was signed and ratified by the United States in 1992, becoming effective in 1994. \textit{Id.} The Convention “established[d] the overall objective of stabilizing [greenhouse gases] at levels that will prevent” dangerous interference with the climate system and defined what such levels might be. \textit{Id.}
\item\textsuperscript{142} \textit{Id.}
\item\textsuperscript{143} See \textit{id}. In explaining his rejection of the Protocol, President Bush cited what he saw as its high cost to American industry. Andrew E. Kramer, \textit{In Russia, Pollution Is Good For Business}, N.Y. Times, Dec. 28, 2005, at C1.
\item\textsuperscript{144} Hodas, \textit{supra} note 2, at 56.
\item\textsuperscript{145} McKinstry, \textit{supra} note 3, at 75; Nordhaus & Danish, \textit{supra} note 2, at 108 (“[T]he Clean Air Act . . . does not directly address control of [greenhouse gas] emissions, much less explicitly authorize [greenhouse gas] regulation.”).
\item\textsuperscript{146} McKinstry, \textit{supra} note 3, at 75. Eleven states have challenged this action in federal court. \textit{Id.}
\item\textsuperscript{147} Nordhaus & Danish, \textit{supra} note 2, at 108.
\item\textsuperscript{148} \textit{Id.}
\end{itemize}
It seems, then, that “in terms of ambient air quality . . . the federal government has abandoned the field to the states.”\textsuperscript{149} There is currently no federal statute directly regulating greenhouse gas emissions.\textsuperscript{150} To fill this perceived gap in federal regulation, numerous states have taken the initiative against greenhouse gas emissions.\textsuperscript{151} Massachusetts, for example, has implemented mandatory CO\(_2\) emissions regulations.\textsuperscript{152} These state initiatives, coupled with regional ones like RGGI, are attempts to make up for the federal government’s failure to ratify the Kyoto protocol or enact other meaningful CO\(_2\) restrictions.\textsuperscript{153}

\textbf{B. The Initiative Itself}

RGGI is an interstate agreement created for the purpose of reducing emissions of CO\(_2\) from fossil fuel-fired power plants located within RGGI’s member states.\textsuperscript{154} Following on the heels of 2001’s Climate Change Action Plan—a groundbreaking (nonbinding) agreement between the governors of the New England states and the premiers of the provinces of Eastern Canada—RGGI is the first regional program of its kind.\textsuperscript{155} It is expected to result in notable decreases in CO\(_2\) emissions from power plants in the region.\textsuperscript{156}

Currently, seven states have signed the Memorandum of Understanding (MOU) committing them to implementing RGGI.\textsuperscript{157} Those signatory states are Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont.\textsuperscript{158} Two more states—Massachusetts and Rhode Island—were afforded the option of signing the MOU in the near future, while Maryland, the District of Columbia, Pennsyl-
vania, and the eastern Canadian provinces are considered “observers” in the process.\textsuperscript{159}

The MOU obliges states to “propose for legislative and/or regulatory approval a CO\textsubscript{2} Budget Trading Program . . . aimed at stabilizing and then reducing CO\textsubscript{2} emissions within the Signatory States.”\textsuperscript{160} Then, the states must “implement[] a regional CO\textsubscript{2} emissions budget and allowance trading program that will regulate CO\textsubscript{2} emissions from fossil fuel-fired electricity generating units” with a rated capacity not less than twenty-five megawatts.\textsuperscript{161} Stated plainly, RGGI’s purpose is to design a regional cap-and-trade program to reduce CO\textsubscript{2} emissions in the signatory states.\textsuperscript{162} The seven states presently committed to the initiative plan to freeze power plant emissions at current levels and then reduce them by ten percent within ten years of the implementation of the initiative.\textsuperscript{163} This ambitious plan is a groundbreaking attempt at using regional cooperation to take serious action against greenhouse gases.\textsuperscript{164}

RGGI’s most significant goal is to “set up a market-driven system to control emissions of carbon dioxide, the main greenhouse gas, from more than 600 electric generators in the [seven] states.”\textsuperscript{165} It is to take effect in 2009, and aims to achieve its goal of a ten-percent reduction in CO\textsubscript{2} emissions by 2019.\textsuperscript{166} When the plan goes into force, it will be “the first mandatory cap-and-trade program in the United States to reduce emissions of the gases that cause global warming.”\textsuperscript{167} Currently, the initiative is still in the development stage.\textsuperscript{168}

To provide guidance in achieving its goals, RGGI mandates the creation of a regional organization (RO) to “facilitate the ongoing administration of the Program.”\textsuperscript{169} The RO, with its headquarters in

\begin{footnotes}
\item[159] See id. at 8; CLF, RGGI, supra note 8.
\item[160] RGGI, MOU, supra note 157, at 2.
\item[161] Id.
\item[164] See CLF, Background, supra note 8.
\item[165] DePalma, supra note 163, at A1.
\item[166] CLF, RGGI, supra note 8.
\item[168] See DePalma, supra note 163. On March 23, 2006, a draft model rule was circulated among the member states. Regional Greenhouse Gas Initiative, Draft Model Rule, http://www.rggi.org/modelrule.htm (last visited Feb. 26, 2007). The comment period closed on May 22, 2006, after at least two stakeholder meetings had been held. Id.
\item[169] RGGI, MOU, supra note 157, at 7.
\end{footnotes}
New York City, will act as a forum for the signatory states, develop, implement and maintain an emissions and allowance tracking system, provide technical support to the signatory states for the development of new offset standards, and provide technical assistance to the states in reviewing and assessing applications for offset projects.\textsuperscript{170} The RO will “have no regulatory or enforcement authority with respect the [RGGI],” as the signatory states retain such authority.\textsuperscript{171} An executive board, consisting of two representatives from each signatory state, will be tasked with overseeing the RO’s operations.\textsuperscript{172} To properly complete its tasks, the RO “may employ staff and acquire and dispose of assets in order to perform its functions.”\textsuperscript{173}

Once RGGI is in place, its founders hope that it will serve as a model for the rest of the nation.\textsuperscript{174} Already, the governors of California, Oregon, and Washington have come together to explore the creation of a similar cap-and-trade program for the reduction of greenhouse gas emissions, including perhaps those produced by motor vehicles.\textsuperscript{175} It is expected that if RGGI is successful, other such initiatives will follow.\textsuperscript{176}

As details of RGGI are being finalized, one major consideration is its effect on energy prices and, accordingly, on consumers.\textsuperscript{177} While there is the possibility that the initiative will result in higher energy prices, officials hope those increases “can be offset by subsidies and support for the development of new technology.”\textsuperscript{178} The allowances and technology, it is anticipated, will be developed with funds raised from the sale of emissions allowances to the utility companies being regulated.\textsuperscript{179}

\textsuperscript{170} Id. at 7–8.
\textsuperscript{171} Id. at 7.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} See DePalma, supra note 163, at A1.
\textsuperscript{175} See West Coast Governors’ Global Warming Initiative, http://www.ef.org/west-coastclimate (last visited Feb. 26, 2007). One of the options the governors have agreed to explore is the adoption of “a market-based carbon allowance program.” Id.
\textsuperscript{176} See DePalma, supra note 163, at A1.
\textsuperscript{177} Id.
\textsuperscript{179} DePalma, supra note 163, at A1.
IV. THE INTERSECTION OF RGGI AND THE COMPACT CLAUSE

A. Does RGGI Require Congressional Approval Under U.S. Steel?

Under *U.S. Steel Corp. v. Multistate Tax Commission*, the Compact Clause’s congressional consent requirement applies only to interstate agreements that are “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.” According to the Supreme Court, this rule “states the proper balance between federal and state power with respect to compacts and agreements among States.” Thus, the proper inquiry in determining whether RGGI requires congressional approval revolves around an analysis of its impact on federal power. A look at the federal government’s hands-off approach to CO2 emissions and a close reading of *U.S. Steel* suggest that congressional consent is not required for RGGI.

To begin this analysis, it is important to emphasize the federal government’s obvious and intentional avoidance of the issue of regulating greenhouse gases, particularly CO2. In 2001, the Bush Administration declared that it would not support U.S. ratification of the Kyoto Protocol, a measure targeted at the control of greenhouse gas emission. The rejection came despite the fact that President Clinton had signed the Protocol in 1998. This decision stands as evidence that the federal government is not interested in exercising its power to regulate the greenhouse emissions targeted by RGGI.

The federal government’s decision not to list CO2 as a CAA criteria pollutant further suggests a lack of interest in exercising regulatory

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180 434 U.S. 452, 471 (1978) (internal quotations omitted).
181 Id.
182 See id.
183 Aside from a direct application of *U.S. Steel*, there are other potential constitutional roadblocks to RGGI, including the Commerce Clause and federal preemption. See Greve, supra note 12, at 288. This Note, however, will deal solely with an application of RGGI to the facts and holdings of *U.S. Steel*.
184 See McKinstry, supra note 3, at 26 (noting the “federal failure to implement the Framework Convention through ratification of the Kyoto Protocol and meaningful regulatory or fiscal policy”).
187 See McKinstry, supra note 3, at 26.
power over this field. In declining to list CO₂, EPA stated that it lacked the authority to do so under the CAA. While the CAA requires electricity generators to monitor and report their CO₂ emissions, EPA’s decision not to list CO₂ as a criteria pollutant suggests that the CAA does not currently control greenhouse gas emissions or authorize their regulation. This federal denial of authority to regulate CO₂ emissions suggests that the current federal government is neither interested in, nor, in its view, capable of exercising power in this area. In short, “the federal government has abandoned the field to the states.” This abandonment is significant to RGGI’s likely treatment under U.S. Steel.

Under U.S. Steel, the test for determining whether an interstate compact requires congressional approval revolves around whether or not it increases the states’ political power vis-à-vis the federal government. In its current form, RGGI devotes itself exclusively to dealing with the problem of CO₂ emissions generated by fossil fuel-fired electric plants. As such, it deals with an issue over which the federal government has expressly avoided exercising power. This suggests that the compact does not “tend[] to the increase of political power in the States” in such a way as to “encroach upon or interfere with the just supremacy of the United States.”

The likelihood that congressional consent would not be required for RGGI is further supported by the text of the Court’s opinion in U.S. Steel. In dicta, the Court noted that the compact at issue “[did] not purport to authorize the member States to exercise any powers they could not exercise in its absence.” Next, the Court explained that there was no delegation of sovereign power to the commission created by the compact, as each state retained “complete freedom to adopt or reject the rules and regulations” of the commission. Lastly, it pointed out that each state had the power to withdraw from the

188 See Hodas, supra note 2, at 56.
189 McKinstry, supra note 3, at 75.
190 See Hodas, supra note 2, at 74. See generally Nordhaus & Danish, supra note 2.
191 See Hodas, supra note 2, at 74.
192 Id.
194 Id. at 471.
195 RGGI, MOU, supra note 157, at 1.
196 See Hodas, supra note 2, at 74.
197 See U.S. Steel, 434 U.S. at 471.
198 See generally id.
199 Id. at 473.
200 Id.
compact at any time. The Court intimated that all of these factors led to the compact’s “apparent compatibility . . . with the interpretation of the [Compact] Clause established by [precedent].”

In light of the Court’s informal three-part inquiry into which interstate agreements by definition do not require congressional consent, it seems even more likely that RGGI will not fall under the auspices of the Compact Clause’s congressional consent requirement.

First, RGGI does not authorize the member states to exercise any powers they could not exercise in its absence. Due to the lack of clarity regarding CAA’s authority over electricity plant-generated CO₂ emissions, the states may be free to regulate these emissions as they wish. U.S. Steel suggests that the adoption of uniform standards “in accord with the wishes of the member States” does not amount to a violation of federal supremacy. Rather, adopting uniform regulations would lead to “increased effectiveness in the administration of” state CO₂ emission regulations that would likely exist in the member states regardless of the existence of RGGI. Such “[r]eciprocal legislation” would merely serve “as a method to accomplish fruitful and unprohibited ends.”

One such example is Massachusetts’s independent enactment of its own binding CO₂ emissions regulations. These regulations mandate that “any person who owns, leases, operates or controls an affected facility shall demonstrate that emissions of carbon dioxide from the

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201 Id.
202 Id. As the Court’s opinion is vague, and subsequent case law and scholarship are thin, it is impossible to determine precisely how significant this three-part inquiry is. It does not appear to be outcome determinative, because it does not suggest that any compact that fails to satisfy the three prongs necessarily requires congressional consent. See id. It does, however, imply that if a compact satisfies the three prong test, it is presumed to fall outside the scope of the congressional consent requirement. See id. At least one constitutional law textbook makes only a passing reference to U.S. Steel and the Compact Clause, indicating the lack of attention received by this area of the Court’s jurisprudence. See Sullivan & Gunther, supra note 135, at 341–42 (devoting just one paragraph to a discussion of U.S. Steel and the Commerce Clause).
204 See U.S. Steel, 434 U.S. at 473.
205 See Hodas, supra note 2, at 74. Significantly, the MOU also states that when the federal government proposes a program comparable to that established by RGGI, the signatory states will transition into that federal program. RGGI, MOU, supra note 157, at 10.
206 See U.S. Steel, 434 U.S. at 474.
207 See id. at 476.
208 See id. (internal quotations omitted). In U.S. Steel, the Court used this language when explaining that the signatory states to the Multistate Tax Commission had done no more than cooperatively exercise power that they could have exercised individually. Id. at 473.
affected facility in the previous calendar year . . . did not exceed historical actual emissions.” If Massachusetts becomes a signatory to RGGI, it will result in “increased effectiveness in the administration of” such preexisting regulations rather than an increase in its power vis-à-vis the federal government. In short, RGGI would play the role of helping Massachusetts achieve “fruitful and unprohibited ends” that it would seek to achieve even in the absence of the agreement.

Second, RGGI does not delegate sovereign power to the regional organization (RO). The MOU signed by the seven member states explicitly says that the organization “shall have no regulatory or enforcement authority with respect to the [RGGI], and such authority is reserved to each Signatory State for the implementation of its rule.” Thus, while the RO is an important body in terms of its role in coordinating the efforts of the signatory states, it in no way usurps their sovereign power. Each state clearly “retains complete freedom to adopt or reject the rules and regulations” of the RO and thus RGGI as a whole. This preservation of the signatory states’ individual sovereignty suggests that the initiative does not increase their power in relation to the federal government under U.S. Steel. In short, the states are not collectively exercising any more power than they would be able to exercise individually.

Finally, each signatory state has the power to withdraw from RGGI. According to the MOU, “[a] Signatory State may . . . withdraw its agreement . . . and become a Non-Signatory State.” In U.S. Steel, the Court suggested that such ability to withdraw was a factor in determining whether an interstate agreement requires congressional consent. It is likely that this element of U.S. Steel’s apparent test for which interstate compacts do not require congressional consent is satisfied.

210 Id.
211 See U.S. Steel, 434 U.S. at 476.
212 See id.
213 RGGI, MOU, supra note 157, at 8.
214 Id.
215 See id.
216 See U.S. Steel, 434 U.S. at 473; RGGI, MOU, supra note 157, at 8.
217 See 434 U.S. at 473.
218 See id.
219 RGGI, MOU, supra note 157, at 9.
220 Id.
221 434 U.S. at 473 (emphasizing that “each State is free to withdraw at any time”).
222 See id.
Thus, it is likely that under *U.S. Steel*, RGGI would not require congressional approval.\textsuperscript{223} The agreement merely facilitates the effective administration of state regulations that would be legitimate in the absence of this agreement.\textsuperscript{224} Additionally, the states are not surrendering sovereign power to RGGI, because they reserve the right to adopt or reject the rules or regulations of the initiative.\textsuperscript{225} Furthermore, each signatory state has the right to withdraw from the compact.\textsuperscript{226} As such, it does not appear to “tend[] to the increase of political power in the States” in a way that interferes with the just supremacy of the United States.\textsuperscript{227} Cumulatively, these factors suggest that RGGI will not require congressional approval if analyzed under the Court’s holding in *U.S. Steel*.\textsuperscript{228}

B. What If the RO Is Given Regulatory and Enforcement Authority?

As the application of *U.S. Steel* to RGGI’s current iteration suggests, the agreement is not one that requires congressional consent.\textsuperscript{229} Significant issues could arise, however, if steps are taken to make the agreement more binding on the signatory states.\textsuperscript{230} Specifically, if the RO were given actual authority over the member states, the agreement would be more likely to require congressional approval.\textsuperscript{231}

Currently, the RO is destined to be a purely advisory body.\textsuperscript{232} It is tasked with four major duties, the first of which is to “[a]ct as the forum for collective deliberation and action among the Signatory States in implementing the Program.”\textsuperscript{233} Second, it must “[a]ct on behalf of each of the Signatory States in developing, implementing and maintaining the system to receive and store reported emissions data.”\textsuperscript{234}

\textsuperscript{223} See id.
\textsuperscript{224} See id. at 476.
\textsuperscript{225} See id. at 473.
\textsuperscript{226} See id.; RGGI, MOU, supra note 157, at 9.
\textsuperscript{227} See *U.S. Steel*, 434 U.S. at 471.
\textsuperscript{228} See id. at 473.
\textsuperscript{229} See supra Part III.A.
\textsuperscript{230} See Zimmermann & Wendell, supra note 34, at 23 (“[C]onsideration should be given to seeking specific federal consent in the instances of any compact which brings state action into a field of federal-state sensitivity.”); see also *U.S. Steel*, 434 U.S. at 473.
\textsuperscript{231} See Zimmermann & Wendell, supra note 34, at 23 (listing commerce-related, compact-created interstate agencies as likely requiring congressional consent); Hasday, supra note 28, at 9 (noting that compacts establishing administrative agencies “with jurisdiction over important aspects of economic or social life” have become increasingly common).
\textsuperscript{232} RGGI, MOU, supra note 157, at 8.
\textsuperscript{233} Id. at 7.
\textsuperscript{234} Id.
Third, it must “[p]rovide technical support to the States for the development of new offset standards to be added to state rules.” Finally, it is mandated to “[p]rovide technical assistance to the States in reviewing and assessing applications for offsets projects.” The advisory nature of these tasks, coupled with the MOU’s explicit declaration that the RO “shall have no regulatory or enforcement authority,” render the RO toothless. Should the signatory states find a need for a more aggressive and binding regulatory scheme, there exists the potential that the RO will be granted at least some form of regulatory and enforcement authority. The MOU provides that the cap-and-trade program established by RGGI must be implemented in the signatory states under the force of statutory or regulatory law, but there is no guarantee that the states will act fairly and in good faith. Without an oversight agency vested with binding regulatory authority, it is easy to envision a change in a state’s leadership or economic circumstances leading to a drastically decreased effort in implementing and enforcing RGGI. Thus, for reasons of stability and utility, it is possible that the signatory states will take this step at some point in the future to make RGGI more effective.

If RGGI’s member states decide to create a more binding agreement in which the RO would have regulatory and enforcement authority over the member states, RGGI’s potential status under U.S. Steel may be greatly affected. Such a change would entail a power shift from the states to a multistate agency, an element that was not present with

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235 Id.
236 Id.
237 See id. at 7–8.
238 See Hasday, supra note 28, at 41 (“[C]reating compact agencies with so little authority that they are unescapably [sic] ineffectual is worse than pointless; it is a reckless use of a potentially dangerous institution.”).
239 See Nordhaus & Danish, supra note 2, at 103–04 (noting the ineffectiveness of emissions-reduction programs that lack rigorous reporting standards and verification requirements); RGGI, MOU, supra note 157, at 6–7.
240 See Hasday, supra note 28, at 10 (“[T]he finality—and enforceability—of [compacts creating interstate agencies] might also seem particularly appealing to states hoping to avoid a ‘race to the bottom,’ in which interstate cooperation would improve the situation of each state only if no state reneges.”). To understand such a possibility better, one need only look to the disparity between the Bush Administration’s approach to the Kyoto Protocol and that of its predecessor. See supra notes 138–41 and accompanying text.
241 See Nordhaus & Danish, supra note 2, at 103–04. Leach and Sugg wrote an excellent, albeit somewhat outdated, book explaining the costs and benefits of establishing interstate agencies by way of interstate compacts. See generally Leach & Sugg, supra note 47.
242 See U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 476 (1978); Zimmermann & Wendell, supra note 34, at 23.
respect to the compact at issue in *U.S. Steel*. This move would thus distinguish RGGI from the compact featured in *U.S. Steel*, increasing the likelihood of the Court requiring RGGI to seek congressional consent.

First, the granting of regulatory and enforcement powers to the RO would seem to “authorize the member States to exercise . . . powers they could not exercise in its absence.” For example, under such a scheme the signatory states could act together in using the RO as a mechanism for applying pressure to another member state. If a signatory state were to provide lax enforcement and administration of RGGI, for instance, the other member states could conceivably compel the RO to take action against the transgressor. This process would clearly be an example of states exercising powers they could not exercise in the absence of a compact, allowing them to use legal leverage that would not otherwise be available to them. It is difficult to envision one state, acting on its own, being able to wield such power over another. As this example makes clear, the RO’s potential possession of such enforcement power would involve far more than a group of states merely adopting reciprocal legislation to “accomplish fruitful and unprohibited ends.” Essentially, any time the signatory states’ representatives to the RO’s executive board initiated regulatory or enforcement action, they would be exercising power that would be unavailable to them in the absence of the compact.

Second, and perhaps more important, vesting regulatory and enforcement authority in the RO would, by definition, involve a “delegation of sovereign power” to that entity. By granting the RO the power to enforce the cap-and-trade program by way of its own binding regula-

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243 See 434 U.S. at 473.
244 See id. Clearly, the structure and subject matter of RGGI are distinguishable from those of the tax-related compact featured in *U.S. Steel* in many ways, but they are comparable in that they satisfy the Court’s three-part inquiry. See id. If the RO were given binding authority, however, that comparison would be considerably more difficult to make.
245 See id.
246 See RGGI, MOU, supra note 157, at 7. The potential for such arm-twisting is foreseen by the MOU’s provision stating that the RO will be run by an executive board comprised of two representatives from each state. See id. This structure suggests that states with majority views could pressure those in the minority. See id.
247 See id.
248 See *U.S. Steel*, 434 U.S. at 473.
249 See HARDY, supra note 11, at 21 (noting the loss of state sovereignty inherent in a state’s involvement with interstate compacts).
250 See *U.S. Steel*, 434 U.S. at 476.
251 See id.
252 See id. at 473.
tions, the states would be acceding to a significant diminution of their sovereignty with respect to the regulation of CO₂ emissions.²⁵³ This diminution of sovereignty would include “reduction in the state’s ability to act independently [in this area], a diversion of state funds and energies to interstate purposes, . . . and a reduction in administrative autonomy and authority.”²⁵⁴ Thus, the states no longer would “retain[] complete freedom to adopt or reject the rules and regulations,” as did the signatories to the compact at issue in U.S. Steel.²⁵⁵ Rather, they would be required to accept numerous binding rules and regulations to which they would not have acceded in the absence of the compact.²⁵⁶ This requirement would clearly constitute a loss of sovereignty.²⁵⁷

The third part of the ad hoc test laid out in dicta in U.S. Steel, involving member states’ ability to withdraw from the compact at any time, is more difficult to assess.²⁵⁸ Granting regulatory and enforcement powers to the RO would not necessarily diminish the states’ ability to withdraw from the agreement.²⁵⁹ The MOU makes clear that any state can withdraw from the agreement, but it is conceivable—if not likely—that if RGGI were to take the next step and grant significant power to the RO, it would also take steps to make the signatory states’ involvement in RGGI more binding by way of a conventional contractual compact.²⁶⁰ In the absence of such steps to restrict member states’ ability to withdraw from the agreement, however, the argument could still be made that the empowered RO would diminish their freedom to withdraw.²⁶¹ If a signatory state had been involved with RGGI for such a period of time that regulations promulgated by the RO had become entrenched in that state’s common practice, it would be considerably more difficult for the signatory state to disentangle itself from RGGI.²⁶²

If, as this analysis suggests, vesting regulatory and enforcement powers in the RO would lead to a considerable change in RGGI’s status under U.S. Steel, the question of its impact on federal supremacy remains unclear.²⁶³ The Court’s holding in that case was vague in

²⁵³ See Hardy, supra note 11, at 21.
²⁵⁴ Id. at 21.
²⁵⁵ See 434 U.S. at 473.
²⁵⁶ See Hardy, supra note 11, at 21.
²⁵⁷ See U.S. Steel, 434 U.S. at 473; Hardy, supra note 11, at 21.
²⁵⁸ See 434 U.S. at 473.
²⁵⁹ See id.
²⁶⁰ See RGGI, MOU, supra note 157, at 7–8, 9.
²⁶¹ See U.S. Steel, 434 U.S. at 473.
²⁶² See id.
²⁶³ See id. at 473.
terms of addressing exactly what sort of agreements would increase state power versus federal power, thus requiring congressional consent; all it provides is, in dicta, the ad hoc test mentioned above. 264 It is not clear whether a compact’s running afoul of those three factors necessarily means that, as a rule, it would increase state power vis-à-vis the federal government. 265 The Court made no mention of whether a compact that is not characterized by those three factors would necessarily require congressional consent. 266 If the RO were granted regulatory and enforcement power, RGGI would no longer be comparable to the compact in U.S. Steel, and it could be in a precarious position if challenged in court. 267

Conclusion

The Supreme Court has interpreted the Compact Clause in Article I of the U.S. Constitution to only require congressional consent for compacts that increase state power at the expense of federal supremacy. Compacts have evolved over time from typically dealing with interstate boundary disputes to involving much more expansive interstate agreements, sometimes including the creation of an administrative body with regulatory and enforcement authority. The relatively recent increase in the number of compacts has not, however, resulted in a corresponding increase in judicial rulings on this subject. Currently, the controlling case is U.S. Steel Corp. v. Multistate Tax Commission, which was decided in 1978. This area of the law has rarely been addressed by the Supreme Court since U.S. Steel.

RGGI is an interstate agreement among seven—and potentially more—northeastern states to establish a regional cap-and-trade program regulating the emission of CO2 from fossil fuel-fired power plants. Formed in response to the lack of federal CO2 emissions regulations under the Bush Administration, RGGI has the potential to implicate the Court’s holding in U.S. Steel and the Compact Clause’s congressional consent requirement.

In its current iteration, it is likely that RGGI will not require congressional consent under a direct application of U.S. Steel. It does not appear likely that, when the initiative is fully implemented in 2009, it

264 See id. This vagueness is the root of at least one commentator’s belief that U.S. Steel’s precedential value is questionable. See Hasday, supra note 28, at 11.

265 See U.S. Steel, 434 U.S. at 473.

266 See id.; Hasday, supra note 28, at 39 (“[S]tates are frequently unable to determine whether an agreement requires congressional consent . . . .”).

267 See U.S. Steel, 434 U.S. at 473.
will tend to increase state power versus that of the federal government. However, if RGGI vests regulatory and enforcement authority in its administrative body, the outcome could be quite different. Existing Compact Clause precedent allows for no more than venturing a guess as to how such a compact would fare. It does seem likely, however, that the empowering of the regional organization (RO) would cast RGGI outside the scope of the three-part inquiry suggested in *U.S. Steel*, leaving the initiative to drift into the relatively uncharted waters of the Court’s congressional consent requirement jurisprudence.