Fordham Environmental Law Review

Volume 24, *Number* 2 2017 *Article* 1

Frozen in Time: The Ossification of Environmental Statutory Change and the Theatre of the (Administrative) Absurd

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ESSAYS

FROZEN IN TIME: THE OSSIFICATION OF ENVIRONMENTAL STATUTORY CHANGE AND THE THEATRE OF THE (ADMINISTRATIVE) ABSURD

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INTRODUCTION

I have been teaching environmental law for almost twenty years, so I am pleased to be able to reflect on these years and look to the future. There are certainly some important emerging trends that could serve as the topic of this essay, such as the push for more market solutions to environmental problems, and the increasing need to integrate environmental and energy policy. But Alexandra Klass has already written a wonderful piece about the relationship between energy and environment for this issue,[1] and there are so many potential concerns I have about how environmental markets can work that I think that topic deserves a longer piece for consideration.

In any event, something else has been troubling my thoughts about the arc of environmental law, and that is its increasing complexity as a discipline in practice. When I first started to teach environmental law, Congress was just implementing the exciting, new Clean Air Act ("CAA") amendments of 1990 and liability under the Comprehensive Environmental Response, Compensation, and Liability Act

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1. *See generally* Alexandra Klass, *Climate Change and the Convergence of Environmental and Energy Law*, 24 FORDHAM ENVTL L. R. 180 (2013).

("CERCLA") was still being interpreted by the courts. My class in environmental law would look at the overall structure of the statutes, note how the regulated community would follow these laws, and predict what was likely to happen in the further administration of these laws. An important skill was to be able to determine which environmental laws might apply to a situation and what the practice of that application would be.

But to teach environmental law now is to realize that it is a different creature. Most of the major conflicts are not so much over the application of the law to general situations, but about the Environmental Protection Agency ("EPA") tweaking the same old pieces of a statutory text to fit a problem that the EPA perceives as currently important. Why? Environmental statutes have not kept up with changing circumstances and new problems, forcing increasing complexity on the administrative process.

Looking to explain the last twenty years of environmental law in terms of statutes, there would not be much to say. With a few, very minor exceptions,[2] one could say that statutory environmental law has not changed at all since 1990.[3] And to read today's tea leaves, it seems likely that it may not change any more than that in the next twenty years.[4] As Richard Lazarus noted in 2006, "Congress's ability to serve a constructive role in the ongoing process of environmental lawmaking has virtually disappeared."[5] And it has not gotten better since then, even in the face of the continuing emergence of the most pressing global environmental problem to date: climate change.[6]

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2. The 2002 amendments to CERCLA created some new substantive provisions to address the cleaning liability of those who knowingly acquired a contaminated site but entered into an agreement with the government for clean up. *See* 42 U.S.C. §§ 9601(40), 9607(r), 9622 (2006).

3. Bradley C. Karkkainen, *Framing Rules: Breaking the Information Bottleneck*, 17 N.Y.U. ENVTL. L. J. 75, 78 (2008). *See generally* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L. J. 619, 629 (2006).

4. Lazarus, *supra* note 3.

5. *Id.* at 621-22.

6. Though I predicted major legislative action on climate change in 2007, like others I was disappointed. *See generally* Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Legislative Proposal is "Best"?*, 102 NW. U. L. REV. COLLOQUY 123 (2007) (describing each of the federal climate change bills and denoting the advantages and disadvantages of each); *See generally* Ann E. Carlson, *Regulatory Capacity and State Environmental Leadership:*

But to say that environmental law has not changed is to ignore the very real consequences that have occurred from successive administrations pushing the limits of statutory language over the past two decades; these administrations have been trying to fit the square peg of emerging policy desires into the round hole of last decade's statutes.[7] Coupled with omnibus statutes that have affected either the budget or "process" of environmental administration,[8] these administrative changes have been considerable. But at what cost?

The failure of our political system to address new environmental problems and issues generally through statutory change has resulted in a system that is absurdly complex to understand and practice. Also, it may have contributed to demeaning judicial review and a narrowing of perceived methods for addressing the very real environmental problems that continue to hit us.[9] In this essay, I will trace a bit of this history and explicate some of the administrative absurdities that we have slogged through, particularly in air regulation. I will conclude by noting the damage this has done and calling for more transparency and accountability in policy making.

I. IN THE BEGINNING...THERE WAS DARKNESS

But then Congress and the President moved over the face of the earth, and environmentalists saw that it was good. The passage of the

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California's Climate Policy, 24 FORDHAM. ENVTL. L. REV. 63 (2013) (focusing on how California has emerged as a leader in enacting climate change legislation and implementing a regulatory program of vast and complex scope).

7. J.B. Ruhl, *Ecosystem Services and the Clean Water Act: Strategies for Fitting New Science into Old Law*, 40 ENVTL. L. 1381, 1382-83 (2010).

8. In 2006, Lazarus argued that most statutory effects on environmental law then came through the appropriations process. Lazarus, *supra* note 3, at 622. I would add to this the plethora of "regulatory reform" laws.

9. In her contribution to this book, Robin Craig notes that environmental systems are complex, but this does not mean that the framework of law must be overly complex itself. *See generally* Robin Kundis Craig, *Learning to Think about Complex Environmental Systems in Environmental and Natural Resource Law and Legal Scholarship: A Twenty-Year Retrospective*, 24 FORDHAM ENVTL. L. REV. 87 (2013). Even if one argues that law should move toward adaptive systems that rely on administrative discretion, that system must be centered in foundational principles made at the Congressional level. *See generally* Victor B. Flatt, *Adapting Laws for a Changing World: A Systemic Approach to Climate Change Adaptation*, 64 FLA. L. REV. 269 (2012) (explaining how a system of lawmaking can be used to efficiently create laws that adhere to the changing field of environmental law).

National Environmental Policy Act ("NEPA") in 1969, the CAA in 1970, and the Clean Water Act ("CWA") in 1972 are watershed moments in environmental law precisely because they represent comprehensive statutory schemes that addressed real problems in a way that was likely to be effective.[10] No one could argue that air and water pollution were beneficial to the planet or its inhabitants, and we knew that much of that pollution came from specific sources that presumably could be controlled through outright bans and technological advances. Even individualized sources of pollution (e.g., automobile emissions) were put on the table and addressed.[11] The glorious achievement of these laws was not that they were the first environmental statutes,[12] but that they introduced a completely different approach. For the first time, the federal government set standards and required technological fixes, in addition to allowing some state flexibility in tailoring pollution responses.[13]

Although one cannot call either of these watershed statutes (or the similar Resource Conservation and Recovery Act ("RCRA") of 1976) a model of eloquent language or simplicity, their structure is fairly clear and easy to understand.[14] These statutes delineated that there are acceptable levels of most pollution that are to be set to protect public health or achieve some other goal,[15] and the states were given the primary responsibility of reaching those levels in their geographic areas.[16] In addition, these statutes assigned specific processes or technology controls to many sources, which insure

10. Lazarus, *supra* note 3, at 624-25.

11. 42 U.S.C. § 7521 (2006).

12. *Id.* Both the 1970 CAA and 1972 CWA were actually amendments to earlier federal statutes.

13. *See, e.g.*,. 42 U.S.C. §§ 7408-11 (2006).

14. *See* Lazarus, *supra* note 3, at 623 (describing 1970 CAA amendments as "relatively short in length" and easy to understand).

15. *See* 42 U.S.C. § 7409 (2006) (National primary and secondary ambient air quality standards); 33 U.S.C. § 1313 (2006) (Water quality standards and implementation plans); 42 U.S.C. § 6921(a) (2006) (Identification and listing of hazardous waste).

16. *See* 42 U.S.C. § 7410 (2006) (State implementation plans for national primary and secondary ambient air quality standards); 33 U.S.C. § 1313 (2006) (Implementation Plans for water quality standards).

actual reductions and assist in the attainment of those goals.[17] Indeed, at the time the CAA was passed, it was speculated that the forthcoming technology controls on automobiles and new sources might be sufficient to reach the health standards that had been set.

The main points of these statutes were clear: to protect public health, and make decisions about pollution levels and pollution control to protect that health based on science. And it works. But there are some side notes as well. Laws enacted around the same time (Endangered Species Act ("ESA"))[18] and parts of the CWA and the CAA made clear that protecting the environment also had value.[19] It was also assumed that grandfathered sources would be gone fairly quickly[20] and that it would be possible to set pollution standards at a natural background or healthful level.[21] However, these well conceived laws might have underestimated the objections that would come from those that stood to lose economically, as these laws worked a major re-distribution in the status quo.[22]

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17. *See* 42 U.S.C. § 7411 (2006) (New source performance standards for major stationary sources of criteria air pollutants); 33 U.S.C. § 1316 (2006) (National standards of performance for point sources of water pollution).

18. *See generally* Hope M. Babcock, *The Sad Story of the Northern Rocky Mountain Gray Wolf Reintroduction Program*, 24 FORDHAM ENVTL. L. REV. 25 (2013) (noting the government's failure to deal with negative reactions from people affected by regulatory laws, such as the Endangered Species Act).

19. CRAIG N. JOHNSTON ET AL., LEGAL PROTECTION OF THE ENVIRONMENT 633 (3rd ed. 2010); *see* 42 U.S.C. §§ 7470, 7491, 7492 (2006) (preventing significant deterioration of air quality areas that meet public health standards and dealing with visibility).

20. WILLIAM L. ANDERSON ET AL., CENTER FOR PROGRESSIVE REFORM, CPR FOR THE ENVIRONMENT: BREATHING NEW LIFE INTO THE NATION'S MAJOR ENVIRONMENTAL STATUTES 15 (2007), *available at* http://www.progressivereform.org/articles/CPR_701.pdf; Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 853 (1984) (quoting 123 CONG. REC. S26847 (1977) (statement of Sen. Muskie)).

21. *See* Cary Coglianese & Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. Rev. 1255, 1285 (2004); JOHNSTON, *supra* note 17, at 269 (explaining that a choice was made in CAA to provide the public with healthy air); Victor B. Flatt, *Saving the Lost Sheep: Bringing Environmental Values Back Into the Fold With a New EPA Decisionmaking Paradigm*, 74 WASH. L. REV. 1, 20-21 (1999).

22. RICHARD LAZARUS & OLIVER HOUCK, ENVIRONMENTAL LAW STORIES 2 (2005).

While it seemed that all could work correctly, the fact that there were some companies, businesses, and individuals who would bear the cost of the clean-up brought trouble to paradise. As noted by Richard Lazarus and Oliver Houck in their introduction to *Environmental Law Stories*, the passage of the major environmental laws worked a radical redistribution in this country.[23] Even if pollution control laws were a perfect internalization of a harm that was unfairly imposed on others, they still brought a cost to those who had not been required to shoulder it before.

So the auto manufacturers fought back. Objection to the implementation of pollution control equipment was fierce.[24] The technology preferred by industry, the catalytic converter, could be rendered inoperable.[25] Industry successfully petitioned the EPA and then Congress to delay full implementation of the reductions required in the 1970 Act.[26] They were even more adamant about not redesigning the automobile or trying to increase gas mileage. This led to extensive loss of market share in the 1970s, as economic forces concerning the availability and cost of oil and gasoline drove consumers to foreign imports that were of smaller size.[27]

Local government, reliant on taxes from development, also fought back. One way to reduce air pollution is to control where development occurs, thus reducing the need for persons to drive long distances. But what was once anticipated as a major portion of the State Implementation Plans ran into a brick wall of objection, with the 1977 CAA amendments prohibiting the federal government from requiring controls on so-called "indirect" sources, such as development.[28]

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23. *Id.*

24. *See* Thomas O. McGarity, *Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L. J. 1521, 1536 (1996) (explaining that before the 1970 CAA was passed, automobile manufacturers were found to be guilty of conspiring to hinder the development of pollution control equipment).

25. *See id.* at 1537.

26. *See id.* at 1540-43; *See also* Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 386 (2004).

27. *See* Katherine Langley, *The Fortress Faces East: Protecting Europe's Automakers*, 1991 WIS. L. REV. 1043, 1058 n.77 (1991).

28. *See* Patrick Del Duca, *Indirect Source Controls: An Intersection of Air Quality Management and Land Use Regulation*, 24 LOY. L.A. L. REV. 1131, 1138,

Directly polluting stationary sources, which are of a smaller number and generally considered the greater pollution villains, did not effectively fight the statutes as directly as the automobile industry, but they found effectiveness in the administrative realm. That administrative struggle has fueled the complexity of environmental law (particularly in the air area) to this day.

II. THE INCREASING ADMINISTRATIVE ALTERATIONS IN THE CLEAN AIR ACT

The 1990 CAA amendments represented a salutary effort to update air pollution regulation and implement new ideas, such as emissions trading. The amendments also saw the attempt to codify certain regulatory choices that had been made in the prior decade, wherein the administrative run on policy had already began. But it did not stop the increasing regulatory complexity that had already started under the CAA.[29]

Three examples, two of which I will go over in detail and all of which should arguably have been handled statutorily, demonstrate this incredible regulatory complexity.

A. New Source Review

In the 1970 CAA, it was decided that existing sources would not be required to retroactively install the same pollution control equipment required of new sources.[30] Instead, existing sources were allowed to continue operating under a "grandfathering exemption," whereby they would only have to install the New Source Performance Standards ("NSPS") pollution control equipment when they chose to

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1161 (1991). *See generally* John R. Nolon, *Shifting Paradigms Transform Environmental and Land Use Law: The Emergence of the Law of Sustainable Development*, 24 FORDHAM ENVTL. L. REV. 242 (2013) (positing ten fundamental paradigm shifts in environmental and economic conditions that change the manner in which state and local governments control land use, the purpose of which is to control, among other things, nonpoint source pollution).

29. *See generally* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (wherein the conservative EPA changed a critical part of the CAA so as to allow upgraded sources to continue to postpone changes in upgrading pollution control equipment through the bubble concept).

30. 42 U.S.C. § 7411(a)(2) (2006).

"modify."[31] A "modification" was defined in the statute as "any physical change . . . which increases the amount of any air pollutant emitted . . . ."[32] It was apparently believed at the time that 1) the requirement of retrofit to the highest standards for new sources would be unfair, and 2) the older sources would not continue operating for much longer.[33] Thus, a carefully balanced decision had been made statutorily. While we aspired to the highest clean-up levels that might only be possible when all major sources were controlled, accepting a short delay for fairness purposes was acceptable.[34] This same reasoning, citing to the same definition of modification, was also included in the prevention of significant deterioration new source review as well as non-attainment new source review in the 1977 Amendments.[35]

The 1977 amendments made significant statutorily weighed changes to the CAA, seeking to preserve existing clean air, recognizing other environmental values of clean air, and making the determination that the federal government could not impose land use controls to meet the requirements of the CAA.[36] There were also modest requirements imposed on existing large sources in non-attainment areas,[37] but no major overhaul to the existing/new distinction enshrined in 1970. The general framework and support for ultimately retiring the existing sources still held sway.

The EPA, however, had already planted the seeds for ensuing complexity. In their article reviewing the history of the "grandfathering" program, Jonathan Remy Nash and Richard Revesz chronicle how the EPA attempted to clarify what constitutes a modification, and to exempt very routine repairs:

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31. *Id.*

32. 42 U.S.C. § 7411(a)(4).

33. *See* Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1682 (2007); CENTER FOR PROGRESSIVE REFORM, *supra* note 20.

34. *Id.*

35. Michael Settineri, *Reforming the New Source Review Program*, 13 FORDHAM ENVTL. L. J. 107, 113 (2001).

36. *See* Del Duca, *supra* note 28, at 1131.

37. 42 U.S.C. § 7501 (2006).

> The [new] rules provided that which changes qualified as "modifications would be decided in case-by-case determinations made by the Administrator. The rules exempted several key activities, however, from the definition of modification: routine maintenance, repair, and replacement; an increase in production rate, if the increase did not exceed the "operating design capacity of the affected facility"; an increase in hours of operation; and use of alternative fuel or raw material if the affected facility could accommodate such use.[38]

Other rules clarified the scale of application, including the allowance of "offsetting" emissions from other parts of a source.[39] But the individualized nature of the determination only increased attempts to circumvent these rules. The EPA was rebuffed for its attempt to limit this statutory provision further by exempting modifications that did not increase pollution over a certain threshold. In *Alabama Power Co. v. Costle*,[40] the D.C. Circuit held that the EPA's jurisdiction of a modification should not be limited by thresholds, noting that "'modification' is nowhere limited to physical changes exceeding a certain magnitude."[41]

That is not the end of the story. What began as a relatively straightforward statutory command turned to chaos through administrative tinkering. In the early years of the Reagan administration there was a backlash against the EPA and other regulatory agencies. This is well chronicled by Tom McGarity's contribution to the anniversary issue.[42] First, the Reagan EPA successfully used notice and comment rulemaking to define "source" in the CAA as entire facilities, which allowed many improvements in operation to come under a "bubble" without overall increasing emissions and triggering NSPS or new source review ("NSR").[43] Also during the Reagan administration, the EPA promulgated regulations purporting to clarify the statutory language of

38. Nash & Revesz, *supra* note 33, at 1684-85.

39. *Id.*

40. 636 F.2d 323, 400 (D.C. Cir. 1979).

41. *Id.*

42. Thomas O. McGarity, *EPA at Helm's Deep: Surviving the Fourth Attack on Environmental Law*, 24 FORDHAM ENVTL. L. REV. 205, 206 (2013).

43. Chevron, USA v. Nat. Resources Def. Council, Inc., 467 U.S. 837 (1984).

modification. The regulations defined how the measurement increase was to be determined, and importantly restated that NSR was not required if the physical change was brought about by "[m]aintenance, repair, and replacement which the Administrator determines to be routine for a source category . . . ."[44] But the Routine Maintenance and Repair Rule (RMRR) was accompanied by an administration that was more sympathetic to business interests. This combination created a bad incentive encouraging every facility to try and be exempted from new source requirements.

When faced with upgrading a power plant's pollution control equipment at the cost of hundreds of millions of dollars, what source would not try to come under this regulatory shelter if it could work with a sympathetic administration? The problem is that for these old plants to keep operating (at high profit for their owners), they eventually have to make repairs, some of which would be significant. It was between this *Scylla and Charybdis* that the EPA was steered. By the end of the 1980s, many claims for the exemption were granted, and many more plants made changes, arguably, with the belief that they would be defined as "routine."[45] This activity prolonged the lives of these older plants far beyond what had been anticipated in 1970.

When a less sympathetic administration came to power, however, the individualized nature of this review allowed whiplash to set in. Professor McGarity has ably explained the Clinton administration posture after 1996 on enforcement against sources that had allegedly "modified" without installing required equipment.[46] Compared with what had happened in the prior sixteen years, this enforcement might have been legally sound, but it came as a shock to many of these sources. The administration brought complaints against thirty-two utilities in ten states.[47] To quote Professor McGarity, "[the] EPA initiated dozens of enforcement actions against aging refineries and power plants", arguing that they "had unlawfully undergone modifications that significantly increased emissions without undergoing new source review."[48]

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44. 40 C.F.R. § 60.14(e)(1).

45. CENTER FOR PROGRESSIVE REFORM, *supra* note 20.

46. McGarity, *supra* note 42, at 215.

47. *See* New York v. U.S. E.P.A., 413 F.3d 3, 12 (D.C. Cir. 2005), *reh'g en banc denied*, 431 F.3d 801 (2005).

48. McGarity, *supra* note 42 at 215.

The EPA had been in the process of clarifying NSR through rulemaking, but "frustrated by its own inability to produce the much-sought-after NSR reform through notice-and-comment rulemaking, the agency clarified the meaning of 'major modification through the exercise of its enforcement authority.'"[49] These enforcement actions were not merely routine; in many cases they were designed to teach a lesson. By seeking damages for every day of violation following the supposed upgrade, which in many cases amounted to years, the Clinton administration sent a clear signal that it meant business.

These enforcement actions, though legal, sent great backlash coursing through the serpentine administrative path. While assessing fines for past violations may be legally sound, the EPA opened itself up to criticism for allowing the illegal behavior to continue for decades. Whatever one's personal beliefs on whether or not the crackdown was long overdue or went too far, it managed to stir a giant that was to fight tooth and nail through today.

After winning a close election in 2000, President George W. Bush was considered friendly to energy interests during the earlier part of his administration.[50] For example Vice-President Dick Cheney chaired a closed-door meeting of energy and other executives that produced recommendations on energy policy, including "relief" from arbitrary NSR enforcement.[51] The Bush administration in turn backed off from the earlier Clinton NSR enforcement.[52]

There also began an attempt to redefine what constituted a modification for purposes of NSR. The administrative proposals included extremely long "look back" periods in which the EPA could look further back for "typical" years of past emissions, increasing the

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49. Nash & Revesz, *supra* note 33, at 1694.

50. Carolyn Bingham Kello, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 BROOK. L. REV. 345, 367 n. 135 (2003).

51. James W. Moeller, *Of Credits and Quotas: Federal Tax Incentives for Renewable Resources, State Renewable Portfolio Standards, and the Evolution of Proposals for a Federal Renewable Portfolio Standard*, 15 FORDHAM ENVTL. L. REV. 69, 152–53 (2004); Joel A. Mintz, *"Treading Water": A Preliminary Assessment of EPA Enforcement During the Bush II Administration*, 34 ENVTL. L. REP. NEWS & ANALYSIS 10912, 10918 (2004); Daniel T. Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 812 (2010).

52. William S. Eubanks II, *The Clean Air Act's New Source Review Program: Beneficial to Public Health or Merely a Smoke-and-Mirrors Scheme?*, 29 J. LAND RESOURCES & ENVTL. L. 361, 369 (2009).

likelihood that no emissions increase, and thus no modification, would be found. Despite its blatant effect, this proposal was upheld as within the agency's discretion (and statutory language) in the first challenge to these new rules, *New York I*.[53] The proposal which attempted to define "modification" without even reference to whether or not there were emissions increases was struck down in *New York II*.[54]

These cases illustrate the lengths to which administrative changes have twisted what should have been a relatively clear statute. Several pages of *New York II* are devoted to a discussion of the word "any" which the majority determines should be given its "customary effect."[55] The EPA attempted to argue for its proposed RMRR change based solely on policy, as if the D.C. Circuit did not understand the basic confines of the executive branch and administrative law.[56] Though with the rejection of the proposed RMRR we have returned to a case-by-case approach, we still have no reason to assume that there will be consistent application of NSR and modification over time. Instead, we have to look to newer programs, such as Mercury regulation, to close down grandfathered pollution sources.

B. Greenhouse Gas Regulation

There have rarely been such complex statutes as those put forth to deal with greenhouse gases in the United States. By 2007, "there were at least ten legislative proposals in Congress [to] address climate change."[57] By 2009, one proposal, the American Clean Energy and Security (ACES) Act of 2009, had passed the U.S. House of Representatives.[58]

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53. New York v. U.S. E.P.A. (*New York I*), 413 F.3d 3, 19-20, 32 (D.C. Cir. 2005), *reh'g en banc den*ied, 431 F.3d 801 (D.C. Cir. 2005).

54. New York v. U.S. E.P.A. (*New York II*), 443 F.3d. 880, 884 (D.C. Cir. 2006).

55. *New York II*, 443 F.3d at 885-86.

56. *Id.* at 889 ("EPA may not avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.") (internal quotation marks omitted).

57. Flatt, *supra* note 6, at 123.

58. William W. Buzbee, *Clean Air Act Dynamism and Disappointments: Lessons for Climate Legislation to Prompt Innovation and Discourage Inertia*, 32 WASH. U. J. L. & POL'Y 33, 62 (2010).

While the EPA was moving parallel with the possibility of regulating greenhouse gases under its CAA authority, most saw this as an ill fit and possibly only as pressure to get Congress to Act. Indeed, when the Supreme Court came down with the *Massachusetts v. EPA* case,[59] most analysts saw it as confirming that Congress would now *have* to pass a comprehensive bill.[60] With John McCain, the first Senator to lend his name to a greenhouse gas control bill, securing the Republican Presidential nomination in 2008, the likelihood of a comprehensive bill, the first environmental one since 1990, seemed assured. But we were proved wrong again when the Senate failed to pass comprehensive legislation.[61]

But while comprehensive greenhouse gas legislation was defeated in Congress (though arguably by only a Senate procedural device), many of us began to look anew at the EPA's attempts to regulate greenhouse gases ("GHGs") through the CAA. What had seemed a feint, now seemed like possible action.[62] What we had failed to get legislatively, we were going to be able to get through the administrative process. Now in this story, I am not substantively critical of the attempt to regulate GHGs under the CAA. In fact, I think the law requires it. Where the administrative push becomes absurd is the attempt to have the regulation look as much like the proposed statutes as possible by regulating the same large group of sources. All fine, except it explicitly contradicts the statute.

When promulgating the final Prevention of Significant Deterioration ("PSD") and Title V Greenhouse Gas Tailoring Rule,

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59. 549 U.S. 497 (2007).

60. *See* Flatt, *supra* note 6, at 123; Press Release, Indiana University News Room, EPA to Regulate Greenhouse Gases: Indiana University Experts Comment (Apr. 17, 2009), *available at* http://info.law.indiana.edu/news/page/normal/10636.html; James E. Smith, Benjamin Escobar, BEIRNE, MAYNARD & PARSONS, L.L.P., *Regulation of Greenhouse Gases: The Management of Uncertainty* (Nov. 30, 2008), Regulation of Greenhouse Gases: The Management of Uncertainty, *available at* http://www.bmpllp.com/publications/118-regulation-greenhouse-gases-management-uncertainty.

61. Richard J. Lazarus, *Climate Change Law in and over Time*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 29, 30 (2010).

62. On another front, the Second Circuit, which had suspiciously held a challenge to greenhouse gas emitters for public nuisance for a long time, also rendered a decision allowing it to move forward. Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d. 309 (2d Cir. 2009) *rev'd*, 131 S. Ct. 2527 (2011).

the EPA noted that applying "the statutory PSD and title V applicability thresholds literally to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program," which Congress never contemplated would be covered.[63] The EPA argued these small sources would face high permitting costs with long delays while providing relatively little benefit, as these sources constitute a relatively small part of the environmental problem.[64]

The EPA analyzed different threshold levels for PSD and title V applicability based on costs to regulated sources and the administrative burdens to process the applications, ranging from the 100/250 tons per year ("tpy") levels for PSD and the 100 tpy level for title V to 100,000 tpy carbon dioxide equivalent.[65] Administrative burdens were based on the number of sources that would be required to obtain a permit at each threshold level.[66] For the PSD program, at the proposal stage, the administrative burdens were calculated based on the workload differences based on the 280 permits issued annually now, compared with the 41,000 new and modified sources per year, which would be required at the 100/250 tpy statutory threshold.[67] The additional cost at the statutory threshold was estimated at 3.3 million hours at a cost of $257 million to include all sources above the 250 tpy threshold.[68] The state and local permitting agencies also reported significant potential burdens.[69] By the time of the final rule publication, the likely number of permits had increased to over 81,500 annually.[70] For the title V program, similar calculations were used, with costs calculated between the 14,700 sources currently covered versus the six million sources that would need to be permitted at the statutory levels.[71] As 97% of these sources would be

63. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31533 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71).

64. *Id.*

65. *Id.* at 31533-34.

66. *Id.* at 31534-35.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 31,538.

71. *Id.* at 31,536.

commercial and residential, the estimated administrative burden at the 100 tpy threshold is an additional $15 billion.[72]

Based on these justifications, the EPA chose to depart from the 100/250 tpy statutory emissions threshold. For the PSD program, the source has to emit, or have the potential to emit, 100,000 tpy carbon dioxide equivalent. Modifications resulting in net GHG emissions increases of 75,000 tpy carbon dioxide equivalent would also require a PSD permit.[73] For title V permits, sources already subject to title V permitting would continue to require a permit.[74] Sources which emit 100,000 tpy carbon dioxide equivalent are, under the rule, required to obtain a permit.[75]

The final rule was challenged by a variety of industry groups and some states. In addition to discussing other issues with the final rule, including the Endangerment Finding and the Tailpipe Rule, the Court of Appeals for the District of Columbia addressed several procedural issues.[76] After noting the administrative burdens the EPA had estimated if the statutory thresholds were immediately used and how the EPA determined the appropriate permitting levels, the court found that all petitioners lacked standing to challenge the "tailoring" rule.[77]

The EPA had justified the "tailoring rule" variance with the explicit statutory requirements on three interrelated grounds regarding administrative burdens: 1) the absurd results if the statutory thresholds were used; 2) administrative necessity; and 3) that the EPA may implement regulatory programs in a piecemeal fashion.[78]

While I am sympathetic to the policy issues making the literal application of the CAA to these sources difficult, the administrative proposal clearly pushed the legislative envelope. Administrative necessity can justify a limited departure from strict statutory compliance,[79] but in this case, why not a smaller threshold (such as the 25,000 tpy argued by some environmental groups)?

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72. *Id.*

73. *Id.* at 31,523-24.

74. *Id.* at 31,524.

75. *Id.*

76. *See* Coal. for Responsible Regulation v. U.S. E.P.A., 684 F.3d 102 (D.C. Cir. 2012).

77. *Coal. for Responsible Regulation*, 684 F.3d at 146.

78. *Id.* at 145.

79. *See* Alabama Power Co. v. U.S. E.P.A., 40 F.3d 450, 454 (D.C. Cir. 1994).

Luckily for the EPA, the D.C. Circuit found it did not have jurisdiction, as the petitioners had failed to show the final rule caused them an "injury in fact," "much less injury that could be redressed by the Rules' vacatur."[80] Instead, the court found the rules mitigated petitioners' injuries. The court found neither theory that the petitioners advanced to cure the jurisdictional issue to be credible – either that the states wanted EPA to immediately apply the statutory thresholds, or that they had standing based on harms from EPA not regulating sooner.[81] The court finalized its discussion by noting that it was a stark contrast to *Massachusetts v. EPA* and that state petitioners had presented no evidence that they were adversely affected by the EPA regulation.[82]

C. The Ozone Debacle

Of all of the absurd administrative stories, none is probably as dastardly as the ozone debacle, and in this case both the Bush and the Obama administrations can take credit.

The CAA requires the EPA to revisit its National Ambient Air Quality Standards ("NAAQS") every five years to ensure that they are adequate to protect the public health and safety.[83] Every new promulgation of the ozone standard has been met with challenges and lawsuits as each fresh examination has indicated the need for more stringent regulation.[84] The proposal of .12 parts per million ("ppm") one hour average in the Carter administration was challenged as being both too lax and too strong, and the change to a .08 ppm eight hour average standard during the Clinton administration was similarly challenged.[85] Relying on administrative deference arguments, both decisions were ultimately upheld, the last being appealed to the Supreme Court.[86]

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80. 684 F.3d at 146.

81. *Id.* at 146-47.

82. *Id.* at 148.

83. 42 U.S.C. § 7409(d) (2006).

84. *See, e.g.*, American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

85. *American Petroleum*, 665 F.2d at 1181.

86. *American Petroleum*, 655 F.2d 1176, *cert. denied*; Am. Petroleum Inst. v. Gorsuch, 455 U.S. 1034 (1982); *Whitman*, 531 U.S. at 457-59 (affirming the appeals court's decision).

In 2006, after substantial delay, the Bush administration revisited the NAAQS rules as required, but proposed a new standard of .75 ppm, which was far above the unanimous recommendations of the scientists who said an ozone level somewhere between .60 and .70 ppm was necessary to protect the public health.[87] A lawsuit followed, and after the 2008 election, the Obama administration noted the likely illegality of the .75 ppm, and re-opened the rulemaking. This delayed a legal decision that likely would have over-turned the 2008 final rules.[88]

The Obama EPA then proposed more rigorous standards that could be supported by the science of 2006, but delayed the final proposal three separate times.[89] Then, in September, 2012, the Obama administration – noting that the standards will be revisited again in 2013 (after the election) – withdrew the rulemaking due because of "the expense."[90]

This may be the most clear example of where political administrative tinkering made matters far worse for public health. In addition to the delays of all of the lawsuits over the years, by not following through with the new rules the Obama administration stated it would propose when it negotiated to drop the lawsuit against the 2006 proposal, the Obama administration held back what surely would have been a successful lawsuit in 2008 (and one which will likely be re-instated).

New evidence suggests that the .60 to .70 ppm limit itself may be too lenient and that tens of thousands of people every year face premature deaths due to ozone.[91] Yes, there will be lawsuits and yes, eventually, the environmental groups will win because the law is clear, but in the meantime, many more people will die, or have their

87. Gabriel Nelson, *Bush Ozone Standards Are 'Not Legally Defensible'*, N.Y. TIMES (July 14, 2011), *available at* http://www.nytimes.com/gwire/2011/07/14/14greenwire-bush-ozone-standards-are-not-legally-defensibl-19743.html.

88. *Id.*

89. *Id.*

90. Deborah Solomon & Tennille Tracy, *Obama Asks EPA to Pull Ozone Rule*, WALL STREET JOURNAL (Sept. 3, 2012) *available at* http://online.wsj.com/article/SB10001424053111904716604576546422160891728.html.

91. Mark. W. Frampton, *Ozone Air Pollution: How Low Can you Go?*, 184 AM. J. RESPIRATORY & CRITICAL CARE MED. 150, 150-51 (July 15, 2011), *available at* http://ajrccm.atsjournals.org/content/184/2/150.full.

health severely compromised. This again illustrates how seductive it is for both liberals and conservatives to use the administrative process to achieve other purposes. While many of us bemoan the gridlock in Congress, this situation may sit well with groups that do not wish to have an open policy debate. Therein lies the problem.

III. THE DAMAGE

In addition to increased costs of litigation, lost lives, and lost productivity, the administrative complexity imposes other hardships. The most obvious is the lack of public policy debate on issues that are important and need to be considered cogently.

If the President, members of Congress, or persons with particular interests want to impose economic costs in more public health impacts – to protect large corporations from lower costs to control dangerous pollution, and to make policy decisions to trade off lives of the young and vulnerable to enrich a smaller slice of the electorate (those who profit by not controlling their pollution) – they should have a public policy debate about it in front of the American public.

Similarly, if we are unable to convince the body politic to adopt better environmental policies, such as a comprehensive cap and trade bill that directs money to climate change adaptation, we should better explain and educate, or re-examine the issues ourselves, not simply use administrative stretching to get to the promised land. This is not new. As Marc K. Landy, Marc J. Roberts and Stephen R. Thomas noted in *The Environmental Protection Agency, Asking the Wrong Questions*, the agency used obfuscation the first time it had to visit the ozone standard because economics were too important not to consider.[92] The continued failure of Congressional policy debates has only made it worse.

But in addition to the lack of political accountability fostered by making major policy decisions in the administrative realm, the increase in complexity means fewer of us understand what is legally required. Our courts register this confusion. Two recent examples are particularly compelling.

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92. Mark K. Landy et al., THE ENVIRONMENTAL PROTECTION AGENCY ASKING THE WRONG QUESTIONS 66-73 (1984).

In April of 2012, the Fifth Circuit released its opinion in *Luminant v. EPA*,[93] finding that the EPA's decision to disapprove the State of Texas Administrative Code § 116.617, governing standard permits for pollution control equipment that "reduce or maintain currently authorized emission rates for facilities authorized by a permit," was arbitrary and capricious under the federal Administrative Procedures Act.[94] While the history of the EPA's disapproval of this portion of the Texas Clean Air Act State Implementation Plan ("SIP") was not in compliance with statutory deadlines and subject to conflicting signals, the Court's reversal was not legally correct.

As the Fifth Circuit correctly points out, the CAA is to be administered by the federal government and the various states in the form of cooperative federalism.[95] Also, as the Fifth Circuit correctly notes, the ability of the federal government to disapprove a SIP is limited to situations in which it fails to provide attainment and maintenance of the NAAQS or "any other applicable requirement of [Chapter 85 of 42 U.S.C.]."[96]

However, the Fifth Circuit misinterprets the application of this standard to the facts in the case. The Texas law allows the state to disapprove a minor modification in certain circumstances, but according to the EPA, the circumstances are not sufficient to ensure that the CAA requirements are being met. In particular, the EPA noted that the provision was not consistent with other parts of the Texas law governing CAA compliance, and does not provide for source specific standards allowing predictability in like sources being treated similarly.[97] The Fifth Circuit held that the EPA could not disapprove the rule under the CAA because the federal government relied on a conflict with Texas law, which the Fifth Circuit claimed to not be part of the CAA, instead of the federal CAA itself, which does not specify the need for source specific standards.[98] This decision was a clear misapplication of the law.

First, when a SIP is approved, the requirements of that SIP become incorporated in the provisions of the federal CAA governing the

93. 675 F.3d 917 (5th Cir. 2012).
94. *Luminant*, 675 F.3d at 922-26.
95. *Id.* at 921.
96. *Id.*; *see* 42 U.S.C. § 7410(l) (2006).
97. *Luminant*, 675 F.3d at 924-25.
98. *Id.* at 926-27.

program in that state.[99] As such, inconsistency with prior approved state provisions is an inconsistency with the CAA as a whole. The CAA is a complicated law that depends on various provisions working together. One of the requirements for a SIP to be approved is that it will allow the state to effectively enforce the CAA.[100] Once it has been approved, if the state then takes an action that is inconsistent with its own laws, which have been approved by the federal government, then that action is also inconsistent with the CAA as a whole.[101] It was perfectly reasonable for the EPA to disapprove part of a state program that does not follow another part of the state program since that would mean it is not consistent with the standards of the CAA itself.

Second, in stating its requirement that Texas have source specific minor NSR review, the EPA cited to its prior regulations and guidance interpreting the provisions of the CAA about effective enforcement, which found that source specificity was necessary for this to occur.[102] The Fifth Circuit simply dismisses this argument by noting that it does not need to give *Chevron* deference to the EPA's prior interpretation of the CAA in these regulations because the EPA did not cite that as authority in the order disapproving this part of the Texas SIP.[103] While such clarity from the EPA might have been welcome, this is a separate question that is not applicable to the standards of legal deference that the court owes to the EPA.

EPA's problem is that in the increasing complexity of the CAA regulations and its back and forth with the states, including Texas, it has had to make serpentine legal arguments to support its policy. This has allowed attorneys challenging these proposals to more easily make inaccurate legal arguments, and, perhaps due to its lack of experience with the CAA, the Fifth Circuit bought these arguments hook, line, and sinker. The case may not warrant the gravity of Supreme Court review, but it is incorrectly decided, and as usual, the ones who lose are the people of Texas and neighboring states, who

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99. *Safe Air for Everyone v. U.S. E.P.A.*, 488 F.3d 1088, 1096–97 (9th Cir. 2007); 42 U.S.C. § 7410(a) (2006) ("Each State shall . . . submit . . . a plan which provides for implementation, maintenance, and enforcement of such . . . standard.").

100. 42 U.S.C. § 7410(a)(2)(C).

101. *See Safe Air for Everyone*, 488 F.3d at 1096-97.

102. *Luminant*, 675 F.3d at 924.

103. *Id.* at 927-28.

fail to get the specific standards that would ensure that their air is clean enough to support the public health and welfare.

Far more surprising is a D.C. Circuit panel's clear misinterpretation of CAA law (and repose) in *EME Homer City Generation, L.P. v. EPA*.[104] This case was brought about on consolidated challenges to the EPA's attempt to implement the Cross-State Air Pollution Rule, a follow up to the Clean Air Interstate Rule ("CAIR") that the D.C. Circuit found wanting in *North Carolina v. EPA*.[105] Basically, the rule and its pieces and subsidiaries were designed to ensure that the states did not cause significant "interference" with "maintenance" of NAAQS in downwind states (also referred to as the "good neighbor provision," or Section 110(a)(2)(D)).[106]

The majority overturns this rulemaking for two reasons: 1) it claims that the EPA's plan improperly failed to reduce only an upwind state's share of contributions to a downwind state's nonattainment; and 2) it erred in simultaneously implementing a Federal Implementation Plan ("FIP") instead of allowing the states to first propose a SIP that would reduce the EPA-determined significant contribution to downwind states. In doing this, the majority notes that "[a]lthough the facts here are complicated, the legal principles that govern this case are straightforward."[107] I agree with this statement, but think the majority actually does what it is criticizing; it formulates its own complex policy prescription for the EPA to implement the good neighbor provision, and it ignores clear and settled law in order to get there.

Much of the disagreement between the majority and the vigorous dissent by Judge Rogers concerns whether or not much of the legal basis for the decision was actually before the court. Specifically, whether the challengers had preserved the issues for appeal concerning distinctions between the threshold calculation of significant contribution and reduction calculation, and whether or not

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104. 696 F.3d 7 (D.C. Cir. 2012), *reh'g en banc denied*, 2013 WL 656247 (D.C. Cir. Jan. 24, 2013)

105. 531 F.3d 896, 907-8 (D.C. Cir. 2008) on *reh'g*, 550 F.3d 1176, 1178 (D.C. Cir. Dec. 23, 2008).

106. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48208, 48209 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, 97).

107. *EME City of Homer*, 696 F.3d at 11.

the states' had waived the right to challenge disapproval of earlier SIPs which failed to adequately implement 110(k).[108] I strongly agree with the dissent on both of these complaints, but specifically emphasize that these repose provisions are not just procedural issues. They exist for a reason. In this case, they are critical to whether and how the EPA and the states are able to effectively protect the public health and welfare. The time to challenge the EPA determination was after the states failed to adequately control interstate contributions and the EPA disapproved the state plans, not three years after it has painstakingly crafted a new plan.

Even though these procedural issues are important, the majority goes even further in simply misstating and misapplying the law. I will not address all of the issues here, but will address one I believe to be particularly important. In one fell swoop, because it says it would be "impossible-to-know,"[109] the majority eliminates the CAA's provision that the states themselves bear the responsibility of implementing SIPs and doing so correctly.[110] The majority claims that it would be impossible to have a SIP with adequate good neighbor provisions unless the EPA had first set budgets for each upwind state. This is untrue.[111] As noted by the dissent, the states have sophisticated environmental agencies that can have access to information about production, modeling, and transport of pollutants as easily as the EPA.[112] They should not be excused from producing an adequate SIP because it is too hard. If the EPA wishes to assist in general pollution budget allocations and rulemaking, that might make it easier for the states, but it would also take more time. The prohibition against significant downwind pollution is a provision of the CAA that has been violated most assuredly since the modern act was first passed in 1970, and the effect of this opinion further delays compliance.

The majority's blithe dismissal of the EPA's ability to craft workable ways for threshold contributions for significance, and other ways to calculate reductions, is also problematic. The majority appears to create a mathematical burden of proportional "fair"

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108. *Id.* at 37 n. 34.
109. *Id.* at 32.
110. *Id.* at 33.
111. *Id.* at 49.
112. *Id.*

reductions out of whole cloth.[113] Instead of leaving the complex implementation of air reductions to the agency with which Congress has entrusted it, an agency with a long history of measurement and modeling, the D.C. Circuit majority seems to craft its own plan for how EPA should do its job. This may be more logical to a clever law clerk handling his or her first environmental case, but that does not make it the law.

I would usually never presume to boldly state that a federal court of appeals "got the law wrong." In fact, in my teaching and scholarship, I go to great pains to note that the court decisions are the law, but these cases force me to state unequivocally that our federal courts, the arbiter of our environmental laws, including the CAA, are themselves, in many cases, ill-equipped to understand the complexity with which it is now burdened. In *Luminant* and *EME City of Homer*, the EPA either took a very long time to make a decision, presumably because it was unsure of what policy position it wanted or that position changed during administration changes,[114] or came up with an incredibly complex program under the CAA to accomplish a difficult goal that Congress refused to revisit.[115] This leads to the complexity that makes interpretation of the Act difficult.

In addition to the complexity faced by our federal courts, there have been hints of an even more fundamental change – the assumption that the agencies are acting in the public interest. Jody Freeman and Adrian Vermeule noted a possible trend: the Supreme Court "majority's increasing worries about the politicization of administrative expertise, particularly under the Bush administration."[116] As stated by Louis J. Virelli III, "[a]gency

113. Certainly reduction allocations would be subject to the arbitrary and capricious standard and that may put limits on burden allocations and fairness of threshold inclusions, but this does not mean the CAA itself requires specific proportional certainty.

114. *See* Luminant v. E.P.A., 675 F.3d 917 (5th Cir. 2012).

115. *See EME City of Homer*, 696 F.3d 7. Congress looked at a legislative fix for the original overturning of the Clean Air Act Interstate Rule, but inexplicably (or perhaps explicably given the thrust of this essay) made no progress. *See* JAMES E. MCCARTHY, CLEAN AIR ISSUES IN THE 111th CONGRESS, CONGRESSIONAL RESEARCH SERVICE, (Sept. 1, 2010), *available at* http://www.cnie.org/NLE/CRSreports/10Sep/R40145.pdf.

116. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2007).

expertise is a foundational principle of administrative law."[117] If there is a reason for our courts to doubt the expertise portion of that deference, where do we turn? Again, this focuses attention on our failure to address new environmental problems comprehensively.

CONCLUSION

The last twenty years of environmental law have seen a disturbing diminishment in the engagement of the legislative process in environmental problems. This has either caused or allowed an increase in complexity of the environmental administrative matrix. Environmental law is now too complicated to be efficiently understood and administered. This creates a situation in which the public must be less engaged with the environment and environmental law, which causes public accountability to suffer. If the only way we address problems is to find ever more tortuous readings of long forgotten terms in environmental laws now over 40 years old, then we undermine our ability to see the possibility of addressing our future challenges. Unless the next twenty years sees a return to legislative problem solving and administrative accountability, we may all follow Judge Kavanaugh of the D.C. Circuit "down the rabbit hole to wonderland."[118]

117. Louis J. Virelli III, *Scientific Peer Review and Administrative Legitimacy*, 61 ADMIN. L. REV. 723, 751 (2009).

118. 696 F.3d at 33.