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COMMENT ON THE SEVENTH CIRCUIT'S ENVIRONMENTAL REGULATION OF BUSINESS

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Professor Kellman's review of Seventh Circuit environmental law decisions highlights an ironic twist of the off-stated criticism that the Reagan years of environmental regulation were years of "nonregulation" in which the interests of business were paramount to the interests of environmental protection. Agency nonfeasance is usually viewed as a benefit to industry. Industry allegedly escapes additional regulatory burdens while environmental protection purportedly suffers from the lack of affirmative action.

However, these Seventh Circuit decisions show that agency inaction or inadequate action can cause and has caused adverse effects upon business interests while not conferring any additional environmental benefit. Two of the more broad-reaching Seventh Circuit cases reviewed arose from inaction or inadequate action on the part of agencies of the executive branch, primarily the United States Environmental Protection Agency (EPA).[1] The Seventh Circuit's response to such agency nonfeasance has been to police the agency's adherence to procedural requirements of the environmental laws rather than to fill the void left by the agency's failings. Consequently, the Seventh Circuit has not provided a very fruitful forum for the protection or advancement of business interests in the area of environmental law.

For business interests, an unfavorable resolution to environmental litigation can be better than no resolution at all. As Professor Kellman concludes, the Seventh Circuit has consistently avoided definitive resolution of substantive environmental law issues. The two National Environmental Policy Act (NEPA) decisions analyzed typify the Seventh Circuit's approach.[2] The impact on business interests is uncertainty concerning the application of statutory environmental requirements. The attendant burdens include an inability to engage in sound economic

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1. Chicago Ass'n of Commerce & Indus. v. United States EPA, 873 F.2d 1025 (7th Cir. 1989); Illinois State Chamber of Commerce v. United States EPA, 775 F.2d 1141 (7th Cir. 1985).

2. Van Abbema v. Fornell, 807 F.2d 633 (7th Cir. 1986); River Road Alliance v. United States Army Corps of Eng'rs, 764 F.2d 445 (7th Cir. 1985).

planning and development without risk of running afoul of future substantive environmental decisions.

While the Seventh Circuit appears troubled by the agency's lack of diligent pursuit of its statutorily delegated functions, the court has responded, at times necessarily, with a "cattle prod" rather than a "big stick." Professor Kellman correctly notes the Seventh Circuit's reluctance to substitute its judgment for that of a government agency—a reluctance born of extensive legal precedent.[3] Arguably, judicial action in the face of agency inaction does not usurp an agency's unexercised judgment. In the area of environmental law, however, the complex task that frequently accompanies attempts to exercise that judgment is beyond the resources and ability of a reviewing court. Of the cases discussed by Professor Kellman, *Chicago Association of Commerce & Industry v. United States EPA*[4] best exemplifies the court's inability to act where the agency has failed to act. The court's forced neutrality in this instance deals just as adverse a blow to affected business interests as do cases where the court has affirmatively denied direct challenges to agency action.

The "removal credit" provision of section 307(b) of the Clean Water Act,[5] at issue in *Chicago Association of Commerce & Industry*, contains one of the Act's most important provisions protecting industry's interests. Congress intended removal credits to apply to avoid redundant treatment, *i.e.*, treatment for treatment's sake.[6] The legislative history of section 307(b) clearly shows that Congress intended that national pretreatment standards for indirect dischargers include a mechanism by which Publicly Owned Treatment Works (POTW) could modify (or relax) these standards to reflect the POTW's own removal capability.[7]

To realize the clear congressional intent to relieve industry from engaging in treatment for treatment's sake, the removal credits program must operate in tandem with the promulgation by EPA of pretreatment standards for indirect dischargers to POTWs. As compliance deadlines near, indirect dischargers must incur the added expense of installing wastewater treatment technology beyond that necessary to meet the standards that would be required if there was an operative removal credits

3. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Western Nebraska Council v. United States EPA, 793 F.2d 194, 200 (8th Cir. 1986); Harley-Davidson Motor Co. v. United States EPA, 598 F.2d 228, 232 (D.C. Cir. 1979); E.I. duPont de Nemours & Co. v. Train, 541 F.2d 1018 (4th Cir. 1976), *aff'd in part, rev'd in part*, 430 U.S. 112 (1977).

4. 873 F.2d 1025 (7th Cir. 1989).

5. 33 U.S.C. § 1317(b) (1988).

6. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 95th Cong., 2d Sess., *reprinted in* LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 343 (1978).

7. H.R. CONF. REP. NO. 95-830, 95th Cong., 1st Sess. 88, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 4424, 4463.

program. An industrial facility foregoing such compliance risks potential enforcement action either by the regulatory agency or by the POTWs charged with authority for enforcing compliance with the pretreatment standards. Once the added capital and operational costs of unnecessary treatment technology are expended by industry, these costs are not recoverable. The amount of the unnecessary expense incurred by industry is further increased in those instances where industry provided essential financial assistance to the local community to construct the POTW. Such industrial financing was provided in the reasonable belief that the need for and expense of redundant in-house industrial treatment would be avoided or significantly reduced.

Since the 1986 decision by the Third Circuit invalidating the 1984 removal credits regulations,[8] EPA still has not fulfilled its nondiscretionary duty to promulgate the sludge regulations required to breathe renewed life into the removal credits program. In the interim, compliance deadlines for various categories of pretreatment standards have come and gone. Congressional intent has been thwarted and business has paid the price.

The environment remains nonetheless protected in the face of EPA's failure to act, because industry must comply with applicable pretreatment standards regardless of the high degree of pollutant removals achieved by the POTWs receiving and further treating their wastewater. An added environmental benefit was gained from the quickened pace of the construction of improved or new POTWs made possible from the financial assistance industry provided in return for expected removal credits.

In *Chicago Association of Commerce & Industry*, the Seventh Circuit's frustration with EPA's inaction is plainly stated in Judge Cudahy's opinion. A complete cure for the adverse effects on the business community caused by EPA's inaction lies in the promulgation of the sludge regulations—an extensive, technical and legal "doctoring" for which the Seventh Circuit is ill-suited. Consequently, the plaintiff indirect dischargers were left with a sympathetic judicial opinion but no affirmative relief. The plantiffs received no protection either from the uncertainty caused by not knowing when EPA will promulgate sludge regulations or from the cost of redundant treatment. The court's decision indicates that where affirmative agency action is necessary to ensure the intended protection of business interests, the courts are a poor forum to achieve that end.

8. NRDC v. EPA, 790 F.2d 289 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987).

A question arising from the Seventh Circuit's decision is whether increased pressure to act could and should have been brought to bear on EPA by the court's exercise of its equitable powers to grant a stay from the enforcement of the pretreatment standards pending EPA's promulgation of the sludge regulations. A stay would be consistent with the congressional intent that redundant treatment is to be avoided. A stay would also have served to relieve the affected industries both from the risk of enforcement action and from the additional expense of redundant treatment.

The Seventh Circuit's inaction in this regard, however, is not necessarily indicative of an antibusiness posture. A specific request for such a stay was not before the court. Further, in the absence of any enforcement action against the affected indirect dischargers, it is arguable that the issue of whether a stay should be granted was not ripe for review.

A truer test of the Seventh Circuit's posture toward business interests may come if the court is presented with a civil action based on the pretreatment standards against indirect dischargers who would be in compliance under an effective removal credits program. In such a case, a cogent argument may be presented that EPA's failure to act has itself created the discharger's alleged violation of the Clean Water Act. How the Seventh Circuit resolves such a conflict would provide a much clearer answer concerning the extent to which the regulated sector will be left to bear the hardship caused by agency procrastination.

The Seventh Circuit's decision in *Illinois State Chamber of Commerce v. United States EPA*[9] exemplifies the court's willingness and ability to cure procedural deficiencies that render agency action inadequate while avoiding the substantive issue. The court vacated EPA's decision to deny Illinois' proposal to redesignate Kane and DuPage Counties as attainment areas because EPA had failed to disclose and articulate the policy on which it based the denial. In so doing, the Seventh Circuit imposed a stricter standard of accountability upon EPA than courts who have given greater deference to agency actions.

The court's remand to EPA was a partial victory for both the state and the regulated sector. The decision affords greater protection to the right of any interested party, including both business and nonbusiness interests, to have a meaningful opportunity to comment on proposed agency action. It is also consistent with the requirement of section 4(b) of the Administrative Procedure Act,[10] that any final rulemaking contain

9. 775 F.2d 1141 (7th Cir. 1985).
10. 5 U.S.C. § 553(b) (1988).

"a concise statement of basis and purpose."[11] Where an agency fails to give notice of the particular guidelines, policies or methodology which it is proposing in a given rule, it deprives interested parties of any meaningful opportunity to comment.[12] Inconsistencies and inadequacies of the agency's proposed rulemaking often cannot be discerned unless the underlying rationale or methodology is disclosed.[13] Absent agency disclosure of its underlying rationale, the result can be a very one-sided administrative record concerning the issues which form the basis for an agency's final decision. The Seventh Circuit's decision rightfully works toward a more even "playing field" when agency decisions are challenged in the courts. It did not, however, decide who ultimately succeeds.

Professor Kellman expresses concern over the Seventh Circuit's remand to EPA because of the potentially arbitrary nature of divining a "rational" policy based on an irrational statutory scheme of dividing the United States into two hundred forty separate air quality control regions (AQCR).[14] Yet, the better course is not to avoid probing into the deficiencies that may exist in the statutory scheme by deferring to unexplained Agency action. Such an avoidance approach may sacrifice the public's due process right to meaningful notice and comment while indirectly upholding an underlying, arbitrary statutory provision. No reasonable interests are served by such a result.

A more direct and adverse effect on business interests resulted from the Seventh Circuit's decision not to address the substantive issue—whether EPA should have approved the redesignation request of the State of Illinois. Existing businesses and those interested in doing business in DuPage or Kane Counties were left in a continued state of uncertainty concerning future business planning and development.

Under EPA's interpretation of the Clean Air Act, a major, new or modified source cannot be constructed in a nonattainment area of a state after June 30, 1979, unless that state has in place an approved state implementation plan (SIP) with an approved permitting procedure for those major sources. Illinois' regulations adopting such procedures for nonattainment areas had not been acted upon by EPA as of the State's

11. *Id.*

12. PPG Indus., Inc. v. Costle, 659 F.2d 1239 (D.C. Cir. 1981).

13. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), 423 U.S. 1025 (1975), *reh'g denied*, 423 U.S. 1092 (1976) (remand to EPA to disclose those specific scientific findings and data on which it relied so that comments may be received).

14. Kellman, *The Seventh Circuit on Environmental Regulation of Business*, 65 CHI.-KENT L. REV. 757, 779-80 (1990).

appeal to the Seventh Circuit.[15] Thus, EPA's inaction regarding these pending Illinois regulations, coupled with the court's failure to approve or disapprove EPA's inadequate denial of redesignation had two adverse effects. It continued the prohibition against any major, new or modified source construction in Kane or DuPage Counties. It also continued the uncertainty as to what permitting procedures such construction would have to satisfy in order to receive regulatory approval.

From an environmental protection perspective, the court's remand served to maintain the nonattainment designation of Kane and DuPage Counties until EPA abided by the court's direction to determine and disclose a rational decision regarding the State's redesignation request. Hence, the environment remained "protected" and possibly "over-protected" depending upon whether Kane and DuPage Counties were ultimately deemed either attainment or nonattainment areas.

However, business received no answer to vital questions concerning the economic growth and environment in DuPage and Kane Counties.[16] The court did not set a deadline by which EPA was to accomplish its directive. In the meantime, the Clean Air Act's December 31, 1987 deadline for compliance with national primary air quality standards, such as ozone, was fast approaching.[17] With that deadline, and the continued nonattainment status, came the threatened ban on federal funds for highway construction and sewage treatment plants. The continued nonattainment status also precluded expansion or siting of new plants in Kane and DuPage Counties. These threatened sanctions and the concomitant likelihood of increased emission controls, which also threatened an increase in the cost of doing business in Kane and DuPage Counties, were acknowledged but unresolved by the court.[18] The Seventh Circuit's decision to remand without approval or disapproval of the State's redesignation request denied business any measure of certainty upon which to plan for the future.

The pursuit of a degree of certainty for business interests subject to environmental regulation fares only slightly better in the Seventh Circuit

15. 49 PCB Op. 111, R81-16, Docket B.

16. Ultimately, the Illinois State Chamber of Commerce (ISCC) resorted to a petition for mandamus to the Seventh Circuit when, by the fall of 1988, the EPA still had not complied with the court's remand. *See* In the Matter of Illinois State Chamber of Commerce, No. 88-3070 (7th Cir. Oct. 21, 1988). The ISCC and the EPA subsequently agreed upon a schedule by which the EPA would complete the agency action. On August 4, 1989, the EPA ultimately denied the State's redesignation request. 54 Fed. Reg. 32,078 (1989).

17. Section 172(a)(2), 42 U.S.C. § 7502(a)(2) (1982).

18. Illinois State Chamber of Commerce v. United States EPA, 775 F.2d at 1142 n.2 (7th Cir. 1985).

decisions under the National Environmental Policy Act (NEPA).[19] Affirmative relief was indirectly obtained by the commercial barge fleeting operation in *River Road Alliance v. United States Army Corps of Engineers*.[20] However, in *Van Abbema v. Fornell*,[21] another panel of the court resolved a similar issue in a different fashion. These different resolutions create uncertainty as to how business interests will fare under NEPA before the Seventh Circuit. Depending upon which panel of the Seventh Circuit is hearing the case, commercial ventures that trigger NEPA's application may or may not have to withstand strict judicial scrutiny. Most significant to business interests is the court's interpretation of the degree to which the regulatory agency has reviewed and evaluated available alternatives.

Judge Cudahy's commitment in *Van Abbema* to uphold the accountability of the environmental planning process does not alone create an unreasonable burden upon business interests. An environmentally sound commercial venture should withstand such scrutiny. But, whether or not the agency conducts a sufficient evaluation under NEPA of alternatives to the proposed action is not a matter within the control of private business interests. Given the Seventh Circuit's inconsistent views on what constitutes a "sufficient evaluation of alternatives," the business sector is again left with a significant degree of uncertainty as to what agency conduct, and hence, which commercial ventures, will pass NEPA review in the eyes of the Seventh Circuit.

Faced with the results of affirmative agency action, Judge Posner's decision in *River Road Alliance* found that action adequate. Judge Posner provided resolution to the immediate controversy at hand—the Corps of Engineer's issuance of a permit to conduct a temporary barge fleeting operation was affirmed. The barge fleeting operator could proceed to conduct its business as planned under a valid permit.

Yet, Professor Kellman strongly criticizes Judge Posner's means of resolving the operator's uncertainty as to how it would be allowed to conduct its barge fleeting business. Specifically, Professor Kellman views Judge Posner's resolution as a distortion of NEPA's purpose and intended protection of aesthetic values. Some words in limited defense of the added certainty afforded by Judge Posner's decision are offered here in rebuttal.

NEPA has been described by the Supreme Court as an "essentially

19. 42 U.S.C. §§ 4321-4370a (1982).
20. 764 F.2d 445 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986).
21. 807 F.2d 633 (7th Cir. 1986).

procedural" statute.[22] As the District of Columbia Circuit further explained in *Jones v. District of Columbia Redevelopment Land Agency*:[23] "[T]he harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates."[24] Judge Posner's scrutiny of whether the Corps of Engineers had properly taken environmental factors into account as required by NEPA, rather than scrutinizing the Corps' conclusion that no significant environmental harm would result, is consistent with NEPA's purpose.

As Judge Posner properly found, the Corps considered the aesthetic impact of the fleeting project, as it must under NEPA. His decision that the extent of the Corps' consideration was sufficient seems to be based more on a recognition of the essentially subjective nature of that analysis than on the promotion of unconstrained, efficient commercial development. Judge Posner acknowledges that aesthetic values must and should be evaluated. He also reasonably questions what added benefit or decisional assistance is to be gained from the additional time and expense of a more extensive study of an ultimately subjective judgment. That judgment is within the agency's discretion and few, if any, objective standards exist to guide a court's "hard look" review. Judge Posner's reluctance to apply the "hard look" doctrine to aesthetic environmental factors, because of the analytical difficulties they present, is supported by similar judicial decisions under NEPA.[25]

Environmental planning need not always be the time-consuming process Professor Kellman advocates. The NEPA regulations state that: "[u]ltimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."[26]

How is anyone better off expending the cost and time of preparing an environmental impact statement that is not likely to provide a better record or better-reasoned decision? Taking a cue from the Clean Water Act, "study for study's sake" is not NEPA's intent.

22. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978).

23. 499 F.2d 502 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975).

24. *Id.* at 512.

25. *See* Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973); *accord*, City of New Haven v. Chandler, 446 F. Supp. 925 (D. Conn. 1978); Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va. 1973), *aff'd per curiam*, 484 F.2d 453 (4th Cir. 1973).

26. 40 C.F.R. § 1500.1 (c) (1989).

CONCLUSION

As Professor Kellman aptly concludes, the decisions discussed herein do not reveal the Seventh Circuit as a pro- or anti-environment court. The lack of any discernible position on environmental policy by the Seventh Circuit results in perhaps its most significant impact on business interests. Particularly in cases where the regulatory agency has failed to act or taken inadequate action, the court's tendency toward avoidance of substantive decisions makes the Seventh Circuit an unattractive forum for business. Indeed, in such cases, the more likely result is that the business sector will know no more about resolving the environmental law controversy at hand after it has been to the Seventh Circuit than before it demanded its "day in court."