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PACE ENVIRONMENTAL LAW REVIEW

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# ARTICLE

# Filling the Gap: The Retroactive Effect of Vacating Agency Regulations

DANIEL H. CONRAD*

## I. INTRODUCTION

When a court vacates an agency regulation, there is a serious question as to whether or not the vacation should apply retroactively. The practical effects of retroactive vacation are far ranging; however, the true legal implications of courts striking down agency regulations as unlawful has not been thoroughly vetted.[1] There is significant case law and publication regarding the promulgation of regulations that apply retroactively, the issue at hand, however, is not if it is appropriate for an agency to create a regulation that affects the regulated community retroactively, but rather when an agency creates an unlawful regulation prospectively, what the retroactive effect of that regulation's subsequent vacation by the courts should be. The issue can be viewed as a fundamental question of the rule of law. If a regulation is current law, how can a court decision then be applied retroactively to those who were following the law as it

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1. *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 293-94 (2003).

stood? However, recent history and actions indicate retroactive application of these judicial decisions may in fact be sound policy.

In the light of rampant midnight regulations[2] and policy shifts caused by rapidly changing governing powers, would it be logical to allow inherently illegal regulations to have the rule of law during the period between their inception and their vacation by the courts? Such a policy may only encourage the promulgation of invalid regulations to benefit industry and other interested parties as an administration prepares to leave office. In addition, lack of a retroactivity doctrine can cause a race to establish facts on the ground in order to ensure the invalid regulations apply.[3] This means that those benefitting from potentially illegal regulations can race to establish their reliance on the regulations by laying facts on the ground prior to the regulation being vacated.[4] Applying a court's decision to vacate the regulations retroactively has the power to make such an action futile because the reliance on the previous regulation would be irrelevant.

Recent developments regarding the regulation of mercury provides an excellent example of the serious nature of the question of retroactivity. While climate change dominates the environmental landscape, an issue like mercury emissions, with

2. *See* John M. Broder, *A Legacy Bush Can Control*, N.Y. TIMES (Sept. 9, 2007), *available at* http://query.nytimes.com/gst/fullpage.html?res=9801EED6163DF93AA3575AC0A9619C8B63&pagewanted=all ("[every] president comes into office complaining about the 11th-hour judicial appointments and midnight regulations left on the White House doorstep by his predecessor. And every president turns around and does the same to his successor.").

3. *See generally* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 157-160 (1978). *See also* Reply Brief in Support of Duke Energy Carolinas LLC's Motion to Dismiss at 14-25, S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. 108CV318, 2008 WL 7612965 (W.D.N.C. Sept. 12, 2008).

4. Retroactivity does not fully solve this issue as several cases exemplify. Once the "egg is scrambled," so to speak, there may be no appropriate remedy. *See* Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 97-98 (D.C. Cir. 2002) ("Normally when an agency so clearly violates the APA we would vacate its action—in this case its "non-rule rule"—and simply remand for the agency to start again. Unfortunately, because we denied preliminary relief in this case, the 2001 program was launched and crops were plowed under. The egg has been scrambled and there is no apparent way to restore the status quo ante. Appellants suggested that if we were to vacate, the Federal Court of Claims would have the responsibility of allocating damages.").

serious health and environmental justice attributes, can fly under the radar.[5] However, mercury poses serious health risks, and the lengthy history of attempts to regulate mercury represents the ongoing battle between industry and environmental organizations on how to properly regulate the toxic substance.[6] In early 2008, when the D.C. Circuit vacated the rule delisting mercury and other Hazardous Air Pollutants (HAPs) from Section 112 of the Clean Air Act (CAA),[7] and with it vacated the Bush Administration's replacement Clean Air Mercury Rule (CAMR) in *New Jersey v. EPA*,[8] it left a gap of administrative law to be interpreted by state governments.

The court's vacatur of CAMR returned the mercury and other HAPs regulations applied to Electric Utility Steam Generating Units (EGUs) (including coal-fired power plants) to the status quo before CAMR was promulgated. Since EGUs were reaffirmed to be listed under section 112(g), for a new EGU to be permitted an applicant is again required to analyze, select, and install Maximum Achievable Control Technology (MACT) to any plant design; this was the case prior to CAMR.[9] This much is clear however, the court failed to address a key point in its holding. What was to happen to the thirty-two power plants in thirteen different states that were permitted, but had yet to complete construction, while CAMR was presented as valid law?[10] From a

5. *See* U.S. GEOLOGICAL SURVEY, MERCURY IN STREAM ECOSYSTEMS (2011), *available at* http://water.usgs.gov/nawqa/mercury/ (a recent study by the U.S. Geological Survey found widespread mercury contamination in the nation's streams and waterways and concluded that mercury is the second leading cause of stream impairment throughout the nation).

6. *See Mercury and Air Toxics Standards (MATS) for Power Plants, History*, U.S. EPA, http://www.epa.gov/airquality/powerplanttoxics/history.html (last updated July 28, 2011).

7. 42 U.S.C. § 7412 (2006).

8. New Jersey v. EPA, 517 F.3d 574, 579 (D.C. Cir. 2008).

9. *See* Clean Air Act, 42 U.S.C. § 7412(g)(2)(B).

10. Press Release, Natural Res. Def. Council, 32 Coal-Fired Power Plants in 13 States Now Up in the Air After Major Court Ruling on Mercury (Feb. 28, 2008) [hereinafter NRDC], *available at* http://www.nrdc.org/media/2008/080228.asp ("[t]he states identified with the most coal-fired power plants now up in the air are: Michigan (four), Wyoming (four), Illinois (three), Nevada (three), Ohio (three), Pennsylvania (three), Texas (three), Iowa (two), Kentucky (two), Louisiana (two), Georgia (one), New Mexico (one) and North Carolina (one). The ruling will impact various aspects of three dozen or more coal-fired power plants, including some now already under construction. Major coal-fired power

legal standpoint, were those permits now invalid? Is a MACT analysis for mercury and other HAPs now required for each EGU permitted while CAMR was thought to be valid law? There is a split among various state departments of environment and the entities responsible for permitting EGUs concerning these questions. There is even a split within states in some circumstances; other states simply do not know what they are now required to do for those plants.[11]

A perfect example of the severity of this issue is the Cliffside power plant, currently under construction in western North Carolina. The proposed construction of a new 825 megawatt (MW) facility at Duke Energy's Cliffside site has ignited controversy on both a local and national level. Locally, citizens object to the construction of another coal plant that could emit dangerous toxins and threaten public health.[12] On the national level, the issues encompass not only public health, but climate change and energy policy as a whole. The construction of new coal plants as opposed to investing in renewable energy sources is seen by many as a slap in the face to curbing greenhouse gas (GHG) emissions and pushing towards a clean energy economy.

The Cliffside plant received its air permits in 2007 while CAMR was still considered good law, but after the lawsuit

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plants impacted by the ruling include: LS Power White Pine (1500 MW - permit pending in Nevada); Sierra Ely (1500 MW - permit pending in Nevada); Toquop (850 MW - permit pending in Nevada) Desert Rock (Sithe Global's 1500 MW in New Mexico); Longleaf (LS Power's 1200 MW Plant in Georgia); Cliffside (Duke Energy's 800 MW Plant in North Carolina); Alliant Marshalltown (600 MW – permit pending in Iowa); LS Power Waterloo (750 MW – permit pending in Iowa); AMP (1000 MW – permit challenged in Ohio); LS Power/Dynegy (750 MW in Michigan).").

11. *See* Letter from Keith Overcash, Dir., Div. of Air Quality, N.C. Dept. of Env. & Nat. Res., to Rich M. Roper, Manager, Cliffside Steam Station Duke Energy Carolinas LLC (June 2, 2008), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Letter_Regarding_Cliffside_MACTs.pdf ("There is an ongoing national debate over the impact of the decision. In particular, opinions differ about whether the ruling affects a previously issued permit under which construction has begun but is not completed."); *See also* NRDC, *supra* note 10.

12. *See generally Stop Cliffside Construction: New Legal Challenge by NC Warn*, N.C. WASTE AWARENESS & REDUCTION NETWORK [WARN] (May 5, 2009), http://www.ncwarn.org/2009/05/stop-cliffside-construction-nc-warn-tells-utilities-commision-news-release/; *See also Citizens Gather for Biggest NC Climate Action in 2 Decades!*, SOUTHERN ENERGY NETWORK BLOG (Apr. 19, 2009), http://southeastenergy.wordpress.com/2009/04/19/citizens-gather-for-biggest-nc-climate-action-in-2-decades/.

challenging it had been filed. After seeing the oral arguments in *New Jersey v. EPA*, Duke Energy raced to begin construction of the plant (getting their facts on the ground in the event of a challenge). That way, if the regulations were vacated, they could claim they had already begun construction. Just nine days after ground was broken at the Cliffside site, the holding in *New Jersey v. EPA* was delivered, vacating CAMR. Yet, Duke Energy claims that because they had commenced construction prior to the ruling, they can apply the mercury standard in CAMR (a standard ruled illegal because it did not adequately protect public health), as well as not conduct the MACT analysis required after the CAMR vacation.[13] The Supreme Court has rejected this "facts on the ground" rationale in regard to applying recently promulgated statutes to already commenced projects of significant investment, specifically with the Endangered Species Act.[14] However, it remains to be seen how this argument applies to the vacatur of agency regulations.

A federal judge in the Western District of North Carolina recently ruled against Duke Energy, ordering that Duke Energy must conduct a MACT analysis for mercury and other HAPs at the Cliffside site.[15] Duke Energy has since appealed this ruling and, in addition, successfully sought to reclassify the Cliffside unit as a minor source. This is another action that would preclude them from conducting the proper mercury emissions analysis

13. Reply Brief in Support of Duke Energy Carolinas LLC's Motion to Dismiss, *supra* note 3, at 3-14

14. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 168-170 (1978). In the Tellico Dam case, Tennessee Valley Authority argued that because the provisions of the Endangered Species Act (ESA) provided that they protect the species at all costs, and that the listing of the snail darter as an endangered species occurred after significant construction had been completed on the Dam and the alternative to completion would result in significant losses, that the injunction on construction and application of the statute to them was unjust and should not be allowed. The Supreme Court rejected this argument. The Court acknowledged that abandoning the dam "will produce results requiring the sacrifice of the anticipated benefits of the project and of many million dollars in public funds." However, the Court affirmed the appellate court decision that "current project status cannot be translated into a workable standard of judicial review. Whether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life."

15. S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. Civ. 108CV318, 2008 U.S. Dist. LEXIS 97485 (W.D. N.C. Dec. 2, 2008).

required for major sources; it rendered the appeal moot, save an issue of attorney's fees.[16]

The Cliffside case touches on many issues: public health, the environment, global warming, hazardous air pollutants, industry's power in politics, fairness, and rule of law. All of these issues hinge on the retroactive effect of the vacatur of agency actions. To dissect the true effect of vacatur on administrative regulations, and the time period when they were believed to be valid, this article will examine several aspects of both environmental regulations and administrative law. First, the article will examine the governing case law regarding vacatur. This analysis will include case law defining vacatur and retroactivity, as well as retroactive application of decisions. Since this article is focused on the retroactive nature of a judicial vacatur, it will not explore the more traditional case law surrounding promulgating regulations that apply retroactively and the different types of retroactivity associated with that practice.[17] It will also look at options other than vacatur as a remedy available to the court and how these may shed light on the implications of vacating a regulation. Second, to show the practical effect of this analysis, this article will look specifically at the reasoning in the *New Jersey v. EPA* decision that vacated CAMR. This will include an examination of the reasons behind mercury and other HAPs regulations, which shows the importance of the issue and a real life application of the retroactivity doctrine. This article will examine a recent federal decision, the Cliffside power plant case discussed earlier, which covers this exact issue as the petitioners argued that Duke Energy was in direct violation of the CAA by continuing construction with a permit that relied on the since-vacated CAMR regulations.[18] It will establish whether or not it is consistent with the interpretation of the law presented in the earlier

16. *See* Press Release, N.C. Dept of Env. and Nat. Res., DENR Responds to Court Order for Expedited Decision on Cliffside HAP Emissions (Mar. 13, 2009), *available at* http://www.ncconservationnetwork.org/documents/cliffsideHAPSfinal.pdf; *see also* Bruce Henderson, *Federal Cliffside Lawsuit Dismissed*, CHARLOTTE OBSERVER (July 3, 2009), http://www.istockanalyst.com/article/viewiStockNews/articleid/3330813.

17. *See generally* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

18. *See* S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. 1:08CV318, 2008 U.S. Dist. LEXIS 97485 (W.D. N.C. Dec. 2, 2008).

sections. Finally, the article will explore the positive and negative policy implications of such a retroactive effect as applied to administrative regulations.

There is strong support for the assertion that the decision in *New Jersey v. EPA* should be applied retroactively. The definition of "vacate" in the D.C. Circuit's case law refers to returning to the status quo, voiding and starting anew as if the regulation never existed.[19] The Supreme Court has defined the retroactive nature of a decision as:

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[20]

The Supreme Court has also identified criteria that must be established to avoid the default retroactive application of a ruling, none of which appear to be met in the current fact patterns.[21] The D.C. Circuit has applied these rulings to administrative law decisions, similar to *N.J. v. EPA*.[22] Additionally, there is case law supporting the notion that when a vacated law was relied on, the result of this reliance could be challenged and overturned.[23]

The facts that the D.C. Circuit had several options for remedy, other than vacating CAMR, and that prospective-only decisions are uncommon in administrative cases,[24] add weight to the claim that the holding should apply retroactively. The rationale for several of these unexercised options is to avoid the

19. *See* Envtl. Def. v. Leavitt, 329 F. Supp. 2d 55, 64 (D.C. Cir. 2004); *see also* Action on Smoking & Health v. Civ. Aero. Bd., 713 F.2d 795, 797 (D.C. Cir. 1983).

20. Harper v. Va. Dep't of Transp., 509 U.S. 86, 97 (1993).

21. *See* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 759 (1995).

22. *See* Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n, 59 F.3d 1281, 1289 (D.C. Cir. 1995).

23. *See* Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991) (vacating the RCRA "mixture rule" that had been law for almost ten years); *See also* United States v. Goodner Bros. Aircraft, Inc., 966 F.2d 380, 385 (8th Cir. 1992) (overturning prior convictions that were based in part possibly on the "mixture rule" which was vacated post-conviction).

24. Levin, *supra* note 1, at 359.

negative consequences and disruption caused by vacating a law, and to provide a proper remedy when no retroactive remedy is available due to the existence of irreversible actions occurring in reliance on the vacated regulation.[25] Finally, from a policy standpoint, it would not make sense to allow agencies to make illegal regulations and have them stand as good law during the period prior to being vacated. The Cliffside example illuminates this point given the public health concerns governing the regulation of mercury and HAPs in general.

## II. DOES A VACATUR OF ADMINISTRATIVE AGENCY REGULATIONS APPLY RETROACTIVELY?

### A. Case Law Defining Vacatur

When the D.C. Circuit vacated the CAMR, it did not describe what the effect of vacating the rule would be. The D.C. Circuit handles almost all of the cases that seek to invalidate an agency regulation.[26] To determine the D.C. Circuit's intent when vacating a rule, we must first look to the definition of "vacate" as used by the D.C. Circuit, and then analyze the possible retroactive effects of vacating regulations.

The D.C. Circuit has defined "vacate" in several instances. In *Environmental Defense v. Leavitt,* the D.C. Circuit stated: "[w]hen a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect and the agency must initiate another rulemaking proceeding if it would seek to confront the problem anew."[27] The Court in *Leavitt* goes on to

25. *See* Allied Signal Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 153 (D.C. Cir. 1993); *see also* Sugar Cane Growers Coop. of Fla v. Veneman, 289 F.3d 89, 97-98 (D.C. Cir. 2002); *see also* Milk Train, Inc. v. Veneman, 310 F.3d 747, 756 (D.C. Cir. 2002) (choosing not to vacate because there is no way to restore the "status quo ante").

26. *See* HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 13 (2011), *available at* http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Handbook%202006%20Rev%202007/$FILE/handbook20091201rev20091106.pdf

27. Envtl. Def. v. Leavitt, 329 F. Supp. 2d 55, 64 (D.C. Cir. 2004) (internal citations and quotations omitted).

state that when the regulations were vacated, EPA was placed in a situation where it had failed to meet its duty to promulgate regulations by the required date, despite the fact that it had promulgated regulations prior to the statutorily granted deadline.[28] Application of this definition to the *New Jersey v. EPA* decision results in a restoration of the status quo for mercury and HAPs regulation, and thus requires a case-by-case MACT analysis before a permit can be issued for the construction of a power plant.

The D.C. Circuit definition of "vacate" does not explain what happens to permits and already-commenced constructions that rely upon the vacated rule. Further definitions, however, make it clear that vacating a regulation should make it seem as if it never had existed and restore the status quo ante.[29] Taken literally, returning to the status quo ante would not only invalidate the regulations but also actions that relied upon the illegal regulation, since these actions would not have occurred or been permissible had the regulation not existed. However, this line of reasoning is not directly discussed in these definitions. Before one can assert that vacating a regulation that was previously relied upon has the consequence that the reliance is invalid as well, one must look further than the case law defining "vacate" and delve into case law determining the retroactive effects of a holding.

### B. Supreme Court View of Retroactive Application of Court Decisions

A series of Supreme Court decisions have addressed exactly how court decisions apply retroactively, the implications caused by such retroactivity, and the possibility of retroactive court

28. *Id.* at 65.

29. *See* Action on Smoking & Health v. Civ. Aero. Bd., 713 F.2d 795, 797 (D.C. Cir. 1983) ("[t]o vacate, as the parties should well know, means to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside. Thus, by vacating or rescinding the recessions proposed by ER-1245, the judgment of this court had the effect of reinstating the rules previously in force."); *see also* Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 97-98 (D.C. Cir. 2002); *see also* Milk Train, Inc. v. Veneman, 310 F.3d 747, 756 (D.C. Cir. 2002) (choosing not to vacate because there is no way to restore the "status quo ante").

holdings causing detrimental repercussions. The case law has changed dramatically over the last forty years.

**a. Chevron Oil v. Hunson**

The Supreme Court addressed the retroactive potential of a decision in 1971 in *Chevron Oil Co. v Hunson.* In this case, a worker was injured while working on an offshore drill off the coast of Louisiana.[30] After waiting several years, he sued Chevron Oil using admiralty laws as the authority for the suit.[31] During the discovery phase of the lawsuit, the Supreme Court announced its holding in the case of *Rodrigue v. Aetna Casualty and Surety Co.*[32] The *Rodrigue* holding changed the interpretation of a particular act, making the admiralty laws no longer applicable in Hunson's case. Instead, Louisiana state laws would now govern such an action.[33] The Louisiana laws carried a one-year statute of limitations, which would have lapsed prior to the suit being filed by Hunson.[34]

To decide whether or not the ruling would apply retroactively, as they acknowledged most do, the Supreme Court used a three-factor test. For a holding not to be applied retroactively, the factors considered included whether: (1) the decision established a new principle of law by either overruling clear past precedent or deciding an issue of first impression not easily foreseen; (2) the prior history and purpose of the rule in question should be examined, while questioning if retroactive application of the decision will further retard its operation; and (3) the inequity caused by retroactive application must be examined.[35] In this case, the Supreme Court found that *Rodrigue* was a case of first impression, overturning a long line of D.C. Circuit's case law stating that the use of admiralty laws was proper. Additionally, the goal of the act under interpretation was to provide "comprehensive and familiar remedies" to individuals

30. Chevron Oil Co. v. Hunson, 404 U.S. 97, 98-100 (1971).
31. *Id.*
32. *Id.* at 99.
33. *Id.*
34. *Id.*
35. *Id.* at 106-107.

such as Hunson.[36] Retroactive application of the ruling in this case would defeat this purpose by denying Hunson a remedy. Finally, Hunson would have a great deal of inequity placed upon him if the ruling was applied retroactively in this case.[37]

This type of selective application of retroactivity of a holding on a case-by-case basis has since been disallowed in subsequent cases.[38] However, since the factors represent the most lenient standard by which the Supreme Court would allow a decision to not be retroactive unless explicitly stated, it is interesting to apply these factors to the facts of the permitted EGUs. *New Jersey v. EPA* did not overrule clear past precedent. It is possible it may have been viewed as a case of first impression, but, given the close proximity of the permits being granted (most less than two years from their issue date), as well as the possibility that the D.C. Circuit's holding may have been "clearly foreshadowed," this factor is negated.[39]

Second, the purpose of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[40] A prospective ruling that would allow a power plant to be built that did not meet the requisite regulation levels for mercury and other HAPs deemed necessary for public health and safety would not advance this purpose. Finally, permitted constructors would have an inequity argument that the retroactive application would hurt them, since their plans and construction relied on the old rule. However, when weighed with the public health inequity argument that improper levels of mercury and HAPs would be applied to EGUs, threatening public health if the decision is not applied retroactively, the EGU owner's inequity argument may not be as strong as originally thought.

In its entirety, it seems a strong possibility that when the three factor test for non-retroactivity set out in *Chevron Oil* is applied to EGUs permitted post-CAMR but prior to the ruling in *New Jersey. v. EPA*, the holding would be determined to have a

36. *Chevron Oil Co.,* 404 U.S. at 107-108.
37. *Id.* at 108.
38. *See infra* Part II-B-b and c.
39. *Chevron Oil Co.*, 404 U.S. at 106.
40. Clean Air Act, 42 U.S.C. § 7401(b)(1).

retroactive effect. While this analysis is useful because the *Chevron Oil* standard presents the most leniency in determining that a holding will not have a retroactive effect, recent case law makes the application of this test unnecessary to reach the same result.

**b. James B. Beam Distilling Co. v. Georgia**

The first major case limiting the application of the *Chevron Oil* factors is *James B. Beam Distilling Co. v. Georgia.*[41] In this case, a law taxing out-of-state liquor disproportionally from in-state liquor was found to violate the Commerce Clause, but the decision was only applied prospectively; the James B. Beam Distilling Co. sued to get back the disproportionate taxes they had paid in reliance on the invalidated law.[42] The lower state courts relied on the *Chevron Oil* factors and claimed that the new rule should only be applied prospectively[43]. The Supreme Court's reasoning divided holdings into three categories: (1) those that apply completely retroactively; (2) those that apply solely prospectively; and (3) those that are applied selectively prospective due to an increased burden or reliance, sometimes referred to by the court as a modified prospective ruling.[44] The Court acknowledged in its decision that applying a holding as fully retroactive was "overwhelmingly the norm."[45]

The state tax law in question in this case was deemed invalid due to the ruling in *Bacchus Imports, Ltd. v. Dias.*[46] In *Bacchus,* a Hawaiian tax, similar to the Georgia tax law in question, had been struck down and the ruling was applied retroactively.[47] This placed the ruling by the Georgia Supreme Court—that the *Beam* ruling should be applied prospectively due to the *Chevron Oil* factors—in the third modified prospective category since the rule relied upon had been applied retroactively elsewhere. The Supreme Court here found that selective prospectivity is not

41. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991).
42. *Id.* at 533-43.
43. *Id.* at 529.
44. *Id.* at 535-37.
45. *Id.* at 535.
46. *Id.* at 539.
47. *James B. Beam Distilling Co.*, 501 U.S. at 539.

allowable and the *Chevron Oil* factors should not have been applicable.[48]

Selective prospectivity was disallowed in criminal cases in *Griffith v. Kentucky*.[49] In its analysis, the Court, speaking of the *Bacchus* ruling, stated that "[i]n most decisions of this Court, retroactivity both as to choice of law and as to remedy goes without saying."[50] The Court held that:

> [o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law is not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases.[51]

#### c. Harper v. Virginia Department of Taxation

The decision in *Harper v. Virginia Department of Taxation* solidifies the opinion in *Beam* and narrows the possibility of prospective holdings even more.[52] *Harper* involved a Virginia tax that was deemed unconstitutional in *Davis v. Michigan Department of Treasury*.[53] The Virginia Supreme Court struck down the law in light of the *Davis* holding, but refused to issue refunds for taxes that were collected in reliance on the unconstitutional law because they claimed they could still apply *Chevron Oil* in spite of *Beam*.[54] The Virginia Supreme Court claimed that *Davis* had made no specific ruling as to whether it was to be applied retroactively or prospectively, and that *Beam*

48. *Id.* at 540.
49. Griffith v. United States, 479 U.S. 314 (1987).
50. *James B. Beam Distilling Co.,* 501 U.S. at 538.
51. *Id.* at 543-544.
52. Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993).
53. Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 817 (1989).
54. *Harper*, 509 U.S. at 91-92.

would only apply if *Davis* had been applied retroactively.[55] The Supreme Court rejected this argument and instead posited that:

> When this Court does not reserve the question of whether its holding should be applied to the parties before it, however, an opinion is properly understood to have followed the normal rule of retroactive application and must be read to hold that its rule should apply retroactively to the litigants then before the Court.[56]

The Court restated and solidified the new rule first addressed in *Beam*, holding that:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . In both civil and criminal cases, we can scarcely permit the substantive law [to] shift and spring according to the particular equities of [individual parties'] claims of actual reliance on an old rule and of harm from a retroactive application of the new rule.[57]

It is important to note that this case law applies to Supreme Court decisions and does not reference District Court decisions such as *New Jersey v. EPA* or agency actions. However, when speaking about the *Beam* decision, the Supreme Court unequivocally stated "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law."[58]

**d. Reynoldsville Casket Co. v. Hyde**

In *Reynoldsville Casket Co. v. Hyde*,[59] the Supreme Court addressed an Ohio decision claiming that although a tolling statute allowing unlimited time to sue for lawsuits against out-of-state defendants was found unconstitutional in *Bendix Autolite*

55. *Id.*
56. *Id.* at 97-98 (internal quotations and citations omitted).
57. *Id.* at 97 (internal quotations and citations omitted).
58. *Id.* at 96.
59. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995).

*Corp. v. Midwesco Enterprises, Inc.*,[60] it would still apply to tort claims "accrued before that decision."[61] The petitioner, Hyde, argued not that *Harper* should not apply, but that the decision to allow the tort claims to continue should be looked at "not through the lens of retroactivity but through that of remedy," and that states have a "degree of legal leeway in fashioning remedies for constitutional ills."[62] While finding this argument clever, the Supreme Court did not find it legitimate.[63] Hyde pointed to cases that she thought allowed state courts to avoid retroactivity by denying a particular remedy. For example, in some tax cases, states could choose to either give a refund, or impose a back tax on those who paid disproportionally less as a result of the struck down rule.[64] The Supreme Court clarified the issue, identifying four circumstances under which a new rule in case law may not determine the outcome of a pending case to which it is being applied retroactively:

> [A] court may find (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or (4) a principle of law, such as that of "finality" present in the *Teague* context, that limits the principle of retroactivity itself.[65]

Since none of these were claimed by *Hyde* or applied to the facts of *Hyde*, the Court held simply that the *Harper* ruling applies and a court cannot escape the retroactive result at the remedial stage.[66]

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60. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888 (1988).
61. *Hyde,* 514 U.S. at 750-751.
62. *Id.* at 752.
63. *See generally id.* at 752-754 (discussing Hyde's arguments).
64. *Id.* at 755.
65. *Id.* (the Teague doctrine applies to habeas corpus petitioners where the Court has found that a habeas petitioner cannot obtain a habeas corpus remedy where doing so requires the habeas court to apply retroactively a new rule of criminal law).
66. *Id.*

### C. The Circuit Court's interpretation of retroactivity and prior reliance on vacated law

The Supreme Court's opinion of the retroactive effect of its decisions appears very clear from the above case law. It would be sensible to apply this general default assumption of retroactivity to the *New Jersey v. EPA* decision, especially in light of the fact that the D.C. Circuit did not hold that the decision should be applied prospectively, and that selective case-by-case prospective application has been disallowed.[67] However, all of this case law applies to Supreme Court decisions and to constitutional issues, not to circuit court holdings and administrative regulations governed by statute. Since the D.C. Circuit oversaw the matter, its interpretation is especially relevant when attempting to determine its intent when vacating CAMR.

#### a. National Fuel Gas Supply Corp v. F.E.R.C.

The D.C. Circuit addressed both of the above mentioned concerns in *National Fuel Gas Supply Corp v. Federal Energy Regulatory Commission.*[68] At issue here was a Federal Energy Regulatory Commission (FERC) order that allowed local distribution companies (LDCs) to reduce their contractual commitments to suppliers.[69] The order was vacated in *American Gas Distributors v. FERC.*[70] National Fuel challenged the retroactive application of this ruling, claiming that they had relied on the order to reduce their contract and were unfairly prejudiced by the retroactive effect of the ruling. They could have taken other actions, such as converting parts of the contract to cover transportation costs, had they known the order was invalid.[71] FERC initially did a *Chevron Oil* three-factor analysis and switched its ruling several times on the retroactive effect.[72] It finally determined that the same remedy, "payment to it by

67. *See supra* Part II-B-b and c.

68. Nat'l Fuel Gas Supply Corp. v Fed. Energy Regulatory Comm'n, 59 F.3d 1281 (D.C. Cir. 1995).

69. *Id.* at 1282.

70. Associated Gas Distrib.v. Fed. Energy Regulatory Comm'n, 824 F.2d 981 (D.C. Cir. 1987).

71. *Nat'l Fuel Gas Supply Corp.*, 59 F.3d at 1286.

72. *See id.* at 1284-86.

National Fuel of the full demand charges associated with its CD reduction" would be required whether the case was viewed under the "*Beam* and *Harper* principles of retroactivity or at the initial choice-of-law level under the third prong of the *Chevron Oil* analysis."[73]

The D.C. Circuit came to the same result but by different reasoning in light of the recent holding in *Hyde*. It applied *Hyde* and summed up the retroactivity analysis surmising that after *Hyde*, only the "the most compelling circumstances" would allow a court to use reliance as a reason to depart from the "norm of retroactive application."[74] The court concluded that:

> [W]hatever the continuing validity of *Chevron Oil* after [*Harper*] and [*Hyde*], there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring that doctrine into play."). Hence, if *Harper* is applicable here, then we do not need to consider whether the Commission properly applied *Chevron Oil;* we need only consider whether any of the four circumstances identified in *Hyde* might apply here.[75]

The court furthered its decision by applying the holdings on retroactivity to agencies as well. In its reasoning, the court could find no rationale for why such decisions and their logic would apply to judicial decisions and not agencies.[76] In explaining this decision, the court discussed why an Article III court decision[77] should be given a retroactive effect:

> Because the decision of an Article III court, however, announces the law as though [it] were finding it discerning what the law is, rather than decreeing what it is . . . changed to, or what it will tomorrow be, all parties charged with applying that decision, whether agency or court, state or federal, must treat it as if it had always been the law. *The agency must give retroactive effect*

73. *Id.* at 1286.
74. *Id.* at 1288.
75. *Id.* (internal quotations and citations omitted).
76. *Id.* at 1289 (internal quotations and citations omitted).
77. An Article III court decision refers to a decision made by a judicial body established by Article III of the U. S. Constitution. *See* U.S. CONST. art. III.

> *to the ruling of a federal court because of the nature of that court.*[78]

The court then compared this reasoning to the reasoning barring an Article III court from applying an advisory decision or one that does not apply evenly and justly to all citizens but singles individuals out discriminately.[79] The court concluded that "[i]n sum, the decision of a federal court *must be given retroactive effect regardless whether it is being applied by a court or an agency*."[80]

Finally, the D.C. Circuit established that the reliance issue and factors of *Chevron Oil* were not to be considered, stating:

> National seeks an evidentiary hearing so that it can present evidence in support of its arguments about reliance. Even if National were able to show that it relied to its detriment upon the CD reduction provision, however, the Commission would not have the discretion to deny Tennessee the remedy of retroactive vacatur of National's CD reduction. Therefore, we need not consider whether the Commission erred by refusing to hold a hearing.[81]

#### b. Shell Oil Co. v. EPA and United States v. Goodner Bros. Aircraft, Inc.

*Shell Oil Co. v. EPA*[82] and *United States v. Goodner Bros. Aircraft, Inc.*[83] occurred prior to the *Harper* and *Hyde* decisions. However, they rely on *Beam,* and provide an example of the process when a rule that was relied upon is vacated and then action is taken following the vacation of the rule. In *Shell Oil*, the court vacated the "mixture rule" promulgated by EPA in its regulations under RCRA; the "mixture rule" had been considered valid law for almost ten years.[84] The D.C. Circuit stated "we

78. *Nat'l Fuel Gas Supply Corp.*, 59 F.3d at 1289 (emphasis added).
79. *Id.*
80. *Id.* (emphasis added).
81. *Id.* at 1290-91.
82. Shell Oil Co v. EPA, 950 F.2d 741 (D.C. Cir. 1991).
83. United States v. Goodner Bros. Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992).
84. *Shell Oil Co.*, 950 F.2d at 765.

vacate these rules and remand them to the agency."[85] In *New Jersey v. EPA*, the D.C. Circuit used similar language to vacate CAMR by holding that "the court must vacate CAMR's new source performance standards and remand them to EPA for reconsideration."[86] Neither ruling expresses an opinion on the retroactive effect of the vacation. However, following the *Shell* ruling, the defendants in *Goodner* appealed to overturn their conviction for RCRA violations, since the conviction had been based in part on the vacated "mixture rule."[87]

The Eighth Circuit directly addressed the question of whether the vacation of the rule would subject prior actions (that relied upon the rule) to reversal and invalidity due to the retroactivity of the *Shell* decision, despite the fact that the D.C. Circuit did not directly address this matter in its holding in *Shell*. The court stated in its analysis of this issue that:

> Under *James B. Beam Distilling,* full retroactive effect must be given to a new rule of civil law when the new rule is applied to the litigants in the case in which the rule was announced. The court in *Shell Oil* did not expressly reserve the question of retroactivity or of whether its holding should apply to the parties before it. On the contrary, it declined to reach the substantive arguments of the petitioner regarding the mixture rule because it had vacated the mixture rule. If the court had not applied the invalidation of the mixture rule to the parties before it, it would have been required to reach the substantive arguments. Under *James B. Beam Distilling* and consistent with the meaning of the word "vacate," we find that invalidation of the mixture rule applies retroactively.[88]

Similarly, the D.C. Circuit in *New Jersey v. EPA* did not reach the other arguments of the petitioners because they had vacated the rule and further analysis was moot.[89] The *Goodner* court concluded that "[b]ased upon the invalidation of the federal mixture rule, we reverse the district court and remand so that the verdicts on counts 1, 2, 3, and 4 may be set aside and a new trial

85. *Id.*
86. New Jersey v. EPA, 517 F.3d 574, 583-84 (D.C. Cir. 2008).
87. *Goodner Bros. Aircraft,* 966 F.2d at 384-85.
88. *Id.* at 385 (internal citations omitted).
89. *New Jersey*, 517 F.3d at 584.

held."[90] This analysis could be applied directly to the EGUs permitted post-CAMR and prior to CAMR being vacated.

Further arguments were not addressed in *Shell Oil* because the rule was vacated. The Eighth Circuit in *Goodner* found that the *Shell Oil* vacation by the D.C. Circuit had retroactive effects and overturned prior convictions that relied on the vacated regulation.[91] The D.C. Circuit also vacated CAMR, and again made no analysis of the further claims due to the vacation of the regulation, and again made no statement to the retroactivity of the decision. In addition, the Supreme Court has since strengthened the presumption of retroactivity in *Harper* and *Hyde*. Thus, it appears given these circumstances there is a very strong argument that the D.C. Circuit intended the effects of vacating CAMR to be retroactive regardless of any reliance upon it.

### D. Other Sources on Judicial Administrative Remedies:

As discussed, there is very little in the way of scholarly works regarding available judicial remedies and their effect when a court finds an agency regulation unlawful.[92] There is even less regarding the specific topic at hand, the retroactive nature of a vacatur of such regulations. While there are ample articles and case law regarding the legality of promulgating regulations with a retroactive effect, this topic is separate from the matter at hand, concerning whether a vacatur will jeopardize actions in the past that relied upon the now-nonexistent regulations. Despite this void, there are a few works that address aspects of the topic and help to shed light on the subject, including potential options a court has when reviewing agency actions. The works discussed below focus on the emergence of the court's option to remand without vacatur, a practice which is examined further in detail below.[93]

In *Vacation at Sea*, Ronald Levin explores the purpose, and the historical use of remand without vacatur, ultimately concluding that the practice is a beneficial remedy for the courts

90. *Goodner Bros. Aircraft*, 966 F.2d at 385.
91. *Id.*
92. Levin, *supra* note 1, at 293-94.
93. *See infra* Part II-E.

to implement.[94] Levin describes remand without vacatur as "[a] court's decision, after full consideration, to pronounce an agency action illegal, but to allow the action to continue in effect anyway."[95] Levin examines the legality of remand without vacatur within the confines of the Administrative Procedure Act (APA),[96] and also looks at what objections to the practice may be raised.[97] Most notably, Levin addresses the "rise of retroactivity in judicial decisions" as a justification for remand without vacatur, stating:

> [e]ven if the Supreme Court were to extend its 'retroactivity of judicial holdings' case law to its logical terminus by overruling Chevron Oil completely, appellate practice in regulatory contexts might not be affected very profoundly because prospective-only judicial decisions have not been very common in administrative cases anyway.[98]

Levin concludes that remand without vacatur "has enabled the courts to temper their relief in administrative cases so as to avoid disruptions, effect [sic] smooth transitions, and maintain the continuity of regulatory measures that protect the public."[99]

In *Remanding without Vacating Agency Action*, Brian Prestes follows the historical rise of remand without vacatur as an alternative to vacating regulations.[100] Prestes describes the rationale for this shift in standard as follows:

> Because agencies tackle complex problems and because agency action can be challenged in many ways and from many directions, proponents argue that agencies should be permitted to present new evidence responding to challengers' attacks when it appears that the agency could likely do so when the adverse consequences of vacation are likely to be significant.[101]

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94. *See generally* Levin, *supra* note 1.
95. *Id.* at 295.
96. *Id.* at 305-15.
97. *Id.* at 345.
98. *Id.* at 358-59.
99. *Id.* at 385-86.
100. *See* Brian S. Prestes, *Remanding without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 111-15 (2001).
101. *Id.* at 123.

Prestes also discusses the controversial legal authority behind remand without vacatur and the history of the APA, before concluding, opposite to Levin, that the practice is unlawful, stating: "the text of the APA, along with the legislative history, statutory purpose, canons of construction, and judicial precedent demonstrate the illegality of remanding without vacating."[102]

In *We've Only Just Begun*, Daniel Rodriguez again examines judicial administrative remedies from the viewpoint of the emergence of remand without vacatur.[103] Rodriguez points to the pros and cons of the new remedy created by the judiciary, pointing to less damage done by the ruling as a positive, and increased judicial activism as a negative.[104] Rodriguez discusses the effects of vacatur of agency regulations in his work, stating: "[v]acatur, on its own terms, has no necessary connection to the remedy of remand. Vacatur obliterates the agency decision."[105] While Rodriguez acknowledges the problematic effects of vacatur, he ultimately concludes that the development and use of remand without vacatur in its place is potentially as problematic.[106]

In *An Article I, Section 7 Perspective on Administrative Law Remedies*, Boris Bershteyn uses game theory to analyze the different remedies available when reviewing administrative agency actions.[107] Bershteyn argues in favor of vacating agency regulations and against remand without vacatur as a remedy; because the former would force Congress to legislate with increased specificity, and as shown through game theory models this is a desirable effect.[108] In his analysis Bershteyn discusses how a bar on the promulgation of retroactive rulemaking, unless explicitly authorized, has pushed the courts towards remand without vacatur; ultimately he concludes that the fears that pushed courts towards that remedy are unfounded, stating that

102. *Id.* at 151.

103. *See generally* Daniel B. Rodriguez, *We've Only Just Begun: The Impact of Remand Orders From Higher to Lower Courts on American Jurisprudence: Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599 (2004).

104. *Id.* at 635-37.

105. *Id.* at 611.

106. *Id.* at 635-37.

107. *See generally* Boris Bershteyn, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 YALE. L.J. 359 (2004).

108. *Id.* at 404.

"the main risk of vacating the rule is not an overly disruptive default policy, but an insufficiently responsive legislature."[109]

While much of the literature on administrative remedies surrounds remand without vacatur and does not directly address the issue at hand, much can be implicitly gained from these analyses. First, the authors all acknowledge the disruptive effect of vacating a regulation. Second, the practice, while disputed, is clearly established. Third, as discussed in the next section, although the option was available to them, the D.C. Circuit chose not remand without vacatur but to vacate CAMR entirely in *New Jersey v. EPA*.

### E. D.C. Circuit had other available options than to Vacate

The case law analysis above[110] is strengthened by the fact that the D.C. Circuit had other options to settle the case and avoid retroactivity, had it not intended a vacation of CAMR to have a retroactive effect. The court could have ruled that the decision applied prospectively, thus negating the default of retroactivity. The court also could have withheld the issuance of its mandate to allow problems presented by the vacatur to be sorted out.[111]

Additionally, the D.C. Circuit itself has developed a procedure known as "remand without vacatur"—discussed in much of the literature above[112] —to avoid the issues involved in vacating a regulation and its retroactive effect. The D.C. Circuit first applied this approach in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*.[113] It identified the criteria to apply this device instead of vacating, stating that it "depends on [1] the

109. *Id.* at 309.

110. *See supra* Part II-B and C.

111. *See* Indep. U.S Tanker Owners Comm. v. Dole, 809 F.2d 847 (D.C. Cir. 1987) ("[w]e vacate the rule because the Secretary's omissions are quite serious and raise considerable doubt about which of the proposed alternatives would best serve the objectives set out in the Merchant Marine Act. Yet we exercise our power to withhold issuance of our mandate until July 16, 1987, to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade.").

112. *See supra* Part II-D.

113. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 146 (D.C. Cir. 1993).

seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed."[114]

The fact that the D.C. Circuit decided not to employ these numerous other options at its disposal is further evidence that it intended the vacation of CAMR to have retroactive results. The D.C. Circuit case law shows that it is well aware of the issues involved and the disruptive effects when a rule is vacated. The reasoning of its decisions to remand without vacatur frequently indicates that the court did not solely vacate specifically in order to avoid these effects, an option they did not exercise in *New Jersey v. EPA*.[115]

Finally, in certain cases, the D.C. Circuit has used remand without vacatur instead of vacatur in instances where the retroactivity of a vacation results in remedies that cannot be satisfied due to past actions. The court stated that the "egg has been scrambled," implying that it cannot be unscrambled as a remedy; vacation is therefore inappropriate, because courts would

114. *Id.* at 150-151.

115. *See* A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995) ("[a]lthough, on this record, we are unable to conclude that the FDA's approval of Philips Roxane's application was not arbitrary and capricious, we are not required to vacate the approval . . . In this case, the FDA may well be able to explain why it reasonably determined that the Prescott Study demonstrated bioequivalency. In addition, vacating the rule approving the NADA would prove disruptive to Philips Roxane, which has relied on it in good faith for over thirteen years."); *see also* Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety and Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990) ("Relevant to the choice are the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed . . . The record before us does not appear to speak to the effects of an interim change—except in the sense that those effects include the safety effects of the order itself (and thus its substantive validity). As the record affords us no basis for concluding that the deficiencies of the order will prove substantively fatal, we remand the case but do not vacate."); *see also* Md. Native Plant Soc'y v. U.S. Army Corps of Eng'rs, 332 F. Supp. 2d 845, 863 (D. Md. 2004) ("Moreover, vacatur at this juncture would have a serious economic impact on the developer. As attested by Hunters Brooke LLC's general partner, Mohammed Tobah, the partnership stands to lose hundreds of thousands of dollars, if not more, if the uncertainty of a vacatur is introduced, even though the Corps may eventually be able to articulate sustainable reasons for its decision.").

be forced to fashion remedies or damages due to the retroactive nature of vacating the regulation.[116]

These cases are of particular relevance because they show that not only does the D.C. Circuit think of the potential effect of vacating before deciding to do so, but it is also aware of the possibility that a remedy may not be available due to prior reliance, and in such circumstances has chosen to remand without vacatur rather than vacate the rule. The inference then would be that by vacating a regulation, the D.C. Circuit intended the vacatur to have retroactive effects and did not feel that the 'egg had been scrambled,' so to speak.

This retroactivity analysis can be applied to EGUs permitted under CAMR prior to *New Jersey v. EPA* as an example of the types of serious issues that the vacatur of agency regulations will affect. In cases where the EGU has finished construction or no change can be made to the projected mercury and HAP emissions without a significant overhaul, it is conceivable that the courts may find no such remedy available; the egg may be scrambled in this situation. However, given the time it takes to construct a typical EGU,[117] and the timing of the *New Jersey v. EPA* decision with respect to the promulgation of CAMR (a little more than two years passed between the two), it does not appear likely that many plants, if any, would be beyond this point of no return in

116. *See* Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 97-98 (D.C. Cir. 2002) ("Normally when an agency so clearly violates the APA we would vacate its action—in this case its "non-rule rule"—and simply remand for the agency to start again. Unfortunately, because we denied preliminary relief in this case, the 2001 program was launched and crops were plowed under. The egg has been scrambled and there is no apparent way to restore the status quo ante. Appellants suggested that if we were to vacate, the Federal Court of Claims would have the responsibility of allocating damages."); Milk Train, Inc. v. Veneman, 310 F.3d 747, 756 (D.C. Cir. 2002) ("As in *Sugar Cane Growers Coop*. where the Secretary had improperly disbursed large quantities of sugar to farmers across the country, who in turn had already plowed under their crops, the Secretary here has already disbursed the 1999 program moneys [sic] to numerous dairy producers throughout the country, and those moneys [sic] may not be recoverable three years later. Here, as there, the egg has been scrambled and there is no apparent way to restore the status quo ante.") (internal quotations omitted).

117. For example, according to Duke Energy, it began constructing the Cliffside Power Plant in January 2008, and Cliffside is not expected to be online until 2012. *See Cliffside Steam Station Project Overview*, DUKE ENERGY, http://www.duke-energy.com/about-us/cliffside-overview.asp (last visited Nov. 21, 2011).

their construction. To further understand the application of this analysis to the particulars of HAP emissions regulation, mercury in particular, and the implications of the vacatur of CAMR, it is important to first understand why mercury regulation is important and its history, then second, the ruling vacating CAMR in *New Jersey v. EPA*.

## III. MERCURY 101

The main type of mercury discussed in this article and emitted from EGUs is methylmercury. Methylmercury affects neurological development and presents several health risks, particularly in a fetus or young child.[118] Methylmercury poses a health hazard when ingested by pregnant women or by mothers with breastfeeding babies.[119] The EPA states, "[i]t is estimated that more than 300,000 newborns each year may have increased risk of learning disabilities associated with in utero exposure to methylmercury."[120] Mercury emitted from power plants is deposited in lakes and oceans where it transforms into methylmercury. It then bioaccumulates (moves itself up the food chain) into large fish. Ingestion of fish is the primary method of human contact with methylmercury.[121] The public health risks posed by mercury are well established and very serious.

Mercury regulation in the United States, despite its recent notoriety and established risks, is in its infancy. Mercury first gained major attention in the environmental community with the release of an EPA Mercury Study Report in 1997, a study required by the amendments to the CAA of 1990.[122] In December of 2000, the EPA listed EGUs under section 112 of the CAA. This listing required that HAPs, including mercury, emitted from these sources must be regulated with a MACT approach.[123] Five years later, the EPA adopted CAMR on March 15, 2005 "to permanently cap and reduce mercury emissions from coal-fired

118. *See Mercury: Human Exposure*, U.S. EPA, http://www.epa.gov/mercury/exposure.htm#meth (last updated Oct. 1, 2010).
119. *See id.*
120. *Id.*
121. *Id.*
122. U.S. EPA, MERCURY STUDY REPORT TO CONGRESS 1-1 (1997).
123. Clean Air Act, 42 U.S.C. § 7412(g)(2)(B).

power plants for the first time ever."[124] CAMR sparked intense debate between industry, which praised the rule for its flexibility and lack of economic impact, and environmentalists, who believed that the rule was not nearly strict enough, catered to big business, and was politically motivated.[125]

CAMR was implemented under section 111 of the CAA.[126] This shifted mercury regulation to a cap and trade based regulatory scheme that alloted maximum amounts of mercury emissions to the states and tribes that regulate it.[127] The additional effect of adopting CAMR was that in order to implement it, EPA first delisted EGUs from section 112 of the CAA, thus no longer requiring a MACT analysis to be completed prior to construction of any new major source or modification to EGUs.[128] Under CAMR, the states and tribes were required to submit a report on their plan for distribution of the credits. Additionally, the credits could have been bought and sold between the plants, and excess credits could be saved for later use, so-called "banking."[129] The EPA claimed that when fully implemented, the proposed caps would have resulted in a decrease in mercury emissions by seventy percent.[130] In addition to the initial cap, another cap would have been imposed in 2018; "new" power plants (those beginning construction after January 30, 2004) would have been held to "stringent" performance standards as well as adherence to the caps.[131]

Much of the criticism of CAMR concerned the switch from using section 112 to using section 111 for HAPs regulation from EGUs. This change fueled the perception that the Bush Administration favored business interests over the environment

124. *Clean Air Mercury Rule*, U.S. EPA, http://www.epa.gov/CAMR/ (last updated Mar. 16, 2011).

125. Lauren Parry, *Clean Air Rules of 2004: Motivation, Impacts, and Concerns*, 25 J. LAND RESOURCES & ENVTL. L. 367, 390 (2005).

126. Clean Air Act, 42 U.S.C. § 7411.

127. Parry, *supra* note 125.

128. Clean Air Act, 42 U.S.C. § 7412.

129. N.C. DEP'T OF ENV'T AND NATural RES., DIV. OF AIR QUALITY, MERCURY EMISSIONS & MERCURY CONTROLS FOR COAL-FIRED ELECTRICAL UTIL. BOILERS II-13 (2005) [hereinafter NCDENR].

130. *Clean Air Mercury Rule: Basic Information*, U.S. EPA, http://www.epa.gov/camr/basic.html (last updated March 16, 2011).

131. *Id.*

when crafting the rule.[132] The regulations were generally well-received by business because of the flexibility afforded them in a cap and trade system regulated by the states.[133] While it is true that a cap and trade system might reduce mercury emissions nationally, environmentalists pointed to the fact that, unlike carbon and global warming for instance, mercury and other HAPs have very localized effects on the surrounding community.[134] Thus, a cap and trade system for regulating mercury would allow "hot spots" to develop where risks would be increased, and could also present several environmental justice issues.[135]

Another concern is that the EPA may not have duly considered the risk to outlier populations, such as several Native American populations, that consume much higher than average amounts of fish in their daily diets. The acceptable mercury emissions level established by EPA was based on an average person's consumption of fish. Thus, communities that rely heavily on fish in their diets may be more susceptible to the risks posed by mercury emissions that have made their way into native fish.[136]

An additional criticism of the 2005 CAMR lies in the "race to the bottom" theory.[137] Since the regulations in the cap and trade system, unlike applying MACT, are on a state-by-state basis, not all states are subject to them. States that have extra emissions credits or are not required to adhere to the regulations might be enticed to recruit business based on their less stringent requirements.[138]

Some states took action to refine EPA mercury emissions standards. For example, North Carolina went through the

132. Parry, *supra* note 125, at 385.

133. *Id.*

134. *See* Press Release, Dartmouth News, New Studies Link Mercury Pollution Hotspots to U.S. Coal-fired Power Plants and Other Sources (Jan. 9, 2007), *available at* http://www.dartmouth.edu/~news/releases/2007/01/09.html. A map of mercury hot spots in North America is available at http://www.cec.org/Storage/49/4186_hotspots_en.pdf.

135. *Id.*

136. Catherine A. O'Neil, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3, 9 (2000).

137. Parry, *supra* note 125, at 392.

138. *Id.* at 391.

process of developing its own supplementary mercury regulations to be used in addition to the CAMR. The Department of Air Quality in North Carolina completed its *Mercury Emissions and Mercury Controls for Coal-fired Electrical Utility Boilers* report on September 1, 2005. The stated goals of the report were to:

> (1) update issues related to monitoring and controlling mercury emissions from coal-fired generating units, (2) update control technology information, (3) provide estimates of cost to benefits of alternative strategies to reduce emissions of mercury, and (4) provide a recommendation to reduce the emission of mercury from coal-fired generating units.[139]

The North Carolina report, which states that the North Carolina regulations are under formation by the Environmental Management Commission, provides an in-depth comparison between the cap and trade system favored by the EPA and the Bush Administration, and the MACT method favored by environmentalists as well as several states. The report points out that both the flexibility and extra time provided by cap and trade to upgrade, and its trade policy, are benefits; however, the ability to "bank" credits may result in higher outputs in later years.[140] MACT, in the eyes of North Carolina, would provide more stringent regulations but might hinder smaller businesses that cannot afford the upgrades and would thus be hurt when no emissions trading is allowed.[141] The conclusion of the report is that North Carolina should pursue a policy that "is at least as stringent as the CAMR and that also meets any additional requirements that the Environmental Management Commission deems appropriate for North Carolina."[142]

Not all states and organizations responded as open-mindedly to CAMR as North Carolina. According to the North Carolina report:

> [s]election of Section 111 instead of Section 112 has resulted in ten states filing a lawsuit challenging EPA's decision to revise its December 2000 regulatory finding that removed coal- and oil-

139. NCDENR, *supra* note 129, at iv.
140. *Id.* at II-14.
141. *Id.* at II-14.
142. *Id.* at V-1.

> fired electric utility steam generating units from the Section 112(c) source category list. EPA's revision rescinds the findings made in 2000 for utility air toxics that supported a requirement that utilities should install MACT, defined under the Clean Air Act. Four environmental groups have petitioned EPA to stay the revised regulatory determination pending the outcome of the states' legal challenge.[143]

While no stays were granted, the state lawsuits were heard and consolidated in *New Jersey v. EPA*. This is discussed in detail in the next section of this article.

## IV. THE HOLDING OF *NEW JERSEY V. EPA*

*New Jersey v. EPA* presents a holding that fits the analysis of the retroactive effect of vacating agency regulations perfectly. If the court were to vacate CAMR when they examined it, several potential issues of retroactivity would need to be resolved, especially if the holding were to be applied to coal-burning power plants permitted during the time period prior to the holding of the case. The *New Jersey v. EPA* decision can be viewed in two parts. First, the court needed to decide if the delisting of EGUs from section 112 of the CAA was legal. Second, if the court found that the delisting was illegal, then it would need to determine what effect, if any, this holding would have on the recent addition of EGU regulation under section 111, i.e. the cap and trade program implemented by CAMR.[144]

To answer the first question, the court examined the arguments of both the petitioners and the defendants. The petitioners claimed that in order to delist EGUs from Section 112, the EPA was required to follow the procedures set forth in Section 112(c)(9) of the CAA.[145] Section 112(c)(9)(B)(ii) states that to delist a source category from section 112, the EPA must determine that "that emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any

143. *Id.* at II-12.
144. New Jersey v. EPA, 517 F.3d 574, 577-78 (D.C. Cir. 2008).
145. *Id.* at 577.

source[.]"[146] The petitioners claimed that EPA had failed to follow this procedure and therefore the delisting was illegal; as the court noted several times, the EPA made no claim they had followed this procedure.[147]

Instead, the EPA made several arguments as to why it was not required to follow the procedures set out in section 112(c)(9) when delisting EGUs from regulation under section 112. EPA attempted to reach the *Chevron* step two level of deference for its interpretation of the statute by arguing that if under section 112(n)(1)[148] it found that EGUs should not be regulated under section 112, then section 112(c)(9) becomes ambiguous.[149] According to EPA, if section 112(c)(9) was ambiguous, EPA should be granted the *Chevron* level of heightened deference in its interpretation of the statute, [150] meaning that the interpretation not need be what the court interprets the statute to mean, instead it must only be a reasonable interpretation. The court dismissed this argument, noting that:

> [S]ection 112(n)(1) governs how the Administrator decides whether to list EGUs; it says nothing about delisting EGUs, and the plain text of section 112(c)(9) specifies that it applies to the delisting of "any source." In the context of the CAA, "the word 'any' has an expansive meaning." Moreover, where Congress wished to exempt EGUs from specific requirements of section 112, it said so explicitly. For example, section 112(c)(6) expressly exempts EGUs from the strict deadlines imposed on other sources of certain pollutants. Furthermore, EPA concedes that listing EGUs under section 112(c) triggered application of some subparts of section 112, but provides no persuasive rationale for why the comprehensive delisting process of section 112(c)(9) does not also apply.[151]

The court found that EPA was not entitled to the high degree of deference granted to an agency at step two of the *Chevron*

146. Clean Air Act, 42 U.S.C. § 7412(c)(9)(B)(ii).
147. *New Jersey,* 517 F.3d at 581-582.
148. Clean Air Act, 42 U.S.C. § 7412(n)(1).
149. *New Jersey,* 517 F.3d at 582; *see also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865 (1984).
150. *New Jersey,* 517 F.3d at 582.
151. *Id.; see also Chevron U.S.A.*, 467 U.S. at 842-43.

analysis. Rather, the court held that the question posed was specifically addressed by the statute, thus barring EPA from advancing beyond step one in a *Chevron* analysis.[152]

The EPA's second argument for not following the section 112(c)(9) procedure was that an agency has an "inherent authority to reverse an earlier administrative determination or ruling where an agency has a principled basis for doing so."[153] The court quickly disregarded this claim by noting that while such an authority is generally given to an agency to reverse an earlier agency decision, Congress has the power to limit this authority, and EPA cannot nullify this Congressional power.[154] The court stated:

> EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 485 (2001) . . . Indeed, EPA's position would nullify section 112(c)(9) altogether, not just with regard to EGUs, for EPA is unable to explain how, if it were allowed to remove EGUs from the section 112 list without regard to section 112(c)(9), it would not also have the authority to remove any other source by ignoring the statutory delisting process.[155]

Finally, the EPA argued that it has previously delisted other sources from regulation under section 112 without following the procedure set forth in section 112(c)(9); therefore, it should be able to do so in the case at hand for EGUs.[156] The court quickly dismissed this argument because "previous statutory violations cannot excuse the one now before the court."[157] Thus, since the procedures in section 112(c)(9) were not followed and EPA presented no persuasive argument as to why they need not be followed, the court vacated the delisting of EGUs from section 112 of the CAA.[158]

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152. *New Jersey,* 517 F.3d at 583; *see also Chevron U.S.A.,* 467 U.S. at 842-43.
153. *New Jersey,* 517 F.3d at 582 (*citing* Respondent's Brief at 22) (internal citations omitted).
154. *Id.* at 582.
155. *Id.*
156. *Id.*
157. *Id.* at 583.
158. *Id.*

Having held that the delisting was illegal, the court needed to analyze what effect, if any, this holding would have on the recent CAMR EGU regulations promulgated under section 111 of the CAA. The court, in its analysis of this question, relied on the EPA's own interpretation of the CAA.[159] This interpretation stated that a source regulated under section 112 could not concurrently be regulated under section 111.[160] Relying on this principle, the court vacated CAMR since it was promulgated on the assumption that there would be no section 112 regulation of EGUs. The court stated:

> [g]iven that these vital assumptions were incorrect, the court must vacate CAMR's new source performance standards and remand them to EPA for reconsideration, for severance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own.[161]

The court leaves no doubt that it has vacated both the delisting of EGUs from section 112 and the subsequent CAMR regulations under section 111. However, it does not address the implications of this vacatur, especially with regard to EGUs permitted during the time window in which section 112 was not applicable, and CAMR was considered governing law. To examine the effects of the vacatur and its potential retroactive application as discussed in Section II, it is helpful to examine another case stemming from this decision which seeks to apply its ruling to a coal-burning power plant retroactively.

## V. THE CLIFFSIDE POWER PLANT

### A. Background

Duke Energy was permitted by the North Carolina Department of Environment and Natural Resources (NCDENR) on January 29, 2008 to construct the Cliffside Plant, an 800 megawatt coal-burning power plant, outside of Rutherfordton,

159. *New Jersey,* 517 F.3d at 583.
160. *Id.*
161. *Id.* at 583-84 (internal citations and quotations omitted).

N.C.[162] Duke states that it began construction on the Cliffside plant on January 30, 2008,[163] nine days before the February 8, 2008, decision in *New Jersey v. EPA*. Thus, according to Duke, section 112 of the CAA requiring it to conduct a MACT analysis for mercury and other HAPs does not apply to its construction of the Cliffside plant.[164] A lawsuit filed in the federal court's Western District of North Carolina claimed not that Duke's permit was invalid, but that by not completing a MACT analysis and continuing construction, Duke was in direct violation of section 112 of the CAA.[165]

The Southern Alliance for Clean Energy (SACE), Natural Resources Defense Council (NRDC), and Sierra Club first gave notice of their suit to Duke Energy in a letter dated May 6, 2008.[166] The letter stated that, by continuing ongoing construction without having conducted a MACT analysis, Duke was in violation of section 112(g)(2)(B). Section 112(g)(2)(B) prohibits "contruct[ing]. . . any major source of [HAPs] unless the Administrator (or the State) determines that [MACT] emission limitation under this section for new sources will be met."[167] Where no specific limitations have been established, as is the case for mercury, MACT "shall be made on a case by case basis."[168] Section 304 of the CAA authorizes the authority for such a citizen suit against Duke.[169]

162. *See Duke Cliffside Permits*, N.C. DEP'T ENV'T & NATURAL RES. DIV. OF AIR QUALITY (July 2, 2009, 11:03 AM), http://daq.state.nc.us/permits/psd/cliffside.shtml.

163. Letter from John Suttles, S. Envtl. Law Ctr., to Rick Roper, Manager, Cliffside Steam Station, Duke Energy (May 6, 2008) (on file with author).

164. *See* Reply Brief in Support of Duke Energy Carolinas LLC's Motion to Dismiss, S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. 108CV318, 2008 WL 7612965 (W.D.N.C. Sept. 12, 2008). This argument is reminiscent of that made by Tennessee Valley Authority in *Tennessee Valley Authority v. Hill*. The Supreme Court invalidated the argument in that case; however, that case dealt with a statute of Congress applying not a judicial vacatur of an agency regulation. *See also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 157-160 (1978).

165. *See* S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. 1:08CV318, 2008 U.S. Dist. LEXIS 97485 (W.D. N.C. Dec. 2, 2008).

166. Letter from John Suttles, *supra* note 163.

167. Clean Air Act, 42 U.S.C. § 7412(g)(2)(B).

168. *Id.*

169. Clean Air Act, 42 U.S.C. § 7604(a).

NCDENR was obviously unsure of the implications of the holding in *New Jersey v. EPA* on the Cliffside Plant. In a letter to Duke, dated June 2, 2008, NCDENR acknowledged that any plant now applying for a permit would be subject to the section 112 requirements; however, "there is a debate whether a major source whose construction was permitted and begun prior to the D.C. Circuit's decision and mandate, but whose construction will be completed for the most part after the date of mandate, is subject to the requirements of § 112(g)."[170] The letter then encourages Duke to engage in a "public process" to determine the "maximum degree of reduction in emissions of HAPs" achievable.[171] In response, Duke agreed to undergo a voluntary "MACT-like" process, but maintained that section 112(g) did not apply to them.[172] While on its face this may seem as if the statute is being followed, the petitioners claimed that a "MACT-like" voluntary process is no substitute for the statutory requirements of an actual MACT assessment, which involves public hearings and studies, and that section 112(g) did indeed apply to the Cliffside Plant. Thus, two main questions were in need of answer in the suit: does section 112(g) apply to the Cliffside plant; and if it does, what is the proper remedy?

170. Letter from Keith Overcash, Dir., Div. of Air Quality, N.C. Dep't of Env't and Natural Res., to Rick Roper, Manager, Cliffside Steam Station, Duke Energy (Jun. 2, 2008), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Letter_Regarding_Cliffside_MACTs.pdf.

171. *Id.*

172. Letter from James L. Turner, President and Chief Operating Officer, U.S. Franchised Elec. & Gas, to Keith Overcash, Dir., Div. of Air Quality, N.C. Dept. of Env't & Natural Res. (July 3, 2008), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Cover_Letter.pdf. *See also* DUKE ENERGY, CASE-BY-CASE MACT ASSESSMENT FOR HAPS, UNIT NO. 6 CLIFFSIDE STEAM STATION PROJECT 3-4 (2008), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Case-by-Case_MACT_Assessment-Final_07-03-08.pdf (presenting the results of Duke's self- assessment of MACT for the Cliffside plane and asserting that MACT does not necessarily apply to the Cliffside plant); *see also* Reply Brief in Support of Plaintiff's Motion for Summary Judgment on Liability and Standing at 11-12, S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. Civ. 108CV318, 2008 U.S. Dist. Ct. Motions LEXIS 53951 (W.D. N.C. Sept. 8, 2008) (Discussing the differences between a "MACT-like" process conducted by Duke and a formal MACT analysis governed by section 112 of the CAA) [hereinafter Reply to Summary Judgment, *S. Alliance for Clean Energy*].

**B. Petitioners' Argument**

The petitioners' claims that Duke must apply MACT for mercury and other HAPs to the Cliffside plant can be broken down into a three-part analysis. First, despite the fact that section 112(g) is a preconstruction requirement, it still applies to the Cliffside plant post-construction commencement.[173] Second, by vacating CAMR, section 112 retroactively applies to the Cliffside plant.[174] Finally, because section 112 applies, Duke is required to conduct a formal MACT analysis; otherwise they are in violation of the CAA.[175] For the purposes of this article, the second argument is by far the most relevant.

The petitioners rely heavily upon the language used by the D.C. Circuit in *New Jersey v. EPA* to refute Duke's claim that the holding 'reinstated' EGUs to be listed under section 112, pointing to the language used that "EGUs remain listed under section 112."[176] Additionally, the petitioners address the case law discussed above. The petitioners assert that judicial decisions should apply retroactively in regards to vacatur of agency regulations; in particular, they point to the *National Fuel* case as an example where the default presumption of a ruling against an agency regulation would be retroactive application.[177]

**C. Duke's Argument**

Duke's argument is not that they have complied with section 112 of the CAA. Instead, Duke claims that the section should not apply to them at all in regards to the Cliffside plant.[178] Duke's argument that section 112 does not apply to the Cliffside plant can be broken into two primary parts. First, Duke claims that section 112 should not apply to the Cliffside plant because the

173. Reply to Summary Judgment, *S. Alliance for Clean Energy*, *supra* note 172, at 6-9.

174. *Id.* at 9-15.

175. *Id.* at 15-17.

176. *Id.* at 10; *see also* New Jersey v. EPA, 517 F.3d 574, 581 (D.C. Cir. 2008).

177. Reply to Summary Judgment, *S. Alliance for Clean Energy*, *supra* note 172, at 11-15.

178. Reply Brief in Support of Duke Energy Carolinas LLC's Motion to Dismiss at 3-14, S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. Civ. 108CV318, 2008 WL 7612965 (W.D.N.C. Sept. 12, 2008).

relevant regulations do not apply to ongoing construction, but only to the commencement of construction, which Duke claims to have commenced prior to *New Jersey v. EPA*.[179] Second, Duke claims that the courts cannot apply section 112(g) retroactively in this case.[180] This second argument is most relevant to this article.[181]

To argue that the court cannot apply section 112(g) and the ruling in New Jersey v. EPA retroactively, Duke makes a series of claims: (1) that to do so the court would be expanding the holding of New Jersey v. EPA; (2) that to do so would ignore the laws against retroactive imposition of liability; and (3) that case law asserts that an agency cannot make retroactive regulations without violating due process and by applying the holding of *New Jersey v. EPA*, the courts would be doing just that.[182]

To support this argument, Duke relies primarily on two cases, *Bowen v. Georgetown University Hospital* and *Landgraf v. USI Film Products*.[183] Duke claims that applying section 112(g) to the Cliffside plant "represents a retroactive application of statutory and regulatory provisions, not a judicial decision"[184] by relying on their assertion that *New Jersey v. EPA* reinstated EGUs to be listed under section 112(g) rather than affirmed that they remain listed, and *Bowen*, holding that an agency must make prospective regulations.[185]

Additionally, Duke discounts the petitioners' reading of *National Fuel*, stating that it "does not even represent a straight-

179. *Id.* at 3-5.

180. *Id.* at 5-14.

181. In addition, Duke claimed that the petitioners lacked proper standing to bring suit, and that the suit was a collateral attack on the state's permitting process. Since neither argument is relevant to the analysis in this article and neither was successful, these arguments are not discussed at length in the discussion of Duke's Motion to Dismiss. *See id.* at 14-25. *See also* S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. Civ. 108CV318, 2008 U.S. Dist. LEXIS 97485 (W.D. N.C. Dec. 2, 2008).

182. Reply Brief in Support of Duke Energy Carolinas LLC's Motion to Dismiss at 14-25, S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. Civ. 108CV318, 2008 WL 7612965 (W.D.N.C. Sept. 12, 2008) [hereinafter Reply to Motion to Dismiss, *S. Alliance for Clean Energy*].

183. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

184. Reply to Motion to Dismiss, *S. Alliance for Clean Energy*, *supra* note 182, at 10.

185. *Id.*

forward application of the judicial retroactivity doctrine, because the remedy . . . would have largely prospective effects."[186] Instead, Duke relies on *Landgraf* and states that the "restriction on retroactivity Due Process imposes constrains all branches of the government, not just the legislative and executive."[187] Duke surmises its argument that section 112(g) cannot be applied to the Cliffside plant retroactively, again relying on the case law decisions that agencies cannot make retroactive regulations, and that finding for the petitioners in this case would be analogous to the judiciary doing just that as a surrogate of the agency claiming that "[j]udicial retroactivity cannot create liability for following then existing law."[188]

### D. The Holding

On December 2, 2008, the Western District of North Carolina published the holding of *SACE v. Duke Energy*. The court granted the motion for summary judgment by the petitioners, and ordered that Duke complete the MACT analysis for mercury and other HAPs in sixty days or face a court-ordered injunction for ongoing construction of the Cliffside plant.[189] The court contends that "the main issue to be decided in this case . . . [is] whether or not the requirements of Section 112(g)(2)(B) apply to the ongoing construction of Unit 6."[190] To reach a decision, the court cited *National Fuel*, *Harper*, and *Beam* to assert that when the D.C. Circuit vacated CAMR the effect of that holding was "that EGUs, including Defendant, remain listed under § 112 and subject to its provision. This Court concludes that § 112(g)(2)(B) and 40 C.F.R. § 63.40(b) were in effect at the time Duke began its construction of Cliffside Unit 6 and the completion of the MACT process was required before construction began."[191] Clearly, at least in the

186. *Id.* at 13.

187. *Id.* at 12; *see also Landgraf*, 511 U.S. at 265.

188. *Id.* at 16.

189. S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. Civ. 108CV318, 2008 U.S. Dist. LEXIS 97485, at *23-24 (W.D. N.C. Dec. 2, 2008).

190. *Id.* at 5.

191. *Id.* at 9 (emphasis added). It should be noted that despite this ruling, Duke Energy has yet to begin the MACT analysis. Duke now claims that they never should have been subject to section 112(g) in the first place, and they now contend that the Cliffside plant is not a "major source" under the statute,

case of the Western District of North Carolina, the court has held that the decision in *New Jersey v. EPA* should apply retroactively, forcing EGUs permitted while CAMR was considered valid law to conduct the MACT analysis for mercury and other HAPs with the same force as if it had always been the law and CAMR had never existed.[192]

## VI. POLICY IMPLICATIONS OF RETROACTIVE OR NON-RETROACTIVE APPLICATION

One final note provides more evidence of the history of retroactive effects when vacating a rule. Prior to the Supreme Court's ruling in *Bowen v. Georgetown University Hospital*,[193] which outlawed agencies from making retroactive rulemakings unless expressly authorized by Congress to do so, agencies would make regulations that became effective during the period the vacated regulation had controlled. The intention was to negate the disruptive effect of the retroactive nature of vacatur. While

although Duke had previously identified the Cliffside plant as a "major source" for mercury and other HAPs. They now contend that they had used inaccurate data when estimating the emissions and that the Cliffside plant is a "minor source" and thus is not required to apply MACT. The NC DAQ has agreed with this conclusion and changed the Cliffside plant to minor source classification. In response to this ruling, the federal case has been put on hold in lieu of suits over state matters such as this classification. *See* Letter from James L. Turner, President and Chief Operating Officer, U.S. Franchised Elec. & Gas, to Keith Overcash, Dir., Div. of Air Quality, N.C. Dept. of Env't & Natural Res. (Dec. 4, 2008), *available at* http://daq.state.nc.us/permits/psd/docs/cliffside/Final_Letter_to_DAQ_12042008.pdf.

192. Since the holding of this case, both parties have filed appeals, with Duke questioning the holding and petitioners hoping for an injunction since North Carolina, at Duke's request, has since reclassified the Cliffside plant as a minor source of HAPs so MACT analysis would not be necessary. The reclassification of the Cliffside Plant as a minor source led to challenges of that decision and the permit issued in regards to it on the state level before the Office of Administrative Hearings in North Carolina. Thus the federal court applied the doctrine of abstention to no longer enforce its previous ruling since the state courts were now directly involved and the direct issue in the federal case about the MACT analysis was not. *See* S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. 108CV318, 2009 WL 1940048 (W.D.N.C. July 2, 2009). The court of appeals did find however, that the environmental plaintiffs had prevailed in the issue on some account. Therefore, they were entitled to attorney's fees. *See* S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. 08-2370, 2011 WL 1421794 (4th Cir. 2011).

193. *See generally* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

this practice is no longer legal, it does show that vacating a rule has a history of retroactive disruption.[194]

In addition, the policy implication to an agency if regulation vacaturs were not given retroactive effect would be to effectively hand the agency significantly more power than we have seen in the past. Because the available recourse when an agency crafts an illegal regulation is through the court system—a system filled with lengthy procedures and delays—agencies would effectively be able to craft any regulation they pleased, no matter how egregious, and those whom it benefited would be able to reap the rewards of such a regulation until it was vacated months if not years later. When applied to the specific situation addressed in this article, it implies that EPA could craft a regulation stating that EGUs do not have to install any pollution control measures, and so long as an entity was permitted for construction before such a regulation was vacated by the courts, the EGU would be able to emit pollutants for years to come with no liability. This is simply not sound public policy.

## VII. CONCLUSION

There is a very strong case to be made that the judicial vacatur of an agency regulation should be applied retroactively when a remedy is available. For example, the ruling in *New Jersey v. EPA* should be retroactively applied to EGUs permitted while CAMR was in effect prior to being vacated in *New Jersey v. EPA*, including the Duke Energy Cliffside plant. The plain meaning of "vacate" implies that the law should be voided and set aside; courts have interpreted this to mean that it should be as if the vacated regulation never existed.[195] The Supreme Court and D.C. Circuit have well-established case law supporting a strong presumption of retroactivity for decisions, the sole exceptions to this presumption exhibiting criteria that are not met in *New Jersey v. EPA*.[196] This case law also includes statements supporting the fact that detrimental effects to a party should not

194. *See id.; see also* Levin, *supra* note 1, at 300 (discussing an increase in decisions employing remand without vacatur because retroactive rulemaking to prevent disruption caused by vacatur is no longer an available remedy).

195. *See supra* Part II-A.

196. *See supra* Part II-B.

be a determinative factor if a holding is applied retroactively. Furthermore, when making their decision, the D.C. Circuit had other options at their disposal, such as remand without vacatur (instead of completely vacating the regulation), which could prevent the disruption caused when a decision to vacate is retroactively applied.[197] In this case, they chose not to apply any of these alternative remedies and therefore subjected the vacation to retroactive effect.

While confusion remains among state departments of environment over whether or not to now require MACT for mercury and other HAPs from EGUs permitted prior to *New Jersey v. EPA*, at least one federal court has ruled that an EGU permitted during the time window after CAMR was promulgated and prior to its vacatur must retroactively apply section 112(g) of the CAA as if it had always been the governing law.[198] Based on these observations, it is the conclusion of this article that any EGU permitted while CAMR was considered valid law is currently in violation of the CAA if they do not conduct the proper MACT analysis required by section 112 of the CAA for mercury and other HAPs. This result is derived from the conclusion that when agency regulations are ruled illegal by a court of law, both case law and public policy support the notion that these regulations carry no validity during the period prior to their vacation.

197. *See supra* Part II-D.
198. *See supra* Part V-D.