



By Richard Lazarus

A Tall Tale That Happens to Be True

The U.S. Court of Appeals for the District of Columbia is expected to rule by the end of this summer in *Coalition for Responsible Regulation v. EPA*, or what are euphemistically referred to as the Greenhouse Gas Cases, now pending before that court. In these consolidated cases, several states and business interests challenge EPA's promulgation of regulations to address greenhouse gas emissions under the existing terms of the Clean Air Act, including that law's program for Prevention of Significant Deterioration.

The court of appeals held oral argument over two days in February. With the benefit of hindsight, the three-judge panel clearly made a threshold procedural mistake. The panel delegated to the parties the responsibility for determining how many attorneys would argue and how they would divide the argument among themselves.

The upshot was 17 different attorneys presented oral argument and on a variety of potentially overlapping and cross-cutting issues. Perhaps not surprisingly, the judges ended up spending considerable time during the argument just trying to sort out which advocates were arguing what issues. And the judges weren't the only ones who lost track. Many of the advocates themselves seemed to forget at times and walked over each other's lines.

The primary purpose of this column, however, is not to dwell on the

oral argument missteps, but instead to don my academic garb and seize the opportunity for an ironic aside on the case in light of the history of the CAA's PSD program. The arguments reminded me about the extraordinary role that Hunton & Williams has played since the emergence of modern environmental law by serving as environmental counsel for the power-plant industry, including in this latest round. One would be hard-pressed to identify any other law firm that has been such a constant and consistent voice on behalf of industry during the past four-plus decades of environmental litigation, especially on air pollution matters. And, in this latest case, Hunton & Williams once again had an understandably prominent role, even if necessarily diluted by the cacophony produced by so many oral advocates.

With the benefit of hindsight, however, those industrial clients might have fared a bit better had Hunton & Williams made one discrete exception to the consistency of its record. The PSD program today finds its origins in the Supreme Court's 1973 affirmance by an equally divided Court in *Ruckelshaus v. Sierra Club* of a district court ruling that embraced the club's claim that the CAA, as drafted in 1970, required EPA to prevent "significant deterioration" of areas of the nation that were at the time cleaner than national ambient air quality standards.

The papers of Justice Harry Blackmun, which can be found in the Library of Congress, reveal, however, that the club achieved that affirmance after Hunton & Williams filed an amicus brief in the case in support of Edison Electric's contention that the statute did not require such a program. That filing apparently prompted Justice Lewis Powell — a former Hunton & Williams partner — to recuse himself from the case (after sitting at oral argument), resulting in the 4-4 split. There is little doubt, based on his other pro-

business votes in environmental pollution cases, how Justice Powell would have voted had he not recused himself. The most certain upshot would have been an EPA victory and therefore the agency never would have had to promulgate PSD regulations in compliance with the High Court's ruling. And the absence of those initial PSD regulations would have dramatically shifted the political dynamic when Congress was amending the statute in 1977.

What I have always found especially odd about the firm's amicus filing is that this was not the first time Justice Powell had recused himself in light of Hunton & Williams' participation in a case before the Court, including on behalf of the power-plant industry as amicus curiae. The justice had done so consistently since joining the Court, which makes one wonder what the firm was thinking when it filed the amicus brief in *Ruckelshaus v. Sierra Club*.

Interestingly, Justice Powell ended that recusal practice soon afterwards. Perhaps the justice received a very unhappy communication from either Hunton's Henry Nickel or his close friend at the firm George C. Freeman regarding the necessity of a recusal in those circumstances? Of course, I have no knowledge whether such a communication ever in fact occurred, but it does not take a lot of imagination to speculate that some folks at Hunton (and its clients) were likely exceedingly unhappy about the justice's recusal in light of the Court's 4-4 affirmance.

In all events, and regardless of the outcome of the recent Greenhouse Gas Cases before the D.C. Circuit, the Sierra Club's thank-you note to Hunton & Williams would seem long overdue.

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In a case of strange bedfellows, a justice's recusal ends up with a victory for Sierra Club