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## Walking the Line Between the Clean Air Act and the Federal Power Act: Balancing Emission Reductions and Bulk Power Reliability

*A power plant can find itself subject to potential liability under the Clean Air Act if it does not cease or greatly reduce operations and at the same time be compelled by the Department of Energy and/or the Federal Energy Regulatory Commission acting under the Federal Power Act to keep operating to ensure reliability. There needs to be cooperation among the federal agencies to create a stable and predictable regulatory environment at a minimum and, more preferably, a comprehensive solution to prevent this conflict from occurring in the first place.*

*Michael Gergen, Claudia O'Brien, Eli W.L. Hopson and David E. Pettit*

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**R**ecent rounds of regulations by the Environmental Protection Agency (EPA) have renewed a critical unresolved legal question for operators of power plants, one that impacts the reliability of the nation's bulk

power grid: What happens when a plant is subject to potential liability under the Clean Air Act (CAA) if it does not cease or greatly reduce operations, and at the same time is compelled by the Department of Energy (DOE) and/or the Federal

Energy Regulatory Commission (FERC) acting under the Federal Power Act (FPA) to keep operating to ensure reliability? Although this scenario may arise for plants installing emission control systems to obtain compliance with the CAA, conflict between the CAA and the FPA is more likely to arise for plants seeking to retire rather than install control systems for which reliability solutions such as new generation or transmission upgrades are not practical under the time constraints imposed by the CAA. In this article we summarize the statutory background for such potential conflicts between the CAA and the FPA, explore previous instances where these laws were in conflict, and discuss the recent regulations and how conflicts arising under them might be addressed by EPA, DOE, and FERC.

## I. Bulk Power Reliability and the Federal Power Act

Both DOE and FERC have ways to address bulk power reliability concerns pursuant to various provisions of the FPA. DOE has invoked its authority several times since 2000, while FERC has only invoked its authority once and in a manner complementary to authority already exercised by DOE.

### A. DOE's authority under the FPA

Section 202(c) of the FPA empowers the Secretary of Energy

to order power plants to operate for reliability reasons during emergency situations. The statute specifically provides that "whenever the Commission determines that an emergency exists . . . the Commission shall have authority . . . to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the

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emergency and serve the public interest."<sup>1</sup>

Even though the language in the FPA refers to "the Commission," the authority to require power plants to operate in fact lies with the Secretary of Energy and DOE. The Department of Energy Organization Act transferred the powers previously vested with the Federal Power Commission to DOE unless the authority is expressly reserved to FERC.<sup>2</sup> While DOE has vested certain powers with FERC, such as those provided in Sections 202(a) and 202(b) of the FPA, DOE has retained its authority under Section 202(c).

Not only has DOE retained this authority, it has interpreted its potential application broadly. DOE has defined an "emergency" to include, among other things, "an unexpected inadequate supply of electric energy."<sup>3</sup> Perhaps presciently, DOE also included "regulatory action which prohibits the use of certain electric power supply facilities" in its definition of "emergency."<sup>4</sup> However, Section 202(c) does not require DOE to take action; instead, it simply provides DOE with the authority to take action if it so chooses. As discussed in more detail below, DOE has invoked this authority in several instances since 2000.

### B. FERC's authority under the FPA

Section 202(c) is not the only provision of the FPA that appears to provide a federal agency with the authority to ensure the reliability and adequacy of electric service. Section 207 of the FPA states that upon a complaint by a state commission, "[w]henver the Commission . . . shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate or sufficient service to be furnished, and shall fix the same by its order, rule or regulation . . ."<sup>5</sup>

While this authority lies with FERC, it has only been invoked on one occasion—and in that instance, DOE had already ordered a plant to generate

electricity pursuant to Section 202(c). Specifically, in 2006, FERC used its authority under Section 207 to require PJM

Interconnection, LLC, (PJM) and the Potomac Electric Power Company ("Pepco") to "file a long-term plan to maintain adequate reliability in the Washington, DC, area and surrounding region, and a plan to provide adequate reliability pending implementation of this long-term plan."<sup>6</sup> Aside from this instance, FERC has refrained from using this authority.<sup>7</sup>

However, Section 207 arguably allows FERC to consider reliability concerns in determining whether a utility is providing adequate or sufficient service.<sup>8</sup> While FERC's authority is contingent upon a complaint by a state commission, Section 207 mandates that FERC take action to remedy the problem upon a finding of inadequate service.<sup>9</sup> In contrast, Section 202(c) simply provides DOE with the discretion to take action, though DOE can do so on its own accord.<sup>10</sup>

Section 309 of the FPA augments FERC's authority by permitting it "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such order, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the FPA]."<sup>11</sup> Courts, however, have narrowly construed Section 309, stating that it "merely augment[s] existing powers"<sup>12</sup> and allows FERC to "use means of regulation not spelled out in detail."<sup>13</sup> As such, FERC would most likely need to

rely on another provision, perhaps in conjunction with Section 309, to address reliability concerns.

## II. EPA's Authority under the Clean Air Act to Regulate Power Plants

EPA has broad authority to regulate power plant operation. For coal fired-power plants, EPA has recently proposed and in

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some cases finalized new regulations that would affect emissions of pollutants, handling of the byproducts of coal combustion, and cooling-water intake structures. These regulations are promulgated under the CAA, the Resource Recovery and Conservation Act (RCRA), and the Clean Water Act (CWA), respectively. Although all of the rules published by EPA have the potential to impact reliability, EPA's recently finalized emissions limits for hazardous air pollutants and for pollutants that cross state lines for utility-scale energy generating units will be the first to impact

operating power plants. As the RCRA rules relating to coal combustion byproducts and the CWA rules on cooling water intakes are still in the draft stage, with no clear statutory deadline for implementation, we focus our discussion on the potential conflict between the CAA rules and FERC and DOE's responsibilities under the FPA.

### A. EPA's authority under the CAA

#### 1. National Ambient Air Quality Standards

EPA is directed under Section 109(b)(1) of the CAA to create national standards, the National Ambient Air Quality Standards (NAAQS), to limit levels of pollutants that are harmful to public health and welfare.<sup>14</sup>

The CAA is a partnership of federal and state regulation, with Section 110 directing each state to adopt a State Implementation Plan (SIP), which EPA must then approve.<sup>15</sup> Once approved, the SIP is effectively a federal law, and enforceable as such.<sup>16</sup> The CAA further provides that once approved, no federal entity "shall engage in, support in any way, or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved . . ."<sup>17</sup> The statute defines conformity as:

"(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations

of the [NAAQS] and achieving expeditious attainment of such standings; and

(B) that such activities will not -

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the severity of any existing violation of any standard in any way; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area."<sup>18</sup>

**A**lthough broadly drafted, there are limitations on the scope of the conformity requirement. Initially, the conformity analysis only covers "major" federal actions; for actions emitting less than the threshold, conformity is presumed.<sup>19</sup> *De minimis* actions are also explicitly excluded by regulation.<sup>20</sup> EPA's regulations also specifically exclude "actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster" or "actions which are a part of a continuing response" to said emergency or disaster, although the federal agency taking the action must make a written determination that the conformity analysis is impractical for a period of up to six months "due to overriding concerns for public health and welfare, national security interests and foreign policy commitments."<sup>21</sup> CAA Section 110(f) also contains a non-delegable Presidential temporary

waiver for energy emergencies, which is limited to a period of four months.<sup>22</sup> Some courts have interpreted EPA's authority to act pursuant to the CAA as discretionary, with the court in *Seabrook v. Costle* noting that no section of the CAA "imposes a mandatory duty on the Administrator to make a finding every time some information concerning a possible violation of a SIP is brought to [her] attention."<sup>23</sup>

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*Although broadly drafted, there are limitations on the scope of the conformity requirement.*

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The NAAQS provisions of the CAA do not directly address conflicts with other laws.

## **2. Mercury and Air Toxics Standards**

EPA is directed under Section 112 to regulate power plant emissions of hazardous pollutants. Congress required EPA to study power plant emissions of hazardous air pollutants under Section 112(n)(1). Following presentation of that study to Congress, the statute required EPA to regulate power plants "if the Administrator finds such regulation is appropriate and

necessary."<sup>24</sup> EPA issued a determination that regulating the emissions of hazardous air pollutants from power plants was "appropriate and necessary" in 2000,<sup>25</sup> and promulgated regulations that have since been vacated by the D.C. Circuit.<sup>26</sup> Subsequently several environmental and public health organizations filed a complaint alleging that EPA had not performed a mandatory duty under the CAA to regulate hazardous air pollutants from coal and oil-fired electrical generating units (EGUs).<sup>27</sup> EPA settled the case, and under the consent decree was required to issue a notice of final rulemaking by Dec. 16, 2011.<sup>28</sup>

**T**he Mercury and Air Toxics Standards (MATS) standards for existing power plants are technology-based emissions limits, with the Administrator required to set levels equivalent to the average emissions of the best-performing 12 percent of plants.<sup>29</sup> EPA must set the effective date no later than three years after the rule is published.<sup>30</sup> Under the CAA, either the administrator or a delegated state may issue an extension of up to one year "if such additional period is necessary for the installation of controls."<sup>31</sup> The President may also grant an exemption for up to two years if "the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so."<sup>32</sup>



As with the NAAQS, there is no language under the MATS that clarifies how to resolve conflicts with other laws. Similarly, there is no language in the other sections of the CAA. The CAA does generally provide authority for citizen suits against any person, including the administrator, for violations of the act or failure of the administrator to perform a required duty.<sup>33</sup>

### III. Past Conflicts between the CAA and the FPA

Bulk power reliability concerns have led DOE to exercise its authority under Section 202(c) of the FPA on several occasions since 2000. For example, DOE ordered the Cross-Sound Cable, an underwater transmission line running between Connecticut and Long Island, to operate during back-to-back summers due to a summer heat wave in 2002<sup>34</sup> and the Northeast Blackout in 2003.<sup>35</sup> However, there have been two instances in recent years where some electric power generators have faced a dilemma between complying with the CAA and following an order under the FPA to generate electricity.

#### A. The Potomac River Generating Station

The Potomac River Generating Station is a 482 MW coal-fired power plant in Alexandria, Va., that provides electricity for

portions of the District of Columbia, including the Blue Plains Advanced Water Treatment Plant—one of the largest wastewater treatment plants in the world.<sup>36</sup> On Aug. 19, 2005, Mirant Corporation, the owner of the station, submitted a computerized emissions model to the Virginia Department of Environmental Quality (VDEQ) indicating that emissions from the station either caused or

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contributed to localized exceedances of the NAAQS.<sup>37</sup> In response to a subsequent letter from VDEQ, Mirant shut down all five of the station's generating units on Aug. 24, 2005.<sup>38</sup>

That same day, the District of Columbia Public Service Commission (DCPSC) filed a petition with both DOE and FERC requesting that Mirant be compelled to operate the station to maintain reliability in the District of Columbia.<sup>39</sup> Based on the "reasonable possibility an outage will occur that would cause a blackout," DOE responded to the DCPSC's petition by ordering Mirant to

resume operations pursuant to Section 202(c) of the FPA.<sup>40</sup> FERC also responded by requiring long-term reliability plans from PJM and Pepco pursuant to Section 207 of the FPA.<sup>41</sup>

DOE's order to resume operation did not, however, expressly alleviate Mirant from possible penalties for exceeding the NAAQS. In its order, DOE sought to walk the line between reliability and potentially adverse environmental impacts by specifying the manner in which Mirant was to operate the station. DOE also stated that if EPA issued a compliance order, then DOE would consider whether and how to conform its order accordingly.<sup>42</sup> Sure enough, six months later, EPA issued a compliance order instructing Mirant to use SO<sub>2</sub> emission controls and to operate only when daily modeling indicated that it would comply with the NAAQS.<sup>43</sup> However, the compliance order also required Mirant to operate the station "as specified by PJM and in accordance with the [2005] DOE Order."<sup>44</sup>

Mirant successfully operated the station pursuant to the orders by DOE and EPA for over a year. On Feb. 23, 2007, however, Mirant's luck ran out. By operating in accordance with DOE's order to run for reliability purposes, the station exceeded its three-hour NAAQS limit and the VDEQ consequently fined Mirant for NAAQS exceedances.<sup>45</sup> This situation was unfortunately not the first time a

generator faced a dilemma involving the CAA and the FPA.

## B. The California Energy Crisis

Near the end of 2000 and into 2001, the state of California experienced an unexpected electricity shortage. DOE responded by ordering certain generation facilities to make energy available to the California Independent System Operator (CAISO) for a period of approximately two months.<sup>46</sup>

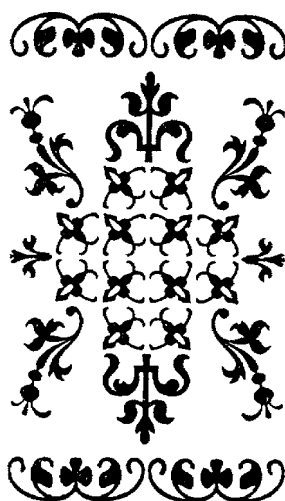
In addition to the action taken by DOE, FERC also instituted a “must-offer obligation” mandating that all non-hydroelectric generators offer all of their available capacity into the spot market during all hours.<sup>47</sup> In light of comments filed by generators, FERC recognized that the must-offer obligation could result in generators operating in violation of their certificates or applicable law. To mitigate this situation, the must-offer requirement did not require generators to run if doing so would otherwise break the law.<sup>48</sup> In a subsequent order, FERC clarified that a generator could go so far as to seek a declaratory order from the courts finding that compliance with the must-offer obligation would result in permit violations if it wanted to prevent citizen suits alleging violations of environmental regulations.<sup>49</sup> This clarification came about in response to a citizen suit against a generator, which the generator settled at a significant cost.<sup>50</sup>

## IV. Potentially Potent Rulemakings

### A. EPA’s finalized regulations

#### 1. Cross-State Air Pollution Rule

On July 6, 2011, EPA finalized regulations requiring significant reductions in SO<sub>2</sub> and NO<sub>x</sub> emissions.<sup>51</sup> EPA issued the



regulations in response to the D.C. Circuit’s remand of a prior version of the rule, the Clean Air Interstate Rule (CAIR).<sup>52</sup> EPA proposed technical adjustments on Oct. 6, 2011, and finalized a supplemental rule including additional states on Dec. 17, 2011.<sup>53</sup> EPA estimates that costs associated with CSAPR are \$800 million annually in 2014, on top of \$1.6 billion per year in capital investments that were being made in response to the previous rulemaking.<sup>54</sup> EPA expects facilities to use dry and wet flue-gas desulfurization (FGD), dry sorbent injection, selective catalytic reduction (SCR), and some fuel switching and process optimization.<sup>55</sup> The initial compliance phase was to begin on

Jan. 1, 2012; however, the D.C. Circuit stayed CSAPR on December 30, 2011 in *EME Homer City Generation, L.P. v. EPA* and ordered the parties to propose briefing schedules so that the case could be heard by April 2012.<sup>56</sup> As the rule stands now, the second, more stringent compliance phase begins on Jan. 1, 2014.<sup>57</sup>

#### 2. MATS for Utility Generators

On Dec. 16, 2011, EPA finalized regulations limiting the emissions of mercury and other hazardous pollutants from EGUs.<sup>58</sup> EPA estimates that the total cost of the rule will be \$9.6 billion annually in 2015.<sup>59</sup> Some industry estimates are significantly higher.<sup>60</sup> EPA expects plants that are installing controls to use a mixture of available technologies, including SCR with FGD, activated carbon injection (ACI), ACI with a fabric filter, dry sorbent injection, and electrostatic precipitators.<sup>61</sup> Costs for individual plants will vary, but for facilities with no pollution controls, compliance costs are expected to run into the hundreds of millions of dollars per plant.<sup>62</sup> EPA made small revisions to the proposal as a result of comments received, which according to EPA’s estimates reduced the costs of compliance by about \$1 billion.<sup>63</sup>

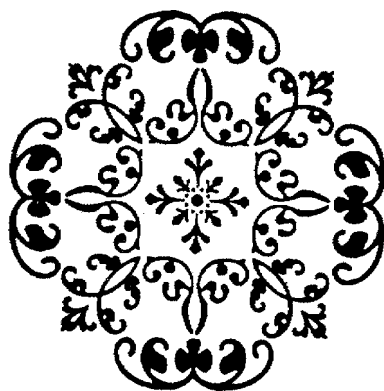
EPA grants the statutory maximum of three years and 60 days from the published date for compliance with the MATS rule, meaning the earliest compliance date would be March 2015.<sup>64</sup> As discussed above, generators that are installing controls may be

eligible for an additional one-year extension from either the state managing the program or the administrator.<sup>65</sup> In two memoranda released with the final rule, one from EPA and one from the President, the administration states that although unlikely to be required, EPA can issue administrative orders that would absolve violators who were operating subject to critical reliability concerns of complying with the CAA for one year under Section 113(a) (governing enforcement of violations).<sup>66</sup> However, as discussed above, prior experiences indicate that the administrative order process may not protect against all risks to companies required to operate for reliability reasons, as citizen suits may be filed by individuals or organizations other than EPA. The memoranda also make clear that the administration intends to make the standard one-year extension for installation of controls under Section 112 (i)(3)(b) “broadly available”; however, the applicability of that extension to facilities that plan on retiring is uncertain.<sup>67</sup> Neither memorandum mentions the President’s authority under Section 112 (i)(4), so the breadth of that additional exemption, and the administration’s willingness to invoke it, are unclear.

### **B. EPA’s proposed regulations**

EPA has also proposed two other rules that are likely to have a significant cost impact on certain

coal-fired electrical generating units, potentially including some that are critical to reliability. The first rule, proposed on June 21, 2010,<sup>68</sup> with a subsequent Notice of Data Availability issued on Oct. 12, 2011,<sup>69</sup> deals with the treatment of coal combustion byproducts. Two regulatory schemes were proposed by EPA under RCRA, with the first being to regulate coal



combustion residuals under Subtitle C of RCRA, which covers the cradle-to-grave treatment of hazardous waste. EPA’s second proposal would regulate the coal byproducts under Subtitle D of RCRA, the section regulating non-hazardous wastes. EPA has indicated that a final rule will not be issued until late 2012; thus the nature of the regulation and the timeline for implementations are unclear.<sup>70</sup>

The second proposed regulation is for the intake of cooling water. EPA has proposed regulations that would cover the impingement (trapping of fish against the intake screen) and entrainment (fish that are drawn into the power plant and affected

by heat or other stress) of fish and other aquatic life.<sup>71</sup> EPA has signed a consent decree with the environmental group Riverkeeper indicating that it will issue final actions by July 27, 2012, although the implementation period for existing plants is still unknown.<sup>72</sup>

### **C. Anticipated impacts on bulk power reliability**

At least a dozen studies have attempted to analyze the potential reliability impacts associated with the recent suite of new regulations by EPA. However, all of these studies face the same problem—we do not have all of the final rules yet, and companies’ responses to the finalized rules are still being developed.

At FERC’s recent Reliability Technical Conference, PJM pointed out that there is a chicken-or-the-egg issue with respect to identifying the impacts on reliability that the proposed rules will have before EPA issues its final rules.<sup>73</sup> The problem is that reliability impacts cannot be reliably estimated until generators identify which units they will retire. At the same time, generators cannot know which units to retire until they have all of the final rules from EPA and have had time to analyze the final regulations. So, in the meantime, the best approach is to attempt to identify all “at risk” generation to understand the possible spectrum of reliability impacts.<sup>74</sup> As a result, there is a variety of studies that make varying assumptions and come to sometimes

dramatically different conclusions.<sup>75</sup>

Regardless of the extent of retirements anticipated across the country, the situation with the Potomac River Generating Station indicates that the early retirement of even a single plant can lead to a localized reliability issue. Accordingly, DOE, FERC, and EPA should take steps to coordinate the implementation of these rules in a predictable manner that does not place generators in the position faced by the Potomac River Generating Station.

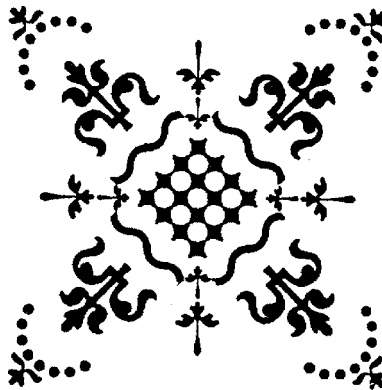
## V. Potential Outcomes for Resolving Reliability Conflicts

EPA, FERC, utilities, and regulators have all proposed a number of different solutions for resolving any potential conflict. We discuss below a number of the solutions that have been proposed or that are present in the underlying statutes. These solutions can generally be grouped into three categories: actions by EPA or the states to waive environmental laws, Presidential extensions, or actions by DOE or FERC to force regulated entities to violate environmental laws, while potentially protecting those entities.

### A. Reliability safety valve

Although this phrase has been incorporated into a number of

different proposals describing different mechanisms, most commonly the “reliability safety valve” refers to a proposal put forward in joint comments on the MATS proposed rule from several independent system operators (ISOs) and regional transmission organizations (RTOs).<sup>76</sup> The Joint RTO Commentors proposed that a retiring generator that is



determined to be critical for system reliability be allowed to operate for an additional fourth year, or longer if more time is required to address the reliability issue.<sup>77</sup> The RTO comments propose limiting the extension to situations where the generator provides an early notice of impending retirement, the ISO/RTO identifies the unit as critical to reliability, and the upgrades or replacements necessary to address the reliability problem are expected to take more than three years.<sup>78</sup>

EPA has adopted some aspects of this proposal into its enforcement memorandum issued with the final MATS rule, although the additional extension

for units critical to reliability would operate *via* administrative order under Section 113(a), and would be limited to a period of one year.<sup>79</sup> On the other hand, neither the Presidential memo nor EPA enforcement memorandum clarify whether the separate “broadly available” one-year extension under Section 112(i)(3)(B) would be available to facilities that are shutting down.<sup>80</sup> Notably EPA indicates that the administrative orders under Section 113(a) would be granted to facilities that are moving into retirement, not just for facilities installing controls, or being replaced with new generation onsite.<sup>81</sup> Potentially more problematic is EPA’s statement that the orders would not be issued before the compliance date, creating the potential for a conflict until the order is posted.<sup>82</sup> In addition, the administrative orders may not remove risks from citizen suits, as previously discussed in the context of the California energy crisis.

A longer-term solution could be to amend the FPA to make clear that those operating under an emergency order issued by DOE pursuant to its authority under Section 202(c) of the FPA are not subject to civil or criminal liability for violating environmental laws or regulations.<sup>83</sup> This has the advantage of addressing any future concerns under other environmental statutes, but may be challenging to pass in a tough legislative environment.



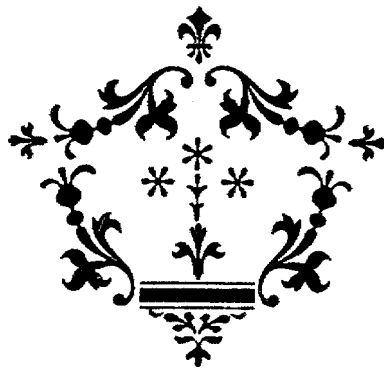
## B. Presidential extensions

Under both CSAPR and MATS, the CAA includes a Presidential waiver that could be used to temporarily extend compliance deadlines for individual facilities. While the administration has not expressed a view as to the potential for use of these statutory exemptions, they remain possible uses for particular situations. Although the CSAPR exemption is limited to only four months by the statute, the Presidential exemption under Section 112 could theoretically be reissued indefinitely for two-year terms if required. Given the potential for long timelines for siting new power plants and transmission lines, this backstop authority may become useful if the other extensions EPA has proposed are exhausted.

## C. Compelled operation to protect bulk power reliability

If an extension, consent decree, or similar waiver cannot be obtained for a unit that is critical to reliability, DOE might choose, as it has previously, to apply its authority under FPA Section 202(c) to require a facility to run. Yet none of the issues raised by the Potomac River and California Energy Crisis situations discussed above have been resolved, leading to significant uncertainty for plant operators. Under FERC's supervision, units that are critical to reliability and planning to retire may be able to negotiate distributed financial burdens for

installing controls, or indemnity against any future costs.<sup>84</sup> Alternatively, similar to the FERC's approach during the California energy crisis, any orders that require a generating facility to operate could be limited so as to make clear that the order would not apply if compliance would result in a violation of the facility's certificate or applicable law.



## VI. Which Statute Controls if Another Conflict Arises?

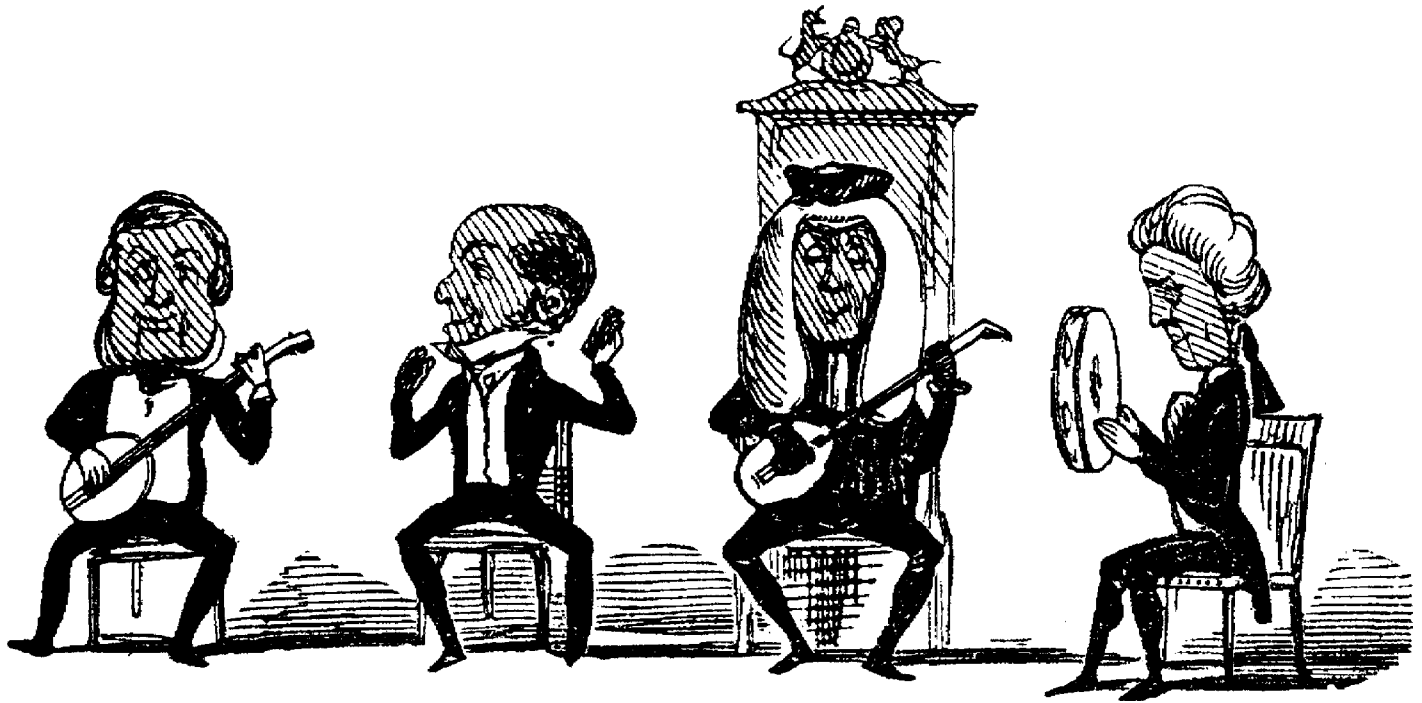
Despite the numerous proposals and possible coordination among federal agencies, it is plausible that another conflict will occur between the CAA and the FPA, just as it did with respect to the Potomac River Generating Station. If another conflict occurs, the question of which statute controls may very well come before the courts.

A court will first look to the statutes to see if either specifically addresses conflicts of law.<sup>85</sup> In this case, neither the CAA nor the

FPA expressly or impliedly trump one another. In the absence of a conflicts-of-law provision, a court will then attempt to harmonize the provision so as to avoid the conflict.<sup>86</sup> As discussed above, there is a potentially critical difference between Sections 202(c) and 207 of the FPA in that DOE's authority under Section 202(c) is discretionary, while Section 207 mandates FERC to "fix" inadequate service. Courts have held that certain environmental statutes must yield if their application prevents a federal agency from fulfilling a nondiscretionary legislative mandate.<sup>87</sup> Because of the nondiscretionary mandate of Section 207, a court could find that FERC's action pursuant to Section 207 cannot be waived or limited by conflicting CAA provisions.<sup>88</sup>

However, a court may not be able to harmonize Section 202(c) of the FPA and the CAA amendments in the more likely event that DOE orders a generating facility to operate such that it violates the NAAQS.<sup>89</sup> In such a scenario, courts will apply two basic principles of statutory interpretation: (1) the more recent statute controls, and (2) the more specific statute controls.

Congress amended the CAA in 1970 to implement the NAAQS. In 1935, Congress enacted Sections 202, 207, and 309 of the FPA. Based on these facts, a court could determine that the CAA amendments repealed by implication the conflicting



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provisions of the FPA.<sup>90</sup> However, courts disfavor a finding that a statute was repealed by implication and will look to determine whether the legislative intent to repeal was clear and manifest.<sup>91</sup> Here, such a determination would be unlikely because there is no evidence that Congress intended the CAA amendments to repeal any conflicting provision of the FPA.

Moreover, a more specific statute will control over a more general one.<sup>92</sup> The more specific statute may even take priority over another statute enacted by Congress more recently.<sup>93</sup> Here, both statutes require specific directives to be applied to individual generating

facilities. The CAA calls for EPA to regulate generating facilities and mandate compliance with the NAAQS. The FPA, on the other hand, provides the authority to require certain plants to operate for reliability purposes as directed by DOE. Thus, while both statutes provide specific directives, it is not unlikely that a court could find that Section 202(c) of the FPA supersedes the CAA.

Regardless of whether the CAA or the FPA (Section 202(c) and/or Section 207) controls, there needs to be cooperation among the federal agencies to create a stable and predictable regulatory environment at a minimum and more preferably, a comprehensive solution to prevent this conflict

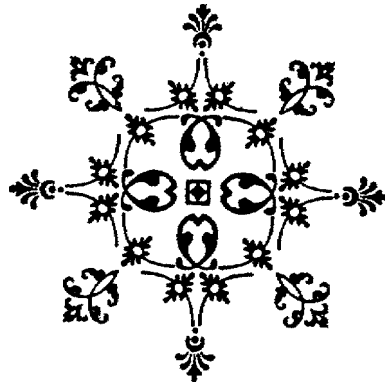
from occurring in the first place.■

#### Endnotes:

1. 16 U.S.C. § 824a(c).
2. See 42 U.S.C. § 7151(b).
3. 10 C.F.R. § 205.371.
4. *Id.*
5. 16 U.S.C. § 824f.
6. *District of Columbia Public Service Commission*, 114 FERC ¶ 61,017 at P 2 (2006).
7. See, e.g., *Arkansas Public Service Commission v. Entergy Service, Inc. et al.*, 119 FERC ¶ 61,223 (2007).
8. William L. Massey, Robert S. Fleishman and Mary J. Doyle, *Reliability-Based Competition in Wholesale Electricity: Legal and Policy Perspective*, 25 ENERGY L.J. 319, 329 (2005).

9. 16 U.S.C. § 824f.
10. 16 U.S.C. § 824a(c).
11. 16 U.S.C. § 825h.
12. *New England Power Co. v. Fed. Power Comm.*, 467 F.2d 425, 430 (D.C. Cir. 1972).
13. *Niagara Mohawk Power Corp. v. Fed. Reg. Energy Comm.*, 379 F.2d 153, 158 (D.C. Cir. 1967).
14. 42 U.S.C. § 7409.
15. 42 U.S.C. § 7410.
16. *See, e.g., Her Majesty the Queen v. City of Detroit*, 874 F.2d 332 (9th Cir. 1989) (holding that once a SIP is approved by the EPA, its requirements become federal law and are fully enforceable in federal court).
17. 42 U.S.C. § 7506(c)(1).
18. *Id.*
19. *See* 40 C.F.R. § 51.853(b) – (c).
20. 40 C.F.R. § 51.853(c).
21. *Id.* §§ 51.853(d)(2), (e).
22. 42 U.S.C. § 7410 (f).
23. *City of Seabrook v. Costle*, 659 F.2d 1371 (5th Cir. 1981) (“*Seabrook*”); *see also Yakima v. Surface Transp. Bd.*, 46 F.Supp. 2d 1092 (E.D. Wa. 1999).
24. 42 U.S.C. § 7412(n)(1).
25. 65 Fed. Reg. 79826-27 (Dec. 20, 2000).
26. *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008).
27. American Nurses Association, Chesapeake Bay Foundation, Inc., Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, Natural Resources Council of Maine, Natural Resources Defense Council, Physicians for Social Responsibility, Sierra Club, The Ohio Environmental Council, and Waterkeeper Alliance, Inc. (Civ. No. 1:08-cv-02198 (RMC)), at: <http://www.epa.gov/ttn/atw/utility/consentfnl.pdf>.
28. Note that the original date of Nov. 16, 2011, was modified by consent of

- the parties, as described in paragraph 7(b). *Id.*
29. 42 U.S.C. § 7412 (d)(3).
30. 42 U.S.C. § 7412 (i)(3).
31. *Id.*
32. 42 U.S.C. § 7412 (i)(4).
33. 42 U.S.C. § 7604 (a).
34. DOE Order 202-02-1, Order Pursuant to Section 202(c) of the Federal Power Act (Aug. 16, 2002).



35. DOE Order 202-03-1, Order Pursuant to Section 202(c) of the Federal Power Act (Aug. 14, 2003); DOE Order 202-03-2, Order Pursuant to Section 202(c) of the Federal Power Act (Aug. 28, 2003).
36. *District of Columbia Public Service Commission*, DOE Order 202-05-3 at 2–3 (Dec. 20, 2005), at [http://www.gc.doe.gov/sites/prod/files/oeprod/DocumentsandMedia/mirant\\_122005\\_2.pdf](http://www.gc.doe.gov/sites/prod/files/oeprod/DocumentsandMedia/mirant_122005_2.pdf) (hereinafter “2005 DOE Order”).
37. *Id.* at 1.
38. *Id.* Mirant subsequently resumed operating one unit for 16 hours of each 24-hour period prior to DOE’s order that it released on Dec. 20, 2005. Both EPA and VDEQ acknowledged that this minimal operation of the station did not result in NAAQS exceedances. *Id.* at 3.
39. Emergency Petition and Complaint of the District of Columbia Public Service Commission, Docket

- Nos. EO-05-01 (DOE), EL05-145-000 (FERC) (filed Aug. 24, 2005).
40. 2005 DOE Order at 6. As an example of the potential ramifications of a blackout, Pepco stated that “within 24 hours of the loss of electric supply, Blue Plains will have no option but to release untreated sewage directly into the Potomac River.” *Id.* at 4.
41. *District of Columbia Public Service Commission*, 114 FERC ¶ 61,017 (2006).
42. 2005 DOE Order at 5, 8–9.
43. Reliability Technical Conference, Docket No. AD12-1-000, *et al.*, Speaker Materials of Debra Raggio, GenOn Energy (filed Nov. 25, 2011), Attachment D, *Mirant Potomac River LLC*, Docket No. CAA-03-2006-0163DA, Administrative Compliance Order by Consent (June 1, 2006); EPA, Press Release, EPA Issues Administrative Order to Mirant Potomac River—Order Sets Schedule for Mirant to Comply with Clean Air Standards (June 2, 2006).
44. Reliability Technical Conference, Docket No. AD12-1-000, *et al.*, Speaker Materials of Debra Raggio, GenOn Energy (filed Nov. 25, 2011), Attachment D, *Mirant Potomac River LLC*, Docket No. CAA-03-2006-0163DA, Administrative Compliance Order by Consent at 14 (June 1, 2006).
45. *See* Reliability Technical Conference, Docket No. AD12-1-000, *et al.*, Speaker Materials of Debra Raggio, GenOn Energy at 5–6 (filed Nov. 25, 2011), Attachments E and F.
46. *See Notice of Issuance of Emergency Orders Under Section 202(c) of the Federal Power Act*, 65 Fed. Reg. 82,989 (Dec. 29, 2000); *see also* DOE Order, Order Pursuant to Section 202(c) of the Federal Power Act (Jan. 11, 2001).
47. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 95 FERC ¶ 61,355 at 61,357 (2001). The must-offer obligation stemmed from an investigation into the reasonableness

of rates for the sale of electric energy in the CAISO and PX spot markets by FERC pursuant to its authority under Section 206 of the FPA.

48. *Id.*

49. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 96 FERC ¶ 61,117 at 61,448 (2001) (“In sum, in order to be exempted from the must offer requirement, a generator must demonstrate that running its unit violates a permit, would result in a criminal or civil violation or penalties, or would result in QF units violating their contracts or losing their QF status. In lieu of submitting a presentation such as that filed by Mirant, a generator may obtain a declaratory order from an appropriate court finding that the generator’s compliance with the must offer requirement will result in a violation of its permit.”).

50. See Reliability Technical Conference, Docket No. AD12-1-000, *et al.*, Speaker Materials of Debra Raggio, GenOn Energy at 4 (filed Nov. 25, 2011).

51. 76 Fed. Reg. 48298 (August 8, 2011) (hereinafter “CSAPR”).

52. CSAPR at 48,211.

53. Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 76 Fed. Reg. 63,860; Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone, Docket ID: EPA-HQ-OAR-2009-0491 (Dec. 17, 2011) (to be codified at 40 C.F.R. parts 52 and 97).

54. EPA, Cross-State Air Pollution Rule, Reducing Air Pollution Protecting Public Health, *presentation* (Dec. 15, 2011) (*at*: <http://www.epa.gov/airtransport/pdfs/CSAPRPresentation.pdf>).

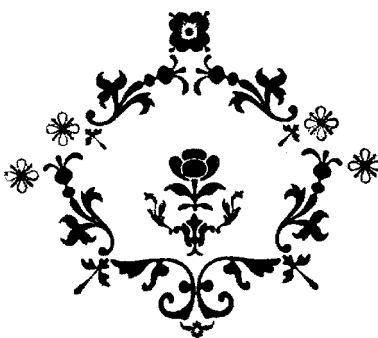
55. CSAPR at 48,279.

56. See *EME Homer City Generation, L.P., et al. v. EPA*, No. 11-1302 (D.C. Cir. Dec. 30, 2011) (order granting requested stay).

57. CSAPR at 48, 211.

58. National Emission Standards for Hazardous Air Pollutants from Coal and Oil fired Electric Utility Steam Generating Units, Docket ID EPA-HQ-OAR-2009-0234, pre-publication version, (to be codified at 40 C.F.R. Part 63) (hereinafter “MATS”).

59. EPA FACT SHEET: Mercury and Air Toxics Standards, ADJUSTMENTS FROM PROPOSAL TO FINAL, Dec. 21, 2011; MATS at 630.



60. Comments of the Utility Air Research Group on EPA’s National Emission Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electricity Steam Generating Units, at 251, Docket EPA-HQ-OAR-2009-0234 (Aug. 4, 2011).

61. Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units – Final Report to Congress, EPA, (Feb. 1998), *at*: <http://www.epa.gov/ttn/atw/combust/utiltox/eurtc1.pdf>.

62. See North American Electric Reliability Corporation, 2010 Special Reliability Scenario Assessment: Resource Adequacy of Potential U.S. Environmental Regulations (Oct. 2010), *at* [http://www.nerc.com/files/EPA\\_Scenario\\_Final.pdf](http://www.nerc.com/files/EPA_Scenario_Final.pdf) (hereinafter “NERC Report”).

63. EPA FACT SHEET: Mercury and Air Toxics Standards, ADJUSTMENTS FROM PROPOSAL TO FINAL, Dec. 21, 2011.

64. MATS at 568.

65. *Id.*

66. See Memorandum for the Administrator of the Environmental Protection Agency, Flexible Implementation for the Mercury and Air Toxics Standards Rule, from Barack Obama (Dec. 21, 2011) (hereinafter “Presidential Memo”); Memorandum, The Environmental Protection Agency’s Enforcement Response Policy For Use Of Clean Air Act Section 113(a) Administrative Orders In Relation To Electric Reliability And The Mercury And Air Toxics Standard, from Cynthia Giles (December 16, 2011) (“Enforcement Memo”).

67. Presidential Memo at 2.

68. Fed. Reg. 35,128 (June 21, 2010).

69. Fed. Reg. 63,252 (Oct. 12, 2011).

70. EPA Eyes Late 2012 For Coal Ash Reuse Risk Analysis Ahead Of Final Rule, Inside EPA (Dec. 9, 2011) (quoting Administrator Jackson, “I think it’s going to be towards the end of the year.”).

71. Fed. Reg. 43,230 (July 20, 2011).

72. See Settlement Agreement Among the United States Environmental Protection Agency, Plaintiffs in *Cronin, et al. v. Reilly*, 93 Civ. 314 (LTS(SDNY), and Plaintiffs in *Riverkeeper, et al. v. EPA*, 06 Civ. 12987 (PKC)(SDNY) (Nov. 22, 2010) as subsequently amended (available at: <http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/phase2/upload/316bsettlement.pdf>).

73. Reliability Technical Conference, Docket No. AD12-1-000, *et al.*, PJM, Interconnection, L.L.C. Testimony of Mike Kormos at 3 (filed Nov. 22, 2011) (hereinafter “PJM Testimony”).

74. *Id.* To date, PJM has not identified any “overarching reliability impacts associated with potentially retiring units that cannot be resolved with transmission upgrades within the four year period allowed by the proposed MATS rule.” *Id.* at 8.



75. See, e.g., NERC Report (finding 33-70 GW of coal-fired generation to be retired by 2015); see also Edison Electric Institute, Potential Impacts of Environmental Regulation on the U.S. Generation Fleet (Jan. 2011), at [http://www.pacificorp.com/content/dam/pacificorp/doc/Energy\\_Sources/Integrated\\_Resource\\_Plan/2011IRP/EEIModelingReportFinal-28January2011.pdf](http://www.pacificorp.com/content/dam/pacificorp/doc/Energy_Sources/Integrated_Resource_Plan/2011IRP/EEIModelingReportFinal-28January2011.pdf) (finding 16-75 GW of unplanned coal-fired generation retirements by 2015) (hereinafter "EEI Report"); *Fitch: New EPA Rule Likely to Speed Plant Retirements*, WALL ST. J. (Dec. 23, 2011) (citing Fitch Ratings, Time to Retire? II The Update to Coal Plant Retirements (Nov. 17, 2011)) (indicating up to 83 GW of coal-fired generation may be retired due to various EPA rules).

76. Joint Comments of the Electric Reliability Council of Texas, the Midwest Independent Transmission System Operator, the New York Independent System Operator, PJM Interconnection, LLC, and the Southwest Power Pool, Docket Nos. EPA-HQ-OAR-2009-0234, et al. (Oct. 21, 2011), at <http://pjm.com/~media/documents/other-fed-state/20110804-epa-hq-oar-2009-0234-iso-rto.ashx> ("Joint RTO Comments").

77. *Id.* at 5.

78. *Id.* at 6.

79. See Enforcement Memo.

80. See Enforcement Memo; Presidential Memo.

81. Enforcement Memo at 5-6.

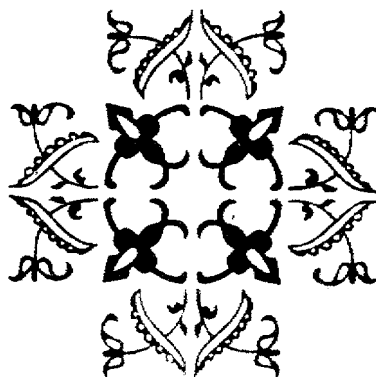
82. *Id.* at 6.

83. See Press Release, Sen. Murkowski (R-Alaska), Reliability Concerns Warrant Careful Review of Utility MACT Rule, (Dec. 21, 2011), at [http://energy.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=821625c0-c4aa-4c79-8253-34a510a1bff6&Month=12&Year=2011&Party=1](http://energy.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=821625c0-c4aa-4c79-8253-34a510a1bff6&Month=12&Year=2011&Party=1).

84. See for example Exelon Generation Company, LLC, Order Accepting and Suspending Tariff Filing at para. 30-31, 132 FERC ¶ 61,219 (Sep. 16, 2010).

85. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 at 756 (1975) ("the starting point in every case involving construction of a statute is the language itself").

86. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (courts will read conflicting statutes "to give effect to each if [courts] can do so while preserving their sense and purpose"); *Morton v. Mancari*, 417 U.S. 535 at 550-551 (1974) ("the courts are not at liberty to pick and choose among congressional enactments, and when



two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

87. See, e.g., *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-669 (2007) (holding that the Endangered Species Act's "no-jeopardy duty only applies to discretionary agency actions and does not attach to actions . . . that an agency is required by statute to undertake once certain specified triggering events have occurred"); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 at 778 (1976) (where a clear and unavoidable conflict in statutory authority exists, "NEPA must give way"); see also *Operation of the Mo. River Syst. Litigation*, 421 F.3d 618, 630 (8th Cir. 2005) (stating that environmental statutes "do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose. . .").

88. See *Nat'l Wildlife Federation v. US Army Corps of Engineers*, 384 F.3d 1163, 1179 (9th Cir. 2004) (holding that the construction and operation of dams in accordance with Congressional mandates did not violate Clean Water Act provisions despite causing exceedances); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992) (holding that the Endangered Species Act does not alter the scope of FERC's authority under the FPA).

89. With respect to the Potomac River Generating Station, the VDEQ argued that the CAA and the FPA did not conflict because both DOE and FERC must consider and, if necessary, mitigate proposed actions under the National Environmental Policy Act (NEPA). Motion to Intervene and Protest of Virginia Department of Environmental Quality Director Robert G. Burnley, Docket No. EL05-145-000 (filed Aug. 29, 2005). However, this argument failed to take into account the fact that DOE orders issued in response to emergency situations are exempt from NEPA. See 10 C.F.R. 1021.343. Because DOE can only order a generating facility to operate in an emergency situation, NEPA will not apply.

90. See *Watt*, 451 U.S. at 266-67 (citing 2A C. Sands, Sutherland on Statutes and Statutory Construction Section 51.02 (4th ed. 1973)).

91. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) ("the cardinal rule is that repeals by implication are not favored").

92. See *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 ("it is familiar law that a specific statute controls over a general one 'without regard to priority of enactment'"); see also 2B Norman J. Singer, Sutherland Statutes and Statutory Construction Section 51.05 (6th ed. 2000).

93. *Morton*, 417 U.S. at 550-551 ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").