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NOTE

CIRCUMVENTING ENVIRONMENTAL POLICY: DOES THE AMERICANS WITH DISABILITIES ACT PROVIDE PROTECTION WHERE ENVIRONMENTAL STATUTES DON’T?

Michael S. Heyl*

INTRODUCTION

On September 14, 2000, forty-nine year old Marsha Mason of Rathdrum, Idaho suffered an acute asthma attack and passed away.\(^1\) The Kootenai County Coroner reported that air pollution was a likely factor in her death.\(^2\) The United States Environmental Protection Agency ("EPA") conducted its own investigation into the matter and found that the burning of 6,522 acres of both the Coeur d'Alene Reservation and the Rathdrum Prairie the day before had produced extensive emissions of smoke and particles into the air.\(^3\) The highest concentration of the smoke was at approximately 8:00 p.m. on the thirteenth of September and Ms. Mason died in the early hours of the fourteenth.\(^4\)

Protecting the quality of human health in modern society places the governments that create and enforce environmental policies in a precari-

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2. Id.


4. Id.
ous position. The roles and responsibilities of today’s government come into conflict with one another on numerous occasions. One particular area where these conflicts arise is in the arena of environmental policy. Policymakers are forced to balance two strong public policy issues: protecting human health and the environment and encouraging economic and technological development. To accommodate these competing interests, many of today’s environmental laws and regulations provide for the limited release of emissions such as smoke particulates and chemicals into the environment—a necessary concession in the development of the medical, pharmaceutical, technological, and agricultural advantages of life in the twenty-first century.

Recognizing the need to protect human health and the environment, the regulation of releases into the environment occurs within the confines of federally-determined health standards. These standards take numerous health and technology considerations into account and are based on the premise that pollution of the air, water, and land increases the risk of human illness and mortality. Laws that restrict this pollution begin to reduce the risk of illness and death as soon as they are implemented.

Despite the comprehensive rubric of U.S. environmental policy, adverse health effects caused by pollution, particularly air pollution, are a matter of increasing concern. Studies are regularly being released that

5. It is important to note that most environmental statutes expressly involve the states as partners in environmental protection. For example, under the Clean Air Act, Congress found “that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of the states and local governments.” 42 U.S.C. § 7401(a)(3) (1994).


7. See id.

8. Issues such as global warming have taken center stage in recent years. Based on the presumption that global warming is increasing rapidly, scientists are predicting droughts, floods and violent storms across the planet over the next century. It is being projected that Earth’s average temperature could rise by as much as 10.4 degrees over the next one hundred years. These predictions represent the most rapid change in ten millennia and are more than sixty percent higher than what scientists predicted six years ago. See THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON THE REGIONAL IMPACTS OF CLIMATE CHANGE AN ASSESSMENT OF VULNERABILITY, (2000), available at http://www.usgecp.gov/ipcc/SRs/regional/index.htm (last visited Nov. 16, 2001).
link environmental air pollution to inauspicious health effects, especially in children. In one recent study, the emission of air particles by the nation's energy industry was linked to increased risk of death and shortened life spans. According to authors of the study, fine particle pollution from U.S. power plants cuts short the lives of over 30,000 people each year. The study also concludes that power plant particle pollution causes more than 603,000 asthma attacks per year. Another recent study found that the lung capacity of children living in the most polluted cities is ten percent lower than those living in less polluted cities. The study purports that "[c]ommon air pollutants, such as those that lead to the formation of ozone like hydrocarbons and nitrogen oxides, as well as particulate matter, slow children's lung development over time..." Such studies tend to raise public consternation that our nation's environmental laws do not go far enough to protect everyone.

One particular activity currently under fire is the practice of agricultural or crop stubble burning. According to the EPA, stubble burning is "a land treatment, used under controlled conditions, to accomplish natural resource management objectives." The EPA goes on to state that:

Prescribed fire is a cost-effective and ecologically sound tool for forest, range, and wetland management. Its use reduces the potential for destructive wild fires and thus maintains long-term air quality. Also, the practice removes logging residues, controls insects and disease, improves wildlife habitat and forage produc-

10. See id.
11. See id. at 5.
tion, increases water yield, maintains natural succession of plant communities, and reduces the need for pesticides and herbicides.

The major air pollutant of concern is the smoke produced. Smoke from prescribed fires is a complex mixture of carbon, tars, liquids, and different gases. The major pollutants from wild land burning are particulate, carbon monoxide and volatile organics.\textsuperscript{15}

The concerns mounting over agricultural burning are the result of its reported impact on human health. According to the EPA, particulate matter, the term for solid or liquid particles in the air, can penetrate deep into the lungs.\textsuperscript{16} Due to the severity of the impact that particulate matter has on individuals, such as the death of Ms. Mason in Rathdrum, Idaho, stories of persons suffering from agricultural burning practices tend to resonate with the public.\textsuperscript{17}

To ensure that activities that release smoke or other emissions into the environment are within federally-permitted limits, today’s environmental laws contain a plethora of provisions providing legal recourse for violations. These regulations ensure that such laws are complied with and consistently enforced. Implicit in the development of these laws is the assurance that human health will be protected. The system, however, is not perfect. For example, vulnerable segments of the population, such as persons suffering from asthma, cystic fibrosis, or other respiratory illnesses, may have difficulty breathing air that contains particles or chemicals released at federally allowable quantities. Furthermore, unless violations of the respective environmental laws occur, enforcement provisions, including citizen suit provisions, tend not to cover adverse impacts caused by the legal emission of constituents into the environment. But just as our system of jurisprudence is in a constant state of evolution, persons with disabilities have discovered a new alternative to possibly redress the individual and adverse effects of state sanctioned environmental releases—The Americans with Disabilities Act of 1990 (“ADA”).\textsuperscript{18}

\textsuperscript{15} Id.

\textsuperscript{16} See id. at 4 (“In recent studies, exposure to particulate pollution either alone or with other air pollutants – has been linked with premature death, difficult breathing, aggravated asthma, increased hospital admissions, emergency room visits, and increased respiratory symptoms in children.”).

\textsuperscript{17} See IDAHO STATESMAN, supra note 1.

\textsuperscript{18} 42 U.S.C. §§ 12101-17, 12201-13 (1994).
By using the ADA, persons with disabilities are essentially challenging the utility of existing environmental statutes. The first statute to come under fire is the Clean Air Act. This Note focuses on how using the ADA causes serious conflicts with carefully crafted environmental programs and would set a dangerous precedent ripe for exploitation. Simply stated, "if . . . [environmental] activities . . . are covered by the ADA, the failure of any local or state government to guarantee pristine air, by eliminating all emissions from sources such as automobiles, industrial facilities, farming, and households, would arguably be a violation of the ADA." Allowing use of the ADA to challenge the state implementation of federal environmental statutes is unconstitutional and inconsistent with congressional intent and legal precedent, and its snowball effect could pollute the courts with challenges to virtually every environmental program.

Part I of this Note introduces some basic background and broad themes covered to better apprise the reader of U.S. environmental laws and their role in protecting human health. Part II details the specific statutes at issue and analyzes cases that potentially could set a precedent for a new disabilities cause of action in environmental law. Part III analyzes the effects of using the ADA to challenge environmental policies. This part relies on the facts of a current case and raises numerous arguments against the cause of action being pursued. Part IV looks at possible outcomes and the abuse that would arise should the courts allow ADA causes of action. This Note concludes with cautions against abuse of this potential new trend in environmental jurisprudence.

I. STATUTORY BACKGROUND AND PRIOR COURSES OF ACTION

Under current environmental policy, every person is entitled to use the same avenues to challenge and enforce environmental policies. These opportunities include challenges arising under the Administrative Procedures Act and comprehensive enforcement mechanisms available in

21. Under the Clean Air Act, "[t]he term person includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States, and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e) (1994).
most environmental statutes. However, though the ADA provides for causes of action independent of those found in environmental laws, its use could heavily impact the way that environmental laws are enforced. To evaluate the legal issues at hand, a summary of the statutes at issue follows. Because state programs implementing the Clean Air Act are the first to come into dispute, a description of the Clean Air Act will serve as the default environmental statute exemplified in this Note.

A. The Americans with Disabilities Act

Congress enacted the Americans with Disabilities Act in 1990 and it became effective on January 26, 1991. The ADA was enacted to "provide a national mandate 'for the elimination of discrimination against individuals with disabilities.'" The Act extends the prohibition of discrimination in federally assisted programs under section 504 of the Rehabilitation Act of 1973 to all activities of state and local governments, regardless of whether they receive federal aid.

The ADA is comprised of five titles. Title I covers employment and requires businesses to provide reasonable accommodations to protect the rights of persons with disabilities in all aspects of employment. This applies to both physical aspects of the job as well as hiring practices and wages. Title II addresses public services and states that such services cannot be denied, and must be accessible to persons with disabilities. Public services covered include those provided by state and local government instrumentalities. Title III requires that public accommodations, such as buildings, be accessible to individuals with disabilities, and Title

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23. The Clean Air Act's enforcement provisions will be summarized and will serve as an example of similar provisions in other statutes.
28. See id.
IV specifically requires that telecommunications companies providing service to the public have devices for use by the deaf. 30 Title V is a miscellaneous section that includes provisions prohibiting the coercion or threatening or retaliating against the disabled or those attempting to aid persons with disabilities. 31 The Department of Justice ("DOJ"), the ADA's main implementing and enforcement body, has indicated that entities are forbidden from denying a disabled person "the opportunity to participate in services, programs or activities that are not separate or different despite the existence of permissibly separate or different programs or activities." 32 Each title of the ADA provides an important shield for persons with disabilities. However, Title II is also being used as a sword.

Persons with disabilities have found that Title II of the ADA may serve as a vehicle to challenge environmental and health law. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 33 Courts have indicated that a showing of intentional discrimination is not necessary to sustain a Title II ADA claim. 34 The scope of covered activities is also very broad. The ADA's legislative history indicates that Congress chose "[n]ot to list all the types of actions that are included within the term 'discrimination' as was done with in Titles I and III, because this title essentially and simply extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act] to all actions of state and local governments." 35

The elements of a Title II claim are also modeled after section 504 of the Rehabilitation Act. To succeed on a Title II ADA claim, the plaintiff must establish:

(1) That the plaintiff is, or represents the interests of a "qualified individual with a disability";

(2) That such individual was either excluded from participation in or denied benefits of some public entity's services, programs or activities, or was otherwise discriminated against; and

32. 28 C.F.R. § 35.130(b)(2) (2000).
(3) That such exclusion, denial of benefits, or discrimination was by reason of plaintiff's disability.\textsuperscript{36}

A "qualified individual with a disability" is defined by the ADA as a person with a disability "[w]ho, with or without reasonable modifications to rules, policies or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity."\textsuperscript{37} Under the ADA, a "disability" is defined as: a physical or mental impairment that substantially limits one or more major life activities of the individual; a record of such impairment; or being regarded as having such an impairment.\textsuperscript{38} Under the DOJ's implementing regulations, a "physical or mental impairment" includes, "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following bodily systems: [n]eurological, muskuloskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine."\textsuperscript{39}

Of particular relevance to an ADA cause of action is that Title II requires public entities to make reasonable accommodations to their policies, practices, and procedures where it is necessary to avoid discrimination on the basis of a disability.\textsuperscript{40} Reasonable modifications in policies, practices, and procedures are required in order to avoid discrimination, "unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity."\textsuperscript{41} In light of the federal-state scheme of many environmental statutes, making reasonable accommodations could be difficult. The following discussion of one such scheme is warranted.

\textbf{B. The Clean Air Act}

The Clean Air Act ("CAA"), enacted in 1970, established a compre-
hensive federal program to address the problem of air pollution.\textsuperscript{42} Despite the fact that Congress federalized air pollution control, it did so recognizing the need for balance between the states and the federal government.\textsuperscript{43} As a result, implementation of the CAA is the joint responsibility of the federal government and the states.\textsuperscript{44} States implement the CAA either through "state implementation plans" ("SIP") or through independent state statutes.\textsuperscript{45}

The CAA provides numerous methods of enforcement. Sanctions may be imposed against a state for not complying with SIP requirements.\textsuperscript{46} For states that fail to meet such requirements, the EPA has two years to promulgate a federal implementation plan in lieu of the states' plans.\textsuperscript{47} In addition, regulated sources are subject to enforcement under the CAA.\textsuperscript{48}

With regard to noncompliance with pollution requirements, the EPA must notify both the violator and the state in which the violation occurs. The EPA has the authority to order compliance, or it may bring a civil action to enforce compliance if the violation is not rectified.\textsuperscript{49} The CAA also contains citizen suit provisions whereby any person may bring a civil action against a violator, the administrator of the EPA, or the state or federal government in order to enforce compliance.\textsuperscript{50}

The fundamental goal of the CAA is the nationwide attainment and maintenance of the National Ambient Air Quality Standards ("NAAQS").\textsuperscript{51} Under the NAAQS scheme, "the states and the Federal

\textsuperscript{42} See 42 U.S.C §§ 7401-7671 (1994).
\textsuperscript{44} See id.
\textsuperscript{45} See id.
\textsuperscript{46} See 42 U.S.C. §§ 7410(m), 7509(b) (1994).
\textsuperscript{49} See id.
\textsuperscript{50} 42 U.S.C. § 7604 (1994). In order to utilize the citizen suit provision, the person(s) must send a notice to the violator sixty days before filing the suit so as to enable the violator to come into compliance or for the government to decide to pursue the violator. Citizens may also sue for past violations if there is a reasonable belief that the violations will recur in the future. One restriction in the citizen suit provision is that a citizen is barred from action if the government is in the process of diligently prosecuting the suit. Id.
\textsuperscript{51} See 42 U.S.C § 7401(b)(1) (1994). One of the key purposes of the CAA and the NAAQS is "to protect and enhance the quality of the nation's air re-
Government [are] partners in the struggle against air pollution. The EPA is required to establish both primary and secondary NAAQS for "criteria pollutants." Criteria pollutants are those pollutants that the EPA determines may jeopardize the public health or welfare. The primary NAAQS are the acceptable concentration of a pollutant in the ambient air measured over a designated time that will protect the public with an "adequate margin of safety." Secondary NAAQS are set at a level to protect the public welfare. The EPA is authorized not only to establish, but also to review and revise the NAAQS every five years.

Once a NAAQS is established, it is up to the states to select and implement the pollution control measures and to attain them by statutory deadlines. The entire nation is divided into air quality control regions and each State must subsequently designate its air quality control regions as meeting ("attainment") or not meeting ("non-attainment") the NAAQS. For those areas designated as non-attainment, states must develop a state implementation plan ("SIP") which sets emission limits imposed to control emissions from specific stationary sources in order to attain the NAAQS. The plans are to provide for attainment as "expeditiously as practicable, but no later than [five] years from the date . . . [of designation]. Once a SIP is submitted, the EPA must approve it. However, the EPA's discretion is limited.

54. See 42 U.S.C. § 7408(a)(1); See also 40 C.F.R. pt. 50 (2000). (The current criteria pollutants are: sulfur dioxide, carbon monoxide, nitrogen dioxide, ozone, particulate matter, and lead).
56. See id. § 7409(b)(2).
57. See id. § 7409(d)(1).
64. In Union Electric v. EPA, 427 U.S. 246, 269 (1976), the Court stated that "Congress plainly left with the states . . . the power to determine which sources would be burdened by regulation and to what extent."
C. Washington's Clean Air Act

Washington State's clean air program will be used as an example for the purposes of this Note because its program has come under recent scrutiny. Joining the federal government in the battle for clean air, Washington State has enacted its own Clean Air Act. The purpose of the Washington act is to ensure that the health and safety of persons vulnerable to the effects of pollution are protected.

Since agricultural harvesting plays a prominent role in Washington's economy, the state legislature developed a program to regulate agricultural burning. The Washington Department of Ecology ("Department") is empowered to establish general criteria allowing for the issuance of permits for agricultural burning activities. For each permit issued, the Department must take into account safety and property considerations as well as the public interests in reducing air, water, and land pollution.

Further, the Department conditions the issuance of its agricultural burning permits on a number of considerations such as: the air quality conditions of the area where the burning will occur; the time of the year; the meteorological conditions; the size and duration of the burning; the type and amount of vegetative material to be burned; the applicant's need to carry out such burning; the existence of extreme burning activities; the risk of escape of fire onto another's property; and the public's interest in

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67. It is declared to be the public policy to preserve, protect, and enhance the air quality for current and future generations. Air is an essential resource that must be protected from harmful levels of pollution. Improving air quality is a matter of statewide concern and is in the public interest. It is the intent of this chapter to secure and maintain levels of air quality that protect human health and safety, including the most sensitive members of the population, to comply with the requirements of the federal clean air act, to prevent injury to plant, animal life and property, to foster the comfort and convenience of Washington's inhabitants, to promote the economic and social development of the state, and to facilitate the enjoyment of the natural attractions of the state. Id. § 70.94.011.
68. See id. § 70.94.650(1) (c).
69. See id.
the environment. Since agricultural burning, like other air emissions, is a legal, albeit regulated, activity, there is very little case law interpreting and testing its existence, scope, and extent.

D. Case Law

Although case law interpreting the ADA is rapidly maturing, conflict between it and other federal statutes is still in an embryonic stage. The first case challenging the implementation of an environmental law by relying on the ADA was *Heather K, by Anita K v. City of Mallard*. In that case, a child with severe respiratory and cardiac conditions sought to permanently enjoin exceptions to the city's general ban on open burning. Even though the city neither burned yard waste nor required its citizens to do so, the court determined that the city may be liable under the ADA for its regulation of open burning. Reasoning that the city's ordinance had a discriminatory effect on the ability of persons with disabilities to take advantage of city services, programs, or facilities, the court found that the plaintiff raised an issue of material fact precluding the city's summary judgment motion. The court also held that the city's regulation of open burning constituted a "program, service or activity" under the ADA. The plaintiff in *City of Mallard* also met the definition of a person

71. The Supreme Court is granting certiorari to an increasing number of ADA cases. One author writes that:

The Supreme Court has also not been overly receptive to arguments in ADA cases. In 1998 it issued a trio of decisions, the gist of which was that in determining if a person was a qualified individual with a disability under the ADA, it was appropriate to see if the person was substantially impaired when corrective measures were considered. These were cases of individuals with vision impairments and high blood pressure. The Supreme Court rejected the plaintiffs' claims in which the federal government, led by the EEOC [Equal Employment Opportunity Commission], concurred that coverage of the individuals should be determined without considering corrective measures.

Charles D. Goldman, High-Profile Civil Rights, EXEC. UPDATE, Nov. 2000, at 32.
73. See id. at 1375, 1376.
74. See id. at 1389.
75. See id. at 1386, 1387.
76. See id. at 1389. A "program or activity" includes "all of the operations of
with a disability since her asthma constitutes a physical impairment that substantially limits one of her major life activities.\textsuperscript{77}

Although \textit{City of Mallard} was the first to use the ADA in a challenge to activities regulated by environmental law, it should not be considered controlling. In denying the city's motion for summary judgment, the court limited its holding to the specific facts of the case - the required elements for an ADA claim. Therefore, the court did not address any of the conflicts between the ADA and the city's ordinance. Even in its discussion of the requirement to make reasonable accommodations to the challenged ordinance, the court offered no suggestions on how to make such accommodations by stating that it is a question of fact not amenable to summary disposition.\textsuperscript{78} As a result, this case may be considered the first of its type, though not influential on larger issues created by use of the ADA in this fashion.

In 1999, a case was filed in Washington State putting the ADA directly at odds with the federal CAA.\textsuperscript{79} The case involved the issuance of air permits granted under the Washington Clean Air Act for the burning of wheat field stubble, and the adverse "discriminatory" effects of the burn-

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\textsuperscript{77.} See 28 C.F.R § 35.104(4)(2) (2000).

\textsuperscript{78.} City of Mallard, 946 F. Supp. at 1390. See also Olmstead v. L.C., 527 U.S. 581, 606 n.16 (1999). "The Supreme Court has suggested that in determining whether an accommodation is reasonable, it would include consideration of 'undue hardship' such as the costs of the modification, the budget of the program or activity, and the overall size and type of the program.".

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ing on people with asthma covered under the ADA. The facts of the case are similar to Heather K:

[Save our Summers (“SOS”)] and two children, one with asthma and one with cystic fibrosis, are seeking to stop the practice of burning off stubble in harvested wheat fields in eastern Washington State.

The large quantities of smoke produced by the burning forces the children to stay indoors, keeping them away from school, and off roads and other public accommodations. This, they argue, violates their rights under ADA.

The stubble burning is conducted under permits issued by the Washington Department of Ecology. Under Washington law, the permits are required to minimize air pollution and can be denied under adverse weather conditions. The plaintiffs brought suit against the Washington Department of Ecology, under the ADA, seeking a preliminary injunction against the issuance of further crop burning permits. The court denied the injunction on grounds that it lacked jurisdiction to consider the suit. Plaintiffs then moved for reconsideration of the lawsuit after which, on December 6, 1999, the court requested that the DOJ file an amicus curiae brief to address:

(1) whether the comprehensive statutory and regulatory scheme of the Clean Air Act (“CAA”), including private remedies, forecloses plaintiffs claims under the Americans with Disabilities Act and

(2) whether the objectives and remedies of the ADA and RA [Rehabilitation Act] can be reconciled with CAA’s standards that are the result of “compromise and consensus.”


81. Id.

82. See id.


The DOJ filed its brief on September 6, 2000, urging the court to find that the ADA and federal CAA be read harmoniously in order to simplify the reconciliation of the two statutes.87 If the court finds a discriminatory effect of the Washington statute, then reasonable accommodations, not fundamental alterations, must be made to the statute. The DOJ cautioned, however, that the “remedies available under the ADA may need to be modified to avoid conflict with the CAA scheme.”88 In addressing this issue, the DOJ stated that in identifying remedies, the court must take into account the purposes and policies of both the federal and state Clean Air Acts.89 Responding to the DOJ brief, the court ruled that the broad sweep of the federal Clean Air Act did not prevent the children from addressing air pollution under the ADA, thus clearing the way for trial.90

II. IMPACT AND ANALYSIS—USING THE SOS CASE AS A GUIDE

The potential impact of using the ADA in a way that conflicts with environmental policies, such as the CAA, could create a “legal train wreck” due to the difficulty of reconciling statutes with fundamentally different goals.91 Although the DOJ opines that the ADA and CAA should be read harmoniously, it provides absolutely no guidance as to how to craft a remedy that takes into account the purposes of the controlling statutes without imposing fundamental alterations to the Washington Clean Air Act. Aside from difficulty in determining a legal remedy, the court’s

88. Id.
89. See id. at 25.
90. Frater, supra note 20 at 3167. SOS also filed a case in the state of Idaho challenging that state’s agricultural burning program. See Save Our Summers v. State of Idaho (No. 00-CV-430-N-EJL D. Idaho, 2000). This case was stayed until the Supreme Court ruled on the then pending case of Board of Trustees of Univ. of Ala. v. Garrett, 193 F.3d 1214 (11th Cir. 1999), cert. granted, 120 S. Ct. 1669 (2000). See Save Our Summers v. State of Idaho (Order Staying Proceedings). Once the Supreme Court ruled on Garrett (analyzed later in this Note), the Idaho District Court denied the plaintiffs' motions for preliminary injunction and temporary restraining order. The Court also dismissed the case as to claims for money damages in accordance with Garrett. See Save Our Summers, No. 00-430-N-EJL (D. Idaho, 2001) ( order denying plaintiffs' motion).
91. Frater, supra note 20, at 3167.
original order denying the plaintiffs' motion for a temporary restraining order raised numerous arguments questioning the use of the ADA when it conflicts with other statutes.\textsuperscript{92} Several of these arguments will be discussed below.\textsuperscript{93}

A. Comprehensive Scheme of Environmental Statutes

The comprehensive scheme of the federal Clean Air Act, like other environmental statutes, should be enough to prevent an alternative cause of action. In \textit{Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n.},\textsuperscript{94} the U.S. Supreme Court held that the presence of a comprehensive remedial scheme within a federal environmental statute forecloses resorting to remedies beyond those contained in the statute itself.\textsuperscript{95} In \textit{Sea Clammers}, the Court considered whether the plaintiffs could file a statutory civil rights claim\textsuperscript{96} to recover damages under the Clean Water Act ("CWA"). The plaintiffs erroneously sought to enforce the standards set forth in the CWA through another statute, even though the CWA contained its own statutory enforcement mechanisms. In making its determi-


\textsuperscript{93} It is important to note that these arguments are raised in light of the fact that the court found the plaintiffs did in fact raise a prima facia case under the ADA. To raise a prima facia case, a plaintiff must establish: that the plaintiff is, or represents the interests of, a "qualified individual with a disability;" that such individual was either excluded from participation in or denied benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and that such exclusion, denial of benefits, or discrimination was by reason of plaintiff's disability. See \textit{City of Mallard}, 964 F. Supp. 1373, 1383 (N.D. Iowa 1996).

In SOS, the plaintiffs have asthma and cystic fibrosis, both recognized as disabilities under the ADA. Meeting the second prong, plaintiffs were denied access to public roads and even school. Lastly, plaintiffs meet the third prong by establishing that the plaintiffs were denied "meaningful" access. This prong is met since one of the plaintiffs had to leave town during burning season while the other could not even visit the family doctor. See \textit{Save Our Summers}, 132 F. Supp. 2d. at 907.

\textsuperscript{94} 453 U.S. 1 (1981).

\textsuperscript{95} \textit{Id.} at 20.

\textsuperscript{96} The statute used was 42 U.S.C. § 1983 (1994). This statute creates a private cause of action for the deprivation of rights, privileges or immunities secured under the Constitution or laws of the United States.
nation, the Court found it significant that the CWA contains extensive enforcement provisions, including citizen suit provisions. The Court's rationale was that the use of section 1983 would circumvent the intent of Congress by allowing only certain remedies and not others when implementing the CWA. The existence of citizen suit provisions makes it less likely that Congress intended to provide for alternative private rights of action.

Like the CWA, the CAA has an extensive remedial scheme that authorizes private causes of action. Any person may bring a civil action against a violator, or against the state or federal governments to enjoin or enforce compliance. The person or persons bringing the suit must first provide notice to the violator or the government sixty days before filing the suit. It is possible that during this sixty day period either the violator will comply with the statute or the government will pursue enforcement, thus eliminating the need for the suit. Circumvention of the provision upsets the delicate balance between industry and public health.

The legislative history of the CAA's citizen suit provision indicates that Congress intended to encourage "citizen participation in the enforcement of standards and regulations established under this Act." Allowing a claim to proceed under the ADA would be a circumvention of the CAA's provisions for citizen participation and be inconsistent with congressional intent. The CAA's comprehensive remedial scheme should foreclose any challenge arising under the ADA.

In its amicus brief, the DOJ opines that the Sea Clammers analysis is not applicable to the situation in Save our Summers v. Wash. State Dep't of Ecology. In the DOJ's opinion, the application of the Sea Clammers analysis should be restricted to cases arising under 42 U.S.C. section 1983. Its rationale is that section 1983

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98. See id.
99. See id. at 20.
102. Id. at 903. (citing S. REP. NO. 91-1196, at 36 (1970)).
104. See id. at 14.
provides a vehicle for plaintiffs to assert violations of federal law; it does not create a substantive right that exists independent of the statute in issue. In contrast, the ADA and the RA (and certainly other disability discrimination statutes) provide protections against discrimination on the basis of disability that are governed by specific substantive standards and are independent of other federal protections.\textsuperscript{105}

The DOJ further distinguishes \textit{Sea Clammers} by noting that the Court did not attempt to reconcile the statutes at issue.\textsuperscript{106} Rather, the SOS court's analysis focused exclusively on the remedial scheme of the CWA. The DOJ also points out that this analysis has not been applied outside the context of section 1983 cases since that provision is unique in that it provides "an enforcement mechanism for substantive rights defined in another statute."\textsuperscript{107} The essence of the DOJ's argument is that in cases involving section 1983, there are not two distinct statutory schemes that could be reconciled. By contrast, the ADA contains substantive rights separate and independent from the CAA and also provides a means of enforcing those rights.\textsuperscript{108} As such, the DOJ urges the court to reconcile the statutes in conflict; however, the DOJ provides absolutely no guidance as to how this should be done.

\textbf{B. Violation of the Eleventh Amendment's Sovereign Immunity Clause}

Another argument weighing heavily against the use of the ADA as a tool to challenge environmental policy is based on the constitutionality of the ADA itself. Relying on several Supreme Court decisions in which other civil rights statutes were found to violate the Eleventh Amendment,\textsuperscript{109} the U.S. Supreme Court, during the October 2000 Term, was

\begin{itemize}
\item 105. \textit{Id.}
\item 106. \textit{See id.}
\item 107. \textit{Id.}
\item 108. \textit{See id.}
\item 109. U.S. CONST. amend XVI;
\end{itemize}

In a series of decisions that involved diverse issues during the past decade, the Supreme Court has been extremely receptive when states have argued "sovereign immunity." In 1996 it held that the state of Florida could not be sued by Seminole Native Americans in a case involving interpretation of a statute, what is known legally as "federal question" jurisdiction. This was followed a few years later by \textit{Alden v. Maine},
asked to consider whether the ADA is in contravention of the Eleventh Amendment’s Sovereign Immunity Clause. In *Board of Trustees of Univ. of Alabama v. Garrett*, the Court held that the Eleventh Amendment bars suits filed under Title I of the ADA, which deals with the employment practices of employers including states. The case was decided on the basis of complaints arising under Title I despite the fact that respondents’ alleged violations of both Title I and Title II of the ADA. Although the Court limited its decision to the Title I complaints, the same analysis is used in numerous Eleventh Amendment cases and, accordingly, may be used to challenge the constitutional validity of Title II of the ADA.

The Eleventh Amendment states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, or civil in the nature of a suit of equity, brought by any person against or in the name of the United States of America, touching any act or omission which is or may be in violation of the Constitution or laws of the United States.”

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527 U.S. 706 (1999) in which the Supreme Court held that states could not be sued for violations of the Fair Labor Standards Act (minimum wage).


110. See Bd. of Trs. of Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001).


The case began in 1997 when plaintiffs Patricia Garrett and Milton Ash filed separate ADA suits against the state. Garrett charged that she was demoted from her job as a nurse at the University of Alabama at Birmingham because she was regarded as disabled because of her cancer history. Ash, a correctional officer, contended that the Alabama Department of Human Services provided inadequate accommodation for his asthma.

112. See Garrett, 121 S. Ct. at 960 n.1.

Though the briefs of the parties discuss both sections in their constitutional arguments, no party has briefed the question of whether Title II of the ADA, dealing with the “services, programs, or activities of a public entity,” 42 U.S.C. §12132, is available for claims of employment discrimination when Title I of the ADA expressly deals with the subject (citations omitted) . . . . We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under §5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question.

*Id.*

commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." A formalistic interpretation of the Amendment limits its application to suits against States from citizens of other states, yet the judiciary has extended its applicability to citizens residing in the same State. Ultimately, the guarantee of the Amendment is that private individuals in federal court may not sue non-consenting states. Regardless, Congress may still abrogate a State's sovereign immunity if it unequivocally intends to do so and acts pursuant to a valid grant of power under the Constitution. The key issue, as in Garrett, is whether Congress acted within constitutional authority to abrogate the Eleventh Amendment in the ADA.

In determining the validity of an Eleventh Amendment abrogation, the Supreme Court has found that the enforcement provisions of section 5 of the Fourteenth Amendment limit the principle of state sovereignty. As such, the Court has determined that Congress may subject a non-consenting state to suit in federal court when it is exercising its enforcement power granted under the Fourteenth Amendment. Congress frequently relies on this power to escape Eleventh Amendment restrictions, such as it did with the ADA, to enforce section I of the Fourteenth Amendment. Section 1 states in pertinent part:

114. U.S. CONST. amend. XI.
116. See id. at 73.
117. See id. In Garrett, the Court stated that the first requirement is not in dispute based on language in the ADA. See Garrett, 121 S. Ct. at 962. "A State shall not be immune under the eleventh amendment of the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." See Garrett, at 962 (citing 42 U.S.C. § 12202).
118. It is important to note that the Eleventh Amendment argument was not available in Heather K because the Eleventh Amendment does not apply to local governments. The Garrett Court stated that "[T]he Eleventh Amendment does not extend its immunity to units of local government." Garrett, 121 S. Ct. at 965 (citing Lincoln County v. Luning, 133 U.S. 529, 530 (1890)).
120. See id. "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Congress intended to use this power in enacting the ADA. See 42 U.S.C. § 12101(b)(4) (1994).
121. "It is clear that Congress intended to invoke § 5 as one of its bases for enacting the ADA. See 42 U.S.C. § 12101(b)(4)." Garrett, 121 S. Ct. at 962 n.3.
No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.  

In enforcing the provisions of section 1, the Court developed a test to determine whether legislation exceeds the scope of the protections provided by the Fourteenth Amendment. The test requires that there be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."  

In applying the Fourteenth Amendment analysis to the ADA, an examination of the Amendment's restrictions to the way in which states treat the disabled must also follow. Such an examination flows from the Equal Protection Clause of the Fourteenth Amendment. Legislation relying on enforcement of the Equal Protection Clause hinges upon whether the class of persons being protected qualifies as a "suspect class." Applicable to the ADA, the Court determined that mental retardation does not qualify as a suspect or quasi-suspect class. As a result, cases involving allegations of state discrimination of the mentally retarded are subject to the minimum "rational-basis" level of judicial scrutiny. In rejecting the classification of the mentally retarded as "quasi-suspect," the Court actually expanded the class beyond the mentally disabled by stating that:

[If the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part

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Contra Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000). Court dismissed ADA Title II claim from case for lack of jurisdiction. Walker at 347. The Court found that the ADA was based on the Commerce Clause and thus, states are not subjected to private litigation in federal court based on Eleventh Amendment. Walker at 346. The Court reasoned however, that legislation based on Section 5 of the Fourteenth Amendment supports private litigation. Walker at 346.

124. See Garrett, 121 S. Ct. at 963.
126. See Cleburne, 473 U.S. at 446.
of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.\textsuperscript{127}

In Garrett, the Court stated that:

Under rational-basis review, where a group possesses "distinguishing characteristics relevant to interests the State has the authority to implement," a State's decision to act on the basis of those differences does not give rise to a constitutional violation. \textit{Id.} at 441 [Cleburne]. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of the treatment and some legitimate governmental purpose.\textsuperscript{128}

As such, \textit{Cleburne} holds that "states are not required by the Fourteenth Amendment to make special accommodations for the disabled so long as their actions . . . are rational."\textsuperscript{129}

Furthermore, the Court also held that in order to invoke its section 5 powers under the Fourteenth Amendment, Congress must identify a pattern of unconstitutional discrimination against the class of persons subject to the challenged legislation. As a result, the constitutionality of the ADA's circumvention of the Eleventh Amendment is determined by whether Congress adequately identified a pattern of unconstitutional discrimination against persons with disabilities by the several states. In Garrett, the Court notes that the ADA's legislative record fails to show a pattern of irrational state discrimination in employment (Title I) against the disabled.\textsuperscript{130} In addition, the Court goes on to note that:

Congress made a general finding in the ADA that 'historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem' . . . The record assembled by Congress includes many instances to support such a finding. \textit{But the great majority of these incidents do not deal with the activities of States}.\textsuperscript{131}

\textsuperscript{127} \textit{Id.} at 445-46.

\textsuperscript{128} Garrett, 121 S. Ct. at 963, 964. (citations omitted).

\textsuperscript{129} \textit{Id.} at 964.

\textsuperscript{130} See \textit{id.} at 965.

\textsuperscript{131} \textit{Id.} (emphasis added). (Emphasis was added to highlight that the finding is not limited only to employment practices governed under Title I of the ADA. The Court acknowledges, as does Justice Breyer's dissent, that some instances of
Consequently, the Court concluded that Congress failed to identify a pattern of discrimination by the states that constituted a violation the Fourteenth Amendment and, as a result, failed to justify the ADA as a remedy that is congruent and proportional to the identified discrimination. The Eleventh Amendment was unconstitutionally abrogated by Title I of the ADA.

The same analysis is directly applicable to Title II. By relying on general findings of discrimination in society, not specifically on states' discriminatory activities, Congress again failed to identify a pattern of state discrimination against persons with disabilities in dealing with state services, programs, or activities. Furthermore, in accordance with Cleburne, states may discriminate on the basis of disability if such classification is rationally related to a legitimate state interest. Applying this terminology to states' implementation of environmental laws, such as Washington and Idaho's implementation of the CAA, states do in fact have sound and rational bases for enacting and implementing environmental policies — the goal of eliminating the adverse health effects of pollution for society as a whole — including those that are disabled. Even if implementation of federal environmental statutes results in adverse impacts to the disabled—as the SOS complaint results from the issuance of agricultural burning permits “[t]he failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause.”

These rational bases that justify environmental schemes, such as the state of Washington's agricultural burning program, are embedded deeply within the federal CAA and Washington's statutory equivalent. Accordingly, Congress can reasona-

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state discrimination are mentioned in the legislative history. Id. at 966-67. However, the Court dismisses these examples by questioning the context in which they were cited and noting that even if unconstitutional actions determined, “…these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which section 5 legislation must be based.” Id. at 965.; See also 42 U.S.C. § 12101(a)(2).

132. See Garrett, 121 S. Ct. at 967, 968.
133. Id. at 968. (Kennedy, J. concurring.).
134. See, e.g., 42 U.S.C. § 7401(b)(1) (1994). The purpose of the Clean Air Act is to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare . . . .” Id. See also 42 U.S.C. § 7409(b)(1) (1994) (ensuring that air quality will protect with an adequate margin of safety); 42 U.S.C. § 7409(b)(2) (1994) (stating secondary NAAQS standard is to protect
bly be determined to have unconstitutionally abrogated the Eleventh Amendment when it enacted Title II of the ADA. It follows that any claims arising under Title II of the ADA for state discriminatory practices based on implementation of federal environmental law cannot succeed under the Equal Protection Clause.

C. Environmental Policy is the Result of Comprehensive Multi-Stakeholder Negotiation

Another argument weighing against the use of the ADA in challenges to the CAA and other environmental laws asserts that environmental policy is the result of an extensive and comprehensive negotiation and development process.\footnote{135} The Administrative Procedure Act ("APA")\footnote{136} sets the framework by which federal agencies develop policy, including environmental standards such as NAAQSs. Basic procedural requirements for rulemakings are listed in section 553 of the APA. The rulemaking process must: specify that the agency is giving interested parties not less than thirty days to participate in the rulemaking through submission of comments, and, when required by statute, in a public hearing; and the agency must consider these comments and include in the final rule a general statement of their basis and purpose.\footnote{137} As such, bringing an environmental action to court based on an ADA claim would circumvent the regulated industry's certainty in the legality of their activities. However, this would create a dom-

\footnote{135} After numerous hearings and extensive research done at the legislative level in developing the statutes, Congress delegates the implementation of the statutes to administrative agencies. The agencies then promulgate rules and regulations that more specifically detail legal obligations, implementation and enforcement. The development of these environmental regulations is the culmination of a finely choreographed process involving vast input from a diverse group of stakeholders including industry, government, special interest groups and the public.


\footnote{137} 5 U.S.C. §§ 553(b), (c), (d) (2000). Other requirements include (1) a notice of proposed rulemaking in the Federal Register; (2) reference to the legal authority under which it is proposed; and (3) a description of the substance of the rule.
Circumventing Environmental Policy

When analyzing the comprehensive nature of environmental statutes such as the CAA, the important role of the states must not be overlooked. As previously stated, the CAA makes the states and the federal government "partners in the struggle against air pollution." The role of the federal government, under the auspices of the EPA, is to develop and enforce the NAAQS. However, the development and implementation of air quality controls resides exclusively with the states. In fact, courts have protected this discretion by stating that the EPA has "no authority to question the wisdom of a state’s choices of emission limitations if they are part of a plan which satisfies the standards of section 110(a)(2)." Furthermore, a State’s discretion in developing and implementing measures to reach attainment does not exclude the adoption of more stringent NAAQS. The only stipulation is that SIPs must be approved by the EPA before they go into effect. For example, Washington State’s SIP for particulate matter has been approved by the EPA. However, if it is determined that the ADA is a super-statute that trumps environmental laws, "the failure of any local or state government to guarantee pristine air, by eliminating all emissions from sources such as automobiles, industrial facilities, farming, and households, would arguably be a violation of the ADA." Such an outcome would change the states’ role in fighting pollution from that of partner to one bearing liability.

D. The Health of Vulnerable Persons is Already Protected Under the Law

Contained in the carefully tailored development of the Clean Air Act

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140. See Union Electric v. EPA, 427 U.S. 246, 269 (1976); ("Congress plainly left with the States . . . the power to determine which sources would be burdened by regulation and to what extent.").
143. Washington’s Open Burning and Field Burning regulations were approved by EPA on September 17, 1990. See U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10, TABLE OF CONTENTS FOR APPROVED WASHINGTON SIPs, at http://yosemite.epa.gov/r10/AIRPAGE.NSF/webpage/table+of+contents+for+approved+washington+sips (last visited Feb. 28, 2001).
144. See Frater, supra note 20, at 3167.
are requirements for the establishment of standards based on the health needs of citizens, including sensitive citizens. In the development of NAAQS, the EPA is required to establish levels that are “requisite to protect the public health” with an “adequate margin of safety.” Sensitive persons, such as asthmatics, are to be included within the group that must be protected. Consideration of sensitive persons in the development of NAAQS health standards is also addressed in the CAA’s legislative history. “NAAQS must protect not only average healthy individuals, but also ‘sensitive citizens’—children, for example, or people with asthma, emphysema, or other conditions rendering them particularly vulnerable to air pollution.” As such, the EPA sets its national standards with a focus on public health—thus taking into account the needs of vulnerable sub-populations.

The consideration and protection of the health of sensitive persons is expressly detailed in the challenged Washington statute in Save our Summers. In fact, the Washington Clean Air Act goes even farther by protect-

145. The first listed purpose of the federal CAA is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.” 42 U.S.C. § 7401(b)(1) (1994).

146. Id. § 7409(b)(1).

147. Lead Indus. Ass’n v. EPA, 647 F.2d 1130, 1153 (D.C. Cir. 1980).


149. The DOJ acknowledges this point in its Save Our Summers amicus brief by pointing out that Congress stated that EPA need not consider the most sensitive individuals within the vulnerable sub-populations. See Brief Amici Curiae of the United States at 19, Save Our Summers v. Wash. State Dep’t of Ecology, 132 F. Supp. 2d 896 (E.D. Wash. 1999) ( No. CS-99-269-RHW). However, DOJ then points to other excerpts in the legislative history indicating that the EPA must consider the effects to a “representative sample of persons comprising the sensitive group rather than to a single person in such a group.” Id. Although the legislative history does not explain this exclusion, one theory is that it is based on the need to develop standards that are reasonable for both the protected class of persons and the regulated community. This delicate balance may also reflect the vast stakeholder input relied upon in the development of the Clean Air Act and the need for this coordination in the development of NAAQSs. Apparently, the DOJ is attempting to carve out some room for ADA claims to protect the “most sensitive individual” referred to in the legislative history. Although this may be the most “politically correct” result, it is inconsistent with the letter of the law and congressional intent.
ing the most vulnerable members of the population beyond the federal requirements. Its stated purpose is to "secure and maintain levels of air quality that protect human health and safety, including the most sensitive members of the population."\footnote{150}

As the result of comprehensive air pollution programs at both the federal and state levels, the concerns of sensitive individuals are in fact taken into account in the development of air quality standards. Reliance on this comprehensive structure is further supported by the well-established rule of statutory construction that where two statutes touch upon the same area, the more specific statute controls the terms of the more general one.\footnote{151} Proponents of this argument conclude that any efforts to use the ADA to circumvent the CAA cannot be countenanced.

E. Finding a Reasonable Accommodation

A final argument that can be raised to prevent the use of the ADA in environmental cases is the difficult task of finding a reasonable accommodation. As previously noted, the ADA requires public entities to make reasonable accommodations to their usual policies, practices, and procedures when necessary to avoid discrimination on the basis of disability.\footnote{152} These modifications are required unless the entity can demonstrate that they (the modifications) would fundamentally alter the nature of the service.\footnote{153} In SOS, the DOJ urges the court to read the two statutes together harmoniously, but cautions that remedies available under the ADA (e.g., reasonable accommodations) may need to be modified to avoid conflict with the CAA scheme.\footnote{154} However, the DOJ passes this daunting task onto the lower court by stating that "[g]iven the early posture of the record, the scant evidence on possible modifications does not render feasible a fair and complete analysis at this point."\footnote{155} With no guidance from the DOJ, courts are essentially left with all of the pieces but without in-

\footnote{150. Washington Clean Air Act, WASH. REV. CODE § 70.94.011 (1992) (emphasis added).}
\footnote{151. See Preiser v. Rodriguez, 411 U.S. 475, 489 (1973).}
\footnote{152. See 28 C.F.R. § 35.130(b)(7) (2000).}
\footnote{153. See id.}
\footnote{155. Id. at 25.}
structions.

Courts have determined that the test for "reasonable accommodation" must be made on a case-by-case basis. To determine whether an accommodation is "reasonable," factors to consider may include the costs of the modification, the budget of the program or activity, and the overall size and type of the program. To add to this list, the DOJ also suggests looking at the purposes and policies underlying the state's clean air program.  

Determining a "reasonable" alternative without fundamentally altering the nature of the services provided would essentially put the CAA and the ADA completely at odds with one another. This is especially the case when a state program has been carefully crafted and thus implicitly incorporates provisions that could already be considered reasonable accommodations, or allows options providing for the development of alternatives under the existing programs. For example, the Washington program was developed to comply with EPA established NAAQS health standards. The Washington Code states that:

As implemented by regulation, the State's agricultural burning permit program seeks to 'establish controls for agricultural burning in the state in order to minimize adverse health and the environmental effects from agricultural burning' and to develop 'economically feasible alternative methods to agricultural burning.' Wash. Admin. Code § 173-430-010 (1999). The permit program regulations further provide that '[a]gricultural burning is allowed when it is reasonably necessary to carry out the enterprise. A farmer can show it is reasonably necessary when it meets the criteria of the best management practices and no practical alternative is reasonably available.' WASH. ADMIN. CODE §173-430-040. "Best management practices" are those

156. See Staron v. McDonalds Corp., 51 F.3d 353, 356 (2d Cir. 1995); see also Crowder v. Kitagawa, 81 F.3d 1480, 1486 (9th Cir. 1996) (determining what constitutes reasonable modification is highly fact specific, requiring case-by-case inquiry.).


158. Brief Amici Curiae of the United States at 24 n.19, Save Our Summers v. Wash. State Dep't of Ecology, 132 F. Supp. 2d 896 (E.D. Wash. 1999) ( No. CS-99-269-RHW). The DOJ points to WASH. REV.CODE § 70.94.011 which states that "[i]t is the policy of the state that costs of protecting the air resource and operating state and local air pollution control programs shall be shared as equitably as possible among all sources whose emissions cause air pollution."
practices for reducing air contaminant emissions from agricultural activities as identified by a research task force established by the State's Department of Ecology. WASH. REV. CODE §§ 70.94.650(4).

Furthermore, the Washington Act established an Agricultural Burning Practices and Research Task Force to develop and revise best management practices (BMPs) for agricultural burning. As such, use of the ADA to challenge statutes such as Washington's is not necessary.

Relying on the flexibility of its program, the Washington Department of Ecology, on January 12, 2001, denied a petition by Save Our Summers to revise the Washington wheat stubble burning regulations. The reason cited for the denial is that a "multi-faceted agricultural burning program [is] already working." The Department of Ecology notes that under the existing program, compromises have been made including voluntary burning reductions by the area's farmers. Preliminary figures showed that at least 12,000 fewer acres were burned in fall 2000 than in fall 1999 - a thirteen percent drop. Furthermore, Department of Ecology Director Tom Fitzsimmons stressed the State's commitment to human health by stating, "We agree we need to figure out how and when wheat stubble burning affects people's health. [...][H]aving a clear answer to that question will give us a more accurate goal for clean air in Eastern...

159. Id. at 24 n.19.

160. WASH. DEPT. OF ECOL., AGRICULTURAL BURNING FOCUS SHEET, Aug. 1998 (98-1027-AQ) available at http://www.ecy.wa.gov/pubs/981027aq.PDF (last revised Aug. 1998). "The Task Force also sets permit fees, identifies research needs and recommends research funding priorities to explore and test economical and practical alternative practices to agricultural burning." Id. The Task Force is comprised of members representing the farming community, conservation districts, the state departments of Agriculture and Ecology, local air authorities, college or university agricultural specialists, and the public health or medical community. See id. The balanced composition of the task force indicates a reasonable program that contains flexibility and discretion to ensure that every individual is protected and that if the health of citizens is in jeopardy, reasonable efforts will be made to ascertain alternatives within the confines of the air program.


162. Id.

163. See id.

164. See id.
Washington and over our State."[^165] The Department is also pursuing funding for a comprehensive study of how field burning affects human health.[^166] As such, reasonable accommodations are already available with more being pursued under existing law. Any changes requiring additional actions would be duplicative or burdensome.

In light of the implicit incorporation of reasonable accommodations and flexibility contained in the Washington program, any changes to the status quo could be considered a fundamental alteration to the State's programs. For example, a prohibition on agricultural burning would no doubt constitute a fundamental alteration. In addition, such a proscription would have serious environmental and economic ramifications. Eliminating controlled burning would increase the potential for destructive wildfires thereby threatening long-term air quality. Additionally, elimination of burning would likely require the use of chemicals and pesticides to control insect populations and the spread of disease, thus increasing the likelihood that individuals would be exposed to potentially toxic chemicals.[^167] Reliance on chemicals and pesticides would also increase the economic burden on farmers who have come to rely on agricultural burning as a cost-effective mechanism to ensure a healthy and hearty crop yield.[^168] Considering the undue hardship elements the Supreme Court referred to in *Olmstead*, this option would likely constitute a fundamental alteration to the existing program.

Other options residing between an outright prohibition and maintaining the status quo, include legion and alternatives for residual removal of stubble such as incorporating the residue in the soil, seeding directly into standing stubble using a "no-till" drill, or bailing and removing wheat straw.[^169] Though not expressly stated in the Code, these alternatives may

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[^165]: See id.
[^166]: See id.
[^167]: Such exposure could be especially damaging to the very sensitive individuals they are trying to protect by eliminating burning activities.
[^169]: Save Our Summers v. Wash. State Dep't of Ecology, 132 F. Supp. 2d 896, 908-09 (E.D. Wash. 1999). Legion is the use of resistant/tolerant varieties of wheat. See id at 908-09. Other alternatives include:

- seeding date adjustment, adjustment of the seed rate and row spacing,
- site specific crop rotation systems targeted to manage the specific pest or-
well have been considered by implication by legislators vis-à-vis the Agricultural Burning Practices and Research Task Force. Regardless, in light of the CAA NAAQS requirements and Washington’s implementing statute accounting for the health of sensitive individuals, an argument can be proffered that reasonable accommodations have been made to comply with ADA requirements and to protect the most sensitive individuals.

III. LOOKING AHEAD – A PRECEDENT RIPE FOR ABUSE

If courts treat the ADA as an extra-environmental enforcement tool, such a precedent would be subject to gross misuse. Individuals and organizations alike would be provided a new opportunity to challenge the strength and implementation of environmental laws. Challenges to a state’s implementation of the CAA would serve as a stepping-stone for challenges to other environmental statutes. These challenges would surely escalate because the ADA would provide standing to organizations that are currently unable to challenge environmental laws absent non-compliance by a covered entity or procedural mishap during regulatory promulgation.

A. The ADA Expands the Class of Those with Standing to Challenge Environmental Laws

Allowing environmentally-based ADA challenges may provide standing to organizations that otherwise are not be able to challenge an environmental statute. For decades, numerous organizations have attempted to challenge environmental policies on the ground that such laws inadequately protect the environment. The doctrine of standing ensures that a suit in federal court is only brought by one who has a personal stake in the outcome or one who has been injured by the other party. The standing doctrine is rooted in the “case or controversies” requirement of the U.S. Constitution. To have standing, a plaintiff must show (1) it has suffered “injury in fact,” that is (a) concrete and particularized, and (b) actual or

imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.\(^\text{171}\)

To meet the first, and perhaps the most cumbersome prong, plaintiffs challenging environmental laws must prove an injury in fact. This criterion is particularly challenging in environmental cases due to limitations imposed by the Supreme Court. In *Sierra Club v. Morton*,\(^\text{172}\) the Court held that the Sierra Club failed to establish an injury in fact based solely on its long-standing interest in defending the environment.\(^\text{173}\) The Court required an allegation of specific harm to an individual or individuals that actually used the area in question for recreational purposes.\(^\text{174}\) Subsequent cases have restricted the injury in fact requirement further.\(^\text{175}\)

An additional hurdle under this prong is that courts typically do not recognize general citizen standing. For example, a person may not have standing to challenge a government action solely because that person is not happy with the program or because that person is a taxpayer.\(^\text{176}\) The Supreme Court has allowed associational standing, so long as certain criteria are met. The Court has stated that:

Under modern associational standing doctrine, an organization may sue to redress its members' injuries when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the

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173. See id. at 735.
174. See id. at 740.
176. See, e.g., Cantrell v. City of Long Beach, 241 F.3d 674 (9th Cir. 2001). This concept was briefly discussed in a case involving the National Environmental Policy Act. In rejecting the plaintiff's "taxpayer" standing argument, the court stated that "[t]o establish standing in a... taxpayer suit under Article III, a plaintiff must allege a direct injury caused by the expenditure of tax dollars." *Id.*
lawsuit.\textsuperscript{177}

In essence, an organization may sue on behalf of its members only if some of its members would have individual standing. Additionally, the Supreme Court has held that individual members of the organizations need not take part in the presentation of the case.\textsuperscript{178}

These standards have limited the amount of claims arising under environmental laws. Nonetheless, organizations could use the ADA as a pretext and thus overcome the standing requirements simply by recruiting the membership of persons with disabilities. As a result, many environmentalist groups would meet all of the elements of associational standing vicariously through the "injury in fact" to the disabled member. Recruitment of persons meeting the definition of "disabled" under the ADA would create a mutually beneficial endeavor. The organization would have standing in the suit and the disabled "member" would receive essentially free legal representation for their claim. The results from this practice would be grossly inconsistent with Supreme Court jurisprudence. Using the ADA as a back door would be obtuse to integral Supreme Court decisions such as \textit{Morton}, and flood the courts with cases that would not otherwise be heard. Furthermore, even if such cases were successful, the result would require the development and promulgation of new policies and programs. This practice could cost millions of dollars, take years of dialogue to create and decades to fulfill.

\textbf{B. Challenges to Other Air Provisions and Environmental Statutes}

Once standing is established, ADA challenges to other environmental statutes are likely to follow. With the CAA blazing the trail, virtually every environmental statute with a state component or state partnership arrangement would be targets of the environmentalist crusade. Under the CAA, persons with asthma could sue a State for the issuance of air emission permits even in attainment zones. The CWA\textsuperscript{179} contains a National Pollutant Discharge Elimination System ("NPDES") program, by which "point sources" may discharge into our nation's waters subject to permits with stipulated pollution controls.\textsuperscript{180} Under the CWA, states are responsi-

\textsuperscript{178} \textit{Id.} (not requiring individual members to participate).
\textsuperscript{180} See \textit{id.} at § 1342(b).
ble for the issuance of NPDES permits under an EPA approved program. 181 Like the CAA, states also retain the authority to promulgate standards regulating water quality. 182 In yet another similarity to the CAA, the CWA has a comprehensive enforcement program comprised of civil actions, criminal liability, and citizen suit provisions. 183

If courts allow the use of the ADA in CAA cases, the table would be set for persons with disabilities to challenge a State’s issuance of an NPDES permit if that individual is exposed to and adversely affected by the constituents in the permitted discharge. For example, a person claiming to suffer from Multiple Chemical Sensitivity Disorder (“MCS”) 184 could possibly challenge the continued issuance of NPDES permits if regularly exposed to water discharges. 185

Continuing down the slippery slope, the ADA could very well become a super-statute, trumping every environmental law that permits limited releases to the environment - either via the air, water, or land.

181. See id.
184. MCS is a highly controversial disorder. Some people believe that exposure to a chemical or chemicals can trigger a symptom complex. Those symptoms occur in many organ systems. No physical signs can be consistently linked between MCS patients, but symptoms include dizziness, nausea, shortened breath or seizures. See OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, MULTIPLE CHEMICAL SENSITIVITIES, at http://www.osha-slc.gov/SLTC/multiplechemicalsensitivities/index.html (last revised Mar. 8, 2001).
185. “Multiple Chemical Sensitivity (MCS) has become one of the most controversial medical theories considered by both state and federal courts.” See Don Evans & Mark Fitzsimmons, Judging Multiple Chemical Sensitivity Claims–The Verdict Is In, 9 THE METRO. CORP. COUNSEL No. 2, at 27. Due to its inconclusive diagnoses and foundation, courts have increasingly rejected the theory when called upon to review expert testimony concerning the alleged syndrome. Id. Relying on the “Daubert Test for Reliable Expert Testimony,” construed in Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993), courts have concluded: (1) the methodology to test for and to make a diagnosis of MCS has not been tested to ensure its reliability, and may not be capable of testing; (2) that the lack of verifiable testing method gives rise to a high rate of error; (3) that peer review of MCS medical literature has resulted in widespread criticism and condemnation of the methodology and diagnosis; and (4) that MCS is not a generally accepted medical diagnosis supported by scientific findings. Id. at 27.
CONCLUSION

Use of the ADA to circumvent environmental policy may become a dangerous trend in environmental and health law. If successful, the potential exists for the ADA to become the nation’s most stringent and comprehensive environmental statute. Even though both the Washington and Idaho District Courts have denied motions to enjoin state permitting activities, the table has been set for future clashes between the CAA and the ADA. Questions also exist as to whether Garrett will prevent such claims from being filed in the future because its strictures apply to ADA actions seeking monetary damages—not equitable relief. Complicating the issue further is the DOJ’s commitment to seek “every opportunity to maintain and expand the effectiveness of the ADA. The DOJ has fought nationwide to uphold the constitutionality of ADA suits against states.”

One would be hard pressed to find opposition the DOJ’s mantra. However, such advancement must progress reasonably, thus not impeding upon the effectiveness of our nation’s existing environmental and health-based statutes.

In light of the aforementioned issues, courts have a great opportunity to ensure that environmental statutes are read “harmoniously” with the ADA. The relationship between the laws should be one of synergy - not conflict. Should courts allow environmentally-based ADA claims to proceed with statutes at odds with one another, the results could unreasonably tip the delicate balance between the protection of human health and sustainable development. The result could force the development of a zero tolerance approach to environmental releases and cripple developments in chemistry, science, medicine and technology. In a strange twist of fate, the very law providing a shield for Americans with disabilities would actually be a sword prolonging, or even preventing, medical and pharmacological advances.
