Penn State Environmental Law Review

Volume 2 | Number 1 Article 5

9-1-1992

Smog Futures: The Latest in Commodities Trading Lacks Procedural Due Process Safeguards

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SMOG FUTURES: THE LATEST IN COMMODITIES TRADING LACKS PROCEDURAL DUE PROCESS SAFEGUARDS

I. INTRODUCTION

The Clean Air Act amendments of 1990 ("CAA amendments"). provide for a market-based incentive to help reduce acid rain.[1] In response to these market incentives, the Chicago Board of Trade has announced a plan to sell futures contracts in the allowances.[2] The emission allowance program, which the Environmental Protection Agency ("EPA") will oversee, presents an internal conflict regarding property rights and due process.[3] This paper examines the nature of this conflict by examining the CAA amendments and the Chicago Board of Trade proposal. Next, property concepts of government benefits are discussed and compared to pollution allowances. This paper then explores legislative authority in defining property rights. Finally, an argument is made for the necessity of due process for those holding emission allowances.

II. BACKGROUND

A. 1990 AMENDMENTS TO THE CLEAN AIR ACT

Sulphur dioxide is a major cause of acid rain.[4] Section 7651 of the Clean Air Act ("CAA")[5] prescribes a sulphur dioxide emission reduction and control program for utility units.[6] The program consists of two phases: Phase I will begin in 1995 and will mainly affect large, high emissions, coal-fired utility plants which

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1. 42 U.S.C. §§ 7651b(a)(1), 7651b(b), 7651(b) (Supp. II 1990). For critiques of market-incentive environmental regulation, see Marshall J. Breger et al., *Providing Economic Incentives in Environmental Regulation*, 8 YALE J. ON REG. 463 (1991); Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153 (1988); MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (1988).

2. *Board of Trade Plans Futures Trading in Utilities' Permits to Pollute*, CHI. TRIB., July 17, 1991, at 5.

3. *See infra* notes 46-56 and accompanying text.

4. Paul Overberg, *Will Pollution Be Traded Like Stocks?* GANNETT NEWS SERVICE, Nov. 23, 1991, *available in* LEXIS, Nexis Library, Gannet News Service File. Sulphur Dioxide "is a heavy pungent colorless gas formed primarily by the combustion of fossil fuels." ENVIRONMENTAL REGULATORY GLOSSARY (G. William Frick & Thomas F.P. Sullivan eds., 5th ed.).

5. 42 U.S.C. § 7651.

6. A utility unit is a power plant. *See* 42 U.S.C. § 7651a(17) (Supp. II 1990).

are listed specifically in the statute;[7] Phase II will begin in 2000 and will affect virtually all utility units with output capacity greater than twenty-five megawatts and new utility units of any size.[8]

The idea of permitting market forces to decide how to reach a specified pollution reduction goal originated with the Environmental Defense Fund.[9] This idea was incorporated into the 1990 amendments to the CAA. The 110 power plants that produce the most sulphur dioxide based on the new emission standards will receive pollution allowances from the EPA in 1995.[10] One allowance entitles the holder to emit one ton of sulphur dioxide per year.[11] The utility companies targeted by the CAA amendments are located in the Northeast and Midwest.[12] The allowances given to the utilities permit less sulphur dioxide emissions than the utilities currently emit.[13]

The main purpose of the CAA amendments is to reduce sulphur dioxide emissions, which will then cause the amount of acid rain to be reduced.[14] Beginning in 1995, utilities must comply with their emissions allowances.[15] If a utility reduces its sulphur dioxide emissions below the legally required amount, it may retain or sell its additional pollution allowances.[16] Allowance transfers are allowed to or from any

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7. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, 56 Fed. Reg. 242, 65,592 (1991). *See also* 42 U.S.C. § 7651c Table A (Supp. II 1990) (affected Sources and Units in Phase I and their Sulphur Dioxide Allowances).

8. 56 Fed. Reg. 242, 65,592 (1991). *See also* 42 U.S.C. § 7651d (Phase II Sulphur Dioxide Requirements).

9. Paul Merrion, *CBT Smog Futures Clearing New Path; World's Top Commodities: Air and Water*, CRAIN'S CHI. BUS., July 22, 1991, at 4.

10. *Id. See also* 42 U.S.C. § 7651b(a) (Supp. II 1990) (allocations of annual allowances for existing and new units).

11. 42 U.S.C. § 7651a (Supp. II 1990) (definitions).

12. Overberg, *supra* note 4.

13. Overberg, *supra* note 4.

14. 42 U.S.C. § 7651(b) (Supp. II 1990) ("The purpose of this subchapter is to reduce the adverse effects of acid deposition through reductions in annual emissions of sulphur dioxide of ten million tons from 1980 emission levels.").

15. *Id.*

16. Merrion, *supra* note 9, at 4; 42 U.S.C. § 7651b(b) (Supp. II 1990) ("Allowances allocated under this subchapter may be transferred among designated representatives of the owners or operators of affected sources under this subchapter and any other person who holds such allowances . . .").

unit, and to or from any person.[17] As a result of the CAA amendments, sulphur dioxide emissions should be nine million tons per year by the year 2000, reflecting half of the 1980 emissions.[18]

The practical result of the sulphur dioxide allowance trading plan will be to permit utility companies in different markets with different types of plants to respond flexibly to the new pollution standards.[19] This creates a financial incentive for utilities to cut their sulphur dioxide emissions through the installation of pollution control equipment or by burning cleaner fuel or both.[20] No sulphur dioxide emission allowances are given to new units.[21] Sulphur dioxide emissions below the federal limit therefore become a new asset for utilities to retain or sell.[22] Thus, both new units and existing units that exceed their legal limit of sulphur dioxide emissions may purchase emission allowances. These allowances will be transferred, "so that market forces may govern their ultimate use and distribution, resulting in the most cost-effective sharing of the emissions control burden . . . ."[23] Therefore, the 1990 CAA amendments achieve the goal of a reduction in sulphur dioxide emissions through flexible compliance procedures and the abandonment of technical decision-making for the utilities.[24]

In order to stimulate and support a market in emission allowances, the EPA Administrator is authorized to conduct sales and auctions of allowances.[25] These "auctions are expected to help signal price information to the allowance market early

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17. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7.

18. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7.

19. Overberg, *supra* note 4.

20. *Pollution Becomes a Hot Commodity*, INDEPENDENT, July 18, 1991, at 24.

21. *Id.*

22. *Coming Soon -- Futures Market in Smog Credits*, L.A. TIMES, July 17, 1991, at 1.

23. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7. *See also* 42 U.S.C. §§ 7651b(a)(1),(e) (Supp II 1990).

24. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7.

25. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7. Title IV mandates that the Administrator hold yearly auctions and direct sales of allowances for (2.8%) of the total allowances required by the statute to be allocated each year.

in the regulatory program."[26] Originally, the allowance price for the EPA auction and direct sale is set at $1,500 per ton. The Act provides for inflation-based increases in the price of allowances.[27] Owners, operators, or representatives of utilities also may transfer allowances prior to their issuance.[28]

Apart from market stimulation, two regulations apply to trading sulphur dioxide emission allowances.[29] First, the amendments prohibit the use of allowances prior to the calendar year of allocation.[30] Second, "[t]ransfers of allowances are not effective until written certification of the transfer, signed by a responsible official of each party to the transfer, is received and recorded by the administrator."[31] Thus, the Amendment itself is drafted to establish, regulate, and foster a market in sulphur dioxide emission allowance trading.

B. THE CHICAGO BOARD OF TRADE PLAN

The Chicago Board of Trade has recently responded to the new market in sulphur dioxide emission allowances. On July 17, 1991, the Chicago Board of Trade announced its plan to act as the middleman for cash forward contracts of emission allowances. Cash forward contracts are agreements to deliver the allowances after they are issued in 1995.[32] On April 21, 1992, the Commodity Futures Trading Commission unanimously approved trading emissions futures on the Chicago Board of Trade.[33] Emission allowances will be traded in twenty-five ton allotments up to three years in advance.[34] "At the exchange, traders would buy and sell contracts for blocks of allowances. Daily[,] their trading would reset prices on contracts for that

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26. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7.

27. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7.

28. 42 U.S.C. § 7651b(b) (Supp. II 1990) (allowance transfer system).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Board of Trade Plans Futures Trading in Utilities' Permits to Pollute*, *supra* note 2, at 5; Peter Passell, *A New commodity to Be Traded: Government Permits for Pollution*, N.Y. TIMES, July 17, 1991, at 1.

33. *Board of Trade Plans Futures Trading in Utilities' Permits to Pollute*, *supra* note 2, at 5; *CFTC Okays CBT Proposal for Contract Based on Government Air Pollution Allowances*, 24 SEC. REG. & L. REP. (BNA) No. 17, at 622 (Apr. 24, 1992).

34. *Board of Trade Plans Futures Trading in Utilities' Permits to Pollute*, *supra* note 2, at 5.

month and contracts expiring periodically through the next three years."[35] The Chicago Board of Trade also intends to offer allowance traders an electronic bulletin board system that will distribute information on allowances offered.[36] Initially, no government approval is required for the trading of allowances;[37] however, trades must be signed by the responsible parties and received and recorded by the administrator pursuant to § 7651b(b).[38]

As with any futures market, prices will vary as do the current price estimates.[39] Some price estimates indicate that the futures contracts will begin to trade on the commodities market at $400 per ton and the price will not rise above $2,000 per ton, which is the fine per ton of illegally emitted sulphur dioxide.[40] Other price estimates by commodities brokers range between $2,000 and $3,000 per ton, based upon the penalty for failure to comply and the possibility of criminal penalties for knowing violations of the CAA.[41] "The market for allowances will fluctuate with the seasons, as power plants gear up for heavy cooling or heating cycles, or with changes in scrubber technology or even the cost of lime[,] which is widely used in scrubbers . . . ."[42]

It is important to recognize that the Chicago Board of Trade provides an easy way to trade allowances.[43] The Chicago Board of Trade proposal "is being hailed by utilities and environmentalists alike as a crucial element in the plan to control acid rain by creating a cost-efficient mechanism to sharply reduce sulphur dioxide emissions by power plants."[44] The EPA commented that the Chicago Board of Trade's intentions show that private enterprise will respond to real or anticipated

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35. Overberg, *supra* note 4.

36. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7, at 65,594 (1991).

37. *Board of Trade Plans Futures Trading in Utilities' Permits to Pollute*, *supra* note 2, at 5.

38. 42 U.S.C. § 7651b(b).

39. *Board of Trade Plans Futures Trading in Utilities' Permits to Pollute*, *supra* note 2, at 5.

40. *Board of Trade Plans Futures Trading in Utilities' Permits to Pollute*, *supra* note 2, at 5. *See also* 42 U.S.C. § 7651j (Supp. II 1990) ("That penalty shall be calculated on the basis of the number of tons emitted in excess of the unit's emissions limitation requirement, or in the case of sulphur dioxide, of the allowances the operator holds for the use of the unit that year, multiplied by $2,000.").

41. Merrion, *supra* note 9, at 4.

42. Merrion, *supra* note 9, at 4.

43. *Board of Trade Plans Futures Trading in Utilities' Permits to Pollute*, *supra* note 2, at 5.

44. Merrion, *supra* note 9, at 4.

needs in the trading market.[45]

III. POLLUTION ALLOWANCES, PROPERTY RIGHTS AND DUE PROCESS

Government-created, market-tradeable pollution allowances appear to create a right or interest in the allowances. In fact, some newspapers refer to the allowances as "rights."[46] Contrary to these assumptions, Congress does not want sulphur dioxide emission allowances to be considered "property:"[47]

> An allowance allocated under this subchapter is a limited authorization to emit sulphur dioxide in accordance with the provisions of this subchapter. Such allowance does not constitute a property right. Nothing in this subchapter or in any other provision of law, shall be construed to limit the authority of the United States to terminate or limit such authorization.[48]

In order for the pollution allowance system of the CAA to continue to reduce sulphur dioxide emissions, the EPA must reduce the number of allowances utilities receive as new pollution strategies and technologies emerge. Congress has found that these technologies exist, are economically feasible, and will become increasingly available.[49] This is important because Congress has stated that nothing shall limit the government's authority to terminate or limit the allowances.[50]

The Administrator of the EPA has the power to issue annual allowances to each utility unit.[51] In order to meet overall emission restrictions "the Administrator shall reduce, pro rata, the basic Phase II allowance for each unit," as long as Phase

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45. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7, at 65,594 (1991). Robert Smack, *Are You Ready for the Sulphur Dioxide allowance market*, ELECTRIC LIGHT & POWER at 4, (Oct. 1992). At the time this paper was written, trading between private parties had started. The Wisconsin Public Service Company has sold 35,000 allowances to two utilities and Ohio Edison purchased 5000 allowances from ALCOA. Prices have averaged $300 per allowance. *Id.*

46. *Pollution Becomes a Hot Commodity*, *supra* note 20, at 24.

47. 42 U.S.C. § 7651b(f) (Supp. II 1990) (nature of allowances).

48. *Id.*

49. 42 U.S.C. § 7651(a)(4) (Supp. II 1990) ("Strategies and technologies for the control of precursors to acid deposition exist now that are economically feasible, and improved methods are expected to become increasingly available over the next decade.").

50. 42 U.S.C. § 7651b(f) (Supp. II 1990).

51. 42 U.S.C. § 7651b(a)(1) (Supp. II 1990).

II requirements are met.[52] The powers granted in these provisions of the CAA amendments indicate that Congress is expecting future allowance reductions by the Administrator.

If the allowances were property rights, whenever the government reduced the number of allowances for a utility, the government would be taking property. When the government takes private property, it must either allow for due process of the law or compensation.[53] Due process "has been read broadly to extend protection to any significant property interest including statutory entitlements."[54] If the pollution allowances were established as property interests, they would become a statutory entitlement. Hence, any taking of an allowance would require procedural due process safeguards. "Procedural Due Process imposes constraints on governmental decisions which deprive individuals of liberty' or property' interests . . . ."[55] Consequently, by legislating sulphur dioxide emission allowances as "non"-property,[56] the federal government is avoiding due process concerns.

IV. PROPERTY CONCEPTS

Property ownership traditionally has been defined as, "the unrestricted right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it."[57] "The term [property] is said to extend to every species of valuable right and interest, [and] in the strict legal sense, is an aggregate of rights which are guaranteed and protected by the government."[58]

In 1964, Charles Reich stated "[w]e must create a new property."[59] The "new property" he wanted to create was in government largess.[60] "The valuables dispensed by the government take many forms, but they all share one characteristic. They are steadily taking place of the traditional forms of wealth -- forms which are

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52. *Id.*

53. U.S. CONST. amend. V ("No person shall . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

54. Fuentes v. Shevin, 407 U.S. 67, 86 (1972). *See also* Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

55. Mathews v. Eldridge, 424 U.S. 319 (1976).

56. 42 U.S.C. § 7651b(f) (Supp. II 1990).

57. BLACK'S LAW DICTIONARY 1216 (6th ed. 1990).

58. *Id.*

59. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964).

60. *Id.* at 733.

held as private property."[61] "To the individual, these new forms [of wealth], such as a profession, job or right to receive income, are the basis of his various statuses in society, and may therefore be the most meaningful and distinctive wealth he possesses."[62] These types of government largess were viewed as given less protection and as impairing an individual's enjoyment of his or her constitutional rights.[63]

In 1970, the Supreme Court created a "new property." In *Goldberg v. Kelly*, the Court held that New York City families who receive financial aid under federally assisted Aid to Families with Dependent Children were entitled to notice and a hearing prior to termination of these benefits according to the Due Process Clause of the Constitution.[64] The test applied to determine the extent of procedural due process required was whether the individual recipients interest in avoiding the loss outweighs the governmental interest in summary adjudication.[65] The recipients of welfare were found to have a statutory entitlement to the benefits.[66] "It may be realistic today to regard welfare entitlements as more like 'property' than 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common law concepts of property."[67] Thus, the Supreme Court redefined certain government benefits from "gratuity" to "property."

The expansion of the application of due process to government benefits halted in 1976 with the Supreme Court decision of *Mathews v. Eldridge*.[68] The issue in *Mathews* was "whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefits payments the recipient be afforded an opportunity for an evidentiary hearing."[69] The Supreme Court listed three factors to consider when determining the specificities of Due Process:

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61. *Id.*

62. *Id.* at 739.

63. *Id.* at 760. For examples of the lack of protection for government largess, see Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir. 1962) (SEC decision of suspension of a broker/dealer license without a hearing upheld); Wall v. King, 206 F.2d 878 (1st Cir. 1953) (upholding the suspension of a driver's license without a hearing).

64. 397 U.S. 254, 264 (1970).

65. *Id.* at 263.

66. *Id.* at 262. "Such benefits are a matter of statutory entitlement for persons qualified to receive them." *Id.*

67. *Id.* at 262 n.8.

68. 424 U.S. 319 (1976).

69. *Id.* at 323.

> 1) The private interest that will be affected by the official by the official action;
> 2) The risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and
> 3) The government's interest . . . .[70]

The holding in *Mathews* was that no pre-termination hearing for Social Security disability benefits was necessary.[71] First, the Court reasoned that since disability benefits were not based on need, the interest of the individual is not as great as the interest of a welfare recipient.[72] Second, the Court found that the agency procedures were carefully structured so that they were already fair and reliable.[73] Finally, the Supreme Court determined that the Government's interest and burden was great because of the large increase in cost and use of administrative resources that would occur from the proposed hearings.[74] Thus, with the enumeration of these three factors, additional procedural due process safeguards against government action are more difficult to attain.

V. POLLUTION ALLOWANCES AS COMPARED TO OTHER "PROPERTY" STATUSES OF GOVERNMENT BENEFITS

Once the Supreme Court changed the status of government benefits to a property interest, due process concerns were appropriate. Many cases arose regarding government benefits and due process of the law. This section of the paper compares three areas of government benefits: jobs, licenses, and radio frequencies.

A. GOVERNMENT EMPLOYMENT

Government jobs, by the terms of their creation, have been found to be property interests and thus subject to due process requirements.[75] In *Board of Regents of State Colleges v. Roth*, David Roth was hired for one year as a non-

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70. *Id.* at 335.

71. *Id.* at 349.

72. *Id.* at 340.

73. 424 U.S. at 343.

74. *Id.* at 347.

75. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

tenured assistant political science professor.[76] He was not rehired, nor given any reason for discharge.[77] Roth alleged that lack of notice of reason for firing and a hearing violated his right to due process of the law.[78] The Court looked to an earlier definition of property rights which provided that such rights were "defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits that support claims of entitlement to those benefits."[79] Roth's terms and conditions of employment were held not to create a property interest in continued employment, since he did not have tenure, his contract was expired, and there was no provision in the contract that cause be given upon termination of employment.[80]

In *Perry et al. v. Sindermann*, a companion case to *Roth*, Robert Sindermann taught in the state college system for ten years through a series of one-year written contracts and was not rehired.[81] Sindermann alleged a *de facto* tenure position[82] based on the policy of the Coordinating Board of the Texas College and University System.[83] A due process violation was alleged since no hearing was held about permitting his contract to lapse.[84] "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke a hearing."[85] The Court remanded the case to allow Sindermann the opportunity to prove his claim in light of the practices of the institution.[86]

Finally, the Supreme Court has decided the issue of when a hearing should

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76. 408 U.S. 564, 566 (1972).

77. *Id.*

78. *Id.* at 568.

79. *Id.* at 577.

80. *Id.* at 578.

81. 408 U.S. 593 (1972).

82. *Id.* at 600.

83. *Id.* at 593. The college official faculty guide contained no tenure system, but a teacher was said to have tenure if he or she maintained satisfactory teaching services and a cooperative attitude toward superiors. The Coordinating Board of the Texas College and University system stated that a person in the university and college system for seven years or more has some form of job tenure.

84. *Id.* at 593.

85. *Id.* at 601.

86. 408 U.S. at 603.

be held.[87] In *Cleveland Board of Education v. Loudermill*, Loudermill was fired for dishonesty on a job application regarding a felony conviction and was not given a hearing until after dismissal.[88] The suit was brought for a pre-termination hearing as opposed to a post-termination hearing.[89] According to Ohio law, Loudermill was a civil servant and could be terminated only for cause.[90] On this basis, the Court found that Loudermill had a property right in continued employment.[91] A hearing prior to deprivation of property is a fundamental principal of due process.[92] To determine whether a pre- or post-deprivation hearing is necessary to fulfill due process requirements, the Supreme Court balanced the government's interest with the individual's interest.[93] The Court determined that Loudermill's interests in continued employment outweighed the State's interest.[94]

In the government job cases, the property interest was found by the terms and conditions of employment, such as contract, tenure or termination upon cause,[95] or a mutual understanding between the parties.[96] However, the terms and conditions creating the pollution allowance system lie in § 7651. In contrast to the government employment cases, the terms of § 7651 explicitly state that the nature of the allowances does not constitute a property right.[97] This definite denial of a property

87. 470 U.S. 532 (1985). *See also* Barry v. Barchi, 443 U.S. 55 (1979).

88. 470 U.S. 532 (1985).

89. *Id.* at 532.

90. *Id.*

91. *Id.* at 539.

92. *Id.* at 542.

93. 470 U.S. at 542.

94. *Id.* at 543-45. Loudermill's interests were the preservation of his livelihood, means of survival, and the chance to present his side of the argument to better reach an accurate decision. The State's interests were the useful employment of the public, keeping qualified employees as opposed to training new ones, and removing a hazardous employee from the workplace. The Court stated that Ohio could have suspended Loudermill with pay until the hearing, as opposed to giving a post-termination hearing. *Id.*

95. Board of Regents v. Roth, 408 U.S. 564 (1972) (since the contract was expired and the position was not tenured, plaintiff had no property interest in continuing employment); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (since employee could only be fired with cause, he had a property interest in continued employment).

96. Perry v. Sindermann, 408 U.S. 593 (1972) (Sindermann may have a property interest based on the policy of the Coordinating Board of the Texas College and University system).

97. 42 U.S.C. § 7651b(f) (Supp. II 1990).

interest nullifies any chance of mutual understanding between an allowance holder and the federal government. Therefore, no basis for finding a property interest in allowances to emit sulphur dioxide exists in the terms and conditions of their creation or in a mutual understanding between the federal government and a utility.

B. LICENSES

The Supreme Court has also held licenses to be property rights.[98] A property right in a license is based on either an essential interest of the licensee in retaining the license,[99] or the conditions of the license.[100] In *Bell v. Burson*, a Georgia statute provided for the automatic suspension of the license of an uninsured motorist who was in an accident unless the motorist posted a security bond to cover any claim of damages.[101] The Court found a driver's license to be essential because the loss of a license may have a detrimental effect on one's livelihood.[102] "Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees."[103] Due process, the relevant constitutional safeguard, limits the state power to terminate this entitlement.[104] The Court also found that a full adjudication was not necessary, only an "inquiry" into the possibility of a judgment in the amount claimed.[105] This compromise aims at balancing the competing interests between the licensee and the state.[106]

In another licensing case, *Barry v. Barchi*, Barchi was a horse trainer whose license was suspended because of the presence of drugs in his horse.[107] A New

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98. Bell v. Burson, 402 U.S. 535 (1971); Barry v. Barchi, 443 U.S. 55 (1979).

99. Bell v. Burson, 402 U.S. 535 (1971).

100. Barry v. Barchi, 443 U.S. 55 (1979).

101. 402 U.S. at 535. The Georgia statute provided for no consideration of the uninsured motorist's fault in causing the accident. *Id.*

102. *Id.* at 539.

103. *Id.*

104. *Id.*

105. *Id.* at 540.

106. 402 U.S. at 540.

107. 443 U.S. 55, 59 (1979). The New York statute stated that when a post-race test revealed the presence of drugs in a horse, a rebuttable presumption was created that the drug was either administered by the trainer or a result of the trainer's negligence in failing to take precautionary measures. *Id.*

York statute entitled Barchi to a post-suspension hearing without a time limitation.[108] A horse trainer's license could not be revoked or suspended by arbitrary discretion; certain contingencies had to be proven according to the New York statute.[109] The Court found Barchi to have had "a property interest in his license sufficient to invoke the protection of the Due Process Clause."[110] The Court held, however, that a post-suspension hearing fulfilled the due process requirement as long as it was a timely hearing.[111] Barchi's interest in retaining his license was balanced by the Court with New York's interest in ensuring the integrity of racing.[112] The Court held that the State had the greater interest and could render due process in the form of a prompt, post-suspension hearing.[113]

Licenses become property rights when the terms of granting the license so provide, such as where conditional suspensions or revocations are included.[114] Licenses also become property rights when an essential interest is at stake, for example a driver's license.[115] Although allowances to emit sulphur dioxide are not "licenses", it can be argued that they are akin to a yearly license to emit a certain number of tons of sulphur dioxide per year. However, the CAA amendments do not provide for conditional suspensions or revocations.[116] The interest in pollution allowances and continuing emission of sulphur dioxide may be considered important. The result of removing pollution allowances from utilities that must burn fossil fuel to operate would be the greatly increased cost of buying all of the needed allowances on the market. In turn, the extra cost of emitting sulphur dioxide may be passed on to the utility customers. The license scenario does not address the problem of continued allowance reductions that are necessary to serve the purpose of § 7651 as amended. Last, the amendment states that the pollution allowances are not property.[117] Thus, a property right in pollution allowances is not correlative to property rights in licenses.

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108. *Id.* at 61.

109. *Id.* at 64.

110. *Id.*

111. *Id.* at 63.

112. 443 U.S. at 64.

113. *Id.*

114. Barry v. Barchi, 443 U.S. 55 (1979).

115. Bell v. Burson, 402 U.S. 535 (1971).

116. 42 U.S.C. § 7651 (Supp. II 1990).

117. 42 U.S.C. § 7651b(f) (Supp. II 1990).

C. RADIO FREQUENCIES

Licenses to operate radio stations at a certain frequency are granted by Federal authority.[118] Radio frequency licenses are distinguishable from other licenses. The purpose of the Communications Act is to protect the public.[119] The Supreme Court has found that "the policy of the Act is clear that no person is to have anything in the nature of a property right as a result of granting a license."[120] The Communication Act states:

> It is the purpose of this Chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority and no such license shall be construed to create any right beyond the terms and conditions and periods of the license.[121]

Applicants for licenses also must sign a waiver of any claim to a particular frequency based on previous use.[122] Although the Communications Act does not specifically state that these licenses are not property, the Supreme Court found the intent of the Communications Act rendered the same outcome.

On the other hand, the courts have recognized the property-like nature of these licenses and valid due process concerns. "A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be

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118. 47 U.S.C. § 301 (1988) (license for radio communication or transmission of energy).

119. 47 U.S.C. § 301 (1988); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

120. 309 U.S. at 475.

121. 47 U.S.C. § 301 (1988).

122. 47 U.S.C. § 304 (1988).

> No station license shall be granted by the Commission until the applicant therefore shall have signed a waiver of any claim to the use of any particular frequency or of electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Id.

the subject of injury."[123] The Supreme Court has acknowledged the value and need for adjudication for frequency licenses.[124] "No licensee obtains any vested interest in any frequency."[125] The Federal Communications Commission ("FCC") may revoke, suspend, or renew a station license.[126] "But in all instances the licensee is given an opportunity to be heard before final action can be taken."[127] The Court seems to be conceding that no property right is retained in a frequency license. However, at the same time the Court is approving of the statutorily required hearings.

If a broadcaster is found to be in violation of certain provisions of the chapter or any rule of the FCC, or has failed to operate as substantially set forth in the license, a cease and desist order may be issued or the license may be revoked.[128]

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123. L.B. Wilson Inc. v. FCC, 170 F.2d 793, 798 (1948). The FCC granted a competitor's application for a construction permit. The FCC denied the petitioner a hearing to present their claim of objectionable interference from the new broadcasting station. *Id.*

124. Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945). In this case, petitioner claimed objectionable interference with its operation from the FCC grant of the application of another station with a different frequency. The FCC granted a hearing to the new station and denied a hearing to Ashbacker. The Court held that both stations were entitled to a hearing. *Id.*

125. *Id.* at 331.

126. *Id.* at 332.

127. *Id.*

128. 47 U.S.C. § 312(a) & (b) (1988). Section 312(a) provides:

> The Commission may revoke any station license or construction permit:
>
> (1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;
> (2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;
> (3) for willful or repeated failure to operate substantially as set forth in the license;
> (4) for willful and repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;
> (5) for a violation of or failure to observe any final cease and desist order issued by the Commission under this section;
> (6) for a violation of section 1304, 1343, or 1464 of Title 18; or
> (7) for a willful repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy.

Id.

However, before revoking a license the FCC must issue an order to show cause.[129] "Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission . . . ."[130] Thus, before a license is revoked, the Communications Act provides for notice and a hearing.

> The FCC also has the authority to suspend the license of an operator:[131]
>
> No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof,stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order.[132]

Hence, notice and a hearing must be given to the licensee by the FCC before a license may be suspended.

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129. 47 U.S.C. § 312(c) (1988).

130. *Id.*

131. 47 U.S.C. § 303(m)(1) (1988). Suspension can be imposed where the licensee:

> (A) has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty,or convention; or
> (B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or
> (C) has willfully damaged or permitted radio apparatus or installations to be damaged; or
> (D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted --
> (1) false or deceptive signals or communications, or
> (2) a call signal or letter which has not been assigned by proper authority to the station he is operating;or
> (E) has willfully or maliciously interfered with any other radio communications or signals; or
> (F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

Id.

132. 47 U.S.C. § 303(m)(2).

The Commission also has the power to renew licenses.[133] A renewal does not result in the automatic grant of a hearing.[134] "A hearing is required only when a petition to deny makes substantial and specific allegations of fact which, if true, would indicate that a grant of the application would be prima facie inconsistent with the public interest."[135] This court made rule only provides for hearings when the petitioner can make "substantial and specific" allegations.

The radio frequency licenses are not considered property by both the Supreme Court and the Communications Act, and yet in cases of suspension, revocation, and sometimes renewal, notice and a hearing is mandated either by the Communications Act or the courts. Through these hearing requirements, procedural due process is applied to something other than a property right in the case of radio frequency licenses.

This scenario is the most appropriate to analogize to pollution allowances. As with the radio frequency licenses and the Communications Act, the CAA amendments do not consider pollution allowances property rights and states this most emphatically.[136] Also, pollution allowances will be considered valuable by those that hold them especially since allowances will be sold on the futures market.[137] Similar to radio frequency licenses, a utility operating under the pollution allowance system may be the "subject of injury" if the allowances are taken away. The major difference between the pollution allowances and frequency licenses is the fact that for revocation and suspension the Communications Act provides for notice and hearings, while in no instance do the CAA amendments provide for these safeguards.[138] However, the radio frequency licenses serve as the closest property interest comparison to allowances for the emission of sulphur dioxide.

VI. POLLUTION ALLOWANCES: DEFINING THE INTEREST INVOLVED AND LEGISLATIVE AUTHORITY

Pollution allowances resemble a property right. Benjamin L. Hooks, in a dissenting opinion to a FCC decision stated, "[d]espite the legal theory of the

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133. 47 U.S.C. § 307(d) (1988) ("No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license.").

134. Alianza Federal de Mercedes v. FCC, 539 F.2d 732 (1976).

135. *Id.* at 736.

136. 47 U.S.C. § 301, 304 (1988); 42 U.S.C. § 7651b(f) (Supp. II 1990).

137. Merrion, *supra* note 9, at 4 (radio frequency licenses are also transferable and have a set market value). *See* Cowles Florida Broadcasting, Inc., 60 FCC 2d 372 (1976) (Hooks dissenting).

138. 47 U.S.C. §§ 312(c), 303(2) (1988); 42 U.S.C. § 7651 (Supp. II 1990).

Communications Act that a license is not a property right, the practical reality has been quite different, as all the world knows."[139] Frequency licenses are readily transferable and have a substantial market value beyond the value of the transferred assets.[140] The market value rests on the expectation that renewal is assured.[141] Similarly, pollution allowances are also readily transferable, and in fact their transfer is encouraged by the CAA,[142] the EPA,[143] and the Chicago Board of Trade.[144] Once trading begins, the allowances will have a fixed market value estimated at anywhere from $400 per ton to $3,000 per ton.[145] The "legal fiction" of the 1990 CAA amendment, that emission allowances are not property rights, is in conflict with the practical reality that awaits emission allowances.

The issue is to what extent Congress or any legislative body may state that a benefit is not a property right in order to avoid due process concerns. A property right flows from rules, understandings, or an independent source, such as state law.[146] Despite this definition of a property right, courts have strayed from it:

> that the property interest allegedly protected by the federal Due Process and Takings clauses arises from state law does not mean that the state has the final say as to whether that interest is a property right for federal constitutional purposes. Rather federal constitutional law determines whether that interest created by the state rises to the level of "property" . . . .[147]

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139. 60 FCC 2d 372 (1976) (a case concerning the FCC favoring a competing license applicant over the renewal license applicant).

140. *Id.* at n.161.

141. *Id.*

142. 42 U.S.C. § 7651(b) (Supp. II 1990) (this section makes an emission allocation and transfer system the means by which the purpose of the amendment is met (reduction of acid rain)).

143. Auctions, Direct Sales and Independent Power Producers Written Guarantee Regulations, *supra* note 7; 42 U.S.C. §§ 7651(a)(1), 7651b(e) (Supp. II 1990) (mandating that the EPA hold auctions and direct sales for a percentage of each year's allocations).

144. Merrion, *supra* note 9, at 4 (announcing the Chicago Board of Trade's plan to sell futures contracts in pollution allowances).

145. *See supra* notes 40-41 and accompanying text.

146. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

147. Hoffman v. City of Warwick, 909 F.2d 615 (1990). This case involved a Rhode Island statute giving enhanced seniority benefits in new and continued employment for returning war veterans. In 1985 the Rhode Island legislature repealed the section of the statute pertaining to new employment and gave the repeal retroactive effect. At the time the plaintiffs were hired, they were unaware of the benefits and then applied for them in 1984. The benefits were denied by their municipal employers

The Supreme Court has also defined the extent to which a legislature can avoid constitutional protection by defining an interest. In *Goldberg v. Kelly*, the State of New York and the federal government considered welfare benefits to be a "gratuity" and, therefore, unprotected by the Due Process Clause.[148] The Court also found welfare benefits to be a statutory entitlement protected by the Due Process Clause.[149] *Sporhase v Nebraska*,[150] also deals with a state-defined interest, but in the context of the Commerce Clause.[151] Nebraska claimed that a statutorily defined lessor interest in groundwater exempts them from interstate commerce concerns when regulating groundwater. [152] Nebraska based the lesser interest on the fiction of state ownership.[153] The Court acknowledged that Nebraska had a heightened state interest, but that this interest did not insulate them from Commerce Clause scrutiny.[154] Thus, courts have found statutorily-defined "non"-property interests to be either property interests or statutorily defined lesser interests as encompassed by Constitutional concerns.

If presented with a case, the Supreme Court most likely would uphold the existing characterization of emission allowances as "non"-property. For example, the radio frequency licenses have been upheld as granting no property right to the licensee,[155] although the economic realities of trading and market values exist.[156] The Court tends to be permissive in allowing government action that may restrict full

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and the statute was repealed. Plaintiffs claim they had a vested right in the seniority credits upon employment while the State said the rights did not vest until the employees actually received the benefits. *Id. See also* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

148. 397 U.S. 254 (1970).

149. *Id. See also supra* notes 55-57 and accompanying text.

150. 458 U.S. 941 (1982).

151. U.S. CONST. art. I, § 8.

152. Sporhase v. Nebraska, 458 U.S. 941, 951 (1982). The Nebraska statute stated: "The surface owner who withdraws Nebraska groundwater enjoys a lesser ownership interest in the water . . . ."

153. *Id.*

154. *Id.* at 951. The Nebraska statute provided that anyone who intended to withdraw groundwater from any well in the state and transport it for use in an adjoining state must obtain a permit from the Nebraska Department of Water Resources. Appellants owned adjoining tracts of land in Colorado and Nebraska. A well in Nebraska pumped the water that irrigated both tracts. Appellants never applied for a permit. Nebraska enjoined them from transporting the water to Colorado and the appellants claimed the statute violated the interstate commerce clause. *Id.*

155. *See supra* notes 119-120 and accompanying text.

156. *See supra* notes 139-141 and accompanying text.

exploitation of property if the government action promotes the general welfare.[157] The purpose of the CAA amendments, reducing acid rain,[158] could be construed as promoting the general welfare. Nevertheless, the Court may, if presented with the chance, apply concepts of due process to pollution allowances as it did to radio frequency licenses.[159]

VII. THE NEED FOR DUE PROCESS UPON TERMINATION OR REDUCTION OF POLLUTION ALLOWANCES

Sulphur dioxide emission allowances should be subject to procedural due process requirements if they are terminated or reduced on an individual utility basis. Allowances will be valuable interests to utilities who may buy, sell, or retain them.[160] A utility that has its allowances terminated or sharply reduced will be subject to possible severe economic injury.[161] One may argue that emission allowances are similar to the radio frequency licenses in that they need not be deemed "property", but they should have the safeguards of notice and hearings for the utility's interests.

The government's interests are also strong. The government is attempting to reduce acid rain through the alternative compliance system of pollution allowances.[162] Reduction in acid rain benefits the general public. The EPA must reduce allowance allotments as technology increases in order for the amendments to be effective. The government does not want to be overwhelmed by due process concerns and claims every time a reduction is necessary. However, the government interests should be balanced with the interests of the pollution allowance holders. Although the *Mathews v. Eldridge* factors make enforcing procedural due process against government action more difficult to achieve, they were prefaced on the existence of some form of agency procedures.[163] The CAA amendments provide no such procedures for the removal of utilities' allowances.

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157. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980). Seminole County Florida was claiming that the interest from a court interpleader bond was public property belonging to them pursuant to a Florida statute. The interest was not a fee for court services because a fee was already charged. The Supreme Court held that the interest was private money belonging to the bond's creditors and that the Florida state legislature could not simply recharacterize the interest as public money. The Court found that this forced contribution to state revenue did not promote the general welfare. *Id.*

158. 42 U.S.C. § 7651(b) (Supp. II 1990).

159. *See supra* notes 124-127 and accompanying text.

160. 42 U.S.C. § 7651b(b) (Supp. II 1990).

161. Barry v. Barchi, 443 U.S. 55 (1979). *See supra* note 110 and accompanying text.

162. 42 U.S.C. § 7651(b) (Supp. II 1990).

163. 424 U.S. 319, 335 (1976).

If, for some reason, an individual utility's allowances were going to be terminated, notice and a pre-termination hearing should be available. In this instance, the holder's interest in retaining the allowances would be protected and the holder could present its claim at the hearing prior to buying all the needed allowances.

In the case of a reduction, however, a hearing should not be mandatory. Reductions should be handled like renewals of radio frequency licenses: a hearing should be required only when the allowance holder "makes substantial and specific allegations of fact which, if true,"[164] would violate the intent or purpose of the CAA amendments or harm the public welfare. These hearings could be post-reduction hearings because the EPA announces the yearly allowances far enough in advance to avoid futures contract difficulties.[165]

Once an allowance holder is issued allowances, an interest is created in retaining the allowances. This interest may not rise to the level of a property right, but, in any event, should be safeguarded. Even the expectation of continued allowances appears to give the holder an interest, especially since the allowances will be sold as futures contracts. The government should not be allowed to side step all procedural due process safeguards by merely labelling allowances "non-property". These safeguards should be provided for emission allowance holders. Furthermore, it can be assumed that the EPA, in using its regulatory powers, will formulate agency rules for the individual removal and reduction of sulphur dioxide emission allowances.

VIII. CONCLUSION

The government, by denying any property right in emission allowances, places itself in a dubious position. On the one hand, it establishes that no property interest exists with respect to pollution allowances. On the other hand, it encourages free market trading of this "less than property interest." In so doing, the government denies allowance holders any due process protection. Utility companies may be skeptical about buying pollution allowances that can be taken by the Federal Government without any specific procedures.[166] Precedent in the government benefits area supports the contention that the emission allowance holders do have some type

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164. *See supra* note 135 and accompanying text.

165. 42 U.S.C. § 7651(a)(1) (Supp. II 1990). "By Dec. 31, 1991, the Administrator shall publish a proposed list of basic Phase II allowance allocations. After notice and opportunity for public comment, but no later than Dec. 31, 1992, the Administrator shall publish a final list of such allocations." *Id.* A revised final statement of allowance allocations must be issued prior to June 1, 1998. Phase II begins Jan. 1, 2000. 42 U.S.C. § 7651d(a)(1). *Id.*

166. In general, the utility industry tends to be risk averse. Matthew L. Wald, *Risk-Shy Utilities Avoid Trading Emission Credits,* N.Y. TIMES, Jan. 25, 1993, at D2. "[T]heir antipathy toward risk means generating a few extra emission allowances, but holding onto them in case of futute need rather than facing the possibility of running short and being at the mercy of sellers, or of being fined by the Environmental Protection Agency. *Id.*

of valued interest in the allowances. This valued interest, whether a property interest, entitlement, or reliance, should be afforded the same type of protection from the Due Process Clause that other government benefits have been granted.

Rochelle Quiggle