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JUDICIAL REVIEW UNDER THE CLEAN AIR AMENDMENTS OF 1970[†]

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The Clean Air Amendments of 1970 (1970 Amendments)¹ radically restructured the preexisting federal and state programs for air quality improvement and, in so doing, created an elaborate administrative procedure for attainment of air quality goals. This procedure was complicated by Congress' determination to utilize a collaborative federal-state approach to solving the nation's air pollution problems.² Finally, Congress determined that the health hazards posed by air pollution were so severe that it had to establish strict timetables for taking action to abate those threats.³

This article examines only one aspect of the administrative scheme of the 1970 Clean Air Amendments: the availability of judicial review of various actions of the United States Environmental Protection Agency (EPA) taken pursuant to the 1970 Amendments. The discussion focuses on those provisions relating to attainment and maintenance of the national ambient air quality standards through the establishment and enforcement of air implementation plans. The first section briefly outlines the statutory scheme of the 1970 Amendments as a basis for the discussions that

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¹ 42 U.S.C. §§ 1857 et seq. (1970). Various technical amendments to this legislation were made by § 302 of the Comprehensive Health Manpower Training Act of 1971, Pub. L. No. 92-157, § 302, 85 Stat. 464.

² 42 U.S.C. § 1857c-5 (1970).

³ 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

follow. The next section examines section 307(b)⁴ of the 1970 Amendments, which forecloses judicial review of various issues at the stage where enforcement of air pollution regulations is being sought by federal and state governments and by private citizens. Its statutory history, constitutionality and related problems are dealt with in turn. The third and final section briefly details those circumstances in which other pre-enforcement judicial review should be available to prospective defendants, issues subject to that review, and the desirability of granting stays of the effectiveness of enforcement orders.

Many of the questions dealt with here have been confronted in cases which have arisen under the 1970 Amendments. It is a basic premise of this article that such issues should be disposed of in a manner which is not only fair to the parties against whom enforcement is sought but also consistent with attainment of the national air quality goals established by the 1970 Clean Air Amendments.

I. STATUTORY FRAMEWORK

Essential to an understanding of the discussions which follow is a brief description of the statutory scheme established by the 1970 Amendments for the prevention and control of air pollution.

In considering amendments to the previous air quality legislation, Congress was aware in 1970 that air pollution posed a severe, pervasive and growing threat to the nation's health and welfare that could only be satisfactorily overcome by swift and effective action.⁵ It was the sense of urgency engendered by this realization which, in the final analysis, contributed more than any other single factor in fashioning the legislation which became law on December 31, 1973. Action to attain healthful air quality across the nation by the middle of the decade of the 1970's was to be taken by the states, or the federal government in case of default by the states, in accordance with a strict timetable.

The Administrator of the EPA, the federal agency responsible for administration and enforcement of the Clean Air Act, was required to establish, within 120 days after enactment of the 1970 Clean Air Amendments, national ambient air quality standards⁶ for various air contaminants⁷ based on so-called air quality criteria.⁸

⁴ 42 U.S.C. § 1857h-5(b) (1970). For the text of this section, see text at note 35 *infra*.

⁵ See, e.g., H.R. Rep. No. 1146, 91st Cong., 2d Sess. 1, 5 (1970); S. Rep. No. 1196, 91st Cong., 2d Sess. 1, 3 (1970).

⁶ 42 U.S.C. § 1857c-4 (1970).

⁷ As of this date national air quality standards have been established for six pollutants: carbon monoxide, hydrocarbons, photochemical oxidants, sulfur oxides, nitrogen dioxide and particulate matter. See 36 Fed. Reg. 22,384 (1971), as amended, 38 Fed. Reg. 25,678 (1973).

Primary standards were to describe levels of concentration of the pollutants in the ambient air⁹ above which adverse health effects had been identified;¹⁰ and secondary standards were to specify those concentrations above which adverse effects on the public welfare were known or anticipated to exist.¹¹ Within nine months after the promulgation of the standards, the states were required to adopt, after reasonable notice and public hearings, and submit to the EPA plans for the implementation, maintenance and enforcement of the standards throughout their respective jurisdictions.¹² The states could adopt plans more stringent than necessary to attain the national air quality standards.¹³ The Administrator was required to act by approving or disapproving each plan or portion thereof within four months of submittal.¹⁴ Approval was required if a plan satisfied certain specific criteria set forth in section 110(a)(2) of the Act.¹⁵ For the purposes of this article, the most significant of such criteria is that which mandates that plans must provide sufficient stationary and/or mobile source controls to ensure (1) the attainment of the primary standards as expeditiously as practicable but no later than three years from the date of plan approval¹⁶ and (2) the secondary standards within a reasonable time.¹⁷ Thereafter, the

The presence of these pollutants in the air results from numerous or diverse mobile or stationary sources. See 42 U.S.C. § 1857c-3(a) (1970).

⁸ Criteria are to reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health and welfare which may be expected from the presence of the pollutants in the ambient air in varying quantities. See 42 U.S.C. § 1857c-3 (1970).

⁹ "Ambient air" is that portion of the atmosphere, external to buildings, to which the general public has access. 36 Fed. Reg. 22,384 (1971).

¹⁰ 42 U.S.C. § 1857c-4(b)(1) (1970).

¹¹ 42 U.S.C. § 1857c-4(b)(2) (1970). Effects on public welfare are considered to include, but are not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

¹² 42 U.S.C. § 1857c-5(a)(1) (1970). The date for submission of the original plans was Jan. 30, 1972. The Administrator may extend the period for submission of a plan for secondary standards for a period not to exceed 18 months from the date otherwise required for submission of such plan. 42 U.S.C. § 1857c-5(b) (1970).

¹³ 42 U.S.C. § 1857d-1 (1970).

¹⁴ 42 U.S.C. § 1857c-5(a)(2) (1970). The first round of approvals and disapprovals of state plans occurred on May 31, 1972. See 37 Fed. Reg. 10,892 (1972).

¹⁵ 42 U.S.C. § 1857c-5(a)(2) (1970).

¹⁶ 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970). The attainment date for primary standards is generally May 31, 1975.

¹⁷ 42 U.S.C. § 1857c-5(a)(2)(A)(ii) (1970). Because secondary standards would require more stringent controls on sources than primary standards and do not impact directly on public health, Congress has allowed the states and the Administrator more leeway for setting the time frame for their attainment than it has in the case of primary standards. See H.R. Rep. No. 1783, 91st Cong., 2d Sess. 45 (1970).

The other required provisions of an implementation plan are set forth in 42 U.S.C. §§ 1857c-5(a)(2)(A) to (H) (1970).

standards must be maintained.¹⁸ If a state failed to submit a plan or submitted one which did not meet the criteria for plan approval, the Administrator was required to promulgate a plan for the state within six months after the date required for submission of the state plans.¹⁹

The 1970 Amendments thus allowed a mere nineteen months from their enactment for establishing the administrative regulatory mechanism for the attack on air pollution.²⁰ Thereafter the controls were required to be implemented and the health-protective primary standards attained within three years, unless the necessary technology for compliance was not available (and various other stringent requirements met), in which case the Administrator was permitted to extend that period for no more than three additional years.²¹

At the heart of an implementation plan are the emission control regulations for stationary and mobile air pollution emission sources. These generally demand constant emission control in terms, for example, of pounds of pollutant emitted per ton of process weight or per million BTU of heat input of fuel.²² Whether they are adopted by the state and approved by the EPA or promulgated by the EPA where a state has failed to act, these regulations are part of the body of federal law enforceable by the EPA²³ and private citizens.²⁴

Federal enforcement of implementation plans is initiated by the issuance of a notice of violation to the source of the emission.²⁵ If the violation of the implementation plan continues for more than thirty days after the EPA's notification, the Administrator may issue an order after an informal conference with the source,²⁶ requiring compliance with the implementation plan,²⁷ or he may commence a civil action for appropriate relief, including a permanent or tempor-

¹⁸ 42 U.S.C. § 1857c-5(a)(1) (1970).

¹⁹ 42 U.S.C. § 1857c-5(c) (1970).

²⁰ The EPA has not kept strictly to the schedules set out in the 1970 Amendments. Some promulgations to correct defects in state plans have been up to a year late. See, e.g., 38 Fed. Reg. 12,698-99 (1973) (new source review regulation for Indiana), later retracted in part, 39 Fed. Reg. 4662-63 (1974) (because of state submission of a partially acceptable new source regulation). See also *Natural Resources Defense Council, Inc. v. EPA*, 475 F.2d 968 (D.C. Cir. 1973).

²¹ 42 U.S.C. §§ 1857c-5(e), (f) (1970).

²² For illustrative regulations, see, e.g., 36 Fed. Reg. 22,406-08 (1971).

²³ 42 U.S.C. § 1857c-8 (Supp. I 1971).

²⁴ 42 U.S.C. § 1857h-2 (1970).

²⁵ 42 U.S.C. § 1857c-8(a)(1) (1970). Where a state is not enforcing its plan, the requirement of a 30-day notice is eliminated. 42 U.S.C. § 1857c-8(a)(2) (1970). Civil and criminal sanctions apply immediately to violations of an approved plan committed during such periods.

See 42 U.S.C. §§ 1857c-8(b)(2)(A), -8(c)(1)(A)(i) (Supp. I 1971).

²⁶ 42 U.S.C. § 1857c-8(a)(4) (1970).

²⁷ 42 U.S.C. § 1857c-8(a)(1) (1970).

ary injunction.²⁸ Criminal penalties of up to \$25,000 per day of violation and imprisonment for up to one year attach to knowing violations²⁹ of a plan requirement³⁰ or EPA order³¹ committed at the expiration of the thirty day notice period.

Moreover section 304 of the 1970 Amendments³² authorizes any person to commence a civil action to enforce the requirements of a federally approved or promulgated plan after giving the Administrator, the state in which the violation occurs, and the source of the violation sixty days notice.³³ The purpose of this provision was to encourage, as well as to supplement state and federal efforts at enforcement.³⁴

II. SECTION 307: FORECLOSURE OF JUDICIAL REVIEW

Judicial review of various actions of the Administrator pursuant to the 1970 Amendments is dealt with in section 307(b) of the Amendments, which provides, in pertinent part:

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard . . . may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section [110] . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.³⁵

²⁸ 42 U.S.C. § 1857c-8(b)(2)(B) (Supp. I 1971). Such relief is also available for violations of EPA orders issued pursuant to 42 U.S.C. § 1857c-8(a)(1) (1970).

²⁹ 42 U.S.C. § 1857c-8(c)(1) (1970).

³⁰ 42 U.S.C. § 1857c-8(c)(1)(A)(ii) (Supp. I 1971).

³¹ 42 U.S.C. § 1857c-8(c)(1)(B) (1970).

³² 42 U.S.C. § 1857h-2 (1970).

³³ The federal district courts have jurisdiction over such actions without regard to the amount in controversy or the citizenship of the parties. See 42 U.S.C. § 1857h-2(a) (1970). Moreover, given the lack of statutory language and legislative history indicating an intent on the part of Congress to make this jurisdiction exclusive, it would seem that such actions can be brought in state courts. See *Lunenburg, Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637, 663 (1973).

³⁴ See S. Rep. No. 1196, 91st Cong., 2d Sess. 3, 36-39 (1970).

³⁵ 42 U.S.C. § 1857h-5(b) (1970). Several hundred suits have been filed under this

Not since the Emergency Price Control Act of 1942³⁶ has Congress explicitly limited judicial review of administrative action in such a manner as it apparently has in this provision. A prospective defendant is given only a limited opportunity to obtain judicial review of certain issues prior to the time enforcement is sought and is foreclosed from litigating such issues in enforcement actions commenced against him. Given the strong tradition of judicial scrutiny of administrative action,³⁷ such a drastic limitation on the availability of judicial review should be given effect, if constitutional, only to the extent that Congress can be said to have clearly intended the result.³⁸ The most appropriate way to begin an examination of section 307(b), therefore, is to attempt to discern the legislative intent and then to examine, with whatever guidance there exists in the case law, the constitutionality of a provision interpreted in accordance with that intent.

A. *Legislative History of Section 307(b)*

A characteristic of the federal air pollution enforcement mechanism first established in 1963 and expanded in 1967 was its capacity for—indeed, its encouragement of—lengthy administrative delay prior to the initiation of court actions for abatement.³⁹ Even at

section, many challenging the EPA's approval or promulgation of implementation plans. A listing of many of these cases is found in 3 E.L.R. 10022-30, 10090, 10133 (1973).

³⁶ Act of Jan. 30, 1942; ch. 26, 56 Stat. 23. See note 82 *infra* for the provision of this act similar to § 307(b)(2) of the 1970 Amendments.

Section 509(b) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1369 (Supp. II 1972), contains provisions for judicial review modeled on § 307(b) of the Clean Air Act.

³⁷ See L. Jaffe, *Judicial Control of Administrative Action* 336 (1965); 4 K. Davis, *Administrative Law Treatise* § 28.07, at 31 (1958). Both of these commentators find that the case law exhibits a presumption of the right to judicial review. This presumption is embodied in § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970). To the extent that § 307(b)(2) is interpreted to preclude review, however, the Administrative Procedure Act cannot provide an independent basis for review. See 5 U.S.C. § 701(a)(1) (1970).

³⁸ See, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970).

Professor Davis has noted that the literal words of a statute, no matter how clear and unequivocal, are seldom a reliable guide as to how the courts will interpret a provision restricting judicial scrutiny of the legality of agency action. 4 K. Davis, *supra* note 37, §§ 28.01, .14, at 2, 68. See, e.g., *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968) (where the Court allowed a pre-enforcement challenge to a selective service classification in the face of § 10(b)(3) of the Military Selective Service Act of 1967, the literal language of which seems to prohibit any judicial review of a classification prior to the criminal prosecution).

³⁹ The enforcement procedures of the 1963 Clean Air Act, Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392, were contained in § 5, 77 Stat. 396. First, a conference of the governmental instrumentalities concerned with the pollution was to be called, followed by the issuance of recommendations for abatement. If adequate action to solve the problem was not taken in six months, a public hearing was to be held to consider what measures were necessary. If action was not taken to abate the pollution within six months thereafter, the

the judicial stage, the system provided ample opportunities for prolonging attempts to finally resolve air pollution problems by permitting the enforcement court to make almost a *de novo* review of matters which may have been extensively discussed and decided earlier at the administrative level.⁴⁰ Thereafter orders were to be entered "as the public interest and the equities of the case" required.⁴¹

Confronted with the slow pace of air pollution control efforts at the state and federal levels⁴² and the mounting evidence of health

federal government could institute an action, for civil injunction relief. Only a handful of conferences were held under this act.

The Air Quality Act of 1967, Act of Nov. 21, 1967, Pub. L. No. 90-148, § 108, 81 Stat. 491, adopted the air quality standards approach which was later elaborated in the 1970 Clean Air Amendments. States were to adopt air quality standards and plans for their implementation. If a state failed to enforce its plan, resulting in violation of the air quality standards, the federal government could issue a 180-day warning notice to the state and source responsible. If the violation of the standards was not corrected, the federal government could initiate an action for civil injunctive relief. No enforcement actions were taken pursuant to these provisions because of the slow pace of implementation plan development. See *Hearings on Air Pollution Control and Solid Wastes Recycling Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., pt. 1, at 234-37 (1970) (which describes the progress in implementing the 1967 Act).

⁴⁰ See Act of Dec. 17, 1963, Pub. L. No. 88-206, § 5(g), 77 Stat. 398 (court to give due consideration to the practicability of compliance and the physical and economic feasibility of securing abatement); Act of Nov. 21, 1967, Pub. L. No. 90-148, § 108(c)(4), 81 Stat. 493 (court to give due consideration to the practicability and the economic and technological feasibility of compliance). See also *Bishop Processing Co. v. Gardner*, 275 F. Supp. 780 (D. Md. 1967), which held that, pursuant to § 5(g) of the 1963 Clean Air Act, the abatement recommendations of a hearing board convened under that act were subject to review in enforcement proceedings. Therefore the court could modify or refuse to enforce the recommendations. *Gardner* involved an animal rendering plant which created an interstate odor pollution problem. Delaware and Maryland had initiated attempts to abate the problem in 1959, but to no avail. The federal government intervened in 1965 pursuant to the conference procedures of the 1963 Clean Air Act of Dec. 17, 1963, Pub. L. No. 88-206, § 5(c), 77 Stat. 397. Failure to obtain voluntary abatement led to the initiation of a civil injunctive action under § 108(g)(1) of the 1967 Air Quality Act, Pub. L. No. 90-148, 81 Stat. 496 (which had been carried over from the 1963 Act). The decision arising from that action, *United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), reiterated that the recommendations of the hearing board were not binding on the enforcement court, though judicial review fell somewhere between *trial de novo* and the traditional scope of review of administrative action. It was not until 1970 that the Bishop Processing Company was forced to close its doors. See *United States v. Bishop Processing Co.*, 423 F.2d 469 (4th Cir.), cert. denied, 398 U.S. 904 (1970).

⁴¹ Act of Dec. 17, 1963, Pub. L. No. 88-206, § 5(g), 77 Stat. 398; Act of Nov. 21, 1967, Pub. L. No. 90-148, § 108(c)(4), 81 Stat. 493.

For discussions of the 1967 Act, see Martin & Symington, *A Guide to the Air Quality Act of 1967*, 33 *Law & Contemp. Prob.* 239 (1968); O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 *Law & Contemp. Prob.* 275 (1968); Comment, *Air Pollution in the Marietta-Parkersburg Area—A Case History*, 32 *Ohio St. L.J.* 58 (1971).

⁴² H.R. Rep. No. 1146, 91st Cong., 2d Sess. 5 (1970) [hereinafter cited as House Report]; S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970) [hereinafter cited as Senate Report]. Discussions regarding the slow pace of implementation plan development and the ineffectiveness of prior federal enforcement efforts are contained in *Hearings on Air Pollution Control and Solid Wastes Recycling Before the Subcomm. on Public Health and Welfare of the House*

hazards posed by air pollution,⁴³ Congress in 1970 embarked on an effort to restructure the previous federal air quality legislation to make it genuinely effective.

While the House of Representatives initially contemplated allowing the states a rather large degree of flexibility in setting the time frame for the attainment of the national air quality standards⁴⁴ and therefore did not see the necessity for limiting judicial review at the enforcement stage,⁴⁵ the Senate approved a bill which mandated attainment of the health-related air quality standards within three years of federal approval of the implementation plans.⁴⁶ In addition, the Senate bill provided that petitions for review of the approval or promulgation of air implementation plans and air quality standards were to be filed in the court of appeals for the appropriate circuit within thirty days of the approval or promulgation.⁴⁷ While the bill did not explicitly foreclose later review by enforcement courts in the manner of section 307(b), that such was the Senate's intention is shown by the portion of the Senate Report dealing with judicial review.⁴⁸ After acknowledging various recent cases on judicial review of administrative action holding that preclusion thereof is not lightly to be inferred but requires a showing of clear legislative intent,⁴⁹ the report continued by noting:

Since precluding review does not appear to be warranted or desirable, the bill would specifically provide for such review within controlled time periods. Of course, the person regulated would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone⁵⁰

Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., pt. 1, at 2-5, 42-52, 234-37, 308, 414-40 (1970).

⁴³ Senate Report, *supra* note 42, at 1.

⁴⁴ House Report, *supra* note 42, at 8 (state implementation plans were required to provide for the attainment of the air quality standards in a "reasonable time;" no definition of that phrase was provided in the House bill).

⁴⁵ *Id.* at 9.

⁴⁶ Senate Report, *supra* note 42, at 2. Arguments in terms of economic and technological feasibility were not to be considered relevant as bases for delaying the early attainment of healthful air quality levels. See *id.* at 2-3.

⁴⁷ S. 4358, 91st Cong., 2d Sess. § 308 (1970), reprinted in Senate Report, *supra* note 42, at 125.

⁴⁸ Senate Report, *supra* note 42, at 40-42.

⁴⁹ The Senate Report refers to *Smith v. United States*, 199 F.2d 377 (1st Cir. 1952); *United States v. McCrillis*, 200 F.2d 884 (1st Cir. 1952); *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959). See also *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

⁵⁰ Senate Report, *supra* note 42, at 41.

The clear implication of this statement is that at least certain issues (*i.e.*, those in which the subject matter does not apply to the defendant alone) must be raised, if at all, within thirty days of final administrative action on the air quality standards and implementation plans.⁵¹ The reasons for so restricting the opportunity for judicial review are not difficult to discover.

By confining review to the courts of appeals and requiring that all challenges to the approval or promulgation of standards and plans be filed within thirty days after such approval or promulgation, the Senate was endeavoring to improve the chance for attaining health-related air quality standards within the strict three-year deadline mandated in the bill.⁵² Without such a provision, many polluters would be encouraged to wait until federal or state enforcement was initiated or imminent and then attack the validity of the applicable regulations on substantive and/or procedural grounds. Further, to the extent that a court in either a pre-enforcement challenge or an enforcement proceeding would strike down the air quality standards and/or implementation plan, the process for implementation plan development⁵³ would have to be reactivated in whole or in part. Moreover, differing decisions in various district courts would not only create great confusion among sources as to what was expected of them but also artificial competitive advantages and thus a certain amount of economic dislocation. With the plan thus in limbo, pollution sources might suspend compliance efforts, and, indeed, might be justified in suspending their compliance if there was a chance that the new plan would contain different or more stringent control requirements. Had the challenge been raised in an action filed immediately upon promulgation of the standards or of the approval of the plan, and had the promulgation or the plan approval been vacated thereafter, there might have been sufficient time to remedy the alleged defects and implement the plan within three years of the date of the original approval of the plan. Invalidation at the enforcement level, however, might leave insufficient time to repromulgate, let alone expect compliance with, the controls. Moreover, without a provision foreclosing review of a plan's validity at the enforcement stage, there would be no assurance that some other enforcement court in the future would not

⁵¹ Such a scheme for judicial review was urged by several persons in testimony before the Senate Subcommittee on Air and Water Pollution during the hearings preceding the enactment of the 1970 Amendments. Hearings on Air Pollution Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. 1239, 1272 (1970).

⁵² Senate Report, *supra* note 42, at 23, 41.

⁵³ See text at notes 5-20 *supra*.

invalidate the new plan and therefore start the process all over again.⁵⁴

The system of judicial review provided by the Senate bill was of course no guarantee against some delay in the implementation of the air quality standards.⁵⁵ However, it was an essential mechanism for reducing such delay as much as possible.

The intentions of the Senate Bill's framers to limit issues which could be raised at the enforcement stage is further confirmed in the Senate Report's discussion of the bill's provision authorizing citizen suits for enforcement of emission regulations.⁵⁶ It is therein noted:

Section 304 would not substitute a "common law" or court-developed definition of air quality. An alleged violation of an emission control standard, emission requirement, or a provision in an implementation plan, would not require reanalysis of technological or other considerations at the enforcement stage. These matters would have been settled in the administrative procedure leading to an implementation plan or emission control provision. Therefore, an objective evidentiary standard would have to be met by the citizen who brings an action under this section

...⁵⁷

Resolution of many issues affecting the validity of air quality standards and implementation plans may require tremendous resources in terms of expert knowledge. To permit litigation of such

⁵⁴ Furthermore, to the extent that there is no mechanism for limiting issues which can be raised in the enforcement forum, the possibility of extended litigation at that stage is magnified and this may threaten attainment of the air quality standards within the three-year deadline even if the plan is eventually upheld.

⁵⁵ For example, the Administrator's approval of the Ohio and Kentucky implementation plans was recently vacated on procedural grounds in a § 307 proceeding. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973). As a result, more than a year after the original approval of the plans, they are unenforceable by the federal government and compliance by many pollution sources appears not to be forthcoming.

It might be argued that, when a plan is struck down in a § 307 challenge, the three-year time frame for attaining the primary standards starts to run from the time when the EPA has approved or promulgated a new plan. 42 U.S.C. § 1857c-5(a)(2)(A) (1970) might be so interpreted though it is not at all clear whether Congress intended this result. Yet even if this interpretation is accepted, § 307(b)(2) serves the purpose of insuring that the air quality standards will be attained as expeditiously as practicable without delays caused by litigating § 307 issues at the enforcement stage.

⁵⁶ S. 4358, 91st Cong., 2d Sess. § 304 (1970), reprinted in Senate Report, *supra* note 42, at 122-23.

⁵⁷ Senate Report, *supra* note 42, at 36. The foreclosure provisions of 42 U.S.C. § 1857h-5(b)(2) (1970) apply to "civil or criminal enforcement" which would include citizen suits brought pursuant to 42 U.S.C. § 1857h-2(a)(1) (1970) for enforcement of implementation plans. Accord, *Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co.*, 6 E.R.C. 1147 (D. Del. 1973) (§ 307(b)(2) applies regardless of whether the plaintiff (citizen) or defendant (polluter) attempts to litigate § 307 issues in enforcement action).

issues in enforcement suits brought by private citizens who would rarely possess the financial ability to muster the necessary technical assistance would effectively deter the institution of the very type of action which the Senate, and later the Congress in enacting section 304 of the Amendments,⁵⁸ sought to encourage.⁵⁹

By acceding to the conference committee's report,⁶⁰ the House thereby accepted both the three-year time limit for attaining primary air quality standards⁶¹ and the authorization of citizen suits.⁶² Section 307(b) as finally enacted merely made explicit what the previous Senate Report had clearly intended as a safeguard for these two provisions—that certain issues were not to be reviewed by the enforcement court in actions brought by the federal government or by private citizens.

While "clear and convincing evidence" of a legislative intent to preclude review at the enforcement stage therefore exists, the question arises as to the scope of section 307's foreclosure of review. The Senate Report indicates that, where the "subject matter" applies to the defendant alone, the enforcement court would be at liberty to review the issue.⁶³ What this means is far from clear. Perhaps the distinction attempted to be drawn is between so-called legislative and adjudicative facts,⁶⁴ the former having to be litigated, if at all, in a section 307 proceeding and the latter left open for review at a later stage. Adjudicative facts pertain to a particular party and its activities while legislative facts are those more generally applicable.⁶⁵ Stated differently, the distinction is between the general validity of the regulation and its applicability to a particular case.⁶⁶ Not only is such a distinction subject to problems of ambiguity,⁶⁷ but also acceptance of it as reflecting the intent of Congress could in an untold number of cases cause the very problems that section 307(b) was designed to avoid—namely, prevention of the attainment of the primary standards within the three-year period or as soon thereafter as possible and undue hindrance of

⁵⁸ 42 U.S.C. § 1857h-2 (1970).

⁵⁹ Senate Report, *supra* note 42, at 36-39.

⁶⁰ H.R. Rep. No. 1783, 91st Cong., 2d Sess. 57 (1970).

⁶¹ *Id.* at 45.

⁶² *Id.* at 55-56.

⁶³ Senate Report, *supra* note 42, at 41.

⁶⁴ See 1 K. Davis, *supra* note 37, § 7.02.

⁶⁵ *Id.* at 413.

⁶⁶ For example, a power company admits that sulfur dioxide stack gas cleaning is technologically feasible in many or most instances; however, in its case, the difficulties preventing installation of such a control device are insuperable because of peculiarities in the design and location of its plants.

⁶⁷ See Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485, 503 (1970).

citizen enforcement. An adequate procedure for raising and litigating issues affecting the validity of implementation plans "as applied" to the individual source can be provided prior to the time enforcement is sought.⁶⁸

It is submitted, therefore, that an interpretation of section 307(b) that would not foreclose the enforcement court from considering issues related to the validity of the implementation plan regulation "as applied" in a particular case runs so strongly counter to the legislative goals of the 1970 Clean Air Amendments that it should not be adopted. In fact, in a case which involved the first enforcement action under the 1970 Amendments, the court dismissed as unsubstantial the argument that a distinction should be drawn between a challenge to a regulation as generally applicable and one attacking the regulation as applied to the objecting party.⁶⁹

The question of whether an issue is foreclosed from consideration at the enforcement stage should instead be answered by determining, first, whether the issue could have been raised and decided in a section 307(b) proceeding, and, second, whether the defendant had an adequate opportunity to present his claims for decision in the administrative and judicial process provided prior to the enforcement action.⁷⁰ The Senate Report's concern for preserving the right of a defendant to raise issues where the "subject matter" applies to the defendant alone⁷¹ can be interpreted to refer, *inter alia*, to those cases in which the defendant contests the facts on which the Administrator based his notice of violation and/or subsequent order,⁷² the form of order, and the legality of the procedures leading to the issuance of the notice of violation and order.⁷³ Such matters could

⁶⁸ See text at notes 107-15 *infra*.

⁶⁹ *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 342 F. Supp. 1006 (D. Del.), remanded, 467 F.2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973). In that case the validity of a sulfur dioxide regulation of the State of Delaware was unsuccessfully attacked as unnecessarily burdensome on the petitioner Getty. The district court replied that "a party must have standing to secure judicial review and in a very real sense any challenge to the validity of a regulation is a challenge to the regulation as applied to the objecting party." 342 F. Supp. at 1014. For further discussion of this case, see text at notes 102-04 *infra*.

⁷⁰ For an examination of the adequacy of the administrative and judicial procedures for litigating issues related to the approval and promulgation of implementation plans, see text at notes 105-41 *infra*.

⁷¹ Senate Report, *supra* note 42, at 41.

⁷² *Accord, Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349, 355-56 (3d Cir. 1972) (where the court noted that no dispute existed regarding the underlying facts supporting the Administrator's compliance order and therefore the case presented no issues which could not have been raised in a § 307 proceeding).

⁷³ For other non-307 issues which can be raised in pre-enforcement and enforcement review, see text at notes 164-84 *infra*.

The Senate bill provided for federal issuance of orders to abate violations of implementation plans together with civil actions to cure violations of any such orders. Criminal sanctions were also specified. The orders could, however, be challenged by actions instituted in district

not be raised and litigated prior to the initiation of the enforcement action.

B. *Constitutionality of Section 307(b)*

While the case law has not provided a clear definition of the constitutional limits of congressional power to restrict the opportunity for judicial review of administrative action,⁷⁴ there appears to be sufficient authority to support the conclusion, though perhaps qualified in certain respects, that section 307(b)'s foreclosure of judicial review of certain issues in the enforcement forum is constitutional as applied to both criminal and civil proceedings regardless of whether the air quality standards or implementation plans are challenged on constitutional or statutory grounds.

Section 307's restriction on the enforcement court's jurisdiction, forbidding consideration of the validity of the regulation whose enforcement is sought, together with the short time period within which any pre-enforcement challenge to the air quality standards and implementation plans must be filed, are the aspects which present peculiar constitutional problems. In *Yakus v. United States*,⁷⁵ a statutory provision limiting judicial review in almost the identical manner was challenged.

Yakus arose under the Emergency Price Control Act of 1942 (EPCA),⁷⁶ a wartime measure involving criminal indictments for the willful sale of wholesale cuts of beef at prices above those prescribed by regulation. The statute provided sixty days following issuance of a maximum price regulation within which challenges of its validity could be made before the Price Administrator,⁷⁷ whose decision was reviewable exclusively by the Emergency Court of Appeals⁷⁸ with certiorari to the Supreme Court.⁷⁹ Though aware of the promulgation of the regulation prior to the expiration of the appeal period,⁸⁰ the defendants filed no protest but instead chal-

courts at the polluting sources' initiative. There was no explicit limitation with regard to the issues which were to be reviewable in such a proceeding. See S. 4358, 91st Cong., 2d Sess. § 116 (1970), reprinted in Senate Report, *supra* note 42, at 97-98. Such a proceeding in district court would be an adequate forum to litigate the narrow range of issues referred to in the text. There is no reason to believe that the Senate intended to permit the examination there of issues touching the validity of an air implementation plan which could have been raised in a § 307 challenge.

⁷⁴ See L. Jaffe, *supra* note 37, at 381-89; 4 K. Davis, *supra* note 37, § 28.18.

⁷⁵ 321 U.S. 414 (1944). Comments on this case are contained in Noel, *Federal Rent Control*, 18 Temp. L.Q. 477 (1944); Quill, *Judicial Review and the Price Control Act*, 24 B.U.L. Rev. 250 (1944).

⁷⁶ Act of Jan. 30, 1942, ch. 26, 56 Stat. 23, as amended, Act of Oct. 2, 1942, ch. 578, 56 Stat. 765.

⁷⁷ Act of Jan. 30, 1942, ch. 26, § 203(a), 56 Stat. 31.

⁷⁸ Act of Jan. 30, 1942, ch. 26, § 204(a), 56 Stat. 31.

⁷⁹ Act of Jan. 30, 1942, ch. 26, § 204(d), 56 Stat. 32.

⁸⁰ 321 U.S. at 435.

lenged the validity of the regulation on statutory and constitutional grounds in the enforcement proceeding.⁸¹ The Supreme Court upheld the convictions. In so doing, it upheld the provision of the Act which (1) removed jurisdiction from the enforcement court to consider the validity of the price regulation for violation of which sanctions were being sought⁸² and (2) provided the sixty-day time limit for challenging a price regulation.⁸³

The Court explained its decision in terms of the power of Congress to define jurisdiction of the inferior federal and state courts on federal questions and to create courts to exercise the judicial power.⁸⁴ It emphasized that the failure to exhaust previous administrative and judicial remedies could foreclose later judicial review, however, only to the extent that the defendants had had a reasonable opportunity to be heard and to present evidence.⁸⁵ Having failed both to pursue the prior opportunity for administrative and judicial relief and to persuade the Court of the inherent inadequacy of that procedure,⁸⁶ the defendants were without a remedy.⁸⁷

There are two principal objections which have been urged against the result reached in *Yakus*. First, it has been argued that it is an unconstitutional abridgement of the judicial power for Congress to require a court created under Article III of the Constitution to decide a case and at the same time to disregard the possibility that

⁸¹ *Id.* at 419. At trial, the petitioners attempted to introduce evidence that the regulation did not conform to the standards of the Act and that it deprived them of property without due process of law. The trial court excluded the evidence as irrelevant because of the foreclosure provision, quoted in text at note 82 *infra*.

⁸² Act of Jan. 30, 1942, ch. 26, § 204(d), 56 Stat. 33, which provided in pertinent part: The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

⁸³ 321 U.S. at 435.

⁸⁴ *Id.* at 443.

⁸⁵ *Id.* at 434-35, 446.

⁸⁶ *Id.* at 435.

⁸⁷ For commentary supporting the result in *Yakus*, see Nathanson, The Emergency Price Control Act of 1942: Administrative Procedure & Judicial Review, 9 Law & Contemp. Prob. 60 (1942); Hyman & Nathanson, Judicial Review of Price Control: The Battle of the Meat Regulations, 42 Ill. L. Rev. 584 (1947). For further discussions of the legality of § 204(d), see Reid & Hatton, Price Control and National Defense, 36 Ill. L. Rev. 255 (1941); Comment, 37 Ill. L. Rev. 256 (1942).

the regulation to be enforced might be unconstitutional.⁸⁸ The answer to this argument would seem to be that a court created by Article III did in fact sit prior to the enforcement action to hear challenges to the regulations on constitutional and other grounds.

Secondly, it is urged that, in criminal cases, removing the question of the regulation's validity from the jury and/or trial court's consideration is a violation of the right to jury trial guaranteed by section 2 of Article III of the Constitution⁸⁹ and the right to a speedy and public trial by jury protected by the Sixth Amendment.⁹⁰ To the extent the defendant has challenged the regulation under the special statutory provision and was unsuccessful, he still has not been afforded the procedural protections of a criminal trial (e.g., proof beyond a reasonable doubt)⁹¹ in contesting the validity of the regulation. To the extent that he fails to pursue the prior opportunity for judicial review, he is foreclosed from any judicial determination of one of the issues which is crucial to proof of his guilt.⁹² On the other hand, neither Article III nor the Sixth Amendment explicitly defines the universe of facts which must be open to consideration in the criminal trial. As Professor Jaffe has pointed out, in the case of an administrative regulation, the individual is commanded to do or cease from doing an act and only then does a refusal become punishable.⁹³ It is the refusal to obey that is the criminal act which is open to consideration at a trial accompanied by the full panoply of procedural rights guaranteed by the Constitution.

Yakus v. United States does not stand alone in supporting the constitutionality of section 307(b). Professor Davis has supported the proposition that constitutional rights may be forfeited by failure to

⁸⁸ 321 U.S. at 467-68 (Rutledge, J., dissenting). See also McLaren, Can a Trial Court of the United States Be Completely Deprived of the Power to Determine Constitutional Questions?, 30 A.B.A.J. 17 (1944).

Rutledge found such an argument to bar on grounds of unconstitutionality the foreclosure provision of the Emergency Price Control Act as applied to criminal proceedings, though not civil proceedings, unless the regulation attacked was invalid on its face. See *Bowles v. Willingham*, 321 U.S. 503, 525-29 (1944) (concurring opinion). Rutledge fails, however, to articulate convincing bases for such distinctions.

⁸⁹ U.S. Const. art III, § 2.

⁹⁰ U.S. Const. amend. VI. For such arguments, see Rutledge's dissent in *Yakus*, 321 U.S. at 478-89 (the opinion does not clearly indicate which issues are for the trial judge and which for the jury); Fraenkel, Can the Administrative Process Evade the Sixth Amendment?, 1 Syracuse L. Rev. 173 (1949); McLaren, supra note 88; Schwartz, Administrative Law and the Sixth Amendment: "Malaise in the Administrative Scheme," 40 A.B.A.J. 107 (1954) (indicating that the question of validity of an order or regulation need not necessarily be one for the jury). See also *United States v. Spector*, 343 U.S. 169, 174-80 (1952) (Jackson & Frankfurter, JJ., dissenting); *United States v. England*, 347 F.2d 425 (7th Cir. 1965).

⁹¹ 321 U.S. at 480-81 (Rutledge, J., dissenting).

⁹² Id. at 478-79 (Rutledge, J., dissenting).

⁹³ L. Jaffe, *Judicial Control of Administrative Action* 394 (1965).

make timely assertion of them before a tribunal having jurisdiction to determine them, finding such a view to be in accordance with necessity and tradition.⁹⁴ Moreover, other commentators have concluded that there need be only an adequate opportunity to contest the constitutional and statutory validity of administrative action at some point in time, and that this opportunity need not necessarily be at the enforcement level.⁹⁵ In addition, civil and criminal cases have upheld the foreclosure of review in the enforcement forum of generally applicable regulations when their validity has been attacked on constitutional and/or statutory grounds, sometimes in the absence of explicit statutory command to do so.⁹⁶ Further, even a greater number of decisions have held adjudicatory orders—*i.e.*, those directed against a named individual or small group of individuals—immune from attack in suits for enforcement when the defendants had failed to resort to the statutorily prescribed methods of review.⁹⁷

Of course, Congress should have some reason for its decision to preclude review at the enforcement stage, but the reported cases do

⁹⁴ 4 K. Davis, *Administrative Law Treatise* § 28.18, at 97 (1958).

⁹⁵ L. Jaffe, *supra* note 93, at 384; Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1378-79 (1953).

⁹⁶ See, e.g., *United States v. Southern Ry.*, 380 F.2d 49 (4th Cir. 1967) (in an action for civil penalties for violation of ICC emergency regulation, challenge to validity of the regulation as *ultra vires* not allowed, given the existence of a prior opportunity provided by statute to contest such orders which was not followed by defendant); *United States v. Southern Ry.*, 364 F.2d 86 (5th Cir. 1966), cert. denied, 386 U.S. 1031 (1967) (same holding as in previous case involving generally the same circumstances, except that here the order was attacked on statutory and constitutional-vagueness grounds); *United States v. 3 7/12 Dozen Packages of Nu-Charme Perfected Brow Tint*, 59 F. Supp. 284 (W.D. La. 1945), *aff'd sub nom. Byrd v. United States*, 154 F.2d 62 (5th Cir. 1946) (in libel proceeding under the Federal Food, Drug and Cosmetic Act, claimant was barred from contesting the factual basis for regulation classifying certain cosmetics as adulterated since the statute provided a prior adequate opportunity to raise such issues which was not pursued here); *United States v. Bodine Produce Co.*, 206 F. Supp. 201 (D. Ariz. 1962) (given the statute's vesting jurisdiction to decide the issue in the court of appeals, trial of criminal misdemeanor under Federal Food, Drug and Cosmetic Act held not the proper forum for challenging validity of DDT tolerance for lettuce as long as statutory requirements for notice and hearing were complied with in promulgating regulation).

⁹⁷ See, e.g., *Lichter v. United States*, 334 U.S. 742 (1948) (in action by the United States to recover excess profits under the Renegotiation Act, failure of the defendants to petition Tax Court for a redetermination excluded consideration in enforcement action of the coverage of the Act, the amount of profits, and other comparable issues which could have been presented to Tax Court); *United States v. Ruzicka*, 329 U.S. 287 (1946) (under Agricultural Marketing Agreement Act of 1937, milk handlers may not challenge in an enforcement proceeding the validity of an order requiring payment of certain money into statutory fund but must instead pursue statutorily prescribed method of review of orders); *Falbo v. United States*, 320 U.S. 549 (1944). See also Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 Minn. L. Rev. 560 (1941).

The constitutional objections leveled at the result in *Yakus* (interference with the judicial power and the right to trial by jury) would, if valid, seem to be equally applicable to these cases, even though the procedures involved in the issuance of the administrative action challenged differ (rule-making in *Yakus*; adjudication under the Clean Air Act). Nevertheless, the courts have not accepted such arguments as a bar to foreclosure.

not require such overwhelming necessity as presented in time of war to justify foreclosure.⁹⁸ The elimination within three years of the threat to the public health posed by air pollution would certainly seem to be an adequate basis for the foreclosure provisions of section 307(b).

Neither *Yakus* nor any other case discovered where review was held to be foreclosed presented a situation in which the enforcement court was barred from considering the constitutionality of the enabling statute⁹⁹ or in which the regulation was unconstitutional on its face.¹⁰⁰ The congressional history of section 307(b) does not compel a reading which would bar challenges to the constitutionality of the Clean Air Act per se, and it is doubtful whether it should be so interpreted.¹⁰¹ Where plans are alleged to be unreasonably burdensome with respect to some sources so as to amount to a denial of equal protection of the laws or to be invalid on other grounds, their validity will in most cases hinge on proof of scientific and/or economic facts extrinsic to the regulations. For this reason situations in which plans or portions thereof are invalid on their face are unlikely to occur.

Given the status of the case law in this area, the opinions of the district court and the Third Circuit in the case of *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*,¹⁰² which, implicitly at least, upheld the constitutional validity of the foreclosure provisions of section 307, seem to be well-founded. Getty Oil Company brought suit to have set aside an order of the EPA issued to a power plant which had violated the applicable federally approved sulfur dioxide regulations of Delaware. Getty, which supplied the high sulfur fluid petroleum coke for burning at the plant and which would therefore be substantially affected if the power company complied with the

⁹⁸ See, e.g., *United States v. Southern Ry.*, 380 F.2d 49 (4th Cir. 1967) (national railway car shortage); *Byrd v. United States*, 154 F.2d 62 (5th Cir. 1946) (protection of public from hazardous cosmetics); *United States v. Bodine Produce Co.*, 206 F. Supp. 201 (D. Ariz. 1962) (protection of public from contaminated food).

⁹⁹ *Yakus*, 321 U.S. at 429-30 (where the Court refused to read the EPCA as attempting to foreclose attacks on its constitutionality); *United States v. Kissinger*, 250 F.2d 940, 941 (3d Cir.), cert. denied, 356 U.S. 958 (1958) (in an action for civil penalties under the Agricultural Adjustment Act of 1938 for producing and marketing wheat in excess of quota, court noted that Congress could not prevent an aggrieved farmer from raising the question of Act's constitutionality as a defense to the action).

¹⁰⁰ While the Supreme Court in *Yakus* was not confronted with a situation where the regulation was unconstitutional on its face, and thus refused to indicate the result that should be reached in such a case, 321 U.S. at 446-47, it is hard to see a distinction of constitutional proportions between the two situations.

¹⁰¹ The section speaks only in terms of insulating "action of the Administrator." 42 U.S.C. § 1857h-5(b)(2) (1970).

¹⁰² 342 F. Supp. 1006 (D. Del.), remanded, 467 F.2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

order, alleged as part of its challenge that the applicable air quality standards were already being met in the vicinity of the plant and that the enforcement of the regulation would impose an unnecessary hardship on Getty and on the power company, at least until sulfur dioxide stack gas scrubbing was available.¹⁰³ The courts refused to listen to such challenges to the Delaware regulation. Even if the objections were valid, Getty had failed to attack the regulation in state court when adopted by the state agency and to file a petition for review under section 307(b). It was foreclosed from raising the issues in a pre-enforcement attack on the EPA order or later in judicial proceedings brought by the EPA to enforce the order.¹⁰⁴

C. Adequacy of Section 307(b) Review

As the previous discussion has pointed out, the constitutional validity of section 307(b)'s foreclosure of judicial review in enforcement actions of issues which could have been raised in a section 307 proceeding hinges on the adequacy of the prior opportunity to be heard on objections to the regulation at the administrative and judicial levels.¹⁰⁵ Recently there has been a plethora of judicial opinions decided which, together with the EPA's regulations, have given some indication of the type of procedural scheme in which a prospective defendant may raise and litigate his objections to the validity of an implementation plan. Generally speaking, the constitutional adequacy of this system of review would not appear open to serious question. Comparison with the procedures upheld in *Yakus* indicates that the procedures under the Clean Air Amendments contain at least as much protection for the interests involved.¹⁰⁶

¹⁰³ 342 F. Supp. at 1012.

¹⁰⁴ 467 F.2d at 357-58 n.14.

¹⁰⁵ See text at notes 94-95 supra.

¹⁰⁶ Under the Emergency Price Control Act, prices were established in accordance with general criteria set forth in the Act, though the Administrator was required to give due consideration to prices existing in certain base periods. Act of Jan. 30, 1942, ch. 26, § 2a, 56 Stat. 24. No hearing was provided prior to promulgation of a price regulation. However, within 60 days after issuance, any person subject to a price regulation could file a protest with the Price Administrator, setting forth his objections, affidavits and other written evidence. Act of Jan. 30, 1942, ch. 26, § 203(a), 56 Stat. 31. Within certain specified time periods, the Administrator was required to grant or deny the protest or give notice for a hearing on the protest or provide opportunity to present further evidence in connection therewith. *Id.* The Supreme Court noted in *Yakus* that the administrative hearing on the protest could validly be restricted to the presentation of documentary evidence, affidavits and briefs, at least in some cases. 321 U.S. at 436. If the Administrator denied the protest, he was required to inform the protestant of the grounds for his decision and of any economic data or other facts of which he took official notice. Act of Jan. 30, 1942, ch. 26, § 203(a), 56 Stat. 31. Within 30 days following denial of a protest, the objecting party could appeal to the Emergency Court of Appeals, which could issue an injunction only if the regulation was not in accordance with law, or was arbitrary or capricious. Act of Jan. 30, 1942, ch. 26, § 204(a), 56 Stat. 31. It could

States are required by section 110(a) of the 1970 Amendments¹⁰⁷ to hold public hearings after reasonable notice prior to their adoption of implementation plans. EPA regulations elaborate this requirement by defining "reasonable notice" to include thirty days notice of the date, time and place of the hearing by prominent advertisement in the air quality control region affected.¹⁰⁸ The proposed plan is to be available for public inspection in the region affected by the plan throughout the notice period.¹⁰⁹

Federal regulations do not require anything more than a legislative, or information gathering, hearing.¹¹⁰ Decisions by the courts of appeals have generally followed the recent trend advocated in scholarly writing¹¹¹ and cases¹¹² and have avoided determining the specific procedures which are required for the state hearings.¹¹³ The procedures to be followed depend on a pragmatic balancing of the various factors including the type of issues presented in terms of their importance and complexity and the fairness to the parties involved.¹¹⁴ To the extent that the state hearing is adequate and the Administrator considers the hearing record in making his decision to approve or to disapprove the state plan, further solicitation of comments at the federal level has been held to be unnecessary.¹¹⁵

One of the more confusing issues involves the interaction of section 307 review of an approved state plan and the various proce-

also order the taking of more evidence before the Administrator. *Id.* Further, review by the Supreme Court on certiorari was permitted. Act of Jan. 30, 1942, ch. 26, § 204(d), 56 Stat. 32.

¹⁰⁷ 42 U.S.C. § 1857c-5(a)(1) (1970).

¹⁰⁸ 37 Fed. Reg. 26,311 (1972).

¹⁰⁹ *Id.* Such requirements are, of course, in addition to any that may be imposed by state law. In order to reduce possible conflict between federal and state requirements, the Administrator may approve variations in the federal notice and hearing procedures if he is convinced that the state's procedures provide for adequate notice to and participation by the public. See *id.* at 26,312.

¹¹⁰ 37 Fed. Reg. 26,311-12 (1972) does not specify the type of hearing required, but the practice has been to require no more than information-gathering hearings.

¹¹¹ See, e.g., Clagett, *Informal Action-Adjudication-Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51.

¹¹² See, e.g., *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971).

¹¹³ See, e.g., *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973), rev'g 352 F. Supp. 697 (D. Colo. 1972); *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3d Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973).

¹¹⁴ In some cases this could result in a requirement that the hearing held on a plan incorporate the right of cross-examination and other procedural hallmarks of the traditional adjudicatory hearing. See *Appalachian Power Co. v. EPA*, 477 F.2d 495, 503 (4th Cir. 1973).

¹¹⁵ See, e.g., *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973). But see *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973).

Nevertheless, the EPA has recently solicited public comment on state plans prior to their approval. See 38 Fed. Reg. 34,894 (1973) (notice of opportunity for public comment on Indiana's new source review regulation). The procedures for federal promulgation of a plan are generally similar to those involved in approval of a state plan, with the principal exception that the federal, not state, government holds the hearing.

dures permitted by state law to challenge or obtain a variance from a state regulation. At least one court has considered the opportunity to challenge a regulation on the state level as an element of apparently some importance in determining the adequacy of the prior opportunity for judicial review.¹¹⁶ Yet if a prospective defendant appeals the state's adoption of a regulation by way of a non-section 307 challenge in which he could raise the same issues as in a section 307 challenge,¹¹⁷ it does not seem that invalidation of the regulation by a state court after federal approval of the plan necessarily opens the issue to judicial review, as one opportunity for judicial review has been afforded, albeit at the federal level, and passed up.¹¹⁸ It has been held in one case that a state variance procedure is an appropriate device to cure "imperfections" in a plan in the instance of the failure of the state to hold an adequate hearing prior to its adoption and submittal of the plan to the EPA.¹¹⁹ This result is clearly wrong. Typically variance proceedings merely provide a means for a source to obtain relief from the impact of a regulation which may impose "undue burdens" in the particular case.¹²⁰ The proceeding is not one to attack the legality of the original adoption of the regulation. Since the issues which can be presented in the two proceedings will necessarily differ, remitting a prospective defendant to the variance proceeding will not provide him an adequate opportunity to challenge the regulation.¹²¹

A further problem with this suggestion is posed by the so-called "Getty Dilemma," which arises from the fact that the federal government and private citizens can bring an action to force compliance with a federally approved plan unless the variance has been approved by the EPA as meeting the substantive and procedural requirements on the Act. *Getty* states that the enforcement court cannot consider the grounds of the variance as a defense to the

¹¹⁶ See *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349, 356 (3d Cir. 1972).

¹¹⁷ See text at notes 123-31 *infra*.

¹¹⁸ In *Clean Air Coordinating Comm. v. Roth-Adam Fuel Co.*, 465 F.2d 323 (7th Cir. 1972), cert. denied, 409 U.S. 1117 (1973), petitioners brought suit in federal court to enjoin proceedings in state court which were delaying Illinois' submission of part of its implementation plan to the EPA. The court held that the federal anti-injunction statute, 28 U.S.C. § 2283 (1970), barred the action, particularly because of the EPA's authority to promulgate a plan for a state where the state fails to submit an acceptable plan. The result is the correct one given the facts presented. However, where a state plan has been approved by the EPA and the 30-day appeal period of § 307 has expired, a collateral attack on the state plan in the state should not affect the enforceability of the plan by the EPA, the state and private citizens.

¹¹⁹ *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3d Cir. 1973).

¹²⁰ See, e.g., Conn. Admin. Regs. § 19-508-13 (Dep't of Environmental Protection, 1972).

¹²¹ Accord, *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 342 F. Supp. 1006, 1014 n.9 (D. Del. 1972).

action if they could have been raised in a section 307 proceeding. If the prospective defendant fails to obtain federal approval of the variance prior to the enforcement action, his opportunity to obtain relief may be effectively extinguished.¹²²

In a section 307(b) action, review of the Administrator's approval of a plan is conducted pursuant to the Administrative Procedure Act whereby the court is authorized to decide all relevant questions of law, to interpret constitutional and statutory provisions, and to determine the meaning or applicability of the terms of a federal agency action.¹²³ The Administrator's action will not be set aside unless it is arbitrary, capricious, or an abuse of discretion,¹²⁴ the record for review being the information upon which the Administrator made his decision.¹²⁵ It is submitted that, in the context of the 1970 Amendments, the reviewing court can and should review all questions of state as well as federal law presented which pertain to the validity of an implementation plan and the regulations

¹²² Moreover, the EPA cannot approve any variance which would prevent the attainment or maintenance of the air quality standards within the time frame established by the Clean Air Amendments. See 42 U.S.C. § 1857c-5(a)(3) (1970). See also *Lunenburg, Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637, 646-58 (1973).

¹²³ 5 U.S.C. § 706 (1970). See *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1336 (1st Cir. 1973), which holds that § 307 merely designates the forum for review and that § 304 provides the authorization for and conditions of suit. If this formulation is followed, it will mean that every § 307 petitioner must frame the issues he raises as relating to the failure of the Administrator to perform a nondiscretionary action or duty under the Clean Air Act. See 42 U.S.C. § 1857h-2(a)(2) (1970). Issues which cannot be successfully framed in such terms and litigated under § 307 will be open to consideration at the enforcement stage.

¹²⁴ 5 U.S.C. § 706(2)(A) (1970). See, e.g., *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 171 (6th Cir. 1973).

The "arbitrary and capricious" standard was interpreted in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), to include an administrative decision which is not based on a consideration of the relevant factors and involves a clear error of judgment.

The "substantial evidence" test of 5 U.S.C. § 706(2)(E) (1970) applies to cases subject to 5 U.S.C. §§ 556, 557 (1970) (procedures for certain types of rule-making and adjudication) or otherwise reviewed on the record of an agency hearing provided by statute. Cases have held that EPA approval and promulgation of a plan are not subject to 5 U.S.C. §§ 556, 557 (1970). See, e.g., *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1306-07 (10th Cir. 1973); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 172 (6th Cir. 1973); *Duquesne Light Co. v. EPA*, 481 F.2d 1, 6 (3d Cir. 1973). This is because there is no requirement in 42 U.S.C. § 1857c-5 (1970) mandating that the implementation plan hearings be "on the record" in those exact words or in similar phrases.

¹²⁵ See *Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir. 1973). As noted in that decision, the reviewing court has the inherent power to require that additional evidence be taken before the Administrator. *Id.* at 504. The court erroneously refers to 42 U.S.C. § 1857h-5(c) (1970) as authority for this power, as that section applies only to determinations required to be made on the record after notice and opportunity for hearing. Yet, as pointed out in note 124 *supra*, decisions to approve plans are not explicitly required to be made "on the record" and will generally not be grounded exclusively on the record of the hearing on the plan.

therein,¹²⁶ whether they are of a substantive or procedural nature. In fact, courts have already done this.¹²⁷ Since one of the criteria for plan approval is that the state have adequate authority to carry out its plan,¹²⁸ the lack of such authority is clearly a basis for a section 307 challenge.¹²⁹

Section 307(b) does not foreclose the possibility of challenges to standards and plans in disregard of changes in circumstances. It allows petitions for review of standards and plans to be filed after the thirty day appeal period lapses if they are based on "grounds arising after such 30th day."¹³⁰ This provision appears to refer to those instances where significant information newly comes to light.¹³¹

One commentator has suggested that section 307(b)'s foreclosure of enforcement review may be unconstitutional, at least with respect to those persons lacking actual knowledge of the approval or promulgation prior to the expiration of the thirty day period allowed for filing petitions for review and/or without necessary legal expertise to mount a challenge to the regulation within the allotted time.¹³² With

¹²⁶ Cf. 5 U.S.C. §§ 706(2)(B), (C), (D) (1970).

¹²⁷ See *Natural Resources Defense Council, Inc. v. EPA*, 483 F.2d 690, 694-95 (8th Cir. 1973) (Iowa's new source regulation comports with federal requirements); *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875, 892-93 (1st Cir. 1973) (Massachusetts lacks legal authority to make emission data available to the public).

¹²⁸ See 42 U.S.C. § 1857c-5(a)(2)(F)(i) (1970). See also 36 Fed. Reg. 22,300 (1971).

The EPA has disapproved state plans where it believed the state lacked the necessary enforcement authority. See, e.g., 37 Fed. Reg. 10,846 (1972).

¹²⁹ Issues that might be raised in a § 307 challenge include: whether the hearings on the implementation plan were conducted in accordance with the applicable requirements, see, e.g., *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3d Cir. 1973); failure to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (Supp. III 1973), see, e.g., *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973); and the sufficiency of the technical support for a plan (e.g., air quality data).

To the extent that a procedural defect in the development of a particular implementation plan (e.g., no cross-examination allowed) infects the adequacy of the opportunity to raise and litigate objections to the plan at the administrative level, though the problem was not raised in a § 307 challenge, it might be argued that § 307(b)(2) should not foreclose raising the defect at the enforcement stage. On the other hand, an appeal to the circuit court pursuant to § 307(b)(1) could have disposed of the issue and required correction of the defect. In effect, there was an adequate opportunity to be heard and § 307(b)(2) should be applied in this case. Note that in *Yakus* the defendants did not pursue their administrative remedies and therefore the Supreme Court refused to say that they would have been inadequate, 321 U.S. at 434-35, though it did suggest that any defects in procedures might have been remedied in the course of the statutorily prescribed appeal to the courts. *Id.* at 434. But see *United States v. 3 7/12 Dozen Packages of Nu-Charme Perfected Brow Tint*, 61 F. Supp. 847 (W.D. La. 1945) (where the enforcement court examined the adequacy of the procedures used to promulgate regulations under the Federal Food, Drug and Cosmetic Act, even though it had held in 59 F. Supp. 284 (1945) that other issues touching the validity of the regulation in question were not open to litigation at the enforcement stage).

¹³⁰ 42 U.S.C. § 1857h-5(b)(1) (1970).

¹³¹ S. Rep. No. 1196, 91st Cong., 2d Sess. 41-42, 65-66 (1970).

¹³² See Note, 1973 Duke L.J. 253, 260.

respect to the notice issue, the cases do not come to grips with the question of what type of notice is necessary before a defendant will be held to have forfeited his opportunity for judicial review. Some decisions upholding forfeiture involve instances where the defendant had actual notice of the challenged regulation or order prior to the expiration of the appeal period or prior to the time enforcement proceedings were instituted.¹³³ In others, it appears that the defendant could only be said to have been on constructive notice of the challenged regulation or order prior to the institution of enforcement action against him.¹³⁴

As specified by statute, publication of a regulation in the Federal Register provides constructive notice to all affected by its contents.¹³⁵ Approvals of implementation plans are so published, the regulations incorporated by reference,¹³⁶ and the thirty day period of section 307(b)(1) is considered to run from the publication of the approval or promulgation in the Register.¹³⁷ The full text of any federally promulgated regulation is set forth in the Register. Even where application of this constructive notice has resulted in serious monetary losses, the courts have adhered to it.¹³⁸

Assuming that constructive notice is not sufficient to justify a waiver of the right to judicial review,¹³⁹ the type of measures required by federal and state law to give public notice of hearings on implementation plans¹⁴⁰ make it likely that in most cases the courts will be able to find that a prospective defendant either had actual

¹³³ See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944); *United States v. Southern Ry.*, 364 F.2d 86 (5th Cir. 1966), cert. denied, 386 U.S. 1031 (1967); *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 342 F. Supp. 1006 (D. Del.), remanded, 467 F.2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

¹³⁴ See, e.g., *United States v. Southern Ry.*, 380 F.2d 49, 51 n.3 (4th Cir. 1967) (regulation served on Association of American Railroads as agent for defendant and published in the Federal Register, 28 Fed. Reg. 12,127 (1963)).

¹³⁵ 44 U.S.C. § 1507 (1970).

¹³⁶ See, e.g., 37 Fed. Reg. 10,846 (1970); 5 U.S.C. § 552(a)(1) (1970):

[M]atter reasonably available to the class of persons affected thereby [implementation plans are kept up to date and available for public inspection at the respective State and EPA Regional offices] is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

¹³⁷ See 37 Fed. Reg. 10,846 (1972). See also *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 342 F. Supp. 1006, 1013 (D. Del. 1972).

¹³⁸ Compare *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (holder of federal crop insurance held bound by regulations published in Federal Register and therefore unable to recover crop loss even though government agent apparently misrepresented scope of insurance coverage at time of application for insurance), with *Bellingham Bay & Co. v. New Whatcom*, 172 U.S. 314, 318-19 (1899) (if service of notice is by publication, that publication must be of such a character as to create a reasonable presumption that the affected party will receive information of what is proposed).

¹³⁹ The notice issue may prove particularly crucial in criminal cases.

¹⁴⁰ See text at notes 107-15 *supra*.

knowledge or reason to know of the approval or promulgation of an implementation plan in sufficient time to file a section 307 challenge.¹⁴¹

The argument that a defendant in an enforcement action should be able to defeat section 307's foreclosure of certain issues by establishing that he lacked the legal expertise to mount a timely challenge to EPA approval or promulgation of a plan may not fare well in the courts. None of the decisions supporting the type of review scheme exemplified by section 307 turned on the existence of the defendant's legal resources to utilize the special statutory proceeding. Furthermore, the determination of whether the defendant had adequate legal resources is fraught with so many difficulties that courts will probably be wary of examining the question. Finally, even if such an issue is deemed relevant in determining the applicability of section 307(b), it is unlikely to be urged successfully in any large number of cases. Even where very limited resources are involved, there is often a trade association or other group that has the necessary money and expertise to mount a timely section 307 challenge.¹⁴²

D. *Circumvention of Section 307(b)*

There are various procedural mechanisms and theories of action that have been or could be advanced which, if accepted, would severely limit the effectiveness of section 307(b) in foreclosing issues from review in the enforcement forum to the extent intended by Congress. It is submitted that the courts should reject such arguments as long as the prior opportunity for administrative and judicial review of these issues was adequate. Several of these approaches deserve close attention.

1. The question of the availability of pre-enforcement review will be explored in the following section.¹⁴³ However, it is relevant to note here that section 307(b)(2), by its express terms, deals with foreclosure of review in civil and criminal "proceedings for enforcement."¹⁴⁴ Therefore, it might be argued that it does not

¹⁴¹ A particularly difficult problem would arise, however, where the interpretation of a regulation adopted by the regulatory agency was not obvious at the time of plan approval or promulgation and is advanced for the first time in the enforcement action. In such a case, the legality of the interpretation should, it seems, be open to litigation in the enforcement forum.

¹⁴² There is also a question of the adequacy of the length of time (30 days) for filing a § 307 challenge. Similarly, short notice periods have been upheld in other circumstances where property rights were at stake. See, e.g., *Wick v. Chelan Elec. Co.*, 280 U.S. 108, 110 (1929) (notice for condemnation proceedings affecting nonresidents given by newspaper in county where land situated once a week for two weeks); *Campbell v. Olney*, 262 U.S. 352 (1923) (20 days notice to challenge improvement lien).

¹⁴³ See text at notes 164-84 *infra*.

¹⁴⁴ See 42 U.S.C. § 1857h-5(b)(2) (1970).

preclude raising section 307 issues in a pre-enforcement forum.¹⁴⁵ To the extent that a court considers section 307 of doubtful constitutionality, perhaps it will adopt such an argument in order to avoid the constitutional question. However, the wisest thing for a court having such an opinion to do would be to confront the constitutional issue head-on and not to accept an interpretation which puts a premium on the race to the courthouse. On the other hand, to the extent that a court considers the enactment of section 307(b) to be within Congress' power, it would certainly not allow pre-enforcement review to undermine the purposes of that provision.¹⁴⁶

2. A state's enforcement of its own plan depends, at least initially, on the legality of the state's adoption of the plan. However, section 307(b)(2) does not on its face insulate the state's action in adopting a plan; it protects only the Administrator's approval of the plan,¹⁴⁷ thus opening the possibility of the plan's being invalidated in a state enforcement action in state court. On the other hand, federal and citizen enforcement of a state plan hinges on federal approval of the plan.¹⁴⁸ Since, as indicated above, all issues of state law presented by a state's adoption of a plan can be raised and

¹⁴⁵ Note, 1973 Duke L.J. 253, 271-72 (1973): One possible jurisdictional basis for such a pre-enforcement challenge might be the provision for citizen suits, 42 U.S.C. § 1857h-2(a)(2) (1970) (authorization of suit against the Administrator where there is alleged a failure on his part to perform an act or duty under the Act which is not discretionary). The ingenious prospective defendant would, in many cases, have no trouble phrasing his arguments to come within the terms of this provision though they would amount to a challenge to the validity of the implementation plan. Already there are cases where parties have attempted, though without success in some instances, to use this provision to raise § 307 issues prior to EPA promulgation of a plan. See *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 254 (D.D.C. 1972), *aff'd*, 4 E.R.C. 1815 (D.C. Cir.), *aff'd* by an equally divided Court *sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

In *United States Steel Corp. v. Fri*, 364 F. Supp. 1013, 1017 (N.D. Ind. 1973), § 304 was used by the court as the jurisdictional basis for a challenge to an EPA enforcement order though the petitioner there was not raising § 307 issues. *Id.* at 1018 n.3. The danger of permitting the use of § 304 to undermine § 307(b)(2) has been pointed out by several commentators. See, e.g., Comment, *The Aftermath of the Clean Air Amendments of 1970: The Federal Courts and Air Pollution*, 14 B.C. Ind. & Com. L. Rev. 724, 732-33 (1973). In order to avoid this result, the pre-enforcement court must ask itself if the issues sought to be raised could have been raised in a § 307 proceeding. If the answer to this question is in the affirmative, it should refuse to permit them to be raised on the basis of the explicit language of § 307(b)(2) and its legislative history. Actions pursuant to 42 U.S.C. § 1857h-2(a)(2) (1970) are, in a sense, proceedings for enforcement, and therefore 42 U.S.C. § 1857h-5(b)(2) (1970), by its express terms, applies thereto to prevent the raising of issues which could have been raised earlier.

¹⁴⁶ See *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 342 F. Supp. 1006 (D. Del.), remanded, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

¹⁴⁷ "Action of the Administrator with respect to which review could have been obtained . . . shall not be subject to judicial review . . ." 42 U.S.C. § 1857h-5(b)(2) (1970).

¹⁴⁸ Both federal and citizen enforcement attach to an "applicable implementation plan," see 42 U.S.C. § 1857c-8(a) (1970), which is defined as a plan approved or promulgated by the Administrator. 42 U.S.C. § 1857c-5(d) (1970).

decided in a section 307 challenge to that federal approval,¹⁴⁹ section 307 by its own terms (supported by its legislative history) forecloses litigation of such issues in enforcement proceedings brought by the EPA pursuant to section 113¹⁵⁰ and by private citizens pursuant to section 304,¹⁵¹ to the extent that they existed on the date of plan approval. The anomalous result that issues touching the legality of a state's adoption of a plan might be raised in state enforcement suits but not in federal and citizen enforcement suits¹⁵² can, however, be avoided. A state is a "person" within the meaning of the citizen suit provision¹⁵³ and can therefore bring a civil action in federal district court for injunctive relief against violators of its federally approved plan¹⁵⁴ with the protection of section 307(b)(2).¹⁵⁵ This preserves the effectiveness of state and local enforcement efforts which Congress believed necessary to the attainment of the air quality goals of the 1970 Amendments.¹⁵⁶

3. Finally, the recent decision in *Buckeye Power, Inc. v. EPA*¹⁵⁷ vacated in toto the EPA's approval of the Ohio and Kentucky implementation plans and, in doing so, adopted a line of reasoning, which, if accepted by other courts, will seriously impair

¹⁴⁹ See text at notes 123-29 *supra*.

¹⁵⁰ 42 U.S.C. § 1857c-8 (Supp. I 1971).

¹⁵¹ 42 U.S.C. § 1857h-(b)(2) (1970). Invalidation of a state plan or part thereof in a collateral state proceeding at the expiration of § 307's 30-day appeal period should not, it is submitted, be construed as constituting grounds arising after the original 30-day appeal period of § 307 and thus reopening the possibility of a § 307 challenge.

¹⁵² This, of course, assumes that state law does not contain provisions comparable to 42 U.S.C. § 1857h-5(b)(2) (1970).

¹⁵³ See 42 U.S.C. § 1857h(e) (1970).

¹⁵⁴ See *Lunenburg*, *supra* note 122, at 662-64.

Even if the standing requirements of *Sierra Club v. Morton*, 405 U.S. 727 (1972) (plaintiff must show that he himself or those he represents suffered or will suffer personal injury), are interpreted to apply to § 304 suits, a state enforcing a plan against sources within its borders and thereby protecting its citizens and the air resources of the state has the requisite interest to establish its right to bring suit. See, e.g., *United States v. United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973) (Illinois has standing to sue under federal common law to restrain discharge of waste water into Lake Michigan from defendant's plant located in Waukegan, Illinois, given the interest of the state and its citizens in the purity and recreational value of Lake Michigan); *Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972). For an analysis of the *U.S. Steel* decision and discussion of a state's standing to protect its natural resources, see Note, 15 B.C. Ind. & Com. L. Rev. 795 (1974).

¹⁵⁵ See note 57 *supra*.

¹⁵⁶ It of course follows from the discussion in the text that a state court invalidation of a plan in a suit other than an enforcement suit after the time has expired for EPA approval and promulgation of plans should have no effect on federal, state or citizen enforcement unless the invalidation is based on grounds arising after the 30-day period of § 307 has elapsed, in which case a new § 307 challenge can be filed. See also note 151 *supra*. As indicated in note 33 *supra*, both federal and state courts would have jurisdiction over enforcement suits brought by states pursuant to § 304. The language and legislative history of the provisions show an intent that § 307(b)(2) apply to proceedings regardless of the court in which suit is brought.

¹⁵⁷ 481 F.2d 162 (6th Cir. 1973).

the capacity of section 307(b) to eliminate issues from the enforcement court's consideration.

The *Buckeye Power* court ignored the fact that the public hearings at the state level on the plans may have supplied sufficient opportunity for public comment to satisfy the informal rule-making requirements of the Federal Administrative Procedure Act¹⁵⁸ to the extent that that statute is applicable to the implementation plan process. It remanded the plans to the EPA for further proceedings consistent with those requirements—that is, issuance of a notice of proposed rule-making, solicitation of public comments, and statement of the bases and purposes for the rule eventually promulgated.¹⁵⁹ Adjudicatory hearings on the petitioners' claims of high cost-benefit, technological infeasibility of compliance, and resource unavailability were held to be unnecessary prior to plan approval.¹⁶⁰ Yet, almost in the same breath, the court asserted its belief that the informal rule-making procedures would not be adequate to provide a forum for petitioners' claims.¹⁶¹ Thus it reached the startling result that the petitioners' claims could be raised in enforcement actions which might be brought against them.¹⁶²

It is submitted that since the court apparently believed that adjudicatory hearings were necessary to fairly resolve the issues raised, it should have required them before the EPA approved the plans and not have delayed them until the enforcement stage. The Administrative Procedure Act sets down only the bare minimum procedural requirements for various types of administrative action. It is to be hoped that the badly reasoned opinion in *Buckeye Power* will not spawn progeny. If followed in other cases, it would severely erode the protection which section 307(b) attempts to give to the mandatory three-year deadline for attaining healthful air quality levels and the mechanism for citizen enforcement established by the 1970 Clean Air Amendments.¹⁶³

¹⁵⁸ 5 U.S.C. § 553 (1970).

¹⁵⁹ 481 F.2d at 171, 174.

¹⁶⁰ *Id.* at 172-73.

¹⁶¹ *Id.* at 173.

¹⁶² The court relied on 5 U.S.C. § 703 (1970), which provides in pertinent part: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." That provision merely restates the principle laid down in *Yakus v. United States*, 321 U.S. 414 (1944), that, absent a prior adequate opportunity for judicial review, a defendant can challenge the legality of administrative action at the enforcement level. Section 307 review can provide prior adequate review which, by the express terms of the statute, is made the exclusive opportunity for raising certain issues.

¹⁶³ The availability of habeas corpus, or of 28 U.S.C. § 2255 (1970) (post conviction relief for federal prisoners), to raise issues foreclosed by § 307(b)(2) in enforcement proceedings has not been examined, given the unlikelihood of enforcement cases resulting in the imprisonment of violators.

III. PRE-ENFORCEMENT REVIEW

There are issues that may be raised prior to enforcement proceedings. Four different situations can arise in which pre-enforcement judicial review may be sought: (1) judicial review sought after federal regulations are proposed but prior to promulgation; (2) judicial review sought after regulations are promulgated but before any enforcement proceeding is commenced; (3) judicial review sought within thirty days of the Administrator's notification to a party of a violation; and (4) judicial review sought after an administrative order has been issued.

In deciding whether judicial review will be granted, a court will determine whether administrative remedies have been exhausted,¹⁶⁴ whether the controversy is ripe for review,¹⁶⁵ and whether the parties have standing.¹⁶⁶ Additionally, judicial review will be denied if a statute precludes review,¹⁶⁷ if the agency action is discretionary,¹⁶⁸ or if a special statutory review proceeding is available.¹⁶⁹

Where judicial review is sought after proposal but before promulgation of regulations under the Act, a plaintiff might be seeking a declaratory judgment that the proposed regulations are invalid. Review should be denied in this situation.¹⁷⁰ A proposed regulation does not injure the plaintiff, and there is no certainty that it will ever be brought to bear against him. Hearings are held on proposed regulations in which interested parties can express their views; thus, if a plaintiff pursued this avenue, the proposed regulation might be amended in such a way that plaintiff would be satisfied with it. It is a principle of ripeness for review that "[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are . . . hypothetical or remote."¹⁷¹ In the event that the objectionable regulation is promulgated, plaintiff has a statutory remedy under section 307.

A second type of pre-enforcement litigation can arise after the approval or promulgation of a regulation but before an enforcement

¹⁶⁴ *McKart v. United States*, 395 U.S. 185, 193 (1969).

¹⁶⁵ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

¹⁶⁶ *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83, 101-06 (1968).

¹⁶⁷ 5 U.S.C. § 701(a)(1) (1970).

¹⁶⁸ 5 U.S.C. § 701(a)(2) (1970).

¹⁶⁹ 5 U.S.C. § 703 (1970).

¹⁷⁰ In *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1307 (10th Cir. 1973), the court dismissed a suit brought on a regulation at the proposal stage. See also *Utah Int'l, Inc. v. EPA*, 478 F.2d 126 (10th Cir. 1973); *Arizona Pub. Serv. v. Fri*, 5 E.R.C. 1878 (D. Ariz. 1973).

¹⁷¹ 3 K. Davis, *Administrative Law Treatise* § 21.01, at 116 (1958).

proceeding under section 113 has been commenced. This situation could arise where a plaintiff is undertaking clean-up action with state or local sanction but before EPA approval of the compliance plan. The plaintiff might want to compel the Administrator to act by approving the plan or by giving notice of violation before large sums of money are invested. In this situation, limited review should be granted. The plaintiff is not asking the court to make substantive determinations as to the suitability of the compliance plan, but rather is seeking to compel the Administrator to perform his statutory duty. In *Abbott Laboratories v. Gardner*,¹⁷² the Supreme Court ruled that review was proper where plaintiff drug manufacturers sought declaratory and injunctive relief against regulations promulgated by the Commissioner of Food and Drugs before enforcement proceedings were brought on the grounds that the impact of the regulations on plaintiffs was immediate (they could comply with the regulation or risk prosecution) and that plaintiffs would suffer hardship if review was withheld.¹⁷³ Thus, in this second situation, review generally ought to be granted unless the plaintiff is not really suffering substantial harm by the Administrator's failure to act (as in a situation where only minimal amounts have been invested). Substantive section 307 issues as to the validity of the plan are also precluded. The reason the Administrator may not issue a compliance order early enough is because of manpower limitation. Having to defend against suits seeking to compel action will only further deplete manpower resources, thus making it harder for the congressional three-year implementation goal¹⁷⁴ to be achieved.¹⁷⁵

In the third situation, the party has been notified of a violation by the Administrator but the thirty day limit for compliance has not expired. During the thirty day period, the Administrator must offer to hold an informal conference with the violator if he is to issue an order.¹⁷⁶ Judicial review should be denied to a plaintiff after notice is issued, but before the conference is held, because until that time, all administrative remedies have not been exhausted.¹⁷⁷ At the conference, the notified party might bring forth facts that would induce the Administrator to drop the proceedings or to work out an

¹⁷² 387 U.S. 136 (1967).

¹⁷³ *Id.* at 149.

¹⁷⁴ H.R. Rep. No. 1146, 91st Cong., 2d Sess. 1, 5 (1970).

¹⁷⁵ Under § 304 of the Act, 42 U.S.C. § 1857h-2 (1970), a citizen might bring an action to compel the Administrator to issue a notice of violation. But see *United States Steel Corp. v. Fri*, 364 F. Supp. 1013 (N.D. Ind. 1973); *Commonwealth v. Fri*, 262 F. Supp. 360 (W.D. Ky. 1973), which view the initiation of enforcement action as discretionary on the Administrator's part.

¹⁷⁶ 42 U.S.C. § 1857c-8(a)(4) (1970).

¹⁷⁷ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52 (1938).

acceptable compromise, in which case premature litigation could be avoided.¹⁷⁸ Some courts might not require that the conference procedure be exhausted before granting review, on the grounds that the conference procedure fails to satisfy procedural due process requirements. There is a general rule that administrative remedies need not be exhausted if they are inadequate.¹⁷⁹ The conference provided for by the Clean Air Act might not satisfy procedural due process requirements, as no rules are set down describing conference procedure, there is no cross-examination (though the violator may be represented by counsel), no formal report of his findings need be issued by the Administrator, and the conference is not an adjudicatory hearing as defined in the Administrative Procedure Act.¹⁸⁰

Once the conference has been held or when it is shown there will be no conference, the case is ripe for judicial review, as administrative procedures have been exhausted. The violator has standing under *Abbott Laboratories*, in that he has the choice of complying or risking criminal penalties.¹⁸¹ In any event, issues which could have been raised in a section 307 proceeding should be precluded here. Plaintiff may raise arguments that the implementation plan was improperly interpreted in applying it against him, that the engineering calculations are in error, or that procedural requirements of section 113 were not followed by the Administrator.

The fourth pre-enforcement review situation occurs where the enforcement order has been issued. This situation is ripe for judicial review under the *Abbott Laboratories* standard, as the Agency has taken its final action on the matter, and the plaintiff is subject to criminal penalties for noncompliance. Section 307 issues are precluded. Issues which can be raised include questions concerning determination by the EPA of the violation, the adequacy of the conference procedure, whether the violation continued beyond the thirtieth day after notice, good faith efforts to comply by the plaintiff, the seriousness of the violation, and the explicit terms of the order. Also, plaintiff may question whether the Administrator complied with the requirements of the Administrative Procedure Act¹⁸² in carrying out the enforcement scheme.

In determining whether a stay of execution should be granted pending the outcome of the litigation, the plaintiff must satisfy four

¹⁷⁸ See *McKart v. United States*, 395 U.S. 185, 193-94 (1969).

¹⁷⁹ *Id.* at 199; *Hillsborough v. Cromwell*, 326 U.S. 620, 625 (1945).

¹⁸⁰ 5 U.S.C. §§ 551 et seq. (1970).

¹⁸¹ For a first offense, knowing violation of an order, penalties of up to \$25,000 per day of violation in fines and up to one year in prison may be imposed. 42 U.S.C. § 1857c-8(c)(1)(B) (1970).

¹⁸² 5 U.S.C. § 706 (1970).

criteria.¹⁸³ First, there must be strong likelihood he will succeed on the merits. This will depend on the facts of each case. Second, irreparable harm must be threatened. The threat of criminal sanction has been held to satisfy this criterion.¹⁸⁴ Next, there must be no harm to other parties in granting the stay. Harm could arise here in that delay to urgently needed abatement of air pollution programs will result, disabling the EPA in its effort to comply with the three-year statutory deadline. Finally, the stay must be in the public interest. Delays could contravene the public interest in achieving clean air as quickly as possible. A court will have to weigh all these factors in deciding whether equity weighs in favor of granting a stay of execution.

CONCLUSION

The Clean Air Amendments of 1970 permit judicial review of various issues prior to the commencement of enforcement action. Generally section 307(b) provides an adequate opportunity for the litigation of those issues which pertain to the validity of air implementation plans approved or promulgated by the EPA. Its foreclosure of judicial review of such issues at the enforcement stage raises no serious constitutional problems. The courts have correctly remitted parties to review proceedings pursuant to that provision where they sought to attack agency action which had not become final. They thereby prevented premature interruptions of the administrative process. When squarely presented with the question of the constitutionality of section 307, the courts have so far upheld the protection to swift and effective enforcement action which it affords, though the recent *Buckeye Power* case threatens erosion of that safeguard.

While section 307 provides for only a limited opportunity for judicial review of certain issues affecting air implementation plans, the availability of pre-enforcement review of non-section 307 issues in at least several instances seems clear. Fairness to the prospective defendants demands such review in these cases, though it may interfere somewhat with speedy enforcement action.

As time progresses and more courts are confronted with the problems dealt with in this article, it is to be hoped that they will strive to arrive at solutions which will minimize delay in the attainment of healthful air quality levels and which, at the same time, will afford defendants and prospective defendants the due process under law to which they are entitled.

¹⁸³ See, e.g., *Nelson v. Miller*, 373 F.2d 474, 477 (3d Cir. 1967).

¹⁸⁴ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).