

THE AFTERMATH OF THE CLEAN AIR AMENDMENTS OF 1970: THE FEDERAL COURTS AND AIR POLLUTION

INTRODUCTION

On December 31, 1970, Congress enacted the Clean Air Amendments,¹ which virtually amended out of existence the Air Quality Act of 1967,² the anti-air-pollution law then in force. The Clean Air Amendments of 1970 [hereinafter the Clean Air Act] were primarily the result of congressional recognition that the cumbersome and time-consuming procedures under the old Act were simply not adequate to combat contemporary air pollution.³ One of the major changes effected by the Amendments was the creation, in sections 109 and 110, of a new system of cooperation between the federal and state governments, a system that places a pronounced emphasis upon federal involvement. Sections 109 and 110 provide for the establishment of national ambient air quality standards and their implementation by the states. Formerly, ambient air quality standards, which were designed to reflect the maximum tolerable amounts of particular identified air pollutants, were formulated by the states.⁴ That approach posed the possibility of having fifty different sets of standards, each supposedly determining what levels of air pollution were injurious to the public health and welfare. Section 109 of the new Act transferred the task of setting the standards to the federal government⁵ and thereby effected a double advantage: uniform standards across the nation would prevent powerful industries from intimidating individual states

¹ Act of Dec. 31, 1970, Pub. L. No. 91-604, 84 Stat. 1676, codified at 42 U.S.C. § 1857 (1970).

² Act of Nov. 21, 1967, Pub. L. No. 90-148, 81 Stat. 485, as amended, 42 U.S.C. § 1857 (1970).

³ In reporting the bill to the House, the Interstate and Foreign Commerce Committee stated:

The purpose of the legislation reported unanimously by your committee is to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again. The Air Quality Act of 1967 (Public Law 90-148) and its predecessor acts have been instrumental in starting us off in this direction. A review of achievements to date, however, make abundantly clear that the strategies which we have pursued in the war against air pollution have been inadequate in several important respects, and the methods employed in implementing those strategies often have been slow and less effective than they might have been.

H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 1 (1970), reprinted in U.S. Code Cong. & Ad. News 5356 (1970). See also Senator Muskie's remarks in 116 Cong. Rec. 32901 (1970):

In the face of citizen concern and corporate resistance, we have learned that the air pollution problem is more severe, more pervasive, and growing faster than we had thought. Unless we recognize the crisis and generate a sense of urgency from that recognition, lead times may melt away without any chance at all for a rational solution to the air pollution problem.

⁴ Act of Nov. 21, 1967, Pub. L. No. 90-148, § 108(c), 81 Stat. 492.

⁵ 42 U.S.C. § 1857c-4 (1970).

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with threats of relocation, and the states were relieved of the difficult and expensive burden of standard-setting and were left free to devote their resources to the development of plans for the implementation and enforcement of the new national standards.⁶

Most significantly, in order to eliminate the waste of time and effort encountered under prior legislation,⁷ Congress streamlined the administration of the Act and wrote in strict deadlines for the establishment of this new implementation program. First, section 109 requires the Administrator of the Environmental Protection Agency (EPA),⁸ the newly created federal agency that administers the Act as well as most of the other federal environmental legislation, to propose and promulgate ambient air quality standards within a short period of time.⁹ These include a "primary" and a "secondary" standard for each air pollutant that has been identified and for which air quality criteria have been issued.¹⁰ A primary standard is a standard of air quality which must be maintained to protect the public health,¹¹ while a secondary standard is a more stringent standard designed to protect the public welfare.¹² The standards, which are usually expressed in simple terms of x micrograms of a specific pollutant per cubic meter,¹³ must then be adopted and enforced by the states through the state implementation plan procedures outlined in section 110.¹⁴ The plans must provide for the implementation, maintenance, and enforcement of the primary and secondary standards for each identified pollutant and must do so with a high degree of specificity in order to be approved by the Administrator.¹⁵ If a state fails to submit an acceptable plan

⁶ Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess., pt. 2, at 449 (1970) (statements of Francis Sargent, Governor of Massachusetts).

⁷ See note 3 *supra*.

⁸ The Environmental Protection Agency was created to administer and coordinate the bulk of the federal environmental programs. See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), set out in 42 U.S.C. § 4321 (1970).

⁹ 42 U.S.C. § 1857c-4 (1970).

¹⁰ The air quality criteria are not standards themselves, but rather statements designed to reflect "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [an air] pollutant in the ambient air, in varying quantities." Section 108 of the Clean Air Amendments, 42 U.S.C. § 1857c-3(a)(2) (1970). The Administrator of the EPA is responsible for issuing the criteria, and he must base the ambient air quality standards on the criteria. Sections 108-09 of the Clean Air Amendments, 42 U.S.C. §§ 1857c-3(a)(2), c-4(b) (1970).

¹¹ Section 109 of the Clean Air Amendments, 42 U.S.C. § 1857c-4(b)(1) (1970).

¹² Section 109 of the Clean Air Amendments, 42 U.S.C. § 1857c-4(b)(2) (1970). Examples of dangers to public welfare are given as "injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation." Section 101 of the Air Quality Act of 1967, as amended, 42 U.S.C. § 1857(a)(2) (1970).

¹³ See 40 CFR §§ 50.4-.11 (1972) (standards for sulfur oxides, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide).

¹⁴ 42 U.S.C. § 1857c-5(a)(1) (1970).

¹⁵ Section 110 of the Clean Air Amendments, 42 U.S.C. § 1857c-5(a)(2) (1970).

of its own within nine months from the promulgation of a standard, the Administrator must promulgate a federal substitute plan within another six months.¹⁶ The stress of the new Act is clearly on expedition and efficiency.

The national ambient air quality standards and the state implementation plans thus constitute the general framework within which all air pollution control is coordinated. The Clean Air Act also provides other procedures, whereby the Administrator assumes practically all responsibility for the regulation of certain types of air pollution: these include pollution created by the construction or relocation of stationary sources of pollution,¹⁷ hazardous pollutants,¹⁸ new motor vehicles,¹⁹ motor fuels,²⁰ and aircraft.²¹ Nonetheless, the implementation program, controlled by the federal government with required participation on the part of the states, occupies center stage. The "federalization" of air pollution control marks a dramatic new effort on the part of Congress to engage in a serious campaign for the preservation of the air as a national resource.²²

During the two-year period since the enactment of the Clean Air Act, almost all the litigation in the federal courts concerning air pollution has focused on administrative action taken with regard to the implementation plan program. The two provisions in the Act that may be invoked by plaintiffs to raise questions concerning the implementation plan program are section 304,²³ which authorizes citizen

¹⁶ Section 110 of the Clean Air Amendments, 42 U.S.C. § 1857c-5(c) (1970).

¹⁷ Section 111 of the Clean Air Amendments, 42 U.S.C. § 1857c-6 (1970).

¹⁸ Section 112 of the Clean Air Amendments, 42 U.S.C. § 1857c-7 (1970). A hazardous air pollutant is one "which in the judgment of the Administrator may cause or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." *Id.*, 42 U.S.C. § 1857c-6(a)(1) (1970).

¹⁹ Section 202 of the Clean Air Amendments, 42 U.S.C. § 1857f-1 (1970).

²⁰ Section 210 of the Clean Air Amendments, 42 U.S.C. § 1857f-6c (1970).

²¹ Section 231 of the Clean Air Amendments, 42 U.S.C. § 1857f-9 (1970).

²² An interesting proposal has been made for an even stronger federal role in air pollution control: not only would the EPA set the ambient air quality standards, but Congress should also give the agency responsibility for establishing emission standards for stationary sources, standards which the states currently establish for themselves as part of the implementation plan procedure. See Note, Clean Air Act Amendments of 1970: A Congressional Cosmetic, 61 *Geo. L.J.* 153, 165-87 (1972).

²³ Section 304 of the Clean Air Amendments provides:

(a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission

suits, and section 307,²⁴ which delineates the permissible scope of

standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced—

(1) under subsection (a)(1)—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c)(1)(B) or an order issued by the Administrator pursuant to section 113(a). Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term "emission standard or limitation under this Act" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive,

which is in effect under this Act (including a requirement applicable by reason of section 118) or under an application implementation plan.

42 U.S.C. § 1857h-2 (1970).

²⁴ Section 307 of the Clean Air Amendments provides in pertinent part:

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 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 or section 111(d) 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.

judicial review of administrative action under the Act. This comment will analyze the litigation in which these sections of the Act have been used as a basis of jurisdiction and will attempt to assess the outcome of each individual case in terms of its corollation with the congressional intent underlying the two provisions. It will be submitted that the courts should beware of the possible consequences of assuming jurisdiction under these provisions without first evaluating the purposes of the provisions in terms of the overall scheme of the Clean Air Act. The citizen suit provision in section 304 is especially susceptible to an overly broad interpretation regarding its authorization of citizen suits against the Administrator of the EPA. That interpretation will be examined, along with the threat of serious dangers that an indiscriminate use of section 304 would pose to a desirable relationship between the EPA and the courts. Other procedural issues, which may affect the judicial treatment given to the Clean Air Act and thus have a bearing on the success or failure of the Act as a comprehensive program of cooperation between the federal and the state and local governments, will then be discussed. Two substantive issues which arose in conjunction with a court's consideration of essentially procedural matters will also be examined: one, resolved by the court's finding that the policy of nondegradation is inherent in the Clean Air Act, is of major significance. Finally, a section of the comment will be devoted to the efforts of litigants to use the federal court system as a forum for the hearing of environmental claims for which the Clean Air Act makes no explicit provision.

I. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION UNDER THE CLEAN AIR ACT

Section 307 of the Clean Air Act specifically provides for judicial review of the EPA Administrator's approval or disapproval of state implementation plans and of his promulgation of substitute federal plans. The provision limits review to the United States Court of Appeals for the appropriate circuit and requires that a petition for such review be filed within thirty days from the date of promulgation or approval of the contested implementation plan.²⁵

A. *The Circumvention of Section 307 Judicial Review*

In two recent cases, plaintiffs who had failed to bring a timely suit under section 307, or who could not utilize the provision because the plan they challenged had not yet been promulgated, sought to

(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.

42 U.S.C. § 1857h-5(b) (1970).

²⁵ Section 307 of the Clean Air Amendments, 42 U.S.C. § 1857h-5(b)(1) (1970), quoted in note 24 supra.

circumvent the limitations of that section and use other means to challenge the Administrator's actions on certain implementation plans. It is submitted that in one case the court erred in assuming jurisdiction outside the scope of section 307, and that the court in the second case correctly perceived that Congress intended to restrict judicial review under the Act, and consequently refused jurisdiction.

In *Anaconda Co. v. Ruckelshaus*,²⁶ the Montana Board of Health had formulated an implementation plan including a regulation that would have substantially reduced the amount of sulfur oxides emitted from the plaintiff's copper smelting plant in that state. The Governor of Montana submitted the plan to the EPA for approval, but first deleted the emission limitation for sulfur oxides. The Administrator of the EPA disapproved the plan, principally because of the absence of a sulfur oxide emission limitation, and, pursuant to his duty under section 110(c) of the Act, proposed an implementation plan to remedy this defect.²⁷ Anaconda petitioned the District Court for the District of Colorado for a preliminary injunction forbidding the Administrator to enforce the new emission limitation.²⁸ Jurisdiction was unsuccessfully challenged on the ground that section 307 was the exclusive means for seeking judicial review of implementation plans.²⁹ Noting that section 307 review was as yet unavailable to the plaintiff because the EPA had not yet promulgated the proposed replacement implementation plan, the court held that it had jurisdiction to consider the case and granted a preliminary injunction.³⁰

Initially, it is difficult to comprehend why the temporary unavailability of section 307 review should provide justification for the district court's assumption of jurisdiction in an area which—according to the congressional declaration in section 307—properly belongs to the circuit courts. The district court relied heavily upon its findings concerning the multimillion dollar program which Anaconda had instituted to control its emissions. It was found that Anaconda had already expended \$16 million on a \$31 million program which it had adopted to achieve a forty percent reduction of its emissions—a reduction which Anaconda, in its own judgment, had decided was sufficient to comply with the ambient air quality standard for sulfur oxide.³¹ The EPA had then decided that a much stricter emission limitation, one which would result in an eighty-nine percent reduction in emissions, was necessary to meet the air quality standard and had included that limitation in its proposal plan.³² The court concluded that Anaconda's current expenditure of \$16 million would be wasted since its program, which was designed to achieve a forty percent reduction of emissions,

²⁶ 352 F. Supp. 697 (D. Colo. 1972).

²⁷ The proposed plan appears in 37 Fed. Reg. 15102 (1972).

²⁸ 352 F. Supp. at 699.

²⁹ Id. at 702.

³⁰ Id. at 708, 714.

³¹ Id. at 709.

³² Id. at 701.

could in no way be used to meet the EPA's proposed eighty-nine percent reduction.⁸³

It would appear, however, that even if the program was so inadequate as to be useless in meeting the more stringent emission limitation, Anaconda's past expenditure did not constitute an irreparable injury. The money was already spent. If the EPA's proposed emission limitation was so unnecessarily strict as to amount to an unjustified "taking" of the \$16 million expended, that issue could have been litigated in a section 307 suit once the limitation was promulgated. Although the court intimated that Anaconda had to proceed post haste to meet the "law's" deadline,⁸⁴ Anaconda was not in fact currently required by law to continue its program. Moreover, the company was not currently exposed to any enforcement proceedings, brought either by the EPA or through a citizen suit,⁸⁵ since the emission limitation was as yet only proposed. The proposed emission limitation would not become law until it was promulgated,⁸⁶ and Anaconda could not have been faulted for waiting for final promulgation of the regulation before continuing with or modifying its reduction program. Once the regulation was promulgated, the Court of Appeals for the Ninth Circuit would have had jurisdiction under section 307 and could have issued the injunctive relief necessary to protect Anaconda had the Administrator been arbitrary or capricious in demanding immediate or unrealistically early compliance. It is therefore submitted that one of the prerequisites for equity jurisdiction, a showing of present or future irreparable harm, was apparently lacking.

The district court nonetheless decided that it had jurisdiction based upon two grounds: first, the citizen suit provision of section 304; second, "the somewhat discretionary grounds" enunciated by the Supreme Court in certain landmark administrative law cases.⁸⁷ These grounds will be discussed *seriatim*.

1. *The Apparent Conflict Between Section 307 and Judicial Review and Section 304 Citizen Suits*

As to the first ground, the court sought to apply the proposition established in *Sierra Club v. Ruckelshaus*⁸⁸ that the district courts may exercise jurisdiction over issues raised in section 304 citizen suits despite the fact that those issues, if raised later, would have to be

⁸³ Id. at 701-02.

⁸⁴ Id. at 709.

⁸⁵ Under § 113 of the Act, the Administrator is authorized to enforce requirements of the Act through compliance orders and civil actions, subject to limitations. 42 U.S.C. § 1857c-8(a)-(b) (1970). Penalties in the form of fines or imprisonment may also be imposed. 42 U.S.C. § 1857c-8(c) (1970). Under § 304 of the Act, a person has the option of suing an alleged violator of the Act or of suing the EPA Administrator to compel him to enforce the requirements against the alleged violator. 42 U.S.C. § 1857h-2(a)(1) (1970).

⁸⁶ 42 U.S.C. § 1857c-5(d) (1970).

⁸⁷ 352 F. Supp. at 708.

⁸⁸ 344 F. Supp. 253 (D.D.C. 1972).

heard by the circuit courts in section 307 proceedings.³⁹ This may be true, but it is first necessary to determine whether Anaconda's petition should be classified as a citizen suit under section 304. The applicable subsection provides that "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any *act or duty under this chapter which is not discretionary with the Administrator.*"⁴⁰ Anaconda's complaint was based primarily on the failure of the Administrator to fulfill two allegedly nondiscretionary duties: first, the duty to allow cross-examination of Government witnesses at the administrative hearings at which the proposed emission limitation was considered;⁴¹ and second, the duty to file a "NEPA statement."⁴² Neither of these "duties" are duties imposed upon the Administrator by the Clean Air Act, and consequently they cannot support a district court's assumption of jurisdiction under section 304. The wording of that section states explicitly that the unperformed duty must arise under the Act. This is not necessarily to imply that the EPA Administrator may refuse to allow cross-examination at administrative hearings or that he is not required to file NEPA statements. The language does, however, require the conclusion that failure to perform such duties is not a proper subject for suit under section 304 of the Act.

In *Sierra Club v. Ruckelshaus*, the plaintiffs alleged that the Administrator had violated the duty imposed upon him by section 101(b) of the Act.⁴³ That section sets out the purposes of the Act; included as an aim is the desire "to protect *and enhance* the quality of the Nation's air resources."⁴⁴ The alleged violation consisted of the EPA's announced policy of approving state implementation plans although the plans permitted the degradation of pure air as long as that degradation did not pollute the air beyond the limits set by the national ambient air quality standards.⁴⁵ The *Sierra Club* court found that the complaint raised a question of a violation of a nondiscretionary duty under the Act, and therefore held that it had jurisdiction under section 304.⁴⁶ In contrast, the only transgression of the Clean Air Act on the part of the Administrator which Anaconda could allege was the fact that the Administrator failed to take into account the additional pollution problems that Anaconda's compliance with the new emission limitation would supposedly create.⁴⁷ In other words, it was

³⁹ Id. at 254.

⁴⁰ 42 U.S.C. § 1857h-2(a)(2) (1970) (emphasis added).

⁴¹ 352 F. Supp. at 702.

⁴² Id. at 710. The environmental impact statements required by § 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1970), otherwise known as "NEPA statements," are discussed in the text accompanying notes 81-95 infra.

⁴³ 344 F. Supp. at 253, 254.

⁴⁴ 42 U.S.C. § 1857(b)(1) (1970) (emphasis added).

⁴⁵ 344 F. Supp. at 254, 256.

⁴⁶ Id. at 256.

⁴⁷ The court agreed with Anaconda's allegation and referred specifically to "problems of water pollution, solid waste disposal problems and air pollution problems having to

the Administrator's judgment in formulating this particular regulation that Anaconda challenged.⁴⁸ Should other courts accept this argument, one would be hard-pressed to conceive of any situation involving the judgment and expertise of the Administrator which would not be a proper subject for action under section 304. Such an expansive reading of the scope of section 304, it is submitted, would effectively destroy the two safeguards of EPA action which Congress formulated in section 307: the thirty-day limitation to compel an immediate and final resolution of any dispute concerning the Administrator's actions in reference to implementation plans, and the exclusive jurisdiction of the circuit courts to ensure that such resolution be uniform.

The solution to the problem of where to demarcate the boundary between section 304 and section 307 appears to lie in the definition of what constitutes a non-discretionary duty under section 304. While the *Sierra Club* case dealt with the abstract question of whether the Administrator did or did not have a duty to insist that implementation plans guard against the degradation of existing air quality, such a question was not raised in *Anaconda*. The Administrator was admittedly under a duty to promulgate the emission limitation for Montana since the state had failed to do so, and he was in the process of fulfilling that duty. In contrast, the dispute in *Anaconda* raised only the *relative* question of how well the Administrator was performing that duty. Had Anaconda alleged a failure on the part of the Administrator to perform a non-discretionary duty arising under the Act, it would have been justified in bringing a citizen suit, since section 304 authorizes "any person" to bring such a suit, and, as the court in *Anaconda* observed, one need not be a private party motivated by purely altruistic ends to qualify.⁴⁹ What should disqualify Anaconda is not its status but the cause of its complaint: it did not seek to require the Administrator to perform some duty under the Act but to question his judgment in setting a standard involving an 89%, rather than a 40%, reduction of emissions. Such a question, regarding an abuse of discretion, should properly be brought under section 307. Section 304, on the other hand, should apply only to cases where the Administrator is alleged to have clearly failed to perform a duty under the Act.

Furthermore, as the legislative history of the Clean Air Act demonstrates, the congressional intent underlying that section was to per-

do with the quarrying, transportation and the hauling of limestone and other similar materials" which it foresaw would arise should the proposed plan be promulgated. The court found that these problems were "directly related to the resultant production of a staggering quantity of unsalable sulfuric acid which would threaten water pollution." 352 F. Supp. at 702.

⁴⁸ More specifically, the issue raised was whether an emission reduction for sulfur oxides of 89% was necessary to protect the public welfare, or whether a less stringent reduction of 40% would have been adequate. *Id.* at 701.

⁴⁹ *Id.* at 708.

mit the use of citizen suits to assist in the enforcement of the Act.⁵⁰ The ironic result of the *Anaconda* decision is that it would permit polluters, those against whom enforcement proceedings are threatened, to invoke the jurisdiction of local district courts to thwart that enforcement. The substantive claims made by *Anaconda* were perhaps legitimate;⁵¹ nevertheless, under the Act the proper place for those claims to be heard is the appropriate circuit court; the proper time, within thirty days after the promulgation of the contested regulation. Congress embodied these limitations in section 307 with the deliberate purpose of protecting EPA action from attack in any court at any time, and an overbroad reading of section 304 will destroy that protection.

2. Other Possibilities of Judicial Review

The alternative basis upon which the *Anaconda* court found jurisdiction was the "somewhat discretionary grounds"⁵² doctrine enunciated by the Supreme Court in *McKart v. United States*,⁵³ and in the companion cases of *Abbott Laboratories v. Gardner*,⁵⁴ *Toilet Goods Ass'n, Inc. v. Gardner*,⁵⁵ and *Gardner v. Toilet Goods Ass'n, Inc.*⁵⁶ The *McKart* case is immediately distinguishable from *Anaconda*. It dealt simply with the proposition that in certain instances, notwithstanding the customary requirement that exhaustion of administrative remedies must precede judicial review of administrative action,⁵⁷ judicial review may be available to a party who has failed to exhaust all administrative remedies.⁵⁸ *Anaconda*, however, was concerned not with the question whether all administrative remedies provided by statute must be first exhausted, but with the issue whether the judicial review explicitly provided by statute is exclusive. The decision in *McKart*, a Selective Service Act prosecution, was motivated by the fact that insistence upon an exhaustion of administrative remedies would have been unduly harsh, since it was a criminal case, especially in light of the fact that the agency involved had no reason to fear disruption of its administrative procedure because of litigants preferring to seek premature ju-

⁵⁰ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-39 (1970). See also 116 Cong. Rec. 32926-27 (Senator Muskie's comments). Section 304 originated as a Senate amendment to a House bill. Conference Rep. No. 91-1783, 91st Cong., 2d Sess., reprinted in U.S. Code Cong. & Ad. News 5374, 5388 (1970).

⁵¹ The court found, inter alia, that the testing methods upon which the strict emission limitation in the proposed plan was ultimately based were dependent upon faulty equipment. 352 F. Supp. at 701.

⁵² Id. at 708.

⁵³ 395 U.S. 185 (1969).

⁵⁴ 387 U.S. 136 (1967).

⁵⁵ 387 U.S. 158 (1967).

⁵⁶ 387 U.S. 167 (1967).

⁵⁷ *Myers v. Bethlehem Steel Corp.*, 303 U.S. 41, 50-51 (1938).

⁵⁸ Petitioner *McKart*, who had previously received a draft classification of IV-A (sole surviving son status) from the Selective Service Board, was reclassified I-A (available for military service). He did not appeal the reclassification through the available administrative procedures and failed to report for induction when ordered to do so. He was tried for this failure. 395 U.S. at 185, 193-97.

dicial review.⁵⁹ The EPA, on the other hand, has every reason to fear a district court's liberal assumption of "discretionary" jurisdiction: no longer would the agency be able to depend upon judicial review of its plans being restricted to the prompt and uniform treatment in the circuit courts afforded by section 307 of the Clean Air Act.

In *Abbott Laboratories* and the two *Toilet Goods* cases which were decided in accordance with that case, the Supreme Court held that courts should not restrict access to judicial review of administrative decisions unless there is a showing by "clear and convincing evidence" of a contrary legislative intent.⁶⁰ The Federal Food, Drug, and Cosmetic Act,⁶¹ which applied in all three cases, was silent as to what review was available for the contested issues. The fact that the statute provided for specific review of other issues was held not to support the inference that no review at all was to be allowed for the issues involved in the cases.⁶² The Court therefore decided⁶³ that it could exercise jurisdiction and grant pre-enforcement review of the regulations under the authority of the Administrative Procedure Act⁶⁴ and the Declaratory Judgment Act.⁶⁵

Unlike the statutory scheme in the *Abbott Laboratories* and *Toilet Goods* cases, however, section 307 of the Clean Air Act is quite explicit in its delimitation of the judicial review permitted for the kind of issue presented in *Anaconda*. Review of the Administrator's promulgation of an implementation plan may be had *only* in the appropriate circuit court within thirty days after promulgation. Thus, the "discretionary" jurisdiction endorsed in *Abbott Laboratories* is inapplicable to the situation in *Anaconda* since there is clear and convincing evidence that Congress intended to foreclose review in most cases through the provisions of section 307.

If the federal courts follow the rationale of *Anaconda Co. v. Ruckelshaus*, the administrative efficiency of the EPA may well be crippled by its consequent exposure to a court-created discretionary review as well as to the review that Congress specifically provided in section 307.

⁵⁹ Id. at 199-200.

⁶⁰ 387 U.S. at 141.

⁶¹ 21 U.S.C. §§ 301-92 (1970).

⁶² 387 U.S. at 140-41. Accord, *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. at 160; *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. at 168.

⁶³ Id. In *Toilet Goods Ass'n, Inc. v. Gardner*, however, the Court declined to exercise the jurisdiction which it asserted it possessed since the issues were not ripe for adjudication under the standards elaborated in the *Abbott Laboratories* case. For those standards to be met, it is necessary that (1) the issues tendered be appropriate for judicial resolution, and (2) excessive hardship be placed upon the parties by the denial of judicial relief at that stage. 387 U.S. at 148-49. Even if the *Anaconda* court's assertion of jurisdiction were well-founded, it would seem that that case also is not ripe for adjudication since the second standard would not be satisfied. It does not appear from a reading of the opinion that *Anaconda* would have suffered any greater hardship if it had been required to wait until § 307 review was available. See text accompanying notes 31-36 supra.

⁶⁴ 5 U.S.C. §§ 701-04 (1970).

⁶⁵ 28 U.S.C. § 2201 (1970).

It is significant to note that the EPA has a mere six months in which to promulgate a substitute implementation plan for a state that fails to submit an acceptable plan.⁶⁶ If section 307 is regarded as an exclusive means of review, absent extraordinary circumstances, the Administrator should encounter no difficulty in meeting the strict deadline. But if *Anaconda* is followed, and proposed regulations which are being formulated as a substitute implementation plan are opened to challenge, it is more than likely that the Administrator will be unable to meet the statutory deadlines. For example, in *Anaconda*, the Administrator should have promulgated the emission limitation for sulfur oxides by July 31, 1972,⁶⁷ but apparently no plan had been promulgated as of the date of the decision, December 19, 1972.⁶⁸ It may be surmised that the delay was caused at least in part by *Anaconda's* suit, and that the effect of the *Anaconda* court's orders⁶⁹ will cause even further delay. In sum, according to *Anaconda* those who may be affected by EPA regulations will have two opportunities, before as well as after promulgation, to challenge those regulations.⁷⁰ It is submitted that such a result is unwarranted: absent extraordinary circumstances—circumstances which do not appear in *Anaconda*—there should be no reason for granting premature judicial review of EPA action, especially when such review militates against the purpose of the Clean Air Amendments of 1970, the expeditious establishment of air pollution standards.

B. Section 307 Viewed as an Exclusive Provision for Judicial Review

At this point it would be appropriate to compare the *Anaconda* decision with *Getty Oil Co. v. Ruckelshaus*,⁷¹ in which the Third Circuit reached a contrary result in a substantially similar factual situation. The Delaware state government had submitted to the EPA an implementation plan which included a regulation limiting the sulfur content of fuel burned in a certain area of the state. After the Administrator of the EPA approved the plan, the Getty Oil Co. applied to state administrative authorities for a variance, but failed to bring a petition for review of the Administrator's action in approving the plan within the thirty-day period established in section 307. Following the necessary procedure,⁷² the Administrator issued the compliance order

⁶⁶ 42 U.S.C. § 1857c-5(c) (1970).

⁶⁷ See note 123 infra.

⁶⁸ 352 F. Supp. at 697.

⁶⁹ The court ordered the Administrator to hold an adjudicatory hearing and to provide the plaintiff with a right to subpoena witnesses and to cross-examine government witnesses; it also ordered him to file a NEPA statement. *Id.* at 714-15.

⁷⁰ This must be, of course, within the bounds of *res judicata*.

⁷¹ 467 F.2d 349 (3d Cir. 1972).

⁷² Section 113 of the Act provides in pertinent part:

Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the

which was the subject of this suit. The Court of Appeals for the Third Circuit held that Getty's failure to file a section 307 appeal barred its district court suit to enjoin the Administrator from enforcing the contested regulation.⁷³ The court stated flatly that the Declaratory Judgment Act and the Administrative Procedure Act could not afford a basis for jurisdiction.⁷⁴ Section 307 review must be regarded as the sole remedy available to the plaintiff, notwithstanding the absence of the word "exclusive" in section 307, since Congress's purpose in drafting that section was clear.⁷⁵ Although the *Getty* court indicated its awareness of the admonition in *Abbott Laboratories* to be wary of restricting judicial review unless there is clear and convincing evidence of a contrary legislative intent, the court concluded that its decision was compelled by the legislative purpose underlying section 307.⁷⁶

Getty's substantive claims, which were similar to Anaconda's, rested on two grounds: first, the fact that the relevant national primary ambient air standard had already been achieved in the area rendered the regulation unnecessary, and second, that compliance with the regulation, at least prior to the development of an alternative technology, would impose an unreasonable hardship upon the plaintiff.⁷⁷ The court's responses to these arguments, though dicta because jurisdiction was denied, are noteworthy. The first objection, that the attainment of the national standards makes further regulation unnecessary, was met with the observation that section 110 of the Clean Air Act requires that implementation plans meet those standards but it does not preclude those standards from being exceeded.⁷⁸ That is, the federal government had not preempted the field of air pollution control with the passage of the Clean Air Act: the state and local governments must provide programs sufficient to satisfy the minimal requirements of the national ambient air quality standards in order to protect and enhance the quality of the air as a national resource. They are explicitly left free, however, to impose standards *higher* than the minimum federal goals.⁷⁹ Secondly, the court in *Getty* regarded the oft-heard excuse—that the present state of technology is insufficient to make compliance possible—as unacceptable in light of the fact that the Act says nothing about deferring compliance for that reason alone.⁸⁰

plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan

42 U.S.C. § 1857c-8(a)(1) (1970).

⁷³ 467 F.2d at 358.

⁷⁴ *Id.* at 356.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 355, 358.

⁷⁸ *Id.*

⁷⁹ 42 U.S.C. § 1857d-1 (1970).

⁸⁰ *Id.* at 359.

C. The "NEPA Statement" Requirement and the EPA

An additional tactic was employed by the plaintiffs in both *Anaconda*⁸¹ and *Getty*⁸² to circumvent section 307's restrictive review provisions: they contended that the EPA, like all other federal agencies, is obligated to file environmental impact statements pursuant to the National Environmental Policy Act⁸³ (hereinafter "NEPA"), and that the EPA's failure to do so in their cases conferred jurisdiction upon the district courts to enjoin EPA action until the NEPA requirements were fulfilled.

Again the two courts split. The circuit court in *Getty* maintained that even if the EPA were subject to NEPA requirements (a position about which the court had serious doubts), such an issue is properly raised in a section 307 proceeding.⁸⁴ The court's conclusion is necessary to prevent section 307 from becoming a dead letter provision: were it otherwise, a pollutor threatened with enforcement proceedings could bring his challenge to EPA action in a district court and beyond the thirty-day limitation, thereby frustrating the restrictive provisions of sections 307.

The district court in *Anaconda* ignored *Getty's* holding that the NEPA issue, along with all the other issues raised, could be properly examined only within the bounds of a section 307 review, and it dismissed as mere dicta the doubts expressed in *Getty* as to whether NEPA applied to the EPA at all.⁸⁵ As far as the *Anaconda* court was concerned, the problem could be reduced to a pure syllogism, the major premise, that all federal agencies must file NEPA statements, together with the minor premise, that the EPA is a federal agency, necessarily implying that the EPA must file NEPA statements.⁸⁶

This simplistic reasoning, it is submitted, frustrates the intent of section 307 of the Clean Air Act, exceeds the mandate of NEPA, and

⁸¹ 352 F. Supp. at 710.

⁸² 467 F.2d at 359.

⁸³ The basic purpose of NEPA is to ensure that the executive branch of the federal government will perform its functions in accordance with a national policy for the useful conservation of the environment. 42 U.S.C. § 4331 (1970). To accomplish this goal, all federal agencies, to the fullest extent possible, are required to:

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C) (1970).

⁸⁴ 467 F.2d at 359.

⁸⁵ 352 F. Supp. at 710.

⁸⁶ Id. at 713.

will impose an intolerable burden upon the EPA should it be followed by the other district courts. First, under section 102 of NEPA as currently interpreted by several circuits, jurisdiction lies in the district courts not only to require agencies to follow NEPA's procedures for the filing of statements and consultation with other agencies, but also to determine whether the substantive requirements of NEPA have been met.⁸⁷ Thus, if NEPA is applied to the EPA, a pollutor threatened with enforcement proceedings will be able to challenge the substantive content of the applicable regulation and thereby circumvent the restrictive review provisions of section 307. Second, it appears anomalous to require the EPA, the agency which is charged with the administration of almost all the federal environmental programs⁸⁸ and which is usually consulted by the other, nonenvironmental agencies when filing their NEPA statements,⁸⁹ to file statements itself. This position is supported by the operative language of the NEPA section that provides for the filing of statements: agencies must file statements only when their administrative actions can be described as "major Federal actions significantly affecting the quality of the human environment."⁹⁰ Common sense seems to dictate that the effect meant by the words "significantly affecting" be a potentially deleterious one. Naturally, most agencies should not be permitted to avoid the mandate of NEPA by claiming that a particular action will enhance the quality of the environment; after all, they are principally dedicated to purposes other than environmental protection, and the alleged enhancement may be debatable.⁹¹ Where, however, the agency involved has as its *primary purpose* the improvement of the environment, and where it has been established to provide the judgment and expertise necessary to fulfill that purpose, it

⁸⁷ *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972). "[This conclusion] is supported by the District of Columbia Circuit, the Second Circuit and the Fourth Circuit, and by the analogous decision of the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 . . . (1971). . . ." *Id.* at 299-300 (footnotes omitted), citing *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Scenic Hudson Preserv. Conf. v. FPC*, 453 F.2d 463, 468-69 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972) (Douglas, J., dissenting); *Ely v. Velde*, 451 F.2d 1130, 1138-39 (4th Cir. 1971). *Contra*, *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1972).

42 U.S.C. § 4332 (1970).

⁸⁸ Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), set out in 42 U.S.C. § 4321 (1970).

⁸⁹ Section 316 of the Clean Air Amendments provides in pertinent part:

The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in . . . any major Federal agency action . . . to which section 4332(2)(c) [NEPA] of this title applies

42 U.S.C. § 1857b-7(a) (1970).

⁹⁰ 42 U.S.C. § 4332(C) (1970).

⁹¹ See, e.g., *Kalur v. Resor*, 355 F. Supp. 1 (D.D.C. 1971), in which the Army Corps of Engineers was held subject to NEPA despite its assertion that since the Corps is an agency dedicated to guarding the environment, the provisions of NEPA do not apply to it. *Id.* at 12-13.

should not be hamstrung through the imposition of unnecessary procedural requirements.⁹² The legislative history of NEPA, though not conclusive, demonstrates that Congress was aware of a possible conflict and did not intend that the relevant language of NEPA be as all-inclusive as it seems at first glance.⁹³ And alternatively, if the administrative actions of the EPA are to be regarded as "significantly affecting the quality of the human environment," the EPA will be compelled to file NEPA statements for almost all of its regulatory activity⁹⁴ since that activity is certainly of "major" significance. Congress's hopes of creating a smoothly functioning environmental agency may well be dashed. Mr. William Ruckelshaus, the present Administrator of the EPA, has expressed his reaction to this aspect of the *Anaconda* decision: "We have concluded that it would be administratively impossible to prepare a statement on every last standard and regulation proposed by the agency. Also, in most cases it would be an unnecessary duplication

⁹² The *Getty* court opined that the EPA already observes many of the NEPA requirements through the agency's own administrative procedures under the Clean Air Act: "[T]he Administrator is given the responsibility of making policy reviews under 42 U.S.C. § 1857h-7, annual comprehensive economic cost studies under 42 U.S.C. § 1857j-1, and periodic reports to Congress under section 1857j-2. It is apparent that the Clean Air Act itself contains sufficient provisions for the achievement of those goals to be attained by NEPA." 467 F.2d at 359.

⁹³ During Senate debate on NEPA, Senator Jackson introduced a memorandum of the Conference Committee entitled "Major Changes in S. 1075 As Passed by the Senate." 115 Cong. Rec. 40416 (1969). It stated: "Many existing agencies such as the National Park Service, the Federal Water Pollution Control Administration and the National Aid [sic] Pollution Control Administration already have important responsibilities in the area of environmental control. The provision of Section 102 (as well as 103) are [sic] not designed to result in any change in the manner in which they carry out their environmental protection authority." *Id.* at 40417-18. Senator Muskie, a member of the Conference Committee, stated more explicitly: "With regard to the environmental improvement agencies such as the Federal Water Improvement Administration and the Air Quality Administration, it is clearly understood that those agencies will operate on the basis of the legislative charter that has been created and is not modified in any way by S. 1075 [NEPA]." *Id.* at 40425. The Federal Water Pollution Control Administration and the National Air Pollution Control Administration were later incorporated into the newly-created EPA as its principal components. Reorganization Plan No. 3 of 1970, § 2, *supra* note 88. The agency which administers NEPA, the Council on Environmental Quality, felt that this legislative history established that the EPA need not file NEPA statements and so ruled. 35 Fed. Reg. 7390, 7391 (1970). At least one commentator has also subscribed to the view that the EPA is not bound by NEPA. See Donovan, *The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 12 B.C. Ind. & Com. L. Rev. 541, 549 (1971).

⁹⁴ The EPA has been specifically exempted from the duty to file NEPA statements regarding certain actions it undertakes in administering the Federal Water Pollution Control Act. 33 U.S.C.A. § 1371(c)(1) (Supp. 1973). Debate in Congress on this Act resurrected the issue of whether the EPA is bound at all by NEPA. See note 93 *supra*. On the floor of the Senate, Senator Muskie said:

... it was clearly intended at the time Congress enacted NEPA that environmental regulatory agencies such as those authorized by the Federal Water Pollution Control Act and the Clean Air Act would not be subject to NEPA's provisions. The Senator [Sen. Jackson] and I had discussions on this point, and it was clearly understood, from the colloquies in the [Congressional Record] on the subject it is clear, that it was the intention of NEPA to put mission-oriented

of effort because agency procedures already call for a thorough analysis of the environmental consequences of our proposals."⁹⁵

D. *The Use of Section 307 to Review the Promulgation of National Air Standards*

Section 307 also provides for the judicial review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard.⁹⁶ Again, the petition for review must be filed within thirty days after the date of the contested action. Since the standards are of national concern, jurisdiction is vested only in the Court of Appeals for the District of Columbia.⁹⁷ In *Kennecott Copper Corp. v. EPA*,⁹⁸ the plaintiff brought a section 307 action to question the basis of the Administrator's action in promulgating the national secondary ambient air quality standard for sulfur oxides. Section 109, the pertinent provision, requires the EPA Administrator to propose and promulgate national air standards "based on" the air quality criteria for each pollutant.⁹⁹ Air quality criteria are simply defined as statements reflecting the "latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities."¹⁰⁰ The criteria which were previously published for sulfur oxides referred to no effects detrimental to the public welfare at levels below eighty-five micrograms per cubic meter. The Administrator nonetheless proposed the considerably more stringent standard of sixty micrograms per cubic meter of the pollutant. The court declined to rule on the record as it was thus presented, but remanded it to the Administrator for him "to supply an implementing statement that will enlighten the court as to the basis on which he reached the 60 standard from the material in the Criteria."¹⁰¹

agencies, not the environmental enhancement agencies, under an environmental structure and that the environmental enhancement or improvement agencies such as the Federal Water Pollution Control Administration and the Clean Air Act would not be subject to NEPA's provisions.

118 Cong. Rec. S16885 (daily ed. Oct. 4, 1972). But see 118 Cong. Rec. H10271 (daily ed. Oct. 18, 1972) where Representative Dingell flatly opposed Senator Muskie's interpretation. However, even under Representative Dingell's strict interpretation, NEPA statements would not be required of the EPA "at the enforcement stage." The *Getty* decision was cited as authority for that position. *Id.*

⁹⁵ 3 BNA Env. Rep., Current Devs. 1018 (Jan. 5, 1973).

⁹⁶ 42 U.S.C. § 1857h-5(b)(1) (1970), quoted in note 24 *supra*.

⁹⁷ *Id.*

⁹⁸ 462 F.2d 846 (D.C. Cir. 1972).

⁹⁹ 42 U.S.C. § 1857c-4 (1970).

¹⁰⁰ 42 U.S.C. § 1857c-3(a)(2) (1970).

¹⁰¹ 462 F.2d at 850. The Circuit Court for the District of Columbia has recently remanded another case to the Administrator for fuller consideration. In *International Harvester Co. v. Ruckelshaus*, the plaintiff auto-makers utilized § 307 to seek review of the Administrator's determination not to grant them an extension of one year for compliance with § 202 motor vehicle emission standards. The court held that the

More important than the actual result in *Kennecott* is its expression of the philosophy of judicial review that the circuit court found inherent in the Clean Air Act. While the court did require further information from the Administrator in order to determine whether his actions embodied an abuse of discretion or error of law, it stressed that it was doing so in the spirit of a "partnership."¹⁰² Further, the court stated that it was "keenly aware of the need to avoid procedural strait jackets that would seriously hinder this new agency in the discharge of the novel, sensitive and formidable, tasks entrusted to it by Congress."¹⁰³ In this vein, the court rejected *Kennecott's* alternative cause of action that the EPA had failed to fulfill a requirement of the Administrative Procedure Act (APA). According to section 4 of the APA, which admittedly applies to the EPA, every agency must incorporate into the regulations which it issues a "concise general statement" of their "basis and purpose."¹⁰⁴ The court in *Kennecott* could have given a strict construction to this statutory requirement in order to reach the result which it did, but the effect of such a decision would have been to bind the EPA to file separate statements regarding each discrete action within its regulatory activity. Such an absolute approach was avoided by the court's holding that the regulation contained in itself a sufficient exposition of its basis and purpose to satisfy the legislative minimum of the APA.¹⁰⁵ The court explained: "Particularly as applied to environmental regulations, produced under the tension of need for reasonable expedition and need for resolution of a host of nagging problems, we are loath to stretch the requirement of a 'general statement' into a mandate for reference to all the specific issues raised in comments."¹⁰⁶ The remand was ordered not on the grounds that it was required by the APA, but in the interest of justice and in aid of the judicial function, centralized in that court, of expeditious disposition of the challenge to the standard.¹⁰⁷

The attitude of the court in *Kennecott* in avoiding the placing of procedural restrictions on the EPA contrasts markedly with the holding in *Anaconda Co. v. Ruckelshaus*¹⁰⁸ that the EPA is subject to NEPA. Even if NEPA were applicable to the EPA, the court in the *Anaconda* case was not compelled to bind the EPA to the procedural requirement of filing NEPA statements in such a literal fashion. The *Anaconda* court, in a fashion similar to the *Kennecott* court, could have found that the EPA had constructively complied with NEPA since the administrative

plaintiffs had made an apparent showing that technology is not available to meet the standards by 1975 and that the Administrator had failed to support his opposing position with a "reasonable presentation." 41 U.S.L.W. 2444 (D.C. Cir., Feb. 10, 1973).

¹⁰² 462 F.2d at 848-49.

¹⁰³ *Id.* at 849.

¹⁰⁴ 5 U.S.C. § 553(c) (1970).

¹⁰⁵ 462 F.2d at 850.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 352 F. Supp. 697 (D. Colo. 1972).

process whereby the EPA formulates its rules and regulations covers the same ground that NEPA does.¹⁰⁹ It is possible, of course, that the court in *Anaconda* hesitated to take such a course because its finding of jurisdiction depended in part on its ruling that the NEPA statement requirement applied in the case before it.

II. THE CITIZEN SUIT PROVISION OF THE CLEAN AIR ACT

The citizen suit provision of the Clean Air Act, which caused considerable controversy when it was debated in Congress,¹¹⁰ is set forth in section 304 of the Act.¹¹¹ The primary purpose of this section is to provide for the public's participation in the enforcement of standards and regulations established under the Act.¹¹² Since section 304 is essentially a "public interest" provision, the only remedy available under it is injunctive relief.¹¹³ It does not itself provide for the recovery of property or personal damages,¹¹⁴ although it does contain a cautionary "savings clause" which emphasizes that section 304 is not meant to restrict any other rights particular plaintiffs may have under the common law or other statutes.¹¹⁵ Jurisdiction is vested in the federal district courts without regard to the amount in controversy or the citizenship of the parties.¹¹⁶

There are two types of section 304 citizen suits. The first may be brought against any person who is alleged to be in violation of an emission standard or limitation or an order issued by the EPA Administrator or a state with respect to such a standard or limitation.¹¹⁷ The second type may be brought against the Administrator himself where there is alleged a failure on his part to perform a nondiscretionary duty arising under the Act, including his enforcement duties.¹¹⁸ The Senate Committee which first considered this provision anticipated that "many citizens suits would be of this nature, since such suits would reduce the ultimate burden on the citizen of going forward with the entire action."¹¹⁹ That is, rather than bring a suit of the first type against an alleged polluter, a citizen can simply commence an action against the

¹⁰⁹ See note 92 *supra*.

¹¹⁰ See 116 Cong. Rec. 32923-27 (1970).

¹¹¹ 42 U.S.C. § 1857h-2 (1970), quoted in note 23 *supra*.

¹¹² S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36 (1970).

¹¹³ 42 U.S.C. § 1857h-2(a) (1970).

¹¹⁴ "There would be no jurisdictional amount required in section 304 nor is there any provision for the recovery of property or personal damages." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970).

¹¹⁵ 42 U.S.C. § 1857h-2(e) (1970).

¹¹⁶ 42 U.S.C. § 1857h-2(a) (1970).

¹¹⁷ 42 U.S.C. § 1857h-2(a)(1) (1970). In the case of an action respecting a violation by a stationary source, suit may be brought only in the district court for the district in which the alleged violation occurred. 42 U.S.C. § 1857h-2(c) (1970).

¹¹⁸ 42 U.S.C. § 1857h-2(a)(2) (1970). See also S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38-39 (1970).

¹¹⁹ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 39 (1970).

Administrator to compel him to institute enforcement action against the pollutor.¹²⁰

To date, there has been a surprising paucity of suits brought against the Administrator under section 304: there have been no reported cases dealing with the Administrator's enforcement responsibilities and only two cases dealing with his administrative responsibilities.¹²¹ It is expected, however, that in the near future many citizen suits will be commenced for the purpose of enforcing specific standards and regulations.¹²² The explanation for the present lack of litigation lies in the fact that in the past two years the EPA has gone through what might be termed an administrative "tooling-up period." The timetables for administrative action set forth in the Act did not require that standards and regulations be drawn up and promulgated until very recently.¹²³ For example, most of the regulations which deal with the control of air pollution generated by stationary sources consist of emission limitations formulated by the states as part of their implementation plan procedures.¹²⁴ The deadline for the Administrator's approval or disapproval of state implementation plans was May 31, 1972.¹²⁵

This section will discuss the substantive issues raised in the two citizen suits which have been decided, as well as two procedural matters dealt with in one of the cases. Both involved suits against the Administrator for his failure to perform nondiscretionary duties imposed by the Act: the first, *Sierra Club v. Ruckelshaus*,¹²⁶ the duty to support

¹²⁰ It is submitted that the citizen plaintiff would merely have to make a showing that the Administrator has good cause to proceed against an alleged pollutor and that the Administrator has unjustifiably failed to do so. The Administrator would then be left with the more complicated task of proving the complained-of violation. The Administrator's enforcement duties are set out in § 113, 42 U.S.C. § 1857c-8 (1970).

¹²¹ *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), aff'd mem., 41 U.S.L.W. 2255 (D.C. Cir., Nov. 1, 1972), cert. granted, 41 U.S.L.W. 3392 (U.S. Jan. 8, 1973) (No. 72-804); *Riverside v. Ruckelshaus*, 4 BNA Env. Rep. Cases 1728 (C.D. Cal. 1972). Additionally one might consider *Anaconda Co. v. Ruckelshaus*, 352 F. Supp. 697 (D. Colo. 1972), where the court invoked § 304 as an alternative basis of jurisdiction. See text accompanying notes 38-51 supra.

¹²² The standards and regulations which can be enforced through a § 304 citizen suit include: (1) regulations issued pursuant to § 110 implementation plans (e.g., emission limitations, schedules and timetables for compliance); (2) § 111 standards of performance for new stationary sources of pollution; (3) § 112 emission standards for hazardous pollutants; and (4) § 210 controls or prohibitions respecting motor fuel or fuel additives. 42 U.S.C. § 1857h-2(f)(1) (1970).

¹²³ Subject to certain exceptions, the deadlines for the promulgation of the standards and regulations were as follows: (1) § 110 state implementation plans—May 31, 1972 (if the Administrator disapproved a plan, he should have promulgated a substitute one by July 31, 1972), 42 U.S.C. §§ 1857c-5(a) to (c) (1970); (2) § 111 standards of performance for new stationary sources of pollution—Oct. 31, 1971, 42 U.S.C. § 1857c-6(b)(1) (1970); (3) § 112 emission standards for hazardous air pollutants—March 31, 1972, 42 U.S.C. § 1857c-7(b) (1970); and (4) § 210 motor fuel controls—no deadline since their promulgation is a matter of discretion with the Administrator, 42 U.S.C. § 1857f-6(c) (1970).

¹²⁴ See 42 U.S.C. § 1857c-5(a) (1970).

¹²⁵ See note 123 supra.

¹²⁶ 344 F. Supp. 253 (D.D.C. 1972), aff'd mem., 41 U.S.L.W. 2255 (D.C. Cir., Nov. 1,

the "nondegradation policy" of the Clean Air Act; and the second, *Riverside v. Ruckelshaus*,¹²⁷ the duty to promulgate implementation plans for states which fail to submit plans that qualify for the Administrator's approval.

A. *Sierra Club v. Ruckelshaus*:
Procedural and Substantive Issues

In *Sierra Club v. Ruckelshaus*,¹²⁸ the plaintiff environmental group brought an action under section 304 to enjoin the EPA Administrator from approving state implementation plans—as he was expected to do within a short time—which failed to include enforcement procedures designed to ensure the "nondegradation" of existing air quality. In other words, the plaintiff contended that it is not sufficient for the implementation plans to be in accord with the national primary and secondary ambient air quality standards; rather they must also provide against any further pollution of the air even though that pollution would not violate the federal minima.¹²⁹ The district court accepted the plaintiff's interpretation and held that the Administrator was under a nondiscretionary duty to require state implementation plans to implement the policy of nondegradation.¹³⁰ The Clean Air Act is to be regarded as setting forth a two-fold mandate: first, air already polluted in excess of the national standards must be allowed to cleanse itself; and second, no air, regardless of how pure it may be, may be polluted to any significant degree.

1. *Standing and the Citizen Suit Provision*

Before considering the substantive issues, the *Sierra Club* court decided, on its own motion, that the plaintiff had standing to bring this section 304 citizen suit¹³¹ within the limitation expressed in the recent Supreme Court decision of *Sierra Club v. Morton*.¹³² It is curious that the court felt obliged even to consider the issue in light of the broad authorization given in section 304: "any person may commence a civil action in his own behalf . . ."¹³³ Congress clearly seems to have granted standing here without restriction. Concededly, despite the extensive liberalization that the doctrine of standing has undergone, the doctrine still usually demands a showing on the part of the plaintiff that he *himself* is adversely affected by the complained-of action.¹³⁴ *Sierra Club v.*

1972), cert. granted, 41 U.S.L.W. 3392 (U.S. Jan. 8, 1973) (No. 72-804). See text accompanying notes 43-51 *supra*.

¹²⁷ 4 BNA Env. Rep. Cases 1728 (C.D. Cal. 1972).

¹²⁸ 344 F. Supp. 253 (D.D.C. 1972).

¹²⁹ *Id.* at 254, 256.

¹³⁰ *Id.* at 256.

¹³¹ *Id.* at 254.

¹³² 405 U.S. 727 (1972).

¹³³ 42 U.S.C. § 1857h-2(a) (1970) (emphasis added).

¹³⁴ The doctrine of standing has been liberalized to the extent that a plaintiff may

Morton so held.¹⁸⁵ This requirement, however, may be modified or eliminated in certain cases by Congress. It is true that Congress may not extend the judicial power beyond the constitutional boundaries implied by the words "case or controversy" in Article III. As the Supreme Court explained in *Sierra Club v. Morton*: "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, . . . or to entertain 'friendly' suits, . . . or to resolve 'political questions,' . . . because suits of this character are inconsistent with the judicial function under Art. III."¹⁸⁶ However, the Court continued: "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' . . . is one within the power of Congress to determine."¹⁸⁷ Congress may, according to this rationale, empower any person to vindicate the public interest by acting in the capacity of what has been called a "private Attorney General."¹⁸⁸

Courts will naturally be loath to relax the traditional standing requirements absent explicit authorization on the part of Congress. Nevertheless, the plain and unrestricted wording of section 304 of the Clean Air Act, corroborated by the legislative history of that section, reveals that the primary goal of Congress in drafting section 304 was to protect the public interest by allowing private actions, a policy which it considered a necessary supplement to administrative action.¹⁸⁹ It is

have standing to vindicate non-economic rights. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970).

¹⁸⁵ 405 U.S. at 738.

¹⁸⁶ *Id.* at 732 n.3.

¹⁸⁷ *Id.*

¹⁸⁸ While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

Associated Industries of New York State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (footnote omitted) (cited with approval in *Sierra Club v. Morton*, 405 U.S. at 732 n.3).

¹⁸⁹ The citizen suit provision originated as a Senate amendment to the House bill. As stated in the Senate Committee Report dealing with the Senate version which, in substantial part, later became § 304: "Government initiative in seeking enforcement under the Clear Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring

submitted that the issue of standing should consequently be considered superfluous in connection with citizen suits brought under the authority of the Clean Air Act, and it would be unfortunate if the courts were to vitiate the effect of section 304 by permitting needless and wasteful litigation on this issue.

2. *The Independence of Section 304 Citizen Suits and Section 307 Judicial Review*

Another procedural aspect of the *Sierra Club v. Ruckelshaus* case, the court's consideration of its jurisdiction under section 304, deserves mention. The EPA Administrator contended at the hearing that since section 307 deals specifically with the judicial review provided for his actions in approving or disapproving state implementation plans, the plaintiffs should wait until he acts upon those plans and thereupon file a section 307 suit in the appropriate circuit court, rather than bring a premature section 304 citizen suit in a district court. The court rejected this contention on the grounds that the Administrator was exposed to suit within the precise terms of section 304: he was alleged to have failed to perform a nondiscretionary duty, *i.e.*, to prevent the degradation of existing air quality.¹⁴⁰ The court's treatment of this claim seems correct since there should be no reason to ignore the literal terms of section 304 and subordinate that section to section 307. Section 304 allows suit against the Administrator for failure to take action required by the Act; section 307 allows suit to review actions already taken by the Administrator. Both sections can logically stand alone, and if Congress had intended that one be dependent on the other, it would have expressed that intent. Furthermore, no purpose would be served in waiting for the issues to be ripe for judicial review under section 307 since they present a straightforward question of statutory interpretation. The issue presented is clear: the EPA Administrator either is or is not under a nondiscretionary duty to provide for the nondegradation of existing air quality.

3. *The EPA Administrator's Duty to Enforce the Nondegradation Policy of the Clean Air Act*

The holding of *Sierra Club v. Ruckelshaus*—that the Clean Air Act does not permit degradation of the air despite the achievement of the national ambient air quality standards—was, it is submitted, a correct one, but the relief granted appears improper. As the court noted, the Clean Air Act established a policy against any significant degradation of the air, and this policy is reflected in the general purpose provision of the Act, the available legislative history of the Act and of its 1967 predecessor, and prior administrative interpretations of the Act.¹⁴¹

enforcement and abatement proceedings." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-37 (1970). See also 116 Cong. Rec. 32903 (1970) (remarks of Senator Muskie).

¹⁴⁰ 344 F. Supp. at 254-55.

¹⁴¹ *Id.* at 255-56. The most important and cogent proof of this policy is given in the

This policy, however, is not at all related to the approval or disapproval of state implementation plans according to the language of the Clean Air Act. The sole purpose of the implementation plans which the states are expected to adopt and submit to the EPA in accordance with section 110 is to provide for the implementation, maintenance, and enforcement of the *national ambient air quality standards*.¹⁴² Nothing is said in section 110 regarding the policy of nondegradation. The Administrator is *required* by the language of that section to approve all plans which provide, within certain time limits, for the attainment of the minimum levels of tolerable pollution as established by the national standards.¹⁴³ Again, no mention is made of nondegradation. There is, then, no express statement in section 110 of the Clean Air Act imposing a nondiscretionary duty upon the Administrator to refuse approval of implementation plans that would allow degradation of clean air even though they would meet national minimum standards—that is, a duty to implement a policy of nondegradation.

The question immediately arises as to how this policy of nondegradation, which was so clearly evident in the legislative history of the Clean Air Act, is to be implemented in the absence of express authorization. Also, if there is neither any explicit reference to nondegradation nor any provision setting forth administrative procedures for implementing that policy, another question arises: can it then be alleged that the Administrator has failed to perform a nondiscretionary duty and thus be exposed to a section 304 citizen suit?

As related above, the national ambient air quality standards are merely minimal standards—the primary standard being that which is requisite to protect the public health and the stricter secondary standard being that which is requisite to protect the public welfare.¹⁴⁴ These standards are not intended, by themselves, to prevent all air pollution of any significance. There are areas in this country, usually rural areas, in which the air is significantly purer than is required by the national standards and which could conceivably be “degraded” to some extent and still not place the public health or welfare in immediate jeopardy and thus not violate the federal minima. This possibility has engendered recent proposals to relocate air polluting industries from urban centers to the countryside.¹⁴⁵ In other words, rather than engage in the ex-

language of the Senate Committee Report: “In areas where current air pollution levels are already equal to, or better than, the air quality goals, [the EPA Administrator] should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.” S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970).

¹⁴² 42 U.S.C. § 1857c-5(a)(1) (1970).

¹⁴³ 42 U.S.C. § 1857c-5(a)(2) (1970).

¹⁴⁴ 42 U.S.C. §§ 1857c-4(b)(1), (2) (1970).

¹⁴⁵ Boston Globe, Jan. 16, 1973, at 2, col. 2. Nondegradation was not envisioned as an absolute policy, but one which depends upon the circumstances of the particular case. The Senate Report states:

Once [the air quality] goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative.

pensive and often risky venture of developing air pollution control techniques, industry could procrastinate by spreading out the air pollution it produces. The *Sierra Club* court recognized that such relocation for the purpose of avoiding the expense of compliance with the nondegradation policy of the Act does not accord with the spirit of the Act, and it has effectively forbidden it by requiring the EPA to approve only those state implementation plans which guard against degradation. Nonetheless, the procedures in section 110 for the formulation of implementation plans do not apply to the policy of nondegradation.

Hence it appears that the Clean Air Act suffers from a serious shortcoming: it endorses a nondegradation policy without explicitly providing for administrative procedures for the implementation of that policy. If nondegradation is to be regarded as simply a matter of discretion with the Administrator, it is doubtful that it will ever be pursued with the vigor and purpose with which Congress endorsed it. Indeed, the present Administrator and the EPA have strenuously opposed any responsibility on their part for its implementation and have presented the courts with the unusual situation of an administrative agency attempting to circumscribe its own authority.¹⁴⁰

It is suggested, however, that there is a provision in the Clean Air Act which may be logically invoked to enforce the nondegradation policy. Section 111 requires the Administrator to promulgate regulations establishing federal standards of performance for new sources of potential air pollution.¹⁴⁷ "New source" is defined very broadly as "any stationary source, the construction or modification of which is commenced after the publication of regulations."¹⁴⁸ "Modification" means "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."¹⁴⁹ Therefore, almost all activities which could give rise to the degradation of existing air quality would come within the scope of these definitions. The construction of new air polluting industries or their relocation would certainly be included, as would almost all changes in operation. The language of section 111 is phrased in terms of reasonableness and feasibility.¹⁵⁰

Given the various alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic controls—deterioration need not occur.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970).

¹⁴⁰ Boston Globe, Jan. 16, 1973, at 2, col. 2.

¹⁴⁷ 42 U.S.C. § 1857c-6(b) (1970).

¹⁴⁸ 42 U.S.C. § 1857c-6(a)(2) (1970).

¹⁴⁹ 42 U.S.C. § 1857c-6(a)(4) (1970).

¹⁵⁰ "The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 1857c-6(a)(1) (1970).

If section 111 is interpreted as the section of the Act which Congress intended to express the nondegradation policy, that policy must be regarded as a flexible one. On the other hand, if section 111 is not the applicable provision and the policy of nondegradation is portrayed as an absolute one, there is an inherent contradiction in the Clean Air Act. The position that the comparatively pure air of some regions of this country may not be degraded to any significant extent is irreconcilable with the fact that Congress authorized the EPA Administrator to permit the construction or modification of air-polluting industries as long as the best pollution control devices which are available and economically feasible are used. The only rational solution to this perplexing problem is to conceive of the policy of nondegradation as a reasonable one to be implemented by section 111. This conclusion should not be interpreted as giving industry carte blanche to relocate and avoid serious efforts to develop an efficient technology for dealing with air pollution. The regulations issued pursuant to section 111 may be demanding as well as reasonable.¹⁵¹

Through the combined use of sections 110 and 111, the Administrator would thus be able to fulfill the double mandate of the Clean Air Act by formulating two different sets of standards: first, the *national ambient air quality standards*, the enforcement of which will allow the passage of time to cleanse the air which is already polluted to such an extent that it endangers the public health and welfare; and second, the *standards of performance for new stationary sources*, the enforcement of which will forbid the degradation of air which is not yet polluted and prevent the polluting industries from evading their present duty to solve the air pollution problem. This approach seems to be the only practical answer to the question of how to abate existing air pollution while avoiding future pollution. If nondegradation is dealt with simply as an implied requirement of section 110 implementation plans, confusion will necessarily result due to the lack of standards, of procedures, and of time limitations.

It is arguable, therefore, that the Administrator can substantially implement the policy of nondegradation by fulfilling his nondiscretionary duty under section 111 to promulgate standards of performance for new stationary sources. Had the plaintiffs in *Sierra Club* alleged a failure of this duty as a basis of their section 304 action, the court could have reached its result on more solid ground. It should be remarked that section 111 is not as forthright as section 110. Section 111 provides that the states "may," not "shall," develop and submit procedures for the implementation of the federal guidelines.¹⁵² The section further provides: "If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he

¹⁵¹ The Administrator has already promulgated standards of performance for certain industrial activities. See 40 C.F.R. Pt. 60 (1972). It is beyond the scope of this comment to determine whether those standards could adequately implement the nondegradation policy.

¹⁵² 42 U.S.C. § 1857c-6(c)(1) (1970).

has under this chapter to implement and enforce such standards . . . ¹⁵³ Here the stress is not so much upon required state participation as it is upon the development of implementation plans for the national ambient air quality standards. The states are not required to submit effective implementation procedures, nor is the Administrator bound to promulgate state-wide procedures if the states fail to do so as he would be under section 110. The Administrator, however, is under a definite duty under section 111 to prevent the needless pollution of already pure air by increased industrial activity, and it is this duty which should have been enforced in the *Sierra Club* suit. The question then arises whether a nondiscretionary duty was involved in this case. Since the Administrator has promulgated standards of performance,¹⁵⁴ he can be said to have fulfilled the nondiscretionary duty imposed upon him by section 111. If the plaintiffs should contest the position that these standards are an adequate implementation of the nondegradation policy, they would be challenging the Administrator's judgment and discretion. It would therefore seem that the proper means of seeking judicial review of the Administrator's action would have been a section 307 suit if section 111 had been recognized by the court as the means by which Congress expressed the nondegradation policy.

B. *Riverside v. Ruckelshaus: The Los Angeles Air Pollution Problem and Some Procedural Considerations*

1. *The Duty to Promulgate Substitute Implementation Plans*

Another duty which section 110 imposes upon the Administrator is the requirement that he propose and promulgate regulations setting forth an implementation plan for any state which fails to submit an acceptable plan within the prescribed time limits.¹⁵⁵ It was for a failure to perform this nondiscretionary duty that the Administrator was sued by the cities of Riverside and San Bernardino, California, among others, in *Riverside v. Ruckelshaus*.¹⁵⁶ The Administrator had, on May 31, 1972, disapproved large portions of the implementation plan submitted by California, especially those parts which set forth procedures for implementing the primary ambient air quality standards for nitrogen oxides, particulates, and photochemical oxidants in the South Coast Air Basin, i.e., the metropolitan Los Angeles area.¹⁵⁷ According to the timetable set forth in section 110, the Administrator should have promulgated a substitute plan for these portions by July 31, 1972.¹⁵⁸ By the time that the plaintiffs' motion for a preliminary

¹⁵³ *Id.*

¹⁵⁴ See note 151 *supra*.

¹⁵⁵ 42 U.S.C. § 1857c-5(c) (1970).

¹⁵⁶ 4 BNA Env. Rep. Cases 1728 (C.D. Cal. 1972).

¹⁵⁷ 37 Fed. Reg. 10851-55 (1972).

¹⁵⁸ If the strict deadlines in § 110 were met, the implementation plan process would have run in the following fashion: (1) publication of proposed national ambient air quality standards—January 31, 1971; (2) promulgation of those standards—April 30,

injunction was heard, the Administrator had proposed or promulgated regulations curing most of the defects in the California plan except the lack of acceptable transportation controls for the attainment of the national standards for photochemical oxidants.¹⁵⁹

"Transportation controls" are "measures which would reduce individual vehicle emissions and/or vehicle miles traveled."¹⁶⁰ Individual vehicle emissions could be reduced through the use of pollution control devices fitted to individual cars and other vehicles or through the use of other types of engines which would not emit the amount of pollution presently being emitted by the piston engine. Vehicle miles traveled could be reduced through various programs designed to discourage the use of cars and other vehicles with the substitution of mass transit. Such measures are required by section 110 only if necessary for the implementation plan of a state to satisfy the national ambient air quality standards.¹⁶¹ In most areas of the country, the national standards could be met through the use of emission controls on stationary sources of air pollution alone.¹⁶² However, there are some areas of the country—including the Los Angeles area—where automobiles and other vehicular traffic are responsible for most of the air pollution and where the federal emission standards for new cars would not be sufficient to abate the pollution due to photochemical oxidants.¹⁶³ The states involved (or the Administrator should they fail to respond) are required by section 110 to include in their implementation plans measures to reduce the pollution generated by used cars in those areas.¹⁶⁴

The court in *Riverside* held that the Administrator had unjustifiably breached a nondiscretionary duty according to the literal terms of the Act, and it accordingly ordered the Administrator to publish, no later than January 15, 1973, proposed regulations setting forth an implementation plan for attaining the primary ambient air quality standard for photochemical oxidants in California, including all necessary transportation controls.¹⁶⁵ The Administrator later com-

1971; (3) submission by the states of implementation plans—January 31, 1972; (4) approval or disapproval by the Administrator of those plans—May 31, 1972; (5) promulgation of implementation plans by the Administrator, if necessary, to replace disapproved plans—July 31, 1972. See 42 U.S.C. §§ 1857c-4,5 (1970).

¹⁵⁹ 37 Fed. Reg. 19812-15, 19830-35 (1972). The Administrator stated that he would not promulgate such transportation controls until February 15, 1973 (almost six months beyond the statutory deadline). 37 Fed. Reg. 19829 (1972).

¹⁶⁰ 38 Fed. Reg. 2194 (1973).

¹⁶¹ 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

¹⁶² 38 Fed. Reg. 2194 (1973).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ 4 BNA Env. Rep. Cases at 1731. The same issue, the unwarranted extension of time for the submission of transportation controls, was raised in *Natural Resources Defense Council, Inc. v. EPA*, 4 BNA Env. Rep. Cases 1945 (D.C. Cir. 1973). The extension was challenged as granted to all the states. Suits had previously been filed in all the circuit courts but were consolidated and heard by the Court of Appeals for the District of Columbia Circuit. That court held that it had jurisdiction under § 307(b)(1) of the

plied with this order and in an accompanying statement explained why he had felt it to be necessary to allow a one-year extension beyond the statutory deadline for the consideration of transportation controls: "Unlike the situation with respect to stationary sources, however, neither EPA nor the States had any real experience with these types of controls. The nature of the controls required, their effectiveness, their effect on air quality, and their social and economic impacts were essentially unknown."¹⁶⁶

The court's decision was nonetheless a necessary one since section 110 imposes on the Administrator an absolute deadline within which he must promulgate plans for the implementation of *primary* ambient air quality standards to replace disapproved state plans.¹⁶⁷ In pointed contrast, section 110 allows the Administrator the discretion to grant an eighteen-month extension to any state for the submission of its plan for the implementation of *secondary* ambient air quality standards.¹⁶⁸ Congress evidently intended that the primary standards, which are designed to protect the public health, be quickly established as a matter of first priority. The definite time limits which were included in the present Act are a deliberate response on the part of Congress to the time-consuming delays which were encountered under the insufficient administrative procedures of the Clean Air Act of 1967.¹⁶⁹

It is understandable why the Administrator was pressed to allow the extension in this case. The notorious air pollution problem in the area surrounding Los Angeles is due mainly to the unique physical aspects of the South Coast Air Basin.¹⁷⁰ The region is geographically and meteorologically enclosed.¹⁷¹ The encircling mountains and the frequent inversions prevent the natural dispersion of pollutants, and the Southern California climate provides ample sunshine to aid in the formation of photochemical smog.¹⁷² Since most of the hydrocarbon emissions in the area are attributable to the use of motor vehicles, transportation controls are the only apparent answer.¹⁷³ The problem,

Clean Air Act since the D.C. Circuit was the "appropriate circuit" for the review of decisions of the Administrator which were nationwide. The court thereupon issued an order which, among other things, compelled the Administrator to rescind the extension of time. *Id.* at 1945-47.

¹⁶⁶ 38 Fed. Reg. 2194 (1973).

¹⁶⁷ 42 U.S.C. § 1857c-5(c) (1970).

¹⁶⁸ 42 U.S.C. § 1857c-5(b) (1970).

¹⁶⁹ *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849 (D.C. Cir. 1972). See Comment, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 12 B.C. Ind. & Com. L. Rev. 571, 576 (1971).

¹⁷⁰ 38 Fed. Reg. 2194 (1973).

¹⁷¹ *Id.*

¹⁷² *Id.* Nitrogen dioxide and hydrocarbons (both of which are emitted principally by automobiles and other vehicles) combine in the presence of sunlight to form ozone, which recombines with nitrogen dioxide to create chemicals usually labeled photochemical smog. One common chemical which forms is peroxyacetyl nitrate (PAN), others are aldehydes including formaldehydes. A. Reitze, *Environmental Law* ch. 3, at 10 (2d ed. 1972).

¹⁷³ 38 Fed. Reg. 2194 (1973).

however, becomes almost insoluble when it is considered that the automobile is by necessity the dominant mode of transportation due to the low-density, sprawling pattern of development which characterizes Southern California.¹⁷⁴ The Administrator has expressed very serious reservations about the viability of the regulations which he was ordered to propose.¹⁷⁵ The most controversial of the regulations deal, of course, with the transportation controls. These controls fall into two categories: first, the reduction of emissions from individual vehicles through the use of retrofit devices to be required of all used cars by January 1, 1976;¹⁷⁶ and second, the reduction by eighty percent of the vehicle miles traveled through the use of a gas rationing system to commence in 1975.¹⁷⁷

As the Administrator has explained, the impact of this transportation control plan will be profound.¹⁷⁸ First, the vehicle owners themselves may have to assume the rather high cost of the retrofit devices.¹⁷⁹ Second, the reduction in the mobility of workers and consumers could seriously disrupt the economy of the Los Angeles area and considerably diminish local, state, and Federal tax revenues.¹⁸⁰ And third, the compulsory reduction of the amount of driving done by the people of the region would radically change their style of living.¹⁸¹ The obvious measure needed to ameliorate the drastic effects of an eighty percent reduction in automobile use is the development of mass transit. But the very reason for the region's heavy reliance upon automobiles and other motor vehicles—its low-density, sprawling pattern of development—is not conducive to the effective use of mass transit.¹⁸²

In spite of the obvious difficulties (perhaps insurmountable in terms of the statutory deadlines), the legal requirements of the Clean Air Act dictated the result in *Riverside v. Ruckelshaus*. If more time is necessary for the states to achieve effective, and reasonable, implementation of the national ambient air quality standards, the correct course to follow would be to seek congressional approval of any needed postponement.

¹⁷⁴ Id.

¹⁷⁵ 38 Fed. Reg. 2195 (1973); Boston Globe, Jan. 16, 1973, at 2, cols. 2-3.

¹⁷⁶ 38 Fed. Reg. 2198 (1973) (proposed 40 C.F.R. § 52.229(b)). In the case of fleets of vehicles comprised of ten or more vehicles, such vehicles will have to be converted to gaseous fuel. Id. (proposed 40 C.F.R. § 52.229(c)).

¹⁷⁷ 38 Fed. Reg. 2195, 2199 (1973) (proposed 40 C.F.R. § 52.229(f)). Gas rationing would be in effect only during the peak pollution period from May 1 to October 31. Id.

¹⁷⁸ 38 Fed. Reg. 2196-97 (1973).

¹⁷⁹ Id. "The cost of control devices could range from \$200 to \$400. The annual cost of inspection/maintenance and the increased cost of gasoline caused by marketing controls is [sic] estimated to be \$5 to \$15. . . . Fleet vehicles could convert to gaseous fuel at a cost of \$500 to \$800 per vehicle." Id. at 2197.

¹⁸⁰ Id. at 2196-97.

¹⁸¹ Id. at 2197.

¹⁸² Id. at 2198.

2: *The Notice Requirement and the Award of Attorney Fees*

There are, in addition, two procedural issues raised in the *Riverside* case which, though of comparatively less importance than the principal issue, warrant discussion in relation to the use and interpretation of the Clean Air Act by the courts. The first concerns the notice requirement for citizen suits brought under section 304. A citizen who seeks to compel the Administrator to perform a nondiscretionary duty under the Act must give the Administrator notice, in such manner as the Administrator has prescribed by regulation,¹⁸³ sixty days prior to the commencement of the action.¹⁸⁴ Since an action is commenced with the filing of the complaint,¹⁸⁵ section 304 therefore requires two months' notice before legal action can even be instituted. The plaintiffs in *Riverside* failed to give the Administrator any such notice. Nonetheless, the court rather generously concluded that there had been "substantial compliance and actual constructive compliance," in that (1) the personal service of the complaint on the Administrator was actual notice of the plaintiff's demand; (2) sixty days had elapsed between the filing of the complaint and the hearing in court; and, (3) the Administrator had during that period all the beneficial effect of the statutory provision, so the purposes of the provision were fulfilled.¹⁸⁶ The intent of Congress in requiring notice was to afford the EPA sufficient time to act and remove the cause for complaint,¹⁸⁷ and this intent is not frustrated provided that the interval between the filing of a section 304 complaint and the court's hearing on it is at least as long as sixty days.

The other procedural aspect of the case involved the court's refusal to award attorney fees.¹⁸⁸ The explanation for such a decision was simply that the action was one against the federal government.¹⁸⁹ The provision in section 304 that specifically allows for the award of attorney fees is phrased in discretionary language,¹⁹⁰ but the legislative history of this provision reveals a very strong expression of policy on the part of Congress: "The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party."¹⁹¹ Perhaps the court determined that such

¹⁸³ See 40 C.F.R. § 54 (1972).

¹⁸⁴ 42 U.S.C. § 1857h-2(b)(2) (1970). In the case of a suit against an alleged violator of an emission standard or limitation promulgated pursuant to the Act or of an order issued by the Administrator or a state with respect to such a standard or limitation, the plaintiff must give sixty days' notice to the Administrator and the interested state as well as to the defendant. 42 U.S.C. § 1857h-2(b)(1) (1970).

¹⁸⁵ Fed. R. Civ. P. 3.

¹⁸⁶ 4 BNA Env. Rep. Cases at 1731.

¹⁸⁷ See S. Rep. No. 91-1196, 91st Cong., 2d Sess. 37 (1970).

¹⁸⁸ 4 BNA Env. Rep. Cases at 1731.

¹⁸⁹ Id.

¹⁹⁰ 42 U.S.C. § 1857h-2(d) (1970), reprinted in note 24 supra.

¹⁹¹ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970). The Senate Committee felt

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an award in *Riverside* would not have been appropriate for some reason other than the fact that the suit was brought against the Government, but that fact in itself is not a legitimate reason under the Act, since section 304 authorizes suits against the Government, and attorney fees as well. A court should, it is submitted, either award the fees or, if such an award is inappropriate, explain why it is so, but an apparently arbitrary decision which denies the award of attorney fees will effectively frustrate the congressional policy behind section 304. This is true since no party but the most altruistic would hazard the costs of litigation to obtain injunctive relief under the Act when it does not anticipate reasonable reimbursement.

There should be no great anxiety that liberal awards would encourage harassing suits. Congress foresaw this danger and minimized it by providing that attorney fees could be awarded to *either* party.¹⁹² Thus if the court decides that a citizen suit has been brought in bad faith or without any reasonable cause, the court should not hesitate to award the Government its costs of litigation. The proper course for the courts to follow is to overcome their traditional disinclination to award costs of litigation and to give full effect to the congressional purpose in section 304. A two-fold benefit will then accrue: the award of fees, where appropriate, to plaintiffs will encourage public participation in the administrative process, and the award of fees, where appropriate, to defendants will discourage the bringing of unreasonable actions.

III. COMMON LAW REMEDIES AND OTHER ALTERNATIVES TO THE REMEDIAL PROVISIONS OF THE CLEAN AIR ACT

While the preceding section has dealt with the right of citizens to seek injunctive relief under the citizen suit provision for the enforcement of the Clean Air Act, this section will be concerned with other theories of relief which those adversely affected by air pollution may employ. These remedies are still available to the public notwithstanding the broad reach of the citizen suit provision: section 304 itself is quite explicit about the fact that it is not intended to restrict any other rights which plaintiffs may claim under other statutes or the common law.¹⁹³ In seeking relief from the effects of air pollution, plaintiffs have advanced a variety of theories, ranging from the ingenious to the traditional, claiming rights arising under the National Environmental

that this policy should extend even to plaintiffs in actions which result in successful abatement but do not reach a verdict. *Id.* See also 116 Cong. Rec. 32903 (1970).

¹⁹² 42 U.S.C. § 1857h-2(d) (1970).

¹⁹³ 42 U.S.C. § 1857h-2(e) (1970), set out in note 24 *supra*. Furthermore, "[c]ompliance with standards under [the Clean Air] Act would not be a defense to a common law action for pollution damages." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970).

Policy Act,¹⁹⁴ the Constitution,¹⁹⁵ the "federal common law,"¹⁹⁶ the federal antitrust statutes,¹⁹⁷ and the common law as it has developed among the states.¹⁹⁸

The claims attempting to infer rights from the general purpose provisions of the NEPA and from constitutional language have been rejected as frivolous.¹⁹⁹ The simple explanation for this lack of success lies in the fact that the suits involved were brought against *private individuals* who owed no duties to the plaintiffs under either NEPA or the Constitution. NEPA is basically an "environmental full disclosure law" applicable only to the agencies and instrumentalities of the federal government.²⁰⁰ The case against rights implied by constitutional provisions is even stronger. One cannot reasonably lay claim to a right to clean air and a safe and healthy environment as existing within the "penumbra" of the Constitution when the defendants against whom this right is asserted are purely private individuals.²⁰¹ Courts have not vindicated constitutional rights absent a showing of governmental intrusion into the privacy of citizens.²⁰² At any rate, any attempts by the courts to recognize such imputed rights and fashion remedies for such rights would clearly constitute a usurpation of legislative power. A complex area such as the control of pollution demands not only a great deal of special expertise but also an intricate balancing process whereby economic, social, and political factors must be weighed. Functions such as these should properly be exercised by the legislatures on both the state and the federal levels.

This section will discuss air pollution law as affected by the federal common law and the federal antitrust statutes. Neither of these theories has been litigated to a final judgment, but both present possibilities for for the use of the federal judiciary to award compensatory as well as injunctive relief. The Clean Air Act is, of course, a primarily regulatory

¹⁹⁴ See, e.g., *Tanner v. Armco Steel Co.*, 340 F. Supp. 532 (S.D. Tex. 1972).

¹⁹⁵ See, e.g., *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98 (2d Cir. 1972).

¹⁹⁶ See, e.g., *Washington v. General Motors Corp.*, 406 U.S. 109 (1972).

¹⁹⁷ See, e.g., *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D. Cal. 1970).

¹⁹⁸ See, e.g., *Chicago v. General Motors Corp.*, 467 F.2d 1262 (7th Cir. 1972). State common law is usually invoked under the private nuisance heading. A discussion of this area is beyond the scope of this article, which is limited to developments in air pollution law on the federal level.

¹⁹⁹ See *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 534-37 (S.D. Tex. 1972); *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398, 402 (C.D. Cal. 1970).

²⁰⁰ *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971). Even where a government instrumentality is the defendant in a suit, a private plaintiff is limited to enforcing the procedural requirements of the NEPA and can claim no substantive rights under the Act. *Id.* at 755. For a contrary view, see E. Hanks & J. Hanks, *An Environmental Bill of Rights: The Citizen Suit and The National Environmental Policy Act of 1969*, 24 Rutgers L. Rev. 230, 244-51 (1970).

²⁰¹ 52 F.R.D. at 402.

²⁰² *Id.*

statute by which standards for various types of pollution are formulated and enforced. The Act does not provide for the recovery of damages or property. Thus, unless plaintiffs wish to present their claims for compensation in state courts by taking the difficult route of private nuisance,²⁰³ they will have to succeed in convincing the federal courts that there exists a basis for federal jurisdiction over their actions for damages.

A. "The Federal Common Law" Governing Air Pollution

The possibility of resorting to "federal common law" to deal with air pollution as a nuisance was raised by the Supreme Court in the recent case of *Washington v. General Motors Corp.*²⁰⁴ Eighteen states, with sixteen others and the City of New York filing a brief as amici curiae,²⁰⁵ sought to invoke the Court's original jurisdiction under Article III, section 2 of the Constitution.²⁰⁶ They petitioned for leave to file a complaint against all four of the major U.S. automobile manufacturers and the latter's trade association. It was alleged that the defendants had since 1953 engaged in a conspiracy to restrain the development of motor vehicle air pollution control equipment and that such conspiracy had substantially contributed to the present air pollution crisis. The proposed complaint originally contained three counts, one of which charged that the defendants' actions constituted a public nuisance contrary to the public policy of the plaintiff states and the federal government. For some reason, all the plaintiffs but one filed a memorandum striking this count from the complaint. The Court denied leave to file the complaint on discretionary grounds and remitted the parties to the appropriate district court for the resolution of all three counts.²⁰⁷ Justice Douglas, speaking for a unanimous Court, noted specifically that the plaintiffs might renew the public nuisance count in the district court according to the rationale of *Illinois v. City of Mil-*

²⁰³ An interesting alternative to the use of private nuisance was presented by the plaintiff in *Chicago v. General Motors Corp.*, 467 F.2d 1262 (7th Cir. 1972), a diversity case in which a strict product liability claim was made under Illinois law. The city of Chicago alleged that the defendant automobile manufacturers were responsible for a substantial amount of the air pollution generated in that city because of the defendants' conduct in manufacturing and selling motor vehicles without pollution control devices. The circuit court dismissed the complaint because it failed to state a claim upon which relief could be granted in view of the present state law. *Id.* at 1267.

²⁰⁴ 406 U.S. 109 (1972).

²⁰⁵ *Id.* at 113 n.3.

²⁰⁶ "In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. Const. art. III, § 2, cl. 2. Such jurisdiction is exclusive only where the controversy is between two or more states. 28 U.S.C. § 1251(a)(1) (1970). In cases where only one party is a state, the Court's jurisdiction may be shared with the inferior federal courts, and its exercise is therefore discretionary. 406 U.S. at 113-14. See also *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-98 (1972).

²⁰⁷ 406 U.S. at 116.

wauke,²⁰⁸ a water pollution case which was decided by the Court the same day.²⁰⁹

The plaintiffs in the *Illinois* case, like those in the *Washington* case, were states. They invoked the original jurisdiction of the Court, but were also denied leave to file their proposed complaint and were remitted to the district courts.²¹⁰ In this second case, the State of Illinois was seeking to enjoin the City of Milwaukee from dumping improperly treated sewage into Lake Michigan, a body of interstate water. Before deciding to remit *Illinois* to the proper district court, the Court determined whether the district court would have jurisdiction to hear the case.²¹¹ The "federal question" statute places a double limitation on the original jurisdiction of the federal district courts: first, the matter in controversy must exceed the sum of \$10,000; and second, it must arise under the Constitution, laws, or treaties of the United States.²¹² A unanimous Court held that the jurisdictional amount was no obstacle in light of the extensive harm threatened by the defendant's alleged actions, and that the controversy did arise under the laws of the United States.²¹³ Justice Douglas, again speaking for the Court, reasoned that while Congress had enacted numerous statutes governing interstate waters, those laws did not authorize the remedy sought by Illinois. However, the fact that Congress had expressed interest in this area by its enactment of those other statutes was held to signify that "it is federal law, not state law, that in the end controls the pollution of interstate or navigable waters."²¹⁴ In other words, despite the inapplicability of the federal statutes to the situation before the Court, their existence suggested that federal rights are involved in this area; and federal courts will not refuse to fashion a federal common law to protect federal rights.²¹⁵ This result, the Court explained, is in line with the federal question jurisdictional statute: the "laws" under which a controversy must arise, for a federal district court to assume jurisdiction to settle it, include not only statutes but also the federal common law.²¹⁶

The Court then advanced the broad proposition: "When we deal with air or water in their ambient or interstate aspects, there is a federal common law . . ."²¹⁷ It should be noted that the particular factual situation in *Illinois v. City of Milwaukee* did involve a state bringing a *public* nuisance action against the political subdivision of another. Even if the Court's holding is to be limited to such a situa-

²⁰⁸ Id. at 91.

²⁰⁹ Id. at 112 n.2.

²¹⁰ Id. at 108.

²¹¹ Id. at 98-101.

²¹² 28 U.S.C. § 1331(a) (1970).

²¹³ 406 U.S. at 98-99.

²¹⁴ Id. at 102.

²¹⁵ Id. at 103 (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957)).

²¹⁶ 406 U.S. at 100.

²¹⁷ Id. at 103.

tion, it will certainly have far-reaching effects. However, should this decision be extended, as arguably it could be extended, to situations involving an *individual* bringing a *private* nuisance action against another,²¹⁸ the federal court system would be made accessible to litigants for the hearing of damage claims under the federal common law as well as for the hearing, which is presently available, of claims for injunctive relief under section 304 of the Clean Air Act. Theoretically, then, anyone who suffers damage in the amount of \$10,000 or more from the effects of interstate pollution may be permitted to bring a claim for damages in the federal district courts under the federal question jurisdictional statute.

But even should this potential right to invoke federal jurisdiction for compensatory relief from damage caused by interstate air pollution be recognized, there may exist a very real obstacle to its full exercise: the problem of how to define "interstate" air pollution. In the case of water pollution, it is relatively easy to distinguish bodies of interstate water from bodies of intrastate water. As far as air pollution is concerned, such a distinction is difficult, if not impossible, to draw. Indeed, the Clean Air Act is based on the premise that there is no effective distinction between interstate and intrastate air for the purposes of the Act.

Although the Act affirms that the prevention of air pollution is primarily the responsibility of the states and local governments, a realistic examination of the Act reveals that the federal government is given the ultimate responsibility over the entire area. It is the federal government, through the Administrator of the EPA, that promulgates the national ambient air quality standards.²¹⁹ The states are then required to develop implementation plans in accordance with the standards for the areas designated by the Administrator.²²⁰ Furthermore, these plans must be approved by the Administrator before they become operative.²²¹ Should the Administrator disapprove a particular state implementation plan, he promulgates a substitute one for the state involved.²²² And, most significantly, the Administrator may issue an order or bring enforcement proceedings against anyone who is in violation of the requirements of an implementation plan.²²³ Therefore, although the implementation plans approved or formulated by the Administrator may vary from state to state, the standards of air quality are national. Absolutely no distinction is made between interstate and intrastate air: the Clean Air Act is concerned with the "ambient air," which the EPA has broadly defined as "that por-

²¹⁸ There has, as yet, been no scholarly commentary on this theoretical extension of the holding in *Illinois v. City of Milwaukee*.

²¹⁹ 42 U.S.C. § 1857c-4 (1970).

²²⁰ 42 U.S.C. § 1857c-5(a)(1) (1970).

²²¹ 42 U.S.C. § 1857c-5(d) (1970).

²²² 42 U.S.C. § 1857c-5(c) (1970).

²²³ 42 U.S.C. § 1857c-8 (1970).

tion of the atmosphere, external to buildings, to which the general public has access."²²⁴

One might ask whether the inference then arises that a private suit for damages under the federal common law of air pollution may be brought in a federal court without a particularized showing that the complained-of pollution had actually crossed state boundaries. Although the scope of this article precludes a detailed discussion of the exact extent to which *Illinois v. City of Milwaukee* applies to private individuals, it is submitted that plaintiffs seeking federal relief on grounds of private nuisance would have to show that their damages were caused by interstate pollution. It may be true that in order to protect the national interest in interstate commerce, Congress may authorize private citizens to seek injunctive relief in federal courts to abate air pollution which originates within the boundaries of a state, but which is a potential threat to the quality of air beyond the boundaries. But a person who complains of damage inflicted by a local polluter is claiming no federal right; he should properly resort to a state forum for relief from this individual injury. Of course, if any substantial injury has been inflicted, there is a probability that the pollutor responsible violated a requirement of the applicable state implementation plan. In that event, the complainant is authorized to seek injunctive relief in the federal courts under section 304 of the Clean Air Act, but that authorization extends only to a vindication of federal rights, viz., the enforcement of the national ambient air quality standards for the preservation of the air as a national resource. If and when an action for damages due to the effects of air pollution is brought in a federal court and is grounded in a theory of federal common law, the plaintiff ought to show first, that the damages are in the amount of \$10,000 or more;²²⁵ and second, that the complained-of pollution originated in a state other than the plaintiff's.

Concerning the content of this new federal common law of pollution, Justice Douglas noted in *Illinois v. City of Milwaukee* that "[w]hile the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they

²²⁴ 40 C.F.R. § 50.1(e) (1972).

²²⁵ The Supreme Court noted in *Illinois v. City of Milwaukee* that "the considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount . . ." 406 U.S. 91, 98 (1972). Furthermore, it may be contended that "the right to live in an environment free from [air pollution] and . . . the right of the defendant to operate its . . . facility are both in excess of \$10,000.00." *Biechele v. Norfolk & Western Ry.*, 309 F. Supp. 354, 355 (N.D. Ohio 1969).

There is also the possibility, not yet raised, of a plaintiff avoiding the \$10,000 limitation by bringing his request for damages as a pendent claim in a suit for injunctive relief under § 304 since Congress has dispensed with the limitation for § 304 suits. It could be argued that both claims should be heard together since they share a "common nucleus of operative fact." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). *Gibbs* could also support bringing a state claim for damages pendent to the federal claim for injunctive relief under § 304.

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may provide useful guidelines in fashioning such rules of decision.²²⁶ If the courts follow this reasoning and adopt the standards and statements of policy expressed in the Clean Air Act, plaintiffs seeking monetary relief for damage caused by air pollution may fare better with the new federal common law than they would with state nuisance law. According to the traditional common law of nuisance, not all interferences with another's protected interests are actionable.²²⁷ The interference must be unreasonable.²²⁸ The proper standard for determining whether a defendant's conduct is unreasonable is the "interest balancing test."²²⁹ As Dean Prosser has explained:

The defendant's privilege of making a reasonable use of his own property for his own benefit and conducting his affairs in his own way is no less important than the plaintiff's right to use and enjoy his premises. The two are correlative and interdependent, and neither is entitled to prevail entirely, at the expense of the other. Some balance must be struck between the two.²³⁰

However, if the plaintiff convinces a federal court (or a state court treating the case as one arising under federal law) that the standards of the Clean Air Act should be adopted as minimal standards of reasonableness, and if he can further show that the defendant has violated those standards during the period in which the harm was inflicted, the plaintiff can greatly simplify his case and avoid the interest balancing test. The defendant may not be able to defend his conduct as reasonable if it is in violation of federally approved air quality standards. Thus, the very specific regulations promulgated pursuant to the Clean Air Act could become a clear and definite way for the court to determine whether the defendant's actions should be adjudged wrong in themselves. The plaintiff would then be left to prove only the remaining elements of causation and extent of damages.

B. *The Antitrust Suits Brought against the Automobile Industry*

Another tactic utilized by the plaintiffs in *Washington v. General Motors Corp.*,²⁸¹ and by plaintiffs in other cases,²⁸² has been to charge violations of the federal antitrust laws.²⁸³ More specifically, the com-

²²⁶ 406 U.S. at 103 n.5.

²²⁷ W. Prosser, *The Law of Torts* 580-82, 596-602 (4th ed. 1971).

²²⁸ *Id.* at 596-602.

²²⁹ *Id.* at 596.

²³⁰ *Id.*

²⁸¹ The plaintiffs also charged a common law conspiracy in restraint of trade independent of the Sherman and Clayton Acts, 406 U.S. at 111-12.

²⁸² *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398, 400 (C.D. Cal. 1970); *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 99 (2d Cir. 1972).

²⁸³ Section 1 of the Sherman Act, as amended, provides in pertinent part: "Every

plaints have been based on the allegation that the defendants, members of the automobile industry and its organizations, have been engaged in a conspiracy, beginning as early as 1953 but concealed until January of 1969, to restrain the development of motor vehicle air pollution control equipment. Impetus for this novel theory was apparently given by a consent decree obtained by the federal government as a result of a criminal antitrust action brought against members of the industry. In that case, *United States v. Automobile Manufacturers Ass'n, Inc.*,²³⁴ the Government had charged that the "Big Four"—General Motors Corporation, Ford Motor Company, Chrysler Corporation, and American Motors Corporation—had, along with their trade association, "conspired with other motor vehicle manufacturers, in violation of § 1 of the Sherman Act (15 U.S.C. § 1), to eliminate competition in the research, development, manufacture and installation of motor vehicle air pollution control equipment, and in the purchase from others of patents and patent rights, covering such equipment."²³⁵ The court approved the consent decree "prohibiting the defendants, *inter alia*, from combining or conspiring to prevent, restrain or limit the development, manufacture, installation, distribution or sale of air pollution control equipment and requiring the defendants to make available to all applicants on a royalty free basis, licenses on air pollution control patents."²³⁶

Certain individual parties, including states, counties, cities, governmental agencies, groups, and private citizens, petitioned to intervene in this case, but their petitions were denied.²³⁷ The purpose of their intervention was, as the court saw it,²³⁸ to block the consent decree, compel the parties to litigate the case to judgment on the merits, and thus use the judgment as a basis for treble damage claims under the Clayton Act.²³⁹ Several of the parties, along with others, subsequently brought actions based on the same factual claims in different district courts across the country.²⁴⁰ The Judicial Panel on

contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal" 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1970). Section 4 of the Clayton Act, as amended, provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731 (1890), as amended, 15 U.S.C. § 15 (1970).

²³⁴ 307 F. Supp. 617 (C.D. Cal. 1969).

²³⁵ *Id.* at 618.

²³⁶ *In re Motor Vehicle Air Pollution Control Equipment*, 311 F. Supp. at 1349-50 n.2 (J.P.M.L. 1970).

²³⁷ 307 F. Supp. at 619-20.

²³⁸ *Id.*

²³⁹ This course of action was pursued by the plaintiffs since § 5 of the Clayton Act, 15 U.S.C. § 16(a) (1970), allows a final judgment, but not a consent decree, obtained by the federal government to be regarded as *prima facie* evidence against the defendant in a suit brought by an individual for treble damages due to the adjudged conspiracy. 307 F. Supp. at 619-20.

²⁴⁰ 311 F. Supp. at 1349-50. The plaintiffs who were denied leave to intervene in

Multidistrict Litigation has transferred all the cases to the District Court for the Central District of California for coordinated pretrial proceedings, and such proceedings are currently underway.²⁴¹ There has yet been no discussion by the courts of this claim on the merits.

CONCLUSION

Of the judicial decisions which have dealt with the Clean Air Act since it was amended in 1970, most have been primarily concerned with procedural matters. The only substantive issue of great import concerned the policy of nondegradation which, if anything, exposed a fundamental flaw in the Clean Air Amendments of 1970. It was obviously as much a policy of Congress to ensure against the deterioration of existing air quality as it was to create the national ambient air quality standards, yet no concrete provision was inserted into the Act to achieve that goal. The result of this lack of foresight was that the court in *Sierra Club v. Ruckelshaus* was compelled to assume the unjudicial task of overseeing, without adequate guidelines from Congress, a reluctant Administrator's implementation of the nondegradation policy. Nondegradation is itself an explosive issue because of its effect upon the possibilities of the relocation of those industries which contribute heavily to the air pollution problem. If full meaning is given to Congress's conception of nondegradation as a firm policy—a policy which simply will not permit any deterioration of the air through the relocation or modification of industry unless absolutely all feasible alternatives have been considered—industry will be virtually compelled to develop the technology necessary for the abatement of air pollution. Conversely, if resort is had to a watered-down version of nondegradation, competition may well develop among the less industrialized states to attract industries which prefer relocation to the development of control devices, and the stage will be set for a more serious air pollution crisis in the future when pollution generating sources will have become entrenched uniformly across the country. The policy of nondegradation may not seem to be an object of immediate concern but, it is submitted, its implementation or lack

United States v. Automobile Manufacturers and who are currently plaintiffs in the *In re Motor Vehicle* case are New York, New Jersey, Connecticut, New York City, and two private individuals. Id.; 307 F. Supp. at 618-19.

²⁴¹ See *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D. Cal. 1970).

The Heart Disease Foundation, a charitable trust, also used the antitrust theory in a class action filed in behalf of the entire urban population of the United States, some 125,000,000 persons. Damages were claimed in the amount of 375 trillion dollars. The court, critical of the "sloppy, scattershot manner in which this complaint was thrown together," dismissed it. The court noted that the foundation was apparently attempting to have its case added to the growing multidistrict litigation in California. *Heart Disease Foundation v. General Motors Corp.*, 463 F.2d 98, 99-101 (2d Cir. 1972). The foundation also attempted to intervene in *Washington v. General Motors Corp.*, but the Supreme Court denied its motion. 404 U.S. at 811 (1971).

thereof will have a direct bearing on the success or failure of the Clean Air Act as a long-term solution to the air pollution problem. For this reason, Congress should have had the foresight to have provided explicit sanctions for the policy of nondegradation in the Clean Air Act.

The other issues which have been raised in recent litigation regarding air pollution and the Clean Air Act are equally if not more noteworthy, for they underline the importance of construing the procedural provisions of the Act in a manner consistent with the spirit of the whole. The liberal provision in section 304 for citizen suits and the restrictions in section 307 upon judicial review of the EPA Administrator's actions were drafted for the express purpose of remedying the administrative failings encountered under prior legislation. While section 304 discourages agency inaction by exposing the EPA to suit by concerned citizens, section 307 protects the EPA, when it does act, from excessive exposure to suit by those whom the agency seeks to regulate. These two sections, which govern the judicial treatment of the EPA, differ to such an extent that they might be regarded as occupying opposite ends of a spectrum, but they both serve the one purpose of expediting the EPA's administrative process. In this light, therefore, it should be apparent why the provisions of section 304 ought not to be interpreted in a grudging manner, and why the restrictions in section 307 have to be given their full force. Thus, the issues of a plaintiff's standing to bring a section 304 citizen suit and the award of attorney fees for such an action, although mentioned only briefly in *Sierra Club v. Ruckelshaus*, should have been more thoroughly considered by the courts in terms of their relation with the overall purpose of section 304. It is likewise with the section 304 notice requirements discussed in the *Riverside* case. The congressional intent behind authorizing citizen suits—that the public should be encouraged to participate in the enforcement of the Clean Air Act—will be effectuated only by a broad interpretation of the statutory language. On the other hand, the deliberate limitations in section 307 which were placed upon judicial challenges to administrative actions ought not to be circumvented through the employment of other procedural tactics. Thus, it is regrettable that the plaintiffs in the *Anaconda* case were permitted to obtain premature review of agency action outside the narrow scope of section 307 by persuading a district court to assume jurisdiction based upon a strained application of the Administrative Procedure Act, the National Environmental Policy Act, and section 304 of the Clean Air Act itself. The *Getty* and *Kennecott* decisions stand in marked contrast, for implicit in those opinions was a recognition of the mandate of the Clean Air Act. The plaintiff corporations in those cases also sought to have the APA and NEPA applied to the EPA's regulatory activity, but the courts recognized that such a course of action would be not only unnecessary from a purely legal standpoint, but also extremely onerous

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in a practical sense for an agency such as the EPA. The advances made by Congress through its enactment of the Clean Air Amendments of 1970 can be preserved only to the extent that they receive sympathetic treatment at the hands of courts such as that provided in the *Getty* and *Kennecott* cases. It would be unfortunate, and ironic, if the very provisions of the Act which were designed to expedite the achievement of a clean environment are to be construed so as to delay such improvement.

By its own terms, the Clean Air Act is not the sole means for the vindication of environmental rights, but thus far only two additional possibilities for the use of the federal courts have been suggested. The first, utilization of the federal common law as applied to interstate pollution, has been established for public nuisance suits by the Supreme Court in the *Illinois v. City of Milwaukee* decision. It is argued that this doctrine may be utilized by private plaintiffs. Although the factual situation in *Milwaukee* involved a state suing a subdivision of another state, the identity of the parties is not necessarily a relevant factor since the Court's opinion was premised on its holding that damage caused by interstate pollution raised a federal question. Theoretically, at least, private plaintiffs may therefore ground their causes of complaint in the federal common law where the complained-of pollution is interstate. The federal courts may not wish to assume jurisdiction over this new and troublesome area; but, in this writer's opinion, it is inconceivable how the unqualified language of *Illinois v. City of Milwaukee* can logically be avoided without being overruled.

A discussion of the legal ramifications of the Court's holding, however, may well become academic, for it is possible that even if private parties are entitled to ground nuisance actions in the federal common law, they may in reality be prevented from succeeding with most of their claims. The practical impediment to a successful use of the federal common law lies in the probability that the federal courts will require plaintiffs to make a particularized showing that the complained-of pollution did in fact cross state boundaries. Except for the relatively few cases where the plaintiff and the defendant are situated in close proximity but on opposite sides of a state boundary, most cases will fail due to the simple difficulty of proving that the specific, complained-of pollution came from another state and caused the harm. It is therefore doubtful that nuisance actions based on federal common law will develop as a viable alternative to the use of the Clean Air Act for injunctive relief and state law for the award of damages.

The second possibility of obtaining jurisdiction in the federal court system for compensatory relief from damage caused by air pollution is the use of the federal antitrust laws in suits against the automobile industry. As mentioned above, the suits which have so been based have not yet been litigated on the merits, and it is there-

fore not possible at this time to give an adequate assessment of this alternative. At any rate, the sheer problem of sustaining the burden of proof, as to the issue of whether the alleged conspiracy on the part of the automobile industry did interfere with the defendants' rights, seems insurmountable. The inevitable conclusion appears to be that there is no real alternative, on the federal level, to the utilization of the remedies provided in the Clean Air Act. Even if the two possibilities discussed here were practicable, they would not be as effective a means of combating air pollution as is the comprehensive regulatory scheme of the Clean Air Act.

EDWARD J. M. LITTLE