Recommendation 76-4

Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act

(Adopted December 9-10, 1976)

The Congress has enacted provisions for judicial review in the Clean Air Act and the Federal Water Pollution Control Act (FWPCA) that are in some respects inconsistent, incomplete, ambiguous, and unsound.

Courts have sometimes felt constrained to stretch these statutes to achieve sensible results. In other instances, courts seem to have ignored sensible general congressional direction in an attempt to do justice in particular cases. On yet other occasions courts have felt compelled by unclear provisions to reach undesirable results that Congress probably did not intend.

Experience under the two Acts has highlighted a variety of problems in the interpretation and application of the judicial review provisions, all of which are likely to be addressed by Congress in the near future.

This series of recommendations urges that, when Congress reconsiders the judicial review provisions of the principal pollution statutes, it rationalize, alter, and clarify them, guided especially by the principle that jurisdictional provisions should draw bright lines to minimize the waste and expense of litigation over whether a case has been brought in the right court. One recommendation is addressed to the Judicial Conference and calls upon the courts, pending congressional action to clarify their powers, to utilize their discretion to transfer judicial review proceedings where transfer will avoid undue duplication of litigation.

More specifically, the Conference has in view these considerations:

1. Section 509(b) of the FWPCA provides that all standards promulgated under it by the Environmental Protection Agency, including national standards, are to be reviewed in the United States Court of Appeals for a circuit in which the petitioner resides or transacts business. Under section 307(b) of the Clean Air Act, on the other hand, certain nationally applicable standards are to be reviewed only in the Court of Appeals for the District of Columbia Circuit, but the EPA's actions in approving or promulgating state implementation plans are reviewable

only "in the United States Court of Appeals for the appropriate circuit." Thus the FWPCA provides for a decentralized review of national standards, whereas the Clean Air Act requires that analogous standards be reviewed only in the D.C. Circuit. This inconsistency in approach should be resolved; the advantages of expeditious and authoritative review of all national standards in the D.C. Circuit suggest that it is the FWPCA's venue provision which should be amended. All national standards under the FWPCA should be made reviewable in the D.C. Circuit. Review of all other regulations, standards, and determinations that are reviewable in the courts of appeals under the FWPCA should be in the circuit containing the affected state or facility. These amendments would entirely supplant the present provisions for review in the circuit in which the petitioner resides or transacts business.

The Clean Air Act's specification of "appropriate circuit" as the venue for review of state implementation plan approvals has also created uncertainties, especially when several plan approvals are challenged on identical grounds. Although a perfect resolution is impossible, an amendment, clarifying that the appropriate circuit is the one containing the state whose plan is challenged, would eliminate much of the prospect of threshold litigation over the question of which is the appropriate circuit, and would also avoid the splitting of cases into two different forums whenever local and national issues are present in the same case. The possibility of undue duplication of proceedings that might result can be met by increasing the flexibility of available transfer provisions to remove doubts about the authority of any court of appeals to transfer a case to any other court of appeals.

2. Section 304 of the Clean Air Act and section 505 of the FWPCA authorize citizen suits in the district courts to require the EPA Administrator to perform "any act or duty under this Act which is not discretionary." Some district courts have accepted jurisdiction under section 304 over cases that amount to challenges to the Administrator's approval and promulgation of state implementation plans, despite the provision of section 307 for exclusive jurisdiction in the courts of appeals to review such action. The citizen-suit provisions should not furnish an alternative or premature method of review of questions that can be raised by direct review of the EPA's actions in the courts of appeals.

The proper scope of the present citizen-suit provisions is especially unclear in the context of standard-setting, where the line between failure to act and failure to act properly is dim. The difficulty of drawing such a distinction is ample reason for giving the courts of appeals exclusive jurisdiction of actions to compel or to postpone the issuance of regulations whose validity would properly be determined in a court of appeals. It is recognized that in its review of

such issues a court of appeals might conclude that the administrative record requires amplification. Since courts of appeals normally do not hold evidentiary proceedings, provision should be made for prior resort or remand to the EPA (or, if that is inappropriate, to the district court) to meet that need.

To prevent unfairness from a litigant's choice of the wrong court, Congress should provide for transfer between district courts and courts of appeals of petitions and complaints filed under the Acts. The Court of Claims transfer provision provides a good model.

3. Although both Acts provided expressly for review in the courts of appeals and for citizen suits in the district courts, it remains possible in some circumstances to obtain non-statutory review under general federal question jurisdictional statutes. But the citizen-suit provisions of both Acts require the plaintiff to give the EPA 60 days' notice of the intended district court action. Congress should make clear that where a non-statutory review action is filed alleging grounds that correspond to those appropriate for the filing of an action under such citizen-suit provisions, failure to comply with the notice requirements of those provisions will require a dismissal of the case.

4. The Clean Air Act and the FWPCA provide that certain regulations reviewable by petition to the courts of appeals "shall not be subject to judicial review in civil or criminal proceedings for enforcement." Moreover, challenges to the validity of regulations must be made in the court of appeals within 30 days (air) or 90 days (water) after promulgation, unless the challenge is based "solely on grounds arising after" the statutory period. The express preclusion of review at the enforcement stage creates a highly unusual and unnecessarily harsh restriction on the right to challenge the validity of a regulation to which one is subject. Congress should amend the Acts to allow the validity of a regulation to be challenged in defense to an enforcement proceeding. It should also amend the Clean Air Act to extend the time limit for filing petitions for review in the court of appeals to 60 days and, for consistency, amend the FWPCA to reduce the 90-day period for filing a petition thereunder to 60 days. Finally, the time limits in both Acts should be made inapplicable where the petitioner can show reasonable grounds for failure to file a timely petition.

5. Not every action of the EPA under the Clean Air Act or the FWPCA is made reviewable in the courts of appeals. Some of the omissions appear to be inconsistent with the general statutory plan, and corrective amendments are desirable.

6. Each of the four judicial review and citizen-suit provisions in the Clean Air Act and the FWPCA presents a different standard for who may petition for review or sue. This leads to undesirable confusion and inconsistency in the administration of the Acts.

Recommendation

A. Venue in the Courts of Appeals

1. Congress should provide for centralized review of national standards under the FWPCA, as is now provided under the Clean Air Act, by amending section 509(b) [33 U.S.C. § 1369(b)] to provide for the review of all such national standards in the Court of Appeals for the District of Columbia Circuit.

2. Congress should further amend section 509(b) of the FWPCA to provide that review of regulations, standards, or determinations affecting single states or facilities be had in the circuit containing the state or facility.

3. Congress should amend section 307(b) of the Clean Air Act [42 U.S.C. § 1857h-5 (b)] to make explicit that the Administrator's action in approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged.

4. Courts of appeals, when reviewing cases arising under the Clean Air Act or FWPCA, should utilize existing transfer powers to avoid undue duplication of proceedings, and Congress should amend the acts or the transfer statute [28 U.S.C. § 2112(a)] to remove doubts about the authority of any court of appeals to transfer such cases to any other court of appeals to avoid undue duplication and in the interest of the administration of justice.

B. Choice between District Court and Court of Appeals for Review

1. Congress should amend the citizen-suit provisions of the Clean Air Act [section 304, 42 U.S.C. § 1857h-2] and FWPCA [section 505, 33 U.S.C. § 1365] to make clear that, insofar as suits against the Administrator of the EPA are concerned, these sections do not provide an alternative or premature method of review of questions that can be raised under the sections that provide for direct review of the EPA's actions in the courts of appeals [section 307(b), 42 U.S.C. § 1857h-5 (b); section 509, 33 U.S.C. § 1369].

2. Congress should amend the Clean Air Act and FWPCA to provide that courts of appeals have exclusive jurisdiction of actions to compel or to postpone the issuance or revision

of regulations whose validity is to be determined in a court of appeals. The amendments should provide that where there is need for the development of a factual record, prior resort or remand shall be made to the EPA, or, if that is inappropriate, to the district court.

3. Congress should provide, by analogy to 28 U.S.C. § 1506, for transfer between courts of appeals and district courts when a proceeding to review EPA action under the Clean Air Act or FWPCA is filed in the wrong forum.

C. Limitation of Non-Statutory Review

Congress should amend the statutes to make clear that when a non-statutory review action is filed alleging grounds that correspond to those appropriate for the filing of a citizen suit under section 304 of the Clean Air Act [42 U.S.C. § 1857h-2] or section 505 of the FWPCA [33 U.S.C. § 1365], failure to comply with the notice requirements of those sections will require a dismissal of the case.

D. Raising Defenses at the Enforcement Stage

1. Congress should amend the Clean Air Act and FWPCA to permit the validity of a regulation to be challenged in defense to an enforcement proceeding.

2. Congress should amend section 307(b) of the Clean Air Act [42 U.S.C. § 1857h-5 (b)] and section 509(b) of the FWPCA [33 U.S.C. § 1369 (b)] to prescribe 60 days as the period within which, under both statutes, a petition for review must be filed in the courts of appeals.

3. Congress should amend the Clean Air Act and FWPCA to ensure that petitions for review of regulations may be filed after the expiration of the time limits of sections 307(b) and 509(b), when the petitioner can show a reasonable ground for failure to file a timely petition.

E. Actions Subject to Court of Appeals Review

1. Congress should amend section 509(b) of the FWPCA [33 U.S.C. § 1369 (b)] to make clear that the following actions by the EPA are reviewable in the courts of appeals:

a. Promulgation or approval of water-quality standards under section 303 [33 U.S.C. §1313].

b. Promulgation of effluent guidelines under section 304 [33 U.S.C. § 1314].

c. Promulgation of regulations governing the discharge of oil or hazardous substances under section 311(b) [33 U.S.C. § 1321(b)].

d. Promulgation of standards for marine sanitation devices under section 312 [33 U.S.C. § 1322] or determinations that a state may completely prohibit the discharge from all vessels of any sewage under section 312(f) [33 U.S.C. § 1322(f)].

2. Congress should amend the Clean Air Act to make those new car emission standards not now reviewable under section 307(b) [42 U.S.C. § 1857h-5 (b)], reviewable in the courts of appeals.

F. Standing

Congress should adopt a single test of standing to govern all proceedings for judicial review under the Clean Air Act and FWPCA.

Citations:

41 FR 56767 (December 30, 1976)

__ FR _____ (2012)

4 ACUS 54

Note: Paragraph 4 of Administrative Conference Recommendation 82-7, Judicial Review of Rules in Enforcement Proceedings states: "Paragraph D of Recommendation No. 76-4, 1 CFR 305.76-4, Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act, is hereby superseded to the extent that it is inconsistent with this recommendation."

Separate Statement of G. William Frick

(1) Recommendation A.2. should be amended to provide that where "national issues" are involved they should be reviewed in the D.C. Circuit. Recommendation A.3. should be amended in the same fashion.

Cases involving permits and permit programs under the FWPCA sometimes involve generic issues that apply to EPA's actions nationwide. For essentially the reasons discussed in

our comments on recommendation A.3., below, we believe such issues should be reviewed in the D.C. Circuit. This result could be specified, without disturbing the general thrust of the Recommendation, by amending section 509 of the FWPCA as suggested in our comments of November 12, 1976.

Although approval and promulgation of State implementation plans (SIP's) under the Clean Air Act usually involve issues peculiar to the affected States, such actions sometimes involve generic determinations of nationwide scope or effect. Examples include EPA's granting of two-year extensions of the date for attainment of national ambient air quality standards in a number of metropolitan areas[1] and its promulgation of generic regulations (applicable to all States) that require prevention of significant deterioration of air quality (40 CFR 52.21). We view such actions as virtually identical to promulgation of "national standards",[2] as to which recommendation A.1. expresses a preference for review in the D.C. Circuit.

Under the existing law, it is possible to argue that the D.C. Circuit is the "appropriate circuit" for review of "national" SIP issues, and three courts of appeals have so held.[3] Recommendation A.3., however, would provide that such issues, together with all other SIP issues, must be in the local circuit. Although recommendation A.4. would promote transfer to avoid "undue duplication of proceedings," it would provide no basis for arguing that the D.C. Circuit is the appropriate transferee forum.

As indicated by Professor Currie in his report, Congress intended review in the D.C. Circuit of "matters on which national uniformity is desirable." Among the reasons for this are the D.C. Circuit's obvious expertise in administrative law matters and its sensitivity to Congressional mandates. In addition, the D.C. Circuit has become thoroughly familiar with the Clean Air Act—a very complex statute—and with its equally complex legislative history. We believe it makes sense to centralize review of "national" SIP issues in the D.C. Circuit, taking advantage of its administrative law expertise and facilitating an orderly development of the

[1] *See NRDC* v. *EPA*, 475 F. 2d 968 (D.C. Cir. 1973).

[2] As with national standards, such actions typically involve establishment or application of uniform principles for all States, are taken on a single administrative record, and do not involve factual questions unique to particular geographical areas.

[3] *Dayton Power & Light Co.* v. *EPA*, 520 F. 2d 703, 706-07 (6th Cir. 1975) (regulations for prevention of significant deterioration), *NRDC* v. *EPA*. 475 F. 2d 968, 969-70 (D.C. Cir. 1973) (two-year extensions and similar issues); *NRDC* v. *EPA*, 465 F. 2d 492, 494 (1st Cir. 1972) (same).

basic law under the Act, rather than to have such issues decided separately by a number of courts, some of which would probably lack frequent exposure to the Act and its legislative history. Moreover, the validity of a nationally applicable regulation will not turn on the particulars of its impacts within a given Circuit.

(2) Recommendation D.1., which would allow the challenge of validity of regulations in enforcement proceedings, should be deleted.

The "legislative history" of this recommendation suggests that it is inspired in part by a concern that the time limits for filing of petitions for review of the validity of regulations are too short, and in part by a concern that *any* time limit may unreasonably constrain the opportunity for such review.

As to the first factor we would much prefer the solution offered by Recommendation D.2. As to the second, we oppose the recommendation on several grounds. Permitting challenges to validity in enforcement would leave open the question of validity indefinitely, notwithstanding Congress' intent to have it decided expeditiously;[4] would require EPA to retain its often immense records indefinitely; would mean district court rather than court of appeals review of validity, notwithstanding the clear intent of Congress; and might very well lead to conflicting results, with resolution of conflicts (if at all) only after review by the courts of appeals and the Supreme Court. In our view, facial validity need be determined only once and should be determined expeditiously; there are other mechanisms for relief based on factors peculiar to individual sources (see comments on recommendation D.3.), and it makes no sense to require every district court presented with the issue of validity to engage in duplicative review of the often immense records involved.

The Recommendation glosses over that fact that State implementation plans, which have and will continue to make up the vast majority of onerous air pollution requirements, can be challenged facially and on grounds of infeasibility through administrative and judicial review channels in the States.[5]

Finally, as Professor Walter Gellhorn observed at the Plenary Session, there is an inherent contradiction between Recommendations D.1. and D.3., viz., the argument is for

[4] *See Kennecott Copper Corp.* v. *EPA*, 462 F. 2d 846, 849 & nn. 14-15 (D.C. Cir. 1972). Expeditious resolution of SIP issues is particularly important because Congress mandated attainment of the health-protective ambient air quality standards (via SIP's) by a time certain, regardless of economic or technical feasibility.

[5] *See Union Electric Co.* v. *EPA*, 96 S. Ct. 2518 (1976).

extending the deadlines for obtaining review while at the same time espousing that there should be no deadline for obtaining review. That the federal courts involved are at different levels does not cure this contradiction.

(3) Recommendation D.3., which would allow late filings of petitions for review upon reasonable grounds shown, should be deleted.

The "legislative history" of this recommendation suggests a number of concerns that may have prompted it: (a) the problem of short time limits; (b) the problem of persons who fail to file through carelessness; (c) lack of opportunity for consideration of individual factors that might affect validity; and (d) the problem of persons who are unaffected by a regulation until after the deadline for filing has passed. My comments are as follows:

(a) Short time limits. We prefer Recommendation D.2. as providing a more direct solution to this problem, if it is thought to be a problem. Protection of one's rights need not await detailed analysis of what EPA has actually done; common practice is to file one-paragraph petitions alleging that EPA's action was arbitrary or capricious, or similarly general grounds.

(b) Carelessness. The industries we regulate generally submit extensive comments on proposed regulations, sometimes "lobby" the agency extensively, often mount well-coordinated attacks on final regulations in court, and seem to follow the development of regulations rather well. And, even before publication of proposals in the Federal Register, they receive notice through EPA's gathering of supporting data from them, through trade associations, through industry representatives on EPA advisory committees, or during pre-publication review by other federal agencies. We believe the public interest in early resolution of validity (clearly intended by Congress) should outweigh the interests of those who fail to file timely petitions through carelessness.

(c) Individual factors that might affect validity. As Professor Currie seems to acknowledge in his report, individual factors are often if not always irrelevant to the validity of EPA regulations. Those cited as examples do not appear to be grounds for challenge of SIP approvals,[6] for example, or of national standards adopted under sections 111 or 112 of the

[6] *See Union Electric Co.* v. EPA, *supra*.

Clean Air Act (42 U.S.C. 1857c-6, 1857c-7). Relief based on such factors may be available through a variety of mechanisms,[7] but they do not go to the validity of the regulations.

(d) Previously unaffected parties. In our view, persons who choose to do business in a regulated industry (or to expand into a geographical area subject to controls) after the establishment of applicable regulations take the business (or the area) as they find it. If a company invents a new process that presents particular problems under an applicable regulation, it may petition for revision of the regulation.

Finally, we note that this recommendation would leave the question of validity open indefinitely, with all the problems that would entail (see discussion of Recommendation D.1.).

[7] Under the Clean Air Act, for example, relief may be available by way of SIP revisions (including variances) approved or promulgated by EPA, postponements of SIP requirements under 42 U.S.C. 1857c-5(f), enforcement orders fixing a "reasonable time" for compliance (42 U.S.C. 1857c-8(a)(4)), equitable relief provided by court order in enforcement proceedings (*see* 42 U.S.C. 1857c-8(b)), waivers or exemptions under 42 U.S.C. 1857c-7, or petition for revision of any applicable regulation.