

JUDICIAL REVIEW UNDER FEDERAL POLLUTION LAWS

David P. Currie*

In an effort to remedy "uncertainties" in their predecessor statutes, which were silent on the subject,¹ both the Clean Air Act² (CAA) and the Federal Water Pollution Control Act³ (FWPCA) were amended in the early 1970's to include explicit provisions for judicial review. Experience has shown, however, that uncertainties persist; the time has come for legislative re-examination.

Both statutes are administered by the United States Environmental Protection Agency (EPA). Both are extraordinarily complicated. Both preserve provisions for federal research and training programs,⁴ for financial assistance to state control programs,⁵ and for the encouragement of uniform state laws and interstate control agencies.⁶ The CAA authorizes the adoption of federal regulations prescribing standards of performance for new stationary sources of pollution endangering public health,⁷ emission standards for sources of "hazardous" pollutants,⁸ emission standards for vehicles⁹ and for aircraft,¹⁰ and standards for the composition of fuels.¹¹ Upon federal adoption of ambient air quality standards¹² for various pollutants, the states are to develop, subject to federal review, plans to implement those standards through emission limitations and other regulatory measures.¹³ While the states are expected to bear a substantial part of the burden of enforcing implementation plans, their provisions as well as federally adopted standards are also enforceable by the Federal EPA.¹⁴

* Professor of Law, University of Chicago. Chairman, Illinois Pollution Control Board, 1970-72.

1. See S. REP. NO. 1196, 91st Cong., 2d Sess. 40 (1970).

2. Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 101-403, 84 Stat. 1676 (codified at 42 U.S.C. §§ 1857-1858(a) (1970)) [hereinafter cited as CAA].

3. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §§ 101-516, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1975)) [hereinafter cited as FWPCA].

4. FWPCA § 104, 33 U.S.C. § 1254 (Supp. V 1975); CAA § 103, 42 U.S.C. § 1857b (1970).

5. FWPCA § 106, 33 U.S.C. § 1256 (Supp. V 1975); CAA § 105, 42 U.S.C. § 1957c (1970).

6. FWPCA § 103, 33 U.S.C. § 1253 (Supp. V 1975); CAA § 102, 42 U.S.C. § 1857a (1970).

7. CAA § 111, 42 U.S.C. § 1857c-6 (1970).

8. *Id.* § 112, 42 U.S.C. § 1857c-7.

9. *Id.* § 202, 42 U.S.C. § 1857f-1.

10. *Id.* § 231, 42 U.S.C. § 1857f-9.

11. *Id.* § 211, 42 U.S.C. § 1857f-6c.

12. See *id.* § 109, 42 U.S.C. § 1857c-4.

13. *Id.* § 110, 42 U.S.C. § 1857c-5.

14. *Id.* § 113, 42 U.S.C. § 1857c-8.

The Act also retains, in vestigial form, a cumbersome conference procedure for abatement of pollution.¹⁵

The heart of the FWPCA is a permit system, administration of which may be delegated to the states under specified conditions.¹⁶ Permits are to be issued if the discharger complies with a complex array of standards, including federal effluent standards for "toxic" pollutants¹⁷ and standards of performance for new sources.¹⁸ In addition, private point sources must employ by July 1, 1977, the "best practicable control technology currently available" and by July 1, 1983, the "best available technology economically achievable"; publicly owned treatment works, by the same dates, are required to implement "secondary treatment," and the "best practicable waste treatment technology," respectively.¹⁹ Permittees must also comply with applicable state requirements and with any limitation required to implement water quality standards,²⁰ which are adopted by states subject to federal review.²¹ More stringent federal standards are to be adopted, subject to some economic constraint, when necessary to protect legitimate water uses.²² Federal standards are also to be adopted to govern wastes from vessels,²³ and there are special provisions for the discharge of oil or other hazardous substances²⁴ and for the deposit of dredgings²⁵ and sewage sludge.²⁶ Federal enforcement of these standards and provisions is authorized.²⁷ Grants are provided for the construction of publicly owned treatment facilities.²⁸

Section 509(b) of the FWPCA provides for judicial review of certain federal standards and limitations regulating the discharges of pollutants, of federal action in passing upon state permit programs, and of federal issuance or denial of permits, upon the filing of an application by "any interested person" in the "Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business"²⁹ within ninety days after the challenged action is taken.³⁰ Section

15. *See id.* § 115, 42 U.S.C. § 1857d.

16. FWPCA § 402(b), 33 U.S.C. § 1342(b) (Supp. V 1975).

17. *Id.* § 307, 33 U.S.C. § 1317.

18. *Id.* § 306, 33 U.S.C. § 1316.

19. *Id.* § 301(b), 33 U.S.C. § 1311(b).

20. *Id.*

21. *Id.* § 303, 33 U.S.C. § 1313.

22. *Id.* § 302, 33 U.S.C. § 1312.

23. *Id.* § 312, 33 U.S.C. § 1322.

24. *Id.* § 311, 33 U.S.C. § 1321.

25. *Id.* § 404, 33 U.S.C. § 1344.

26. *Id.* § 405, 33 U.S.C. § 1345.

27. *Id.* § 309, 33 U.S.C. § 1319.

28. *Id.* §§ 201-207, 33 U.S.C. §§ 1231-1237.

29. Since 1948 the correct title has been "United States Court of Appeals," each with jurisdiction over a "circuit" containing several "districts." *See* 28 U.S.C. § 43(a) (1970).

30. FWPCA § 509, 33 U.S.C. § 1369(b) (Supp. V 1975) provides in substantial part:

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D)

307(b) of the CAA, allowing only thirty days and not specifying by whom review may be sought, separates most of those actions reviewable in the courts of appeals into two classes:³¹ national ambient air quality standards, federal emission standards, and federal fuel standards are to be reviewed "only in the United States Court of Appeals for the District of Columbia"; the EPA Administrator's "action in approving or promulgating any implementation plan" is reviewable "only in the United States Court of Appeals for the appropriate circuit."³² Under both statutes, "action of the Ad-

in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

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

(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

31. Section 110(f) of the CAA, 42 U.S.C. § 1857c-5(f)(2)(B) (1970), provides for review of determinations respecting state applications for postponement of implementation plan requirements in "the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person."

Section 206(b)(2)(B)(ii) of the CAA, 42 U.S.C. § 1857f-5(b)(2)(B)(ii) (1970), authorizes review of determinations respecting suspension or revocation of motor vehicle compliance certificates upon petition by "the manufacturer" in "the United States court of appeals for the circuit wherein such manufacturer resides or has his principal place of business" in "any case of actual controversy as to the validity of [such] determination."

32. CAA § 307, 42 U.S.C. § 1857h-5 (Supp. V 1975) provides:

(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 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title 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 1857c-5 of this title or section 1857c-6(d) of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within

ministrator with respect to which review could have been obtained" under the foregoing provisions "shall not be subject to judicial review in civil or criminal proceedings for enforcement."³³ In addition, both statutes contain citizen-suit provisions authorizing "any person"³⁴ or any person "having an interest which is or may be adversely affected"³⁵ to file an action in federal district court against the Administrator for "failure of the Administrator to perform any act or duty under this [Act] which is not discretionary."³⁶

30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.

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

(c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce such additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with return of such additional evidence.

33. FWPCA § 509(b)(2), 33 U.S.C. § 1369(b)(2) (Supp. V 1975); CAA § 307(b)(2), 42 U.S.C. § 1857h-5(b)(2) (1970). *See* notes 29, 30 *supra*.

34. CAA § 304(a), 42 U.S.C. § 1857h-2(a) (1970).

35. FWPCA § 505(a), (g), 33 U.S.C. § 1365(a), (g) (Supp. V 1975).

36. FWPCA § 505(a), 33 U.S.C. § 1365(a) (Supp. V 1975); CAA § 304(a), 42 U.S.C. § 1857h-2(a) (1970). In both Acts the citizen-suit provisions read in substantial part:

(a) Except as provided in subsection (b) [of this section], any [person (title 33) or citizen (title 42)] may commence a civil action on his own behalf—

. . . .

(2) 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.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to order the Administrator to perform such act or duty

(b) No action may be commenced—

. . . .

(2) under subsection (a)(2) [of this section] 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 [§ 1857c-7(c)(1)(B) of title 42, or §§ 1316 and 1317(a) of title 33, or an order issued by the Administrator pursuant to § 1857c-8(a) of title 42]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

. . . .

(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 or effluent] standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Sorting out who may take which cases to what courts and when they may do so under these provisions has already yielded a bumper crop of litigation. This Article undertakes to analyze and criticize the judicial review provisions under the federal pollution laws and the cases interpreting them and to suggest legislative and judicial improvements.³⁷

I. ACTIONS SUBJECT TO REVIEW

Not every action of the Administrator under the CAA and the FWPCA is expressly made reviewable. For example, nothing is said about judicial review of regulations respecting the discharge of sewage from vessels³⁸ or the discharge of oil and other hazardous materials;³⁹ of the decision to allow additional time to control the emission of "hazardous" air pollutants;⁴⁰ or of the various determinations to be made with respect to grants for sewage treatment plant construction.⁴¹ In some such cases a citizen suit will lie under the quasi-mandamus provisions to compel performance of a non-discretionary duty, as when the Administrator was ordered to allot the sums appropriated for construction grants under the FWPCA.⁴² As I shall attempt to show below,⁴³ however, these provisions cannot be stretched into a general mandate for reviewing all actions on the merits. In cases beyond their scope one must ask whether judicial review can be had on some basis outside the pollution statutes themselves.

The Federal Administrative Procedure Act (APA) provides that, "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law,"⁴⁴ "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."⁴⁵ These provisions, the Supreme Court has said, embody a "basic presumption of judicial review": "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."⁴⁶ Therefore the mere omission of an action of the Administrator from the explicit review provisions of the CAA and the FWPCA does not demonstrate that such action cannot be reviewed;⁴⁷ one must ask in each instance whether the omission reflects a congressional

37. This Article was originally prepared as a report to the Administrative Conference of the United States. The Conference acted on most of the recommendations of that report in December 1976. See 41 Fed. Reg. 56,768 (1976). The Article reflects the action of the Conference and other recent developments.

38. FWPCA § 312, 33 U.S.C. § 1322 (Supp. V 1975).

39. *Id.* § 311, 33 U.S.C. § 1321.

40. CAA § 112, 42 U.S.C. § 1857c-7(c)(1)(B)(ii) (1970).

41. FWPCA § 204, 33 U.S.C. § 1284 (Supp. V 1975).

42. See *Train v. City of New York*, 420 U.S. 35 (1975), in which jurisdiction was not discussed.

43. See text accompanying notes 207-11 *infra*.

44. 5 U.S.C. § 701(a) (1970).

45. *Id.* § 704.

46. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967) (citation omitted).

47. *Abbott Laboratories v. Gardner* held that the inclusion of specific provisions for review of certain actions need not imply that the failure to provide for review of others was an attempt to preclude review.

desire to preclude review or to commit the question to agency discretion, and, if not, whether independent jurisdictional grounds exist outside the pollution statutes to support a judicial challenge.

Finding independent jurisdictional grounds is easy. A claim that the Administrator has erred in carrying out duties imposed by federal statute is a claim arising under federal law,⁴⁸ and the \$10,000 jurisdictional minimum for such cases was recently made inapplicable to any action "against the United States, any agency thereof, or any officer or employee thereof in his official capacity."⁴⁹ The same act amended the APA to do away with any lingering possibility that actions for nonmonetary relief against federal officers might be barred by sovereign immunity or for failure to join the United States as a party.⁵⁰ The Declaratory Judgment Act provides a remedy.⁵¹ Thus, assuming a ripe controversy and a plaintiff with standing, the only question is whether Congress meant to preclude review.

The quasi-mandamus provisions expressly declare that they do not preclude judicial review of actions they do not cover: "Nothing in this section shall restrict any right which any person . . . may have under any statute or common law . . . to seek any other relief . . ." ⁵² The provisions for review by federal courts of appeals are silent on this question, but the House Committee was explicit in respect to section 509 of the FWPCA: "The inclusion of section 509 is not intended to exclude judicial review under other provisions of the legislation that are [sic] otherwise permitted by law."⁵³ Legislative history is not so clear with respect to section 307 of the CAA, but again it gives no evidence of a purpose to limit review. The Senate Report states that the purpose of section 307 was the removal of "uncertainty" as to the availability of judicial review and that the "precluding of review does not appear to be warranted or desirable"; it says nothing about actions omitted from section 307.⁵⁴ In the case of neither statute, therefore, can there be a showing of "clear and convincing evidence" of an intention to restrict nonstatutory review generally. It remains possible, however, that review of particular actions may be found precluded or otherwise inappropriate.

A. *State Action on Water Permits*

Section 402 of the FWPCA⁵⁵ authorizes the Administrator, or upon his certification a state, to issue permits allowing the discharge of pollutants.

48. The claim therefore falls within 28 U.S.C. § 1331 (1970), the "federal question" provision. *Id.* § 1331(a).

49. Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6553 (amending 28 U.S.C. § 1331 (1970)).

50. *Id.* § 1, at 6577 (amending 5 U.S.C. § 702 (1970)).

51. 28 U.S.C. § 2201 (1970).

52. CAA § 304(e), 42 U.S.C. § 1857h-2(e) (1970); FWPCA § 505(e), 33 U.S.C. § 1365(e) (Supp. V 1975).

53. H.R. REP. NO. 911, 92d Cong., 2d Sess. 136 (1972).

54. S. REP. NO. 1196, 91st Cong., 2d Sess. 40-41 (1970).

55. 33 U.S.C. § 1342(a), (b) (Supp. V 1975).

Section 509(b)⁵⁶ provides for review of the Administrator's action under section 402 by federal courts of appeals; it is silent with respect to review of state action. A claim that a state official has issued or denied a permit because of a misapplication of the federal statute or regulations would "aris[e] under" federal law; sovereign immunity would not be a barrier to an injunctive or declaratory action because the officer allegedly would be acting beyond his authority;⁵⁷ at least if the amount in controversy exceeded \$10,000,⁵⁸ there would be district court jurisdiction unless review is precluded.

Finding a cause of action on the merits might be more difficult. Both the applicant injured by an erroneous denial and the pollutee injured by an erroneous grant appear to be within the protective purpose of the federal law they seek to enforce,⁵⁹ but that is not always sufficient.⁶⁰ The statute does require that an approved state program "at all times be in accordance with" section 402 and with guidelines issued under section 304,⁶¹ but it explicitly provides two different remedies in case of noncompliance: EPA veto of the individual permit grant⁶² and revocation of approval of the state program.⁶³ Nevertheless, the inference that Congress meant to leave applicants without a remedy for unlawful denial of a permit seems so harsh as to be highly improbable; and the provision that "compliance with a permit . . . shall be deemed compliance" with most provisions of the federal statute,⁶⁴ coupled with the apparent legislative understanding that the EPA's veto power would be sparingly exercised,⁶⁵ is powerful evidence that some review of an erroneous grant is necessary to carry out the statutory purpose of sections 304 and 402 of the FWPCA.

But the inference is strong that any such review should be had, subject to possible Supreme Court supervision,⁶⁶ in a state court. The omission of state permit action from review in federal courts of appeals does not seem inadvertent, since Congress explicitly provided for such review of identical federal actions under the same section. No reason appears for thinking Congress preferred district court review for state permit action, since the

56. *Id.* § 1369(b).

57. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908); *cf. Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 698-702 (1949).

58. *See* 28 U.S.C. § 1331 (1970). An action charging violation of the statute, and arguably also one charging violation of regulations under it, would also fall within 28 U.S.C. § 1337 (1970), which gives jurisdiction without regard to amount of actions arising under statutes "regulating commerce," if the interpretation of two courts of appeals is accepted. *See, e.g., Imm v. Union R.R.*, 289 F.2d 858, 859-60 & n.3 (3d Cir. 1961); *D. CURRIE, FEDERAL COURTS* 533-34 (2d ed. 1975).

59. *See J.I. Case Co. v. Borak*, 377 U.S. 426, 433-35 (1964).

60. *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 455-56, 458, 462, 464-65 (1974).

61. 33 U.S.C. § 1342(c)(2) (Supp. V 1975).

62. *Id.* § 1342(d)(2).

63. *Id.* § 1342(c)(3).

64. *Id.* § 1342(k).

65. *See Mianus River Preservation Comm. v. Administrator*, 541 F.2d 899, 907-09 (2d Cir. 1976).

66. *See* 28 U.S.C. § 1257 (1970).

statute contemplates identical hearings before state and federal agencies.⁶⁷ If federal review were to be provided, the treatment of comparable federal action suggests it would have been in the appellate court. The omission, therefore, is persuasive if not compelling evidence of an intention to preclude all initial federal court review, especially since the presence of a state officer as defendant and the probable existence of ancillary state law issues furnish plausible reasons for such a decision.⁶⁸

B. *Vehicle Emission Standards*

Section 307(b) of the CAA provides for review by federal courts of appeals of new motor vehicle emission standards "other than a standard required to be prescribed under section 202(b)(1)"—in other words, except for the hydrocarbon, carbon monoxide, and nitrogen oxide standards applicable to "light-duty vehicles" manufactured during or after "model year" 1975. Two alternative inferences may be drawn from this exception, since it clearly is not an accident: that the excepted standards are reviewable under general federal law in the district courts, or that they are not reviewable at all. It is difficult to imagine any reason why these standards, in contrast to other new motor vehicle standards, are more suitable for pre-enforcement review in the district rather than the circuit courts. Perhaps a more plausible explanation is that Congress foresaw, first, little scope for judicial review because the contents of these regulations are very precisely prescribed in the statute; and second, little time for review because of the short lead time before compliance was required. Moreover, Congress may have thought it was providing an ample safety valve in section 202(b)(5), which allows a one-year extension of the 1977 carbon monoxide and hydrocarbon standards upon proof of specified hardships. The denial of an extension is subject to judicial review in the courts of appeals.

None of these, however, is a sufficient reason for excluding judicial review altogether. That the 1977 and 1978 light-duty vehicle standards must require a ninety percent reduction in the exhaust levels of earlier vehicles by no means eliminates the possibility of disputes over what the earlier levels were; that the Administrator's 1975 standards were specifically incorporated into the statute does not immunize them from constitutional attacks, however unlikely to succeed. Furthermore, the extension provision neither applies to nitrogen oxides, nor allows more than a single year's

67. See FWPCA § 509(a)(1), (b)(3), 33 U.S.C. § 1342(a)(1), (b)(3) (Supp. V 1975). The EPA regulations, while providing both a "public hearing" and an "adjudicatory hearing" upon federally issued permits, see notes 102 and 103 *infra*, require only the former for state permits, and then only if there is "a significant public interest." 60 C.F.R. § 124.36 (1976). The consistency of this provision with the statutory requirement of a "public hearing" in this adjudicative context seems questionable; in any case the EPA practice is hardly indicative of a congressional intention to differentiate between state and federal permits, for the statute uses the same word for both.

68. *Cf. Mianus River Preservation Comm. v. Administrator*, 541 F.2d 899, 906 (2d Cir. 1976).

respite, nor permits an attack upon the validity of the regulation. Thus, there may indeed be occasions for judicial review of these standards.

That pre-enforcement review may be obstructed by the pressures of time does not mean that a manufacturer subjected to sanctions for violating the standards should be prohibited from challenging them at that time; indeed the assumption of *Yakus v. United States*⁶⁹ is that, at least where judicial enforcement is sought, he must be allowed to do so unless he has had an adequate prior opportunity. In contrast to the situation involving state permit action under the FWPCA, state court review does not seem a realistic possibility.⁷⁰ The serious constitutional question that would be posed if the EPA were permitted to impose sanctions for violations of regulations that were never subject to challenge, and the Supreme Court's interpretation of the APA as requiring a "clear and convincing" showing of intent to preclude judicial review, suggest that nonstatutory review of the emission standards excepted from section 307 is not precluded.

C. Enforcement Notices and Orders

One case in which nonstatutory review was held unavailable is *West Penn Power Co. v. Train*.⁷¹ West Penn had been served with a thirty-day notice for violation of implementation plan provisions respecting particulates and sulfur oxides. It filed an action in the district court, alleging that it was in compliance with the plan.⁷² The court of appeals correctly held that, because the validity of the plan was not under attack, the action was not barred by section 307's thirty-day limitation or venue provisions.⁷³ Nevertheless, the court gave three reasons for holding that the action could not be maintained: The notice of violation was not a "final" agency action as required by the APA; whether to enforce the notice by further administrative or judicial proceedings was committed to the Administrator's discretion; and in any event the APA provided no basis for jurisdiction to challenge administrative action.⁷⁴

In holding the notice not "final" the court paid no heed to the compelling argument of the dissent that the company found itself in a serious dilemma: it must either accede to the EPA's interpretation of the plan, which meant installing an expensive scrubber, or it must risk penalties and a possible shutdown if its own interpretation turned out to be wrong.⁷⁵ The case was as ripe for decision as if the dispute had been over the validity of

69. 321 U.S. 414, 439, 444 (1944).

70. It is difficult to imagine any reason why Congress might have wanted these regulations to be reviewed in state rather than in federal courts, as both the defendant and the governing law are federal. Indeed the jurisdiction of state courts over federal officers in injunctive proceedings is highly doubtful. *See, e.g., McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603-05 (1821) (mandamus); *Pennsylvania Turnpike Comm'n v. McGinnes*, 179 F. Supp. 578, 579-80, 583 (E.D. Pa. 1959); D. CURRIE, FEDERAL COURTS 630-34 (2d ed. 1975).

71. 522 F.2d 302 (3d Cir. 1975).

72. *Id.* at 305-06.

73. *Id.* at 309.

74. *Id.* at 310-11.

75. *Id.* at 318 (Adams, J., dissenting).

the regulation itself.⁷⁶ Thus even if the notice was not "final" agency action, there was an "actual controversy" between the parties over the interpretation of the implementation plan, and for such controversies the Declaratory Judgment Act⁷⁷ affords a remedy—provided, of course, there is jurisdiction.

That the EPA "may" rather than "must" follow up a thirty-day notice with an order or complaint would be highly relevant if a plaintiff sought to compel EPA to take enforcement action, for the inevitable defense would be that the Administrator had discretion not to proceed. West Penn, however, made no such claim. Its position was that the EPA had no authority to enforce its interpretation of the plan, for West Penn was not in violation. That the EPA has discretion not to sue those who are in violation does not mean it has discretion to sue those who are not; actions against prosecutors with the usual discretion not to prosecute are common when the plaintiff alleges there is no right to prosecute at all.⁷⁸

The court's third argument was that the APA provided no jurisdictional basis. The Supreme Court has since agreed,⁷⁹ but the jurisdictional problem has been solved by the removal of the amount requirement in actions against federal officers.⁸⁰

One court has gone so far as to refuse to determine whether a plaintiff was in violation of an implementation plan provision after the EPA had issued an order against it.⁸¹ In part this conclusion was erroneously based upon section 307's provision for exclusive appellate court jurisdiction to review the validity of the plan. But the court also found judicial review of orders precluded by the Act's failure to provide explicitly for review. First, the court argued, the statute represented a "strong congressional desire to protect the public health"; second, a provision for such review had been deleted from the bill by the Conference Committee "follow[ing] discussion in the Senate of the need for a simple, direct method of enforcement and the need to issue an immediate cease-and-desist order to protect the public health."⁸²

The court's reasoning is unpersuasive. That public health was at stake gives us no clue as to Congress' intentions on judicial review; the leading case refusing to find preclusion of review by silence arose under a statute protecting public health.⁸³ The provision deleted from the earlier Senate bill did not quite authorize judicial review, since it merely stated that compliance with an order would not have "foreclose[d]" a suit to challenge the order. Arguably the detailed venue provision included for such suits

76. *Cf.* *Abbott Laboratories v. Gardner*, 387 U.S. at 152-53; *National Automatic Laundry & Cleaning Council v. Schultz*, 443 F.2d 689, 696 (D.C. Cir. 1971).

77. 28 U.S.C. § 2201 (1970).

78. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452 (1974).

79. *Califano v. Sanders*, 97 S. Ct. 980 (1977).

80. *See* note 49 *supra*.

81. *Lloyd A. Fry Roofing Co. v. EPA*, 9 ERC 1265, 1269-71 (W.D. Mo. 1976).

82. *Id.*

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

indicated more than a desire to leave the matter to general law, but quite clearly the reason for the reference to review was the fear that in its absence one would have to risk penalties in order to make a challenge.⁸⁴ The omission of this provision in conference is as consistent with the conclusion that it was unnecessary, or that compliance should moot review, as with the conclusion that review was meant to be excluded. The "discussion in the Senate" preceding deletion in fact took place during a committee hearing on a different bill that said nothing about judicial review, long before any action by the Senate on either bill; while one party to the discussion argued that the EPA should be able to enter an order without prior hearing, there was no suggestion that judicial review should be barred.⁸⁵ In light of the APA's presumption of reviewability, especially after *Abbott Laboratories v. Gardner*,⁸⁶ far more evidence of intention to exclude judicial review should be necessary.

The present law is adequate to afford a forum in both the cases just discussed, but the danger that one so seriously in need of judicial guidance can be denied it by misinterpretation of that law suggests the desirability of an amendment to make clear the power of the district courts to resolve actual controversies over the interpretation of implementation plans or other regulations under the pollution laws.⁸⁷

D. The Notice Requirement

Quite a different problem of nonstatutory review was raised by *Natural Resources Defense Council, Inc. v. Train*.⁸⁸ NRDC sued to compel the Administrator to issue effluent guidelines within the deadlines of section 304 of the FWPCA. It had neglected to give the EPA the sixty-day notice required by the citizen-suit provision of section 505, but the court held jurisdiction lay under the APA: section 505 was intended to increase, not to contract judicial review, and its explicit saving clause made clear that it did not preclude actions that could otherwise be brought under other laws.⁸⁹

The trouble with this reasoning is that it undermines the flat statutory requirement of prior notice to the EPA. It is one thing to hold that section 505 is not meant to make unreviewable actions that fall outside its purview, or to make unavailable remedies, such as damages, that it does not afford. But to hold that Congress by a general saving clause intended to allow precisely the relief authorized by section 505 to be pursued against the precise actions enumerated in that section without compliance with the

84. S. REP. NO. 1196, 91st Cong., 2d Sess. 22, 98 (1970).

85. 2 SENATE COMM. ON PUBLIC WORKS, 93d CONG., 2D SESS., LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 1005-06 (1974).

86. 387 U.S. 136 (1967).

87. The Administrative Conference Committee on Judicial Review decided not to propose a recommendation to that effect, doubting its necessity and its efficiency in resolving concrete cases.

88. 510 F.2d 692 (D.C. Cir. 1975).

89. *Id.* at 700-01; *accord*, NRDC v. Callaway, 524 F.2d 79, 83-84 (2d Cir. 1975); Conservation Soc'y v. Secretary of Transp., 508 F.2d 927, 938-39 & n.62 (2d Cir. 1974).

conditions carefully attached by the statute is another matter. Congress evidently thought notice to the Administrator served an important purpose in affording an opportunity for administrative enforcement that might avoid the need for court action;⁹⁰ that purpose may be frustrated by the *NRDC* decision whenever an alternative jurisdictional basis can be found for the identical action that falls within section 505. The court did soften the blow by acknowledging that the failure to give notice would be held a failure to exhaust administrative remedies when there was "reason to believe that further agency consideration may resolve the dispute and obviate the need for further judicial action."⁹¹ This approach transforms Congress' clear and flat rule into a matter of court judgment on the facts of each case, which may unnecessarily promote litigation; and there is no assurance that all courts upholding nonstatutory jurisdiction will take the same view of exhaustion.⁹² I would not have held the notice provision could so easily be evaded; the statutes should be amended to assure that it may not be in the future.⁹³

II. ACTIONS REVIEWABLE IN THE COURTS OF APPEALS

A. Adjudications

Direct appellate review of formal administrative adjudications, such as cease-and-desist orders of the Federal Trade Commission,⁹⁴ has long been standard practice: because the agency's action is to be judged by the administrative record, there is no need for a trial, and thus no need for prior resort to a district court.⁹⁵ Since enforcement under the pollution laws is essentially entrusted to the courts,⁹⁶ formal agency adjudication is not so prominent here as it is under many statutes. Decisions on formal adjudicative records are, however, required with respect to postponement of the date for compliance with an air quality implementation plan under section 110(f)⁹⁷ and suspension or revocation of certificates of motor vehicle emission compliance under section 206(b) of the CAA.⁹⁸ In both cases direct review is expressly authorized in the courts of appeals.⁹⁹

90. See S. REP. NO. 1196, 91st Cong., 2d Sess. 37 (1970).

91. 510 F.2d at 703.

92. Exhaustion was not mentioned in any of the decisions cited in note 89 *supra*.

93. The Administrative Conference is in agreement with this position. Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ C) [hereinafter cited as ACUS Recommendations 1976].

94. 15 U.S.C. § 45 (1970).

95. See Recommendations of the Administrative Conference of the United States, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ 5) [hereinafter cited as ACUS Recommendations 1975]; Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 5-6 (1975) [hereinafter cited as Currie & Goodman].

96. 33 U.S.C. § 1319 (Supp. V 1975); 42 U.S.C. § 1857c-8 (1970). These same sections provide for administrative enforcement orders, but without requiring a hearing. Consequently, on review of such orders, a trial court hearing on adjudicative facts is likely to be required by due process. See Currie, *Federal Air-Quality Standards and Their Implementation*, 1976 A.B. FOUNDATION RESEARCH J. 365, 403.

97. 42 U.S.C. § 1857c-5(f) (1970).

98. *Id.* § 1857f-5(b).

99. CAA §§ 110(f), 307(b), 42 U.S.C. §§ 1857c-5(f), 1857h-5(b) (1970).

1. NPDES Permits

Direct appellate review is also authorized with respect to "the Administrator's action . . . in issuing or denying any permit" under section 402 of the FWPCA.¹⁰⁰ The statutory requirement that the Administrator afford an "opportunity for public hearing" before taking such action¹⁰¹ appears to make this a sensible provision, for in this adjudicatory context "public hearing" would seem to contemplate decision on a trial-type record. The EPA's regulations, however, while providing both for an apparently legislative "public hearing"¹⁰² and for an "adjudicatory" one upon proper request,¹⁰³ authorize the Administrator in reviewing the initial decision of his subordinate to decide "on the basis of the record and any other consideration he deems relevant."¹⁰⁴ Whether this striking provision squares any better with the statute than it does with principles of fair and orderly procedure may be doubted. If it does, it may force the reviewing court to allow a further hearing, which the court of appeals is in a poor position to provide. I suspect, however, that the occasions on which the Administrator goes outside the record will be rare enough not to impair the general principle of direct appellate review; and in any event it is the offending regulation, not the statutory review provision, that ought to be amended.

Nevertheless there is reason to suggest a reservation with respect to direct appellate review of permit actions under section 402. One recent estimate places the number of potential permit applications as high as 75,000,¹⁰⁵ and many may involve questions of significance only in the particular case. Permit appeals therefore may prove to fall within that exceptional class of formal adjudications for which the Administrative Conference has recommended initial district court review "in the interest of conserving the scarce and overextended resources of the Federal appellate system."¹⁰⁶ Delegation of permit authority to the states¹⁰⁷ should reduce the number of permit appeals,¹⁰⁸ and the scope of issues open at the permit stage is still an unresolved question.¹⁰⁹ It seems too early to make a final assessment of the desirability of district court review, but an amendment may be in order if permit cases begin to impose a heavy burden on

100. FWPCA § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) (Supp. V 1975).

101. *Id.* § 402(a)(1), 33 U.S.C. § 1342(a)(1).

102. 40 C.F.R. § 125.34 (1976). This hearing is to be held only if there is "a significant degree of public interest."

103. *Id.* § 125.36. Such a hearing is mandatory on request of any "person . . . having an interest which may be affected."

104. *Id.* § 125.36(n)(12).

105. *See* NRDC v. EPA, 537 F.2d 642, 646 n.11 (2d Cir. 1976).

106. ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ g). *See also* Currie & Goodman, *supra* note 95, at 18-19, 24-25.

107. FWPCA § 402(b), (c), 33 U.S.C. § 1342(b), (c) (Supp. V 1975).

108. *See* Mianus River Preservation Comm. v. Administrator, 541 F.2d 899, 906 (2d Cir. 1976); text accompanying notes 110-20 *infra*.

109. *See, e.g.,* E.I. du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 1027-28 (4th Cir. 1976), *aff'd in part and rev'd in part*, 97 S. Ct. 965 (1977).

the courts of appeals. In any event, the problem should be a transitory one; the flood of applications should decline to a trickle after sources now in existence receive their permits.

The provision for reviewing the issuance or denial of a permit also poses a question of interpretation. While it is clear enough that state action with respect to section 402 permits is not reviewable in the courts of appeals,¹¹⁰ the Administrator has authority to veto state issuance of such a permit.¹¹¹ In *Mianus River Preservation Comm. v. Administrator*,¹¹² the Second Circuit held his failure to exercise that authority was not "the Administrator's action . . . in issuing or denying . . . [a] permit" within section 509(b). In reaching this conclusion the court opined that "the option to take no action" appeared to be "committed to the Administrator's almost unfettered discretion," citing legislative history to indicate that the veto power should be sparingly exercised and a statutory provision authorizing its waiver without specifying on what grounds.¹¹³ Emphasizing, moreover, that "the federal agency took no action at all," it quoted from a related district court opinion: "The mere failure to disapprove a state administrative action cannot be deemed decisionmaking by a federal body."¹¹⁴ The result cannot clearly be said to embody either the conclusion that the failure to veto was insulated from review by the APA provision for actions "committed to agency discretion by law"¹¹⁵ or the thesis that inaction is necessarily excluded from section 509, for it seems a cross between the two: "Such inaction, predicated upon the statute's express design, can hardly be described as 'Administrator's action . . . in issuing . . . [a] permit'"¹¹⁶

The decision was probably right, though neither theory suggested by the court is beyond argument. One may question whether the waiver provision should really be construed to permit the EPA to refuse altogether to carry out a reviewing function Congress undeniably saw fit to confer.¹¹⁷ And since an explicit decision not to veto would appear to be EPA "action" for purposes of judicial review,¹¹⁸ it is arguable that review under section

110. *Mianus River Preservation Comm. v. Administrator*, 541 F.2d 899, 902-06 (2d Cir. 1976).

111. FWPCA § 402(d)(2), 33 U.S.C. § 1342(d)(2) (Supp. V 1975).

112. 541 F.2d at 906-10.

113. The waiver provision provides that "[t]he Administrator may, as to any permit application, waive paragraph (2) of this subsection." FWPCA § 402(d)(3), 33 U.S.C. § 1342(d)(3) (Supp. V 1975).

114. 541 F.2d at 909, quoting *Shell Oil Co. v. Train*, 415 F. Supp. 70, 78 (N.D. Cal. 1976).

115. 5 U.S.C. § 701(a)(2) (1970).

116. 541 F.2d at 909.

117. *Cf. NRDC v. Train*, 9 ERC 1425 (2d Cir. 1976), which directed institution of proceedings leading to the issuance of an air quality standard for lead despite a provision that the Administrator need do so only for those pollutants "for which . . . he plans to issue air quality criteria." CAA § 108(a)(1)(C), 42 U.S.C. § 1857c-3(a)(1)(C) (1970).

118. *See* 5 U.S.C. §§ 551(6), (13) (1970), incorporated by reference in § 701(a)(2) of the same title with respect to judicial review: "'agency action' includes . . . an agency . . . order," *id.* § 551(13), while "'order' means . . . a final disposition, whether affirmative [or] negative . . . in form," *id.* § 551(b).

509 should not be evaded simply because, for identical reasons, the Agency has chosen to achieve the same result without entering an order. The failure to act at all, however, is generally dealt with separately under the provision for citizen suits in the district courts,¹¹⁹ presumably because in such cases there will usually be no formal administrative record. That a formal hearing record may accompany a state agency's denial of a permit application¹²⁰ should not be decisive, as the word "action" in section 509 applies as well to other situations in which inaction would mean no record, and the citizen suit lies whether there is a record or not. Moreover, even if the Administrator has taken "action" by failing to act, he has neither "issu[ed]" nor "den[ied]" a permit, as section 509 seems to require; nor would he have done so by entering an order expressly declining to block the state's issuance of the permit. This difficulty also makes somewhat questionable the court's dictum acknowledgment, and the EPA's concession, that the court of appeals could review the Administrator's actual veto of the issuance of a state permit, though in light of the policy of section 509 such action might be held a "den[ial]." Review of the Administrator's veto authority in the district courts would present problems of its own that were not addressed in *Mianus*.

These problems of interpretation are perhaps too minor to justify congressional attention, but neither the scope of discretion in exercising the veto power, nor the availability of judicial review of that exercise, appears to have been adequately thought through. Since the EPA's action or failure to act is presumably to be based upon the state hearing record, it seems reasonable, subject to the concern expressed above with regard to permit review generally, that such review as is allowed be had in the courts of appeals.

2. Other Adjudications

The statutes are silent on judicial review of the issuance or denial of dredge deposit or sludge discharge permits under sections 404 and 405 of the FWPCA,¹²¹ and of two-year waivers of hazardous pollutant requirements to enable individual sources to install controls under section 112 of the CAA.¹²² Dredge permits are subject to a hearing requirement that makes them theoretically analogous, for review purposes, to permits under section 402, although they probably will be far less numerous. Sludge permits, inexplicably, are not subject to a hearing requirement, nor are section 112 waivers; in such cases, absent an EPA regulation prescribing hearings,¹²³ a judicial hearing is likely to be necessary on facts peculiar to

119. FWPCA § 505, 33 U.S.C. § 1365 (Supp. V 1975).

120. *Id.* § 402(b)(3), 33 U.S.C. § 1342(b)(3).

121. 33 U.S.C. §§ 1344, 1345.

122. 42 U.S.C. § 1857c-7(c)(1)(B)(ii) (1970).

123. The regulations, 40 C.F.R. §§ 61.10-61.11 (1976), provide for decisions regarding waivers under the hazardous substances provision to be based initially upon the written submission of the applicant. If the request is to be denied, the EPA must provide the applicant with "notice of the information and findings upon which such intended denial is based" and

the applicant, thus making the district court the better forum. It would be better to have such hearings before the expert agency itself, with review in the courts of appeals, unless the unimportance of the matter or the number of prospective appeals counsels otherwise.

Direct appellate review is provided for orders in response to applications to postpone compliance with vehicle emission standards under section 202(b)(5) of the CAA.¹²⁴ Though the "public hearing" required in the latter instance has been held to be a "legislative" one,¹²⁵ in practice it seems to have produced an adequate record for direct review,¹²⁶ and the obvious importance of the determination makes avoidance of the district court desirable on efficiency grounds.

B. Rulemaking

Direct appellate review of informal rulemaking is a relatively recent innovation¹²⁷ made practicable by the increasing tendency of courts and Congress to require agencies to base regulations on materials that are before them¹²⁸ and on the recognition that a trial-type hearing may be unnecessary to establish "legislative" facts¹²⁹ even if brought out for the first time in a reviewing court.¹³⁰

The pollution statutes are in accord with this modern trend; most of the actions subject to direct appellate review are regulations adopted without formal hearings. Not every such regulation, however, is included, and it is not always easy to determine which are. One obvious omission, already discussed,¹³¹ is the light-duty vehicle emission standards; since they seem as appropriate for direct review as do other vehicle standards for which such review is provided, it would be proper to make them reviewable in the courts of appeals.¹³² Other omissions and interpretive problems will now be addressed.

afford the opportunity for presentation of "additional information or arguments," apparently in writing.

124. 42 U.S.C. § 1857f-1(b)(5); see CAA § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970).

125. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630 (D.C. Cir. 1973).

126. See *id.*

127. See *United Gas Pipe Line Co. v. FPC*, 181 F.2d 796 (D.C. Cir. 1950), construing a provision for direct review of FPC "orders" not to include regulations because "an appellate court has no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues." *Id.* at 599. But the *United Gas Pipe Line* doctrine is in decline today. Currie & Goodman, *supra* note 95, at 39-40.

128. *E.g.*, Occupational Safety & Health Act, 29 U.S.C. § 655(f) (1970) (construed in *Associated Indus. of N.Y. State, Inc. v. Department of Labor*, 487 F.2d 342, 349 (2d Cir. 1973)); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 379-87 (D.C. Cir. 1973) (new source performance standards, CAA § 111, 42 U.S.C. § 1857c-6 (1970)).

129. See K. DAVIS, ADMINISTRATIVE LAW TEXT, § 7.03, at 160 (3d ed. 1972).

130. See Currie & Goodman, *supra* note 95, at 39-54. This method of review, under appropriate circumstances, has been endorsed by the Administrative Conference. ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ g).

131. See text accompanying notes 68-71 *supra*.

132. The Conference has so recommended. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ E(2)).

1. *Disapproval or Decision Not to Adopt Regulations*

In *Utah International, Inc. v. EPA*¹³³ the Tenth Circuit held that section 307 of the CAA did not authorize direct review by the courts of appeals of the Administrator's disapproval of a state plan for the implementation of air quality standards.¹³⁴ The statute ambiguously provides for review of "action in approving" plans,¹³⁵ which could refer either to actual approval alone or to the Administrator's decision either way on the approval question. The Tenth Circuit held that section 307 incorporated the usual limitation of review to final action¹³⁶ and that rejection of a state plan under the circumstances was not final:

[T]he effect of a disapproval order under the Clean Air Act is to reopen the administrative process . . . [U]ntil such time as the E.P.A. promulgates its own plan, after allowing the state an opportunity to come up with a revised plan of its own, there is no final applicable [sic] order under the statute.¹³⁷

The court added it thought it "doubtful" that the case was ripe for review under the principles of *Abbott Laboratories v. Gardner*.¹³⁸

The decision is supported by the considerations that underlie the related doctrines of ripeness, finality, and exhaustion of administrative remedies, as well as the federal presumption against interlocutory appeals from trial courts.¹³⁹ While approval of a state plan, like the adoption of another self-executing regulation in *Abbott*, imposes obligations upon the affected polluter that place him in the dilemma of risky disobedience or costly compliance, disapproval ordinarily does not; and the controversy may be mooted in the course of remaining proceedings to determine the contents of the substitute federal plan. Ordinary principles of finality, as the Tenth Circuit has held, should be read into section 307.

This is not to say, however, that "action in approving or promulgating" plans should be held to exclude every plan disapproval. If the EPA disapproves a plan *revision* proposed by a state on its own initiative, its action will often be final: no further administrative proceedings are necessarily contemplated, and the existing plan remains in effect. Similarly, if the Administrator after a full notice-and-comment proceeding finally decides not to adopt any regulation at all, there will be an adequate record for resolving in the court of appeals any contention that he was required to do so.¹⁴⁰ Policy therefore counsels construing the references to "action . . . in promulgating" standards or "in approving" plans in section 307 of the

133. 478 F.2d 126 (10th Cir. 1973).

134. *Id.* at 127.

135. CAA § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970).

136. The APA makes reviewable "final agency action" and other "agency action made reviewable by statute." 5 U.S.C. § 704 (1970).

137. 478 F.2d at 127-28.

138. 387 U.S. 136 (1967), *cited in* 478 F.2d at 128.

139. *See generally* 28 U.S.C. §§ 1291, 1292 (1970).

140. He may have had discretion to adopt no standard at all, but the court of appeals can decide the extent of that discretion as well as the district court.

CAA and in section 509 of the FWPCA to include final action either way on the question of approval. The alternative of total unreviewability is not lightly to be inferred, and district court review is unpalatable; there is no reason the outcome before the Administrator should determine the forum for judicial review. The proper interpretation of these provisions could be facilitated by amending them to afford review of "final action . . . with respect to approval or promulgation" of standards or plans. Nevertheless, the courts have so far done well with the existing language despite its ambiguity.

2. *Implementation Plan Extensions*

Although the CAA provides for direct appellate review of decisions respecting postponement of the date by which an individual source must comply with an implementation plan (section 110 (f)), it says nothing about review of the decision whether or not to extend the date for compliance with the ambient standard itself under section 110(e). Nevertheless, the courts of appeals, without discussion, have entertained challenges both to the grant¹⁴¹ and to the denial¹⁴² of section 110(e) extensions in the course of reviewing implementation plans under section 307. This practice seems clearly correct. There is no reason to think Congress intended this decision to be either unreviewable or reviewable in the district courts. Since the deadline determines the length of time in which the ambient standard is to be implemented, and since the extension decision is made at the time the Administrator passes upon the plan, a state request for extension of the date is realistically a part of its implementation plan, and its approval is therefore subject to review under section 307. Conversely, when the Administrator refuses the extension and promulgates a plan of his own, the refusal can be challenged as an attack upon the compliance schedules in the federal plan.

3. *Emission Standards*

Another question about the coverage of section 307 was raised in *United States v. Big Chief, Inc.*¹⁴³ Charged with the criminal violation of a federal regulation requiring the wetting of asbestos materials prior to building demolition, Big Chief attempted to challenge the validity of the regulation in federal district court. Section 307, however, provides for exclusive jurisdiction in the courts of appeals to review any "emission standard" under section 112, the hazardous pollutant provision, under which the demolition rule had been promulgated. Though it ultimately upheld the regulation on the merits, the court made clear it thought its jurisdiction was precluded by section 307: to limit direct appellate review to numerical standards "would frustrate the plain legislative purpose behind

141. *NRDC v. EPA*, 494 F.2d 519, 524-25 (2d Cir. 1974).

142. *Texas v. EPA*, 499 F.2d 289, 318 (5th Cir. 1974).

143. 7 ERC 1840 (E.D. La. 1975).

the review provision.”¹⁴⁴ The thrust of the review provision, the court correctly intimated, was to provide review of any regulations adopted purportedly under the emission standard authority of section 112.¹⁴⁵

4. Effluent Guidelines

Section 301(b) of the FWPCA provides that “there shall be achieved” by specified types of sources “effluent limitations” requiring application by 1977 of “the best practicable control technology currently available,” and by 1983 of “the best available technology economically achievable,” in either case “as defined” or “as determined” by the Administrator “pursuant to section 304(b).” The latter section, in turn, directs the Administrator, “for the purpose of adopting or revising effluent limitations under this Act,” to adopt “regulations, providing guidelines for effluent limitations” that describe the effluents to be obtained upon use of the best practicable and best available technology. The Administrator adopted effluent guidelines for corn wet milling plants. In *CPC International, Inc. v. Train*,¹⁴⁶ a large corn processor challenged the guidelines directly in the Court of Appeals for the Eighth Circuit. Section 509 says nothing about judicial review of guidelines promulgated under section 304, but the EPA took the position that they were within section 509’s provision for appellate review of “effluent limitation[s] . . . under § 301(b).”¹⁴⁷ The court dismissed the suit for lack of jurisdiction.¹⁴⁸

Section 301, the court concluded, did not authorize the promulgation of effluent limitations by regulation. By forbidding issuance of a discharge permit “outside the guidelines,” section 402(d)(2) was said to demonstrate that the permit-issuing authority is to follow the guidelines promulgated under section 304(b), and is not to refer to independent regulations promulgated under section 301.¹⁴⁹ Legislative history was mustered: an EPA administrator had testified that “effluent limitations required by Section 301 would be established and applied to all point sources . . . by means of the permits issued under Title IV.”¹⁵⁰ In short, the effluent limitations to be established under section 301 were those in individual permits granted under section 402, not the section 304 guidelines upon which those permit limitations were to be based.

144. *Id.* at 1841.

145. *Id.* The Sixth Circuit, rejecting the feeble contention that § 307 applied only to procedural attacks on the promulgation of a regulation, has held the same regulation not reviewable in a criminal proceeding. *United States v. Adamo Wrecking Co.*, 545 F.2d 1, 4-6 (6th Cir. 1976). On the issue raised in *Big Chief* it said only, “[W]e see nothing inconsistent with the purposes of this statute in the Administrator’s promulgation of a ‘work practice’ as a condition of an emission standard which, absent fulfillment of the work practice conditions, otherwise prohibits any emission” *Id.* at 6 n.2.

146. 515 F.2d 1032 (8th Cir. 1975).

147. *Id.* at 1037.

148. *Id.* at 1052; *accord*, *CPC Int’l, Inc. v. Train*, 540 F.2d 1329, 1331 & n.1 (8th Cir. 1976) (dictum).

149. *CPC Int’l, Inc. v. Train*, 515 F.2d 1032, 1038-39 (8th Cir. 1975).

150. *Id.* at 1039.

This is a possible interpretation of the statute, but a singularly unappealing one. The court's distinction between section 301 limitations and section 304 guidelines is highly artificial; the court conceded that the sole purpose of the latter was to define the former. The Senate Report, which the court quoted, was quite explicit: "[T]hese [section 304] guidelines would define the effluent limitations required by the first and second phases of the program established under section 301."¹⁵¹ What seems to have motivated CPC in arguing that section 304 guidelines were not reviewable as section 301 limitations was the substantive argument that the limitations embodied in permits are to vary according to individual circumstances. The jurisdictional and uniformity questions, however, are separable; one court has held the EPA may promulgate section 301 limitations by regulation so long as they allow flexibility at the permit stage.¹⁵²

Despite the Eighth Circuit's disclaimer, its interpretation seems to make the explicit provision for review of the approval or promulgation of "effluent limitation[s] . . . under section 301" almost without independent significance. If the only such limitations are those contained in individual permits, they are all reviewable anyway under the section 307 provision respecting the issuance or denial of any permit. The *CPC* court argued that there was no redundancy because "[t]he reference to § 301 is necessary if the Administrator's action under § 301(c), modifying the application of the 1983 requirements to certain point sources, is to be subject to judicial review."¹⁵³ Apparently such determinations are to be made outside the permit process, when that process has been delegated to the state. Yet this cannot be the sole office of section 509's reference to section 301, since "the legislative history shows quite clearly that section 301(c), which was only added during the House-Senate Conference, did not even exist at the time [the review provision] was originally drafted."¹⁵⁴ Moreover, to limit the reference to section 301(c) determinations would, as the Supreme Court has since said, produce the anomalous situation in which the courts of appeals would review individual actions while regulations of general applicability were reviewed in the district courts.¹⁵⁵

In policy terms the *CPC* holding can only be described as a minor disaster. Nowhere does the court begin to intimate why Congress might have wanted to omit the section 304 guidelines from review by the courts of appeals. The same questions concededly will be subject to review there

151. S. REP. NO. 414, 92d Cong., 1st Sess. 51 (1971).

152. *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975).

153. 515 F.2d at 1043.

154. *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1037 (3d Cir. 1975).

Section 301(f) also bans the discharge of certain biological warfare agents and radioactive waste, 33 U.S.C. § 1311(f) (Supp. V 1975), and the court in *CPC* read it to outlaw all discharges without permits. 515 F.2d at 1042-43. While these provisions might be considered effluent limitations, *but see* *American Iron & Steel Inst. v. EPA*, 526 F.2d at 1038 ("section 301(f) is not an 'effluent limitation,' but rather a flat prohibition on all such discharges"), they are not limitations "approved" or "promulgated" by the Administrator; they are prescribed by the statute itself. 33 U.S.C. § 1311(f) (Supp. V 1975).

155. *E.I. du Pont de Nemours & Co. v. Train*, 97 S. Ct. 965, 975 (1977).

when the guidelines are applied to individual permits. There is no reason to believe there will be any greater difficulty in establishing the relevant facts than in reviewing other regulations promulgated after the identical notice-and-comment procedure. Any suggestion that the guidelines might not be ripe for review until applied to the individual in his permit was torpedoed by the court's flat dictum that the guidelines were reviewable in the district courts under general law.¹⁵⁶

The *CPC* case itself most graphically illustrates the inconsistency and waste of the review system it created. As is its practice, the EPA had proposed and adopted simultaneously four sets of effluent requirements for corn wet milling plants: new source performance standards under section 306(b), pretreatment standards for discharges into municipal sewers under section 307(c), and guidelines for best practicable and best available technology under section 304. *CPC* challenged all four; the court reviewed the first two on the merits while declining jurisdiction over the challenge to the existing source regulations.¹⁵⁷ It is not as if the several standards were unrelated. They all affect the same processes of the same industry; the court that masters the industrial facts well enough to pass on one standard has a head start in passing on the others. Indeed, the corn milling standard for new plants, which the court did review, was identical to the 1983 guideline for existing plants, which it refused to review. Moreover, the new source standard was premised upon use of the technology the Administrator had prescribed in his 1977 existing plant guidelines, plus deep-bed filtration. In passing upon the new source standard, the court found it necessary to determine that the technology required by the 1977 guidelines it refused to review was in fact adequate to meet the guideline. This is not to say that the court fully resolved the validity of the guidelines on the merits, for it might still have been open to argument that technology available for new plants could not practicably be incorporated into existing ones. But the overlap of issues was enormous, and the waste of effort in requiring an entirely new challenge to the guidelines in the district court was unforgivable.

The *CPC* court's refusal to consider section 304 guidelines to be section 301 effluent limitations is not compelled by the statutory language or history, is not supported by any conceivable statutory policy, and makes a total shambles of the review process. Five other courts of appeals have since disagreed with *CPC*'s jurisdictional ruling,¹⁵⁸ a sixth court has disagreed with its reasoning,¹⁵⁹ and the House has passed a bill to make it

156. 515 F.2d at 1034. *See also* 540 F.2d at 1331 n.1.

157. The existing source regulations in fact have since been reviewed by a district court. *Grain Processing Corp. v. Train*, 407 F. Supp. 96 (S.D. Iowa 1976).

158. *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976); *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976); *E.I. du Pont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975), *aff'd*, 97 S. Ct. 965 (1977); *American Petroleum Inst. v. EPA*, 526 F.2d 1343 (10th Cir. 1975); *American Meat Inst. v. EPA*, 526 F.2d 442 (7th Cir. 1975).

159. *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975) upheld on the merits EPA's authority to promulgate effluent limitations under § 301 by regulation without

explicit that section 304 guidelines are reviewable in the courts of appeals.¹⁶⁰ The Supreme Court has recently addressed this question. It has held that the EPA has authority to promulgate effluent limitations by regulation under section 301, so that review in the courts of appeals follows as a matter of course.¹⁶¹ While this decision allows the EPA to assure direct appellate review by using the section 301 label, it leaves open the possible denial of such review if the Agency should choose to adopt section 304 guidelines without that label, as apparently it means to do whenever time permits.¹⁶² There is thus still a need to provide for appellate review of such guidelines.

5. Credit for Polluted Intake

In reviewing effluent guidelines for the iron and steel industry the Third Circuit in *American Iron & Steel Institute v. EPA*¹⁶³ (*AISI I*) declared that "any individual point source should be entitled to an adjustment in an effluent limitation . . . if it can show that its inability to meet the limitation is attributable to significant amounts of pollutants in the intake water."¹⁶⁴ The EPA adopted regulations so providing, and the Third Circuit refused to review them in *American Iron & Steel Institute v. EPA*¹⁶⁵ (*AISI II*): "We agree with the EPA's analysis that the Net-Gross Regulations do no more than prescribe the policy and procedures to be followed in connection with applications for permits."¹⁶⁶ Because these regulations "[did] not in themselves restrict quantities, rates, or concentrations"¹⁶⁷ of pollutants, they were not "effluent limitations" within section 509(b) as the statute defines them;¹⁶⁸ because they "[did] not specify the factors to be considered . . . in determining control measures to be utilized by individual point sources,"¹⁶⁹ they were not even "effluent guidelines" under section 304. The court went on to cast doubt even on the reviewability of the regulations in the district court, even though that question was not before it: ". . . without the original gross limitations before us, the modifications, if any, which may be

discussing jurisdiction. The Tenth Circuit in *American Petroleum Inst.* avoided deciding whether § 301 gave the Administrator power to adopt limitations by regulation, finding it sufficient for jurisdictional purposes that he had purported to act under § 301.

160. S. 2710, 94th Cong., 2d Sess., § 18 (House version), 122 CONG. REC. H5285, H5288 (daily ed. June 3, 1976). EPA, justly complaining that the *CPC* decision results in both "bifurcated" review and "at least a one-year delay," has asked Congress to overrule the decision. The Natural Resources Defense Council agrees. See 6 ENVIR. REP. (BNA) 1692 (1976). See also ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ E(1)(b)).

161. *E.I. du Pont de Nemours & Co. v. Train*, 97 S. Ct. 965, 974 (1977).

162. *Id.* at 972-73, 975-76.

163. 526 F.2d 1027 (3d Cir. 1975).

164. *Id.* at 1056.

165. 543 F.2d 521 (3d Cir. 1976).

166. *Id.* at 526.

167. *Id.* at 527.

168. "The term 'effluent limitation' means any restriction . . . on quantities, rates, and concentrations of . . . constituents which are discharged from point sources . . ." 33 U.S.C. § 1362(11) (Supp. V 1975).

169. 543 F.2d at 529.

effected by the operation of the Net-Gross Regulations are both incalculable and unintelligible."¹⁷⁰

The court's concern for the abstract nature of the controversy is exaggerated. The question of background credit is a readily comprehensible one that seems resolvable on the basis of the statute itself, without reference to the particular figures in any individual effluent guideline;¹⁷¹ and that is how the EPA treated it in adopting a general regulation. Yet the other half of the Supreme Court's test for the ripeness of administrative action¹⁷² appears not to be met: the "Net-Gross" regulations have no impact on the discharger until effluent guidelines applicable to him have also been adopted or a permit sought.¹⁷³ The iron and steel guidelines, remanded to the EPA earlier by the Third Circuit, had not been reissued when the background regulations were challenged.¹⁷⁴

Once the guidelines reappear, however, it would be unfortunate to make appellate reviewability of the background regulations depend upon whether the guidelines expressly incorporate them, as the opinion suggests. The Third Circuit itself passed on the question of background credit when it reviewed the original iron and steel guidelines,¹⁷⁵ and other courts have properly reviewed the net-gross regulations in determining the validity of effluent guidelines for other industries.¹⁷⁶ Regardless of the form of words used, the intake credit rules help to define the discharger's obligation under the effluent limitation itself and thus can readily be held to be, in effect, part of the various effluent limitations. Moreover, contrary to what the court said, those rules seem to do precisely what section 304 guidelines are supposed to do: they specify a factor—the presence of untreatable pollutants in the intake water—"to be taken into account in determining the control measures and practices to be applicable to point sources."¹⁷⁷ It follows from my argument regarding the *CPC* case that they should be held reviewable in the court of appeals. In any event the statute too easily lends itself to the court's construction. It should be amended to provide for direct review of all final action respecting regulations *relating to* effluent limitations under section 301.¹⁷⁸

170. *Id.* at 527-28.

171. See Currie, *Rulemaking Under the Illinois Pollution Law*, 42 U. CHI. L. REV. 457, 496 & n.157 (1975).

172. See *Abbott Laboratories v. Gardner*, 387 U.S. at 148-49.

173. See text accompanying notes 133-39 *supra*; cf. *Utah Int'l, Inc. v. EPA*, 478 F.2d 126, 128 (10th Cir. 1973).

174. *American Iron & Steel Inst. v. EPA*, 543 F.2d at 524 & n.6.

175. *American Iron & Steel Inst. v. EPA*, 526 F.2d at 1056.

176. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1361 (4th Cir. 1976); *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976); *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 633 (2d Cir. 1976).

177. 33 U.S.C. § 1314(b)(1)(B) (Supp. V 1975).

178. The second *AISI* decision came down too late for consideration by the Committee on Judicial Review; consequently no proposed recommendation on the subject was presented to the Conference.

6. Water Quality Standards

Conspicuously missing from the review provisions of section 509(b) is the Administrator's approval or promulgation of water quality standards under section 303.¹⁷⁹ Section 301, however, requires among other things compliance with any "limitation . . . required to implement any applicable water quality standard established pursuant to this [Act]."¹⁸⁰ My analysis of the *CPC* case raises the question whether the reference to water quality standards in section 301 renders those standards subject also to judicial review under section 509 as "effluent limitation[s] or other limitation[s] under section [301]."¹⁸¹ The Second Circuit has held, correctly I think, that it does not.¹⁸² The text immediately implies a distinction between water quality standards themselves and "limitation[s] . . . required to implement" them. Even if the standards are "other limitations" within section 509, it is only the regulations implementing them that must be met under section 301.

The Second Circuit described the omission of water quality standards from section 509 as "odd";¹⁸³ it should be rectified.¹⁸⁴ As the court noted in seeking possible reasons for the omission, such standards differ from effluent guidelines in that they "apply only in a single state and have less direct effect on individual enterprises."¹⁸⁵ The latter, however, is equally true of air quality standards and the former of plans for their implementation; both are reviewable in the courts of appeals. Moreover, neither fact seems of great force in determining whether review should be in a district rather than circuit court. That the standard is local argues for review in the various circuits as opposed to the District of Columbia, and its indirect impact argues that review in any forum may be premature. Section 303 does not specify what procedure either a state or the Administrator is to follow with regard to water quality standards; it is possible therefore that the record on review may be somewhat less adequate than in the case of air quality standards, which are the result of notice-and-comment procedure.¹⁸⁶ On the other hand, the silence of the FWPCA with respect to procedure seems more likely to be taken to mean that the notice-and-comment requirements of the APA¹⁸⁷ apply;¹⁸⁸ the disputed decisions

179. 33 U.S.C. § 1369(b) (Supp. V 1975).

180. *Id.* § 1311(b)(1)(C).

181. *Id.* § 1369(b)(1)(E).

182. *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 516 (2d Cir. 1976).

183. *Id.* at 518.

184. The Conference has so recommended. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ E(1)(a)).

185. 538 F.2d at 517.

186. CAA § 109(a), 42 U.S.C. § 1857c-4(a) (1970).

187. 5 U.S.C. § 553 (1970).

188. *See* 5 U.S.C. § 559 (1970): "Subsequent statute may not be held to supersede or modify this subchapter [containing the notice and comment requirements] . . . except to the extent that it does so expressly." *See* *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 170-71 (6th Cir. 1973), holding § 553 applicable to EPA approval of implementation plans.

under the CAA that rejected this conclusion¹⁸⁹ were based largely upon the express provision for a state hearing on such plans¹⁹⁰ that would have made a federal proceeding duplicative. Furthermore, the relevant facts are legislative; they can if necessary be brought out in the court of appeals without a trial-type hearing.

Section 303(e) of the FWPCA provides for state submission of a "continuous planning process," to be approved by the EPA if it "will result in plans" providing, among other things, for "adequate implementation . . . for revised or new water quality standards."¹⁹¹ If the Administrator were to pass upon the implementation plans themselves, the effluent standards they contained would, under the reasoning I have applied to the *CPC* case, be reviewable under section 509 as effluent limitations approved by the Administrator under section 301. The apparent gap between the "planning process" that the EPA is to approve and the actual implementation plan the state is thereafter to adopt, however, introduces a complication: the limitations in the state plan evidently will not themselves be approved by the EPA and thus will fall outside section 509. Moreover, because no federal action is involved, the implication may be that there is no review in the district courts either,¹⁹² although the possibility of federal court enforcement proceedings under section 301 suggests the contrary. Whether the limitations are necessary or sufficient to achieve the water quality standards will presumably be reviewable in the appropriate state or federal court when they are incorporated into a permit.¹⁹³ The principle problem here is attributable to the substantive division of labor between state and federal agencies, not to the provisions for judicial review.

7. Other Omissions

Section 211 of the CAA authorizes the Administrator by regulation to require registration and to "control" or to "prohibit" the manufacture or sale of any motor vehicle fuel or fuel additive.¹⁹⁴ Although section 307 authorizes review by courts of appeals of "any control or prohibition" respecting fuels, the Sixth Circuit has construed it to include registration requirements as well, essentially because direct review of such regulations would be sound policy.¹⁹⁵ That something ought to be the law does not make it so; the statute should be amended to authorize direct review of registration regulations.

The water statute contains a number of additional authorizations for generally applicable regulations for which no judicial review provision is

189. *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973); *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3d Cir. 1973). *Contra*, *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973).

190. CAA § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970).

191. 33 U.S.C. § 1313(e) (Supp. V 1975).

192. *See* text accompanying notes 55-68 *supra* (state permits).

193. However, § 301 also requires the discharger to meet any more stringent limitations established under state law, whether or not necessary to meet the water quality standards.

194. 42 U.S.C. § 1857f-6(c) (1970).

195. *Lubrizol Corp. v. Train*, 547 F.2d 310 (6th Cir. 1976).

made. Section 312, for example, authorizes regulations respecting the discharge of domestic wastes from vessels; section 311 for defining "hazardous substances," prescribing equipment to prevent their discharge, determining what quantities of such materials are harmful, setting per unit dollar amounts for discharge penalties, and establishing inspection standards; section 403 for defining "degradation" of the oceans;¹⁹⁶ section 404 for the deposit of dredged material;¹⁹⁷ and section 405 for the disposal of sewage sludge.¹⁹⁸ All of these seem as susceptible to direct appellate review as do those listed in section 509, and they ought to be included.¹⁹⁹

Section 312 of the FWPCA further authorizes states to ban all boat sewage discharges upon the Administrator's finding that adequate facilities for removal and treatment are reasonably available.²⁰⁰ Nothing is said about either administrative procedure or judicial review, except that the state is to file an "application" and the Administrator is to act within ninety days. Even if no administrative hearing is held and the Administrator relies on factual material outside the application—such as the Agency's own inspection—it may be unnecessary to hold an evidentiary hearing upon judicial review because of the arguably "legislative" nature of the facts in issue. Thus, especially since related regulations under the same section should be made reviewable directly in the courts of appeals, a plausible case can be made for direct appellate review of the adequate facilities determination as well. There is an obvious analogy to approval of a state permit program under section 402, which the courts of appeals may review.²⁰¹ However, the absence of any record requirement—unless remedied by EPA regulation—and the apparent utility of cross-examination of government inspectors if relied upon to resolve narrow factual questions suggest caution. At the least, provision should be made for remand if it proves necessary to conduct a hearing. The Administrative Conference has recommended district court review of informal adjudications except for actions that "typically involve issues of law or of broad social or economic impact," even if a trial will be rare;²⁰² while the action in question is probably rulemaking, the fact that the determination may be no more significant than whether there should be two pumpout stations rather than one in a single harbor argues in any event against burdening the courts of appeals with these cases.²⁰³

196. FWPCA §§ 311-312, 403, 33 U.S.C. §§ 1321-1322, 1343 (Supp. V 1975).

197. *Id.* § 404, 33 U.S.C. § 1344.

198. *Id.* § 405, 33 U.S.C. § 1345.

199. With regard to boat sewage and hazardous substances, which were considered by the Committee on Judicial Review, the Conference has so recommended. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶¶ E(1)(c), (d)).

200. FWPCA § 312(f)(3), 33 U.S.C. § 1322(f)(3) (Supp. V 1975).

201. *Id.* §§ 402, 509(b), 33 U.S.C. §§ 1342, 1369(b).

202. ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ 6(b)(i)).

203. The Conference at EPA's suggestion has recommended direct appellate review. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ E(1)(d)).

Finally, nothing is said of judicial review of approval or disapproval of state permit programs for sludge disposal under the FWPCA section 405,²⁰⁴ or of determinations that specified areas are off limits for the deposit of dredgings under section 404.²⁰⁵ The former is analogous to the approval of state NPDES programs under section 402, which are made reviewable in the courts of appeals; only the probable greater importance of NPDES seems a reasonable justification for the distinction. Presumably the classification of an area as off limits for dredgings is to be done by regulation rather than by adjudication, since it is implicit that all potential depositors would be affected. Nevertheless, since such a decision would probably be of essentially local impact, a good case can be made for retaining district court review.

III. THE CITIZEN-SUIT PROVISIONS

A. *Undermining the Courts of Appeals*

The plaintiff in *Sierra Club v. Ruckelshaus*²⁰⁶ argued that the EPA Administrator was required to disapprove state proposed implementation plans that did not prohibit deterioration of areas cleaner than required by air quality standards. The plaintiff in *Anaconda Co. v. Ruckelshaus*²⁰⁷ argued that the Administrator was required to issue an environmental impact statement and hold an adjudicatory hearing before promulgating a plan provision applying to the plaintiff's plant. Each of these cases was filed in a federal district court, and each court accepted jurisdiction under section 304 of the CAA, which authorizes citizen suits to require the Administrator to perform "any act or duty under this Act which is not discretionary." The district court in *Sierra Club* reasoned that if, as alleged, the CAA required the Administrator to insist upon nondegradation clauses, his failure to do so was a failure to perform a duty as to which the Act left him no discretion, meeting the requirements of section 304.²⁰⁸

If the only section of the Act requiring construction in the *Sierra Club* case had been section 304, something might have been said for such literal interpretation, even though the terminology of the section is scarcely the usual means of expressing a general principle of judicial review. But one must not read section 304 in isolation. Since every nonconstitutional challenge to an implementation plan can be characterized as arguing that the Administrator has failed to do what the statute requires, the reasoning of the district court in *Sierra Club* means that every such attack upon approval or promulgation of a plan may be brought in the district courts, although section 307 expressly says it shall be brought "only" in the courts of appeals. The only way to make sense of the statutory scheme is to hold, contrary to

204. FWPCA § 405, 33 U.S.C. § 1345 (Supp. V 1975).

205. *Id.* § 404, 33 U.S.C. § 1344.

206. 344 F. Supp. 253, 254 (D.D.C. 1972), *aff'd mem.*, 4 ERC 1205 (D.C. Cir. 1972), *aff'd by an equally divided court sub nom.* *Fri v. Sierra Club*, 412 U.S. 541 (1973).

207. 352 F. Supp. 697, 702 (D. Colo. 1972), *rev'd*, 482 F.2d 1301, 1307 (10th Cir. 1973).

208. 344 F. Supp. at 254.

Sierra Club, that section 307's explicit provision for exclusive appellate court jurisdiction limits what otherwise might have been the jurisdiction of the district courts under section 304.²⁰⁹

The district court in *Anaconda* echoed the literalism of *Sierra Club*, but it came up with an additional argument. The federal plan in *Anaconda* had only been proposed, not adopted. Therefore, said the court, section 307 could not provide the exclusive remedy because it provided no remedy at all: "[N]o present review is available to plaintiff under Section 307 of the Act because there has been no promulgation of an implementation plan"²¹⁰ This argument was equally applicable to *Sierra Club*, where the Administrator had not yet acted upon plans that the states had submitted.

That the federal standard in *Anaconda* could not have been reviewed under section 307 before its adoption is almost certainly true. The courts have generally held challenges to merely proposed regulations unripe,²¹¹ and the Tenth Circuit has soundly held that section 307 applies only to final EPA action.²¹² Far from supporting the *Anaconda* argument that mere proposal of a federal plan is reviewable in a district court, however, the unavailability of review under section 307 compellingly argues to the contrary. The reason that merely proposed regulations or disapprovals of state plans are not reviewable in the courts of appeals is that they are not reviewable at all. Allowing pre-promulgation review in the district court both contradicts the policy against resolving premature questions and frustrates Congress' clear intent to avoid delay by routing questions regarding the legality of implementation plans directly to the courts of appeals.²¹³ Thus, it should come as no surprise that the Tenth Circuit reversed in *Anaconda* and ordered a dismissal for lack of jurisdiction under section 304:

Congress has made clear in [section 307] . . . that the courts of appeals are to review the promulgation or implementation of a clean air plan

209. *Accord*, *Lunenburg & Roselle, Judicial Review Under the Clean Air Act Amendments of 1970*, 15 B.C. INDUS. & COM. L. REV. 667, 691 n.145 (1974). The same result should be reached under the FWPCA despite the absence from § 509 of the word "only"; district-court review would contradict the policy of expeditious review evident in placing jurisdiction in the courts of appeals.

210. 352 F. Supp. at 707.

211. *E.g.*, *Lever Bros. Co. v. FTC*, 325 F. Supp. 371, 373 (D. Me. 1971); *cf.* *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-66 (1967) (holding unripe an attack on an adopted regulation that the Court said had no immediate effect upon the plaintiffs).

212. *Utah Int'l, Inc. v. EPA*, 478 F.2d 126, 127 (10th Cir. 1973).

213. If, as argued in *Anaconda*, there is a real danger of irreparable harm in waiting until promulgation to seek review, that argument might be better directed to creating access to the court of appeals under § 307 in order to respect the policy of direct review. However, one presupposition of direct review is that there will be no need for a trial, which the appellate court is ill-equipped to conduct, and the court can hardly base its decision on what was before the Administrator if the latter has not completed his proceedings. This problem is of less significance when, as is often the case in such proceedings, the issues are of law or of legislative fact that may be debated in briefs without trial; and it may be that a claim of irreparable harm prior to promulgation is always insufficient to overcome countervailing policies in light of the possibility of staying the final regulation pending judicial review. In any event, § 304 should not be used to circumvent the principle of direct review absent a most convincing showing that immediate district court review is imperative.

. . . . A further reason for denying jurisdiction in this case is that the cause was not ripe for injunctive relief *Utah International, Inc. v. Environmental Protection Agency*²¹⁴

Essentially the same considerations apply to the *Sierra Club* case.²¹⁵

In short, allegations that the Administrator has failed to take action required by statute should not be permitted to circumvent the plain statutory command that judicial review of decisions respecting implementation plans and certain other regulations is to be in the courts of appeals, or the plausible inference that review prior to final agency action is generally premature. To hammer home a point that should already be obvious, Congress might insert within the citizen-suit provisions an explicit exception for matters that are or will become reviewable in the courts of appeals.²¹⁶

B. Omissions from Adopted Regulations

The paradigm citizen suit, as indicated by the language of sections 304 and 505, is a horse of quite another color. A typical example is *City of Riverside v. EPA*,²¹⁷ in which it was argued and held that the Administrator had failed to promulgate an implementation plan for Los Angeles within the time limits prescribed by statute.²¹⁸ Such a case cannot be based on materials on which the Administrator has passed, since he has done nothing; consequently there may have to be a trial, which would make direct appellate review impracticable. Moreover, to wait until eventual promulgation of the plan would utterly fail to protect the plaintiff's position. Thus, in light of the provisions for review by courts of appeals, the citizen suit should not be viewed as an avenue of judicial review of past or future administrative action. Rather, it properly provides a remedy for the failure of the Administrator to act at all.

Yet there will be cases in which, as observed by by one court of appeals, "the line between action and inaction . . . disappears."²¹⁹ In *National Resources Defense Council, Inc. v. EPA*²²⁰ the Administrator had promulgated a standard limiting the lead content of gasoline in order to protect catalytic exhaust devices. The plaintiff argued he was required to adopt additional standards to protect the public health from direct effects of automotive lead emissions. On the one hand, as the court pointed out, NRDC's complaint was that the regulation adopted did not go far enough; on the other, it was that the EPA had failed to adopt any health-related regulation at all.

214. 482 F.2d 1301, 1304 (1973).

215. Tactical considerations such as the desirability of avoiding multiple litigation and the availability of attorneys' fees may well influence a party's decision to seek review in a district court. But the questions of fees and of centralized review are analytically separable from the question of review in the district court or court of appeals; they should be dealt with on their own merits, and should not be permitted to distort the present issue.

216. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ B(1)).

217. 4 ERC 1728 (C.D. Cal. 1972).

218. *Id.* at 1731.

219. *NRDC v. EPA*, 512 F.2d 1351, 1356 (D.C. Cir. 1975).

220. 512 F.2d 1351 (D.C. Cir. 1975).

The court concluded, with some misgivings, that the case had been properly brought under section 307, suggesting that the EPA had "discretion" with respect to the adoption of health standards, but that the exercise of that discretion in light of the available information was reviewable in the court of appeals.

The suggestion that section 307 affords the appropriate remedy for questions of factual arbitrariness seems to turn the apparent policy underlying the division of authority between courts of appeals and district courts on its head, for if the sole task is application of the statutory language there will be less likelihood of need for the trial that only the district court is equipped to conduct. Moreover, the narrow scope of review suggested by the court for section 304 risks making questions of abuse of discretion totally unreviewable when the Administrator has done nothing at all. This is not a necessary reading of the statutory limitation to duties that are "not discretionary." Such a limitation has always confined the writ of mandamus; yet the better view, confirmed by the Supreme Court, is that the writ lies to determine whether an officer has acted beyond the scope of his admitted discretion.²²¹

A better approach would build upon the basis for district court jurisdiction under section 304: when there has been a rulemaking proceeding and the petitioner is dissatisfied with the result, the court can weigh the objection against the material that was before the Administrator, and the proper forum is the court of appeals. When there has been no proceeding, there is no administrative record and, consequently, greater likelihood of need for a trial; therefore, the district court is the appropriate forum. This distinction accords well with the common-sense meanings of sections 304 and 307, which provide, respectively, for failure to act and for review of administrative action.

Thus, the court was right, albeit for different reasons, in ruling that the omission of a health-related lead standard was a matter for the court of appeals under section 307. The initial proposal had contained such a provision, which was presumably the subject of comments during the rulemaking proceeding; these comments would form a basis for judging the legality of the Administrator's decision to drop the proposal. On the other hand, if health standards had not been a subject of the proceeding, section 304 would have provided the sole remedy.²²²

221. *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925); see W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 151-53 (6th ed. 1974). There are still courts that refuse mandamus under 28 U.S.C. § 1361 (1970) for abuse of discretion. *E.g.*, *Ortego v. Weinberger*, 515 F.2d 1005, 1011 (5th Cir. 1975). The court in *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 662-63 (D.C. Cir. 1975), saying that § 304 was meant to reach only matters on which there is no discretion at all, relied on the insertion of the words "not discretionary" in conference and the committee's explanation that the provision had been "limited" to "mandatory functions." But the committee may simply have been concerned to make doubly certain that the courts did not substitute their judgment for the Administrator's when he had acted within the scope of his discretion. The court gave no reason why Congress might have wished to preserve a distinction admittedly "abstract and conceptual." *Id.* at 662.

222. *Cf. City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975). The Seventh Circuit held that a district court had no jurisdiction under § 304 to review the Administrator's

C. *The Failure to Revise Regulations*

A further question of the interplay between sections 304 and 307 was posed in *Oljato Chapter of Navajo Tribe v. Train*,²²³ a district court action under section 304 to compel the Administrator to revise the new source performance standards for coal-fired power plants.²²⁴ Rather surprisingly, in view of the absence of a record and of the language of section 307, the court held that section provided the sole avenue of redress. First, the court drew once again on the distinction it had made concerning the scope of review in *NRDC v. EPA*: section 111's provision that the Administrator "may" revise performance standards gives him discretion that takes the matter outside section 304; abuse of that discretion is reviewable, if at all, under the broader power of section 307. Moreover, the latter section was intended "to provide a legal mechanism—and an exclusive one—to assure that standards were revised whenever necessary."²²⁵ Here the court quoted the Senate Report to show that the provision allowing direct review more than thirty days after promulgation of a standard "on grounds arising after such 30th day" was meant to allow review of an abuse of discretion in refusing to revise a standard on the basis of new information:

It is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any promulgated standard, regulation, or approved or promulgated implementation plan after the date of promulgation whenever it is alleged that significant new information has become available.²²⁶

This is a most unexpected conclusion. The immediately attractive answer to a section 304 complaint seeking a revision is simply that the statutory term "may" imposes no duty to revise the standards and that therefore, on the merits, the plaintiff has no cause of action. However, it is

decisions to make indirect source regulations inapplicable to sources whose construction was commenced before January 1, 1975, over the objection that he had failed "to promulgate regulations with respect to such facilities": "[A] provision defining the scope of regulations and their effective date is as much a part of the regulations as the substantive parts." *Id.* at 689. The court dismissed, for failure to give the required notice, a § 304 claim that the Administrator had unlawfully omitted several pollutants from the nondegradation regulations and held that this claim could not be made under § 307, saying that the allegation was of failure to act. Because the inclusion of these pollutants had been extensively considered in the rulemaking proceeding, this latter ruling was in error. A significant prematurity problem, *cf. American Iron & Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975), was avoided because the Administrator explicitly incorporated the nondeterioration rules into existing implementation plans. Consequently, the District of Columbia Circuit has properly entertained under § 307 the argument that the Administrator erred in approving a plan not limiting degradation by automotive pollutants. *Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976).

223. 515 F.2d 654 (D.C. Cir. 1975).

224. Specifically, the plaintiffs asked that EPA require the use of flue gas desulfurization devices even when low-sulfur coal was burned.

225. 515 F.2d at 660; *accord*, *Union Elec. Co. v. EPA*, 515 F.2d 206 (8th Cir. 1975) (dictum), *aff'd*, 427 U.S. 246 (1976). As the court recognized in *Oljato*, this holding made it unnecessary to decide whether, apart from the exclusivity provision, § 304 applied.

226. S. REP. NO. 1196, 91st Cong., 2d Sess. 41-42 (1970).

not easy to visualize how "grounds arising after" the review deadline can be relevant to the validity of the original regulation unless, as the court held in *Oljato*, the regulation must be revised as technology improves. However awkward the phrasing, this is not such an implausible rendering of the statutory language as to justify ignoring such a clear statement of legislative intent. Thus I conclude the court was probably right in *Oljato*, but the statute is in dire need of amendment; a judicial review provision ought not be made to bear the weight of an implicit duty of revision that contradicts the apparently plain words of another section of the same statute.

Given the court's decision that there is a duty to revise standards when new information comes along, it seems peculiar that the statute places review of the failure to do so in the court of appeals. There was no substantial administrative record in *Oljato* on which to base review; as the court recognized, it was faced with the prospect of developing the facts on its own, a task for which a district court seems eminently better equipped. One way out would have been to hold that the facts in question were "legislative" and thus could be established through Brandeis briefs without trial.²²⁷ The court found a different way, requiring under its "inherent powers to enforce our interest in informed decision-making" that "any new information thought to justify revision" be first presented to the Administrator as a prerequisite to review in the court of appeals.²²⁸

Assuming the court was correct about the duty to revise, this resolution has much to recommend it in policy. Since the initial decision whether or not to revise is the Administrator's, it makes sense that factual material bearing on that decision be first presented to him rather than to either a district court or court of appeals. The court can more properly be said to be reviewing his decision under those circumstances than if it is asked to rule that the Administrator should have revised the standard on the basis of material that was not formally before him. But I see no warrant in the statute for requiring proceedings before the Administrator on a request for revision; if section 307 provides review of a failure to revise, it seems to contemplate documentary establishment of the relevant legislative facts in the court of appeals. I think the court has taken liberties with the statute in order to achieve a more sensible scheme.

D. *Mandamus in the Courts of Appeals*

As the cases just discussed should indicate, the existence in each statute of two distinct provisions for judicial scrutiny of the EPA in different courts has already created considerable uncertainty and litigation over the proper forum. Judge Wright is highly critical of the current state of the law:

227. See Currie & Goodman, *supra* note 95, at 48-49.

228. *Accord*, Union Elec. Co. v. EPA, 515 F.2d 206 (8th Cir. 1975) (dictum), *aff'd*, 427 U.S. 246 (1976).

[T]he courts have been of . . . little help to litigants attempting to discern the parameters of Sections 304 and 307. While the courts play jurisdictional badminton with these provisions, batting one case back to the District Court under Section 304 while taking another identical one under Section 307, litigants should not be denied substantial rights because of uncertainty created by courts and Congress.²²⁹

The judicial and legislative reforms suggested above may alleviate, but cannot completely avoid, this uncertainty. At best, the risk of finding oneself in the wrong forum when it is too late to file in the right one seems substantial enough to call for a transfer provision like that applicable to the Court of Claims.²³⁰ Uncertainty and threshold litigation would be reduced further if the statute provided for appellate court determination (except in enforcement cases) of all questions relating to regulations whose validity is reviewable there. Furthermore, the courts of appeals, because of their exclusive jurisdiction over final regulations, are likely to be more familiar with the subject matter of these challenges than are the district courts. Besides, since review of such a regulation adopted as a result of a court order will be in the appellate court, district court jurisdiction over the initial mandamus action effectively splits a single case between two courts.²³¹

At first glance the cases properly brought in the district court under the quasi-mandamus provisions belong there because of the absence of a record; on reflection, however, this may be a largely theoretical problem. Whether a standard must be promulgated will often depend solely upon statutory construction,²³² and the ease of documenting the fact that no standard has been adopted is likely to avoid the need for a hearing on the facts. If the duty of the Administrator turns on such issues as whether a substance is a danger to public health,²³³ the facts are likely to be "legislative" and thus susceptible to proof by Brandeis briefs without trial. While policy may make it desirable, even though not necessary, to develop such technical matters through oral testimony unsuitable for an appellate court, the *Oljato* opinion seems correct, as a policy matter, in stating that the

229. *NRDC v. EPA*, 512 F.2d 1351, 1361 (D.C. Cir. 1975) (dissenting in part).

230. *See* 28 U.S.C. § 1506 (1970):

If a case within the exclusive jurisdiction of the district courts is filed in the Court of Claims, the Court of Claims shall, if it be in the interest of justice, transfer such case to any district court in which it could have been brought at the time such case is filed, where the case shall proceed as if it had been filed in the district court on the date it was filed in the Court of Claims.

See also ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ 8).

231. A question might even arise whether the proper avenue for review of such a regulation is a contempt proceeding in the district court under some circumstances, which is contrary to the statutory design.

232. *See, e.g.*, *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976) (duty to adopt air quality criteria for lead); *NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1974) (deadline for adopting effluent guidelines under § 304 of the FWPCA).

233. *See, e.g.*, *NRDC v. EPA*, 512 F.2d 1351 (D.C. Cir. 1975) (lead standards for fuel); *cf. Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975) (revision of new source standard to reflect improved technology).

delegation of authority to the Administrator to decide whether a standard should be adopted or revised strongly suggests that the place to develop factual materials, whether through trial or written submission, is before the Agency itself.²³⁴ The language of the same court in assuming jurisdiction over an order resulting from informal adjudication is singularly apt here: "[T]he facts in issue lie peculiarly within the special competence of the Secretary. The district court could do no more than remand to the Secretary, as we do here."²³⁵

On the basis of these considerations, the Administrative Conference has recommended that the courts of appeals be given authority to resolve preliminary questions respecting standards whose validity is reviewable in the courts of appeals, and to deal with the *Oljato* problem by remanding when necessary for an appropriate agency or district court proceeding.²³⁶

IV. THE TIME LIMITS ON REVIEW

It is common for one charged with violating a regulation to argue in defense that the regulation is invalid. Such a practice has considerable potential for delay, for the upshot may be that the agency must start all over on a new regulation after the time has come to meet the original. To avoid this risk, Congress, which was in a great hurry to see the country cleaned up, required that attacks on the validity of listed types of regulations be made by petition in the court of appeals within thirty days (in the case of air) or ninety days (in the case of water) after promulgation. To make this point abundantly clear, the statutes add that action reviewable by petition in the courts of appeals "shall not be subject to judicial review in civil or criminal proceedings for enforcement."²³⁷ A later review in the

234. *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d at 666-67.

235. *EDF v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970).

236. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ B(2)). This recommendation appears to be consistent with the principles enunciated in ACUS Recommendations 1975, 1 C.F.R. § 305.75-3 (1976) (Recommendation No. 75-3, ¶ 6), with respect to review of informal agency actions: The proceedings in question seem likely to involve important issues that will often be taken in any event to the courts of appeals; the issues seem likely in most cases to be resolvable without evidentiary trial; and the issues are likely to be closely related to others already directly reviewable in the appellate courts.

The phrasing of the 1976 recommendation posed some difficulty. It could not very well include "all questions relating to" such standards, since it was not intended to place enforcement proceedings in the courts of appeals. Examples intended to be included are the failure to promulgate a standard, the failure to revise it, and the refusal to postpone the date for submission of an implementation plan for secondary air quality standards. The drafting is not precise and may exclude other examples. Perhaps it would be best to refer all questions of nondiscretionary duties respecting such standards to the courts of appeals.

If a hearing is necessary, I have argued that the agency is generally the best place to hold it. This may not always be the case, however, as, for example, if the question is the adequacy of the agency's excuse for failure to meet a statutory deadline. Thus, the allowance exists in the recommendation for remand to a district court when an agency hearing would be inappropriate.

237. FWPCA § 509(b), 33 U.S.C. § 1369(b) (Supp. V 1975); CAA § 307(b), 42 U.S.C. § 1857h-5(b) (1970).

court of appeals, however, is allowed if based "solely on grounds arising after" the statutory period.²³⁸

A. Interpretation

The scope of these limitations on judicial review was at issue in *Getty Oil Co. v. Ruckelshaus*.²³⁹ A provision of Delaware's implementation plan limited the use of high sulfur fuels in certain parts of the state after January 1, 1972. Delmarva Power and Light Co., owner of the only plant subject to the regulation, failed to comply by the prescribed date, and the EPA issued an order directing it to comply by May 1, 1972. Getty, which supplied high sulfur fuel to Delmarva in return for electricity, sued to have the order set aside. The Administrator argued that the action was barred by section 307 of the CAA because the issues could have been raised in an attack upon the approval of the plan within thirty days after promulgation.²⁴⁰

Getty raised four distinct grounds for attacking the EPA's order. The Third Circuit held all four were cognizable by a section 307 petition and were therefore barred. As to three of these grounds, the court was plainly mistaken; as to the fourth, its holding was subject to serious doubts.

Getty's first argument was that the National Environmental Policy Act²⁴¹ required the Administrator to draw up an environmental impact statement before issuing a compliance order.²⁴² A contention that NEPA required an impact statement in connection with the approval of the implementation plan itself would clearly have been cognizable under,²⁴³ and hence barred by, section 307. Getty's position, however, was that a statement was required not upon plan approval but upon issuance of the later enforcement order. It seems abundantly clear that no such argument would have been appropriate in a section 307 proceeding. Not only is that section limited to challenges to the plan itself, but at the time when such a review could have been sought there was no order to challenge.

Getty's next argument was that no federal compliance order should be issued until final resolution of a pending state variance proceeding.²⁴⁴ This argument too has nothing to do with the approval of the implementation plan; it relates solely to the question of prerequisites for issuing a federal order. It thus could not have been made under section 307 and cannot be forbidden by that section.

238. *Id.* See text accompanying notes 223-28 *supra* for consideration of the meaning of the new-grounds provision.

239. 342 F. Supp. 1006 (D. Del. 1972), *remanded*, 467 F.2d 349 (3d Cir. 1972).

240. Since Getty had taken the initiative by suing in advance of any effort at judicial enforcement, technically its challenge could not be barred by the preclusion of judicial review "in civil or criminal proceedings for enforcement." Section 307, however, explicitly excludes all untimely challenges by providing that review of the standards may be had "only" by filing a timely petition in the court of appeals. The word "only" does not appear in the comparable § 509 of the FWPCA; yet exclusivity is plainly intended, for the policy of requiring early review of regulations is infringed equally by a late challenge in any form.

241. 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1970).

242. *Id.* § 4332(2)(c).

243. See *Appalachian Power Co. v. EPA*, 477 F.2d 495, 504-07 (4th Cir. 1973).

244. 467 F.2d 349, 355 (3d Cir. 1972).

Getty's third argument was that the compliance date set in the enforcement order was not a "reasonable" one in light of the seriousness of the violation and good faith efforts at compliance,²⁴⁵ as required by section 113.²⁴⁶ The government argued that, since an earlier compliance date had been set by the implementation plan, the time to attack the date was during a section 307 proceeding to review the regulation.²⁴⁷ There is a certain appeal to this position; to the extent that the EPA, in issuing the later order, is bound by the date already set in the regulation, repetition of the regulation date cannot obscure the fact that, in substance, the attack is on the date set by the regulation. Getty, however, contended that the provision of a reasonable time for compliance under section 113 was not merely a formality, but a chance for a substantive second look on the basis of individual hardship—in short, an informal variance provision.²⁴⁸ Getty's argument was thus quite distinct from that which could have been made under section 307: while Getty could have argued in a section 307 petition that the regulation time was too short, it could not have argued there that the factors listed in section 113 required a variance from a valid regulation.

The district court, to its credit, resolved each of these first three issues on the merits.²⁴⁹ The court of appeals, without serious effort at explanation, simply characterized the complaint as effectively attacking the validity of the regulation.²⁵⁰

Finally, admitting that the only way to attack an implementation plan on its face was under section 307, Getty nevertheless argued that section 307 did not authorize, and therefore did not forbid by later defense or suit, an attack on the regulation as applied to an individual case. Both the district court and the court of appeals rejected this distinction.²⁵¹ The statute certainly does not say it is limited to facial challenges; general principles of separability and standing often mean that the normal attack upon a statute or regulation is as applied rather than across the board, and late challenges present the same problems of delay in achieving clean air whether facial or as applied.²⁵²

However, the considerations that make direct appellate review of regulations practicable²⁵³ are inapplicable when the attack is based upon facts peculiar to the individual company. Suppose, for example, that a company subject to a regulation conceded to be generally valid argues that

245. *Id.* at 355. *See also* 342 F. Supp. 1006, 1019 (D. Del. 1972).

246. 42 U.S.C. § 1857c-8(a)(4) (1970).

247. *See* 467 F.2d 349, 355-60 (3d Cir. 1972).

248. *Id.* at 358. *See also* 342 F. Supp. 1006, 1020 (D. Del. 1972).

249. *Cf.* *West Penn Power Co. v. Train*, 522 F.2d 302 (3d Cir. 1975), which held correctly that a dispute over whether the plaintiff was in compliance with the applicable implementation plan was not barred by § 307. *Id.* at 316-17.

250. 467 F.2d 349, 355, 359 (3d Cir. 1972).

251. *See id.* at 355-56; 342 F. Supp. 1006, 1015 (D. Del. 1972).

252. *Cf.* *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921), which held that a provision for appeal to the Supreme Court when state statutes were upheld by state courts included cases in which a statute was attacked as applied. *Id.* at 288-89.

253. *See* text accompanying notes 127-30 *supra*.

it cannot comply because there is no room to install the necessary controls at its crowded plant, or that its financial condition is so precarious that it is unreasonable to apply the regulation to it, or that the air is so clean in its vicinity that compliance with a strict emission standard would be a waste of money. These claims all depend upon facts that, in traditional terms, would be considered adjudicative rather than legislative, and on which standard learning would suggest there is a right to a trial-type hearing²⁵⁴ that appellate courts are ill-equipped to provide. Moreover, the rulemaking record before the Administrator is likely to focus upon general questions concerning the desirability of the regulation as a whole; it would be most cumbersome to try every individual variance case during the course of the rulemaking proceeding. Finally, even if there is a record of individual facts, it will not be the result of the trial-type procedure that the Constitution often requires for adjudicative facts, for the pollution statutes do not provide for such a hearing in the adoption of regulations. There is no provision in these statutes, as there is in the Hobbs Act,²⁵⁵ for transfer to a district court for hearing. Furthermore, remand to the Agency for further evidence is authorized only when the decision being reviewed is required by statute to be based on the record of a trial-type hearing; this is not true of any regulations relevant here.

The inadequacy of the rulemaking procedure for establishing adjudicative facts has led one court to hold, contrary to *Getty*, that attacks on regulations as applied cannot be brought under or precluded by section 307.²⁵⁶ There is much to be said for this position. If possible, the statute should be construed to avoid a result either unconstitutional or impracticable. It is hard to believe Congress meant to require appellate courts to conduct trials or to encumber rulemaking proceedings with innumerable individual claims of individual hardship, and it made no provision for separate quasi-judicial hearings. Moreover, the Senate Committee expressly said that a regulated person "would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone."²⁵⁷ But the entire question of where to file an attack on a regulation as applied may be based upon a misconception of the substantive law. The very purpose of a regulation is to avoid the necessity for determining the appropriate requirements on a case-by-case basis; that a particular company may have special problems in meeting the standard will most likely be held to be no excuse.²⁵⁸ This conclusion is made the more

254. See generally *Londoner v. Denver*, 210 U.S. 373, 379 (1908).

255. 28 U.S.C. § 2347 (1970).

256. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 173 (6th Cir. 1973).

257. S. REP. NO. 1196, 91st Cong., 2d Sess. 41 (1970). *Lunenburg & Roselle, Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. INDUS. & COM. L. REV. 667-79 (1974), would construe this remark to refer to attacks on enforcement orders, which necessarily apply only to the complaining party. However, the antecedent for "such review" appears to be review of "standards, rules and regulations." S. REP. NO. 1196, 91st Cong., 2d Sess. 40 (1970).

258. See, e.g., *Heinz v. Bowles*, 149 F.2d 277, 281 (Emer. Ct. App. 1945), which interpreted a statute requiring maximum prices to be "generally fair and equitable": "[I]f the maximum prices enabled most of the nonprocessing slaughterers to operate profitably, the regulation

compelling under the federal air and water pollution statutes by the conspicuous absence of the broad variance provisions that are the common means of excusing compliance with pollution laws on the basis of individual hardship; to hold a regulation invalid as applied to individual facts would effectively grant the variance that Congress has refused to authorize.²⁵⁹

B. Constitutional and Policy Questions

A similar provision limiting the time for judicial review of regulations under wartime price control legislation was upheld against due process objections by the Supreme Court in *Yakus v. United States*²⁶⁰ on the ground that it afforded a reasonable opportunity to challenge the regulations "in view of the urgency and exigencies of wartime price regulation,"²⁶¹ which were detailed at some length. In view of this decision it is not surprising that the lower courts have so far upheld the time limits of the pollution laws, without much discussion.²⁶²

Yet the harshness of such a measure is manifest. Not everyone who will ultimately be affected by a regulation will even find out about it as soon as it is adopted, especially if, as one court has questionably held in reliance on the literal terms of the statute, the time begins to run before publication of the action in the Federal Register.²⁶³ Some who do find out will not immediately recognize that it affects them, or that it will be burdensome to comply with, or that there are grounds for attacking it. The problem is compounded by the fact that the impact of an air quality standard upon the individual may be impossible to determine until after adoption of the plan for its implementation, by which time the deadline will long since have passed. Indeed the constitutional ripeness of an attack on an unimplemented air quality standard may be in doubt, since the standard does not compel anyone to do anything and its ultimate impact is so uncertain.²⁶⁴ The statute even appears to make invalidity unavailable as a defense to persons who went into the affected business, moved into the affected area, or indeed were born after the thirty-day or ninety-day period. Perhaps most serious, the statute places the burden of instituting litigation upon the citizen, which is likely (and one suspects intended) to discourage litigation over the validity of the regulations. To test the *Yakus* principle one may hypothesize a statutory requirement that all constitutional challenges to federal or state statutes must be made by instituting actions within thirty

would not be rendered invalid by the fact that an occasional marginal producer in the group could not stay in business under the established ceilings." See also *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975).

259. See Currie & Goodman, *supra* note 95, at 51-52.

260. 321 U.S. 414, 434-37 (1944).

261. *Id.* at 435.

262. *Peabody Coal Co. v. Train*, 518 F.2d 940, 943 (6th Cir. 1975); *Granite City Steel Co. v. EPA*, 501 F.2d 925, 926 (7th Cir. 1974); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349, 357-58 (3d Cir. 1972). In support of this conclusion see *Lunenburg & Roselle, Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. INDUS. & COM. L. REV. 682-83 (1974).

263. *Peabody Coal Co. v. Train*, 518 F.2d 940, 942-43 (6th Cir. 1975).

264. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

days after their enactment. One suspects the Court might not be so happy with a wholesale requirement of early review and would begin limiting *Yakus* to extreme wartime emergencies, or to "merely" economic matters such as prices.

Three remedies of increasing impact may be suggested. Most modestly, thirty days appears to be a particularly short time in which to require the decision to challenge a regulation; the Conference recommends that the two statutes be made consistent at sixty days.²⁶⁵ More significantly, I would urge the courts, regardless of the time period chosen, to take care not to cut off review in cases in which there was no reasonable prior opportunity for judicial determination of the challenger's claim. Perhaps, to avoid the constitutional question, they could accomplish this by a creative construction of the provision respecting grounds "arising" after the thirtieth or ninetieth day, although the language is refractory and although the explicit purpose of this provision was to require revision in light of changed circumstances.²⁶⁶ Perhaps it could be done, as one court has suggested, by importation of general principles equitably tolling limitation statutes.²⁶⁷ Alternatively, it should be held, as implied in *Yakus*, that to impose sanctions upon one who has never had a fair opportunity to challenge the regulation under which he is charged is to deprive him of property without due process of law.²⁶⁸ The statutes should be amended to make clear that later attacks may be made by those with no opportunity to mount a timely challenge.²⁶⁹

I would further recommend, in view of the likelihood that the early review requirements may trap the unwary, that they be expeditiously repealed. It seems unduly harsh, and out of line with modern views as represented in the Federal Rules of Civil Procedure, to deprive people of substantial rights—perhaps to shut down a plant worth millions of dollars—even for negligent failure to foresee the need to seek pre-enforcement review. Abolition of the limits would also avoid time consuming threshold litigation over whether the failure to seek timely review was justifiable. Further, the time limits may actually increase the number of challenges filed, since affected persons may feel impelled to sue to protect against enforcement that may never take place. It seems significant that Congress saw no need to forbid review at the enforcement stage in the highly comparable areas of occupational safety and health²⁷⁰ and control of

265. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ D(2)). H.R. 10498, 94th Cong., 2d Sess., § 305(c)(3) (1976), as passed by the House in 1976, would extend the air deadline to 60 days.

266. See text accompanying notes 223-28 *supra*.

267. *Peabody Coal Co. v. Train*, 518 F.2d 940, 942 (6th Cir. 1975) (dictum).

268. That the congressional authority over federal-court jurisdiction cannot be so exercised as to deny constitutionally guaranteed rights I consider established by *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); accord, *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948). For further materials on this much-debated issue, see D. CURRIE, *FEDERAL COURTS* 132-52 (2d ed. 1975).

269. The Conference is in agreement with this position. See ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ D(3)).

270. 29 U.S.C. § 655(f) (1970); see S. REP. NO. 1282, 91st Cong., 2d Sess. 8 (1970).

toxic substances,²⁷¹ and that after two years' experience the prohibition on defending at the enforcement stage was abandoned even in the admittedly extraordinary context of wartime price regulation.²⁷² I see no comparable emergency in the present pollution context; if in certain rare situations involving highly toxic contaminants such an emergency may appear, a time limit restricted to such emergency cases would serve the need. Accordingly the Administrative Conference, over the EPA's opposition, has recommended that the invalidity of a regulation be a permissible defense in an enforcement proceeding.²⁷³

C. *Augmenting the Rulemaking Record*

A related problem is presented by the provisions of H.R. 10498,²⁷⁴ passed by the House in 1976, which would limit the review of a court reviewing an air pollution regulation to the record compiled in the Agency's rulemaking proceeding and generally to objections raised before the Agency. The latter limitation, but not the former, would be inapplicable upon a showing that it was "impracticable to raise such objection within such time" or that the grounds for objection are new, if the objection is "of central importance to the outcome of the rule." Commendably, in the event the new objection may be made, it is to be made in the first instance before the Agency. These amendments would further the sound policy that courts should review what the EPA has done, not make initial determinations of their own on matters within the experience of the Agency. Like the time limits on judicial review, however, they may deprive the unwary litigant of the opportunity to show that a regulation is invalid. The allowance for making a late objection when a timely one was impracticable should probably be extended to additions to the record²⁷⁵ to avoid penalizing those who

271. Toxic Substances Control Act, Pub. L. No. 94-469, § 19(a)(1)(A), 90 Stat. 2039 (1976) (to be codified at 15 U.S.C. § 2618).

272. Act of June 30, 1944, ch. 325, tit. II, § 107, 58 Stat. 639.

273. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ D(1)). Permitting review in enforcement proceedings would permit regulations to be challenged in the district courts, and I have indicated my strong preference for review in the courts of appeals. But the reason for the preference is the waste of time involved in requiring a separate and unnecessary district court proceeding. When an enforcement action is filed, there will generally be factual questions concerning the issue of violation that require district court consideration in any event; for that court to determine the validity of the regulation at the same time will not necessitate a separate proceeding.

Review at the enforcement stage would also permit decentralized review of regulations now subject to exclusive review in the District of Columbia Circuit. As will appear below, I would favor decentralized review of all regulations. The Conference, which did not, nevertheless evidently thought the policies favoring centralization should yield to the injustice of preventing tardy review. If necessary the two policies could be reconciled, at some litigation cost, by providing for certification of validity questions in enforcement cases to the D.C. Circuit. Cf. Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (Supp. V 1975); *DeRieux v. The Five Smiths, Inc.*, 499 F.2d 1321 (Temp. Emer. Ct. App. 1974).

An improved variance procedure, which I would favor, would not avoid the time limit problem. No administrative hearing is called for to resolve facial attacks on the regulations, and if such a procedure were provided, my problem would remain: Should the challenger be precluded from invoking it after the expiration of 30 (or 90) days?

274. H.R. 10498, 94th Cong., 2d Sess., § 305(a)(7)(A), (B) (1976).

275. See Toxic Substances Control Act, Pub. L. No. 94-469, § 19(b), 90 Stat. 2040

have not even been negligent; the integrity of statutory restrictions on rulemaking and the unfairness of denying a reasonable opportunity to assert one's rights outweigh the need for expedition. The truly careless litigant, however, may be in a somewhat less favorable position with regard to the right to bring forward new objections or new factual material than with regard to the right to seek delayed judicial review. For new matter, properly handled, requires in every case a burdensome reopening of the rulemaking proceeding, while tardy judicial review on the basis of what was before the Agency does so only if the regulation is found to be invalid. Moreover, the hardship to the potential litigant, while it may be substantial in a particular case, will often be less severe when he is merely limited to what was done before the Agency than when he is forbidden to sue at all. On balance, I think it is probably desirable to exclude tardy objections and factual material that could practicably have been presented in the rulemaking proceeding. Without these limitations, either Agency expertise will be circumvented or the rulemaking process will never be completed.²⁷⁶

V. WHICH COURT OF APPEALS?

A. *Centralized Review of National Standards*

Under the CAA, review of some administrative actions is had in the Court of Appeals for the District of Columbia Circuit, and review of others in what is with something less than total clarity described as the "appropriate" circuit. The Senate Report was quite explicit about why the distinction was made:

Because many of these administrative actions are national in scope and require even and consistent national application, the provision specifies that any review of such actions shall be in the United States Court of Appeals for the District of Columbia. For review of the approval or promulgation of implementation plans which run only to one air quality control region, the section places jurisdiction in the U.S. Court of Appeals for the Circuit in which the affected air quality control region, or portion thereof, is located.²⁷⁷

Thus the principle is clear: matters of local significance are to be reviewed locally, while matters on which national uniformity is desirable are to be reviewed only in the District of Columbia. A glance at the matters the committee placed on each side of this line suggests a basic rationality to the division. Implementation plans are submitted by individual states and

(1976) ("reasonable grounds for . . . failure to make such submissions and presentations in the proceeding before the Administrator").

276. A proposed recommendation to this effect was deleted by the Committee on Judicial Review, not on the merits, but because it was thought to relate to the procedures for raising late objections rather than to judicial review. Efforts on the Conference floor to require that materials or objections brought forward for the first time in enforcement proceedings be first passed on by the agency were defeated, though no one spoke in opposition. The *Oljato* decision, see text accompanying notes 223-28 *supra*, suggests the courts will find ways of accomplishing this goal without specific authorization.

277. S. REP. No. 1196, 91st Cong., 2d Sess. 41 (1970). The bill as it then stood, like the final act, employed the term "appropriate" circuit. See *id.* at 125.

may differ from state to state; the statute in authorizing such diversity has subordinated any interest in uniformity. On the other hand, national ambient air quality standards set at levels necessary to protect the public health and welfare²⁷⁸ and national emission standards set according to available or practicable technology²⁷⁹ are likely to be nationally uniform. Thus the lone timely petition to date attacking an ambient air quality standard was filed in the District of Columbia Circuit,²⁸⁰ and challenges to allegedly too stringent provisions in Maryland, Virginia, and West Virginia implementation plans approved by the EPA were filed in the Fourth Circuit, which includes those states.²⁸¹

The FWPCA, in contrast, makes no provision for centralized review of regulations of nationwide impact. Even nationally applicable performance standards for new sources, for example, are reviewable under that Act in the circuit in which the petitioner "resides or transacts such business."²⁸² There is no apparent reason why centralized review is more appropriate for such cases when the polluted medium is air than when it is water; the statutes are simply inconsistent. It would seem appropriate for Congress to decide one way or the other. My own preference, as I have indicated elsewhere,²⁸³ is against vesting exclusive jurisdiction in a single reviewing court. While centralization facilitates the development of expertise and speeds final resolution of issues without the necessity for Supreme Court intervention, it also deprives us of the benefit of diverse views on difficult legal questions, gives enormous power to a single inferior tribunal, inconveniences distant litigants to some degree, and creates undesirable pressures on the process of appointing judges.²⁸⁴

B. The "Appropriate" Circuit

Not every case fits the pattern envisioned by the Senate Committee. Arguably, for example, an especially stringent air quality standard could be set to protect a particular national park.²⁸⁵ Similarly, in response to a

278. CAA § 109(b)(1), (2), 42 U.S.C. § 1857c-4(b)(1), (2) (1970).

279. *Id.* § 111(a)(1), 42 U.S.C. § 1857c-6(a)(1).

280. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 846-47 (D.C. Cir. 1972).

281. *See Appalachian Power Co. v. EPA*, 477 F.2d 495, 499 (4th Cir. 1973).

282. FWPCA § 509(b), 33 U.S.C. § 1369(b)(1) (Supp. V 1975).

283. *See generally* Currie & Goodman, *supra* note 95.

284. The Conference, by a divided vote, recommends centralized review of national standards under both statutes. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ A(1)). The pointed language of the Supreme Court in resolving an inter-circuit conflict over the power of the EPA to prescribe effluent limitations by regulation, suggests that the Court itself may favor decentralized review:

This case exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task, as well as having underscored the reasonableness of the agency view.

E.I. du Pont de Nemours & Co. v. Train, 97 S. Ct. 965, 978 n.26 (1977).

285. An appropriate example is found in the express provision of the Illinois Environmental Protection Act, wherein substantive regulations "may make different provisions as required by circumstances for different contaminant sources and for different geographical areas." ILL. REV. STAT., ch. 111½, § 1027(a) (1976). This authority—to tailor the rule to the

request for postponement the Administrator promulgated 1975 vehicle emission standards that were more stringent for California than for the rest of the nation.²⁸⁶ Conversely, that not every question respecting an implementation plan is of purely local significance has already spawned court decisions raising serious issues not only of statutory policy but of statutory construction as well.

On May 31, 1972, the Administrator announced his decision regarding the approval or disapproval of a number of state implementation plans.²⁸⁷ The Natural Resources Defense Council (NRDC) challenged the Administrator's action on several grounds: that he had unlawfully extended the statutorily prescribed time²⁸⁸ for filing plans to achieve compliance with the primary air quality standards; that in extending the date for compliance with those standards he had failed to follow prescribed statutory procedures;²⁸⁹ and that he had approved plans that did not contain adequate measures to assure that future growth would not cause violations of the air quality standards.²⁹⁰

Since NRDC was attacking the Administrator's "action in approving or promulgating any implementation plan," section 307 tells us review should be sought in the "appropriate" circuit; and the Senate Report, quoted above, suggests that "appropriate" is shorthand for "the Circuit in which the affected air quality control region . . . is located." This analysis would mean that, since many state plans were being attacked on identical grounds, review would have had to be sought in eleven courts at once. To protect itself,²⁹¹ NRDC filed all eleven petitions, but to avoid multiple litigation it asked that all cases be transferred to the District of Columbia Circuit, which it alleged to be the "appropriate" circuit under section 307 because the Administrator, in taking the challenged actions, had "articulated the administrative policy positions which were applied nationally and uniformly."²⁹²

Five courts of appeals accepted this argument and transferred the cases; the other five stayed proceedings pending the outcome in the District of Columbia.²⁹³ Only the First Circuit wrote an opinion, and it approved the transfer,²⁹⁴ concluding that "appropriate" was not a synonym

need—should be held implicit in the federal statutes, since no intention appears to require EPA to ignore distinctions relevant to statutory standards. See Currie, *Federal Air-Quality Standards and Their Implementation*, 1976 AM. B. FOUNDATION RESEARCH J. 365, 368-69. Especially stringent water-quality standards for high-quality recreational waters are common at the state level. *E.g.*, Ill. PCB Regs., ch. 3, Rule 206 (Lake Michigan).

286. See 38 Fed. Reg. 10,317, 10,318 (1973).

287. 37 Fed. Reg. 10,842 (1972).

288. CAA § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970).

289. *Id.*, § 110(e), 42 U.S.C. § 1857c-5(e) (1970).

290. *Id.*, § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B).

291. CAA § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970), requires challenges to EPA approval of implementation plans to be filed within 30 days.

292. See *NRDC v. EPA*, 465 F.2d 492, 493 (1st Cir. 1972) (quoting from the petitioners' brief).

293. See 3 ENV'T L. REP. (ELI) 10,013 (1973).

294. *NRDC v. EPA*, 465 F.2d 492 (1972).

for "local." First, said the court, when Congress intended to require local review under the Clean Air Act it specifically said so: the same statute provides for review of a decision postponing the date for individual compliance with a state implementation plan in the court of appeals "for the circuit which includes such State."²⁹⁵ Nor, the court said, did the Senate Report require a contrary conclusion:

The Senate Report implies a Congressional concern for a geographic approach to review only where particularistic attention is given to each plan devised for one air quality control region, and not where the automatic application of standard, nation-wide guidelines to all plans simultaneously preordains wholesale approvals or extensions.²⁹⁶

Having thus interpreted "appropriate" to allow a "flexible approach" to determining the most suitable forum on the facts of the case, the First Circuit then held that the issue should be decided in a single proceeding in the District of Columbia:

Whatever words are used to describe the Administrator's actions on the three issues presented, we fail to understand how his rationale relates specifically to each individual state plan. The legal issues raised by petitioners in the First Circuit seem to be identical with those raised in every other circuit. The parties are the same. There do not appear to be factual questions unique to each circuit. We must also consider that litigation in several circuits, with possible inconsistent and delayed results on the merits, can only serve to frustrate the strong Congressional interest in improving the environment as evidenced by the Clean Air Act. Additionally, we do not feel that judicial manpower is so abundant so as to permit several circuits to solve identical complex legal and factual issues in the present case. We note that petitioners first filed in the United States Court of Appeals for the District of Columbia Circuit. That is where the Environmental Protection Agency has its headquarters. That is where the appropriate files are kept and where the regulations are announced. In light of all these factors we are led to conclude that the D.C. Circuit is "the appropriate circuit" to hear petitioner's claims.²⁹⁷

Transfer, the First Circuit then held, was authorized if not required by 28 U.S.C. § 2112(a), which mandates transfer to the court in which the first proceeding was filed when "proceedings have been instituted in two or more courts of appeals with respect to the same [administrative] order."²⁹⁸

295. CAA § 110(f)(2)(B), 42 U.S.C. § 1857c-5(f)(2)(B) (1970).

296. 465 F.2d at 494.

297. *Id.* at 495.

298. It is not altogether clear that the First Circuit's decision that the District of Columbia was the "appropriate" forum to entertain an attack upon all implementation plan approvals was a requisite to transfer under § 2112(a). The court opined that any requirement that the transferee court be one in which the petition was properly filed "might be thought of as" satisfied by the holding that the District was the "appropriate" forum. It also expressed "doubts," however, that there was any such requirement: Since the first petition had been filed in the D.C. Circuit, "we are granted express authority to transfer this case to the D.C. Circuit"—apparently even if venue was improper there. *Eastern Air Lines, Inc. v. CAB*, 354 F.2d 507, 510-11 (D.C. Cir. 1965), so holds. Yet, though the statute, unlike the district court transfer provision in 28 U.S.C. § 1404(a) (1970), contains no express limitation requiring transfer to a court in which the proceeding "might have been brought," see *Hoffman v. Blaski*, 363 U.S. 335 (1960), Congress could scarcely have intended to frustrate applicable venue limitations by permitting a litigant to bootstrap himself into an inappropriate forum simply by

The District of Columbia Circuit, accepting jurisdiction of the entire case, agreed with the reasoning of the First Circuit and added that requiring review in the circuit including the state whose plan is attacked would have further "anomalous" results:

The Administrator has informed us that implementation plans in several metropolitan areas cover jurisdictions falling within several circuits. In our own metropolitan area of the District of Columbia and the surrounding Virginia and Maryland suburbs, for example, adoption of the Administrator's narrow interpretation of the statute would require review of the Administrator's approval of the D.C. metropolitan area implementation plans to take place in both our own court and the Court of Appeals for the Fourth Circuit. We doubt that Congress intended such a result, especially in light of the indication elsewhere in the Act of a strong congressional concern for coordinated decision-making with respect to metropolitan areas crossing over several jurisdictions.²⁹⁹

filing there first and then requesting transfer from a proper forum in which an identical petition is later filed. Surely the question whether the first petition was properly filed must be open after transfer in such a case; if it is, no useful purpose would be served by transferring other petitions there only to be dismissed along with the one erroneously filed.

A less radical interpretation of § 2112(a) might also sustain transfer without a determination that the transferee circuit has jurisdiction with respect to every state's plan that is under attack. The transfer section requires only that proceedings be instituted in two or more courts with respect to "the same order." It might therefore suffice, even if the transferee forum must have jurisdiction, that it have jurisdiction over some portion of the order; and the jurisdiction of the D.C. Circuit over the Administrator's order insofar as it affected the District of Columbia was clear. This argument, however, would require transfer if one petition attacked a provision based upon considerations peculiar to California and another one peculiar to Connecticut, while forbidding transfer if the Administrator had chosen to enunciate parallel actions respecting several states in more than one formally titled "order." It might be preferable, when a single order disposes of a variety of disparate matters, to determine the meaning of "order" on the admittedly uncertain basis of litigation convenience in the particular case.

A further problem with transfer concerns whether or not regulations are "orders" within § 2112. The APA excludes them from its definition of "orders," 5 U.S.C. § 551(6) (1970), and some courts have held them outside provisions for direct review of administrative "orders" in the courts of appeals. *See Currie & Goodman, supra* note 95, at 39-41. It is highly probable that what Congress had in mind in the transfer statute were adjudicative orders; the statute and its history are permeated with references to the "record," *see* S. REP. NO. 2129, 85th Cong., 2d Sess. (1958), which is a concept only recently given content as to rulemaking decisions not required to be based on the record. *See Currie & Goodman, supra* note 95, at 43-48. The potential multiplicity of parties and of issues may make the appropriateness of mandatory transfer and consolidation less clear when general regulations are to be reviewed.

The First Circuit's holding that the District of Columbia Circuit was the appropriate one in *NRDC* may have meant that venue was improper in the transferor court; and a later decision has held § 2112 inapplicable in such an instance, *Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 708 (6th Cir. 1975), without giving reasons. *Contra, NLRB v. Bayside Enterprises, Inc.*, 514 F.2d 275 (1st Cir. 1975). Neither the language nor the purpose of § 2112, however, appears to make this fact decisive, though a comparable district-court provision was apparently thought insufficient to provide for transfer from an improper forum. *See* 28 U.S.C. §§ 1404(a), 1406 (1970). *Goldlaw v. Heiman*, 369 U.S. 463 (1962), lends some support to a broad reading here, for it held that § 1406, which expressly dispenses with the need for proper venue, implicitly makes personal jurisdiction unnecessary as well.

Finally, several courts have found an "inherent" power in the courts of appeals to transfer cases, even from a forum in which venue is improper, for example, *Dayton Power & Light Co. v. EPA*, 520 F.2d at 708; *Georgia-Pacific Corp. v. FPC*, 512 F.2d 782, 783 (5th Cir. 1975), but only to a court in which the case could properly have been filed, *Eastern Air Lines, Inc. v. CAB*, 354 F.2d 507, 510 (D.C. Cir. 1965).

299. *NRDC v. EPA*, 475 F.2d 969, 969-70 (D.C. Cir. 1973).

More recently the Sixth Circuit reached the same conclusion when the nondegradation regulations affecting all state plans were challenged in several circuits at once.³⁰⁰

On the facts of these cases it would certainly have been wasteful to have had eleven review proceedings instead of one; and the issues were certainly of national significance. However, the flexible interpretation of the term "appropriate circuit" adopted in the *NRDC* opinions requires the courts to decide in each case what is the most suitable forum. This in turn may result in a good deal of threshold litigation, precisely the kind of litigation that venue statutes are intended to avoid. Such statutes make rough determinations as to the suitable forum in broad categories of cases, on the basis that a perfect allocation of individual cases to the best court is not worth the cost in litigating over what is, after all, an ancillary question. In their desire to achieve a sensible resolution of the particular case, the *NRDC* opinions appear to leave us essentially without a venue statute for determining where to challenge action with respect to the approval of implementation plans.

The problem of uncertainty would be reduced if we could construe the *NRDC* opinions to hold that questions of national import must be decided in the District of Columbia, while others are to be decided locally. However, they enunciate no such simple test. The First Circuit stressed the "flexible" nature of the venue provision, the fact that the parties to all eleven cases were identical, and the fact that the first petition had been filed in the District of Columbia; the transferee court implied that a single forum would be appropriate for all questions about implementation plans covering a single metropolitan region. Which forum to choose in the latter situation,³⁰¹ or what to do if the parties differ³⁰² or if there is no petition in the D.C. Circuit, is by no means clear. Other courts, moreover, have paid no heed to any distinction between local and national issues; without referring to the *NRDC* venue cases, five courts of appeals have entertained identical arguments that state variance provisions are illegal,³⁰³ five that the statute requires consideration of the cost of compliance,³⁰⁴ and four that

300. *Dayton Power & Light Co. v. EPA*, 520 F.2d 703 (1975). The opinion adds nothing to the reasoning of the earlier cases except to note that the regulations in issue had been adopted pursuant to an order of the District of Columbia courts. However, while the *Sierra Club* was a party in both the Sixth and the D.C. Circuits, the parties in the two forums were not otherwise identical; the decision therefore may reflect a further step toward consolidating all "national" issues in the District of Columbia.

301. See *District of Columbia v. Train*, 521 F.2d 971, 979 n.6 (D.C. Cir. 1975), noting the transfer of Fourth Circuit petitions affecting the National Capital Air Quality Control Region to the D.C. Circuit without giving reasons for the choice.

302. In *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), petitions were filed by different parties in two circuits, and transfer was ordered without discussion. *Id.* at 979 n.6. See *Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 705-06 (6th Cir. 1975).

303. All five were styled *NRDC v. EPA*: 507 F.2d 905, 908 (9th Cir. 1974); 494 F.2d 519, 522 (2d Cir. 1974); 489 F.2d 390, 393 (5th Cir. 1973); 483 F.2d 690, 691 (8th Cir. 1973); 478 F.2d 875, 879 (1st Cir. 1973). Three conflicting positions were taken, and the issue was resolved in *Train v. NRDC*, 421 U.S. 60 (1975).

304. *St. Joe Minerals Corp. v. EPA*, 508 F.2d 743, 747-48 (3d Cir. 1975); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 168 (6th Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495,

the states may not be ordered to engage in regulatory activities.³⁰⁵

In any case, referring all issues of national importance to a single circuit would not put an end to definitional problems. What would happen, for example, if a federal position on the general availability of technology to control gold mine emissions turned out to have practical application only to three circuits in which gold mines exist? But there is a more serious problem with such a test: one arguing that a particular measure is unnecessary to meet ambient standards in Des Moines and that the EPA must reject unnecessarily strict measures would apparently have to file in two courts at the same time.

There is another possible reading of the "appropriate circuit" that would take account of the failure to provide explicitly for local review while avoiding some of the uncertainty of the *NRDC* approach: that Congress intended to leave the question to be resolved according to general venue statutes. Such a course would be entirely sensible if review were in the district courts, for the Judicial Code contains explicit provisions specifying district court venue.³⁰⁶ That there is no general venue statute for the courts of appeals,³⁰⁷ however, makes the inference seem unlikely. If Congress in prescribing the "appropriate" circuit meant to incorporate district court venue provisions by analogy, those most nearly in point allow civil actions against federal agencies or officers to be brought where the plaintiff or defendant resides—which may be wherever it does business, if it is a corporation³⁰⁸—or where the cause of action arose, which common sense would say, if metaphysics allows, is where the plan is to take effect.³⁰⁹ Some uncertainty in choice of analogy is provoked by dissimilar provisions for Tucker Act or tort actions against the United States itself.³¹⁰

498-99 (4th Cir. 1973) (all holding costs relevant). *Contra*, *Union Elec. Co. v. EPA*, 515 F.2d 206, 215-16 (8th Cir. 1975); *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 843 (7th Cir. 1975).

305. *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3d Cir. 1974) (holding they may). *Contra*, *Brown v. EPA*, 521 F.2d 827, 831 (9th Cir. 1975); *Maryland v. EPA*, 530 F.2d 215, 225 (4th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 986-87 (D.C. Cir. 1975). On the other hand, petitions in several circuits attacking indirect-source provisions incorporated in various state plans have been transferred to the District of Columbia Circuit, presumably because such provisions were adopted in response to that court's decision in the *NRDC* case. *NRDC v. EPA*, 475 F.2d 969 (D.C. Cir. 1973). *See City of Highland Park v. Train*, 519 F.2d 681, 689 (7th Cir. 1975).

306. 28 U.S.C. §§ 1391-1403 (1970 & Supp. V 1975).

307. The Federal Rules of Appellate Procedure provide that petitions to review administrative orders shall be filed in "a court of appeals which is authorized to review such order." FED. R. CIV. P. 15(a). Similarly, the APA speaks of review in "a court of competent jurisdiction," 5 U.S.C. § 703 (1970). Venue is commonly but variously prescribed in statutes setting up each agency. *E.g.*, 15 U.S.C. § 45(c) (1970) (Trade Commission orders in circuit where act occurred or plaintiff resides or does business); 47 U.S.C. § 402(b) (1970) (FCC license denials in District of Columbia Circuit).

308. *See* 28 U.S.C. § 1391(c) (1970). There are, however, questions both as to whether this provision applies to corporate *plaintiffs* and as to whether it should be read into venue provisions pertaining to suits against the United States or its officers. *Id.* § 1391(e). *See* text accompanying notes 315-20 *infra*.

309. *See* 28 U.S.C. § 1391(e) (1970).

310. *See* 28 U.S.C. § 1402 (1970 & Supp. V 1975).

Thus there are at least four plausible interpretations of the statutory term "appropriate" circuit, each with its own drawbacks. To require an ad hoc determination of the most appropriate forum in the individual case, as apparently held in the *NRDC* cases, invites wasteful threshold litigation. To refer all issues of "national" concern to the District of Columbia Circuit would create some uncertainty and would require many cases to be split in two. To hold analogous venue statutes incorporated in section 307 would also generate uncertainty, would allow forum shopping, and would be hard to reconcile with the statute's apparently singular reference to "the" appropriate forum. To read "appropriate" as a euphemism for "local," while it accords best both with the explicit intention of the Senate Committee and with the juxtaposition of the D.C. Circuit as the forum for reviewing national standards, would have required the waste of eleven identical proceedings in *NRDC*.

The lessons to be drawn from this analysis are three. First, as a matter of statutory construction, the *NRDC* opinions are a classic example of hard cases and bad law. The Senate Committee's unmistakable statement of intention would have been followed if legislative history is ever to have a place in interpretation, as it is a perfectly plausible rendering of the statutory language. Second, the statute itself is intolerably vague; it lends itself to useless threshold litigation over four conflicting interpretations. Third, the only judicial interpretation of the statute to date is itself unacceptably uncertain, promising additional litigation over its application.

A bill recently passed by the House would provide for exclusive District of Columbia review of implementation-plan approval "if such action is based on a determination of nationwide scope or effect and if the Administrator finds and publishes that such action is based on such a determination."³¹¹ This proposal would leave intact in the absence of such a finding the vague reference to the "appropriate" circuit, which may yet spawn additional litigation—for example, when an issue is not national but is common to portions of a control region extending beyond a single circuit. Moreover, it would require a District of Columbia forum for all national issues whether or not there are challenges to more than one state's plan, whether or not the parties are identical, and whether or not local issues are also present, although the result in some cases may be either to split a single case in two or to burden the D.C. Circuit with issues local to another circuit. It is left unclear whether pendent local issues are to be separated out or litigated in the district, or whether the court may decide this question according to the facts of each case. In an effort to reduce litigation over what is a "national" issue, the bill would give the EPA, an interested party, effective power to select a favorable forum. To the extent judicial review of the EPA's certification is to be allowed—and the bill leaves this question up in the air—uncertainty and undesirable threshold litigation would reappear. If such a provision is enacted, it should at least make clear that issues that are not national in scope are to be reviewed in the circuit containing

311. H.R. 10498, 94th Cong., 2d Sess., § 305(c)(4) (1976).

the state whose plan is at issue, that the EPA's certification is not reviewable, and that the D.C. Circuit has discretion to transfer pendent local questions. My general belief in the desirability of divergent views on questions of national import,³¹² however, leads me to recommend codification of the Senate Committee position that all questions respecting implementation plans are reviewable in the circuit containing the state whose plan is challenged,³¹³ relying on the transfer power to alleviate undue multiplicity of litigation in extreme cases such as *NRDC*.³¹⁴

C. *The Vague Test of the FWPCA*

The Administrative Conference advocates exclusive D.C. Circuit review of national standards under the FWPCA. Even if this view becomes law, however, there will remain EPA actions subject to local review in local courts of appeals, such as the grant or denial of permits, action on state permit programs, and water quality related standards for individual bodies of water under section 302.³¹⁵ The present provision for venue in the circuit where the petitioner "resides or transacts such business," whether or not its applicability is later limited to local determinations, is subject to serious objections.

First, with respect to corporations, the reference to the circuit where the petitioner "resides" is ambiguous. Arguably it incorporates the definition of the general venue statute,³¹⁶ namely, that a corporation "resides" wherever it does business. If so it seems undesirably broad, for California

312. See text accompanying notes 284-85 *supra*.

313. To add the District of Columbia Circuit at the petitioner's option, as in many administrative review statutes, would afford a safety valve against wasteful multiple litigation as in *NRDC* without inconveniencing the government, but at the cost of forum-shopping and of further burdening that busy court and requiring it to decide many issues of purely local concern.

314. Cf. *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1035 (3d Cir. 1975), in which transfer was used to consolidate related challenges against nationwide effluent limitations under the FWPCA's provision for decentralized review. Although the transfer route requires the apparently wasteful step of initial multiple filings, it has the intangible advantage, as compared with a flexible test for the "appropriate" initial forum, of implying that local review is the norm, to be departed from only upon a special showing; it is conceivable that this difference in emphasis may discourage unnecessary litigation. Moreover, the considerable discretion embodied in the principle of transfer is a substantial safeguard against potential reversal on venue grounds in the Supreme Court. In light of the ambiguity of existing transfer powers, see note 298 *supra*, the Administrative Conference recommends an amendment "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, or in the interests of justice." ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ A(4)).

The Conference, while favoring centralized review for nationwide regulations, has adopted the Senate Committee position. *Id.* ¶ A(3). The costs of attempting to centralize review of national questions in implementation plans are too high.

315. 33 U.S.C. § 1312 (Supp. V 1975). ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-3, ¶ E), would add to this list the approval of state water quality standards and of state proposals to ban the discharge of marine sewage.

In all these cases, as with implementation plans, questions of national import may well arise. As in the case of implementation plans, however, the Conference was unimpressed by EPA's request for centralized review of such issues.

316. 28 U.S.C. § 1391(c) (1970).

hardly seems the right place to argue a case involving a Pennsylvania factory just because the company also does business there. But the general definition has not been read into every special venue statute,³¹⁷ and corporations have been held under the patent venue statute to "reside" only where incorporated.³¹⁸ Moreover, it is not even clear whether or not the general definition applies to corporate plaintiffs as well as to defendants,³¹⁹ or whether it incorporates the untidy law of "doing business" that governed personal jurisdiction before the enactment of long-arm statutes. Furthermore, even a narrower definition of residence would hardly point to the most appropriate forum, since the place of incorporation or principal place of business—the latter itself an elusive and litigation-provoking concept³²⁰—may be far from the plant whose discharge is at stake.

Ambiguity is compounded by the FWPCA's unfortunate provision for venue where the petitioner "transacts such business." There is no antecedent for "such," so it is unclear whether the requisite fact is the transaction of business affected by the challenged regulation or the transaction of any business at all. The latter reading would appear unjustifiably broad, since convenience and familiarity with local conditions dictate a forum with some connection with the controversy. Even the more restricted meaning can be unduly stretched, as when one court concluded that business transacted at company headquarters in Missouri would be affected by Colorado's permit program.³²¹ The court sidestepped the question of corporate residence and expressly refused to resolve the ambiguity respecting transaction of business, for it found both tests satisfied, while quoting the Conference Committee's paraphrase of the statute as allowing venue where the petitioner "resides or transacts business." The court did largely redeem the situation by transferring the case to the Tenth Circuit, but it would avoid a situation of musical chairs if the courts held, and the statute provided, that venue lay in Colorado in the first place.

Drafting the appropriate venue provision, however, is not so easy as it might appear. The Administrative Conference position on national standards somewhat simplifies the task, for most of the actions remaining subject to local review apply only to a single state (for example, permit program approval) or to a single facility (permit issuance or denial). The Conference thus recommends that such determinations be reviewed "in the circuit containing the state or facility."³²² For simplicity's sake the recommendation is silent as to section 302 standards, which may affect a body of water (such as Lake Superior) in more than one circuit. Such

317. See *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957) (patent case under 28 U.S.C. § 1400(b)).

318. *Id.* at 226.

319. Compare *Southern Paperboard Corp. v. United States*, 127 F. Supp. 649, 650 (S.D.N.Y. 1955), with *Chicago & N.W. Ry. v. Davenport*, 94 F. Supp. 83, 85 (S.D. Iowa 1950).

320. See *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960).

321. *Peabody Coal Co. v. EPA*, 522 F.2d 1152, 1153 (8th Cir. 1975).

322. ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ A(2)).

standards should be reviewable in one of those circuits, preferably that in which the petitioner is affected by the challenged action.

The drafting problem becomes more acute if the present principle of local review for national standards is retained or extended to the CAA. When a person subject to the requirement challenges such a standard, it would make sense to channel review to a circuit in which he makes the affected discharge or conducts the affected business. When the petitioner is a consumer of air or water arguing that a national standard is too lax, analogy suggests review should take place where he is affected by the action of which he complains. While such a test would no doubt lead to some litigation, it is a somewhat more precise variant of the familiar reference to the place where the cause of action arose; it would probably be the best single standard if local review were to be provided for all actions reviewable in the courts of appeals.

VI. STANDING

Section 304 of the CAA allows a suit by "any person";³²³ section 505 of the FWPCA by a person "having an interest which is or may be adversely affected";³²⁴ section 509 of the same Act by "any interested person";³²⁵ and section 307 of the CAA is silent on the question of standing.³²⁶ The existence of these four conflicting provisions for various types of judicial review makes for both uncertainty and inconsistency in the administration of the laws.

A. Interpretation

1. "Any Person"

"Any person" may sue to compel the Administrator to perform a nondiscretionary duty under section 304 of the CAA. It is difficult to construe this language not to confer standing on everyone; the First Circuit has described it as a provision for "universal" standing.³²⁷ The legislative history contains nothing to cast doubt on this interpretation. The Senate Report stressed the need for citizen suits to make up for possible government laxity and observed that persons suing under section 304 "would be performing a public service";³²⁸ nothing was said about any limitation on who might bring suit.³²⁹

323. 42 U.S.C. § 1857h-2 (1970).

324. 33 U.S.C. § 1365(g) (Supp. V 1975).

325. *Id.* § 1369.

326. 42 U.S.C. § 1857h-5 (1970).

327. *NRDC v. EPA*, 484 F.2d 1331, 1337 (1st Cir. 1973) (dictum).

328. S. REP. NO. 1196, 91st Cong., 2d Sess. 38 (1970).

329. *Id.* at 36-39. One court, however, has without explanation stated that § 304 does not dispense with the necessity for demonstrating "a sufficient interest in the specific controversy as to meet traditional concepts of standing." *Coalition for Clean Air v. District of Columbia*, 6 ERC 1363, 1365 (D.D.C. 1974) (dictum), citing *Sierra Club v. Morton*, 405 U.S. 727 (1972). Finding a sufficient allegation of injury, the court upheld standing.

2. "An Interest . . . Adversely Affected"

The original Senate version of the comparable citizen-suit provision of the FWPCA would similarly have conferred universal standing.³³⁰ A House amendment would have limited standing to persons "affected" and to groups whose participation in the administrative process had shown "a special interest in the geographic area in controversy."³³¹ Thereafter, in *Sierra Club v. Morton*,³³² the Supreme Court held that only a person injured had standing to challenge governmental action under the APA, which provides for review at the instance of a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."³³³ The Conference Committee, leaving intact the sentence allowing suit by "any citizen," thereupon defined "citizen" for purposes of section 505 as "a person having an interest which is or may be adversely affected."³³⁴ This language, the Conference Report explains, "reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton*."³³⁵

It seems odd that the committee felt compelled, in drafting a statutory standing provision, to incorporate the test the Court had employed in construing another statute. Moreover, there may be no little confusion in administering the standing requirement of section 505. The language chosen—"an interest . . . adversely affected"—is neither that of *Sierra Club* nor of the statute that opinion construed. All *Sierra Club* holds is that one who does not allege injury may not sue; Congress could have adopted that requirement by conferring standing on anyone "adversely affected." The ambiguous additional requirement of an "interest" may be merely redundant, or it may suggest that something beyond simple injury is required. The APA, on the other hand, has been authoritatively construed to require not only injury but also that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."³³⁶ Since this language was quoted with evident approval in dictum in the *Sierra Club* opinion, it is arguable that the Conference Committee meant by its use of the word "interest" to incorporate the full standing requirements of the APA. Again, however, less ambiguous terms were at hand to accomplish this goal; the bare word "interest" does not immediately suggest a determination of the class protected by the provision sought to be enforced, and a paraphrase of the zone test or a reference to the APA would have made matters perfectly plain. Indeed, the most natural reading of the naked

330. See H.R. REP. NO. 1465, 92d Cong., 2d Sess. 145 (1972).

331. See H.R. REP. NO. 911, 92d Cong., 2d Sess. 363 (1972).

332. 405 U.S. 727 (1972).

333. 5 U.S.C. § 702 (1970).

334. H.R. REP. NO. 1465, 92d Cong., 2d Sess. 146 (1972).

335. *Id.*

336. *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

words of section 505 would suggest a reincarnation of the old requirement, specifically discredited by the Supreme Court in construing the APA, that the plaintiff have a "legally protected interest."³³⁷ Such an interpretation, however, as well as any fourth possible meaning of "interest" that departs from the *Sierra Club* or APA tests, would be clearly contrary to the explicit intention of the Conference Committee to "reflect" the *Sierra Club* decision.³³⁸

My inclination would be to hold that "interest . . . adversely affected" is a long-winded way of saying "adversely affected." The most probable explanation of the Conference Committee's behavior is that it detected in *Sierra Club* intimations of constitutional limitations on standing, although the case explicitly turned on statutory construction, and the court in footnote dictum appeared to disclaim the existence of any constitutional limitation.³³⁹ If the standing requirement was inserted out of perceived constitutional compulsion, it should be read to require only injury in fact, for the Court has never suggested even in dictum that anything more is required by the Constitution, and it has expressly said Congress may confer standing outside the zone of protected or regulated interests.³⁴⁰

3. "Interested Person"

Section 509 of the FWPCA authorizes any "interested person" to challenge certain EPA regulations and actions of the Administrator with regard to permits. The Committee reports are silent on the meaning of "interested person."³⁴¹ Plainly enough, the intention was to avoid conferring standing on everyone. But the choice of language is most unfortunate, for it departs from all established landmarks, leaving the courts, I cannot resist saying, at sea. "Adversely affected" would have been easily understood in light of *Sierra Club*; the APA or its zone test could have been plugged in if that had been thought desirable. At the very least one might have expected either consistency with section 505 of the same statute or an explanation of why and how the two sections differed. The attractive conclusion that an "interested person" under section 509 is the same as one "having an interest . . . adversely affected" under section 505 is made more difficult by the fact that the former language was already in the bill before the *Sierra Club* decision,³⁴² when the latter section was conspicuously broader;³⁴³ thus the "interested" language of section 509 cannot be explained as a response to felt constitutional compulsion.

337. *See id.*

338. *See* Montgomery Env'tl Coalition v. Fri, 366 F. Supp. 261, 264 (D.D.C. 1973) (observing that § 505 incorporates the *Sierra Club* test, quoting the APA, and upholding standing because the plaintiff had alleged injury).

339. *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972).

340. *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 151-53 (1970).

341. *See* H.R. REP. NO. 911, 92d Cong., 2d Sess. 135-36 (1972); H.R. REP. NO. 1465, 92d Cong., 2d Sess. 147-48 (1972).

342. *See* H.R. REP. NO. 911, 92d Cong., 2d Sess. 369 (1972).

343. *Id.* at 363.

Nevertheless, I would opt for the equation of the two phrases. The most natural reading of "interested person" is one requiring that there be something at stake; the language does not readily suggest the further APA requirement that the litigant be within the protected or regulated zone. Moreover, the insertion of a special standing provision suggests, although only mildly, a dissatisfaction with leaving the question to the established test of the APA, which would ordinarily otherwise apply. A final possibility would be to equate "interested" with the contemporaneous House bill provision in section 505 for groups—for example, for conservation organizations³⁴⁴—showing "a special interest" in the area affected.³⁴⁵ But the latter provision was altered by the Conference Committee in an effort to conform to the *Sierra Club* decision; it should not be presumed that the Committee accidentally left intact another provision of the same statute that did not so conform.

4. Section 307

Remaining for discussion is section 307 of the CAA, which provides that "a petition for review" of specified regulations and other actions "may be filed" but fails to say by whom. The specification in an earlier draft that such a petition might be filed by any "interested person"³⁴⁶ was dropped without explanation.

A number of courts have entertained section 307 challenges by conservation organizations without adverting to any question of standing.³⁴⁷ The District of Columbia Circuit, however, has clearly opined in dictum that the omission of any standing provision reflects "a determination to let standing in § 307 suits be controlled by the Administrative Procedure Act,"³⁴⁸ and two other courts have thrown out section 307 challenges made by organizations failing to allege injury to interests protected or regulated by the statute.³⁴⁹

This resolution seems correct. The APA clearly applies by its own terms, and the silence of section 307 does not suggest that any different standing test was intended. The omission of the word "interested" is as consistent with a desire to avoid the confusion of unfamiliar terminology as it is with a desire to remove impediments to standing. That the test of

344. See *NRDC v. Train*, 519 F.2d 287, 288 (D.C. Cir. 1975), in which the court in an action held to lie under the APA and not under § 509, and, without addressing the issue of standing directly, described the plaintiffs as "corporations interested in the implementation and enforcement of federal laws protecting the environment." Such an interest is clearly insufficient under the APA, whatever its status under § 509. See generally *Sierra Club v. Morton*, 405 U.S. 727 (1972).

345. See text accompanying note 331 *supra*.

346. See S. REP. NO. 1196, 91st Cong., 2d Sess. 125 (1970).

347. E.g., a series of cases entitled *NRDC v. EPA*: 494 F.2d 519 (2d Cir. 1974); 489 F.2d 390 (5th Cir. 1974); 483 F.2d 690 (8th Cir. 1973). The Fifth Circuit case was reviewed in the Supreme Court, again without mention of standing. *NRDC v. Train*, 421 U.S. 60 (1975).

348. *NRDC v. EPA*, 512 F.2d 1351, 1354 n.14 (D.C. Cir. 1975).

349. See generally *NRDC v. EPA*, 507 F.2d 905 (9th Cir. 1974); *NRDC v. EPA*, 481 F.2d 116 (10th Cir. 1973).

section 307 is apparently more restrictive than that of the comparable section of the FWPCA, which retains the word "interested," is a problem for Congress rather than for the courts. Yet the First Circuit, in a highly creative opinion, has spelled out a distinct theory in support of the conclusion that anyone may file a petition under section 307.

The case was one of the many filed by the NRDC challenging state implementation plans. Successful in part on the merits, the Council moved for attorneys' fees. Section 307 is silent on this subject, as it is on standing. Section 304, however, which authorizes suit by "any person" to compel performance of a nondiscretionary duty, specifically authorizes attorneys' fees in "any action brought pursuant to" section 304. Perceiving no reason why Congress might have thought attorneys' fees appropriate only in district court actions, the court held that petitions under section 307 were actions brought under section 304. Section 307, said the court, was merely a venue provision: "The authorization for, and conditions of, suit are contained in § 304(a). The legislative history reveals that § 307 does no more than direct that some proceedings must be brought in the circuit courts."³⁵⁰ Not only does this argument apply with equal force to the standing provision of section 304; the court in explicit dictum declared that anyone could sue under section 307: "The section providing for review of actions of the Administrator is § 304(a), and since § 304(a) specified that standing was universal, there was no need to repeat the allowance in § 307."³⁵¹

The terminology of section 304 makes this construction seem implausible. As I have argued above,³⁵² an action to compel performance of a nondiscretionary duty is a highly unusual means of expressing a general principle of judicial review; it is the traditional language of mandamus, and mandamus for the Administrator's inaction was the type of case discussed in the legislative history in connection with section 304. Moreover, the separation of sections supports this analysis; a Congress that believed it had set out a general provision for judicial review in section 304 would be expected to insert ancillary venue provisions at that point in the statute, not to return to the subject three sections later, without cross-references, using the distinct language of judicial review. The District of Columbia Circuit, focusing largely upon the quite separate histories of sections 304 and 307, has refused to follow the First Circuit, reluctantly holding that attorneys' fees are unavailable under the latter: "Sections 304 and 307 contemplate distinct groups of cases."³⁵³ Particularly telling was that court's demonstration that it is invariably impossible for a litigant to meet the requirements of both sections: while section 307 requires review to be sought within thirty days after the challenged action, section 304 requires sixty-day notice to the Administrator before filing suit. Thus, the First Circuit's holding that

350. NRDC v. EPA, 484 F.2d 1331, 1336 (1st Cir. 1973).

351. *Id.* at 1367.

352. See text accompanying notes 209-11 *supra*.

353. NRDC v. EPA, 512 F.2d 1351, 1355 (D.C. Cir. 1975).

section 307 petitions are actions under section 304 means that nobody can ever challenge the actions listed in section 307. It is impossible to believe Congress had any such intention. The inconsistent standing requirements of the two sections deserve Congress' attention, but the APA provides the test of standing under section 307.

B. *The Constitutional Question*

Finally, the serious constitutional question posed by the universal standing provision of section 304 merits discussion. Much has been written on the constitutional status of the standing requirement,³⁵⁴ and this is hardly the place for a definitive resolution. The Supreme Court has never had occasion to rule on the matter one way or the other, and its dicta conflict. On the one hand, such a judicial conservative as Mr. Justice Harlan once said that Congress might confer standing on anyone,³⁵⁵ while the majority in *Sierra Club* observed that "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."³⁵⁶ On the other hand, in 1974 the Court described the earlier *Data Processing* case³⁵⁷ as having "held that whatever else the 'case or controversy' requirement embodied, its essence is a requirement of 'injury in fact.'"³⁵⁸ In 1975, in finding a lack of standing in a case in which Congress had not attempted to give it, the Court declared flatly that "the art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party,"³⁵⁹ and a 1976 opinion contains no fewer than seven explicit obiter references to a constitutional requirement of injury.³⁶⁰

Given this inconclusive direction from above, the courts of appeals have divided on the question of the constitutionality of unrestricted standing under the CAA. The District of Columbia Circuit, in a case arising under section 304, has squarely upheld the citizen suit provision in reliance on the *Sierra Club* dictum quoted above.³⁶¹ The Ninth and Tenth Circuits, in refusing to read the unlimited standing provision of section 304 into section 307, have argued that to do so would be unconstitutional.³⁶² The Tenth Circuit opinion attempts an analysis in terms of the policies underly-

354. See, e.g., Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?* 78 YALE L.J. 816 (1969).

355. *Flast v. Cohen*, 392 U.S. 83, 130 (1968) (dissenting opinion).

356. *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citations omitted).

357. See *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 151-53 (1970). Since standing was upheld under a statute requiring injury, the constitutional argument in *Data Processing* was pure dictum.

358. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1974).

359. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

360. See *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38-42 (1976).

361. *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 814 n.26 (D.C. Cir. 1975).

362. *NRDC v. EPA*, 507 F.2d 905 (9th Cir. 1974); *NRDC v. EPA*, 481 F.2d 116 (10th Cir. 1973).

ing the constitutional requirement of a "case" or "controversy": absent injury, there is no assurance that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form thought to be capable of judicial resolution,"³⁶³ and "unrestricted" standing endangers the separation of powers.

The argument of "specificity" does not seem compelling in the present context, since it appears that individual circumstances are unlikely to be relevant to the validity of a regulation even when it is challenged by a person who is injured.³⁶⁴ But the requirement that the parties be sufficiently adversary to assure adequate presentation of both sides is a significant obstacle to citizen standing. That the plaintiff is hurt by the action he attacks undoubtedly helps to assure that the case will be vigorously prosecuted. A glance at the *Sierra Club* case, however, suffices to show that injury is not indispensable to provide a true adversary; no one can honestly entertain fears of inadequate presentation when the Sierra Club sues to protect the environment. Conversely, the trivial injury the Supreme Court has held sufficient to satisfy standing requirements³⁶⁵ is far from absolute assurance of vigorous advocacy; a person nominally injured may be collusively in league with the defendant. Nevertheless, the undesirability of a subjective inquiry in each case into the degree of ferocity with which the plaintiff opposes the action he challenges argues in favor of drawing a firm and administrable line, though it be inevitably inexact at the margin. Moreover, even if a careful congressional provision granting standing to those demonstrating a sufficient adverse position would be upheld, the universal standing provision in section 304 is overbroad unless one accepts the argument of Professor Scott: "If the plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation."³⁶⁶

Adequate presentation, moreover, is not the sole consideration. Although there is some appeal to Mr. Justice Harlan's position that arguments based on the separation of powers are somewhat blunted when Congress has specifically authorized citizen suits to review its own actions,³⁶⁷ this cannot be a complete answer. First, it is the actions of the Executive, not of the Congress, that the CAA subjects to citizen attack. Moreover, no one would argue, I suppose, that Congress could give the courts jurisdiction to decide unripe or moot cases, even if there were

363. *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

364. See text accompanying notes 258-60 *supra*.

365. See *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973). "We have allowed important interests to be vindicated by plaintiffs with no more at stake . . . than a fraction of a vote, . . . a five dollar fine and costs, . . . and a \$1.50 poll tax '[A]n identifiable trifle is enough for standing'" *Id.* (citations omitted).

366. Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973).

367. *Flast v. Cohen*, 392 U.S. at 131-32 (dissenting opinion).

assurance that both sides would be presented by the nation's best lawyers. It is in the interest of the courts, as well as of the Congress, that the former not be plunged unnecessarily into making controversial pronouncements on important legal questions. The case or controversy requirement may be viewed as confining the courts to their traditional job of determining whether a plaintiff is entitled to something of value which he claims from the defendant. That in exercising this function the courts inevitably are called upon to resolve important public questions, and that their doing so is a crucial cog in our system of checks and balances, does not mean the courts may reach out to supervise the government by making pronouncements in "cases" in which the plaintiff has nothing at stake.³⁶⁸

The constitutional policy of checks and balances that underlies judicial review,³⁶⁹ however, can be said to argue in favor of a construction of "case" and "controversy" that would permit Congress to extend standing beyond the injured. When harm is highly concentrated, as in automobile negligence and breach of contract, the probability of a suit by the victim is generally sufficient to assure vindication of the law. When the harm is widespread and individually small, however, as is often true in pollution cases, it may be that no victim will find it worth the cost to sue. There is even the possibility in some environmental situations that no one is injured in the *Sierra Club* sense, as when a deep-sea species protected by the law is threatened with extinction. In either of these cases the injury requirement may frustrate fulfillment of the law.³⁷⁰ The inability of those within the protected class to sue has been an explicit reason for finding standing in others who are injured;³⁷¹ whether similar considerations will be held relevant to the definition of "case" or "controversy" remains to be seen. In any event, traditional principles of judicial restraint should enjoin considerable deference to the determination of Congress that the injury requirement is not a part of the "case" or "controversy" limitation.

I would venture to predict, on the basis of what I think are the predominant as well as the most recent Supreme Court dicta, that injury will be held to be a constitutional requirement. In policy terms this would superficially appear to be a matter of some concern. As one court observed in finding itself unable to award attorneys' fees under section 307, the citizen suit is an important counterbalance to the ever present polluters who clearly have standing: "[T]here may come a day soon when EPA's determinations, though frequently attacked because they are too stringent, are only seldom contested because they are not stringent enough."³⁷² In all probability, however, restricting standing to the injured will not make an important practical difference under the pollution laws. For pollution usually hurts somebody, and, subject to the barratry laws, means can be

368. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 114-15 (1962).

369. See *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803).

370. See Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RESOURCES J. 76, 78-79, 81 (1973).

371. See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 254-56 (1953).

372. *NRDC v. EPA*, 512 F.2d 1351, 1358 (D.C. Cir. 1975).

found, including group representation of members and the provision of attorneys' fees, for augmenting the resources of the victim whose stake will not support the cost of suit. In the Ninth Circuit case, for example, while the petition of the Natural Resources Defense Council was dismissed for want of standing, the court reached the merits because a copetitioner, who the court said would "suffer injury if compelled to breathe air less pure than that mandated by the Clean Air Act," was a resident of the state whose plan was under attack.³⁷³ Moreover, the informer's action noted by Professor Berger may provide a last legislative means for assuring a watchdog on the anti-pollution side of the fence; the Supreme Court, without discussion, has upheld a judgment in favor of a plaintiff, evidently otherwise unaffected, who had been authorized to sue for fraud against the government and to keep half the damages for himself.³⁷⁴

C. *The Remedy*

Congress ought to eliminate the inconsistency by prescribing a single test for standing under all four provisions.³⁷⁵ One goal of such a test that I think should be obvious is to avoid the use of unfamiliar terms such as "interest affected" or "interested party," which will provoke unnecessary litigation. Conferring standing on everyone would meet this goal but would probably be unconstitutional. Either the zone test or a simple injury requirement, I believe, would be reasonably precise while serving the purposes of the standing requirement. The Committee on Judicial Review of the Administrative Conference proposed that the statutes provide standing for anyone adversely affected by the action (or inaction) challenged, and I agree.

"Adversely affected" is the language of the familiar APA. Despite the qualification in that statute to adverse effect "within the meaning of a relevant statute," the term "adversely affected" has acquired a recognized meaning of its own. The Supreme Court has equated adverse effect with "injury in fact,"³⁷⁶ which it has also said is the constitutional requirement.³⁷⁷ A substantial body of law has grown up to define what constitutes the requisite injury. "Aesthetic and environmental" harm, as well as financial, may qualify;³⁷⁸ it is immaterial that the injury is widely shared;³⁷⁹ the injury

373. *NRDC v. EPA*, 507 F.2d 905, 910 (9th Cir. 1974). The court might have added, but did not, that the second branch of the APA test was also satisfied; for there can be no doubt that a principal purpose of the statute was to protect against injuries to the public health.

374. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943). Whether such a provision would withstand serious analysis is another question. While the monetary stake should guarantee an adversary presentation if sufficiently substantial, I doubt that such an artificial interest should overcome the policy against unnecessary intervention in the affairs of other branches of the government.

375. The Administrative Conference is in accord with this position, ACUS Recommendations 1976, 41 Fed. Reg. 56,768 (1976) (Recommendation No. 76-4, ¶ F); the Conference did not agree on what that test should be.

376. *E.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

377. *E.g.*, *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 39 (1976).

378. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973).

379. *Id.*

need not be substantial, as "a five dollar fine" will do;³⁸⁰ but a mere intellectual concern will not.³⁸¹ Of course there will be questions of interpretation. Short of abandoning all limitations on standing, the only alternative is to prescribe a detailed code listing the categories of persons entitled to sue. The difficulty of foreseeing all possible fact situations makes such an approach highly risky, and I am not convinced it would eliminate more uncertainty than it would create.

Some will object that a test of injury in fact would not permit enough people to sue; others will contend that it would permit too many. To the first I would respond that the Constitution leaves no choice and that someone can almost always be found who is hurt by pollution. To the second I would argue that it is as important to keep the EPA from being too lax as it is to keep it from being too strict. Challenges by persons injured by the failure to adopt strict regulations seem essential to effectuating the statutory purpose of preventing undue pollution. To add the requirement that the injured party be in the regulated or protected class would probably make little practical difference, but it would add another source of litigation expense without materially advancing the policies behind the standing requirement. I would provide standing for anyone adversely affected.

VII. CONCLUSION

In its haste to do something positive about the environment, Congress has been quite careless in enacting provisions for judicial review under the pollution laws. The various provisions are inconsistent, incomplete, ambiguous, and in several respects misguided. It is time for a sober reconsideration and restatement of the provisions for judicial review in light of the accumulated experience and guided above all by the principle that jurisdictional provisions should draw bright lines to minimize the waste of litigation over whether the case has been brought in the right court.

Confronted with unsatisfactory statutory provisions for judicial review, the courts have understandably but improperly attempted on occasion to stretch the statute in order to achieve more sensible results. In other instances courts have shortsightedly ignored even sensible congressional directions in an effort to do justice in a particular case. Finally, some courts have felt required by ambiguous provisions to reach unfortunate results that Congress has not in fact required. Pending statutory amendment, the job of the courts is to do their best to carry out Congress' intentions, resolving true ambiguities so as to promote an efficient and sensible system of judicial review.

380. *Id.* at 689 n.14.

381. *See* *Sierra Club v. Morton*, 405 U.S. at 739-40.