State Implementation Plans and Air Quality Enforcement

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II
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A
THE STATE IMPLEMENTATION PLAN STRATEGY

Although broad discretion is vested in EPA to administer the Act, several sections of the statute provide for judicial review of EPA action.1 Such review may be sought by industry, environmental groups, or other interested citizens. EPA has had to defend itself against charges from environmentalists of being overly lenient in its interpretation of the Act's provisions and claims of industry that it is being too rigorous in administering the Act.

1. Judicial Review of EPA Action

a. Section 307(b): Judicial Review of Pre-enforcement Action

Section 307(b) of the Act provides for judicial review of what may be termed pre-enforcement activity on the part of EPA: promulgation of national primary and secondary standards,2 emission standards for hazardous pollutants,3 standards of performance for new or modified stationary sources4 and for certain mobile sources,5 and approval or promulgation of any state plan implementing a national ambient air quality standard.6

Problems have arisen concerning jurisdiction, standing, and venue in cases brought under section 307(b). Petitions for review of EPA standards must be filed in the U.S. Court of Appeals for the District of Columbia. Other petitions for review under section 307(b) must be filed in the U.S. Court of Appeals for the "appropriate circuit." The precise meaning of that phrase has been the subject of some dispute.

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In *NRDC v. EPA*, Natural Resources Defense Council and others petitioned for review of EPA action in approving certain state plans and filed motions for a declaratory judgment that the court's decision would apply nationwide. When the court denied the motion, NRDC filed identical petitions in the 10 circuits to transfer the cases to the D.C. Circuit. The Court of Appeals for the First Circuit granted the motion for transfer because the petitions raised the same legal issues, and there appeared to be no factual issues unique to any circuit. More important, delayed and inconsistent results on the merits in different circuits would frustrate congressional intent to expedite solution of the problems of air pollution. In addition, if environmental groups were forced to seek separate determinations on identical issues, the burden on their limited resources would be such as to limit significantly the number of meritorious actions which could be brought.

In another case brought by the Natural Resources Defense Council against EPA, NRDC and others filed petitions in the U.S. Court of Appeals for the Tenth Circuit challenging EPA approval of the New Mexico, Utah, and Colorado implementation plans. All three petitions were dismissed for lack of standing, the court finding that petitioners had failed to allege either citizenship in the affected states or any injury resulting from the Administrator's actions. The court's interpretation of Congress' "blanket authorization" in section 307(b) was that it was not sufficiently unequivocal to justify an authorization of suits by "private attorneys general." Fortunately, environmentalists have not encountered similar standing problems when challenging EPA action in other courts.

Any party dissatisfied with EPA approval of a plan must seek review within 30 days of the Administrator's action unless new grounds for filing a petition arise after the thirtieth day. Failure to seek review of EPA action as provided by section 307(b)(1) precludes review of that issue in later civil or criminal enforcement proceedings.

b. **Section 304(a)(2): Citizens Suits Against the Administrator**

Section 304(a)(2) is a jurisdictional section permitting any inter-
ested person to sue the Administrator for failure to perform a nondiscretionary duty under the Act. Suits under this section must be brought in a federal district court, but the amount in controversy and diversity of citizenship requirements do not apply. Plaintiffs must notify EPA 60 days before they commence an action under this section, so that the Administrator may remedy the failure and thereby avoid unnecessary litigation.

The provisions of the Act which set forth the Administrator's nondiscretionary duties are ambiguous. Some sections set forth prerequisites for certain administrative action. If these conditions are met, the Administrator must act in accordance with the section. However, the statutory language setting forth many of the requirements is ambiguous, in which case the suits under section 304(a)(2) are essentially challenges to the Administrator's interpretation of the Act. The most notable nondiscretionary duty is the approval of state plans implementing national primary and secondary standards: if a plan satisfies the provisions of section 110(a)(2) it must be approved; if not, it must be disapproved. It should be noted that while approval of state implementation plans is subject to judicial review under section 307(b), it would also be subject to review in a section 304 proceeding as a failure to disapprove a plan which did not meet all the requirements of section 110(a)(2). Disapproval of a state plan is not subject to review under section 307(b) but might be under section 304 as failure to approve a plan which did conform to the mandates of section 110(a)(2). Although the double provision for challenges to EPA approval of plans may signify in part the great importance of state implementation plans for carrying out the goals of the Act, it is also an illustration of the complex interplay between various sections of the Act.

2. Air Quality and Emission Standards

a. Definition of Ambient Air Standards

The national ambient air quality standards establish the maximum permissible concentrations in the atmosphere of each pollutant identified as dangerous to the public health or welfare. In contrast with an emission standard, which regulates the amount of a given pollutant a source may emit over a specified time period, an ambient air standard is concerned with how much of a particular pollutant is present in the atmosphere regardless of the source. Thus violations of ambient air standards are assessed in terms of concentrations in the atmosphere, regardless of the sources that contribute to them.

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19. See Utah International v. EPA, 478 F.2d 126, 5 ERC 1311 (10th Cir. 1973).
standards are detected by sampling the ambient air, not by monitoring the emissions from stationary or moving sources.\textsuperscript{21} Emission standards often are set to insure the meeting of the ambient air standards. Depending upon the established emission standards, the aggregate of emissions in a region may exceed the levels permitted by the ambient air standards even though each source in that region complies with the applicable emission standards.

National ambient air standards are established on the basis of air quality criteria. The Administrator must issue these criteria for each air pollutant

(A) which in his judgment has an adverse effect on public health and welfare; and

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources . . . .\textsuperscript{22}

Air quality criteria must reflect "the latest scientific knowledge useful in indicating the . . . effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air."\textsuperscript{23}

The primary standard for each pollutant must reflect the maximum levels which would not endanger the public health;\textsuperscript{24} the secondary standard must be set to protect the public welfare.\textsuperscript{25} Ambient air standards have been set for the following pollutants: sulfur oxides, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons and nitrogen dioxide.\textsuperscript{26}

\begin{table}[h]
\begin{tabular}{|l|c|c|}
\hline
Pollutant & Averaging Time & Primary Standard & Secondary Standard \\
\hline
Photochemical & & & \\
Oxidants & one hour & 160 \( \mu g/m^3 \) & Same as Primary \\
& & (0.08 ppm) & \\
Hydrocarbons & three hours & 160 \( \mu g/m^3 \) & Same as Primary \\
& & (6-9 A.M.) & (0.24 ppm) \\
Nitrogen Dioxide & annual arithmetic average & 100 \( \mu g/m^3 \) & Same as Primary \\
& & (0.05 ppm) & \\
Carbon Monoxide & eight hours & 10\( \mu g/m^3 \) & Same as Primary \\
& & (9 ppm) & \\
& & one hour & 40 \( \mu g/m^3 \) \\
& & & (35 ppm) \\
Sulfur Dioxide & annual arithmetic mean & 80 \( \mu g/m^3 \) & 60 \( \mu g/m^3 \) \\
& & (0.03 ppm) & (0.02 ppm) \\
& & 24 hours & 365 \( \mu g/m^3 \) & 260 \( \mu g/m^3 \) \\
& & (0.14 ppm) & (0.10 ppm) \\
& & three hours & & 1300 \( \mu g/m^3 \) \\
& & & & (0.5 ppm) \\
\hline
\end{tabular}
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\textsuperscript{22} Id.
\textsuperscript{23} Id. § 108(a)(2), 42 U.S.C. § 1857c-3(a)(2).
\textsuperscript{24} Id. § 109(b)(1)(a), 42 U.S.C. § 1857c-4(b)(1)(a).
\textsuperscript{26} National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. §§ 50.4-50.11 (1973).
b. Procedures for Promulgation

The procedures which the Administrator must follow in promulgating the primary and secondary standards are outlined in section 109 of the Act. The Administrator is required to publish, within thirty days of the enactment of the Clean Air Amendments, proposed regulations prescribing national primary and secondary ambient air standards for each pollutant for which air quality criteria have been published before the Act was passed. Interested persons are allowed to submit written comments on the proposed standards within a reasonable time, not to exceed ninety days, after which the Administrator shall promulgate final standards. When determining the final standards the Administrator is not required to respond to the comments submitted. The language of the Act specifically left changes in the regulations to the Administrator’s discretion, to be exercised in light of comments or any other information. If the Administrator subsequently issues air quality criteria for any additional pollutants, he must propose primary and secondary standards for those pollutants simultaneously with the criteria and follow these same procedures.

The first, and thus far only, suit challenging the ambient air standards established by EPA, is Kennecott Copper Corp. v. EPA. Dissatisfied with the secondary ambient air standard for sulfur oxides, Kennecott Copper brought a petition under section 307 of the Act, alleging that the standard was neither based on underlying air quality criteria nor accompanied by a general statement of purpose and sufficient information on which to base judicial review. The court agreed that relevant information must be available to the court for the purpose of reviewing challenges to air quality standards issued by EPA. It also recognized a need to avoid procedural straight jackets “that would seriously hinder this new agency in the discharge of the novel, sensitive, and formidable tasks entrusted to it by Congress.”

Table 1. National Ambient Air Quality Standards (Continued)

<table>
<thead>
<tr>
<th>Pollutant</th>
<th>Averaging Time</th>
<th>Primary Standard</th>
<th>Secondary Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Particulate Matter</td>
<td>annual geometric mean</td>
<td>75 µg/m³</td>
<td>60 µg/m³</td>
</tr>
<tr>
<td></td>
<td>24 hours</td>
<td>260 µg/m³</td>
<td>150 µg/m³</td>
</tr>
</tbody>
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Standards are expressed in micrograms (µg) of pollutant per cubic meter of air (1 µg = one millionth of a gram), and in parts per million (ppm). Concentrations, other than annual averages, are not to be exceeded more than once per year. Source: 40 C.F.R. §§ 50.2-50.11 (1973).

30. Id.
32. 462 F.2d 846, 3 ERC 1682 (D.C. Cir. 1972).
33. Id. at 848, 3 ERC at 1683.
34. Id. at 848, 3 ERC at 1684.
was not required to hold public hearings before issuing primary and secondary standards, the court concluded that the information to be made available concerning the basis of the Administrator's determination of standards need not be as detailed and specific as the record of an evidentiary hearing. The court remanded the case to EPA, directing that a statement be submitted to the court explaining how the secondary standard for sulfur oxides reflected underlying air quality criteria. The court was careful to specify that the remand not delay other agency or state action necessary to carry out the mandates of the Act. Furthermore, the Administrator was to be free to revise the air quality criteria without accepting additional comments from interested parties and to change the standards without submitting recommendations to the court. Here, as in other cases, the D.C. Circuit demonstrated a clear desire not to contravene or limit the congressional intent manifested in the Act: the expeditious control of air pollution.

Any revision of the national primary and secondary standards is also subject to section 109 procedures. Since all petitions for judicial review of standards promulgated by EPA must be filed in the D.C. Circuit Court, that court's action in *Kennecott Copper* may indicate how the court will treat such petitions for review in the future. The court showed an unwillingness to hamstring the agency charged with administering the Clean Air Act. In view of the procedural safeguards which the Act requires at later stages of the enforcement process, and the tendency for both industry and environmental groups to use procedural technicalities as a means of delay or harassment, the court was wise not to interpret section 109 as requiring an exhaustive statement of reasons. Strict procedural requirements would have necessarily caused a lag in the promulgation of standards. This could have resulted in EPA facing timetable difficulties under the Act if such a delay occurred in this early stage of implementing the Clean Air Act.


36. It was further held that the standard itself was sufficient to satisfy the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 6352, 7562 (1970), requiring a general statement of purpose for administrative determinations. *Id.* § 553(c).


40. Section 113(a)(4) provides that compliance orders do not become effective until the violator has had an opportunity to confer with the Administrator. 42 U.S.C. § 1857c-8(a)(4) (1970).
c. Mobile Source Standards

The Administrator must under section 202(a)(1) of the Act prescribe "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment causes or contributes to, or is likely to cause or contribute to air pollution which endangers the public health or welfare." There is no requirement that EPA hold hearings or accept written comments prior to issuing these standards, but under section 307(b) of the Act, judicial review of mobile source standards may be sought, just as for ambient air, new source performance, and hazardous emission standards.

3. State Implementation Plans

To insure that the national primary and secondary standards will be met throughout the fifty states, Congress requires each state to formulate an implementation plan specifying how the standards will be achieved, maintained, and enforced in that state. This is in furtherance of the congressional intent to allow states primary control of air pollution, subject to EPA guidance and supervision. Final authority to approve or disapprove such plans rests with the Administrator of EPA though approval of plans is subject to judicial review under section 307(b) of the Act. The formulation and subsequent approval of state plans has been the basis of most of the litigation under the Clean Air Act. On one side, attacks have come from industry, anxious to delay, and if possible avoid, compliance with the standards which, for reasons of economy, technology, and convenience, it considers to be too stringent. Challenges have come also from environmental groups,

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42. Id. See The Automobile Controversy, supra note 5.
47. 42 U.S.C. § 1857h-5(b) (1970). Utah International, Inc. sought judicial review of an EPA order disapproving portions of the New Mexico state implementation plan (which had previously been approved) because EPA had failed to grant interested parties a hearing prior to the disapproval. The case was dismissed on jurisdictional grounds: Section 307(b) only provides for judicial review of EPA action approving or promulgating plans, not in disapproving plans. Utah International, Inc. v. EPA, 478 F.2d 126, 5 ERC 1311 (10th Cir. 1973).
48. Appalachian Power Co. v. EPA, 477 F.2d 495, 5 ERC 1311 (10th Cir. 1973); Buckeye Power Inc. v. EPA, 481 F.2d 162, 5 ERC 1611 (6th Cir. 1973); Duquesne Light and Power Co. v. EPA, 481 F.2d 1, 5 ERC 1473 (3rd Cir. 1973); International Harvester v. Ruckelshaus, 478 F.2d 615, 4 ERC 2040 (D.C. Cir. 1973); Portland Ce-
concerned that EPA is approving plans which are inadequate to achieve or to maintain the Act's standards. EPA thus has been caught in the middle, appearing at times too lenient and at times too hard-line with respect to the demands of each interest group.

a. Formulation of Plans by the States

Section 110 of the Act sets out the substantive and procedural requirements with which a state must comply before the Administrator can approve its implementation plan. If these requirements are satisfied, the Administrator must approve the plan; if not, he must disapprove it and promulgate an alternative plan. The ambiguity of certain provisions of section 110 leaves considerable leeway for administrative discretion in deciding whether or not to approve a plan—it is not always clear whether a particular requirement has been satisfied, especially since each state has different air pollution problems. Furthermore, the high stakes involved for industry coupled with several of the Act's ambiguities have prompted several corporations to challenge EPA approval of plans. This litigation has generally focused on the applicability of the hearing provisions of the Administrative Procedure Act to the adoption and approval of plans by EPA, and on the necessity for EPA to file environmental impact statements on its actions in approving or promulgating plans.

(1.) Procedural requirements

The procedural requirements for the adoption of implementation plans by the states are skeletal at best. However section 110(a)(2) requires that the Administrator shall approve a plan if "it was adopted

49. Delaware Citizens for Clean Air v. EPA, 480 F.2d 972, 5 ERC 1582 (3rd Cir. 1973); NRDC v. EPA, 475 F.2d 968, 4 ERC 1945 (D.C. Cir. 1973); NRDC v. EPA, 478 F.2d 875, 5 ERC 1879 (1st Cir. 1973); NRDC v. EPA, 483 F.2d 690, 5 ERC 1509 (10th Cir. 1973); NRDC v. EPA, 481 F.2d 116, 5 ERC 1506 (1st Cir. 1973); Sierra Club v. Ruckelshaus, 344 F. Supp. 253, 4 ERC 1205 (D.D.C.), aff'd mem., 4 ERC 1815 (D.C. Cir.), aff'd by an evenly divided court sub nom. Fri v. Sierra Club, 412 U.S. 541, 5 ERC 1417 (1973); Riverside v. Ruckelshaus, 4 ERC 1728 (CD. Cal. 1972).


51. See text accompanying notes 117-56 infra.


after reasonable notice and hearing."^54 Industries have challenged EPA approval of plans, claiming that the state hearings under this provision should have been full adjudicatory hearings with opportunity for cross-examination.^55 In Appalachian Power Co. v. EPA,^56 the plaintiff challenged the Administrator's approval of the Virginia and West Virginia implementation plans and Bethlehem Steel protested the approval of the Maryland plan. Petitioners sought a remand to EPA with instructions to hold full adjudicatory hearings prior to final approval of the plans because of alleged inadequacy of the state hearings. The court concluded that if the Administrator determined that the state hearings had provided petitioners with "the reality of an opportunity to make an effective presentation,"^57 further hearings at the federal level prior to approval were not required. The court did not directly rule out the possibility that there should be some opportunity for cross-examination at the state hearings. Nor did it preclude petitioners from moving for the right to introduce additional evidence upon a showing of its materiality and reasonable grounds for their failure to present it earlier.^58 Nevertheless, the court did not hold specifically that the state hearings should have been adjudicatory, but merely indicated that all interested parties should have a sufficient opportunity to present their objections to the proposed plans. Additionally, the court imposed upon the Administrator the responsibility to review the record of the state hearings carefully in order to insure that petitioners' due process rights had been observed.^59

(2.) Substantive requirements

Section 110(a)(2)^60 sets forth the substance of what each state

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55. Appalachian Power Co. v. EPA, 477 F.2d 495, 5 ERC 1222 (4th Cir. 1973); Duquesne Light and Power Co. v. EPA, 481 F.2d 1, 5 ERC 1473 (3rd Cir. 1973); Buckeye Power, Inc. v. EPA, 481 F.2d 162, 5 ERC 1611 (6th Cir. 1973); Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697, 4 ERC 1817 (D. Colo. 1972), rev'd 482 F.2d 1301, 5 ERC 1673 (10th Cir. 1973).
56. 477 F.2d 495, 5 ERC 1222 (4th Cir. 1973).
57. Id. at 503, 5 ERC at 1228.
58. Although the court did not grant petitioners the absolute right to an adjudicatory hearing, as requested, the court did grant them some of the benefits attendant upon such a right: the possibility of an opportunity for cross-examination and the right to adduce additional evidence—which petitioners would have been entitled to under § 307 (c) of the Act, (42 U.S.C. § 1857h-5(c) (1970)), if they had been granted an adjudicatory hearing.
59. In the running battle between industry and EPA concerning the applicability of the Administrative Procedure Act to EPA action and the necessity for adjudicatory hearings, the courts have thus far been unwilling to require adjudicatory hearings except in the two instances when, in the language of the APA, 5 U.S.C. § 554(a) (1970), and the Act such hearings are explicitly required. Sections 110(f)(2) and 206(b)(2)(B), 42 U.S.C. §§ 1857c-5(f)(2), f-5(b)(2)(B) (1970).
60. (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1) approve or disapprove
implementation plan must contain to secure the approval of the Administrator. Failure of a plan to satisfy any of the requirements should result in disapproval of either the entire plan or the deficient portion. Section 110(a)(2) requires that state plans contain timetables, monitoring and inspection provisions, and an enforcement program. The Act specifies that "the Administrator shall approve" state plans which have satisfied the requirements of section 110(a)(2)(A) through (H). Approval of a plan is therefore a nondiscretionary act which the Admin-

such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h—1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements. 42 U.S.C. § 1857c-5(a)(2) (1970).
istrator must perform. But considerable administrative discretion still is involved in interpreting subsections (A) through (H) and in deciding whether a state plan complies with the requirements. It is these discretionary determinations which environmental groups have challenged in the suits questioning the adequacy of state plans.

The Act requires that the national primary standards for each relevant pollutant must be attained "as expeditiously as practicable but . . . in no case later than three years" from the time the plan implementing that standard is approved by EPA.\textsuperscript{61} Timetables for the attainment of the standards must be in each state plan. If primary standards are changed or new standards added, states must revise their implementation plans to provide for attainment of such new or altered standards within three years of the time the revised plans are approved. A state’s Governor may, however, apply for a two-year extension beyond the three-year deadline for a specific class of polluting sources.\textsuperscript{62}

With respect to the attainment of the secondary ambient air standards, the Act is more lenient: it requires that the state plan “specif[y] a reasonable time at which such secondary standard will be attained.”\textsuperscript{63} Section 302(h)\textsuperscript{64} states that effects on “public welfare” (which the secondary standard is designed to protect) include
effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.\textsuperscript{65}

Determination of what should constitute a “reasonable time” to achieve the mitigation of such widespread ills may well be a subject of strong disagreement. Since the economic costs of developing and initiating the use of technology to achieve the secondary (as well as the primary) standards will undoubtedly be great, it is likely that industry will pressure state officials to set the timetables as far in the future as possible when developing secondary standard implementation plans.

Thus far, however, all challenges to EPA approved plans have focused on timetables for implementing the primary standards. In the D.C. Circuit case of \textit{NRDC v. EPA},\textsuperscript{66} the Council questioned the Ad-

\textsuperscript{62.} See text accompanying notes 169-81 infra.
\textsuperscript{65.} \textit{Id.}
ministrator's granting extensions for achieving the primary standards without compliance with the provisions of sections 110(e) and (f).\(^\text{67}\)

The court ruled in favor of NRDC, finding that the Administrator "did not conform to the strict requirements of the Clean Air Act."\(^\text{68}\) In a hard-line opinion the court explicitly stated that the availability or unavailability of technology was relevant only to the granting of extensions under section 110(e)\(^\text{69}\) and that delay in adopting full implementation plans was not justified.

In *Delaware Citizens for Clean Air v. EPA,*\(^\text{70}\) petitioners (DCCA) challenged the Administrator's approval of portions of the Delaware state plan, alleging that the plan failed to provide for achievement of the nitrogen dioxide primary standard within the statutory deadline.\(^\text{71}\)

The Delaware nitrogen dioxide control strategy approved in May 1972 proposed an attainment date of May 1975 (later revised to January 1974) just within the three-year limitation. Nevertheless, the court stated that "Delaware's plan itself seems to indicate that it is inadequate to attain the nitrogen dioxide standard."\(^\text{72}\) The court was faced with the difficult problem of reviewing an approved implementation plan which proposed an attainment date within the three-year deadline but which on its face appeared inadequate to guarantee that the deadline would be met. Choosing to treat DCCA's challenge as an allegation that the plan did not provide for attainment of the nitrogen dioxide standard "as expeditiously as practicable,"\(^\text{73}\) and finding section 307(b)\(^\text{74}\) silent as to the appropriate standard of review, the court relied on the standard set forth in section 706 of the Administrative Procedure Act.\(^\text{75}\) Section 706(2)(A)\(^\text{76}\) requires reversal of an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or if, as explained by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe,*\(^\text{77}\) it is not based on a consideration of all the relevant factors or is a clear error of judgment. After reviewing the record of the state hearings and the

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68. 475 F.2d at 970, 4 ERC at 1946.
69. See text accompanying notes 174 and 184 infra.
70. 480 F.2d 972, 5 ERC 1582 (3rd Cir. 1973).
71. DCCA had also challenged the attainment date and maintenance provisions for sulfur dioxide. The attainment date was changed, however, and EPA withdrew approval of the maintenance provisions, rendering those issues moot in the case. *Id.* at 975, 5 ERC at 1584.
72. *Id.* at 974, 5 ERC at 1583.
77. 401 U.S. 402 (1971).
EPA report on the Delaware implementation plan, the court stated:

EPA has considered . . . the technology now available to deal with emissions from stationary sources; the levels of emissions from automobiles to be expected in the future; the current level of pollution of Delaware air; and the impact of the implementation plan of New Jersey. 78

It then concluded that EPA action had been proper. The court avoided the problem of whether the standard could be achieved under the approved plan. Yet, if the plan was inadequate to achieve the standard and the proposed attainment date realistically could not be met, the court should have disapproved the Administrator's action as arbitrary under the EPA standard. 79

To insure that the primary and secondary standards will be achieved by the statutory deadlines, section 110(a)(2)(B) requires state plans to include:

- emission limitations, schedules, and timetables for compliance with such limitations, and other such measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls. 80

The meaning of "emission limitation" has been the subject of some controversy. Industries, and some states in their implementation plans, have attempted to establish tall-stack dispersion as a legitimate emission limitation. At least one court, however, has rejected that approach in a suit brought by NRDC. 81 The Georgia implementation plan was submitted for EPA approval containing a tall-stack dispersion plan for sulfur dioxide and particulates. The Fifth Circuit ruled favorably on NRDC's challenge to this provision. The court determined that not only was a tall-stack dispersion not an emission limitation, but that it also violated the policy against nondegradation. The court based its decision on the fact that Congress had specifically rejected an earlier draft of the section which called for "emission limitations or equivalent measures" to be employed. 82 Furthermore, the court ordered that tall-stack dispersion not be used at all until all possible emission limitations have been tried.

78. 480 F.2d 972, 977, 5 ERC 1582, 1586.
79. If the plan as proposed was indeed inadequate to achieve the primary standard, DCCA could also have attacked the plan under Section 110(a)(2)(B), see text accompanying note 46 supra. DCCA could have used this section to demand that if the emission limitations and other measures included in the plan were insufficient, other more stringent measures such as land use or transportation controls should have been added.
81. NRDC v. EPA, 489 F.2d 390, 6 ERC 1248 (5th Cir. 1974).
82. Id. at 409, 6 ERC at 1260.
The ambiguity of section 110(a)(2)(B) has provoked serious controversy concerning the states' freedom to determine the content of their control strategies and the authority of EPA to require inclusion of measures other than emission limitations and timetables for compliance. The original theory of state implementation plans was that within certain guidelines states would be free to choose whatever configuration and combination of control measures they wanted, as long as they provided for attainment and maintenance of the primary and secondary standards within the statutory time limit.

Compliance schedules, as interpreted in EPA regulations, must prescribe dates by which all sources will be in compliance with various requirements of the plans—emission limitations and other control measures. EPA requires compliance schedules to provide for incremental progress in the abatement of pollution, in order that the states be able to supervise the attainment of the primary and secondary standards by the statutory deadlines. Without interim deadlines, the states would be unable to insure that emission sources would comply by the final attainment date and would have to wait until after that date to take any enforcement action.

NRDC successfully used section 110(a)(2)(B) to challenge EPA action allowing several states to delay submission of the transportation control portions of their implementation plans. The D.C. Circuit ruled that the delay was an unjustifiable violation of section 110(a)(2)(B) and ordered EPA to rescind the extensions. The states were required to submit plans fully "complying with each and every requirement of Sections 110(a)(2)(A) through (H)." Thus NRDC forced EPA to require "land-use and transportation controls" in state plans, when such controls were not originally included. The court thereby limited states' discretion to include only those measures which they considered essential to attainment and maintenance of the standards, and to choose between equally effective measures on the basis of their own preference.

Another measure which courts have made a mandatory part of state implementation plans is a program of nondegradation. Nondegradation policy is designed to insure that no significant deterioration of ambient air quality shall be permitted even in areas where the air is

83. Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 40 C.F.R. § 51.15 (1973) [hereinafter cited as Plan Requirements].
84. Id. § 51.15(c).
86. Id. at 970, 4 ERC at 1946.
87. See Complex Sources, supra note 66, text accompanying notes 10-19.
not yet as polluted as the primary or secondary standards allow. In addition to emission limitations and transportation and land use control strategies, the plans must establish a system for monitoring ambient air quality, since the states must compile and analyze data, and make such information available to EPA upon request. EPA regulations set out certain minimum requirements which a state's surveillance system must comply with: measurement method, minimum frequency of sampling, and the number of air quality monitoring sites (based on population of region).

The adequacy of state monitoring systems to facilitate the flow of information to EPA is particularly crucial in the absence of provisions in the Act for federal monitoring of ambient air quality. This is vital to the efficient implementation of the Act, for without such monitoring and access to information, the enforcement of emission standards by the states, EPA, and citizens would be seriously jeopardized.

Equally vital to the implementation of the Act, and in particular to its enforcement by means of the citizen's suits, is the requirement of section 110(a)(2)(F)(iv) that reports correlating emission data with emission limitations and schedules be made available to the public. The Fifth Circuit, in NRDC v. EPA ruled that a provision in the Georgia plan permitting state officials to block public access to such reports would have to be disapproved. The court rejected the rationale that the provision was needed to protect trade secrets, reasoning that public access to such information is crucial to citizen enforcement of the Act. The Second Circuit took the same position, concluding that in cases of conflict between confidentiality of trade secrets and public access to information, public access should prevail.

States are required to institute a procedure for reviewing the loca-

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88. Fri v. Sierra Club (Sierra Club v. Ruckelshaus), 344 F. Supp. 253, 4 ERC 1205 (D.D.C. 1972), aff'd mem. 359 F.2d 1028, 4 ERC 1815 (D.C. Cir. 1973), aff'd 412 U.S. 541, 5 ERC 1417 (1973). The exact nature of these measures is not yet apparent. EPA has issued several sets of proposed regulations covering this problem, but as yet no final decision has been made as to what measures will be required. See Comment, VI: Sierra Club v. Ruckelshaus: On a Clear Day . . . . , 4 ECOLOGY L.Q. 739 (1975) [hereinafter cited as On a Clear Day].

89. The existence of such information in some organized form, and its availability to the public, are crucial to the effectiveness of the citizen suit provision of the Clean Air Amendments of 1970, § 304, 42 U.S.C. § 1857h-2 (1970). For further discussion of this issue see text accompanying notes 276-77 infra.


91. See text accompanying notes 207-19 infra.

92. See text accompanying notes 276-77 infra.


94. 489 F.2d 390, 6 ERC 1248 (5th Cir. 1974).

95. NRDC v. EPA, 494 F.2d 519, 6 ERC 1475 (2d Cir. 1974). The court held, inter alia, that a specific exception for emission data should have been written into New York's plan.
tion of new stationary sources to which a performance standard will apply.\(^96\) This review procedure must possess sufficient authority to prevent the construction or modification of sources in a location which would interfere with attainment or maintenance of the national primary or secondary standards.\(^97\) The state plan must also require prior state approval for industrial construction or modification plans.\(^98\) Although the Act requires that industry submit "relevant information" there exists no definitive interpretation of this phrase.\(^99\) Alleging that the Iowa implementation plan did not satisfy these Section 110(a)(2) requirements, the Natural Resources Defense Council challenged EPA approval of the plan.\(^100\) The petitioners claimed, in part, that the Iowa new source review provisions were inadequate in three respects: (1) They did not require denial of a permit if a source would prevent the attainment or maintenance of an ambient air standard; (2) they did not contain a procedure for reviewing the location of new sources; and (3) they failed to guarantee that sources granted a permit would fully comply with the control strategy. EPA conceded the first claim and agreed to take steps to cure the defect, but contested the second and third allegations. In a somewhat cursory opinion, the Eighth Circuit affirmed the Administrator's approval of those portions of the Iowa plan dealing with new source location and continued compliance with the control strategy. The court determined that the provision in the Iowa plan making a permit non-transferable from one location to another was sufficient to indicate that location was an important concern in the granting of permits. However, the court's conclusion failed to take into account a situation in which an industry is initially applying for a permit, not merely seeking a transfer. The Act does not specify what standards should be incorporated in a plan's new source review provisions; however, it would seem, at a minimum, that permits could not be granted for locations in which construction or modification of industrial plants would result in non-compliance with the primary or secondary standards in that region.\(^101\) Otherwise, Congress would not have provided for new source review so explicitly in the Act. Without adequate review of these sources, the attainment and maintenance of both primary and secondary standards would be seriously undermined.

99. The regulations are more specific than the Act, however. See note 101 infra.
100. 483 F.2d 690, 5 ERC 1917 (8th Cir. 1973).
101. EPA's regulations do specify the information which must be submitted to and considered by the state prior to construction or modification. Plan Requirements, supra note 83, 40 C.F.R. § 51.18 (1973).
Section 110(a)(2)(E) mandates that each plan include a provision for intergovernmental cooperation adequate to insure that emissions from sources in one air quality control region will not interfere with attainment or maintenance of primary and secondary standards in any other region. The requirement is particularly important for states which contain large metropolitan areas that border on or overlap other states. Pursuant to this section, the Administrator has issued a regulation requiring regional state agencies to distribute information concerning factors which might affect air quality to the states responsible for that region and adjoining ones. In the Eighth Circuit case of NRDC v. EPA, petitioners also challenged EPA approval of the Iowa plan on the ground that it did not adequately provide for such intergovernmental cooperation. NRDC claimed that the state plan's provision for exchange of information was insufficient to insure that binding enforcement agreements, or mutual aid pacts between states, would be established if necessary. The Eighth Circuit, however, ruled that the exchange of information would enable other states or EPA to set emission limitations and otherwise supervise compliance with the national standards, thus interpreting the Act as not requiring binding enforcement agreements. The Court clearly ignored the importance of this provision, for the mere exchange of information does not begin to solve the problems of interregional pollution. This decision could result in some regions being forced to adopt onerous control strategies attempting to deal with air pollution created in other regions. A binding enforcement or mutual aid pact would be a more practical and efficient means to control this interregional pollution problem.

In a third suit brought by NRDC, petitioners alleged that the failure of Massachusetts and Rhode Island to fulfill one of the requirements of section 110(a)(2)(F) should have resulted in disapproval of those states' implementation plans. Section 110(a)(2)(F)(i) requires states to include assurances of adequate personnel, funding, and authority to carry out their implementation plans. NRDC claimed

103. Another section under which the states may be required to cooperate is Clean Air Amendments § 115, 42 U.S.C. § 1857d (1970), which concerns abatement of violations by means of conference procedures.
105. 483 F.2d 690, 692, 5 ERC 1917, 1918 (8th Cir. 1973). See case cited supra note 100.
106. 483 F.2d 690, 692-93, 5 ERC 1917, 1918 (8th Cir. 1973). The Second Circuit agreed with the Eighth on the issue of intergovernmental cooperation. NRDC v. EPA, 494 F.2d 519, 6 ERC 1475 (2d Cir. 1974).
107. NRDC v. EPA, 478 F.2d 875, 5 ERC 1879 (1st Cir. 1973).
109. See note 60 supra for the requirements contained in subsections 110(a)(2)(F)(ii)-(v). EPA's regulations based on these requirements are found in Plan Require-
that both plans failed to give the necessary assurances. The court took
a lenient view of Rhode Island's assurances of funding, personnel, and
authority to implement its plan. The decision was based on an EPA
regulation requiring each state to include "a description" of the re-
sources available to state and local agencies, including one, three, and
five-year projections of resources likely to become available.\textsuperscript{110} Al-
though, as the court noted, a description is not equivalent to a guar-
antee, short of state legislative action a state probably could not provide
a full "guarantee." The court thereby avoided the question of whether
the Act requires such state legislative action, by finding the EPA
regulation consistent with section 110(a)(2)(F).\textsuperscript{111} The Massa-
chusetts plan, however, did not even include a "description" as speci-
fied in the regulation; instead, Massachusetts merely stated that it
needed additional staff and funds to implement its plan. The court
found that although determination of what assurances are necessary
was within the Administrator's discretion, the lack of any assurances
that Massachusetts "would be able to enforce the plan" made further
information essential to justify EPA approval.\textsuperscript{112} The court did not
rule out the possibility that the approval might have been justified had
the Administrator given a detailed statement of his reasons for conclud-
ing that Massachusetts had provided the necessary assurances. Absent
such a statement, the court directed the Administrator to submit an
explanation.\textsuperscript{113}

According to section 110(a)(2)(H)\textsuperscript{114} an implementation plan
may be approved only if it provides for revision procedures including
public hearings. It may be necessary to revise a plan if it lacks one
or more required elements or if it fails to take into account changes
in the national primary or secondary standards or in the availability of

\begin{itemize}
\item \textsuperscript{110} 478 F.2d at 883-84, 5 ERC at 1883, discussing Plan Requirements, \textit{supra} note 83, 40 C.F.R. \S 51.21 (1973).
\item \textsuperscript{112} In NRDC v. EPA, 494 F.2d 519, 6 ERC 1475 (2d Cir. 1974), the court held
that a plan, in this case New York's, which contains only a statement that resources
are inadequate must be disapproved.
\item \textsuperscript{113} \textit{Id.} The court did not express its views as to the rationale which would justify
the Administrator's action. It is unclear what EPA's response would or could be if a
state legislature refused to vote sufficient funds to implement an adequate plan, whether
proposed by the state or promulgated by EPA. Section 113, 42 U.S.C. \S 1857c-8
(1970) allows EPA to assume enforcement responsibility if a state does not act. How-
ever, the Act does not authorize the Federal government to monitor ambient air quality,
a circumstance which would seriously undermine the effectiveness of federal enforce-
ment if a state refused to act.
\item \textsuperscript{115} Clean Air Amendments \S 110(a)(2)(H)(i), 42 U.S.C. \S 1857c-5(a)(2)(H)
better means to achieve those standards. In NRDC v. EPA the First Circuit agreed with the petitioners that the Rhode Island plan was deficient in these respects and stated that revision procedures must be set forth explicitly in the plan and not merely hinted at in an amendment provision. If a state failed to provide revision procedures, EPA would be required to promulgate state implementation regulations under all circumstances requiring revision of state plans. Federal administrative costs would thereby increase, and delays would result because EPA is required to hold hearings before revision of numerous state plans. Because expeditious enforcement of the Clean Air Act depends not only on the states' cooperation but also upon their authority and power to implement its requirements, adequate revision provisions are essential to state plans.

b. EPA Authority and Responsibility

(1.) Approval of plans

If the submitted state implementation plans satisfy all the requirements of section 110(a)(2), the Administrator must approve them. Such approval, however, is subject to section 307(b) challenges in the courts both by environmentalists questioning the adequacy of the plans and by industry questioning their stringency. One major issue raised by section 307(b) suits is when technological feasibility and economic and social costs may be considered in the implementation and enforcement of state plans. There has been no clear agreement among the circuits on this question, and the issue is far from settled, particularly in light of the recent "energy crisis."

Provisions of the Rhode Island and Iowa plans were challenged by NRDC in the First and Eighth Circuits respectively because they allowed for consideration of economic and social factors in the issuance of abatement orders. EPA had approved both plans despite these provisions. Before the First Circuit, EPA argued that to the extent these provisions were inconsistent with the Act they would not be given effect. The court rejected this rationale, holding that since approval of a plan has the effect of making it federal law, portions of a plan which are inconsistent with the Act must be disapproved and, if

116. 478 F.2d 875, 5 ERC 1879 (1st Cir. 1973).
117. Id. at 878, 5 ERC at 1883.
120. NRDC v. EPA, 478 F.2d 875, 5 ERC 1879, 1883-87 (1st Cir. 1973).
121. NRDC v. EPA, 483 F.2d 690, 693-94, 5 ERC 1917, 1919 (8th Cir. 1973).
necessary, revised. Before the Eighth Circuit, EPA argued that despite any provisions in the Iowa plan, postponement of the date for achieving the primary standards would not be allowed beyond the three-year deadline of May 1975. The court accepted EPA's reasoning and allowed the provisions to stand.

If the states are permitted to consider economic and social costs in issuing abatement orders, one of the major purposes of the 1970 Clean Air Amendments — to counteract the states' demonstrated tendency to drag their feet in fighting air pollution — would be seriously undermined. To the extent that economic and social costs should be considered, the appropriate time is during the formulation of the implementation plans. At that time the plan is still subject to EPA approval, and states' discretion must pass federal scrutiny. Should such discretion be allowed at the stage of issuance of abatement orders, the states could completely (or at least significantly) avoid enforcing of the implementation plans and thereby place the entire burden of enforcement on the federal government, contrary to congressional intent. Denying the states discretion not to enforce abatement orders because of high economic and social cost would still leave the possibility of exceptions (in cases of extreme hardship) to the requirement of compliance with an implementation plan. Two procedures are outlined in the Act which could apply in such situations: revision of the plan or portions thereof, or postponement of the date for compliance under section 110(f). Moreover, the states are under heavy pressure from industry to be lenient and dependence on economic and social costs would give the states too easy a basis for justifying nonenforcement.

Industry has focused on economic factors in challenging approved plans, and has also sought the application of the procedural requirements of the Administrative Procedure Act (APA) at the federal level prior to EPA approval. These attempts usually have proved unsuccessful. In Appalachian Power Co. v. EPA, petitioners claimed that the Administrator was required, when evaluating and approving state planning.

122. In NRDC v. EPA, 489 F.2d 390, 6 ERC 1248 (5th Cir. 1974), the Fifth Circuit held, inter alia, that a provision in the Georgia plan permitting cost and technological feasibility to take precedence over public health would have to be disapproved and that those factors may not be permitted to interfere with attainment of the three year deadline.
123. NRDC v. EPA, 483 F.2d 690, 5 ERC 1917 (8th Cir. 1973).
127. See cases cited in note 55 supra.
128. 477 F.2d 495, 5 ERC 1222 (4th Cir. 1973). See also text accompanying notes 56-59 supra.
STATE PLANS AND ENFORCEMENT

plans, to consider the economic feasibility of "those provisions which impose such onerous and 'condemnatory' burdens on [petitioners]"\textsuperscript{129} in an evidentiary proceeding. Section 110 of the Act does not mandate a hearing at the federal level before plans can be approved; only state hearings are required.\textsuperscript{130} The court determined that "if the state hearings were adequate the Administrator was not required, prior to approving the state plans, to extend to petitioners or other interested parties an opportunity to be heard."\textsuperscript{131} The determination of whether the state hearings were adequate was held to be within the Administrator's discretion, subject to reversal only if it was "arbitrary, capricious, or an abuse of discretion."\textsuperscript{132} The court further found that full evidentiary hearings were not required at the state level.

Buckeye Power Co. challenged the Administrator's approval of the Kentucky and Ohio plans because of alleged EPA failure to permit interested parties to submit written comments and to consider the impossibility of compliance with the plan by Buckeye.\textsuperscript{133} Conflicting information concerning legislative intent was presented to the court: EPA relied on legislative history indicating that economics and technological feasibility were less important than the public health.\textsuperscript{134} There was also indication of congressional intent that the district courts, in suits to enforce abatement orders, should give "due consideration to the practibility and to the technological feasibility of complying with the provisions of the plan."\textsuperscript{135} The court found the EPA argument lacking in merit and deferred to petitioners' plea that the electrical utilities plants in Ohio and Kentucky would have to close down if forced to comply with the state plans. The court further reasoned that since 110(f) postponements can be granted only by the state governor, there could be no guarantee that the section 110(f) remedy would be available to Buckeye.\textsuperscript{136}

\textsuperscript{129} Id. at 501, 5 ERC at 1226. See text accompanying notes 264-72 infra for a discussion of Getty Oil v. Ruckelshaus in which this argument was sustained on due process grounds.

\textsuperscript{130} Clean Air Amendments § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970). § 110(c) does require the Administrator to provide for hearings within the state on proposed regulations to modify implementation plans, if the state has held no public hearings. 42 U.S.C. § 1857c-5(c) (1970).

\textsuperscript{131} 477 F.2d at 502, 5 ERC at 1227.

\textsuperscript{132} Id. at 505, 5 ERC at 1229 relying on the Administrative Procedure Act, § 10 (e), 5 U.S.C. § 706(2)(A) (1970).

\textsuperscript{133} Buckeye Power, Inc. v. EPA, 481 F.2d 162, 5 ERC 1611 (6th Cir. 1973). For further discussion of Buckeye see text accompanying notes 238-40 infra.


\textsuperscript{136} Id. at 170, 5 ERC at 1615. See text accompanying notes 182-95 infra for further discussion of postponements.
Buckeye also alleged that EPA erred in not allowing it to submit written comments as required by section 553 of the APA or, in the alternative, failed to hold a full scale evidentiary hearing before approving the plans. The court decided that since the Administrator had built no record in the process of approving and disapproving portions of the plans, the case must be remanded to EPA and interested parties must be permitted to submit written comments in conformity with section 553 of the APA. This decision is inconsistent with that of the Fourth Circuit in Appalachian Power. That court rejected Buckeye's request for an evidentiary hearing primarily because section 110 does not explicitly require that EPA approval of plans take place "on the record after opportunity for an agency hearing" like its counterpart in the Administrative Procedure Act. In rejecting petitioners' claim the court relied not only on the absence of this APA language, but also on the existence of provisions in the Clean Air Act explicitly requiring adjudicatory hearings and on the mandate that EPA approval take place within four months of the time plans are submitted. Thus, in view of the wording of the Act, the constraints of time, and the congressional interest in expedition, the court refused to require extended adjudicatory hearings by EPA.

(2.) Disapproval of plans and promulgation of alternatives

Pursuant to Section 110(c) of the Act, the Administrator must issue a proposed implementation plan for a state if he has disapproved a plan for failure to meet the requirements of Section 110(a)(2). In addition, EPA may issue substitute implementation plans if the state fails to submit a plan within the prescribed time or if the state fails, within the appropriate time after notification from the Administrator, to revise an implementation plan in accordance with the requirements of Section 110(a)(2)(H).

138. 481 F.2d at 171, 5 ERC at 1617.
139. In Appalachian Power Co. v. EPA, 477 F.2d 495, 5 ERC 1222 (4th Cir. 1973), the court held that if EPA determined that the state hearings prior to adoption of the implementation plan were adequate, EPA need not grant industry further opportunity to present comments before approving the plan.
145. Id. § 110(c)(1), 42 U.S.C. § 1857c-5(c)(1).
146. Id. § 110(c)(3), 42 U.S.C. § 1857c-5(c)(3).
147. Id. § 110(c)(2), 42 U.S.C. § 1857c-5(c)(2).
hold a public hearing if the state has not yet held one.\textsuperscript{148} Although the Act does not so indicate, presumably if EPA disapproves a state plan when state hearings were held, and draws up an alternative plan radically different from the original, a hearing within the state would be required on the proposed new plan.

This hearing requirement was again questioned in \textit{Anaconda Copper Co. v. Ruckelshaus}.\textsuperscript{149} Anaconda claimed that EPA must hold not only a public but an adjudicatory hearing prior to promulgation of a portion of Montana's implementation plan.\textsuperscript{150} In May 1972 EPA issued a proposed regulation for sulfur dioxide after having disapproved the Montana plan because it did not contain any regulation of sulfur dioxide emissions. In response to Anaconda's immediate demand for an adjudicatory hearing, EPA agreed to hold only a "legislative" hearing. Anaconda argued that an adjudicatory hearing was required under the APA because the regulation was individual in impact and condemnatory in purpose. Nevertheless, the Tenth Circuit rejected this argument, stating that Anaconda was not the only affected or interested party and concluded that Anaconda had not been deprived of procedural due process.\textsuperscript{151} The court may have feared that by granting interested parties the right to an adjudicatory hearing at the proposed regulation stage, it would set off a process of unending delay that would interfere with the Congressional policy of expedition. The court also based its decision on the absence of language in section 110(c) requiring decisions to promulgate final plans to be made "on the record after opportunity for a hearing."\textsuperscript{152}

In \textit{Riverside v. Ruckelshaus},\textsuperscript{153} Riverside, San Bernadino, and the cities of the surrounding area sued EPA under the section 304\textsuperscript{154} citizen suit provision for failure to propose an alternative plan for photochemical oxidants under section 110(c) after disapproving portions of the California plan. EPA had published partial regulations as a substitute for the disapproved portions of the plan, but had failed to include transportation controls to help regulate photochemical oxidant levels in

\begin{itemize}
  \item \textsuperscript{148} Id. \textit{§} 110(c), 42 U.S.C. \textit{§} 1857c-5(c).
  \item \textsuperscript{149} 352 F. Supp. 697, 4 ERC 1817 (D. Colo. 1972), rev'd 482 F.2d 1301, 5 ERC 1673 (10th Cir. 1973).
  \item \textsuperscript{150} Anaconda initially applied for declaratory and injunctive relief in the federal district court for the District of Colorado under the citizen suit provisions of Section 304, 42 U.S.C. 1857h-2 (1970). The 10th Circuit held that the district court had improperly taken jurisdiction in the case since the Montana plan, if approved by EPA, would be subject to review in the U.S. Court of Appeals for the appropriate circuit under Section 307(b), 42 U.S.C. 1857h-5(b) (1970).
  \item \textsuperscript{151} 482 F.2d at 1306-07, 5 ERC at 1676.
  \item \textsuperscript{152} Id. at 1306. 5 ERC at 1676, discussing Administrative Procedure Act, \textit{§} 5, 5 U.S.C. \textit{§} 554(a) (1970). See text accompanying notes 139-42 \textit{supra}.
  \item \textsuperscript{153} 4 ERC 1728 (D.C. Cal. 1972).
  \item \textsuperscript{154} 42 U.S.C. \textit{§} 1957h-2 (1970).
\end{itemize}
the air. The court concluded that the failure to submit transportation control plans in accordance with section 110(a)(2)(B) was a breach of a non-discretionary duty, and ordered the Administrator to prepare regulations remedying the defect.

B

PROVISIONS FOR DELAY: EXTENSIONS, POSTPONEMENTS, AND VARIANCES

Although the Act established strict timetables for achieving national ambient air quality standards, provisions for extensions, postponements, and variances were included in the Act to protect industry and the public from undue hardship in certain narrowly circumscribed situations. The determination of what circumstances justify delay, and whether a particular situation qualifies, involves balancing numerous complex factors at both legislative and administrative levels. In drafting and passing the 1970 Amendments, Congress was anxious to make the requirements stringent enough to insure improvement in the levels of air pollution, rigid enough so that industry and the states could not delay compliance, and yet sufficiently flexible to prevent serious nation-wide problems and to accord with currently feasible technology. Congress tried to do all this by allowing for postponements and extensions but making the procedural requirements for them specific and difficult to satisfy.

I. Ambient Air Standards: Justifiable Delays in their Implementation

Sections 110(b), (e) and (f) set forth the circumstances which justify delay in implementing the national standards and the procedures which must be followed in applying for and approving such delays.

156. 4 ERC at 1729.
159. (b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed eighteen months from the date otherwise required for submission of such plan.
(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for
In certain situations the granting of delays is discretionary with the Administrator and therefore not open to challenge under the citizen suit if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirement before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare, then the Administrator shall grant a postponement of such requirement.

(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by 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 praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of
provision of section 304. Otherwise, the Administrator's grant or denial of a delay is mandated by whether or not the requirements of section 110 have been satisfied, and is thus subject to section 304 suits.

\[ \text{provision of section 304.}^{160} \text{ Otherwise, the Administrator's grant or denial of a delay is mandated by whether or not the requirements of section 110 have been satisfied, and is thus subject to section 304 suits.}^{161} \]

\[ \text{a. Submission of Plans} \]

The Act does not provide for the extension of deadlines for submission of primary standard implementation plans; these must be submitted within nine months after standards are promulgated.\[ \text{EPA, however, granted several states extensions of time for submitting the transportation and land-use control portions of their implementation plans. The Natural Resources Defense Council challenged the Administrator's action in several circuit courts, and the cases were consolidated for review in the Court of Appeals for the District of Columbia.}^{163} \text{ The court based its decision on section 110(b), which specifically grants the Administrator's authority to extend deadlines for secondary standard implementation plans but makes no such grant with respect to primary standard plans.}^{164} \text{ The court held that this section was the exclusive source of the Administrator's authority to extend deadlines under the Act, so that the contested extensions were prohibited. The court ordered EPA to rescind them.}^{165} \]

\[ \text{The extension of the deadline for submission of state plans implementing national secondary standards is a matter which section 110(b) specifically leaves to the discretion of the Administrator.}^{166} \text{ The length of the extension is limited to 18 months from the time submission of the plan would otherwise be required. Thus, since the original date when the plans were to be submitted was nine months from the promulgation of a national standard, the maximum extension would allow submission of a plan within two years and three months after promulgation of such standard. The latitude thus allowed with respect to secondary} \]

\[ \text{the entire record at such hearing.} \]

\[ \text{(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket shall be assigned for hearing and decision at the earliest practical date and expedited in every way.} \text{ 42 U.S.C. § 1857c-5(b), (e), (f) (1970).}^{160} \]

\[ \text{160. Extension of the period for submission of secondary standard implementation plans is, under Section 110(b), discretionary with the Administrator, as is the granting of extensions under section 110(e), subject to the limitations of subsection 110(e)(2).} \text{ 42 U.S.C. §§ 1857c-5(b), (e), (e)(2) (1970).}^{161} \]

\[ \text{161. The granting of postponements under Section 110(f) is nondiscretionary with the Administrator if all the requirements of the section are satisfied.} \text{ 42 U.S.C. §§ 1857c-5(f) (1970).}^{162} \]


\[ \text{163. NRDC v. EPA, 475 F.2d 968, 4 ERC 1945 (D.C. Cir. 1973).}^{164} \]

\[ \text{164. 42 U.S.C. § 1857c-5(b) (1970).}^{165} \]

\[ \text{165. 475 F.2d at 968, 4 ERC at 1946.}^{166} \]

\[ \text{166. 42 U.S.C. § 1857c-5(b) (1970).}^{166} \]
standards seems consistent with congressional intent as manifested in the provision requiring achievement of secondary standards within "a reasonable time."\(^{167}\) In light of industry's attempts to delay compliance even with the primary standards,\(^{168}\) it may well take advantage of the section 110(b) provision to put pressure on the states to seek extension of deadlines for submitting secondary standard implementation plans. Presumably section 110(b) would apply not only to plans implementing the secondary standards promulgated when the Act first passed, but also to revisions, modifications, and standards promulgated for additional pollutants thereafter.

b. Extensions: Section 110(e)

If a state government is convinced, in preparing an implementation plan, that it cannot comply with the statutory timetable for achieving a primary standard, it may resort to a procedure for extending that deadline. Section 110(e) of the Act\(^{169}\) provided a remedy for states which anticipated being unable to achieve a primary standard even before they had submitted their implementation plans. The requirements for section 110(e) extensions are strict, and at least one court has held that 110(e) is exclusive as a remedy.\(^{170}\) As narrow as they are, however, the requirements leave considerable leeway for interpretation by EPA or by a court on judicial review.

Only the governor of a state submitting an implementation plan may apply for a section 110(e) extension. The remedy is therefore not available to an industry which wishes to avoid, or believes that it cannot achieve, compliance unless that industry can convince the state's governor of its plight prior to submission of the implementation plan. This could be done either through argument and presentation of evidence at the state hearing, or through private lobbying aimed directly at the governor or his staff. Of course, if a state's economy depends upon a particular industry, that industry might successfully exert pressure on the governor to gain an extension, even if the industry could comply with the standard but is unwilling to do so because of potential

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168. For examples of such attempts to delay, see: Getty Oil Co. v. Ruckelshaus, 342 F. Supp. 1006, 4 ERC 1141 (D. Del. 1972), aff'd 467 F.2d 349, 4 ERC 1567 (3rd Cir. 1972), cert. denied, 409 U.S. 1125, 4 ERC 2040 (1973); Appalachian Power Co. v. EPA, 477 F.2d 126, 5 ERC 1311 (10th Cir. 1973); Duquesne Light and Power Co. v. EPA, 481 F.2d 1, 5 ERC 1473 (3rd Cir. 1973); Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697, 4 ERC 1817 (D. Colo. 1972), rev'd 482 F.2d 1301, 5 ERC 1673 (10th Cir. 1973).


loss of profits. The substantive requirements of section 110(e) may help to control such abuse.

If a state fails to apply for a two-year extension at the time its implementation plan is submitted, the remedy is forfeited, but the state still may seek a one-year postponement under section 110(f). Therefore, if a state has prior knowledge of obstacles to compliance which satisfy the requirements of section 110(e), it will be more advantageous to seek an extension than a postponement, since the procedural and substantive requirements of section 110(e) are less strict than those of section 110(f).

Section 110(e) permits the Administrator to grant an extension if, after review of the state's implementation plan, he determines that one or more emission sources or a class of moving sources are unable to comply with the plan because the requisite technology is unavailable and will not become available in time to comply. Thus a party seeking extension must be able to show that the necessary technology will not become available within the three-year deadline. In addition, the state must have considered "reasonably available alternative means of attaining such primary standard and . . . justifiably concluded that attainment of such primary standard within three years cannot be achieved." The interpretation of "reasonably available," and what would constitute a justifiable conclusion that compliance within three years is impossible, is left to the Administrator's discretion. In making these determinations the Administrator may face hard choices. The standards can always be achieved by closing down an industry unable to comply with a plan. This remedy, however, might result in severe economic hardship not only to the industry but also to the general public if the industry in question were a large-scale employer, a key

173. This is true only if the state's interest is actually in delaying compliance and not in pressuring industry.
176. "Reasonably available" could be interpreted to require use of more stringent emission limitations, land use, complex source and transportation control plans, as well as limiting the hours of specific plants. In NRDC v. EPA, 494 F.2d 519, 6 ERC 1475 (2d Cir. 1974), the court rejected petitioner's argument that in granting a two-year extension to New York for particulate matter, EPA wrongly permitted New York to omit land use and transportation controls as part of its strategy. The court recognized that such alternatives were economical but socially unacceptable, and refused to reverse EPA's determination that this did not come within the meaning of "reasonably available."
customer or supplier of other commercial interests, or an important source of tax revenue. Therefore EPA probably would feel heavy political pressure not to take such drastic action. There are means of curtailing emissions short of closing down an industry, such as limiting hours of operation. Other methods also exist for limiting pollutant concentrations in particular areas, such as land use controls. EPA's problem is to decide to what extent these and other measures must be considered reasonably available alternatives and how severe the hardship must be to justify a conclusion that attainment of standards within three years is impossible.

An extension granted to a state for one source or class of sources does not obviate the requirement that the implementation plan provide for compliance by all other sources within the three-year period. This requirement indicates that the state is to draw up a plan providing for overall attainment of the primary standard within each region within the prescribed time period. Then, if an extension is granted, one source or class of sources is excepted from the requirement of compliance.

Section 110(e)(2)(B) further requires that if an extension is granted the plan must provide for such interim measures of control of the excepted sources as the Administrator decides is reasonable under the circumstances. This vague subsection offers no hint whether "reasonable" refers to the extent of the burden imposed on industry, the degree of protection afforded the public health, or the economic and social cost to the public in terms of lost jobs, curtailed services, and limited availability of products on the market.

In NRDC v. EPA, the District of Columbia Circuit held that, just as section 110(b) was the exclusive means of extending the date for submission of an implementation plan, so section 110(e) was the sole avenue for extending the deadline for attainment of prescribed standards. The court refused to permit the Administrator to circumvent

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178. One unresolved and critical problem is the extent to which technological feasibility can and should be taken into account by the states in formulating the original plans. If it were not taken into account at all the states could propose totally unrealistic plans which nevertheless appeared to provide for the attainment of the primary standards. In such circumstances the important decisions would either be left to EPA to decide in determining whether to approve the plan or would be postponed to the enforcement stage, when the states and EPA would have to decide whether to issue abatement orders.
180. 475 F.2d 968, 969, 4 ERC 1945, 1946 (D.C. Cir. 1973). Although the court appeared to establish an absolute requirement that the states submit land use and transportation controls, these requirements are arguably discretionary within the language of
section 110(e) by allowing states simply to delay submission of transportation and land use control portions of their plans. The states must submit full plans and apply concurrently for extensions. Since the granting of extensions is discretionary with the Administrator, his decision cannot be challenged under the citizen suit provisions of section 304.  

\[\text{c. Postponements: Section 110(f)}\]

The Act provides a further opportunity to delay attainment of a national primary standard: Section 110(f) allows states to apply for a one-year postponement of a compliance deadline in an implementation plan if they do so before the deadline has passed. The postponement provision is more explicit than section 110(e) and its requirements stricter, for section 110(f) mandates an adjudicatory hearing prior to the grant or denial of a postponement and provides for judicial review of EPA’s determination. The granting of a postponement is a non-discretionary act which the Administrator must perform if certain requirements are satisfied and his failure to do so would provide grounds for a citizen suit under section 304.

In order to qualify for a postponement, a state must demonstrate that good faith efforts have been made to comply with the deadline, that a source or class of sources is unable to comply because the requisite technology is unavailable or has not been available long enough to achieve compliance, that alternative operating procedures either have reduced or will reduce, if not eliminate, the negative impact on the public health, and that the continued operation of the source in question is essential to national security or public health or welfare. These requirements leave room for extensive interpretation by the Administrator, in defining good faith or the prerequisites for determining that continued operation of a source is necessary to the public health or welfare. Nonetheless, the procedural mandates of section 110(f) (2) significantly limit this administrative discretion.

Section 110(f)(2)(A) requires the Administrator’s decision to be made “on the record after notice to interested persons and opportunity

Section 110(a)(2)(B), 42 U.S.C. §§ 1857c-5(a)(2)(B) (1970). The court ignored this possible interpretation of the section, and ordered EPA to treat the statutory language as mandatory and require submission of such plans for all states.

for a hearing.” Courts have interpreted similar language under the Administrative Procedure Act as requiring a full adjudicatory hearing in which parties may call and cross-examine witnesses. Industries have sought, but failed to secure, this type of hearing prior to EPA approval of state implementation plans. Section 110(f)(2)(A) further requires that EPA base its ruling on a “fair evaluation” of the entire hearing record and include a detailed statement of the findings and conclusions on which the decision is based. These requirements not only guarantee industry and environmental groups the opportunity to confront each other but also provide a full record to serve as the basis for judicial review.

Section 110(f)(2)(B) allows those dissatisfied with the denial or granting of a postponement to seek judicial review. The appeal must be filed within 30 days of the Administrator's decision in the federal court of appeals for the circuit which includes the state in question. The reviewing court may affirm or set aside the decision in whole or in part, but the standard of review of the Administrator's findings of fact is whether or not they were based on a “fair evaluation” of the entire hearing record. Thus the Administrator has more limited discretion with respect to the granting of postponements than he has for extensions, which need not be based on the record of an adjudicatory hearing and are not subject to judicial review. Even if the section did not explicitly permit judicial review, a denial of a postponement would be subject to challenge by industry, discharged employees, or other detrimentally affected persons under the citizen suit provisions of section 304.

From industry's perspective the disadvantage of the extension and postponement remedies is that they can be secured only at the request of the state governor; industry cannot apply directly. In Buckeye Power, Inc. v. EPA the Sixth Circuit held that since the postponement remedy was not available to Buckeye at its own instigation, it should be allowed to raise claims of high cost and technological infeasibility as a defense in a suit to enforce an abatement order.

190. See cases cited supra note 55.
194. 481 F.2d 162, 5 ERC 1611 (6th Cir. 1973).
195. 481 F.2d at 168, 5 ERC 1618. Section 113 of the Act which provides for
d. Variances

Apart from sections 110(e) and (f), the Act does not specifically provide for the grant of variances by states to specific industries which would exempt them from compliance with an implementation plan. The Natural Resources Defense Council challenged attempts by Rhode Island and Massachusetts to establish state variance procedures independent of section 110(f). Rhode Island had authorized its Director of Health to exempt polluters from emission limitations and schedules both before and after the mandatory date for attainment of national primary standards. The court held that while some flexibility might be permissible prior to the three-year deadline, the state lacked authority to grant variances extending beyond that deadline. With respect to the "post-attainment" period, in which the state plan must provide for maintenance of the standards, the court held that section 110(f) applied exclusively and no variance could be granted by the state, except possibly in case of mechanical breakdowns or "acts of God," and then only for very short periods of time.

The Fifth Circuit, in another Natural Resources Defense Council suit, took a more rigid approach than the First, the Second, or the Eighth Circuits had taken on the issue of variances. The Fifth Circuit held that even in the pre-attainment period variances could not be granted by the state without the approval of the Administrator, on the theory that Congress intended emission limitations to be met immediately even though there was a three-year grace period for ultimate at-
tainment of the national primary ambient air quality standards.\textsuperscript{199}

Although the courts have explicitly determined that the Act's extension and postponement provisions are exclusive and that attempts to circumvent them will be unsuccessful,\textsuperscript{200} there has been little indication of how lenient the courts will be in reviewing EPA decisions to grant or deny postponements.

2. \textit{Hazardous Air Pollutants}

Section 112\textsuperscript{201} outlines two procedures according to which sources emitting hazardous pollutants may be exempted from compliance with emission limitations established under that section. The first is limited and within the discretion of the Administrator: Section 112(c)(1)(B)(ii)\textsuperscript{202} allows the Administrator to grant to an existing stationary source a waiver of compliance for up to two years. This can be done only if the time is necessary for installation of controls and if interim steps will be taken to assure that the health of persons will be protected from imminent danger. Section 112(c)(2)\textsuperscript{203} empowers the President to exempt any stationary source from compliance with section 112(c)(1) if the source must operate for reasons of national security and the necessary control technology is not available. The only limitation on this exemption is that the President must report to Congress on each exemption granted and for each extension, which he may grant for successive two-year periods.

C

\textbf{ENFORCEMENT OF STANDARDS AND PLANS}

One of the most complicated aspects of the enforcement phase of Clean Air Act implementation is the relationship between state and federal authority and responsibility. Not only are the states required to draw up implementation plans which become federal law following EPA approval, but the states and the federal government must share responsibility for enforcing the Act in all but a few areas. Federal preemption under the Act is total only with respect to aircraft and new motor vehicle emissions;\textsuperscript{204} partial preemption exists with respect to new source performance standards\textsuperscript{205} and hazardous emission stand-

\textsuperscript{199} NRDC v. EPA, 489 F.2d 390, 6 ERC 1248 (5th Cir. 1974).
\textsuperscript{200} An exception is the Sixth Circuit decision in Buckeye Power, Inc. v. EPA, 481 F.2d 162, 5 ERC 1611 (6th Cir. 1973), discussed at text accompanying note 195 supra.
\textsuperscript{205} Id. § 111, 42 U.S.C. § 1857c-6.
ards. One of the motivations for the Clean Air Amendments of 1970 was to remedy the ineffectiveness of the states in attacking and solving air pollution problems under the 1967 Act. The 1970 Amendments did not remove from the states all responsibility for eliminating air pollution; rather it created a federal-state enforcement network of reciprocal and overlapping powers and responsibilities. This framework is not without serious practical problems, as will become evident.

1. Detection and Determination of Violations

An absolute prerequisite for effective enforcement is a mechanism whereby responsible agencies are guaranteed to receive information concerning violations of emission limitations and ambient air quality standards. The types of violations which must be detected through effective inspection and monitoring and then corrected are non-compliance with any of the requirements of implementation plans and violations of new source performance and hazardous emission standards.

The Administrator, in his discretion, is entitled to require inspections of emission sources and monitoring of emissions under section 114 of the Act. These procedures may be used (1) to assist in developing implementation plans, new source performance or hazardous emission standards, or (2) to detect violations of such standards and plans. Although the Administrator may delegate his authority to a state which develops a procedure for inspections and monitoring, federal enforcement authority under section 114 is nevertheless preserved. EPA therefore can intervene and perform the inspection and monitoring function without taking prior administrative or judicial action against the state whenever a state fails to adequately meet its delegated responsibility. In addition to the provisions of section 114, section 110(a)(2)(F) requires that a state implementation plan contain provisions for installation of monitoring equipment, submission of periodic reports on emissions, and analysis of reports by state agencies. Therefore, federal intervention in the sphere of inspections and monitoring under section 114 would not entirely relieve the state

207. The states have primary responsibility for monitoring ambient air quality and detecting violations of ambient air standards, and for requiring stationary sources to provide data on emissions. *Id.* §§ 110(a)(2)(C) and (F), 42 U.S.C. §§ 1857c-5(a)(2)(C) and (F).
209. *Id.* § 114(a), 42 U.S.C. § 1857c-9(a).
210. *Id.* § 114(b)(1), 42 U.S.C. § 1857c-9(b)(1). This procedure is similar to that in sections 111 and 112 (42 U.S.C. §§ 1857c-6 and 7) for new source performance and hazardous emission standards.
of its responsibility in that area, even if the reason for the intervention was failure of the state to take effective action. Thus, although EPA has the authority to inspect and monitor emissions in a state, the state still has the primary duties for data collection and monitoring in accordance with its implementation plan.

The potential problems of duplication and inconsistent enforcement by states and EPA could be avoided through proper delegation of the powers given to the Administrator in section 114. Because the states must carry out the preliminary inspection procedures, the Administrator could delegate all of the authority to the state to inspect and monitor. EPA would then be out of the initial enforcement process. The Administrator would, however, retain final authority if the state failed to adequately carry out its responsibilities.

Section 114(a)(1) provides EPA with authority parallel to that which the states must assume under Section 110(a)(2)(F): the Administrator may require the owner or operator of an emission source to install, use, and maintain monitoring equipment to detect whether violations occur and to sample emissions in accordance with federally prescribed procedures. Furthermore, the Administrator can require industry to keep records and furnish reports of emission data collected by the monitoring equipment. The Act does not indicate whether the procedures required by EPA must be consistent with those established in a state’s implementation plan, and if not, how potential conflicts should be resolved.

The Act is also silent on the types of monitoring procedures which the states and EPA shall use. For instance, ambient air must be sampled in each region in order to determine whether there are violations of the primary and secondary standards. However, the results of sampling will differ markedly depending on the testing sites chosen. Different testing locations could favor one industry over another and could produce varying conclusions concerning whether a violation of the primary or secondary standards had occurred. No technical procedure is prescribed for indicating the validity or applicability of measurements obtained under this section. A statistical sampling program or a test for factors affecting the variance of aerial measurements would aid the utility of this section. This is only one of the many practical problems in the area of monitoring and inspections.

The Administrator is authorized under section 114(a)(2) to

212. Id.
214. EPA has issued regulations governing the location of monitoring sites for monitoring the ambient air, but they are not specific enough to eliminate ambiguity. 40 C.F.R. § 51.17 (1973).
enter the premises where an emission source is located to sample emissions and inspect records and equipment. Although the section specifies that the Administrator shall have the right to enter and inspect "upon presentation of his credentials," serious due process questions are raised by this right of entry. If the entry takes place without notice or consent of the owner or operator of the source, there may be an unlawful search and seizure.  

Section 114 further requires that any data and reports collected through the inspection and monitoring procedures must be available to the public unless they would constitute trade secrets. This availability is absolutely crucial to the effectiveness of enforcement by EPA, or by citizens under Section 304. Section 114 does not specify whether the data made available to the public need only be raw data compiled from the sampling and monitoring of emissions, or whether the public may have access to the analysis of that data made by EPA and state agencies. If only raw data must be made available the effectiveness of citizen participation in the enforcement process may be significantly curtailed, since the burden on citizen groups to analyze and compile the data might increase the time and cost beyond what they could afford.

2. Responses to Violations

a. State Enforcement

Theoretically, under the Clean Air Act, the states must enforce their own implementation plans (including land use, complex source and transportation controls), and in some cases, new source performance and hazardous emission standards. Whether they can be forced to do so is an issue that remains to be settled. There is no explicit provision in the Act which insures that the states will effectively assume their share of the enforcement burden. This is a very important question because of the limited capability of EPA to enforce the Act in all states.

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216. See Western Alfalfa Corp. v. Air Pollution Variance Board, 510 P.2d 907 (Colo. App. 1973), rev’d, 94 S. Ct. 2114 (1974) (holding that evidence gathered in tests by an inspector from the “open fields” outside the plant was not an illegal search and seizure).


219. Section 110(a)(2)(F), which requires states to provide in their implementation plans for periodic reports on stationary source emissions and for analysis of reports by the state agency, also requires that the reports be available to the public. 42 U.S.C. § 1857c-5(a)(2)(F) (1970).


221. Id. §§ 111(c) and 112(d), 42 U.S.C. §§ 1857c-6(c) and 7(d) (1970). See text accompanying notes 224-26 infra.
A necessary part of each state's implementation plan is an assurance that the state will have "adequate personnel, funding and authority" to carry out the plan. Implicit in this requirement is the assumption that the state will enforce its plan and that it will not be necessary to rely on federal funds and personnel for this enforcement. This is significant since states have primary responsibility for enforcing ambient air standards and emission standards for existing stationary sources.

If a state submits an acceptable plan for implementing new source performance standards or hazardous pollutant emission standards, the Administrator may delegate the authority to enforce those standards to that state. EPA, however, retains the power to enforce those standards if the state fails to do so. Thus, there is parallel state and federal enforcement authority for each of the standards established by the Act, with the exception of exclusive federal enforcement of motor vehicle and aircraft emission standards.

Despite this parallel authority, there is no mechanism under the Act which EPA can use to force the states to bear their share of the enforcement burden. EPA must assume that burden for states which fail to do so. Therefore, the lack of coercive power may result in a heavier load of enforcement action left to EPA, by default, than it is equipped with funding and personnel to handle. The provisions of section 110(a)(2)(F) were intended to avoid precisely this problem, but the absence of legal power to force the states to undertake enforcement significantly weakens that provision. Essentially, the system established by the Act for parallel state-federal enforcement authority is all "stick" and no "carrot." Just as the only assurance that the states would submit implementation plans was that EPA could promulgate substitute regulations which might have been less palatable to the states than those which they themselves would adopt, so the only insurance that the states will enforce their own plans is the threat that if they do not, EPA will do it for them. Should the states fail to enforce, EPA could undertake more stringent and less flexible enforcement activity than might be politically acceptable to the citizens of a state.

b. Federal Enforcement

EPA has authority under section 113 to undertake enforcement
action either on its own initiative or when a state fails to act. EPA can issue abatement orders as a first step against violators of the Act, which may be followed by a civil suit if the order does not result in compliance.

Although the states are required to assume primary responsibility for enforcing their implementation plans, sections 113(a)(1) and (2)\textsuperscript{229} establish parallel federal authority to enforce such plans. In the absence of a finding that a state has been dilatory in enforcing its plan, EPA must, upon the discovery of a violation, first notify both the person in violation and the state whose plan applies.\textsuperscript{230} If the violation continues for more than 30 days following the notification, EPA may proceed with enforcement action independently of the state.\textsuperscript{231} Presumably this 30-day notice period was intended to allow states the opportunity to respond to the violation without federal interference. If the violation is not remedied within 30 days, EPA may issue a compliance order or immediately commence a civil action\textsuperscript{232} in the federal district court for the district in which the defendant is located or doing business. Similarly, violation of a compliance order may subject the violator to a civil suit without delay.\textsuperscript{233}

If the Administrator finds violations of an implementation plan so widespread as to indicate a failure of state enforcement, he must notify the state. Continued failure of enforcement for more than 30 days after such notice results in mandatory public notice of the Administrator's finding. The period beginning with the Administrator's notification and ending with the state's assurance that it will effectively assume its enforcement responsibility constitutes the period of "federally assumed enforcement." The effect of such a finding is that EPA has primary responsibility to enforce the state plan and need not give 30 days notice to the violator or the state prior to issuing compliance orders or commencing civil suits.\textsuperscript{234} All violators must be given an opportunity to confer with the Administrator before a compliance order becomes effective, and the appropriate state air pollution agency must be notified of any civil action.\textsuperscript{235}

The only difference between the federal enforcement procedure

\begin{itemize}
  \item \textsuperscript{229} 42 U.S.C. §§ 1857c-8(a)(1) and (2) (1970).
  \item \textsuperscript{231} See text accompanying notes 241-63 infra.
  \item \textsuperscript{232} Id.
  \item \textsuperscript{233} The language of the section states that the Administrator "shall" take action upon detecting violations, and that he "may" either issue a compliance order or bring a civil suit. This suggests that federal enforcement is required, while the method used is discretionary, except perhaps when the state has already initiated enforcement proceedings.
  \item \textsuperscript{235} Id. § 113(a)(4), 42 U.S.C. § 1857c-8(a)(4).
\end{itemize}
for new source performance and the procedure for hazardous pollutant emission standards is that no initial 30 day notice is required before EPA may commence enforcement action. Furthermore, no conference with the Administrator is necessary for a violator of a hazardous pollutant emission standard.

A question of utmost importance is whether economic and social factors and issues of technological feasibility may be taken into account in the enforcement process. In a suit brought by National Resources Defense Council (NRDC), the Court of Appeals for the First Circuit held that a state agency responsible for the enforcement of an implementation plan may not take economic and social factors into account in the issuance of abatement orders. Although the court was examining EPA approval of a state plan, it laid the groundwork for challenging consideration of such factors in the issuance of federal compliance orders under Section 113.

However, in Buckeye Power, Inc. v. EPA, the Sixth Circuit indicated in dictum that industry should be able to raise claims of technological infeasibility as a defense in a civil suit to enforce an abatement order. Section 113 on federal enforcement contains no indication that technological infeasibility should be available as a defense to an enforcement action. Moreover, the court recognized that the Act does provide a forum in which claims of technological infeasibility may be raised: the administrative hearing to determine whether a postponement should be granted under section 110(f). The court pointed out, however, that although the postponement remedy permits consideration of technological issues, the remedy is available only at the request of a state's governor, not an industry. The court reasoned that industry should be able to raise technological defenses to enforcement at some stage, and that since it could not do so on its own initiative by seeking a postponement, a civil enforcement suit was the most appropriate forum. There is a flaw in this analysis, however. Although a postponement must be sought by a governor, it can only apply to one source or a class of similar sources. Therefore, it is very unlikely that a governor would apply for a postponement on his own initiative, and it is almost certain that an industry which anticipated being unable to comply with an emission limitation for technological reasons would instigate the process leading to a request for a postponement. In deciding whether to apply for a postponement, the governor would have to weigh the importance of the industry's continued operation against the

237. NRDC v. EPA, 478 F.2d 875, 5 ERC 1879 (1st Cir. 1973).
238. 481 F.2d 162, 168, 5 ERC 1611, 1618 (6th Cir. 1973).
desirability of achieving the national ambient air standards within the statutory deadline. Should industry be allowed to raise claims of technological infeasibility in section 113 enforcement actions, the entire postponement procedure would be short-circuited. The federal district courts would then have to assume the burden of deciding whether the technology was actually unavailable, a decision which Congress intended EPA to make, based on the record of the postponement hearing. In light of both section 113 and section 110(f) and several court decisions holding that Congress intended the postponement remedy to be exclusive, the court's suggestion in Buckeye is both undesirable and in contravention of the Act.

c. The Federal Enforcement Paradox

A potential danger for subversion of the Clean Air Act is that federal "enforcement" under procedures established by section 113 may permit wholesale extensions of time for compliance for industries which are in violation of limitations imposed under state implementation plans or new and hazardous source emission controls. Although such widespread delays would directly contravene Congressional intent, the explicit language of this section appears to enable EPA by careful manipulation of the compliance order process to allow violators to postpone indefinitely compliance with the applicable emission control or implementation plan. It would be ironic if the federal enforcement authority, included in the Act in part because there is no way for Congress to compel the states to enforce their implementation plans, could be used to undermine effective enforcement and prevent attainment of the national standards.

(1.) Dangers inherent in EPA enforcement discretion

The Administrator of EPA, in case of failure of state enforcement, has authority under section 113 to employ three alternative enforcement procedures: issuance of a compliance order; commencement

240. NRDC v. EPA, 475 F.2d 968, 4 ERC 1945 (D.C. Cir. 1973); NRDC v. EPA, 478 F.2d 875, 5 ERC 1879 (1st Cir. 1973); see also, Getty Oil Co. v. Ruckelshaus, affirming opinion, 467 F.2d 349, 4 ERC 1567 (3rd Cir. 1972).


243. See text accompanying notes 222-27 supra.


of a civil action, including a suit for injunctive relief,\textsuperscript{248} and prosecution for criminal penalties, in the case of knowing violators during periods of federally assumed enforcement.\textsuperscript{247} Although under subsections 113(a)(1),(2) and (3)\textsuperscript{248} the Administrator is at least required to issue notifications of violations which come to the attention of EPA, further enforcement action is left entirely within his discretion. If the Administrator chooses to pursue the compliance order approach rather than one of the more rigorous enforcement procedures involving harsher sanctions, he is apparently free to do so.\textsuperscript{249} This open-ended enforcement discretion of the Administrator raises some paradoxical questions.

If the Administrator consistently chooses to enforce state plans and new source and hazardous emission standards by means of compliance orders, the degree of latitude permitted to industry will be greater than if judicial sanctions are sought. For example, the Administrator must confer with the alleged violator before a compliance order becomes effective.\textsuperscript{250} This provides an opportunity for the violator to make off-the-record promises and bargains, since such conferences are not even subject to the limited review to which administrative hearings are subject under the Administrative Procedure Act.\textsuperscript{251} The effects of violating a compliance order are also less harsh than those of violating the court's order in a civil action. In the former case the Administrator has discretion concerning what action to take, whereas in the latter the party in violation of the court's order will be subject to a contempt citation and possible imprisonment or large fines.

Furthermore, the Administrator in issuing a compliance order is required to specify a time for compliance which is "reasonable." Section 113(a)(4) allows "reasonable" time to be determined by taking into account any good faith efforts to comply and the seriousness of the violation.\textsuperscript{252} Terms such as "good faith" and "reasonable" are extremely difficult to specify; if they form the criteria on which a decision is to be based, that decision is hard to attack substantively, even assum-

\textsuperscript{246} Id. §§ 113(a)(1), (b), 42 U.S.C. §§ 1857c-8(a)(1), (b).
\textsuperscript{247} Id. § 113(c), 42 U.S.C. § 1857c-8(c).
\textsuperscript{248} 42 U.S.C. §§ 1857c-8(a)(1), (2), and (3) (1970).
\textsuperscript{249} In U.S. Steel Co. v. Fri, 364 F. Supp. 1013, 6 ERC 1161 (N.D. Ind. 1973), the U.S. Steel Company attempted to seek review of an EPA compliance order by a U.S. District Court. EPA argued that neither the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06, 1305, 3344, 6352, 7562 (1970), nor the Clean Air Act provided for review of compliance orders. The court failed to find clear congressional intent precluding review and concluded that the opportunity to defend an enforcement action provided an adequate forum for review.
ing a procedure is available for bringing such a challenge. The danger inherent in having such a vague standard for establishing compliance dates is that if EPA as a result of political pressure or for lack of sufficient enforcement resources set compliance dates far in the future, it would be easy to rationalize the delays in terms of reasonableness and good faith efforts by industry to comply.

(2.) Wholesale compliance orders: the bases of attack

If EPA employed the compliance order approach on a mass basis, several negative results might follow. First, attainment of the national primary standards might be delayed past the mandatory three-year deadline.\(^{253}\) Second, industries might be permitted to do informally through the enforcement process what they ought to have done formally through the extension and postponement procedures.\(^ {254}\) Although such action would ostensibly be permissible under the terms of section 113, the broader mandates of the Act may provide grounds for attacking the strategy if it were implemented. Since the Act requires attainment of the national primary standards within three years, specifies state implementation plans\(^ {255}\) as well as new\(^ {256}\) and hazardous source\(^ {257}\) emission standards as the means for achieving those standards, and designates EPA as the agent of federal enforcement in case of state failure to enforce, it could be argued that a non-discretionary duty is imposed on EPA to use the mandatory three-year deadline as a guide in its enforcement actions. On this basis, citizens' groups could sue EPA under section 304(a)(2) for failure to perform a non-discretionary duty under the Act.\(^ {258}\) Alternatively, if EPA's enforcement powers were characterized as fully discretionary, environmentalists could sue the Administrator under the APA\(^ {259}\) for abuse of discretion in effectively granting wholesale extensions in violation of the Act's basic purposes.

A second theory to use in attacking EPA for misusing compliance orders to provide leeway to those in violation of the Clean Air Act might be an analogy to the variance problem which was raised by the Natural Resources Defense Council in several suits against EPA.\(^ {260}\) In these cases EPA was ordered to disapprove those portions of state plans


\(^{254}\) Id. §§ 110(e) and (f), 42 U.S.C. §§ 1857c-5(e) and (f).

\(^{255}\) Id. § 110, 42 U.S.C. § 1857c-5.

\(^{256}\) Id. § 111, 42 U.S.C. § 1857c-6.

\(^{257}\) Id. § 112, 42 U.S.C. § 1857c-7.


\(^{260}\) NRDC v. EPA, 494 F.2d 519, 6 ERC 1475 (2d Cir. 1974); NRDC v. EPA, 489 F.2d 390, 6 ERC 1248 (5th Cir. 1974); NRDC v. EPA, 478 F.2d 875, 5 ERC 1879 (1st Cir. 1973).
which gave states authority to grant individual industries variances extending beyond the three year deadline. The courts characterized the period after the deadline as the post-attainment period, and determined that non-compliance during that period must be authorized through the regular extension and postponement procedures. Thus a compliance order permitting non-compliance to continue beyond the three-year deadline would be a similar circumvention of the formal and established extension and postponement procedures and could be attacked on that ground.\(^{261}\)

A further negative impact of the compliance-order strategy would be on the effectiveness of citizen enforcement. Under the terms of section 304(b) citizens are permitted to bring civil actions against polluters to enforce the provisions of emission standards and limitations and of compliance orders. However, if a citizen were to bring such an enforcement action with respect to a compliance order, the Administrator could intervene as a matter of right\(^{262}\) and defend the reasonableness of the compliance date specified and the good faith of the industry. Furthermore, if sued for a continuing violation by a citizens' group, the defendant industry might, if a compliance order had been issued by EPA, use that order as a defense, even if the order did not require compliance until long past the mandatory attainment date. Such an order, however, was not intended by Congress to be an absolute defense to successful citizen suits. Rather, Congress intended that when such a defense is interposed, the court subject the terms of the order to close scrutiny, and bar suit only if the terms of the order are appropriate.\(^{263}\)

d. Conflicts in State and Federal Enforcement

The parallel state-federal enforcement authority under the Act has resulted in conflicts over whether the two enforcement powers may be exercised independently and, if so, what remedy might be available to industries caught in the squeeze. Two cases in which industry sought to be freed from the danger of inconsistent state and federal enforcement action constitute the major litigation in this area.\(^{264}\) The primary

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261. See text accompanying notes 196-200 supra.
263. If the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.
264. Getty Oil Co. v. Ruckelshaus, 342 F. Supp. 1006, 4 ERC 1141 (D. Del. 1972),
issues raised by *Getty Oil Co. v. Ruckelshaus* and *Duquesne Light Co. v. EPA* are whether simultaneous enforcement proceedings can be pursued by EPA and state agencies and whether the decisions of state courts in state proceedings are binding on EPA in federal proceedings, and vice versa. Section 113\(^{265}\) does not preclude simultaneous state and federal enforcement, so long as EPA notifies the state in question of action taken; no other provision of the Act resolves these issues.

*Getty Oil* was brought initially in the federal district court for the district of Delaware, which denied Getty's request for an injunction staying the effect of a compliance order issued by EPA; this decision was appealed to the Third Circuit. In October, 1970, the Delaware Water and Air Resources Commission (WARC) adopted a regulation for New Castle County limiting the sulfur content of fuel burned by facilities of a certain description. The regulation was approved by EPA as part of the Delaware implementation plan. Getty did not challenge the Administrator's approval, although it had argued against the regulation at the state hearing. Only the Delmarva Power and Light Company, which operated a power station for, and was supplied with fuel by, Getty, was subject to the regulation. Delmarva also failed to challenge the Administrator's approval in court.

In September, 1971, Getty applied to the State Secretary of Natural Resources and Environmental Control for a variance from the effective date—January, 1972—of the regulation; the request was denied. In December of the same year, Getty appealed the secretary's decision to WARC and sought a temporary restraining order in state court to prevent state enforcement of the regulation pending a ruling on the appeal by WARC. The order was granted.\(^{266}\)

On the basis of information supplied by Delmarva, EPA concluded that a violation of the regulation had occurred and was continuing. EPA issued a compliance order in April, 1972. Getty immediately initiated a suit in federal district court to enjoin further EPA enforcement pending the appeal to WARC and was denied relief.\(^{267}\) On appeal, the Third Circuit remanded the case to the district court with instructions to dismiss for lack of jurisdiction.

Getty claimed that the regulation was arbitrary and unreasonable in its application—because the national primary standards had already been achieved in New Castle County and because compliance prior to development of alternative technology would impose an undue hard-

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affd 467 F.2d 349, 4 ERC 1567 (3rd Cir. 1972), cert. denied, 409 U.S. 1125, 4 ERC 2040 (1973); Duquesne Light Co. v. EPA, 481 F.2d 1, 5 ERC 1473 (3rd Cir. 1973).
266. 467 F.2d at 354, 4 ERC at 1568.
267. 467 F.2d at 355, 4 ERC at 1569.
ship on Getty and Delmarva. This, they contended, was in violation of the fourteenth amendment due process clause. The court, however, looked past Getty's claim and characterized the situation as follows:

having failed to appeal the Administrator's approval of the Delaware plan, and faced as it is with the EPA's compliance order, Getty is presented with the choice of either compliance or breach, until such time as its application for a variance is favorably considered. 268

Thus Getty's claim and the court's characterization of the conflict raise the major issues of this case: (1) Whether sections 307(b) 269 and 110(f) 270 comprise the exclusive remedies for review of the Administrator's approval; (2) whether variances constitute revisions of the state plan and are therefore subject to EPA approval; and (3) whether EPA should have to suspend enforcement action while an industry pursues its state remedies. The court decided the first issue, and ultimately the entire case, by holding that Getty's failure to challenge the Administrator's approval in the proper court under section 307(b) effectively precluded "pre-enforcement review" in the district court. The court reasoned that Getty's attempt to procure a determination in the district court on the validity of the regulation was an effort to short-circuit the Act's procedure for review. Furthermore, the court concluded that Getty had not been deprived of due process merely because it was not entitled to pre-enforcement review in the district court. Due process requires that a party be guaranteed a meaningful opportunity to present its views: Getty had appeared at the state hearing on the regulation, could have challenged the approval of the regulation in a section 307(b) proceeding, and was present at the conference between EPA and Delmarva before the compliance order became effective.

In considering whether variances granted by the state would constitute revisions of the state plan, the court noted that according to EPA regulations a state's decision to defer the applicability of a portion of its control strategy constitutes a revision. 271 The court therefore concluded that since revisions of state plans must be approved by EPA, a state could not substitute its judgment for the Administrator's in evaluating the merits of the variance sought by Getty.

The court did not address the issues of whether EPA has an absolute right to approve (or disapprove) variances as revisions, whether it must suspend enforcement pending appeals at the state level, and whether it can enforce measures which are stricter than necessary to

268. 467 F.2d at 358, 4 ERC at 1572.
achieve the national standards. One of Getty's primary claims was that since the national primary standards for sulfur oxides had already been achieved in New Castle County, forcing Delmarva to comply with the regulations would impose an unjustifiable burden. The court emphasized EPA's obligation to enforce the national standards and concluded that EPA must enforce any state plan until revised or its effective date postponed. Implicit in the court's holding was the conclusion that EPA can enforce a stricter measure than is necessary to achieve the national standards and need not suspend enforcement of a plan pending state action. The former conclusion follows from section 116,272 which establishes the national standards as a floor but permits states to adopt and enforce stricter measures. Because measures adopted by states and approved by the Administrator are enforceable by EPA under section 113, it follows that EPA should be able to enforce such stricter measures. A court will only reach the question of whether EPA must suspend enforcement pending a state determination for an industry if the industry has first exhausted its remedies at every stage. The plaintiffs in Getty Oil had not pursued their earlier remedies.

In Duquesne Light Co. v. EPA,273 the court attempted to decide how the "Getty Oil dilemma"274 should be avoided or resolved in the case of an industry which had pursued all its legal remedies. Duquesne Light and two other companies had challenged EPA approval of the Pennsylvania implementation plan in a 307(b) proceeding on both substantive and due process grounds, asking that EPA at least be required to hold a legislative-type hearing275 prior to approval. Duquesne Light had also applied for state variances. The court in effect fashioned a compromise solution. It gave EPA the choice of either suspending enforcement of the Pennsylvania plan with respect to the three companies until they had finished pursuing their state remedies or granting a limited legislative-type hearing, without opportunity for cross-examination. This solution allowed Duquesne Light and the other companies a more expanded scope for presenting their views prior to enforcement, in order to minimize the danger of industry being caught in the Getty Oil squeeze. As the court recognized, EPA might choose to hold a legislative hearing, approve the plan, and proceed to enforce it before Duquesne Light had exhausted state avenues of review. The possibil-

273. 481 F.2d 1, 5 ERC 1473 (3rd Cir. 1973).
274. The court stated "The present case presents the Court with the spectre of a recurrence of the Getty paradox. Here the plan has been adopted by, and is enforceable by, the EPA during the time state proceedings that might alter the plan are underway." 481 F.2d at 8, 5 ERC at 1478.
275. The court used the term "limited legislative hearing" to describe the type of hearing required by the Administrative Procedure Act for rule-making procedures. 481 F.2d at 10, 5 ERC at 1480.
ity of this conflict seems unavoidable, however, without serious emasculation of federal enforcement authority under the Act.

e. Citizen Enforcement

The Act permits not only the states and EPA but also interested citizens to enforce its provisions. Section 304\(^{276}\) sets out the procedures for citizen suits, allowing any "person" to commence such a suit on his own behalf, subject to certain limitations. Citizens may sue any person, including the United States, alleged to be in violation of an applicable emission standard. The suits are to be brought in the U.S. District court in which the violator is located, regardless of the amount in controversy or the citizenship of the parties. The plaintiffs must notify the Administrator of the violation in question at least sixty days before bringing the action.\(^{277}\) Plaintiffs must also notify the alleged violator and the state in which the violations occur, in order to allow the states to initiate enforcement action and the potential defendant a chance to correct the violation. In suits involving emissions of hazardous pollutants or citizen suits against a party allegedly in violation of an abatement order issued by EPA under section 113, the action may be brought immediately after notification.

If EPA or the state has commenced judicial action against an alleged violator, citizens may not commence separate actions but have the right to intervene in the ongoing action. The Administrator also has the right to intervene in any citizen suit brought against the owner or operator of a stationary source for violation of an emission limitation or an order concerning such limitation.

Finally there is a provision that any rights which citizens might have under common law or other statutes to seek relief from polluted air or to enforce an emission standard are in no way limited by section 304.\(^{278}\)

In Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.,\(^{279}\) a citizens' group sued under section 304\(^{280}\) to recover damages for alleged violation of the Delaware plan implementing the national secondary standard for sulfur dioxide. Stauffer defended on grounds that the State Water and Air Resources Commission had granted a variance. The U.S. District Court dismissed the action for lack of jurisdic-
tion on the grounds that it should have been brought in the Circuit Court as a challenge to a revision of the state plan under section 307(b). However the court did assume that section 304 establishes a private right to damages, although it limits the exercise of that right to individuals; the court concluded that payment of damages may not be made to an environmental organization for injuries to its members.

CONCLUSION

The history of the Clean Air Act through its litigation in the courts has so far reflected attempts by industry to stall compliance through imposition of procedural requirements on EPA, and efforts of environmentalists to put teeth into the Act by forcing EPA to comply with the Act's substantive provisions. In response to industry's suits seeking to compel EPA to grant adjudicatory hearings at various stages of the standard-issuance and state implementation plan approval process, courts have in general refused to read into the Act the provisions of the Administrative Procedure Act. In permitting EPA a certain amount of procedural leeway, the courts have generally relied on the specific language of the Act, the absence of specific rigid procedural requirements, and the congressional intent manifested in the Act that the problems of air pollution should be solved as expeditiously as possible. Consistent with this rationale, the courts have been far stricter with EPA in response to suits by environmentalists, requiring the federal environmental enforcement agency to compel the states to conform their implementation plans to the substantive requirements of the Act, and to refrain from approving plans which would have permitted informal delays in circumvention of the formal delay provisions and consideration of economic, social and technological feasibility in violation of the Act.

From the perspective of environmentalists the picture with respect to enforcement has not been nearly so rosy. There remain a number of crucial issues which have not been settled by litigation, legislation,

281. Id. § 1857h-5(b). The court based this conclusion on an EPA regulation establishing that deferral of the applicability of a portion of a control strategy constitutes a revision of a state plan unless it results in deferral of the attainment date for a national standard specified in the plan. 40 C.F.R. § 51.32(f) (1973).


283. Subsequent to the dismissal of the suit, plaintiff DCCA moved for attorney's fees as provided for in "appropriate cases" by section 304(d), 42 U.S.C. § 1857h-2(d) (1970). Although it recognized that under the terms of the Act attorney's fees need not be limited to successful parties, the court refused to make an award in this case on the grounds that plaintiffs should have anticipated their failure to recover based on the Administrator's approval of the variance in question. DCCA v. Stauffer Chemical Co., 62 F.R.D. 353, 6 ERC 1541 (D. Del. 1974).
or administrative regulation. The extent to which federal enforcement authority can be used to permit open-ended delay remains an unresolved question. Furthermore, the provisions in the Act for citizen enforcement have not been effectively utilized thus far and it is unclear whether in light of massive resistance on the part of industry and the complex but relatively inadequate state-federal enforcement network, citizens' groups will be able to muster sufficient resources and political influence to mount an effective enforcement effort in the wake of state and federal failure to do so.

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