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Comment

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Environmentalism faces an uneasy future in America. The nation, deep in an energy shortage that threatens economic recession, has begun to vacillate in its commitment to clean up the environment.[1] Meanwhile, industry is exploiting statutes designed to protect environmental values in an effort to retard corrective programs. Even if the original ambitions were unrealistic, it would be foolish to relegate the environment once again to lowest priority. Environmental problems will not conveniently subside during the energy crisis, despite industry's pleas to ignore them. Congress' consistent failure to coordinate new programs with existing legislation is largely responsible for industry's ability to manipulate the environmental laws. Environmentalists celebrated three major victories in the year 1970. On January 1, the National Environmental Policy Act of 1969 optimistically announced "the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . ."[2] The Environmental Protection Agency was created in Reorganization Plan No. 3 of 1970,[3] bringing order from the chaos of smaller environmental agencies scattered throughout the federal bureaucracy. Unfortunately, Congress never spelled out the relationship between the EPA and the eleven-month-old NEPA. The only discernible line of demar-

1. *See* Wall Street Journal, March 25, 1974, at 3, col. 1 (Southwest ed.). The administration's proposals would undermine the Clean Air Act in two ways. First, they would remove federal authority to prevent significant deterioration of air that is now cleaner than current national standards. Second, they would allow utilities and industries to use methods for dispersing pollutants as a substitute for the costly "scrubber" antipollution equipment now required by EPA.

2. 42 U.S.C. § 4331 (1970).

3. REORGANIZATION PLAN NO. 3 OF 1970, H.R. DOC. NO. 91-366, 91st Cong., 2d Sess. (1970) [hereinafter referred to as REORGANIZATION PLAN NO. 3]. The plan consolidated a number of major agencies, including the Federal Water Quality Administration, the National Air Pollution Control Administration, the Environmental Control Administration, the Bureau of Solid Waste Management, and the Federal Radiation Council. The EPA also received some functions of the Bureau of Radiological Health and the Atomic Energy Commission and some specific statutory duties of the Secretaries of the Interior, HEW, and Agriculture.

cation between the two was a vague idea that EPA had the responsibility to implement and enforce environmental programs while the Council on Environmental Quality, created in Title II of NEPA, would set overall policies.[4] Perhaps this scheme was theoretically sound, but the passage of the Clean Air Act Amendments of 1970[5] gave rise to difficult practical questions. Specifically, problems arose about whether EPA is bound to obey the procedural requirements of NEPA, what kind of administrative procedures EPA must follow when it issues regulations, what technological considerations must or can compete in the Clean Air Act programs, and the nature and scope of judicial checks on EPA action.

The two most common vehicles for industry suits are the programs for national primary and secondary ambient air quality standards and the standards of performance for new stationary sources.[6] National primary and secondary ambient air quality programs are set in motion when the Administrator publishes a list of air pollutants that will be subject to federal standards, pursuant to section 108 of the Clean Air Act.[7] Simultaneously, he issues proposed standards for each of the listed pollutants under section 109 of the Act.[8] After a ninety-day period during which interested persons may submit written comments on the proposed standards, the Administrator promulgates the standards, with appropriate modifications.[9] Section 117 of the Act requires the Administrator to consult with advisory committees, independent experts, and federal agencies and departments before issuing criteria or publishing lists, standards, or regulations.[10] This procedure resembles

4. *Hearings on Reorganization Plan No. 3 of 1970 (Environmental Protection Agency) Before a Subcomm. of the House Comm. on Government Operations*, 91st Cong., 2d Sess., 13 (1970). This document supports the view of NEPA as a general statute whose policies apply across the board and which authorizes consideration of environmental values even when an agency's specific mandate is silent on the point.

5. 42 U.S.C. § 1857b-1 (1970), *amending* Clean Air Act §§ 101 *et seq.*, 42 U.S.C. §§ 1857 *et seq.* (1970).

6. *Id.* §§ 1857c-4, -5 (ambient air standards); *Id.* § 1857c-6 (stationary sources).

7. *Id.* § 1857c-3, *implemented in* 36 Fed. Reg. 1515 (1971). The EPA regulations define "ambient air" to be "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e) (1973). The regulations further provide that "[n]ational primary ambient air quality standards define levels of air quality which the Administrator judges are necessary, with an adequate margin of safety, to protect the public health. National secondary ambient air quality standards define levels of air quality which the Administrator judges necessary to protect the public welfare from any known or anticipated adverse effects of a pollutant." *Id.* § 50.2(b) (1973).

8. 42 U.S.C. § 1857c-4 (1970), *implemented in* 36 Fed. Reg. 1503 (1971).

9. 36 Fed. Reg. 8186 (1971) (codified at 40 C.F.R. §§ 50.1-.11 (1973)).

10. 42 U.S.C. § 1857e(f) (1970).

the consultations required by NEPA during the preparation of an impact statement.[11]

Following the promulgation of primary and secondary ambient air quality standards, section 110 of the Act requires each state to adopt a plan that "provides for the implementation, maintenance, and enforcement" of the standards.[12] EPA guidelines govern the preparation, adoption, and submission of state plans, and the state is obligated to give reasonable notice and to hold public hearings before adopting its implementation plan.[13] Completed plans are then due nine months after promulgation of the standards, unless EPA has approved a time extension. Four months after a plan reaches EPA, the Administrator gives his initial approval or disapproval, either in whole or in part. In place of disapproved portions not satisfactorily revised by the state, the Administrator issues his own proposal and holds hearings on it, unless the state conducts a public hearing associated with his revision.[14] Establishment of standards of performance for new stationary sources tracks the same basic procedure as ambient air quality standard-setting.[15] The Administrator publishes a list of categories of stationary sources; he then publishes proposed regulations establishing federal standards of performance for the listed categories. After interested persons have an opportunity to submit written comments, the standards become effective.[16]

Judicial review of the Administrator's action in promulgating any ambient air quality standard or standard of performance for new stationary sources is available only in the D.C. Circuit.[17] Review of EPA approval or promulgation of a state plan implementing the standards

11. Section 117's language substantially mirrors the consultation requirement in NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970), with the important difference that NEPA requires compliance to the fullest extent possible, while consultation to the "maximum extent practicable" is sufficient under the Clean Air Act.

12. 42 U.S.C. § 1857c-5(a)(1) (1970).

13. *Id.* (notice and hearing); 40 C.F.R. §§ 51.1 *et seq.* (1973) (guidelines).

14. *See* 40 C.F.R. pt. 52 (1973), subparts B to EEE. For the most up-to-date summary of the status of each state's plan, see BNA ENV. REP., FEDERAL REGULATIONS § 121, at 121:0181 (1973).

15. The Act defines "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 1857c-6(a)(1) (1970). "Stationary source" is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." *Id.* § 1857c-6(a)(3).

16. 36 Fed. Reg. 5931, 15704 (1971).

17. Clean Air Act § 307, 42 U.S.C. § 1857h-5(b)(1) (1970).

is available in the court of appeals for the appropriate circuit.[18] In addition, the Act leaves open the possibility of suing in district court under section 304,[19] the citizen suit provision, or under general federal question jurisdiction,[20] although the congressional intent behind the Clean Air Act would disfavor use of either strategy.

I. EPA's Duty to Comply with NEPA

Industry's sudden concern with the enforcement of NEPA's procedural requirements stems from its desire to delay implementation of air pollution programs.[21] Part of its motivation is purely profit-inspired, but an equally significant part is attributable to environmental groups' facile ability to ignore technological and economic realities. No one reasonably could suggest that clean air is worth a complete halt in industrial production; the question is actually where to draw the line between marginal, expendable plants and economically necessary activity. NEPA attempts to take these factors into account, since it mandates a balancing process between environmental considerations and the more traditional economic and technical factors. The impact statement is the worksheet in the balancing process, whose goal is thorough agency evaluation of proposed action and alternatives. Nonetheless, impact statements have not proved to be a panacea.[22] Some have been notorious for their great length; others, however, dispose of the complex factors listed in NEPA in a page or two.[23] Thus far, in considering NEPA's applicability to EPA, the courts have paid minimal attention to industry's claims of prohibitive economic costs, high cost-benefit ratios, discrimination against particular industries, and impossibility of achieving federal standards. Left without a sympathetic forum, industries in desperation have resorted to extensive dilatory tactics.

18. *Id.*
19. 42 U.S.C. § 1857h-2 (1970).
20. 28 U.S.C. § 1331 (1970).
21. *See* Environmental Defense Fund, Inc. v. EPA, 489 F.2d 1247, 1256 n.57 (D.C. Cir. 1973).
22. For an article challenging the assumption that NEPA will change the decision-making process, see Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).
23. *See, e.g.*, U.S. DEPT. OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT FOR THE GEOTHERMAL LEASING PROGRAM (1973) (four volumes); U.S. DEPT. OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT FOR THE PROTOTYPE OIL SHALE LEASING PROGRAM (1973) (six volumes); *Appendixes to Hearings on Administration of the National Environmental Policy Act Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., ser. 91-41, pt. 2, at 290, 322 (1970) (assorted brief impact statements).

The absence of external controls over EPA has brought about much of the litigation. By default, the courts have assumed a supervisory role. Industry claims often have considerable merit, but the EPA has been reluctant to accept explicit responsibility to implement NEPA and to allow public scrutiny of EPA methodology. Unlike other federal agencies, its decisions uniformly have far-reaching enviroumental effects. According to the specific terms of NEPA, all agencies of the federal government must prepare an environmental impact statement for "major" federal actions "significantly affecting" the quality of the human environment.[24] Ignoring this language, the Council on Environmental Quality originally adopted the view that NEPA did not apply fully to active environmental agencies and exempted EPA regulatory activity from the actions requiring an impact statement.[25] The EPA continues to hold itself exempt from filing impact statements for regulations, although it routinely files statements for some nonregulatory activities.[26] As a matter of grace the EPA has now agreed to prepare impact statements for some regulatory activities, but it has stressed that the action was entirely voluntary and subject to change at any time.[27] Even if these statements accomplish the same end as a mandatory statement while they last, as a matter of sound judicial administration it would be more desirable to hold that NEPA requires EPA to take this action. NEPA is a known quantity; each circuit has developed an understanding of the requirements of an impact statement and the court's responsibilities in judicial review. Although

24. 42 U.S.C. § 4332(2)(C) (1970).

25. COUNCIL ON ENVIRONMENTAL QUALITY, STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT, 36 Fed. Reg. 7725 (1971) (guideline 5(d)). The CEQ's revised guidelines, issued August 1, 1973, make no mention of an EPA exemption, although neither do they concede that EPA is included. 38 Fed. Reg. 20549 (1973).

26. 40 C.F.R. § 6.13(b)(6) (1973). For example, CEQ filed reports on EPA impact statements for sewage treatment facilities. *See, e.g.*, 39 Fed. Reg. 6774 (1974), 39 Fed. Reg. 4131 (1974), 39 Fed. Reg. 1536 (1974), 38 Fed. Reg. 26019 (1973), 38 Fed. Reg. 18580-81 (1973), 38 Fed. Reg. 10755 (1973), 38 Fed. Reg. 5675 (1973). Statements on wastewater treatment facilities are reported at 39 Fed. Reg. 4804 (1974), 39 Fed. Reg. 4131 (1974), 39 Fed. Reg. 1536 (1974), 39 Fed. Reg. 1304 (1974), and 38 Fed. Reg. 9115 (1973). A statement on proposed legislation is reported at 38 Fed. Reg. 15102 (1973).

27. 39 Fed. Reg. 16186-87 (1974). Whether this new stance will ultimately further or hinder the aims of environmentalists is hotly disputed. *See* 4 BNA ENV. REP., CURRENT DEVELOPMENTS 2055 (Apr. 12, 1974). In any event, the impact statements are preferable to the "environmental explanations" the EPA had originally intended to issue. 38 Fed. Reg. 15653 (1973). For a criticism of the explanations that favors full impact statements, see Comment, *Halfway There: EPA's "Environmental Explanations" and the Duty to File Impact Statements*, 3 ELI ENV. L. REP. 10139 (1973).

EPA's offer to prepare statements was a giant practical step in the right direction, it is undesirable to leave this important area to the whims of the agency. Holding the EPA statutorily subject to NEPA would substantially clarify the relationship between the various environmental statutes and agencies.

A. Scope of NEPA

NEPA contains both procedural and substantive aspects, although most courts feel that their power ordinarily reaches only the procedural provision.[28] Section 101 sets out the substantive portion, a declaration of "the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources "for specified environmental ends.[29] Inspiring as this model may be, it is the procedural requirement of an environmental impact statement that gives NEPA its bite. This requirement operates on all laws of the United States. In the context of the problems that confront the courts under the Clean Air Act, it means that the statement ultimately produced must reflect the high standards of interdisciplinary approach, reception of comment, articulation, and public disclosure mandated by NEPA.

Three principles that emerge from the cases decided on NEPA should be applied to any agency action involving environmental considerations. First, NEPA requires openness in the decisionmaking process. Next, its sweep is subject to a reasonableness limitation. Finally, the policies of NEPA are more important than any specific procedures. NEPA must not be applied so aggressively that its underlying policies are defeated.[30] The first major case construing NEPA, *Calvert Cliffs' Coordinating Committee v. AEC*,[31] established that specific statutory obligations did not vitiate NEPA. At least three duties remained: the obligation to comply with certain standards, the

28. *See, e.g.*, Jicarilla Apache Tribe v. Morton, 471 F.2d 1275, 1280-81 (9th Cir. 1973); Scenic Hudson Preservation Conference v. EPA, 453 F.2d 463, 481 (2d Cir. 1971). *But see* Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033, 1037 (8th Cir. 1973); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 297-301 (8th Cir. 1972).

29. 42 U.S.C. § 4331(b) (1970).

30. *Cf.* Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972). *See also* Environmental Defense Fnnd, Inc. v. Corps of Eng'rs, 342 F. Supp. 1211 (E.D. Ark.), *aff'd* 470 F.2d 289 (8th Cir. 1972).

31. 449 F.2d 1109 (D.C. Cir. 1971).

obligation to coordinate with other agencies, and the obligation to act or refrain from acting contingent upon certification from specified agencies. Thus, even if one of NEPA's requirements is inappropriate, the agency still must comply with the other provisions.

B. Purpose of NEPA

The original purposes for requiring a detailed impact statement were to shape the agency's decisionmaking process and to advise other interested agencies and the public of a planned federal action's environmental consequences.[32] NEPA has been described minimally as an environmental full disclosure law.[33] It may even be intended to make substantive changes in the decisionmaking process.[34] NEPA mandates that action can be taken only after the agency has complete awareness of all conceivable environmental consequences of its plan.[35] Through the impact statement requirement, "NEPA provides evidence that the mandated decisionmaking process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own."[36] EPA regulatory activity may reduce one type of pollution at the expense of increasing another.[37] The reality of this danger lends credence to the value of an impact statement's disclosure of consequences and alternatives.

C. Applicability of NEPA

1. General principles.—It is becoming clear that NEPA is subject to a reasonableness construction.[38] The courts have retreated

32. Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 364 (E.D.N.C. 1972). *See also* Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 350-51 (8th Cir. 1972); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972) (impact statement's objective is enlightenment of others).

33. Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972). Whether an agency must disclose the methodology behind facts it finds is an open question. The Eighth Circuit implied that disclosure might be required in Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972); *accord*, Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

34. *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 297 (8th Cir. 1972).

35. National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971).

36. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

37. *See, e.g.*, Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1303-04, 1306 (10th Cir. 1973); 119 CONG. REC. E2504 (daily ed. April 17, 1973) (comments by Dr. James Pitts, head of California Statewide Air Pollution Research Center in Riverside); F. ANDERSON, NEPA IN THE COURTS 111-12 (1973).

38. *E.g.*, Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 297

from requiring an agency to discuss alternatives beyond its statutory authority.[39] The Supreme Court further emphasized the limitations of NEPA by holding that it was not intended impliedly to repeal any other statute, but instead was to supplement existing laws.[40] Although for a time the procedural requirements of NEPA seemed to engulf everything in sight, the trend has reversed appreciably.[41] The courts have recognized the absurdity of allowing procedures to defeat the underlying policies; that practice subverts the very purpose of the procedures—assurance that the policies of section 101 are implemented.[42] Thus, if an impact statement were prepared in connection with regulatory activity under the Clean Air Act, the time constraints of the substantive legislation would restrict the statement's detail.[43]

Section 102 of NEPA permits necessary adjustments since it directs compliance only "to the fullest extent possible."[44] The CEQ interprets this phrase to mean that each agency of the federal government shall comply with section 102 unless existing law applicable to the agency's operations expressly prohibits some act necessary for compliance, or the law makes compliance impossible as a practical matter.[45] At worst, this interpretation might mean that a less than gargantuan

(8th Cir. 1972); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834-38 (D.C. Cir. 1972).

39. *Compare* Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834-36 (D.C. Cir. 1972) (impact statement should not be limited to discussion of alternatives within the responsible official's scope of authority), *with* Gage v. AEC, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973) (more restrictive view). *See also* Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972).

40. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 694 (1973).

41. Impact statements still are required regularly for projects such as highways, dams, and urban renewal, which involve massive federal expenditures. Marginal cases where statements were required included the Secretary of the Interior's termination of contracts for the purchase of helium, in National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971), and the zoning of the Georgetown waterfront, in Citizens Ass'n v. Zoning Comm'n, 477 F.2d 402 (D.C. Cir. 1973). On the other hand, decisions not to file an impact statement were recently upheld in United States v. Students Challenging Regulatory Agency Procedure, 412 U.S. 669 (1973); Kings County Economic Community Development Ass'n v. Hardin, 478 F.2d 478 (9th Cir. 1973); and Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973).

42. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 297 (8th Cir. 1972), *quoting from* S. REP. No. 296, 91st Cong., 1st Sess. 19 (1969).

43. The court recognized this possibility in Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 381 n.19 (D.C. Cir. 1973). The argument that it would result in a group of second-class impact statements carries little weight, since at present there are no impact statements at all. Nothing in NEPA precludes adjusting the detail of a statement to external statutory constraints.

44. 42 U.S.C. § 4332 (1970).

45. 38 Fed. Reg. 20551 (1973).

impact statement would violate section 102, making compliance impossible for EPA. The courts, however, are free to ignore CEQ's advice and adopt a more flexible construction of the statutory language.[46] Using a reasonableness criterion, courts could hold EPA subject to NEPA and judge the adequacy of EPA's statements on that basis.

2. Recent industry suits.—No court of appeals has explicitly adopted this position. On the contrary, several circuits have held that EPA is exempt to some degree from the impact statement requirement. The first comprehensive discussion of the impact statement issue appears in the D.C. Circuit's opinion in *Portland Cement Association v. Ruckelshaus.*[47] Several cement manufacturers resisted the Administrator's stationary source standards for new or modified portland cement plants, issued pursuant to section 111 of the Clean Air Act. At the time the proposed regulations were published, the Administrator revealed his justifications in a brief document. In December 1971 he adopted the standards by regulation, which provided that particulate matter emitted from portland cement plants should not exceed a given amount.[48] The EPA announced that the standards were based on stationary source testing conducted by EPA or independent contractors and on data derived from other sources, which included the available technical literature. It concluded that systems capable of meeting the standards were adequately demonstrated and that the standards were achievable at reasonable costs. Three months later, prompted by an intervening decision of the D.C. Circuit stressing full disclosure,[49] the agency published a supplemental statement, exposing more details behind the standards. Even so, it was not until April 1972 that petitioners at last received full information about the tests. Then, the cement manufacturers attacked the Administrator's action on three grounds: failure to comply with NEPA, failure to take adequate account of economic costs, and failure to demonstrate the standards' achievability. The court tackled the NEPA issue first, rejecting at the outset the "plain meaning" argument that EPA must file a statement because "all agencies" must do so.[50] Because the "plain mean-

46. *See* Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 424 (5th Cir. 1973) (CEQ guidelines are advisory only because CEQ lacks authority to prescribe regulations governing compliance with NEPA).

47. 486 F.2d 375 (D.C. Cir. 1973).

48. 36 Fed. Reg. 24876 (1971) (codified at 40 C.F.R. § 60.62 (1973)).

49. Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972).

50. Two district courts had accepted that argument. *See* Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697, 710-13 (D. Colo. 1972), *rev'd*, 482 F.2d 1301 (10th Cir. 1973); Kalur v. Resor, 335 F. Supp. 1, 12-15 (D.D.C. 1971).

ing" doctrine is "subservient to a truly discernible legislative purpose,"[51] the court turned to the legislative history to see whether Congress could have intended to impose the requirement on active environmental agencies. After a lengthy discussion it concluded that numerous items were entitled to some weight as indicia of legislative intent, but none was decisive.[52]

Turning to the policies underlying NEPA, the court again found competing considerations. Even though an exemption might better serve NEPA policies, an external check on the EPA is equally desirable. Faced with this conflict, the court concluded that *Portland Cement* was not the appropriate case for a final decision on a broad exemption. Tightly circumscribing its holding, the court said that "[w]hat is decisive, ultimately, is the reality that, section 111 of the Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement."[53] The functional equivalent concept comes to the brink of requiring EPA to comply with NEPA. The court's error was in assuming that compliance necessarily entailed the time-consuming statements with which it was familiar. If it had embraced a more flexible reading of NEPA and ascribed some content

51. 486 F.2d at 379-80. *See also* Wilderness Soc'y v. Morton, 479 F.2d 842, 855 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973); District of Columbia v. Orleans, 406 F.2d 957, 959 (D.C. Cir. 1968).

52. The court first pointed out that EPA itself did not exist when Congress considered NEPA, which forced the court to imagine what answer the legislature would have given to a problem that was neither discussed nor contemplated. 486 F.2d at 380. It next noted the specific timetable in the Clean Air Act and found that timetable inconsistent with a full impact statement, although accommodations might be made. *Cf.* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 697-98 & n.22 (1973); Atlanta Gas Light Co. v. FPC, 476 F.2d 142 (5th Cir. 1973). Although neither NEPA nor the legislative history expressly exempts environmentally protective regulatory agencies, a document entitled *Major Changes in S. 1075 as Passed by the Senate*, introduced into the *Congressional Record* by Senator Henry Jackson, the bill's sponsor, did mention an express exemption for existing agencies with important environmental responsibilities. *See* 115 CONG. REC. 40418 (1969). Finally, § 511(c)(1) of the Federal Water Pollution Control Act Amendments of 1972 provided that NEPA is not applicable to EPA, at least with respect to impact statements, except when grants are made for the construction of publicly owned waste treatment works and when EPA issnes new source permits. 33 U.S.C. § 1371(c)(1) (Supp. II, 1972). There is some indication that Congress viewed this as a general clarification of the applicability of the impact statement process to EPA's regulatory functions. *See* ENVIRONMENTAL POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 93D CONG., 1ST SESS., CONGRESS AND THE NATION'S ENVIRONMENT: ENVIRONMENTAL AND NATURAL RESOURCES AFFAIRS OF THE 92D CONGRESS 1026-28 (Comm. Print 1973). Yet as the *Portland Cement* court pointed out, comment by a later Congress is a hazardous basis for inferring the intent of an earlier Congress. 486 F.2d at 382.

53. 486 F.2d at 384; *accord*, Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 431 (D.C. Cir. 1973).

to the "fullest extent possible" phrase, the decision would have rested on firmer ground.

The chief elements of the D.C. Circuit's "functional equivalent"—an evaluation of a proposed standard's counterproductive environmental effects, the economic costs to the industry, and a statement of reasons setting forth the environmental considerations—purportedly echoed the requirements in section 111 of the Clean Air Act.[54] Nonetheless, the statutory directive to set a "standard for emissions of air pollutants" reflecting the degree of control achievable with the Administrator's designated "best system of emission reduction" is not equivalent either to the court's prescription to consider counterproductive environmental effects or to an impact statement. The court was reluctant to admit that it had looked beyond the Clean Air Act to define a partial impact statement equivalent. Having demonstrated its willingness to place this much of a burden on EPA, the court simply should have held NEPA applicable to the environmental agency. Even if the information in the functional equivalent were identical to that in an impact statement, placing EPA under NEPA would yield the advantage of a clarified relationship.

Additional positive benefits would flow from an impact statement in the *Portland Cement* situation. The public and other agencies would be invited to discuss the environmental impacts, adverse effects, short and long term uses, and irreversible commitments of a proposed air pollution standard.[55] The EPA would have a statutory duty to compose a written evaluation of its own proposal and to heed material suggestions. Furthermore, the change might well improve the substantive quality of EPA-developed programs.[56] First, the courts would know to apply the standards for procedure and disclosure that they have developed for NEPA. Consistent application of predictable standards would enable EPA to meet the judiciary's expectations in the future, thus narrowing the opportunities for delay.[57] As the D.C. Circuit tacitly recognized, an impact statement adjusted to the time

54. These considerations were the "best system of emission reduction," taking the costs of achieving reductions into account. 42 U.S.C. § 1857c-6(a)(1) (1970); 486 F.2d at 385.

55. *See* 40 C.F.R. § 6.40 (1973).

56. For example, in *Portland Cement* a single test was used to support the proposed standard for emission from dry-process kilns, and of three tests conducted for wet-process kilns, only one supported the proposed standard. 486 F.2d at 396, 398. In *Anaconda* the EPA's standard was again calculated on the basis of only one test. Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697, 700-01 (D. Colo. 1972), *rev'd*, 482 F.2d 1301 (10th Cir. 1973).

57. *Cf.* Note, *The Judicial Role in Defining Procedural Requirements For Agency Rulemaking*, 87 HARV. L. REV. 782, 802 (1974).

schedule of the Clean Air Act presents no insurmountable preparation problems.

Reasons advanced by other courts that have refused to require EPA compliance with NEPA are equally unpersuasive. The Third Circuit has considered the issue in two industry suits, *Getty Oil Co. v. Ruckelshaus*[58] and *Duquesne Light Co. v. EPA*.[59] *Getty Oil* began as a suit in district court for temporary and permanent injunctive relief to stay the effect of the Administrator's order to comply with the Delaware state implementation plan.[60] Getty frankly admitted that it sought more time to comply with the regulation it had violated. Besides alleging that EPA's order was arbitrary and capricious, Getty claimed that it was invalid due to noncompliance with NEPA. While the Third Circuit evaded the issue by assuming that it could have been raised in a statutory petition for review in the circuit court, it did assert that "[i]t is apparent that the Clean Air Act itself contains sufficient provisions for the achievement of those goals sought to be attained by NEPA."[61] This remark thoroughly obscured the basic question whether the language of NEPA requires compliance even if some of its policies are furthered by other laws.

Dusquesne Light was a statutory proceeding to review the Administrator's approval of Pennsylvania state plan regulations limiting sulphur oxide emissions. Although Pennsylvania had held hearings on the state plan, the court found these inadequate. Squarely faced with the NEPA issue this time, the court held that "in approving the state implementation plans, the Administrator is not required to meet the impact statement requirements of the NEPA—certainly in the context of this case."[62] Yet it did not identify the circumstances obviating the necessity for a statement. The only reason it offered was the redundancy of requiring an environmental agency to prepare an impact statement. Yet given the methodical and detailed analysis in an impact statement and the differences in function between EPA and NEPA, the court's fear of repetition seems unfounded.[63]

58. 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).
59. 481 F.2d 1 (3d Cir. 1973).
60. 342 F. Supp. 1006 (D. Del. 1972).
61. 467 F.2d at 359.
62. 481 F.2d at 9.
63. The court relied on International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), for the redundancy proposition. That court considered the wisdom of the Administrator's refusal to suspend 1975 light-duty vehicle emission standards for one year. The Administrator had the duty to produce a reasoned demonstration of his methodology's reliability. 478 F.2d at 649. Since he had failed to satisfy this require-

The Fourth Circuit considered a challenge to the Administrator's approval of the West Virginia, Virginia, and Maryland state plans brought by electric generating plant operators and Bethlehem Steel in *Appalachian Power Co. v. EPA*.[64] Without even a nod to the purposes of NEPA or the scope Congress intended it to have, the court simply said "[w]e are convinced that . . . [NEPA] is inapplicable to the action of the Administrator in seeking, through the approval of state implementation plans, to improve 'the quality of the human environment.' "[65] Citing the *Getty Oil* remark that the Clean Air Act adequately protected NEPA's goals, it refused to require EPA to prepare an impact statement. Again brushing over the express language of NEPA, the Sixth Circuit held in *Buckeye Power, Inc. v. EPA*[66] that it was "unnecessary" for the Administrator to prepare an impact statement when he approved the Ohio and Kentucky state plans. This court thought that EPA would have to file the statement with itself. Actually, its fears were based on a misunderstanding, since the statements are "made available to the President, the Council on Environmental Quality and to the public."[67] Additionally, it leaned on the *Appalachian Power* and *Getty Oil* decisions, neither of which withstands close analysis.

The last circuit to consider the NEPA question was the Tenth, in *Anaconda Co. v. Ruckelshaus*.[68] Its discussion adds only an ambiguity to the other cases. Concluding that the plaintiff's contention lacked merit and substance, the court recited that "[t]o compel the filing of impact statements could only serve to frustrate the accomplishment of the Act's objectives."[69] Whether the court meant the Clean Air Act or NEPA is not clear; in either case the reasoning fails to give proper weight to the objectives NEPA is designed to accomlish and to the flexibility inherent in NEPA's "fullest extent possible" provision.

ment, the court remanded for further consideration. The NEPA issue was dismissed in a footnote on the ground that EPA's decision would include an assessment of the environmental consequences of action and inaction, thereby making an impact statement redundant. *Id.* at 649, 650 n.130. Nevertheless, this assumes that the court's assessment of need is correct; in fact, only a statutory requirement to consider all the factors in NEPA can assure that a fully reasoned decision will be forthcoming.

64. 477 F.2d 495 (4th Cir. 1973).
65. *Id.* at 508.
66. 481 F.2d 162 (6th Cir. 1973).
67. *See* 42 U.S.C. § 4332(2)(C) (1970).
68. 482 F.2d 1301 (10th Cir. 1973).
69. *Id.* at 1306.

With the exception of the D.C. Circuit, the courts have skimmed lightly over the assertion that EPA must prepare an impact statement. Either the Clean Air Act or the environmental responsibilities of the EPA are said to make the statement unnecessary. *Portland Cement* refined the problem, finding an exemption from NEPA only because the Clean Air Act provided functionally equivalent procedures. A later D.C. Circuit case took this idea one step further. In *Environmental Defense Fund, Inc. v. EPA*,[70] the court found that EPA had actually complied with NEPA when it withdrew DDT registrations under the Federal Insecticide, Fungicide, and Rodenticide Act. The opinion rested on the assumption that compliance did not inexorably demand adherence to "the strict letter of NEPA requirements."[71] Furthermore, for the first time the court specifically stated that all five of the core NEPA issues were carefully considered during the hearings and the decisionmaking process. It concluded that "where an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient."[72] Although the court never referred to NEPA's requirement of compliance "to the fullest extent possible," it is that portion of the statute that sanctions the flexible "functional compliance" standard. The facts of this case indicate that functional compliance is attained only if all five factors of section 102 are systematically considered. The judicial administration problems inherent in the *Portland Cement* standard do not arise if the court knows that nothing can be omitted. Only the form has changed; the substance must follow prior NEPA law. Compliance with NEPA need not require the enormous impact statements produced when no statutory time constraints exist. To hold EPA subject to the impact statement requirement by adjusting the statement's detail to the Clean Air Act would serve NEPA's full disclosure policies, aid the decisionmaking process, and frustrate industry's dilatory tactics by settling the issue once and for all. In a time when multiple environmental considerations are likely to be given cursory agency attention, EPA's statutory duty to prepare impact statements should be recognized.

70. 489 F.2d 1247 (D.C. Cir. 1973).
71. *Id.* at 1256.
72. *Id.* at 1257.

II. Administrative Procedures Required of EPA

The procedural issues confronting EPA as it administers the Clean Air Act vary with the program in question. Industry challenges arise in four contexts: original standard-setting by EPA, approval of state plans, replacement of defective parts of state plans with EPA standards, and constitutional or statutory attacks on EPA regulations independent of their merit in a given case. When standards are set, the Act calls for written comments.[73] The Administrator relies on state hearings when he approves state plans;[74] the Act is silent on his duty to accept comments or hold hearings prior to the approval decision. Finally, he must hold a fresh hearing when he prepares a replacement plan, unless the state conducts its own public hearing on the revision.[75] The final evaluation of these procedures rests on due process considerations, identification of the kind of decision the Administrator is making, and the court's dependence on sufficient disclosure of the Administrator's reasoning to ensure meaningful judicial review.

A. Administrative Law Background

Due process does not require a full adversary hearing every time a governmental action affects private parties.[76] Instead, its requirements are tailored to the type of proceeding in question. The Supreme Court set out some important factors in *Hannah v. Larche,* including "[t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding . . . ."[77] These considerations determine whether a party may comment in writing, present an oral argument, or have a full trial-type hearing. The companies suing under the Clean Air Act are asserting a right to independent federal consideration of the soundness of state implementation plans, since approved plans are subject to federal enforcement. For many, it is a question of raw economic survival, since compliance with a plan could force shutdown. Balanced against this interest, however, is the congressional intent to protect the public health and wel-

73. 42 U.S.C. §§ 1857c-4(a)(1)(B), -6(b)(1)(B) (1970).
74. *Id.* § 1857c-5(a)(1).
75. *Id.* § 1857c-5(c).
76. *E.g.,* Goldberg v. Kelly, 397 U.S. 254, 266-67 (1970); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 894 (1961).
77. 363 U.S. 420, 442 (1960).

fare embodied in the Clean Air Act Amendments of 1970. With the public in mind, Congress allowed only a short timespan for EPA and the states to adopt standards and implement plans.

Administrative proceedings increasingly are molded to the contours of a particular program; still, there are two basic types: rulemaking and adjudication.[78] Generally, rulemaking procedures are suited for resolving nonfactual issues of law, policy, and discretion.[79] When adjudicative or historical facts, which confrontation and cross-examination can best elicit, are at issue, an adjudicatory hearing should be held.[80] Another way of viewing the two distinguishes between general rules of future effect and adjustment of individual rights. Borderline activities often are not susceptible to categorization; for this reason, hybrid proceedings have evolved to meet special situations.[81]

In a pure rulemaking proceeding, the right to a hearing is usually limited to written comments, although the agency has discretion to hear oral argument.[82] The right to cross-examine in rulemaking arises only if rules are required by statute to be made on the record after opportunity for an agency hearing.[83] Similarly, the Administrative Procedure Act permits an agency to streamline further its rulemaking if it finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.[84] Courts have relied on this provision in refusing to require rulemaking hearings for EPA approval of state plans.[85] After the agency has arrived at a decision, it must articulate its reasons: a straightforward and precise explanation is essential to meaningful judicial review.[86] The EPA must adhere to

78. The Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970), provides for rulemaking procedures in section 4 and adjudication in section 5. *Id.* §§ 553, 554 (1970).

79. The APA defines "rule" broadly as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4) (1970). For a discussion of when a rulemaking hearing is appropriate see Virgin Islands Hotel Ass'n, Inc. v. Virgin Islands Water & Power Auth., 476 F.2d 1263, 1268 (3d Cir. 1973).

80. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.05 (1958).

81. *See* Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 68; Note, *supra* note 57, at 796.

82. 5 U.S.C. § 553(c) (1970).

83. *Id.* §§ 553(c), 556(d).

84. 5 U.S.C. § 553(b)(3)(B) (1970).

85. *See* Duquesne Light Co. v. EPA, 481 F.2d 1, 8 (3d Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 503 (4th Cir. 1973).

86. *See, e.g.*, Kennecott Copper Corp. v. EPA, 462 F.2d 846, 849-50 (D.C. Cir. 1972); WAIT Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969).

a high standard of articulation, given the social and technical complexities inherent in its decisions.[87] Absent a complete record, the court would be powerless to evaluate whether EPA fully performed its statutory duties in nonarbitrary fashion. The impact statement and disclosure of the methodology behind standards should be issued simultaneously with proposed regulations, continuing the previous practice under EPA's guidelines. This would allow maximum opportunity to cure defects and ensure a complete record for the reviewing court.

B. Procedure When EPA Sets Standards

The Administrator's decision on a procedural route for standard-setting must take into account factors relevant for due process, administrative efficiency, and judicial review. His starting point, of course, is the statutory scheme. Specifically, the Clean Air Act gives "interested persons" the right to submit written comments when standards are set under section 111 of the Act or when national primary and secondary ambient air quality standards are promulgated under section 109.[88] Thus, while the general public is free to submit comments, the Act does not expressly grant them a right to a detailed explanation of the Administrator's disposition of the comments. If, however, EPA begins preparing impact statements for clean air regulatory activity in accordance with its current policies on public participation for other impact statements, the public should receive a comprehensive explanation in the statement at the time the proposed standards were published.[89]

A different problem affects the participatory rights of a manufacturer who must comply with final clean air standards. The petitioners in *Portland Cement* raised several complaints about EPA procedures. They argued first that the Administrator must prepare a quantified cost-benefit analysis; second, that the adopted standard unduly threatened the supply of cement; third, that the standards for

87. *See* Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528, 540-41 (D.C. Cir. 1972); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 848-50 (D.C. Cir. 1972).

88. 42 U.S.C. §§ 1857c-4(a)(1)(B), -6(b)(1)(B) (1970).

89. EPA regulations currently define "interested persons" in the section on preparation of impact statements to include both applicants for agency contracts and public parties like conservation groups. 40 C.F.R. § 6.11(h) (1973). They describe public participation as an "integral part of the Agency planning process" that involves "continuous, two-way communication keeping the public fully informed about the status and progress of studies and findings, and actively soliciting comments from all concerned and affected groups and individuals." *Id.* § 6.40.

cement plants were discriminatory because they were higher than those for steam-generating plants fired by fossil fuel; and finally, that the promulgated standards' achievability was not "adequately demonstrated" pursuant to section 111(a)(1) because EPA's tests and scientific methodology were unsound. The court's response to these four arguments acknowledged the manufacturer's right to obtain adequate information, but it relieved the Administrator of any duty to present affirmative justifications for varying standards in different industries. Section 111(a)(1) requires the Administrator to consider costs. But the court held that a fully quantified cost-benefit analysis was not required, since it would clash with the Act's time constraints. The EPA had included in the rulemaking record a document entitled *The Financial Impact of Air Pollution Control Upon the Cement Industry*. This statement supplied adequate information about the costs to the industry and proved to the court that the Administrator had satisfied his obligations.[90]

The EPA's failure promptly to provide its testing methods and results and its refusal to respond to legitimate complaints concerning methodology were critical defects in the decisioumaking process. Disclosure of the test results only after the standards were promulgated made a farce of the petitioners' opportunity to comment. The EPA compounded the injury when the court ordered it to consider the criticisms of an emission control systems engineer, and it simply appended his analysis to the record. In remanding, the court specifically ordered EPA to comment on potentially significant matters; generally, when manufacturers' comments step over a threshold of materiality the agency has a duty to respond.[91] Finally, the court suggested a rule for disclosure of information, which was not limited by its terms to manufacturers:

> In order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance. If this is not feasible, as in case of statutory time constraints, information that is material to the subject at hand should be disclosed as it becomes available, and comments received, even though subsequent to issuance of the rule—with court authorization, where necessary.[92]

90. 486 F.2d at 387-88.
91. *Id.* at 394.
92. *Id.*

In context, this rule appears only to favor manufacturers; presently no court has imposed upon EPA a duty to respond to comments made by the general public.

C. Procedure When the EPA Approves State Plans

The courts have not agreed on what procedures are necessary when the Administrator approves state plans. The difference in opinion reduces to a court's willingness to evaluate for itself whether the state hearing made further federal consideration unnecessary, a task it must often undertake if it wishes to provide any meaningful check on EPA. The *Getty Oil* court believed that the procedural stance of the case prevented it from reaching the issue of the adequacy of the state hearings. Neither petitioner had filed a section 307 petition for review of the Administrator's approval of the plan; both had opted to seek variances to avoid compliance. While these proceedings were pending, the EPA issued an order requiring compliance by a certain date. Getty responded with a suit in federal district court to stay the order and to enjoin further proceedings by the Administrator. It claimed that the order's euforcement prior to a hearing would amount to a taking of property without due process.

The Third Circuit concluded that Getty was actually making a belated challenge to the regulation. It therefore ordered dismissal for lack of jurisdiction; in section 307 Congress had designated the court of appeals as the exclusive forum for adjudicating the validity of a regulation. Without discussing the issue, the court assumed that traditional equity relief was foreclosed. Had Getty taken advantage of section 307, the court assumed it could have raised thereunder the questions of economic hardship or lack of compelling necessity. The EPA's enforcement of the regulation was unassailable, since Getty's failure to sue under section 307 was not attributable to "any lack of sufficient notice or hearing."[93] Thus, the need for a hearing prior to a section 307 proceeding was not considered.

The *Appalachian Power* court was forced to discuss the procedures required of the Administrator only generally, since the full record of the state hearings had not been certified to the court. Nonetheless, the court agreed with the Administrator that adequate state hearings would relieve him of any duty to extend an opportunity to be heard to interested parties prior to the plans' approval. Congress'

93. 467 F.2d at 357.

omission of any hearing requirement in the Clean Air Act Amendments, plus the statutory timetable, persuaded the court not to impose the burden of two hearings on the same plan. Nevertheless, it reiterated that its conclusion depended upon the adequacy of the state hearing. It cautioned that "[s]hould it appear, after the state hearings have been certified to this Court, that an adequate right of hearing at the state level was not afforded the petitioners, a motion to remand [to EPA for hearings] as requested by the petitioners might be in order."[94] The court also resolved the due process issue in the Administrator's favor. Congress found the dangers of air pollution so pressing that the probable delays resulting from state and federal administrative proceedings could not be tolerated. Yet the court's acceptance of the procedures was expressly contingent upon an assumption that the Administrator had in fact reviewed the state record. Alarmingly, the Administrator had intimated that he did not review the hearings before the state authority. "Under those circumstances," the court said, "the entire justification for a denial of a hearing before the Administrator would be undermined and it might well be that a court would be compelled to remand the proceedings for a hearing before the Administrator."[95] That behavior on the Administrator's part flouts the legislative intent of the Clean Air Act and due process. Only so long as the state provides an adequate hearing that is fully reviewed by the Administrator is EPA exempt from holding a second hearing.

In *Duquesne Light* the Third Circuit confronted the section 307 issues anticipated by *Getty Oil*. The question was what procedures "are required of the Administrator, if any, in determining whether to approve a state implementation plan as provided in § 110(a)(2) [of the Clean Air Act]."[96] The court first weighed the companies' claim that due process demanded that they be afforded some form of hearing prior to federal approval. It rejected the contention that adjudicative hearings were required, relying on two Supreme Court decisions.[97] Since the Clean Air Act contains no explicit provision requiring hearings for approval of state plans, the clear showing necessary to predicate an adjudicatory hearing was missing. The court's conclusion ad-

94. 477 F.2d at 503.
95. *Id.* at 504 n.33.
96. 481 F.2d at 4.
97. United States v. Florida E.C. Ry., 410 U.S. 224 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972).

ditionally was supported by the general applicability and prospective nature of the plan. The *Duquesne Light* court accepted the *Appalachian Power* court's analysis with respect to legislative hearings. Insofar as the Administrative Procedure Act was concerned, EPA had no duty to hold hearings at the federal level. Normally, these would be both impracticable and unnecessary. The court, however, had the state proceedings before it. On the basis of the record, it concluded that the petitioners were not afforded a "truly meaningful hearing."[98]

Motivated by the unsatisfactory result in *Getty Oil* that left the company the Hobson's choice of complying or facing liability for a violation, the court presented EPA with two alternatives. The first course of action was to "refrain from imposing any penalties on *these companies* during the pendency of their state admininstrative and judicial actions, so long as such actions are pursued by the companies in good faith with due diligence . . . ."[99] The other choice was to hold a limited legislative hearing. The hearing would entail submission of written comments and oral arguments, if requested, but not cross-examination. Although this solution adequately disposed of the specific problems in the case, it would have been better if the court had simply remanded to EPA for a hearing. Not only would these claims probably have been settled sooner, but the simplicity of the procedure would have contributed greatly to predictablility,

This solution would have been consistent with the one suggested in *Appalachian Power* and adopted in *Buckeye Power.* Yet the *Buckeye Power* analysis differed from both the *Duquesne Light* and *Appalachian Power* rationales. The Sixth Circuit held that state hearings were inadequate per se to protect the petitioners' interest. Since the plans were subject to federal enforcement, the federal administrative rulemaking "must permit some public participation in the decisionmaking, and, in a generalized way, it must articulate its bases and purposes."[100] The court stressed the importance of a record for judicial review and noted that the Administrator "took no comments, data, or other evidence from interested parties, nor did he articulate the basis for his actions."[101] The court never touched on why the state record would not suffice for the purposes of judicial review and failed to recognize

98. 481 F.2d at 9.
99. *Id.* at 10 (emphasis in original). The court also held that the Pennsylvania plan remained in effect except as it applied to these parties.
100. 481 F.2d at 170-71.
101. *Id.* at 171.

that the requirement of an impact statement could cure the lack of articulated reasons. The Administrator's approval of the two plans at issue was deferred until he complied with the rulemaking provisions of the APA. The possibility that he had in fact determined that a hearing was unnecessary was not raised. The court properly rejected adjudicative hearings on the same ground used in *Duquesne Light*: Congress had not used language indicating a preference for adversary proceedings in the rulemaking. Nothing restricted the action vacating the approval of the plans to the parties before the court. Under these circumstances the manufacturers located within the Sixth Circuit won a significant victory in their effort to delay implementation of the Clean Air Act.

Procedural requirements for EPA approval of state plans should be elastic. If a party has presented all his evidence at an adequate state hearing, the *Appalachian Power* and *Duquesne Light* view that no additional federal hearing is required should prevail. This approach would prevent a party who failed to present his full case to the state tribunal from burdening EPA with evidence not available to the state. If, on the other hand, the party has arguments peculiarly applicable to the federal level,[102] which a state either ignored or failed to weigh properly, there would be an opportunity for EPA to hear them. Supervision by the courts could ensure that neither the state hearing nor the Administrator's consideration of the record will be a mere formality. Instead, the flexible procedure would strike a workable balance between the time constraints of the Clean Air Act and the safeguards available in multiple proceedings.

D. Procedure When EPA Issues a Plan

The EPA issues a state implementation plan whenever the Administrator rejects a plan, or the state fails to submit its plan or a revision within the time allowed.[103] Only in these circumstances does the Clean Air Act specifically direct the Administrator to hold hearings.[104] Thus, the issue concerns the kind of hearing required, not

102. *Cf.* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973) (per curiam affirmance by an equally divided Court). The district court found that the federal policy of nondegradation of existing clean air did not permit individual states to submit implementation plans allowing emissions to rise to the secondary standard level of pollution.

103. 42 U.S.C. § 1857c-5(c) (1970).

104. Even in this situation the Administrator is not compelled to hold hearings if the state conducts a public hearing associated with his revision. *Id.*

whether a hearing should be held. In *Anaconda* the Administrator proposed a regulation to control the emission of sulphur oxide within Deer Lodge County, Montana. Although the proposed regulation was ostensibly general, the only significant source of sulphur oxide pollution in the area was the Anaconda plant. In addition, the proposed allowable emission was admittedly an arbitrary figure selected by EPA, which represented a devastating reduction of eighty-nine percent in Anaconda's existing emissions. Despite the absence of other oxide sources and the tremendous potential hardship to Anaconda, the EPA refused the company's demand for an adjudicatory hearing. It chose to limit presentations to testimony and written submissions. Anaconda resorted to a suit in the federal district court seeking an injunction against EPA's promulgation of the regulation in the absence of an adjudicatory hearing. The district court granted relief,[105] but on appeal the Tenth Circuit held that the district court lacked jurisdiction to entertain the suit. It found that the claim was not ripe, since the administrative proceedings had not been completed. Furthermore, it thought that Congress intended review by the court of appeals for the "appropriate circuit," the Ninth for Montana, to be the exclusive means of reviewing the promulgation or implementation of a state plan.[106]

Despite its finding that Clean Air Act jurisdiction was lacking, the court went on to consider Anaconda's claim of deprivation of procedural due process. Viewing the proceedings as rulemaking, it found no language in the Clean Air Act indicating that Congress required a decision "on the record after opportunity for an agency hearing."[107] This decision, however, avoided the essence of Anaconda's argument that its individual survival was at stake. The EPA had actually undertaken to decide the level of sulphur oxide emissions that the Anaconda Copper Company could lawfully maintain. Yet, despite the company's obvious economic interest in the decision, the court held that Anaconda's isolation did not control the issue whether the hearing should be adjudicatory, given the many other interested parties who would be affected. This conclusion's validity must rest upon Congress' recognition of the public interest in controlling air pollution. Environmental decisions inevitably have an impact on the entire population of an area; perhaps for this reason Anaconda's economic stake was less important than it otherwise would be. The court, however, was short-

105. 352 F. Supp. 697 (D. Colo. 1972).
106. 482 F.2d at 1304.
107. *Id.* at 1306.

sighted to refuse both an adjudicatory hearing and an environmental impact statement. Had full disclosure been effected through an impact statement and supplementary documents, EPA at least would have confronted the technological claims, the environmental benefits, and possible alternatives. Anaconda would have had ample notice and opportunity to inject its views into the balancing process. Finally, a reviewing court would have been able to evaluate the evidentiary basis of EPA's regulation.

A final prop for the court's decision to require only legislative hearings is the type of facts that enter into the decision on permissible emission limitations. Highly technical scientific analysis, expert opinions, and projections typically do not necessitate cross-examination and confrontation rights.[108] Almost never will one proposition be "true" and all others "false." Companies are free to submit as many expert opinions and studies as they wish. The EPA then has a duty to consider these comments and explain why it has followed or rejected the advice. If it fails to do so, a company can ask the court to vindicate its rights. With this safeguard, a legislative hearing accompanied by an impact statement would adequately protect the interests of the affected industries.

III. Judicial Review of Standards

Confusion has permeated judicial interpretation of the review provisions in the Clean Air Act. Section 307 of the Act clearly states that review of clean air standards is available only in designated courts of appeals.[109] Yet a broad citizen suit provision and the power of a district court to issue injunctions and declaratory judgments stand ready to undercut the specified forum's exclusivity. Courts also disagree on the permissible scope of review, given the highly technical nature of EPA's work. Finally, the appropriate standard of review remains unsettled. Tension between the relatively simple "arbitrary or capricious" standard and a standard requiring the court actively to evaluate the substantive merit of the agency decision is woven through almost every Clean Air Act decision. The resolution of the standard of review problem will determine how accountable EPA will be, for

108. *See* Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 317 (1933) (scope of hearing depends on context); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973); American Air Lines, Inc. v. CAB, 359 F.2d 624, 633 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

109. 42 U.S.C. § 1857h-5 (1970).

the judiciary is the sole institution with the ability to exercise case-by-case supervision over the agency.

A. Proper Forum

Congress habitually creates "exclusive" forums for appeals from administrative decisions. Section 307 of the Clean Air Act is typical; the Conference Report on the bill said that it "specifies the courts in which certain appeals may be prosecuted."[110] In the past, however, the Supreme Court has had little difficulty in circumventing language creating exclusive forums, if it found clear violations of statutory proscriptions[111] or statutory rights.[112] Even so, the forum established by Congress normally must be used if the statutory language is mandatory and a clear violation of an express provision is not at issue. These exclusive forum provisions would be of academic interest only if it made no practical difference which court heard the complaint. From a company's standpoint, however, this will rarely be the case. Probably the most important difference between court of appeals review and district court review is the time factor. Congress intended to expedite all procedures under the Clean Air Act;[113] part of its general program was to cut off district court review of national primary and secondary ambient air quality standards, emission standards, standards of performance, and implementation plans. Thus far, the courts have paid lip service to the congressional scheme.[114] Disturbingly, however, two courts of appeals have reviewed district court decisions on claims falling within the ambit of section 307.[115] Why the companies were able to avoid 307, and whether something can be done to prevent this avoidance in the future, are vital questions.

Neither case rested jurisdiction on section 304, the citizen suit provision, but its presence in the Act makes it difficult to argue for

110. H.R. REP. No. 91-1783, 91st Cong., 2d Sess. 57 (1970).

111. *E.g.*, Leedom v. Kyne, 358 U.S. 184 (1958).

112. *E.g.*, Oestereich v. Selective Serv. Bd., 393 U.S. 233 (1968). *But see* Clark v. Gabriel, 393 U.S. 256 (1968).

113. The House Report stated that the purpose of the 1970 amendments was to "speed up, expand, and intensify the war against air pollution in the United States . . . ." It found also that the methods employed in implementing previous programs often had been "slow and less effective than they might have been." H.R. REP. No. 91-1146, 91st Cong., 2d Sess. 1 (1970).

114. Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); Natural Resources Defense Council, Inc. v. EPA, 465 F.2d 492 (1st Cir. 1972).

115. Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

section 307's exclusivity. It provides that "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary . . . ."[116] The district courts have jurisdiction over the action without regard to the amount in controversy. Later on, the same section contains a savings clause providing that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."[117] The Supreme Court construed a similar savings clause to refer to the entire statute in *Abbott Laboratories v. Gardner*.[118] Thus, unless section 304 can be read narrowly enough to preserve exclusive section 307 review of EPA standard-setting and plan adoption, Congress will have defeated its own expressed purpose.

The legislative history of section 304 indicates that it was included in the Senate bill to authorize "citizen suits against violators, government agencies, and the Administrator to seek abatement of such violations or for enforcement of the provisions of the Act."[119] Clearly the idea was to facilitate the enforcement of antipollution measures. If the Administrator was tardy in issuing standards, or refused to approve a state plan meeting the requirements of section 110(a)(2),[120] a suit against him for failure to perform a mandatory duty would be warranted. This construction is also consistent with the Conference Report's analysis of section 304, which enigmatically assures that "[t]he right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected."[121] "Other relief" could simply refer to a declaratory judgment or an injuction in the mandatory duty situations.

Even without section 304, the problem of possible circumvention of section 307 would remain. If a plaintiff could allege in good faith a $10,001 injury stemming from a Clean Air Act regulation, he could file a suit under the general federal question statute[122] for declaratory

116. 42 U.S.C. § 1857h-2(a)(2) (1970).
117. *Id.* § 1857h-2(e).
118. 387 U.S. 136, 146 (1967).
119. H.R. REP. No. 91-1783, 91st Cong., 2d Sess. 55 (1970) (Conference Report).
120. 42 U.S.C. § 1857c-5(a)(2) (1970).
121. H.R. REP. No. 91-1783, 91st Cong., 2d Sess. 56 (1970).
122. 28 U.S.C. § 1331 (1970).

or injunctive relief. The Administrative Procedure Act provides for judicial review of agency action for any person aggrieved.[123] In *Rusk v. Cort* the Supreme Court expressly refused to hold that "the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions . . . in the absence of clear and convincing evidence that Congress so intended."[124] Given section 304's savings clause, it seems unlikely that such "clear and convincing evidence" exists. On the other hand, the overriding policy of rapid progress in the war against air pollution tends to support giving full effect to section 307 and denying the district court's jurisdiction under section 1331 where the two coincide. The court of appeals has all powers necessary to provide full judicial review of the Administrator's actions covered by section 307. The APA gives the court specified by statute power to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[125] This might even extend to the power to take evidence if necessary;[126] it certainly includes the power to remand to the agency for additional factfinding.[127] Section 307(b)(2) indicates strongly that review should be denied if jurisdiction under 307 was available but was bypassed.[128] Thus, if a party questions the validity of any standard or any plan implementing a standard, he should be compelled to use the section 307 procedure.[129]

123. 5 U.S.C. § 702 (1970).

124. 369 U.S. 367, 379-80 (1962).

125. 5 U.S.C. § 706 (1970).

126. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the reviewing court happened to be a district court. Still, instead of remanding to the Secretary of Transportation for further explanation of his decision, the Supreme Court remanded to the district court. It acknowledged that "it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard. . . . The court may require the administrative officials who participated in the decision to give testimony explaining their action." 401 U.S. at 420. If these statements apply generally to the role of reviewing courts under the APA, then the court of appeals may be able to take affidavits or testimony in an extraordinary case. *See also* Ford Motor Co. v. NLRB, 305 U.S. 364 (1939).

127. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

128. "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 1857h-5(b)(2) (1970). There may be constitutional problems with the prohibition against review in criminal proceedings. *See* United States v. England, 347 F.2d 425 (7th Cir. 1965).

129. Requiring only that the petition be filed within 30 days following the promulgation of a standard, section 307 should also be available for preenforcement review. 42 U.S.C. § 1857h-5(b) (1970). Nevertheless, a petitioner would have to satisfy the ripeness test announced in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

B. Scope of Review

Despite the oft-repeated general presumption of reviewability,[130] courts frequently have hesitated to review administrative decisions based on highly technical facts, supposedly necessitating substantial sophistication and expertise.[131] Yet the Supreme Court has asserted that "[r]eviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions . . . ."[132] In environmental cases the lower courts have tended to adopt an activist view.[133] Disagreements persist in two areas: whether the scientific methodology used to arrive at the standards is reviewable, and whether the substantive soundness of the end result is reviewable.

No case under the Clean Air Act has gone farther than *International Harvester Co. v. Ruckelshaus*.[134] The D.C. Circuit, after admitting the complexity of the issues, plunged into a detailed review of all components of the Administrator's denial of a one-year suspension of 1975 auto emission standards. It believed the central technical issue to be the reliability of EPA's methodology, although it paradoxically refused to hold that EPA's failure to provide a reasonable opportunity to comment on the methodology invalidated the decision on procedural grounds. Ironically, this aspect of the process was the one most suited to judicial evaluation. It did review the substantive adequacy of the regulations and found them sufficiently defective to justify remand. Concurring in the remand because of the procedural deficiencies, Chief Judge Bazelon asserted that Congress did not intend the courts to engage in a substantive evaluation of the Administrator's assumptions and methodology.[135] Once a court has established "a

130. *E.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

131. The Supreme Court's decision in SEC v. Chenery Corp., 332 U.S. 194, 209 (1947), reads like an ode to agency expertise. *See also* Kletschka v. Driver, 411 F.2d 436, 443 (2d Cir. 1969).

132. NLRB v. Brown, 380 U.S. 278, 291 (1965).

133. *See, e.g.*, Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973), an ambitious undertaking by a judge construing NEPA. After setting out the history and general background of a Corps of Engineers project, the judge discussed its relevance to NEPA and the role of the courts under NEPA. He then explained what an impact statement in general should contain, and proceeded practically to write the statement for the project at issue. Conclusional statements on cost-benefit and alternatives were specifically rejected in favor of "sufficient detail and non-technical language so as to permit the non-expert reader to evaluate intelligently the agency's conclusions." 359 F. Supp. at 1366. This approach supports a general requirement of disclosure of background tests and methodology in the impact statement.

134. 478 F.2d 615 (D.C. Cir. 1973).

135. *Id.* at 649. The absurdity of the majority's undertaking is illustrated by its ad-

decisionmaking process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public,"[136] it has satisfied its responsibilities.

In *Portland Cement* the D.C. Circuit again laboriously discussed the substantive technical problems in the Administrator's methodology. The scope of review was the same, although the discussion was more limited, in *Essex Chemical Corp. v. Ruckelshaus.*[137] Both of these opinions focused on the facts the Administrator used to support his conclusions and the criticisms leveled at his technique. To hold that the Administrator's methodology falls within the scope of section 307 review places a huge responsibility on the courts; but if the courts refuse to shoulder the burden, EPA will answer to no one.

C. Standard of Review

To decide that an issue comes within the scope of the court's review says nothing about the standard of review that should prevail. Standards range from *de novo* determination of facts and conclusions to substantial evidence or reasonableness,[138] to arbitrariness, capriciousness, or abuse of discretion,[139] and finally to a strong presumption of correctness.[140] The courts certainly have not accorded EPA a presumption of correctness like the one given the Federal Power Commission. The closer issue is whether they should use the "arbitrary and capricious" standard or whether they should go one step further, as in *Portland Cement* and *Essex Chemical,* and apply a test of reasonableness.

The danger of ending the inquiry once the Administrator's action has been found noncapricious or nonarbitrary lies in overreliance on agency expertise. As *Portland Cement* and *Anaconda* illustrate, industries often have legitimate claims. Arguably the *Anaconda* situation failed an arbitrariness test, but *Portland Cement* is not as clearcut. In *Citizens to Preserve Overton Park, Inc. v. Volpe,*[141] the Supreme Court

mission that "we do not discern how this paper supports the claim made, though we are aware that this statement may merely reflect the court's lack of scientific understanding." *Id.* at 645 n.112.

136. *Id.* at 651.

137. 486 F.2d 427 (D.C. Cir. 1973).

138. *E.g.,* NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

139. *E.g.,* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

140. *E.g., In re* Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968).

141. 401 U.S. 402, 415 (1971).

indicated that the primary prerequisite for substantial evidence review is a record serving as the basis of agency action. The EPA's impact statement, containing or supplemented by full disclosure of its test methodology, would provide this kind of record. Thus the impact statement would help trigger a more searching judicial review of the agency's action. The court should review all of the evidence introduced by the agency and the challenger. If it concludes that the balance is at least close enough so that reasonable minds in the scientific community could differ, then it should uphold EPA. If EPA fails to support its action with enough evidence to create this balance, the court should invalidate the defective regulation and remand to EPA for further consideration. Possibly the EPA will learn quickly to prepare impact statements and records supported by firm scientific facts. When that happens, the goal of the Clean Air Act to fight vigorously against air pollution without debilitating delays will be realized.

IV. Conclusion

The environmental legislation of 1970 introduced goals for the nation that are proving difficult to reconcile with economic stability and efficiency. The Clean Air Act directs EPA to set standards and enforce them, while the National Environmental Policy Act mandates full disclosure whenever a federal agency undertakes a major action significantly affecting the quality of the human environment. Environmental impact statements are infamous for their potential to create delays. Now industry, hurt so often by projects postponed pending an impact statement, is attempting to use this procedure and others to delay implementation of Clean Air Act programs. Even so, it would be naive overreaction to declare EPA exempt from compliance with NEPA, particularly in the teeth of the language making "all agencies" subject to it. Industry does have legitimate complaints about the quality of the background research EPA conducts and the achievability of EPA clean air standards. More serious are the fears that EPA would set standards to reduce one kind of pollution without realizing the effect on other kinds of pollution. Both of these problems would be reduced if EPA regulatory activities were subject to the NEPA impact statement requirement.

The ultimate goal is an adequate impact statement, prepared by EPA itself, issued when regulations are proposed. A necessary predicate to a court's refusal to approve a statement would be a finding of bad faith in EPA's investigation of adverse impacts. At the time

the proposals were finalized, EPA would articulate its response to all material comments, adding this response to the impact statement. In this manner every consideration would be set out clearly in one place, thereby making substantial evidence review possible. Industry's valid claims would be dealt with openly, thus affording affected parties due process of law. Finally, judicial review of issues relating to standards or plans would be restricted to a section 307 proceeding, leaving to the district courts cases that could not have been brought under section 307. This proposal clarifies the relationship between NEPA and the Clean Air Act and furthers the goals of each. Most important, the resulting decisions, dependent upon economic and scientific considerations, will reflect more sensitively an equitable balance between environmental benefits and costs.