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# The EPA's Discretion to Regulate Acid Rain: A Discussion of the Requirements for Triggering Section 115 of the Clean Air Act

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**THE EPA'S DISCRETION TO REGULATE ACID RAIN:  
A DISCUSSION OF THE REQUIREMENTS FOR  
TRIGGERING SECTION 115 OF THE CLEAN AIR ACT**

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I. INTRODUCTION

**A**cid rain does not respect political boundaries; the problem of acid rain has had a devastating effect on human health and the environment of the northeastern United States as well as the area across the Canadian border.<sup>1</sup> Studies show that both the United States and Canada contribute to each other's acid rain problem, although the United States is the more generous giver.<sup>2</sup> Acid rain has lead to the "death" of hundreds of freshwater lakes which no longer contain fish or other aquatic life.<sup>3</sup> Dangerous concentrations of heavy metals in water supplies and in fish have been linked to acid rain.<sup>4</sup> The destructive effects also include reduced capacity for plant life and the depletion of vital nutrients from the soil.<sup>5</sup> Acid rain eats away the surfaces of stone and metals which corrodes buildings, automobiles, and other man made structures.<sup>6</sup> The effects of acid rain on humans, as well as contributing to increased

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<sup>1</sup> See *infra* text accompanying notes 18-60 .

<sup>2</sup> One estimate puts the amount of sulfur oxide gases that Canada receives from the United States at 2 to 4 times the amount that the United States receives from Canada and the quantity of nitric oxide that Canada receives is eleven times greater. OFFICE OF RESEARCH AND DEVELOPMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY, REPORT No. EPA-600/9-79-036, ACID RAIN 13 (1980)[hereinafter OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA].

<sup>3</sup> See *infra* text accompanying notes 35-37.

<sup>4</sup> See *infra* text accompanying notes 38-40.

<sup>5</sup> See *infra* text accompanying notes 41-45.

<sup>6</sup> See *infra* text accompanying notes 46-48.

concentrations of toxic metals in water supplies and fish consumed, are believed to be seriously damaging to the pulmonary system.<sup>7</sup>

Recognizing the implications of transboundary air pollution problems such as acid rain, Congress in 1977 amended section 115<sup>8</sup> of the Clean Air Act<sup>9</sup> to permit the Administrator of the U.S. Environmental Protection Agency to order the reduction of air pollution menaces emanating from the United States which affect foreign nations. In the final days of the Carter administration, the then EPA Administrator, Douglas Costle, initiated action under section 115 to confront the acid rain problem affecting Canada when he issued findings that the United States was largely responsible for the Canadian acid rain situation.<sup>10</sup> The EPA administrators who followed Costle in the Reagan administration, however, refused to take further action to abate the problem.<sup>11</sup>

In 1985, six northeastern states, four environmental organizations, and a number of individuals<sup>12</sup> brought suit<sup>13</sup> in federal district court to

<sup>7</sup> See *infra* text accompanying notes 49-52.

<sup>8</sup> 42 U.S.C. § 7415 (1982), *International air pollution*.

(a) Endangerment of public health or welfare in foreign countries  
from pollution emitted in United States

Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

(b) Prevention or elimination of endangerment

The notice of the Administrator shall be deemed to be a finding under section 7410(a)(2)(H)(ii) of this title which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a) of this section. Any foreign country so affected by such emission of pollutant or pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan.

(c) Reciprocity

This section shall apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section.

<sup>9</sup> 42 U.S.C. §§ 7401-7642 (1982).

<sup>10</sup> *New York v. Thomas*, 613 F. Supp. 1472, 1490 (D.D.C. 1985), *rev'd* 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

<sup>11</sup> *Id.* at 1477.

<sup>12</sup> *Id.* at 1476. The opinion mentions six, but nine plaintiff states are listed as being represented on the case including New York, Pennsylvania, Maine, Massachusetts, New Hampshire, Vermont, New Jersey, Rhode Island and Connecticut. The environmental

force the EPA to take further steps to control the situation. The district court ordered EPA Administrator Lee M. Thomas to take the necessary subsequent actions required under section 115.<sup>14</sup> In September of 1986, the U.S. Court of Appeals for the District of Columbia Circuit reversed the lower court on the grounds that the EPA findings made by Costle were issued without proper notice and comment procedures as required by the Administrative Procedure Act.<sup>15</sup> *New York v. Thomas*<sup>16</sup> is the first major case<sup>17</sup> to interpret section 115 and it will have a major impact on the ability to combat international acid rain problems through the Clean Air Act.

This note discusses issues which often arise in environmental litigation such as the difficulties in identifying sources and assessing responsibility, the problem of interpreting statutory language to decide how much discretion agency officials have to not pursue identified environmental hazards, and most importantly, under what circumstances notice and comment is required and when in the rulemaking process it must be given. This note shows that the court of appeals' ruling on the notice and comment issue in this case has incorrectly permitted practically unlimited discretion to EPA administrators under section 115 of the Clean Air Act. The unfortunate impact of this ruling is that it allows EPA Administrators, when faced with identified international environmental hazards such as the acid rain problem affecting Canada and the north-eastern United States, to ignore the situation indefinitely.

## II. THE ACID RAIN PROBLEM

The phenomenon known as "acid rain" results when sulfur oxide or nitric oxide gases emitted into the atmosphere react with moisture to

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organizations included the Sierra Club Legal Defense Fund, the National Wildlife Federation, the Natural Resources Defense Council, and the National Audubon Society. The individuals were Robert and Jane Townsend, Ellen Edith Desmond, and the Honorable Richard Ottinger, a U.S. Representative. On appeal, the Province of Ontario, Canada intervened on behalf of the plaintiffs. The defendant was the current EPA Administrator, Lee M. Thomas. Intervenors on behalf of the defendant included the Alabama Power Co., National Coal Association, Cincinnati Gas & Electric. On appeal the states of Ohio and Kentucky intervened on behalf of the defendant. Appellee's Brief, *New York v. Thomas*, 802 F.2d 1443 (D. C. Cir. 1986).

<sup>13</sup> *New York v. Thomas*, 613 F. Supp. 1472 (D.D.C. 1985), *rev'd* 802 F.2d 1443 (D.C. Cir. 1986).

<sup>14</sup> *Id.* at 1486.

<sup>15</sup> *New York v. Thomas*, 802 F.2d 1443, 1448 (D.C. Cir. 1986).

<sup>16</sup> 613 F. Supp. 1472 (D.D.C. 1985), *rev'd* 802 F.2d 1443 (D.C. Cir. 1986).

<sup>17</sup> In fact, the litigation over section 115 arose in 1981 when the state of Ohio and several public utilities sought review of Costle's findings. See, e.g., Note, *Acid Rain, Canada and the United States: Enforcing the International Pollution Provision of the Clean Air Act*, 1 B.U. INT'L L.J. 151, 177 (1982).

form solutions of water and sulfuric or nitric acid.<sup>18</sup> These solutions fall back to the earth as acid rain. Although certain amounts of these gases are emitted into the atmosphere from natural sources such as volcanoes and decaying vegetation, experts agree that at least in the industrialized parts of the world, most of these gases come from the combustion of fossil fuels in power generating plants, industrial factories, and motor vehicles.<sup>19</sup> Acidity is measured on the pH scale with the number 7 indicating a neutral measurement with acidity increasing as the number value decreases. Although water is naturally somewhat acidic, with a pH value of 5.6, certain rainfalls in the United States have been recorded with a pH value of less than 2.<sup>20</sup> Because the pH scale is a logarithmic measure, each change of one unit represents a tenfold change in acidity.<sup>21</sup> Therefore, the rainfall mentioned above is a thousand times more acid than regular water. In order to better understand just how acidic such water is, it should be noted that the pH value of pure lemon juice is slightly greater than 2.<sup>22</sup> Rainfalls with pH values of 4 to 4.5 are now commonplace in the northeastern section of the United States.<sup>23</sup> This rain is therefore ten times as acidic as normal rainwater.

"Acid rain" is a far too limited term to describe the extent of the problem. The gases which react with the moisture in the air to form acid rain also become part of the snow, rain, and even fog.<sup>24</sup> In addition, these pollutants fall to the ground in dry form and when moisture reaches them, they have the same effect as acid precipitation.<sup>25</sup> Therefore, many experts prefer to use the term "acid deposition."<sup>26</sup>

Estimates of sulfur oxide and nitric oxide emissions into the atmosphere from man made sources for 1982 were 29.1 and 24 million tons respectively for the United States alone.<sup>27</sup> The vast majority of these emissions come from power utility plants, most of which are located in the Ohio River valley.<sup>28</sup> Although the subject is currently under debate, most experts agree that these gases and particles may remain suspended in the atmosphere for days, weeks, or even years depending on a variety of factors such as size, height of release, and wind strength.<sup>29</sup> It is

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<sup>18</sup> *E.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 5.

<sup>19</sup> *Id.* at 3-5.

<sup>20</sup> *E.g.*, R.H. BOYLE & R.A. BOYLE, ACID RAIN 18 (1983).

<sup>21</sup> *E.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 8.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *E.g.*, D. BUBENICK, ACID RAIN INFORMATION BOOK 50 (2d ed. 1984).

<sup>28</sup> *E.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 26.

<sup>29</sup> *E.g.*, D. BUBENICK, *supra* note 27, at 123. For a discussion of the various techniques for

believed that these emissions can travel hundreds or thousands of miles, crossing state and national boundaries.<sup>30</sup> Since the construction of the "tall stacks"<sup>31</sup> in the United States and Canada in the 1970's, some of which are over 1000 feet high, the residence time in the atmosphere and the potential traveling distance have been greatly increased.<sup>32</sup> The general west to east flow of the air currents in the middle latitudes in North America and Europe result in the situation where the areas east of regions of heavy industry usually suffer the worst effects from acid deposition.<sup>33</sup>

Although some controversy exists regarding how far acid rain may travel, there is little disagreement over its destructive effects.<sup>34</sup> Studies on the effects of acidification on freshwater lakes in North America and Scandinavia have been conducted for some time.<sup>35</sup> Lakes with low pH values consistently have no fish or other aquatic life.<sup>36</sup> Lowered pH values kill mature fish and result in interference with their reproductive cycle.<sup>37</sup> In addition, death and disease in fish, caused by the concentration of heavy metals such as lead, aluminum, and mercury in their bodies have been traced to increased water acidity which causes these metals to go into solution and be readily absorbed.<sup>38</sup> The same poisonous effects occur in humans who ingest the fish or the water.<sup>39</sup> Estimates of lakes in this condition number in the hundreds in the Adirondack Mountain region of New York alone.<sup>40</sup>

The destructive effects of acid deposition on vegetation and soil are many, but not as well documented as the effects on lakes, some experts believe, because much of the research has been done only in laboratories.<sup>41</sup> But such experiments have shown that acid precipitation causes the destruction of algae and other materials which are necessary

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measuring and monitoring acid rain as well as for modelling programs see *e.g., id.* at 164-261.

<sup>30</sup> *E.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 7.

<sup>31</sup> This term is now commonly used to refer to the extremely high altitude smokestacks used by numerous industries and power utilities. For the view that the tall stacks are the unfortunate creation of the Environmental Protection Agency's own policies see Edwards, *Through the Crevices: Acid Rain and the Clean Air Act*, 11 OHIO N.U.L. REV. 671, 698 (1984).

<sup>32</sup> *E.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 9.

<sup>33</sup> *E.g.*, D. BUBENICK, *supra* note 27, at 124.

<sup>34</sup> Some authors claim beneficial effects of acid rain on vegetation, including increased soybean productivity and pine needle growth. *Id.* at 284.

<sup>35</sup> *E.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 14-15.

<sup>36</sup> *E.g.*, D. BUBENICK, *supra* note 27, at 273-77; OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 14-16.

<sup>37</sup> *E.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 16.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 17.

<sup>40</sup> *Id.* at 16.

<sup>41</sup> *E.g.*, D. BUBENICK, *supra* note 27, at 280.

for the breakdown of organic matter to be used by plants.<sup>42</sup> In addition, acid deposition reacts with valuable mineral nutrients in the soil to leach them out and deplete its value.<sup>43</sup> Most plants subjected to acid deposition show reduced growth, lowered crop yields, lesions, and reduced capacity for photosynthesis.<sup>44</sup> Deforestation in the Black Forest region of Germany is the most famous example of this acid rain phenomenon.<sup>45</sup>

The effects of acid deposition on man made objects have been widely observed. Acid deposition has considerable ability to accelerate the "weathering" or breaking down of stone and metals.<sup>46</sup> Some of the world's greatest artistic and architectural masterpieces are currently showing signs of losing the battle with acid deposition and other pollutant forms.<sup>47</sup> The cost of rebuilding or repairing these items is extremely high.<sup>48</sup>

Although some of the potential effects of acid deposition on humans<sup>49</sup> are currently the subject of debate, certain facts are quite clear. Fresh-water bodies which become acidified accelerate the formation of heavy metals in the fish we eat, in some cases to levels toxic to humans.<sup>50</sup> Acidic water supplies leach toxic metals such as lead and copper from household

<sup>42</sup> *E.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 19.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 21.

<sup>45</sup> *E.g.*, R.H. BOYLE & R.A. BOYLE, *supra* note 20, at 75.

<sup>46</sup> *E.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 22.

<sup>47</sup> The Statue of Liberty is one of the more well known examples of famous masterpieces believed to be currently suffering as a result of acid rain. Scientists have noted that a darker color is emerging in the green coat of the statue and there is fear that the copper-based symbol of liberty may be the victim of a serious corrosion problem. Peterson, *A Statue of a Different Color*, 127 SCIENCE NEWS 404, June 29, 1985. A conservator for the Art Institute of Chicago claims that "Most public sculpture is on the way to the sewers" due to the gradual weathering effects of acid rain and other types of air pollution which corrode the surfaces of most outdoor sculptures and architectural edifices. In Athens, Greece, a portion of the Acropolis has been taken indoors in order to avoid the documented effects of air pollution on the sculptures adorning the building. *On the way to the Sewers?*, 83 ART NEWS 11-12, February 1984.

Ironically, more effort and expense is exerted in the effort to preserve such masterpieces than is spent on protecting the public health from the effects of air pollution and acid rain. Studies on the effects of environmental pollutants should be a priority of those in charge of the nation's health. Regrettably, the interest is not there. See *infra* notes 49-52.

See also, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 22.

<sup>48</sup> One estimate of the total cost of acid deposition on human health and environment is \$5,000,000,000 per year. Wooley & Wappett, *Cumulative Impacts and the Clean Air Act: An Acid Rain Strategy*, 47 ALB. L. REV. 37, 42 n. 26 (citing a statement by Dr. Thomas Crocker before the U.S. Senate Committee on Environment and Public Works on September 23, 1980). For an entire volume of essays on the economic aspects of acid deposition see 8 ECONOMIC PERSPECTIVES ON ACID DEPOSITION CONTROL (T. Crocker ed. 1984).

<sup>49</sup> For an interesting short discussion regarding the health effects of acid deposition including an estimate that 120,000 people die each year of illnesses related to acid deposition see *The Transnational Implications of Acid Rain*, 5 CAN.-U.S. L.J. 2, 47-50 (1981).

<sup>50</sup> See *supra* note 38, and accompanying text.

plumbing into drinking water.<sup>51</sup> The potential effects on the pulmonary system and other bodily functions are likely damaging but have yet to be determined.<sup>52</sup>

Although there is some controversy regarding various aspects of the acid deposition problem,<sup>53</sup> there is no question that the problem exists in North America, Europe and other parts of the world.<sup>54</sup> Fortunately, there is also considerable information and technology available to reduce the emissions of the culpable gases from combustion furnaces and engines. Some of these solutions, such as the use of low sulfur coal and coal scrubbers,<sup>55</sup> are already in place, largely as the result of environmental regulations such as the Clean Air Act<sup>56</sup> instituted by the federal and state governments. But there is little evidence that the problem has diminished and increasing industrialization particularly in the southern and western portions of the United States,<sup>57</sup> the return of coal fired energy sources in the wake of the steep increase of oil prices in the 1970's,<sup>58</sup> the amenability of the EPA to relax and delay pollution control standards,<sup>59</sup> and the current administration's hostility toward efforts to control this potentially catastrophic situation,<sup>60</sup> do not bode well for the future.

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<sup>51</sup> *E.g.*, D. BUBENICK, *supra* note 27, at 292.

<sup>52</sup> For a quite recent opinion by the medical community in testimony before a Senate subcommittee on environmental pollution, doctors from the American Academy of Pediatrics, the American Public Health Association, and the Mount Sinai Medical Center in New York City testified that there was evidence linking acid rain to bronchitis and asthma among children. N.Y. Times, Feb. 4, 1987 at 7, col. 1.

<sup>53</sup> For a brief overview of what is generally considered to be known and what is not known about the causes and effects of acid deposition see *The Transnational Implications of Acid Rain*, *supra* note 49, at 32-38.

<sup>54</sup> See *supra* notes 27-52 and accompanying text.

<sup>55</sup> Other examples of emission reduction techniques include desulfurization, denitrification, and stack gas combustion. For further examples see *e.g.*, OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 2, at 28.

<sup>56</sup> For an interesting short summary regarding the Clean Air Act's attempt to regulate air pollution see Kramer, *Transboundary Air Pollution and the Clean Air Act: An Historical Perspective*, 32 U. KAN. L. REV. 181 (1983). For the view that the Clean Air Act is generally an ineffective tool for acid deposition control see *e.g.*, Edwards, *supra* note 31.

<sup>57</sup> See, *e.g.*, Wetstone, *Air Pollution Control Laws in North America and the Problem of Acid Rain and Snow*, 10 ENVTL. L. REP. 50,001, 50,001 (1980).

<sup>58</sup> See, *e.g.*, D. BUBENICK, *supra* note 27, at 63-69.

<sup>59</sup> See, *e.g.*, Edwards, *supra* note 31, at 701; Wetstone, *supra* note 57, at 50,008.

<sup>60</sup> For a discussion of the breakdown of negotiations between the United States and Canada regarding acid rain due to apparent Reagan administration uncooperativeness see *e.g.*, Edwards, *supra* note 31, at 749; Note, *Acid Rain, Canada and the United States*, *supra* note 17, at 169-72.



III. SECTION 115 OF THE CLEAN AIR ACT<sup>61</sup>

The basic federal tool for the protection of air quality is the Clean Air Act<sup>62</sup> which is administered by the U.S. Environmental Protection Agency. In 1977, Congress amended section 115 of the Clean Air Act, which had previously dealt with both interstate and international air pollution, to deal exclusively with international air pollution problems.<sup>63</sup> Section 115 provides that the EPA Administrator initiate proceedings to abate international pollution problems emanating from the United States where the following criteria are met.<sup>64</sup> First, the Administrator must have reason to believe that pollution sources in the United States are contributing to the endangerment of the public health or welfare of a foreign nation.<sup>65</sup> Second, the Administrator's belief must be based on a report from a duly constituted international agency;<sup>66</sup> in the alternative, the Secretary of State may order the Administrator to act if the Secretary believes that a situation meeting the above described criteria exists.<sup>67</sup> Third, once these criteria are met, section 115 requires that the Administrator "shall give" formal notification to the governor of the state or states where the emissions originate<sup>68</sup> and that such notification places the obligation on the state to revise as much of its current emissions standards plan as is necessary to alleviate the problem.<sup>69</sup> Fourth, the Administrator may only take such action, if the affected country by law permits the United States the same rights to prevent or control air pollution affecting the U.S. as is given that country by section 115.<sup>70</sup>

The first and only attempt to implement section 115 occurred

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<sup>61</sup> 42 U.S.C. § 7415. For discussions of § 115 see e.g., Edwards, *supra* note 31; Wooley & Wappett, *supra* note 48; Note, *Acid Rain, Canada and the United States*, *supra* note 17; Note, *The Applicability of the Clean Air Act Section 115 to Canada's Transboundary Acid Precipitation Problem*, 11 B.C. ENVTL. AFFAIRS L. REV. 539 (1984); Note, *Proposed Clean Air Act Amendments: The United States Response to Acid Rain*, 17 GEO. WASH. J. INT'L. L. & ECON. 137 (1982); *The Transnational Implications of Acid Rain*, *supra* note 49.

<sup>62</sup> 42 U.S.C. §§ 7401-7642 (1982).

<sup>63</sup> The Senate, in its discussion of the amendment, clearly indicated its intention to strengthen § 115 by a comment on the section's not having been used and by changing the enforcement procedure from the conference form which is described as "lengthy and uncertain" to the implementation plan approach which it noted had "proven to be more successful". S. REP. NO. 717, 94th Cong., 2d Sess. 44 (1976). For the original version of § 115 see e.g., *id.* at 173-77.

<sup>64</sup> 42 U.S.C. § 7415 (a)(1982).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 42 U.S.C. § 7415 (b)(1982).

<sup>70</sup> 42 U.S.C. § 7415 (c)(1982).

in *New York v. Thomas*.<sup>71</sup> In 1985, six states, four environmental organizations, and four individuals brought suit against the U.S. Environmental Protection Agency in federal district court for the District of Columbia seeking an order to compel the EPA Administrator to require the pollution emitting states to revise their State Implementation Plans (SIP) in order to alleviate the acid rain problem affecting Canada.<sup>72</sup> The action grew out of a determination by former EPA Administrator Douglas M. Costle, during the final days of the Carter administration in 1981, that acid rain emanating from the U.S. was endangering the public health and welfare in Canada.<sup>73</sup> However, before Costle was able to proceed to notify the states under section 115, the Reagan administration replaced him with Ann Gorsuch, then William Ruckelshaus, and finally Lee M. Thomas, the named defendant in the suit, none of whom issued notices or took any action regarding the problem.<sup>74</sup> The district court in *New York v. Thomas* issued an order requiring the current EPA Administrator, Lee M. Thomas, to issue revision notices to the states.<sup>75</sup> However, on appeal, the U.S. District Court for the District of Columbia, in an opinion written by Judge Antonin Scalia, reversed the lower court's decision.<sup>76</sup>

This case represents the only judicial interpretation of section 115. Numerous complex issues were raised by this litigation. This Note will deal with a few of the more important issues raised by this case and by the statute itself including the difficulties in identifying sources and assessing responsibility for air pollution menaces. Further, this note will address the problem of interpreting statutory language to decide how much discretion agency officials have to not pursue identified environmental hazards and how agency determinations are made, and most importantly, the role of notice and comment and public participation in agency decisionmaking.

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<sup>71</sup> 613 F. Supp. 1472 (D.D.C. 1985), *rev'd* 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

<sup>72</sup> *Id.* at 1477. The State Implementation Plan (SIP) referred to in § 115 is an integral part of the Clean Air Act's mechanisms for controlling air pollution inside the nation's boundaries. As set down in § 110 of the Act, the SIP procedure requires each state to submit to the EPA Administrator a comprehensive plan to demonstrate compliance with the air quality standards promulgated under § 109 for each air quality control region or regions within the state. Section 110 requires that the state's plan include programs for the testing and monitoring of air quality, and procedures for the enforcement of the required standards. Section 115 has merely borrowed the § 110 procedures for the control of international air pollution.

<sup>73</sup> 613 F. Supp. at 1476.

<sup>74</sup> *Id.* at 1477.

<sup>75</sup> *Id.* at 1486.

<sup>76</sup> 802 F.2d 1443, 1448 (D.C. Cir. 1986).

#### IV. THE REQUIREMENTS FOR A DETERMINATION THAT A SECTION 115 SITUATION EXISTS

One of the major issues raised in *New York v. Thomas* concerns the form of an Administrator's determination that a situation calling for the implementation of section 115 is present. The statute itself does not specify the form in which the Administrator's determination must appear. It merely requires that there is a "reason to believe" based on reports which triggers notification of the states.<sup>77</sup> In *New York v. Thomas*, neither the district court nor the court of appeals challenged the plaintiffs' contention that Costle had reason to believe that a situation of endangerment existed after his receipt of the report by the International Joint Commission.<sup>78</sup> Nor was the issue raised as to whether the Commission was a "duly constituted international agency."<sup>79</sup>

The defendants did challenge the sufficiency of the form in which Costle's determination was made. Costle had written letters to the then Secretary of State, Edmund Muskie, and to Senator George Mitchell of Maine in January of 1981, indicating his belief that the United States was responsible for much of the acid rain problem in Canada.<sup>80</sup> Later that same month, Costle issued his findings in a press release.<sup>81</sup> The defendants in the *New York v. Thomas* case, including the current EPA Administrator, Lee M. Thomas, argued that the letters and the press release did not constitute "official" decision making and therefore did not bind subsequent Administrators to take further action.<sup>82</sup> The district court rejected this argument, noting other examples of EPA action taken through correspondence.<sup>83</sup> Furthermore, the district court ruled that the defendants' contention that Costle's findings should have been published in the Federal Register in order to constitute official decision making was not valid. The judge countered that "publication in the Federal Register would be inappropriate for this kind of action because it is not a rule or policy statement. 5 U.S.C. § 552(a)(1) and 553(b)".<sup>84</sup>

The court of appeals offered its own interpretation of how section 115 should operate, with an open criticism of the statute's drafting:

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<sup>77</sup> 42 U.S.C. § 7415 (a) and (b) (1982).

<sup>78</sup> 613 F. Supp. at 1482-83. The court of appeals did not address this issue.

<sup>79</sup> *Id.* at 1482. The court noted that the Commission was established by a treaty between the United States and Canada in 1909 and had been charged with the responsibility of resolving transboundary disputes of various types between the two countries since its inception. *Id.*

<sup>80</sup> For the complete text of the letters see *id.* at 1486-92.

<sup>81</sup> *Id.* at 1476.

<sup>82</sup> *Id.* at 1484.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Had the statute been executed as Congress probably anticipated, the present suit would not have arisen. Notice of "endangerment" and "reciprocity" findings would have been issued at the same time as the proposed SIP revision notices, comment would have been taken on both, and both would have been published in final form in the Federal Register. *Cf. National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 778 (D. C. Cir. 1976) . . . Because Administrator Costle chose to issue the "endangerment" and "reciprocity" findings before attempting to identify the culpable states, however, we must determine appellants' claim that the findings legally bind the current Administrator to issue SIP notices.<sup>85</sup>

In evaluating the way in which the Administrator makes a determination regarding "endangerment" Judge Scalia's analysis thus ties the issue of identification of the culpable states to the issue of whether a condition of endangerment exists. However, no such conclusion is warranted by language of the statute itself which clearly permits the Administrator to base his decision on reports alone.<sup>86</sup> It can be assumed that the International Joint Commission report dealt with the sources of the air pollution which were affecting Canada. However, air pollution tends to be dispersed and it would be difficult to trace exactly from which state or source came the pollutants in the air over Canada.<sup>87</sup> Moreover, the case cited by Scalia, *National Asphalt*,<sup>88</sup> does not support his argument. Section 111<sup>89</sup> of the Clean Air Act, with which *National*

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<sup>85</sup> 802 F.2d at 1446.

<sup>86</sup> 42 U.S.C. § 7415 (1982).

<sup>87</sup> See *supra* text accompanying notes 29-33.

<sup>88</sup> 539 F.2d 775 (D.C. Cir. 1976).

<sup>89</sup> 42 U.S.C. § 7411 (1982). Subsection (b) states in part:

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance. . . .

Subsection (d) provides in part:

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or 7412(b)(1)(A) of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new

*Asphalt* dealt, requires that the Administrator determine a *category* of sources which he or she believes contribute significantly to air pollution in the U.S. and to promulgate standards for emission control to be published. The states are then required to submit plans to enforce the standards set by the Administrator.<sup>90</sup> But section 111 clearly does not require the identification of particular sources or states as opposed to the identification of a category of sources prior to making a determination. Section 111 clearly envisions a two stage process where there is first a designation of a particular category and then the establishment of performance standards to control emissions.<sup>91</sup>

The above discussion shows that section 115 offers no clear guidelines for the manner in which an EPA Administrator makes "official" a determination that air pollution from the United States is affecting the public health and welfare in Canada. The statutory language does not require that he or she "publish" such a determination.<sup>92</sup> It would appear that the notification of the states to revise the SIPs would certainly make the determination official. The *New York v. Thomas* case thus raises the issue of whether the determination is official prior to notification. Contrary to Judge Scalia's analysis, section 111<sup>93</sup> and other sections of the Clean Air Act do not require the identification of particular polluters or problem states prior to making a determination that a particular air pollution problem exists. The fact that the suit arose owes less to any defect in section 115, as Judge Scalia suggests, than it does to the change of administrations and the latter's open hostility to enforcement of the Clean Air Act.<sup>94</sup>

## V. DISCRETIONARY ACT?

Another major issue raised by the interpretation of section 115 is whether a determination by the EPA Administrator that there is

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source, and (B) provides for the implementation and enforcement of such standards of performance.

...

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

<sup>90</sup> 42 U.S.C. § 7411 (c) and (d)(1982).

<sup>91</sup> See *supra* note 89.

<sup>92</sup> See *supra* note 8.

<sup>93</sup> 42 U.S.C. § 7411 (1982).

<sup>94</sup> See *supra* note 60 and accompanying text.

endangerment and reciprocity requires mandatory action on the part of the Administrator or whether further action is purely discretionary. In *New York v. Thomas*, the district court focused on the word "shall" with regard to the Administrator's duty to notify and concluded that a mandatory duty existed.<sup>95</sup> The word "shall" when used in a statute has been held to require a nondiscretionary duty to act by the Supreme Court and the lower courts.<sup>96</sup> This interpretation of section 115 language was not disturbed by the court of appeals and is fairly settled law.

## VI. NOTICE AND COMMENT

The most important issue raised in the *New York v. Thomas* litigation and a key element to the understanding of section 115 involves the questions of whether and when the agency must involve the public and potentially affected parties in a section 115 action against domestic polluters which endanger the public health and welfare of a foreign nation. The resolution of this issue involves an analysis of the statute itself and, because actions taken under it would become administrative law, the Administrative Procedure Act.<sup>97</sup>

The Administrative Procedure Act mandates procedures that administrative agencies must follow when they make rules. Even though agency decisions often have the force of law, these decisions are commonly referred to as "rules" and the procedure by which they are made is called "rulemaking". The APA describes two basic types of rulemaking: adjudicatory rulemaking<sup>98</sup> and what is simply called rulemaking<sup>99</sup> or sometimes referred to as "informal" rulemaking. Adjudicatory rulemaking is characterized by formal, trial type hearings which provide interested parties an opportunity to become involved in the rulemaking. The procedures can include the taking of evidence, and the use of subpoenas and depositions, such as in a normal trial.<sup>100</sup> Informal rulemaking also requires public participation but in a less structured manner. Section 553<sup>101</sup> of the APA lists four general requirements for rulemaking. First,

<sup>95</sup> 613 F. Supp. at 1485-86.

<sup>96</sup> See, e.g., *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975).

<sup>97</sup> 5 U.S.C. §§ 551-706 (1982).

<sup>98</sup> 5 U.S.C. § 554 (1982).

<sup>99</sup> 5 U.S.C. § 553 (1982).

<sup>100</sup> 5 U.S.C. § 556 (c)(1)-(4)(1982).

<sup>101</sup> 5 U.S.C. § 553 (1982) Rulemaking is set out as follows:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved-

(1) a military or foreign affairs function of the United States; or  
 (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal

there must be prior notice or proposed rulemaking published in the Federal Register describing the terms and the substance of the rule as well as reference to the legal authority which supports the rule.<sup>102</sup> Second, after the publication of the notice, the agency must provide interested parties the opportunity to participate in the rulemaking by allowing them to comment on the rule in the form which the agency deems appropriate.<sup>103</sup> Third, after consideration of the relevant matter presented, the agency must issue a statement with the final form of the rules which states their basis and purpose.<sup>104</sup> Finally, substantive rules are required to be published 30 days before they are scheduled to go into effect during which more comment is permitted.<sup>105</sup> The APA permits the informal rulemaking procedures described above to be used by an agency unless formal adjudicatory proceedings are required by statute.<sup>106</sup> Be-

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Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply-

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead to this subsection.

(d) The required publication or service of a substantive rule shall be made no less than 30 days before its effective date, except-

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

<sup>102</sup> 5 U.S.C. § 553(b)(1982). See *supra* note 101.

<sup>103</sup> 5 U.S.C. § 553(c)(1982). See *supra* note 101.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

cause section 115 contains no such requirement, informal procedures are sufficient.

Notice and comment is the key to the informal rulemaking process. The philosophy behind notice and comment procedures grows out of concern for the democratic process.<sup>107</sup> Administrative agencies, unlike legislative bodies, are not elected, yet their decisions may carry the force of law equal to those of the legislature. Notice and comment allow for public participation and provide a check against arbitrary behavior on the part of administrators.

In spite of the central importance of notice and comment procedures to administrative rulemaking, section 553 of the APA provides exceptions to the notice and comment requirements in certain circumstances and, in a limited number of situations, there is an exemption from all of the section 553 rulemaking requirements.<sup>108</sup> Although the evidence points to the intention of former EPA Administrator Douglas M. Costle to provide for notice and comment,<sup>109</sup> an argument could be made that section 115 determinations are exempt from all or parts of the procedural requirements. Section 553(a) of the APA grants two categories of agency rulemaking exemption from all of the requirements of that section. The categories are "(1) military or foreign affairs functions of the United States; or (2) matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."<sup>110</sup> Clearly, a determination by the EPA Administrator under section 115 that air pollution was endangering the public health and welfare of a foreign country could not properly fall under exemption (2). However, such a decision might qualify for the "foreign affairs function of the United States" exemption in subsection (1) above. Although the legislative history regarding this exemption shows Congress's intention that it be construed narrowly and only to "affairs which so affect relations with other governments that, for example, public rulemaking would clearly provoke definitely undesirable international consequences,"<sup>111</sup> the exemption has been invoked recently by other agencies and approved by the federal courts.<sup>112</sup>

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<sup>107</sup> K. DAVIS, *ADMINISTRATIVE LAW TEXT* 142 (1972). Professor Davis in this classic text on administrative law also notes the twin rationales of quicker action and the development of expertise which underlie the creation of the administrative system.

<sup>108</sup> 5 U.S.C. § 553(a)(1982).

<sup>109</sup> Costle's letter to Senator Mitchell indicated such were his plans. 613 F. Supp. at 1492.

<sup>110</sup> 5 U.S.C. § 553(a)(1982).

<sup>111</sup> *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983)(quoting S. Report No. 752, 79th Cong., 1st Sess. 13 (1945)).

<sup>112</sup> See, e.g., *Malik-Marzaban v. I.N.S.*, 653 F.2d 113 (D.C. Cir. 1981); *Yassini v. Crosland*, 618 F.2d 1356 (D.C. Cir. 1980). Both of these cases dealt with Iranian nationals living in the United States who challenged deportation orders issued by the Immigration and Naturalization Service without providing for notice and comment. The courts consid-



Action taken pursuant to section 115 should be considered as a "foreign affairs function" exemption. Such action, whether initiated by the EPA Administrator or, as provided in the statute, the Secretary of State, would certainly constitute official policy of the United States government involving foreign affairs. Indeed, recent U.S.-Canadian relations have demonstrated that acid rain is an important political issue between the two countries.<sup>113</sup> It is also conceivable that public comment on the matter could have undesirable international consequences. Indeed, the limited public comment which already occurred led to hostility between negotiators for the U.S. and Canada on the acid rain question and the breakdown of talks.<sup>114</sup>

In addition to the total exemption from the requirements of section 553 rulemaking, subsection 553(b) relieves an agency from compliance with the *prior* notice requirement, except when required by statute, in the case of:

- A) interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- B) when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.<sup>115</sup>

If this exemption applies, the agency is still required to publish its rule and to permit public comment. It is only relieved of the duty to provide for notice and comment prior to the formulation of the rule.<sup>116</sup>

Clearly most of the exemptions from notification of proposed rulemaking listed above would not apply to action taken under section 115. Such action would not qualify as a "rule of agency organization, procedure, or practice" which is an exemption clearly designed for internal agency matters. Nor would action taken pursuant to section 115 qualify as an "interpretative rule" which involves merely an explanation of an existing statute or rule as opposed to a new rule which a section 115 decision would certainly represent. It would be difficult to justify an exemption from the prior notice requirement on the basis that "notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest" regarding a section 115 decision. Prior case law in which the EPA attempted to claim the last two-mentioned exemptions under other

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ered these orders to fall squarely within the foreign affairs function exemption because the orders were part of the Carter administration's response to the taking of the American hostages in Iran.

<sup>113</sup> See *supra* note 60 and accompanying text.

<sup>114</sup> *Id.*

<sup>115</sup> 5 U.S.C. § 553(b)(1982).

<sup>116</sup> 553(b) states that only "this subsection", meaning (b), does not apply.

sections of the Clean Air Act further supports the argument that these exemptions are not applicable.<sup>117</sup>

The "general statements of policy" exception has generated a considerable body of case law<sup>118</sup> and has potential application to decisions taken under section 115 like the one made by Costle in his attempt to invoke the statute. One commentator has noted two rationales for the exception, based on notions of efficiency and open administration.<sup>119</sup> The first rationale is to provide a measure of freedom to allow the agency to deal with the unexpected and the second is to avoid any tendency for the agency to operate on an unannounced policy in an effort to circumvent notice and comment procedures.<sup>120</sup>

Initially, the courts defined "general statements of policy" as those statements having "prospective" effect. In *Guardian Federal Savings and Loan Ass'n v. FSLIC*,<sup>121</sup> the D.C. Circuit Court described a general statement of policy as a "statement issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."<sup>122</sup> This test was later abandoned for a focus on whether the statement would "alter the rights and obligations without further action by the agency"<sup>123</sup> of the parties affected. If this question was answered in the affirmative, then the pronouncement was not merely a general statement of policy. This test proved difficult for the courts to apply because it was too simplistic and it did not provide guidance as to how great the effect must be in order to render it more than a general policy statement.<sup>124</sup>

More recently, the courts have employed two major tests to evaluate

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<sup>117</sup> See, e.g., *United States Steel Corp. v. United States Environmental Protection*, 595 F.2d 207 (1979)(U.S. Steel challenged the EPA's determination that the area in which the company resided was a nonattainment sector for suspended particulates pursuant to 42 U.S.C. § 7407(d). The EPA had not given the company an opportunity to comment on the designation. The court rejected the EPA's contention that to permit comment was impracticable due to an approaching compliance deadline as insufficient reason to invoke the exception); *Detroit Edison v. United States Environmental Protection Agency*, 496 F.2d 294 (6th Cir. 1974)(The court rejected the EPA's contention that the changes it had made in § 110 compliance provisions involved merely an "interpretative" rule. Nor did the court accept the argument that notice and comment were impracticable and the court ordered the EPA to permit comment on the revised provision).

<sup>118</sup> See *infra* note 121-37 and accompanying text.

<sup>119</sup> Note, *An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures*, 73 GEO. L.J. 1007, 1013 (1985). See also Note, *A Functional Approach to the Applicability of Section 553 of the APA to Agency Statements of Policy*, 43 U. CHI. L. REV. 430 (1976).

<sup>120</sup> Note, *An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures*, 73 GEO. L.J. 1007, 1013 (1985).

<sup>121</sup> 589 F.2d 658 (D.C. Cir. 1978).

<sup>122</sup> *Id.* at 666.

<sup>123</sup> Note, *supra* note 120, at 1009.

<sup>124</sup> *Id.* at 1011.

whether an agency decision qualifies for the general policy statement exception.<sup>125</sup> First, the “substantial impact” test, which focuses on the impact on those to whom the order is directed.<sup>126</sup> Second, the “binding norm” test, which examines the degree to which a pronouncement limits agency discretion.<sup>127</sup> The substantial impact test was rejected in *Jean v. Nelson*<sup>128</sup> for a binding norm test and its emphasis on the agency’s discretion rather than the parties affected.<sup>129</sup> The case held that if an agency decision ties the agency’s hands so that it must act in an automatic fashion with no element of discretion, then it is not a general policy statement.<sup>130</sup>

One of the major cases to deal with the binding norm test was *Pacific Gas and Electric v. Fed. Power Comm’n*.<sup>131</sup> In that case the Commission, during an energy crisis, issued an order without providing for notice and comment which stated that natural gas would be allocated to pipeline companies on an end use basis rather than on prior contractual commitments. The customers of the pipeline companies challenged the order. The court found the order to be a general statement of policy.<sup>132</sup> Noting first the difference between substantive law and general statements of policy, the court stated that the former have the force of law.<sup>133</sup> The court proceeded to look at the following factors. First, the court noted that the agency’s own characterization of the rule showed that it was intended to be a general policy statement.<sup>134</sup> The court quoted the pronouncement’s language which included “need for guidance” and “propose to implement”.<sup>135</sup> Second, the court noted that the intention of the statement was clearly to establish policy through further proceedings which the agency would decide on a case by case basis.<sup>136</sup> The court cited another distinguishing feature in that there was no “immediate and significant impact” on the complainant parties and that notice and comment was anticipated on any plans adopted which would affect them.<sup>137</sup>

Under the above analysis, a determination by the EPA Administrator

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 711 F.2d 1455 (11th Cir. 1983), *rev’d in part as moot*, 727 F.2d 957 (11th Cir. 1984)(en banc).

<sup>129</sup> *Id.* at 1480.

<sup>130</sup> *Id.* at 1481-82.

<sup>131</sup> 506 F.2d 33 (D.C. Cir. 1974).

<sup>132</sup> *Id.* at 41.

<sup>133</sup> *Id.* at 38.

<sup>134</sup> *Id.* at 39.

<sup>135</sup> *Id.* at 40.

<sup>136</sup> *Id.* at 41.

<sup>137</sup> *Id.* at 42.

that air pollution emanating from the U.S. endangers the public health and welfare of a foreign country could qualify as a general statement of policy if the agency retains some discretion regarding enforcement. Clearly, such a determination would have a substantial impact on the public, but since the *Pacific Gas and Electric* case this is not the exclusive focus of the inquiry. The language of section 115 which calls for mandatory action gives the impression of permitting little discretion regarding enforcement. However, the plaintiffs in the *New York v. Thomas* case argue persuasively that under section 115 the agency is bound to merely commence a rulemaking which will consider all of the issues.<sup>138</sup> Indeed, in the *National Asphalt* case cited by Judge Scalia, the court ruled that under a similar Clean Air Act statute which also placed a mandatory duty on the agency, the agency might properly accept a challenge to its basic policy determination.<sup>139</sup>

This inquiry leads to another key issue raised by section 115 and the notice and comment requirements of the APA: when in the process of rulemaking must the opportunity for notice and comment be given? Even if a section 115 determination of endangerment could not properly be labelled as a general statement of policy and therefore not exempt from notice and comment, may notice and comment properly be held *after* the determination is made? The APA requires prior notice unless the rule falls within one of the exceptions.<sup>140</sup> The language of section 115 supports the notion that enforcement action is triggered automatically upon a determination of endangerment.<sup>141</sup> One could draw the conclusion that for there to be any meaningful public participation in a section 115 action, notice and comment would have to be held *prior* to the Administrator's finding. This was indeed part of the rationale behind Judge Scalia's reversal of the district court order in *New York v. Thomas*.<sup>142</sup>

But the case relied upon by Judge Scalia in his analysis of the proper moment for notice and comment in a section 115 action does not support his conclusion. In *National Asphalt* the petitioners challenged an EPA action under section 111 of the Clean Air Act in which the agency published a notice in the Federal Register indicating that the petitioners' industry was a "significant contributor" to air pollution and included proposed new standards for emission control.<sup>143</sup> Like section 115, section 111 also requires the Administrator to identify air pollution problems

<sup>138</sup> Appellee's Petition for Rehearing and Suggestion for Rehearing en Banc at 12, *New York v. Thomas*, 802 F.2d 1443 (D.C. Cir. 1986).

<sup>139</sup> *National Asphalt*, 539 F.2d 775, n.2.

<sup>140</sup> 5 U.S.C. § 553 (1982). See *supra* note 101 for the text of the statute.

<sup>141</sup> 42 U.S.C. § 7415 (1982). See *supra* note 8 for the text of the statute.

<sup>142</sup> 802 F.2d at 1446-48.

<sup>143</sup> 539 F.2d at 779-80.

and to take action to alleviate the problem.<sup>144</sup> The petitioners argued that because the agency had published the designation of “significant contributor” and the proposed standards simultaneously, the agency had already made a final decision on the petitioners’ status as a “significant contributor” and therefore the petitioners were not given an opportunity to contest the designation.<sup>145</sup> The court held that the EPA was required to hold notice and comment on the designation of the industry as a significant contributor.<sup>146</sup> Judge Scalia seizes on this point to argue that notice and comment were required on Costle’s initial determination that a situation of endangerment existed and therefore should have been held prior to the issuance of his findings.<sup>147</sup>

A careful analysis would appear to suggest a conclusion in opposition to Judge Scalia’s. While the *National Asphalt* case supports the conclusion that notice and comment requirements would apply to section 115, that decision did not require the EPA to hold notice and comment prior to the issuance of initial findings. Indeed, the court stated to the contrary that

We agree with the Government that the Administrator is not required to publish his “significant contributor” designation in proposed form and then hold a separate informal rulemaking on that specific issue. Neither the Clean Air Act nor the APA requires that an agency hold two separate rulemaking proceedings as to different parts of one rule. Thus, the EPA can continue to have one informal proceeding as long as that proceeding considers both the “significant contributor” designation and the proposed standards.<sup>148</sup>

This analysis is clearly applicable to a determination made under section 115 that a situation of endangerment exists. The obvious import of the *National Asphalt* decision is to permit a certain amount of agency discretion in initiating policy while also permitting the public to challenge the basic premise of any policy before the agency takes action. Like

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<sup>144</sup> Compare *supra* note 8 with *supra* note 89.

<sup>145</sup> 539 F.2d at 779-80.

<sup>146</sup> 539 F.2d at 779, n.2.

<sup>147</sup> 802 F.2d at 1447.

<sup>148</sup> 539 F.2d at 779, n.2. *But cf.* *United States Steel v. United States Environmental Protection*, *supra* note 117 (contending that § 553 is designed to ensure that the affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas and therefore the EPA’s designation of the petitioner’s sector as a nonattainment area without prior notice and comment was invalid). This case can be distinguished from *New York v. Thomas*, however, because in *United States Steel*, the court acknowledged as a major factor in its decision the fact that the nonattainment designation caused an immediate and severe impact on the petitioners including the risk of civil penalties and lost investment. *Id.* at 212. No such similar consequences attach from an initial determination under § 115.

section 111, section 115 contains a "trigger mechanism" which mandates enforcement action upon the identification of an air pollution problem. However, based on the rationale of the *National Asphalt* case, notice and comment could be held after the Administrator makes a determination in a section 115 action, as long as the public is permitted to challenge the findings of "endangerment" and "reciprocity".<sup>149</sup>

## VII. TIME LIMITS ON ENFORCEMENT

Unlike many sections of the Clean Air Act, section 115 has no clear guidelines as to when enforcement must take place once the initial criteria are met.<sup>150</sup> In the reversal by the court of appeals in *New York v. Thomas*, Judge Scalia addresses this issue

It suffices to say that, because the findings were issued without notice and comment, they cannot be the basis for the judicial relief the appellees seek. How and when the agency chooses to proceed to the stage of notification triggered by the findings is within the agency's discretion and not subject to judicial compulsion.<sup>151</sup>

Here, Judge Scalia, apparently contradicting the earlier portion of the decision<sup>152</sup> in which he concluded that the findings were not binding on the current Administrator, appears to accept the findings as validly promulgated despite the lack of prior notice and comment. But Scalia introduces a new element of discretion, apparently due to the lack of a formal time limit in section 115, by permitting the agency to decide when it will hold notice and comment. However, it is doubtful that Congress intended the lack of a time limit to permit unlimited discretion on the part of the Administrator regarding when enforcement should proceed.<sup>153</sup> This construction of section 115 allows the EPA to simply ignore the problem.

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<sup>149</sup> Considering that Judge Scalia based his reversal on this case and that in *New York v. Thomas*, the current EPA Administrator stipulated that if forced to issue revision notices, he would allow comment to challenge the findings of both "harm" and "reciprocity", Judge Scalia's reliance on the notice and comment issue is even less comprehensible.

<sup>150</sup> Compare *supra* note 8 with *supra* note 89.

<sup>151</sup> 802 F.2d at 1448.

<sup>152</sup> It is indeed confusing when for most of the opinion it is argued that the findings are invalid for lack of prior notice and comment and in the final sentence of the opinion to accept that the findings have triggered notification.

<sup>153</sup> See *supra* note 63.

## VIII. CONCLUSION

Unless it could be viewed as a "foreign affairs function", a determination by an EPA Administrator under section 115 of the Clean Air Act that air pollution emanating from the United States is endangering the public health and welfare of a foreign nation should not be exempt from notice and comment. The impact on the states and private parties which such a determination would trigger—forced reduction of emissions from power plants, factories, automobiles—requires public involvement. However, because air pollution problems are increasingly becoming matters of international concern, the foreign affairs function exception to the rulemaking requirements could be an option for the EPA, particularly if the enforcement action is initiated by the Secretary of State.

Given that section 115 is not exempt from the notice and comment requirements of the Administrative Procedure Act, the question becomes when must the opportunity for notice and comment be given. Although a plain reading of the statute, which triggers mandatory action upon the Administrator's determination that endangerment and reciprocity exist, lends support to the contention that notice and comment should be held prior to the initial determination in order to be meaningful, the language of section 115 strongly suggests that the initial determination is subject to the discretion of the Administrator alone<sup>154</sup> without prior involvement by others in the decisionmaking process. The logical resolution of this conflict between the language of section 115 and the requirements of the APA is to permit the Administrator to make a determination based on the Administrator's judgment and then to hold notice and comment on the issues of endangerment and reciprocity as well as the proposed emission reduction plans. The purposes of notice and comment, to provide information for agency decisionmaking and to protect the public against arbitrary agency action, would not be frustrated by such a system. Furthermore, other sections of the Clean Air Act utilize this type of two stage process.

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<sup>154</sup> Section 115 is indeed different from other sections of the Clean Air Act in that under other sections the Administrator's determination of what constitutes excessive pollution can be based on the objective criteria in established standards under the Act. However, a § 115 determination that United States air pollution is endangering the public health and safety of a foreign nation does not easily lend itself to an objective standard. A number of troubling questions are raised by this problem: Which standard should the Administrator use—that of the United States or of the foreign nation and what if the foreign nation's definition of "endangerment" refers to a lower level of pollution than is found under United States standards? Should polluters in the United States be allowed to comment on whether a situation of "endangerment" exists in a foreign country? All of these considerations support an interpretation that a determination regarding whether air pollution emanating from the United States is endangering the public health and welfare of a foreign nation should be within the discretion of the Administrator alone.

Once the Administrator issues a determination that a section 115 situation exists however, the agency should be required to rapidly proceed to the notification and enforcement stage. The lack of a specific time limit between the initial determination and the notification stage in the statute itself does not afford the EPA the discretion to delay enforcement at will. Section 115 does contain an element of discretion; an Administrator may choose not to make a determination that the public health and welfare of a foreign nation is "endangered" in spite of a clearly existing problem. Once such a finding is made however, the agency must proceed to act.

Section 115 deals with complex air pollution problems, such as acid rain, which are not completely understood through current scientific knowledge. This lack of knowledge makes some courts reluctant to enforce EPA action against private parties whose contribution to the acid rain problem is not clearly defined. Congress however, recognized these limitations and mandated a solution in section 115 to deal with the problem. The devastating consequences of acid rain and our responsibility as a member of the global community compel judicial enforcement of section 115 rather than the promulgation of interpretations designed to limit its effect.<sup>155</sup>

STUART N. KEITH

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<sup>155</sup> Tragically, it is not likely that § 115 will be invoked again. Due to prevailing wind patterns, United States air pollution most heavily affects Canada. Evidence regarding the effects of United States air pollution on Europe is incomplete. *See supra* notes 27-33.



