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ENVIRONMENTAL LAW

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Last year's Seventh Circuit Review[1] noted that the proliferation of federal enactments in the environmental field generated an increasing number of cases implementing and interpreting them. While the Seventh Circuit's contribution has not been great numerically, it has been called upon to resolve several highly complex and important matters in the environmental field. During the past year, the court has rendered decisions interpreting various provisions of the Federal Water Pollution Control Act Amendments of 1972,[2] The Clean Air Act,[3] and the National Environmental Policy Act of 1969.[4] In addition, the court has rendered one decision premised on the common law of nuisance, the traditional legal remedy for abating environmental damage.

Two cases considered substantive environmental control statutes. In *American Meat Institute v. EPA*,[5] the court was concerned with the EPA administrator's capability of promulgating effluent standards under section 301 of the Water Act,[6] as distinguished from the determination of effluent standards in implementation of his permit issuing jurisdiction on a case by case basis. The court's decision in *Bethlehem Steel Corp. v. EPA*[7] related to the propriety of the administrator's designation of an air quality maintenance area in Indiana, under the Clean Air Act. The principle issue revolved around the question of ripeness of the proceeding.

Two cases involved NEPA. *Nucleus of Chicago Homeowners Association v. Lynn*[8] considered whether the United States Department of Housing and Urban Development (HUD) had discharged its NEPA obligations respecting the preparation of an environmental impact statement (EIS) in the designation of housing sites pursuant to court order under *Gautreaux v.*

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1. Zabel, *Environmental Law*, 52 CHI.-KENT L. REV. 326 (1975) [hereinafter cited as Zabel].
2. 33 U.S.C. §§ 1251-1376 (Supp. 1972).
3. 42 U.S.C. §§ 1857-1859 (1970&Supp. 1972).
4. 42 U.S.C. §§ 4321-4347 (1970) [hereinafter referred to in the text as NEPA].
5. 526 F.2d 442 (7th Cir. 1975).
6. 33 U.S.C. § 1311 (Supp. 1972).
7. 536 F.2d 156 (7th Cir. 1976).
8. 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

Chicago Housing Authority.[9] The second, *Swain v. Brinegar,*[10] was concerned with whether the Secretary of Transportation, in planning and developing a forty-two-mile highway segment connecting Peoria and Lincoln, Illinois, had fulfilled his obligations under the Federal-Aid Highway Act[11] and under NEPA. This case was a reconsideration of an earlier decision[12] holding that the delegation of preparation of the EIS by the Federal Highway Administration to the State of Illinois was not a fulfillment of NEPA requirements. The case was reheard en banc because of amendments to NEPA respecting delegation of preparation of the impact statement to a state agency.[13] The earlier case had determined that the corridor selection was valid but that the delegation of preparation of the EIS to the State of Illinois violated NEPA.

Harrison v. Indiana Auto Shredders Co.[14] raised the recurring issue of whether industrial enterprise which imposes burdens on a residential community may be subject to judicial restraint notwithstanding compliance with relevant environmental and land use regulations. The case illustrated the difficulties of environmental control under traditional common law nuisance approaches.

EPA Guidelines Under the Water Pollution Control Act

American Meat Institute required the making of two independent but related determinations under the Water Pollution Control Act Amendments of 1972.[15] First, the court was obliged to determine whether it had jurisdiction to hear the appeal based upon a determination of whether the EPA administrator's issuance of effluent limitations under section 301 was authorized.[16] Secondly, it was required to ascertain whether the regulations promulgated comported with statutory and judicial standards set forth in the Act and relevant judicial decisions.

Section 101(a) of the Act provides as a national goal, the elimination of all discharges of pollutants into navigable waters by 1985 and the achievement by 1983 "wherever attainable of a water quality adequate to maintain

9. 296 F. Supp. 907 (N.D. Ill. 1969) (original findings); 304 F. Supp. 736 (N.D. Ill. 1969) (injunction requiring affirmative action), *aff'd,* 436 F.2d 306 (7th Cir. 1971), *cert. denied,* 402 U.S. 922 (1971); Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973), *rev'd sub nom.* Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 96 S. Ct. 1538 (1976).

10. 542 F.2d 364 (7th Cir. 1976) (en banc).

11. 23 U.S.C. §§ 101-155 (1970).

12. 517 F.2d 766 (7th Cir. 1975). For a detailed discussion of the first decision, see Zabel, note 1 *supra,* at 327-32.

13. 42 U.S.C. § 4332(2)(D) (1970), *as amended by* Act of Aug. 9, 1975, Pub. L. No. 94-83, § (D), 89 Stat. 424.

14. 528 F.2d 1107 (7th Cir. 1975).

15. 33 U.S.C. §§ 1251-1376 (Supp. 1972) [hereinafter referred to ir the text as the Act].

16. *Id.* § 1311.

aquatic life and allow recreational use."[17] As intermediate steps to achievement of the 1985 goal, section 301(b)[18] requires application of the "best practicable control technology currently available" by July 1, 1977 to achieve the promulgated effluent limitations on point sources.[19] Achievement of the 1983 effluent limitations using the best available technology is also determined in accordance with regulations issued by the administrator pursuant to section 304(b) of the Act.[20]

Section 304(b) further provides that the administrator shall publish regulations providing "guidelines for effluent limitations" by identifying specific pollutants and the degree of effluent reduction attainable through the application of the 1977 and 1983 technologies. While sections 301 and 304 govern existing sources, provision has also been made requiring the administrator to promulgate regulations for new sources.[21] Section 402[22] establishes a permit system for discharges, replacing the permit system formerly administered by the Army Corps of Engineers under the Act of 1899.[23]

In *American Meat Institute*, the EPA administrator issued regulations relating to the "Red Meat Processing Segment of the Meat Products Point Source Category" covering simple and complex slaughterhouses. He also promulgated regulations covering low and high processing packinghouses. The regulations limited discharges of biochemical oxygen demand (BOD 5), total suspended solids (TSS) and ammonia. They were correlated to the 1977 and 1983 achievement objectives. Plaintiffs, as operators of slaughterhouses and meatpacking plants, sought review of the effluent limitations.

17. *Id.* § 1251(a).

18. *Id.* § 1311(b).

19. For a definition of a point source, see 33 U.S.C. § 1362(14) (Supp. 1972): "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

20. 33 U.S.C. § 1314(b) (Supp. 1972). *See* 526 F.2d at 445 n.5:

> Although § 304(b) called for publication of final guideline regulations within one year after the effective date of the Act, which would have been October 18, 1973, EPA failed to do so, presumably because of the staggering proportions of its task. In an action to require EPA to comply with the statutory deadline, the United States District Court for the District of Columbia ordered the agency to issue regulations for the Meat Products Point Source Category by February 16, 1974. *National Resources Defense Council, Inc. v. Train*, 6 ERC 1033 (D.D.C. 1973). The court of appeals reversed the district court's holding that the October 18 deadline applied to categories of point sources, which unlike the meat product category, were not listed in § 306(b)(1)(A), 510 F.2d 692, 704 *et seq.* (D.C. Cir. 1975), but affirmed as to those categories that were so listed.

Projected 1977 and 1983 technologies are to be defined by the administrator under section 304. 33 U.S.C. § 1314(b)(1) (Supp. 1972).

21. 33 U.S.C. § 1316 (Supp. 1972).

22. *Id.* § 1342.

23. Act of 1899, ch. 425, § 13, 30 Stat. 1152 (1899) (current version at 33 U.S.C. § 407 (Supp. 1972)).

Jurisdiction to Review

The issue respecting the court's jurisdiction was based on a challenge by amici curiae[24] that the administrator lacked authority under section 301 of the Act to promulgate effluent standards. They argued his authority was limited to the issuance of guidelines under section 304 which were reviewable only by a district court under the Administrative Procedure Act.[25] While section 509(b)(1) expressly provided for court of appeals review of effluent limitation standards approved or promulgated under section 301, the amici argued that the administrator lacked authority to issue effluent limits under section 301. Accordingly, the regulations so issued were at most section 304 guidelines not subject to court of appeal review. The court recognized that although the parties to the litigation had not challenged the authority of the administrator to establish section 301 regulations, since the court's jurisdiction was being challenged, it would consider the argument made by amici curiae.

Two other courts of appeals had arrived at opposite conclusions on the same issue. The Eighth Circuit in *CPC International, Inc. v. Train*[26] supported the position of the amici holding that the administrator lacked power to promulgate effluent regulations under section 301. Since the regulations were not properly issued, they were not reviewable under section 509(b). The Third Circuit reached an opposite result in *American Iron & Steel Institute v. EPA*,[27] finding the authority to issue section 301 effluent regulations properly vested in the administrator. Several district courts had arrived at a similar conclusion.[28]

The Seventh Circuit first considered the administrator's determination that he had jurisdiction under section 301 to set general limits based on section 304(b) guidelines and was not limited to establishment of effluent limits by the permit issuing process alone on a case by case basis under section 402 of the Act. Its initial consideration was the degree of deference to be accorded the administrator's determination based on *Train v. Natural Resources Defense Council, Inc.*[29] In *Train*, where differing interpretations of the same provisions of the Act had been made by several courts of appeals, all differing from the one adopted by the Agency, the United States Supreme Court held that while the Agency's construction was not the only one it permissibly could

24. The amici who filed briefs attacking the administrator's authority were CPC International and the American Petroleum Institute. 526 F.2d at 448 n.12.

25. 5 U.S.C. §§ 701-706 (1970).

26. 515 F.2d 1032 (8th Cir. 1975).

27. 526 F.2d 1027 (3d Cir. 1975).

28. E.I. DuPont de Nemours & Co. v. Train, 383 F. Supp. 1244, 1253 (W.D. Va. 1974), *aff'd*, 528 F.2d 1136 (4th Cir. 1975), *cert. granted*, 96 S. Ct. 1662 (1976); American Paper Inst. v. Train, 381 F. Supp. 553, 554 (D.D.C. 1973); American Petroleum Inst. v. Train, No. 74-F-8, slip op. at 6 (D. Colo. April 8, 1975).

29. 421 U.S. 60 (1975).

have adopted, it was at the very least sufficiently reasonable that it should have been accepted by the reviewing court. More importantly, the Court found it sufficiently reasonable to preclude the courts of appeals from substituting their own judgment for that of the Agency. In the context of the present case, the issue was not whether the Agency's interpretation of section 301 was the only one permissible, but whether it was sufficiently reasonable to preclude the court from substituting its judgment for that of the Agency.

Secondly, the court of appeals considered provisions of section 509(b) respecting jurisdiction of the court of appeals to review the administrator's action in approving or promulgating effluent limits under section 301. While section 301 did not expressly direct the administrator to adopt effluent limits, subsection (a) provides that "except as in compliance with this section" the discharge of any pollutant by any person shall be unlawful. Subsection (b) requires achievement of certain "effluent limits for classes and categories of point sources" by 1977 and 1983 respectively, the language of which is difficult to reconcile with the view that effluent standards are to be set by permit alone on an individual basis under section 304. Subsection (e) refers to effluent limits established pursuant to "this section." Section 304 provides that the guidelines to be published by the administrator shall be for the purpose of adopting or revising effluent limits suggesting a power in the administrator to promulgate across the board effluent limits independent of the guidelines and independent of case by case allowance pursuant to permit issuing authority.

The language of several other sections was likewise considered. Section 302(a) relates to the establishment of stricter effluent limits "than those set under 301(b)(2)." Section 303 requires each state to identify waters where effluent limits set under section 301(b)(1) are not strong enough to implement water quality standards and section 309 prohibits violations of section 301 or the conditions of any permit issued under section 402. While not specifying how or by whom the effluent limits are to be established, the court viewed the foregoing provisions as support for the position that Congress intended section 301(b) limits to have independent existence apart from the permit process.[30]

The court next considered the permit process itself. It noted that section 401[31] required state certification that the applicant complied with section 301 or that there was no applicable effluent limit under sections 301(b) or 302. Section 505(f)[32] defines effluent standards for purposes of citizens' suits to include an effluent limit under section 301 of the Act and "a permit or

30. *See* American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1035-42 (3d Cir. 1975).
31. 33 U.S.C. § 1341(a)(1) (Supp. 1972).
32. 33 U.S.C. § 1365(f) (Supp. 1972).

condition thereof," negating a construction that such provisions relate exclusively to permit conditions and supporting the contention that section 301(b) contemplates effluent limit promulgation on its own and independent of section 402 permit conditions.

The legislative history of the Act indicated that when the original version was reported Senator Bentsen expressly stated that section 301(b)(1) anticipated that "the Administrator shall issue [regulations] pursuant to section 301 and section 304" of the Act.[33] The Senate report further expressly stated that pursuant to sections 301(b)(1)(A) and 304(b) the administrator is to interpret "best practicable" as a "basis for specifying" clear and precise effluent limitations. Senator Muskie, during Senate consideration, observed that each polluter would be obliged to achieve "nationally uniform effluent limitations based on 'best practicable' technology no later than July 1, 1977"[34] and that practicability and availability would not be determined on a plant by plant basis.[35]

The totality of the foregoing was held to establish the reasonableness of the administrator's position and that it represented a reasonable accommodation of the policies embodied in the Act. Nationwide effluent standards would assure uniformity with the state maintaining a major role in regulating water pollution under section 101(b) of the Act. The EPA's position gave weight to both the policy of uniformity and that of federalism. It avoided anomalies inherent in the Eighth Circuit's *CPC International* decision. Under that decision, individual EPA permits based on nationally uniform guidelines would be directly reviewed by the court of appeals.[36] Yet the nationwide guidelines themselves would be reviewed in the first instance by the district court under the Administrative Procedure Act. Such a procedure would be antithetical to the congressional purpose of using direct review to the courts of appeals to insure expeditious and consistent application of effluent guidelines. The court concluded that the position chosen by the EPA "was 'correct' to the extent that it can be said with complete assurance that any particular interpretation of a complex statute [is a] 'correct' one."[37]

Validity of the Promulgated Regulations

The court was therefore able to review the regulations promulgated. It first enunciated the standards of review as follows:

33. A LEGISLATIVE HISTORY OF WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93 Cong., 1st Sess. 1283 (1973).

34. *Id.* at 162.

35. *See* American Meat Inst. v. EPA, 526 F.2d 442, 451 n.18 (7th Cir. 1975): "Remarks by Senator Muskie, made in a similar context before passage of the Clean Air Act, have been held to be 'entitled to significant weight.' " *See* Amoco Oil Co. v. EPA, 501 F.2d 722, 734 (D.C. Cir. 1974).

36. 33 U.S.C. § 1369(b)(1)(F) (Supp. 1972).

37. 526 F.2d at 452 (quoting Train v. National Resources Defense Council, Inc., 421 U.S. 60, 87 (1975)).

> Under § 10(e) of the Administrative Procedure Act . . . agency action in an informal rulemaking proceeding is to be sustained unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." . . . This standard requires us to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[38]

The court held its role was not to set effluent limits itself or to substitute its judgment for that of the Agency.[39] In substance, it was required to determine whether the limitations set by the Agency were "the result of reasoned decisionmaking."[40] If the basis stated by the Agency for its decision was insufficient, the court was not empowered to supply another reason which the Agency itself has not chosen to rely on. It must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[41]

Based upon the foregoing standards of review, the court upheld all effluent standards promulgated with the exception of the 1977 and 1983 TSS standards for complex slaughterhouses and the 1983 ammonia limits.[42] The 1977 TSS standards for complex slaughterhouses were determined not supported by a reasoned basis for the limitation, primarily because of the EPA's failure to explain why, in this one instance, it rejected questionnaire data and relied on inconsistent data from its own research testing agency. Such reliance was contrary to previous procedures where questionnaire and test data varied. While a departure from a previously taken position was within the Agency's discretion, a reasoned and record-supported explanation was necessary as to why the contrary approach was taken in this instance. Questionnaires had been relied on previously when at odds with the test results on the grounds that the questionnaire data collected over extended periods was more reliable than isolated tests conducted by the research institute employed by the EPA. Since the 1983 TSS complex slaughterhouse regulations were, in part, based on the 1977 limits, the court believed that these, too, should be reconsidered on remand.

1983 ammonia limits were found unacceptable because of the EPA's sole reliance in arriving at the standard upon ammonia stripping which did not appear to have technological support. The feasibility of the ammonia removal system had not been established in the absence of supporting technology to

38. 526 F.2d at 452 (quoting Camp v. Pitts, 411 U.S. 138, 141-42 (1973) & Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

39. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

40. 526 F.2d at 453 (quoting Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427, 434 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 969 (1974)).

41. 526 F.2d at 453 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

42. The rejected standards were remanded to the EPA for "expeditious consideration." 526 F.2d at 467.

resolve problems of air flow, temperature, and scaling inherent in the technique. Likewise, alternative methods of nitrification did not contain record-support that the regulatory limits could be achieved.

Realizing that the 1977 deadline was fast approaching, the Seventh Circuit made an effort to minimize the delay inherent in its remand order. The court directed that the EPA may reissue the limitations without further hearings, notice or opportunity for comment if it concluded on reconsideration that evidence in the existing record was adequate to support the limitations even though it had not previously relied on them. Any renewed challenge must then be filed within twenty-one days after the regulations were repromulgated and would be heard by the court on an accelerated briefing schedule.

The decision in *American Meat Institute* decisively shifted the judicial balance in favor of EPA's interpretation of its authority under sections 301 and 304, and thereby promoted the achievement of national uniformity among discharge limitations within particular point source categories. As the court noted, the EPA could, by drafting its section 304 guidelines and vetoing permits which did not comply, theoretically accomplish the same result in terms of national uniformity even if it were held to have no power to promulgate single number effluent limitations under section 301. Such an alternative is largely illusory because it would involve the Agency in innumerable detailed individual permit evaluations. Such guideline decisions, reviewable in the federal district courts, rather than in the courts of appeals, would produce divergent judicial rulings taking years to reconcile.

The EPA's view, as approved by the Seventh Circuit, will result in less complicated permit evaluations. It also means that review will lie directly in the courts of appeals. It assures a greater chance for uniformity and swift reconciliation of any judicial disagreements which may arise. As the Seventh Circuit noted, any other result "conflict[s] with the congressional purpose of using direct review in the courts of appeals to insure expeditious and consistent application of effluent guidelines."[43]

Ripeness for Challenge of EPA Emission Standards Under the Clean Air Act

The other case considered under a substantive environmental control statute was *Bethlehem Steel Corp. v. EPA*.[44] The petitioners, several steel and power companies and a municipality, challenged the EPA's designation under the Clean Air Act[45] of certain areas in Indiana as air quality mainte-

43. *Id.* at 452.
44. 536 F.2d 156 (7th Cir. 1976).
45. 42 U.S.C. §§ 1857-1859 (1970&Supp. 1972).

nance areas (AQMA). The petition was dismissed on the grounds that the challenged agency action was not ripe for review.

The Clean Air Act requires that state plans in implementation of national primary and secondary air quality standards adopt emission limitations and "such other measures necessary to assure attainment of primary and secondary national ambient air quality standards including land use and transportation controls."[46] The EPA is given power to promulgate its own implementation plan where the state has failed to submit a plan to the EPA or where a plan submitted does not accord with statutory requirements. In *Natural Resources Defense Council v. EPA*,[47] the Court of Appeals for the District of Columbia Circuit ordered review of the adequacy of all state implementation plans to ascertain whether such plans contained measures necessary for maintenance of national standards. Subsequently, the EPA disapproved all state implementation plans for failure to contain adequate regulations or procedures for maintenance of national standards.

The EPA then published regulations setting forth requirements for states to follow in developing air quality maintenance provisions in their implementation plans. The maintenance provisions included establishment of areas where, due to current air quality or projected growth rates, the national standard may be exceeded within the subsequent ten-year period and provided criteria and standards for the establishment of such areas. Since Indiana failed to submit its own AQMA designations, pursuant to its statutory authority,[48] the EPA issued its own for the state.

Petitioners challenged these designations on a variety of theories: (1) that they were not promulgated in compliance with procedural safeguards under the Administrative Procedure Act; (2) that they were not authorized by the Clean Air Act; and (3) that they constituted an unconstitutional exercise of federal power. The EPA took the view that the designations should not be reviewed before specific maintenance plans were formulated and until plaintiffs would be subjected to sanctions for noncompliance.

Section 307(b)(1),[49] which vests review of plans promulgated by the administrator in the court of appeals, was deemed to provide a forum for such review. However, the section was not dispositive of when such a proceeding should take place. Nor did it require the court of appeals to take jurisdiction independent of considerations of ripeness. Support for the court's position was found in other circuits.[50] Turning to the ripeness issue, the court relied

46. 42 U.S.C. § 1857c-5 (Supp. 1972).
47. 475 F.2d 968 (D.C. Cir. 1973).
48. 42 U.S.C. § 1857c-5 (Supp. 1972); 40 C.F.R. § 52.792 (1976) (designation).
49. 42 U.S.C. § 1857h-5 (Supp. 1972).
50. Kennecott Copper Corp. v. EPA, No. 75-1463 (10th Cir. March 18, 1976); Buckeye Power, Inc. v. EPA, 525 F.2d 80 (6th Cir. 1975).

primarily on the holding of the United States Supreme Court in *Abbott Laboratories v. Gardner*[51] which had stated: "The problem [determination of ripeness] is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[52]

The court considered the application of the foregoing standard to the facts of the instant case. The first determination was whether the issues raised by plaintiffs respecting the authority of the administrator to issue the challenged regulations were sufficiently concrete "to prevent the courts . . . from entangling themselves in abstract disagreement over administrative policies."[53] The court found the issues raised were either "purely legal" or concerned completed matters which would not be clarified if review were delayed because no further factual developments could occur. In this respect, the issues were deemed sufficiently concrete for review.

The next consideration was whether the challenged agency action was "final." The challenged regulation was considered "definitive" by *Abbott* standards. However, unlike the regulation under consideration in *Abbott*, no compliance by plaintiffs was expected since the promulgated regulations only provide for a study by Indiana of future air pollution in the designated areas. Standards for a plaintiff to follow could not be promulgated until completion of the study. The agency's action was, therefore, not final but rather part of an ongoing and continuing administrative decisionmaking process. While the issues presented concrete legal questions, they were not fit for judicial review, not having reached the point where they required compliance by plaintiff.

The absence of a final agency decision militating against review, however, had to be weighed against the hardship to plaintiffs in denying review. The current EPA listing of areas for further study by the states did not impose obligations on plaintiffs and the possibility of further injury in complying with future standards set by the state was not sufficient to warrant review of the designation at the present time. The steel and power companies contended that AQMA designation of Porter County caused uncertainty in business operation because capital must be maintained to cover possible expenditures of funds for pollution control equipment required to meet more restrictive air pollution regulations. With respect to the power companies, the designation would affect economic growth in the companies' service areas which had to be taken into account in the companies' current capital planning. Furthermore, disclosure of the EPA's designation through Securities and

51. 387 U.S. 136 (1967).
52. *Id.* at 148.
53. *Id.*

Exchange Commission requirements would allegedly diminish the value of the companies' securities and adversely affect their fund-raising capability.

The hardship contention of the city of Evansville was premised on the designation of Vanderburgh County as an AQMA. Such a designation allegedly forced the city into a dilemma. Funds allocated by the city for environmental purposes were being used for local projects. With its AQMA designation, the EPA had asked the city to participate in analysis and planning of air quality management standards for the county, which in turn required curtailment of the city's current environmental projects. The city contended that its nonparticipation in such projects would result in a plan of inferior quality.

Both contentions were rejected by the court. The court found the claims of uncertainty advanced by the power and steel companies "vague and speculative" and not involving injuries in the nature of concrete business costs envisioned by the Supreme Court in *Abbott* and *Toilet Goods Association v. Gardner.*[54] In those cases, the plaintiffs were forced to expend considerable funds for compliance or face serious penalties for noncompliance and the stigma inherent in violating the law. No such dilemma existed in the present case since there was no directive to comply with and no sanctions for noncompliance. Further, the Agency action was not deemed to affect primary conduct such as contract negotiation, ingredient testing or record compilation. The only effect was on long-range planning. The challenged actions would be reviewable in the future when the AQMA was incorporated in the state implementation plans. At that time, plaintiffs' hardship would preclude denial of review on grounds of ripeness because they then would face the dilemma of expending funds to meet anti-pollution standards or face penalties and loss of good will for noncompliance, the classic dilemma found in pre-enforcement review cases.

The claim of the city of Evansville was considered on a different footing since it was unquestionably faced with a "difficult and immediate" choice as to allocation of funds earmarked for environmental purposes. However, the dilemma faced by Evansville was not of the type which would compel immediate review since the city's dilemma was one faced by all governmental bodies confronted with the need for expenditures greater than funds available. No external sanctions would be imposed on the city if it chose not to participate in the air quality study. The claimed loss would be of its own making, not the EPA's, and the relief should be sought by appeal to "the source of those funds, not to this court,"[55] a conclusion of questionable realism. Further, the court considered speculative, at best, the city's assertion

54. 387 U.S. 158 (1967).
55. 536 F.2d at 164.

that its failure to participate in the air quality study would produce an inferior product which it characterized pursuant to the decision in *United States v. SCRAP*[56] as an "ingenious academic exercise in the conceivable."

In sum, the court found the challenge to the administrative action not ripe for review. While the actions were complete and final, they were part of an ongoing administrative process not yet culminated in a coercive order directed to the plaintiffs. No direct or immediate harm was alleged to result from the interim order. In view of the strong national interest in furthering the mandate of the Clean Air Act, judicial action which would delay "the already prolonged program to develop and maintain an unpolluted environment"[57] was not warranted.

"PEOPLE POLLUTION" AND NEPA

In *Nucleus of Chicago Homeowners Association v. Lynn*,[58] the court considered an injunction proceeding filed by plaintiff, a corporation organized "to prevent the damage to neighborhood communities which will result if low-rent housing for low-income families is placed in working-class and middle-class neighborhoods of Chicago."[59] The proceeding sought to enjoin the building of low income housing units by the Chicago Housing Authority (CHA) with the assistance of the United States Department of Housing and Urban Development (HUD) on the grounds that HUD had failed to comply with NEPA[60] in failing to file an EIS. The district court's judgment for the defendants was affirmed.

The court reviewed the history of efforts to locate public housing in the Chicago metropolitan area culminating in the decision of the district court in *Gautreaux v. Chicago Housing Authority*[61] which ordered the CHA to construct 1,500 units of low income scattered-site housing. As an initial step toward compliance, HUD and CHA instituted an eighty-four-unit scattered-site housing project of which sixty-three units were under construction at the time of the litigation. Plaintiffs sought to enjoin this construction of public housing on the grounds that HUD failed to file an EIS under section 102 of NEPA assessing the impact of siting low income public housing in middle and working-class neighborhoods.

56. 412 U.S. 669 (1973).
57. 536 F.2d at 164.
58. 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).
59. *Id.* at 227.
60. 42 U.S.C. §§ 4331-4335 (1970).
61. 296 F. Supp. 907 (N.D. Ill. 1969) (original findings); 304 F. Supp. 736 (N.D. Ill. 1969) (injunction requiring affirmative action), *aff'd*, 436 F.2d 306 (7th Cir. 1971), *cert. denied*, 402 U.S. 922 (1971); Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973), *rev'd sub nom.* Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 96 S. Ct. 1538 (1976).

Plaintiffs alleged that low income housing tenants as a group, when compared to the social class represented by the individual plaintiffs, possess a " 'higher propensity toward criminal behavior and acts of physical violence,' 'a disregard for physical and aesthetic maintenance of real and personal property,' and 'a lower commitment to hard work.' "[62] Plaintiffs, in contrast were alleged to belong to a social class that emphasized " 'obedience and respect for lawful authority' " and to possess " 'a much lower propensity for criminal behavior' and 'a high regard for physical and aesthetic improvement of real and personal property.' "[63] Plaintiffs contended that the proposed construction of CHA scattered-site housing would have a direct adverse impact upon the physical safety of those plaintiffs residing in close proximity to the sites, as well as a direct adverse effect upon the aesthetic and economic quality of their lives so as to "significantly affect the quality of the environment."

The court analyzed the substantive provisions of the statute requiring an EIS for all major federal actions significantly affecting the quality of the human environment. The Council on Environmental Quality guidelines promulgated in implementation of NEPA required federal agencies to establish their own procedures to identify those actions requiring environmental impact statements.[64] Pursuant to these guidelines, HUD had issued its own regulations for systematic evaluation of the department's programs. A special environmental clearance for the first eighty-four sites proposed to comply with the *Gautreaux* litigation had been conducted. A negative statement or finding of inapplicability was issued stating that the proposed project posed no significant environmental impacts.

The sufficiency of the HUD environmental review was challenged at the trial. Plaintiffs' evidence consisted *inter alia* of statistics demonstrating the welfare dependency of CHA tenants. It further showed their need for employment opportunities and their dependence on day care, health care, educational services and youth and family counseling. If unsatisfied, plaintiffs alleged these needs would lead to neighborhood problems, violence and property destruction. Because HUD had failed to examine these considerations, plaintiffs asserted that HUD had breached its duty under NEPA to weigh the potential environmental traumas associated with the construction of low-cost housing. In rejecting the plaintiffs' claim, the district court doubted "the utility of projecting human behavior on the basis of social statistics" and concluded that plaintiffs had failed to prove that the social characterizations of the prospective CHA tenants would have a significant impact on the human environment so as to require HUD to prepare an EIS.

62. 524 F.2d at 228.
63. *Id.*
64. 40 C.F.R. § 1500.3(a) (1976).

On appeal, the court of appeals first considered the standard of review of an EIS. It held that the Agency's determination that an EIS need not be filed should be sustained unless the decision constitutes an abuse of discretion or otherwise was not in accordance with the law.[65] The court observed that the national policy expressed in NEPA is "as broad as the mind can conceive" and necessarily included concern for the quality of urban life, observing further, however, that environmental problems of the city "are not as readily identifiable as clean air and clean water."[66] This lent support to the view that deference would be accorded the Agency's good faith judgment and the "arbitrary and capricious" context for review of such administrative matters would be controlling.

The court concluded that HUD was not compelled to consider the comprehensive environmental impact of the entire 1,500 unit scattered-site program as a single entity but could confine its environmental analysis to the eighty-four units approved to date. Comprehensive evaluation required by the statute did not compel HUD to aggregate the entire program if, in the Agency's judgment, evaluation of the aggregate was not feasible. Since no more than eighty-four of the 1,500 sites had been selected, comprehensive evaluation of the total program was not only infeasible but impossible. The entire concept of the scattered site program called for environmental evaluation on a discrete site basis. Such sequential evaluation, as housing sites were selected, was not an abuse of discretion.

The court next held, contrary to plaintiff's assertion, that the record was adequate to support HUD's decision not to file an EIS. The record was dependent on the "particular federal action proposed," and a concise no significant impact statement may be sufficient if grounded on supporting evidence.[67]

The gravamen of plaintiff's complaint was that low income public housing tenants as a group, statistically exhibited a high incidence of violence, law violation and destruction of property and that HUD failed to consider the adverse impact of these social characteristics on the neighborhoods CHA had chosen for the construction of scattered-site housing. However, the court concluded that "people pollution" of the environment "cannot fairly be projected as having been within the contemplation of Congress."[68]

65. 524 F.2d at 229. *See* First Nat'l Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973).

66. 524 F.2d at 229 (quoting First Nat'l Bank of Chicago v. Richardson, 484 F.2d at 1377).

67. *See* Hanly v. Mitchell, 460 F.2d 640, 646 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1973).

68. 524 F.2d at 231 (quoting Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1037 (D.C. Cir. 1973)).

However, the court indicated there was no need to resolve the question in the context of the present case as HUD had in fact considered the impact of the scattered-site housing on the social fabric of the recipient communities. HUD's negative statement relied on several factors to conclude the project was not likely to produce adverse environmental effects. Among the factors considered was the low density design of the housing. Since the housing would be built on vacant lots in compliance with local zoning, anticipated burdens on schools, transportation and community services would be at most "incremental." Further, pursuant to the *Gautreaux* decree, one-half of all dwelling units at a site would be offered to housing applicants residing in the community. From the foregoing, the court concluded that there was little reason to believe that the influx of new CHA tenants would drastically alter the character of the neighborhood. Lastly, CHA tenant selection and eviction policies would diminish the potential of danger to the well-being of their neighbors.

Consideration had also been given in the HUD negative statement to such physical environmental matters as solid waste disposal, sewage, water pollution, noise levels and traffic congestion. Based on the fact that the proposed housing was an "infill" of existing neighborhoods, the HUD statement concluded that the project would have no significant environmental impact. The totality of the foregoing was deemed a satisfactory basis for judicial review of the Agency's decision. The court disposed of the plaintiff's contention that the mere existence of a controversy mandates the preparation of an EIS, holding that the Council on Environmental Quality guidelines requiring an EIS when the environmental impact of the project was likely to be highly controversial[69] were not applicable in the context of the present proceeding.

Finally, the court held that HUD satisfied the requirements of the Act in using a systematic disciplinary approach and in exploring alternatives to scattered-site housing required by sections 102(2)(A) and 102(2)(D) of NEPA.[70] HUD's failure to consult particular sources favored by plaintiff was not fatal since the court found that HUD, in good faith, had considered the impact of the project on the social environment of the site neighborhoods.

With respect to the alleged failure to consider alternatives to the scattered-site program, such as broad scale metropolitan planning and comprehensive social service programs to alleviate problems of low income public housing tenants, the court observed that the scattered-site housing was court-ordered and HUD and CHA had no alternative but to construct the housing. The only alternatives available were in site selection and in this

69. 40 C.F.R. § 1500.6(a) (1976).
70. 42 U.S.C. §§ 4332(2)(A), (D) (1970).

respect, HUD and CHA had acted within the parameters of *Gautreaux* suggesting rejection of two sites for noncompliance with noise control guidelines pending further environmental analysis, indicating that the agencies had exercised a degree of selectivity in site selection and that NEPA requires no more.[71]

SCOPE AND DELEGATION OF EIS REQUIREMENTS

Swain v. Brinegar[72] had been before the court in the previous term[73] and was reconsidered en banc because of the congressional amendment to NEPA bearing on the issues in the earlier decision. The basic issue in *Swain* was whether the Illinois Department of Transportation in its corridor selection, land acquisition and construction of a fifteen-mile segment of a forty-two-mile supplemental freeway connecting Peoria and Lincoln, Illinois complied with the Federal-Aid Highway Act of 1970[74] and NEPA. Plaintiffs, as owners of a 440-acre farm part of which was in the path of the new highway, sought to enjoin further acquisitions and construction of the fifteen-mile segment

71. Five cases have considered the issues of whether people can be "pollution" as distinguished from "polluters" and whether environmental impact under NEPA can be construed to include a class of persons per se. *See* Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973); Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 999 (1972); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971).

In *Hiram Clarke*, the court held HUD's environmental assessment adequate in support of a 272-unit low and moderate income housing project in considering the environmental effect of "deteriorating neighborhood influences." In *Goose Hollow*, the court found HUD's examination inadequate to support a high-rise apartment building in a low-rise dwelling area. The court noted that "the building will undoubtedly change the character of the neighborhood." However, "neighborhood character" as used by the court related to population density and structural nonconformity and not consequences of the character alleged by plaintiff in *Nucleus*. In *Maryland-National*, the court considered that the project had to comply with zoning standards as embodying aesthetic, cultural and social considerations affecting the locality.

The *Hanly* cases concerned the construction of a large federal jail facing two apartment structures. The court directed the General Service Administration environmental review board to consider the possible effects on the neighborhood of future prisoner riots, increased noise levels and the effect of a proposed drug treatment center. These were a consequence of squeezing a jail into a narrow area directly across from the two apartment houses. The second EIS produced was found adequate with respect to environmental consequences of possible riots and noise. The EIS was found deficient, however, for failure to consider whether crime might increase in the neighborhood because of out-patient use of the drug treatment center attached to the jail. Superficially, this concept seemed to lend support to plaintiffs' position in *Nucleus* that people, including those not convicted of any offense, could per se constitute an environmental threat under NEPA by their presence in the neighborhood. It lent support in spite of the difference in the structure of the class in issue in each case and the difference in predictive capabilities respecting the classes.

For a discussion of these issues, see Daffron, *Using NEPA to Exclude the Poor*, 4 ENVIRONMENTAL AFFAIRS 81 (1975).

72. 542 F.2d 364 (7th Cir. 1976).

73. 517 F.2d 766 (7th Cir. 1975). For a detailed discussion of the first decision, see Zabel, note 1 *supra*, at 327-32.

74. 23 U.S.C. §§ 101-155.

because of alleged violations of the foregoing statutory provisions.[75]

The plaintiffs challenged the compliance with the Federal-Aid Highway Act on the basis that the selection of the corridor was arbitrary and violated the Act's full disclosure policy. The challenge to the adequacy of the EIS was based on the allegation that preparation of the EIS was impermissibly delegated by the Federal Highway Administration to a state agency and, in any event, was insufficient under NEPA requirements. The district court had held in favor of defendants. On the first appeal, the court of appeals validated the corridor selection but held that there was improper delegation by the Federal Highway Administration to the Illinois Department of Transportation with respect to preparation of the EIS.

After the earlier decision, Congress amended NEPA[76] to provide that an EIS was not legally insufficient solely by reason of having been prepared by a state agency or official if: (1) The state agency had state-wide jurisdiction; (2) the federal official furnished guidance and participated in the preparation; (3) the federal official independently evaluated the statement prior to approval and adoption; and (4) the federal official notified and solicited the views of other state or federal land management entities of any action or alternative that may have significant impact on such entity. The amendment did not relieve the federal official of his responsibility for the scope, objectivity and content of the entire EIS.

To determine the effect of the amendment on the prior ruling, a rehearing was granted en banc. At the outset, the court concluded that the earlier decision could not stand in light of the NEPA amendment. The EIS as prepared by the state agency was deemed to satisfy the procedural requirements of the amendment with respect to adequacy of federal review, federal guidance to the state and federal participation. Further, the federal agency pursuant to the amendment had accepted and exercised final authority for evaluation of the environmental impact of the proposal.

The court next considered the sufficiency of EIS in terms of compliance with the requirements of NEPA and whether the scope of EIS was as broad as the scope of the federal action, giving consideration to the recently decided case of *Aberdeen & Rockfish Railroad Co. v. SCRAP.*[77] The court found no

75. *See* Zabel, note 1 *supra*, at 327.

76. 42 U.S.C. § 4332(2)(D) (1970), *as amended by* Act of Aug. 9, 1975, Pub. L. No. 94-83, § D, 89 Stat. 424.

77. 422 U.S. 289 (1975) [hereinafter cited as *SCRAP II*]. In *SCRAP II*, a "general revenue proceeding" by the ICC approving across-the-board rate increases proposed by the railroad was held by the Supreme Court to be "non-final" action by which the adequacies of an EIS could be determined. Plaintiffs asserted that the Commission's EIS had given inadequate consideration to

flaw in the EIS so far as it evaluated the fifteen-mile segment. However, since in the view of the majority, the federal action involved concerned the entire forty-two-mile freeway, an EIS addressed only to the fifteen-mile segment was deemed insufficient.

The court spelled out the EIS requirements of section 102(2)(C) of NEPA, itemizing the factors that must be included in the detailed statement mandated by the act. While finding the EIS met statutory standards for the fifteen-mile stretch in all particulars, the court could not agree that it was proper to confine the EIS to the fifteen-mile segment alone. Basing its decision on the NEPA statute, regulations and cases, the majority concluded that the proposed federal action being taken included the funding of the entire forty-two miles of the project. The district court judgment was accordingly reversed.

Addressing itself first to the Federal Highway Administration policy and procedure memorandum implementing Council on Environmental Quality guidelines,[78] the court observed that the memo expressly provided that: "[p]iecemealing proposed highway improvements in separate environmental statements should be avoided. If possible, the highway section should be of substantial length that would normally be included in a multiyear highway improvement program."[79]

The court found the purpose of the foregoing standards to be to insure that any assessment of environmental impact from the project was meaningful. Segmentation would limit the usefulness of the studies. While each of the small segments might be devoid of serious consequences standing alone, when taken as a whole, they could have devastating consequences. Secondly, preparation of an EIS for an initial segment would set the overall pattern for the balance of the highway. This would make subsequent studies a formalistic exercise because the capability of the decisionmaker to choose an alternative route would no longer exist. Such a circumstance would frustrate the objectives NEPA was designed to achieve. A balance must be struck by the

the environmental consequences of its rate determination in favoring virgin materials over recyclables. They further asserted the increase would deter to a significant degree the environmentally desirable use of recycled materials. In upholding the adequacies and scope of the EIS, the Court held that the comprehensiveness of an EIS may be correlated to the character of the proceeding requiring it. "In order to decide what kind of an environmental impact statement need be prepared, it is necesssary first to describe accurately the 'federal action' being taken." *Id.* at 322. The more final and comprehensive the nature of the "action" by the agency, the more comprehensive the EIS required. In the instant case, since the ICC decision was not final with respect to particular rates and was "neutral" in that it was a percentage increase applicable to both virgin and recyclable materials, the amount of environmental impact directed by NEPA was considered correspondingly low, the scope of the EIS being trimmed to the breadth of the action calling for it.

78. 23 C.F.R. § 771.5(a) (1976) (current language).

79. Swain v. Brinegar, 542 F.2d 364, 368 (7th Cir. 1976). *See* 23 C.F.R. § 771.5(a) (1976).

decisionmaker and the courts between short term segmented and meaningless studies and long term visionary exercises that may take years to accomplish. "The view [taken] must be one neither confined by the literal limits of the specific proposal nor one unbounded except by the limits of the designer's imagination."[80] The task of the court was not to make the choice but to ascertain whether the choice made was reasonable.

With respect to the proposed highway projects the court relied upon decisions previously considering the issue.[81] The court enunciated the following standards to determine the scope of the proposed project:

> (1) Does the proposed segment have a substantial utility independent of future expansion? (2) Would its construction foreclose significant alternative routes or locations for an extension from the segment? (3) If, as here, the proposed segment is part of a larger plan, has that plan become concrete enough to make it highly probable that the entire plan will be carried out in the near future?[82]

Based upon the foregoing standards, the court concluded that the EIS must cover the entire forty-two-mile freeway. First, the court found that the proposed fifteen-mile stretch had no independent utility apart from the total forty-two-mile project, observing that the northern terminus of the segment ended at no logical or major terminus. In this respect, the court disagreed with the district court finding that a completed three and one-half-mile stretch at the northern terminus of a fifteen-mile stretch was a major highway control element. The court concluded rather that the north and south ends of the fifteen-mile stretch are merely points in the country. Secondly, building of the fifteen-mile stretch would limit choices for constructing the northern segment, thus tainting any separate environmental evaluation of the northern component. Lastly, the fifteen-mile segment was part of a firm forty-two-mile supplemental freeway. Federal funding had been or would be sought for the total project. Accordingly, the whole forty-two-mile segment was an ongoing project which constituted the federal action being taken as required in *SCRAP II*. The entire project, therefore, constituted a single enterprise. While the forty-two-mile project was part of a total 1,800 mile trunk system, the total project was not subject at the outset to the requirements of NEPA, since the larger project was considered in the "visionary" category and still subject to revision.

In this respect, the court's view was consistent with that expressed in *Nucleus*. In both cases it held that the federal action to which NEPA

80. 542 F.2d at 369.

81. Conservation Soc'y of S. Vt. v. Secretary of Transp., 531 F.2d 637 (2d Cir. 1976); Daly v. Volpe, 514 F.2d 1106 (9th Cir. 1975); Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973); Named Individual Members of the San Antonio Conserv. Soc'y v. Texas State Highway Dep't, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972).

82. 542 F.2d at 369.

consideration must be addressed was not the total contemplated project (1,500 homes - 1,800 miles) but the discrete viable elements thereof having independent significance as part of the whole (84 homes - 42 miles), the segments of which, however, could not be further broken down into separate non-discrete components (15 miles - 1 home) for EIS purposes. The court concluded that the total forty-two-mile project must be evaluated as a unit and the existence of an EIS for the northern portion, even if coupled with the EIS for the fifteen-mile stretch did not suffice. Judgment was reversed and the case remanded.

Judge Swygert filed a separate concurring opinion which agreed with the majority that construction of the forty-two-mile stretch was the proper federal action to which the EIS should be addressed but disagreed with its assessment that the Federal Highway Administration's delegation of preparation of the EIS to Illinois authorities fulfilled the statutory requirements of the NEPA amendments respecting the federal agency's duties for EIS preparation. In his view, the federal authority had failed to furnish sufficient guidance and participation in the EIS preparation and had done little more than rubber stamp the state-prepared EIS. Comments and criticisms voiced by the federal agency prior to preparation of the final EIS were brief and insignificant, demonstrating a lack of serious independent analysis or review required by the statute, placing ultimate control in federal hands.[83]

Judge Tone, in an opinion concurred in by Judges Pell and Bauer, dissented, believing the fifteen-mile segment a proper entity for the preparation of an EIS. Diagramming the entire forty-two-mile project, Judge Tone noted the completion of the three and one-half-mile segment connecting the fifteen-mile stretch in issue to the remaining twenty-three and one-half-mile portion to the north terminating in Peoria. The existence of this three and one-half-mile segment in Judge Tone's view gave the fifteen-mile stretch to the south an independent and discrete significance precluding what in its absence might allow for a possible alternative routing of the entire project. The only way an alternative route could be pursued would be by abandoning and duplicating the three and one-half-mile stretch already existing, a possibility never suggested. The Federal Highway Administration's characterization of the three and one-half-mile stretch, as a major highway control element under its own regulations, should have been accorded due deference. In Judge Tone's view, the court has articulated the principle that the role of the court was to determine whether the agency has made a reasonable choice but had not applied the principle to the facts of the case.

83. *See* Conservation Soc'y of S. Vt. v. Secretary of Transp., 531 F.2d 637 (2d Cir. 1976).

THE LIMITATIONS OF TRADITIONAL POLLUTION REMEDIES

In *Harrison v. Indiana Auto Shredders Co.*,[84] the court was confronted with competing environmental considerations in the context of a traditional nuisance action. The case furnished a classic situation requiring balance, in the court's language, between "the legitimate demands of an urban neighborhood for clean air and a comfortable environment against the utility and economic enterprise of a beneficial, but polluting, industry."[85]

The facts were relatively simple. Defendant, pursuant to zoning allowance granted by the relevant governmental authorities and consistent with restrictive covenants, established and operated an automobile shredding plant in a predominantly industrial area of Indianapolis on land previously used as a railroad roundhouse and later as a dumping ground. Plaintiffs were owners and residents who lived or operated businesses in adjacent areas. They contended that the operation of the shredder caused dust, vibration and noise in amounts and kinds constituting statutory and common law nuisance by damaging and endangering the health and safety of the residents and workers in the area. The operation also allegedly violated municipal air pollution regulations.[86]

Zoning allowance was given, on application to defendant's predecessor in interest, by the City-County Council of Marion County. The zoning application was accompanied by an extensive list of restrictive covenants imposing restrictions on the operation relative to noise, burning, and waste disposal. It also detailed the configuration of the installation, fencing, and traffic access. The zoning classification placed the operation in a heavy industrial district. The classification imposed height restrictions on buildings and equipment and included environmental restrictions on noise, vibration, smoke and odors.

The proposed land use and operation were abandoned by the original applicant but were later taken over by the defendant, subject to the zoning allowances and restrictive covenants. Permits for operation were issued by the municipal authorities and operations ensued. Shortly thereafter, com-

84. 528 F.2d 1107 (7th Cir. 1975).

85. *Id.* at 1109.

86. The character and operation of a shredder can best be discerned by the court's description:

> [A] shredding machine is composed of massive rotary teeth (called "hammers") that rip off pieces of the automobile as it passes a cutting edge and then spits fist-sized chunks of metal and other matter across a series of "cascades," blowers, and magnets, which separate the ferrous metals from the non-ferrous metals and debris. A series of conveyors then carries the product and waste to storage. A "hammermill" such as the one in this case weighs 220 tons and measures approximately ten feet in width, fourteen feet in length, and nine feet in height. The conveyors, blowers, cascades, motors, and storage bins that clean, treat, and house the shredded product are built around this central machine.

Id. at 1110.

plaints respecting the shredders' noise, vibration and air pollution were voiced by neighbors resulting in modifications and improvements in the operation, including installation of additional air pollution control and noise abatement equipment.

The instant suit was originally filed in an Indiana court and removed to the federal court. The plaintiffs sought both compensatory and punitive damages and a permanent injunction to shut down the operation. Plaintiffs' subjective evidence respecting the discomfort and damage allegedly caused by the shredder related to cracked walls, dust accumulation, sleepless nights, disturbance of children and diminution of property values. Vibrations from the shredder operation were alleged to have interfered with certain business operations. Governmental officials and media representatives testified for the plaintiffs. Their testimony corroborated the testimony of the neighborhood witnesses regarding noise, vibration and air pollution. No plaintiff testimony supported specific adverse health impacts from the shredder operation or violations of environmental regulations or significant zoning infractions. Recurring explosions from gas tanks going through the hammermill were deemed by the court to "present little danger to the neighborhood" and viewed as excusable because the "company gave the fire department its complete cooperation on the matter." Testimony of local realtors respecting loss of property values consequential to the shredders' operation was less than the nonexpert estimates by the claimants.

Mr. Justice Clark, writing for the court, summarized the plaintiffs' testimony as "sincere but unsophisticated assessments of the harm the shredder had caused" evidencing strong proof of the displeasure and annoyance caused by the shredder's noise, vibration and air pollution. However, the evidence "failed to show either actual health hazards or significant damage to building structures" directly attributable to the shredder's operation.

Defendant's testimony contrasted sharply with plaintiffs', both in form and substance. It consisted principally of expert testimony that improvements were made by the defendant to minimize environmental harm from air pollution, noise explosions and vibration. They further testified to testing done at the site and compliance with regulatory limits. Defendant's property valuation experts contended that property damage was insignificant because of the age of the buildings, ranging from fifty to one hundred years, the antiquated condition of the property and the industrial character of the area.

Options considered by the trial judge were to allow continuation of the business and award permanent damages or alternatively to enter an injunction shutting down the business. The court's decision adopted both alternatives,

awarding compensatory damages and punitive damages totalling $500,000 and entering a permanent injunction ordering the shredder to cease operations within forty days.

While conceding that the plaintiffs were entitled to "some form of equitable relief and damages," the court of appeals reversed and remanded, holding the award of both injunctive relief and permanent and punitive damages improper. Characterizing nuisance actions as a "legal garbage can," the court recognized that concern for a cleaner environment has forced the courts to fashion modern hybrids of the traditional concepts of nuisance law and equity. The instant case represented a classic situation where the desires of a community for economic and industrial strength must be balanced against the need for clean and livable surroundings. The court noted this was a task not easily achieved and one for which the courts may not be ideally suited, notwithstanding their traditional role in balancing equities and their insulation from pressures to which legislatures and administrative agencies are often subjected. Limitations on such auto shredders presented difficulties beyond those normally characterizing disputes of this nature because the defendant, in addition to making an economic contribution to the community in the form of payroll taxes and an investment, was also furnishing a needed environmental benefit in providing a means of disposing of junk cars, a continuing subject of blight, by presenting a means of recycling and ultimate conservation of natural resources.

The court viewed its task as two-fold: first, it was required to determine whether a nuisance existed and if so, what type; second, what form of relief should be fashioned. In the court's view, a permanent injunction would be warranted only where the nuisance imminently and dangerously affected the public health or where non-health injuries were substantial. Absent the foregoing circumstances, a permanent injunction would only be entered where there was reckless disregard of substantial annoyances to adjacent property owners plus an impossibility of mitigating the offensive characteristics of the business.

Based upon the foregoing standards, the court found the entry of a permanent injunction to be error. Recognizing some degree of adverse impact on the adjacent areas, the court felt the health, safety, and welfare injury had not been shown to justify the extreme remedy. No violations of environmental or health regulations were in the record, showing a lack of support for the district court's findings that zoning ordinances and vibration, noise and air pollution standards had been violated so as to endanger the public health. On this basis, a permanent injunction was held unwarranted.

Several factors particularly impressed the court and led to the ultimate

determination. The first factor was the absence of evidence of violation of any environmental regulation. From this the court reasoned, somewhat simplistically, that no adverse health consequences would ensue from defendant's operation. Secondly, the court viewed the age of the residences and other structures in the area, the general industrial character of the neighborhood and the former uses of the subject property as factors precluding substantial damage awards. Next, the court gave defendant considerable credit for the amount of work done to alleviate the environmental impact resulting from the operation. Lastly, the court observed defendant's compliance with zoning standards and essentially all of the covenant restrictions.

In the last analysis, the court viewed the case in large measure as a zoning problem to be resolved on the local level and was understandably influenced by the fact that the property where the shredder was situated had been classified for zoning purposes by the municipal government to accommodate the use. The court held that on the totality of all factors, particularly the absence of adverse health effects, the defendant should have been given time to alleviate the burdens caused. The remand would appear to enable the district court to retain jurisdiction while defendant took the necessary corrective measures and if not achieved, presumably to use its equitable powers to mandate achievement.

The damage award was voided on the grounds that damages coupled with a permanent injunction were improper. In any event, private nonpermanent nuisance damages should have been measured in terms of loss of rental value. Further, the cooperation rendered by defendant to governmental authorities made punitive damages improper.

The court's direction on remand gave little guidance with respect to the character of constraint the court contemplated. The court's voiding of a permanent injunction which would close down the plant would presumably limit the trial court to use of a mandatory injunction directing specific steps to be taken to abate the environmental nuisances with enforcement by contempt citation for noncompliance.

The issue of availability of damages to the injured plaintiffs was also left in somewhat less than satisfactory condition. The court reversed because of the manner in which damages had been computed but left open the possibility of a damage award premised on the loss of rental value. Judge Fairchild dissented, viewing the computation for damage to property as based upon a reasonable inference from the circumstances of causation and not clearly erroneous even though arrived at by nonexpert testimony. The dissent accepted the majority's view that damages for personal annoyance under Indiana law were based on loss of rental value during the time the nuisance existed for which record support was lacking.

He further dissented, believing that under Indiana nuisance law[87] the findings of interference with enjoyment of life and property were not clearly erroneous and served as a sound predicate that defendant was liable for nuisance. Agreeing with the majority that punitive damages were unwarranted, the dissent felt that compensatory damages for injury to property were warranted particularly since the injunction was being dissolved.

The dissent found the position of the district court with respect to the injunction supportable but based on public policy considerations noted by the majority he would have modified the injunction to permit further operation of defendant's facility subject to court supervision. Such supervision would establish a level at which operation could continue without unreasonable interference with the comfort and enjoyment of plaintiff's property. In the alternative, he could ascertain at what level the plant could be reasonably operated upon payment of compensation to plaintiff for the continuing burden. What the dissent suggested was probably not too far from what the majority contemplated to be the role of the trial court on remand. However, the majority's rather sketchy directive in this respect leaves the matter in a state of uncertainty.

The case underscores the difficulties inherent in resolving complex environmental problems in the context of nuisance suits. Other courts have confronted similar problems reaching results bearing some similarity and at the same time recognizing the unsatisfactory solution of the methods employed. One partial solution is the structuring of a statewide environmental control program not limited solely to violation of numerical emission limits but incorporating the concept of nuisance in the prohibition of air and water pollution. Definitions of air pollution may preclude unreasonable interference with the enjoyment of life[88] as well as proscribe conduct that not only causes air pollution but also that which may tend or threaten to cause it. Such a definition would also prevent emissions for which there are no numerical limits. Emissions that met such numerical limits but nevertheless caused or contributed to air pollution could likewise be controlled.

In this manner, controls of the type needed in the instant case could be invoked as part of the overall state environmental program and enforced by administrative procedures or judicial action. Such controls would not therefore be limited to case-by-case adjudication by harmed residents under prevailing nuisance concepts. The problems of such reliance are particularly brought out in the context of the present case where the court refrained from employing the injunction unless severe health impacts were demonstrated to result from the challenged conduct notwithstanding the extreme interference

87. IND. CODE ANN. §§ 34-1-52-1 to 34-1-52-3 (1973) (Burns).
88. *See, e.g., id.* § 13-1-1-2.

with the quality of life, a circumstance the court appears to concede. Considerations of economic reasonableness and technical feasibility would serve as standards precluding a cease-and-desist order or an injunction in instances where the disparity between the hardship on the polluter and the hardship on the community was disproportionate. Although damages could be awarded only in a civil proceeding, resort to comprehensive state regulation prohibiting unreasonable interference with the enjoyment of life would achieve comprehensive abatement measures minimizing the need to resort to damage actions except in extreme circumstances.[89]

In *Boomer v. Atlantic Cement Co.*,[90] neighbors filed a suit seeking an injunction and damages as a consequence of dust, smoke and vibration emanating from a nearby cement plant. While conceding that the traditional New York rule would call for the imposition of an injunction where the nuisance had resulted in substantial injury to the plaintiff notwithstanding the economic disparity between the consequences of the effect of the injunction and the effect of the nuisance, the New York court ordered the injunction to be vacated upon payment of permanent damages to plaintiff as determined by the trial court. Weighing heavily in the court's determination was the apparent absence of adequate technology to abate the admitted environmental nuisance and the apparent lack of assurance that adequate technology would be forthcoming in the foreseeable future. The court noted that the defendant's investment in the plant was $45,000,000 and that it employed over 300 people.

89. *See, e.g.*, Illinois Environmental Protection Act, § 3(b), ILL. REV. STAT. ch. 111-1/2, § 1003(b) (1975): "Air Pollution is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." Under such a statute, a much broader range of activities is proscribed. *See* Illinois Environmental Protection Act, § 9(a), ILL. REV. STAT. ch. 111-1/2, § 1009(a) (1975):

> No person shall:
> Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act.

See also § 33(c), ILL. REV. STAT. ch. 111-1/2, § 1033(c) (1975):

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
> (ii) the social and economic value of the pollution source;
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

See Processing & Books v. Pollution Control Bd., 64 Ill. 2d 68, 351 N.E.2d 865 (1976), for a construction of this section. *See also* Bloom & Butler, *The Illinois Environmental Protection Act: The Burden of Proof Becomes Clearer*, 53 CHI.-KENT L. REV. 57 (1976).

90. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

In reaching its decision in *Boomer*, the court relied on *Northern Indiana Public Service Co. v. Vesey*.[91] Specifically, the court held that a public interest would be served by allowing the continued operation of the plant and denied the injunction. In addition, the court concluded that less injury would be occasioned by requiring the defendant to pay the plaintiff's damages than by enjoining the operation of the plant. The court observed that such technological improvements as might ultimately emerge would be the consequence of industry-wide research and resources and not the result of defendant's efforts alone. The dissent felt that an injunction should be granted rather than depart from the rule. In permitting the injunction to become inoperative upon payment of permanent damages, the majority was, in effect, licensing a continuing wrong. Once such permanent damages were assessed and paid, the incentive to alleviate the wrong would be eliminated thereby allowing a continuation of air pollution without abatement. The situation was analogized to reverse condemnation without any benefit to the public, a circumstance antithetical to the reverse condemnation concept. The dissent would have enjoined defendant from continuing its harmful discharges unless the defendant could abate its nuisance within eighteen months, anticipating that within such period more effective procedures would be developed than those presently employed.

The better remedy is to have the prohibition of unreasonable interference with enjoyment of life incorporated in the state environmental control act. This would ensure that all discharges causing this result would be subject to abatement by action of the state as well as private individuals. If the statute so provided, this would be accomplished irrespective of compliance with regulatory limits and without the necessity of demonstrating the presence of adverse health attributes. The determination of such pollution as so defined could be played against a standard whereby unreasonableness of the interference could be based upon considerations of economic reasonableness, technological feasibility and such considerations as the degree of interference with the public health and welfare and the social and economic value of the pollution source.

The foregoing standards would preserve the elements the *Harrison* court believed relevant. It would not impose upon the plaintiffs, however, the necessity of demonstrating subjective harm. Such statutory inclusions would not obviate the need for a civil suit for damages, but would lend the force of the state to the environmental improvement program in the context of nuisance-oriented pollution. This would be accomplished without necessitating all impetus coming from the aggrieved neighbors who by virtue of

91. 210 Ind. 338, 200 N.E. 620 (1936).

residing in industrially oriented areas presumably would not possess the means necessary to employ expert witnesses and legal fees needed to challenge the industrial polluter.

CONCLUSION

The foregoing opinions of the Seventh Circuit have made a significant contribution to emerging concepts of environmental law. In some instances the court plowed new ground by implementation of important federal environmental statutes. In others, it has shown the inadequacies of traditional legal procedures in dealing with new and sophisticated environmental concepts. In all instances, it has expedited the resolution of environmental issues. Deference to administrative determination was accorded, if supported by a reasoned decision, and where absent, the court, consistent with the Supreme Court's directive, declined to substitute its judgment for that of the administrative agency.

American Meat Institute, in particular, implemented federal water pollution legislation in areas where statutory construction was imperative to achieve congressionally mandated goals and where the statute itself was vague and confusing, omitting express procedural directives. *Nucleus* interpreted NEPA in the context of public land use and welfare considerations. *Harrison* made manifest the unsuitability of traditional nuisance procedures to abate pervasive pollution problems. This year's contribution by the court has furthered the understanding and substance of the environmental area.