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THE SEVENTH CIRCUIT ON ENVIRONMENTAL REGULATION OF BUSINESS

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I. INTRODUCTION

Recent Seventh Circuit environmental law decisions display the tensions of intellectually powerful jurists confronting murky questions of statutory interpretation involving challenges to the actions of recalcitrant federal agencies. This court's resolution of these controversies leaves no doubt that the judges understand that large and conflicting interests are at stake in environmental decisions; far more ambiguity attends the court's willingness to exercise its authority to enforce environmental law.

This essay focuses on seven decisions issued by this circuit in the years 1985-1989. The objectives are first to expound on the doctrine developed in these decisions—each is an important contribution to the body of environmental law—and second to speculate on what these decisions reveal about the condition of environmental jurisprudence at the beginning of the 1990s.

These decisions reveal a court deeply troubled by its perception of the executive branch's unwillingness (or incompetence) to perform its statutorily delegated functions to protect the environment. It cannot be ignored that these cases arose during the Reagan years when the government's role in protecting the environment was unquestionably at its twenty-year nadir. Perhaps having perceived this irresponsibility, there is almost no mention of the doctrine of deference to agency discretion—a notable omission in light of the doctrine's repeated use in other circuits.[1]

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1. The leading statement of judicial deference to the EPA comes from Chevron, U.S.A. v. NRDC, 467 U.S. 837, 844 (1984): "[W]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Among the circuits, the Court of Appeals for the District of Columbia Circuit has been the leading proponent of judicial deference. *See* Sierra Club v. United States Army Corps of Eng'rs, 772 F.2d 1043, 1051 (2d Cir. 1985) ("The power of a court in effectuating the purpose of judicial review generally is narrowly drawn. Courts must defer to the action taken by the agency, which is presumed to be valid."). *See also* New York v. United States EPA, 852 F.2d 574, 579-81 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989). The First Circuit held in BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 652 (1st Cir. 1979): "[O]ur review of agency rule-making is very limited . . . . We will not remand so long as the Agency has explained the facts and policies on which it relied; the facts have some basis in the record; and a reasonable person could make the judgment the Agency made." The Second Circuit held in Vermont v. Thomas, 850 F.2d 99, 102 (2d Cir. 1988): "[I]n view

Yet, this court is also troubled by the implications of substituting its judgment for that of a government agency, even one that has failed to meet its obligations. The reasons for this hesitance seem to derive from broad institutional considerations regarding the limited or restrained role of the federal judiciary.[2] It is the Seventh Circuit's wrestling with the limits of its own authority in the environmental law context that frames the theme of this essay.

II. THESIS AND ANTITHESIS IN ENVIRONMENTAL DECISION MAKING

A. The Ambiguities of Framing Environmental Law Cases

The problem, and the opportunities, underlying analysis of environmental law decisions is that an appellate court often must address the abstract question of what is its role in our constitutional system of government—a task which may bear only a vague connection to rational enforcement of legislated environmental policy. That the legal question in an environmental case may be steps removed from the actual controversy generates fascinating opinions with insights for students of the role of the courts as well as of environmental law.

Typically, an environmental suit entails a challenge against a gov-

of the EPA's responsibility to administer the Clean Air Act, we must give great deference to the Administrator's interpretation of the statute." The Third Circuit held in Modine Mfg. v. Kay, 791 F.2d 267, 273 (3d Cir. 1986) (citations omitted): "We are charged with deference to EPA in the construction of the 'complex' Clean Water Act." The Fourth Circuit held in Reynolds Metals Co. v. United States EPA, 760 F.2d 549, 559 (4th Cir. 1985) (citation omitted): "[A]n agency's data selection and choice of statistical methods are entitled to great deference, and its conclusions with respect to data and analysis need only fall within a 'zone of reasonableness.' " The Fifth Circuit held in American Cyanamid Co. v. United States EPA, 810 F.2d 493, 496 (5th Cir. 1987) (citation omitted): "In our judicial review we give great deference to the EPA's interpretation of the statutory scheme that Congress entrusted it to administer." *See also* Chemical Mfrs. Ass'n v. United States EPA, 870 F.2d 177 (5th Cir. 1989). The Sixth Circuit held in Navistar Int'l Transp. Co. v. United States EPA, 858 F.2d 282, 286 (6th Cir. 1988), *cert. denied*, 490 U.S. 1039 (1989) (citation omitted): "Our standard of review in cases involving conflicting interpretations of an administrative regulation is to give considerable deference to the administrative agency's interpretation." The Eighth Circuit held in Missouri Coalition for the Env't v. United States Army Corps of Eng'rs, 866 F.2d 1025, 1032 (8th Cir.), *cert. denied*, 110 S. Ct. 76 (1989) (citation omitted): "[T]he court's only role is to insure that the agency has considered the environmental consequences before taking action." The Ninth Circuit held in Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986) (citations omitted): "This standard of review is highly deferential . . . . The court may not set aside agency action as arbitrary or capricious unless there is no rational basis for the action." The Eleventh Circuit held in Manasota-88, Inc. v. Thomas, 799 F.2d 687, 691 (11th Cir. 1986): "This deferential standard presumes the validity of the agency action and prohibits a reviewing court from substituting its judgment for that of the agency."

2. An enormous body of commentary has discussed the appropriate level and standards of judicial review of agency determinations. Some of the works most relied upon in this essay include Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985); and Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985).

ernment agency for failing to perform or improperly performing an obligation compelled by Congress: either that agency has pursued an anti-environmental policy allegedly in contradiction of congressional intent, or it has denied procedural opportunities for private interests to participate appropriately in decisionmaking. The presence of a regulatory agency between Congress as lawmaker and the affected private commercial actors is critical to understanding the role of the courts in making environmental law decisions. The Seventh Circuit, when hearing an environmental controversy, must weigh the opposing arguments of the challenging litigant and the regulatory agency as to the proper interpretation of congressional policy. While the court is under an affirmative duty to enforce the law that Congress has enacted, it is restrained by the admonition that the judiciary should defer to the execution of the law by the properly delegated agency. Yet, judicial deference to congressional policy is not the same as deference to the administrative agency whose function it is to enforce that policy. Ironically in some cases, to be deferential to congressional policy may entail strict scrutiny of an agency's actions.[3]

Throughout these cases is a repeated inquiry as to whether the issue presented is within the court's jurisdiction, is within the discretion of the agency, or is a matter for Congress to resolve. To make these decisions, the judges must exercise their skills of statutory interpretation as to highly complicated and often ambiguous environmental statutes. Arguably, the entire exercise diverts attention away from the underlying controversy so that the real implications of the court's decision are shrouded in an abstract assessment of the role of the federal judiciary.

The preceding overview suggests that how an appellate court enforces congressional policy while deferring to agency expertise should not be reduced to simplistic assertions premised upon policy preferences. Traditional polar positions of pro-environment or pro-development do not satisfactorily explain a court's environmental decisions. Indeed, none of the cases discussed herein can be honestly viewed as merely the expression of the court's attitude toward the condition of the environment. Understanding the Seventh Circuit's perspective requires a more subtle inquiry as to the following questions: (1) does the court substantively expand the use of the government's planning function by interpreting statutes so as to fulfill their environmental protection purposes, with the concomitant result of delaying industrial development? (2) how does the court respond to allegations of agency nonfeasance—does it fill the

3. Garland, *supra* note 2, at 562-63.

apparent void through the exercise of its own authority? (3) does the court manipulate jurisdictional issues to raise or lower the procedural opportunities to hear challenges to environmental decisions (or the lack thereof)? and (4) does the court expand legal remedies and liabilities to advance environmental accountability?

B. Perspectives on Environmental Jurisprudence

Further complicating the analysis is the fact that the government's role as environmental regulator changes depending on the type of statute authorizing its conduct (or lack of conduct). It is useful in this context to recognize that this role is at least three-dimensional. In its first dimension of environmental regulation, federal agencies must comply with an array of planning,[4] management,[5] and preservation[6] statutes, including the National Environmental Policy Act of 1970 (NEPA)[7] which is the subject of two recent Seventh Circuit decisions discussed herein.[8] These statutes authorize the government to establish decisionmaking systems regarding the use of public resources that specify in advance how resources are to be used (substantive regulation) and how executive decisions regarding such use are to be made (procedural regulation). The exercise of this authority is obviously prior to any environmental impact; indeed, the purpose of this authority is to minimize, in advance, adverse environmental impacts.[9]

The second dimension of environmental regulation comprises statutes, notably the Clean Air[10] and Clean Water Acts,[11] that limit emissions of pollution. These statutes establish complex regulatory systems administered by the Environmental Protection Agency (EPA), the object

4. *E.g.*, The Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. §§ 1451-64 (1988); The Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. §§ 1600-87 (1988).

5. *E.g.*, The Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-84 (1982).

6. *E.g.*, The Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-44 (1988).

7. 42 U.S.C. §§ 4321-70a (1982).

8. Both River Road Alliance v. United States Corps of Eng'rs, 764 F.2d 445 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986) and Van Abbema v. Fornell, 807 F.2d 663 (7th Cir. 1986) concern Environmental Impact Statements under NEPA.

9. Agencies must consider that actions may not only accomplish a short-term end but also may profoundly affect the future in foreseeable and unforeseeable ways. This consideration must take place prior to an irretrievable commitment of resources. These provisions force administrative agencies to recognize that a decision does not simply impact upon one static moment in time but has consequences long after it is too late to stop it, and that the decisions our society makes now will shape the society our children will inherit, and may partially determine what our children will be like.

Kellman, *Anxiety Over the TMI Accident: An Essay on NEPA's Limits of Inquiry*, 51 GEO. WASH. L. REV. 219, 236 (1983).

10. 42 U.S.C. §§ 7401-7642 (1988).

11. 33 U.S.C. §§ 1251-1386 (1988).

of which is to require that facilities emit no more than the technologically feasible minimum levels of harmful substances.[12] This is a form of traditional health and safety regulation whereby Congress delegates to an executive agency the task of supervising industry's selection of technology and, in some cases, of forcing the advance of technological development.[13] The regulatory authority here is contemporaneous with the environmental impact. Four of the recent Seventh Circuit decisions discussed herein involve challenges to EPA's regulation of pollution emissions.[14]

The third dimension of environmental regulation includes statutes such as CERCLA[15] and the Surface Mining Control and Reclamation Act[16] as well as sections of other statutes (*e.g.*, the oil spill sections of the Clean Water Act[17] and the imminent hazard section of the Resource Conservation and Recovery Act[18]) designed to respond to specific types of environmental injury. These statutes reflect the government's authority to enforce accountability by establishing procedures to determine the government's response to and legal liability for specified environmental abuses. These statutes are fundamentally remedial in nature, providing that the government act after the injury has been suffered. One of the recent Seventh Circuit decisions discussed herein is within this category.[19]

A court may be regarded as "activist" or "restrained" on the basis of how it approaches these cases in each of these three categories. An activist court, inspired by the broad purposes of most environmental legislation[20] and concerned that regulatory agencies may be "captured" by the objects of their regulation, may exercise the full measure of their

12. Each statute's provisions for pollution control of new facilities provides for the most stringent emission limitation. Compare the requirement of best practicable control technology (BPT) currently available in the Clean Water Act, 33 U.S.C. § 1314(b)(1)(A) (1988), with the requirement of new source performance standards in the Clean Air Act, 42 U.S.C. § 7411 (1988).

13. *See generally* Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

14. These four cases are: Illinois State Chamber of Commerce v. United States EPA, 775 F.2d 1141 (7th Cir. 1985), Bethlehem Steel Corp. v. United States EPA, 782 F.2d 645 (7th Cir. 1986), American Paper Inst. v. United States EPA, 890 F.2d 869 (7th Cir. 1989), and Chicago Ass'n of Commerce & Indus. v. United States EPA, 873 F.2d 1025 (7th Cir. 1988).

15. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-75 (1988).

16. 30 U.S.C. §§ 1201-11, 1221-1328 (1988).

17. 33 U.S.C. § 1321 (1988).

18. 42 U.S.C. § 6973 (1988).

19. Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988) concerns potential liability under CERCLA.

20. "[F]ederal courts reviewing administrative action have accorded special protection to environmental interests through the use of nonconstitutional controls, such as statutory construction and the imposition of procedural safeguards." Stewart, *The Development of Administrative and Quasi-*

power and discretion to effectuate a pro-environment policy.[21] An environmental activist court views the planning function as designed to promote the optimally beneficial action to fulfill the broad environmental mandate contained in the purpose sections of NEPA and like legislation. It will broaden both the application of planning statutes as well as the requisite level of agency evaluation of alternatives. As to pollution control legislation, an activist court fills gaps in the enforcement of statutory regimes with its own equitable powers or federal common law. Accordingly, such a court expands private citizens' access to challenge agency action. As to accident response legislation, an activist court imposes liabilities in a way that tends to ensure that someone will pay for the environmental liability even if that someone is not the cause of the injury according to tort law. This approach is generally associated with the Court of Appeals of the District of Columbia during the 1970s,[22] but has lost favor in the past decade.[23]

A second and quite opposite approach, grounded on concerns that the judiciary is counter-majoritarian, is embodied in the concept of judicial restraint that has guided much of the Supreme Court's environmental decisionmaking in the past decade.[24] As Justice Rehnquist wrote: "The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to re-examination in the federal courts under the guise of judicial review of agency action."[25] A restrained court will refuse to demand more than the minimum administrative procedures specified by the Administrative Procedure Act, regardless of whether those procedures satisfy the purposes of the regulatory legislation. A restrained court, facing agency nonperformance, will demand that statutory trigger mechanisms be fully satisfied before it requires that the agency take action to control pollution; if agency nonperformance prevents regulatory progress, then so be it. Accordingly, a court motivated by concepts of judicial restraint will not lower barriers to environmental litigation—in extreme form, jurisdic-

Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 IOWA L. REV. 713, 717 (1977).

21. *Id.* at 728-29.

22. "The 'paramount importance' attributed to environmental values serves to grab the court initially and causes the court to be especially attentive in its review process—to see whether the Government has acted to give due protection to the environment." Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974). *See also* Ethyl Corp. v. United States EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

23. Levy & Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 346 (1989).

24. *Id.* at 353.

25. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978).

tional doctrines will be manipulated to preclude judicial review. Finally, a judicially restrained court will impose liabilities for environmental injuries according to its semantic interpretation of congressional policy rather than on an independent assessment of the purpose of those remedies.

In an article addressing the Seventh Circuit's environmental decisions in the early 1980s,[26] Professor Glicksman identified the early roots of judicial activism in environmental litigation through the early 1970s and traced activism's subsequent decline through a line of Seventh Circuit decisions involving the pollution of Waukegan Harbor. Professor Glicksman described the contraction of judicial review and the concomitant elimination of environmental rights and remedies. The doctrine of institutional restraint, concluded Professor Glicksman, was in the process of replacing early concepts of judicial activism:

> The Waukegan Harbor litigation indicates that the Seventh Circuit is more reluctant than previously to use each of the techniques of institutional activism to promote the objectives of federal environmental statutes . . . . The Seventh Circuit's reduced reliance on the techniques of institutional activism appears to stem from its emphasis on the need for judicial economy and its fear of usurping the authority of the legislative and executive branches.[27]

A few years later, it is clear that the Seventh Circuit has abandoned judicial activism as a legitimate basis upon which to decide environmental law cases. The doctrine of judicial restraint has a powerful advocate in Judge Posner, the author of two of the seven decisions discussed herein,[28] each of which gave rise to a spirited dissent. In advocating judicial restraint, Judge Posner not surprisingly relies on the language of economic analysis, but rarely does this rhetoric enlighten decisionmaking. On the contrary, Judge Posner's reasoning often clouds the issues presented by the case; invariably, that reasoning results in the adoption of the pro-development position.

It is not altogether clear, however, that the approach of judicial restraint has won an unqualified victory. The recent decisions of the Seventh Circuit suggest that out of the conflict between judicial activism and restraint, some of the judges in some cases have adopted a perspective that may be identified as strict scrutiny. This approach recognizes that

26. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and The Environment*, 63 CHI.-KENT L. REV. 209 (1987).

27. *Id.* at 233.

28. Judge Posner wrote the opinions in River Road Alliance v. United States Corps of Eng'rs, 764 F.2d 445 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986) and in Bethlehem Steel Corp. v. United States EPA, 782 F.2d 645 (7th Cir. 1986).

while judges should not impose their own environmental agenda, neither should the court endorse shabby reasoning by administrative agencies, much less outright abdication of delegated responsibility. In contrast to the position taken by Judge Posner, other seventh circuit judges assert the judiciary's role in strictly scrutinizing agency decisions, not on the basis of environmental policy preferences, but on the basis of whether the agency demonstrates reasoned decisionmaking. Most notably, the three opinions written by Judge Cudahy[29] evince considerable annoyance with agency decisions and a willingness to engage in rigorous scrutiny of their bases. The tone of Judge Cudahy's opinions is professorial as he examines the logical inadequacies of banal assertions offered by agencies seeking judicial deference. His approach is activist only in the institutional sense: he does not advocate that the court follow a policy agenda, but that it should actively intrude on agency discretion where the exercise of that discretion is not analytically well founded.[30] Regardless of whether one agrees with his decisions or not, they exemplify how an able jurist raises the level of inquiry in the pursuit of more reasoned law enforcement—a notable accomplishment in this era of judicial acquiescence.

The seven decisions under examination herein are organized according to the three dimensions of environmental regulation. The first category, consisting of two decisions, concerns the adequacy of environmental planning for new facilities pursuant to NEPA. The second category, consisting of four decisions, concerns the legitimacy of EPA decisions pursuant to its authority to enforce pollution control statutes. The third category, consisting of one decision, concerns the imposition of liability on private parties for damage to the environment.

III. CONSIDERATION OF ENVIRONMENTAL IMPACTS UNDER NEPA

NEPA's brief statement of general principles requires federal agencies to consider values of environmental preservation in their spheres of decisionmaking[31] and prescribes judicially enforceable procedures to ensure that those values are fully promoted.[32] Section 101[33] declares a

29. The three opinions written by Judge Cudahy are Van Abbema v. Fornell, 807 F.2d 663 (7th Cir. 1986), Illinois State Chamber of Commerce v. United States EPA, 775 F.2d 1141 (7th Cir. 1985), and Chicago Ass'n of Commerce & Indus. v. United States EPA, 873 F.2d 1025 (7th Cir. 1988).

30. For an important recent discussion of the distinction between policy activism and institutional activism in the sphere of environmental law decisions, see Levy & Glicksman, *supra* note 23.

31. "NEPA remains the foundation for all that followed because it made protection of the environment 'to the fullest extent possible' a duty of every federal bureaucrat, agency and department." Kean, *The Environmental Movement in 1985: Between NEPA and 2000*, 10 COLUM. J. ENVTL. L. 199, 199-200 (1985).

32. In 1978, the Council on Environmental Quality (CEQ) promulgated regulations for the

broad national commitment to protecting and promoting environmental quality. Yet, NEPA does not specify particular results;[34] it requires only that environmental costs and benefits receive due consideration in developmental decisions.[35]

Section 102(2)(c)[36] requires that all agencies prepare[37] a detailed statement (Environmental Impact Statement or EIS) that fully discusses the impact of a proposed development on the environment, the environmental costs that might be avoided, and alternative measures that might alter the project's cost/benefit equation.[38] The EIS requirement serves two purposes: it forces agencies to evaluate rigorously the environmental consequences of the contemplated action,[39] and it documents how the decision was reached, thereby affording public access to the considered information and facilitating judicial review.[40]

This is potentially far-reaching since an agency in preparing an EIS must examine all reasonably available means of accomplishing a specific goal. Thus, the agency's decision must result from a broad examination of opportunities and methods and specify that the optimally beneficial action has been selected while alternatives are still available.[41] Although a proposed action may proceed even with adverse environmental effects if other values outweigh the environmental costs, the EIS serves the func-

preparation of Environmental Assessments (EAs) and EIS's. These guidelines set out specific elements that an agency must produce in a Record of Decision (ROD). First, the agency must set out its final decision; second, it must discuss every alternative action considered with recognition of those that it preferred for environmental reasons; and third, the agency must identify every feasible precaution available to protect the environment and why it was or was not adopted. *See generally* Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 233-242 (1989).

33. 42 U.S.C. § 4331 (1982).

34. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) (per curiam); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

35. Judicial scrutiny, however, does not extend to the substantive merits of an agency's decision. Assuming therefore, that an agency has examined the environmental consequences of its proposed action fully, the courts will not second-guess an agency's eventual decision even if the decision is to proceed with an environmentally unsatisfactory project. Andreen, *supra* note 32, at 209.

36. 42 U.S.C. § 4332(2)(c) (1982).

37. Actually, NEPA does not require that the agencies actually prepare the EIS themselves, only that they evaluate the EIS after delegating preparation to private contractors. An unresolved question is what standard of evaluation must be met by the agency in adopting the EIS as its own. *See* Frank, *Delegation of Environmental Impact Statement Preparation: A Critique of NEPA's Enforcement*, 13 B.C. ENVTL. AFF. L. REV. 79, 84-85 (1985).

38. "NEPA exhorted agencies to broaden their horizons, and not to measure everything with benefit-cost ratios." Parenteau, *NEPA at Twenty*, 6 ENVTL. F., Sept.-Oct. 1989, at 14, 15.

39. That Congress explicitly intended that NEPA be as rigorous as possible is established by the legislative history of the action-forcing measures introduced by the Senate and eventually included in the statute. *See* Andreen, *supra* note 32, at 221-23.

40. Robertson v. Methow Valley Citizens Counsel, 109 S. Ct. 1835, 1845 (1989).

41. *See generally* Pollack, *Reimagining NEPA: Choices for Environmentalists*, 9 HARV. ENVTL. L. REV. 359, 373-74 (1985).

tion of offering other governmental bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures.[42]

Litigation over NEPA may be divided into two large categories of issues. First, to what activities does NEPA's EIS-preparation requirement apply? This threshold requirement is important since if permitting a particular development does not compel an agency to prepare an EIS, the developer saves considerable time and expense, the environmental impacts remain unanalyzed, and no court need consider the sufficiency of the agency's compliance with section 102(2)(c).[43] Second, if an EIS must be prepared, what is its scope? Most important, what is the scope of reasonable alternatives to the proposal that must be discussed?[44]

As to each of these questions, the underlying issue for the judiciary concerns the standard of judicial review. That is, in the event that an agency decides either that no environmental impact statement is necessary, or that a required EIS is not inadequate for failing to discuss a conceivable alternative, what should be the basis for a court to reverse such a decision? Through a series of decisions beginning in the late 1970s and up through two recent decisions, the Supreme Court has consistently narrowed the scope of judicial review.[45]

The question of what is the appropriate standard of review for NEPA impact statements—the arbitrary and capricious test of the Administrative Procedure Act[46] or a "reasonableness" standard—has been debated for over a decade in the circuit courts.[47] Recently, the Supreme Court employed the "arbitrary and capricious" standard of the Administrative Procedure Act to uphold a determination that a supplemental EIS was not required in view of new information.[48] Justice Stevens, writing for the unanimous court, recognized the difference among some circuits, but dismissed the debate because the distinctions between the standards of review are difficult to discern.[49] Thus, in any given case, whether the agency's action is "arbitrary and capricious" may depend on how rigor-

42. *Robertson*, 109 S. Ct. at 1846. *See generally* Kellman, *supra* note 9.

43. *See generally* Fogelman, *Threshold Determinations Under the National Environmental Policy Act*, 15 B.C. ENVTL. AFF. L. REV. 59 (1987).

44. *See* Kellman, *supra* note 9.

45. In effect, the Supreme Court has said that NEPA is a balance sheet with no bottom line. The courts may police the process to keep the agencies honest in their consideration and disclosure of the effects of the proposed projects—warts and all—but the agencies, not the courts, must make the ultimate policy calls.
Parenteau, *supra* note 38, at 16-17.

46. 5 U.S.C. § 706(2)(A) (1988).

47. C.A.R.E. NOW, Inc. v. FAA, 844 F.2d 1569, 1572-73 n.3 (11th Cir. 1988).

48. Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851 (1989).

49. *Id.* at 1861 n.23.

ously the reviewing court tests the "reasonableness" of that action. The important question, therefore, is not what to call the standard of review but how to apply it.

While there may now be more accord as to the standard of review, the content of that standard is still undefined. That is, what constitutes arbitrary and capricious conduct in the context of NEPA's impact statement requirement? In two recent NEPA decisions, the Seventh Circuit has shown that the same standard of review, applied differently to similar situations, can lead to significantly different results. Both cases involved challenges to the adequacy of the Army Corps of Engineers assessment of the environmental impacts of proposed new facilities under NEPA. In each case, the Corps had issued a permit to build a facility on the Mississippi River, but that permit issuance was challenged as failing to comply with NEPA's mandate that the Corps systematically study the environmental effects of a proposed action and develop alternatives. The two decisions graphically demonstrate the schism on the Seventh Circuit as to the judiciary's role in protecting the environment. Neither of these decisions is "landmark" in the voluminous collection of NEPA litigation, but their contrast in light of their factual similarity illustrates a fundamental difference of approach between those who would use NEPA broadly so that it might serve its intended purpose of environmental protection and those who would constrict NEPA so that it does not interfere with economic development.[50] More specifically, the cases illustrate the contrasting approaches of Judges Cudahy and Posner.

A. River Road Alliance v. United States Army Corps of Engineers[51]

The Army Corps of Engineers had granted a permit to National Marine Service, Inc. for a temporary barge fleeting facility on the Mississippi River—a facility where up to 30 barges are either anchored or moored to buoys. The planned facility would include a fleet limited to the length of six barges and would cover a seven-mile scenic stretch known as Alton Lake whose shores are undeveloped except for National Marine's shipyard a half mile north of the proposed site. The need for the proposed fleeting facility was due to congestion at one of the locks of

50. Whether there is any merit to the charge that NEPA threatens economic development is considerably in doubt.

> [I]t can hardly be said that NEPA has hurt the economy. The country has been through a deep recession and a full recovery since NEPA was passed and is currently running strong, with the usual caveats. Forces other than environmental policy would seem to be more important to the national and world economies.

Parenteau, *supra* note 38, at 15.

51. 764 F.2d 445 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986).

the Mississippi River; when that lock is replaced, the facility will be discontinued.

A scenic highway runs along the Illinois Shore beneath dramatic bluffs thus affording motorists a view of Alton Lake which, according to the Corps, "provide[s] some of the most impressive and unique vistas of any area along the Mississippi River."[52] Yet, the Corps' environmental assessment (EA) found the aesthetic impairment would be minimal since " '[i]f a motorist were proceeding along Great River road at a rate of 40 miles per hour, a fleet six barges long would obstruct his view of the river for less than 25 seconds.' "[53] Furthermore, possible impacts on downstream mussel beds and on wintering catfish were determined not to be serious. Finding no significant effect on the environment, the Corps issued a permit and operations began in 1982. The facility was shut down in 1984, however, when the district court enjoined it due to the inadequacy of its compliance with NEPA. While the district court did not order preparation of an environmental impact statement, that was the clear impact of its decision.

On appeal, Judge Posner, writing for the panel majority, began by noting that an environmental impact statement can be a lengthy and time-consuming document. "Applying for a routine permit would often be economically infeasible if an environmental impact statement were always required."[54] Consequently, the issue is "whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides."[55] For a reviewing court, it was not relevant whether the facility was an unfortunate eyesore; what is relevant is whether the Corps exceeded its authority in concluding that an EIS was not required.[56]

Turning to the issue of significant impact, Judge Posner acknowledged that the Corps "has a fund of knowledge and experience regarding the Mississippi River that judges of a federal court of appeals cannot match."[57] But Judge Posner was more than willing to pronounce as to the validity of the aesthetic concerns expressed by the plaintiffs. Referring to the fact that some witnesses had testified that they would enjoy the view of "an aquatic parking lot," Judge Posner stated "we cannot say

52. *Id.* at 447.
53. *Id.* at 447-48 (quoting the Corps' environmental assessment).
54. *Id.* at 449.
55. *Id.*
56. *Id.* at 450.
57. *Id.* at 451.

that the Corps was unreasonable in believing them and in giving some weight to their tastes, however unrefined those tastes may seem to people who prefer natural to commercial vistas."[58] In any event:

> Aesthetic objections alone will rarely compel the preparation of an environmental impact statement. Aesthetic values do not lend themselves to measurement or elaborate analysis. The necessary judgments are inherently subjective and normally can be made as reliably on the basis of an environmental assessment as on the basis of a much lengthier and costlier environmental impact statement.[59]

Since the environmental impact was small, the search for alternatives need be less extensive. National Marine Service, the applicant, had found no alternatives suitable, and the Corps was entitled not to conduct a further study: "The Corps is not a business consulting firm . . . . The Corps has to depend on the parties for such information . . . ."[60]

Judge Wood, dissenting, would have upheld the trial judge's conclusion that the Corps did not take a hard look at the environmental impacts.[61] Specifically, permitting the company to study alternative sites and determine that none was satisfactory "is a little like consulting the fox about the best location for the chicken house."[62] He also offered a very different opinion as to the importance of aesthetics. Noting that Congress created the Great River Road along the bank to provide the public with access to the scenic views that will now be a scenic view of barges, he stated: "The majority measures the visual obstruction and impact of this commercial permit area only by the length of six barges in a row which a motorist going 40 mph would pass in 25 seconds. Some motorists, I think, would drive faster than that just to get past the barges."[63]

Judge Wood's point here focuses on a deeply troubling aspect of Judge Posner's opinion for the majority. It is not so much the result that is troubling—whether NEPA requires an EIS in this situation is a question as to which reasonable minds may disagree. What is troubling is the majority's visceration of the unique aspects of NEPA analysis.

First, by establishing a presumption against EIS preparation because of time and expense, the majority skews the entire purpose of NEPA. Environmental planning is supposed to take time. It may be that Congress believed that the nation would be better off, on balance, paying the

58. *Id.*
59. *Id.* (citation omitted).
60. *Id.* at 453.
61. *Id.* at 455.
62. *Id.* at 458.
63. *Id.* at 455.

costs of EIS preparation than continuing to pay the costs of ill-planned development. By establishing a presumption against EIS preparation, Judge Posner does not merely neutralize the possibility that the time will be well spent; Judge Posner asserts the value of efficient commercial development unconstrained by appellate review.

Second, the majority's deference to the Corps' assertions both as to the minimal impacts and the lack of alternatives, based on evidence submitted by the applicant, certainly undercuts the so-called hard look doctrine. This is not a court that takes NEPA as an obligation to ask piercing questions about how administrative agencies have done their jobs—this is a court that views some evidence to justify agency decisions as sufficient for purposes of appellate review.

Third, and most troubling, is Judge Posner's professed neutrality as to the aesthetic impacts of the project: "for a motorist proceeding along Great River Road at a rate of 40 miles per hour, a fleet six barges long would obstruct his view of the river for less than 25 seconds, but some witnesses testified that they would enjoy the view of an aquatic parking lot." This assertion suggests that the only value that is legally recognizable is dollar value; all other considerations are subjective and highly individual and hence may not be legitimately factored in by judges. As such, this assertion reduces NEPA to a series of formalistic computations that signify nothing. It could be argued to the contrary that NEPA is not value-neutral but that it is the product of experience—that the nation has in this brief statute expressed its unwillingness to have scenic views obstructed by barges without sensitivity to what has been lost and to the possibility of accomplishing similar ends through alternative means. That expression is no stronger, of course, than the courts are willing to recognize; clearly, Judge Posner gives it trivial force.

B. Van Abbema v. Fornell[64]

A near mirror-image of the *River Road Alliance* case came before a different panel, and its different resolution indicates that Judge Posner's opinion may not speak for the entire Seventh Circuit.

The Corps of Engineers issued a permit to Paul Fornell to build a facility for transloading nearly 500,000 tons of coal per year from trucks to barges along the Mississippi River. Coal from the Freeman United Coal Mining Company mine in Illinois would be trucked to the facility where it would be loaded onto barges for delivery to the Muscatine Power and Water Company in Muscatine, Iowa. The proposed site of

64. 807 F.2d 633 (7th Cir. 1986).

the facility is (1) within the Warsaw Historic District which is listed on the National Register of Historic Places; (2) near the scenic outlook of the Fort Edwards State Historic Monument; and (3) the terminal of a truck route that would pass through three state parks and a private nature reserve that are sanctuaries for many wildlife species including bald eagles.

As required, the Corps prepared an Environmental Assessment (EA) which upon review led to the decision that no Environmental Impact Statement was necessary because there would be no significant impact and that a permit, subject to a variety of conditions, should issue. Judge Cudahy, writing for a unanimous court, upheld the finding of no significant impact (FONSI) because the EA evidenced a "hard look" at environmental factors.[65] "The Corps . . . undertook its assessment properly; it considered the relevant factors and it made rational decisions about the likely impacts of the proposal. The numerous special conditions that the Corps imposed on the permit also suggest that the Corps took an adequately detailed and critical look at environmental impacts and concluded that no significant effects would follow either issuance or denial of the permit."[66]

However, stated Judge Cudahy, it does not follow automatically from a finding of no significant impact that the issuance of a permit is necessarily in the public interest. The Corps is legally obligated to consider the economics of alternative means to accomplish the same goals. Yet the Corps never adequately evaluated an existing facility at Quincy, some 35 miles downriver of Warsaw, except to draw nearly verbatim from Fornell's letter in support of his application to build the Warsaw facility. Indeed, the Corps' Rock Island District Engineer had recommended against issuing the permit because there was no overwhelming need to approve the proposed facility when other alternatives were available.[67] "A review of the record reveals that the Corps never adequately evaluated Quincy, the 'no-build' alternative."[68]

Furthermore, the Corps ignored the details of its economic analysis of building at the proposed site. Specifically, the economic advantages of the new facility were based on reduced trucking and barge costs, but its analysis was apparently based on inaccurate mileage and unverified rate

65. Specifically, the Corps had evaluated possible threats to public health and safety, unique aspects of the proposed site such as nearby parks or cultural resources, whether special cumulative effects are likely, the degree to which historic districts and landmarks would be adversely affected, and the degree to which endangered species might be threatened. *Id.* at 637.

66. *Id.*

67. *Id.* at 641.

68. *Id.* at 640.

estimates.[69] When these deficits were brought specifically to the attention of the Corps, the Corps offered no explanation: "[W]e cannot approve a public interest review entirely indifferent to the facts. The Corps has a duty to ensure the accuracy of information that is important to the decision it is making, at least when obvious errors are brought clearly to its attention."[70]

While Judge Cudahy recognized that the Corps faced a close decision, no mention was made of judicial deference. Judge Cudahy concluded that the Corps conducted no "substantial investigation of alternatives on its own" but rather relied "upon a record replete with important factual inconsistencies and ambiguities that the Corps did not attempt to resolve."[71] The alleged economic benefits may indeed outweigh the environmental costs, but it was impossible to determine whether the Corps' consideration of alternatives was reasonable in light of the specific factual challenges tendered to the Corps. "An overall public welfare review cannot be deemed reasonable when the economic half of the balance is obscured by a record of miscalculations followed by recalculations apparently intended only to bolster a decision already made."[72] The case was remanded so that the Corps could consider alternatives and make a reasoned assessment of the public welfare.

The contrast here with the decision in *River Road Alliance* is striking. In Judge Cudahy's opinion there is no mention of the costs or delays inherent in EIS preparation—they do not appear to be relevant considerations. Instead, the opinion strictly scrutinizes the Corps' evidence and finds it wanting. Most important, Judge Cudahy's opinion demonstrates an appreciation of the serious environmental consequences that are caused by lax and unverified administrative approvals of proposed developments.

The difference between Judge Posner and Judge Cudahy in these two decisions is profound for the future of NEPA law. Judge Cudahy seems far more concerned with upholding the accountability of the environmental planning process, and accordingly he adopts a strict scrutiny approach. This approach can not seriously be labelled as pro- or anti-environmental, yet it is an approach that recognizes the broad and important purposes of NEPA and strives to realize those purposes. Judge Posner seems far more concerned with permitting the marketplace, as regulated, to function efficiently; accordingly, he adopts the posture of

69. *Id.* at 641.
70. *Id.* at 642.
71. *Id.*
72. *Id.* at 643.

deference. As to the role of the courts in enforcing the broad purposes of NEPA, Judge Posner's approach could not stand in more stark contrast to Judge Cudahy's.

IV. JUDICIAL REVIEW OF EPA POLLUTION CONTROL REGULATION

The regulation of industrial emissions of pollution into the air and water involves a complex interaction between Congress, EPA, participants in industry, state governments, and the federal courts. Both the Clean Air Act and the Clean Water Act delegate to EPA the authority to issue permits that require the implementation of advanced technology to control emissions. Beneath their exceeding complexity, the basic premise of both statutes is the idea that pollution control technology requirements should strive for uniformity in the sense of imposing the maximum obligations uniformly applicable up to the point of causing a shutdown of the plant or industry. Both statutes require that (1) each state prepare a plan to achieve air and water quality standards; and (2) according to the terms of that plan, each polluter must install state of the art technology to reduce emissions. Both statutes mitigate these obligations by permitting polluters to "offset" their pollution against reductions in emissions from other sources within their geographic proximity.[73]

Litigation under these pollution control statutes almost invariably involves a challenge to the authority of EPA; that is, each case presents fundamentally a question of administrative law as to whether the EPA rule or decision that is under challenge is a valid exercise of the agency's statutory powers as delegated by Congress. In the four controversies before the Seventh Circuit that are discussed herein, the challenges concerned; (1) whether EPA properly disapproved a state's request to modify its clean air plan; (2) whether an EPA proposed rule is appropriate for appellate review; (3) whether another rule may be reviewed by a federal court; and (4) whether the agency's refusal to issue a rule supports a claim for judicial relief.

By the way these issues are formulated in litigation, it is clear that the underlying environmental policy is never in question. In each case, the dispute turns on three questions: (1) what did Congress intend as to the particular aspect of the statute being challenged? (2) has EPA properly acted within the scope of its delegated authority? and (3) who may

73. For an informative debate regarding the merits of offsets, see Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267 (1985) and Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

assert a challenge, in what court, and when is that challenge ripe? How a court answers these questions suggests precious little about the judges' attitudes toward the environment; far more indication is there of the judges' attitudes toward the respective roles of administrative agencies and the courts within our constitutional system.

In the four controversies discussed herein, the Seventh Circuit appears torn between two considerations. First, this court consistently exhibits its profound displeasure with the work of the Reagan EPA, finding that the agency has in some important respect failed to perform its statutory obligations or has performed them without a reasonable basis. Second, this court, almost as consistently, manifests an unwillingness to remedy EPA's problems—that is a task for the other branches of government. In these decisions, the court confronts the dilemma of judicial review of an agency it finds deeply troubling but which it believes it is powerless to correct out of respect for the statutory limits on its own authority. Yet, notably missing from the court's resolution of these issues are references to the principle of deference to agency discretion which is so often used as justification for decisions by other circuit courts.

The judges of the Seventh Circuit do not argue about the desirable quality of the air or water. These decisions instead reveal an appellate court struggling over far more abstract questions: (1) by what standard should the reasonableness of EPA's decisions be reviewed? (2) what is the consequence of EPA's failure to perform its statutory duties? and (3) what is the scope of appellate court jurisdiction under pollution control statutes to review EPA activity? These decisions are important more because of the intellectual prowess devoted to answering these questions about judicial review of an administrative agency than for their substantive results.

The four decisions discussed herein represent two each from the Air and Water Acts. Two involve challenges to the EPA's regulations regarding permissible offsets; two involve challenges to decisions to grant/deny specific permits. These disputes arose randomly, connected only by chronology and geography. It is difficult, of course, to draw conclusions from such a small and disparate sample of cases interpreting statutes of such breadth and complexity. Further ambiguity derives from the fact that in two cases (one air, one water), an affirmative regulation of EPA is under challenge; in two cases, the allegation is of inadequate EPA action. Perhaps what is most noteworthy is that in none of the cases did the Seventh Circuit definitively resolve the substantive issue between the par-

ties: in one case the court remanded for more information;[74] in two cases the court denied jurisdiction to hear the claim;[75] and in the fourth case, it denied it had the power to force the agency to act.[76]

A. Judicial Review of EPA Clean Air Act Decisions Under the "Arbitrary and Capricious" Test—Illinois State Chamber of Commerce v. United States EPA[77]

The Clean Air Act[78] establishes a combined state and federal program to control air pollution. While EPA sets national ambient air quality standards (NAAQS), each state must adopt and submit to EPA for approval an implementation plan specifying the manner in which the NAAQS will be attained within designated air quality control regions (AQCRs).[79] Under the Clean Air Act's enforcement scheme, the United States is divided into over two hundred forty AQCRs; the air in each region must meet national standards for criteria pollutants. The quality of the ambient air in the location of a facility is critical in determining the requisite level of compliance for a Clean Air Act permit. If the air in a region does not meet federal standards, regardless of from where the pollution originated, the industrial facilities in or entering that region face greater regulatory burdens.

The Clean Air Act requires that levels of pollutants in the ambient air in each area not exceed the national primary standards set by the EPA (0.12 part per million in the case of ozone). If a region has pollution levels in excess of national standards, it is designated a "nonattainment area." One consequence of being in a nonattainment area is that new sources may be constructed only under limited conditions, and existing sources must adopt reasonably available control technologies. Specifically, new facilities may be constructed in nonattainment areas only pursuant to EPA's "emissions offset" policy: existing sources within that same area must reduce emissions to "offset" the newly added emissions. To obtain a permit, a prospective developer is required to establish that the new facility complies with New Source Performance Standards (NSPS) *and* that the reduction of emissions from another facility would result in no net increase of pollution into the region because offsets have

74. *Illinois State Chamber of Commerce*, 775 F.2d at 1151.
75. *American Paper Inst.*, 890 F.2d at 878; *Bethlehem Steel Corp.*, 782 F.2d at 655.
76. *Chicago Ass'n of Commerce & Indus.*, 873 F.2d at 1032-33.
77. 775 F.2d 1141 (7th Cir. 1985).
78. 42 U.S.C. §§ 7401-7642 (1982).
79. For more complete discussions of the approval process for a SIP, see Delaney v. EPA, 898 F.2d 687 (9th Cir. 1990), and Greater Cincinnati Chamber of Commerce v. United States EPA, 879 F.2d 1379 (6th Cir. 1989).

been obtained from existing facilities in the region. Such offsets are, of course, unnecessary in attainment areas where compliance with technology standards is sufficient for a permit. Thus, classification as attainment or nonattainment has significant implications for new development.

Each state sets the geographic boundaries of AQCRs, and submits to EPA a list of those regions which meet NAAQS and those that are nonattainment. Furthermore, each state may redesignate its air quality control regions "for purposes of efficient and effective air quality management,"[80] upon a showing that there have been no violations within an area for the past year. Such redesignation becomes effective only upon EPA's approval.

This controversy concerned the proposed redesignation of Kane and DuPage Counties in the Chicago urban area from nonattainment to attainment. The AQCR of Chicago was established in 1978. That submission included a list of counties, each of which was nonattainment, including Kane and DuPage. In 1983, Illinois applied for redesignation of Will and McHenry Counties to attainment status for ozone, and EPA approved the change. Shortly thereafter, Illinois proposed to upgrade Kane and DuPage Counties and submitted data showing that no violations had been monitored in those counties, but EPA denied the proposal. EPA reasoned that because the prevailing winds are from south through west, ozone precursor emissions from DuPage and Kane Counties can contribute significantly to excess ozone levels in Chicago; consequently, these counties must continue to be considered as part of the Chicago urbanized ozone nonattainment area. The State of Illinois and the Illinois Chamber of Commerce petitioned for review, alleging that EPA's refusal to redesignate these two counties was arbitrary and capricious.

That the problem here concerned ozone added a further dimension of complexity to the controversy. Ozone is not directly discharged into the atmosphere but forms under appropriate meteorological conditions from precursors known as volatile organic compounds. Because this reaction takes time, ozone concentrations tend to form downwind of the sources that produce them. Thus, ozone is a regional rather than a local phenomenon. EPA has advocated allowing ozone created by new sources to be offset by reductions anywhere within a large, urban, ozone-producing area. Consequently, DuPage and Kane "can contribute significantly to ozone NAAQS exceedances which continue to be observed in the Chicago area," and "must continue to be considered as part of the

80. 42 U.S.C. § 7407(e)(1) (1982).

Chicago urbanized ozone nonattainment area."[81]

According to Judge Cudahy, writing for the majority,[82] EPA could have justified its refusal to reclassify DuPage and Kane Counties on the basis of at least four different theories. First, a nonattainment area must include all the sources that contribute to pollution in that area. This theory, ruled Judge Cudahy, does not explain the original division of areas into counties, or the separate upgrading of Will and McHenry Counties which are sources of pollution in the Chicago area. Since in the case of ozone the areas would have to be large, in some cases the polluted area itself might contribute nothing to the pollution. Moreover, a look at the boundaries approved by EPA in the nation's eight largest metropolitan areas shows that no attempt was made to draw up the boundaries in such a way as to track the movement of ozone away from the sources as this theory would require.

The second and third theories were that the nonattainment status of DuPage and Kane Counties may be based on measurements either outside the area on the basis of monitors downwind or on the basis of ozone *precursors* monitored within the area itself. Judge Cudahy made it clear that the statute authorizes EPA to monitor downwind of the area itself. However, there is no evidence that EPA has in fact adopted either of these measurements. Thus, EPA should clarify the standards as to when a county is to be held accountable for ozone outside its borders.

The fourth theory is that an urban ozone nonattainment area must include the entire urbanized area and no part of the urbanized area may be upgraded until the entire area reaches attainment. Accordingly, the fact that the Chicago area has been listed by counties since 1978 may be no more than an accident of recordkeeping. While Judge Cudahy found elements of this theory persuasive, it failed to explain how the attainment status of an urban area is to be changed and is inconsistent with the action EPA took in originally approving the Illinois ozone list for the Chicago area by counties. That EPA changed its position is acceptable,

> but it must do so on the basis of a reasoned analysis. If EPA changed its policy, it did not say so; and neither did it explain how its justification of its most recent action could be made consistent with its earlier actions, if no change in policy was involved. It must do one or the other. If it has changed its policy, it must explain how and why; if it has not, it must articulate an explanation that will account for both the earlier and the most recent actions it has taken. Until it has done one

81. 48 Fed. Reg. 46,084 (1983) (cited in *Illinois State Chamber of Commerce*, 775 F.2d at 1145).

82. Judge Cudahy was joined by Senior Circuit Judge Pell. Judge Coffey dissented.

or the other, its actions will appear to be arbitrary.[83]

The court vacated EPA's decision and remanded the matter to EPA for clarification of the grounds upon which it will deal with the Illinois request. In refusing to uphold EPA on a redesignation decision for the first time, it is clear that the Seventh Circuit dealt a blow to the agency's authority; it is not at all clear that Kane and DuPage Counties won. Illinois suggested that the court reverse EPA's decision, but the court flatly refused: "It is not true that the record supports redesignation."[84] Earlier in the opinion, Judge Cudahy indicated that although EPA's arbitrary decision cannot be upheld, redesignation of DuPage and Kane Counties is troublesome:

> It is essential to the success of the Clean Air Act that these controls [emissions offsets] apply in appropriate areas, and we refuse to construe the law in such a way that the controls will apply to areas that suffer from but do not produce ozone pollution but not to areas that produce but do not suffer from such pollution . . . . The consequences of a mistaken upgrading are extremely serious.[85]

It is striking that the Seventh Circuit would admonish EPA for failing to give the states a clear understanding of how areas will be evaluated; indeed, it is in direct conflict with the other two circuit court decisions on this question. Faced with a virtually identical situation in which EPA had refused to redesignate Lorain County, Ohio, an upwind suburban area of Cleveland, despite monitoring data showing Lorain's compliance with NAAQS, the Sixth Circuit in *Ohio v. Ruckelshaus*[86] held that to have denied redesignation was a permissible exercise of EPA's authority.[87] The Sixth Circuit recognized EPA's authority "to deny redesignation with respect to a component of a nonattainment area which produces a substantial portion of the area's pollution even though the air within that component tests at an acceptable level."[88] Similarly, the Ninth Circuit in *Western Oil & Gas Association v. United States EPA*[89] has ruled that the statutory sections providing for redesignation "provide for considerable EPA discretion in designating area boundaries large enough to achieve the purposes which underlie the classification scheme."[90]

Judge Coffey's dissent in *Illinois State Chamber of Commerce* simi-

83. 775 F.2d at 1147 (citation omitted).
84. *Id.* at 1151.
85. *Id.* at 1150.
86. 776 F.2d 1333 (6th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).
87. *Id.* at 1339.
88. *Id.* at 1340.
89. 767 F.2d 603 (9th Cir. 1985).
90. *Id.* at 606. *See also* Arizona v. Thomas, 824 F.2d 745 (9th Cir. 1987).

larly stressed judicial deference. In his opinion, EPA has consistently followed a policy that any county in the Chicago urban area contributing to the Chicago urban area's ozone problem will remain in nonattainment status until the Chicago urban area problem of ozone is adequately controlled and thus reaches attainment status.[91] This areawide designation conforms with EPA's attempt to control the ozone problem. In order to reach its goal of attaining compliance with national air standards, EPA suggested that the urban area nonattainment zone include the sources of the ozone affecting the urban area's air quality. According to Judge Coffey, the scope of review under the "arbitrary and capricious" standard is limited; agency action must be upheld if its path may reasonably be discerned.[92] Since a review of the administrative record reveals that EPA had consistently considered the entire urban area to be one zone for purposes of establishing that area's attainment/nonattainment status, the majority's decision to remand does not follow the proper standard for review.

EPA's task on remand—to clarify the basis of its delineation of the Chicago-area AQCR for ozone—may ultimately be impossible since there is little policy rationale underneath the division of the United States into two hundred forty regions, especially as to ozone which is highly subject to airborne transport. The statutory purpose of redesignation is to promote "efficient and effective air quality management."[93] However, an increasing body of scientific opinion establishes that air pollution travels long distances and, consequently, that one region's pollution may be the result of facilities far upwind. Indeed, as our scientific understanding of air pollution as a global rather than a local phenomenon grows, the reason for AQCR delineation must be based on some notion of administrative convenience rather than on a sense that pollution remains where it is emitted. Although the court's insistence on rational decisionmaking is admirable, it is applied in a context which is, by design, somewhat arbitrary. Although that basis is, as Judge Cudahy holds, difficult to discern, the court's demand for logical coherence may ultimately be frustrated by the absurdity of trying to clean the air by focusing on each small section of the nation separate and apart from its neighbors.[94]

Furthermore, it is striking that every party in the litigation lost.

91. 755 F.2d at 1151.

92. *Id.* at 1157.

93. 42 U.S.C. § 7407(e)(1) (1982).

94. It is noteworthy that under the Clean Air Act amendments as proposed at the time this Article is being written provide that monitoring for purposes of issuing clean air permits must be done on a statewide basis and that emissions levels will be technology-based (best available control technology) rather than based exclusively on ambient air quality.

The State of Illinois was certainly unsuccessful in redesignating DuPage and Kane Counties, and the court explicitly disagreed with the contention that intra-county monitoring showing compliance with NAAQS necessarily justified redesignation. Certainly, EPA was unsuccessful in asserting its authority to regulate the division of areas into AQCRs. EPA must go back and explain the bases of its refusal to redesignate, but its prior inconsistencies will render its task difficult to support on review. In *Illinois State Chamber of Commerce*, the Seventh Circuit has sent one of the strongest messages delivered in recent years in favor of strict scrutiny of EPA decisions; yet in so doing, it calls into question whether such strict scrutiny is beneficial to anyone.

B. *Appellate Jurisdiction Under The Clean Air Act*—Bethlehem Steel Corp. v. United Stated EPA[95]

The *Bethlehem Steel* decision is extremely complex and, in the end, furthers the interests of no one. It is a fine example of technical sophistry that lacks reference to any value other than exultation of semantic distinctions. Ultimately, the *Bethlehem Steel* decision needlessly complicates appellate review of compliance with the Clean Air Act and demonstrates that at least a majority of this panel simply does not want to get involved.

At issue were multiple challenges to EPA's approval of the portion of Indiana's implementation plan that concerned pollution from coking operations in nonattainment areas. Each state's implementation plan must, of course, strictly regulate existing facilities where the national air quality standards have not yet been attained. Lake County, Indiana, is precisely such a nonattainment area in part because of the large volume of steel produced there. Coke is an input into the production of steel made by heating coal in virtually airless ovens that generate a dense mixture of gases known as coke oven gas which can leak out of steel plants and into the atmosphere. Two of EPA's orders partly approving and partly disapproving Indiana's SIP revisions for coking ovens were challenged respectively by three steel companies and by a citizens group, Citizens for a Better Environment (CBE).

The steel companies challenged (1) EPA's decision to discontinue consideration of a proposed regulation relating to the opacity of emissions from coke oven batteries, and (2) EPA's disapproval of parts of Indiana's plan regulating coke oven doors. The proposed opacity regulation concerned the difficulties of measuring the intermittent leakage of

95. 782 F.2d 645 (7th Cir. 1986).

coke oven gas; to solve the impracticabilities of constant monitoring, EPA has long employed a standard of opacity—the degree to which an observer can see through a plume of coke oven gas. Indiana's original plan, submitted to EPA in 1972, contained a regulation which placed a forty percent limitation on the opacity of emissions. This regulation was changed in 1983 by two EPA orders, but one of those orders was struck down in an earlier Seventh Circuit decision[96] leaving the original 1972 regulation in effect. The Seventh Circuit unanimously agreed that to order EPA to re-evaluate an earlier proposal when it has already begun a rulemaking proceeding on a new opacity standard would "smack almost of harassment of this harassed agency."[97]

The steel companies also challenged as unreasonable EPA's disapproval of Indiana's implementation plan provision regarding leaks from coke oven doors. Indiana had provided that ten percent of all the doors to each battery, plus four doors in the battery, would be allowed to leak; EPA said the most it would allow to leak in each battery would be ten percent of operating doors, plus four. The difference was that if there were unused capacity, Indiana's proposal would allow leakage from ten percent plus four of all doors, even those that were unused, whereas EPA's revision would limit the formula to only those doors in actual operation. The companies argued that if a change in activity level is cheaper in the circumstances, they should not be penalized for preferring to make that change rather than to take greater care: operating fewer ovens rather than sealing the doors of their operating ovens more tightly. Judge Posner responded that Indiana's rule conflicts with the principle

> that polluters in nonattainment areas must use whatever control technology is reasonably available. The Indiana rule presupposes and the companies concede that even if a coke battery is running at full capacity, leakage can still feasibly be limited by 10 percent of the doors plus 4 . . . . It follows that compliance with a 10 percent plus 4 rule confined to operating ovens is achievable too, since that rule equates to a 10 percent plus 4 rule for all ovens when all ovens are operating, as they may be.[98]

The highly controversial aspect of the case was the majority's (Judges Posner and Flaum) refusal of jurisdiction over challenges brought by CBE. CBE had sought an order requiring EPA to issue new rules, within six months, governing pollution from coking operations in nonattainment areas; until then, CBE urged that the parts of Indiana's plan approved by EPA should go into effect as interim regulations which

96. Bethlehem Steel Corp. v. United States EPA, 723 F.2d 1303 (7th Cir. 1983).
97. 782 F.2d at 650.
98. *Id.* at 652-53.

would be superseded when EPA issues its new regulations. Specifically, the CBE claimed that (1) EPA could not approve Indiana's revised SIP when it did not find that the emission reductions required by the SIP will meet the statutory requirement for attainment of the national ambient air quality standards; (2) EPA could not exempt major sources of particulate matter from the statutory monitoring requirements; and (3) EPA has a duty to commence rulemaking to promulgate a SIP for Lake County, Indiana that remedies these deficiencies.

Judge Posner, writing for the court, ruled that the court of appeals has no authority to issue the type of order that the citizen group sought under section 307 of the Clean Air Act,[99] which provides that an appellate court has jurisdiction to review the approval or promulgation of any implementation plan or any other final action of EPA. Where the challenge is to compel EPA to perform a nondiscretionary obligation, section 304 of the Act[100] provides for jurisdiction in the district court. According to Judge Posner:

> If the EPA's refusal to undertake the rulemaking proceeding requested by the citizens group was the failure to perform a nondiscretionary duty, then exclusive jurisdiction to remedy that failure lies in the district court, while if the failure was a failure to perform a discretionary duty, it follows not that there is jurisdiction in this court but that there is jurisdiction in no court.[101]

Judge Posner asserted two reasons for refusing jurisdiction. The first concerned the logic of the statutory division of jurisdiction: under section 304, judicial review of inaction by the agency lies in the district courts; under section 307, judicial review of final agency action lies in the appellate courts. Since the citizens group was not challenging the validity of the order, nor did it want the court to refuse to enforce the order in whole or in part, but just wanted more rigorous regulations in the future, it must proceed in the district court under section 304:

> The remedy sought by the citizens group is not to rescind or modify the rule that the EPA has adopted; it is to order the EPA to conduct a new, follow-on rulemaking proceeding. When all that is being complained of is a failure to undertake a new proceeding distinct from that which is under review, the complainant has stated a claim if at all only under section 304.[102]

The second reason concerned the superior capability of the district court in compiling an administrative record that could disclose pros and

99. 42 U.S.C. § 7607 (1988).
100. *Id.* § 7604.
101. 782 F.2d at 655.
102. *Id.* at 656.

cons of a finding that a new rulemaking proceeding would be a feasible and fruitful undertaking. The appellate courts, according to Judge Posner, "are not set up to exercise managerial or administrative functions effectively . . . [or] to evaluate the monthly progress reports that the citizens group asks us to direct the EPA to submit . . . [or to] institute contempt proceedings when and if the EPA defaults . . . ."[103] Since in this case the CBE did not object to what the EPA had done but only sought to have it launch a new rulemaking proceeding, jurisdiction properly lay in the district court.

Judge Swygert's dissent from the part of the opinion dismissing the citizen group's claims is an eloquent critique of the majority's position:

> [R]efusing jurisdiction on the ground that CBE only requested a demotion produces the absurd result that a court of appeals would have had jurisdiction if CBE had requested this court to reverse out-right the December 6, 1983 order in its entirety because the "finally approved" regulations did not meet the statutory criteria; but because CBE has requested less extreme relief, based on the same substantive claims, this court does not have jurisdiction. The result is not only absurd, but manifestly unjust, since now CBE cannot obtain any judicial review of its substantive claims.[104]

This case falls squarely within the rule announced in *Indiana & Michigan Electric Co. v. United States EPA*,[105] that jurisdiction properly belongs in the court of appeals when the "complaint about agency inaction is embedded in a challenge to the validity of an implementation plan."[106] In this case, CBE's "complaint about the validity of the plan is intertwined with its complaint that the EPA must promulgate a plan that calls for attainment and source monitoring and that remedies the deficiencies in the Indiana revised SIP."[107]

In addition, according to Judge Swygert, two judicial proceedings will now be necessary for review of EPA's order. The circuit court considered the challenges brought by the steel companies, but "the district court will consider CBE's claims that the EPA has refused to undertake a non-discretionary duty to implement a proper SIP where none . . . exists."[108] Moreover, the majority's decision not to transfer this case to the district court is presumably a result of its refusal to decide whether jurisdiction does properly belong in the district court. Thus, even if CBE

103. *Id.*
104. *Id.* at 658 n.2.
105. 733 F.2d 489 (7th Cir. 1984).
106. *Id.* at 490. *Accord* Kamp v. Hernandez, 752 F.2d 1444 (9th Cir.), *modified*, 778 F.2d 527 (9th Cir. 1985).
107. 782 F.2d at 660.
108. *Id.* at 661.

still can file a claim in the district court, this case will again come before the court of appeals from a district court's dismissal for lack of jurisdiction. "[T]he same administrative order will be subjected to review by this panel of the court, by another district court, . . . and by yet another panel of this court."[109] "The majority's refusal to assume jurisdiction only defers a decision that could properly be rendered today, put the parties and the courts through the unnecessary expense of further proceedings, and needlessly expends limited judicial resources."[110]

"Almost three years after the congressionally mandated deadline for compliance has passed and six and one-half years after the State of Indiana submitted its first defective SIP, EPA has yet to take any affirmative action."[111] "EPA's dilatory action threatens the public welfare by permitting the citizens of Lake County, Indiana to be subjected indefinitely to unacceptable levels of air pollution."[112] "[I]t is time for this court to intercede and to enforce the Clean Air Act as it is written, not as it has, in practice, been amended by the EPA."[113]

The great weight of precedent and logic clearly supports Judge Swygert's position on this issue. Beginning with the Supreme Court's decision in *Harrison v. PPG Industries, Inc.*,[114] appellate court jurisdiction has been mandatory for all final actions. The Ninth Circuit has held that appellate jurisdiction exists where three criteria are met: (1) the action is final in the sense of being definitive; (2) the record is developed to a point adequate for review; and (3) the action has sufficient immediate impact on an interest of the party seeking review.[115] Undeniably, these criteria were met in the *Bethlehem Steel* litigation.

The agency action complained of, whether the complaint is construed as a challenge to the validity of an order or as a request to demote that order to an interim status, was definitive. The point here is that Judge Posner's distinction of trial versus appellate jurisdiction on the basis of the remedy sought by the complainant simply misinterprets the law. Jurisdiction in the district court lies for actions to compel agency action where there has not been an agency decision. A reason for this allocation of jurisdiction is that in such cases, there has been no prior factual record or legal determination that can be reviewed by the appellate court. Under section 304, district court jurisdiction is appropriate

109. *Id.*
110. *Id.* at 661-62.
111. *Id.* at 662.
112. *Id.* at 663 n.7.
113. *Id.* at 664.
114. 446 U.S. 578 (1980).
115. Hawaiian Elec. Co. v. United States EPA, 723 F.2d 1440, 1442-43 (9th Cir. 1984).

for essentially de novo proceedings where the allegation is that the court must initiate regulatory activity where the agency should have but has not. Where the agency has regulated, but allegedly has not done so in compliance with the terms of the statute, jurisdiction is more appropriate in the court of appeals, and no court has held to the contrary except for the majority in *Bethlehem Steel*.

Judge Posner's argument that the district court is better equipped to compile a record is at best irrelevant. The statute does not provide for a case by case balance test to determine whether the district court or the appellate court could more efficiently process the controversy. The statute provides for appellate court jurisdiction to hear complaints that the agency has rendered an improper decision; if that condition is met, then the appellate court has a wealth of legal tools to develop a sufficient factual record.[116]

Indeed, no decision since *Bethlehem Steel* concerning appellate jurisdiction of Clean Air Act disputes has been in accord with the majority's holding that a final action may not be reviewed by the appellate court.[117] The Ninth Circuit, in *Abramowitz v. United States EPA*,[118] confronted an analogous challenge to EPA approval of pollution control measures in an implementation plan that were alleged to be inadequate. EPA construed the challenge as against its deferral of a decision as to how to take more extensive regulatory steps; therefore, there was no final action and appellate jurisdiction would not lie. The court rejected this contention, cautioning that the fact that EPA did not label its action as "final" does not preclude appellate review, and that to deny review would create a danger that two proceedings involving the same agency action could occur simultaneously.[119]

Only in cases where there has been an explicit finding that EPA has not promulgated a "final action" has any court refused jurisdiction.[120] Cases before and after *Bethlehem Steel* recognize that the bifurcated ju-

116. "[A]n appellate court is not without recourse in the event it finds itself unable to exercise informed judicial review because of an inadequate administrative record. In such a situation, an appellate court may always remand a case to the agency for further consideration." *Harrison*, 446 U.S. at 594.

117. The district court in Maine v. Thomas, 690 F. Supp. 1106, 1111-12 (D. Me. 1988), *aff'd*, 874 F.2d 883 (1st Cir. 1989), cited the *Bethlehem Steel* decision favorably but went on to find that EPA's deferral of a decision was a final action that could only be reviewed by the appellate court. The appellate court, affirming, based its holding squarely on the determination that the challenged action of the EPA was "final action" and accordingly nonreviewable under section 304. 874 F.2d at 886.

118. 832 F.2d 1071 (9th Cir. 1987).

119. *Id.* at 1075-76. *See also* Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987).

120. *See* Asbestec Constr. Serv., Inc. v. United States EPA, 849 F.2d 765 (2d Cir. 1988); General Motors Corp. v. United States EPA, 871 F.2d 495 (5th Cir. 1989).

risdiction of challenges to EPA determinations under the Clean Air Act must not serve as a Catch-22 to bar adjudication of claims that EPA has not complied with the statute, nor should bifurcation result in duplicative proceedings. Yet, the Seventh Circuit majority accomplishes exactly such results.

C. *Jurisdiction of the Courts of Appeals Under The Clean Water Act*—American Paper Institute, Inc. v. United States EPA[121]

Similar concerns—adherence to statutory limits on jurisdiction, and the necessity of an administrative record—are manifest in this recent decision. Once again, the court refused jurisdiction to review a challenge to EPA regulations, but here the rationale concerned federal versus state appellate review.

The Clean Water Act authorizes EPA to administer water pollution control on dischargers through a permit system called the National Pollutant Discharge Elimination System (NPDES). Each point source must obtain a NPDES permit before it may pollute American waters; any discharge without a permit is illegal.[122] Where a state has a properly authorized permit-issuing program, the state proposes the NPDES permit it intends to issue to a point source and EPA has ninety days to object. If EPA objects, and reaffirms its objection after a comment period and a hearing, the state may modify the terms of its proposed permit or, if the state refuses to do so, EPA may assume exclusive authority to issue the permit. One criterion of a permit is compliance with EPA's antidegradation policy that establishes standards for assuring that the waters of a state will maintain existing quality once a desired water quality standard is reached.

Since 1974, the State of Wisconsin has issued permits to point sources through the Wisconsin Department of Natural Resources (WDNR). EPA rejected eleven of thirteen proposed permits on the grounds that those permits failed properly to monitor and limit the discharge of toxic pollutants; five of the eleven would have violated antidegradation policies. Soon thereafter, the WDNR modified the permits to meet EPA's objections. This action was brought by plaintiff paper and pulp mills (API) challenging EPA's authority to object to the proposed permits which, API argued, were within the guidelines and requirements of the Clean Water Act. Furthermore, API claimed that the Clean

121. 890 F.2d 869 (7th Cir. 1989).
122. 33 U.S.C. § 1311(a) (1988).

Water Act does not authorize EPA to promulgate an antidegradation policy for the states.

EPA objected to subject matter jurisdiction, asserted that the claims were moot, and argued that the doctrine of ripeness precludes review. API claimed that the court had subject matter jurisdiction pursuant to 33 U.S.C. section 1369(b)(1)(F) to review an action issuing or denying any permit. In effect, EPA denied permits when it objected to the permits proposed by WDNR since EPA gave WDNR no choice but to accept its objections if WDNR wanted to retain control over the permit program. API cited the Supreme Court's decision in *Crown Simpson Pulp Co. v. Costle*,[123] which held that an EPA objection to a proposed state permit constituted a "denial" that gave jurisdiction to the federal appellate courts to review.

Judge Wood, writing for the Seventh Circuit, distinguished *Crown Simpson* because the 1977 amendments to the Clean Water Act established that EPA may issue a permit if the state refuses to modify its proposed permit. "Thus, an EPA objection to a proposed state permit is no longer 'functionally similar' to denying a permit."[124] Judge Wood emphasized that *Crown Simpson* was a practical response to the concern with creating a system of bifurcated review where federal district courts would review EPA objections to state-issued permits and federal appeals courts would review EPA issuance and denials of its own permits. By contrast, the Seventh Circuit's concern was not a split between federal district and appellate courts, but rather from a split in the review of state-issued permits between state and federal courts as to who would hear challenges to state NPDES permits issued after an EPA objection.

> When reviewing state-issued permits, state courts may examine challenges to any pertinent EPA objections. Because an EPA objection causes a state permit to issue in other than its proposed form, the propriety of an EPA objection might often be at issue when reviewing a state-issued permit. The state courts are perfectly competent to decide questions of federal law.[125]

This holding is noteworthy in light of the fact that it represents a revised opinion sharply in contrast with the original opinion issued some months earlier. In its earlier opinion, the court, per Judge Wood, ruled that appellate court jurisdiction would best comport with Congress' goal of prompt review of EPA actions.[126] Approached pragmatically, a "re-

123. 445 U.S. 193 (1980).

124. 890 F.2d at 874.

125. *Id.* at 875.

126. 19 Envtl. L. Rep. (Envtl. L. Inst.) 21,361 (7th Cir. 1989). Three reasons were offered: (1) an EPA objection to the state's proposal effectively denied a permit, *id.* at 21,363; (2) a contrary

fusal to review an objection will create the bifurcated system that the Supreme Court found unacceptable . . . ."[127] Likewise, "[a]n objection from the EPA carries great weight with the state-permitting agency . . . [which] would strongly persuade a state agency to modify a proposed permit."[128] Despite acknowledging subject matter jurisdiction to review EPA's objections, the Seventh Circuit refused to review because of ripeness.[129] Judicial intervention before the final permit is issued would disrupt the relationship between the state and EPA by giving the state and interested parties an incentive not to cooperate in order to trigger review in an outside forum.[130] That dismissal for lack of ripeness[131] was replaced by the revised opinion in light of matters raised in the petition for rehearing en banc which was denied.

In addition, API sought review of EPA's antidegradation policy, but the Seventh Circuit held that it lacked subject matter jurisdiction. Congress clearly provided that judicial review be limited to "effluent limitations or other limitation" directly related to effluent limitations. Whether an EPA regulation is an effluent limitation requires consideration of the specificity of the regulation, the persons to whom the regula-

interpretation would lead to a bifurcated system in which the district court would review claims regarding permits proposed by states (but not yet issued) and the appellate court would review claims regarding permits proposed by the EPA, *id.* at 21,364; and (3) review at different levels of the judicial system would cause delays in resolving disputes, *id.* at 21,366.

127. *Id.* at 21,364.

128. *Id.* at 21,365.

129. According to the Seventh Circuit's original opinion, fitness for review connotes finality—in order to avoid judicial interference with agency procedures, only final agency actions are examined. *Id.* at 21,365. Here, an objection from the EPA is an intermediate step in the process of issuing a permit. The state must respond before the process can move forward—it can force the EPA to re-evaluate its objections by refusing to modify its proposal. Regardless of the state's response, the administrative process is not fully completed before a permit is issued. Congress intended a delicate balance of power and cooperation which would be disrupted and slowed if review was permitted each time the EPA objected to a state-proposed permit.

130. When a federal program mandates that a state and federal agency work together, different versions of a joint project will undoubtedly be publicly suggested and modified as the parties work together. By insulating this preliminary work product from immediate review, we allow the state and federal agency to propose new ideas without fear that the proposals will be subject to immediate review and challenge in the courts.

Id. at 21,366.

131. Judge Fairchild wrote a separate concurrence on the grounds of ripeness for review. Judge Fairchild initially noted that immediately after EPA had first objected to the proposed state permits, "the matter was not ripe for review because of the likelihood of further administrative action . . . ." *Id.* at 21,368. However, at the time of the present action, the matter had proceeded to a stage at which modified state permits had in fact issued. These modified permits ostensibly indicated that EPA had approved the changes. Consequently, Judge Fairchild noted that "[i]f ripeness be the proper concern, the matter can never become more ripe for federal review." *Id.* Nonetheless, Judge Fairchild stated that federal review would result in an awkward division of review between state and federal tribunals. "[T]he Act must contemplate in this situation that review of the validity of requiring more stringent limitation is left to the state. Although the controversy remains, it is no longer a controversy which a federal court of appeals has jurisdiction to decide." *Id.*

tion is directed, and the effect of the regulation on point sources. The antidegradation regulations provide a general outline for maintaining water quality standards but do not limit the permissible amount of discharge. Furthermore, the antidegradation regulation is written in general terms of policy and indicates EPA's goals with regard to maintaining existing water quality. Hence it does not come within the jurisdiction of the appellate court.

According to the Seventh Circuit's logic, once EPA has objected to state-issued NPDES permits, any challenge to that action must await the state's response so that proper jurisdiction may be ascertained. If the state responds by accepting the objections and accommodating its permits accordingly, then the permits are, by definition, issued by the authorized state agency and are reviewable in a state court proceeding. If the state does not accept EPA's objections, then the statute empowers EPA to exercise authority; the federal district courts have jurisdiction to entertain an inquiry as to whether EPA exceeded its delegated authority in assuming permit-granting authority. If EPA acted within the bounds of its authority, then its issuance of a permit is reviewable only in the federal courts of appeals.[132]

Comparison of the *American Paper Institute* case and the *Bethlehem Steel* case permits a few cautiously-asserted[133] conclusions about how appellate judges decide whether they have jurisdiction to hear a challenge to an EPA decision. Whereas Judge Posner in *Bethlehem Steel* focused on the remedy sought by the plaintiffs (in a sense, an accident of pleadings) and rendered a decision likely to result in delay and duplicative review, Judge Wood grounded the *American Paper Institute* decision in an appreciation of the paramount role the regulatory statute gives to the states and provided a division of jurisdiction that can reduce duplicative review. By interpreting the statute's jurisdictional provisions on the basis of the underlying policy of the Act rather than on the basis of the complainant's pleadings, Judge Wood denies appellate jurisdiction in a manner likely to clarify jurisdiction for the next challenger. By abjuring reliance on "policy," Judge Posner's denial of appellate jurisdiction leaves future litigants without clear direction as to which court to enter; indeed, his own language suggests that there may be no appropriate

132. For a full discussion of this logic, see generally Champion Int'l. Corp. v. United States EPA, 850 F.2d 182 (4th Cir. 1988).

133. Comparisons must be cautiously asserted if for no other reason than the fact that the cases were decided under different statutes. The underlying issue in each case, whether there is appellate jurisdiction to review an EPA determination, is identical. However, the resolution of that issue under the Clean Air Act need not be, nor is, the same as resolution of that issue under the Clean Water Act.

court. The point here is that the decision to accept/deny appellate jurisdiction is critical to environmental law enforcement not only for the result reached in any given case but for the logical route it provides litigants to proceed to the correct forum. While both the *Bethlehem Steel* case and the *American Paper Institute* case reach the same result, the two opinions suggest divergent approaches to the role of the federal circuit judge in environmental litigation.

D. The Impact of EPA's Failure To Perform Nondiscretionary Duties Under The Clean Water Act—Chicago Association of Commerce & Industry v. United States EPA[134]

The Seventh Circuit's recent decision in *Chicago Association of Commerce & Industry v. United States EPA*, vividly exhibits its irritation (at least that of Judge Cudahy[135]) with the procrastination and recalcitrance of EPA. It is a troubling decision because the outcome is undesirable to the court and indeed to any observer.

As one means of obtaining the Clean Water Act's goals of eliminating the discharge of toxic pollutants into the nation's waters, Congress provided that an indirect discharger, *i.e.*, an industrial discharger whose wastes flow into a public sewage system rather than directly into navigable waters, must pretreat its waste waters so as to achieve, together with the Publicly Owned Treatment Works (POTW) that treated the waste before final discharge into navigable waters, the same level of toxics removal as would be required of a direct discharger.[136] At the same time, the Act allows the indirect discharger to receive a "removal credit" from the POTW for the amount of waste removed from the stream of waste water by the POTW itself.[137] This provision permits an increased amount of pollutants to flow from the indirect discharger's plant to the treatment plant provided that the additional pollutants are removed at the POTW.

134. 873 F.2d 1025 (7th Cir. 1989).

135. It should be noted that Judge Easterbrook, in Illinois South Project, Inc. v. Hodel, 844 F.2d 1286 (7th Cir. 1988) expressed similar impatience with the Department of Interior in enacting regulations under the Surface Mining Control and Reclamation Act. The court remanded a challenge to EPA's approval of Illinois' proposed definition of "valid existing rights" held by mine operators since that definition was premised on defective EPA regulations: "We remand with instructions to return this subject to the Secretary for further proceedings under whatever regulation is in force at the time the Secretary issues a fresh decision. If the Secretary wishes to use something like the 1983 regulation, he had best promulgate it." *Id.* at 1290.

136. "Removal credits simply reallocate between the POTW and the indirect dischargers the responsibility for removing the total amount of pollutant necessary to achieve the applicable limit." Chemical Mfrs. Ass'n v. United States EPA 885 F.2d 253, 260 (5th Cir. 1989).

137. 33 U.S.C. § 1317(b)(1) (1988). The removal credit provision was added to the statute by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1589 (1977).

The importance of the removal credit program to promote the development and use of POTWs is beyond dispute. A publicly owned treatment works is an efficient but expensive method of removing effluents from water streams. The POTW, once in operation, serves not only contributing facilities but everyone in the region as well. Therefore, it is to the advantage of both industry and the environment to spend capital for control technology collectively on a single regional POTW.[138] The Clean Water Act specifically recognizes the importance of centralizing the filtration of wastewater by providing grants for the construction of such facilities.[139] The "removal credits" provide an incentive for private industry to contribute to the large capital costs of constructing a POTW on the expectation that those industries can attain compliance for less total outlay than if each facility installed its own control devices. Furthermore, the program prevents redundant regulation; without it, industry would face duplicative costs for wastewater treatment that would provide treatment for treatment's sake.

Under the Act, removal credits are available, however, only if (1) pollutants introduced into POTWs by indirect dischargers do not interfere with the operation or performance of the works, and (2) those pollutants do not prevent sludge use or disposal by such works. The second requirement is important because Congress sought to prevent the contamination of sludge with toxics removed from the effluent flowing through the POTW so as to encourage the productive recycling of sludge. Accordingly, EPA was required to promulgate regulations establishing pretreatment standards and governing sludge disposal before approving a removal credit program. The first regulations were promulgated in 1977; two subsequent versions in 1978[140] and 1981[141] had the effect of relaxing the requirements that POTWs and indirect dischargers were required to meet. Despite this relaxation, continued pressure from industry led EPA to promulgate a fourth set of rules in 1984[142] that were more lenient still.

The 1984 regulations were challenged by the Natural Resources Defense Counsel. The Third Circuit ruled that the new regulations failed to meet the requirements of the Act.[143] In response, EPA continued the

138. *See generally* Cerro Copper Products Co. v. Ruckelshaus, 766 F.2d 1060 (7th Cir. 1985).
139. 33 U.S.C. §§ 1281-1299 (1988).
140. 43 Fed. Reg. 27,736 (1978).
141. 46 Fed. Reg. 9,404 (1981).
142. 49 Fed. Reg. 31,212 (1984).
143. NRDC v. United States EPA, 790 F.2d 289 (3d Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987). The Third Circuit invalidated the regulations on four grounds: (1) the POTWs and the indirect dischargers were no longer required to remove toxics with the same consistency required of

1981 regulations previously in effect. This solved most of the Third Circuit's problems, except that EPA's failure to promulgate new sludge regulations remained. In May, 1985, the Chicago Metropolitan Sanitary District (MSD) applied for removal credit authority. In effect, industrial facilities in the Chicago area sought benefits allegedly available under the Water Act for dischargers to POTWs. In February, 1987, Congress stayed until August the part of the Third Circuit's decision that applied to sludge disposal and ordered EPA to prepare sludge regulations.

In 1987, MSD renewed its application for removal credit authority which EPA did not act upon by the time the congressional stay expired. As of the time of oral argument in the *Chicago Association of Commerce* case, EPA still had not promulgated the regulations required by statute. Thus, a regulatory vacuum existed. Plaintiffs, indirect dischargers, filed an action to compel EPA to act on MSD's first application for removal credit authority since EPA's own unreasonable delay prevented the grant of authority. The district court granted EPA's motion to dismiss on the ground that without sludge regulations, no action could be taken on the MSD's application; since removal credits were supposed to be available to encourage efficient pollution control only if regulations were in place to prevent, *inter alia*, interference with sludge control, EPA's failure to promulgate these regulations rendered such credits unavailable.

Judge Cudahy, affirming dismissal, began in no uncertain terms: "In this case we confront the consequences of an egregious failure on the part of the United States Environmental Protection Agency (the "EPA" or the "Agency") to perform what the Agency itself admits to be its non-discretionary duty."[144] Plaintiffs argued that (1) MSD should have been granted removal credit authority prior to the expiration of the congressional stay in August, 1987; or (2) even if EPA cannot grant authority, it can process the MSD's application in all respects except as to sludge regulations in order to expedite the review process once sludge regulations are generated. However, the relief sought by the plaintiffs was, according to the court, unavailable because removal credits are no longer available to any POTW, including those that had received authority prior to passage of the Water Quality Act. Indeed, MSD cannot even submit a completed application until the sludge regulations are in place. Judge

direct dischargers, *id.* at 298-305; (2) removal credits no longer had to be adjusted to account for the discharge of untreated sewage when sewer systems overflowed, *id.* at 305-07; (3) withdrawal of credits for removal below mandated levels was less stringent than the 1981 rule for withdrawing removal credits, *id.* at 310-11; and (4) the EPA had not promulgated sludge regulations as required by the 1977 Act, *id.* at 313.

144. 873 F.2d at 1027.

Cudahy recognized the frustration of "this 'Catch-22' situation," but denied "that any action can be taken on the MSD's application until sludge regulations are produced."[145] The only recourse remaining to plaintiffs is a suit to compel EPA to perform its nondiscretionary duty and generate the sludge regulations. This action was currently pending. Judge Cudahy's concluding sentences are noteworthy:

> Our decision in no way reflects approval of the course of action (or, more accurately, inaction) the EPA has pursued in this area. However, we must leave to a later day the puzzling question of how to compel a recalcitrant agency to perform a duty it has repeatedly been ordered to carry out, by Congress and by the courts. Until that time, we wash our hands of the sludge problem.[146]

The frustration that is apparent in Judge Cudahy's opinion bespeaks volumes about environmental law in the 1980s. The entire system for regulating emissions into the air and water is based on the assumption that EPA will perform its delegated responsibilities more or less reasonably. Both the Clean Air and Clean Water Acts employ so-called "triggering mechanisms" by which regulatory consequences follow from an EPA finding or rule. Congress intended a strong role for EPA and therefore much of these complex environmental statutes specify the consequences of EPA decisionmaking. What happens when that agency, either because of political hostility to environmental regulation or incompetence, fails to so make decisions? A bad decision may be judicially reviewed; a failure to decide leaves a court without authority since no court is likely to take upon itself the task of administering the removal credits program. Undeniably, therefore, the best way to frustrate accomplishment of the goals of the Clean Air and Clean Water Acts is for EPA simply to procrastinate.

V. Liability For Environmental Response and Reclamation: Supplier Liability for Toxic Releases, Edward Hines Lumber Co. v. Vulcan Materials Co.[147]

When a mess has been made, how should the costs of cleanup be allocated? Federal statutes increasingly address this question by allocating liability among a prescribed set of potentially responsible parties. The purpose of these statutes is to specify the appropriate governmental response to an environmental injury that has already occurred and to

145. *Id.* at 1032.
146. 873 F.2d at 1032-33.
147. 861 F.2d 155 (7th Cir. 1988).

establish a mechanism for holding responsible parties liable for the damages that result from their activity. By specifying liability, these statutes (1) broaden the pool of potentially responsible parties beyond those whom the common tort law may have held liable; (2) clarify a standard of causation sufficient to establish liability and make that standard uniform throughout the nation; and (3) provide an approach for apportioning liability among joint tortfeasors.[148] The objective of such enactments is to allocate risks and provide incentive to take safety precautions by encouraging polluters better to identify whose wastes are released and who is responsible.[149]

Litigation under environmental liability statutes tends to be between two private parties and thus the existence of a regulatory agency that so dominated the cases in the earlier sections of this discussion is far less pronounced. In some cases, the imposition of liability requires a careful integration of statutory language with traditional tort concepts of responsibility for accidents. More often, the questions requiring appellate review, instead of focusing on whether an agency has adequately performed its delegated duty, focus on who should be liable for how much damages. Not surprisingly, cases under environmental liability statutes seldom reach the federal appellate courts.

In the one recent controversy to come before the Seventh Circuit concerning the allocation of environmental liabilities for toxic releases, a combination of inexplicable litigation strategy by the plaintiffs and the appellate panel's unwillingness to review an issue not properly raised on appeal served to avoid what might have been a fascinating question of statutory liability.

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)[150] was enacted to address the increasing threat of contamination from improper disposal of hazardous wastes.[151] The revelations of disasters such as at Love Canal had demonstrated the seriousness of the problem and the inadequacy of existing legal controls.[152] To remedy that deficiency, Congress included five elements in CERCLA: the establishment of a fund to finance response ac-

148. *See generally Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1511-42 (1986).

149. *Id.* at 1544.

150. 42 U.S.C. §§ 9601-9675 (1988).

151. *See generally* Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

152. *See Environmental Emergency Response Act: Hearings on S. 1480 Before the Committee on Environmental and Public Works, S. Rep. No. 848*, 96th Cong., 2d Sess. (1980) [hereinafter Senate Report]. For a discussion of the litigation concerning Love Canal, see United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067 (W.D.N.Y. 1982).

tion,[153] the provision of sources of revenue for that fund,[154] the delegation of authority to respond to hazardous substance releases,[155] the granting of adequate compensation to victims of such releases,[156] and the imposition of liability on those responsible for hazardous substance releases.[157] It is the last of these aspects of CERCLA—the imposition of liability on those responsible—that has generated the most litigation, including the Seventh Circuit's decision discussed herein.

Congress established liability under CERCLA because of a perception that state tort law was, for a variety of reasons, inadequate to trace causation and assess responsibility. Accordingly, Congress sought to impose strict liability, jointly and severally, on those who benefit financially from handling hazardous materials so as to "internalize the health and environmental costs of that activity into the costs of doing business."[158] The Act[159] imposes liability on four classes of potentially responsible parties:

(1) current owners or operators of a facility at which hazardous substances are released;

(2) persons who owned or operated the facility at the time hazardous substances were disposed of at the facility;

(3) persons who arranged for the disposal or treatment of the hazardous substance; and

(4) transporters of hazardous substances to disposal or treatment facilities.

In 1986, Congress amended CERCLA[160] to clarify the right of a party held liable under CERCLA to seek contribution from other potentially responsible parties and to recover costs properly allocated to those parties. Through the requirement of contribution, Congress intended to expedite litigation and to increase the incentive for parties to assume responsibility for cleanup because at least part of the costs could be imposed on others. The right of contribution also reflected a sense that it was equitable to distribute costs among all wrongdoers and that the likelihood of inclusion as a responsible party would deter future polluters.

153. 42 U.S.C. § 9612 (1988).
154. *Id.* § 9611.
155. *Id.* § 9604.
156. *Id.* § 9611-13.
157. *Id.* § 9607.
158. Senate Report, *supra* note 152, at 13. *See generally*, Comment, *"Arranging for Disposal" Under CERCLA: When Is A Generator Liable?*, 15 Envtl. L. Rep. (Envtl. Law Inst.) 10,160 (1985).
159. 42 U.S.C. § 9607(a) (1988).
160. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 1647 (1986).

The limiting condition is that to be found liable to contribute to the costs of cleanup, that party must be independently liable as one of the four categories of potentially responsible parties set out in section 9607(a). In *Edward Hines*, the Seventh Circuit confronted the question of when a supplier of hazardous substances may be liable for contribution if those substances are released into the environment.

Edward Hines contracted with Osmose to build a facility for preserving wood. Osmose had extensive experience with using chromated copper arsenate (CCA), a hazardous substance under CERCLA, to weatherize wood. Pursuant to the contract, Osmose advised Hines on selection of the appropriate location for the facility and designed and built the facility as a closed loop so that hazardous substances would not escape. Hines owned and operated the facility under Osmose's trademark with employees trained by Osmose. Osmose was obligated to provide technical information and marketing assistance to Hines, but Hines exercised sole responsibility for the operation, maintenance, upkeep, and control of the facility. Hines promised to buy its next five years' requirements of CCA from Osmose and gave Osmose full and immediate access to the facility for the purpose of insuring quality control. Hines stored the run-off from the facility in a holding pond at the site.

In 1978, Hines sold the facility to Mid-South Wood Products, Inc., who continued to operate the facility. In 1982, the EPA and the Arkansas Department of Pollution Control and Ecology found residues of CCA in the groundwater near the plant. Hines entered into a consent decree to pay nearly $5 million to clean up the facility. Hines sought contribution from Osmose as either an owner or operator under section 9607(a)(2) or as one who arranged for disposal under section 9607(a)(3).

The district court held that Osmose was not liable on either ground.[161] Section 9607(a)(3) did not apply because the statutory phrase "arranged for disposal or treatment" was intended to circumscribe "the types of transactions in hazardous substances to which liability attaches . . . ."[162] "[T]he mere sale of these substances for use in the wood treatment process does not constitute arranging for the disposal or treatment of a hazardous substance . . . ."[163] Prior case law was cited for the proposition that to be liable as one who has arranged for disposal, a party must be motivated to dispose of it.[164] Since such a motivation was

161. Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651 (N.D. Ill.), *aff'd*, 861 F.2d 155 (7th Cir. 1988).

162. 685 F. Supp. at 654.

163. *Id.* at 656.

164. The court relied on United States v. A & F Materials Co., Inc., 582 F. Supp. 842 (S.D. Ill.

clearly absent, the court granted summary judgment on this issue to Osmose. As to the claim that section 9607(a)(2) imposes liability, the district court held that it does apply to a party who designs and builds a manufacturing system but does not own or operate the facility.[165] Nor, in the absence of any direct authority to control operations, could Osmose be held liable as an operator of the facility. Accordingly, summary judgment was granted on this issue as well.

In what may be the most puzzling environmental litigation decided recently, Judges Easterbrook, Posner, and Cudahy affirmed the district court without addressing what appears to be the obvious issue in the case. The question addressed was whether that supplier could be considered an owner or operator of the purchaser's facility; the court correctly held that a supplier is not responsible as an owner or operator under 9607(a)(2). The question not addressed was whether Osmose was liable as one who arranges for disposal or treatment of hazardous substances owned or possessed by any other party at any facility owned or operated by another party under 9607(a)(3).

Judge Easterbrook began the Seventh Circuit's affirmance stating: "Osmose's potential liability arises, if at all, under section 107(a)(2) of CERCLA, 42 U.S.C. section 9607(a)(2) . . . . So everything turns on whether Osmose 'owned or operated' the Mena plant."[166] There is no mention here or anywhere in the opinion of the possibility that Osmose might be potentially liable under section 9607(a)(3). This omission, while wholly unexplained, must be due to the fact that possible liability under section 9607(a)(3) was not included in appellants' brief.[167] The remainder of Judge Easterbrook's opinion is a well-reasoned exposition on why Osmose as the independent construction contractor does not qualify as an owner or operator of Hines' facility. Clearly, Osmose did not own the facility. Furthermore, using common-law concepts, the term "operator" connotes day to day control which Osmose did not exert. Hines was, therefore, solely responsible:

> Large potential obligations concentrate the mind wonderfully, leading the owner-operator to assign duties and liabilities by contract to those who can best take precautions. Hines had a warranty and could have bargained for indemnification; if it did not, or if it chose to enforce the

1984), New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984), and United States v. Westinghouse Elec. Corp., 22 Env't Rep. Cas. (BNA) 1230 (S.D. Ind. 1983).

165. 685 F. Supp. at 656.

166. 861 F.2d at 156.

167. Apparently, Hines chose to base its appeal on the district court's ruling that Osmose was not an owner or operator. However, Hines' choice did not, as a matter of law, prevent the appellate panel from reaching the issue of whether Osmose had arranged for disposal since that issue was litigated and resolved in the district court.

rights it had, Hines has only itself to blame.[168]

This conclusion is, of course, unassailable. Osmose was not an owner or operator at the time of disposal. There is nothing in the way of congressional intent or judicial precedent to indicate that section 9607(a)(2) should apply to companies in Osmose's position. The relevant question, to repeat, is whether section 9607(a)(3) applies. The district court's resolution of that question is not so obviously correct that it would have wasted the appellate panel's time and effort to evaluate. Indeed, a strong argument can be made that Osmose should have been liable as a party that had arranged for disposal of the hazardous substances. The district court based its analysis on the fact that Osmose lacked motivation to dispose of the chemicals it transferred to Hines. The court cited two decisions,[169] in which liability under section 9607(a)(3) was found, to support its reliance on the motivation theory, but in neither of these cases was the holding explicitly or implicitly grounded on a requirement that defendant be motivated to dispose. A third case cited by the district court, the one upon which it placed the greatest weight, *United States v. Westinghouse Electric Corp.*,[170] denied liability under section 9607(a)(3) for many reasons, including the fact that the plaintiff, rather than the defendant, had actually arranged for disposal.

It is important to note that the very same question was decided in favor of imposing liability by the Eighth Circuit within a few months after the Seventh Circuit's decision. In *United States v. Aceto Agricultural Chemicals Corp.*,[171] the United States sought over $10 million in response costs from eight pesticide manufacturers (Aceto) to repay expenses incurred in the cleanup of a facility operated by Aidex, an independent contractor. Aceto shipped active pesticide ingredients to the Aidex facility for formulation into a commercial grade produced for sale to farmers and other consumers. Formulators such as Aidex mix the manufacturer's active ingredients with inert materials according to the manufacturer's specifications. Thus, the pesticide ingredients, the work in process, and the commercial grade pesticide were always owned by the defendant manufacturers. Defendants argued that Aidex was hired to formulate, not dispose, and that its materials were ingredients, not waste. But the government countered that waste generation is inherent in the pesticide formulation process; defendants could not have hired Aidex

168. 861 F.2d at 159.

169. United States v. A&F Materials Co., Inc., 582 F. Supp. 842 (S.D. Ill. 1984); New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984).

170. 22 Env't Rep. Cas. (BNA) 1230 (S.D. Ind. 1983).

171. 872 F.2d 1373 (8th Cir. 1989).

without arranging for the disposal of waste. The court emphasized that Aidex performed "a process on products owned by defendants for defendants' benefit and at their direction,"[172] and held that acceptance of defendants' argument would thwart accomplishment of the CERCLA's goal—that those responsible should pay for cleanup.[173]

Whether suppliers of hazardous chemicals may be liable for the cleanup of their purchasers' facilities is an important question under CERCLA's provision for strict, joint and several liability. To hold the suppliers of hazardous chemicals potentially responsible for cleanup costs would substantially lengthen the list of those who may be liable for the nation's hazardous wastes sites.[174] There are at least three different positions on this question that have been asserted. The first, reflected in the district court opinion in *Edward Hines*, is that in order to be liable as one who has arranged for disposal, the defendant must have intended to dispose the chemical—a sale or transfer for the purpose of further processing undermines a motivation to dispose. A second position, broader than the so-called "motivation" concept, is that liability should attach whenever the supplier is in control of the chemical either by having title throughout the relevant period or having physical control. This is the position seemingly advocated by the Eighth Circuit in *Aceto Agricultural*, which would extend liability even to those who do not have a motivation to dispose. A third position, broadest of all, would extend liability to all parties who had knowledge of the danger and who somehow failed to prevent the leakage. Arguably, the facts in *Edward Hines* would have supported liability only under this theory.

Had the issue been properly raised and had the Seventh Circuit explicitly affirmed the district court's holding that section 9607(a)(3) did not apply, it would have put this circuit into conflict with the Eighth Circuit and would have crystallized an important environmental law question for Supreme Court resolution. Had the Seventh Circuit reversed that portion of the district court's holding, it would have clarified and broadened the scope of potential CERCLA liability. Since the Seventh Circuit did not discuss this question, its decision in *Edward Hines* is an unfortunate missed opportunity.

172. *Id.* at 1381.

173. *Id.* at 1382. *See also* United States v. Velsicol Chem. Corp., 701 F. Supp. 140 (W.D. Tenn. 1987).

174. *See generally* Note, *The Imposition of Vicarious Strict Liability on Off-Site Generators of Hazardous Waste*, 40 RUTGERS L. REV. 569 (1988).

VI. CONCLUSION

The seven cases discussed herein involved four federal environmental statutes; they arose randomly, connected only by chronology and geography. It is difficult, of course, to draw conclusions from such a small and disparate sample. Yet, a review of these decisions reveals a few noteworthy conclusions.

First, it is striking how little reference is made to the administrative law concept of judicial deference to agency expertise and discretion. Only one opinion, Judge Coffey's dissent in the *Illinois State Chamber of Commerce* decision, makes explicit reference to the idea that courts often defer to EPA on matters within its delegated authority. On the contrary, the Seventh Circuit repeatedly takes EPA's decisions to task, subjecting them to rigorous scrutiny and often finding them wanting. For this reason alone, each of these cases constitutes an intellectually compelling contribution to the development of environmental law.

Second, this court is neither pro- nor anti-environment; it is certainly not an activist court in the sense of advocating a policy. Indeed, this court is so far from having a discernible position on environmental policy that the characterization of its opinions on such a basis would be disingenuous.

Third, this court in these opinions offers profound grist for debating the role of judicial review. For a wide variety of reasons, environmental disputes compel these judges to reveal their views about the judiciary as an institution in relation to administrative agencies and thus to Congress. The apparent disparity between Judges Posner and Cudahy as to the appropriate limits of judicial review and the importance of strict scrutiny of agency determinations promises a fascinating clash of intellects for the 1990s.

Fourth, it is striking how little is actually decided in these cases. From the perspective of an observer examining the controversy that brought the litigants to the Seventh Circuit and then examining the position they are in after the Seventh Circuit has rendered its decision, one cannot help but be struck by the insignificance of the court's decisions to the litigants themselves. Of the seven decisions, only the decision in *Van Abbema* requires a change in conduct from what would have occurred had the case never gone before the Seventh Circuit. In the remaining six decisions, the result after the decision is exactly the same as it was before the decision. This may suggest that while the jurisprudence of strict scrutiny seems to have established a foothold in this circuit court, the debate between competing judicial philosophies may have only a negligi-

ble impact on the actual environmental decisions reached by federal agencies or by private parties. No doubt there are some who would applaud this "jurisprudence of minimal impact," but it may be worth considering whether the severity of the environmental threat and the ambivalent response of government agencies should compel the judiciary to use its power. The repeated assertion that the problems of the environment are not an appellate court's responsibility diminishes the force of law as a response to critical social problems and, in that sense, weakens us all.