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BAUGHMAN V. BRADFORD COAL CO., INC.: A REAFFIRMATION OF CITIZEN SUITS POLICY WITHIN THE CLEAN AIR ACT

The legislative genesis of the Clean Air Act occurred in July, 1955, with the enactment of the Air Pollution Control Act, in which Congress recognized the impending problem of air pollution in the United States and asked the states to become actively involved in its prevention and control.¹ In the ensuing 15 years Congress passed several subsequent acts embodying the same precepts contained in the initial Act.² This succeeding legislation recognized the exigency of air pollution control in the United States and further suggested that the states take primary responsibility for its eradication, with the federal government providing research and financial aid. The Air Quality Act of 1967 also granted the federal government limited supervisory authority,³ although it did not alter the original federal policy of allowing voluntary participation by the states in air pollution containment.⁴

Not until the enactment of the Clean Air Act Amendments of 1970 did federal policy radically change.⁵ This Act commanded the states to initiate comprehensive programs that included stringent requirements. In addition, it required the Administrator of the Environmental Protection Agency (EPA) to define and publish national primary and secondary ambient air quality standards.⁶ It also ordered the states to draft State Implementation Plans for the prevention and control of air pollution, to submit these plans to the EPA for approval, and to begin enforcing the

¹ Clean Air Act of July 14, 1955, Pub. L. No. 84-159, 69 Stat. 322 (1955).

² Act of June 8, 1960, Pub. L. No. 86-493, § 1, 74 Stat. 162 (1960); Clean Air Act Amendments, Pub. L. No. 88-206, 77 Stat. 392 (1963); Pub. L. No. 89-272, 79 Stat. 992 (1965); Pub. L. No. 89-675, 80 Stat. 954 (1966). See also Note, *Federal Clean Air Policy: Its Uncertain Foundations*, 10 IND. L. REV. 931 (1977).

³ Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

⁴ See Note, *Federal Clean Air Policy: Its Uncertain Foundations*, 10 IND. L. REV. 931, 944 (1977).

⁵ Pub. L. No. 91-604, 84 Stat. 1676 (1970), enacted Dec. 31, 1970, (codified at 42 U.S.C. §§ 1857-1858(2) (West 1976) and subsequently changed to 42 U.S.C.A. §§ 7401-7642 (West Supp. 1978) upon enactment of the Clean Air Act Amendments of 1977).

⁶ 42 U.S.C. § 1857c-4(a)(1) (West 1976). This section was subsequently changed to 42 U.S.C.A. § 7409 (West Supp. 1978) upon enactment of the Clean Air Act Amendments of 1977.

plans within a specified period of time.⁷

More importantly, the 1970 Act was embellished with a provision for citizen suits, which became profoundly significant in the enforcement of these State Implementation Plans.⁸ The pur-

⁷ 42 U.S.C. § 1857c-5(a)(1) (West 1976), which was subsequently changed to 42 U.S.C.A. § 7410 (West Supp. 1978) after enactment of the Clean Air Act Amendments of 1977. The 1977 Act did not alter 42 U.S.C. § 1857c-5(a)(1) (West 1976), which directed the states to submit implementation plans and authorized the Administrator of the EPA to approve or reject those plans. 42 U.S.C.A. § 7410 (West Supp. 1978) provides in pertinent part:

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. . . .

(a)(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. . . .

⁸ 42 U.S.C. § 1857h-2 (West 1976), which subsequently was changed to 42 U.S.C.A. § 7604 (West Supp. 1978), upon enactment of the Clean Air Act Amendments of 1977. This section also was left intact by the 1977 Act, which did not modify the requirements for initiating citizen suits. 42 U.S.C.A. § 7604 reads in relevant part:

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C or subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to

pose of this provision was two-fold: it widened citizen access to the courts, enabling citizens to participate in the fight against air pollution, which directly affects their health and safety; and it attempted to motivate and goad the EPA and state agencies charged with the responsibility of enforcing anti-pollution statutes into appropriate action.⁹ Hence, the statute enabled individual citizens or groups, with or without standing to sue, to challenge governmental efforts or failures to manage or regulate the environment and to sue private entities to enjoin them from conducting polluting activities on any public or private property.

The 1970 Act remains the backbone of air pollution environmental law. Congress has since enacted the Clean Air Act Amendments of 1977, but these Amendments only slightly modify the 1970 Act and revise none of the citizen suits provision.¹⁰

It is against this background that *Baughman v. Bradford Coal Co., Inc.*¹¹ entered the contemporary environmental litigation arena. On December 27, 1976, a group of residents of Bigler, Pennsylvania, instituted an action under the citizen suits provision of the Clean Air Act Amendments of 1970¹² against Bradford Coal Company in the United States Federal District Court for the Middle District of Pennsylvania. Their complaint charged the coal company with operating an excessively polluting coal processing plant in violation of the Pennsylvania Implementation Plan.¹³ The plan was enforceable by the state, the EPA, or the

nonattainment) or who is alleged to be in violation of any condition of such permit.

The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

⁹ See *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975). See generally, DiMento, *Citizen Environmental Litigation and the Administrative Process*, 2 DUKE L.J. 409 (1977); and Senator Muskie's comments at 116 CONG. REC. 32,926 (1970).

¹⁰ Pub. L. No. 95-95, 91 Stat. 712 (1977) (codified at 42 U.S.C.A. §§ 7401-7642 (West Supp. 1978)), which includes the entire Amendments.

¹¹ 592 F.2d 215 (3rd Cir. 1979).

¹² 42 U.S.C.A. § 7604(a)(1) (West Supp. 1978). See note 8.

¹³ This implementation plan is codified at 35 PA. CONS. STAT. ANN. §§ 4001-4015 (Purdon Cum. Supp 1979). It was properly approved by the EPA.

federal district court pursuant to 42 U.S.C.A. § 7604(a)(1).¹⁴ This statute bestows subject matter jurisdiction upon the federal court, obviating any need to invoke the traditional subject matter jurisdiction statutes.¹⁵

The major controversy in the case arose because of the existence of another provision of the statute, 42 U.S.C.A. § 7604(b).¹⁶ Bradford maintained that this statute precluded the district court from having subject matter jurisdiction. Part of the statute requires a citizen to give the EPA, the state, and the alleged polluter 60 days notice prior to actually filing suit in federal court.¹⁷ This allows all parties an opportunity to rectify the problem and avoid litigation. In this case the plaintiffs had complied with this provision. However, another subsection in the statute prohibits any citizen from filing suit in federal court if “. . . the Administrator or State has commenced and is diligently prosecuting a civil action in a *court* of the United States or a State. . . .”¹⁸

Well before the plaintiffs filed their action, the Pennsylvania Department of Environmental Resources (DER) had commenced an action against Bradford for the same alleged violations before the Pennsylvania Environmental Hearing Board (Hearing Board)

¹⁴ 42 U.S.C.A. § 7604(a)(1) (West Supp. 1978). See note 8.

¹⁵ 28 U.S.C. § 1331 (West 1976) requires a federal question to exist. The plaintiffs in *Baughman* could have availed themselves of this statute as well, since the case arose under a federal statute. However, 28 U.S.C.A. § 1332 (West Supp. 1979), requiring diversity of citizenship and a minimum amount in controversy, would have been inapplicable.

¹⁶ 42 U.S.C.A. § 7604(b) (West Supp. 1978) states in pertinent part:

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a *court* of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right. . . (emphasis added).

¹⁷ *Id.* § 7604(b)(1)(A).

¹⁸ *Id.* § 7604(b)(1)(B). (emphasis added).

pursuant to statutes in the Pennsylvania Implementation Plan.¹⁹ These statutes enabled the DER to issue orders and enforce the state anti-pollution laws and authorized the Hearing Board to adjudicate disputes arising from the DER's activities.²⁰

Consequently, the issues before the district court were: (1) whether the Pennsylvania Environmental Hearing Board was a "court" for the purposes of precluding the district court from hearing the case by virtue of 42 U.S.C.A. § 7604(b)(1)(B);²¹ and (2) whether the DER and the Hearing Board had "diligently prosecuted" the action prior to the plaintiffs filing their suit.²² The district court ruled that the Hearing Board could not be a "court" for the purpose of defeating the plaintiffs' action and determined that both the DER and the Hearing Board had been dilatory in their prosecution of Bradford's case. The court of appeals upheld the decision.

There is a dearth of authority specifically construing the term "court" under 42 U.S.C.A. § 7604(b)(1)(B).²³ In *Baughman* the court of appeals recognized that generally the word "court" in a statute refers to only "the tribunals of the judiciary and not to

¹⁹ 35 PA. CONS. STAT. ANN. § 4004 (Purdon Cum. Supp. 1979) provides in pertinent part:

The department [DER] shall have power and its duty shall be to—

(4.1) Issue orders to any person owing or operating an air contamination source, or owning or possessing land on which such source is located, if such source is introducing or is likely to introduce air contaminants into the outdoor atmosphere in excess of any board rule or regulation, or any permit requirement applicable to such source, or at such a level so as to cause air pollution. . . . Within thirty (30) days after service of any such order the person to whom the order is issued or any other person aggrieved by such order may file with the hearing board an appeal setting forth with particularity the grounds relied upon.

³⁵ PA. CONS. STAT. ANN. § 4006 (Purdon Cum. Supp. 1979) states:

The hearing board shall have the power and its duty shall be to hear and determine all appeals from orders issued by the department in accordance with the provisions of this act. Any and all action taken by the hearing board with reference to any such appeal shall be in the form of an adjudication and all such action shall be subject to the provisions of the act of June 4, 1945 (P.L. 1388), known as the 'Administrative Agency Law'.

²⁰ *Id.*

²¹ 42 U.S.C.A. § 7604(b)(1)(B) (West Supp. 1978). See note 16.

²² *Id.*

²³ *Id.*

those of an executive agency with quasi-judicial powers."²⁴ In support of this premise the court cited cases that had not been decided under the Clean Air Act, though the analysis of the various courts in support of that general rule was convincing.²⁵ In *Department of State v. Spano*,²⁶ the Pennsylvania Real Estate Commission initiated an adjudicatory procedure against a real estate broker for violation of a state statute prohibiting discriminatory rental practices. Prior to the Commission bringing its action against the broker, the Pennsylvania Human Relations Commission, another state agency, had conducted adjudicatory proceedings against the broker and found him in violation of the human relations statute. A provision of the Real Estate Brokers' License Act authorized the State Real Estate Commission to revoke a broker's license if found to have violated any provision of the Act.²⁷ The issue in the case was whether the Human Relations Commission was a "court of competent jurisdiction," thereby enabling the State Real Estate Commission to utilize testimony from the adjudication of the Human Relations Commission for the purpose of removing the broker's license by statute. The Commonwealth court held it was not, mainly due to the lax evidentiary requirements of an administrative agency, and reversed the decision of the Real Estate Commission, declaring:

While many administrative agencies make decisions which are judicial in nature . . . we know of no authority, nor has any been cited, that such power affords them the stature of a court. Absent a clearly expressed contrary legislative intent to a different meaning, the word "court" as contained in a statute can only mean one within the judicial structure of the government

²⁴ 592 F.2d at 217.

²⁵ *United States v. Frantz*, 220 F.2d 123, 125 (3rd Cir. 1955), *cert. denied*, 349 U.S. 954 (1955); *Nelson v. Real Estate Commission*, 35 Md. App. 334, 370 A.2d 608 (1977); *Department of State v. Spano*, 1 Pa. Commw. 240, 274 A.2d 563 (1971). In *Frantz*, a third circuit case, the court held that the word "court" in the Soldiers' and Sailors' Relief Act of 1940 could not be construed to "include a head of an executive department administratively determining excess profits on war contracts. . . ." 220 F.2d at 125. The court maintained that Congress had explicitly precluded that term from applying to governmental agencies by providing that: "The term 'court', as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record." *Id.*

²⁶ 1 Pa. Commw. at 240, 274 A.2d 563 (1971).

²⁷ *Id.* at 242, 274 A.2d at 565.

or a judge thereof, and cannot include an agency of the executive branch simply because it possesses quasi-judicial powers.²⁸

The court of appeals in *Baughman* also cited contrary authority which demonstrated that the Pennsylvania Environmental Hearing Board had been deemed a "court" for the purpose of removal to federal court.²⁹ The court rather cursorily dismissed this authority, though, by determining that the purport of federal removal statutes was significantly different than that of environmental legislation. Such a distinction was unnecessary, however, because close scrutiny of that apparently contrary authority reveals no real conflict with the court of appeals' decision. In one case, *United States v. Pennsylvania Environmental Hearing Board*,³⁰ the federal government allegedly violated the Pennsylvania Clean Stream Law and desired to remove the case from the state agency to federal court. The removal was allowed. The district court hearing the case held that the term "court" should not be construed so narrowly as to defeat the utilization and application of the federal removal statute and declared:³¹ "This [removal] policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)."³²

This rationale cuts both ways, however. If words in a statute are not to be so myopically construed as to defeat federal policy, then, likewise, they should not be so expansively construed as to run afoul of that same policy. Thus, because the policy considerations of the Clean Air Act are of paramount importance, as will be noted later, this type of analysis is in essence an endorsement of the *Baughman* decision. Accordingly, the *Baughman* court had no real need to make any distinction between removal and environmental policy.

The most compelling case the court of appeals cited in sup-

²⁸ *Id.* at 245, 274 A.2d at 566.

²⁹ 592 F.2d at 217-18, *citing* 28 U.S.C. § 1442, the federal removal statute and *United States v. Pennsylvania Environmental Hearing Board*, 377 F. Supp. 545, 553 (M.D. Pa. 1974). *See also*, *Volkswagon de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972), where the Labor Relations Board was held to be a "court," since its broad discretionary authority and power endowed it with sufficient characteristics to enable it to achieve statutory goals.

³⁰ 377 F. Supp. 545 (M.D. Pa. 1974).

³¹ *Id.* at 553.

³² *Id.*, the court *citing* *Wellingham v. Morgan*, 395 U.S. 402, 407 (1969).

port of its decision was *Friends of the Earth v. Carey*,³³ wherein an environmental group filed suit against the State of New York and its governor under the same citizen suits provision as in *Baughman*.³⁴ The state had been recalcitrant in the enforcement of its implementation plan. Part of this plan had been approved by the EPA, but a portion had been rejected and sent back to the state for revision. The complaint alleged that the state had failed to enforce that portion of the plan which had been approved and had been laggard in completing its revisions. The district court refused to hear the case and dismissed the suit. It found that the EPA was still reviewing part of the plan and was negotiating consent orders with the state at the time of the suit. The court reasoned that the EPA was ultimately charged with enforcement of the plan, and judicial review would amount to an intrusion into the EPA's decision making processes and, hence, an usurpation of its authority.³⁵ The court of appeals reversed the decision and ordered the approved portion of the implementation plan immediately enforced. It also commanded the EPA to complete the portion of the plan that it had rejected, using EPA guidelines. In addition, the court announced that the district court had failed to recognize and appreciate the import of citizen suits as countenanced by Congress.³⁶ The court enunciated: ". . . [T]he citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced."³⁷

Upon examining the legislative history, the *Friends* court determined that Congress had been adamantly opposed to anything

³³ 535 F.2d 165 (2nd Cir. 1976).

³⁴ 42 U.S.C.A. § 7604 (West Supp. 1978), after the Clean Air Act Amendments of 1977. See note 8.

³⁵ See Note, *Friends of the Earth v. Carey: Enforcing the Clean Air Act*, 9 TRANSP. L.J. 411 (1977), for a more extensive study of the case.

³⁶ 535 F.2d at 172.

³⁷ *Id.* See also, *National Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1975), which the *Baughman* court cited along with *Friends*. See note 33. In *Train* a citizen suit was initiated against the EPA to compel its Administrator to publish and enforce guidelines required by the Federal Water Pollution Control Act Amendments of 1972. At issue was the propriety of the suit, because the environmental group had failed to follow the appropriate statutory notice procedure. The court upheld the citizen suit irrespective of that error.

less than statutory restrictions placed on citizen suits:³⁸ "Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings. . . ."³⁹

After assiduously studying the 1970 Act and its history, the court also announced:

. . . [B]oth the underlying rationale and legislative history surrounding the citizen suit provision demonstrate that Congress intended the district court to enforce the mandated air quality plan irrespective of the failings of agency participation. As noted earlier, the very purpose of the citizens' liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals.⁴⁰

Though *Friends* does not specifically define the word "court" for *Baughman's* purposes, it is important for two reasons. First, the case demonstrates a willingness by federal courts to take an air pollution dispute from the purview of the EPA or any state agency if it appears that that agency is dilatory in its responsibility to the public. Though no specific "action" had been filed by the EPA against the State of New York, thereby forcing the federal court to dismiss the citizen suit if that agency was diligently prosecuting the action, the language in the case manifests a desire by the court timely to resolve air pollution disputes directly affecting the public, regardless of whether the EPA or a state agency is reviewing the problem, negotiating consent orders, or doing anything less than "diligently prosecuting" the action. Another case decided under the citizen suits provision, *National Resources Defense Council, Inc. v. Train*,⁴¹ attests to this rationale. In that case the federal court determined it had subject matter jurisdiction even though the notice provision of 42 U.S.C.A. § 7604(b)(1)(A)⁴² had not been met. Second, the *Friends* court interpreted and embraced the Congressional intent embodied in the

³⁸ *Id.*

³⁹ *Id.*, citing from S. Rep. No. 1196, 91st Cong., 2d Sess. 36-39 (1970).

⁴⁰ *Id.* at 173.

⁴¹ 510 F.2d 692 (D.C. Cir. 1975).

⁴² 42 U.S.C.A. § 7604(b)(1)(A) (West Supp. 1978). See note 16.

legislative history, which manifests important policy determinations.

The *Baughman* court cited part of the legislative history of the 1970 Act in its majority opinion.⁴³ A closer examination of the history reveals the fervor with which Congress championed the citizen suits provision.⁴⁴ In one debate, Senator Muskie responded to a charge by Senator Hruska that the provision would overburden the federal courts and paralyze appropriate regulatory agencies.⁴⁵ Senator Muskie remarked that the provision required an individual or group to give 60 days' notice to the EPA, state agency, and the alleged violator prior to filing suit, and then stressed that if the problem had not been addressed and appropriate action taken within 60 days, the agency deserved to relinquish the case to the federal courts.⁴⁶ Reading from the record of the Senate Committee on Public Works, he announced:

It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, *if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.*⁴⁷

Obviously, in light of this language, the proponents of the legislation did not intend an administrative agency to be a "court" for the purposes of defeating citizen suits under 42 U.S.C.A. § 7604.⁴⁸ By bestowing such broad discretionary authority upon federal courts, Congress essentially stated that an agency does not have the same status and authority as a "court" under

⁴³ 592 F.2d at 218.

⁴⁴ 116 CONG. REC. 32,900-928 (1970). This is the reference to the Senate debate of September 21, 1970, concerning passage of the proposed National Air Quality Standards Act of 1970, which ultimately was enacted as part of the Clean Air Act Amendments of 1970.

⁴⁵ *Id.* at 32,925.

⁴⁶ *Id.* at 32,926-27.

⁴⁷ *Id.* (emphasis added).

⁴⁸ 42 U.S.C.A. § 7604 (West Supp. 1978).

the Clean Air Act.

The holdings in the previously discussed cases, coupled with this legislative history, afforded the *Baughman* court sufficient authority to decide this first issue. Going further, however, the court determined that before an agency can be a "court" under the citizen suits provision, it must be "empowered to grant relief which will provide meaningful and effective enforcement of an implementation plan."⁴⁹ It reasoned that since the EPA was able to provide injunctive relief pursuant to 42 U.S.C.A. § 7413,⁵⁰ whereas the Hearing Board was not,⁵¹ the EPA may be justified in being a "court", but the Hearing Board may not.⁵² The court also pointed out that the EPA was able to recover civil penalties of up to \$25,000 a day for continuing violations after an injunction has been issued,⁵³ yet the Hearing Board was only able to assess penalties of up to \$2,500 a day.⁵⁴ Considering the authority the *Baughman* court had before it, this argument seems not only unnecessary but somewhat dubious as well, since the court failed to cite any authority to support its reasoning.

The court of appeals' determination of the second issue solidified its decision. From every indication the Hearing Board and the DER had not been "diligently prosecuting" Bradford's alleged violations. Since the citizens had complied with the notice re-

⁴⁹ 592 F.2d at 218.

⁵⁰ 42 U.S.C.A. § 7413(b) (West Supp. 1978), provides in pertinent part:
(b) The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than \$25,000 per day of violation, or both. . . .

⁵¹ 35 PA. CONS. STAT. ANN. § 4009.1 (Purdon Cum. Supp. 1979). This statute enables the Hearing Board to assess civil penalties against a violator of the state pollution laws. The Hearing Board may level a maximum penalty of \$10,000 against the violator and fine him up to \$2,500 a day for continued violations after an order has been issued; but the statute does not confer authority upon the Hearing Board to grant injunctive relief. However, a separate statute enables the DER to obtain injunctive relief from the state Attorney General.

⁵² 592 F.2d at 218.

⁵³ 42 U.S.C.A. § 7413(b) (West Supp. 1978).

⁵⁴ 35 PA. CONS. STAT. ANN. § 4009.1 (Purdon Cum. Supp. 1979); 42 U.S.C.A. § 7413(b) (West Supp. 1978). See note 50 for pertinent quote from the federal statute.

quirements,⁵⁵ the DER and the Hearing Board had at least 60 days to make Bradford rectify the problem or at least take appropriate action to appease the citizens. Also, the DER had initiated its own action well before the notification by the plaintiffs, so that agency had ample time to initiate abatement proceedings or obtain an injunction against Bradford from the state Attorney General pursuant to statute.⁵⁶ Both agencies had failed to resolve the problem internally or within the state court system.

More significantly, subsequent to the filing of the plaintiffs' suit, the DER and Bradford agreed to pay the State of Pennsylvania \$10,000 for past violations and to construct a new processing plant by December 31, 1979. The DER consented to allow Bradford to continue operating its plant provided it "take all reasonable interim measures at the existing site to keep fugitive emissions to a minimum (albeit, apparently, in excess of Plan levels)."⁵⁷ This order was not submitted to the EPA for approval as required by statute.⁵⁸ Collectively, these factors constitute flagrant inertness and a lack of good faith on the part of the DER, and substantiate the court's finding that the agencies indeed acted in less than diligent fashion.

Consequently, the court's judgment in *Baughman* was sound and furthered Clean Air Act policies and objectives. It appears the federal courts are still willing to uphold the ideals and objectives of the 1970 Act, unless in doing so the harm would clearly outweigh the benefit. Obviously, in *Baughman* this was not the case. Had the court ruled differently, the Hearing Board more

⁵⁵ 42 U.S.C.A. § 7604(b)(1)(A) (West Supp. 1978). See note 16.

⁵⁶ 35 PA. CONS. STAT. ANN. § 4010 (Purdon Cum. Supp. 1979), reads in relevant part:

In addition to any other remedies provided for in this act, the Attorney General, at the request of the department, may initiate, in the Commonwealth Court or the court of common pleas of the county in which the defendant resides or has his place of business, an action in equity for an injunction to restrain any and all violations of this act or the rules and regulations promulgated hereunder, or to restrain any public nuisance or detriment to health caused by air pollution. . . .

⁵⁷ 592 F.2d at 217.

⁵⁸ 42 U.S.C.A. § 7410(5)(a)(iii) (West Supp. 1978). Variances from an implementation plan granted by a state are not effective until approved by the EPA. See *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976). See text accompanying notes 33 and 34.

than likely would have felt vindicated and more autonomous. In addition, Bradford would have continued to keep the DER at bay by paying minimal fines and making hollow promises. In the meantime, Bradford's coal processing plant would have continued to spew forth its pollutants upon the inhabitants of Bigler, Pennsylvania, who would have reconciled themselves to their insalubrity while cursing their legal impotence.

Hunter C. Quick

