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Thomas v. New York: Sisiphean¹ Tragedy on the Environmental Stage

I. INTRODUCTION

Since the international pollution provision of the Clean Air Act² was amended by Congress in 1977, many commentators³ have hoped that the damage caused to Canada by pollutants emitted from sources in the United States and falling to the earth in the form of acid rain⁴ could be abated with this potentially powerful new remedy. Indeed, when the plaintiffs in *New York v. Thomas*⁵ won their case at the district court level, the community of environmental interests was poised for a major victory. It appeared that where the private conferences of diplomacy had stalled, the public forum of the judiciary was

1. From Greek mythology, a king of Corinth condemned forever to roll a stone up a hill in Hades only to have it roll down again on nearing the top.

2. Clean Air Act, § 115, 42 U.S.C. § 7415 (1983).

3. E.g., Lutz, *Managing a Boundless Resource: U.S. Approaches to Transboundary Air Quality Control*, 11 ENVTL. L. 321 (1981); Comment, *Acid Rain, Canada, and the United States: Enforcing the International Pollution Provision of the Clean Air Act*, B.U. INT'L L.J. 151 (1982); Comment, *Beyond the Bargaining Table: Canada's Use of Section 115 of the United States Clean Air Act to Prevent Acid Rain*, CORNELL INT'L L.J. 193 (1983); see also, Wooley, *Acid Rain: Canadian Litigation Options in U.S. Court and Agency Proceedings*, 17 U. TOL. L. REV. 139 (1985) (David R. Wooley, Assistant Attorney General for the State of New York, served as lead counsel for plaintiffs in *New York v. Thomas*. This article stresses the importance of Canadian involvement in acid rain litigation under the international pollution provision of the Clean Air Act.)

4. "Once released, sulfur and nitrogen pollutant gases become part of the soup of pollution, dust, and water vapor that mix in the atmosphere, cook in the sunlight, and react with one another in a variety of ways. Here sulfur dioxide and nitrogen oxide gases are transformed into sulfate and nitrate particles and eventually, if water vapor is present, into acids." G. WETSTONE & A. ROSENCRANZ, *ACID RAIN IN EUROPE AND NORTH AMERICA: NATIONAL RESPONSES TO AN INTERNATIONAL PROBLEM* 23-24 (1983). The process by which the rain fall cleanses the atmosphere below the rainclouds is known as "scavenging" and results in the "acid precipitation" better known as acid rain. *Id.* at 13. Studies on the acidity of rain, however, reflect only part of the acid problem. "Acids may also arrive in dry form as sulfate and nitrate particles, or as sulfur dioxide gas. Upon contact with water, sulfur forms sulfuric acid, nitrate forms nitric acid, and dry gaseous sulfur dioxide can, through a more complex process, be converted into sulfates." *Id.* This is known as "dry deposition." For purposes of this Note, the common term acid rain will connote both acid precipitation and dry deposition.

5. *New York v. Thomas*, 613 F. Supp. 1472 (D.D.C. 1985), *rev'd*, 802 F.2d 1443 (D.C. Cir. 1986) (unanimous decision) *petition for reh'g filed*, Nos. 85-5970 and consolidated cases (D.C. Cir. 1986), *petition for reh'g denied* Nov. 24, 1986, *cert. denied*, 107 S. Ct. 3196 (1987), *Her Majesty The Queen in Right of Ontario v. Thomas*, 107 S. Ct. 3196 (June 8, 1987) (No. 86-1374), *cert. denied*, *New York v. Thomas* 107 S. Ct. 3196 (June 8, 1987) (No. 86-1373).

about to succeed. A promising solution was in sight for a menacing environmental problem which could transform a blue-green lake teeming with life into a crystal-clear lifeless tomb.⁶

But the scene changed drastically on September 18, 1986, when the United States Court of Appeals, District of Columbia Circuit, unanimously reversed the decision of the district court with instructions to dismiss the case.⁷ The court, in an opinion written by then court of appeals judge Antonin Scalia, declined to reach the substantive issues of the case and instead based the holding on a procedural point. Specifically, the court held that pursuant to the Administrative Procedure Act,⁸ notice-and-comment procedures should have accompanied the findings which, according to the plaintiffs, trigger the international pollution provision of the Clean Air Act. The practical implications of the decision are unfavorable for those anxious to see whether the international pollution provision (section 115) of the Clean Air Act will ever play an active role in the elimination of acid rain in Canada. The construction given to section 115 of the Clean Air Act by the court of appeals' opinion does not augur well for the plaintiffs or for the environmental community.

This Note will examine the two different approaches taken by the district court and the court of appeals. It will then focus on the procedural correctness of the notice-and-comment procedure mandated by the court of appeals decision, and discuss the role of the Administrator of the Environmental Protection Agency (EPA) under the international pollution provision of the Clean Air Act. The Note will conclude with a suggestion as to the motive behind the court of appeals decision and a summary of some of the latest congressional attempts at solving the acid rain problem.

The purpose of this Note is twofold. First, it is intended to provide a critical analysis of the court of appeal's decision. Second, this Note will highlight the issues which will have to be addressed in a revision or update of the Clean Air Act. Failure to act now to salvage

6. Howard and Perley, *Acid Rain*, 2 AMICUS J. 23 (1981).

Nellie Lake is a peaceful, sparkling lake in northcentral Ontario It's the kind of lake chosen by the Canadian government for tourists ads in U.S. magazines Nellie Lake is also *acid dead*. The water is sparkling clear because the acid rain has destroyed everything in it, including the color. It is abnormally peaceful because its natural aquatic life, from fish to crayfish to snails has ceased.

Id.

7. *Thomas*, 802 F.2d 1443 (D.C. Cir. 1986).

8. 5 U.S.C. §§ 551(4), 553(b)(A) (1977).

section 115 of the Clean Air Act⁹ could mean relegating it to its previous dormant state, while leaving the problem of long range transboundary air pollution¹⁰ to the uncertainty and inaccessibility of the political process.

II. FACTS OF *THOMAS V. NEW YORK*

A. *Statutory Background*

Laws to abate international air pollution date back to the early versions of the Clean Air Act.¹¹ The House Report of the 1965 Act states:

As a member of the North American community, the United States cannot in good conscience decline to protect its neighbors from pollution which is beyond their legal control. Therefore the bill provides remedies for foreign countries adversely affected by air pollution emanating from the United States¹²

Prior to 1970, however, the principal legal means for abatement of air pollution, whether domestic or international, was the enforcement of conference procedures, "a lengthy and uncertain process in which all parties—State, local, Federal agencies and the polluter—were convened to negotiate a schedule for control of the emissions alleged to cause the problem."¹³

With the adoption in 1970 of national ambient air quality standards (NAAQS)¹⁴ and statutory deadlines,¹⁵ the enforcement mecha-

9. Clean Air Act § 115, 42 U.S.C. § 7415 (1983).

10. Long range transboundary air pollution is the technical definition used to describe the acid rain phenomenon in the international as opposed to the domestic setting:

The emissions which form acid rain respect no national or state boundaries; they are part of a "transfrontier" pollution problem to which the world is becoming more sensitive. There seems to be little doubt in the Province of Ontario that Ohio River Valley power plants will be the ruination of Ontario's large tourist industry. U.S. states bordering Canada also suffer from the effects of acid rain sent from a foreign source.

1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.09, at 2-588 (1987).

11. Brief for Appellees at 11, *New York v. Thomas*, 802 F.2d 1443 (D.C. Cir. 1986) (No. 85-5970).

12. H.R. REP. NO. 899, 89th Cong., 1st Sess. 6, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 3613.

13. S. REP. NO. 127, 95th Cong., 1st Sess. 57.

14. "Ambient" or "air quality" standards prescribe pollutant levels in the atmosphere that cannot legally be exceeded during a specified time period. That is, they state a level of concentration of a particular pollutant in the air which should not be exceeded on the average during a given period. They do not apply directly to individual pollution sources; these are controlled by emissions standards designed to reduce total emissions from all sources in an area to that point which results in achievement of the ambient or air quality standard.

nism changed from the conference procedure to the state implementation plan (SIP)¹⁶ with its enforceable requirements for every source of pollution.¹⁷ The conference procedure, however, remained the sole enforcement mechanism for international abatement under section 115 of the Clean Air Act. Hence, the pre-1977 version of the international pollution provision of the Clean Air Act called for the abatement of air pollution by means of conference procedures if the Administrator of the Environmental Protection Agency found that emissions originating in the United States endangered the health or welfare of persons in a foreign country.¹⁸

Upon amending major portions of the Clean Air Act in 1977, Congress decided that the success of the SIP with respect to interstate air quality control might provide a corresponding advancement in the international area, especially since the old provision had not been used.¹⁹ As a result, in 1977 subsection (a) of the international provision of the Clean Air Act was amended to read:

Whenever the Administrator, upon receipt of reports, surveys, or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.²⁰

Furthermore, subsection (b) provides that the notice of the Adminis-

Krier, *The Irrational National Air Quality Standards: Macro- and Micro-Mistakes*, 22 U.C.L.A. L. REV. 323, 323 n.2 (1974). See, Jorling, *The Federal Law of Air Pollution Control*, FED. ENVTL. L. 1058 (1974).

15. Each state was required to be in compliance with NAAQS by December 31, 1982. Compliance may be delayed until December 31, 1987, for carbon monoxides and photochemical oxidants. Clean Air Act § 172, 42 U.S.C. § 7502 (1983).

16. The responsibility for meeting these air quality standards (NAAQS) is delegated to the states, "each of which is required to submit a State Implementation Plan (SIP) for EPA approval. The SIPs must provide for the 'implementation, maintenance, and enforcement' of these . . . standards in each air quality control region within each state." Lutz, *Managing a Boundless Resource: U.S. Approaches to Transboundary Air Quality Control*, 11 ENVTL. L. 321, 326 (1981).

17. S. REP. NO. 127, *supra* note 13.

18. *Id.*

19. *Id.*

20. Clean Air Act § 115(a), 42 U.S.C. § 7415(a) (1983).

trator shall be deemed a finding under section 110(a)(2)(H)(ii) of the Clean Air Act, requiring a state implementation plan revision "with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a) of this section."²¹

Finally, subsection (c) of section 115, introduced the requirement of reciprocity.²² The section would apply "only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section."²³

Although diplomacy achieved some minor success in addressing the issue of acid rain through agreements, accords, and memoranda, these efforts have resulted mostly in establishing joint commissions to study the problem and share information.²⁴ Little concrete progress has actually occurred to solve the problem. Doubts about the ability of the Clean Air Act to protect acid-sensitive ecosystems in both the United States and Canada led some legislators to propose new acid rain legislation.²⁵ Unfortunately, none of the proposed bills have been enacted into law "because none of them has been able to overcome the formidable barriers presented by conflicting economic and political interests."²⁶

21. Clean Air Act § 115(b), 42 U.S.C. § 7415(b) (1983).

22. Clean Air Act § 115(c), 42 U.S.C. § 7415(c) (1983).

23. *Id.*

24. *E.g.*, Memorandum of Intent between the Government of Canada and the Government of the United States of America Concerning Transboundary Air Pollution (Aug. 5, 1980).

25. Comment, *Acid Rain, Canada, and the United States: Enforcing the International Pollution Provision of the Clean Air Act*, 1982 B.U. INT'L L.J. 151, 172 (This article provides a good summary of the early versions of proposed acid rain legislation).

26. Joint Report of the Special Envoys on Acid Rain (Jan. 1986) at 16 [hereinafter Lewis-Davis Report]. The "Shamrock Summit" on March 17 and 18, 1985 between Prime Minister of Canada Brian Mulroney and President Ronald Reagan culminated in an agreement in which each would appoint a special envoy to examine the acid rain issue and report back before their next meeting in Spring 1986. Drew Lewis, former Secretary of Transportation, worked with William Davis, former Premier of Ontario, in preparing this report. *Id.*

Wind patterns contribute to the political complexity of the acid rain problem. They often exacerbate what would be a difficult problem even if the polluter and the victims were in the same locale. For example, coal-fired power plants in the Ohio Valley emit pollutants which are carried by the winds directly into southern Canada and the northeastern United States before the acids return to the ground and the effects are noticed. At that point, the stage is set for a battle which pits Canada against the United States, the northeastern United States against the Midwest, and fishing, recreational and environmental interests against utility, mining, and union interests.

The failure of the legislative alternative and the inadequacy of the diplomatic alternative pushed the newly revised international pollution provision to the forefront as a potential means to abate long range international air pollution.

B. Procedural History and Facts of Thomas v. New York

In April 1980, in a speech to state environmental officials, then EPA Administrator under the Carter Administration, Douglas Costle, addressed the critical problem of acid rain. He concluded that "the time [had] come [to] make the transition from research to action," and that the EPA intended to work within the structure of the Clean Air Act to address the problem."²⁷

In October of 1980, the International Joint Commission (IJC) issued its *Seventh Annual Report on Great Lakes Water Quality*.²⁸ In this report the Commission found that "acid rain [was] causing harm to water quality, soil fertility, crops, forests, property and human health in the Great Lakes Basin, an area including parts of seven states and the Province of Ontario."²⁹

On December 17, 1980, the Canadian Parliament enacted a law similar to section 115 of the Clean Air Act. The Canadian law³⁰ provides protection to the United States from Canadian air pollution sources.³¹

On the basis of the Canadian statute and the IJC report, Administrator Costle determined that the prerequisites for pollution abatement action under section 115 had been satisfied.³² In letters dated January 13, 1981 Costle submitted his findings to Secretary of State

27. Brief for Appellees, *supra* note 11, at 12.

28. *Seventh Annual Report on Great Lakes Water Quality* (1980).

This report gives an overview and a lake-by-lake description of the water quality in the Great Lakes Basin during 1978 with an indication of some broad changes that have occurred since 1972 A range of problems arising from industrial and municipal discharges to the Lakes are addressed, including toxic and hazardous substances and hazardous waste disposal; phosphorous and eutrophication; the long range transport of airborne pollutants, and radioactivity.

Id. at 1.

29. Brief for Appellees, *supra* note 11, at 13. See *Seventh Ann. Report on Great Lakes Water Quality*, *supra* note 28, at 48-55.

30. An Act to Amend the Clean Air Act, ch. 45, § 3, 1980-1983 Can. Stat. 1160.

31. Section 3 of the Canada's Act to Amend the Clean Air Act was a vital step towards the enforcement of section 115 in the United States. Quickly passed by the Canadian Parliament, the amendment was intended to, and in fact did, form the basis for a judicial determination that the reciprocity requirement of section 115(c) had been satisfied.

32. Brief for Appellees, *supra* note 11, at 13.

Edmund Muskie³³ and Senator George Mitchell.³⁴ He publicly announced his findings in a press release³⁵ three days later. Costle's letter to Secretary Muskie stated that "acid deposition is endangering public welfare in the United States and Canada and . . . United States and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country."³⁶ He also stated that his conclusions were based on the *Seventh Annual Report on Great Lakes Water Quality* issued by the IJC.³⁷

Administrator Costle also concluded in his letter that Canadian legislation passed on December 17, 1980³⁸ gave the United States essentially the same rights³⁹ under Canadian law as Canada enjoyed under United States law. Costle's second letter, addressed to Senator Mitchell,⁴⁰ expanded upon his findings sent to Secretary Muskie. In spite of these determinations, however, Costle's successors in the EPA repeatedly refused to take action to issue section 115 notices.⁴¹

Consequently, in 1985 six northeastern states,⁴² four environmental associations,⁴³ former New York Congressman Richard Ottinger, and three United States citizens owning property in the Muskoka Lakes region of Canada filed suit in the United States District Court for the District of Columbia.⁴⁴ They sought to compel then Administrator of the EPA, Lee M. Thomas, "to require emitting states to re-

33. Letter from EPA Administrator Douglas M. Costle to Secretary of State Edmund S. Muskie (Jan. 13, 1981), reprinted in *New York v. Thomas*, 613 F. Supp. 1472, app. A (D.D.C. 1985), rev'd 802 F.2d 1443 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 3196 (1987).

34. Letter from EPA Administrator Douglas M. Costle to Senator George Mitchell (Jan. 13, 1981) reprinted in *New York v. Thomas*, 613 F. Supp. at app. B.

35. *EPA Administrator Believes Canadian Acid Rain Problem May Warrant Action in U.S.*, EPA Press Release (Jan. 16, 1981) (on file at LOY. L.A. INT'L & COMP. L.J.).

36. Letter from EPA Administrator Douglas M. Costle to Secretary of State Edmund S. Muskie (Jan. 13, 1981), reprinted in *New York v. Thomas*, 613 F. Supp. 1472, app. A (D.D.C. 1985), rev'd 802 F.2d 1443 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 3196 (1987).

37. *Id.*

38. *Id.* See also Act to Amend the Clean Air Act, ch. 45, § 3, 1980-1983 Can. Stat. 1160.

39. The existence of reciprocal rights is essential to the enforcement of section 115. See *supra* note 22 and accompanying text.

40. Letter from EPA Administrator Douglas M. Costle to Senator George Mitchell (Jan. 13, 1981) reprinted in *New York v. Thomas*, 613 F. Supp. at app. B.

41. Brief for Appellees, *supra* note 11, at 14.

42. This number eventually grew to eight northeastern states by the time the case reached the court of appeals: New York, Maine, Vermont, Rhode Island, Connecticut, Massachusetts, New Hampshire, and New Jersey. The province of Ontario also joined the case on appeal.

43. The Sierra Club Legal Defense Fund, the Natural Resources Defense Council, the National Audubon Society, and the National Wildlife Federation.

44. *New York v. Thomas*, 613 F. Supp. 1472, 1476 (D.D.C. 1985), rev'd 802 F.2d 1443 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 3196 (1987).

wise their State Implementation Plans, as mandated under section 115 of the Clean Air Act . . . in order to abate the damage allegedly traceable to the transboundary air pollution."⁴⁵ The plaintiffs claimed that the findings made by Costle while he was EPA Administrator were sufficient to invoke section 115.⁴⁶ Intervening on behalf of the agency were three midwestern states (West Virginia, Kentucky, and Ohio), the National Coal Company, and a group of utilities. All of these parties were concerned that they might be adversely affected by any determination EPA might be required to make about emissions contributing to acid rain.

III. REASONING OF THE COURT

A. District Court Decision

1. Jurisdiction

The district court granted jurisdiction based on the "citizen suit provision"⁴⁷ of the Clean Air Act. That provision allows any person to commence a civil action on his own behalf "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. . . ."⁴⁸ The plaintiffs' allegation that the duty of the EPA Administrator to issue revision notices was mandatory, and the sufficiency of the notice, persuaded the court to exercise jurisdiction.⁴⁹

The court then addressed the issue of standing. It stated that "a plaintiff seeking redress must allege: 1) threatened or actual injury resulting from the putatively illegal action; and 2) an injury that can be fairly traced to the challenged action that is likely to be redressed by a favorable decision."⁵⁰ The court concluded that all of the plaintiffs except Representative Ottinger⁵¹ presented facts sufficient to meet the constitutional requirements.

On the requirement of direct injury, the court pointed out that

45. *Id.*

46. *Id.*

47. Clean Air Act § 304, 42 U.S.C. § 7604(a) (1983).

48. *Id.*

49. *Thomas*, 613 F. Supp. at 1477.

50. *Id.* at 1478.

51. *Id.* at 1479. (The court found that since there were no special standing rules for members of Congress, and since Ottinger did not allege any property or personal interest in the matter, his complaint was merely a "generalized grievance" shared with others. He was, however, allowed to remain in the action since other plaintiffs alleged sufficient facts to invoke the court's jurisdiction). *Id.* at 1480.

although the plaintiffs may not have presented specific evidence of identifiable harm, "legally recognizable harm may be retrospective or prospective in nature."⁵² It was sufficient that the plaintiffs alleged that pollution from the midwestern United States may cause damage to air quality, water quality, and property in Canada, "areas in which plaintiffs' citizens or members live, work, vacation or own property."⁵³

The more difficult question involved the second requirement, traceability and redressability.⁵⁴ Recognizing the inherently problematic nature of connecting injury to relief in the area of acid rain, the court relied on the statute itself. The court explained that "at the heart of section 115 is the congressional determination that the revision of state implementation plans is an effective mechanism for abatement of international air pollution."⁵⁵ Furthermore, the court cited prevailing precedent which held that the redressability requirement should be construed broadly in favor of the plaintiffs, and that the plaintiffs need only show that the requested relief would benefit them in some perceptible, tangible fashion.⁵⁶ Having settled the justiciability issues, the court next turned to the merits of the case.

2. Merits of the Case

The court analyzed the plaintiffs' claim under section 115. It began with the requirement that the Administrator's decision be based upon reports from a "duly constituted international agency."⁵⁷ The court recognized that the IJC "is charged with the responsibility of resolving transboundary water and navigational disputes between the United States and Canada" under the United States-Canada Boundary Waters Treaty of 1909.⁵⁸ Its duties include the approval of applications for activities that would affect the natural flow of water on the other side of the boundary. Thus, the court concluded "that the

52. *Id.* at 1480.

53. *Id.*

54. The plaintiffs argued that these two elements "are inseparable in the present case because the relief plaintiffs seek is an order compelling the EPA to end the very inaction which is the cause of the plaintiffs' injuries." The defendants, however, claimed that the plaintiffs failed to establish a causal link between EPA inaction and the aggravated harm in Canada. *Id.* at 1481.

55. *Id.*

56. *Id.*

57. Clean Air Act § 115(a), 42 U.S.C. § 7415(a) (1983).

58. *New York v. Thomas*, 613 F. Supp. 1472, 1482 (D.D.C. 1985), *rev'd* 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

Costle determination⁵⁹ was made upon receipt of reports . . . from a duly constituted international agency."⁶⁰

Next the court examined the second clause of section 115(a), which requires that the Administrator have "reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country" ⁶¹ A passage from the IJC report cited by the court stated that the transmission of toxic and hazardous substances is a serious problem and that "[a]ll parts of the Great Lakes watershed are now receiving precipitation containing five to forty times more acid than would occur in the absence of atmospheric emissions."⁶² The court found that the IJC report did afford former Administrator Costle ample basis to conclude that air pollution from the United States contributed to acid deposition in Canada and could reasonably endanger the public health and welfare of that country.⁶³

Having found that the Costle letters were sufficient to satisfy subsection (a), the court turned to subsection (c). Section 115(c) requires that Canada afford to the United States essentially the same rights that the United States grants to Canada with respect to international air pollution.⁶⁴ This "reciprocity requirement" was discussed by Administrator Costle in his letters to Secretary Muskie and Senator Mitchell.⁶⁵ The Administrator had determined that reciprocity did exist based on Section 21.1 of the Canadian Clean Air Act.⁶⁶ Nevertheless, he had qualified this assertion by stating that it was "a fluid and dynamic situation that is subject to change."⁶⁷

Although the district court was satisfied that reciprocal rights did exist, it was troubled "by Costle's own qualifications of his conclusion, aggravated in this case by the lengthy passage of time since the

59. See text accompanying notes 32-40.

60. *Thomas*, 613 F. Supp. at 1482.

61. Clean Air Act § 115(a), 42 U.S.C. § 7415(a) (1983).

62. *Thomas*, 613 F. Supp. at 1482. See Seventh Ann. Report on Great Lakes Water Quality, at 50.

63. *Thomas*, 613 F. Supp. at 1482.

64. Clean Air Act § 115(c), 42 U.S.C. § 7415(c) (1983).

65. See text accompanying notes 33-34.

66. An Act to Amend the Clean Air Act, ch. 45, § 3, 1980-1983 Can. Stat. 1160.

67. Letter from EPA Administrator Douglas M. Costle to Senator George Mitchell (Jan. 13, 1981) reprinted in *New York v. Thomas*, 613 F. Supp. at app. B.

determination was made.”⁶⁸ Therefore, the court gave the EPA an opportunity to review the issue of reciprocity to determine whether the Costle conclusion was still viable.

Once the formal requirements of section 115 are met, “the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate” so those states may revise their state implementation plans.⁶⁹ The court explained in a footnote that:

the states to which notification is due were not identified by Costle. Costle instructed his staff to determine which states were to be targeted, but no final action was taken. The Court is convinced that the obligation to identify the polluting states is incidental to giving formal notification and not a prerequisite to the conclusion that Costle made the requisite findings under section 115.⁷⁰

The defendants’ main contention was that Costle’s findings did not constitute official decision-making and, therefore, could have no legal significance. They specifically objected to the fact that Costle used letters to make his determinations. The defendants argued that letters cannot constitute formal administrative decision-making. Publication in the Federal Register, by contrast, would have given these determinations the characteristics of official action.⁷¹

The plaintiffs countered that “the letters have all the attributes of official agency action.”⁷² The plaintiffs cited to numerous instances where official EPA action was thus effectuated.⁷³

The district court observed, “the fact that Costle memorialized his findings in a letter does not defeat their classification as official agency action.”⁷⁴ It reasoned that: 1) “publication in the Federal Register would be inappropriate for this kind of action because it is not a rule or policy statement” under the Administrative Procedure Act;⁷⁵ 2) “notification to the governors would presumably be achieved by letter;”⁷⁶ and, 3) the Administrator’s choice of medium should not

68. *New York v. Thomas*, 613 F. Supp. 1472, 1484 (D.D.C. 1985), *rev'd* 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

69. *Id.*

70. *Id.* at n.*.

71. *Id.* at 1484.

72. *Id.*

73. *Id.*

74. *Id.*

75. 5 U.S.C. §§ 552(a)(1), 553(b) (1977).

76. *New York v. Thomas*, 613 F. Supp. 1472, 1484 (D.D.C. 1985), *rev'd* 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

frustrate his intent to secure compliance by the states.⁷⁷

After addressing the defendants' remaining two arguments,⁷⁸ the court granted the plaintiff's motion for summary judgment and ordered the Administrator to notify the appropriate states for implementation plan revisions. The defendants then appealed.

B. Court of Appeals Decision

The Court of Appeals for the District of Columbia Circuit framed the issue in the case as "whether, under § 115 of the Clean Air Act . . . , Administrator Costle's letter legally obligated his successors to identify the states in which pollution responsible for acid deposition originates and to order those states to abate the emissions."⁷⁹ The court began by reviewing the applicable sections of the Clean Air Act and discussing the Costle letters. The court stressed that although the findings were sent to Secretary Muskie and Senator Mitchell and were announced in a press release, "[n]o advance notice of Administrator Costle's actions was given, no comments were solicited, and neither the letters nor the findings were published in the Federal Register."⁸⁰

The court of appeals strongly criticized the district court opinion. Judge Scalia stated that the district court "was not troubled by the EPA's argument that identifying *which* states to notify would be time consuming, costly and perhaps impossible . . . Likewise, the court was untroubled that Administrator Costle made his findings in private correspondence"⁸¹

The court then considered the Administrative Procedure Act

77. *Id.*

78. Defendants' second argument was that Costle's actions were revoked by the actions of his successor, Administrator Ann Gorsuch. In a letter she sent to the governor of Ohio on Sept. 22, 1981, Administrator Gorsuch stated that the Costle letters did not satisfy section 115 and that the letters were of no legal significance. The court found that the ordinary procedure employed by Administrators to avoid being bound by the decisions of a predecessor required more than Gorsuch wrote in her letter. Since Gorsuch neither reviewed the factual bases for Costle's determination nor suggested his determination was erroneous, her letter did not rise to the stature of a revocation. *Id.* at 1485.

Defendants' third argument was that even if Costle did make the requisite findings, the decision to notify the states or take other additional steps is discretionary. The court found the language of section 115(b) dispositive, observing that the normal inference of "shall" is that the act is mandatory. Moreover, legislative history of section 115 provided that a finding of "harm" by the Administrator would *require* the State to revise its implementation plan. *Id.*

79. *Thomas v. New York*, 802 F.2d 1443, 1445 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

80. *Id.*

81. *Id.* at 1446. In its analysis of section 115, the court observed that it is "an unusual statute executed in an unexpected manner." It reasoned that in "a complex, multi-source

(APA).⁸² The APA governs the procedures by which government agencies promulgate rules in the absence of procedures set forth in the agency's enabling statute. If applicable, it requires that general notice of the proposed rule is published in the Federal Register and that the agency give interested persons an opportunity to comment on the proposed rule.⁸³ Examining the definition of a "rule," the court determined that pursuant to section 551(4) of the APA, "an agency statement that bound subsequent EPA Administrators to issue SIP revision notices would be a statement of 'future effect designed to implement . . . law or policy'"⁸⁴ and would thus be a rule. Therefore, the Costle findings constituted a rule. Because no notice-and-comment procedures accompanied the Costle findings, Scalia concluded

pollution problem like acid deposition, identification of the problem does not necessarily bring with it identification of the blameworthy states." *Id.*

82. 5 U.S.C. §§ 551-59 (1977).

83. According to one scholar:

The Federal Administrative Procedure Act provides for a system of antecedent publicity before agencies may engage in substantive rule-making. General notice of any proposed rule-making must be published in the Federal Register. The agency must then afford interested persons the opportunity to participate in the rule-making process through submission of written data, views, or arguments, with or without opportunity to present them orally, and all relevant matter so presented is to be considered by the agency.

B. SCHWARTZ, ADMINISTRATIVE LAW § 61, at 165 (1976) (footnote omitted).

84. *Thomas v. New York*, 802 F.2d 1443, 1446 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987). This provision defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency . . ." 5 U.S.C. § 551(4) (1977). The APA classifies administrative action into two categories. "Its procedural provisions are grounded on the distinction between the legislative or rulemaking functions of administrative agencies, on the one hand, and their judicial or adjudicative activities, on the other." B. SCHWARTZ, *supra* note 83, § 55, at 143. Although there is no bright line between rulemaking and adjudication, a key factor in making this determination is time. "A rule prescribes *future* patterns of conduct; a decision determines liabilities on the basis of *present* or *past* facts." *Id.* § 55, at 144.

On this point, the court of appeals concluded "that if Administrator Costle's findings left the EPA no alternative but to issue SIP notices ultimately causing the termination or restriction of the operations of many utilities and manufacturers—if they *forced* the EPA to take direct and substantial regulatory actions—they could not be promulgated without notice-and-comment procedures." *Thomas*, 802 F.2d at 1447. Although this author believes that even if the Costle findings are a rule, the Clean Air Act provides for notice-and-comment at a later point in time, the findings in fact defy easy classification. They are neither rulemaking nor adjudication. The APA classifications, formed before the administrative law boom of the 1960's and 1970's, are simply inappropriate. Perhaps the best way to define the findings is as agency action that has "fall[en] through the cracks of the APA." *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 851 (E.D. Va. 1980) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).

that they were of no legal effect.⁸⁵

The court also determined that the Costle findings did not fall within any of the exceptions⁸⁶ to the general requirement of notice-and-comment before rulemaking, such as "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."⁸⁷ The case was therefore dismissed.

IV. ANALYSIS

A. Identification of Polluting States

The interpretation of section 115 by the district court differed greatly from that of the court of appeals. Once the district court found it had jurisdiction, it proceeded directly to the statute. The district court's analysis manifests a sensitivity to the precise language of section 115 and the sequential order of "finding" and "duty" which the statute appears to contemplate.⁸⁸

Because the principal issue in the case boiled down to whether the Administrator had a duty to ask the polluting states to revise their implementation plans, the district court was careful to separate out those findings which were prerequisites to the duty and those which would follow in its wake. This explains why the court noted that the obligation to identify the polluting states was incidental to the Administrator's giving formal notification to the governors.⁸⁹ Although using the term "incidental"⁹⁰ was an unfortunate word choice, the ordering of finding and duty not only followed the literal mandate of the statute but also made a good deal of intuitive sense as well.

For example, even though there is a dearth of information from Congress as to exactly how section 115 was intended to operate, what little does exist seems to suggest that the proper focus of the section is to recognize an obligation on the part of the United States to abate

85. *Thomas*, 802 F.2d at 1448.

86. 5 U.S.C. § 553(b)(A) (1977).

87. *Thomas*, 802 F.2d at 1447.

88. Brief for Appellees, *supra* note 11, at 54. ("When Congress wished to mandate sequential action by the Administrator, it knew how to do so," citing to §§ 108(a) and 109(a) requiring the Administrator to first publish a list of pollutants, then issue standards for the listed pollutants and also §§ 111(b), 111(f) requiring Administrator to first publish a list of categories of stationary sources, then issue performance standards for the listed categories). *Id.* at n.30.

89. *New York v. Thomas*, 613 F. Supp. 1472, 1484 n.* (D.C. Cir. 1986), *rev'd* 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

90. *Id.*

long-range transboundary air pollution.⁹¹ Assuming this is the crux of the legislation, it stands for the very important proposition that once the Administrator validly determines that air pollution emitted from sources within the United States is causing harm to a foreign country, the focus becomes domestic. The burden then shifts to the United States to decide which of its states should revise their SIP's and to what degree. It would seem unfair to allow the EPA to escape the parameters of the statute, and thereby shift the burden back onto the foreign country, simply by failing to identify the blameworthy states. Such an interpretation adds a virtually impenetrable gloss over the statute because of the difficulty in determining which states to identify. Therefore, if the district court were to place identification before a duty to notify, the difficulty of the task would hopelessly impede the statute's operation. By imposing a legal duty on the agency, the ruling of the district court at least forced the agency to begin the long process of enforcement.

In contrast, the court of appeals decision obfuscates the identification issue. Without squarely addressing the problem, Scalia criticizes the district court for rejecting the EPA argument that identification of the blameworthy states would be time-consuming, costly, and perhaps impossible.⁹² While this is partially true (it is doubtful that substantial identification is impossible), it is difficult to see its legal relevance to the question of whether the duty to notify the blameworthy states is precedent or subsequent to the identification of those states. Even more difficult to understand is the relevance of these comments to the one dispositive issue in this case, i.e., whether notice-and-comment should have accompanied the Costle findings.

B. Notice-and-Comment Procedures

There are two important problems with the court of appeals' conclusion that the Costle findings constitute a rule and are therefore subject to the APA notice-and-comment procedures. First, a strict reading of section 115 of the Clean Air Act suggests that Congress had already provided for notice-and-comment at a later point where Congress believed it was more appropriate, and therefore, resort to the APA was inappropriate. Second, the court cites *National Asphalt*

91. See *supra* text accompanying note 12; see also S. REP. NO. 127, 95th Cong., 1st Sess. 57.

92. *Thomas*, 802 F.2d at 1446.

*Pavement Association v. Train*⁹³ to support its conclusion, while this case, in fact, better lends itself to the plaintiffs' position.

The thrust of this discussion centers around an important concept. Section 115 apparently contemplates a sequential order of events: a step-by-step process⁹⁴ which begins first with a reciprocity finding, followed by a report from a duly constituted international agency, then a determination of injury based upon the Administrator's "reasonable belief," and so on. One could probably recognize each step as a rule (since all the steps in the aggregate will have some future effect) and thereby require notice-and-comment to accompany each finding or determination. This approach clearly would be hopelessly inefficient and obstructive. Considering what notice-and-comment is intended to accomplish, the proper inquiry should focus upon the appropriate time to demand this procedural device as an absolute requirement without which no duty to act exists on the part of the EPA.

1. Statutory Construction

Contrary to what the plaintiffs⁹⁵—and to a degree what the defendants—argued, there is ample statutory direction to help resolve this inquiry. A textual analysis indicates that the proper time for notice-and-comment is upon notice to the governors of the polluting states. Section 115 provides that once the Administrator determines that pollution emitted in the United States endangers the public health and welfare in a foreign country, "the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate. . . . The notice of the Administrator *shall be deemed a finding* under section 7410(a)(2)(H)(ii) of this title which requires a plan revision"⁹⁶

The deliberateness of Congressional drafting is borne out by the fact that further action of the EPA at this point is prescribed in sec-

93. *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775 (D.C. Cir. 1976).

94. *See supra* note 88 and accompanying text.

95. Plaintiffs' notice-and-comment argument de-emphasized the express language of the statute, probably because there was no hint that that would become the *sine qua non* of the case. In their brief they argued that a requirement of notice-and-comment on the findings would create an "additional step" not required by section 115. Brief for Appellees, *supra* note 11, at 54. It was only on petition for rehearing that plaintiffs urged the court to recognize that under the statute notice-and-comment would have been afforded at a *later stage*. Petition for Rehearing and Suggestion for Rehearing En Banc at 2, *New York v. Thomas*, 802 F.2d 1443 (D.C. Cir. 1986) (No. 85-5970), *cert. denied*, 107 S. Ct. 3196 (1987) (emphasis added).

96. Clean Air Act § 115(b), 42 U.S.C. § 7415(b) (1983) (emphasis added).

tion 110(a)(2)(H)(ii).⁹⁷ This section provides that after the issuance of revision notices, and the subsequent submission to the EPA of new SIP's, the Administrator must approve the plan if he finds both that it was adopted after reasonable notice and hearing and provides for revision after public hearing.⁹⁸ Thus, there is some explicit suggestion as to where Congress believed notice-and-comment to be important, *during* or *after* the notification stage, not *before*.

Further textual support can be found in section 115(a) itself. There are two events which would trigger a duty on the part of the Administrator to issue revision notices. First, the Administrator could act on his own authority if, based upon surveys and reports, he has reason to anticipate that pollution emitted in the United States is endangering health or public welfare in a foreign country.⁹⁹ Second, the Administrator could act in response to a request from the Secretary of State when the Secretary alleges the same set of facts.¹⁰⁰ This second triggering device reflects the strong international interest to be served and it recognizes the unilateral nature of the "harm finding" from either of these officials.

On the latter point, one might ask the following question: had the Secretary of State directed the Administrator to prepare revision notices, would the court subject the Secretary of State's findings to the requirement of notice-and-comment? Because of the Secretary's international duties, it is doubtful that the court would require notice-and-comment on an order issued by his office. If this assumption is correct, under the court of appeal's reasoning a determination of harm from the Administrator is subject to notice-and-comment, but one issued by the Secretary of State might not be. It would be inconsistent, however, to impose on one executive department a requirement of notice-and-comment which is not required of another when the determination in either case is exactly the same. Since statutes should be interpreted to avoid inconsistencies, notice-and-comment should not be required at the "finding" stage.

2. The Case of *National Asphalt*

One point which might have bothered the court about section 115 is that on its face it contemplates only one situation where notice-

97. Clean Air Act § 110(a)(2)(H)(ii), 42 U.S.C. § 7410(a)(2)(H)(ii) (1983).

98. *Id.*

99. Clean Air Act § 115(a), 42 U.S.C. § 7415(a) (1983).

100. *Id.*

and-comment must be held, that is after notification to the governors of the emitting states. At that point, a state being ordered to revise its SIP could presumably present factual data to the EPA and argue that instead of emitting "x" amount of a particular pollutant, it really only emits "y," a lesser amount, and therefore the EPA standards are too stringent. The court may have feared that once revision notices had been delivered, it would be too late for a state to deny any contribution to international pollution at all. Thus, by requiring notice-and-comment on the findings, a state would have a chance to comment on whether or not it is a contributor and should be issued a revision notice.

But far from supporting this position, the decision the court cites, *National Asphalt Pavement Association v. Train*,¹⁰¹ argues against it. Judge Scalia contends that:

Had the statute [section 115] been executed as Congress probably anticipated, the present suit would not have arisen. Notice of the "endangerment" and "reciprocity" findings would have been issued at the same time as the proposed SIP revision notices, comment would have been taken on both, and both would have been published in final form in the Federal Register.¹⁰²

Scalia goes on to explain that the defendants' claim that the findings are not legally binding has now arisen "[b]ecause Administrator Costle chose to issue the 'endangerment' and 'reciprocity' findings before attempting to identify the culpable states"¹⁰³

National Asphalt involved section 111¹⁰⁴ of the Clean Air Act which requires the Administrator of the EPA to maintain a list of stationary sources which cause or contribute significantly to air pollution reasonably anticipated to endanger public health or welfare.¹⁰⁵ Within 120 days after the Administrator designates a particular source category as a "significant contributor," he must publish proposed standards of performance for sources within this category.¹⁰⁶

Petitioners, National Asphalt Pavement Association, argued that by "simultaneously publishing the 'significant contributor' designation and proposed standards of performance, the Administrator indi-

101. *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775 (D.C. Cir. 1976).

102. *New York v. Thomas*, 802 F.2d 1443, 1446 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

103. *Id.*

104. Clean Air Act § 111, 42 U.S.C. § 7411 (1983).

105. Clean Air Act § 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A) (1983).

106. Clean Air Act § 111(b)(1)(B), 42 U.S.C. § 7411(b)(1)(B) (1983).

cated that he had already reached a final determination on the 'significant contributor' designation and did not consider it open for discussion during the informal rulemaking procedure."¹⁰⁷ The court disagreed. On the basis of the EPA's published notices, the agency's response to written comments, and record correspondences between the petitioners and EPA, the court concluded that "the 'significant contributor' designation was subject to comment as a threshold question in the rulemaking process, and that petitioners were specifically informed of that fact."¹⁰⁸

The *National Asphalt* court stated that "where the data underlying the 'significant contributor' designation is likely to overlap substantially with that underlying the proposed standards, the most sensible course for an agency is to have one proceeding directed at both issues."¹⁰⁹ In other words, *National Asphalt* should be read as standing for the proposition that the EPA need not hold two separate rulemaking proceedings as to different parts of one rule. Therefore, it does not follow from this case that because the Costle findings were not issued in conjunction with the revision notices (with notice-and-comment accompanying both), notice-and-comment must now accompany the finding alone as a condition precedent to issuing revision notices.

Applying the principle of *National Asphalt* to the facts of *Thomas*, the rule promulgated is the request for plan revisions from each polluting state. Upon notification that it must revise its SIP's, a given state then has an opportunity to claim that it is not a contributor to international air pollution. Much of the evidence which the state presents to prove this will also be relevant as to the extent that each state will have to curtail its emissions if it is found to be a contributor. Indeed, to call for notice-and-comment at an earlier stage would be to put the cart before the horse. These findings are interwoven with the revision notices. In and of themselves they have no effect except as an additional step towards the enforcement of the provision. One might ask what there is to comment upon (and who should be there to comment upon it) when no states have yet been targeted by the EPA for revision?

107. *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 779-80 (D.C. Cir. 1976).

108. *Id.* at 780.

109. *Id.* at 779 n.2.

V. THE DISCRETION OF THE ADMINISTRATOR

The final sentences of the court of appeals opinion truly ring the death knell for the plaintiffs by foreclosing any future possibility of relief on the basis of the Costle findings. Scalia asserts that "because the findings were issued without notice-and-comment, they cannot be the basis for the judicial relief appellees seek. How and when the agency chooses to proceed to the stage of notification triggered by the findings is within the agency's discretion and not subject to judicial compulsion."¹¹⁰ There can be little doubt that Scalia's imposition of the procedural hurdle of notice-and-comment effectively ended the litigation.

The court's holding has two effects on the plaintiffs. First, it means that the Costle letters have no binding legal effect. Second, and more importantly, it suggests that it is within the EPA's absolute discretion to decide whether it should resurrect the substance of the Costle findings, call for notice-and-comment, and proceed to the stage of notification.¹¹¹

Because Scalia's final observations resonate throughout environmental law, the final sentence of the court's opinion merits closer scrutiny. Is it true that the judiciary cannot compel the agency to proceed to the stage of notification since that is within the discretion of the agency? Stated another way, can the EPA be compelled to re-issue a finding which would begin the notification process all over again?

The citizen suit provision of the Clean Air Act¹¹² posits the general rule that mandatory duties can be compelled by order of the court through a citizen suit but that discretionary duties cannot be so compelled.¹¹³ However, as Professor Rodgers points out: "Distinguishing obligatory official duties answerable to citizen suits from protected islands of discretionary choice presents one of the more delightful conundrums of the law."¹¹⁴

Rodgers suggests that the use of citizen suits to enforce nondis-

110. *New York v. Thomas*, 802 F.2d at 1443, 1448 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

111. The irony of the case is difficult to overlook. The court has just told the EPA that because it did not do its job correctly, i.e., holding notice-and-comment, the EPA prevails in the litigation. This odd result proceeds, of course, from having two hostile EPA Administrations back to back.

112. Clean Air Act § 304, 42 U.S.C. § 7604 (1983).

113. *Id.*

114. 2 W. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER ch. 4, § 4.5, at 71 (1986).

cretionary duties may be a means of uncovering "the smoking gun illegalities of the agency [EPA]."¹¹⁵ He goes on to state that:

This approach would be in keeping with the role of the citizen as the excavator of past commitments. It thus might be expected that nondiscretionary activity for purposes of citizen suits creeps over "to include instances where the Administrator transgresses the bounds of his discretion and not only the extraordinary cases where he has no discretion at all."¹¹⁶

Examples of nondiscretionary duties include the EPA obligations to publish reports and regulations by a specific deadline,¹¹⁷ to promulgate an implementation plan by the time required,¹¹⁸ and to determine whether a state-submitted plan complies with the Clean Air Act.¹¹⁹

The discretionary side of the ledger "includes most of the universe of administrative actions,"¹²⁰ such as the Administrator's duties to bring emergency actions,¹²¹ to list hydrochloric acid and silicon dioxide as hazardous air pollutants and to establish emission standards for them,¹²² to determine that an action is environmentally "unsatisfactory" for purposes of section 309 of the Clean Air Act,¹²³ and to make findings that may trigger a variety of enforcement actions.¹²⁴

The proposition that it is completely within the discretion of the Administrator to make findings triggering enforcement is unsettling. As a general rule, the 1977 Amendments to the Clean Air Act make

115. *Id.* Historically, the availability of a writ of mandate turned on the distinction between ministerial and discretionary actions. Often the test was whether "the administrator exceeded the *permissible scope* of his discretion." *Id.* at 211. In focusing on the administrator's authority, this refinement conforms to the close scrutiny doctrine of judicial review. *Id.* at 71.

116. 1 W. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER ch. 3, § 3.4, at 223 (1986).

117. *See* *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984) (enforcing duty to issue final standards for radionuclide emissions); *Citizens for a Better Env't v. Costle*, 515 F. Supp. 264, 270-71 (N.D. Ill. 1981) (it is sufficient to find an arguable nondiscretionary duty to promulgate regulations in some of the settings depicted in the complaint).

118. *Riverside v. Ruckelshaus*, 3 ELR 20043 (C.D. Cal. 1972).

119. *Citizens for a Better Env't*, 515 F. Supp. at 271 (it is "almost axiomatic" that EPA has a non-discretionary duty to determine in a timely fashion whether state SIPs comply; discouraging conditional approvals and deferrals).

120. RODGERS, *supra* note 116, ch.3, § 3.4, at 224.

121. *Cf.* *Committee for Consideration of Jones Fall Sewage Sys. v. Train*, 375 F. Supp. 1148 (D.C. Md. 1974), *aff'd*, 539 F.2d 1006 (4th Cir. 1976) (en banc) (Clean Water Act case).

122. *Thompson v. Chicago*, 5 ELR 20283 (N.D. Ill. 1975).

123. *Sierra Club v. Morton*, 379 F. Supp. 1254 (D.C. Colo. 1974).

124. *Wisconsin's Env'tl. Decade, Inc. v. Wisconsin Power & Light Co.*, 395 F. Supp. 313 (W.D. Wis. 1975) (discretionary duty to decide whether a violation occurs but a mandatory duty to notify and to make a finding whether a violation has occurred).

clear that, as to major sources, a civil action "must be filed in the wake of a finding of violation of the Act."¹²⁵ "The crux of this slippery slope of compulsion is whether EPA is obliged to make the finding that starts the slide,"¹²⁶ that is to say, whether the EPA is obliged to find or not find a violation of the Clean Air Act.

The policy arguments go both ways. The EPA argues that it does not have the resources to fully enforce all the laws within its province; therefore, it does not issue findings in every case it could, and perhaps, should.¹²⁷ The other side, argued forcefully in *Wisconsin's Environmental Decade, Inc. v. Wisconsin Power & Light Co.*,¹²⁸ questions the value of a promise of a compulsory duty to file a civil suit against a major polluter if the agency retains discretion to declare known violations as not "found."¹²⁹ So far at least, the agency has been able to retain its discretion.¹³⁰ Professor Rodgers, however, speculates that it could boil down to "how well the objecting party documents a problem that needs correction (so as to render a refusal to find [to make the finding] arbitrary and capricious)."¹³¹ He notes that:

A court might conclude that the agency's decision to ignore a dramatic and egregious pollution problem reflects not so much an enforcement allocation choice but a decision to get out of the enforcement business. That is, the courts may choose to police not

125. RODGERS, *supra* note 116, ch. 3, § 3.38, at 542; Clean Air Act § 113(b), 42 U.S.C. § 7413(b) (1983).

126. RODGERS, *supra* note 116, ch. 3, § 3.38, at 542.

127. *Id.* In *Seabrook v. Costle*, the Court of Appeals for the Fifth Circuit strongly criticized the result reached by the district court in *Wisconsin's Env'tl. Decade, Inc. v. Wisconsin Power & Light Co.*, 395 F. Supp. 313 (W.D. Wis. 1975):

We think the *Wisconsin Environmental* court's creation of a nondiscretionary duty which is not imposed by the statutory language pays too little heed to the doctrine of prosecutorial discretion. One of the principal bases for the doctrine is judicial recognition that enforcement agencies have only limited resources at their command. The enforcement agencies are duty-bound to allocate those resources in the interest of the general public as they perceive it, not in the causes deemed most important by individual citizens The *Wisconsin Environmental* court's argument that the duty to issue a notice upon finding a violation would be an "empty one" if the Administrator could avoid the duty by failing to make a finding is based ultimately on the assumption that the EPA will not carry out its investigatory duties in good faith. This is an assumption which, in the absence of clear statutory language or legislative history, we are unwilling to attribute to Congress.

659 F.2d 1371, 1375 (5th Cir. 1981).

128. *Wisconsin's Env'tl. Decade*, 395 F. Supp. 313 (W.D. Wis. 1975); *cf.* *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 128-35 (D. S.C. 1978) (Clean Water Act).

129. RODGERS, *supra* note 116, ch. 3, § 3.38, at 542.

130. *Id.* See *Seabrook*, 659 F.2d 1371.

131. RODGERS, *supra* note 116, ch. 3, § 3.38, at 542.

enforcement pie-slicing but unacceptable shrinkage of the size of the pie.¹³²

Application of the foregoing discussion to *Thomas v. New York* reveals that the issuance of a new finding probably¹³³ cannot be compelled by the court since it appears to be within the EPA's discretion. Since the *Costle* finding failed to meet the court's procedural requirement of notice-and-comment, the slate is erased and the whole process starts all over again. The court's acceptance of this view, however, does not make the policy argument on the other side evaporate. The fact remains that long-range transboundary air pollution is an "egregious problem" and that the current EPA's decision to ignore a previous Administrator's finding could reflect not so much an "enforcement allocation choice" but rather a choice to get out of the "enforcement business" altogether.

VI. HIDDEN AGENDA: LAST LOOK AT ALTERNATIVES

The anomalous result reached by the court of appeals which, as counsel for plaintiffs remarked in the petition for rehearing, compels EPA to hold notice-and-comment every time they "sneeze[] in the direction of rulemaking"¹³⁴ suggests that there may be an alternative ground for the holding, namely one based on the separation of powers doctrine. Two principal factors could dictate this result. First, the problem of long-range transboundary air pollution is by definition an international one and one which recent presidents have tried to resolve under the umbrella of their foreign affairs powers.¹³⁵ Second,

132. *Id.* at n.29.

133. Conceivably, since there has been no formal revocation, the plaintiffs have two options: (1) they could petition the EPA for rulemaking under the *Costle* findings; or, (2) they could ask the EPA to remake the finding which triggers section 115 and provide notice-and-comment with it. Under the first option, the plaintiffs face the prospect of the EPA invoking Scalia's statement that the *Costle* findings have no legal effect and therefore rulemaking cannot attach to them. Under the second option, if the EPA refuses to remake the finding, the plaintiffs could proceed under section 307(b) of the Clean Air Act which provides for judicial review of discretionary acts based upon an arbitrary and capricious standard of review. As this discussion demonstrates, however, if the Administrator retains discretion to issue findings, it is very difficult for plaintiffs to prove that the failure to find is arbitrary and capricious.

134. Petition for Rehearing, *supra* note 95, at 14-15 n.7.

135. See generally Foreign Relations Authorization Act, Pub. L. No. 95-426, § 612, 92 Stat. 990 (1978). Section 612 provides in part:

[T]he United States and Canada have a tradition of cooperative resolution of issues of mutual concern which is nowhere more evident than in the environmental area.

(b) It is the sense of the Congress that the *President* should make every effort to negotiate a *cooperative agreement* with the Government of Canada aimed at preserving the mutual airshed of the United States and Canada so as to protect and enhance

international air pollution can also be viewed as a problem more appropriate for the legislature since it is replete with "balancing" problems: 1) weighing industrial against agricultural and fishing interests; 2) weighing economic against public health interests; and 3) weighing domestic against international interests.

Cast in this light, the court's opinion reveals new contours. It is plausible that the introduction of notice-and-comment was a means of throwing the problem back to what the court viewed as the more appropriate governing body.¹³⁶ Therefore, an update of what the other branches of government have been doing on the acid rain problem is helpful, not only to demonstrate the strong separation of powers aspect inherent in the acid rain problem, but also to show from where future answers are likely to come.¹³⁷

Throughout the present litigation, the court was aware of the Joint Report of the Special Envoys on Acid Rain prepared by Drew

air resources and insure the attainment and maintenance of air quality protective of public health and welfare.

(c) It is further the sense of the Congress that the President, through the Secretary of State working in concert with interested Federal agencies and the affected States, should take whatever *diplomatic actions* appear necessary to reduce or eliminate any undesirable impact upon the United States and Canada resulting from air pollution from any source.

Id. (emphasis added).

136. In opposing the petitions by the plaintiffs for the Supreme Court to grant certiorari, the EPA "reviewed the concerted effort by Administration officials to reach an agreement with Canadian officials and concluded that requiring states to respond immediately to the problem [of acid rain] would not comport with the *national agenda* for addressing acid deposition." 18 ENVTL. REP. 571 (1987) (emphasis added).

137. David Wooley, lead counsel for plaintiffs in *New York v. Thomas*, commented: "In the long run it is most likely that the acid rain issue will be settled finally through diplomacy or legislation. It is a mistake, however, to discount or underestimate the potential benefits of litigation for acid rain control proponents." Wooley, *Acid Rain: Canadian Litigation Options in U.S. Court and Agency Proceedings*, 17 U. Tol. L. Rev. 139, 139 (1985). The option of using litigation for the abatement of long range trans-boundary air pollution has not however been wholly abandoned.

Five other cases pending in federal court seek to compel the EPA to address the acid rain problem under other provisions of the Clean Air Act. See *Natural Resources Defense Counsel v. Thomas*, No. 85-1488 (D.C. Cir. argued Sept. 25, 1987) (based on the tall stack provisions of the Clean Air Act § 123); *New York v. EPA*, Nos. 84-1592 and 85-1082 (D.C. Cir. to be re-argued Dec. 10, 1987) (based on the interstate pollution provisions of the Clean Air Act § 126); *Natural Resources Defense Counsel v. Thomas*, No. 87-1437 (D.C. Cir. filed Aug. 28, 1987) (seeking to overturn EPA's refusal to establish a secondary particulate matter standard for acid rain, § 109 and § 602(h) of the Clean Air Act); (4) *Maine v. Thomas*, civil action, No. 87-0204P (D. Ma.) (seeking to force EPA to address acid rain through visibility impairment provisions of the Clean Air Act § 169a); *Environmental Defense Fund v. Thomas*, No. 85-Civ.9507(DNE) (S.D.N.Y.) (seeking to force EPA to revise NAAQs for sulfur dioxide in a matter which would prevent acid rain, § 109 and § 602(h)). The state of New York is a party to each of the above cases.

Lewis and William Davis pursuant to the agreement reached at the so-called "Shamrock Summit".¹³⁸ The Lewis-Davis Report set forth a number of recommendations including: (1) the implementation of a 5-year, \$5 billion control technology commercial demonstration program, half of which would be funded by the federal government for projects which industry recommends and for which industry would contribute the other half; (2) a panel, headed by a senior U.S. cabinet official, to oversee the research demonstration program and to select the projects to be funded with a representative from Canada invited to sit on the panel; (3) a review of the American and Canadian existing air pollution program and legislation for the purpose of identifying opportunities for addressing environmental concerns; and, (4) the development of standard, accurate methods to measure dry deposition.¹³⁹ In addition to these items, the Report also recommended greater exchange of relevant data both at the agency and private levels and more scientific research across the board.¹⁴⁰

While adopting a favorable posture toward the recommendations of the Lewis-Davis Report,¹⁴¹ the Reagan Administration moved slowly. Then, just two weeks before the scheduled summit conference with Prime Minister Mulroney in Ottawa, Reagan announced that "the United States would seek \$2.5 billion over five years for projects to combat acid rain."¹⁴² Reagan stated that the \$2.5 billion would be used for test projects and that he would encourage private industry to at least match that amount. He also proposed a special advisory panel which would include some Canadian members to take charge of "funding and selecting pollution control projects."¹⁴³ When the request reached the House of Representatives on June 26, 1987, only \$350 million was approved for intensified research to control acid

138. Lewis-Davis Report, *supra* note 26, at 29-33. (Lewis and Davis characterized their recommendations as "realistic": "They must not ask either country to make a sudden, revolutionary change in its position.") *Id.* at 29. Compare, *Constructive Step on Acid Rain*, Wash. Post, Jan. 9, 1986, at A22, col. 1, ("The U.S. side of the report does still tiptoe as to the extent of the damage done. But it does not pretend there is none.")

139. Lewis-Davis Report, *supra* note 26, at 29-35.

140. *Id.*

141. White House Press Release, Statement by the President, Jan. 8, 1986 ("This report represents an earnest effort by the United States and Canada to address an important environmental issue and exemplifies what can be accomplished in the spirit of Canadian-American cooperation. We will be carefully reviewing the report and its recommendations.") (on file at Loyola of Los Angeles International and Comparative Law Journal). *Id.*

142. *Reagan Backs Canada on Acid Rain, Asks \$2.5 Billion*, L.A. Times, Mar. 19, 1987, § I, at 12, col. 1.

143. *Id.*

rain.¹⁴⁴

When Reagan met with Mulroney in Ottawa, the Canadians asked the United States to sign a treaty which would reduce the air pollution that causes acid rain by 50% by 1994.¹⁴⁵ This would be a more formal accord than the bilateral agreement the Canadians asked for earlier which the United States resisted.¹⁴⁶ It is doubtful, however, that the Canadians will be able to pursue the treaty since one of Mulroney's major priorities is a free-trade agreement with the United States which might tend to overshadow the acid rain issue.¹⁴⁷

On the legislative front, four new bills¹⁴⁸ have been offered in the Senate and referred to committee for the abatement of air pollution and its domestic and international effects. Especially noteworthy in the international area is the proposed New Clean Air Act¹⁴⁹ introduced by Senator Stafford. That bill proposes an amendment to section 115 of the Clean Air Act which provides that if air pollution emissions in the United States cause or contribute to a violation of a *water quality standard or requirement established by a foreign country*, it is deemed to cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country.¹⁵⁰

Nothing could more clearly demonstrate than does this bill the dissatisfaction with the EPA having discretion to render the initial section 115 finding. By its exact wording, it revokes EPA discretion on the very point so troubling in the *Thomas v. New York* opinion, i.e. that re-issuance of new findings by the EPA subject to notice-and-comment is within the discretion of that agency.¹⁵¹

By conditioning the decision of issuance of an initial section 115 finding on the basis of an objective criterion, like a country's water

144. *Reagan Rebuffed on Acid Rain Funds*, N.Y. Times, June 27, 1987, § I, at 14, col. 6. It has been suggested that pro-abatement congressmen voted down the request since they saw it as not directly addressing the issue. Also, since utilities were to manage the funds to develop new technology, it was believed they would not aggressively discharge their duty. *Id.*

145. *Mulroney Asks Reagan for Treaty on Acid Rain*, L.A. Times, Apr. 6, 1987, § I, at 1, col. 3.

146. *Id.*

147. *Id.* Canadian polls, however, seem to indicate that a resolution of the acid rain problem is considered top priority among the Canadian public. The Inside EPA Weekly Report, Mar. 20, 1987, vol. 8, no. 12.

148. S. 95, 100th Cong., 1st Sess. (1987); S. 300, 100th Cong., 1st Sess. (1987); S. 321, 100th Cong., 1st Sess. (1987); S. 316, 100th Cong., 1st Sess. (1987).

149. S. 300, 100th Cong., 1st Sess. (1987) (entitled "New Clean Air Act").

150. *Id.* at 11.

151. See *supra* notes 111-132 and accompanying text.

quality standards, the enforcement of section 115 would rest to a smaller degree on the whim of the Administrator. Concomitantly, it would allow courts to take a more active role in the enforcement of section 115 because judges could now explore the entire terrain of the EPA decision without having to skirt the murky swamp of administrative discretion.

The bill also requires the President, by January 1, 1988, to "institute negotiations with Canada and Mexico for the purpose of concluding a tripartite agreement" to, inter alia, minimize projected and existing levels of air pollution and create an institutional framework to control sources of transboundary pollution.¹⁵² Additionally, the bill directs the Secretary of Treasury, after consultation with the EPA, to submit a study on a "system of tariffs on emissions adequate to encourage reductions in emissions of precursors of acid deposition and other forms of environmental pollution."¹⁵³

VII. CONCLUSION

Whether the legislative proposals or the executive negotiations dealing with the problem of acid rain ever bear fruit remains to be seen. One thing, however, is certain: *Thomas v. New York* represents a major obstacle to any future attempts towards the enforcement of section 115 of the Clean Air Act as presently constituted. At best, future plaintiffs will have to hope for an EPA Administrator willing to re-issue the findings that trigger section 115 and then hold notice-and-comment at the precise time the court requires; at worst, however, future plaintiffs have witnessed a de facto severance of section 115 from the Clean Air Act on separation of powers grounds. In either event, the boulder has tumbled down, and the difficult struggle must begin anew.

Dean Adam Willis

152. S. 300, 100th Cong., 1st Sess. (1987).

153. *Id.* at 12.

