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Steven L. Feldman

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# THE ADMINISTRATIVE PROCEDURE ACT'S NOTICE AND COMMENT REQUIREMENTS: "GOOD CAUSE" FOR FURTHER DELAY IN THE IMPLEMENTATION OF THE CLEAN AIR ACT?

*Steven L. Feldman\**

## I. INTRODUCTION

Congress has been struggling with the problem of air pollution in the United States for over twenty-five years. During this time period numerous laws have been enacted,<sup>1</sup> all of which have attained only moderate success in dealing with this important national problem.<sup>2</sup> Most recently, Congress passed the 1977 Amendments<sup>3</sup> to the Clean Air Act (CAA) of 1970.<sup>4</sup> The revised statutory scheme set down a strict schedule requiring that certain national ambient air quality

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\* Staff Member, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

1. The Clean Air Act was first passed in 1955 as Pub. L. No. 84-159, 69 Stat. 322 (1955). It has been amended over the years by the following laws:

Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963); Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965); Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954 (1966); Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970); Comprehensive Health Manpower Training Act of 1971, Pub. L. No. 92-157, 85 Stat. 431 (1971); Energy Supply & Environmental Coordination Act, Pub. L. No. 93-319, 88 Stat. 246 (1974); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

The Clean Air Act is currently codified at 42 U.S.C. §§ 7401-7626 (Supp. III 1979).

2. H.R. REP. NO. 294, 95th Cong., 1st Sess. 207, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1286.

3. Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified at 42 U.S.C. §§ 7401-7626 (Supp. III 1979)).

4. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified at 42 U.S.C. §§ 1857-1857I (1976), recodified at 42 U.S.C. §§ 7401-7626 (Supp. III 1979)). This law is technically an amendment to the Clean Air Act (CAA) which was originally enacted in 1955 as Pub. L. No. 84-159, 69 Stat. 322. However, in reality, its enactment so drastically changed the earlier versions of the CAA that the 1970 law is now commonly referred to as the Clean Air Act of 1970. It is the 1970 Act which forms the basis of the current CAA which was most recently amended in 1977. See note 1 *supra*.

standards (NAAQS)<sup>5</sup> be attained by December 31, 1982.<sup>6</sup> The 1977 Clean Air Act Amendments direct the United States Environmental Protection Agency (EPA) to coordinate a joint federal-state program designed largely to attain the primary and secondary NAAQS levels which had not been fully achieved under the 1970 Act.<sup>7</sup> In promulgating regulations required by section 107(d) of the 1977 Amendments,<sup>8</sup> the EPA bypassed certain notice and comment procedures arguably required by section 553<sup>9</sup> of the Administrative Procedure Act (APA).<sup>10</sup> These notice and comment procedures are designed to allow for public input in the agency rulemaking process.<sup>11</sup> The EPA argued that its action was allowable under the two "good cause" exceptions to section 553 of the APA.<sup>12</sup> It reasoned that the tight statutory deadlines mandated by Congress in section 107(d) made notice and comment procedures "impracticable and contrary to the public interest."<sup>13</sup>

Absent the usual notice and comment procedures, the regulations issued by the EPA were quickly challenged in the courts by industry and several states.<sup>14</sup> The plaintiffs claimed that their rights under

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5. 42 U.S.C. § 7409 (Supp. III 1979). NAAQS are pollution standards set by the EPA which define what levels of pollution, for various pollutants, are considered acceptable under the CAA. NAAQS are divided into two basic categories under § 7409: a) Primary NAAQS; and b) Secondary NAAQS. Primary NAAQS are defined under § 7409(b)(1) as "requisite to protect the public health." Secondary NAAQS are defined in § 7409(b)(2) as "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." For further discussion of these categories, see text at notes 29-35 *infra*.

6. 42 U.S.C. § 7502(a)(1) (Supp. III 1979).

7. 42 U.S.C. §§ 1857-1857l (1976) (recodified at 42 U.S.C. §§ 7401-7626 (Supp. III 1979)). The 1970 Act had set a nationwide deadline of July 1, 1975, for attaining primary NAAQS while secondary NAAQS were required to be attained within a "reasonable time," defined in most SIP's to be the same as the primary standard's attainment date. However, these deadlines were only partially met throughout the nation. See text at notes 48-49 *infra*.

8. 42 U.S.C. § 7407(d) (Supp. III 1979). These regulations required EPA to designate areas of the country as attainment, nonattainment, or unclassifiable for various pollutants. They are discussed in great detail later in this article. See text at note 68 *infra*.

9. 5 U.S.C. § 553 (1976). These notice and comment procedures are described in more detail later in this article. See text at notes 98-107 *infra*.

10. 5 U.S.C. §§ 551-559 (1976).

11. See generally Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970).

12. 5 U.S.C. § 553(b)(3)(B), (d)(3). These two exceptions basically allow an agency to follow normal rulemaking procedures under § 553 upon a showing of "good cause." See text at notes 108-220 *infra*.

13. 43 Fed. Reg. 8,962, 8,962 (1978).

14. Five cases involving this issue were fully litigated. They are: *U.S. Steel Corp. v. EPA*, 595 F.2d 207 (5th Cir. 1979); *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3d Cir. 1979); *U.S. Steel Corp. v. EPA*, 605 F.2d 283 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 710 (1980); *Republic*

the APA had been violated, thereby making the EPA's section 107(d) designations<sup>15</sup> invalid. Of the five cases in 1979-80 in which the validity of the EPA's regulations were challenged, three circuit courts of appeal held that the EPA did not have good cause to bypass the ordinary procedures and that plaintiffs' rights under the APA had been violated.<sup>16</sup> Two circuits held, to the contrary, that the EPA acted properly in invoking the good cause exceptions, finding no section 553 violation.<sup>17</sup> Since the United States Supreme Court has denied certiorari<sup>18</sup> to review the issues presented in these cases, this area has been left in a state of confusion and flux.

This split among the circuits has had a great impact upon the implementation of the 1977 Clean Air Act Amendments, while also casting severe doubts as to when the APA's good cause exceptions will be allowed. Primarily, the effect of this litigation has been to postpone significantly the attainment of primary NAAQS<sup>19</sup> (NPAAQS) in those circuits where the EPA's designations were overturned. This postponement takes on added significance when viewed in light of the long history of congressional attempts to lower the amount of pollutants in the air—attempts which have continually met with only partial success. Also, the three-to-two split by the five circuits over the applicability of the section 553 good cause exceptions has left the scope of these exceptions in a quite muddled state.

This article will analyze the various issues raised in these five circuit court opinions, concentrating on the good cause issue and its effects on the implementation of the CAA. First, a brief history of the relevant portions of both the CAA and APA will be presented in order to understand the context in which these cases arise. Second,

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Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980); N.J. v. EPA, 626 F.2d 1038 (D.C. Cir. 1980). Numerous other challenges were also initially raised, but were not fully litigated for various reasons. For a comprehensive listing of all suits initially filed on this issue see *Lawsuits Challenging EPA's Area Designations Under Section 107(d) of the Clean Air Act*, May 15, 1979 (EPA Internal Memorandum).

15. The word "designation" in this article is used to refer to the EPA regulations issued under § 107(d) of the CAA, 42 U.S.C. § 7407(d), see note 8 *supra*, designating areas as attainment, nonattainment, or unclassifiable for various pollutants. See text at notes 129-33 *infra*. Thus, it is synonymous with the word "regulation," whenever "regulation" is used to refer to the § 107(d) designations.

16. U.S. Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979); N.J. v. EPA, 626 F.2d 1038 (D.C. Cir. 1980).

17. U.S. Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 710 (1980); Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980).

18. U.S. Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 710 (1980).

19. 42 U.S.C. § 7409(b)(1) (Supp. III 1979). See note 5 *supra*.

this article will discuss the five courts' analyses of the good cause issue. In discussing the circuits' treatment of this issue, this article will analyze the earlier case law on these section 553 exceptions, attempting to discern from it various trends and lines of thought. Also, the relationship between the strong public policies which underlie the CAA, the APA, and the good cause exceptions will be examined. At the end of this discussion, some conclusions will be given regarding the effects of this circuit split on both the scope of the good cause exceptions and on the implementation of the 1977 Amendments to the CAA. Third, various secondary issues faced by these five courts including harmless error,<sup>20</sup> judicial review,<sup>21</sup> and remedial relief will be discussed, noting the effect of these issues on the implementation of the 1977 Amendments. Finally, some conclusions will be offered regarding the effect of these five cases on both the various legal issues involved and the implementation of the CAA as well. Also, the various factors contributing to this unfortunate litigation, and the lessons to be learned from it, will be presented.

## II. THE SETTING: BACKGROUND AND LEGISLATIVE HISTORY OF THE CAA AND THE APA

### A. *The CAA*

#### 1. History Prior to 1977

Congress' attempts to legislate solutions to air pollution date back to 1955 when the Committee on Interstate and Foreign Commerce recommended, and Congress enacted, a federal air pollution research and technical assistance program which has become known as the Clean Air Act.<sup>22</sup> In 1963, Amendments to the Clean Air Act<sup>23</sup> were passed, calling for a greater federal role than under the 1955

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20. The harmless error doctrine, as used in this article, refers primarily to § 706 of the APA, 5 U.S.C. § 706 (1976), which states that "due account shall be taken of the rule of prejudicial error." See text at notes 292-333 *infra*.

21. This article will focus on the Seventh Circuit's unique interpretation of the CAA's judicial review provision—§ 307(d), 42 U.S.C. § 7607(d) (Supp. III 1979); see text at notes 334-65 *infra*.

22. Pub. L. No. 84-159, 69 Stat. 322 (1955). The 1955 Act referred to was originally entitled "Air Pollution Control—Research and Technical Assistance." The 1963 Amendments to that Act amended the title to read "An Act to provide for air pollution prevention and control activities of the Department of Health, Education and Welfare, and for other purposes." Pub. L. No. 88-206, § 14(2), 77 Stat. 392 (1963). However, § 14 of the 1963 bill also provided that "[t]his act may be cited as the 'Clean Air Act'." Pub. L. No. 88-206, § 14, 77 Stat. 392 (1963).

23. Pub. L. No. 88-206, 77 Stat. 392 (1963).

Act.<sup>24</sup> The CAA was amended many other times<sup>25</sup> in order "to improve, strengthen and accelerate programs for the abatement and prevention of air pollution."<sup>26</sup> Yet it was not until 1970 that Congress developed a comprehensive program for the elimination of air pollution in the United States by restructuring the CAA.<sup>27</sup>

In order to attack effectively the air pollution problem, Congress

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24. The 1955 Act provided for federal involvement only to the extent that it funded research (at about a \$5 million per year level). The Committee stressed that: "The bill does not propose any exercise of police power by the Federal Government, and no provision in it invades the sovereignty of states, counties, or cities." S. REP. NO. 389, 84th Cong., 1st Sess. 4, *reprinted in* [1955] U.S. CONG. CODE & AD. NEWS 2457, 2459. While the 1963 Act kept control primarily in the hands of state and local governments, it did call for a substantially greater federal role. First, it called for a greatly expanded role in supporting state and local control programs and increased funds for federal research to be conducted by the Department of Health, Education, and Welfare (HEW). Second, it gave the federal government a role in abating pollution by authorizing it to deal with interstate air pollution problems on an ad hoc basis through a cumbersome abatement procedure. Pub. L. No. 88-206, § 5, 77 Stat. 392 (1963).

25. See note 1 *supra*.

26. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 165 (6th Cir. 1973). This case is commonly referred to as *Buckeye Power No. 1*.

27. Whereas the earlier enactments had made some inroads in dealing with the nation's air quality problems, the 1970 Act was much more ambitious legislation. This was made clear in the House report on the 1970 Amendments which stated:

The purpose of the legislation reported unanimously by your committee is to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again. The Air Quality Act of 1967 (Public Law 90-148) and its predecessor acts have been instrumental in starting us off in this direction. A review of achievements to date, however, make abundantly clear that the strategies which we have pursued in the war against air pollution have been inadequate in several important respects, and the methods employed in implementing those strategies often have been slow and less effective than they might have been.

H.R. REP. NO. 91-1146, 91st Cong., 2d Sess. 1, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5356, 5356.

The report went on to state the reasons why this legislation was needed, remarking that:

Air pollution continues to be a threat to the health and well-being of the American people. While a start has been made in controlling air pollution since the enactment of the Air Quality Act of 1967, progress has been regrettably slow. This has been due to a number of factors: (1) cumbersome and time-consuming procedures called for under the 1967 act; (2) inadequate funding on Federal, State and local levels; (3) scarcity of skilled personnel to enforce control measures; (4) inadequacy of available test and control technologies; (5) organizational problems on the Federal level where air pollution control has not been accorded a sufficiently high priority; and (6) last, but not least, failure on the part of the National Air Pollution Control Administration to demonstrate sufficient aggressiveness in implementing present law.

. . . Therefore, it is urgent that Congress adopt a new clean air legislation which will make possible the more expeditious imposition of specific emission standards both for mobile and stationary sources and the effective enforcement of such standards by both State and Federal agencies.

*Id.* at 5, U.S. CODE CONG. & AD. NEWS at 5360.

totally revamped the previous legislation when it enacted the 1970 Amendments. The basic features of the 1970 Act<sup>28</sup> need to be outlined as they form the basis upon which the 1977 Amendments rest.

First, the 1970 Act required the EPA to establish National Ambient Air Quality Standards (NAAQS). These are divided into two groups: primary and secondary.<sup>29</sup> The primary standards, designed to protect the public health, define those levels of pollution which cannot be exceeded without threatening adverse effects on human health.<sup>30</sup> The secondary standards,<sup>31</sup> designed to protect the "public welfare,"<sup>32</sup> set an even stricter limit on the concentration of pollutants allowed in the air than do the primary standards. These standards are at the core of the Act, and from them many critical features of the Act emanate.<sup>33</sup> The EPA promulgated NAAQS for six criteria<sup>34</sup> pollutants in April of 1971.<sup>35</sup>

Upon establishment of the air quality standards, the 1970 CAA called upon state agencies to develop state implementation plans (SIP's) which were to set out the methods to be used in attaining these standards.<sup>36</sup> The Act set up a strict statutory timetable for both the adoption and implementation of the SIP's. Under this schedule, the EPA was to approve the states' final plans no later than July 31, 1972, and the states were required to attain the primary standard by July 31, 1975, subject to a two-year extension

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28. See note 4 *supra*.

29. 42 U.S.C. § 1857c-4 (1976) (recodified at 42 U.S.C. § 7409 (Supp. III 1979)). See note 5 *supra*.

30. 42 U.S.C. § 7409(b)(1) (Supp. III 1979).

31. *Id.* § 7409(b)(2).

32. The term "public welfare" has been defined quite broadly. It is essentially an umbrella term which has numerous components including protection of property, agricultural production, ecosystems, and aesthetics. Hays, *Clean Air: From the 1970 Act to the 1977 Amendments*, 17 DUQ. L. REV. 33, 35 (1978-79); Quarles, *Federal Regulation of New Industrial Plants*, 10 ENVIR. REP. (BNA) (Monograph No. 28) 4 (1979) [hereinafter cited as Quarles].

33. Quarles, *supra* note 32, at 4. The Quarles article stated:

The standards define the quality of air which must be achieved to prevent adverse effects. Many critical features of the program originate from this foundation—including the basic point that control requirements depend on adequate data and analysis to determine what the air quality actually is, to identify the sources of pollution affecting air quality and the manner in which pollutants are dispersed and interact in the ambient air, and to determine what reductions and controls are needed to achieve specified air quality objectives.

*Id.*

34. "Criteria pollutants" are those pollutants in the ambient air which the EPA has determined to be safe at certain prescribed levels. These levels are the primary and secondary NAAQS.

35. 40 C.F.R. §§ 50.4-50.11 (1980). The six criteria pollutants are: Total suspended particulates (TSP), sulfur dioxide, photochemical oxidants, hydrocarbons, carbon monoxide, and nitrogen oxide. Lead was added to this list in Oct. 1978. 40 C.F.R. § 50.12 (1980).

36. 42 U.S.C. § 7410(a) (Supp. III 1979).

under certain conditions.<sup>37</sup> In order to designate geographical units in which pollutant levels could be monitored, the country was divided into 247 air quality control regions (AQCR's).<sup>38</sup>

Although the 1970 Act did not specify the consequences of failure to attain the primary NAAQS by the 1975 deadline, and since public health was made the sole consideration in setting such standards, one of the logical alternatives available to the EPA was to shut down those sources which failed to reduce emissions to acceptable levels. This remedy was specifically endorsed by the Senate committee report on the 1970 Amendments.<sup>39</sup> However, this "all or nothing" approach was never adopted by most courts. Some courts simply refused to accept this approach,<sup>40</sup> others tried to modify it,<sup>41</sup> and

37. 42 U.S.C. § 1857c-5(e) (1970). This section stated:

(e) Extension of time period for attainment of national primary ambient air quality standard in implementation plan; procedure; approval of extension by Administrator.

(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) of this section for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the state has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

This 1975 deadline and two-year extension applies only to the primary NAAQS. Since the secondary NAAQS have not been hotly contested to date, the term "NAAQS" will refer exclusively to the primary standards for the balance of this article.

38. 42 U.S.C. § 1857c-2 (1976).

39. S. REP. NO. 1196, 91st Cong., 2d Sess. 2-3 (1970). The report stated: The committee determined that . . . the health of people is more important than the question of whether the early achievement of ambient air quality standards is technologically feasible . . . . Therefore, the committee determined that existing sources of pollutant should meet the standard of the law or be closed down. *Quoted in Kramer, The 1977 Clean Air Amendments: A Tactical Retreat From the Technology-Forcing Strategy?*, 15 URB. L. ANN. 103, 105 n.8 (1978) [hereinafter cited as Kramer].

40. *Duquesne Light Co. v. EPA*, 522 F.2d 1186 (3d Cir. 1975), *vacated and remanded*, 427 U.S. 902 (1976); *St. Joe Minerals Corp. v. EPA*, 508 F.2d 743 (3d Cir. 1975), *vacated as moot*, 425 U.S. 987 (1976).

41. *Natural Resources Defense Council, Inc. v. EPA*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc. v. EPA*, 475 F.2d 968 (D.C. Cir. 1973).



others essentially rewrote the 1970 Act.<sup>42</sup> Also, in the 1976 case of *Union Electric Co. v. EPA*,<sup>43</sup> Justice Powell, in a concurring opinion, found this shutdown alternative to be impractical, favoring a more balanced approach.<sup>44</sup>

In retrospect it appears that the 1970 Act may have been overly ambitious in its approach. By 1975, it became apparent that "despite significant progress,"<sup>45</sup> this aggressive, "technology-forcing"<sup>46</sup> strategy had not lead to any significant technological breakthroughs.<sup>47</sup> As of August 31, 1975, of the 247 AQCR's in the nation, it was estimated that 132 did not attain the NPAAQS for particulate matter, and 35 failed to attain the NPAAQS for sulfur dioxide.<sup>48</sup> The attainment levels for the other criteria pollutants were not any better.<sup>49</sup> Thus, because of the inflexibility of the 1970 Act, the

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42. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973). In this case the court rejected the idea that the 1970 Act was based on the "all or nothing" approach, holding that Congress, if it intended to shut plants down, would have stated so in the 1970 Amendments.

43. 427 U.S. 246 (1976).

44. In this opinion J. Powell stated:

Environmental concerns, long neglected, merit high priority, and Congress properly has made protection of the public health its paramount consideration. . . . But the shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by decline in ambient air quality. The result apparently required by this legislation in its present form could sacrifice the well being of a large metropolitan area through the imposition of inflexible demands that may be technologically impossible to meet and indeed may no longer even be necessary to the attainment of the goal of clean air.

I believe that Congress, if fully aware of this Draconian possibility, would strike a different balance.

*Id.* at 271-72 (1976).

45. H.R. REP. NO. 294, 95th Cong., 1st Sess. 207, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1077, 1286.

46. By making primary NAAQS solely a health-based standard, the 1970 Amendments explicitly rejected technological and economic constraints as considerations in achieving pollution abatement. This type of approach is commonly referred to as "technology-forcing." Since sources face possible forced closings if they fail to meet the health-based standard, this approach assumes that these industries will be forced to develop new technologies to reach these standards. The basic philosophy behind this approach was summed up by Senator Edmund S. Muskie (D. Maine) when he stated: "Predictions of technological impossibility or infeasibility are not sufficient as reasons to avoid tough standards and deadlines, and thus to compromise the public health . . . . Only a clear cut and tough public policy can generate the needed effort." Quoted in Bonine, *The Evolution of 'Technology-Forcing' In The Clean Air Act*, 6 ENVIR. REP. (BNA) (Monograph No. 21) 1 (1975). See generally, *id.*; La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA L. REV. 771 (1976-77).

47. See Kramer, *supra* note 39, at 108 & n.26.

48. *Id.* at 108 & n.27.

49. See Letter from EPA Administrator Russell Train to Senator Edmund Muskie (May 12, 1975) (attachment at 3), reprinted in [1977] U.S. CODE CONG. & AD NEWS 1077, 1286-87. The letter, dated May 12, 1975, assessed the attainment situation for the five criteria pollutants.

EPA was faced with the possibility<sup>50</sup> of shutting down plants and putting an end to growth in most of America's industrial areas, a price that the courts<sup>51</sup> and the American public were unwilling to pay.<sup>52</sup> Prior to the 1977 Amendments, the EPA made an attempt to resolve the problem by publishing its "Offset Policy," an interpretative ruling, on December 21, 1976.<sup>53</sup> This ruling stated that new plants could be constructed in nonattainment areas only if emissions were controlled to the greatest extent possible and if more than equivalent offsetting emission reductions were obtained from other sources. Thus, the EPA, under this policy, attempted to make room for economic growth in highly developed nonattainment areas as long as air quality was to be improved as a result of that growth.

pollutants. While recognizing that its statistics were based on "less than adequate information" it presented the following estimates:

Of the 247 air quality control regions in the Nation, 60 are projected not to meet standards by statutory deadlines for TSP and 42 for sulfur oxides. For oxidants 74 air quality control regions have reported levels in excess of the national ambient air quality standards; it is expected that a high proportion of these air quality control regions will continue to have oxidant levels exceeding national ambient air quality standards past the attainment dates. A similar situation exists for nitrogen dioxide and carbon monoxide. Currently, 13 cities exceed the nitrogen dioxide national ambient air quality standards (and will probably continue to exceed it in the immediate future). Likewise, 54 cities are in this category for carbon monoxide.

50. The shutdown approach was never explicitly stated in the 1970 Act, thereby leading to arguments over whether it was actually intended. See note 42 *supra*. However, the shutdown approach was generally accepted as the logical outcome of the technology-forcing strategy adopted by the CAA. Thus, while the EPA was not directly ordered to shut down plants in order to attain NPAAQS, such action was the most effective possible approach that the EPA could take in order to implement the 1970 Act.

51. See notes 39-44 *supra*.

52. Raffle, *Prevention of Significant Deterioration and Non-Attainment Under The Clean Air Act—A Comprehensive Review*, 10 ENVIR. REP. (BNA) (Monograph No. 27) 3 (1979).

53. 40 C.F.R. § 51, app. S (1980). When the 1970 Act was originally passed, no attention was paid to new sources since it was generally assumed that the NAAQS would be reached by the target date. However, when it became clear in 1975 that this would not occur, the EPA was faced with the question whether the Clean Air Act was intended to stop new industrial development in nonattainment areas. The EPA in passing the Offset Ruling attempted to reconcile the conflicting concerns of clean air and economic growth.

Specifically the Offset Ruling established four criteria necessary for approval of a new source in a nonattainment area. These criteria are as follows:

1) the new source must contain pollution control devices able to assure the lowest achievable emission rate (LAER), which cannot be less stringent than any new source performance standard (see 42 U.S.C. § 7411 (Supp. III 1979));

2) all other sources owned by an applicant in that AQCR must be in compliance with the SIP requirements or on another approved schedule;

3) the applicant must reduce emissions generated by the new source after LAER, *i.e.*, offset emissions; and

4) the emission offsets must provide a positive net air quality benefit in the affected area. Quarles, *Federal Regulation of New Industrial Plants*, 10 ENVIR. REP. (BNA) (Monograph No. 28) 16 (1979).

The legislative history of the 1977 Amendments also recognized and dealt with the problem of economic growth under the CAA. In its discussion of section 117<sup>54</sup> of the House bill, the House Committee on Interstate and Foreign Commerce recognized the severe economic problems posed by the 1970 Act, and tried to strike a balance between these economic concerns and the health concerns which motivated enactment of the CAA.<sup>55</sup> However, the reason for the failure to achieve timely compliance with the national standards was not simply the economic hardship placed on industry. According to then EPA Administrator Train, among the reasons for the failure were: a) the complexity of pollution abatement and unexpected problems such as the economic recession and energy crisis; b) inadequate enforcement and noncompliance by individual sources; c) inadequate state regulations; and d) numerous court challenges which prevented federal or state enforcement action.<sup>56</sup> In light of this general background and these basic problems, Congress enacted the 1977 Amendments.

## 2. The 1977 Amendments

Congress, in passing the 1977 Amendments, sought to rectify the problems arising from the 1970 Act. While the basic structure of the 1970 Act was kept intact, various revisions were made in order to better address the problems discussed above.

The legislative history of the 1977 Amendments makes it clear that "the primary and overriding purpose of the bill remain[ed] the prevention of illness or death which is air pollution related and protection of public health."<sup>57</sup> Efforts in Congress to change the primary NAAQS's to consider other factors such as economics, technology, and energy<sup>58</sup> were ultimately rejected. The House report, in its discussion of both the nonattainment problem<sup>59</sup> and its proposal for prevention of significant deterioration (PSD),<sup>60</sup> dwells at

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54. 42 U.S.C. § 7502 (Supp. III 1979).

55. H.R. REP. NO. 294, 95th Cong., 1st Sess. 210, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1289.

56. Train Cites Clean Air Progress, Need For Continued Enforcement 2 (EPA Press Release, May 30, 1975), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1286.

57. H.R. REP. NO. 294, 95th Cong., 1st Sess. 2, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1080.

58. See Kramer, *supra* note 39, at 111 & n.44-46.

59. H.R. REP. NO. 294, *supra* note 57 at 207-10. U.S. CODE CONG. & AD. NEWS 1286-89.

60. *Id.* at 105-10, U.S. CODE CONG. & AD. NEWS at 1183-88. Prevention of Significant Deterioration (PSD) was promulgated as a final regulation by the EPA on August 7, 1980. 45 Fed. Reg. 52,676 (1980) (to be codified at 40 C.F.R. §§ 51.24, 52.21).

great length on the severe health effects caused by air pollution in general, and nonattainment of the NPAAQS in particular.<sup>61</sup>

The report discusses voluminous medical evidence,<sup>62</sup> most of which pointed out the necessity of attaining NPAAQS in order to protect the public health, and urges that no delays or relaxation be allowed in the attainment dates.<sup>63</sup> Pointing out the scope of the problem and the need for action, the report adds that:

[N]on-attainment of air quality standards in a wide and densely populated region could result in a phenomenal health impact, measured in terms of millions of days of aggravated disease, asthma attacks and lower respiratory disease episodes. The committee points out that the people whose health is affected by air pollution number in the tens of millions.<sup>64</sup>

The committee's decision to reaffirm the health based standards was further supported by new evidence suggesting that the margins of safety, originally set to prevent the occurrence of known and anticipated health effects, had turned out to be very modest or even nonexistent.<sup>65</sup>

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The purpose of the PSD rules is to prevent significant deterioration of the air quality in areas where the air is cleaner than [required under] applicable national standards. Accordingly, PSD applies only in [those] areas which are either cleaner than [required by] the national standards, or unclassifiable, for at least one pollutant.

Goldberg, *Source Planning Under the New PSD Regulations*, 10 ENVIR. REP. (BNA) (Monograph No. 29) 2 (1980).

61. H.R. REP. NO. 294, 95th Cong., 1st Sess. 110-22, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1077, 1188-1200.

62. *Id.* at 105-06, U.S. CODE CONG. & AD. NEWS at 1183-84. The medical evidence included testimony by the American Medical Association and the American Lung Association. Also, various unnamed studies were discussed.

63. *Id.*

64. *Id.* at 209, U.S. CODE CONG. & AD. NEWS at 1288. The magnitude of the health problem posed by air pollution had also been noted in the case law prior to the 1977 Amendments. One court noted the severity of this problem by stating:

Acute episodes of high pollution have clearly resulted in mortality and morbidity . . . . [T]here is now no longer any doubt that high levels of pollution sustained for periods of days can kill. Those aged 45 and over with chronic diseases, particularly of the lungs or heart, seem to be predominantly affected. In addition to these acute episodes, pollutants can attain daily levels which have been shown to have serious consequences to city dwellers.

There is a large and increasing body of evidence that significant health effects are produced by long-term exposures to air pollutants.

Cleveland Electric Illuminating Co. v. EPA, 572 F.2d 1150, 1153 (6th Cir.), cert. denied, 439 U.S. 910 (1978) (quoting Rall, *Review of the Health Effects of Sulfur Oxides*, 8 ENV'TL HEALTH PERSPECTIVES 97, 99 (1974)).

65. H.R. REP. NO. 294, 95th Cong., 1st Sess. 106-10, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1077, 1185-88. The legislative history discussed a number of medical and scientific reports stating that the margins of safety, originally believed to be present in the NPAAQS,

Despite strong reaffirmance of the need for health based standards as the primary purpose of the Act, the 1977 Amendments did make certain concessions to accommodate legitimate concerns expressed by the business community. First, the Amendments pushed back the mandatory attainment date for NPAAQS from July 31, 1975 to December 31, 1982 or "as expeditiously as practicable."<sup>66</sup> In order to reach the 1982 goal, a strict statutory schedule was set under a new implementation process. This implementation process called for the classification of all AQCR's in the nation as either attainment, nonattainment, or unclassifiable within 120 days of August 7, 1977.<sup>67</sup> After the states submitted their lists to the EPA, the Administrator had until February 3, 1978, to "promulgate each such list with such modifications as he deem[ed] necessary."<sup>68</sup> After such lists were promulgated by the EPA, the states had until January 1, 1979, to compose their revised State Implementation Plans (SIP's) under which their measures for assuring success in attaining the statutory deadlines were to be detailed.<sup>69</sup> Thus, by postponing the attainment date until 1982, the 1977 Amendments made certain concessions to business. At the same time, by establishing a strict statutory deadline and discussing at length the severe health problems posed by air pollution, Congress made clear that the protection of public health remains the predominant goal of the CAA.<sup>70</sup>

Another concession made to the business community was the continuance of the "Offset Policy" through July 1, 1979.<sup>71</sup> The Offset Policy was designed to allow for continued economic growth in nonattainment areas, provided that continued progress was being made towards attainment of the NPAAQS. Continuance of this policy through mid-1979 allowed the states to permit economic growth while revising their SIP's to allow for similar activity in the future. Approval of new plants in nonattainment areas is still allowed

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were modest or even nonexistent, due to new evidence that potential for harmful health effects does exist at lower levels of pollution in the ambient air.

66. 42 U.S.C. § 7502(a)(1) (Supp. III 1979).

67. *Id.* § 7407(d)(1).

68. *Id.* § 7407(d)(2).

69. *Id.* § 7407(a), (a)(1).

70. See text at note 57 *supra*.

71. 42 U.S.C. § 7502 note (Supp. III 1979). The Offset Policy was originally enacted as a stopgap to the problem of economic stagnation in nonattainment areas. The 1977 Amendments, in § 202, officially extended this interpretative ruling until June 1, 1979, at which time revised SIP's had to be adopted. While the 1977 Amendments did continue the basic policy of the Offset Ruling, one important change was made. This change dealt with the baseline levels of pollutants from which the offsets were measured. Essentially, this change liberalized the baseline levels, thereby making offsets easier to attain until June 1, 1979.

under the revised SIP's, provided that various conditions are met.<sup>72</sup> The legislative history on the House bill's section 129<sup>73</sup> points out that the section has two main purposes: a) to allow for reasonable growth in a nonattainment area while also making reasonable progress towards attainment of the NPAAQS, and b) to allow states greater flexibility in furthering economic growth than the Offset Ruling affords.<sup>74</sup>

The 1977 Act also calls for greater public and local government participation in air pollution decisions.<sup>75</sup> Although the overriding purpose of the Act is clearly protection of public health, the legislative history reveals that one of the main purposes of the 1977 Amendments was "to insure more effective, informed public involvement in decision-making under the Act."<sup>76</sup> Thus, the Amendments specifically require that revised SIP's be the product of cooperative consultation between state and local governments,<sup>77</sup> with the state adopting and the EPA approving such plans only "after reasonable notice and public hearings."<sup>78</sup> It is important to note that the section 107 designations,<sup>79</sup> classifying the nation's AQCR's as attainment, nonattainment, or unclassifiable for the various criteria pollutants, do not specifically call for reasonable notice and public hearings. Instead the section only requires that the Administrator, whenever he wishes to modify a list submitted by a state, notify the state and request all available information on the region. Section 107 also requires that the Administrator provide the state with an opportunity to show why any proposed modifications are inappropriate.<sup>80</sup>

72. 42 U.S.C. § 7503. After June 1, 1979, the 1977 Amendments intended that the revised SIP's (which had to be submitted to and approved by the EPA by this date under the 1977 Amendments in order for new construction to be allowed) provide the framework for review of new sources in nonattainment areas. Basically, the same approach as that taken by the Offset Ruling is applied except that some new provisions were added which tighten restrictions on construction of new plants. The most important of these new provisions links approval of new sources to completion of revision of the entire SIP in order to eliminate violations. *Id.* §§ 7410(a)(2)(I), 7502(a)(1). The practical effect of this section makes new construction difficult in many nonattainment areas.

For a good discussion of the 1977 Amendments' approach toward economic growth and new sources, see Quarles, *supra* note 32.

73. 42 U.S.C. § 7503 (Supp. III 1979).

74. H.R. REP. No. 294, 95th Cong., 1st Sess. 211, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1290.

75. *Id.* at 2, U.S. CODE CONG. & AD. NEWS at 1079.

76. *Id.*

77. 42 U.S.C. § 7502(b)(9) (Supp. III 1979).

78. *Id.* §§ 7502(b)(1), 7410(c).

79. Hereinafter, they will be referred to as § 107 designations, § 107 regulations, or § 107 lists.

80. 42 U.S.C. § 7407(d)(2) (Supp. III 1979).

A new subsection, designed to deal with problems not adequately covered by the 1970 Act's judicial review provisions, was also introduced in the 1977 Amendments. As the legislative history reveals, one of the major problems with the 1970 Act was the excessive amount of litigation which resulted from it and eventually delayed the statutory deadlines set within the Act.<sup>81</sup> The House report on the 1977 Amendments also recognized this problem stating that, in order to prevent rulemaking from bogging down over minor technical questions, the extent to which the Administrator's decisions on procedural matters may be reversed during judicial review must be limited.<sup>82</sup> To rectify this problem, new subsection 307(d)<sup>83</sup> was enacted as part of the 1977 Amendments. This subsection contains a provision, 307(d)(9), which establishes a new, more limited standard for judicial review of most agency rulemaking under the CAA. Subsection (d)(1) of section 307 expressly states that it applies to thirteen specific provisions of the Act<sup>84</sup> as well as "such other ac-

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81. See note 56 *supra*.

82. H.R. REP. NO. 294, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1401.

83. 42 U.S.C. § 7607(d) (Supp. III 1979).

84. *Id.* § 7607(d)(1).

This subsection applies to—

- (A) the promulgation or revision of any national ambient air quality standard under section 109 [42 U.S.C. § 7409],
- (B) the promulgation or revision of an implementation plan by the Administrator under section 110(c) [42 U.S.C. § 7410(c)],
- (C) the promulgation or revision of any standard of performance under section 111 [42 U.S.C. § 7411] or emission standard under section 112 [42 U.S.C. § 7412],
- (D) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 211 [42 U.S.C. § 7545],
- (E) the promulgation or revision of any aircraft emission standard under section 231 [42 U.S.C. § 7571],
- (F) promulgation or revision of regulations pertaining to orders for coal conversion under section 113(d)(5) [42 U.S.C. § 7413(d)(5)] (but not including orders granting or denying any such orders),
- (G) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 119 [42 U.S.C. § 7419] (but not including the granting or denying of any such order),
- (H) promulgation or revision of regulations under subtitle B of title I [42 U.S.C. §§ 7450-7459] (relating to stratosphere and ozone protection),
- (I) promulgation or revision of regulations under subtitle C of title I [42 U.S.C. §§ 7470-7491] (relating to prevention of significant deterioration of air quality and protection of visibility),
- (J) promulgation or revision of regulations under section 202 [42 U.S.C. § 7521] and test procedures for new motor vehicles or engines under section 206 [42 U.S.C. §

tions as the Administrator may determine."<sup>85</sup> Among those provisions listed are the promulgation or revision of SIP's by the Administrator under section 110(c)<sup>86</sup> and promulgation or revision of regulations related to PSD.<sup>87</sup> However, subsection 307(d)(1) does not specifically list the promulgation of section 107(d) descriptions.

Subsection 307(d)(9)(D) of the 1977 Amendments sets forth the standard under which a reviewing court may reverse a procedural violation by the EPA if such action is included in section 307(d)(1). The (d)(9)(D) standard, like all of section 307(d)(9), is quite limiting, its intent being the elimination of unnecessary litigation. Section 307(d)(9)(D) gives a three-prong test for judicial reversal of procedural violations. This three-prong test requires that: 1) the violation must be arbitrary or capricious; 2) an objection to a procedure may be raised during judicial review only if the objection was raised during the public comment period; and 3) the error must be so serious and of such relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.<sup>88</sup> Thus, section 307(d) in general and section 307(d)(9)(D) specifically set out a very detailed procedure and standard for judicial review of agency rulemaking under the CAA. These standards are much more elaborate than those normally required under the APA<sup>89</sup> and, thus, make invalidation of mere procedural errors difficult to attain in a reviewing court. This article now turns its attention to the APA, discussing primarily those sections which deal with rulemaking procedure and judicial review.

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7525], and the revision of a standard under section 202(a)(3) [42 U.S.C. § 7521(a)(3)], (K) promulgation or revision of regulations for noncompliance penalties under section 120 [42 U.S.C. § 7420],

(L) promulgation or revision of any regulations promulgated under section 207 [42 U.S.C. § 7541] (relating to warranties compliance by vehicles in actual use),

(M) action of the Administrator under section 126 [42 U.S.C. § 7426] (relating to interstate pollution abatement), and

(N) such other actions as the Administrator may determine.

The provisions of sections 553 through 557 and section 706 of title 5 of the United States Code [5 U.S.C. §§ 553-557, 706] shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5 of the United States Code [5 U.S.C. § 553(b)(A), (B)].

85. *Id.* § 7607(d)(1)(N).

86. *Id.* § 7607(d)(1)(B).

87. *Id.* § 7607(d)(1)(I).

88. *Id.* § 7607(d)(9).

89. 5 U.S.C. § 706 (1976). See text at notes 121-27 *infra*.



### B. *The APA*

Like the CAA, the APA<sup>90</sup> has a long, although quite different, legislative history.<sup>91</sup> Although administrative agencies have been present in American government for well over 100 years,<sup>92</sup> the intensive growth of administrative regulation brought on by the New Deal made the need for organized administrative procedure quite great.<sup>93</sup> The APA was designed to settle and regulate the field of federal administrative procedure by setting forth legal guides outlining the "minimum basic essentials" required of agencies.<sup>94</sup> Its central purpose was "to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected."<sup>95</sup>

The section of the APA with which this article is principally concerned is section 553, entitled "Rulemaking."<sup>96</sup> This section requires an agency which intends to promulgate rules,<sup>97</sup> to publish a general

90. 5 U.S.C. §§ 551-559 (1976). The provisions of 5 U.S.C. §§ 701-706, dealing with judicial review, were originally enacted as part of the Administrative Procedure Act. However, as part of a general revision of title 5, the Administrative Procedure Act was officially repealed on Sept. 6, 1966, and its provisions incorporated into 5 U.S.C. §§ 552-559 and §§ 701-706. While the Administrative Procedure Act is currently commonly cited as only §§ 551-559, for the purpose of this article it will be assumed to include §§ 701-706 as well.

91. See generally H.R. REP. NO. 1980, 79th Cong., 2d Sess., reprinted in [1946] U.S. CODE CONG. & AD. NEWS 1195-1202.

92. *Id.*, reprinted in [1946] U.S. CODE CONG. & AD. NEWS 1195, 1197.

93. The 1937 Report of the President's Committee on Administrative Management recognized this problem, pointing out that:

There is a conflict of principle involved in [Agencies'] make-up and function. . . . They are vested with duties of administration . . . and at the same time they are given important judicial work . . . . Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness, it weakens public confidence in that fairness.

H.R. REP. NO. 1980, 79th Cong., 2d Sess., 2, reprinted in [1946] U.S. CODE CONG. & AD. NEWS 1195.

94. S. REP. NO. 752, 79th Cong., 1st Sess., reprinted in UNITED STATES CONGRESS, SENATE COMMITTEE ON THE JUDICIARY, LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 1944-46, at 193 (1949) [hereinafter cited as LEGIS. HISTORY OF APA 1944-46].

95. *Id.*

96. 5 U.S.C. § 553 (1976).

97. The words "rule" and "rule-making" as used in the APA are defined in 5 U.S.C. § 551(4), (5). These sections read as follows:

(4) "rule" means the whole or a 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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule-making" means agency process for formulating, amending or repealing a rule.

notice of proposed rulemaking in the Federal Register,<sup>98</sup> to afford an opportunity for interested persons to participate in the rulemaking by submitting written comments,<sup>99</sup> and to adopt a general statement of the basis for and purpose of rules subsequently adopted.<sup>100</sup> Section 553 further requires that the publication of the rule be made at least thirty days before its effective date,<sup>101</sup> subject to three exceptions,<sup>102</sup> and that each agency give an interested person the right to petition for the issuance, amendment, or repeal of a rule.<sup>103</sup>

The effect of section 553 is to:

enable parties to express themselves in some informal manner prior to the issuance of rules and regulations, so that they will have been consulted before being faced with the accomplished fact of a regulation which they may not have anticipated or with reference to which they have not been consulted.<sup>104</sup>

The section thus recognizes that interested persons and regulated industries have a right to participate in the rulemaking process. Furthermore, it assumes that the quality of policy decisions will be improved if public input is considered before decisions are made.<sup>105</sup> As Justice Douglas stated in his dissent in *NLRB v. Wyman-Gordon*,<sup>106</sup>

[a]gencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice . . . . Public airing of problems through rulemaking makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.<sup>107</sup>

98. 5 U.S.C. § 553(b) (1976).

99. *Id.* § 553(c).

100. *Id.*

101. *Id.* § 553(d).

102. *Id.*

103. The section reads as follows:

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

*Id.* § 553(e).

104. LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 358.

105. See *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976); *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969).

106. 394 U.S. 759, 777-78 (1969).

107. *Id.*, quoted in *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1113 n.76 (C.D. Cal. 1976).

Although a dissenting opinion, Justice Douglas' comments are commonly cited as an accurate account of the function of the § 553 notice and comment procedures in the administrative process.

However, despite the importance of public notice and participation in rulemaking, section 553 of the APA lists numerous exceptions,<sup>108</sup> two of which this article will deal with in detail. These two exceptions are commonly referred to as the "good cause" exceptions and they are found in subsections (b)(B) and (d)(3) of section 553.<sup>109</sup>

### 1. The (b)(B) Exception

The (b)(B) exception of section 553 deals with the preliminary notice of rulemaking that is normally required. Section 553(b) states that general notice of proposed rulemaking must be published in the Federal Register in order to alert interested parties that such rules are being formulated. However, section 553(b)(B) states that, except when notice or hearing is required by statute, normal section 553(b) procedures do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>110</sup>

The legislative history of this exception makes it clear that it should be narrowly construed. The Senate report on the (b)(B) exception is illuminating in this regard. It states:

The exemption of situations of emergency or necessity is not an "escape clause" in the sense that any agency has discretion

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108. In all, § 553 contains seven exceptions. Three exceptions are contained in § 553(d). See note 102 *supra*. Two other exceptions are contained in § 552(a). These read as follows:

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

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to the agency management or personnel or to public property, loans, grants, benefits, or contracts.

The final two exceptions are contained in § 553(b)(3)(A) and 553(b)(3)(B). These read as follows:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

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

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

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

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

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

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

109. 5 U.S.C. §§ 553(b)(3)(B), 553(d)(3) (1976).

110. *Id.* § 553(b)(3)(B).

to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published. "Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings. "Unnecessary" means unnecessary so far as the public is concerned as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary," it requires that public rulemaking procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rulemaking warrants an agency to dispense with public procedure.<sup>111</sup>

The House report on this exception adds that "[i]mpracticable' means a situation in which the due, *timely*, and required execution of agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings."<sup>112</sup> Thus, while also endorsing a narrow construction of the exception, this part of the House report seems to take a slightly more liberal view than that taken by the Senate report.

## 2. The (d)(3) Exception

Whereas the (b)(B) exception deals with pre-promulgation notice, the (d)(3) exception relates to section 553's requirement that a rule must be published at least thirty days before its effective date.<sup>113</sup> However, unlike (b)(B), the (d)(3) exception contains no qualifying language. It simply states that the thirty day period is not necessary where the agency has good cause to dispense with it and publishes its reason with the rule. Despite this difference in statutory language, most courts and commentators have taken the position that the two exceptions have roughly the same meaning.<sup>114</sup>

111. S. REP. NO. 752, 79th Cong., 1st Sess., reprinted in LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 200.

112. H.R. REP. NO. 1980, 79th Cong., 2d Sess., reprinted in LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 258.

113. Section 553(d)(3), 5 U.S.C. § 553(d)(3) reads:

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

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

114. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 590 (2d ed. 1978); Bonfield, *Public Participation in Federal Rule-making Relating to Public Property, Loans, Grants, Benefits or Contracts*, 118 U. PA. L. REV. 540, 599-600 (1970).

The purpose of the (d)(3) exception must be viewed in light of the purpose of section 553(d) in general. Basically, section 553(d) is designed to "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of the rule may prompt."<sup>115</sup> Early hearings on this section suggested that it was necessary in order to provide a procedure to correct error or oversight in regulations before, rather than after, they become effective.<sup>116</sup>

Like the (b)(B) exception, the (d)(3) exception is not intended to be an escape clause which can be arbitrarily exercised. Its use must be based on legitimate grounds supported in law and fact.<sup>117</sup> It is designed to let certain rules take effect immediately or in less than thirty days where unavoidable limitations of time, or demonstrable urgency of the conditions they are designed to correct, exist.<sup>118</sup> The exception, and the section as a whole, requires agencies to proceed with the convenience or necessity of the people affected as their primary consideration.<sup>119</sup> Thus, it is clear that the (d)(3) exception is also intended to be narrowly construed.<sup>120</sup>

### 3. The Judicial Review Provision of the APA—Section 706

Another section of the APA, relevant to the five circuit cases to be discussed in this article, is its scope of judicial review provision. This

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Also, the Courts of Appeals for the Third, Fifth, and D.C. Circuits interpreted these two exceptions to have roughly the same meaning. *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3d Cir. 1979); *U.S. Steel Corp. v. EPA*, 595 F.2d 207 (5th Cir. 1979); *N.J. v. EPA*, 626 F.2d 1038 (D.C. Cir. 1980).

However, at least one case (*U.S. Steel Corp. v. EPA*, 605 F.2d 283 (7th Cir. 1979)) has not accepted this view, finding the (d)(3) exception to set a broader standard than the (b)(B) exception does. *Id.* at 286.

115. S. REP. NO. 752, 79th Cong., 1st Sess., *reprinted in* LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 201.

116. STAFF OF SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., *reprinted in* REPORT ON THE ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 20.

117. S. REP. NO. 752, 79th Cong., 1st Sess., *reprinted in* LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 201.

118. H.R. REP. NO. 1980, 79th Cong., 2d Sess., *reprinted in* LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 260.

119. 92 CONG. REC. 5650-51 (1946), *reprinted in* LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 359.

120. It is universally accepted that the two good cause exceptions should be narrowly construed. There does not appear to exist a view in opposition to the narrow construction interpretation. However, there is some controversy as to how narrowly those exceptions should be construed. All courts which have considered the issue seem to recognize that too liberal an interpretation would undermine the very purpose behind § 553. Yet, some sharp differences of opinion exist over what type of situation justifies the use of these exceptions. See text at notes 122-291 *infra*.

provision, section 706,<sup>121</sup> sets out a standard of judicial review quite different from CAA section 307(d)(9). The intent of APA section 706 is to allow agencies as much discretion as possible in their day-to-day decision making while recognizing that ultimately it is the role of the courts, rather than the agencies, to decide questions of law.<sup>122</sup> Thus, section 706 allows the reviewing court far greater discretion in reviewing agency action than does CAA section 307(d)(9), listing seven areas in which a reviewing court may overturn or compel an agency action.<sup>123</sup>

Of particular interest is section 706(2)(D) which deals with judicial review of procedural violations. This section provides that a reviewing court can "set aside agency action, findings, and conclusions found to be . . . without observance of procedures required by law."<sup>124</sup> Section 706 provides further that, when making determinations under this section, the whole record of those parts cited by a party should be carefully reviewed and "due account shall be taken of rule of prejudicial error."<sup>125</sup>

The Senate report on subsection (2)(D) adds little insight stating that, "[w]ithout observance of procedure required by law means not only the procedures required and procedural rights conferred by this bill but any other procedures or procedural rights the law may re-

121. 5 U.S.C. § 706 (1976).

122. H.R. REP. NO. 1980, 79th Cong., 2d Sess., *reprinted in* LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 278.

123. Section 706 reads as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USC §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

124. 5 U.S.C. § 706(2)(D) (1976).

125. *Id.* § 706.

quire."<sup>126</sup> Thus, the APA sets out a standard of judicial review of agency rulemaking, whereby any rule promulgated without observing required procedures can be invalidated upon a showing of prejudice by the injured party. This is clearly a much lower standard for judicial invalidation of agency rulemaking than that set forth in section 307(d)(9)(D) of the CAA.<sup>127</sup>

Since the key provisions of the CAA and APA have now been outlined, this article will now undertake a discussion and analysis of the issues presented in the split among the five circuit courts of appeal. The following section, Section III, will discuss in great detail the good cause issue, analyzing the split among the circuits in light of both the prior case law on these exceptions and the underlying policies of the CAA and APA. After this discussion of the good cause issue, Part IV will discuss the various secondary issues presented by these five cases including the issues of harmless error, judicial review, and remedial relief.

### III. THE CASES—GOOD CAUSE

In the 1977 Amendments to the CAA, Congress imposed a new and strict schedule for attaining primary NAAQS.<sup>128</sup> The states were required under section 107(d)<sup>129</sup> to submit to the Administrator

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126. S. REP. NO. 752, 79th Cong., 1st Sess., *reprinted in* LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 214.

127. See text at notes 81-89 *supra*.

128. 42 U.S.C. § 7502(a)(1) (Supp. III 1979). See text at notes 67-70 *supra*.

129. 42 U.S.C. § 7407(d) (Supp. III 1979) reads:

(1) for the purpose of transportation control planning, part D (relating to nonattainment) [42 U.S.C. §§ 7501-7508], part C (relating to prevention of significant deterioration of air quality) [42 U.S.C. §§ 7470-7479], and for other purposes, each State, within one hundred and twenty days after August 7, 1977 [the date of the enactment of the Clean Air Act Amendments of 1977], shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on August 7, 1977—

(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;

(B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;

(C) do not meet a national secondary ambient air quality standard;

(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or

(E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.

of the EPA a list designating their AQCR's as either attainment, nonattainment, or unclassifiable for the various criteria pollutants by December 5, 1977.<sup>130</sup> The Administrator of the EPA, in turn, was required to "promulgate each such list with such modifications as he deem[ed] necessary" by February 3, 1978.<sup>131</sup> Using these modified lists, each state was to formulate a SIP by January 1, 1979<sup>132</sup> in order to ensure attainment by 1982.<sup>133</sup>

On March 3, 1978, one month late, the Administrator promulgated the modified list<sup>134</sup> of nonattainment areas.<sup>135</sup> Despite the requirements of section 553(b) and (c) of the APA,<sup>136</sup> neither notice nor opportunity for public comment was provided for by the Administrator. Furthermore, the list was promulgated as a "final rule" and was made effective immediately. Thus the normal procedure of section 553(d)<sup>137</sup> was bypassed. As required by section 553, the Administrator attached an explanation for his action which seemed to invoke both the (b)(B) and (d)(3) good cause exceptions. He mentioned the tight congressional schedule stating:

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(2) Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary. Whenever the Administrator proposes to modify a list submitted by a State, he shall notify the State and request all available data relating to such region or portion, and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate.

(4) Any region or portion thereof which is not classified under subparagraph (B) or (C) or paragraph (1) of this subsection.

(5) A State may from time to time review, and as appropriate revise and resubmit, the list required under this subsection. The Administrator shall consider and promulgate such revised list in accordance with this subsection.

130. *Id.* § 7407(d)(1). On the whole, the states submitted these lists in on time, although some states were between two weeks and two months late in submitting these designations. See *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289 (7th Cir. 1979) (stating that some states, such as Wisconsin, were almost two months late in submitting their proposed designations); *Oscar Meyer Co. v. Costle*, 605 F.2d 559 (7th Cir. 1979) (decided with the *U.S. Steel* case—no published opinion).

131. 42 U.S.C. § 7407(d)(2) (Supp. III 1979).

132. *Id.* § 129(c) of the 1977 Amendments (uncodified). The amendments required that the revised SIP's be submitted to the EPA by Jan. 1, 1979. They also required that the complete revision of these SIP's in nonattainment areas be completed by July 1, 1979. *Id.* § 172, 42 U.S.C. § 7502.

133. 42 U.S.C. § 7502(a)(1).

134. The promulgated lists are published as rules in the Federal Register. Thus, for the purposes of § 107(d) the term "promulgated lists" is synonymous with the terms "rules," "regulations," and "designations." See note 15 *supra*.

135. 40 C.F.R. § 81.300-356 (1979). The EPA, in most instances, essentially accepted the states' lists of nonattainment designations, making only thirty-six minor modifications. 43 Fed. Reg. 40,412 (1978).

136. See text at notes 96-100 *supra*.

137. See text at notes 101-02 *supra*.



The States are now preparing revisions to their State implementation plans (SIP's) as required by Sections 110(a)(2)(I) and 172 of the Act. This enterprise, which must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under Sec. 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances, it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.<sup>138</sup>

However, the Administrator did offer to receive post-hoc public comments stating: "The Agency recognizes . . . the importance of public involvement in the designation process. It is[,] therefore, soliciting public comment on this rule by May 2, 1978."<sup>139</sup>

In response to this action by the EPA, suits were filed across the country, predominantly by large steel companies, claiming that their rights under the APA had been violated.<sup>140</sup> Of these suits, five were fully litigated in five different circuit courts of appeal.<sup>141</sup> The plaintiffs in these cases all claimed primarily that the EPA lacked good cause to bypass the procedures outlined in section 553 of the APA. They therefore argued that the rules should be declared invalid until proper public notice and comment procedures could be conducted.

In deciding whether the section 553 good cause exceptions were applicable, the circuits have split three to two, with the majority ruling that the EPA did not have good cause to bypass the APA.<sup>142</sup>

In the process, these cases have raised further issues which have not been definitively settled. This section of the article will now analyze in some detail the good cause issue presented in these cases. First, the general approach of the prior case law on these two section 553 exceptions will be discussed, trying to discern from it where the law stood at the time these five cases arose. Second, the actual approach taken by the five circuits on the good cause issue will be presented. Third, the split among the circuits over this issue will be

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138. See note 135 *supra*.

139. *Id.*

140. See note 14 *supra*.

141. *Id.*

142. The three circuits which failed to find good cause for EPA's action were the Third, Fifth, and D.C. Circuits. The Sixth and Seventh Circuits found that the EPA had properly utilized the good cause exceptions.

carefully analyzed, demonstrating the effects of this litigation on both the scope of the good cause exceptions and the implementation of the 1977 Amendments to the CAA as well. Following this presentation of the good cause issue, Section IV of this article will discuss the various secondary issues raised in this litigation.

#### *A. Treatment of the Two Good Cause Exceptions in the Case Law*

The case law regarding the two good cause exceptions is generally confusing and particular trends of thought are difficult to discern from it. One major problem is that many of the cases fail to distinguish between the two exceptions<sup>143</sup> and often mistakenly refer to them both as the "notice and public comment provisions"<sup>144</sup> or as the "thirty-day notice requirement."<sup>145</sup> However, as indicated earlier,<sup>146</sup> the two provisions are not alternatives, but are exceptions to two different procedural requirements under section 553. Subsections (b) and (c) of section 553 provide an opportunity for the public to participate in rulemaking before an agency adopts a rule. Under the (b)(B) exception, if an agency can show good cause, it can bypass this notice and public comment requirement. On the other hand, subsections (d) and (e) of section 553 provide the public with "an opportunity to prepare for the rule and to petition the agency for reconsideration."<sup>147</sup> These requirements still exist even if good cause is found under (b)(B).<sup>148</sup> Thus, under the (d)(3) exception, a rule can become effective immediately (as in the case here) or effective in less than thirty days only upon a showing of good cause.

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143. See, e.g., *Kelly v. Dept. of Interior*, 339 F. Supp. 1095 (E.D. Cal. 1972) (three judge court) (the (b)(B) exception was invoked by the agency yet the case involves a regulation which was made immediately effective); *Reeves v. Simon*, 507 F.2d 455 (Temp. Emer. Ct. App. 1974) (the rule was made immediately effective yet the court found good cause under the (b)(B) exception).

144. *Reeves v. Simon*, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1979).

145. *United States v. Gavrilovic*, 551 F.2d 1099, 1104 n.9 (8th Cir. 1977); see generally *Lancot, The 'Good Cause' Exceptions: Danger to Notice and Comment Requirements Under the Administrative Procedure Act*, 68 GEO. L. J. 765, 771-72 (1980) [hereinafter cited as *Lancot*].

146. See text at notes 109-20 *supra*.

147. *Lancot*, *supra* note 145, at 771.

148. S. DOC. NO. 248, 79th Cong., 2d Sess., *reprinted in* LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 201. In this document, the Senate Judiciary Committee reported that § 553(d) "does not provide procedures alternative to notice and other public proceedings required by the prior subsections of this section [§ 553(b) and (c)]. . . . Where public procedures are omitted as authorized in certain cases, [subsection (d)] does not thereby become inoperative." *Quoted in Lancot*, *supra* note 45, at 771 n.56.

Although many courts have muddled this difference, they are virtually unanimous in agreeing that these two section 553 exceptions have roughly the same scope or meaning.<sup>149</sup> It is interesting to note that this is true despite the fact that the (b)(B) exception contains qualifying language that the (d)(3) exception does not contain.<sup>150</sup> In the five cases concerning the validity of the EPA's section 107(d) designations, both exceptions are involved since no notice and opportunity for public comment was given and the rule was made immediately effective by the EPA.

While there is some confusion over the applicability and scope of the two good cause exceptions, most courts tend to agree that they both (as well as all seven section 553 exceptions)<sup>151</sup> should be narrowly construed.<sup>152</sup> The courts recognize the fact that the procedural safeguards outlined in section 553 are an extremely important means of participatory democracy which make rulemaking much more comprehensive and sensitive to the needs of all parties concerned.<sup>153</sup> Therefore, the courts do not want to see the good cause exceptions utilized whenever an agency merely finds it inconvenient to follow the procedures of the APA. The legislative history of the APA tried to give the courts some guidance on this issue:

It will thus be the duty of reviewing courts to prevent avoidance of the requirements of [the APA] by any manner or form of indirection, and to determine the meaning of the words and phrases used. For example, in several provisions, the expression "good cause" is used. The cause so specified must be interpreted by the context of the provision in which it is found and the purpose of the entire section and bill. Cause found must be real and demonstrable.<sup>154</sup>

However, as the case law reveals, courts have had a real problem in reaching a consensus as to how narrowly these exceptions should be construed and what fact situations constitute "real and demonstrable" good cause.

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149. See text at note 114 *supra*.

150. See text at notes 113-14 *supra*.

151. See note 108 *supra*.

152. American Bus Ass'n v. United States, 627 F.2d 525 (D.C. Cir. 1980); Nat'l Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377 (2d Cir. 1978); American Iron & Steel Inst. v. EPA, 568 F.2d 284 (3d Cir. 1977).

153. See *Sannon v. United States*, 460 F. Supp. 458, 463-64 (S.D. Fla. 1978).

154. S. Doc. No. 248, 79th Cong., 2d Sess. 217 (1946), reprinted in LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 217.

### 1. The Construction of the Good Cause Exceptions in Cases Prior to 1970

The case law on the good cause exceptions can be loosely divided into historical periods for the purpose of this analysis. The first time period contains those cases which were decided before the Economic Stabilization Act of 1970.<sup>155</sup> These early cases tend to reflect the confusion and lack of uniformity which is characteristic of this area. One line of these pre-1970 cases adopted the view that a mere conclusory statement of good cause was sufficient to invoke the exception. The most frequently cited of these cases is *Allegheny Airlines v. Village of Cedarhurst*.<sup>156</sup> At issue in this case was a rule, adopted without notice and comment, which increased the amount of air traffic over the Village of Cedarhurst. The statement accompanying the rule stated simply that it was "adopted without delay in order to promote safety of the flying public." The court upheld the validity of the rule, concluding that the statement was sufficient to make section 553 rulemaking impracticable and contrary to the public interest.<sup>157</sup>

During this same time period, however, another line of cases refused to uphold application of the exceptions merely on the basis of conclusory statements.<sup>158</sup> Instead, in these cases, the court looked much more carefully at the issues involved in order to see if good cause actually did exist. For example, in *Kelly v. Dept. of Interior*,<sup>159</sup> the court invalidated a Department of Interior regulation which contained a conclusory statement as an explanation for invoking the (b)(B) exception.<sup>160</sup> The court reasoned as follows:

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155. Pub. L. No. 91-379, 84 Stat. 799 (1970) (codified at 12 U.S.C. § 1904 (Supp. II 1972)). This act, designed to cure the nation's economic woes of the late 1960's and early 1970's, marked a significant turning point in the case law on the two good cause exceptions. See text at notes 163-82 *infra*.

156. 132 F. Supp. 871 (E.D.N.Y. 1955).

157. *Id.* at 884; see *Harry H. Price and Sons, Inc. v. Hardin*, 299 F. Supp. 557, 559-60 (N.D. Tex. 1969), *vacated on other grounds*, 425 F.2d 1137, 1139 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971). The court upheld the validity of a regulation promulgated by the Secretary of Agriculture without following normal § 553 procedures, finding a conclusory statement sufficient to justify the Secretary's use of the good cause exceptions.

158. See *Texaco, Inc. v. FPC*, 412 F.2d 740 (3d Cir. 1969); *Kelly v. Dept. of Interior*, 339 F. Supp. 1095 (E.D. Cal. 1972) (three judge court); *Hotch v. United States*, 212 F.2d 280 (9th Cir. 1954).

159. 339 F. Supp. 1095 (E.D. Cal. 1972) (three judge court).

160. The explanation read:

Notice of proposed rule-making procedure is being waived since the amended regulations are necessitated by and in conformity with federal statute, and it is desirable that there be no further delay in the beneficial effect of the Act of August

While this notice contains an implicit "finding" that further delay would have prejudiced the Act's beneficiaries, it mentioned no supporting "reasons." The Secretary argues that over a year had already elapsed between the time Congress had amended the Act and he had changed his regulations, but neither he nor the notice explains why an additional 30 days was critical. . . .

. . . . [A] meaningful pre-publication dialogue between the plaintiffs and the Secretary may have even avoided this lawsuit. In our opinion, therefore, the 30-day comment period should be closely guarded and the "good cause" exception sparingly used.<sup>161</sup>

Thus, the court in *Kelly* took a much narrower view of the good cause exceptions than did the court in *Allegheny Airlines*.<sup>162</sup>

## 2. The Construction of the Good Cause Exceptions in Cases Involving the ESA

With the passage of the Economic Stabilization Act (ESA) in 1970,<sup>163</sup> a whole new line of cases involving the section 553 good cause exceptions emerged.<sup>164</sup> Throughout Phases I and II of the Economic Stabilization Program<sup>165</sup> regulations promulgated by the Price Commission were issued without publication of a notice of proposed rulemaking and virtually all were made effective either retroactively or on the date of publication.<sup>166</sup> When these regulations

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18, 1958, *supra*, as amended. Therefore, the amended regulation will become effective on the date of publication in the FEDERAL REGISTER.

*Id.* at 1101.

161. *Id.* at 1101-02 (citations omitted).

162. See also note 157 *supra*.

163. See note 155 *supra*.

164. *United States v. Great Atlantic & Pacific Tea Co., Inc.*, 342 F. Supp. 272 (D. Md. 1972); *National Helium Corp. v. FEA*, 569 F.2d 1137 (Temp. Emer. Ct. App. 1978); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974); *Reeves v. Simon*, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975); *Nader v. Sawhill*, 387 F. Supp. 1208 (D.D.C. 1974), *aff'd*, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975); *Energy Reserves Group, Inc. v. FEA*, 447 F. Supp. 1135 (D. Kan. 1978); *Shell Oil Co. v. FEA*, 527 F.2d 1243 (Temp. Emer. Ct. App. 1975); *Consumers Union of U.S., Inc. v. Sawhill*, 393 F. Supp. 639 (D.D.C.), *aff'd sub nom.*, *Consumers Union of U.S., Inc. v. Zarb*, 523 F.2d 1404 (Temp. Emer. Ct. App. 1975). This list of cases is not intended to be exhaustive. Rather it contains the most commonly cited cases for the purposes of this article.

165. The Economic Stabilization Program was comprised of various actions by the federal government, authorized under the Economic Stabilization Act, to deal with the nation's economic woes at that time. Among the actions taken by President Nixon under the Economic Stabilization Act were wage and price controls—commonly known as Phase I and Phase II wage and price controls.

166. *E.g.*, *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974); *Reeves v. Simon*, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

were challenged, the courts, unlike in the pre-1970 cases,<sup>167</sup> were virtually unanimous in finding that good cause existed. In the vast majority of these cases, the courts found that prior notice and comment, as well as a thirty day pre-effectiveness period, would undermine the goals that the regulations sought to achieve.

A commonly cited case in this group is *DeRieux v. Five Smiths, Inc.*<sup>168</sup> In this case, the Atlanta Falcons, a professional football team, was sued for violating the ESA by playing games during the Phase I price freeze<sup>169</sup> at prices exceeding those of the year before. The Falcons challenged the Executive Order<sup>170</sup> which froze prices, claiming it was issued without following the procedures of section 553. The Temporary Emergency Court of Appeals (TECA) held the good cause exception to be applicable in this situation. It reasoned that, “[h]ad advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct ‘actual transactions’—or avoid them—before the freeze deadline. Each price increase would have generated further increase in a growing spiral of inflation . . . .”<sup>171</sup> The court found good cause to exist despite the fact that the Executive Order did not contain a statement of reasons for invoking the exception as required by section 553(b)(B). The court concluded that Congress did not intend a technical violation, like the one included in this case, to affect the outcome where the reasons for the exception were so obvious and compelling.<sup>172</sup>

Another commonly cited case from this time period is *Reeves v. Simon*.<sup>173</sup> This case, also argued before the Temporary Emergency Court of Appeals, involved the validity of regulations issued by the Federal Energy Office (FEO) which prohibited retail gasoline stations from reserving part or all of their monthly gasoline allocation for sale exclusively to their regular customers. This rule was made effective immediately. In its statement of good cause, appended to the regulations, the FEO stated that normal rulemaking procedure under section 553(d) was impracticable because “serious alterations in established business practice” were occurring, resulting in “certain purchasers being served while others were being wholly

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167. See text at notes 155-62 *supra*.

168. 499 F.2d 1321 (Temp. Emer. Ct. App), *cert. denied*, 419 U.S. 896 (1974).

169. See note 165 *supra*.

170. Executive Orders are subject to the provisions of the APA, just as any administrative rulemaking.

171. 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974).

172. *Id.* at 1333.

173. 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

excluded.”<sup>174</sup> The FEO determined that these regulations were needed to give “immediate guidance and information with respect to the mandatory petroleum allocation and price regulations.”<sup>175</sup> In upholding the FEO’s use of the (d)(3) exception, the TECA cited *DeRieux* stating that this conclusion is based upon facts so obvious that they may be judicially noticed.<sup>176</sup> It concluded that “[t]he gasoline shortage was a temporary, but highly disruptive, national emergency. The long lines and violence required immediate action.”<sup>177</sup>

A third case in which an agency’s use of the good cause exception was upheld is *Nader v. Sawhill*.<sup>178</sup> *Nader* involved a regulation issued by the Cost of Living Council (the predecessor of the Federal Energy Administration (FEA)) which allowed an increase in the ceiling price of “old” crude oil. As in the *Reeves* case, this rule was made immediately effective. The FEA determined there “was an immediate need for action to provide production incentives for domestic producers in view of the Arab oil embargo and that advance notice of a price increase would affect sales and deliveries adversely during an increasingly difficult period of supply.”<sup>179</sup> The TECA found the good cause exception applicable despite the fact that the regulation at issue had been accompanied by only a conclusory statement.<sup>180</sup> It concluded that this technical violation did not warrant reversal, “considering the expeditious nature of the proceedings and that good cause in fact was present”;<sup>181</sup> however, it warned that repeated technical noncompliance would not be tolerated. Thus in *Nader*, as in this whole line of cases, the court looked behind a conclusory statement of good cause in order to determine if good cause did in fact exist. The courts, unlike in the pre-1970 cases, were willing to evaluate for themselves the circumstances existing at the time the regulation was promulgated and

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174. *Id.* at 458 (quoting from FEO decision to dispense with the thirty-day notice period).

175. *Id.*

176. *Id.* at 459 (quoting *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974)).

177. *Reeves v. Simon*, 507 F.2d 455, 459 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

178. 387 F. Supp. 1208 (D.D.C. 1974), *aff’d*, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975).

179. *Id.* at 1209.

180. 514 F.2d 1064 (Temp. Emer. Ct. App. 1975).

The Cost of Living Council’s (CLC) statement said merely that good cause was justified due to the need “to provide immediate guidance and information with respect to the decisions of the Council.” *Id.* at 1068.

181. 514 F.2d 1064, 1068-69 (Temp. Emer. Ct. App. 1975).

the purpose of the Act under which it was promulgated in making their determinations.<sup>182</sup>

### 3. The Construction of the Good Cause Exceptions in Cases Involving Express Deadlines

Another line of good cause cases are those dealing with express deadlines.<sup>183</sup> Most of these cases have arisen in the mid-1970's and, unlike the cases involving the ESA, have had mixed results. One of the earliest of these cases involving an express deadline was *Clay Broadcasting Corp. v. U.S.*<sup>184</sup> That case involved Federal Communications Commission (FCC) regulations which altered a cable TV license fee schedule.<sup>185</sup> Just before the FCC passed these regulations, Congress made clear that it wanted the Commission to become more self-sustaining and wanted the new fee schedule to cover as much of fiscal year 1971 as possible.<sup>186</sup> Because of this time constraint, the FCC complied with the section 553(b) and (c) notice and comment procedures, but made the rule effective only twenty-four days after its publication.<sup>187</sup> This raised the issue whether the Commission's use of the (d)(3) exception, allowing a regulation to become effective in less than thirty days, was applicable in this situation. In allowing the FCC's use of the (d)(3) exception, the Fifth Circuit held that good cause existed to bypass normal section 553(d) procedure because the Commission, in accordance with congressional directives, wanted the fee schedule to cover as much of fiscal 1971 as reasonably possible.<sup>188</sup> The court also reasoned that widespread

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182. See *Tasty Baking Co. v. Cost of Living Council*, 395 F. Supp. 1367, 1394 (E.D. Pa. 1975); see text at note 154 *supra*.

183. The term "express deadline" as used in this section refers to timetables mandated by Congressional agencies or the courts in some form. These timetables are used as a basis for bypassing § 553 procedures.

184. 464 F.2d 1313 (5th Cir. 1972), *rev'd on other grounds sub nom.*, *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974).

185. 47 C.F.R. § 74.1125 (1972). The concept of user charges for services such as cable television was explicitly authorized by Congress in the Independent Offices Appropriation Act of 1952. (31 U.S.C. § 483(a) (1976)). The Federal Communications Commission (FCC) adopted its first fee schedule under this act in 1963 (Report and Order: Fees, 34 F.C.C. 811 (1963)) and, in the case at hand, was attempting to revise broadly its fee schedule.

186. *Clay Broadcasting Corp. v. United States*, 464 F.2d 1313, 1316 (5th Cir. 1972), *rev'd on other grounds sub nom.*, *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974).

187. The rule was published in the Federal Register on July 8, 1971, and became effective on August 1, 1971.

188. 464 F.2d 1313, 1320 (5th Cir. 1972).



notice would actually be provided the affected parties and a first-of-the-month effective date was required for administrative proportion of yearly fees.<sup>189</sup> Thus, while also basing its decision on other factors, the court in *Clay Broadcasting* found that a congressionally imposed time constraint did justify use of the section 553(d)(3) good cause exception.

A recent case in which a deadline was a contributing factor in finding good cause is *Energy Reserves Group, Inc. v. FEA*.<sup>190</sup> In *Energy Reserves*, the Federal Energy Administration promulgated regulations which exempted stripper wells from oil price controls. These regulations, issued without notice and comment and made immediately effective, were required by Congress to be promulgated not later than fifteen days after the enactment of the Emergency Petroleum Allocation Act of 1973 (EPAA).<sup>191</sup> In upholding the FEA's good cause claim the court stated:

In view of the legislative requirement of expeditious promulgation by [FEA] implementing . . . EPAA, and of the necessity to quickly decontrol stripper lease prices once Congress' intent to do so was statutorily mandated in order that oil not be held off the market in anticipation of such price increases . . . , . . . "good cause" existed for the [FEA's] failure to follow APA notice and comment procedures.<sup>192</sup>

Thus, as in *Clay Broadcasting*, the presence of congressional intent to have the regulations promulgated in a relatively short period of time was held to justify use of section 553 good cause exception.

Another case which involved time constraints is *Shell Oil Co. v. FEA*.<sup>193</sup> In that case the court failed to find good cause to bypass normal section 553 rulemaking procedures when the FEA issued regulations under the ESA<sup>194</sup> controlling the amount that a lessor may be charged as rent for real property used in the retailing of

189. *Id.*

190. 447 F. Supp. 1135 (D. Kan. 1978).

191. 15 U.S.C. § 753(a) (Supp. V 1975).

192. 447 F. Supp. 1135, 1150 (D. Kan. 1970) (citations omitted).

193. 527 F.2d 1243 (Temp. Emer. Ct. App. 1975).

194. In actuality the regulations were issued under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760h (Supp. V 1975). However, the power to issue regulations limiting rents used in retailing gasoline originally came from Phase IV of the Economic Stabilization Program under the ESA and was transferred to FEA from the Cost of Living Council. Thus, "FEA recognized that with the expiration, on April 30, 1974, of the Economic Stabilization Act of 1970, . . . its authority to regulate all rents charged for any real property used in connection with retailing gasoline had ended." 527 F.2d 1243, 1245 (Temp. Emer. Ct. App. 1975).

gasoline<sup>195</sup> without section 553 notice and comment procedures. The FEA claimed good cause existed for bypassing these normal procedures because the ESA was about to expire and it wanted to avoid a period of decontrol over rents. Despite the importance of this regulation in stabilizing gasoline prices,<sup>196</sup> the court declared it invalid because it was promulgated without proper section 553 procedures. The court stated that "the expiration of the [ESA] was not so unexpected as would have precluded advance notice by the FEA of its own proposed regulations for controlling rents and accepting comments thereon prior to April 30, 1974 [the expiration date of the ESA]."<sup>197</sup> It reasoned that, by waiting until near the expiration date of the ESA, the FEA essentially forced interested parties to bear the burden of compliance and denied them the opportunity to comment except by bringing a lawsuit.<sup>198</sup>

Two other cases in which the presence of express timetables were held not to justify the use of the section 553 good cause exceptions are *Consumers Union of U.S., Inc. v. Sawhill*<sup>199</sup> and *American Iron and Steel Institute v. EPA*.<sup>200</sup> *Consumers Union* involved an FEA interim price regulation for unleaded gasoline<sup>201</sup> which was promulgated without notice and comment procedures. The EPA, in January of 1973, had required that unleaded gas be made generally available by July 1, 1974, yet FEA waited until May 24, 1974, to pro-

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195. 10 C.F.R. § 212.101-03 (1975).

The regulations were actually issued on April 30, 1974, but were printed in the Federal Register on May 1, 1974.

196. The FEA regulation noted the direct effect that the price of rented property used in the retailing of gasoline has on gasoline prices. The regulation stated that:

The leasing of property used in the retailing of gasoline, between suppliers and retailers, is inextricably woven into the fabric of the supplier's marketing system and is directly related to the price at which gasoline is sold at retail. The price charged for product and the rent charged for the property, each of which is often expressed as a flat rate in cents per gallon, constitute a combined charge to the retailer by the suppliers for the purchasing and retailing of gasoline. FEO has determined that the statutory mandate to regulate the price of refined petroleum products requires the continued regulation of rents charged between retailers and suppliers in service station leases, as an integral part of its petroleum pricing regulations.

527 F.2d 1243, 1245 (Temp. Emer. Ct. App. 1975), quoting from, 39 Fed. Reg. 15,139-40.

197. 527 F.2d 1243, 1248 (Temp. Emer. Ct. App. 1975).

198. *Id.*

199. 393 F. Supp. 639 (D.D.C.), *aff'd sub nom.*, *Consumers Union of U.S., Inc. v. Zarb*, 523 F.2d 1404 (Temp. Emer. Ct. App. 1975).

200. 568 F.2d 284 (3d Cir. 1977).

201. 10 C.F.R. § 212.112 (1975). "This regulation permitted refiners who did not sell unleaded gasoline on May 15, 1973, to sell unleaded gasoline at the same price as premium grade leaded gasoline." 393 F. Supp. 639, 640 n.1 (D.D.C. 1975).

mulgate this regulation. In rejecting FEA's claim that use of the section 553(b)(B) exception was necessary because of the time constraints posed by the July 1 deadline, the district court noted that there was more than one year between the passage of the EPA regulation and the final deadline. It further noted that since FEA had almost six months to act<sup>202</sup> "the emergency gasoline shortage . . . [did] not . . . rise to the level of good cause."<sup>203</sup> Similarly, *American Iron & Steel* involved regulations issued by EPA on March 29, 1976, without a notice and comment period or a thirty day pre-effectiveness period.<sup>204</sup> A district court order<sup>205</sup> required that the regulations at issue be promulgated no later than March 15, 1976. In overturning the EPA's use of the section 553(b)(B) and (d)(3) good cause exceptions, the Third Circuit pointed out that the EPA had known of its duty to promulgate these regulations for almost three years.<sup>206</sup>

In *Consumers Union*, *American Iron & Steel*, and *Shell Oil* the courts held that the existence of an express deadline will not, in and of itself, constitute good cause to uphold a regulation promulgated without normal section 553 procedures. The courts in all three cases noted that the agencies had been aware of their deadlines for a *substantial* period of time before they acted. These cases clearly demonstrate that the key element in a good cause case involving an express deadline is the length of time that the agency has known of the pending deadline. In the cases in which the courts failed to find good cause to bypass section 553 procedures, the agencies had anywhere from six months to three years to promulgate the regulations in question. Conversely, in those cases where good cause was found,<sup>207</sup> the agencies had only a few weeks or months to act. Those cases illustrate that a finding of good cause will *not* be made by a court when an agency has had a substantial amount of time to follow

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202. While the EPA regulation was issued in January of 1973, FEA did not receive authority to pass such regulation until the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. §§ 751-760h (Supp. V 1975)) became law on Jan. 15, 1974. However, this still left FEA with almost six full months before the July 1 deadline to pass the regulation.

203. 393 F. Supp. 639, 641 (D.D.C. 1975).

204. The regulations, dealing with certain manufacturing processes within the iron and steel industry, "established maximum permissible quantities of pollutant which may be discharged by operations performing the designated processes." 568 F.2d 284, 289 (3d Cir. 1977).

205. *Natural Resources Defense Council, Inc. v. United States Nuclear Reg. Comm'n*, 539 F.2d 824 (2d Cir. 1976), *vacated on other grounds*, 434 U.S. 1030 (1978).

206. 568 F.2d 284, 292 (3d Cir. 1977). The EPA's knowledge of its duty to promulgate these regulations dated back to November 11, 1973.

207. See text at notes 184-92 *supra*.

normal section 553 rulemaking procedures and still meet its stipulated deadline.

It is clear from this discussion that the case law on the section 553 good cause exceptions, prior to the five circuit cases involving section 107(d) designations, is quite muddled and confusing. However, some trends in the law can be discerned from these cases. First, most courts currently refuse to take the position that a mere conclusory statement is sufficient to justify the use of a section 553 good cause exception. Instead, most courts now follow the position taken by the Senate report on section 553,<sup>208</sup> concluding that the reasons given by an agency for invoking a good cause exception must be "real and demonstrable."<sup>209</sup> Thus, most courts now require that a documented statement which briefly outlines the reasons for invoking a good cause exception accompany a regulation which is promulgated without following normal section 553 procedures. Second, the cases involving the ESA demonstrate that where a sense of urgency and immediacy is present, especially where the national economy is involved, a court is likely to find good cause to bypass normal rulemaking procedures. Finally, the express deadline cases reveal that the length of time that an agency has known of and can prepare for an impending deadline is the key factor in determining whether the use of a good cause exception is justified.

This article will now turn to a discussion of the approaches taken on the good cause issue by the five circuit cases involving the section 107(d) designations. These five cases will be carefully analyzed, examining how the trends in the case law on these section 553 exceptions affected the outcome of these circuit court opinions. In addition, those factors which lead the courts to split three to two on this important issue will be discussed in detail.

### *B. The Approach of the Five Circuit Cases Involving Section 107(d) Designations on the Good Cause Issue*

Largely as a result of this somewhat muddled background, the five cases to be discussed in this section split three to two on the section 553 issue with the majority failing to find good cause for the EPA's action. As seen earlier,<sup>210</sup> these five cases involved the validity of regulations, issued by the EPA without notice and comment procedures and made immediately effective, designating various

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208. See note 154 *supra*.

209. See text at note 154 *supra*.

210. See text at notes 128-42 *supra*.

regions of the country as attainment, nonattainment, or unclassifiable for the six criteria pollutants listed in the regulations under the CAA. In this split among the circuits, there appears to be a difference in approach taken by the courts in reviewing the good cause exceptions. In those circuits which failed to find good cause, the courts tended to view the EPA's argument as being based solely on the importance of the statutory schedule and the need to give immediate guidance to the states.<sup>211</sup> However, in those circuits which found good cause, the courts took a closer look at the overall situation. They placed greater emphasis on such long-range factors as the long history of delay in attaining healthy air in America and the numerous health effects related to this delay.

The first case decided in this battle over the EPA's implementation of the 1977 Amendments was *Sharon Steel Corp. v. EPA*,<sup>212</sup> a Third Circuit case. In this case, both Sharon Steel Corporation and Bethlehem Steel Corporation challenged the EPA's determination in its March 3, 1978, rule that four AQCR's in Pennsylvania<sup>213</sup> were nonattainment for particulates (TSP). The plaintiffs claimed that the EPA violated section 553 in promulgating this rule.<sup>214</sup> The Third Circuit upheld the plaintiff's argument, holding that the EPA's section 107(d) designations were promulgated without following proper section 553 rulemaking procedures. In finding that the Administrator lacked good cause to bypass normal section 553 procedures, the court attempted to "coordinate the commands of the APA and those of the Clean Air Act."<sup>215</sup>

The court noted that nowhere during the debate over and enactment of the 1977 Amendments did Congress express any intention of relieving the EPA from the ordinary rulemaking procedures of the APA in formulating section 107(d) designations.<sup>216</sup> The court admitted that the lack of express congressional intent to bypass the normal section 553 procedures did not settle the issue in and of itself.<sup>217</sup> Nevertheless, it went on to reject the EPA's contention that

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211. The EPA in its statement involving the good cause exceptions (attached to the March 3, 1978 regulations) mentioned these factors. See text at note 138 *supra*.

212. 597 F.2d 377 (3d Cir. 1979).

213. The four areas are: The City of Sharon; the City of Farrell; the Allentown-Bethlehem-Easton Air Basin; and the Harrisburg Air Basin.

214. 597 F.2d 377, 378-79 (3d Cir. 1979).

215. *Id.* at 380.

216. *Id.*

217. *Id.*

the strictness of the statutory schedule precluded prior notice and comment.<sup>218</sup>

The court did offer an alternative scenario which it would have found acceptable. This scenario was presented by the Third Circuit as follows. The Administrator received the Pennsylvania designations on December 5, 1977. Since the EPA planned to modify these designations only when clearly incorrect, the Administrator should have been able to publish the Pennsylvania designations as proposed rules within ten days after receiving them. This would have given the states, at least, a description of the subjects and issues involved in accordance with section 553(b)(3). Then, the comment period could have run until January 15, 1978, at which time the EPA could have taken about ninety days to review the comments (the Administrator actually took about 120 days to review the comments received during the sixty day post-promulgation period). Thus, the final rule would have been issued on or about April 15th rather than the March 3rd date. This would have given the states only one month less to draft their SIP's by the statutorily required January 1, 1979, date. The court determined that this would have been ample time in light of the fact that: 1) the states would have known with certainty the contents of the final rule on that date; and 2) the states could have begun drafting their SIP's as early as December 5, 1978, since their designation lists would be quite similar to the final designation.<sup>219</sup>

It is interesting to note that despite the voluminous case law on the good cause exceptions, the Third Circuit made its finding on this issue without referring to many other cases. In fact, the only case cited in its discussion of the section 553 exceptions was *American Iron & Steel Institute v. EPA*.<sup>220</sup> This case was cited merely for the proposition that the good cause exceptions are to be narrowly construed.<sup>221</sup>

The second case to consider the validity of the section 107(d) designations was *U.S. Steel Corp. v. EPA*,<sup>222</sup> a Fifth Circuit case. That case also held that the EPA was incorrect in using the good cause exceptions to bypass normal rulemaking procedures. In *U.S. Steel* a steel company challenged the EPA's designation of various

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218. *Id.*

219. *Id.*

220. 568 F.2d 284 (3d Cir. 1977).

221. *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 379-80 (3d Cir. 1979).

222. 595 F.2d 207 (5th Cir. 1979).

areas of Alabama as nonattainment for TSP.<sup>223</sup> As in *Sharon Steel*, the court interpreted the EPA's statement of good cause to be based principally on the strict statutory timetable. However, citing *American Iron & Steel Institute v. EPA*<sup>224</sup> and *Shell Oil v. FEA*,<sup>225</sup> the circuit court held that a mere statutory deadline was not enough in itself to constitute good cause.<sup>226</sup> It concluded that, while a deadline is a factor to be considered, the agency must still show "the impracticability of affording notice and comment."<sup>227</sup> The court held that the EPA was unable to meet this burden. Using basically the same rationale as the Third Circuit, it noted that the EPA gave no reason why it could not have published the Alabama list upon receipt and accept comments while reviewing it, thereby giving the petitioners an opportunity to influence the agency's action prior to promulgation.<sup>228</sup> Further, the circuit stressed that the EPA itself did not regard the statutory deadline as sacrosanct, since its list was published one month late.<sup>229</sup>

In *U.S. Steel* the court also addressed and rejected the Administrator's argument that the EPA had good cause in that it had to provide immediate guidance to the states in formulating their SIP revisions.<sup>230</sup> The court noted, as did the Third Circuit,<sup>231</sup> that the states could have started revising their SIP's as soon as they submitted them to the EPA since the EPA's role was limited to just modifications.<sup>232</sup> When the EPA made their modifications, the states could then have revised their plans to accommodate these modifications.

In the next case involving the validity of the section 107(d) designations, *U.S. Steel Corp. v. EPA*,<sup>233</sup> the Seventh Circuit refused to follow the Third and Fifth Circuits and instead found that the EPA did indeed have good cause to bypass section 553 procedures. This

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223. *Id.* at 210.

224. 568 F.2d 284 (3d Cir. 1977).

225. 527 F.2d 1243 (Temp. Emer. Ct. App. 1975). See text at notes 193-98 *supra*.

226. 595 F.2d 207, 213 (5th Cir. 1979).

227. *Id.* In concluding, the Fifth Circuit cited *American Iron & Steel Inst.*, holding that the Agency had not made a strong enough showing to invoke these narrowly construed exceptions. However, the court did recognize the fact that courts have used the exception "where delay would do real harm," citing the *DeRieux*, *Nader*, and *Reeves* cases. *Id.* at 214.

228. *Id.* at 213.

229. *Id.* It is somewhat ironic that the court raised this point since the state was seventeen days late in submitting its list to the EPA here.

230. *Id.* at 214; see text at note 138 *supra*.

231. *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 380 (3d Cir. 1979).

232. 595 F.2d 207, 214 (5th Cir. 1979).

233. 605 F.2d 283 (7th Cir. 1979).

case, which involved contested nonattainment areas in northern Indiana, was markedly different in its approach and analysis than the two earlier cases. First, unlike the Third and Fifth Circuits, the court had rejected the idea that the two good cause exceptions have roughly the same meaning, holding the (d)(3) exception to be broader since it has no qualifying language.<sup>234</sup> The court noted that the legislative history of the (d)(3) exception contained a statement that the exception would apply in conditions of "demonstrable urgency," interpreting this to be a broader exception than the (b)(B) exception. However, despite this unique interpretation, the court determined that good cause could be found under both exceptions.

The court began its discussion of the validity of the section 107(d) designations with the narrower (b)(B) exception.<sup>235</sup> In analyzing the (b)(B) exception, the court found that normal section 553 procedures would have been impracticable in this case since the EPA was faced with a situation "in which the due and required execution of the agency function would be prevented by its undertaking public rulemaking proceedings."<sup>236</sup> The court accepted the EPA's argument that a tight statutory schedule may justify good cause, citing the *Clay Broadcasting Corp. v. U.S.* and *Energy Reserves Group v. FEA* cases as support for this position.<sup>237</sup> Taking a broader view of the situation than the Third and Fifth Circuits, the court concluded that the deadlines here "were a response to the failure of the states to meet prior attainment deadlines and represent congressional concern over the seriously adverse health consequences of continued nonattainment."<sup>238</sup> In fact, in a footnote,<sup>239</sup> the court noted that the legislative history of the 1977 Amendments included a passage whereby Congress expressed its strong concern over the fact that the various major steel companies had no plants in compliance as of the time of the 1975 congressional testimony.<sup>240</sup> In light of this back-

234. *Id.* at 286, 289-90.

235. *Id.* at 286-87.

236. *Id.* at 287 (*quoting* S. REP. NO. 248, 79th Cong., 2d Sess., *reprinted in* LEGIS. HISTORY OF APA 1944-46, *supra* note 94, at 200, 258).

237. 605 F.2d 283, 287 (7th Cir. 1979).

238. *Id.* (footnote omitted).

239. *Id.* at 287 n.5.

240. H.R. REP. NO. 294, 95th Cong., 1st Sess. 210-11, *reprinted in* [1977] U.S. CONG. & AD. NEWS 1289.

The committee is also mindful of the fact that several categories of major polluters have not complied with emission limits in nonattainment areas. The 1975 subcommittee hearings reflect this disturbingly high incidence of noncompliance. In particular, the following testimony is of great concern:



ground the court determined that the "EPA was properly concerned that these explicit deadlines be met."<sup>241</sup> It expressed hesitance in allowing the petitioner to again delay compliance through this challenge, noting that it would throw the deadline scheme into disarray.<sup>242</sup> The court distinguished *American Iron & Steel Institute v. EPA* and *Consumers Union of U.S., Inc. v. Sawhill*, stating that the agencies had much longer periods of time to promulgate the contested rules in those cases than in the instant case.<sup>243</sup>

The Seventh Circuit directly rejected the alternative approach recommended by both the Third and Fifth Circuits. The court reasoned that the EPA needed time to go over the designations when first received from the states, since some had to be rejected prior to publication. Then, adding one month for comment and four months to review these comments (the amount of time it actually took the EPA), "compliance with notice and comment procedures would have delayed promulgation by five months or more, leaving the states with less than six months to formulate implementation plans."<sup>244</sup> The court concluded that "given the legislative requirement of expeditious promulgation, the need for the states to begin promptly their own planning process, and the continuing adverse impact on health that any further delays would entail, . . . the Administrator had 'good cause' to exempt these designations from section 553."<sup>245</sup> The court also held that the broader (d)(3) exception applied since, as any delay in the EPA's designations would ultimately result in health problems due to delayed nonattainment, "demonstrable urgency" existed in this case.<sup>246</sup>

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MR. ROGERS. Let's see, we have had the law five years now. Could you tell me, company by company, how many of your plants are in compliance presently and how many are not?

MR. ARMOUR (Interlake, Inc.). I think we have to define in compliance with what.

MR. ROGERS. The Clean Air Act?

MR. ARMOUR. We do not have any in compliance.

MR. ANDERSON (Bethlehem Steel Corp.). None.

MR. JAICKS (Inland Steel Co.). None.

MR. MALLICK (U.S. Steel Co.). None.

MR. TUCKER (National Steel Corp.). We have no plants in compliance.

MR. JAICKS. It sounds terrible. But these are hard value money expenditures.

MR. TUCKER. There are some good reasons for this.

MR. ROGERS. It is shocking to me. I didn't realize we had no plants in the steel industry in compliance.

*Id.*

241. 605 F.2d 283, 288 (7th Cir. 1979).

242. *Id.* at 288-89 & n.11.

243. *Id.* at 288 n.8.

244. *Id.* at 288.

245. *Id.* at 288-89 (footnotes omitted).

246. *Id.* at 290.

Not long after the decision of the Seventh Circuit, the Sixth Circuit case of *Republic Steel Corp. v. Costle*<sup>247</sup> was decided. This case involved an attack by eight major corporations<sup>248</sup> on designations by the EPA of various parts of Ohio as nonattainment for sulfur dioxide (SO<sub>2</sub>). The petitioners agreed that these designations were promulgated without following proper section 553 procedures. In *Republic Steel* the court, like the Seventh Circuit Court of Appeals, found good cause to exist for bypassing normal section 553 procedures. The Sixth Circuit devoted much of its opinion to a discussion of the long history of recalcitrance by industry.<sup>249</sup> It noted how industries in Ohio have continually resisted the EPA's attempts to attain NPAAQS for SO<sub>2</sub> by filing numerous lawsuits.<sup>250</sup> Further, the court dealt extensively with the massive health problems posed by the failure to attain acceptable levels of SO<sub>2</sub> and noted that the NAAQS's had been set with little or no margin of safety.<sup>251</sup>

The court put forth five separate reasons for its holding that the (b)(B) exception was applicable. First, the court noted that the January 1, 1979, mandatory attainment date (for SIP's) could not be achieved if notice and comment procedures were followed, thereby making them impracticable. Second, the Sixth Circuit cited the long history of industry non-cooperation in dealing with the SO<sub>2</sub> problem in Ohio (i.e., numerous protests and litigation). Third, the court stated that the Administrator could not rely on Ohio EPA's designations since experience showed that Ohio EPA represented more often the interests of industry rather than the general public. Fourth, the circuit determined that it would be "contrary to the public interest to ignore the statutory schedule,"<sup>252</sup> since the lack of control of SO<sub>2</sub> emissions outweighs any economic arguments presented. Finally, the court concluded that the EPA had in fact given consideration to the post-promulgation comments and made many changes in the designations.<sup>253</sup>

In concluding, the court expressly rejected the approach of the Third and Fifth Circuits. It stated:

Both the Third and Fifth Circuit opinions appear to us to ignore the sense of urgency which characterized the Congressional

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247. 621 F.2d 797 (6th Cir. 1980).

248. The corporations were: Republic Steel Corp., General Motors Corp., U.S. Steel Corp., Ohio Edison Co., B.F. Goodrich Co., Goodyear Tire & Rubber Co., Shell Oil Co., and Dayton Power and Light Co.

249. 621 F.2d 797, 799-80 (6th Cir. 1980).

250. *Id.*

251. *Id.* at 800-02.

252. *Id.* at 804.

253. *Id.* at 803-04.

debate preceding the passage of the Clean Air Act Amendments of 1977. Additionally, we would wish to be somewhat more sensitive to the "public interest" in achievement of national air quality standards. If the circumstances of this case do not justify employment of the good cause exception, we will be hard put to find any justification for its use. Past experience has taught this court that remand means an additional two-year delay in achieving national air quality standards in Ohio.<sup>254</sup>

The final opinion to consider the validity of the section 107(d) designations was the D.C. Circuit case of *New Jersey v. EPA*.<sup>255</sup> In this case many states, principally from the northeast,<sup>256</sup> protested various EPA designations of AQCR's as nonattainment for photochemical oxidant pollution (oxidants).<sup>257</sup> Despite the fact that the two most recent cases on the subject had upheld the EPA's promulgation of the section 107(d) designations, the D.C. Circuit failed to find good cause for the EPA's action.

The D.C. Circuit discussed many reasons why it found the EPA's use of the good cause exceptions to be inappropriate. The court devoted a large portion of its opinion to a review of the Third, Fifth, Sixth, and Seventh Circuit cases. The D.C. Circuit, however, made clear that it found the reasoning of the Fifth Circuit persuasive.<sup>258</sup> In reaching its decision, the court first noted the importance of the section 553 rulemaking procedure, and emphasized that the exceptions to it must be narrowly construed.<sup>259</sup> In emphasizing the importance of following normal APA procedures in this situation, the D.C. Circuit next opined that "the APA may be deployed to insure that the Administrator fulfills his obligations under the Clean Air Act"<sup>260</sup> since public input can be important in spotting possible errors made by the EPA or the states.<sup>261</sup>

The third, and most important, reason for its decision was the court's view that "under the facts of this case, the Administrator could have reconciled the commands of the two acts by publishing the designations submitted to him by the states as proposed

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254. *Id.* at 804.

255. 626 F.2d 1038 (D.C. Cir. 1980).

256. Besides New Jersey, the other states which were petitioners in this case were Maine, Connecticut, Massachusetts, New York, Rhode Island, and Vermont, as well as the District of Columbia and the City of New York.

257. 626 F.2d 1038, 1041 (D.C. Cir. 1980).

258. *Id.* at 1042.

259. *Id.* at 1045-46.

260. *Id.* at 1046.

261. *Id.* at 1046-47.

rules.”<sup>262</sup> Under this view, also adopted by the Third and Fifth Circuits, the Administrator would have followed normal section 553 procedures with the section 107(d) designations being promulgated as a final rule by April 15, two months after the original deadline. The opinion reasoned that neither the Sixth nor Seventh Circuits showed how this reconciliation might be unsatisfactory. The court concluded that, if these section 553 exceptions are truly to be narrowly construed, then they cannot be invoked where such a reconciliation is possible.<sup>263</sup> The court also recognized that both the Sixth and Seventh Circuit opinions hinged in part on evidence of past recalcitrance by certain states and industries. However, the D.C. Circuit failed to decide what weight this evidence should be given since no such evidence was presented in this case.<sup>264</sup>

The D.C. Circuit also expressly criticized the approach taken by the Sixth and Seventh Circuits. Specifically, it attempted to discredit the Seventh Circuit’s use of the *Clay*<sup>265</sup> and *Energy Reserves*<sup>266</sup> cases, stating that they were not applicable to the situation at hand.<sup>267</sup> Further, the court, while admitting reversal would delay implementation of the CAA, stated that such reversal would “not noticeably interfere with, and may actually promote, the ends of the Clean Air Act.”<sup>268</sup> Finally, the court rejected the Seventh Circuit’s

262. *Id.* at 1047.

263. *Id.*

264. *Id.*

265. *Clay Broadcasting Corp. v. United States*, 464 F.2d 1313 (5th Cir. 1972), *rev'd on other grounds sub nom.*, *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974).

266. *Energy Reserves Group v. FEA*, 447 F. Supp. 1135 (D. Kan. 1978).

267. The D.C. Circuit, while not contending “that a statutory schedule can never preclude notice-and-comment rule making” (626 F.2d 1038, 1047 (D.C. Cir. 1980)), stated that *Clay* and *Energy Reserves* did not bear the precedential weight placed on them. The court concluded that *Clay* was not applicable since it only involved the (d)(3) good cause exception. However, this analysis by the D.C. Circuit overlooked the fact that the § 107(d) designations in the present case involved the (d)(3) exception as well as the (b)(B) exception. The court distinguished *Energy Reserves* on the basis that “the time statutorily allotted for the promulgation of regulations was so extraordinarily short—fifteen days—that notice and comment were ‘unavoidably prevented, . . . in an almost physical sense.’” *Id.* at 1047. The court stated that *Energy Reserves* was also based on “the necessity to quickly decontrol stripper lease prices once Congress’ intent to do so was statutorily mandated in order that oil not be held off the market in anticipation of such price increase.” *Id.* (quoting *Energy Reserves Group v. FEA*, 447 F. Supp. 1135, 1150 (D. Kan. 1978)).

268. 626 F.2d 1038, 1048 (D.C. Cir. 1980). The court stated that:

An agency’s functions will be impaired any time it is reversed on procedural grounds, and such occasional impairments are the price we pay to preserve the integrity of the APA. Of course, cases under the “tight schedule” version of good cause are sure to be

approach to the (d)(3) exception holding that it was wholly irrelevant in this case.<sup>269</sup>

*C. Analysis of the Split Among the Circuits on the Good Cause Issue and Conclusion in this Area*

The three-to-two split among the circuits over the good cause issue is representative of a sharp difference of opinion among the courts as to how the section 553 exceptions should be analyzed and defined. Analysis of these cases, and the earlier good cause cases upon which they partly rest, is often hampered by continuous confusion by the courts over the distinction between the (b)(B) and (d)(3) exceptions, as well as by differing opinions over the scope of these exceptions. However, despite the lack of precision in this area, certain basic differences in approach are quite clear upon analysis of the five circuit court opinions.

One major difference in the analysis of the courts is that the Third, Fifth, and D.C. Circuits found the 107(d) deadline and the normal section 553 rulemaking procedures reconcilable while the Sixth and Seventh Circuits did not. As the D.C. Circuit stated most succinctly:

The Sixth and Seventh Circuits assume that the goals of the Clean Air Act and the Administrative Procedure Act irreconcilably conflict, and no doubt the facts and background of *U.S. Steel* and *Sharon Steel* suggest that the rules of the latter Act may be employed to thwart the goals of the former. But this assumption fundamentally misconceives the purpose and shrugs off the wisdom of the APA. Both the case at bar and our explication of the APA show that the APA may be deployed to insure that the Administrator fulfills his obligations under the Clean Air Act.<sup>270</sup>

In order to achieve a reconciliation between the APA and the 1977 Amendments, the Third, Fifth, and D.C. Circuits recommended a modification of the 1977 CAA Amendments' statutory schedule that was mandated by Congress. The courts determined that the procedures outlined in section 553 are so important to proper ad-

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particularly troublesome in this respect, since if an agency's allegations as to the need for expedition are remotely true, the lapse of time necessary to secure judicial review will assure that a court cannot easily reverse the agency. But a court serves neither the law nor, ultimately, the parties before it by succumbing, without a cautious examination of a case's facts, to whatever *fait accompli* an agency may choose to present.

269. *Id.* Apparently, the court believed that the (d)(3) exception was not at issue in this case. However, this overlooks the fact that the contested § 107(d) designations were made immediately effective thereby raising the (d)(3) issue. See note 265 *supra*.

270. 626 F.2d 1038, 1046 (D.C. Cir. 1980).

ministrative rulemaking that modifications in the 1977 Amendments' statutory schedule were justified. These three circuits offered an alternative scenario stating that the Administrator should have first published the state's designations immediately as proposed rules, then allowed thirty days for public comments, and finally published the designations as a final rule by April 15, 1978. Thus, in order to achieve this "reconciliation," the three courts realized that the statutory deadline for the section 107(d) designations could not be met if normal rulemaking procedures were followed. This raises the question whether Congress, by setting such a strict statutory timetable, was implicitly requiring that, if necessary, normal section 553 procedures be bypassed and the good cause exceptions used in the promulgation of the nonattainment designations.<sup>271</sup> If it is assumed, as it rightfully should be, that Congress was aware of the requirements of the APA when drafting section 107(d), then the answer to this question must be yes. These exceptions provide the perfect vehicle for reconciling the CAA and APA in this situation, since they allow the EPA to meet Congress' mandated deadline without violating any provisions of the APA. This argument is further supported by the sense of urgency which existed in Congress when setting these deadlines, because of the long history of failure to attain healthy air in the U.S.<sup>272</sup>

This interpretation puts the approach of the Third, Fifth, and D.C. Circuits on shaky ground. Their interpretation is questionable since it essentially rewrites the 1977 Amendments despite the fact that Congress appeared to have implicitly rejected the need for normal section 553 procedures. The Third Circuit in the *Sharon Steel* case anticipated this argument and attempted to refute it. The court stated that:

Congress gave no explicit indication that it intended to override the procedural safeguards of the APA . . . . Even at the time when Congress passed the amendments to the Clean Air Act, the circumstances that the Administrator advances as good cause should have been apparent. Nonetheless, Congress nowhere recorded any express indication that the 1977 Amendments should relieve the Administrator from the ordinary procedures set forth in the APA for rulemaking.<sup>273</sup>

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271. This point, while not expressly stated, was implied by the Court of Appeals for the Sixth and Seventh Circuits when they stated that the February 1978 deadline for the § 107(d) designations could not be reconciled with the APA unless the good cause exceptions were utilized.

272. Both the Sixth and Seventh Circuits mentioned that Congress exhibited a sense of urgency when passing the 1977 Amendments.

273. *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 380 (3d Cir. 1979).

The Third Circuit's argument, however, seems to overlook the fact that the APA has exceptions built right into it, thereby eliminating the need for any express indications by Congress of an intent to bypass normal APA procedures.

Although not cited by either the Sixth or Seventh Circuits in their opinions, there is some case law under the CAA supporting the idea that Congress can, in fact, implicitly authorize the bypass of normal section 553 procedures. In both *Appalachian Power Co. v. EPA*<sup>274</sup> and *Duquesne Light Co. v. EPA*,<sup>275</sup> suits were brought under the 1970 CAA claiming that violations of section 553 had occurred. In these cases, public notice and comment procedures were followed, as required by statute, by state authorities when formulating their SIP's but were not followed by the EPA when it reviewed these plans and promulgated them as rules. In finding that the EPA had good cause under the (b)(3)(B) exception to promulgate these rules, the Fourth Circuit in *Appalachian Power* went into a lengthy discussion of why a hearing before the EPA was not warranted:

It [a federal hearing] would seem particularly unwarranted, too, in a situation, where Congress had determined that expedition was demanded by urgent considerations of health and the general welfare. That Congress intended that such a hearing before the Administrator on the state plan was to be avoided in the interest of expediting action is persuasively suggested by the statutory language. Thus, the Amendments in express words enjoin the state authorities to afford, after notice, a hearing to all interested parties, but, in providing for the subsequent approval by the Administrator, it omitted any prior hearing requirement. This omission would seem to have been purposeful, in keeping with the Congressional intent to expedite the promulgation of state enforcement plans, without encumbering the administrative procedures with two hearings on the same plan. That this was so, the Administrator found confirmed, since, under the provisions of the Amendments, there was "no practical way that the rulemaking procedures of the Administrative Procedure Act [covering hearings preliminary to administrative actions] could be followed if the statutory time-table [for the promulgation and approval of state implementation plans under the Amendments] was to be observed." . . . In effect, Congress made a finding, which the Administrator merely confirmed in his order, that, under these circumstances, a hearing at the Administrator's level was both "impractical" and "unnecessary." That finding met the requirements of Section 553 (b)(3)(B), 5 U.S.C.A.<sup>276</sup>

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274. 477 F.2d 495 (4th Cir. 1973).

275. 481 F.2d 1 (3d Cir. 1973).

276. 477 F.2d 495, 502-03 (4th Cir. 1973).

Thus, both the Third<sup>277</sup> and Fourth Circuits held that Congress assumed that normal section 553 procedures would not be followed and the good cause exception would be utilized when there is no practical way that the APA can be followed and still meet the express deadline. This situation is very analogous to the five circuit cases involving the nonattainment designations, since there was no practical way in which the normal rulemaking procedures of the APA could have been followed by the EPA if the statutory timetable set out in section 107(d) was to be met. Also, in *Appalachian Power*, the omission of express words calling for notice and comment procedures in section 107(d) would seem to have been purposeful, in keeping with the congressional intent to expedite the attainment of the primary standards.

This discussion of congressional intent ties into another major difference between the circuits in their good cause analyses, namely, how broadly a court should look at the circumstances involved. A mere conclusory statement should not, in itself, be enough to justify good cause if the section 553 procedures are to have any real meaning. However, it was also not the intention of Congress to overturn regulations for merely technical noncompliance especially when good cause clearly exists.<sup>278</sup> In this regard, cases such as *De Rieux*<sup>279</sup> and *Nader*<sup>280</sup> suggest that a more comprehensive view of the circumstances should be undertaken by the court in order to determine if good cause does in fact exist.

The term "more comprehensive view of the circumstances" is used here to signify something closely analogous to a totality of the circumstances test. By taking a comprehensive or broad view of the circumstances, it is meant that the court will not base its decision solely on the plain meaning of an agency's statement of good cause. Rather, it signifies that a court should look at the broader totality of the circumstances out of which the use of the section 553 exceptions arise in making its determination.

Clearly the Third, Fifth, and, to a lesser extent, D.C. Circuits took a fairly narrow view of the circumstances in holding that good cause did not exist. They looked at merely the plain meaning of the EPA's statement of good cause and not at the broader circumstances out of

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277. In *Duquesne Light* the Third Circuit expressly followed the rationale of the Fourth Circuit in *Appalachian Power*.

278. *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332-33 (Temp. Emer. Ct. App. 1974), cert. denied, 419 U.S. 896 (1974).

279. 499 F.2d 1321 (Temp. Emer. Ct. App. 1974).

280. *Nader v. Sawhill*, 387 F. Supp. 1208 (D.D.C. 1974), aff'd, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975).



which this statement arose. In their analysis, the three courts which failed to find good cause considered only: a) whether the setting of the statutory timetable; and b) the state's need for immediate guidance justified the use of the good cause exceptions. Unlike the Sixth and Seventh Circuits, they did not consider such issues as past recalcitrance by industry and public health in analyzing whether the Administrator had good cause to bypass section 553 procedures. Perhaps the best example of this difference between the courts in viewing the totality of the circumstances can be seen by contrasting the Fifth and Seventh Circuit court opinions. In the Fifth Circuit opinion, the court stated that the good cause exceptions should be utilized only "when delay would do real harm."<sup>281</sup> In backing up this proposition, the court cited the *Reeves* case,<sup>282</sup> stating that the regulation in this case, designed to allow nonregular customers equal access to gasoline during the 1973 shortage and minimize the violence related to this problem (fistfights, etc.), met the real harm standard. The Fifth Circuit distinguished *Reeves* from the case at hand, positing that a delay in meeting the section 107(d) statutory deadline by one or two months does not constitute the same kind of real harm.

The Seventh Circuit opinion sharply disagreed with the Fifth Circuit's opinion and in particular its use of the *Reeves* case. The Seventh Circuit took a much broader view of the circumstances, stating that delay in meeting these statutory deadlines would ultimately mean more health problems due to delayed attainment of NPAAQS. The court, in criticizing the Fifth Circuit's use of *Reeves*, stated, "[w]e are at a loss to understand how gas shortages and fistfights constitute 'real harm' whereas mortality and illness resulting from continued high levels of air pollution do not."<sup>283</sup> Thus, by taking a broader view of the statement of good cause, the Seventh Circuit came to an opinion at direct odds with the Fifth Circuit's view.

To a large extent, the narrow view taken by the Third, Fifth, and D.C. Circuits was caused by the EPA itself. In its statement of good cause, the EPA mentioned only the states' need for immediate guidance and the tight schedule imposed by Congress as reason for invoking the exceptions. Nowhere in its statement did the EPA mention the important health factors related to failure to meet the NPAAQS by the statutory deadline, nor did it mention the long

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281. U.S. Steel Corp. v. EPA, 595 F.2d 207, 214 (5th Cir. 1979) (footnote omitted).

282. *Reeves v. Simon*, 504 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

history of delay in this area. Thus, the EPA's statement was a conclusory statement which did not reveal the underlying reasons why good cause was justified. The EPA may have greatly hurt its own case by not providing more detailed reasoning in its statement.

One final area in which the five circuit court cases involving the section 107(d) designations took differing approaches is in their analysis of the express deadline strand of good cause cases. While most of these courts dealt with this issue quite summarily, it is an important area in which a sharp split can be discerned. As seen earlier in the section on express deadline cases, the courts have denied good cause only in cases where an agency has had a substantial period of time to meet the deadline. In the *American Iron and Steel*<sup>284</sup> and *Shell Oil*<sup>285</sup> cases, for example, the agencies had two and one-half years and six months respectively to prepare for the deadlines. Also in the *Consumers Union*<sup>286</sup> case, the agency had over a year to pass the contested regulations before the final deadline. On the other hand, the two cases mentioned earlier which upheld the EPA's good cause claim on the basis of a statutory deadline, *Clay Broadcasting*<sup>287</sup> and *Energy Reserves*,<sup>288</sup> both involved very short time periods—about one month in *Clay Broadcasting* and only fifteen days in *Energy Reserves*. Thus, the five principle cases discussed in this article deal with a time period, ninety days, which falls in between the time involved in the earlier express deadline cases.

The Fifth and D.C. Circuit courts<sup>289</sup> rejected the idea that the existence of a deadline for agency action, whether set by statute or court order, constitutes good cause for a section 553(b)(B) exception. The Fifth Circuit, citing *American Iron and Steel* and *Shell Oil* as support, stated that a "deadline is a factor to be considered, but the agency must still show the impracticability of affording notice and comment."<sup>290</sup> The court held that the EPA did not meet this showing of impracticability in this case. However, neither the Fifth Circuit nor the D.C. Circuit made serious mention of the immediacy element present in this strand of good cause cases. While the D.C. Circuit at-

283. *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289 n.10 (7th Cir. 1979).

284. *American Iron & Steel Inst. v. EPA*, 568 F.2d 284 (3d Cir. 1977).

285. *Shell Oil Co. v. FEA*, 527 F.2d 1243 (Temp. Emer. Ct. App. 1975).

286. *Consumers Union of United States v. Sawhill*, 393 F. Supp. 639 (D.D.C. 1975).

287. *Clay Broadcasting Corp. v. United States*, 464 F.2d 1313 (5th Cir. 1972), *rev'd on other grounds sub nom.*, *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974).

288. *Energy Reserves Group, Inc. v. FEA*, 447 F. Supp. 1135 (D. Kan. 1978).

289. The Court of Appeals for the Third Circuit did not directly address this issue and did not discuss any of the cases in the express deadline strand of good cause cases.

290. *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 213 (5th Cir. 1979).

tempted to distinguish *Energy Reserves* on the basis that it involved an "extraordinarily short" time period, neither that Circuit nor the Fifth Circuit mentioned the very short time period involved in promulgating the section 107(d) designations. These courts did not deal with the fact that, just as in *Clay Broadcasting* and *Energy Reserves*, the ninety-day express deadline could only be made if the good cause exceptions were utilized.

On the other hand, the Sixth and particularly the Seventh Circuits recognized the strong element of immediacy present in these cases. Both of these courts recognized that, as in *Clay Broadcasting* and *Energy Reserves*, use of the good cause exceptions was necessary in order to meet the express deadline mandated by Congress. The Seventh Circuit expressly mentioned<sup>291</sup> that the *American Iron & Steel* and *Consumers Union* cases involved much longer time periods than in the instant case. Thus, these courts recognized, quite correctly, that the situation at hand was much more analogous to *Clay Broadcasting* and *Energy Reserves* than to the other express deadline cases. They concluded that the good cause exceptions were designed to be used in such a situation so that the congressionally mandated deadline could be upheld.

This discussion has, to now, centered on the analysis of the five circuit courts on the major issue of good cause to bypass normal section 553 rulemaking procedures. However, primarily in those three courts in which good cause was not found, there remained various secondary issues for the courts to deal with. This article will now address the courts' treatment of these secondary issues.

#### IV. THE CASES—SECONDARY ISSUES

After the five Circuit Courts of Appeal made their initial determination on whether good cause existed to invoke a section 553 exception, they were still faced with the task of resolving various secondary issues. First, the three circuits which found a section 553 violation had to examine whether the doctrine of harmless error allowed the section 107(d) designations to stand, regardless of the APA violation. These three courts also had to fashion equitable relief for the aggrieved parties, trying to reconcile the somewhat conflicting goals of the APA and the CAA. Finally, despite holding good cause to exist for bypassing normal section 553 procedures, the Seventh Circuit dealt with the issue of what constitutes the proper

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291. *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 288 n.8 (7th Cir. 1979).

scope of judicial review of section 107(d) designations. These secondary issues will be discussed in the balance of this article. In addition, their impact on the implementation of the 1977 Amendments will be analyzed.

### A. Harmless Error

#### 1. Background

The doctrine of harmless error, as applied to administrative cases, is closely tied in with the concept of scope of judicial review. Since the harmless error doctrine presents a standard upon which a reviewing court may base its reversal of a lower court opinion, the doctrine serves as a standard which both defines and limits the scope of review. In light of this close relationship, it is not surprising that the APA's harmless error provision is found within APA section 706<sup>292</sup> entitled "Scope of Review." For purposes of this article, the relevant subparts of this section state:

The reviewing court shall—

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (D) without observance of procedures required by law.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and *due account shall be taken of the rule of prejudicial error.*

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292. 5 U.S.C. § 706 (1976) (emphasis added). This section was originally known as § 10(e) of the APA. The entire section reads:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 U.S.C. §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Thus, the APA grants reviewing courts the power to overturn an agency action promulgated without following proper section 553 procedures only when some prejudice can be shown by the aggrieved party.<sup>293</sup>

The case law on the harmless error doctrine prior to these five Circuit cases is relatively uniform in its application of the doctrine to review of actions. Most courts hold that the courts and agencies together constitute a partnership for the purpose of effectuating the congressional will and furthering the public interest.<sup>294</sup> The courts have therefore concluded that "an error cannot be dismissed as 'harmless' without taking into account the limited ability of a court to assume as a judicial function, the distinctive discretion assigned to the agency."<sup>295</sup>

Because of the somewhat limited role of the courts in reviewing agency actions, judges usually will not strike down such actions for merely technical violations.<sup>296</sup> This limited role has clearly been applied by the courts to violations of section 706(2)(D). While it is clear that the harmless error doctrine cannot be used so broadly as to undermine the procedures which the APA seeks to promote,<sup>297</sup> most courts agree that "procedural irregularities are not per se prejudicial."<sup>298</sup> Although there is some disagreement as to how strict a standard should be applied, the courts<sup>299</sup> generally follow a standard roughly equivalent to that in the federal harmless error statute<sup>300</sup> which states: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Thus, where procedural violations are present, courts will generally not overrule regulation unless actual prejudice is shown. In the case of section 706(2)(D) violations,

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In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

293. *See, e.g.*, *NLRB v. Seine & Line Fisherman's Union of San Pedro*, 374 F.2d 974, 981 (9th Cir.), *cert. denied*, 389 U.S. 913 (1967).

294. *Ala. Ass'n. of Ins. Agents v. Bd. of Gov. of Fed. Reserve Syst.*, 533 F.2d 224, 236-37 (5th Cir. 1976); *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970); *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 465-66 (D.C. Cir. 1967).

295. *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 465-66 (D.C. Cir. 1967); *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

296. *Ala. Ass'n. of Ins. Agents v. Bd. of Gov. of Fed. Reserve Syst.*, 553 F.2d 224, 236 (5th Cir. 1976).

297. *See Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969).

298. *NLRB v. Seine & Line Fisherman's Union of San Pedro*, 374 F.2d 974, 981 (9th Cir.), *cert. denied*, 389 U.S. 913 (1967).

299. *E.g.*, *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 465 (D.C. Cir. 1967).

300. 28 U.S.C. § 2111 (1976).

the standard most generally followed is that stated in the Ninth Circuit case of *NLRB v. Seine & Line Fisherman's Union of San Pedro*:<sup>301</sup> "Procedural irregularities are not per se prejudicial; each case must be determined on its individual facts . . . . Moreover, 'the burden of showing that prejudice has resulted' is on the party claiming injury from the erroneous rulings."<sup>302</sup>

In this regard, prejudice is generally held to mean that the party claiming injury must show that the contested procedural violations have been the cause of the injury. Thus, in *NLRB v. Health Tec Division/San Francisco*,<sup>303</sup> an error had occurred at a representation hearing when the hearing officer failed to make an independent evaluation of privilege before issuing his report to the NLRB. The reviewing court refused to reverse since the party could not establish that this determination had resulted in prejudice to him. Also in *Chrysler Corp. v. FTC*,<sup>304</sup> the court refused to reverse an FTC order where evidence was allowed to be admitted subsequent to argument before the Commission, since this evidence was not believed to be prejudicial to the petitioner. However, where actions by the agency clearly change the outcome, then the error is prejudicial and warrants reversal. Thus, in *Braniff v. C.A.B.*,<sup>305</sup> the court reversed a decision by the Civil Aeronautics Board (CAB) granting a Dallas-to-Miami run to Eastern Airlines, where the CAB had based its decision on several factual errors which clearly had a material effect on the outcome.

Closely related to the harmless error issue is the question whether alternative procedures can be used, thus making an earlier procedural error harmless. Specifically, in the five principle cases discussed in this article, the question arose whether the EPA's granting of post-promulgation (i.e., post hoc) notice and comment was an adequate alternative to normal section 553 procedure and thus made the procedural violations harmless. In this regard, the case law is virtually unanimous in holding that such alternatives are not adequate.<sup>306</sup>

The underlying rationale of the cases rejecting post-promulgation

301. 374 F.2d 974 (9th Cir.), *cert. denied*, 389 U.S. 913 (1967).

302. *Id.* at 981 (citations omitted).

303. 566 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 832 (1978).

304. 561 F.2d 357 (D.C. Cir. 1977).

305. 379 F.2d 453 (D.C. Cir. 1967).

306. *Kelly v. Dept. of Interior*, 339 F. Supp. 1095, 1101-07 (E.D. Cal. 1972) (three judge court); *City of N.Y. v. Diamond*, 379 F. Supp. 503, 517 (S.D.N.Y. 1974); *Maryland v. EPA*, F.2d 215, 222 (4th Cir. 1975), *vacated on other grounds sub. nom.*, *EPA v. Brown*, 431 U.S. 99 (1977); *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972).

comments is that such comment periods are much less effective than the pre-promulgation comments required by the APA. As the Fourth Circuit stated in *Maryland v. EPA*,<sup>307</sup> “[t]he reception of comments after all the crucial decisions have been made is not the same as permitting active and well prepared criticism to become a part of the decision making process.”<sup>308</sup> The courts generally agree that, in light of the psychological<sup>309</sup> and bureaucratic pressures present, such post hoc comments are not nearly as effective as pre-promulgation comments, and therefore are not a suitable alternative which make harmless a violation of section 553 procedures.

## 2. The Five Circuit Court Cases

The three circuit courts which failed to find good cause for using the (b)(B) or (d)(3) exceptions all examined whether or not the contested section 107(d) designations should be allowed to stand under the doctrine of harmless error. The EPA argued that its nonattainment designations should be upheld, notwithstanding a section 553 violation, under this doctrine. Basically, the agency made the contentions in this regard that: 1) the sixty-day post-promulgation comment period made any procedural violations harmless; and 2) the companies and states suffered no real harm since the contested designations were only designed to aid the states in developing their SIP's.<sup>310</sup> In all three circuits, these contentions were rejected.

The Third Circuit held that the EPA's improper use of the good cause exceptions was prejudicial in nature to the petitioners. The plaintiffs in this case, Sharon Steel Corp. and Bethlehem Steel Corp., claimed that the section 107(d) designations would place great burdens on their ability to expand and grow in the contested areas. They argued, quite successfully, that, in light of this economic burden, the absence of notice and comment procedures was not harmless.

The court determined that the steel companies were, in fact, injured despite the EPA's argument that the challenged designations were only designed to give guidance to the states and were not binding with respect to applications by companies to build new plants or modify existing ones. The court noted that, since the implementation

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307. 530 F.2d 215 (4th Cir. 1975).

308. *Id.* at 222.

309. *See* N.J. v. EPA, 626 F.2d 1038, 1049-50 (D.C. Cir. 1980).

310. EPA contention number two does not apply to the D.C. Circuit case because all the petitioners were states and were thus not directly affected by the Offset Ruling's limitations on new development.

of the Offset Policy,<sup>311</sup> companies in nonattainment areas do face significant burdens in getting licenses. Thus, the Third Circuit concluded:

The designations fixed by the Administrator evidently will have some weight, even if they will not be dispositive. Moreover, the uncertainty about what weight these designations will carry in future proceedings may influence the companies current plans for construction. The Administrator's failure to abide by the APA, we conclude, was not harmless.<sup>312</sup>

The Fifth Circuit took a slightly different route in dismissing the argument that the improper bypassing of normal section 553 procedures was harmless. The court quoted *Braniff*,<sup>313</sup> stating that the harmless error doctrine should be used only "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached."<sup>314</sup> Taking a very narrow view of the harmless error doctrine, the court held that, since the agency's error plainly affected the procedure used, the court could not assume that there was no prejudice to the petitioners.<sup>315</sup>

With respect to this issue of harmless error, both the Third and Fifth Circuits have strong cases. It is quite clear that the EPA's procedures, once found to be in violation of section 553, were prejudicial in nature to the aggrieved parties. First, these designations were clearly one of the factors upon which application for licenses for new construction or modification of plants were to be judged. Since these licenses were quite difficult to get in nonattainment areas due to the Offset Ruling and its off-spring legislation in the 1977 Amendments,<sup>316</sup> it is clear that such procedural violations were in fact prejudicial.

However, despite the strength of this argument, the Fifth Circuit's discussion of the harmless error issue is poorly conceived and open to criticism. While the court mentioned the prejudicial implications of the Offset Ruling when discussing the "ripeness" issue,<sup>317</sup> the court failed to mention them in connection with the

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311. See text at note 53 *supra*.

312. *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) (footnotes omitted).

313. *Braniff Airways, Inc. v. CAB*, 379 F.2d 453 (D.C. Cir. 1967).

314. *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979).

315. *Id.*

316. 42 U.S.C. § 7503 (Supp. III 1979).

317. The Fifth Circuit, unlike the other four circuits, felt that there was a ripeness issue present. The court agreed with the EPA's contention that the § 107(d) designations were merely a preliminary step in the SIP process and in themselves would perhaps be unripe for judicial review. However, the court held that the designations have consequences apart from



question of harmless error. Instead, the court used the case of *Braniff Airways v. C.A.B.*<sup>318</sup> to show that the harmless error doctrine did not apply. However, in an apparent attempt to restrict the use of the harmless error doctrine, the court interpreted *Braniff* as having a much more strict test for the use of this doctrine than the case actually has. *Braniff*, in quoting from the Supreme Court case of *Massachusetts Trustees of Eastern Gas and Fuel Associates v. U.S.*,<sup>319</sup> stated that the principle of limited judicial interference with agency discretion<sup>320</sup> “does not mechanically compel reversal ‘when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached.’”<sup>321</sup> Yet, in citing the *Braniff* case, the Fifth Circuit stated that the harmless error doctrine “is to be used *only* ‘when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached.’”<sup>322</sup> Clearly, this is a much more restrictive application of the harmless error doctrine than actually stated in *Braniff*. Thus, the Fifth Circuit left itself open to criticism by incorrectly using this case in arguing for a strict application of the harmless error doctrine.

With respect to the post-promulgation comment issue, the Third, Fifth, and D.C. Circuits were in total agreement. Relying on the earlier case law mentioned above,<sup>323</sup> all three courts determined that post hoc comments was not an adequate substitute for pre-promulgation comments and thus did not render the error harmless. Both the Fifth Circuit and D.C. Circuit, relying largely on *Kelly v. Department of Interior*,<sup>324</sup> stated:

Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rulemaking process in a meaningful way. . . . “We doubt that persons would bother to submit their views or that the Secretary would seriously con-

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their role in the SIP revision process which constitute a substantial injury to the petitioners, thus making the controversy ripe for review. The consequences referred to arise from the Off-set Ruling’s limitations on development of new facilities in nonattainment areas.

318. 379 F.2d 453 (D.C. Cir. 1967).

319. 377 U.S. 235, 248 (1964).

320. See text at notes 295-302 *supra*.

321. *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 466 (U.S. App. D.C. 1967).

322. *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (*quoting* *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 466 (D.C. Cir. 1967)) (emphasis added).

323. See text at notes 307-09 *supra*.

324. 339 F. Supp. 1095 (E.D. Cal. 1972). This case involving regulations issued by the Secretary of the Interior dividing and distributing assets of California Indian rancheria, also rejected the use of post hoc comments.

sider their suggestions after the regulations are a *fait accompli*." . . . Were we to allow the EPA to prevail on this point we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.<sup>325</sup>

The Third Circuit also adopted this rationale stating, "[a]fter the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decisionmaker is likely to resist change."<sup>326</sup>

The Sixth Circuit also considered the issue whether the post hoc comments rendered the section 553 violation harmless and explicitly rejected the view taken by the Third, Fifth, and D.C. Circuits. The court noted that, after receiving these post-promulgation comments, the EPA made thirty-six changes or modifications in its previously announced designations.<sup>327</sup> It viewed the taking of post hoc comments as a reasonable alternative which enabled the EPA to expedite the attainment process, especially in light of the long history of delays in attaining NPAAQS in Ohio. The court stated: "Under these circumstances, we think the Administrator's solution of promulgating a schedule of nonattainment areas and subsequently receiving objections and comment, and thereafter effecting such changes as were required, was a reasonable approach consistent with the Administrative Procedure Act."<sup>328</sup> In defense of its holding the court cited the Seventh Circuit case of *U.S. Steel v. EPA* as well as *Cleveland Electric Illuminating Co. v. EPA*<sup>329</sup> and *Cincinnati Gas & Electric Co. v. EPA*.<sup>330</sup>

With regard to the post hoc comment issue, the approach of the Third, Fifth, and D.C. Circuits is more reasonable than that of the

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325. *N.J. v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (quoting *U.S. Steel v. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1979), quoting *Kelly v. Dept. of Interior*, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972)).

326. See note 312 *supra*.

327. *Republic Steel Corp. v. Costle*, 621 F.2d 797, 804 (6th Cir. 1980).

328. *Id.*

329. 572 F.2d 1150 (6th Cir. 1978), *cert. denied*, 439 U.S. 910 (1978) (court did not require the EPA Administrator to make determination on SO<sub>2</sub> pollution control plan on record after opportunity for an agency hearing absent any Clean Air Act language requiring him to do so. Court held legislative-type hearing to be sufficient).

330. 578 F.2d 660 (6th Cir. 1978) (court upheld the EPA's decision to use highly technical formula in monitoring SO<sub>2</sub> emissions to minimize administrative costs). It is interesting to note that these cases and the Seventh Circuit case of *U.S. Steel v. EPA* do not directly deal with the post-promulgation comments issue.

Sixth Circuit.<sup>331</sup> If good cause is not found, it is extremely unlikely that post-promulgation comments will be viewed as an adequate alternative. The APA was designed to give the public a chance to comment *before* rules have been promulgated.<sup>332</sup> It is at this point that public input has its maximum effect upon the process, since no firm decisions have been made. In this regard, post hoc comments are clearly less effective, since agencies are much less willing to change their position once final decisions have been made. Furthermore, to uphold post hoc comments as a valid alternative, after a good cause claim has been rejected, would open the door to extensive use of such comment periods by agencies. This would create the potential for agency abuse which could largely undermine the goals of the APA.<sup>333</sup>

*B. Judicial Review—Section 307(d)*

As indicated earlier,<sup>334</sup> the CAA contains its own judicial review section, section 307,<sup>335</sup> which supplements the judicial review provisions of the APA. Of particular interest here is section 307(d),<sup>336</sup> which was added to the CAA by the 1977 Amendments. This subsection makes thirteen specific actions<sup>337</sup> under the CAA very difficult to overturn upon judicial review. These thirteen actions are set forth in section 307(d)(1).<sup>338</sup> Section 307(d)(9) provides that these actions can only be overturned if found to be:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
- (D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the require-

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331. Since the Sixth Circuit found that good cause did exist for invoking the exceptions, its discussion of the post hoc comments issue is *dicta*.

332. See text at note 104 *supra*.

333. As both the Fifth and D.C. Circuits pointed out, allowing extensive use of post hoc comments would make the provisions of § 553 virtually unenforceable. An agency which wished to bypass normal § 553 procedures could simply take post-promulgation comments and republish the rule before a reviewing court could act. This could open the door for an agency which wished to undermine the goals of § 553, eliminating any meaningful public participation in their rulemaking.

334. See text at notes 81-89 *supra*.

335. 42 U.S.C. § 7607 (Supp. III 1979).

336. *Id.* § 7607(d) (Supp. III 1979).

337. *Id.* § 7607(d)(7) (Supp. III 1979). For the entire text of Clean Air Act § 307(d)(1), see note 84 *supra*.

338. 42 U.S.C. § 7607(d)(1) (Supp. III 1979).

ment of paragraph (7)(B) [that “[o]nly an objection to a rule or procedure which was raised . . . during the period for public comment” may be revised during the judicial review] has been met, and (iii) the condition of the last sentence of paragraph (8) [that the procedural errors “were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made”] is met.<sup>339</sup>

Of particular interest here is subsection (d)(9)(D), which involves judicial review of procedural violations under the CAA. Like the rest of section 307(d), subsection (d)(9)(D) mandates a standard of review which is much more stringent than that required by APA section 706(2)(d).<sup>340</sup> The legislative history of section 307(d)<sup>341</sup> indicates that Congress’ intent in passing this subsection was to prevent the EPA’s actions from “bogging down” over technical arguments by limiting “the extent to which the Administrator’s decisions on such procedural matters may be reversed during judicial review.”<sup>342</sup> However, the plain language of section 307(d) indicates that it applies only to those actions listed in section 307(d)(1) and not to all actions under the CAA.

The Seventh Circuit, in a unique interpretation, was the only circuit to apply section 307(d)(9)(D) to section 107(d) designations. The court, after finding good cause for bypassing normal section 553 procedures, introduced the section 307(d) argument as an alternative basis for its holding.<sup>343</sup> The court quoted the legislative history mentioned above,<sup>344</sup> stressing the fact that the 1977 Amendments were designed to eliminate “litigation over technical and procedural irregularities”<sup>345</sup> so that NPAAQS may be achieved as expeditiously as practicable.<sup>346</sup> The court argued that, despite the fact that section 107(d) designations are not expressly listed in section 307(d)(1), these

339. *Id.* § 7607(d)(9).

340. 5 U.S.C. § 706(2)(d) (1976).

341. H.R. REP. NO. 294, 95th Cong., 1st Sess. 322, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1077, 1401.

342. *Id.*

343. The court presented the § 307 issue as a separate, alternative basis for its holding. In introducing the § 307 issue the court stated “[e]ven if the agency’s procedures here were not in technical compliance with § 553 of the APA, we would still not be able to reverse the Administrator’s action in this case.” *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 290 (7th Cir. 1979). Later in the opinion, the court stated “we believe this provision [§ 307(d)(9)(D)] to be applicable and controlling. . . .” *Id.* at 291 n.14. However, despite such strong language, this language is merely *dicta* since the case was already fully decided on the good cause issue.

344. See text at note 342 *supra*.

345. 605 F.2d 283, 290 (7th Cir. 1979).

346. *Id.*

designations, as well as all rulemaking<sup>347</sup> by the EPA, were still intended by Congress to be reviewed under section 307(d)(9). The Supreme Court denied certiorari in this case.<sup>348</sup> Thus, the Seventh Circuit's opinion has created a split<sup>349</sup> among the circuits over the proper application of section 307(d)(9)(D).

In support of its interpretation of section 307(d), the Seventh Circuit presented two different arguments. The first argument presented by the court was essentially an analysis of the legislative history of section 307(d). In this analysis, the court noted that the legislative history referred to a "legislative-adjudicative" distinction<sup>350</sup> which is a procedural issue not listed in section 307(d)(1) and "which relates to the propriety of any rulemaking at all."<sup>351</sup> The circuit interpreted this reference to suggest that Congress intended the (d)(9)(D) standard "to extend to all rulemaking by the EPA whether or not it is in the explicit categories covered by all the provisions of section [307(d)]."<sup>352</sup> The court concluded its argument by quoting section 307(e) which provides: "Nothing in [the CAA] shall be construed to authorize judicial review of regulations or orders of the Administrator under [the CAA], except as provided in this section."<sup>353</sup> Thus, the Seventh Circuit under this analysis concluded that the legislative history of section 307(d) demonstrated Congress' intent to apply the (d)(9)(D) standard to such EPA action as the section 107(d) designations. Applying this strict standard of review to the contested nonattainment designations, the court found no basis for declaring them invalid.<sup>354</sup>

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347. While the Seventh Circuit said that the (d)(9) standard applied to all rule making, it must be assumed that this means all rulemaking under the CAA, since § 307(d) only applies to actions under the CAA.

348. 100 S.Ct. 710 (1980).

349. For the other circuits' analyses of this issue, see text at notes 356-57 *infra*.

350. The legislative history states:

Under the flexible procedures specified by the committee, disputed questions of classification may arise concerning, for example, whether a given question involves "facts" or "policy" or whether a given fact is "legislative" or "adjudicative." To prevent rule-making from bogging down in arguments about such matters, and to underline that the agency is authorized to adopt rule-making procedures to the individual case, the committee has limited the extent to which the Administrator's decisions on such procedural matters may be reversed during judicial review.

H.R. REP. NO. 294, 95th Cong., 1st Sess. 322, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1401.

351. 605 F.2d 283, 291 (7th Cir. 1979).

352. *Id.*

353. *Id.*

354. *Id.*

In a footnote,<sup>355</sup> the court presented a second argument in support of its application of the (d)(9)(D) standard to the section 107(d) designation, stating:

Arguably these designations fit within the subsection's application to "the promulgation or revision of an implementation plan by the Administrator under section [110(c)] . . ." or to the "promulgation or revision of regulations under subtitle C of subchapter 1 of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility)." 42 U.S.C. § 7607(d)(1)(B), (I). The designation of areas as "attainment" or "non-attainment" is an integral part of the promulgation of implementation plans and of regulations designed to prevent significant deterioration of air quality.

The Seventh Circuit reasoned that, since the actions expressly stated in section 307(d)(1) could not be implemented without the section 107(d) designations first being promulgated, then these designations had to be implicitly covered by the section 307(d)(9)(D) standard of review. Thus, utilizing this "arguably necessary" approach, the Seventh Circuit found the section 107(d) designations to be valid under the section 307(d)(9)(D) standard of review.

Unlike the Seventh Circuit, both the Fifth and D.C. Circuits held that the Section 107(d) designations are plainly not subject to the section 307(d)(9)(D) standard of review.<sup>356</sup> Since subsection (d)(1) specifically enumerates thirteen sections which the (d)(9) standard does apply to, these courts found no reason to determine that the section 107(d) designations should also be covered. Also, since the Administrator of the EPA did not argue that those designations should be covered by section 307(d) under section 307(d)(1)(N),<sup>357</sup> these courts found no reason to apply the (d)(9)(D) standard of review.

It is clear upon examination that the Seventh Circuit's arguments are strained and that the criticisms of this approach by the Fifth and D.C. Circuits are well founded. The Seventh Circuit's argument that section 107(d) designations are implicitly included because they are

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355. *Id.* at 290 n.12.

356. *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 n.18 (5th Cir. 1979); *N.J. v. EPA*, 626 F.2d 1038, 1048-49 (D.C. Cir. 1980). The Sixth Circuit also mentioned the Seventh Circuit's use of the (d)(9) issue, stating "[w]e would be inclined to rely upon this reasoning also if the Administrator had exercised the powers granted him by 42 U.S.C. § 7607(d)(1)(N) (1976)." *Republic Steel Corp. v. Costle*, 621 F.2d 797, 805 n.2 (6th Cir. 1980).

357. 42 U.S.C. § 7607(d)(1)(N) (Supp. III 1979). The subsection reads: "(N) such other actions as the Administrator may determine."

prerequisites for various sections which are explicitly covered<sup>358</sup> is an extremely weak argument which, if accepted, would render section 307(d)(1) meaningless. Under the CAA, virtually every section is a prerequisite or is arguably necessary for the implementation of one or more other sections under the Act. If Congress wanted this or any other section to be covered by section 307(d), it could have specified them as it did the thirteen others.

Similar weaknesses are also apparent in the court's legislative history-section 307(e) argument.<sup>359</sup> The mere fact that the legislative report<sup>360</sup> referred to a procedural distinction<sup>361</sup> not ultimately addressed in subsection (d) does not support the argument that Congress wanted section 307(d) "to extend to all rulemaking by the EPA whether or not it is in the explicit categories covered by all the provisions of section 7607(d) [307(d)]."<sup>362</sup> The remark on the legislative-adjudicative distinction taken from the legislative history was merely an example given by the House Committee on Interstate and Foreign Commerce to show that Congress did not want the implementation of the 1977 Amendments to be delayed by litigation over merely technical procedural arguments. In addition, contrary to the Seventh Circuit's argument, section 307(e) does not require that section 307(d) be the only standard under which actions under the CAA are reviewed. Section 307(e) merely requires that regulations issued under the CAA, if applicable, be reviewed under the standards set out in section 307(d)(9). It in no way supercedes review under the APA of those actions not listed in section 307(d)(1). In fact, section 307(d)(1) seems to provide for review under the APA for those sections of the CAA which are not expressly enumerated in (d)(1), stating that:

The provisions of section 553 through 557 and section 706 [of the APA] shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5 of the United States Code [5 U.S.C. § 553(b) (A), (B) (1976)].

The Seventh Circuit's reading of section 307(d) could, if applied, have a dramatic effect on the scope of judicial review of agency rulemaking. The court's holding may be interpreted in two ways

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358. See text at notes 355-57 *supra*.

359. See text at notes 348-54 *supra*.

360. *Id.*

361. *Id.*

362. *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 291 (7th Cir. 1979).

both of which have broad effects on the scope of review of agency rulemaking. These two interpretations are that the court: 1) essentially amended the judicial review section of the APA; or 2) required that section 307(d) be applied when reviewing all EPA rulemaking.<sup>363</sup> Thus, the court in effect created two APA's, one for the EPA and one for all other agencies. In arguing for the denial of certiorari before the Supreme Court, even the EPA was apparently uncomfortable with the broad scope of this holding. Rather than trying to have the high court uphold this argument, the EPA dismissed it as merely dicta.<sup>364</sup> Since certiorari was denied, the validity of the Seventh Circuit's holding remains unclear.

The results of the Seventh Circuit's section 307(d) argument, if followed by other courts, will be to disrupt greatly the scope of review provision set out in the 1977 Amendments. Since the Seventh Circuit is the only court to adopt this interpretation to date, parties who desire to participate in rulemaking under the CAA, or any other rulemaking by the EPA, cannot know with certainty what rules govern the proceeding itself or any subsequent judicial review. Many companies, including the petitioners in the Seventh Circuit case,<sup>365</sup> operate in many circuits across the country. If the Seventh Circuit's interpretation does have vitality, it may force many large companies to operate under conflicting rules for identical procedures depending on where an action is brought. Since certiorari was denied by the Supreme Court, the six other circuits across the country have been left with no guidance as to which judicial review procedures they should apply.

#### IV. REMEDIES

A final area in which the split among the circuits has disrupted the uniform implementation of the Clean Air Act is the area of remedies. As with harmless error, the only courts which had to deal with the remedy issue were those which overturned the EPA designations because of a lack of good cause for bypassing section 553 procedures. The basic problem these courts faced was the perceived necessity of reconciling the conflicting demands of invalidating the

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363. *U.S. Steel v. EPA*, 100 S.Ct. 710, 711 (1980) (opinion of J. Rehnquist dissenting from denial of Writ of Certiorari) (citing petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 14).

364. 100 S.Ct. 710, 711 (1980) (opinion of J. Rehnquist dissenting from denial of Writ of Certiorari).

365. The petitioners were *U.S. Steel Corp. and Youngstown Sheet and Tube Company*.



contested section 107(d) designations while at the same time trying to attain NPAAQS as quickly as possible. The Third, Fifth, and D.C. Circuits took similar, but not identical, approaches to this problem.

Courts, under their broad equity powers, generally are afforded a great deal of discretion in fashioning remedies for procedural violations by administrative agencies.<sup>366</sup> These broad equitable powers were defined in the Supreme Court case of *Ford Motor Co. v. NLRB*<sup>367</sup> in which Chief Justice Hughes stated:

While the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements.<sup>368</sup>

The Third Circuit attempted to use these equitable powers to protect both the rights of the injured parties and the goals of the CAA. In this respect, the court stated “[a]lthough the companies are entitled to relief, we must be careful not to grant relief so broad as to endanger the Congressional scheme for the control of air pollution.”<sup>369</sup> Thus, following the example of an earlier Third Circuit case, *Duquesne Light Co. v. EPA*,<sup>370</sup> the court decided to invalidate only these section 107(d) designations contested by the petitioners, and *only* as they applied to the two petitioners in this case. The court remanded the contested designations for TSP to the Administrator, forbearing him

366. See *Indiana and Michigan Electric Co. v. FPC*, 502 F.2d 336, 346-48 (D.C. Cir. 1974) (opinion on rehearing); *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939).

367. 305 U.S. 364 (1939).

368. *Id.* at 373. See *Indiana and Michigan Electric Co. v. FPC*, 502 F.2d 336, 346-48 (D.C. Cir. 1974) (opinion on rehearing).

369. *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979).

370. 481 F.2d 1 (3d Cir. 1973). The court, in this case involving SIP's under the 1970 CAA, formulated a very narrow remedy. Essentially the court, except as to those companies which petitioned for review in this case, allowed contested SIP's to remain in effect.

The court explained its reasons for invoking this limited remedy by stating:

In resolving [the issues] . . . the Court is mindful of the desire for rapid action expressed by Congress in enacting the Clean Air Act, and the role the Act plays in protecting the nation's health by requiring clean air. Moreover, we are cognizant of the circumscribed opportunity for review provided by Congress, again manifesting an insistence on expedition. In view of the limited review proceeding, this Court holds that, except as it applies to Duquesne, Pennsylvania Power, Ohio Edison and St. Joe Mineral, whose petitions for review were timely filed under section 307(b)(1), the Pennsylvania implementation plan remains in effect.

481 F.2d 1, 10 (3d Cir. 1973).

from applying to Sharon and Bethlehem any of the requirements or sanctions imposed on nonattainment areas by the 1977 amendments to the Clean Air Act until the Administrator shall have conducted a limited legislative hearing in which he gives these two companies the required statutory notice and opportunity for participation and comment as provided by the APA, 5 U.S.C. § 553 (1976).<sup>371</sup>

Thus, the Third Circuit granted a very limited form of relief, attempting to protect the rights of the petitioners under the APA while minimizing interference with the congressional scheme for attaining healthy air in the U.S.

The Fifth Circuit decided to grant a broader remedy than the Third Circuit. It also recognized the need for a balanced approach, stating that "[w]hile the EPA . . . must abide by the procedural requirements of the Clean Air Act and the APA, they must also act expeditiously in order to fulfill Congress' principal goal of attaining the primary air quality standards by the end of 1982."<sup>372</sup> Nevertheless, the court ordered that the contested designations be remanded and reconsidered by the EPA. Specifically, the Fifth Circuit held that the contested designations were invalid as to the parties affected by them. The court ordered the EPA to give notice of the proposed section 107(d) designations and allow comments by the entire public when repromulgating the rules.<sup>373</sup>

The Fifth Circuit recognized that such a procedure on remand would make it impossible to follow the statutory deadlines set out in the CAA. In an attempt to minimize delays, the court developed a new revised timetable for promulgating the rules and setting in motion the SIP process. The court gave Alabama<sup>374</sup> nine months after final EPA promulgation of the section 107(d) designations to revise and submit its SIP. Although the court did not state how long the EPA had to promulgate the nonattainment lists, a conservative estimate would be three to four months.<sup>375</sup> Finally, the court gave the EPA four months from the date of their submission to approve or disapprove these SIP's. Thus, by ordering such procedures on re-

371. 597 F.2d 377, 381-82 (3d Cir. 1979).

372. U.S. Steel Corp. v. EPA, 595 F.2d 207, 215 (5th Cir. 1979).

373. *Id.*

374. Actually, Alabama's agency responsible for state actions under the CAA—the Alabama Air Pollution Control Commission (AAPCC)—would revise the SIP's here.

375. This estimate is conservative in that if thirty days are allotted for comments and thirty days are required by § 553(d) for a post-publication pre-effectiveness period, only one to two months would remain for the EPA to go over the comments and publish the designations. Considering that, in actuality, EPA took four months to publish these designations in 1978, a more accurate estimate would be five to six months.

mand, the effect of the Fifth Circuit's decision was to establish a new implementation schedule for the CAA eighteen to twenty-two months behind that originally mandated by Congress in the 1977 Amendments.<sup>376</sup> Also, the decision was applicable to *all* persons operating within the contested designation areas and thus had a much broader impact upon implementation of the CAA.

The approach taken by the D.C. Circuit was virtually identical to that taken by the Fifth Circuit. While ordering the challenged designations to be set aside and be reconsidered with proper notice and comment procedures, the court, like the Third and Fifth Circuits, sought to minimize interference with the goals of the CAA.<sup>377</sup> Like the Fifth Circuit, the court did not expressly limit these comment procedures to just the petitioners named in the case. The court did, however, mandate that the reconsideration period proceed as expeditiously as possible and order that "in no cases shall the stage of the reconsideration process extend beyond the time allotted for such stage by 42 U.S.C. § 7407 [§ 107]."<sup>378</sup> Thus, the D.C. Circuit took the broader remedial approach of the Fifth Circuit. It invalidated the contested designations as to *all* parties affected and ordered a new schedule well over two years behind that originally mandated by Congress in the 1977 Amendments.<sup>379</sup>

The tough dilemma faced by these three courts in fashioning an equitable remedy was clearly illustrated in criticisms of the Third and Fifth Circuit opinions made by the Seventh Circuit.<sup>380</sup> The courts were faced with a situation in which any remand of the contested designations by the courts had to throw the statutory schedule off target by well over a year. Since the original section 107(d) designations were due to be promulgated by the EPA on February 3, 1978, and the first of these circuit court cases was not decided until over fourteen months after that date,<sup>381</sup> any reconsid-

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376. This opinion came down on May 3, 1979, fifteen months after the original Feb. 3, 1978, deadline for promulgation of the § 107(d) designations. Adding anywhere from three to seven months to repromulgate the designations, the entire timetable was set back eighteen to twenty-two months.

377. *N.J. v. EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980).

378. *Id.*

379. The D.C. Circuit opinion was decided on June 30, 1980, approximately one year after the Third and Fifth Circuit opinions and almost twenty-seven months after the original deadline for the 107(d) designations. Thus, adding three to seven months for repromulgation of the listings, the D.C. Circuit outlined a timetable thirty to thirty-four months behind the original one set out in the 1977 Amendments.

380. *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289 n.11 (7th Cir. 1979).

381. The first opinion to come down was the Third Circuit's opinion of *Sharon Steel v. EPA*, 597 F.2d 377 (3d Cir. 1979), decided on April 25, 1979.

eration process will delay implementation by a minimum of fifteen months. In criticizing the decisions of the Third and Fifth Circuits, the Seventh Circuit stated "a remand at this point would intolerably delay the implementation of the statutory scheme and completely frustrate the Congressional purpose."<sup>382</sup> On the other hand, the three courts which failed to find good cause were also faced with the responsibility of upholding the integrity of the APA and protecting the rights of the injured parties. In an attempt to deal with this dilemma, the Third Circuit decided to protect the rights of just those parties who filed suit, viewing this as a compromise between the apparently conflicting goals of the APA and the CAA. However, in making this compromise, the court had to leave many affected parties without a remedy. This limited remedial approach was looked at critically by the Seventh Circuit which commented, "[i]f the rule is defective . . . we see no reason why anyone, whether they filed suit or not, should be subject to it."<sup>383</sup>

The three courts which found the EPA's action to be without good cause faced a no-win situation. Any remedy invoked by them would significantly delay implementation of the CAA, while any attempt to minimize this effect would deny remedial relief to aggrieved parties. In terms of implementing the CAA, there is no doubt that the Third Circuit's approach was the least disruptive. It appears that, in reaching this balance, the Third Circuit placed great weight on the CAA's policy of attaining healthy air by 1982. The court decided that this policy goal was more important than the rights of non-parties adversely affected by these designations.

The upshot of these cases has been to fragment greatly the 1977 Amendments' implementation process. One of the major goals of the CAA over the past ten years has been to have a unified national approach in which no region of the country will have an unfair economic advantage. Thus, under the 1977 Amendments, all areas with nonattainment problems were placed on an identical statutory schedule. However, as a result of this litigation over the section 107(d) designations, a number of the nation's AQCR's are on entirely different schedules for attaining NPAAQS for various criteria pollutants. For example, while most areas of the country are still required to attain NPAAQS by December 31, 1982, those AQCR's involved in the D.C. Circuit case do not have to attain their health based standard for ozone until some time in 1985. People living in those

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382. 605 F.2d 283, 289 n.11 (7th Cir. 1979).

383. *Id.*

regions of the country will be forced to breathe air considered unhealthy for over two years longer than the rest of the nation.

#### V. SUMMARY AND CONCLUSION

The split among the circuits over the validity of the section 107(d) designations has created a great deal of fragmentation and confusion in a number of areas. In a narrow sense, this litigation has created confusion over the application of various legal doctrines, most notably the APA's good cause exceptions and the CAA's section 307(d) scope of review provision. However, in a broader sense, the outcome of this litigation has been to undermine, to a significant extent, many of the goals which Congress sought to achieve in passing the 1977 Amendments to the CAA. The aftermath of this unfortunate litigation reveals that responsibility or blame cannot be placed in any one area. Yet, upon close examination, there are many important lessons to be learned from this litigation which have application to both the CAA and virtually all other environmental legislation.

Of the legal doctrines affected by this split among the circuits, the section 553 good cause exceptions were affected most profoundly. While the overall scope of these exceptions was in a somewhat muddled state prior to this litigation, one of the clearest lines of cases under the good cause exceptions had been the express deadline cases.<sup>384</sup> The earlier case law in this area had been virtually uniform in finding good cause for bypassing normal section 553 procedures whenever an agency did not have enough time to comply with these section 553 procedures and still meet the mandated deadlines. However, the Third, Fifth, and D.C. Circuits failed to find good cause despite the fact that the EPA could not comply with the section 553 procedures and still meet its ninety-day statutory deadline, putting this line of cases in a confused state. Also, this litigation has apparently created precedent in three circuits that severe health effects are not enough to justify good cause. This is an extremely disturbing development, especially in light of the fact that most cases involving economic urgency have been found to satisfy the requirements of these section 553 exceptions.<sup>385</sup>

A second legal doctrine left in a muddled state as a result of this litigation is the scope of review to be applied to agency actions under the CAA and, more specifically, the scope of CAA section 307(d). While the plain language of section 307(d) clearly states that the

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384. See text at notes 183-209 *supra*.

385. See text at notes 163-88 *supra*.

(d)(9)(D) review standard applies only to those actions under the CAA specifically listed in subsection (d)(1), the Seventh Circuit's unique interpretation of this section has left this view somewhat in doubt. By interpreting section 307(d) to apply, not only to section 107(d) designations, but to *all* EPA rulemaking as well, the Seventh Circuit has, in effect, made all EPA action under the CAA subject to the strict (d)(9)(D) standard of review. Thus, this decision makes the legality of various future action by the EPA under the CAA depend largely upon what circuit the issue is litigated in. While the Seventh Circuit's interpretation of section 307(d) can possibly be dismissed as dicta,<sup>386</sup> the fact remains that the court called it a "compelling" alternative holding, and thus it stands, at least arguably, as good law.

Other legal issues affected, to a lesser extent, by this litigation include the harmless error doctrine and the scope of remedial relief in rectifying improper administration action. Although the three courts which found a section 553 violation were unanimous in holding that the harmless error doctrine was not applicable, there is some language in the Sixth Circuit opinion, arguably dicta, suggesting that the post hoc comments received by the EPA were a reasonable alternative to normal APA rulemaking procedure. Thus, this opinion creates some confusion as to whether post hoc comments can be considered a reasonable alternative which makes harmless a violation of section 553 notice and comment rulemaking procedures. In addition, the Third Circuit's narrow approach to remedial relief creates some confusion as to which parties this relief should be granted when such relief could seriously undermine a congressionally mandated timetable.

While the legal confusion created in this litigation will certainly have important effects on the outcome of future litigation, at least of equal importance is the impact this litigation will have on the implementation of the CAA. One of the major goals of the CAA was the creation of a uniform nationwide approach towards attaining healthy air in America by the end of 1982. This nationwide approach was taken because air pollution knows no geographical limitations, and Congress wanted all citizens in the United States to be able to breathe clean air by a specified date.<sup>387</sup> In addition, Congress determined that such an approach would prevent a state from attaining an unfair economic advantage by having less stringent air quality stand-

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386. See note 343 *supra*.

387. See generally Quarles, *supra* note 32.

ards which would attract more industrial development in that state than in states with stricter standards.<sup>388</sup> However, largely as a result of this litigation, this uniform nationwide approach has been to a significant extent undermined. Rather than having the entire nation attain NPAAQS by December 31, 1982, now large segments of the country will still remain as nonattainment areas for various pollutants well into 1984 and 1985.

Another goal of the 1977 Amendments which has been undermined is the avoidance of excessive and unnecessary litigation. The legislative history indicated that one purpose of the 1977 Amendments was "to provide greater legislative guidance"<sup>389</sup> so as to avoid excessive court challenges which had led to long delays in implementation of earlier versions of the CAA. Section 307(d) of the 1977 Amendments, which made overturning of agency action quite difficult, was passed in pursuance of this goal. However, as these five cases demonstrate, excessive litigation still resulted.

The final and most significant goal of the 1977 Amendments undermined by this litigation is that of attaining NPAAQS nationwide by December 31, 1982. Congressional attempts to clean the air in the United States date back to 1955 with only partial success being registered during this twenty-six year period. Beginning with the introduction of the NPAAQS concept in the 1970 Act, Congress has been pursuing a standard based solely on public health for the past eleven years. Well aware of the severe health effects related to air pollution, Congress sought to attain "healthy air" by including a strict statutory schedule in the 1977 Amendments, requiring that NPAAQS be attained nationwide by 1982. However, the result of this litigation has been to essentially rewrite the 1977 Amendments in those circuits finding a section 553 violation. Rather than uphold Congress' urgent attempt to attain healthy air by the end of 1982, the Third, Fifth, and D.C. Circuits decided to create a new timetable two to three years behind that of the 1977 Amendments. Thus, persons living in these circuits will be forced to breathe unhealthy air long after the rest of the nation has ceased doing so.

In hindsight, it is clear that responsibility or blame for this controversial litigation must be pointed in a number of different directions. First of all, the legislative history and congressional drafting of section 107(d) were inadequate. Since Congress sought to elimi-

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388. *Id.*

389. H.R. REP. NO. 294, 95th Cong., 1st Sess. 2, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1079.

nate excessive litigation in the 1977 Amendments, one way in which it could have furthered this goal was to make clear whether the section 107(d) designations required normal section 553 rulemaking procedures. In this way Congress could have anticipated beforehand and eliminated this unnecessary litigation rather than relying on the courts to determine the applicability of the two good cause exceptions.

The second reason for the occurrence of this litigation is the ambiguity of the good cause exceptions themselves. While it is clear that Congress did not intend these two exceptions to be escape clauses, their actual scope has been a source of confusion and debate for over thirty years. Also during this time period, courts have been continually confused in trying to differentiate between the scope of the (b)(B) and (d)(3) exceptions. Since the five circuit cases involving section 107(d) designations have come to conflicting views on the applicability of these exceptions, as well as in interpreting the scope of the (b)(B) and (d)(3) exceptions, perhaps it is time for Congress to give more direct guidance on these questions. While it is normally the role of the courts to resolve such issues, it is clear that the ambiguity surrounding these concepts has made them largely counterproductive. Thus, the need for clarification of these concepts to avoid future ambiguity is great.

Another factor contributing to this unnecessary litigation was recalcitrance on the part of the steel industry. As indicated earlier in this discussion, many major American industries, most notably the steel industry, have continually sought refuge in the courts from meeting their obligations under the CAA. While much of this litigation by industry has been aimed at protecting its legitimate economic interests, some of it has been clearly unnecessary. This excessive recalcitrance on the part of the industry, and the steel companies in particular, was noted not only in the legislative history of the 1977 Amendments,<sup>390</sup> but also in the Sixth and Seventh Circuit opinions.<sup>391</sup> Both of these circuits determined that, when viewed in light of the long record of resistance in meeting their duties under the CAA, this action by the steel companies was merely another example of their procrastination. Thus, both courts refused to uphold the steel companies' argument, realizing that to do so would result in another two-year delay in implementing the CAA.

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390. See note 240 *supra*.

391. *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 287 n.5 (7th Cir. 1979); *Republic Steel Corp. v. Costle*, 621 F.2d 797, 799, 803 (6th Cir. 1980).



Also, in light of this long record of industry recalcitrance, one must question the general wisdom of the EPA's action here. While there does exist a strong legal basis for the EPA's argument that good cause was present to bypass normal section 553 procedures, in practical terms it may not have been a wise move to utilize these exceptions. Relying on past history, the EPA could reasonably have expected industry to challenge them on such an issue. In fact, as the Third Circuit case illustrates, the EPA had forewarning of the possible legal problems inherent in bypassing section 553 procedures and, thus, was well aware that this litigation might arise.<sup>392</sup> Thus, in order to implement the CAA as quickly as possible, the approximate two-month delay which would have occurred if section 553 procedures were followed may have been a small price to pay compared to the much longer delays likely to grow out of this litigation.

A final factor contributing to this unfortunate litigation is the lack of Supreme Court review. When the petitioners in the Seventh Circuit case applied for certiorari to the Supreme Court, many of the fragmenting effects of this litigation were readily apparent. Also, with the Sixth and D.C. Circuit cases yet to be decided, it appeared that this case was ripe for Supreme Court review. However, the Supreme Court disagreed, denying the steel companies' writ of certiorari and leaving the many issues presented in these cases without final resolution by the high court.

Yet, even in its denial of certiorari, the Supreme Court demonstrated the divisions and ambiguities which have arisen out of these cases. Writing for a three man dissent,<sup>393</sup> Mr. Justice Rehnquist recognized that the problem of tight statutory deadlines is one which occurs quite often with environmental legislation. In pointing out both the need for guidance in this area and also the need to rectify the more specific problem of differing interpretations of the good cause exceptions by the Third, Fifth, and Seventh Circuits, Mr. Justice Rehnquist stated:

In the area of environmental regulation, . . . tight statutory schedules are both quite common and frequently unmet. If EPA's actions in the present case pass without review by this Court, persons subject to EPA's jurisdiction in different parts of the country will be entitled to different procedural protections when either they or EPA find themselves up against a deadline.<sup>394</sup>

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392. *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 382 (3d Cir. 1979).

393. The three dissenting justices were J. Rehnquist, J. White, and J. Powell.

394. 100 S.Ct. 710, 711 (1980).

Also, in regard to the section 307(d) issue raised in the Seventh Circuit opinion, Rehnquist stated:

Although the Court of Appeals suggested that the promulgation of the list "arguably" could be characterized as one of those enumerated actions, it went well beyond the statutory language to hold that "Congress meant this limitation on review of procedural errors to extend to all rulemaking by the EPA whether or not it is in the explicit categories covered by the provision of section [307(d)]." . . . As petitioners point out, this ruling has the effect of establishing two Administrative Procedure Acts, one for the EPA and one for all other agencies.<sup>395</sup>

In concluding, Rehnquist demonstrated his belief in the need for Supreme Court review in this case by stating:

We can avoid invocation of our jurisdiction to resolve conflicts among the decisions of the Courts of Appeals construing important sections of the statute only by breaking faith with the spirit, if not the letter of those Acts of Congress making our jurisdiction in virtually all cases discretionary rather than obligatory. I therefore would grant the writ of certiorari.<sup>396</sup>

In conclusion, despite congressional efforts to the contrary, the CAA has once again become subject to many of the pitfalls which the 1977 Amendments desperately sought to avoid. Because of the five circuit court cases discussed in this article, the 1977 Amendments, like its numerous predecessors, have only met with partial success. However, as the CAA comes up for congressional review in 1981, there are many important lessons to be learned from this litigation.

First, if Congress is still intent on keeping its commitment to the public health concept, this review period will be the appropriate time to make this intent clear. This dedication to the public health concept can best be demonstrated by reaffirmance of the NPAAQS and deadline concepts thereby forcing the states to make as strenuous an effort as is reasonably possible to attain healthy air by a specified date. Certainly, many aspects of the CAA must undergo new cost-benefit analyses at this time and it is possible that in some cases certain deadlines may have to be extended. However, the overall importance of public health in terms of economic welfare as well as in social costs remains so great that this commitment should be reaffirmed.

Second, the long history of delay in attaining the goals of the CAA makes clear that the deadline concept is necessary in order to deal

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395. *Id.*

396. *Id.* at 712.

most effectively with the nation's air pollution problem. While this concept (i.e., technology-forcing) has not been completely effective, it is only since this concept was adopted in 1970 that significant progress has been made in cleaning up the nation's air. Thus, the current deadline approach should be retained with as little change as is reasonably possible.

Finally, Congress must reaffirm and tighten up its commitment to avoid excessive litigation under the CAA. By more clearly defining when certain actions should be exempt from APA rulemaking procedures and by expanding the list of actions covered by section 307(d), unnecessary litigation such as this can be avoided in the future.