Strategies to Overcome Agency Recalcitrance Under the Federal Clean Air Act: The Acid Rain Litigation Experience

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STRATEGIES TO OVERCOME AGENCY RECALCITRANCE
UNDER THE FEDERAL CLEAN AIR ACT: THE ACID RAIN
LITIGATION EXPERIENCE

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I. Introduction

A. Summary

In the 1970 and 1977 Clean Air Act amendments, Congress attempted to create a judicial safety net to assure that EPA would carry out its obligations under the Act. These "citizen suit" and judicial review provisions were put to the test during the past eight years when EPA, for ideological reasons, generally refused to implement key elements of the Act.

During this period, states and citizen groups filed lawsuits seeking to force EPA to take actions required under sections of the Act concerning interstate pollution, international pollution, national standards, tall smoke stacks, visibility protection, new source standards and air toxics. Many of these cases were brought to force EPA to address the problems of acid rain in the eastern states.

Repeatedly in these cases disputes arose concerning which court had jurisdiction over challenges to EPA inaction, in circumstances where it was unclear whether the agency's refusal to act constituted "final action" (reviewable in the Court of Appeals under § 307) or failure to carry out a "nondiscretionary duty" (enforceable in the district court citizen suit under § 304).

A great deal of litigants' and courts' time was wasted in jurisdictional battles that delayed, often indefinitely, a resolution on the merits of these cases. For many years, there was no clear direction from the courts on the question of whether district courts or courts of appeals had jurisdiction over agency inaction. Litigants were left guessing by conflicting precedents. EPA took advantage by defending cases, no matter where brought, with the argument that the cases should be in another court (or in no court at all).

Although the plaintiffs prevailed in the actions to force EPA to revise tall stack regulations and to complete rulemaking on revisions to the sulfur oxides standards, many cases foundered in a jurisdictional quagmire, allowing EPA to escape its responsibilities under the Act.

In denying relief, several decisions from the period 1987-1989 severely limited access to the federal courts under either §§ 304 or 307 to overcome EPA's refusal to carry out requirements of the Clean Air Act. The Act's judicial safety net against EPA
recalcitrance is badly in need of repair. The judicial review and
citizen suit sections of the Act often no longer serve as an
effective guarantee that the Act will be implemented by EPA.
Important parts of Act have been crippled by judicial acquiescence
in agency inaction and the executive branch has been allowed to
ignore the congressional directives essential to a healthy
environment.

Congress is now considering sweeping amendments to the
Federal Clean Air Act to address the problem of acid rain, air
toxics and the widespread failure of the states to attain national
air quality standards. These amendments would impose many new
duties and obligations upon the Environmental Protection Agency.
Unfortunately these amendments may suffer the same fate that has
crippled many important provisions of the 1970 and 1977
Amendments. Unless there are also changes to the citizen suit and
judicial review provisions of the Act, there will be no assurance
that Congress' new directives will be obeyed by EPA or enforced by
the courts.

Changes to the citizen suits and judicial review provisions
of the Act have been included in several bills under consideration
in the House and Senate. Most promising is the language being
developed in the Senate Subcommittee on Environmental Protection.
The bill would correct several court access problems created by
decisions of the U.S. Courts of Appeals and would provide new
remedies to overcome EPA inaction on important air pollution
problems.

The revised language would reinvigorate the federal courts as
a forum to challenge EPA inaction. The amendments would expand
the scope of what constitutes a "nondiscretionary duty" under the
citizen suit provisions of § 304, and provide an enforceable
deadline for EPA to respond to petitions for rulemaking. The
amendments would retain the current and troublesome bifurcation of
jurisdiction between the district courts and Courts of Appeals,
but would clarify the jurisdictional boundary lines between the
district courts and courts of appeals, to eliminate some of the
guesswork and uncertainty in choosing a forum for challenges to
EPA inaction.

Support is needed for these changes from states and public
interest groups. Currently, most lobbying efforts are focused on
amendments to the substantive provisions of the Act. Greater
attention must be devoted to the judicial enforcement mechanisms
of the new law.
## B. General References

### 1. Judicial Decisions

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<td>New York v. U.S.E.P.A., 716 F.2d 440 (7th Cir. 1983)</td>
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<td>New York v. EPA, 710 F.2d 1200 (6th Cir. 1983)</td>
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<td>State of Ohio v. Ruckelshaus, 776 F.2d 1333, 1338 (6th Cir. 1985)</td>
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<td>NRDC v. Thomas, D.C. Cir. Docket No. 87-1438 (to be argued 12/14/89)</td>
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<td>State of Vermont v. Thomas, 850 F.2d 99 (2d Cir. 1988)</td>
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Air Toxics  


New Source Performance Standards  

Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987)

2. **Legislative Proposals Containing Changes**  
   **To Citizen Suit and Judicial Review Provisions of CAA**

S. 1630, "Clean Air Restoration and Standards Act of 1989", Section 309 (Baucus, Chaffee).

H. 2585, "Air Toxics Control Act of 1989," Section 6(12), (13), (16), and (17) (Leland, Molinari).

II. **STRATEGIES TO OVERCOME AGENCY INACTION UNDER THE CLEAN AIR ACT**

A. Many provisions of the 1977 version of Clean Air Act impose duties on EPA to address long range and regionwide pollution problems such as acid rain.

   Interstate Air Pollution  
   42 U.S.C. §§ 7410(a)(2)(E), 7426 (§§ 110, 126)

   International Air Pollution  
   42 U.S.C. § 7415 (§ 115)

   Tall Stacks Air Pollution  
   42 U.S.C. § 7423 (§ 123)

   National Standards  
   42 U.S.C. §§ 7408; 7409 (§§ 108, 109)

   Visibility Impairment  
   42 U.S.C. § 7491 (§ 169A)

   Air Toxics  
   42 U.S.C. § 7412 (§ 112)

   New Source Performance Standards  
   42 U.S.C. § 7411 (§ 111)

B. Many of these are generic provisions which are intended to redress a broad category of air pollution problems. Typically
they provide that the Administrator "shall" take abatement action (by setting national standards, or issuing abatement notices to states) whenever threshold findings or facts establish that air pollution is harming health or the environment. The challenge facing Clean Air advocates during the Reagan administration, was how to force EPA to act when it either refused to acknowledge obvious harm, or acknowledged the harm but refused to take required abatement action. Examples include:

1. EPA recognizes under § 115(a) that U.S. emissions harm Canada (in form of acid rain), but refuses to issue notices requiring states to take abatement action.

2. EPA recognizes in § 108 criteria documents that SO2 and particulate matter emissions cause harm to "welfare" in the form of acid rain, but refuses to set national ambient air quality standards under § 109 to protect against "any" adverse effect of regulated pollutants.

3. EPA recognizes that certain air toxic emissions are cancer causing, but refuses to set NESHAPS standards under § 112.

C. Aside from such generic provisions, the 1977 amendments also directed EPA to address specific pollution problems. Examples include tall stacks, visibility impairment and nonattainment provisions. During the Reagan Administration, EPA often refused to promulgate regulations to implement these provisions or devised pro forma regulations that did not achieve the emission control objectives of the Act. Examples include EPA's refusal to establish regional haze regulations under § 169A, its tall stack regulations that have twice been remanded by the D. C. Circuit, and its failure to issue § 110(c) notices to states requiring modifications of nonattainment plans.
D. Recent court decisions have tended to reject challenges to EPA inaction and have narrowed the scope of the citizen suit and judicial review provisions of the Act.

1. The D.C. Circuit and Second Circuit decisions appear to limit citizen suit jurisdiction to enforcement of "ministerial" duties for which Congress has imposed a specific deadline for compliance. *Sierra Club v. Thomas* (NSPS decision) and *EDF v. Thomas* (§ 109 case). Many duties imposed upon the Administrator by existing law and in proposed legislation involve far more than simple ministerial acts and are not subject to a particular deadline.

2. D.C. Circuit and First Circuit cases encourage EPA to try to duck judicial scrutiny by labeling its decisions as deferral of action, based on uncertainty in the science of air pollution control. Illustrative of this trend are the decisions in *State of New York v. EPA* (§ 126), *State of Maine v. Thomas* (visibility case) and EPA's arguments in *NRDC v. Thomas* (pending challenge to particulate matter standards). But see *Abramowitz v. EPA* (9th Circuit) (court rejects EPA deferral claim).

3. D.C. Circuit and Second Circuit cases largely eliminate district courts from enforcing duties which flow from threshold findings of harm. *Thomas v. State of New York* (§ 115), and *NRDC v. Thomas* (Second Circuit air toxics decision).

4. Excessive judicial deference to EPA judgment and expertise can cripple important provisions of the Act, as illustrated by the outcome in *State of New York v. EPA* (§ 126 case). Contrast that decision with the D.C. Circuit's close scrutiny of EPA "impossibility of performance" and deference defenses in the stack height cases.

E. In many instances these cases leave Clean Air Act advocates with only a very inadequate route toward relief involving a petition for rulemaking, a subsequent "unreasonable delay" case in the Court of Appeals and finally a judicial review proceeding that is booby trapped with finality and deference defenses.
F. Implications of these decisions in other areas of the Clean Air Act and in regard to the proposed amendments to the Act.

1. Examples of other provisions of the existing law which depend upon a threshold finding. 42 U.S.C. §§ 7408, 7409, 7410(a)(2), 7412, 7411, 7426, 7521(a)(1), 7541(b)(c), 7457, 7571(a)(2).

2. Examples of provisions of existing law that impose a duty to act without specifying a deadline for action. 42 U.S.C. §§ 7411(d)(existing source standards), 7412(revisions to standards), 7415 (international air pollution notices), 7475(d), 7521(a)(1)(revision of motor vehicle emission standards), 7521(d)(vehicle useful life regulations), 7525(motor vehicle testing).

3. Examples from the "Lent Substitute" proposed amendments.
   - no deadline for revisions of hazardous emissions standards(§ 301);
   - threshold finding required for 50% of hazardous emission source standards and for regulation of residual risks(§ 301);
   - calls for non-attainment plan revisions are not subject to a deadline, and rely upon a threshold finding of administrator regarding inadequacy (§ 101e);
   - no deadline for imposing sanctions for failure to submit an approvable nonattainment plan (102g);
   - no deadline for promulgation of regulations to control evaporative emissions from motor vehicles(§ 205);
   - no deadline for mobile source toxics regulations(§ 206);
   - no deadline for promulgation of no-board diagnostic regulations (§ 207);
   - threshold determination necessary to trigger regulations to protect Great Lakes from air toxics (§ 301n);
G. Proposals for amending the judicial review and citizen suit provisions of the Act would eliminate many of these problems.

1. Expand the scope of the term "nondiscretionary" in § 304 to include duties for which no deadline is imposed and clarify that district courts may compel EPA to act even though the unfulfilled duty involves an exercise of judgment by the Administrator on complex or scientific matters (e.g. more than simply "ministerial" duties, as suggested by the 2nd Circuit decision in EDF v. Thomas).

2. Ensure that final decisions to defer action are reviewable either by Court of Appeals or District Court at the plaintiffs' option.

3. Ensure that district courts may inquire as to the existence of threshold findings or facts in determining whether a nondiscretionary duty to act exists.

4. Provide district court jurisdiction to correct instances where EPA has unreasonably delayed taking action, thereby avoiding jurisdictional confusion and delays caused by the Court of Appeals' assumption of jurisdiction over such cases in Sierra Club v. Thomas.

5. Provide a time limit under which EPA must respond to petitions for rulemaking, and thereby speed citizen suit or judicial review actions to compel EPA to take actions required by the Act.

H. Describe status of § 304 and § 307 amendments in House and Senate, with call for support by scholars, states and citizen groups.

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PROPOSED AMENDMENTS TO THE CLEAN AIR ACT CONCERNING CITIZEN SUITS AND PETITIONS

I. Section 304(a) is amended as follows:

1. Paragraph (2) is amended to read as follows:

"(2) against the Administrator where there is alleged a failure to unreasonable delay, or a failure to perform a nondiscretionary duty, prov. failure to act does not include a written decision not to take action which designates, within such decision, as a final action within the meaning of s

2. by inserting after "to perform such act or duty," the following:

"or to compel agency action unreasonably delayed,"; and

3. by adding at the end thereof the following:

"For the purposes of paragraph (2), the district court has jurisdiction to compel performance of a nondiscretionary duty regardless of whether the Act assigns a specific deadline or time period for performance, and regardless of whether the act to be performed involves an exercise of the Administrator's judgment or technical expertise. Where a provision of the Act mandates that the Administrator shall take specified action when certain preconditions are met, (A) the court's power to compel the specified action under paragraph (2) shall not depend in any manner upon whether the Administrator has published in the Federal Register a proposed or final determination that the threshold preconditions are met, and (B) the court may inquire into and determine such facts as are necessary to adjudicate whether the threshold preconditions are met."

II. Section 307(b) is amended by adding the following at the end thereof:

"(3) Where a final decision by the Administrator undertakes to perform an action, but defers such performance to a later time, any interested person may either challenge the deferral pursuant to paragraph (1) or bring an action at any time under section 304(a)(2) to compel such performance.

III. Section 307 is amended by adding the following new subsection at the end thereof:

"(h) Petitions. — Any person may petition the Administrator to issue, amend, reconsider, or repeal any regulation or order under the authority of this Act. Within six months the Administrator shall either grant the petition or issue a final decision denying the petition, except that in the case of a petition for reconsideration under section 307(d)(7)(B), the Administrator shall grant or deny the petition within four months. In any case in which the Administrator grants a petition, the Administrator shall take final action in response to any such petition within a reasonable time."
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<th>Case Name</th>
<th>Status</th>
<th>Plaintiffs or Petitioners</th>
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<tr>
<td>Interstate Air Pollution</td>
<td>Supreme Court denies (March 6, 1989) petition for writ of certiorari seeking reversal of EPA and July 1988 court decisions refusing to order emission reductions at midwest sulfur dioxide sources which cause violations of national air quality standards in Pennsylvania, New York and Maine.</td>
<td>NY, PA, ME, NH, VT, MA, CN, NJ</td>
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<td>Tall Stacks Regulation</td>
<td>U.S. Court of Appeals in Washington overturned EPA regulations, for the second time, in January, 1988. EPA under new administration will have to rewrite regulations that could lead to sulfur dioxide emissions at midwestern plants with tall stacks</td>
<td>NRDC, EDF, Sierra, NY, CN, ME, MA, NH, NJ, RI, VT</td>
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<td>Visibility protection</td>
<td>U.S. Court of Appeals dismisses on May 19, 1989 States' litigation to force EPA to write regulations to reduce haze conditions in national parks -- regulations would lower sulfur dioxide emissions. Case affirms an earlier adverse decision of U.S. District Court (July 1988).</td>
<td>ME, VT, NY, MA, NJ, CN, RI, Sierra, NRDC, E.D.F., C.L.F., Audubon</td>
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<td>International Air Pollution</td>
<td>Petition for Rulemaking (filed April 1988) under § 115 of Clean Air Act denied by EPA on October 14, 1988. EPA declares that it doesn't have sufficient information to decide whether acid rain is causing harm to Canada and NE states. Appeal of decision filed by Ontario and Sierra Club on 11/1/88. States filed similar suit on November 21, 1988. Rulemaking Petition was filed in response to adverse decision of U.S. Court of Appeals in State of New York v. Thomas, 802 F.2d 1443 (D.C. Cir. 1986)</td>
<td>NY, MN, CN, VT, NH, MA, NJ, ME, RI, Ontario, DC, Sierra, Audubon, Isaak Walton League, National Wildlife</td>
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<td>National Air Quality Standards</td>
<td>-- 2 cases --</td>
<td>EDF, NY, CN, NH, MA, VT, MN, RI, NRDC, Sierra</td>
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<td>(§§ 108-109, Clean Air Act, 42 U.S.C. §§ 7408, 7409)</td>
<td>(1) U.S. Court of Appeals in New York City directs EPA to make a decision whether or not to revise the national air quality standard for sulfur dioxide to address acid rain. Case reverses an adverse decision of U.S. District Court (April, 1988). Decision of Court of Appeals is issued on March 23, 1989. Case is remanded to District Court for it to set a deadline for EPA action on national standard.</td>
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<td>(2) Challenge filed in September 1987 to EPA's refusal to consider acid rain effects when it revised the National Particulate Matter Standard. Case to be argued in U.S. Court of Appeals in December, 1989.</td>
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