

# Jnrisdiction to Review Agency Inaction Under Federal Environmental Law

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## I. INTRODUCTION: THE "CONFUSED CLASS OF CIRCUMFORANEOUS LITIGANTS"

The Clean Air Act Amendments of 1970 and the Federal Water Pollution Control Act Amendments of 1972 are cornerstones of modern federal environmental law. The two Acts contain many provisions which have served as models for later environmental legislation, including unique sections authorizing citizens to enforce the provisions of these laws through litigation brought in federal court.<sup>1</sup> This practice of enforcement through so-called "citizen suits"<sup>2</sup> became the norm<sup>3</sup> for later environmental legislation.<sup>4</sup>

The most celebrated feature of these enforcement provisions is the authorization they give to private individuals to bring suit directly against private entities and individuals who are allegedly violating air pollution standards, water pollution standards, or other similar statutory standards. This aspect of the citizen suit provisions has attracted extensive scholarly commentary<sup>5</sup> and been

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1. See Clean Air Act ("CAA") §§ 304(a)(1), 307(b)(1), 42 U.S.C. §§ 7604(a)(1), 7607(b)(1) (1994); Clean Water Act ("CWA") §§ 505(a)(1), 509(b)(1), 33 U.S.C.A. §§ 1365(a)(1), 1369(b)(1) (West 1995 & Supp. 1996).

2. See, e.g., MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1991); JEFFREY G. MILLER & ENVIRONMENTAL LAW INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987); Symposium, *Citizen Suits: The Privatization of Environmental Law Enforcement*, 8 J. ENVTL. L. & LITIG. 253 (1993).

3. A debate, however, exists over whether such suits are preferable from a policy standpoint. Compare David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1561 (1995) (arguing that "only extensive use of citizen suits as private attorneys general can safeguard the enforcement system from collapse and prevent states from using lax environmental enforcement as an economic development tool") and Michael D. Axline & Patriek C. McGinley, *Universal Statutes and Planetary Programs: How EPA Has Diluted the Clean Water Act*, 8 J. ENVTL. L. & LITIG. 253, 287 (1993) ("Citizen enforcement compensates, to some extent, for EPA's inadequate resources. Citizen enforcement is also necessary, however, because EPA is an agency, and like any agency it is subject to capture, self-interested decisionmaking, and institutional agendas that differ from those of Congress.") with Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Dependent Values*, 22 GA. L. REV. 337 (1988) (arguing that citizen suits do not promote the intended policy interests) and Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990) (Citizen suit provisions in their present form cannot promote the policy goals they are ostensibly intended to serve.).

4. See, e.g., Toxic Substances Control Act, 15 U.S.C.A. § 2619 (West 1995 & Supp. 1996); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994); Noise Control Act, 42 U.S.C. § 4911 (1994); Resources Conservation and Recovery Act, 42 U.S.C. § 6972 (1994); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (1994); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046 (1994).

5. See, e.g., LISA JORGENSON & JEFFREY J. KIMMEL, BUREAU OF NATIONAL AFFAIRS, ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION (1988); Peter A. Alpert, *Citizen Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?*, 16 B.C. ENVTL. AFF. L. REV. 283 (1988); Michael D. Axline et al., *Stones for David's Sling: Civil Penalties in Citizen Suits Against Polluting Federal Facilities*, 2 J. ENVTL.

the subject of a significant amount of litigation.<sup>6</sup> Congress, however, also set out at least two other functions in these statutes: the authorization of judicial review of actions taken by the Environmental Protection Agency (“EPA”)<sup>7</sup> and the empowerment of citizens to force a recalcitrant EPA to act.<sup>8</sup> As a means to implement these two functions, Congress created a “bifurcated” jurisdictional structure. Thus, under both laws the United States district courts have jurisdiction over “action-forcing” suits, brought by citizens against EPA’s

L. & LITIG. 1 (1987); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833 (1985); Marcia R. Gelpe & Janis L. Barnes, *Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1025 (1990); Charles N. Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?*, 15 WM. MITCHELL L. REV. 327 (1989); Patrice Scatena, *Gwaltney of Smithfield v. Chesapeake Bay Foundation: A New Form of Subject Matter Jurisdiction Under Section 505 of the Clean Water Act?*, 19 ENVTL. L. 119 (1988); Beverly M. Smith, *The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 40 CASE W. RES. L. REV. 1 (1989-90); Robert D. Snook, *Environmental Citizen Suits and Administrative Discretion: When Should Government Enforcement Bar a Citizen Suit?*, NAT'L ENVTL. ENFORCEMENT J., April 1995, at 3; Sharon Elliott, Comment, *Citizen Suits Under the Clean Water Act: Waiting for Godot in the Fifth Circuit*, 62 TUL. L. REV. 175 (1987); Philip Key, Note, *Gwaltney of Smithfield v. Chesapeake Bay Foundation: Subject Matter Jurisdiction and Citizen Suits*, 19 ENVTL. L. 93 (1988); Diana L. Lee, Note, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: Its Implications for Citizen Suits Under the Clean Water Act*, 16 ECOLOGY L.Q. 571 (1989); James L. Thompson, Note, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656 (1987); L. Ward Wagstaff, Note, *Citizen Suits and the Clean Water Act: The Supreme Court Decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 1988 UTAH L. REV. 891; Colleen M. Wolter, Note, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: The Supreme Court Disallows Citizen Suits for Wholly Past Violations of the Clean Water Act*, 3 ADMIN. L.J. 425 (1989); Joel A. Waite, Comment, *The Continuing Questions Regarding Citizen Suits Under the Clean Water Act: Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 46 WASH. & LEE L. REV. 313 (1989); Lance L. Shea, Note, *Gwaltney of Smithfield v. Chesapeake Bay Foundation: Balancing Interests Under the Clean Water Act*, 25 SAN DIEGO L. REV. 857 (1988).

6. See, e.g., MILLER, *supra* note 2 (extensively discussing the use of citizen suits).

7. Most federal environmental statutes call for action by the Administrator of the EPA. See, e.g., 33 U.S.C. § 1314(a)(1) (1994) (Administrator must adopt water quality criteria reflecting latest scientific knowledge.); 42 U.S.C. § 7408(a)(2) (1994) (Administrator shall issue air quality criteria for listed pollutants.). In practice, decisions by the Administrator are often referred to as “EPA” decisions, and plaintiffs litigating those decisions routinely have named both the agency and the Administrator as defendants. In this Article, the terms are used interchangeably.

8. See *Natural Resources Defense Council v. EPA*, 512 F.2d 1351, 1355 (D.C. Cir. 1975) (“Although the major emphasis throughout the development of section 304 was on its role as a vehicle for enforcement of established standards, courts have read it to cover the Administrator’s failure to take other steps required of him, such as the promulgation of implementation plans or standards within a specified time.”); *O’Leary v. Moyer’s Landfill, Inc.*, 523 F. Supp. 642, 647-48 (E.D. Pa. 1981) (“The [Clean Water] Act authorizes citizen suits against (1) those alleged to be ‘in violation’ of the Act’s limitations, and (2) the Environmental Protection Agency (EPA), through its administrator, upon the EPA’s failure to perform a non-discretionary act.”).

Administrator, alleging a failure to perform a “nondiscretionary act” required by law,<sup>9</sup> while the federal courts of appeals have jurisdiction to review “final actions” of the Administrator.<sup>10</sup>

This bifurcated jurisdictional structure<sup>11</sup> is intended to ensure agency adherence to statutory requirements by authorizing citizen actions to compel compliance and to expedite judicial review of final agency actions. Over the past two decades, however, those purposes have often been lost in a confusing maze of case law construing the jurisdiction statutes.<sup>12</sup> Courts have often struggled to separate agency inaction that is part of a “final action,” and which thus is reviewable only in the court of appeals, from an agency’s failure to take “nondiscretionary” action, which only the district courts can remedy.<sup>13</sup> In the process, some courts have commented on the disarray presented by their decisions, for example, by referring to parties as “circling in a Sargasso Sea of jurisdictional boundaries, out of reach of the substantive review they seek”;<sup>14</sup> as a “confused class of circumforaneous litigants, wandering perplexedly from forum to forum in search of remediation”;<sup>15</sup> and as plaintiffs forced to “spin the wheel of jurisdictional fortune”<sup>16</sup> in their attempts to seek judicial review.<sup>17</sup>

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9. See CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2) (1994); CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2) (1994).

10. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (1994); CWA § 509(b)(1), 42 U.S.C.A. § 1369(b)(1) (West Supp. 1996).

11. As in the CAA and CWA, the jurisdictional concept of direct review in the court of appeals has been replicated in other environmental laws. See, e.g., 42 U.S.C. § 6976(b) (1994) (review under the Resource Conservation and Recovery Act).

12. See, e.g., *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 518 (2d Cir. 1976) (“It would be too much to say that we construe this confusing statute [§ 509(b)(1) of the CWA] with confidence.”). For an early view of the problems created by the statutes, see David P. Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221 (1977).

13. See, e.g., *Utah Power & Light Co. v. EPA*, 553 F.2d 215, 217 (D.C. Cir. 1977) (noting that the jurisdictional provisions of the CAA have been the sources of periodic confusion) (citing *District of Columbia v. Train*, 533 F.2d 1250, 1252 (D.C. Cir.), cert. granted, 426 U.S. 904 (1976)).

14. *NRDC v. Administrator, EPA*, 902 F.2d 962, 993 (D.C. Cir. 1990) (Edwards, J., concurring and dissenting), vacated in part and dismissed in part by 921 F.2d 326 (D.C. Cir. 1991). The “Sargasso Sea” is an area of the North Atlantic Ocean encompassing the Bermuda islands that is strewn with free-floating seaweed. The sea was first mentioned by Columbus, who crossed it on his initial voyage in 1492. Many early navigators had the unfounded fear of becoming entangled with the mass of floating vegetation. 10 *New Encyclopedia Britannica* 452 (15th ed. 1997). The Sargasso Sea has been used as a metaphor for difficult legal navigational issues in a number of judicial opinions. See *Albernaz v. United States*, 450 U.S. 333, 343 (1981) (Rehnquist, J.) (Decisional law in the area of double jeopardy is “a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.”); *Hunter v. State*, 430 A.2d 476, 480 n.2 (Del. 1981) (defining the Sargasso Sea in a case that was remanded for reconsideration in light of *Albernaz*); *State v. Haggard*, 619 S.W.2d 44, 49-50 n.3 (Mo. 1981) (quoting definition of the Sargasso Sea).

15. *Maine v. Thomas*, 874 F.2d 883, 884-85 (1st Cir. 1989).

16. *Save the Bay, Inc. v. Administrator, EPA*, 556 F.2d 1282, 1292 (5th Cir. 1977).

17. See also *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313-14 (9th Cir. 1992):

The complexity of our exegesis [on jurisdiction] necessarily gives us pause about its correctness. We see strength in the argument of Longview Fibre that the EPA

While the judicial language is colorful, the confusion over the jurisdictional boundaries in cases of agency inaction has adversely affected the administration of federal environmental law. One effect is the sheer waste of resources expended in litigation over the proper forum for a dispute. For example, in some cases parties have filed lawsuits to protect against possible jurisdictional error in their choice of court,<sup>18</sup> and in at least one instance a plaintiff moved to dismiss its own petition in order to secure a judicial determination about the jurisdictional correctness of that choice.<sup>19</sup> Parties who have guessed incorrectly may find themselves out of court entirely, as the short statute of limitations in the Clean Air Act ("CAA") and Clean Water Act ("CWA")<sup>20</sup> can preclude filing a later action in the proper court or raising issues in subsequent proceedings.<sup>21</sup>

Most importantly, as instances of EPA inaction have increased over the past decade,<sup>22</sup> the confusion has undermined a primary purpose of the judicial review statutes. Instead of increasing EPA's accountability through citizen-initiated

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construction unwisely fragments the process of review. . . . [T]remendous resources in time and money and considerable legal skill have gone into finding out the proper address for an appeal, an activity which does not keep water clean and does not process wood pulp.

Bethlehem Steel Corp. v. EPA, 538 F.2d 513, 518 (2d Cir. 1976) ("The jurisdictional question is a difficult one. Several courts, including this one, have commented previously on the jurisdictional and substantive problems presented by the FWPCA [Federal Water Pollution Control Act] . . .").

18. Roll Coater, Inc. v. Reilly, 932 F.2d 668, 671 (7th Cir. 1991) (noting that "careful counsel must respond to the combination of uncertain opportunities for review and § 509(b)(2) by filing buckshot petitions [for review]").

19. See Lubrizol Corp. v. EPA, 562 F.2d 807, 811 (D.C. Cir. 1977) (Petitioner filed actions in both the district court and the court of appeals, but petitioner "consistently has argued that original jurisdiction to review the particular regulation at issue . . . lies with the federal district courts . . .").

20. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (West 1995) (60 days); CWA § 509(b)(1), 33 U.S.C.A. § 1369(b)(1) (West 1994) (120 days).

21. See, e.g., Westvaco Corp. v. EPA, 899 F.2d 1383, 1387 (4th Cir. 1990) (Westvaco "candidly profess[ed] its uncertainty about the immediate reviewability of the EPA actions challenged here, hence its fear that failure to seek review now might preclude its right to have the action reviewed in later enforcement proceedings . . ."); Monsanto Co. v. EPA, 19 F.3d 1201, 1203 (7th Cir. 1994) ("[A]s Monsanto's counsel pointed out in oral argument, § 307 virtually compelled the company to seek an immediate review of the agency's denial of the waiver or it would lose the defense.").

22. See MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 245-50 (1990) (describing efforts by the Reagan Administration to curtail environmental regulation). EPA's actions are part of a larger trend toward inaction by administrative agencies generally, particularly in the late 1980s and early 1990s. See Patricia M. Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 522 (1988) (characterizing this period of regulatory law as "the era of 'nonregulation'").

lawsuits, the uncertainty has hindered the attainment of that goal.<sup>23</sup> In the words of one judge, the courts sometimes have played a game of “jurisdictional badminton” with a plaintiff’s action between the court of appeals and the district court.<sup>24</sup> In the worst cases, EPA has employed the statutes as a means of avoiding judicial review of its actions by raising inconsistent arguments over jurisdiction in different forums.<sup>25</sup>

This Article examines the bifurcated jurisdiction provisions in the CAA and CWA, the two laws that served as the model for much of the later environmental legislation, and suggests how those provisions should be interpreted in cases of agency inaction. After first summarizing the pertinent statutes, the Article identifies the statutory language and concepts in the review provisions that have proved most troublesome and then discusses the judicial construction of those provisions. The Article then identifies a set of criteria that can be used to evaluate the judicial approaches, including congressional intent derived from the legislative history of the Acts as well as policies necessarily implicated by the review provisions. Finally, the Article applies the criteria to the statutory provisions in question and determines which judicial approach to the statutes best comports with those criteria.<sup>26</sup>

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23. The problem of determining jurisdiction can harm both regulated industry and environmental plaintiffs who seek judicial review. Industry, for example, may be uncertain whether preliminary action taken by the agency is reviewable in the district court or the court of appeals. In general, however, environmentalists rather than industry tend to seek judicial review when the agency has not acted. Accordingly, the problem of determining the correct jurisdiction is more pressing for environmental interests than for industry.

24. *NRDC v. EPA*, 512 F.2d 1351, 1361 (D.C. Cir. 1975) (Wright, J., concurring and dissenting).

25. *See Bethlehem Steel Corp. v. EPA*, 782 F.2d 645 (7th Cir. 1986) (Swygert, J., dissenting):

The EPA’s purposeful evasion of its statutory mandate is evidenced by the fact that it has attempted to insulate its inaction from judicial review. In a virtually identical action filed in the Northern District of Illinois . . . the EPA moved the district court to dismiss CBE’s claim that the EPA had failed to perform its nondiscretionary duty . . . to promulgate regulations on the ground that the district court lacked subject matter jurisdiction. The district judge denied EPA’s motion. After the EPA had taken final action on a revised Illinois [State Implementation Plan (“SIP”)], CBE sought an order from the district court, under Section 304, compelling the EPA to perform its nondiscretionary duty to commence rulemaking . . . . Once again the EPA moved to dismiss CBE’s claims, arguing that jurisdiction belonged in the court of appeals because the EPA had taken final action with respect to an Illinois revised SIP. The district judge agreed. . . . CBE filed the instant action in this court seeking review of similar claims regarding the Indiana SIP and agreed to settle its district court claims without an adjudication of the merits. The EPA then argued in this action that jurisdiction properly belongs in the district court .

*Id.* at 663-64.

26. Citizen suits are subject to a growing number of other constraints which may prevent courts from hearing them. Most significantly, the Supreme Court has held that Congress cannot, consistent with Article III of the United States Constitution, grant universal standing to citizens under an environmental statute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *See, e.g.*, Harold Feld, *Saving the Citizen Suit: The Effect of Lujan v. Defenders of*

The Article concludes that judicial review should be available after the agency has completed a cycle of proceedings, such as a rulemaking or other self-contained procedural process. Of the possible approaches to judicial review, this approach optimizes the various policy considerations at stake in judicial review of agency inaction. Most significantly, it assures predictability for litigants, results in timely review of agency decisionmaking, and promotes agency accountability. At the same time, if used in a sensitive manner this approach will not unnecessarily intrude on agency autonomy, another primary policy goal of the judicial review statutes. Finally, this approach is consistent with the indications of congressional intent found in the legislative history of the judicial review provisions of the CAA and CWA, particularly the more extensive history of the 1990 amendments to the CAA.

## II. THE JUDICIAL REVIEW MODEL AND THE CONCEPT OF BIFURCATED JURISDICTION

The 1990 amendments to the CAA and the 1987 amendments to the Federal Water Pollution Control Act ("FWPCA") contained provisions for judicial review of decisions by the Administrator of EPA. Those provisions established a "bifurcated" scheme for judicial review in which some decisions are directly reviewable in the United States courts of appeals, while others are cognizable only in the district court. The uncertainty in the statutory language, however, has been the source of considerable confusion over how the bifurcated jurisdiction is intended to operate.

### *A. The Clean Air Act*

#### 1. The 1970 Amendments

Section 304 of the 1970 Amendments to the CAA authorizes two different types of suits by private individuals to enforce the Act. First, a private citizen can bring suit against "any person" (a term defined to include the United States and other government agencies to the extent permitted by the Eleventh Amendment) who is alleged to be in violation of an emission standard or limitation, or an order issued by the EPA Administrator. Second, any person can sue the Administrator "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."<sup>27</sup>

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*Wildlife and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141 (1994); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). Most recently, the Court has expanded state immunity under the Eleventh Amendment in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), a decision which probably means that states cannot be the subject of citizen suits brought in federal court.

27. CAA § 304, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1991-92 (1970) (current version at 42 U.S.C. §§ 7604(a)(1), (2) (1994)). The statute read in pertinent part:

(a) Except as provided in subsection (b), any person may commence a civil action



Section 304 of the Amendments thus separated the types of lawsuits authorized into two classes. The first class concerns enforcement situations in which a source is violating specified standards or orders, while the second class is intended to compel action by EPA.<sup>28</sup> Section 304 also addressed various procedural matters pertinent to these classes of litigation, including a requirement that a plaintiff must give sixty days notice to the proposed defendant before filing suit.<sup>29</sup>

In addition, the 1970 Amendments included section 307, which concerned petitions for judicial review of actions taken by the Administrator. This section first declared that a petition for review of many of the Administrator's actions listed in the statute "may be filed only in the United States Court of Appeals for the District of Columbia."<sup>30</sup> Section 307 then stated that a petition for review of the Administrator's action in approving or promulgating a state implementation plan ("SIP"), or taking other specified actions, "may be filed only in the United

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on his own behalf—

- (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
- (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

28. See Theodore L. Garrett & Sonya D. Winner, *A Clean Air Act Primer: Part III*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,301, 10,314 (1992) ("[S]ection 304 has been invoked by a variety of parties, including environmental groups, industry, and even state agencies, to compel EPA to comply with its nondiscretionary obligations under the Act, including the promulgation of regulations and the review of SIPs.").

29. CAA § 304, Pub. L. No. 91-604, § 12, 84 Stat. 1676, 1706 (1970) (current version at 42 U.S.C. § 7604 (1994)). Pre-filing notice was not required for certain specified types of violations, and an action could not be brought if the Administrator or state "has commenced and is diligently prosecuting a civil action." *Id.* The statute also established venue requirements, authorized intervention by the Administrator if he or she was not a party to the action, and specified costs that could be recovered, including attorney and expert witness fees. *Id.* It defined the term "emission standard of limitation under this Act" as used in the statute. *Id.* Finally, the Amendments waived the usual jurisdictional limits of the district courts with respect to the amount in controversy or citizenship of the parties. *Id.*

30. CAA § 307(b)(1), Pub. L. No. 91-604, 84 Stat. 1708 (1970) (current version at 42 U.S.C. § 7607(b)(1) (1994)). The statute at that time read in pertinent part:

- (b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) may be filed only in the United States Court of Appeals for the appropriate circuit.

States Court of Appeals for the appropriate circuit.”<sup>31</sup> In authorizing review of an “action” by the Administrator, the statute notably did not mention whether the action had to be final, nor did it define the term “appropriate circuit.”

## 2. The 1977 Amendments

The 1977 Amendments to the CAA<sup>32</sup> made only minor changes to section 304 which did not substantially affect the citizen suit provisions.<sup>33</sup> The Amendments, however, did change section 307 in several important ways. First, they tinkered with the CAA’s venue restrictions, adding to the list of actions which the 1970 Amendments required to be filed in the Court of Appeals for the District of Columbia Circuit. Most importantly, the Amendments added an express requirement that a challenge must be to a “final action” and amended the statute to require that challenges to “any other nationally applicable regulations promulgated, or final action taken, by the Administrator” must be filed in that circuit.<sup>34</sup> Review of other actions, such as actions concerning SIPs or actions

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31. CAA § 307(b)(1), Pub. L. No. 91-604 § 12(a), 84 Stat. 1707 (current version at 42 U.S.C. § 7607(b)(1) (1994)). Section 307(b)(1) continued:

A petition for review of the Administrator’s action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit.

32. Pub. L. No. 95-95, § 303(a)-(c), 91 Stat. 771, 772 (1977) (current version at 42 U.S.C. § 7604 (1994)); Pub. L. No. 95-190, § 14(a)(77), (78), 91 Stat. 1404 (1977) (current version at 42 U.S.C. § 7503 (1994)).

33. Most importantly, the Amendments expanded the range of actions subject to a citizen suit by including violations of Part C of the Act, 42 U.S.C. § 7470-7492 (1994), which contained provisions to prevent significant deterioration of air quality, and Part D, the nonattainment provisions. 42 U.S.C. § 7501-7515 (1994). The Amendments also expanded the class of specific actions which could be brought. Under the Amendments, any person could bring a civil action:

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

CAA § 304(a)(3), 42 U.S.C. § 7604(a)(3) (1994).

34. Section 307(b)(1), as amended in 1977, read as follows:

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under section 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator’s action in approving or promulgating any implementation plan under section 110 or section

“locally or regionally applicable,” could be filed only “in the United States Court of Appeals for the appropriate circuit.”<sup>35</sup> Here too, however, Congress added a finality requirement: it authorized review of “any other final action of the Administrator.”<sup>36</sup> Thus, in the 1977 Amendments Congress limited direct judicial review in the courts of appeals to “final actions” of the Administrator, a limitation not expressly included in the 1970 Amendments.<sup>37</sup>

### 3. The 1990 Amendments

The 1990 Amendments to the CAA specifically addressed the circumstances in which the district courts could order EPA to act. Congress amended section 304(a) to authorize the district courts “to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed.”<sup>38</sup> This new provision marked the first time that Congress explicitly recognized the possibility that the agency might unduly delay in taking action.<sup>39</sup>

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111(d), any order under section 111(j), under section 112(c), under section 113(d), under section 119, or under section 120, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

Pub. L. No. 95-95, § 305(c), 91 Stat. 776 (1977) (current version at 42 U.S.C. § 7607 (b)(1) (1994)).

35. *Id.*

36. *Id.*

37. The Amendments also specified that only certain provisions of the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 (1994), applied to lawsuits brought challenging rulemakings under the Act. That provision may well have exempted EPA from APA actions alleging that the agency had “unreasonably delayed” in taking certain actions. *See* 42 U.S.C. § 7604(a) (1994).

38. CAA § 304(a), 42 U.S.C. § 7604(a) (1994).

39. Congress also attached a venue provision to that authority: actions to compel such agency action may be filed only in district courts within the circuit “in which such action would be reviewable under section 7607(b) of this title.” *Id.* The statute reads as follows:

The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay,

The 1990 Amendments<sup>40</sup> also changed section 307. Most importantly, they provide that “[w]here a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time,” any person may challenge that deferral through the judicial review mechanism provided in section 307.<sup>41</sup> Thus, the Amendments allow deferrals of performance to be challenged directly in the United States courts of appeals, but only if such deferral is part of a “final decision.”<sup>42</sup>

### *B. The Clean Water Act*

#### 1. The 1972 Amendments

Congress modeled the citizen suit and judicial review provisions of the 1972 Amendments to the FWPCA, now known as the CWA,<sup>43</sup> closely after the 1970 Amendments to the CAA.<sup>44</sup> Section 505 of the Amendments contains a citizen suit enforcement provision that parallels section 304 of the CAA. It authorizes citizens to bring a civil action against the United States or other government instrumentalities who are violating either an effluent limitation or standard established under the Act, or a state or federal order issued with respect to such

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notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

CAA § 304(a), 42 U.S.C. § 7604(a) (1994). In other words, if a plaintiff is seeking a court order for action which, when final, would be nationally applicable and thus reviewable only in the District of Columbia Court of Appeals, the plaintiff may file its suit only in the United States District Court for the District of Columbia. The 1990 Amendments also changed slightly the types of cases that could be brought without giving 60 days notice prior to suit and added provisions regarding the disposition of penalties paid as a result of suits brought under § 304(a). *See* CAA § 304(b), (g), 42 U.S.C. § 7604(b), (g) (1994).

40. Pub. L. No. 101-549, §§ 108(p), 110(5), 302(g), (h), 702(c), 703, 706, 707(h), 710(b), 104 Stat. 2469, 2470, 2574, 2681-84 (codified as amended at 42 U.S.C. § 7607 (1994)).

41. CAA § 307(b)(2), 42 U.S.C. § 7607(b)(2) (1994).

42. The 1990 Amendments make clear that filing a petition for reconsideration does not affect the finality of the Administrator's action for purposes of judicial review, and they make other minor changes to the list of specific actions by the Administrator made subject to judicial review in the statute. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (1994). The Amendments also authorize review of revisions to regulations for enhanced monitoring and compliance certification programs under § 7414(a)(3), and delete the previous authorization for review of actions taken under § 7413. *Id.*

43. The 1977 Amendments declared that the Act was now to be known as the CWA. *See* Pub. L. No. 95-217, § 1, 91 Stat. 1566 (1977) (current version at 33 U.S.C. § 1251 (1994)) (“[T]his act . . . may be cited as the ‘Clean Water Act of 1977.’”). For purposes of uniformity, when this Article refers to the legislation as a whole, it uses the title “Clean Water Act.”

44. *See* *Lubrizol Corp. v. Train*, 547 F.2d 310, 318 (6th Cir. 1976) (“The judicial review provision of the Water Act, § 509(b)(1), is quite similar to § 307(b)(1) of the Clean Air Act . . . . The similarity of the Clean Air Act and the Water Act has led courts to refer to provisions of one act when interpreting its counterpart in the other. *See e.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1, 17 (D.C. Cir. 1976) (*en banc*); *NRDC v. Train*, 166 U.S. App. D.C. 312, 510 F.2d 692, 701-02 (1975).”).

standard or limitation.<sup>45</sup> The Amendments also authorize a citizen suit in the United States district court "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."<sup>46</sup> Thus, like the CAA Amendments of 1970, the 1972 Amendments to the FWPCA authorize citizen suits in the United States district courts to compel nondiscretionary actions without regard to the amount in controversy or citizenship of the parties.<sup>47</sup>

The provisions of the 1972 Amendments to the FWPCA authorizing initial jurisdiction directly in the court of appeals likewise follow the pattern established two years earlier in section 307 of the 1970 Amendments to the CAA.<sup>48</sup> The 1972 Amendments listed six types of action by the Administrator of EPA and then authorized "any interested person" to seek review of them "in the Circuit Court of Appeals for the United States for the Federal judicial district in which such person resides or transacts business."<sup>49</sup> A ninety day statute of limitations applied to such review, and if a party did not seek review, it could not obtain judicial review in a later civil or criminal enforcement proceeding.<sup>50</sup>

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45. CWA § 505(a), 33 U.S.C. § 1365(a)(1) (1994).

46. CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2) (1994). Section 505(a) of the 1972 Amendments read in full:

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

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

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

CWA § 505(a), Pub. L. No. 92-500, 86 Stat. 888 (1972) (current version at 33 U.S.C. § 1365(a) (1994)).

47. *Cf.* CAA § 304(a)(2), Pub. L. No. 91-604, 84 Stat. 1706 (1970) (current version at 42 U.S.C. § 7604(a) (1994)); CWA § 505(a), Pub. L. No. 92-500, 86 Stat. 888 (1972) (current version at 33 U.S.C. § 1365(a) (1994)). Pre-litigation notice is required, and the statute contains procedural provisions regarding such matters as venue that are similar to those in the CAA. *Cf.* CWA § 505(b), (c), Pub. L. No. 92-500, 86 Stat. 888 (1972) (current version at 33 U.S.C. § 1365(b), (c) (1994)); CAA § 304(b), (c), Pub. L. No. 91-604, 84 Stat. 1706 (1970) (current version at 42 U.S.C. § 7604(b), (c) (1994)).

48. *Cf.* CAA § 307(b)(1), Pub. L. No. 91-604, 84 Stat. 1708 (1970) (current version at 42 U.S.C. § 7607(b)(1) (1994)).

49. FWPCA § 509(b)(1), Pub. L. No. 100-236, 86 Stat. 816, 892 (1972) (current version at 33 U.S.C.A. § 1369(b)(1) (West Supp. 1996)).

50. FWPCA § 509(b)(1), (2), Pub. L. Nos. 100-236, 92-500, 86 Stat. 816, 892 (1972) (current version at 33 U.S.C.A. § 1369(b)(1) (West Supp. 1996) and 33 U.S.C. § 1369(b)(2) (1994)).

## 2. The 1977 and 1987 Amendments

The 1977 "mid-course correction" Amendments to the CWA did not change sections 505 and 509. Thus, unlike the 1977 Amendments to the CAA, they did not expressly require that an EPA action be final before a party could seek judicial review, although judicial interpretations of the Act ultimately imposed that requirement as a matter of administrative law.<sup>51</sup> The 1987 Amendments<sup>52</sup> amended both sections but made only minor changes to the basic citizen suit and judicial review provisions.<sup>53</sup>

### III. INTERPRETATION OF THE JURISDICTION STATUTES

The overall framework of the jurisdictional provisions of the CAA and CWA is deceptively simple: final actions<sup>54</sup> are reviewed directly in the court of appeals, while the district court has jurisdiction to compel EPA to carry out a nondiscretionary act. The framework's simplicity, however, quickly dissolves upon closer inspection.

For example, the District of Columbia Circuit opined that "Congress has provided some sort of rough roadmap for jurisdiction":<sup>55</sup> the courts of appeals review final actions taken by the Administrator on a fully developed administrative record, while the district courts have jurisdiction over petitions "to

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51. *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1387 (4th Cir. 1990) ("Our jurisdiction to review agency action under the CWA is limited to the categories of agency action identified in 33 U.S.C. § 1369(b)(1), and is further subject to the general limitation that only final agency action is subject to immediate judicial review."); *American Paper Inst. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (holding that policy statement concerning tolerances for dioxin in permits for paper mills using chlorine bleaching was not final agency action).

52. Water Quality Act of 1987, Pub. L. No. 100-4, §§ 308(b), 406(d)(3), 505(a), (b), 101 Stat. 7, 39, 73, 75 (current version in scattered sections of 33 U.S.C.); Pub. L. No. 100-236, § 2, 101 Stat. 1731, 1732 (1987) (current version at 28 U.S.C. § 2112 (1994)).

53. The Amendments to § 505 establish requirements of service of the complaint upon the Administrator and the Attorney General, prevent the entry of a consent judgment until 45 days after service, Water Quality Act of 1987, § 504, Pub. L. No. 100-4, 101 Stat. 7, 75 (1987) (current version at 33 U.S.C. § 1365(c)(3) (1994)), and authorize an award of costs and attorney fees to prevailing or substantially prevailing party, Water Quality Act of 1987, § 505(b)(4), Pub. L. No. 100-4, 101 Stat. 7, 76 (1987) (current version at 33 U.S.C. § 1365(d) (1994)). The Amendments to § 1369 expand the list of specific actions for which judicial review is authorized by adding the approval or promulgation of an effluent limitation under § 1345, Water Quality Act of 1987, § 406(d)(3) (1987) (current version at 33 U.S.C. § 1369(b)(1)(E) (1994)), or an individual control strategy under § 1314(l), Water Quality Act of 1987, § 308(b) (1987) (current version at 33 U.S.C. § 1369(b)(1)(G) (1994)).

54. The CWA does not expressly limit the court of appeals' jurisdiction to "final actions," but judicial interpretation has done so. *See, e.g., Appalachian Energy Group v. EPA*, 33 F.3d 319 (4th Cir. 1994) (To the extent that EPA's action in the case advising that a CWA permit was required is only a predictor of future action, it is not yet final action subject to review.) and cases cited *supra* note 51.

55. *NRDC v. Administrator, EPA*, 902 F.2d 962, 988 (D.C. Cir. 1990), *vacated in part and dismissed in part* by 921 F.2d 326 (D.C. Cir. 1991).

require the Administrator to do what the Act demands.”<sup>56</sup> Thus, the court saw the jurisdictional choice as dependent upon the existence of a developed administrative record.<sup>57</sup> The “rough roadmap,” however, is not very useful in specific factual situations. Consider a typical scenario in which the Administrator has compiled a complete administrative rulemaking record on a subject and decides not to adopt a rule but, by doing so, violates a plain legal command. Is the Administrator’s decision a final action taken on a “fully developed record” and thus reviewable in the court of appeals, or is it a petition that “requires the Administrator to do what the Act demands,” an action cognizable only in district court? The statutory language does not provide a definitive answer.<sup>58</sup>

Another court cites administrative discretion as the key to understanding bifurcated jurisdiction. The district court is the proper forum “when the Administrator is charged with failure to perform a non-discretionary duty,” but a plaintiff must sue in the court of appeals when the Administrator is “charged with abusing his discretion.”<sup>59</sup> However, the dichotomy between failure to perform a nondiscretionary duty and abuse of discretion will not untangle the review provisions. For example, take one obvious problem: after the 1990 Amendments to the CAA, *both* the district court and court of appeals have jurisdiction over nondiscretionary actions. The district court can compel “nondiscretionary action” by the Administrator,<sup>60</sup> while the court of appeals has jurisdiction over the Administrator’s “final decision” deferring performance of any “nondiscretionary action.”<sup>61</sup> And reconsider the scenario in which, after compiling a rulemaking record, the Administrator does not act even though all the evidence in the record would require action. A test focusing on a supposed difference between the failure to exercise discretion and abuse of that discretion does not inform litigants as to whether the district court or court of appeals is the correct forum.

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56. *Id.*

57. *See also* *Save the Bay, Inc. v. Administrator, EPA*, 556 F.2d 1282, 1292 (5th Cir. 1977) (“When Congress has vested this court with original review, it generally has done so in relation to an administrative process that more easily lends itself to production of a reviewable record.”).

58. *See* *Garrett & Winner, supra* note 28, at 10,313:

Technically, the Act appears to require challenges to the approval decision to be brought in the court of appeals and challenges to the failure to act in the district court. However, the legal issues involved in both challenges may be inextricably intertwined, thus raising the possibility of duplication of judicial resources and conflicting decisions.

59. *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061, 1067 (N.D.W. Va. 1973); *see also* *Council of Commuter Orgs. v. Metropolitan Transp. Auth.*, 683 F.2d 663, 665 (2d Cir. 1982) (“In general, a court of appeals may consider challenges to agency action taken by the Environmental Protection Agency . . . and a district court is the proper forum for suits to compel the EPA to take nondiscretionary action and to compel state and local agencies and officials to comply with requirements of a state implementation plan . . .”).

60. CAA § 304(a), Pub. L. No. 101-549, § 707(a), (f), 104 Stat. 2399, 2683 (1990) (current version at 42 U.S.C. § 7604(a)(2) (1994)).

61. CAA § 307(b)(2), Pub. L. No. 101-549, § 707(h), 104 Stat. 2399, 2683-84 (1990) (current version at 42 U.S.C. § 7607(b)(2) (1994)).

The difficulties of interpreting the jurisdiction statutes flow from two sources. First, the terms used in the bifurcated jurisdictional provisions are not self-defining. In particular, the acts do not explain whether agency "action" can include a decision by the agency not to regulate in a particular instance even if a statute imposes a nondiscretionary duty for the agency to do so. Second, under any conceivable definition, the jurisdictional grants of authority to the district courts and courts of appeals overlap.

This Part of the Article first examines these conceptual difficulties and briefly evaluates the possibility that concurrent jurisdiction in the courts of appeals and the district courts could solve the problem. The discussion then turns to an examination of judicial interpretations of the bifurcated jurisdiction sections. It analyzes five separate tests which the courts have formulated to determine whether jurisdiction to review inaction by the Administrator lies in the district court or the court of appeals.

#### *A. Conceptual Problem I: Agency "Action" and Agency "Final Action"*

The terms and concepts used to establish the jurisdictional line between the district courts and the courts of appeals are not self-defining. Most importantly, determining when the agency has "acted" has proven difficult. Equally vexing to courts has been determining whether a particular action, once taken, is "final" action within the meaning of the statute.<sup>62</sup>

Because judicial review in the court of appeals is possible only if the Administrator has taken "final action,"<sup>63</sup> the Administrator must "act" for jurisdiction to attach in these courts. If the Administrator has not adopted a rule or issued an order, it is tempting to conclude that no action has taken place. The failure to act, however, may have occurred after the agency undertook a regulatory proceeding in which it compiled and reviewed information to determine whether the adoption of a rule was warranted,<sup>64</sup> or after the agency reviewed action previously taken by a state as part of EPA's statutory oversight of state implementation.<sup>65</sup> In these instances, the question becomes whether *any*

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62. For discussions of judicial review of agency inaction generally, see E. Gates Garrity-Rokous, Note, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 YALE L.J. 643 (1991); Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627 (1983).

63. See *supra* text accompanying note 34.

64. See *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975) (The Administrator refused to revise previously promulgated new source performance standards for coal-fired power plants.).

65. Under the CWA, for example, the Administrator has the right to "veto" state actions on permits if they are inconsistent with the requirements of the Act. 33 U.S.C. § 1251 (1994); see *Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978) (rejecting plaintiff's claim that the court of appeals could review the Administrator's failure to veto a state permit because the Administrator had previously "coerced" the State Water Resources Control Board into making changes in that permit); *Save the Bay, Inc. v. Administrator, EPA*, 556 F.2d 1282 (5th Cir. 1977) (concluding that the court of appeals lacked jurisdiction where petitioner challenged Administrator's failure to veto a permit issued by Mississippi Air and Water Pollution Control Commission and to withdraw the permit authority which the Administrator had delegated to



decision at the end of such a process—an affirmative approval or a refusal to take action at that time—ought to be termed an action and thus possibly subject to review in the court of appeals.<sup>66</sup>

Assuming there is agency action, a second important definitional concept is whether the action is “final.” The CAA authorizes review in the court of appeals of listed agency actions and of “final action taken” by the Administrator.<sup>67</sup> Although the CWA does not directly mention “final” action, courts have required finality as a condition for jurisdiction in the court of appeals,<sup>68</sup> in accordance with the established principle of administrative law that an agency’s action must be final before a court will review it.<sup>69</sup>

Consider a scenario like that posed above<sup>70</sup> in which the agency has completed a regulatory proceeding but decided not to undertake a particular course of conduct at that time. It has, however, specifically left open the possibility of future action. Although the agency may have acted, has it taken final action so as to give the court of appeals jurisdiction to review its decision?<sup>71</sup>

The complexity of EPA regulatory proceedings compounds the problem of determining whether the agency has taken “final action.” The statutes setting forth the court’s jurisdiction to review EPA action seem to envision a process by which the agency’s decisionmaking will occur in discrete blocks with easily identifiable beginnings and endings. In fact, however, the administrative process of implementing federal environmental law, particularly the CAA, has in practice

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the Commission).

66. Additionally, of course, a broader definition of what is an administrative “action” will reduce the discretion that EPA possesses to act without judicial interference, a factor that has played a significant role in Supreme Court decisions involving judicial review of other forms of agency inaction. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.). Decision of this question may well be complicated by impacts upon state autonomy if a federal court of appeals should deem EPA’s decision not to interfere to be “final action.” *See Mianus River Preservation Comm. v. EPA*, 541 F.2d 899, 906 (2d Cir. 1976) (“To conclude that a State’s issuance of such an NPDES permit is ‘Administrator’s action’ subject to direct review by this Court, would in some cases result in our being required to review issues involving only a State agency’s application and interpretation of purely State law.”).

67. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (1994); *see Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1442-43 (9th Cir. 1984) (An action is final if it is definitive, is based on a record adequate to permit review, and has an immediate impact on an interest of the party seeking review.).

68. *See supra* note 51.

69. Under the APA a court may only review “final agency action.” 5 U.S.C. § 704 (1994); *see Franklin v. Massachusetts*, 505 U.S. 788 (1992) (Census Bureau’s decision to allocate federal overscas employees for census purposes was not “final agency action” under the APA.).

70. *See supra* text accompanying note 59.

71. *See Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 649 (7th Cir. 1986) (concluding that EPA’s refusal to act on a state’s proposal to amend the SIP was a final order reviewable in the court of appeals).

become vastly more complicated.<sup>72</sup> The EPA often takes a series of sequential actions to address a common problem,<sup>73</sup> and determining when the Administrator's action is final on any particular issue in an ongoing regulatory process is problematic, to say the least.<sup>74</sup>

For example, when EPA has initially determined that the CAA's "prevention of significant deterioration" provisions applied to a proposed source of air pollution, courts have concluded that this determination was final action for purposes of judicial review.<sup>75</sup> That determination, however, simply initiates a lengthy administrative process which only later will culminate in the imposition of specific regulatory constraints upon the source. In contrast, when regulated sources seek judicial review of a decision by EPA enforcing regulatory requirements against the source, courts are much more reluctant to conclude that this initial decision is final action for purposes of judicial review,<sup>76</sup> fearing that

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72. *See, e.g.,* *Citizens for a Better Env't v. Costle*, 515 F. Supp. 264, 270 (N.D. Ill. 1981) ("Perhaps the most striking feature of this litigation is the extent to which EPA's administrative processing of Illinois' and Indiana's Part D SIP's has diverged from the procedure contemplated by the Clean Air Act.").

73. For example, in *Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303 (7th Cir. 1983), EPA first issued an interpretive regulation announcing that it could reclassify areas as nonattainment under the CAA and then proceeded to reclassify the area in which plaintiff's facility was located. The court rejected EPA's argument that the plaintiff forfeited its right to judicial review of the reclassification by not having sought judicial review of the interpretive regulation within 60 days of its promulgation. *Id.* at 1306.

74. *See, e.g.,* *Madison Gas & Elec. Co. v. EPA*, 4 F.3d 529 (7th Cir. 1993) (EPA action awarding allowances for emission of sulfur dioxide to electric utilities is "final action."); *Municipal Auth. of St. Mary's v. EPA*, 945 F.2d 67, 72 (3d Cir. 1991) ("While the EPA's approval of the list [of polluted navigable waters subject to the requirements of the CWA's § 304(l) program] and the ICS ['individual control strategy' for point sources on the list] technically constitutes the federal agency's final act in administering the 304(l) program, this is not the final act in the implementation and administration of the program's requirements . . . . [T]he existence of [the] permit modification process and the events which have taken place in this case amply demonstrate that EPA's involvement in the process is, in fact, preliminary and initial."); *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1389 (4th Cir. 1990) (rejecting petitioner's argument that EPA's preliminary disapproval of state submissions under § 304(l) was reviewable).

75. *See, e.g.,* *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (EPA determination that a proposed replacement program at an electric utility was subject to both new source performance standards and prevention of significant deterioration requirements was reviewed as a final action, though the finality of the determination was not an issue in the case.); *Puerto Rican Cement Co., Inc. v. EPA*, 889 F.2d 292, 296 (1st Cir. 1989) (The court has jurisdiction to review EPA's determination that plaintiff could not build a replacement facility without meeting PSD requirements.); *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440 (9th Cir. 1984) (EPA's determination that an electric company's change to higher sulfur fuel was a "major modification" under the agency's prevention of significant deterioration regulations was final action.).

76. *See, e.g.,* *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement*, 20 F.3d 1418 (6th Cir. 1994) (The structure of the CWA indicated that Congress intended to prohibit pre-enforcement judicial review of compliance order issued under that Act.) (citing *Southern Pines Assoc. v. United States*, 912 F.2d 713, 716 (4th Cir. 1990)); *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1082 (3d Cir. 1989) (Since neither risk of sanctions nor severe hardship flowed from a stop-work order, the order was not final action.); *cf. Allsteel*,

such determinations will entangle the courts in the agency's enforcement process.<sup>77</sup>

These precedents suggest that any test for determining final action<sup>78</sup> must be flexible enough to consider the issue in light of later actions contemplated by the agency's procedures.<sup>79</sup> However, they also demonstrate the difficulties that

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Inc. v. EPA, 25 F.3d 312, 315 (6th Cir. 1994) (A stop-work order was final agency action because it exposed the party to immediate and practical impact.).

77. See, e.g., *Solar Turbines*, 879 F.2d at 1078 (no pre-enforcement review of a compliance order); *West Penn Power Co. v. Train*, 522 F.2d 302 (3d Cir. 1975) (The court had no jurisdiction over the power company's action seeking declaratory and injunctive relief against a notice of violation issued by EPA.); *Route 26 Land Dev. Ass'n v. United States*, 753 F. Supp. 532, 539 (D. Del. 1990) (An Army Corps of Engineers cease and desist order is not reviewable.); cf. *Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295, 1299 (W.D.N.Y. 1979). In that case the plaintiff sought review of an EPA order directing it to allow a proposed inspection of its property. Although EPA initially objected to jurisdiction, it later agreed that the district court had jurisdiction, and the court found it had jurisdiction over EPA's counterclaim seeking a mandatory injunction granting EPA access to plaintiff's plant. See also *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1032 (7th Cir. 1984) (An order disapproving a delayed compliance order was reviewable since the consequence of that order is that the polluter must either comply immediately or pay a noncompliance penalty.); David M. Moore, Comment, *Pre-enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 PACE ENVTL. L. REV. 675, 685 (1992) ("EPA has successfully prevented pre-enforcement review by arguing that its administrative actions are not final.").

78. In determining whether EPA's request for information about certain discharges by a vinyl chloride manufacturer constituted "final action" under the CAA, the court of appeals in *Dow Chemical v. EPA*, 832 F.2d 319 (5th Cir. 1987), declared that a final agency action "is one that imposes an obligation, denies a right, or fixes a legal relationship." *Id.* at 323 (quoting *Geyen v. Marsh*, 775 F.2d 1303, 1308 n.6 (5th Cir. 1985)). A great many actions taken by agencies, however, arguably "fix" legal relationships, and many of these are not final for purposes of immediate judicial review. See *Burlington N.R.R. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996) ("[T]he Board notes that 'all agency orders fix rights and obligations in some way or other, and yet not all are final.' . . . True enough . . .").

79. The determination of finality also closely relates to the judge-made doctrine of ripeness which is a cornerstone principle of administrative law. As articulated by the Supreme Court in its leading case on ripeness, *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), this doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Id.* at 148. It also protects agencies from judicial interference "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.*

The courts have been inconsistent in defining the relationship of ripeness to finality. Some courts see the two concepts as separate, with ripeness ensuring that issues are fit for judicial review, and finality as primarily encompassing concerns over interference with the administrative process. *Burlington N.R.R.*, 75 F.3d at 690-92 (analyzing the concepts separately, albeit under an overall heading "Finality and Ripeness"); *Public Citizen Health Research Group v. Commissioner, Food and Drug Admin.*, 740 F.2d 21, 30 (D.C. Cir. 1984). Others analyze finality as part of the two-part test for ripeness established by *Abbott Laboratories*, which requires courts to examine the fitness of the issue for judicial determination and the hardship to the parties if review is not undertaken. See *Western Oil and Gas Ass'n v. EPA*, 633 F.2d 803, 807 (9th Cir. 1980) (The *Abbott Laboratories* analysis of ripeness, "according to the understanding of most courts, depends on the combined weight of the issue's 'fitness' for judicial resolution and the hardship to the aggrieved party if review is postponed."); *NRDC v. EPA*, 859 F.2d 156, 166 (D.C. Cir. 1988) (citing the "two-pronged"

practitioners face in determining when judicial review is available because the agency has taken final action.

*B. Conceptual Problem II: "Nondiscretionary" Action*

In addition to the problem of determining what the statutory language means, under any definition the concepts used in the bifurcated jurisdictional statutes overlap. An important example is the statutory dichotomy between the type of inaction that is a "failure to perform a nondiscretionary act," over which the district court is given jurisdiction, and other inaction that amounts to an abuse of agency discretion, over which only the court of appeals may have jurisdiction.

Where the agency has done nothing at all or has only taken steps that are not conceivably final action, the only possible challenge is to allege in the district court that the agency has failed to perform a nondiscretionary act. In such cases the question is one of statutory interpretation, with courts undertaking the sometimes difficult task<sup>80</sup> of determining from the pertinent statutory language alone whether the Administrator must act,<sup>81</sup> or whether the decision to act is a matter of discretion. Litigation has included issues such as whether the Act specifically establishes a mandatory deadline before which the Administrator must act,<sup>82</sup> whether the court is willing to infer such a deadline,<sup>83</sup> and whether the

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*Abbott Laboratories* test). These courts see finality as part of the "fitness" determination. *Citizens for a Better Env't v. Costle*, 515 F. Supp. 264, 278 (N.D. Ill. 1981) ("Issues are considered 'fit' for judicial resolution when they can be characterized as 'purely legal' and as 'concrete' and when they are posed by final agency action.").

Still others have found that ripeness and finality are virtually the same thing. *Sierra Club v. Gorsuch*, 715 F.2d 653, 657 (D.C. Cir. 1983) ("The requirement of finality is in essence a question of ripeness, focussing on the appropriateness of the issues presented for judicial review. Courts have approached this determination in a pragmatic way, considering 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'") (citing *Abbott Laboratories*, 387 U.S. at 149). And some cases even take the position that an environmental determination can be ripe without being final. *Dow Chemical*, 832 F.2d at 324 n.30 ("Because finality is only one of the four ripeness factors outlined in *Abbott Laboratories*, an agency action may be final without being ripe."); see also *Greater Detroit Resource Recovery Auth. v. EPA*, 916 F.2d 317, 327-28 (6th Cir. 1990) (EPA letter was not "final agency action" within meaning of the statute, and thus the district court did not have jurisdiction, even though the issue was ripe because "[b]oth of the *Abbott Laboratories* criteria are fully satisfied.").

80. Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 69-70 (1995) (recognizing difficulty in determining whether a particular provision involves a discretionary duty).

81. See *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 278 (4th Cir. 1992) (upholding as reasonable Administrator's interpretation of CAA § 404(d)(3), 42 U.S.C. § 7651c(d)(3) of the CAA as not imposing upon him a nondiscretionary duty to review extension proposals under the Acid Deposition Control provisions of the Act prior to promulgating regulations governing the subject); *NRDC v. EPA*, 770 F. Supp. 1093, 1105 (E.D. Va. 1991) (The CWA does not require EPA to publish numerical criteria for dioxin; thus no nondiscretionary duty exists.).

82. See *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) ("In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must 'categorically mandate' that all specified action be taken by a date-certain deadline. In such circumstances,

Administrator's previous administrative conclusions have rendered later action nondiscretionary.<sup>84</sup> Another frequently litigated point is whether EPA is required to initiate enforcement action. Here, as in other areas of administrative law,<sup>85</sup> the courts have been hesitant to interfere with the agency's choices as to whether to enforce and have interpreted statutory language as discretionary even where it appears mandatory.<sup>86</sup>

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the only question for the district court to answer is whether the agency failed to comply with the deadline.") (citations omitted); *Scott v. City of Hammond*, 741 F.2d 992, 996-98 (7th Cir. 1984) (If a state fails over a long period of time to submit total maximum daily load limits to EPA as required, this failure might amount to "constructive submission" of no TMDL's (Total Maximum Daily Loads), and EPA's failure to act "would amount to failure to perform a nondiscretionary duty.").

83. See *Citizens for a Better Env't v. EPA*, No. C-90-1124-JPV, 1990 WL 269123, at \*2 (N.D. Cal. Nov. 6, 1990) ("The notion that a deadline on the administrator may arise by inference from another date only applies if the other date is clearly fixed, and only in rare instances.") (citing *Sierra Club*, 828 F.2d at 790).

84. See *NRDC v. Train*, 545 F.2d 320, 324, 328 (2d Cir. 1976) (Administrator was required to list lead under § 108 of the CAA where the Administrator admitted that, in his judgment, lead met the statutory definition of a pollutant having an "adverse effect on public health and welfare."); *NRDC v. Thomas*, 689 F. Supp. 246, 253 (S.D.N.Y. 1988) ("[Section] 112(b)(1)(A) imposes on the EPA a mandatory, non-discretionary duty to list any substance found by the Agency to be a hazardous air pollutant."); *Council of Commuter Orgs. v. Metropolitan Transp. Auth.*, 524 F. Supp. 90, 93 (S.D.N.Y. 1981) (In order for EPA to have a duty to withhold federal funds, the Administrator must make a discretionary finding that the Governor has not submitted a state implementation plan ("SIP") which takes into account attainment of the national ambient air quality standards, but the Administrator had not made such a finding here.), *aff'd*, 683 F.2d 673 (2d Cir. 1982).

85. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.").

86. See *Dubois v. Thomas*, 820 F.2d 943, 948 (8th Cir. 1987) (Although section 309(a)(3) of the CWA states that "whenever on the basis of any information available to him, the Administrator finds that any person is in violation . . . he shall issue an order requiring such person to comply . . . or he shall bring a civil action," the court concluded that the duties imposed by section 309(a)(3) to investigate or make findings are discretionary.); *Sierra Club v. Train*, 557 F.2d 485, 490-91 (5th Cir. 1977) (Administrator's duties under § 309(a)(3) are discretionary despite use of word "shall," and the Administrator thus was under no mandatory duty to issue an abatement order.). Some courts have been willing to find that under § 309(a)(1), which states that "[w]henver, on the basis of any information available to him, the Administrator finds that any person is in violation . . . the Administrator shall notify the person in violation . . . of such finding," the Administrator has a mandatory duty to issue a notice of violation. In *New England Legal Found. v. Costle*, 475 F. Supp. 425, 433 (D. Conn. 1979), the court held that "[t]he Act, therefore, imposes upon the Administrator a non-discretionary duty to issue a Notice of Violation once he finds non-compliance with SIP requirements . . ." See also *Greene v. Costle*, 577 F. Supp. 1225, 1227-30 (W.D. Tenn. 1983) (issuance of compliance order was mandatory.); *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 134 (D.S.C. 1978) (Administrator must issue a compliance order once he or she finds a violation.); *cf. Council of Commuter Orgs.*, 524 F. Supp. at 92 (holding that "[t]he duty to issue notice of violations [under section 309(a)(1)] arises only after the EPA Administrator makes a discretionary finding that such violations have occurred").

That notice, however, is not an enforcement step that requires compliance, while a notice of abatement would be. And once the notice issues, all further enforcement decisions are

In contrast to these situations, the jurisdictional confusion arises when EPA undertakes a regulatory proceeding, but it culminates in a refusal to act. On such occasions, a considerable overlap can exist between the jurisdiction of the district court to review a failure to perform a nondiscretionary action, and that of the court of appeals to review a final action,<sup>87</sup> because it is often easy to frame a legal challenge to agency inaction in terms of an agency's lack of discretion.<sup>88</sup> For example, finding scientific facts based on information in an administrative record in most instances has a discretionary component to it,<sup>89</sup> but in a given

discretionary. *West Penn Power Co. v. Train*, 522 F.2d 302, 310 (3d Cir. 1975) ("Issuance of a violation notice is thus non-discretionary. However, the decision to enforce a violation is discretionary under 42 U.S.C. § 1857c-8(b)."); *New England Legal Found.*, 475 F. Supp. at 433.

87. *See* *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 661 n.9 (D.C. Cir. 1975) ("[O]verlap is conceivable, for instance, where the Administrator acts but, in the view of the challengers, does not act far enough."). The *Oljato* court further observed that "[i]f an abuse of discretion were held to be a failure to perform a nondiscretionary act, failure to perform any duty, discretionary or nondiscretionary, under the Act would be drawn within the scope of Section 304." *Id.* at 663 (emphasis in original).

88. Thus, in *NRDC v. Reilly*, 976 F.2d 36 (D.C. Cir. 1992), petitioner challenged a stay which the EPA had issued for final standards regulating emissions of radioactive particles. The court of appeals held that the CAA did not give EPA the power to issue the stay. Arguably, however, EPA could have claimed that the case belonged in the district court, since it was premised on EPA's lack of discretion in issuing the stay and on the agency's nondiscretionary duty to issue the regulations. In fact, the district court had previously ordered EPA to issue the regulations which, after issuance, the agency had later stayed. *See* *Sierra Club v. Gorsuch*, 551 F. Supp. 785-89 (N.D. Cal. 1982).

Similarly, in *Armco, Inc. v. EPA*, 869 F.2d 975 (6th Cir. 1989), EPA sent a letter objecting to Ohio's approval of removal credits for a steel facility, and the company petitioned for review of that letter. EPA based its letter on the position that it could not approve removal credits until the agency has promulgated regulations. The court of appeals found that it lacked jurisdiction, stating that "[w]e deem the issuance of the sludge removal regulations to be non-discretionary functions of USEPA" and that the petition was "an attempt to by-pass original district court jurisdiction in this case." *Id.* at 981, 982. The court could just as easily have concluded that it had jurisdiction to review the objection (assuming that it was a final action, *see supra* notes 62-74), and that the effect of the removal regulations on the letter was simply a legal issue which it must consider in its review.

*See also* *Golden Gate Audubon Soc'y v. Army Corps of Eng'rs*, 700 F. Supp. 1549 (N.D. Cal.), *vacated*, 717 F. Supp. 1417 (N.D. Cal. 1988). In rejecting the Port of Oakland's argument that the Corps of Engineers did not fail to perform a mandatory duty as required by § 1365(a)(2) of the CWA in order for jurisdiction to attach, the court reasoned:

While the Corps may or may not have a mandatory duty to make jurisdictional determinations over sites, once it makes such a determination, it must do so correctly. The Corps has a mandatory duty to ascertain the relevant facts, correctly construe the applicable statutes and regulations, and properly apply the facts to the law . . . . Whichever party is right on these legal and factual issues, there can be no question that it is mandatory, and not discretionary, for the Corps' decisions to be correct.

*Id.* at 1554.

89. *See* Alyson C. Flournoy, *Legislation Inaction: Asking the Wrong Questions in Protective Environmental Decisionmaking*, 15 HARV. ENVTL. L. REV. 327, 328 (1991):

The traditional decisionmaking structure of . . . [environmental] statutes identifies a single factual prerequisite and predicates regulation on the agency's ability to

situation the facts in the record may admit of only one conclusion.<sup>90</sup> In that instance what is normally a discretionary decision by the agency arguably becomes nondiscretionary.<sup>91</sup> If an agency has decided not to act in such a situation, the courts must decide whether to treat the Administrator's decision as discretionary, and thus possibly reviewable in the court of appeals as "final action," or nondiscretionary and thus reviewable only in the district court.<sup>92</sup>

An erroneous interpretation of law by the Administrator presents another situation in which there is potential overlap between district and appellate court jurisdiction. For example, a petitioner may argue that the Administrator erred by interpreting a statute's coverage to be less than is statutorily mandated.<sup>93</sup> Such

demonstrate that fact with a specified measure of proof. This places a premium on certainty in the decisionmaking process, which, in turn, encourages parties to debate the inevitable uncertainty.

90. *See* NRDC v. EPA, 770 F. Supp. 1093 (E.D. Va. 1991) (stating that petitioner alleged that under existing scientific data on the effects of dioxin on water quality, the Administrator was required to make "triggering" foundational findings that a revision to the dioxin standard is necessary).

91. *See, e.g.,* Chemical Mfrs. Ass'n v. EPA, 870 F.2d 177, 249 (5th Cir. 1989) (rejecting argument of NRDC that EPA should have regulated additional pollutants "[d]ue to the lack of any evidence confirming NRDC's assertions of dangers posed to workers' safety").

92. *See* NRDC v. EPA, 512 F.2d 1351 (D.C. Cir. 1975). In this case petitioner challenged regulations governing the use of lead in gasoline, arguing that the controls on lead included in the final EPA regulations were deficient. After noting that its jurisdiction to review the regulations was proper under § 307 of the CAA, the court of appeals observed that "[f]rom another point of view . . . [the] suit was directed at the 'failure of the Administrator to perform [a nondiscretionary duty].'" *Id.* at 1357. That duty was the "refusal to promulgate controls which, given the information available to him on the health effects of airborne lead, he had no choice but to promulgate." *Id.* The court then noted that although "[t]his characterization may rest on an overly broad reading of what Congress intended by 'not discretionary,'" EPA had initially disputed the power of the court of appeals to hear the case, arguing that the district court under § 304(a) of the CAA of 1970 was the proper forum. *Id.*

*See also* Dow Chemical Co. v. Costle, 480 F. Supp. 315, 319 (E.D. Mich. 1978). In this case Dow contended that the phrase "shall approve any revision" to a state implementation plan requires the Administrator to perform a mandatory duty and that § 304 of the CAA of 1977 empowers a lawsuit in the district court for failure to perform a nondiscretionary duty. EPA, in contrast, "contests that § 304 of the CAA does not apply in this situation as the duties of the Administrator in reviewing a proposed revision to a state implementation plan are discretionary and require independent judgment."

93. *See* Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 661 n.9 (D.C. Cir. 1975). Here the court observed:

Section 304 [of the CAA] allows challenges to the Administrator's failure to act, while § 307 speaks of challenges to his actions. While these appear to involve separate issues, overlap is conceivable, for instance, where the Administrator acts but, in the view of the challengers, does not act far enough. If nondiscretionary duties are involved, the challenge might fairly be said to lie under either § 304 or § 307.

*Id.*

The confusing overlap between the two is well-illustrated in Delaware Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256 (3d Cir. 1991). The court first stated broadly that jurisdiction to review a challenge to EPA's approval of a state implementation plan lies in the court of appeals:

alleged error could be termed a “failure to perform a non-discretionary act” that is reviewable in the district court, or it could be part of the agency’s “final action” that is reviewable only in the court of appeals.<sup>94</sup>

Thus, a petitioner may characterize allegations that the agency erred in interpreting a statute or that its action lacks evidentiary support in two plausible ways: (1) as a challenge to a failure to perform a nondiscretionary act, which lies in the district court, or (2) as a challenge to final action, which lies in the court of appeals. Even more vexing for purposes of jurisdiction, a petitioner’s challenge to the validity of a single regulation can encompass both types of arguments.

For example, in a 1992 case an environmental group sought judicial review of the Administrator’s promulgation of regulations governing stormwater discharges under the CWA.<sup>95</sup> The group challenged the agency’s decision to exempt construction sites of less than five acres from the rules. Because petitioner claimed that the statute did not allow for exemptions, it could frame the argument in terms of the agency’s failure to perform a nondiscretionary act. But some past court decisions had upheld similar exemptions under the theory that agencies may adopt *de minimis* exemptions grounded in administrative convenience;<sup>96</sup> thus, petitioner also argued that no evidence in the record supported an exemption of this size—an argument that the Administrator had abused his discretion. While the court ultimately accepted the latter argument and concluded that the five-acre limit was arbitrary and capricious,<sup>97</sup> the nature of the two related arguments illustrates the overlap between the jurisdictional language in the statutes.

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Under § 7607 [or CAA § 307], private parties may seek to correct a plan’s failure to meet the law’s requirements by a petition for review filed in the courts of appeals. Section 7607 allows citizens groups to petition . . . for relief from an administrative refusal or failure to insist on an implementation plan reasonably calculated to meet the requirements of the Act . . . .

*Id.* at 266. The court thus indicated that even legal failures to include measures in an implementation plan are reviewable only in the court of appeals. The court then seemed to backtrack on this position in the very next paragraph, declaring that “[t]he statutory basis for private actions based on what is in, or is not in, an approved implementation plan is found in § 7607, unless the plan fails to meet an existing standard or limitation imposed under the Act.”

*Id.* at 266-67. Arguably, the court was indicating that in some instances both courts might possess jurisdiction. *See also* NRDC v. EPA, 915 F.2d 1314 (9th Cir. 1990) (deciding water pollution rule, which provided that states must identify discharging point sources for some but not all of certain listed waters, was invalid because the statute required that those point sources be identified for *all* listed waters).

94. *See, e.g.*, Citizens for a Better Env’t v. Costle, 610 F. Supp. 106, 111 (N.D. Ill. 1985) (noting that “the distinction between ‘the failure to act and the failure to act properly’ is not always clear”).

95. NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992).

96. *See, e.g.*, Monsanto Co. v. Kennedy, 613 F.2d 947, 955 (D.C. Cir. 1979) (stating that “de minimis” principle allowed the Food and Drug Administration to find that the level of migration into food of a particular chemical is so negligible as to present no public health or safety concerns).

97. NRDC v. EPA, 966 F.2d at 1306.



In sum, the terminology used in the jurisdictional provisions is not self-defining and overlaps. Thus, an agency's decision not to act, made subsequent to a regulatory proceeding, arguably could be characterized in a number of ways: (1) as final action reviewable in the court of appeals; (2) as a failure to perform a nondiscretionary act, reviewable in the district court; (3) as an abuse of discretion, reviewable in the court of appeals; or (4) as inaction that does not involve a failure to perform a nondiscretionary act, in which case no court would have jurisdiction over the matter. In addition, after the 1990 Amendments to the CAA, a decision not to act may be a "final decision" that defers performance of any nondiscretionary statutory action to a later time, now reviewable in the court of appeals,<sup>98</sup> or it could merely amount to an "agency action unreasonably delayed," over which the district court has jurisdiction.<sup>99</sup>

As the case law discussed below in this Article demonstrates, the key factors for determining the category into which the inaction falls include whether the agency has compiled a sufficient administrative record for judicial review; whether the challenge to the inaction is framed in terms of statutory misinterpretation, error in the consideration of evidence, or error in the exercise of policy discretion; whether the agency has promised further proceedings on the same subject; and whether the inaction is related to other action which the agency has taken.

### *C. The Alternative of Concurrent Jurisdiction*

The discussion so far has assumed that if jurisdiction exists to review agency inaction, it must lie exclusively either in the district court or the court of appeals. But the importance of clearly defining the jurisdictional boundaries between the two courts would greatly diminish if, at least in some instances, both courts possessed jurisdiction over an issue. For example, if a petitioner alleged that the Administrator had violated the CAA by approving a state implementation plan ("SIP") which did not contain all the legally required components,<sup>100</sup> both courts conceivably could have jurisdiction. The petitioner could file in the district court under section 304 of the Act, since it is alleging that the Administrator failed to perform the nondiscretionary duty of ensuring that the plan was complete. Alternatively, the petitioner could file in the court of appeals under section 307, since the lawsuit challenges the basis for the Administrator's final action approving the SIP.

A smattering of opinions have recognized the possibility of concurrent jurisdiction under the bifurcated judicial review provisions,<sup>101</sup> but the few courts

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98. CAA § 307(b)(2), 42 U.S.C. § 7607(b)(2) (1994).

99. CAA § 304(a), 42 U.S.C. § 7604(a) (1994).

100. *See, e.g., City of Seabrook v. EPA*, 659 F.2d 1349 (5th Cir. 1981) (Plaintiffs alleged that various parts of the state's implementation plan failed to comply with the CAA.).

101. *See, e.g., Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1307 (10th Cir. 1973) (Lewis, J., concurring) (stating that he was "not prepared to agree that the trial court lacked naked jurisdiction to entertain this action" but agreeing with majority that the court of appeals had jurisdiction); *NRDC v. EPA*, 484 F.2d 1331, 1337 (1st Cir. 1973) (finding that § 304(a) of CAA of 1970 provided the authorization for suit against the Administrator, whether brought

explicitly addressing this issue have rejected it.<sup>102</sup> The courts reason that the distinction in the statutory language between nondiscretionary action and review of final action,<sup>103</sup> as well as the legislative history of the statutes,<sup>104</sup> argue against a conclusion that concurrent jurisdiction is possible. The decisions also cite the longstanding judicial policy against concurrent jurisdiction<sup>105</sup> as well as concerns over avoiding duplication of judicial procedures and inconsistent decisions.<sup>106</sup>

Accordingly, no court has endeavored to solve the interpretive difficulties posed by the bifurcated jurisdiction provisions by holding that jurisdiction over agency inaction is proper in both the district court and the court of appeals. Instead, courts have sought to devise a test that will determine the proper jurisdiction in which a plaintiff may bring various challenges to agency inaction.

#### *D. Judicial Tests to Determine Jurisdiction over Agency Inaction*

Given the definitional uncertainty and the use of overlapping statutory terms, the courts have attempted to draw a practical and sensible dividing line between the jurisdictional domains of the district court and the court of appeals. As one court put it, "clear and workable guidelines" are needed for these basic

in district court or in a court of appeals under § 307, and concluding that § 307 simply directed that certain actions authorized by § 304(a) be brought in one forum rather than the other); *see also* *Montgomery Env'tl. Coalition v. Costle*, 646 F.2d 595, 596-97 (D.C. Cir. 1981) (declaring that in *NRDC v. EPA*, 512 F.2d 1351 (D.C. Cir. 1975), "this court held that the power to award attorneys' fees under the citizen suit provision, section 304 . . . did not authorize such awards to litigants seeking judicial review of agency action under section 307(b) . . . even where the same litigation could arguably have been framed as a citizen suit in the district court").

102. *See, e.g.*, *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984); *Pennsylvania Dep't of Env'tl. Resources v. EPA*, 618 F.2d 991, 995 (3d Cir. 1980); *Environmental Defense Fund v. EPA*, 598 F.2d 62, 91 (D.C. Cir. 1978); *Citizens for a Better Env't v. Costle*, 515 F. Supp. 264, 268 (N.D. Ill. 1981).

103. *NRDC v. EPA*, 512 F.2d at 1355:

[T]he language and history do not provide a basis for holding, as a general matter, that section 304 encompasses suits against the Administrator for taking steps alleged to be misguided or uninformed. Review of the Administrator's exercise of judgment, or 'discretion,' of course, is available under section 307, which establishes *exclusive* jurisdiction in the courts of appeals for actions within its compass.

(emphasis in original).

104. *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 663 (D.C. Cir. 1975) ("If an abuse of discretion were held to be a failure to perform a nondiscretionary act, failure to perform *any* duty . . . would be drawn within the scope of Section 304," an outcome which "is exactly the result Congress intentionally deleted from the Act.") (emphasis in original).

105. *Id.* at 660 ("The two suggested forms of action are substantively identical, and it is well settled that bifurcated jurisdiction between District Court and Court of Appeals over identical litigation is not favored.")

106. *Center for Auto Safety v. EPA*, 558 F. Supp. 103, 105 (D.D.C. 1983) (concluding that jurisdiction over plaintiff's claim was vested exclusively in the court of appeals as "duplicative litigation is generally to be avoided because it needlessly expends limited judicial resources while creating the risk of inconsistent decisionmaking").

jurisdictional grants.<sup>107</sup> This Part of the Article discusses how courts have determined whether an agency's decision to do nothing—inaction—is a final action allowing judicial review in the court of appeals, or is a failure to perform a nondiscretionary act, vesting jurisdiction only in the district court. The courts have applied five different tests to this problem, tests which in a given situation can result in quite different jurisdictional outcomes.

### 1. The “Embedded in Final Action” Test

In *Indiana & Michigan Electric Co. v. EPA*,<sup>108</sup> perhaps the most cited case addressing the issue of bifurcated jurisdiction, the Court of Appeals for the Seventh Circuit considered a paradigm of agency inaction and crafted the “embedded in final action” test. As required by the CAA, the Indiana Air Pollution Control Board submitted a revision of its SIP to EPA. The revised plan established a ceiling on emissions of sulfur dioxide, but it also provided that a source would be in compliance if its daily emissions, when averaged over thirty days, did not exceed the ceiling.

EPA approved the revised plan but in doing so stated that it was “taking no action on the 30-day averaging compliance concept.”<sup>109</sup> Citing section 307, two utilities petitioned for review of that decision in the court of appeals, arguing that the Administrator had no discretion to refuse to act on the averaging provision. EPA responded that the court of appeals lacked jurisdiction because petitioners were challenging agency inaction—the failure to approve the thirty-day averaging provision—rather than any final action by EPA. Thus, according to the agency, this challenge belonged in the district court under that court's jurisdiction to compel nondiscretionary action.<sup>110</sup>

The court rejected EPA's argument. Admitting that the utilities' contention “brings the petition for review within the literal reach” of jurisdiction over nondiscretionary action under section 304,<sup>111</sup> the court found that jurisdiction was properly in the court of appeals because the petitioner's complaint about agency inaction was “embedded in a challenge to the validity of the implementation plan.”<sup>112</sup> The court did not further explain when agency inaction would be deemed “embedded” in a larger agency final action over which jurisdiction in the court of appeals was unquestionably proper. It merely declared that EPA had announced its failure to act in an order based upon an administrative record, and that if section 304 applied, the petitioners would have to proceed simultaneously in the district court (challenging the agency's inaction) and in the court of appeals (challenging the action which the agency had taken), a wasteful result. The court also noted that the petitioners had requested the court to invalidate EPA's order approving the revised state plan without the averaging

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107. *NRDC v. EPA*, 512 F.2d at 1357.

108. 733 F.2d 489 (7th Cir. 1984).

109. *Id.* at 490.

110. *Id.*

111. *Id.*

112. *Id.*

process; they did not ask the court to order EPA action on the thirty-day compliance provision.<sup>113</sup>

The Court of Appeals for the Ninth Circuit also adopted the embedded in final action test in *Kamp v. Hernandez*<sup>114</sup> and later followed the test in *Abramowitz v. EPA*.<sup>115</sup> The two cases were factually similar. In *Kamp*, EPA approved emission control measures for an Arizona SIP without requiring the state to demonstrate that the plan would attain and maintain the national ambient air quality standards. Similarly, in *Abramowitz* the petitioner contended that EPA violated the CAA by approving ozone and carbon dioxide control measures for the Los Angeles region without determining whether those measures would attain the national ambient air quality standards.<sup>116</sup>

In both cases EPA argued that while its approval of the control measures could be reviewed in the court of appeals, its inaction—the failure to determine whether attainment and maintenance would occur—was subject to review only in the district court. The court of appeals nonetheless found jurisdiction over both aspects of the agency's decision. It reasoned that "when the challenge to agency inaction 'is embedded in a challenge to the validity of an implementation plan,' jurisdiction lies in the circuit court reviewing the implementation plan."<sup>117</sup>

113. *Id.* at 491.

114. 752 F.2d 1444, 1454 (9th Cir.), *modified*, 778 F.2d 527 (1985).

115. 832 F.2d 1071 (9th Cir. 1987). The author was one of the attorneys for the plaintiff in this action.

116. Following *Kamp*, the *Abramowitz* court found that the agency's inaction—failing to determine attainment—was embedded in the action that it did take approving the SIP revision, and that both aspects of the agency's action were reviewable in the court of appeals under § 307. *Id.* at 1072.

117. *Kamp*, 752 F.2d at 1454 (quoting *Indiana & Michigan Elec. Co. v. EPA*, 733 F.2d 489, 490 (7th Cir. 1984)); *Abramowitz*, 832 F.2d at 1076. Compare, however, a Ninth Circuit decision handed down just prior to *Kamp*, *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 1984), which reached a result arguably in conflict with the outcome under the embedded in final action test. In *Trustees*, petitioners sought review of permits issued by EPA under the CWA, requesting that the court direct EPA to promulgate effluent limitation guidelines before granting individual permits. The argument was that the permits were invalid because adoption of the guidelines was a prerequisite to issuing the permits. Under *Indiana & Michigan Electric*, the claim about the agency's inaction—the failure to issue guidelines—seemingly was embedded in its challenge to the permits; indeed, this inaction was the claimed reason for invalidating the final action taken in granting the permit. The court, however, held that the plaintiffs' argument "is framed in terms of the EPA's failure to comply with a nondiscretionary duty to promulgate industry-wide rules," and thus jurisdiction was proper only in the district court under § 505(a)(2) of the CWA of 1972 (current version at 33 U.S.C. § 1365 (a)(2) (1994)). *Kamp*, 749 F.2d at 558.

There is one possible way to square *Trustees* with *Indiana & Michigan Electric*, and thus with the *Kamp* case in the Ninth Circuit. The court also held that under the CWA, issuance of the guidelines was not a prerequisite to issuance of the permits, for permits could be issued "incorporating 'such conditions as the Administrator determines are necessary to carry out the provisions of this [Act]' when no limitations or guidelines are yet available." *Id.* (quoting the CWA of 1972 (current version at 33 U.S.C. § 1342(a)(1) (1994)). Once the court reached this conclusion, it was clear that the failure to issue the guidelines could have no effect on the permit. Thus, the court might then have been able to dismiss for lack of jurisdiction, since the agency's inaction was no longer legally "embedded" in the action that the agency did take, the

## 2. The "Remedy" Test

A second test, adopted by the Court of Appeals for the Third Circuit in *Pennsylvania Department of Environmental Resources v. EPA* ("*Commonwealth*"),<sup>118</sup> determines jurisdiction over suits challenging agency inaction by focusing on the relief requested by the petitioner. In *Commonwealth*, EPA adopted standards of performance for new sources of water pollution in the coal-mining industry. When the agency announced its decision, however, it deferred the promulgation of regulations covering one type of discharge from these same sources.<sup>119</sup> Petitioners challenged this inaction, contending that the Administrator lacked the authority to defer promulgation of standards for this type of discharge.<sup>120</sup>

The court focused on the remedy requested by petitioner. It observed that petitioner "asked not to suspend regulations, but to order the promulgation of completely new and different regulations."<sup>121</sup> Concluding that "an allegation of inadequacy of a set of regulations is quite different from an allegation that a needed regulation was nonexistent," the court held that it lacked jurisdiction under section 509 of the CWA. According to the court, only the district court possessed jurisdiction over the latter allegation.<sup>122</sup>

Thus, under the *Commonwealth* court's remedy test, appellate jurisdiction over agency inaction turns on the type of relief requested by the petitioner. For example, if the petitioner challenges the agency's failure to regulate a class of sources, jurisdiction will depend upon whether the petitioner seeks to set aside a part of an adopted regulation or asks the court to order EPA to promulgate additional regulations.<sup>123</sup>

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issuance of the permits.

118. 618 F.2d 991 (3d Cir. 1980).

119. The regulations would have covered so-called "post-mining discharges," which are polluting discharges from closed or abandoned mines. *Id.* at 993-94.

120. *Id.*

121. *Id.* at 997.

122. *Id.* at 996.

123. Thus, the *Commonwealth* court was able to distinguish an earlier Third Circuit decision which held that the court of appeals had jurisdiction to review the Administrator's decision to exempt certain of petitioner's competitors from a set of effluent limitations. *Id.* at 996 (distinguishing *American Iron & Steel Inst. v. EPA*, 568 F.2d 284 (3d Cir. 1977)). In this earlier case, known as "*AISI II*," petitioners challenged the Administrator's decision to exempt plants in the Mahoning River Valley region of Eastern Ohio from a set of effluent limitations establishing the "best practical control technology currently available" for certain manufacturing processes within the iron and steel industry. Without commenting on any jurisdictional issues raised by this claim, the court of appeals in *AISI II* addressed the merits of the claim, concluding that EPA had not violated the APA in promulgating the regulations. *AISI II*, 568 F.2d at 294. The *Commonwealth* court distinguished this earlier case on the basis that:

The *AISI II* petitioners did not allege that the Administrator failed to promulgate at all but contended that his regulations improperly excluded a group of competitors to which they should have been extended. Their objection was to the imposition of the promulgated regulation on them, while their competitors

Other courts, however, have either expressly or impliedly refused to adopt the “remedy” distinction found determinative by the Third Circuit. In *Consolidation Coal Co. v. Costle*,<sup>124</sup> the Fourth Circuit Court of Appeals reviewed effluent limitations for existing point sources in the same industry that later would be the subject of the regulations at issue in *Commonwealth*.<sup>125</sup> Petitioners challenged the exclusion of point source discharges from inactive surface mines during reclamation and revegetation, and from underground mines after coal production had ceased. The court of appeals, however, did not even mention a jurisdictional problem in reaching the merits, concluding that the Administrator’s decision to create the exclusion was correct. It found that the Administrator did not act arbitrarily in failing to meet the statutory deadline by promulgating regulations dealing with post-mining discharges, rejecting petitioners’ contention that the court should remand the regulations for prompt inclusion of inactive mines.<sup>126</sup> Additionally, the holding and reasoning of other decisions are inconsistent with the *Commonwealth* court’s remedy test. They emphasize the need to avoid piecemeal judicial review, where the court of appeals would review what the Administrator has done and the district court would review the Administrator’s inaction.<sup>127</sup>

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remained exempt.

*Commonwealth*, 618 F.2d at 996-97.

124. 604 F.2d 239 (4th Cir. 1979).

125. The court in *Commonwealth* had reviewed performance standards for new sources in that industry, while *Consolidation Coal* concerned standards for existing sources.

126. *Consolidation Coal Co.*, 604 F.2d at 251-52. It did note, however, that to the extent that petitioners were arguing that the Administrator acted illegally on the basis of information not included in the administrative record, or for the imposition of a judicial deadline for promulgating the regulations, the case “would more appropriately be brought in a district court.” *Id.* at 252.

The Third Circuit in *Commonwealth* first distinguished *Consolidation Coal* on the basis that the court was “not confronted with a petitioner’s request that the EPA be ordered to promulgate new or different regulations.” *Commonwealth*, 618 F.2d at 996. That conclusion seems inaccurate, however, given the *Consolidation Coal* court’s statement that petitioners had sought a remand of the regulations for inclusion of inactive mines, which would have been a “new or different regulation.” Later in the opinion, the court in *Commonwealth* more forthrightly noted that to the extent its opinion was inconsistent with *Consolidation Coal*, it declined to follow that holding. *Id.* at 997.

127. See also *Santa Barbara County Air Pollution Control Dist. v. EPA*, 31 F.3d 1179 (D.C. Cir. 1994) (Without discussing any jurisdictional question, the court of appeals reviewed petitioner’s contentions that final rules failed to include marine vessels in transit among the regulated sources.); *City of Seabrook v. Costle*, 659 F.2d 1371 (5th Cir. 1981). In *City of Seabrook*, plaintiffs challenged the Administrator’s approval and conditional approval of revisions to the Texas SIP under the CAA. Plaintiffs argued that because they were complaining in part of what the Administrator failed to do—that is, to promulgate plan revisions for Texas—there was no final action and thus no jurisdiction in the court of appeals. The Fifth Circuit disagreed, declaring that it wished to avoid a ruling that “would result in an impractical process of piecemeal review that Congress could not have intended in §§ 304 and 307.” *Id.* at 1373. Although the court did not mention *Commonwealth*, it clearly rejected the reasoning of that decision.

Additionally, the district court’s decision in *Maine v. Thomas*, 690 F. Supp. 1106 (D. Me. 1988), *aff’d*, 874 F.2d 883 (1st Cir. 1989), is also inconsistent with *Commonwealth*, although

Interestingly, two years after the Seventh Circuit adopted the embedded in final action test,<sup>128</sup> that court seemed to restrict that test's scope by making its application turn on the remedy requested. In *Bethlehem Steel Corp. v. EPA*,<sup>129</sup> EPA took three separate steps. The agency (1) disapproved a proposed revision to the Indiana SIP (1980 APC-3), (2) suspended consideration of a related plan amendment (1979 APC-9), and (3) later approved part of a third plan revision (1981 APC-9). It also, however, disapproved part of this third revision because it did not contain "reasonably available control technology" as required by the CAA.<sup>130</sup>

The court found that the steelmaking company's challenge to EPA's first action suspending consideration of 1979 APC-9 was reviewable under section 307, citing *Indiana & Michigan Electric* without elaboration.<sup>131</sup> It also considered the steel company's challenge to EPA's third action, the disapproval of 1981 APC-9. However, another petitioner, an environmental group, had challenged this third action, the approval of 1981 APC-9, on the basis that the approved plan revision was not sufficiently stringent. The environmental group argued that the revision should be treated as an interim rule until a later rule including more stringent provisions was promulgated.<sup>132</sup>

The court of appeals found that if EPA's refusal to act as the citizens requested was a failure to perform a nondiscretionary act, then only the district court would have jurisdiction over this claim. The court distinguished *Indiana & Michigan Electric*, characterizing it as a case in which the order was challenged because the agency "failed to do something it was duty-bound to do."<sup>133</sup> In *Bethlehem Steel*, however, the order "has no consequences" harmful to the environmental group; the group just "wants more in the future."<sup>134</sup> If the EPA disapproval had "tainted the remedial parts of the [EPA] order in the group's eyes," then the case would have been different and the court of appeals could have heard it under the dominion of *Indiana & Michigan Electric*.<sup>135</sup>

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once again that earlier decision is not mentioned directly. EPA had earlier completed a rulemaking on protection of visibility in federal parks and wilderness areas in which it specifically reserved for future phases of certain categories of regulations. Several years later, plaintiffs filed suit in the district court to compel promulgation of those additional regulations. The district court, however, found that it had no jurisdiction because the prior deferral of the additional regulations was a "final action" and reviewable only in the court of appeals under § 307 of the CAA. *Id.* at 1111. Under the "remedy" test, because plaintiffs were not seeking to set aside the earlier regulations and were requesting only promulgation of new ones, jurisdiction would lie in the district court.

128. *Indiana & Michigan Elec. Co. v. EPA*, 733 F.2d 489 (7th Cir. 1984); *see supra* text accompanying notes 108-15.

129. 782 F.2d 645 (7th Cir. 1986).

130. *Id.* at 650.

131. *Id.* at 649.

132. *Id.* at 654.

133. *Id.* at 655.

134. *Id.*

135. *Id.* The court also stated that the administrative record contained nothing about the feasibility of the additional steps requested by the citizens group. *Id.*

### 3. The "Rulemaking Cycle" Test

The next three tests stem from one piece of litigation, *NRDC v. Administrator, EPA*.<sup>136</sup> In a part of the opinion vacated when the environmental petitioners subsequently moved for voluntary dismissal of their petition after the case had been decided, the three judges on the panel explicated very different approaches to deciding the question of judicial jurisdiction to review agency inaction.

In *NRDC v. Administrator*, the Administrator had adopted revisions to the national ambient air quality standard for particulates. Initially, a draft of the proposal released for public comment had indicated that the Administrator was proposing to defer a decision on whether to adopt a standard for fine particles that would address visibility impairment. The draft also stated that the Administrator was continuing to evaluate alternative approaches to the reduction of acid deposition.<sup>137</sup> At the adoption of the final rule revising the particulate matter standards, the Administrator announced that he would "proceed with consideration of a visibility based standard in parallel with work on acid deposition."<sup>138</sup> Accordingly, on that same day EPA published an advanced notice of proposed rulemaking "soliciting public comment on the appropriateness of a separate secondary fine particle standard designed to protect visibility."<sup>139</sup> The advanced notice, however, did not propose a particulate matter standard to deal with acid deposition.<sup>140</sup>

An environmental group sought review of the Administrator's decisions regarding visibility and acid deposition in the Court of Appeals of the District of Columbia Circuit, and the court issued three separate opinions. In a concurring and dissenting opinion, Judge Edwards concluded that jurisdiction was properly in the court of appeals under section 307(b) because both parts of the agency's decision, that dealing with visibility and that concerning acid deposition, constituted final action. In his view the fact that EPA had completed the standard rulemaking cycle and reached a conclusion was determinative and final. Although EPA had failed to decide in the final rule whether it would regulate particulates to protect visibility and to prevent acid deposition, the agency nonetheless had taken final action on those subjects within the meaning of section 307.<sup>141</sup>

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136. 902 F.2d 962 (D.C. Cir. 1990) (per curiam), *vacated in part and dismissed in part by* 921 F.2d 326 (D.C. Cir. 1991).

137. *Id.* at 966.

138. *Id.* at 982 (citing Revisions to the National Ambient Air Quality Standard for Particulate Matter, 52 Fed. Reg. 24,646-47 (1987)).

139. *Id.* (citing Revisions to the National Ambient Air Quality Standard for Particulate Matter, 52 Fed. Reg. 24,647 (1987)).

140. *Id.*

141. The court stated:

EPA's failure to take action in a final rule, either by postponing a decision or failing altogether to address an issue raised in comments, does not turn a petition for review into an action for failure to comply with a mandatory duty such that the district court alone has jurisdiction.

*Id.* at 992. Judge Edwards carefully noted that his conclusion about jurisdiction did not imply



While the court in *NRDC v. Administrator* undertook judicial review after EPA had concluded an informal rulemaking, the logic of the “rulemaking cycle” test is not necessarily limited to rulemaking proceedings. The focus of Judge Edwards’s opinion is on two facts: (1) the agency had completed a rulemaking by issuing a final rule after a notice and comment period, and (2) the agency had clearly indicated that it had considered the disputed issues during the rulemaking process.<sup>142</sup> Thus, the rulemaking cycle test could apply outside the context of rulemaking, provided that the agency had completed a set of procedural steps, had afforded the parties an opportunity to make their positions known on issues, and had actively considered the disputed issues before deciding not to act.

In his opinion Judge Edwards reasoned that the various courts of appeals “have been consistent in saying that jurisdiction always lies under section 307 after the agency has completed a rulemaking and the challenge is to that rulemaking.”<sup>143</sup> This statement, however, is overbroad. For example, in jurisdictions following the embedded in final action test to review a rulemaking,<sup>144</sup> the inaction challenged must be embedded in EPA’s affirmative action for jurisdiction to attach in the court of appeals. If the inaction is not embedded, then jurisdiction to review the inaction would not attach even if the agency had completed a rulemaking cycle and had considered the issue during that cycle.<sup>145</sup> Similarly, under the remedy test,<sup>146</sup> a court of appeals will have jurisdiction if the petitioner seeks to set aside a specific part of the rule adopted, but not if it seeks to compel further rulemaking. In contrast, the rulemaking cycle test would place all such issues under the jurisdiction of the court of appeals as long as they were considered during the rulemaking process.<sup>147</sup>

Other courts have adopted approaches consistent with the rulemaking cycle test without directly articulating it.<sup>148</sup> However, the principal case cited by Judge

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a decision about the substantive merits of the court’s review, for the agency’s decision to defer adoption of a particulate standard was not necessarily inconsistent with the agency’s legal obligations under the CAA. *Id.* at 993.

142. *Id.* at 989.

143. *Id.* at 991.

144. *See supra* text accompanying notes 108-17.

145. In a concurring and dissenting opinion, Judge Silberman explicitly noted that Judge Edwards’s approach “goes far beyond the notion that our appellate jurisdiction covers issues ‘embedded’ in a final rule.” *NRDC v. Administrator*, 902 F.2d at 996 n.1.

146. *See supra* text accompanying notes 118-35.

147. For example, in *Pennsylvania Dep’t of Env’tl. Resources v. EPA*, 618 F.2d 991 (3d Cir. 1980) (“*Commonwealth*”), the leading case adopting the remedy test, the court found no jurisdiction where petitioners attacked the agency’s refusal to regulate discharges from inactive mines when it adopted final rules for a category of point sources. In contrast, under a “rulemaking cycle” approach, the court would presumably find that the court of appeals has jurisdiction to review that inaction.

148. For example, in *Vermont v. Thomas*, 850 F.2d 99 (2d Cir. 1988), Vermont adopted provisions for its SIP which addressed the problem of regional haze. When EPA reviewed those provisions pursuant to the CAA, it issued a final ruling taking “no action” on those parts of the SIP aimed at controlling regional haze. Without discussion of any jurisdictional question, the court of appeals reached the merits and affirmed EPA’s decision. In doing so, it rejected petitioners’ claim that EPA’s “no action” ruling deprived Vermont of a definitive decision on the merits of the proposal, an argument that plainly cast EPA’s decision in terms

Edwards in support of the test, *Sierra Club v. Gorsuch*,<sup>149</sup> is not fully consistent with the rulemaking cycle approach. In *Sierra Club* petitioners sought review of EPA's decision, at the end of a rulemaking, that refused to place strip mines on the list of air pollution sources subject to regulations governing fugitive emissions. Explaining that it had not made a final decision on the issue, EPA declared that it would consider the matter further over the next several months.<sup>150</sup>

Plaintiffs challenged EPA's decision to defer adoption of the rules. The court of appeals first decided that it had jurisdiction under section 307 of the CAA because the petition challenged EPA's list of sources as promulgated and the inclusion of strip mines was clearly an issue in the rulemaking.<sup>151</sup> Then, however, the court narrowed the issues it would review, declaring that the question of whether the CAA required EPA to regulate strip mines was not before it.<sup>152</sup> Instead, the court examined only the agency's reasons for deferring action in order to determine whether the delay was inconsistent with the agency's discretion under the applicable statutory scheme.<sup>153</sup> In other words, although *Sierra Club* at first appeared to endorse a full "rulemaking cycle" approach, it limited the scope of the available review by excluding arguments that the CAA required EPA to regulate strip mines.

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of agency inaction. *Id.* at 104.

Similarly, in *Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989), yet another case dealing with regional haze, appellant sued in the district court to compel EPA to promulgate regulations combating regional haze. Earlier, the agency had concluded a rulemaking in which it deferred the adoption of rules on this subject. In ruling that the district court lacked jurisdiction because the agency was not under a nondiscretionary obligation to act, the First Circuit Court of Appeals explained that had plaintiff challenged EPA's inaction at the conclusion of the initial rulemaking, the court of appeals would have had jurisdiction to consider the matter. *Id.* at 887. Judge Edwards cited both of these cases in his concurring opinion in *NRDC v. Administrator*, 902 F.2d at 962.

Other decisions also support the rationale of the "rulemaking cycle" test. In *NRDC v. Thomas*, 689 F. Supp. 246 (S.D.N.Y. 1988), *aff'd*, 885 F.2d 1067 (2d Cir. 1989), the district court reviewed the Administrator's decision that he lacked sufficient information to determine which pollutants were hazardous under former § 112 of the CAA. The court noted that this decision might have been found to be an abuse of discretion on review before a court of appeals, thus implying that the Administrator's decision was "final action" that was reviewable in the court of appeals under § 307(b). *Id.* at 258; *see also* *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 658-59 (7th Cir. 1986) (Swygert, J., dissenting) ("[U]nder the clear language of section 307, even when the sole claim is that agency action is invalid because the agency [rule] did not go far enough, that claim properly belongs in the courts of appeals.").

149. 715 F.2d 653 (D.C. Cir. 1983). The decision is critiqued in Jacqualee Story, *Administrative Agency Inaction: Misapplication of the Finality Doctrine—Sierra Club v. Gorsuch*, 715 F.2d 653 (D.C. Cir. 1983), 59 WASH. L. REV. 993 (1984).

150. *Sierra Club*, 715 F.2d at 655.

151. *Id.* at 657.

152. *Id.* at 657 n.29. The court also noted the *Sierra Club*'s argument that the court should treat the delay by EPA as "equivalent to a decision not to regulate and subject to review as such." *Id.* It then concluded, in reasoning that is less than clear, that because the *Sierra Club* admitted it had no other evidence to place before the agency in the future, this issue "collapses" into the question that the court would review: whether the omission of strip mines from the rulemaking list was arbitrary and capricious. *Id.* at 657-58 n.29.

153. *Id.* at 659.

Thus, although the Sierra Club had argued in the rulemaking that the CAA required EPA to regulate strip mines, if the Sierra Club wished to raise this issue in litigation, it presumably could have done so only in the district court under section 304. In contrast, Judge Edwards found such legal issues reviewable when he reached the merits in *NRDC v. Administrator*.<sup>154</sup> The approach of the *Sierra Club* court thus is narrower than the rulemaking cycle test advocated by Judge Edwards.<sup>155</sup>

In sum, the rulemaking cycle test advocated by Judge Edwards would give the court of appeals jurisdiction over all legal questions that were placed at issue in a rulemaking (or other similar) proceeding, regardless of whether that proceeding ended in action or inaction by the agency. As we shall now see, however, the test is not fully followed in the District of Columbia Circuit. Under the rulemaking cycle test, the court in *NRDC v. Administrator* would have concluded that it had jurisdiction over both the visibility and acid deposition issues, but Judge Wald concluded that the court had no jurisdiction over the visibility issue.

#### 4. The “Constructive Final Action” Test

A fourth approach to jurisdiction over agency inaction is found in Judge Wald’s opinion in *NRDC v. Administrator*. Judge Wald reasoned that agency inaction can sometimes be deemed “constructive final action” and thus within the jurisdiction of the court of appeals. The focus of the test is on the facts underlying the actual stage of the agency’s decisionmaking, rather than on completion of a rulemaking cycle.

Under the constructive final action test, an explicit decision not to revise a national ambient air quality standard would be considered final and would fall within the court of appeals’ jurisdiction.<sup>156</sup> Although such a decision not to act is subject to later revision, for purposes of a given rulemaking it is constructively final. Alternatively, at the end of a given rulemaking the agency “may stand mute, indicating neither that a revision is contemplated nor that a decision

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154. In *NRDC v. Administrator*, EPA, 902 F.2d 962 (D.C. Cir. 1990) (per curiam), *vacated in part and dismissed in part* by 921 F.2d 326 (D.C. Cir. 1991), Judge Edwards noted that EPA had identified visibility impairment and acidic deposition as “known adverse effects.” Accordingly, he concluded that the Administrator “was required” by § 109 of the CAA to select a level to protect the public from visibility impairment and acidic deposition. He would have remanded the matter to the agency and instructed it to propose and finalize regulations addressing visibility impairment and acidic deposition. *Id.* at 994. Thus, given the agency’s admission in an earlier proposal that visibility impairment and acid deposition had “welfare effects,” *id.* at 981, Judge Edwards showed no hesitancy in reviewing whether the CAA required the agency to regulate those two effects.

155. The discussion in *Sierra Club* of the appropriate remedy for a violation is also puzzling. The court reviewed the administrative record and determined that the record was “inadequate to support EPA’s action.” *Sierra Club*, 715 F.2d at 661. Despite this determination, it next concluded that “at this point” it could not find that the agency had acted arbitrarily and capriciously, *id.*, a conclusion which presumably means that petitioner was not entitled to any relief. However, the court then remanded the matter to EPA to “reconsider” whether strip mines should be added to the list. *Id.*

156. *NRDC v. Administrator*, 902 F.2d at 983.

against revision has been reached.”<sup>157</sup> Here, too, Judge Wald would deem the action final, reasoning that the result of such agency inaction is not different than a situation where the agency states that a revision of the standards is inappropriate.<sup>158</sup> Thus, in each situation—an explicit determination not to revise or agency “muteness” at the completion of rulemaking—Judge Wald would reach the same outcome as the rulemaking cycle approach, though by other means.<sup>159</sup>

Judge Wald, however, parts ways with the rulemaking cycle approach in a third situation: when at the conclusion of rulemaking, the agency indicates that it is still actively considering taking action. By explicitly leaving open a window for possible future action, the agency’s decision not to act is, under her approach, not constructively final. Thus, under the constructive final action test, the circumstances of the particular situation will dictate whether the agency’s inaction amounts to final action, with jurisdiction proper in the court of appeals, or is merely a step on the way toward future final action, in which case the court of appeals lacks jurisdiction.<sup>160</sup>

Judge Wald then applied her test to the visibility and acid deposition issues at issue in the *NRDC v. Administrator* case. As to visibility, she emphasized that the agency “remains technically engaged in at least the foreplay of [the] formal rulemaking” cycle because, at the time EPA completed the rulemaking, it had published a separate advanced notice of proposed rulemaking to address visibility.<sup>161</sup> Thus, because EPA announced that it was still actively considering future action, it did not take final action for purposes of judicial review.

Judge Wald reached the opposite conclusion with respect to acid deposition, however, concluding that the agency’s decision was final and subject to immediate judicial review in the court of appeals. The distinguishing factor here was EPA’s statement that it had deferred taking action indefinitely on acid

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157. *Id.*

158. *Id.* at 984.

159. Judge Wald also indicated that jurisdiction in the court of appeals would attach where (1) there is evidence that the agency is simply not presenting its views honestly and is hiding a final decision not to act behind a wall of silence, or (2) the agency “may have failed to act with regard to one or a few interconnected parts of an overall plan,” *id.*,—the embedded in final action approach.

160. *Id.* Judge Silberman’s dissent in the case termed this approach as one of “constructive final action.” *Id.* at 995. He also categorized Judge Edwards’s rulemaking cycle approach as a constructive final action approach. *Id.* The term, however, better fits Judge Wald’s approach, for she focuses on facts to determine under what circumstances preliminary agency inaction should be deemed a “constructive” final decision. Judge Edwards’s approach, on the other hand, is process-oriented and would make all issues final that were considered during the rulemaking proceeding.

161. *Id.* at 986. Judge Wald distinguished *Sierra Club v. Gorsuch*, the principal decision which Judge Edwards cites in his concurring opinion to support the rulemaking cycle approach, on the ground that the agency in that case had actually decided not to include strip mines on the list of sources. *Id.* at 986 n.9. In contrast, she concluded that in the present case the issuance of the advance notice of proposed rulemaking “suggests that EPA is moving, however glacially, towards a final decision.” *Id.* (emphasis in original). But in *Sierra Club*, just as in *NRDC v. Administrator* with respect to visibility, EPA had explicitly stated that it was continuing to consider whether to add strip mines to the list. See *Sierra Club v. Gorsuch*, 715 F.2d 653, 655 (D.C. Cir. 1983); see also *supra* text accompanying notes 141-47.

deposition because it lacked the adequate scientific understanding. Furthermore, when it refused action, EPA was already ten years beyond the statutory deadline established for agency action by the CAA.<sup>162</sup> Given this deadline, Judge Wald concluded that EPA's inaction "is effectively a final decision not to revise in this NAAQS revision cycle."<sup>163</sup>

Thus, under the constructive final action test, whether EPA has taken final action depends on the totality of circumstances underlying the agency's decisionmaking and upon the statutory obligations, including deadlines for action, imposed upon it. This approach is consistent with a few other decisions in which courts have concluded that long delays can turn the agency's inaction into constructive final action for purposes of judicial review.<sup>164</sup>

### 5. The "Actual Final Decision" Test

Finally, a fifth test takes a literal approach to determining when final action has occurred and accords significantly more deference to the agency's refusal to act. In *NRDC v. Administrator*,<sup>165</sup> Judge Silberman rejected both the constructive final action and rulemaking cycle tests. He emphasized that the statutory term "final action" literally suggests that agency inaction is not reviewable at all,<sup>166</sup> and that jurisdiction in the court of appeals is "anchored in an actual . . . final decision."<sup>167</sup> Under Judge Silberman's approach, which I term the "actual final decision" test, "when the agency has failed to decide, no matter how 'close' the agency is to [making] that decision,"<sup>168</sup> the matter is unreviewable.<sup>169</sup>

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162. *Id.* at 988.

163. *Id.* "NAAQS" refers to National Ambient Air Quality Standards. The opinion goes on to state that "[t]he agency's protestations of its open mind and continuing study are, without more, insufficient evidence that in this rulemaking, EPA's decision is anything but one not to establish an acid deposition standard as a result of this review and revision cycle." *Id.*

164. *See, e.g.,* *Scott v. Hammond*, 741 F.2d 992, 996 (7th Cir. 1984) ("We believe that, if a state fails over a long period of time to submit proposed TMDL's, this prolonged failure may amount to the 'constructive submission' by that state of no TMDL's."); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1100 (D.C. Cir. 1970) ("At some point administrative delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review."); *Alaska Center for the Env't v. Reilly*, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991); *see also* *Public Citizen Health Research Group v. Commissioner, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) (citing *Environmental Defense Fund*, 428 F.2d at 1093, and concluding that when delay is extremely lengthy or when exigent circumstances render it equivalent to a final denial of petitioners' request, "the court can undertake review as though the agency had denied the requested relief and can order an agency to either act or to provide a reasoned explanation for its failure to act").

165. *NRDC v. Administrator, EPA*, 902 F.2d 962 (D.C. Cir. 1990), *vacated in part and dismissed in part* by 921 F.2d 326 (D.C. Cir. 1991).

166. *Id.* at 995.

167. *Id.* at 997.

168. *Id.*

169. Judge Silberman did recognize two limited exceptions to this general approach. First, review is allowable "when we thought the record indicated that the agency has cloaked a final decision—even a decision not to act—from the public." *Id.* at 995. The authority cited for this exception was *Sierra Club v. Gorsuch*, 715 F.2d 653 (D.C. Cir. 1983), a decision which Judge

Applying the approach to both the visibility and acid rain proceedings conducted by EPA, Judge Silberman found both unreviewable. In the case of visibility, EPA had taken preliminary action in the form of a lapsed advanced notice of proposed rulemaking, and since it was unknown how the agency would act in the future, no final action had occurred.<sup>170</sup> Furthermore, the acid deposition proceedings were “virtually indistinguishable from the visibility standard.”<sup>171</sup> Because the agency was not “standing idle” on the matter but was “moving, albeit slowly, towards a final decision,”<sup>172</sup> the court of appeals lacked jurisdiction.

Judge Silberman’s approach thus focuses on the agency’s characterization of where it stands in the regulatory process and what it has formally decided, rather than on what procedures the agency has completed. It is closely related to Judge MacKinnon’s dissent in *Sierra Club*,<sup>173</sup> which found that EPA had not taken final action on regulating strip mines when it omitted strip mines from rules which it had adopted. Judge MacKinnon reasoned that “[t]here is absolutely nothing in the record to support a statement that the Administrator has made any such decision” on strip mines,<sup>174</sup> emphasizing that the agency was prudent in deciding to compile additional data “before it embarks on imposing controls and regulations in what is essentially a new field, that is, the nationwide regulation of the emission of dust (fugitive emissions) from strip mines.”<sup>175</sup> In both cases, the agency’s characterization of where it stands in its decisionmaking process would control for purposes of judicial review.

#### IV. IDENTIFYING CONGRESSIONAL INTENT

As the discussion in the previous Part demonstrates, the courts have adopted an array of approaches to determining whether inaction is reviewable and, if so, whether the district court or the court of appeals possesses jurisdiction. The decisions, however, have often left practitioners bewildered about where to file an action and have given rise to a significant amount of litigation over jurisdiction.

The various judicial approaches to the bifurcated jurisdictional review provisions must be measured against two sets of criteria. First, the legislative history of the jurisdictional provisions reveals certain indications of Congress’s intent in enacting them. This Part of the Article examines the legislative histories of the CAA and CWA to determine congressional intent. Second, the jurisdictional provisions plainly implicate a number of policies which the courts

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Silberman termed a “stretch.” *NRDC v. Administrator*, 902 F.2d at 995. See *supra* text accompanying notes 141-47. He also seemed to recognize the validity of the “embedded in final action” approach by noting that the “constructive final action” and “rulemaking cycle” approaches go “far beyond” that notion. *NRDC v. Administrator*, 902 F.2d at 996 n.1.

170. *NRDC v. Administrator*, 902 F.2d at 997.

171. *Id.*

172. *Id.* at 998.

173. *Sierra Club v. Gorsuch*, 715 F.2d 653 (D.C. Cir. 1983).

174. *Id.* at 661.

175. *Id.* at 662.

have found important to determining their meaning, policies which this Article identifies in the following Part.

### A. *The Original Provisions*

The legislative history of the jurisdictional provisions included in the CAA Amendments of 1970 and the FWPCA Amendments of 1972 is relatively limited.<sup>176</sup> The history almost entirely centers on the 1970 changes to the CAA, as Congress explicitly modeled the jurisdictional provisions in the 1972 Amendments to the Water Pollution Control Act on the earlier CAA amendments.<sup>177</sup> Despite the paucity of history, however, some conclusions can be drawn.

Section 304 originated in the Senate, as the House bill proposing clean air legislation contained no authorization for citizen suits.<sup>178</sup> The legislative history of the Senate's consideration of this section focuses almost entirely on the provision allowing citizens to bring enforcement suits against private polluters, rather than on the judicial review provisions in which the agency would be the defendant. The original provision in the Senate bill did not limit the district court's jurisdiction to suits alleging the Administrator's failure to perform nondiscretionary action. Rather, the Administrator was subject to suit for the "failure of the Secretary to exercise . . . any duty established by this Act,"<sup>179</sup> a provision not limited to situations in which the Administrator lacked any discretion. The legislative report accompanying the bill passed by the Senate merely stated that citizens could bring suit against the Administrator to force action, and that those suits were not limited to enforcement of emission limitations.<sup>180</sup>

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176. The legislative history has been compiled for all amendments to the CAA and CWA since 1970 that are relevant to the interpretation of the jurisdictional provisions. See LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 (1993) [hereinafter 1990 AMENDMENTS LEGISLATIVE HISTORY]; LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 (1978) [hereinafter 1977 AMENDMENTS LEGISLATIVE HISTORY]; LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 (1974) [hereinafter 1970 AMENDMENTS LEGISLATIVE HISTORY]; LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1973) [hereinafter 1972 AMENDMENTS LEGISLATIVE HISTORY].

177. H.R. REP. NO. 911, 92d Cong., 2d Sess. at 133 (1972), reprinted in 1972 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 820 ("Section 505 closely follows the concepts utilized in section 304 of the CAA.").

178. H.R. REP. NO. 1783, 91st Cong., 2d Sess. 133 (1970), reprinted in 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 205.

179. S. 4358, 91st Cong., 2d Sess. § 304(a) (1970) (emphasis added), reprinted in 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 614 (Suit may be brought "where there is alleged a failure of the Secretary to exercise (i) his authority to enforce standards or orders established under this Act; or (ii) any duty established by this Act.").

180. See S. REP. NO. 1196, 91st Cong., 2d Sess. 38-39 (1970), reprinted in 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 438-39 ("The Committee bill would provide in the citizen suit provision that actions will lie against the Secretary for failure to exercise his duties under the Act, including his enforcement duties."); *id.* at 64-65, reprinted in 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 464-65 ("The actions may be

Various interested parties objected to the breadth of the wording in the bill, fearing that it would authorize a flood of citizen suits against the Administrator which could interfere with the administration of the Act.<sup>181</sup> Thereafter, the Conference Committee amended the citizen suit provision to refer only to "any act or duty . . . which is not discretionary."<sup>182</sup> A floor sponsor of the bill indicated that suits brought against the Administrator are limited to actions in which the plaintiff alleges that the Administrator "fail[ed] . . . to perform mandatory duties imposed by statute."<sup>183</sup>

This amendment was intended to narrow the scope of citizen suits in the district court. The final phrase—"any act or duty . . . which is not discretionary"—could encompass a wide variety of situations in which parties contend that either the evidence on an issue or the statutory language deprives the Administrator of discretion. The comment on the floor, however, seems to

brought against any person . . . where there is an alleged violation of any of its provisions, or against the Secretary where he fails to enforce any standards or orders established under the Act or to compel him to exercise any duty imposed upon him under the Act.").

Although the legislation did not restrict suits against the Administrator to actions that were intended to enforce specific standards against pollution sources, some of the discussion assumed that citizen suits against the Administrator were only intended to compel such enforcement actions. See Letter from Elliott Richardson, Secretary, Department of Health, Education, and Welfare, to Hon. Jennings Randolph, Chairman, Committee on Public Works (Nov. 17, 1970), *reprinted in* 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 215 (referring to "the authorization of citizen suits against the Secretary to force him to take enforcement action in a particular case" and asserting that such actions would "distort[] enforcement priorities that are essential to an effective national control strategy").

181. See Memoranda Attached to Letter from Thomas C. Mann, President, Automobile Manufacturers Ass'n, to Hon. Edmund S. Muskie (Aug. 27, 1970), *reprinted in* 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 725 ("No reason has been suggested why, in the absence of citizen suits, the Secretary would fail to perform his duties under the Act . . ."), 729 ("A mere enumeration of some of the types of private suits which might be filed against the Secretary requiring his exercise of any 'duty' under the Act illustrates the complexity and interference with the administrative process inherent in this authorization.").

182. H.R. REP. NO. 1783, 91st Cong., 2d Sess. 33 (1970), *reprinted in* 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 183. Even after this amendment, members of Congress continued to view the citizen suit provision chiefly in terms of what effect it would have on government enforcement actions against private polluters:

A provision which has received a lot of attention deals with citizen suits. The legislation will permit such suits against polluters as well as against the Administrator. However, citizen suits against the Administrator will be limited to those duties which are mandatory under the legislation and the suits will not extend to those areas of enforcement with regard to which the Administrator has discretion.

116 CONG. REC. 42,520 (1970) (statement of Mr. Staggers), *reprinted in* 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 112.

183. See 116 CONG. REC. 42,393 (1970) (statement of Mr. Spong), *reprinted in* 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 147 ("The conference substitute retains the Senate provision for citizen suits against violators, although suits against the Administrator of the Environmental Protection Agency are limited to actions in which there is an alleged failure by the Administrator to perform mandatory duties imposed by the statute.").



indicate that Congress intended the amendment to have a narrower purpose: to limit citizen suits to situations where a statute *on its face* requires the Administrator to act. Under this construction, citizen suits would not be viable when a plaintiff alleges that (1) given the requisite scientific evidence, the Administrator could reach only one conclusion about a factual issue, and (2) based on this conclusion, the statute *then* admitted of only one course of action.

The legislative history of the 1972 Amendments to the Water Pollution Control Act contains few references to the jurisdictional provisions, and these references largely emphasize that section 505 of the proposed legislation was closely patterned after section 304 of the CAA Amendments of 1970.<sup>184</sup> The history, however, does indicate that a citizen may not sue when the Administrator's actions are discretionary and that the citizen suit provision was intended only for situations in which the Administrator is compelled by law to act.<sup>185</sup> This history thus seems to confirm that Congress intended for the district court's jurisdiction over citizen suits to encompass only situations in which the court interprets the statute to determine whether it requires the Administrator to act. It would not authorize the court to decide whether the evidence before the Administrator, if interpreted in a certain way, might then give rise to a nondiscretionary duty to act.

One broader point evident from the history of the 1972 CWA Amendments, however, is the congressional intent to expand public participation in the regulatory process through the use of citizen suits. Tracking statements made in the legislative history of the 1970 CAA Amendments,<sup>186</sup> the history of the 1972 Amendments stresses encouragement of public participation in the

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184. The closeness between the two sections even extends to the legislative history, where some of the language explaining the citizen suit provisions in the Conference Report on the Water Pollution Control Act Amendments is identical to that found in the Conference Report on the CAA two years earlier. See S. REP. NO. 414, 92d Cong., 1st Sess. 80-81 (1971), reprinted in 1972 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 1498-99.

185. This limitation was clearly explained in a statement before Congress by Rep. Staggers: Citizen suits may be instituted against the administrator only for failure to act where he must. In other words wherever he is given discretion in the act, he may not be sued. He may be sued only for those matters imposed in the bill upon the administrator as a matter of law.

116 CONG. REC. 42,522 (1970), reprinted in 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 117.

186. 116 CONG. REC. 42,382 (1970) (statement of Mr. Muskie), reprinted in 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 127 (The bill extended the concept of public participation to the enforcement process. The citizen suits authorized in this legislation would apply important pressure. Although the Senate did not advocate these suits as the best way to achieve enforcement, it was clear that they should be an effective tool.); see also Statement of Sen. Muskie, 116 CONG. REC. 42,387 (1970) (statement of Sen. Muskie), reprinted in 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 138 ("[T]his bill provides for other participation by citizens in various ways. We regard that as a key element in the successful prosecution of air pollution goals which this bill undertakes."); 116 CONG. REC. 33,117 (1970) (statement of Mr. Cooper), reprinted in 1970 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 387 ("The committee bill also breaks new ground in extending public participation, an essential element throughout the act, to enforcement proceedings.").

implementation of the new water pollution controls.<sup>187</sup> One cannot, of course, give too much credence to general statements emphasizing public participation when deciding on specific interpretations of sections 304 and 505, but the statements do suggest that an unduly narrow construction of citizen rights to bring suit under both Acts might conflict with this congressional goal.<sup>188</sup>

### B. The 1977 Amendments

The legislative histories of the 1977 Amendments to both the CAA and CWA add almost nothing to the understanding of the jurisdictional review provisions. As noted above,<sup>189</sup> the Amendments did not make any important substantive changes regarding jurisdiction to sections 505 and 509 of the CWA. The House bill amending the CAA, House Bill 6161, did amend section 307 of the Act to add the important final action limitation, and the Senate acceded to that amendment in Conference Committee.<sup>190</sup> The legislative history, however, does not explain what Congress intended by this new language.<sup>191</sup>

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187. See, e.g., Senator Cooper's statement at the Senate Debate:

A ninth major element of the bill before us is the provision for public participation throughout all procedural activities established under the bill. Public participation is encouraged in the establishment of control requirements, the development of information, as in the enforcement process through citizen suits, a provision first applied in the Clean Air Amendments of 1970. Perhaps more than in any other Federal program, the regulation of environmental quality is of fundamental concern to the public. It is appropriate, therefore, that an opportunity be provided for citizen involvement.

117 CONG. REC. 3,821 (1971), *reprinted in* 1972 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 1306.

188. One of the few courts to recognize this point was the Second Circuit in *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976). The court stated that in enacting § 304, "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Id.* at 172. The court then declared: "[T]hus the Act seeks to encourage citizen participation rather than to treat it as [a] curiosity or a theoretical remedy." *Id.*; see also *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975) (Citizen suits "reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.") (citations omitted).

189. See *supra* text accompanying note 51.

190. Compare H.R. 294, 95th Cong., 1st Sess. § 305(c)(1), (2) (1977), *reprinted in* 1977 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2436, with CAA Amendments of 1977, Pub. L. No. 95-95, Title III, § 305(c)(1), (2), § 307(b)(1), 91 Stat. 685, 776, *reprinted in* 1977 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 282.

191. The legislative history of the amendments to § 307 is almost entirely taken up with discussions of specific procedural requirements for EPA rulemakings which became subsection (d) of that statute. See, e.g., 123 CONG. REC. 26,618 (1977), *reprinted in* 1977 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 557. The closest thing to an explanation for the "final action" provision is found in the House Report accompanying H.R. 6161. This report, however, merely declares that the bill "is intended to clarify some questions relating to venue for review of rules or orders under the act." H.R. REP. NO. 294, 95th Cong., 1st Sess. 323 (1977), *reprinted in* 1977 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2790. It does not explain why the provisions regarding final action were included. *Id.* The report also

*C. The 1990 Clean Air Act Amendments*

## 1. Senate Committee Consideration

In contrast to the relatively sparse legislative history discussed above, Congress directed considerable attention to the jurisdictional provisions of sections 304 and 307 in crafting the 1990 Amendments to the CAA largely in response to criticism that the review provisions had insulated the agency's failure to act from judicial review.<sup>192</sup> The legislative activity<sup>193</sup> began in the Senate when the Senate Environment and Public Works Committee reported Senate Bill 1630 out of committee on November 16, 1989.<sup>194</sup> Senate Bill 1630 proposed to amend section 304(a) by authorizing suit in the district court "where there is alleged a failure to act that violates one or more of the standards set forth in § 307(d)(9), or constitutes unreasonable delay."<sup>195</sup> Since one of the standards in section 307(d)(9) of the CAA is whether the action was found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"<sup>196</sup> the bill would have allowed the district court to review agency inaction for abuse of discretion, thereby changing the existing rule which placed jurisdiction to review for abuse of discretion solely in the court of appeals.

Additionally, the bill provided that a failure to act "does not include a written decision not to take action which the Administrator designates, within such decision, as a final action within the meaning of § 307(b)(1)."<sup>197</sup> The bill also would have authorized the district court to "compel agency action unreasonably delayed."<sup>198</sup> It stated that where the Act mandates the Administrator to take specified action when certain preconditions are met, the court's power to compel

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explains that it approved certain suggestions put forth by the Administrative Conference of the United States. *Id.* at 2791.

192. For a discussion of the effect of the 1990 Amendments on enforcement, see Michael S. Alushin, *Enforcement of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 2217 (1991); David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 ENVTL. L. 2233 (1991); Permitting and Enforcement Under the Clean Air Act Amendments of 1990, [April 1991] 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,178.

193. For such summaries of the legislative history of the 1990 Amendments, see James Miskiewicz & John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, 9 PACE ENVTL. L. REV. 281, 284-85 n.1; Permitting and Enforcement Under the Clean Air Act Amendments of 1990, [April 1991] 21 ENVTL. L. REP. (Envtl. L. Inst.) at 10,178-80 nn.1, 5 (1991); The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721 (1991).

194. S. REP. NO. 228, 101st Cong., 1st Sess. 158 (1989), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7906.

195. *Id.* at 537, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8287.

196. CAA § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A) (1994).

197. S. REP. NO. 228, 101st Cong., 1st Sess. 537 (1989), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8287.

198. *Id.* at 538, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8288.

that action “shall not depend . . . upon whether the Administrator . . . has published in the Federal Register a proposed or final determination that the threshold preconditions are met.”<sup>199</sup>

Finally, Senate Bill 1630 proposed to amend section 307 by providing that “[w]here a final decision by the Administrator undertakes to perform any action, but defers such performance to a later time,” any interested person could challenge that deferral under section 307(a)(1).<sup>200</sup> Alternatively, in lieu of using section 307, a person could bring an action “at any time” in the district court under section 304(a)(2) to compel performance of such deferred action.<sup>201</sup>

It should be noted that, under the language of this amendment, jurisdiction in both the court of appeals and the district court was founded on whether the Administration had made a final decision that “undertakes to perform” an action. Thus, the language seemed to require that the Administrator first agree that action is warranted but then defer that action to a later time. In this instance, a plaintiff could sue either in the court of appeals or in the district court.

The Report of the Senate Environment and Public Works Committee on Senate Bill 1630 addressed the meaning of these proposed changes.<sup>202</sup> The report indicated that with respect to the provisions relating to agency inaction, “the citizen suit provision of the Act will encompass the full range of inaction covered by the Administrative Procedure Act.”<sup>203</sup> Where the agency did not concede it had a duty to act, a citizen suit could challenge the agency by alleging that (1) its refusal is not in accordance with law (“for example, that it violates an unqualified and specific ‘shall’ command in the Act”) or (2) its refusal is arbitrary, capricious, or an abuse of discretion.<sup>204</sup> Furthermore, the fact that EPA

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199. *Id.*

200. *Id.* at 539, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8289.

201. *Id.* In addition, the bill would have established a procedure by which interested persons could petition the Administrator to issue, amend, reconsider, or repeal any regulation or order, and it required the Administrator to respond to the petition according to a statutory timetable. *Id.* It specified that judicial review of any final action by the Administrator “shall be in accordance” with the APA. *Id.* at 573-74, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8323-24. Finally, the bill would have explicitly defined certain types of administrative enforcement orders issued by EPA as “non-final” for purposes of judicial review under § 307. *Id.* at 531, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8281.

202. The provisions of the bill as reported which dealt with judicial review of agency inaction were substantially identical to those in the bill as introduced. See S. 1630, 101st Cong., 1st Sess. §§ 302, 309(b), (d), (h) (1989), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 9197-99, 9202-05.

203. S. REP. NO. 228, 101st Cong., 1st Sess. 374, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8714. The report further noted that the term “failure to act” was taken directly from the definition of “agency action” in § 551(13) of the APA. *Id.*

204. *Id.* at 375, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8715. The report noted that examples of the “arbitrary, capricious, or an abuse of discretion” categories “would include circumstances where the failure to act is not rationally based, ignores clear evidence, or where it frustrates the purposes and goals of the Act by failing to correct deficiencies in air pollution standards or regulations.” *Id.* (The district court could not only compel actions unreasonably delayed, it could “design remedies to address EPA failures to act

failed to make "threshold determinations or findings" would not restrict the district court's power to order action by EPA.<sup>205</sup> The report stated that if the plaintiff prevailed, the Committee wanted the court to "define the scope of EPA's duty and specify the particular actions EPA must take to fulfill that duty within the court-imposed deadline."<sup>206</sup>

The report then explained that where a lawsuit over inaction "would effectively require a court to overturn final action previously taken by the EPA," jurisdiction over the challenge would lie in the court of appeals under section 307(b)(1).<sup>207</sup> The report cited *Indiana & Michigan Electric Co.*,<sup>208</sup> which adopted the "embedded in final action" approach to judicial review of agency inaction.<sup>209</sup> The report further noted that where EPA procedures culminated in a "formal decision not to take action," review would lie in the court of appeals.<sup>210</sup>

The report on Senate Bill 1630 discussed the district courts' power to compel agency action "where EPA has already commenced a proceeding directed at the final action sought by the plaintiff, but . . . failed to complete it within a reasonable time."<sup>211</sup> The report noted that EPA's failure to publish "threshold determinations or findings in the Federal Register, either in proposed or in final form,"<sup>212</sup> would not prevent the court from compelling EPA to act.

Finally, the report discussed the situation where a final decision "addresses only part of an air pollution issue, and defers the balance of the issue for resolution at a later time."<sup>213</sup> In such situations, the amendments were intended to give citizens the option of suing either under section 307(b)(1) in the court of

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that are arbitrary, capricious, and abuse of discretion, or not in accordance with law.").

205. *Id.* The amendment was intended to overrule the holding in *State of New York v. Thomas*, 802 F.2d 1443 (D.C. Cir. 1986). *Id.*

206. *Id.*

207. *Id.*

208. 733 F.2d 489 (7th Cir. 1984). The decision is discussed *supra* in the text accompanying notes 108-13.

209. S. REP. NO. 228, 101st Cong., 1st Sess. 374 (1989) (citing *Indiana & Michigan Elec. Co.*, 733 F.2d at 490), reprinted in 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8714.

210. *Id.* Specifically, the report stated that such a situation would constitute a denial within the meaning of the APA and "would likewise be reviewable in the court of appeal under section 307(b)(1)." *Id.* Since denials under the APA normally would be reviewable in the district court, however, the report may have implied that both the district court and the court of appeals would have concurrent jurisdiction. As noted above, the bill *did* expressly authorize concurrent jurisdiction over one class of cases: where the Administrator made a "final decision" undertaking to perform an action but deferring such performance to a later time. *Id.* at 375, reprinted in 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8715.

211. *Id.* at 375, reprinted in 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8715.

212. *Id.* The report states that this amendment was intended to overturn the decision in *State of New York v. Thomas*, 802 F.2d 1443 (D.C. Cir. 1986).

213. *Id.*

appeals or under section 304(a)(2) in the district court. If the latter, the sixty-day time limit found in section 307 would not restrict the suit.<sup>214</sup>

As reported from the Senate, the proposed amendments included in Senate Bill 1630 would have comprehensively revised the law of agency inaction under the CAA. Most significantly, they would have greatly expanded the district courts' jurisdiction over agency inaction by enlarging section 304's coverage beyond the limited situation of a clear statutory command for administrative action. Jurisdiction would have expanded to cover the "full range of [agency] inaction,"<sup>215</sup> including situations where the agency's failure to act was arbitrary and capricious. Furthermore, by stating that the district court's jurisdiction does "not depend" on whether the Administrator has published "threshold preconditions" to action in the Federal Register, the Senate report implies that a plaintiff could prove those preconditions in the district court.<sup>216</sup> Finally, in such cases the court would have had explicit authority to define the scope of the agency's obligation to act.<sup>217</sup>

The proposed changes to the court of appeals' jurisdiction were less clear. Senate Bill 1630 would have granted the court jurisdiction over a "final decision" in which the Administrator undertakes to perform an act but then defers action until a later time.<sup>218</sup> In practice, however, such cases are rare. In most cases, the Administrator simply defers making a final choice, and the court of appeals is left to determine whether this deferral is final action within the meaning of section 307. The proposed changes to section 307 did not address this latter situation.

The report stated that, if EPA procedures culminated in a "formal decision" not to take action, the court of appeals could review it.<sup>219</sup> But the language in the bill itself was not this broad; it referred only to the situation where the Administrator issued a "written decision not to take action which the Administrator designates, within such decision, as a final action."<sup>220</sup> Thus, while the legislative history (that is, the report) declared that the court of appeals would have jurisdiction over *any* formal decision not to take action, the bill referred only to a "written decision not to take action" which the Administrator had designated as final action. Situations in which the Administrator designates his or her inaction as final action, and thus invites judicial review of that inaction, are far less likely to occur.

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214. *Id.* The report noted that EPA would have a duty to conclude the rulemaking proceedings enumerated in § 307(d)(1) within a reasonable time, and that the agency must promptly respond to petitions by citizens for action in final, judicially reviewable form.

215. *Id.* at 374, reprinted in 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8714.

216. *Id.*

217. *Id.* at 375, reprinted in 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8715.

218. *Id.* at 374, reprinted in 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8714.

219. *Id.*

220. S. 1630, 101st Cong., 1st Sess. § 309(b)(1) (1989), reprinted in 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8714.

Significantly, Senate Bill 1630 introduced the term, “final decision” into the debate over proposed changes to jurisdiction. In contrast with “final action,” which can be read to imply that the Administrator must act before jurisdiction will attach, a final decision seems to require only that the Administrator *decide* whether or not to act.

The changes proposed in Senate Bill 1630 had one other significant provision: they expressly included the concept of concurrent jurisdiction. A plaintiff could challenge a final decision undertaking to perform action, but then deferring that action, either in the court of appeals or the district court.<sup>221</sup> Thus, the bill for the first time endorsed the concept that the trial and appellate courts’ jurisdiction under the CAA overlapped to some degree. But nothing in the legislative history defined the meaning of the term “final decision” or explained how it might differ from the statutory term “final action.” Thus, while the authorization for concurrent jurisdiction was clear, the circumstances under which that jurisdiction would exist were not.

## 2. Senate Floor Consideration

After Senate Bill 1630 was reported from Committee, negotiations between Senate leaders and the White House produced a proposed substitute for the legislation that had passed out of committee.<sup>222</sup> Except for minor wording changes, the so-called “Baucus-Chafee Substitute” retained the proposed amendments to section 304 concerning suits to compel action when the agency had unreasonably delayed or simply failed to act.<sup>223</sup> Similarly, the substitute kept

221. S. REP. NO. 228, 101st Cong., 1st Sess. 375 (1989), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8715.

222. S. AMEND. NO. 1293, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7339.

223. The amendments to § 304(b) included in the bill as reported by committee read as follows:

(2) against the Administrator where there is alleged a failure to act that violates one or more of the standards set forth in section 307(d)(9) [including whether the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law], or constitutes unreasonable delay, provided however that a failure to act does not include a written decision not to take action which the Administrator designates, within such decision, as a final action within the meaning of Section 307(b)(1) . . . .

S. 1630, 101st Cong. 1st Sess. § 609(b)(2) (1989), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8287. The substitute bill would have amended § 304(b) to authorize suits:

(2) against the Administrator where there is alleged a failure to perform any act or duty under the Act which is not discretionary with the Administrator, including failures to act that violate one or more of the standards set forth in section 307(d)(9), or that violate the duty to object to issuance of a permit as set forth in section 354(b), or that constitute unreasonable delay, provided however that a failure to act does not include a written decision not to take action which the Administrator designates, within such decision, as a final action within the meaning of section 307(b)(1) . . . .

S. AMEND. NO. 1293, 101st Cong. 2d Sess. § 608(b)(2) (1990), *reprinted in* 1990

the proposed amendments to section 307(b) that authorized suit to compel performance of deferred actions in which the Administrator had "undertake[n] to perform an action."<sup>224</sup> It also retained the provisions allowing citizens to petition the Administrator to act. The most significant change was the elimination of the provisions in the original Senate Bill 1630 granting concurrent jurisdiction to the district courts and courts of appeals over such litigation.<sup>225</sup>

On the Senate floor, however, Senator Nickles offered a comprehensive amendment to the enforcement and citizen suit provisions of the CAA.<sup>226</sup> Backed by the Justice Department,<sup>227</sup> Senator Nickles argued that the bill would authorize citizens to sue the Administrator in district court for discretionary actions and foresaw a deluge of such actions.<sup>228</sup> Senator Nickles's proposed amendment

AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7845-46.

The substitute bill added the phrase "where there is alleged a failure to perform any act or duty . . . which is not discretionary," while the original Senate Bill 1630 spoke of a "failure to act" violating one of the standards set forth in § 307(d)(9). The substitute, however, still seemed to expand the district courts' jurisdiction to allow review of agency action for abuse of discretion, in contrast to its previous jurisdiction, which was limited to the failure to perform an act or duty which was not discretionary. As noted above, the legislative history of this latter jurisdiction indicates that it was to encompass only situations in which the Administrator had violated a plain statutory command. This change in the nature of the violation which forms the basis for the district court's jurisdiction also is reflected in the title of the proposed amendment. This part of the original Senate Bill 1630 was entitled only "Unreasonable Delay"; the Baucus-Chafee Substitute enlarged the title to read "Unreasonable Delay and Nature of Violation."

224. S. AMEND. NO. 1273, 101st Cong., 2d Sess. § 608(d),(e) (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7847-48.

225. *Id.*, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7847.

226. S. AMEND. NO. 1373, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 167, at 6406-30.

227. *See* Letter from Dick Thornburgh, Attorney General, to Sens. George J. Mitchell and Robert Dole, 136 CONG. REC. S3180 (daily ed. Mar. 26, 1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 6370-71:

[T]his language [in S. 1630] would impair EPA's ability to implement the Act . . . Whereas current law provides citizens with the ability to sue EPA for failure to take nondiscretionary actions, the proposed language would give plaintiffs . . . an unprecedented new power to use litigation to compel EPA to take action which is discretionary. . . . Instead of setting priorities and allocating resources according to congressional directives, orderly rulemaking procedures, and sound enforcement discretion, EPA and DOJ priorities will be set by individual litigants and courts all over the country, without regard to national concerns.

228. As Senator Nickles stated:

If there is ever a lawyers' heyday amendment it is the Baucus-Chafee approach. The Baucus-Chafee approach allows citizens groups to sue EPA for making discretionary actions. And we are going to have EPA second guessed on every single decision they make on permits because there is some environmental group or other group that thinks that some permit should not be issued for whatever reason. They are going to sue EPA every single day.

Comments of Sen. Nickles, 136 CONG. REC. S3189 (daily ed. Mar. 26, 1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 6393; *see also* Comments of Sen. Heflin ("[T]he Baucus-Chafee Amendment would give plaintiffs an unprecedented new power to use litigation to compel EPA to take action, even where the act does not require EPA to take such action . . . . [T]hey could go straight to the district court, and the district court



addressed the situation where preconditions were required before the Administrator came under a mandatory duty to act, such as when a statute requires the Administrator to find that a risk or fact exists before mandating the Administrator to act. In those situations, the amendment authorized citizens to sue when the Administrator took final action on the preconditions but did not formally publish notice of that action in the Federal Register.<sup>229</sup>

The amendment would have sharply narrowed the scope of the original bill's authorization of citizen suits in district court when the failure to act was "arbitrary, capricious, or an abuse of discretion." Under the Nickles Amendment, suits challenging such inaction would be proper only when the Administrator had taken final action but did not formally publish notice of that action. This situation, however, would occur only in very limited circumstances, if at all, and is unrelated to the problem that the original bill sought to address: occasions where, despite the available evidence, the Administrator *refused* to take any final action.

In rebuttal to the criticisms of Nickles and the Justice Department, the bill's sponsors argued that the citizen suit provisions of Senate Bill 1630 applied only to nondiscretionary actions<sup>230</sup> and were needed to correct court decisions which never reached the merits of the agency's inaction.<sup>231</sup> This defense, however, was

would have the power to order EPA to take actions that Congress has expressly entrusted to EPA's discretion."), 136 CONG. REC. S3170 (daily ed. Mar. 26, 1990), *supra* note 176, at 6344. Senator Heflin also argued that plaintiffs "would not have to seek timely court of appeals review of the Agency's decision to defer the regulatory action, as is required under the current Clean Air Act." *Id.*

229. The amendment stated in pertinent part:

Where a provision of the Act mandates that the Administrator shall take specified action when certain preconditions are met and the Administrator has taken final action finding such preconditions, the court's power to compel the specified action under paragraph (2) shall not depend upon whether the Administrator has published notice of such final action in the Federal Register.

S. AMEND. NO. 1373, 101st Cong., 2d Sess. § 609(b) (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 6427. The amendment also attempted to authorize suit for unreasonable delay by amending § 307(d)(1) to state that action under it "shall be subject to the provisions of section 706(1) of title 5 of the United States Code." *Id.* § 609(d), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 6428.

230. 136 CONG. REC. 5357 (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 6446 ("The language in amendment 1293 [the Baucus-Chafee substitute] merely states that suits will lie if the agency again delays unreasonably in its execution of a nondiscretionary duty.").

231. Senator Lieberman commented:

Recently, however, a series of court decisions have limited the scope of citizen suits and created a situation that allows EPA, in my opinion, to escape judicial scrutiny [sic]. As a result of those decisions, the ability of State and citizen groups to compel EPA to comply with the clear mandates of the act are uncertain. In many of these cases, the courts never reach the question of whether or not the agency's inaction violated the law. Instead, the cases became mired in disputes that concerned the court's jurisdiction . . . .

. . . . But Congress should guarantee that the courts will have the power to at least hear the merits of the claims of the citizens . . . and to determine whether EPA is fulfilling its responsibility under the law . . . .

not accurate since Senate Bill 1630 would have given the district court jurisdiction over more than just “nondiscretionary actions.” It would have authorized the court to review the agency’s inaction for “abuse of discretion” and to determine whether the agency’s failure to act was arbitrary and capricious in light of the evidence.

Ultimately, the amendment proposed by Senator Nickles was defeated on an extremely close vote.<sup>232</sup> The Senate as a whole then adopted the Baucus-Chafee substitute<sup>233</sup> and approved Senate Bill 1630 as so amended.<sup>234</sup>

### 3. House Consideration

In contrast to the Senate’s lengthy consideration of provisions regarding agency inaction, the House virtually ignored the issue. On May 17, 1990, the Committee on Energy and Commerce reported on House Bill 3030, which contained lengthy amendments to the CAA.<sup>235</sup> The bill did not include any provisions relating to citizen suits for agency inaction.<sup>236</sup>

When House Bill 3030 reached the floor, however, the Committee offered a series of amendments that members had negotiated after the bill passed out of Committee,<sup>237</sup> and Congress ultimately enacted two of these into law. First, the amendments proposed to amend section 304(a) by authorizing the district courts

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136 CONG. REC. 5276 (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 6353.

232. 136 CONG. REC. S3241 (daily ed. Mar. 27, 1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 167, at 6450-51 (47-50 vote). Senator Dole later re-proposed the amendment under his own name, but the amendment (Amendment 1456, *see* 136 CONG. REC. S3885 (daily ed. Apr. 3, 1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7264) failed by a 49-51 vote. 136 CONG. REC. S3796 (daily ed. Apr. 3, 1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7155. During debate on the measures, after Senator Specter argued that the bill allowed the district court to review discretionary decisions of the Administrator, Senator Chafee offered to delete the language “including failures to act that violate one or more of the standards set forth in section 307(d)(9).” 136 CONG. REC. S3242 (daily ed. Mar. 27, 1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 6454. Senator Nickles, however, declared that more than a single deletion was needed. 136 CONG. REC. S3243 (daily ed. Mar. 27, 1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 6456 (“There are several sections in the current Baucus-Chafee language that would allow citizens groups to sue EPA over discretionary activity other than just 307(d)(9), so I would encourage you, if you are trying to clean that up, to look at those other sections as well.”). The offered deletion, however, apparently was never implemented.

233. 136 CONG. REC. S17434 (daily ed. Oct. 27, 1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7177.

234. 136 CONG. REC. S17434 (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7248-49 (89-11 vote).

235. *See* H.R. REP. NO. 490, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 3021-3710.

236. *See* 136 CONG. REC. S16953 (Oct. 27, 1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 3162 (statement of Rep. Dingell).

237. *See* 136 CONG. REC. 11,900 (1990) (statement of Rep. Dingell), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2716.

to compel agency action unreasonably delayed.<sup>238</sup> Second, the amendments provided that “[w]here a final decision of the Administrator defers performance of any nondiscretionary statutory action to a later time,” a plaintiff could challenge that deferral in the court of appeals pursuant to section 307(a)(1).<sup>239</sup>

These proposed jurisdictional amendments differed from the Senate version in three important ways. First, the amendments limited the district court’s jurisdiction. The amendments did not include the provision in Senate Bill 1630 that authorized the district court to compel action where the Administrator’s refusal to act was arbitrary or capricious. Thus the district court could now only compel action unreasonably delayed.

Second, the proposed amendments to section 307 previously included in Senate Bill 1630 considered the situation where the Administrator “undertakes to perform an action but defers such performance to a later time.”<sup>240</sup> The House amendments eliminated the requirement that the Administrator “undertake” to perform the action; instead, jurisdiction would attach if the Administrator issued a final decision which “defers performance of any nondiscretionary statutory action to a later time.”<sup>241</sup>

Finally, Senate Bill 1630 would have placed jurisdiction over such deferreds in the district court under section 304. In contrast, the House amendments proposed to lodge it solely in the court of appeals under section 307.<sup>242</sup>

On the House floor, Congresswoman Collins was the only Representative to offer comments directly addressing the amendments to sections 304 and 307. She noted that in the past EPA had used the CAA’s jurisdictional provisions to “blunt the effectiveness of the citizen suit as a tool for enforcing Congress’ mandates” and that the amendments were intended “to redress the more important jurisdictional problems” that had arisen under the Act.<sup>243</sup> She further emphasized

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238. H.R. 3030, 101st Cong., 2d Sess. § 608(f), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2349-50. The amendment also provided that if the Administrator’s final action would be the adoption of nationally applicable regulations that would be reviewable only in the United States Court of Appeals for the District of Columbia, then a plaintiff could bring suit to compel such action only in the United States District Court for the District of Columbia. H.R. 3030, 101st Cong., 2d Sess. § 608(h), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2350.

239. *Id.*, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2350.

240. S. 1630, 101st Cong., 2d Sess. § 608(b), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 4736.

241. *Id.*, *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2350.

242. The House amendment declared that “any person may challenge the deferral pursuant to paragraph (1).” S. 1630, 101st Cong., 2d Sess. § 608(h) (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2350. Paragraph one, of course, is part of § 307, which sets forth the court of appeals’ jurisdiction in such cases.

243. 136 CONG. REC. 11,918 (statement of Rep. Collins), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2766. Congresswoman Collins continued:

In case after case—especially throughout the 1980’s—the EPA has successfully fought citizen cases on procedural grounds, never even reaching the merits of the cases. The EPA argued that it was irrelevant whether it was blatantly violating a clear congressional directive because the citizen suit provision, as written, simply did not permit the court to hold the agency responsible. As was observed in a 1986 case, Bethlehem Steel Corp. versus EPA in my home State of Illinois: “It

that the amendments authorized challenges both to unreasonable delay<sup>244</sup> and to deferral of a performance by the Administrator.<sup>245</sup> With respect to agency inaction, Congresswoman Collins was blunt: "The courts must also have the power to determine whether the EPA is violating the law by failing to act."<sup>246</sup>

The House adopted the amendments<sup>247</sup> and then approved House Bill 3030 as amended.<sup>248</sup> Finally, the House voted to strike out all provisions of Senate Bill 1630 and substitute them with the provisions of House Bill 3030, thus ensuring that a conference committee would have to resolve the differences between the House and Senate versions of the legislation.<sup>249</sup>

#### 4. The Conference Decisions and Final Passage

The Conference Committee accepted the provisions related to agency inaction that were included in the House version of Senate Bill 1630, and these were ultimately enacted into law.<sup>250</sup> Because Congress concluded work on the bill very late in the session, the Conference Report is merely forty pages long despite the length of the final bill.<sup>251</sup> The principal legislative history of the Conference Committee's decisions consists of a joint statement released by the Senate managers of the legislation, and of statements made by Senator Nickles on the floor of the Senate.

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seems apparent from the EPA's conduct that its main objective is to preclude—or at least delay as long as possible—judicial review of these claims."

*Id.*

244. Congresswoman Collins stated:

First, it makes clear that if the EPA unreasonably delays action, the EPA cannot defend itself on procedural grounds that the court has no jurisdiction. In recent years, big problems have resulted from the Administrator unreasonably delaying action. Often, individuals affected by the EPA's stalling techniques have not been allowed to bring lawsuits because the Administrator claimed the issue was still being reviewed by the EPA. The committee amendment will ensure that Federal courts can compel action by the EPA that has been unreasonably delayed.

136 CONG. REC. 11,918 (statement of Rep. Collins), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2766.

245. *Id.* The language states:

[T]he amendment clarifies that a deferral of performance by the EPA can also be challenged in court. Thus, when action is taken, but the action in effect defers performance of a statutory duty to a later time, the Federal courts will have jurisdiction to compel prompt performance of that duty.

246. *Id.*

247. 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2769.

248. *Id.* at 3013-16.

249. *Id.* at 3019.

250. Pub. L. No. 101-549, 101 Stat. 2683-84 (1990) (current version at 42 U.S.C. § 7604, 7607 (1994)), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 76, at 697-98.

251. H.R. CONF. REP. NO. 952, 101st Cong., 2d Sess. 347 (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 1785-1805.

The “Chafee-Baucus Statement of Senate Managers”<sup>252</sup> included two observations on the provisions of the final bill that concern citizen suits challenging agency inaction. First, it explained that,

[B]y adopting the House language that confirms the availability of citizen suits when EPA defers a nondiscretionary action, the conferees in no way intend to weaken existing case law that holds—in language not limited to deferrals of nondiscretionary duties—that an EPA deferral is final action subject to challenge in the federal courts of appeals under section 307(b)(1).<sup>253</sup>

Second, the statement warned that “adoption of the House language in no way limits the universe of EPA actions subject to unreasonable delay suits.”<sup>254</sup>

Senator Nickles, who had vigorously opposed the language in the Senate bill on the grounds that it subjected the Administrator’s discretionary decisions to citizen suits,<sup>255</sup> also commented on the conferees’ agreement. He noted that, in

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252. Chafee-Baucus Statement of Senate Managers, 136 CONG. REC. S16,933 (daily ed. Oct. 27, 1990) (statement of Sen. Chafee), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 880. The statement first notes that although the conference report includes some 800 pages of legislative language, due to time constraints it contains less than 40 double-spaced pages of explanatory text. *Id.* at 880. The statement then continues:

To help rectify this problem, we have prepared a detailed explanation of five important titles. The explanation is in the form of a traditional statement of managers. It has not been reviewed or approved by all of the conferees but it is our best effort to provide the agency and the courts with the guidance that they will need in the course of implementing and interpreting this complex act.

*Id.*

Some courts have used this statement in determining Congressional intent. *See* Environmental Defense Fund v. Browner, 1995 WL 91324, at \*7 (N.D. Cal., Feb. 10, 1995) (Because Senator Baucus was the sponsor and manager of Senate Bill 1630, and the chair of the subcommittee that reported the bill, “his comments are entitled to substantial weight as evidence of congressional intent.”). *But see* NRDC v. Browner, 57 F.3d 1122, 1128 (D.C. Cir. 1995) (“Even assuming it is probative of congressional intent, this statement lacks the deliberate and definite quality of persuasive legislative history.”).

253. Chafee-Baucus Statement of Senate Managers, 136 CONG. REC. S16,933 (daily ed. Oct. 27, 1990) (statement of Sen. Chafee), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 946.

254. *Id.* at 947. The managers also stated that although the Conference Committee decided not to adopt the language in the Senate bill that would have established a time frame for EPA response to citizen petitions, that decision “is in no way an endorsement of the numerous delays that have characterized the agency’s actions on a number of key air pollution issues.” *Id.* Instead, they declared, the final provisions reflect the conferees’ judgment that EPA’s conduct “is better addressed by the more flexible case-by-case approach inherent in ‘unreasonable delay’ suits.” *Id.*

The statement also declared that language addressing pre-enforcement judicial review of administrative orders was unnecessary. It noted that § 307(b)(1) defines the term “final action” only by a non-exclusive list of particular kinds of actions. According to the managers, however, since three federal circuits had already held that “except with respect to judicial review of administrative penalty assessments and orders, there is no opportunity for pre-enforcement review,” no new statutory language addressing the issue was necessary. *Id.* at 947.

255. *See supra* text accompanying notes 216-20.

general, the “more intrusive citizen suit provisions of the Senate” had been removed and replaced with the “less intrusive provisions of the House.”<sup>256</sup>

In sum, although the Senate bill proposed significant changes to the courts’ jurisdiction over actions challenging the Administrator’s failure to act, the final bill narrowed those changes considerably. Ultimately the only change to district court jurisdiction was to allow an action for “unreasonable delay,” the traditional action authorized by the APA.<sup>257</sup> Congress rejected the sweeping changes, proposed by the Senate in the original Senate Bill 1630, which would have authorized jurisdiction in the district court where plaintiffs alleged that a failure to act was arbitrary, capricious, or an abuse of discretion. The change to the court of appeals’ jurisdiction was more significant, but ultimately it too was narrower, covering only a final decision that deferred performance of a nondiscretionary statutory action.

#### *D. Six Conclusions from the Legislative History*

Six conclusions from the legislative history are relevant to determining the respective jurisdictions of the district courts and courts of appeals to review agency inaction. The first two stem from the history of the 1970 Amendments to the CAA, while the latter four originate in the history of the 1990 Amendments to that Act.

##### 1. “An Act or Duty Which Is Not Discretionary”

The first conclusion from the legislative history concerns the meaning of the key statutory phrase “an act or duty . . . which is not discretionary,”<sup>258</sup> the language which determines the jurisdiction of the district court under the 1970 CAA Amendments. In a particular circumstance, there may be several reasons why an agency is under an obligation or duty to act which is nondiscretionary. The obvious example is when the statute, on its face, requires the Administrator to act regardless of the factual circumstances. Alternatively, the statutory language may authorize action but stipulate that the action is to occur only after the Administrator finds that certain preliminary facts exist. Another possibility is that, while the statutory language gives the Administrator discretion to act, the evidence before the Administrator may be so one-sided that consideration of it can lead to only one rational conclusion: the Administrator must act.

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256. 136 CONG. REC. S16,991 (statement of Sen. Nickles), reprinted in 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 1062. The one exception that he noted concerned citizen suits seeking civil penalties for past violations.

257. 5 U.S.C. § 706(1) (1994); *see, e.g.*, *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987) (“Resolution of a claim of unreasonable delay obviously may require a number of factual determinations and may also entail a balancing of competing considerations.”); *Nader v. Federal Communications Comm’n*, 520 F.2d 182, 206 (D.C. Cir. 1975) (“Under the Administrative Procedure Act, administrative agencies have a duty to decide issues presented to them within a reasonable time and reviewing courts have a duty to ‘compel agency action unlawfully withheld or unreasonably delayed.’”).

258. CAA § 307(a)(2), 42 U.S.C. § 7604(a)(2) (1994).

The question is whether Congress intended to authorize jurisdiction in the district court to compel agency action in all three types of situations, or only in some of them, and the history of the 1970 CAA Amendments answers this question. The language in section 304 was included in an amendment to the original bill, and the floor sponsor of this amendment indicated that it was intended to cover situations in which the Administrator “fail[ed] to perform mandatory duties imposed by statute.” Similarly, Congress utilized almost identical language for the district court’s jurisdiction in the 1972 Amendments to the FWPCA, and the history of that legislation indicates that the district court has jurisdiction over those acts or duties “imposed upon the administrator as a matter of law.” Thus, Congress intended to grant the district court jurisdiction over situations in which a statute on its face imposes a nondiscretionary duty to act. By implication, congressional silence on other aspects of jurisdiction means that jurisdiction would not extend to situations in which the court must first find that certain facts exist before it can conclude that the agency’s obligation to act is nondiscretionary nor to situations where manifestly one-sided evidence should force the Administrator to act.<sup>259</sup>

The legislative history of the 1990 Amendments confirms this understanding of section 307(a)(2)’s meaning. The bills considered prior to passage of the 1990 Amendments explicitly proposed broadening the district court’s review powers to include review for abuse of discretion, review previously proper only in the court of appeals. The Senate Committee report first noted that the proposed amendment would authorize review to determine whether the action was or was not in accordance with law—“for example, that it violates an unqualified and specific ‘shall’ command in the Act.” The report, however, then noted that it also would authorize review when the alleged failure to act was arbitrary, capricious, or an abuse of discretion, that is, where conclusions from the evidence before the Administrator, rather than just a command in the statute, formed the basis of the legal compulsion to act.<sup>260</sup> Moreover, by indicating that the district court’s jurisdiction “shall not depend” on whether the Administrator has published a determination that certain “threshold preconditions” to action exist, the bill strongly implied that plaintiffs could prove those factual preconditions to the district court. Then, once the preconditions were proven, the plaintiffs could argue that in light of them, the Administrator was under a nondiscretionary duty to act.

Congress, however, deleted the language in the bill that would have broadened the district court’s jurisdiction. Except for the new provision allowing the district court to remedy unreasonable delay, Congress retained the original language of

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259. Of course the other two situations mentioned above—ones in which there is a factual precondition to the Administrator’s action or in which all facts in a record lead to a single conclusion—also arguably require action by the Administrator “as a matter of law.” For example, one might say that where a plaintiff proved a factual precondition to the Administrator’s action, the Administrator then is compelled to act “as a matter of law.” Congressional silence on the other two situations is not absolute proof that Congress intended them to be outside the scope of district court jurisdiction. The language in the history, however, does not mention situations in which the legal compulsion is attached to certain facts.

260. See *supra* note 82.

the CAA with respect to the district court's jurisdiction over nondiscretionary actions. By rejecting the broad language, Congress indicated its intent to retain the previous understanding of the district court's jurisdiction over "nondiscretionary actions" as covering only violations of plain statutory commands.<sup>261</sup>

## 2. "Clear-Cut" Violations

Second, a handful of opinions have declared that citizen suits to compel agency action under sections 304 and 505 are limited to "clear-cut violations,"<sup>262</sup> or as one court termed it, "specific non-discretionary clear-cut requirements."<sup>263</sup> While most courts expressing this principle have not used it to decide the case,<sup>264</sup> some have employed it in order to justify a narrowing construction of citizen suit rights.<sup>265</sup>

The legislative history does reveal that Congress narrowed section 304 from its original form, which would have authorized suits to compel any "duty," so that the final language only authorized suits to compel nondiscretionary action.<sup>266</sup> Furthermore, as demonstrated above,<sup>267</sup> Congress intended this jurisdictional authorization to cover only actions compelled by statute. Beyond that, however, the legislative history does not indicate whether the category of actions subject to citizen suits must be "clear-cut" or whether the category is more limited than

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261. Numerous cases have undertaken this type of purely statutory review. *See, e.g.,* Fairview Tp. v. EPA, 773 F.2d 517, 525 (3d Cir. 1985) ("District court jurisdiction over citizens' suits depends on the existence of a duty alleged to be nondiscretionary with the Administrator . . . . The viability of appellants' citizens' suit therefore depends on whether DER had 'been delegated sufficient authority to administer the . . . program' so that the Administrator had a nondiscretionary duty to approve or disapprove the Step III grant application within forty-five days of receipt from DER.").

262. *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (quoting *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975)).

263. *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980) (addressing the citizen suit provisions of the CAA).

264. For example, the decision in *Mountain States* was primarily based on the standing of petitioners.

265. *See, e.g.,* *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 (4th Cir. 1992). The court framed the issue as "whether the statute imposed upon the Administrator a nondiscretionary duty to process extension applications before he promulgated final regulations implementing the statutory program." It then noted that the term "nondiscretionary" is one that "has been construed narrowly." *Id.* at n.3 (citing, among other cases, *Mountain States*, 630 F.2d at 766; *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978); and *Wisconsin's Eprvtl. Decade, Inc. v. Wisconsin Power & Light Co.*, 395 F. Supp. 313, 321 (W.D. Wis. 1975)). *Mountain States* was cited for the proposition that citizen suits were limited to "specific non-discretionary clear-cut requirements." *See also* *Defenders of Wildlife v. Browner*, 888 F. Supp. 1005, 1007 (D. Az. 1995) ("Congress intended to limit the number of citizen suits which could be brought against the Administrator and so consciously struck a balance to minimize disruption of the CWA's complex administrative process.") (citing *Kennecott*, 572 F.2d at 1353).

266. *See supra* text accompanying notes 179-82.

267. *See supra* text accompanying note 183.



those actions otherwise encompassed within the term “nondiscretionary actions.”<sup>268</sup> In short, the legislative history does not support a conclusion that the term “nondiscretionary” should be construed narrowly.<sup>269</sup>

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268. When the use of the principle that the violation must be “clear cut” is traced to its origins in the case law, no convincing legislative history is cited to support it. In *Mountain States*, 630 F.2d at 766, the court of appeals declared that “Congress thus restricted citizens’ suits to actions seeking to enforce specific non-discretionary clear-cut requirements of the Clean Air Act.” The court generally cited *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973), but that decision nowhere finds that a “clear-cut” limitation exists. Indeed, one conclusion of the *Anaconda* decision was that plaintiff’s attempt to enjoin EPA promulgation of an SIP should be denied because the case was not ripe for review. *Id.* at 1305.

Similarly, in *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987), the court stated that “Congress provided for district court enforcement under section 304 in order to permit citizen enforcement of ‘clear-cut violations by polluters or defaults by the Administrator,’” citing *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975). *See also* *NRDC v. Thomas*, 689 F. Supp. 246, 252 (S.D.N.Y. 1988), *aff’d*, 885 F.2d 1067 (2d Cir. 1989) (quoting *Sierra Club*, 828 F.2d at 791, concerning “clear-cut violations”). The 1975 *Train* decision did make this statement. It did so, however, after examining the legislative history and concluding that “because of the obvious danger that unlimited public action might disrupt the implementation of the Act and overburden the courts, Congress restricted citizen suits to actions seeking to enforce specific requirements of the Act.” *Train*, 510 F.2d at 700.

This statement is generally accurate, for as noted above, Congress amended the legislation to limit suits to compelling only nondiscretionary action, rather than to compelling the exercise of “any duty.” A statement that the actions must “enforce specific requirements of the Act,” however, is not quite the same as concluding that a “clear-cut” violation is required. Indeed, the *Train* court’s actual statement, which referred to “clear-cut violations by polluters or defaults by the Administrator” (emphasis added), is ambiguous as to whether the adjective “clear-cut” was even intended to modify the word “defaults” or was solely modifying the word “violations.” It is that category of actions, defaults by the Administrator, that are at issue in agency inaction cases, not violations by polluters.

269. This issue was discussed most recently in *Monongahela Power Co.*, 980 F.2d at 276 n.3. The principal cases cited by the court for its conclusion that the term should be construed narrowly were: *Mountain States*, 630 F.2d at 766; *Kennecott*, 572 F.2d at 1355; and *Wisconsin’s Env’tl. Decade*, 395 F. Supp. at 321. As discussed above in footnote 268, *Mountain States* cites an earlier precedent, *Anaconda*, 482 F.2d at 1301, which does not support the conclusion. The *Kennecott* decision cites *Wisconsin’s Env’tl. Decade*, but the latter case also does not support any conclusion about the scope of jurisdiction to compel nondiscretionary actions. It states only that:

[T]his particular provision [that is, section 304 of the CAA as amended 42 U.S.C. § 1857h-2 (1994)] was intended to provide relief only in a narrowly-defined class of situations in which the Administrator failed to perform a mandatory function; it was not designed to permit review of the performance of those functions, nor to permit the court to direct the manner in which any discretion given the Administrator in the performance of those functions should be exercised.

*Wisconsin’s Env’tl. Decade*, 395 F. Supp. at 321. The *Wisconsin’s Env’tl. Decade* court’s statement is generally accurate, as the legislative history does talk about compelling “mandatory functions.” But, correctly recognizing the class of situations to which the statute applies, nondiscretionary actions, does *not* support a conclusion that the legislative history calls for construing this class of situations narrowly. Indeed, the decision in *Wisconsin’s Env’tl. Decade* does not even examine any legislative history in its discussion.

One of the few cases reaching a more accurate conclusion as to the congressional intent is *Northwest Env’tl. Advocates v. City of Portland*, 56 F.3d 979, 987 (9th Cir. 1995) (“Thus,

### 3. "Final Decisions" Versus "Final Actions"

Third, and most significantly, the language of the 1990 Amendments, considered in light of the legislative history, indicates that Congress intended to broaden the court of appeals' jurisdiction over agency inaction. The Act now gives the court jurisdiction "[w]here a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time."<sup>270</sup>

As discussed in detail above,<sup>271</sup> the courts had experienced difficulty determining when final action occurs within the meaning of section 307 in those situations where the agency chose not to act. The 1990 Amendments, however, do not use the term "final action" in the changes to the court of appeals' jurisdiction; rather, the Amendments give the court of appeals jurisdiction over any "final decision" that defers performance of a nondiscretionary statutory action. The phrase "final decision" is broader than the term "final action," which implies that the agency has *acted*. A final decision, in contrast, can take place without action. The reference to a "decision" is inconsistent with the previous emphasis by some courts that the agency must "act" before jurisdiction attaches in the court of appeals.<sup>272</sup> It also indicates that Congress wished to avoid the previous debate over what constitutes final action.

In sum, the language that Congress ultimately passed in the 1990 Amendments significantly broadens the court of appeals' jurisdiction. The court is no longer limited to reviewing final actions; it can now look at any final decision that fails to implement a nondiscretionary duty.

### 4. "Formal" Decisions Versus "Final" Decisions

While the language that Congress ultimately adopted in the 1990 Amendments refers to decisions rather than actions, it nonetheless retains the requirement that the decisions be final. The legislative history documents the significance of this choice, for Congress considered omitting a finality requirement. While Senate Bill 1630 referred to a final decision, the committee report on Senate Bill 1630 spoke of a *formal* decision not to take action.<sup>273</sup> The omission of any reference to a "final" decision in this report might have indicated that Congress not only

consistent with the statutory language, the legislative history of the citizen suit provision reflects Congress's intention to grant *broad* authority for citizen enforcement." (emphasis in original).

270. CAA § 307(b)(2), 42 U.S.C. § 7607(b)(2) (1994).

271. See discussion of tests *supra* text accompanying notes 107-75.

272. For example, in offering the "actual final decision" test, discussed above, Judge Silberman emphasized that the statutory term "final action" suggests, literally, that agency inaction is not reviewable at all. *NRDC v. Administrator, EPA*, 902 F.2d 962, 997 (D.C. Cir. 1990) (Silberman, J., concurring and dissenting), *vacated in part and dismissed in part by* 921 F.2d 326 (D.C. Cir. 1991).

273. S. REP. NO. 228, 101st Cong., 1st Sess. 374 (1989), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8714.

intended to authorize judicial review of agency decisions, as opposed to actions, but also that those decisions need not even be final.

To adopt a construction that finality is not required, however, would ignore the plain meaning of the statutory language. Thus, while Congress no longer intends that the agency takes final action, it must make a decision that is final for jurisdiction in the court of appeals to attach.

#### 5. The Elimination of the "Undertaking to Perform" Requirement

Another wording change that preceded the final adoption of the 1990 Amendments bolsters the conclusion that agency action is no longer required before the court of appeals may exercise jurisdiction. As discussed above,<sup>274</sup> Senate Bill 1630 originally proposed to give jurisdiction to the court of appeals only where the Administrator had "undertake[n] to perform an action."<sup>275</sup> On its face, this language would cover only the relatively small number of situations in which the Administrator decided to undertake an action but simply deferred its commencement. This jurisdictional grant would not apply to refusals to decide whether to act, such as when the Administrator is silent on an issue raised in a proceeding or expressly defers a final decision. Nor would it cover those situations in which the Administrator made an express, final decision not to act. But these situations, of course, were the ones that presented the most difficulties to the courts of appeals in determining whether the Administrator had taken the final action necessary for the court of appeals to exercise jurisdiction.

Congress, however, deleted the language requiring an undertaking of action before the bill's final passage.<sup>276</sup> This deletion indicates even more strongly that Congress intended for the court of appeals to have jurisdiction to review a broader range of agency inaction, as long as it was embodied in a final decision.

The legislative history highlights the significance of this deletion. The committee report on Senate Bill 1630 declared that *any* such "formal decision not to take action" is reviewable in the court of appeals,<sup>277</sup> while Senate Bill 1630 spoke only of a final decision which deferred performance until a later time—a much narrower class of circumstances. Thus, the report on Senate Bill 1630 indicated that the Senate Committee which approved it intended to broaden the court of appeals' jurisdiction over agency inaction to an even greater degree than the bill's express language reflected.

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274. See *supra* text accompanying note 200.

275. S. 1631, 101st Cong., 1st Sess. § 609(d) (1989), reprinted in 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8289.

276. Interestingly, the report of the Committee on Environment and Public Works, which reported S. 1630 to the Senate floor, attributed a broader meaning to the proposed changes to § 307 than the bill's actual language indicated. The report states that under the bill, if "EPA procedures" culminate in a "formal decision not to take action," the court of appeals could review it. See *supra* note 219 and accompanying text. In so stating, the report differs from the language actually in the bill.

277. *Id.*

The Amendments that Congress ultimately enacted, however, largely did implement what this legislative history suggested was the Committee's intent. The final language, which is now in section 307, authorizes the court of appeals to review any final decision which "defers performance of a nondiscretionary statutory action." The Amendments retained the significant reference to a decision rather than an action, but they also broadened the types of decisions reviewable. No longer did the bill limit those decisions to ones which the Administrator had undertaken to perform but had deferred performance; rather, the statute now encompassed *any* final decision in which the Administrator deferred performance of a nondiscretionary statutory duty.<sup>278</sup>

The deletion of the "undertaking to perform action" language is important for another reason. The language in the Amendment as enacted into law refers to a final decision which "defers performance of any nondiscretionary statutory action to a later time."<sup>279</sup> One possible reading of this language is that, for jurisdiction to attach in the court of appeals, the Administrator must (1) recognize a duty to perform, and (2) explicitly defer performance of that duty within the decision itself. In other words, if the decision does not expressly state that the Administrator will take action at a later time, the court of appeals has no jurisdiction.

Such an interpretation, of course, would greatly limit the number of situations in which a final decision was reviewable in the court of appeals. But this interpretation seems unduly narrow when viewed in light of the deletion of the "undertake to perform" language. By deleting the "undertaking to perform" requirement, Congress indicated that it was unnecessary for the Administrator to recognize the requirement to act and to promise its performance. An interpretation of the present language that requires that a decision recognize a duty to perform and explicitly defer it for appellate jurisdiction to attach would, in effect, reinstate the deleted language. In doing so, it would deprive the change

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278. One other question is whether the term "nondiscretionary *statutory* duty" is intended to limit the court of appeals' jurisdiction to situations in which a statute *alone* requires the agency to act. In other words, does the language intend to exclude those situations where the Administrator's decision has become nondiscretionary because of facts included in the administrative record? If that were the case, then the district courts' jurisdiction and the court of appeals' jurisdiction would cover precisely the same types of situations. The only difference would be that if the Administrator decided not to act after completing a proceeding and compiling a record, suit would be proper only in the court of appeals.

The answer appears clear that Congress did not intend such a narrow construction. To the extent that the courts of appeals had found jurisdiction to review agency inaction under prior law, their review determined whether the agency's action was nondiscretionary in light of *both* the statute and the administrative record. *See, e.g.,* *Abramowitz v. EPA*, 832 F.2d 1071, 1079 (1987) (ordering the Administrator to reject the state implementation plan for the South Coast Air Basin in light of the administrative record). The 1990 Amendments were intended to broaden, not contract, that prior jurisdiction.

279. CAA § 307(b)(2), 42 U.S.C. § 7607(b)(2) (1994).

in the bill's language of meaning, despite the fact that courts have found such deletions significant in determining congressional intent.<sup>280</sup>

To avoid this result, a better interpretation would not require that the Administrator expressly defer performance of a nondiscretionary statutory duty in a final decision. Rather, if the *effect* of that final decision is to defer performance, then jurisdiction to review that deferral would exist in the court of appeals.<sup>281</sup>

## 6. The Rejection of Overlapping Jurisdiction

Lastly, the Amendments explicitly raise the question of overlapping jurisdiction. While the district court retains its jurisdiction over a failure to perform any act or duty which is not discretionary with the Administrator, the court of appeals now has jurisdiction over a final decision that defers performance of any nondiscretionary statutory action. The question thus arises whether Congress intended the two types of jurisdiction to be exclusive, or whether a petitioner can choose to bring the litigation in either court.

Although the answer is not entirely clear, the better view is that Congress did not intend to authorize concurrent jurisdiction. The principal support for this conclusion is that the original Senate Bill 1630, as reported by the Committee on Public Works and the Environment to the Senate floor, expressly authorized concurrent jurisdiction. It would have amended section 307(b) to state that where the Administrator had undertaken to perform an action in a final decision but deferred performance to a later time, a party could challenge that deferral either in the court of appeals under section 307(a) or in the district court under section 304(a)(2).<sup>282</sup>

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280. *See, e.g.,* *Stewart v. Ragland*, 934 F.2d 1033, 1037 n.6 (9th Cir. 1991) ("When legislators delete language, we may assume that they intended to eliminate the effect of the previous wording.").

281. Of course a party seeking to raise this issue on judicial review would have to exhaust their administrative remedies by raising the issue before the Administrator as well. If the party did not raise the issue in this fashion, then it could not be said that the final decision deferred performance if that decision otherwise was silent on the issue. If that were the situation, no evidence would exist that the Administrator ever had considered the issue, and such consideration is a prerequisite to a decision deferring it to a later time.

282. Senate Bill 1630 stated in pertinent part: "(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." S. 1630, 101st Cong., 1st Sess. § 609(d) (1989), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 8289.

The Committee report summarized:

The amendments address situations where an EPA final decision addresses only part of an air pollution issue, and defers the balance of the issue for resolution at a later time. In those situations, the amendments will provide that citizens have the option of suing either under section 307(b)(1) in the Federal courts of appeals (within sixty days of the EPA final action that announced the deferral) or under section 304(a)(2) in the district court (without any statutory time limit).

S. REP. NO. 228, 101st Cong., 2d Sess. 375 (1990), *reprinted in* 1990 AMENDMENTS

However, all later versions of the legislation that ultimately became the 1990 Amendments deleted the authorization for concurrent jurisdiction. The so-called "Baucus-Chafee Substitute" for the original Senate Bill 1630 allowed citizens to challenge final decisions which undertook action but deferred performance only under section 304(a)(2),<sup>283</sup> while the House Amendments, which ultimately became law, authorized a challenge only under section 307 in the court of appeals.<sup>284</sup> Congress's refusal to enact an explicit provision authorizing concurrent jurisdiction over agency inaction in both the district court and the court of appeals strongly argues against an interpretation that such concurrent jurisdiction now exists.

#### *E. Summary of the Legislative Intent*

To summarize, prior to the 1990 Amendments to the CAA, the legislative histories of that Act and of the CWA did not provide much assistance in properly construing the jurisdictional provisions. The only significant point that can be derived from the amendments prior to 1990 is that Congress likely intended that the district court's authority to compel an "act or duty which is not discretionary with the Administrator" should extend only to those acts and duties plainly commanded by explicit statutory language. This interpretation significantly narrows the range of situations in which a suit in the district court would be proper. For example, where the Administrator's obligation does not arise until after he or she has engaged in discretionary fact-finding, the district court cannot order the agency to engage in that fact-finding or decide the facts itself in lieu of the agency.

In contrast, the legislative history of the 1990 Amendments to the CAA contains significant indications about the meaning of the jurisdictional provisions in that Act. The most important lesson from this most recent history is that, by expressly authorizing judicial review of final decisions by the Administrator that defer certain actions, Congress did not intend to limit judicial review only to final actions taken by the Administrator. Congress, however, also refused to authorize any review in the district court of agency inaction on the basis that such inaction was an abuse of discretion as opposed to a violation of a plain statutory command. Moreover, the insertion and subsequent deletion of a provision that would have given the district courts and the courts of appeals concurrent jurisdiction over certain challenges to agency inaction indicates that Congress rejected the concept of concurrent jurisdiction.

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LEGISLATIVE HISTORY, *supra* note 176, at 8715.

283. CAA Amendments of 1989, 101st Cong., 2d Sess. § 608(d) (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 7847.

284. CAA Amendments of 1990, 101st Cong., 2d Sess. § 608(h) (1990), *reprinted in* 1990 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 176, at 2350.

V. IDENTIFYING AND PRIORITIZING THE POLICIES  
IMPLICATED BY THE BIFURCATED JURISDICTION  
PROVISIONS

This Part of the Article identifies a series of policies which an analysis of the jurisdictional statutes must consider. The policies are varied; they concern the impact of various aspects of judicial review upon the courts, upon the agency that is the subject of the review, and upon the litigants. Because of their variation, no single interpretation of the bifurcated review provisions can satisfy all of them. A closer look at the policies, however, reveals that they are not of equal weight and can be prioritized. In particular, while the policy goals of assuring agency accountability and protecting agency autonomy appear to be in conflict, the analysis demonstrates that the agency's need for autonomy is not equally cognizable in all instances.

*A. Identifying the Policies*

Because the legislative history offered relatively little indication of what Congress intended to accomplish in enacting the bifurcated jurisdiction statutes, particularly before the enactment of the 1990 Amendments to the CAA, the policies that those provisions implicate play a decisive role in their interpretation. The jurisdictional provisions implicate six separate policies originating in concerns over judicial economy and case management as well as in general principles of administrative law that the courts must consider. Two of these policies, conserving judicial resources and recognizing limitations on the fact-finding and remedial capabilities of appellate courts, concern the impact that the review provisions have on the judiciary. Two others, protecting agency deliberations and assuring agency accountability, address the relationship between the statutes and the administrative functions performed by EPA. Finally, the last two policies, assuring both predictability in the judicial review process and timely review of EPA decisions, seek to ensure that litigants' interests are protected.

A proper interpretation of the review provisions requires the exploration of each of these policies. Thereafter, the various tests used by the courts, set out at length above in this article,<sup>285</sup> can be measured against those policies.

I. Conserving Judicial Resources

Judicial economy is the policy that the courts most frequently recognize in deciding questions about jurisdiction to review agency inaction under the CAA and CWA. That policy has two components. First, the courts want to avoid piecemeal review of EPA actions in which a district court reviews part of an overall agency action, with the remainder of that action reviewed directly in the

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285. See *supra* text accompanying notes 107-75.

court of appeals.<sup>286</sup> If both courts are considering related issues or are reviewing part of what is effectively a single administrative record, substantial duplication of judicial efforts will occur.<sup>287</sup>

Thus, in *E.I. du Pont de Nemours & Co. v. Train*,<sup>288</sup> an important decision which established the Administrator's power to set technology-based effluent limitations by regulation under the CWA, the Supreme Court premised its ruling partly on the avoidance of unnecessary judicial duplication. The Court found that it would be "highly anomalous" if EPA's 1983 "best available technology" regulations and the new source performance standards were directly reviewable in the court of appeals, while the 1977 "best practicable control technology" regulations based on the same administrative record were reviewable only in the district court.<sup>289</sup>

A second component of the policy goal of judicial economy is to avoid requiring parties to file separate, sequential requests for judicial review of what

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286. *See* *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("[B]ifurcation of review is undesirable."); *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 661 (7th Cir. 1986) ("[B]ifurcated review of essentially identical claims is not favored . . ."); *Indiana & Michigan Elec. Co. v. EPA*, 733 F.2d 489, 491 (7th Cir. 1984) ("Judicial economy would be disserved by having different aspects of the same order reviewed in two different courts at once."); and *City of Seabrook v. Costle*, 659 F.2d 1371, 1373 (5th Cir. Unit A Oct. 1981) ("The suggestion that the district court can order the Administrator to do the things he has failed to do in the SIP approval process while the court of appeals is reviewing what the Administrator has actually done would result in an impractical process of piecemeal review . . ."). Piecemeal review also can occur if review of closely related matters is split between the federal courts and the state courts. *See* *Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 671 (7th Cir. 1991) ("Review of the EPA's approval [of lists under § 304(l) of the CWA] in district court, and of the state's submissions and modifications in state court, would bifurcate proceedings in a way Congress wanted to avoid.").

287. *Center for Auto Safety v. EPA*, 558 F. Supp. 103, 105 (D.D.C. 1983) (Jurisdiction is proper exclusively in the court of appeals because "[t]he two actions are essentially identical, and duplicative litigation is generally to be avoided because it needlessly expends limited judicial resources while creating the risk of inconsistent decisionmaking."); *see also* *P.H. Glatfelter Co. v. EPA*, 921 F.2d 516, 518 (4th Cir. 1990) ("Review by this court at this preliminary stage would lead to piecemeal review and undermine future state administrative and judicial proceedings."); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 660 (D.C. Cir. 1975) ("The two suggested forms of action are substantively identical, and it is well settled that bifurcated jurisdiction between District Court and Court of Appeals over identical litigation is not favored.").

288. 430 U.S. 112 (1977).

289. *Id.* at 127-28; *see also* *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196-97 (1980) ("Under the contrary construction of the Court of Appeals, denials of NPDES [National Pollutant Discharge Elimination System] permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits."); *Virginia Elec. and Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) ("[T]he regulations issued under § 316(b) are so closely related to the effluent limitations and new source standards of performance of §§ 301 and 306 that we think it would be anomalous to have their review bifurcated between different courts.").



is effectively a single, ongoing agency proceeding.<sup>290</sup> As one court put it, an interpretation in which parties must “pester the court” with petitions for review should be avoided.<sup>291</sup> Rather, to the extent possible, the interpretation of the jurisdictional provisions should clearly identify when a plaintiff must file a petition for review. It should avoid the need for duplicative or sequential filings intended solely to avoid a judicial ruling that the plaintiff should have sued earlier and that, because it did not, the statute of limitations now bars the action.<sup>292</sup>

## 2. Recognizing Limitations on Fact-Finding and on the Exercise of Remedial Powers at the Appellate Level

A second important judicial policy arises out of the distinct functions performed by trial and appellate courts. Judicial review directly in the court of appeals is proper only when the agency has compiled an administrative record that will form the basis for the court’s review, and therefore, when no need for judicial fact-finding exists.<sup>293</sup> The court of appeals should not be put in the

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290. *American Paper Inst. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (“[T]he more that we pull within [§ 1369(b)(1)], the more arguments will be knocked out by inadvertence later on—and the more reasons firms will have to petition for review of everything in sight.”).

291. *Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 671 (7th Cir. 1991) (Review of EPA’s approval of lists under § 304(l) of the CWA, and review of state submissions and modifications to permits in the state court, “would also induce firms to pester the district courts, for under § 509(b)(2) any firm that forgoes available review is forever barred.”).

292. This policy is also predicated on the idea that the agency should not have to defend various parts of its decisionmaking in sequential petitions for review. *Public Citizen Health Research Group v. Commissioner, Food and Drug Admin.*, 740 F.2d 21, 31 (D.C. Cir. 1983) (“[T]he integrity of the administrative process is threatened by piecemeal review of the substantive underpinnings of a rule.”).

293. *See Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 769 (2d Cir. 1988) (“Since an administrative order reviewable under § 7607(b) may be filed only in the courts of appeals—which are not designed and are ill-equipped to serve as fact-finding forums—this factor strongly militates against finding the instant order a final one.”); *Modine Mfg. Corp. v. Kay*, 791 F.2d 267, 270 (3d Cir. 1986) (“Where the agency has already compiled an administrative record . . . district court fact-finding is unnecessary, and district court review in such a situation is both a needless and time-consuming duplication of the ultimate appellate consideration.” (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985))); *Indiana & Michigan Elec. Co. v. EPA*, 733 F.2d 489, 490 (7th Cir. 1984) (“The ground for giving jurisdiction over agency-inaction cases to the district courts rather than the courts of appeals is that when an agency fails to act there may be no record for the court of appeals to review.”); *NRDC v. EPA*, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) (“[T]he great advantage the district courts have over the courts of appeals—their ability to use extensive factfinding mechanisms—is not relevant here. There is not even an arguable need to engage in technical fact-finding when judicial review is concentrated on an agency record and policy determinations.”); *Save the Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282, 1292 (5th Cir. 1977) (“When Congress has vested this court with original review, it generally has done so in relation to an administrative process that more easily lends itself to production of a reviewable record.”); *Friends of the Earth v. EPA*, 499 F.2d 1118, 1128 (2d Cir. 1974) (“Congress must have intended that judicial enforcement of implementation plans be instituted in the district courts where a factual record can be developed.”).

position of having to find facts not based in a record; the district court is the proper forum for such a task.<sup>294</sup>

In addition to concern over the courts of appeals' inability to find facts in deciding the merits of the action, the courts have cited judicial capacity to enforce remedial orders as a consideration in deciding jurisdiction. For example, if a petitioner successfully challenges the Administrator's failure to adopt regulations, the petitioner may request the court to order the Administrator to adopt the required regulations within a reasonable period of time. The parties often will dispute what period is reasonable, or the agency may later be charged with contempt for failing to comply with the court's order.<sup>295</sup> An appellate court may conclude that it is ill-suited to referee these types of factual disputes.

Finally, a third policy concern, albeit one mentioned less frequently in the opinions, emphasizes that it is appropriate to place review in the court of appeals because appellate courts sometimes become intimately familiar with the work, practices, and needs of specific agencies.<sup>296</sup> The theory<sup>297</sup> is that where a statute such as section 307(b) of the CAA gathers all nationally applicable regulations for review in one circuit court of appeals, that court will acquire substantial knowledge and understanding of EPA's operations.<sup>298</sup> This knowledge, in turn,

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294. Some courts also have noted that if the district court reviews an administrative record, the parties likely will not be satisfied with review only at that level. Rather, given the important issues and large costs of compliance often at stake in environmental litigation, they are quite likely to appeal an adverse ruling as a matter of course. For example, in *Lubrizol Corp. v. Train*, 547 F.2d 310, 317 (6th Cir. 1976), the court stated that:

District court review of these regulations would be time consuming and duplicative since the decision of the district court will generally be appealed to a court of appeals which will simply review the same administrative record and assess the agency action anew without special deference to the district court's opinion.

295. See *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 900-04 (N.D. Cal. 1984) (finding the Administrator in contempt for failing to promulgate final standards for radionuclides).

296. See *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978) (noting that § 307(b)(2)'s "twin congressional purposes of insuring that the substantive provisions of the standard would be uniformly applied and interpreted and that the circumstances of its adoption would be quickly reviewed by a single court intimately familiar with administrative procedures"); *United States v. Ethyl Corp.*, 761 F.2d 1153, 1156 n.7 (5th Cir. 1985) (quoting *Adamo*, 434 U.S. at 284).

297. The theory of benefits is fully explored in Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330-32 (1991).

298. The advantages of specialized courts have been thoroughly examined. See, e.g., David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975); Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377; Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

will inform the courts' review of the agency's actions<sup>299</sup> and will also produce expeditious opinions.<sup>300</sup>

Modern environmental regulation, however, is notorious for its complexity.<sup>301</sup> Judicial review in a particular case will focus on narrow issues of statutory interpretation, will require a close reading of specific regulations, and will entail consideration of technical information principally relevant only to the precise point at issue. Often courts cannot easily generalize this knowledge and put it to use in subsequent litigation on different issues. Furthermore, even if courts can do so, familiarity with the agency and its workings is not an unmitigated good, as the court may lose a neutral perspective in its dealings with a particular agency.<sup>302</sup> Accordingly, this policy concern is not particularly powerful in the context of the bifurcated jurisdiction provisions.<sup>303</sup>

### 3. Protecting Agency Autonomy

A third relevant policy is preserving the agency's ability to set its own priorities and agenda within the limits of its discretion under the statutory scheme. In recent years Congress has increasingly mandated specific deadlines for agency actions without allocating sufficient resources for the agency to carry out those assigned tasks.<sup>304</sup> Additionally, it has set forth the actions which the

299. See, e.g., Wald, *supra* note 22, at 514 (Because the court's relationship to government counsel is relatively close due to repeat appearances, the resulting dialogue is more candid than one between strangers.).

300. Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1228 (1992).

301. See *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985) (deferring to EPA interpretation of the CWA because "EPA's understanding of this 'complex statute' is a sufficiently rational one . . ."); *United States Steel Corp. v. EPA*, 444 U.S. 1035, 1038 (1980) (Rehnquist J., dissenting from denial of certiorari) (The provisions of the CAA "swim before one's eyes."); *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Env'tl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994) (finding "no reason to doubt the validity" of the government's description that the "enormity of the 1990 amendments [to the CAA] beggars description" and that Congress "took what was widely perceived as an 'unapproachable piece of legislation' and tripled the Act's length and 'geometrically increased its complexity' . . .").

302. Bruff, *supra* note 300, at 1219 (suggesting that, because the District of Columbia Circuit specializes in complex statutes such as the CAA, the Circuit "has drifted into an active role of enforcing the 'spirit' of these statutes," and that a generalized court "may provide a better buffer between government and the regulated").

303. See also Alex Kozinski, *Remarks Concerning Professor Bruff's Proposals*, 39 UCLA L. REV. 1249 (1992) (suggesting that inconsistency among circuits is "not such a bad thing" because "[e]xperience gained from diverse parts of the country may teach an agency that its initial attempt at implementing a statute can be improved").

304. See Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 829-30 (describing the increased use of statutory deadlines). A 1985 study found that EPA was subject to 328 statutory deadlines, a list unquestionably increased by the 1990 CAA Amendments. Environmental and Energy Study Inst. & Environmental Law Inst., *Statutory Deadlines In Environmental Legislation: Necessary But Need Improvement* 11 (Sept. 1985).

agency is to take in considerably more detail than is found in earlier environmental statutes.<sup>305</sup>

Critics have argued that such legislative micro-management of administrative activities is counterproductive<sup>306</sup> and that the agencies need more latitude to establish regulatory priorities, to assign resources according to those priorities, and even to reinterpret statutes that prove administratively impossible to implement.<sup>307</sup> They also suggest that judicial orders requiring the agency to perform a nondiscretionary act can require the expenditure of limited agency resources on some regulatory tasks which, in terms of overall environmental protection, are far less important than others facing the agency.<sup>308</sup> Statutory deadlines, which are often the subject of action-forcing litigation brought under environmental legislation, do have the benefit of establishing priorities for the

305. See, e.g., Craig N. Oren, *Detail and Delegation: A Study in Statutory Specificity*, 15 COLUM. J. ENVTL. L. 143, 145 (1990) (discussing the increased use of specificity in environmental legislation); Robert V. Perceival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS., Autumn 1991, 173, at 173 (discussing the Reagan Administration's "regulatory relief" program which resulted in congressional amendment of "the already action-forcing environmental laws" to constrain EPA's discretion even more severely).

306. Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994) (increased oversight efforts by the White House led, in turn, to attempts by Congress to "catch up," and this "cycle of competition" has harmed regulatory policy through the use of secrecy and micro-management).

307. See, e.g., John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOL. L. Q. 233, 306 (1990) (citing advantages to having courts cure symbolic legislation through instrumental interpretation); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 28 (1991) ("The now widespread phenomenon of unrealistic and inconsistent judicial commands to agencies is attributable to two factors—malleable doctrines and growth in the highly decentralized federal judiciary.").

308. R. Shep Melnick paints an almost totally negative picture of judicial review:  
 Judicial review has subjected agencies to debilitating delay and uncertainty.  
 Courts have heaped new tasks on agencies while decreasing their ability to perform any of them. They have forced agencies to substitute trivial pursuits for important ones. And they have discouraged administrators from taking responsibility for their actions and for educating the public.

R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 246 (1992); see also Bruff, *supra* note 300, at 1209 ("Because each agency is centrally organized, it has an overall grasp of its programs and priorities that is unavailable to a court reviewing one of its decisions. Consequently, judicial review constantly risks impairing agency operations."); Robert L. Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS., Autumn 1991, 249, at 301 (Complying with judicial review is costly, and perfecting a record that will survive judicial review can, among other results, reduce total agency work product and force agency resources into less productive forms of regulation.). But see ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 144 (1993) ("This study indicates that, contrary to the general picture painted by many of today's judicial scholars, the partnership of courts and public agencies has many positive attributes.").

agency as well as mitigating political pressure on the agency not to act.<sup>309</sup> At the same time, if the deadline is unrealistic, as many EPA deadlines are<sup>310</sup> given the resources available to the agency, the deadline can force the agency to make a hasty decision or to divert resources into litigation.<sup>311</sup>

Any question about the appropriate extent of such agency autonomy is not susceptible to a categorical answer. Suggestions that the agency can simply ignore statutory mandates because of a claimed lack of resources run the risk that the agency will base resource allocation decisions on short-term political expediency or disagreement with statutory goals, rather than on sound planning designed to maximize priorities based upon valid environmental considerations, such as risk to health. Moreover, the proposal that the agency should be able to ignore a statutory mandate would reject the fundamental tenet that Congress establishes the work agenda of agencies it has created through statutory mandates.

The debate over the agency implementation of statutory mandates, however, does serve to focus attention on the pervasive problem of lack of resources needed to carry out all of the EPA mandates. The chronic shortage of agency resources means that EPA faces important strategic allocation choices. Courts are ill-equipped to second guess those choices; they must carefully consider whether their decisions will unduly impinge upon this aspect of the agency's autonomy. Several courts have recognized this need to respect agency autonomy in interpreting the final action requirement of the bifurcated jurisdictional review provisions.<sup>312</sup>

#### 4. Assuring Agency Accountability

In tension with the policy of avoiding undue interference with agency autonomy is the principle that agencies must be accountable to the public for their actions.<sup>313</sup> On the most basic level, accountability requires that EPA must

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309. See Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 53 (1989).

310. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 313 (1991) ("Congress has repeatedly demanded that the agency perform impossible tasks under unrealistic deadlines.").

311. See Shapiro & Glicksman, *supra* note 304, at 835-36; Shapiro & McGarity, *supra* note 309, at 53-54.

312. See, e.g., *Pennsylvania Dep't of Env'tl. Resources v. EPA*, 618 F.2d 991, 997 (3d Cir. 1980) (reading a "finality requirement" into § 509 of the CWA, and noting that "unlimited interlocutory review could seriously impede the performance of EPA's rulemaking functions").

313. Accountability is a primary goal of a basic tenet of administrative law, the nondelegation doctrine. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (positing that the first function of the nondelegation doctrine is to ensure that popular choices of social policy "are made by Congress, the branch of our Government most responsive to the popular will"). Indeed, much of modern administrative law centers on concerns over the exercise of administrative discretion and posits, as a principal goal, the idea of greater agency accountability for actions. See also Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 58 (1991) ("Most bureaucratic entities pursue institutional power with the same

not affirmatively employ the bifurcated jurisdictional review provisions as a means of avoiding legitimate judicial scrutiny into the agency's compliance with nondiscretionary statutory requirements.<sup>314</sup> Several courts, however, have concluded that EPA has employed the review requirements for just this purpose,<sup>315</sup> and redressing this type of agency conduct was a theme of the legislative history of the 1990 Amendments to the CAA.<sup>316</sup>

More generally, accountability also requires that, at some point after the agency has been given sufficient time to consider an issue and has reached a conclusion about it, the agency's work must be subject to judicial review. A line must be drawn between reflective consideration and analysis of issues by the agency in light of available resources, and unwarranted delay inspired not by lack of resources but simply by lack of will or political disagreement with the obligations imposed by statute. Concerns over unjustified agency delay underlie the provisions of the former APA still in force today authorizing courts to remedy "unreasonabl[e] delay[]" in agency decisionmaking,<sup>317</sup> and those concerns apply equally to judicial review under the CAA and CWA.

### 5. Assuring Predictability for Litigants

A fifth policy implicated by the judicial review provisions is the predictability of judicial review from the litigants' standpoint. Extensive litigation over the collateral issue of which court has jurisdiction to hear a case not only squanders judicial time, it also wastes the litigants' resources by increasing the cost of an already-expensive litigation process.<sup>318</sup> Thus, in interpreting the bifurcated jurisdiction provisions, the courts must consider whether a particular interpretation will allow parties to determine easily the court in which they should bring a case.

vigor that they shun accountability.").

314. Fluornoy, *supra* note 89, at 380 ("If EPA has free reign to decide when it has sufficient evidence to act, statutes mandating action are a sham."). There is, of course, considerable debate about the scope of the courts' role in determining whether such a nondiscretionary duty arises. In recent years, the Supreme Court in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), has instructed lower courts to defer to agency interpretations of ambiguous statutes. As a result, instances in which courts find statutory violations have lessened. Glicksman & Schroeder, *supra* note 308, at 304 (noting a "move toward a much more modest sense of what the law is, and of what the statute commands"). The question at issue with respect to agency inaction is whether, if such a nondiscretionary duty exists even under an expanded view of the agency's right to determine its statutory obligations, the agency can be held accountable for violating that duty.

315. *See, e.g.*, *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 663 (7th Cir. 1986) (Swygert, J., dissenting) ("The EPA's purposeful evasion of its statutory mandate is evidenced by the fact that it has attempted to insulate its inaction from judicial review.").

316. *See supra* text accompanying note 243.

317. 5 U.S.C. § 706(1) (1994).

318. *See Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1314 (9th Cir. 1992) (observing that "[w]e can tell from the briefs and arguments in this Clean Water Act case that tremendous resources in time and money and considerable legal skill have gone into finding out the proper address for an appeal, an activity which does not keep water clean and does not process wood pulp").

Interestingly, few courts have expressly recognized any concern over the need for certainty on the part of litigants. In *Harrison v. PPG Industries, Inc.*, a case interpreting the finality requirement in section 307, the Supreme Court did note that because of uncertainty over judicial jurisdiction to review the agency's action, the petitioner had filed both a petition for review in the court of appeals and a complaint in the district court.<sup>319</sup> The Court of Appeals for the District of Columbia Circuit also has noted the need for "clear and workable guidelines" for judicial review.<sup>320</sup> Most courts, however, have focused on the policies pertaining to judicial resources that more directly implicate the courts,<sup>321</sup> leaving it to the litigants to pick up the pieces from the judicial interpretations. As a result, the courts have paid insufficient attention to the impact of their decisions on the litigants seeking review, and confusion over the bifurcated review provisions has proliferated.

## 6. Assuring Timely Review

The last policy that must be considered is assuring timely judicial review of EPA decisions. In many cases where administrative agencies have acted after compiling a record, Congress has nonetheless required plaintiffs first to seek review in the district court rather than directly in the court of appeals.<sup>322</sup> Standing in contrast to this practice, the direct appellate review provisions of the CAA and CWA, together with the short time frames in which plaintiffs must seek review, are intended not only to avoid duplication of judicial efforts<sup>323</sup> but also to secure expeditious review so that any errors are quickly brought to the agency's attention.<sup>324</sup> That intent is consistent with the overall emphasis in both Acts of requiring EPA to address environmental hazards expeditiously.<sup>325</sup> If application

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319. 446 U.S. 578, 584 (1980).

320. See *NRDC v. EPA*, 512 F.2d 1351, 1357 (D.C. Cir. 1975), in which the court noted that awarding attorneys' fees under the theory advanced by petitioner "could also impede the development of clear and workable guidelines for the administration of sections 304 and 307 as the Act's basic jurisdictional grants." The court, however, then observed that "[d]isarray among existing decisions suggests that such guidelines will not be easily arrived at in any event." *Id.* at 1357 n.32.

321. See *supra* text accompanying notes 286-92.

322. Review is generally in the district court. See 5 U.S.C. § 706 (1994). Some more specialized agencies with elaborate administrative processes have statutes providing for direct review in the court of appeals. See, e.g., 8 U.S.C. § 1105(a) (1994) (direct review of decisions under the Immigration and Nationality Act); 16 U.S.C. § 8251(b) (1994) (direct review of decisions of the Federal Energy Regulatory Commission under the Federal Power Act); 29 U.S.C. § 160(e), (f) (1994) (direct review of decisions of the National Labor Relations Board); 47 U.S.C. § 402(b) (1994) (direct review of decisions of the Federal Communications Commission).

323. See *supra* text accompanying notes 286-303.

324. *NRDC v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (Congress has declared a preference for prompt review in § 307(b)(1).).

325. See *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 659 n.6 (D.C. Cir. 1975) ("[I]n the Clean Air Act the Congress was particularly concerned with rapid review of the promulgated standards, and so imposed the especially short 30-day [now 60-day] filing period.").

of the bifurcated review provisions causes delay while courts sort out the proper jurisdiction for litigating and perhaps conclude that plaintiffs must begin anew in another forum, that delay undermines the policy.

### *B. Prioritizing the Policies*

The discussion above sets forth the relevant policies that are important to construing the jurisdictional reach of the statutes authorizing judicial review of agency environmental decisions. Those policies, however, are not of equal weight. A closer examination of them in the context of judicial review of environmental statutes reveals that they may be prioritized in terms of importance. Those priorities, in turn, simplify the task of determining which approach to judicial review best promotes the policies underlying the review statutes.

#### 1. The Court-Centered Policies

The concern about conserving judicial resources is significant, for judicial consideration of environmental issues in litigation is time-consuming. The complexity of the major federal environmental laws, such as the CAA and CWA, is now established beyond question; numerous courts have attested to the difficulty of construing them.<sup>326</sup> Moreover, the technical details posed by environmental issues are equally daunting.<sup>327</sup> Resolution of an issue can require consideration of cost-benefit analysis,<sup>328</sup> risk analysis,<sup>329</sup> advanced scientific

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326. *See supra* note 17.

327. Bruff, *supra* note 300, at 1204:

Regulatory proceedings can readily produce administrative records of 10,000 pages or more, filled with conflicting material on technical issues of fact and policy. A judge must struggle just to understand the technical issues—evaluating the soundness of their resolution by the agency and deciding how far to probe are harder still.

328. *See, e.g., American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1117 (D.C. Cir. 1995) (explaining that in regulating the manufacture and sale of fuel or fuel additives, the agency must “consider all relevant medical and scientific evidence, including other feasible means of achieving emission standards, and also consider available scientific and economic data, including a cost benefit analysis comparing emission control devices that use the prohibited fuel and those that do not”); *NRDC v. EPA*, 937 F.2d 641, 643 (D.C. Cir. 1991) (upholding cost-benefit analysis used by EPA in excluding “fugitive dust” from surface coal mining regulations in identifying major facilities subject to “prevention of significant deterioration” regulations); *Rybacheck v. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990) (“[T]he EPA is required to consider the costs and benefits of a proposed technology in its inquiry to determine the [best practicable control technology].”) (quoting *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 805 (9th Cir. 1980)).

329. *See, e.g., Leather Indus. of Am., Inc. v. EPA*, 40 F.3d 392, 396 (D.C. Cir. 1994) (reviewing EPA’s adoption of a “risk-based concentration cap”); *NRDC v. Administrator, EPA*, 902 F.2d 962, 974 (D.C. Cir. 1990), *vacated in part and dismissed in part by* 921 F.2d 326 (D.C. Cir. 1991) (upholding the Administrator’s determination of the primary air quality standards for particulates based solely on risk to health); *Flournoy, supra* note 84, at 329 (observing a “common model” of environmental statutes “directing the Environmental



inquiry,<sup>330</sup> and decisionmaking under various levels of uncertainty.<sup>331</sup> And because compliance with environmental regulation is costly, much of the litigation over it is multi-party in nature, further adding to its time-consuming nature.

All of these factors suggest that the courts should seek to avoid any interpretation of the review provisions which might require both the district court and the court of appeals to consider related aspects of one underlying regulatory proceeding. In such instances, the costs to the judicial system are real and large.

The second judicially centered policy, avoiding judicial fact-finding at the appellate level, is entitled to some credence, but in terms of judicial review of agency inaction, it is not greatly significant. The case law demonstrates that, in practice, the courts of appeals have been asked to review agency inaction only after the agency has completed some sort of administrative proceeding and then failed to act. In such instances the parties have been accorded the opportunity to submit pertinent facts and argue their positions to the agency, and the court of appeals will have an administrative record to review.

Judicial fact-finding is a larger concern only where the court of appeals concludes that the agency violated an obligation to act and is asked to fashion an injunctive-type remedy. The only facts at issue here, however, relate to the timetable in which the agency must act, with the agency arguing that it needs more time and the party seeking action arguing that the agency needs less time. The dispute is principally over the resources reasonably available to the agency to carry out its statutory obligation.

In this context, any concern over an appellate court's inability to find facts in deciding disputes over resources available to the agency is more theoretical than real for three reasons.<sup>332</sup> First, a dispute over the timetable needed to carry out the statutory obligation will not arise in every case. The party seeking agency action may not seek a judicial timetable for agency action, or the parties may agree on

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Protection Agency . . . to impose regulatory restrictions if it determines that an activity or substance within the statute's scope poses a risk of harm to health or the environment").

330. *See, e.g.*, *Baltimore Gas & Elcc. Co. v. NRDC, Inc.*, 462 U.S. 87, 103 (1983) (Court must be at its most deferential when the agency is making predictions, within its area of special expertise, at the frontiers of science.); *NRDC v. EPA*, 16 F.3d 1395, 1404 (4th Cir. 1993) ("Once again, we are confronted with an area dominated by complex scientific inquiry and judgment.").

331. *See, e.g.*, *New York v. Reilly*, 969 F.2d 1147, 1150-51 (D.C. Cir. 1992) ("We are particularly deferential when reviewing agency actions involving policy decisions based on uncertain technical information."); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1528 (D.C. Cir. 1990) (noting the "considerable uncertainty and controversy" surrounding allegations about the detrimental effects of acid rain); *NRDC v. Administrator, EPA*, 902 F.2d at 971 (Administrator did not act arbitrarily in drawing conclusions from the uncertain and conflicting data.).

332. Indeed, appellate courts have ordered rulemaking as a remedy in some environmental cases. *See, e.g.*, *Delaney v. EPA*, 898 F.2d 687, 695 (9th Cir.), *cert. denied*, 498 U.S. 998 (1990) (ordering EPA to promulgate federal implementation for counties in Arizona).

a timetable for carrying out the agency's obligations.<sup>333</sup> In both situations, the court is not required to make judgments about what actions the agency is capable of taking.

Second, even when these types of issues are fully litigated at the district court level in other situations, they tend to be decided by paper motion rather than through live testimony.<sup>334</sup> The court of appeals is certainly capable of reading and deciding such motions; it does so routinely on other aspects of appellate litigation.<sup>335</sup> The court of appeals also has the ability to appoint a special master.<sup>336</sup>

Finally, the court of appeals has the option of completely avoiding the factual problems associated with the remedial stage of the litigation. The court could undertake review of the agency's inaction and conclude that the agency violated a mandatory obligation to take action. However, it could limit its remedy to a declaration that the agency is required by law to take action. The agency would then be under an obligation to act within a reasonable time-frame, and a party could then file an action in the district court seeking an order that set forth an explicit timetable.

Thus, while the courts must be concerned about the likelihood that an interpretation of the relevant statutes will require the court of appeals to decide factual issues, that outcome is not likely in the instance of agency inaction under federal environmental law. Accordingly, this concern is not entitled to great weight in interpreting the relevant statutes.

## 2. The Agency-Centered Policies

The policies of protecting agency autonomy and insuring agency accountability are both legitimate in the situation of agency inaction. The agency may appropriately demand respect for its autonomy in deciding how best to utilize its resources, particularly in an era of increasingly stringent budgets. Moreover, an

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333. See *Sierra Club v. Browner*, Civ. A. Nos. 93-124 (NHJ), 93-125, 93-197, 93-564, 1994 WL 750290, at \*6 (D.D.C., Sept. 20, 1994) (Mem. Op.) (finding that proposed timetable in consent decree under which EPA would promulgate regulations regarding marine vessel loading emissions was fair and reasonable).

334. See, e.g., *American Petroleum Inst. v. EPA*, 72 F.3d 907, 912 (D.C. Cir. 1996) (deciding various attorney's fee applications and noting that "[p]etitioners have provided support for the reasonableness of their rates through affidavits and a survey of rates"); *Sierra Club v. Thomas*, 658 F. Supp. 165, 172-73 (N.D. Cal. 1987) (discussing declarations submitted by plaintiffs and EPA).

335. See, e.g., *Southern Ohio Coal Co. v. Dept. of the Interior*, No. 93-3878, 1993 WL 642401 (6th Cir. 1993) (in which a motion for a stay of a preliminary injunction was granted in part and denied in part).

336. See *Allsteel, Inc. v. EPA*, 25 F.3d 312, 315 (6th Cir. 1994):

To the extent that the petition may raise factual questions, they could be dealt with by remand to the agency or by appointment of a special master. See *Harrison*, 446 U.S. at 594 ("[A]n appellate court is not without recourse in the event it finds itself unable to exercise informed judicial review because of an inadequate administrative record.").

*Id.*

agency's claims that it must continue to deliberate because of an uncertain scientific basis for action are entitled to credence, especially where the judicial branch is not equipped to easily determine the validity of those claims.

At the same time, administrative accountability is also essential for an endeavor so closely associated with protection of the public health. The need for accountability is heightened where indications exist that an agency is taking an unduly long period to consider issues or is employing lengthy procedures as a shield to avoid carrying out explicit statutory mandates. As noted above,<sup>337</sup> some judges have suggested that EPA has engaged in such conduct.

The two policies of autonomy and accountability plainly conflict. In the context of judicial review of agency inaction, deference to agency autonomy can easily lead to lack of accountability. The opposite is also true: increased judicial scrutiny designed to assure accountability can unduly impinge upon agency autonomy.<sup>338</sup> Some middle ground is necessary so that judicial review can serve both policies.

The criticism that EPA is overly "micro-managed" by statute would seem to suggest that judicial review should be structured to maximize the agency's autonomy, even if that autonomy is enlarged at the expense of agency accountability. Under such an approach, judicial review of agency inaction would be limited so that the courts would minimally interfere with the agency's decisions. Before taking such a step, however, it is important to consider carefully the functions that a court performs in undertaking judicial review of various types of EPA decisions, for judicial review of agency inaction varies markedly in the potential for interference with the agency's legitimate expectations of autonomy.

At one extreme, the agency's refusal to act may occur after it has examined complex scientific evidence and concluded, based on this examination, that no action at this time is warranted.<sup>339</sup> The agency may bolster this decision by arguing that it is considering various other alternative regulatory avenues in order to address the environmental problem at issue.<sup>340</sup> At the other extreme, the agency's factual conclusions about the scientific evidence or its policy choices

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337. See *supra* text accompanying note 24.

338. Chief Judge Wald articulated the competing concerns well:

If an agency is outrageously dragging its feet or ignoring its statutory mandate from Congress, why shouldn't that behavior be just as reviewable as, say, the decision of an agency to flout its mandate and repeal existing rules in the name of deregulation? Nevertheless, there is a strong counterargument that judges are not capable of reviewing agency inaction involving, as it often does, allocation of discrete sources and policy priorities, at least where the relevant statute provides no standards by which to evaluate the agency's decision not to act.

Wald, *supra* note 22, at 522.

339. See, e.g., *NRDC v. Administrator, EPA*, 902 F.2d 962, 981 (D.C. Cir. 1990), *vacated in part and dismissed in part* by 921 F.2d 326 (D.C. Cir. 1991) (recounting EPA's defense of its decision not to regulate particulates on the grounds that it was awaiting a "coherent, scientifically based strategy" for relating the visibility effects of fine particles with the acid deposition phenomenon).

340. *Id.* (discussing how the agency evaluated various approaches to acid deposition).

may not be in question; rather, the plaintiff simply alleges that the agency's inaction has violated a plain statutory command to act.<sup>341</sup>

The agency's claim to autonomy, and thus to insulation from judicial review of its inaction, is strongest when the court is reviewing either its assessment of scientific evidence or its policy choices. The court's inability to understand fully the scientific evidence renders its interference with the agency's scientific choices problematic. The possibility that judicial review may adversely affect the agency's ability to carry out its regulatory functions suggests that any review of administrative inaction which touches on these areas should be very deferential to the agency's judgments.

It is quite another thing, however, to insulate the agency from judicial review of its failure to carry out a statutory command where the scientific facts are undisputed and the only policy choice in question concerns the wisdom of the statutory requirement itself, rather than administrative policy choices about how to carry it out. If, in this instance, courts ignore plain statutory mandates out of deference to the agency's autonomy, they have effectively rejected the fundamental tenet of administrative law that Congress, through statutory mandates, establishes the regulatory agenda of the agencies which it has created.<sup>342</sup> A regime of judicial review which immunizes the agency's refusal to implement a Congressional mandate from judicial oversight deprives the mandate of meaning, for in doing so, the court effectively has allowed the agency to equate its lawmaking choices with those of the legislative branch of government. Extending agency discretion to these lengths is inadvisable, and judicial review of an agency's refusal to conform to plainly expressed legislative will provides a necessary check on its power.

Moreover, judicial review of agency inaction, particularly if it violates a plain statutory requirement, does not excessively affect the area of autonomy to which the agency is legitimately entitled. While statutory directives are more specific now than in the past,<sup>343</sup> they still leave significant areas of administrative discretion. For example, the agency may still possess considerable discretion in allocating resources to implement the statutory command and in setting the timetable for implementing the regulatory scheme. Additionally, if the agency believes that the statute is unwise, it can use the implementation process as a means of convincing Congress that the statute is counter-productive and should be changed.<sup>344</sup>

Finally, EPA's history suggests that its claims for respect of its autonomy, at least in some instances, are suspect. At various points in its history the agency

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341. See, e.g., *Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th Cir. 1987) (reviewing petitioner's allegation that EPA violated explicit statutory requirements in the CAA by not disapproving an SIP).

342. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 15 (1993) ("Assuring that a primary legislative power remains in Congress is the task of the delegation doctrine.").

343. See *supra* notes 304-05.

344. For example, the agency has convincingly argued that it should not have to write "federal implementation plans" for the many instances in which states have failed to submit timely plans under the CAA.

has been subject to illegitimate pressures to ignore the plain statutory direction set out in the CAA and CWA.<sup>345</sup> For example, EPA as an agency has suffered from overtly political interference in its functioning, particularly through executive branch extra-statutory oversight of the agency's decisions. If statutes limit the availability of review when the agency refuses to act, the outcome is not necessarily an increase in agency autonomy that will result in improved decisionmaking. Instead, it may mean that extra-legal pressures on the agency which stem from political expediency rather than agency expertise operate outside the sphere of judicial correction.<sup>346</sup>

In sum, the suggestion here is that in the construction of the judicial review statutes, while courts should exercise considerable deference in reviewing agency inaction based on the agency's scientific expertise or policy judgments, it is entirely appropriate for courts to determine whether the agency's inaction violates a purely statutory command. In the latter case, the need for agency accountability is more important than protecting its autonomy. Rather, it is within the process of exercising discretion in implementing the statutory command that courts should elevate the importance of agency autonomy and grant greater judicial deference to the agency's resource- and policy-based choices in implementing the statute. Thus, to the extent possible in interpreting the statutes authorizing jurisdiction, the court should defer only to the agency's choices of implementation mechanisms, resource-allocation, and emphasis in risk regulation.<sup>347</sup>

Some argue that, in undertaking judicial review of agency inaction within this type of framework, the courts usurp power that properly belongs to the executive branch of government.<sup>348</sup> That argument, however, is misplaced. Such criticisms of the judicial role in reviewing EPA actions ignore the fact that Congress, not the courts, sets the statutory deadlines and mandatory requirements. A court cannot choose among them, for it has no legitimate criteria by which to determine whether to order the agency to implement one particular statute but not order the agency to enforce another mandatory statute which the agency also has not implemented. A court must treat all mandates equally, or it will be subject to the same criticism legitimately directed at EPA in the past: that the agency has

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345. See Glicksman & Schroeder, *supra* note 308, at 267.

346. See Shapiro & McGarity, *supra* note 309, at 56 (observing how groups relied on deadlines under the Occupational Safety and Health Act to force a reluctant agency to act).

347. That deference also should manifest itself in the court's determination of the time-frame in which it will order the agency to comply with the statutory mandate. See McGarity, *supra* note 313, at 78 (noting that external reviewing institutions like the courts judge an agency by its ability to do what Congress tells it to do within a reasonable time, "if not necessarily within the extremely ambitious deadlines to which Congress occasionally subjects EPA"). The agency may avoid a statutorily set timetable by showing it is impossible or infeasible to issue the regulations within that time frame. *Sierra Club v. Thomas*, 658 F. Supp. 165, 172 (N.D. Cal. 1987). A few courts, albeit a minority, have held that in mandating EPA to issue regulations, the court must accept EPA's proposed schedule if EPA demonstrates that it is proceeding in good faith. *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 569 (D.D.C. 1986); *Illinois v. Costle*, 12 *Env'tl. Rep. Cases* (BNA) 1597 (D.D.C. 1979).

348. See Melnick, *supra* note 308.

chosen the requirements it wished to implement on political rather than legal grounds.

Thus, the two conflicting policies of accountability and autonomy are best served not by interpreting the jurisdictional review statutes to exempt agency inaction from judicial review, but by building into the scope of review an increased measure of deference for the agency's legitimate autonomy in scientific analysis, resource allocation, and policy adoption.<sup>349</sup> If the agency completes a process but refuses to act, the twin concerns over autonomy and accountability are met if the court concludes that jurisdiction for judicial review exists but also recognizes that it should intrude on the agency's choice not to act only where the record contains no support for that choice or the agency has violated a plain statutory command. Finally, structuring judicial review in this manner also will encourage the agency to document in the record its reasons for refusing to act,<sup>350</sup> an effort that will increase the legitimacy of the agency's administrative processes.

### 3. The Litigant-Centered Policies

Unlike the agency-related policies of autonomy and accountability, the two relevant litigant-related policies—assuring predictability in determining the appropriate court for judicial review and assuring timely review—generally work in harmony. If the law is clear about the choice of court for judicial review of agency inaction, that certainty will avoid much of the delay inherent in collateral litigation over jurisdiction. It will also avoid the unnecessary costs associated with that collateral litigation.

In general, the policy of assuring timely review of administrative action is promoted if, where possible, review is placed directly in the court of appeals, since the extra step of review in the district court is avoided.<sup>351</sup> Where review must begin in the district court, however, the policy of timeliness is still served by maximizing the parties' ability to predict the proper court. Timeliness is also

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349. Increased deference for agency rulemaking has been suggested as a means of freeing the rulemaking from current judicially imposed constraints. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1426 (1992); see also Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1285 (1989) (suggesting that doctrines which move the legal environment closer to the goal of a politically accountable administrative state are those which accord significant deference to agencies but leave courts positioned to confine agency action within constitutional and statutory boundaries). One need not subscribe to this generalized theory, however, to conclude that in the context of judicial review of agency inaction in these circumstances, an increased measure of deference to the agency is appropriate.

350. See Wald, *supra* note 22, at 528 (noting the increase in the number of cases in which courts "[do] not . . . tell an agency that its methodology or procedures were wrong . . . but rather . . . tell an agency that it has not sufficiently explained why it chose the course it did—in short, 'go back and rewrite your reasons'").

351. *Virginia v. United States*, 74 F.3d 517, 525 (4th Cir. 1996) (citing judicial economy as a major basis for the CAA's jurisdictional scheme, "to wit, the risk of duplicative or piecemeal litigation, and the risk of contradictory decisions" (quoting *NRDC v. Reilly*, 788 F. Supp. 268, 273 (E.D. Va. 1992))).

served where the statutory structure of judicial review avoids the situation in which both the district court and court of appeals simultaneously consider issues involving the same administrative record or the same statutory scheme. In such situations, it is very likely that the loser in the district court will file an appeal. When such an appeal occurs, neither the agency's implementation of its actions—if it prevails—or its consideration of issues on remand—if it does not—will begin until the appeal is resolved. Accordingly, the benefits of timeliness intended by authorizing direct review in the court of appeals are lost.

#### VI. UNTANGLING THE KNOT: TOWARD A MORE SYSTEMATIC REGIME OF JUDICIAL REVIEW

This final Part of the Article examines the various tests that the courts have used in construing the bifurcated jurisdiction provisions in light of the policy considerations and indications of legislative intent identified in the discussion above. The purpose of this analysis is to determine which of the judicial tests most closely accords with those policies and that intent.

The sheer number of policies relevant to the jurisdictional statutes makes it difficult for any single approach to satisfy them all. Further complicating the analysis are the conflicting goals of some of the policies and the fact that, as discussed above, the policies do not merit equal treatment. In contrast, applying the legislative intent is easier. The most important indications of legislative intent are few, principally appearing only in the history of the 1990 Amendments, and do not apply to the CWA's jurisdictional provisions, which Congress has not recently changed.

Accordingly, the analysis first undertakes the more complex task of examining the various judicial approaches to review of agency inaction to determine which of them maximizes adherence to the relevant policies. After completing this analysis, the discussion then turns to the legislative history to determine whether the optimum approach from a policy standpoint is consistent with the indications of legislative intent found in that history.

This Part concludes that two tests, the rulemaking cycle and constructive final action tests, best accommodate the relevant policies implicated by the jurisdictional review provisions. The rulemaking cycle test, however, is distinctly superior to the constructive final action test in terms of consistency with legislative intent. Thus, this Part concludes that courts should apply the rulemaking cycle test, but they should do so in a manner which exhibits sensitivity towards the agency's needs for autonomy. Finally, the Article suggests an interpretation of the judicial review statutes that is consistent with the rulemaking cycle test but that would avoid a conflict with the congressional intent rejecting concurrent jurisdiction in both the district court and the courts of appeals.

*A. Application of the Relevant Policies*

## 1. "The Embedded in Final Action" Test

As noted above,<sup>352</sup> the embedded in final action test is the most widely cited of the judicial tests for determining finality of agency action. It allows the court of appeals to review agency inaction that is embedded in a challenge by the plaintiffs to broader agency action. This approach, however, seriously conflicts with several of the relevant policies that underlie the judicial review statutes.

The most significant problem with the approach is its lack of predictability for litigants. The difficulty arises because the courts have not defined—and cannot define with any particularity—when a specific determination is embedded in a larger agency action that is final for purposes of judicial review. The word "embedded" implies that the inaction must be sufficiently related to other, presumably broader action which the agency did take. In other words, the inaction must be a subset of activity related to a broader category of agency decisionmaking which, on balance, contains more action than inaction. If it does, the court of appeals can assume jurisdiction over the entire "final action" under section 307 of the CAA.

In practice, however, the test is unpredictable, for many types of agency inaction can be categorized as part of a broader action taken by the agency. For example, when the Administrator takes no action on a single part of a proposed revision to an SIP under the CAA, that inaction may be closely related to a broader decision either to approve or disapprove the entire plan.<sup>353</sup> In other instances, however, the inaction is sufficiently separable from the action that it will not be treated as embedded in the action.<sup>354</sup>

The embedded in final action approach does not provide any criteria for differentiating between the two situations. As a result, the determination that the inaction is embedded in a larger agency final action is an empty conclusion rather than the end result of the application of a set of criteria that renders a predictable conclusion. Application of the embedded in final action test thus devolves into case-by-case adjudication with little predictability for new or unusual situations.

For example, in the seminal case adopting the test, *Indiana & Michigan Electric Co. v. United States EPA*,<sup>355</sup> the SIP submission at issue included a

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352. See *supra* text accompanying notes 108-17.

353. For example, in *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994), petitioners asserted that "EPA's decision not to allow utilities to obtain conditional approval in advance of certain alternative 'emissions averaging' plans was arbitrary in light of its decision to allow for conditional approval of such plans" in regulations governing other types of emissions. The court reviewed the allegation without any concern about jurisdiction.

354. See, e.g., *NRDC v. Administrator, EPA*, 902 F.2d 962, 986 (D.C. Cir. 1990) (Wald, C.J., concurring), *vacated in part and dismissed in part by* 921 F.2d 326 (D.C. Cir. 1991) (observing that the visibility standard was not "embedded" in an overall secondary air quality standard, but was "entirely separate" from another secondary standard).

355. 733 F.2d 489 (7th Cir. 1984).



thirty-day averaging provision which EPA did not act upon in approving the overall submission. The court found that EPA's inaction on the thirty-day averaging provision was final for purposes of judicial review but did not explain why it had reached that conclusion. One explanation is that the SIP revision was submitted as a uniform package, and thus any inaction on part of that package was embedded in the larger decision on that package. This interpretation, however, is inconsistent with the result in a later Seventh Circuit case, *Bethlehem Steel Corp. v. United States EPA*,<sup>356</sup> in which the court rejected jurisdiction over a citizens group's challenge to the approval of an SIP revision on the ground that it did not go "far enough." The inaction in that case seemingly was just as embedded in the final action approving the SIP revision as that in *Indiana & Michigan Electric Co.*, and both plaintiffs were arguing that the SIP approvals did not comply with a statutory requirement.

Another possible explanation for the *Indiana & Michigan Electric Co.* result is that through its inaction on the thirty-day averaging provision, EPA effectively approved an SIP revision that differed from the one which the state had submitted. However, while this distinction might explain the result in *Indiana & Michigan Electric Co.*, other cases do not limit the test to this category of circumstances.<sup>357</sup>

Thus, the meaning of the embedded in final action test is unclear, and the test cannot be sufficiently generalized so that plaintiffs could definitively determine the proper forum for their actions. Furthermore, because the test forces plaintiffs to litigate over the correctness of the forum, the test hinders the goal of securing timely review of agency determinations. If a plaintiff chooses incorrectly, the plaintiff either must begin anew in the proper forum—so long as the sixty-day statute of limitations in section 307 does not prevent the filing of a new action.<sup>358</sup> And to avoid the latter possibility, a plaintiff may choose initially to file in *both* the district court and the court of appeals.

Moreover, the test in many instances guarantees that one and possibly even two courts will have to review extensive administrative material to decide the jurisdictional questions. For example, a plaintiff may file a challenge in the court of appeals to the part of an agency rulemaking that is unquestionably final as well as to the agency's refusal to act on another issue in that rulemaking. To apply the embedded in final action test and determine its jurisdiction over the latter claim, the court of appeals cannot simply read the petition for review. Rather, to understand the agency's action, the court of appeals will have to review the part of the administrative record that concerns both claims. If the court ultimately determines that the inaction was not embedded, it would then dismiss the claim despite the extensive efforts that it had made to understand fully the issues it raises.

The embedded in final action test is relatively neutral with respect to the policy goals of ensuring agency accountability and protecting agency autonomy. This

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356. 782 F.2d 645 (7th Cir. 1986).

357. See *Abramowitz v. EPA*, 832 F.2d 1071 (9th Cir. 1987); *Kamp v. Hernandez*, 752 F.2d 1444 (9th Cir. 1985).

358. CAA § 307(b)(2), 42 U.S.C. § 7607(b)(2) (1994).

neutrality stems from the fact that the test focuses on the closeness of the relationship between the action that the agency did take and its inaction. It does not, for example, automatically sweep a large number of agency inactions before the court of appeals simply because the agency has completed a process, as does the rulemaking cycle approach, or automatically reject any jurisdiction in the courts of appeals for the inaction, as does the actual final decision approach. Rather, the effects on agency autonomy and accountability are random because the test is centered on an independent variable: the relationship between the inaction and other action which the agency has taken. Thus, the embedded in final action test neither systemically promotes nor hinders either agency accountability or agency autonomy.

In sum, the most significant shortcoming of the embedded in final action test is the inability to define what counts as embedded. Without such a definitive interpretation, the test lacks predictability for litigants, invites repeated litigation to determine jurisdiction, and does not serve the policy of assuring timely review.

## 2. The "Remedy" Test

The principal positive feature of the remedy<sup>359</sup> test is that a litigant can readily predict the appropriate forum by considering the type of relief sought from the court. If the petitioner is asking the court to set aside regulations adopted by the agency, jurisdiction lies in the court of appeals. In contrast, if the remedy sought is an order requiring the agency to promulgate new regulations, the district court has jurisdiction. Thus in terms of predictability, the remedy test is far superior to the embedded in final action test, which provides little predictability in its application.

The test also strongly furthers a second albeit less important policy goal: recognizing limitations on the remedial capabilities of appellate courts. Indeed, the test is premised on the concept that the remedy sought from the court determines the court's jurisdiction. It assumes that, if the court must order additional rulemaking rather than merely set aside rules already adopted, the court of appeals is unsuited to hear the action. Rather, the litigation is proper only in the district court, which has the fact-finding capabilities necessary to fashion an appropriate compliance order.

By establishing the remedy sought by petitioner as the primary determinant of jurisdiction, however, the test seriously undermines the goal of assuring judicial economy by virtually ensuring that duplication of judicial efforts will occur. Consider the following typical scenario: EPA adopts a regulation which both industry groups and environmentalists immediately challenge. The industry groups seek to set aside the rule as overly stringent and insufficiently based on the record, while the environmentalists claim that the rule does not go far enough, perhaps by failing to cover certain sources. Under the remedy test, the industry petition is appropriately heard in the court of appeals, because the remedy that industry petitioners seek is to set aside the rule. In contrast, because the environmentalists do not seek to set aside the existing rule but only wish to

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359. See *supra* text accompanying notes 118-35.

extend its reach, the environmentalists' petition must be heard in the district court.

Assuming that the district court accepts jurisdiction over the environmentalists' petition,<sup>360</sup> both courts will have to review the same administrative record to decide the respective cases, thus resulting in duplication of judicial efforts. Furthermore, if the district court's decision on the environmentalists' petition is appealed, the court of appeals will have to consider that record a second time at a later date. The result is a serious conflict with the policy goal of conserving judicial resources.

Also, under this scenario the remedy test will jeopardize the goal of assuring agency accountability. In the case of an allegation, like this one, that a regulation is insufficient in its scope, the determination of whether the litigation belongs in the court of appeals or the district court is almost fortuitous. Jurisdiction will turn on the form of the agency regulation—whether the exclusion is implicit or explicit—rather than on any substantive difference in the action.

Thus, if the agency expressly exempts certain sources from the requirements in a regulation, jurisdiction is proper in the court of appeals, for the remedy then requires that the agency first set aside its existing exemption. In contrast, the agency might consider and then reject the idea of adopting a broader regulation that includes additional sources. It might then implement this decision not by expressly exempting certain sources from the regulation, but by adopting a narrower definition of *included* sources and remaining silent about other sources. In that instance, the petition would not ask that the court set aside the adopted regulation, but would instead seek to require the agency to expand the regulation to include additional sources. Jurisdiction over that type of action, however, would be proper only in the district court under the remedy test.<sup>361</sup>

The result is a regime of judicial review which allows the agency, through the form of its regulation, to manipulate the form in which any appeal initially will be heard, a situation hardly conducive to promoting agency accountability. At the same time, since the challenge to the adopted regulation itself is heard in the court of appeals, while the challenge to the inaction is heard in the district court, the goal of ensuring timely review of the agency's decisions is jeopardized, as that review of related actions is now split between two courts.

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360. Under this scenario, the environmentalists claim that, based on the information which the agency compiled in the administrative record of the rulemaking, the agency's inaction was a failure to perform a nondiscretionary act. If a district court takes the position that it has jurisdiction only over suits in which the lack of discretion is evident from the statutory language itself—not from the evidence in the administrative record—no court would have jurisdiction over the inaction. In that instance the goal of assuring agency accountability would be compromised.

361. In the leading case adopting the remedy test, *Pennsylvania Dep't of Env'tl. Resources v. EPA*, 618 F.2d 991, 996 (3d Cir. 1980), the court emphasized that "an allegation of inadequacy of a set of regulations is quite different from an allegation that a needed regulation was nonexistent." That statement is true if the "needed regulation" is a wholly different set of regulations covering new types of discharges or emissions. If, on the other hand, the "needed regulation" concerns the scope of sources covered, the difference between the two sets of regulations is not nearly as large.

Finally, the remedy test is neutral in its impact on the policy of recognizing agency autonomy. It premises jurisdiction on the type of relief that the court is asked to order, a factor unrelated to the agency's exercise of autonomy.

In summary, the significant advantage of the remedy test is its predictability. Jurisdiction is easy to predict because, unlike the embedded in final action test, both the courts and the parties can easily determine whether petitioners seek to set aside an existing regulation or to require EPA to promulgate a new rule. At the same time, however, the test can easily result in duplication of judicial efforts and may well invite agencies to structure their rules in a manner that would avoid direct review in the court of appeals, outcomes at odds with the policy goal of assuring agency accountability.

### 3. The "Rulemaking Cycle" Test

The strength of the rulemaking cycle test<sup>362</sup> is that it plainly serves the litigant-related policies. Because it treats rulemaking—and presumably, other agency procedures which embody a decisionmaking "cycle"<sup>363</sup>—as final action for purposes of judicial review, the test is predictable to litigants. Litigants simply determine whether the cycle is complete before seeking judicial review. The test also assures timely review of agency decisions by fixing jurisdiction directly in the court of appeals at the completion of the cycle; litigants need not take the time-consuming step of first applying to the district court for relief.

Additionally, the rulemaking cycle test promotes agency accountability by informing the agency that, at the completion of a procedural cycle, a court will have jurisdiction to review the action that the agency has taken until that point. The agency thus must recognize that, at the completion of the cycle, it will be held accountable for its decisions during the rulemaking. If the agency can complete a rulemaking or other procedural cycle, determine to take no action at that time, and escape judicial review on the ground that its autonomy must be protected, the agency can effectively insulate itself from judicial review of its decisionmaking. If it does, the goal of assuring agency accountability is subordinated to the goal of protecting the agency's autonomy. The rulemaking cycle test avoids this possibility.

One difficulty with the test, however, is a possible conflict with the policy of respecting agency autonomy. If the agency has completed a cycle of proceedings but has not yet ultimately decided what to do about a particular issue, judicial review of the agency's inaction arguably could interfere with legitimate agency

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362. See *supra* text accompanying notes 136-56.

363. EPA makes many of its most important decisions within the context of informal rulemaking. See Shapiro & McGarity, *supra* note 309, at 58 (explaining that Congress demanded that EPA regulate "important aspects of industrial life in fundamental ways," and this feat "was to be accomplished through informal rulemaking"). Even if the agency is not engaged in rulemaking, however, it normally will use other procedural steps, such as notice and comment, before rendering a final decision. The logic of the rulemaking cycle test would apply to these other procedural devices as well.

prerogatives. For example, in *NRDC v. Administrator*,<sup>364</sup> the Administrator was facing difficult scientific and economic questions in evaluating alternative approaches to reducing acid deposition. At the end of a rulemaking cycle, he took no action but immediately initiated another preliminary rulemaking proceeding. Under such circumstances, an extended series of administrative proceedings might well be appropriate and should be protected from judicial interference.

Proper employment of the rulemaking cycle test, however, would minimize interference with an agency's legitimate autonomy.<sup>365</sup> Use of the test merely results in the court's jurisdiction over a petition for review; it does not establish a substantive standard for that review. Rather than protecting the agency's autonomy by concluding that the courts have no jurisdiction to review the agency's inaction, a court can protect that autonomy by exercising deference in reviewing any agency decision, made at the end of a rulemaking, in which the agency explains why it has not definitively decided what course of action to take.

Review of the Administrator's actions with regard to acid deposition in *NRDC v. Administrator* can serve as an example. If the agency had violated an explicit statutory command to adopt regulations, the court would invalidate the agency's refusal to act. Absent such a violation, however, as long as the agency clearly expressed its reasons for its inaction and the record contained substantial evidence supporting the agency's decision to gather further information rather than to act, the court would uphold the agency's action. Thus, the court would interfere only if it appeared that the agency was violating a plain statutory obligation by refusing to act or if its refusal was arbitrary.

The rulemaking cycle test has conflicting effects on the policy of conserving judicial resources. It avoids the situation in which both the court of appeals and the district court review parts of one overall agency action based on the same administrative record. Under the test, all aspects of the agency's action are reviewable in the court of appeals at the completion of a cycle of proceedings. The test also avoids impelling parties to file sequential petitions for judicial review out of uncertainty as to when and in which court such petitions must be filed. Instead, they will know that, at a completion of a rulemaking or procedural cycle, they must seek review at that point or be barred from review at a later date.<sup>366</sup> At the same time, however, by potentially subjecting all decisions at the end of a rulemaking cycle to judicial review, this test increases the jurisdictional load of the court of appeals.

Finally, because the test authorizes judicial review in the court of appeals at the completion of a rulemaking or procedural cycle, the court will review the administrative record detailing the agency's actions during that cycle. The test does not violate the policy goal of recognizing the limits on the fact-finding

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364. 902 F.2d 962 (D.C. Cir. 1990), *vacated in part and dismissed in part* by 921 F.2d 326 (D.C. Cir. 1991).

365. See *supra* text accompanying note 312.

366. It is true that by allowing parties to seek review at the end of a rulemaking cycle, the test may encourage them to file petitions for review at the end of each cycle rather than filing a single petition at a later time. But the court's overall workload should not increase greatly; rather, the substantive amount of review will remain the same, but will be split into discrete segments rather than reviewed as a whole at a single time.

capabilities of an appellate court, as the court is not asked to go outside the record to find facts.

#### 4. The "Constructive Final Action" Test

As discussed above,<sup>367</sup> the constructive final action test is similar to the rulemaking cycle test. It differs from that test only when, at the conclusion of a rulemaking, the agency has not acted but indicates that it is still actively considering action.<sup>368</sup> Thus, for the most part, the effects of this test on the policies underlying the review statutes mirror the effects of the rulemaking cycle test.

In the situation where the two tests do not overlap, however, the constructive final action test fails to serve two policies. The first is predictability for litigants. As applied by Chief Judge Wald in *NRDC v. Administrator*,<sup>369</sup> the key factors in determining whether the agency has "constructively" taken final action appear to be the precise status of the agency's procedures, particularly whether the agency has committed to undertake further specific steps,<sup>370</sup> whether the agency actually has decided certain facts or issues,<sup>371</sup> the agency's explanation for its inaction,<sup>372</sup> and the relationship of the agency's inaction to any statutory deadline.<sup>373</sup> Because Chief Judge Wald did not discuss the weight given these factors, litigants must guess which of them will predominate in arguments over whether the court of appeals has jurisdiction. The result is a serious lack of predictability in applying the test in these circumstances.

Secondly, this uncertainty impels litigants to file petitions for review to avoid later arguments that they waived their right to review by not filing at an earlier time. Thus, by encouraging the filing of separate, sequential petitions for review, the test compromises the policy goal of conserving judicial resources.

#### 5. The "Actual Final Decision" Test

The actual final decision test<sup>374</sup> unquestionably serves three of the six policy goals underlying the judicial review statutes. First, the test strongly serves the policy goal of assuring predictability for litigants. The test is precise: the

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367. See *supra* text accompanying note 159.

368. See *supra* text accompanying note 160.

369. 902 F.2d 962 (D.C. Cir. 1990), *vacated in part and dismissed in part* by 921 F.2d 326 (D.C. Cir. 1991).

370. *Id.* at 986 (observing that on the visibility issue EPA "remains technically engaged in at least the foreplay of formal rulemaking" because it had, at the time it completed the initial rulemaking cycle, published an advanced notice of proposed rulemaking to address visibility).

371. *Id.* at 986 n.9 (distinguishing *Sierra Club v. Gorsuch*, 715 F.2d 653 (D.C. Cir. 1983), on the basis that in the latter case the agency had actually decided not to include strip mines on a list of sources).

372. *Id.* at 997 (noting that the agency had deferred indefinitely from taking action on acid deposition because it lacked adequate scientific understanding of its effect).

373. *Id.* at 988 (noting that when it refused to act, EPA was already 10 years behind the statutory deadline established by the CAA).

374. See *supra* text accompanying notes 165-75.

agency's decision is not reviewable unless it constitutes action rather than inaction and is couched in terms of a "final" decision. Thus, lawyers can easily determine whether judicial review is available.

Secondly, the test strongly supports the policy goal of respecting agency autonomy. Because it focuses on the agency's own characterization of where it stands in the decisionmaking process, the test affords the agency maximum flexibility in structuring the procedures that it believes are necessary to reach a decision. Agency autonomy—in the sense of freedom from judicial oversight—also is enhanced because, under this test, *all* agency inaction is defined as unreviewable.

Third, the test serves the less important goal of recognizing the limitations on appellate fact-finding and remedial capabilities. Concerns over these two appellate functions arise when the agency has not acted, and the court must either find facts to determine whether it should have acted or remedy agency inaction. Under the actual final decision test, the court will not find itself in either position.

The test has mixed results with respect to the goal of conserving judicial resources. Because the test is predictable, parties will not have to file sequential petitions for review because of uncertainty over when the court of appeals has jurisdiction to hear the matter. More importantly, the test deems all forms of agency inaction as unreviewable. Thus, fewer agency decisions will be subject to judicial review than under other tests which allow for the possibility that courts can review agency inaction in some circumstances.

In some instances, however, the test will result in piecemeal judicial review of a single administrative record. If any part of the agency's decision in a rulemaking proceeding amounts to inaction rather than to an affirmative decision to act, that inaction is reviewable—if at all—only in the district court on the theory that the agency has violated a plain statutory command. If the inaction is reviewable in the district court, the actual final decision results in piecemeal judicial review in much the same manner as the remedy test discussed above. Two courts, rather than one, will address related issues raised in a single agency proceeding.

At the same time, the actual final decision test plainly does not serve two other policy goals of the jurisdictional statutes. First, it promotes agency autonomy almost to the exclusion of the goal of agency accountability. As long as the agency—for whatever reason—has not rendered an actual final decision, the court of appeals has no jurisdiction to undertake review. Thus, even under a worst case scenario where the agency is arbitrarily refusing to act or is employing attenuated procedures to avoid taking action, the agency will be immune from judicial scrutiny. The practical effect of the test is to sacrifice accountability until such time as it suits the agency.

Second, this policy greatly hinders the goal of assuring timely judicial review so that errors may quickly be brought to the agency's attention. Instead, by actually allowing the agency to structure its procedures to avoid judicial review in difficult situations, this test attenuates such review.

## 6. Summary

The test which best promotes those policies underlying the jurisdictional provisions is the rulemaking cycle test. The actual final decision test also strongly promotes several of the relevant policies, while the other tests are markedly less effective in carrying out the policies.

Both the rulemaking cycle and actual final decision tests share the feature of allowing litigators to predict accurately when judicial review will be available. In addition, the rulemaking cycle test strongly implements the policies of assuring accountability and timely review. Its principal detriment is its possible impact on agency autonomy, although judicial deference to the agency's reasons for structuring its decisionmaking process in a certain fashion can lessen this impact. Finally, it has a mixed effect on conserving judicial resources.

The actual final decision test in some ways stands in sharp counterpoint to the rulemaking cycle test. It promotes agency autonomy and ensures that appellate courts will not become embroiled in fact-finding or enforcing complex remedial orders. Its principal detriment is its failure to assure agency accountability, and it also fails to assure timely review of the agency's decisionmaking.

The other three tests are inferior from the standpoint of implementing the relevant policies. Despite the number of cases in which courts have cited it favorably, the embedded in final action test does not strongly implement any of the relevant policies. Moreover, the uncertainty of the test prevents predictability among litigants, a significant detriment. The remedy test assures predictability and, as its name implies, avoids entangling the appellate courts in fact-finding or implementation of complex remedial orders. However, because the test is centered on the court's capabilities rather than on the agency's decisionmaking process, it is indifferent to agency accountability. Nor does the test necessarily conserve judicial resources or assure timely review.

Finally, the constructive final action test is similar in impact to the rulemaking cycle test. It is, however, less predictable than the latter test and thus less efficacious from a policy perspective.

### *B. Implementing the Legislative Intent*

The last step in the analysis is to determine whether the tests are consistent with congressional intent. Because the rulemaking cycle test and, to a slightly lesser degree, the actual final decision test are superior from the perspective of implementing policy, only those tests are analyzed for consistency with legislative intent.

Here, the outcome of the analysis of the two tests is strikingly different because of the 1990 Amendments to the CAA. As discussed above,<sup>375</sup> the principal conclusion from the 1990 Amendments is that Congress broadened the range of agency decisions that would be subject to judicial review. The change of language from review of final actions to review of final decisions indicates

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375. See *supra* text accompanying note 270.



that agency inaction also is reviewable in the court of appeals under some circumstances. Moreover, a steady theme in the history is that Congress was critical of narrow judicial interpretations which foreclosed judicial review of agency inaction.

This intent directly conflicts with the actual final decision test. The test was premised on the idea that the statutory term "final action" literally suggests that agency inaction is not reviewable at all. If the agency has failed to act, the matter is unreviewable "no matter how 'close' the agency is to [making] that decision."<sup>376</sup> In light of the legislative intent, this premise is no longer tenable.

In contrast, the rulemaking cycle test is fully consistent with this legislative intent. When the agency has completed a rulemaking cycle or other procedural process, it has "decided" even if its choice is not to take action. The test is thus consistent with both the language of the 1990 Amendments, which authorizes review of final decisions, as well as with the legislative intent to broaden review of agency inaction.

Two other indications of legislative intent are pertinent: (1) Congress's refusal to authorize review of inaction in the district court on the basis of "review of abuse of discretion,"<sup>377</sup> and (2) the rejection of concurrent jurisdiction.<sup>378</sup> The rulemaking cycle test does not conflict with the first indication of intent. It calls only for a greater number of cases to be reviewed in the court of appeals, where review is proper for abuse of discretion, rather than the enlargement of the district court's jurisdiction to include such matters. Similarly, because the actual final decision approach disallows *any* review unless there is a final action, it also avoids review of agency inaction in the district court for abuse of discretion.

Nor does the actual final decision test conflict with the last indication of legislative intent, the congressional rejection of concurrent jurisdiction. Once again, because the test strictly forbids review of agency inaction, there is no possibility of concurrent jurisdiction with the district court over such inaction.

Application of the rulemaking cycle test does pose a potential conflict with the congressional intent to reject concurrent jurisdiction. The problem arises in one situation: where the agency is under an explicit statutory duty to take certain action but at the end of a rulemaking cycle refuses to do so. Under the rulemaking cycle test, the court of appeals has jurisdiction to review that refusal. Because the agency has failed to perform a nondiscretionary statutory duty, however, the district court also may have jurisdiction over a citizen suit brought to compel that duty.

The jurisdictional statutes, however, could be interpreted to avoid such concurrent jurisdiction. Two different interpretations of sections 304 and 307 of the CAA are possible. First, in this situation, jurisdiction over such failure to perform a nondiscretionary statutory duty could lie only in the district court. Thus, if the agency completed a rulemaking cycle and failed to carry out that

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376. *NRDC v. Administrator, EPA*, 902 F.2d 962, 997 (D.C. Cir. 1990) (Silberman, J., concurring and dissenting), *vacated in part and dismissed in part* by 921 F.2d 326 (D.C. Cir. 1991).

377. *See supra* text accompanying notes 260-61.

378. *See supra* text accompanying notes 282-84.

duty, the court of appeals could not review that failure; instead, a plaintiff would have to file a separate action in the district court. This interpretation, however, has effects that are inconsistent with policies underlying the review statutes. Most obviously, it would fragment jurisdiction over related matters between the district court and the court of appeals, thus wasting judicial resources. Furthermore, given a choice between jurisdiction in the district court or the court of appeals over a purely statutory question, the interpretation violates the policy goal of assuring timely review of agency action.

The second interpretation, which would vest jurisdiction in this situation solely in the court of appeals, avoids these problems. The court of appeals would consider this issue along with other issues raised in the rulemaking, and the matter would be timely considered because district court review would be unnecessary.

Accordingly, the courts should interpret the rulemaking cycle test to vest jurisdiction solely in the court of appeals over allegations that EPA failed to perform a nondiscretionary statutory duty in addition to allegations of abuse of discretion in the rulemaking. If that interpretation is adopted, the rulemaking cycle test is fully consistent with congressional intent.<sup>379</sup>

*C. Accounting for Statutory Differences Between the  
Clean Air and Clean Water Acts.*

The most pertinent indications of congressional intent regarding the jurisdiction statutes primarily concern the 1990 Amendments to the CAA.<sup>380</sup> Nothing would prevent a court from using the rulemaking cycle test for that law and a separate test, such as the actual final decision test, for the CWA.<sup>381</sup> For several reasons, however, the rulemaking cycle test should be the uniform approach to both laws.

First, both the CAA and CWA employ the same bifurcated jurisdictional framework, and the latter's review sections were patterned after the original provisions in the 1970 Amendments to the CAA. The courts have recognized the relationship between the two sets of jurisdictional provisions by, in some

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379. Under this interpretation, jurisdiction over the failure to perform a nondiscretionary action would lie solely in the court of appeals while that court reviewed the agency's rulemaking decisions. If a petitioner failed to petition for review of EPA's failure to perform a nondiscretionary statutory duty that was at issue in the rulemaking, it could not bring an action in the district court pursuant to § 304 of the CAA while the court of appeals' action remained pending.

After the court of appeals decided the case, however, nothing would prevent the petitioner from later suing in the district court under § 304 alleging a failure to perform a statutory duty. Unless the petitioner could bring such an action once the possibility of concurrent jurisdiction expired, the failure to petition the court of appeals would mean that EPA effectively received immunity from its failure to perform its nondiscretionary statutory duty. There is no indication, either in the wording of the jurisdictional review provisions or the legislative history, of such a congressional intent.

380. See *supra* text accompanying notes 192-258.

381. See *supra* text accompanying notes 165-76.

instances, using decisions under one law to support holdings under the other.<sup>382</sup> This pattern strongly suggests that a uniform approach to their interpretation is appropriate. Additionally, the same policies underlie the jurisdictional statutes for both laws and, as discussed in detail above, the rulemaking cycle test best effectuates those policies.

These reasons strongly suggest that the rulemaking cycle test should be used for litigation under the CWA as well as for cases arising under the CAA. There is, however, one significant difference between the framework for judicial review under the CAA and the CWA. The CWA authorizes direct review in the court of appeals of a closed set of specifically delineated EPA decisions, including the grant or denial of a permit and the establishment of effluent limitations.<sup>383</sup> The courts have held that, if EPA's decision does not fall within this limited set of decisions, jurisdiction in the court of appeals is unavailable.<sup>384</sup> In contrast, the CAA contains a catch-all authorization allowing the courts of appeals to review "any other final action" taken by the agency.<sup>385</sup>

This difference means that a broader set of decisions is reviewable in the court of appeals under the CAA than under the CWA. Other than this difference, however, no statutory reason exists why the rulemaking cycle test cannot be applied under both laws. In determining whether agency inaction is reviewable under the CWA, the question initially would be whether the decision made fell within the limited set of decisions subject to review. If it did, then the court, pursuant to the rulemaking cycle test, would determine whether the agency's inaction should be considered final action subject to review. It would make this determination by considering whether the agency had completed a discernable "procedural cycle" in which it had afforded parties the opportunity to present their views on issues.<sup>386</sup> If so, then the inaction would be reviewable.

Furthermore, as with the CAA, the deference accorded to the agency would depend on the alleged illegality. If the plaintiff claimed that the agency's inaction violated a plain statutory command that did not depend on the agency first finding that certain facts existed, the court of appeals would exercise the normal deference accorded the agency's interpretation of a statute.<sup>387</sup> On the other hand, if the plaintiff's challenge implicates the agency's scientific fact-finding or policy choices, the court's review of the inaction would be more deferential, as the reasons for respecting the agency's decisionmaking autonomy are greater.

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382. See *supra* note 44.

383. CAA § 509(b)(1); 33 U.S.C. § 1369(b)(1) (1994).

384. See, e.g., *American Paper Inst. v. EPA*, 890 F.2d 869 (7th Cir. 1989) (noting that EPA decision not to object to a state permit was unreviewable as the decision not to object was not included among the categories reviewable in 33 U.S.C. § 1369(b)).

385. CAA § 307(b)(1); 42 U.S.C. § 7607(b)(1) (1994).

386. See *supra* note 142.

387. See *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 865 (1984) (stating that "the administrator's [statutory] interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference").

## VII. CONCLUSION

Congress intended the bifurcated jurisdictional provisions in the CAA and CWA to facilitate judicial review rather than to create a "confused class of circumforaneous litigants."<sup>388</sup> The rulemaking cycle test best effectuates the congressional policies underlying the review sections and is fully consistent with the 1990 Amendments to the CAA. Accordingly, this test ought to govern judicial review under the bifurcated jurisdictional provisions. Its adoption would finally bring the circumforaneous litigants safely to port.

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388. See *Maine v. Thomas*, 874 F.2d 883, 884-85 (1st Cir. 1989).