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The 1977 Procedural Amendments to the Clean Air Act - Have They Made a Difference

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NOTES AND COMMENTS

THE 1977 PROCEDURAL AMENDMENTS TO THE CLEAN AIR ACT—HAVE THEY MADE A DIFFERENCE?

ENVIRONMENTAL LAW, CLEAN AIR ACT—The 1977 Procedural Amendments to the Clean Air Act have not caused the D.C. Circuit Court of Appeals to give more deference to decisions by the Environmental Protection Agency. If anything the D.C. Circuit Court of Appeals is taking a harder look than ever at decisions of the EPA.

PROCEDURAL BACKGROUND

The Administrative Procedure Act (APA)[1] originally enacted in 1946[2] required only three things of a federal agency wishing to promulgate a rule: (1) the federal agency must give notice in the Federal Register of the proposed rule;[3] (2) the agency must give the public an opportunity to participate through written or oral comments;[4] and (3) the agency must publish a final rule incorporating a concise general statement of the agency's basis and purpose for the rule.[5] Transcripts and exhibits of material received at non-mandatory public hearings along with all papers and requests filed in the proceedings constituted the exclusive record for decisions by the agency and for judicial review of that decision.[6] The rule could be overturned when judicially reviewed only if it was found to be "arbitrary and capricious."[7] Different courts have defined "arbitrary and capricious" in different ways, but for purposes of this comment Black's Law Dictionary definition is sufficient and precise. It defines "arbitrary and capricious" as "willful and unreasonable" action by an administrative agency.

The APA applied to rulemaking by the EPA until 1977 when Congress amended the Clean Air Act. The amendments included a new rulemaking procedure for the EPA to use in promulgating regulations for industry. The House of Representatives thought these new procedures were necessary "to assure consistency in policy and legal interpretations" between different regional offices of the EPA.[8]

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1. 5 U.S.C. § 553 (1982).
2. Ch. 324, 60 Stat. 238 (1946).
3. 5 U.S.C. § 533(b) (1982).
4. *Id.* § 553(c).
5. *Id.*
6. *Id.* § 556(e).
7. *Id.* § 706(a)(2).
8. H.R. REP. NO. 294, 95th Cong., 1st Sess. 2, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1105 [hereinafter cited as H.R. REP. NO. 294].

The amended procedure supplants the APA procedure for EPA rule promulgation under the Clean Air Act.[9] The Administrator must still begin with a proposed rule published in the Federal Register. However, the proposed rule must now be accompanied by a statement of its basis and purpose.[10] The statement must include a summary of the factual data,[11] the methodology used in obtaining and analyzing data,[12] and the major legal interpretations and policy considerations underlying the proposed rule.[13] The statement must also refer to pertinent data taken from the Scientific Review Committee[14] and the National Academy of Sciences.[15] It also must explain any excluded data from these sources.

Under the new procedural requirements the Administrator must establish a "rulemaking docket"[16] which shall be kept open for public inspection.[17] The statement of the basis and purpose and all data it relies on must be placed in the docket.[18] All written comments and transcripts of mandatory public hearings must also be put in the docket.[19] Any relevant documents received after the comment period must be placed in the docket,[20] as well as all drafts for interagency review and all documents and comments received on these drafts.[21]

The new procedural requirements force the Administrator to accept comments, just as the APA would, but in addition, the Administrator must respond to each significant comment, criticism, or new data which comes to light during the comment period.[22] Both written and oral comments must be accepted and the docket must be kept open for thirty days after completion of the mandatory proceedings to allow for submission of rebuttal and supplementary information.[23]

The final rule must still be accompanied by a statement of the basis and purpose. However, it must also include an explanation of the reasons for any major changes from the proposed rule.[24] The promulgated rule must be based on information found in the docket.[25]

9. 42 U.S.C. § 7607(d)(1) (Supp. V 1981).
10. *Id.* § 7606(d)(3).
11. *Id.* § 7607(d)(3)(A).
12. *Id.* § 7607(d)(3)(B).
13. *Id.* § 7607(d)(3)(C).
14. This Committee was newly established by the amendments.
15. 42 U.S.C. § 7607(d)(3) (Supp. V 1981).
16. *Id.* § 7607(d)(2).
17. *Id.* § 7607(d)(4)(A).
18. *Id.* § 7607(d)(3).
19. *Id.* § 7607(d)(4)(B)(i).
20. *Id.*
21. *Id.* § 7607(d)(4)(B)(ii).
22. *Id.* § 7607(d)(6)(B).
23. *Id.* § 7607(d)(5)(iv).
24. *Id.* § 7607(d)(6)(A).
25. *Id.* § 7607(d)(6)(C).

The docket constitutes the exclusive record for judicial review.[26] The standard for review is still "arbitrary and capricious"[27] on all substantive issues.[28] For procedural errors, the court may invalidate the rule "only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made."[29]

NEW SOURCE PERFORMANCE STANDARDS BACKGROUND

The overall scheme of the Clean Air Act requires the EPA to set National Ambient Air Quality Standards (NAAQS) and the states to set emission limitations on stationary sources.[30] For "new sources" the EPA, not the states, must set the emission limitations.[31] "New sources" are stationary sources "the construction or modification of which is commenced after the publication of regulations . . ."[32] The Administrator shall ". . . publish a list of categories of stationary sources" which in the Administrator's judgment "cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health and welfare."[33] Following the listing of a category the Administrator must set New Source Performance Standards (NSPS). These standards "shall reflect the degree of emission limitation and the percentage reduction achievable through the application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."[34]

Since the promulgation of these NSPS affects all plants in a particular category, they will have a nationwide effect. That means that persons wishing to challenge their promulgation must appeal to the District of Columbia Circuit Court of Appeals.[35] It is these challenges that this comment will analyze to determine whether the new procedural require-

26. *Id.* § 7607(d)(7)(A).

27. *Id.* § 7607(d)(9)(A). The House version of the amendments would have changed the standard to "supported by substantial evidence" but the Senate would not go along with the change. H. CONF. REP. NO. 564, 95th Cong., 1st Sess. 2, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1558.

28. Substantive review covers review of the standards set by the EPA while procedural review covers alleged failures by the EPA to use the procedures mandated by Congress.

29. 42 U.S.C. § 7607(d)(8) (Supp. V 1981).

30. *Id.* § 7410. The EPA sets the overall goals while the states figure out how to limit pollution at the source so as to meet the air quality goals.

31. *Id.* § 7411.

32. *Id.* § 7411(a)(2).

33. *Id.* § 7411(f).

34. *Id.* § 1857(c)-(6)(a)(1).

35. *Id.* § 7607(b)(1).

ments of the Clean Air Act have resulted in additional deference to the EPA by the court. This comment will analyze three pre-amendment cases and two post-amendment cases which are representative of the court's approach to NSPS challenges. Non-procedural issues raised in each case will not be analyzed in this comment.

PRE-AMENDMENT CASES

Portland Cement Association v. Ruckelshaus[36]

In 1971 the EPA published the first list of "categories of stationary air pollution sources which significantly contribute to the endangerment of public health and welfare."[37] Included on that list were steam generators, incinerators, sulfuric acid plants, nitric acid plants, and portland cement plants.[38] Approximately five months after publishing the list the EPA published standards of performance for each category.[39]

The Portland Cement Association challenged the standards promulgated by the EPA for emissions of particulates by portland cement plants. The emission limitation for portland cement plants was set at .30 lbs of particulate emission per ton of feed to the kiln for all new plants.[40] The *Portland Cement* challenge had three basic arguments: (1) there was no Environmental Impact Statement (EIS) prepared by the EPA, (2) EPA had not adequately considered the economic cost of the standards, and (3) the standard was not achievable.

The court found that the section of the Clean Air Act which required the EPA to set NSPS was the functional equivalent of an EIS[41] and the court would not require more from the EPA. On the economic challenge by the Association the court, per Judge Leventhal, looked to the record and found that the Administrator had considered economic studies and had found that the cost of installing anti-pollution equipment to meet the standard would be approximately 12% of the plant's investment budget and operating the new equipment would cost approximately 7% of the operating cost of the plant.[42] The Administrator did not consider that excessive. The court seems to apply a strict "arbitrary and capricious" standard here and does not look at the reasonableness of the cost figures of the EPA. Since the EPA did consider costs, the court will not overturn the EPA.

36. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), *after remand*, 513 F.2d 506 (D.C. Cir.), *cert. denied*, 423 U.S. 1025 (1975), *reh'g denied*, 423 U.S. 1092 (1975).
37. 36 Fed. Reg. 5,931 (1971).
38. *Id.*
39. 36 Fed. Reg. 15,704 (1971).
40. 486 F.2d at 378.
41. *Id.* at 386.
42. *Id.* at 387.

The petitioners argued that the EPA should have done an actual cost/benefit analysis. The court said that a cost/benefit analysis by the Agency was not necessary, but that if the Association wanted a cost/benefit analysis considered by the Agency the association could present such an analysis to the EPA for consideration.[43] In addition, the court found that the Agency had done some cost/benefit analysis when it considered the elasticity of demand. The Agency had found that if the plants passed on the costs of the installation and operation of the anti-pollution equipment to their customers, demand for their product would not significantly drop.[44] Again the court was applying the "arbitrary and capricious" standard. Since the EPA looked at economic factors the court would require no more. Here the court is putting the burden on the challenger to show that a cost/benefit analysis would show that a different standard should have been set. Congress specifically requires the EPA to consider the cost of achieving emission reduction,[45] but does not require the EPA to do cost/benefit analysis.

The challengers further argued that the economic cost to them was higher than the cost to other listed categories, specifically incinerators, because incinerators were allowed to emit more particulate emissions than portland cement plants. The court found support in the record for a different standard for portland cement plants than for incinerators even though the court thought the Agency need not support different standards.[46] Different standards were probably envisioned by Congress when it required the Agency to set standards for each category rather than for all categories.[47] In this case the Administrator had found that the technology was available to achieve the lower standard for cement plants, but was not yet available for incinerators.[48] The court accepted the Administrator's findings in this regard partly because the Association did not challenge the availability criteria and partly because it found the distinction did not need support. When considering the due process issue on remand[49] the court stated, "No doubt the Administrator will be influenced by accumulated experience should it give rise to reasons for modification of the range now existing between the prescribed standards."[50] Perhaps the court wanted to leave open the possibility of a due process challenge for reargument later, but in this case the differences were not

43. *Id.*
44. *Id.* at 388.
45. 42 U.S.C. § 7411(a)(1) (Supp. V 1981).
46. 486 F.2d at 389.
47. 42 U.S.C. § 7411 (Supp. V 1981).
48. 486 F.2d at 389.
49. 513 F.2d 506 (D.C. Cir. 1975).
50. *Id.* at 508.

found to be "arbitrary and capricious" because the EPA did have a basis for their distinction.

Even though the court accepted the economic analysis of the Agency, the court did not accept the Agency's analysis of the achievability of the standard. The court rejected the Agency's analysis because its analysis was supported with test data accumulated after the standard was set. Since that is effectively no support at all, it was found to be "arbitrary and capricious." The Agency had not made its test data and methodology available to the industry in time for them to challenge it. The court specifically required the EPA to consider the contentions of the Association.[51] While this remand appears to be very pro challenger, the court went further and stated that the Agency could have supported its analysis by extrapolation of data accumulated before the standard was set if the Agency had been responsive to comments and testimony of experts.[52] The court is giving specific guidance to the EPA, but not to the challengers.[53]

It appears that the court was forcing the Agency to use a procedure—response to comments—which Congress had not yet mandated. The court also required the Agency to make its test data and methodology available to industry.[54]

Essex Chemical Corp. v. Ruckelshaus[55]

At the same time that *Portland Cement* was challenging NSPS for portland cement plants, Essex Chemical Corporation brought a challenge for sulfuric acid plants and Appalachian Power Company brought a challenge for steam generating facilities. The court chose to address the Essex Chemical and Appalachian Power challenges in one decision. The NSPS for sulfuric acid plants was set at 4 lbs of SO_2 emission per ton of sulfuric acid produced and the NSPS for coal-fired steam generators was set at 1.2 lbs of SO_2 emission per million Btu of electricity produced.[56]

The court, per Judge Tamm, defined its own standard of review before it addressed the specific challenge that the standards were not achievable.

51. 486 F.2d at 394.

52. *Id.* at 402.

53. After remand the court, per curiam, affirmed the NSPS for Portland Cement plants because the additional tests did support the standard—no longer "arbitrary and capricious." Apparently the EPA satisfied the court even though it could not satisfy the challengers without a court battle.

54. The Supreme Court denied certiorari on this case, but later in *Vermont Yankee Nuclear Power Corporation v. NRDC*, 435 U.S. 519 (1978), the Supreme Court told the District of Columbia Circuit Court that they could not dictate procedure to the EPA. Perhaps *Vermont Yankee* should be limited to NEPA challenges. Maybe Congress needs the input from the court to make changes in the law.

55. 486 F.2d 427 (D.C. Cir. 1973), *cert. denied* 416 U.S. 969 (1974).

56. 36 Fed. Reg. 24,876 (1971). The court did not readdress the challenges to the lack of an EIS and the lack of cost/benefit analysis, but instead referred the reader to the *PortlandCement* analysis.

The court stated that it would look for reasonableness in the standards.[57] The court would consider whether the Administrator had based his decision on relevant factors and would look at the record to see if the decision made was the result of "reasoned decision making."[58] The court would remand to the Agency only if it found a "clear error of Judgment."[59] This seems to be a different standard than "arbitrary and capricious," but may really only be a new definition of the same standard. Perhaps combining a step forward with "reasonable" and a step backward with "clear error of judgment" leaves the review at "arbitrary and capricious."

The Essex Chemical Corporation challenged the 4.0 lbs/mBtu standard as too low because 6.5 had been the level suggested during comment. The court found that the 4.0 standard was based on information derived from inspections, consultations, and literature.[60] The court found that the EPA had used test data from plants operating at 52% capacity but had also based its standard on results of European plants found in the literature and on industry supervised tests.[61] The court concluded that the 4.0 limit was low, but based on "reasoned decision making."[62] If the plant which could achieve the standard was only operating at 52% capacity there seems to be a serious question of representativeness. However, the court downplayed the representativeness question, perhaps because of the support found in the industry supported tests and the literature. With any support at all the court would not find the standard "arbitrary and capricious" or "clearly erroneous."

The court found that the coal-fired steam generator standard of 1.21 lbs/mBtu, challenged by Appalachian Power, was based on tests of a prototype, tests of full-scale control systems, literature sources, available fuel supplies, and documentation of manufacturer's expectations.[63] Since the standard was well supported in the record the court could find no "clear error of judgment." However, the court did remand because the EPA had failed to fully consider the adverse environmental effects of using the best technology available—a lime slurry scrubbing system.[64] Such consideration was required by the Clean Air Act and lack of consideration is "clearly erroneous" or "arbitrary and capricious."

The Supreme Court refused to grant certiorari, and this case did not reappear in the Court of Appeals, so it is probably fair to say that the EPA was learning from its mistakes. The Agency was apparently able to

57. 486 F.2d at 417, 434.
58. *Id.*
59. *Id.*
60. *Id.* at 435.
61. *Id.*
62. *Id.* at 437.
63. *Id.* at 440.
64. *Id.* at 441.

satisfy both industry and the environmentalists that the standard was correct even when it did fully consider the adverse effects of the best technologically feasible system.

National Asphalt Pavement Association v. Train[65]

In 1973 the EPA added asphalt concrete plants to its list of "categories of stationary air pollution sources which significantly contribute to the endangerment of the public health and welfare."[66] At the same time the Agency proposed standards for the industry.[67] The Asphalt Pavement Association challenged the EPA's right to propose standards for the asphalt industry without giving the industry an opportunity to comment on the designation of "significant contributor" prior to the proposed standards. The Association also challenged the standards themselves.

The court, per Judge McGowan, found no error by the EPA because the Agency did allow the industry to comment on the designation during the comment period and at hearings on the standards.[68] Thus, the Agency did not act "arbitrarily and capriciously." There appear to be two reasons why the court did not go into depth on this issue.

First, the court seems to consider that Congress had set a time limitation on the EPA. If the agency took time to allow comment on the designation prior to proposing standards the potential for delay would increase. Second, the court stated that it was willing to give more deference to the EPA when it was making legislative policy choices such as deciding whom to control.[69] Without saying so, the court implied that it was willing to give less deference when the EPA was actually administering the congressional mandate by promulgating standards.

Besides these two policy reasons for giving the EPA more leeway in chosing whom to regulate, the court found that the petitioners had failed to point out anything in the record to indicate that the EPA had acted arbitrarily and capriciously in deciding to list asphalt concrete plants as an industry subject to NSPS regulations.[70] The court failed to address the distinct possibility that if the Agency did act "arbitrarily and capriciously," there would be nothing "in the record" to support that claim.

On the issue of the standards themselves[71] the court upheld the EPA even though the standards were based on limited testing. Even limited testing is not "arbitrary and capricious." The court found that the standard

65. 539 F.2d 775 (D.C. Cir. 1976).
66. 38 Fed. Reg. 15,380 (1973).
67. *Id.* at 15,406.
68. 539 F.2d at 781.
69. *Id.* at 783.
70. *Id.*
71. 40 C.F.R. §§ 60.2–.8, 60.12, 60.90–.93, 60.100–.106, 60.110–.113, 60.120–.123, 60.130–133, 60.140–.144, 60.150–.154 (1974).

of review is appropriately deferential since technology is not the court's expertise but the Agency's.[72] The court does not explain how this is less deferential than the deference given when the EPA designated the industry as a "significant contributor" to air pollution even though it claimed to be less deferential on issues of standards than on issues of designation.

Except for this decision, the District of Columbia Circuit Court of Appeals seems to be making it the business of the court to become an expert in technology and thus able to look closely at EPA standards to determine if they are "arbitrary and capricious" or based on "reasoned decision making" or at least not "clearly erroneous." Without making an effort to become experts the court cannot really judge the sufficiency of the record and would always remain highly deferential. Fortunately for the challengers the court has become the expert and will look closely to find if there has been error.

POST-AMENDMENT CASES

National Lime Association v. EPA[73]

On May 3, 1977, the EPA added lime manufacturers to its "list"[74] and proposed standards for the industry.[75] The final standard for particulate emissions by a lime manufacturer using a rotary kiln was set at .15 kilograms of particulate emission per megagram of limestone feed.[76] The Lime Association challenged the standard as not achievable. The Association claimed that the EPA test data was not representative of the industry.

The court, per Judge Wald, found that the EPA had supported its standard with test data from sites which could achieve the standard, but that the Agency had failed to explain fully its choice of sites for testing in the record.[77] Requiring the Agency to "explain fully" its choice is requiring more than just a lack of arbitrariness. It seems that if the court were sticking to its "arbitrary and capricious" standard it should find that any support is enough. The court also found that the Agency had failed to support its decision to discard data from sites which failed to achieve the standard.[78] Failure to support fits more closely to the "arbitrary and capricious" standard of review.

The court found that it was required to give a "hard look" at the

72. 539 F.2d at 786.
73. 627 F.2d 416 (D.C. Cir. 1980).
74. 42 Fed. Reg. 22,510 (1977).
75. *Id.* at 22,506.
76. 40 C.F.R. §§ 60.340–.344 (1978).
77. 627 F.2d at 443.
78. *Id.*

Agency's decision[79] and when the court did take a "hard look" it found gaps in the Agency's rationale. The court mentions that this "hard look" approach was retained in the 1977 amendments. In fact it was actually "arbitrary and capricious" which was retained in the 1977 amendments. From this case it appears that the "hard look" is getting harder all the time as the court becomes more expert in the field of environmental law.

The court was troubled by the industry's failure to supply its data on unachievability, but found that the EPA must affirmatively show that its standards reflect consideration of all variables.[80] This approach seems to be in direct contradiction to the approach in *Portland Cement,* where the court found that if the industry wanted cost/benefit analysis considered by the Agency, industry must supply the analysis. To be consistent, if industry wants variable data considered, they should present it to the Agency.

The court found that the EPA had set out such variables as gas velocity and operating levels, but had failed to explain how those variables were taken into account when the Agency set the standard at .15 kg/mg.[81] The court also found that the EPA had failed to closely examine the effect this standard would have on coal use.[82] Requiring close examination appears to be requiring more than a lack of arbitrariness. The EPA had also failed to consider the impact of particle size variation on the effectiveness of different pollution systems.[83] Taken together, all these failures by the EPA led the court to conclude that the EPA had not supported its promulgated standard as achievable. The court was unwilling to say that any one of these factors alone would be enough to find error, but taken together there was error. The court did not say that taken together it was clear that the Agency had acted "arbitrarily and capriciously." Rather, the court said that its "hard look" showed error. It appears that the court is shifting from looking for lack of arbitrariness to looking for error in spite of Congress' retention of the "arbitrary and capricious" standard.

Thus the court remanded this case to the Agency for reconsideration, but sent along some guidelines to assist the Agency in the future. The court stated that the EPA was only required to provide sufficient data to demonstrate that the Agency had taken a systematic approach to problems.[84] The court stated that it would find that the Agency had taken a systematic approach and used "reasoned decision making" if it: (1) accounted for variables, (2) supported the representativeness of its test sites,

79. *Id.* at 451.
80. *Id.* at 437.
81. *Id.*
82. *Id.* at 439.
83. *Id.* at 442.
84. *Id.* at 454.

(3) assured the court of the validity of its testing methods, and (4) showed the court that its test methods were determined statistically significant.[85] In addition, the court would require the Agency: (1) to state its assumptions, (2) reveal its processes, (3) explain its rejections, and (4) set forth its rationale.[86] The court would prefer that the Agency support its rationale in its initial support statements. However, it would not require support in the initial support statements. Even though the court presented its "requirements" as "guidelines," the EPA is expected to accept the court's guidance in such matters.

While the court is careful not to force additional procedures on the Agency, the court does seem to be telling the Agency how to make a record for judicial review. The "guidelines" seem to come from the procedural requirements of both *Portland Cement* and the new procedural requirements of the 1977 amendments. The court, however, claims they come from *Portland Cement,* without mentioning the amendments.[87] This decision was not appealed to the Supreme Court. Perhaps with judicial "guidelines" plus statutory procedures the court has found a way to demand more than a lack of arbitrariness from the Agency without crossing the Supreme Court.

Sierra Club v. Costle[88]

In 1976 the Sierra Club and others petitioned the EPA to revise its standards for SO_2 emission for coal-fired steam generating plants. The environmentalists claimed that changes in technology made 90% reduction feasible and they wanted the EPA to require such reduction.[89] The EPA investigated and proposed an 85% reduction standard.[90] However, the final standard provided for a variable reduction.[91] The new standard left the 1.2 lbs of SO_2 emission per Btu of electricity produced as the maximum pollution allowable (as approved in *Essex Chemical*), but required 90% reduction for plants using high sulfur fuel and 70% reduction for plants using low sulfur fuel.[92]

The Sierra Club and the California Air Resources Board challenged the variable standard, the modeling technique used by the EPA, and the 70% lower reduction requirement. Utility companies challenged the 90% higher reduction requirement and the Environmental Defense Fund (EDF) challenged the 1.2 ceiling on procedural grounds. The court, per Judge

85. *Id.* at 452–53.
86. *Id.* at 453.
87. *Id.*
88. 657 F.2d 298 (D.C. Cir. 1981).
89. *Id.* at 315.
90. 43 Fed. Reg. 42,154 (1978).
91. 40 C.F.R. §§ 60.8, 60.40, 60.40a–.49a (1981).
92. *Id.*

Wald, chose to combine all these challenges into one case, but for the sake of clarity, this comment will analyze each challenge separately.

The Sierra Club Challenge

On the challenge to the variable standard the court found that the Clean Air Act specifically allowed for variations if the EPA supported the variations in the record.[93] The court seems to imply that there is some specific statutory requirement for support of variable standards. However, there is no such requirement set out in the statute separate from the general requirement that all decisions by the EPA be supported by the record. The court also found support for variations in the legislative history.[94] The court found that the Agency must consider all of the relevant factors and must demonstrate a reasonable connection between the facts in the record and the resulting policy choice.[95] The only function of the court, according to Judge Wald, is to insure that "the Agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules . . . for the future."[96] In this case the EPA set variable standards because it found, through modeling, that variable standards could achieve the same results as one standard but would be more cost-wise. The court seems to say that the EPA thus did some cost/benefit analysis which is not required. In fact the EPA was responding to political reality. If, in order to do that, they must do some cost/benefit analysis the EPA will do the analysis.

Sierra Club challenged the use of modeling, but the court upheld the EPA's use of modeling because the Agency could demonstrate a rational connection between the factual input, the modeling assumptions, and the results and conclusions of the Agency.[97] In addition, the court found that the EPA had discussed modeling and its assumptions in its proposed rule and had accommodated the Sierra Club's objections voiced during the comment period.[98] The court found that modeling was allowable because public disclosure of the assumptions on which the model was based was a sufficient safeguard to prevent abuse.[99] This field of modeling is another field in which the court feels it is not an expert. Perhaps over time, as more challenges are made, the court will become more of an expert in modeling, as it has in environmental law in general.

3. 657 F.2d at 319.
94. *Id.* at 322.
95. *Id.* at 323.
96. *Id.* at 322–23.
97. *Id.* at 338.
98. *Id.* at 335.
99. *Id.* at 334.

The Sierra Club also challenged the 70% low reduction requirement because it was based on the use of a dry scrubbing technique which had not been considered in the proposed standard. The court found that the EPA did not use the dry scrubbing technique as the sole basis for its lower standard.[101] The court found the EPA was justified in encouraging the use of the dry scrubbing technology, even though the support for such encouragement was "less than overwhelming."[101] The court found that even though 70% was not specifically discussed during public comment, it was a continuation of the sliding scale analysis which was open to public comment.[102] Even though the court found "limited substantiation"[103] for the determination that 70% was the best percentage achievable while still promoting a new technology, the court declined to remand. The court would have preferred that the Agency had reopened comment once the new technology was seriously considered because the court felt that to do so would have been the wise strategy,[104] but the court would not require the EPA to always use the wise strategy. The court seems to be falling back from its "hard look" to allow for technology-forcing innovations. It is unclear why they will accept technology-forcing in this area, but in others will require the EPA to prove "representative" testing.

The Utility Company Challenges

The utility companies challenged the 90% reduction requirement as unachievable. The companies claimed that the proposed standard of 85% was based on the use of flue gas desulfurization (FGD) alone, while the final 90% reduction requirement was based on a technology which combined FGD and pre-washing. They claimed that changing from one technology to another was a major change for which the EPA must reopen comment.

The court found that the industry was not entitled to a new comment period because the record indicated that a combination technology had in fact been discussed in the first comment period. Therefore, the public had actual notice and adequate explanation of the proposal to use a combination technology.[105] In addition, the court found that industry had been using washed coal for some time. They should have plenty of data on how it works with and without FGD. If industry had problems with the combined technology they should have presented their documented evidence to the EPA. They did not do so; therefore, they are precluded

100. *Id.* at 345.
101. *Id.* at 351.
102. *Id.* at 355.
103. *Id.* at 351.
104. *Id.* at 348.
105. *Id.* at 360.

from now raising a potential problem. This appears to be a flashback to the *Portland Cement* decision, which required the industry, rather than the EPA, to do cost/benefit analysis. This is in contradiction to the court's statement in *National Lime Association* that the EPA is required to affirmatively support its decisions.[106]

The industry tried to challenge the representativeness of the data used by the EPA in setting the 90% reduction standard. The court quickly disposed of that argument by finding that it was correct for the EPA to use projected rather than actual achievability criteria.[107] The court accepted the EPA statement that the standard is designed for new plants, not existing ones. The court also found evidence in the record that improvements in any actually used system are feasible.[108]

In issuing new regulations the EPA also changed the particulate emission standard reducing the allowable particulate emissions from .10 lbs/mBtu to .03 lbs/mBtu. The industry challenged this reduction as well, claiming it was not achievable. The court found that the EPA had demonstrated that the standard was achievable using baghouse technology[109] even though the EPA had failed to substantiate that the standard was also achievable through the use of electrostatic precipitators (ESP).[110] It appears that any method used to prove achievability is enough—another flashback to "arbitrary and capricious" review. The court did not address the problem of the differences in cost between baghouses and ESP even though baghouses are newer and presumably more expensive than ESP.

The EDF Challenges

The EDF challenged the fact that the EPA did not reduce the 1.2 lbs of SO_2 emission per mBtu of electricity produced standard. This group claimed that the EPA had succumbed to political pressure not to promulgate stricter controls. To support this allegation the EDF proved that the EPA had continued to have *ex parte* communications with the White House and with several senators after the close of the comment period. Some of these communications were explained in the dockets while some were not. Some of these communications were not included in the docket.[111]

The EPA acknowledged that stricter controls were technologically feasible, but found that stricter controls would be excessively burdensome on producers and users of high sulfur coal. Apparently this potential

106. 627 F.2d at 444.
107. 657 F.2d at 364.
108. *Id.*
109. *Id.* at 384.
110. *Id.* at 380.
111. The EDF found out about the unexplained meetings through the Freedom of Information Act (FOIA).

burden was the focus of the *ex parte* communications. The court was concerned about meetings not documented in the record,[112] but the court also found that the EPA is given discretion to determine which documents (and oral communications) need to be placed in the docket.[113] The court recognized that the EPA promulgation of NSPS is informal rulemaking and not adjudication. Even though the court felt a particular bias against *ex parte* communications because of their judicial outlook the court accepted the EPA position that the statute does not forbid *ex parte* meetings. Also the EPA is an executive agency and must consider political pressures, especially if they come from the White House. As long as the EPA bases its decisions on the record the court will not overturn these decisions. In this case not changing the standard was apparently based on the record even though the court did not address this specifically.

It appears that the court would have preferred that the Agency reopen comment after the *ex parte* communications, but would not consider the EPA's decision not to reopen comment error. If the Agency had reopened comment the industry and the environmentalists would have had an opportunity to counter the political pressure with some of their own. Perhaps the Agency did not want to be faced with other political pressure. As the court said, "Finality, after all, has a place in administrative rulemaking, just as it does in judicial decision making."[114]

CONCLUSION

The D.C. Circuit Court has *not* given more deference to the EPA since the 1977 procedural amendments. If anything the court is harder than ever on the Agency. It doesn't appear that the harder look is based on any procedural requirements imposed by Congress but, rather, the harder look is based on the court's growing expertise in the field of environmental law.

The District of Columbia Circuit Court doesn't seem to think that the procedural amendments have changed anything between the EPA and the challengers, be they environmentalists or industry. Perhaps the court agrees with the House of Representatives, which said that the procedural amendments were directed at insuring consistency between EPA district offices rather than at insuring a better relationship between the EPA and its challengers.[115]

It appears from this analysis that while the D.C. Circuit Court is becoming more expert in environmental law with each case it decides,

112. 657 F.2d at 400.
113. *Id.* at 403.
114. 657 F.2d at 400.
115. H.R. REP. NO. 294, *supra* note 8.

the court is not ready to take a firm stand on what its review standard should be. In *Portland Cement* the court is clearly using the strict "arbitrary and capricious" standard. Then in *Essex Chemical* the court sets up a "reasonableness" coupled with a "clear error of judgment" standard. Both these cases were decided in the same year, yet the standard is slightly different. In *National Asphalt* the court falls back to excessive deference.

Even the same judge does not appear to use the same standard consistently. In *National Lime* Judge Wald is very hard on the Agency and is using a "hard look" standard. Then in *Sierra Club,* she is much more deferential to the Agency using some standard incorporating "feasible" and lack of arbitrariness.

Until the D.C. Circuit Court decides for itself what the standard of review should be, it will be most difficult for both the EPA and the challengers to prepare a case for trial or know when to settle their differences without the assistance of the court.

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