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**Civil and Criminal Enforcement of the
Clean Air Act After the 1990
Amendments***

James Miskiewicz**

John S. Rudd***

The Clean Air Act Amendments of 1990 formed one of the most sweeping revisions of any federal environmental statute in recent history. A wide array of technical improvements to existing provisions were joined with entirely new substantive programs aimed at controlling such diverse concerns as the development of new fuels, reduction of acid rain, ozone depletion, and even global warming. Aside from its ambitious substantive programs, however, the 1990 Amendments were driven by a recogni-

* The opinions expressed in this article are solely those of the authors and do not necessarily reflect the views of the authors' respective agencies.

** James Miskiewicz is currently a Trial Attorney with the Environmental Crimes Section, Environment & Natural Resources Division, U.S. Department of Justice, Washington, D.C. From 1988-90 he was Law Clerk to the Hon. G. Thomas Eisele, Chief Judge U.S. District Court, Eastern District of Arkansas. He received his J.D. from the City University of New York Law School at Queens College in 1988 and his B.A. from City College of New York in 1982.

*** John S. Rudd is currently an Attorney-Advisor in the Office of Enforcement, Air Enforcement Division, U.S. Environmental Protection Agency, Washington, D.C. From 1988-90 he was Law Clerk to the Hon. Gregory W. Carman, U.S. Court of International Trade, New York, N.Y. He received his J.D. from the City University of New York Law School at Queens College in 1988 and a B.A. from Swarthmore College in 1982.

tion that the existing Clean Air Act had become largely unenforceable. Thus, the Amendments greatly expand the government's enforcement authority, and provide a host of new enforcement options. In this article, the authors discuss these changes to the civil and criminal enforcement provisions of the Act, and examine how these revisions seem to contain a mixture of strengths and weaknesses that raise as many concerns as they do hopes that the new Act will better achieve the goal of protecting and enhancing the quality of the Nation's air.

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I. Introduction

In the closing days of the 101st Congress, amid a flurry of

last-minute bills and a bitter debate over the federal budget deficit, Congress passed the Clean Air Act Amendments of 1990,¹ ending a thirteen year political stalemate during which

1. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990). The Amendments were enacted by the House and Senate on October 26 and 27, 1990, the last two days of the 101st Congress, and signed into law by President Bush on November 15, 1990. Throughout this article the Clean Air Act will be referred to as "the Act" or the "CAA." The Act as it existed prior to its amendment in 1990 will be referred to as "the pre-1990 Act." Although Congress did not formally give the amendments a short title, earlier versions of the House and Senate bills referred to the amendments as the "Clean Air Act Amendments of 1990," and this article will refer to them as "the Amendments."

In the summer of 1989, the Bush Administration submitted clean air bills into both the House of Representatives and the Senate. H.R. 3030, 101st Cong., 1st Sess. (July 27, 1989) [hereinafter House Bill as Introduced]; S. 1490, 101st Cong., 1st Sess. (Aug. 3, 1989) [hereinafter Administration's Senate Bill]. The House adopted H.R. 3030 as its markup vehicle and referred the bill to the Committee on Energy and Commerce which reported the bill as amended on May 17, 1990. H.R. REP. NO. 490, 101st Cong., 2d Sess. pt.1 (1990); see also H.R. 3030, 101st Cong., 1st Sess. (1989), reprinted in H.R. REP. NO. 490, *supra*, at 1 [hereinafter House Report Bill]. House bill 3030 was passed by the entire House chamber on May 23, 1990 by a vote of 401 to 21. 136 CONG. REC. H2944 (daily ed. May 23, 1990). The text of the bill was reported on June 5, 1990. H.R. 3030, 101st Cong., 1st Sess. (1989), 136 CONG. REC. H3171 (daily ed. June 5, 1990) [hereinafter House Bill as Passed].

The Senate relied on its own markup vehicle, S. 1630, which was introduced September 14, 1989. S. 1630, 101st Cong., 1st Sess. (1989), 135 CONG. REC. S11,139 (daily ed. Sept. 14, 1989) [hereinafter Senate Bill as Introduced]. Senate bill 1630 incorporated the enforcement provisions from the Administration's Senate Bill intact. Compare Administration's Senate Bill, *supra*, §§ 601-613 with Senate Bill as Introduced, *supra*, §§ 301-310, 135 CONG. REC. at 11,156-59. The Senate Committee on Environment and Public Works issued its report on S. 1630 on December 20, 1989. S. REP. NO. 228, 101st Cong., 1st Sess. (1989), reprinted in 1990 U.S.C.A.N. 3385; see also S. 1630, 101st Cong., 1st Sess. (1989) (S. 1630 as reported by the Committee on Environment and Public Works), 136 CONG. REC. S27 (daily ed. Jan. 23, 1990) [hereinafter Senate Report Bill]. Although the Committee amended the bill, the enforcement title remained virtually unchanged.

After the Bush Administration threatened to veto S. 1630 over the implementation costs, Senator Mitchell withdrew it from the Senate floor. A panel of Administration officials and Senate leaders negotiated a compromise, which was submitted as a substitute amendment. Mitchell-Dole Amendment No. 1293, 136 CONG. REC. S2031 (daily ed. Mar. 5, 1990) [hereinafter Mitchell-Dole substitute]. After the bill was again placed on the Senate floor during debate of the Mitchell-Dole substitute, Senators Heflin, Nickles and others attempted to weaken the permit program and enforcement sections of the substitute with an amendment of their own. Nickles-Heflin Amendment No. 1373, 136 CONG. REC. S3211 (daily ed. Mar. 26, 1990) [hereinafter Nickles-Heflin Amendment]. The Nickles-Heflin Amendment was narrowly defeated by the Senate by a vote of 50 to 47 on March 27, 1990. 136 CONG. REC. S3241 (daily ed. Mar. 27, 1990). The full Senate passed the Mitchell-Dole substitute and S. 1630

the Act had become largely ineffective as an environmental enforcement tool.² The great inertia that had stalled previous

on April 3, 1990 by a vote of 89 to 11. 136 CONG. REC. S3833 (daily ed. Apr. 3, 1990). The text of the bill was reported on April 18, 1990. S. 1630, 101st Cong., 1st. Sess. (1989), 136 CONG. REC. S4363 (daily ed. Apr. 18, 1990) [hereinafter Senate Bill as Passed].

Both the House and Senate bills were then sent to a congressional conference committee. The conference committee consisted of nine Senators and 138 House members. See 136 CONG. REC. D823 (daily ed. June 28, 1990) (Senate conferees); 136 CONG. REC. H4377-78 (daily ed. June 28, 1990) (House conferees and instructions); see also 136 CONG. REC. H6908 (daily ed. Aug. 3, 1990) (appointment of additional House conferees). Although the conference committee made numerous choices between House and Senate versions of the bills, it provided little explanation in its final report of the enforcement provisions in the conference agreement. See H.R. CONF. REP. NO. 952, 101st Cong., 2d Sess. 347 (1990), reprinted in 1990 U.S.C.A.N. 3867. The entire section discussing the title VII enforcement provisions consisted of two pages. However, to rectify the lack of meaningful conference report guidance, the Senate floor managers of S. 1630 submitted a more detailed statement of managers on the conference bill that *inter alia* addressed the permit and enforcement titles. See Chafee-Baucus Statement of Senate Managers, 136 CONG. REC. S16,933, S16,940-44, S16,950-53 (daily ed. Oct. 27, 1990) [hereinafter Statement of Senate Managers]. Although the Statement of Senate Managers was before the Senate prior to the vote on the conference bill, there was not sufficient time to have it reviewed and approved by all conferees prior to its release. *Id.* at S16,933 (the Senate managers explained, "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"). However, Rep. Dingell, a House cosponsor and floor manager of the House legislation, counseled against court reliance for interpretive guidance on anything but official reports. 136 CONG. REC. E3714 (daily ed. Nov. 2, 1990) (extension of remarks made on Oct. 26, 1990 by Rep. Dingell).

The House passed the conference agreement on October 26, 1990 by a vote of 401 to 25. 136 CONG. REC. H12,943-44 (daily ed. Oct. 26, 1990) (now denominated as S. 1630); see Supplemental Report, H.R. Res. 399, 101st Cong., 2d Sess., 136 CONG. REC. H2756 (daily ed. May 23, 1990) (outlining procedures for the insertion of H.R. 3030 into S. 1630 as a substitute amendment). The Senate passed the conference agreement on October 27, 1990 by a vote of 89 to 10. 136 CONG. REC. S17,434 (daily ed. Oct. 27, 1990). President Bush signed S. 1630 into law on November 15, 1990. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

For further discussion of the legislative history of the Act, see Stephen E. Roady, *Permitting and Enforcement Under the Clean Air Act Amendments of 1990*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,178, 10,179, 10,180 n.1, n.5 (1991); The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721 (1991); Theodore L. Garrett and Sonya D. Winner, *A Clean Air Act Primer: Part III*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,301, 10,321-29 (1992). See also 136 CONG. REC. 3181 (daily ed. Mar. 26, 1990) (statement of Sen. Durenberger) for the general outline of Senate consideration.

2. For a comprehensive discussion of the political forces responsible for the stalemate that precluded amendment of the Act during this period, see Waxman, *supra*

efforts to improve the Clean Air Act seemed finally overcome by increasing public concern with the threat of global warming, acid rain, and news of mysterious "holes" in the earth's protective layer of atmospheric ozone.³ In some respects, the Amendments are the product of unique alliances among environmental activists, industry groups, and an Administration looking to claim it made good on candidate George Bush's pledge to become the "environmental president." Thus, among its many new substantive programs, the Act includes: a gradual ban on ozone-depleting chemicals; an innovative market-based approach to lower sulphur dioxide emissions that have been linked to "acid rain"; requirements for use of cleaner fuels and sales of automobiles that emit little or no air pollution; and new provisions to break the regulatory logjam in setting "safe" emissions standards for toxic air pollutants.

The Amendments were also driven by an obvious need to craft legislation that could be rationally and stringently enforced. Relying on past experience with the Clean Water Act and the Resource Conservation and Recovery Act, Congress added to the Clean Air Act a national permitting system to set and control emissions from stationary sources. The Amendments considerably expand EPA's authority to assess civil penalties without full-blown court proceedings and to issue tickets for minor violations in a first-ever "field citation" program. The Amendments also increased criminal penalties for knowing violations of the law, and should make it easier for EPA to gather investigative information, issue emergency orders and recover substantial penalties from violators.

While these changes inspire hope that enforcement will be more swift and certain, providing a more meaningful deterrent to would-be violators, the Amendments unfortunately also leave numerous gaps, and even create new hurdles to air pollution control. Time will tell how serious these flaws will become. However, for now the Act offers a mixed bag of good and bad news, rather than a total fix of the problems uncovered during earlier efforts to control the most ephemeral of all

note 1, at 1721-42.

3. See, e.g., *id.* at 1733-42.

forms of environmental degradation, pollution of the air we breathe. The purpose of this article is to survey the substantive changes to the civil and criminal enforcement provisions in the Clean Air Act as they apply to stationary sources, the means by which they will be implemented, and the potential strengths and weaknesses in carrying out the mandates of this new legislation.

II. Civil Enforcement

The Amendments contain new civil enforcement authorities that will have a profound effect on the compliance and enforcement environment heretofore facing the regulated community. The foremost of these, the operating permit program, provides the linchpin of efforts to reinvigorate civil enforcement of the Act. For the first time, operating permits will assemble in one document virtually every standard, limitation, requirement or prohibition under the Act applicable to a specific source, greatly simplifying compliance determinations and enforcement. The Amendments also added two new tiers of enforcement authority, administrative penalties and field citations, giving EPA much needed flexibility in forum choice in enforcement actions. In addition, new requirements for source self-monitoring, reporting, and compliance certifications will allow state and local agencies to more effectively target scarce resources at the worst offenders and help to ensure continuing compliance with the Act. The addition of broad investigatory subpoena authority provides EPA a powerful tool to ferret out noncompliant activities and develop viable enforcement actions, potentially enhancing the quality of proof offered at trial. Expanded and clarified penalty assessment authority will increase industry incentives to comply and allow EPA to exact meaningful recompense for noncompliant activity.

The Amendments offer an unparalleled opportunity for EPA to fashion a comprehensive, effective, and accountable civil air enforcement regime. EPA has made clear its intention to implement and apply these new and expanded authorities aggressively, to usher in a new era of air pollution enforce-

ment.⁴ Whether this invitation to substantially transform enforcement of the Act becomes a reality or a lost opportunity depends in large measure on how EPA interprets these authorities in the myriad of regulations it is required to write. By any measure the task is a daunting one. The Amendments require EPA to promulgate more than 55 rules before 1995, many of which are likely to be highly contentious.⁵ In the next few years it will be important to track EPA's success in meeting this challenge and see whether new life can be breathed into the Act's promise of clean air.

A. New and Modified Enforcement Authorities

1. Operating Permits⁶

The Act places the responsibility for attainment and maintenance of the national ambient air quality standards (NAAQS)⁷ on the individual states through the adoption and

4. See James M. Strock, *Stationary Source Enforcement*, in *THE CLEAN AIR ACT AMENDMENTS: BNA'S COMPREHENSIVE ANALYSIS OF THE NEW LAW* 255, 263 (Bureau of National Affairs, Inc. 1991) [hereinafter Strock, *Stationary Source Enforcement*]; James M. Strock, *EPA's Enforcement Priorities for Fiscal Year 1991*, 6 NAT'L ENVTL. ENF. J. 3, 7-8 (Feb. 1991) [hereinafter Strock, *EPA Enforcement Priorities*]; see generally James M. Strock, *EPA's Environmental Enforcement in the 1990's*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10,327 (Aug. 1990) [hereinafter Strock, *EPA Environmental Enforcement*]; Herbert H. Tate, Jr., *Enforcement Authority and the New Clean Air Act*, 7 NAT'L ENVTL. ENF. J. 13 (June 1992).

5. See William K. Reilly, *The New Clean Air Act: An Environmental Milestone*, 17 EPA JOURNAL (Jan-Feb 1991) at 3; see also Strock, *Stationary Source Enforcement*, *supra* note 4; David P. Novello, *EPA's Proposed Air Permit Regulations: Implementing the 1990 Clean Air Act Amendments*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,511, 10,512 (1991).

6. This article will address the provisions of the operating permit program that have a direct bearing on enforcement of the Act. For more detailed discussions of the scope, drafting and implementation of the permit program see Roady, *supra* note 1, and Novello, *supra* note 5. For a review of the legislative history pertaining to title V see Timothy L. Williamson, *Fitting Title V Into the Clean Air Act: Implementing the New Operating Permit Program*, 21 ENVTL. L. 2085 (1991). In certain critical respects, affected sources under title IV (concerning acid deposition control) will be regulated by title V operating permit requirements; this topic, however, is beyond the scope of this article.

7. Under the Act, each state has the primary responsibility for ensuring that the NAAQS will be achieved and maintained. CAA §§ 101(a)(3), 107(a), 109, 42 U.S.C. §§ 7401(a)(3), 7407(a), 7409 (1988 & Supp. II 1990).

implementation of state implementation plans (SIPs)⁸ and the delegation of many of the Act's federal programs to the states.⁹ Upon approval by EPA, SIP requirements become federally enforceable.¹⁰ To be successful, this system places a high premium on the cooperative development of productive state and federal relations. Over the years, EPA and the states have consistently improved their working partnership in implementing the Act. Nevertheless, the highly decentralized SIP system, delegating achievement and maintenance of air quality standards to the states,¹¹ created fertile ground for conflicts between EPA, which must ensure national consistency in implementation of the Act, and the states, which are charged with promoting the more varied social and economic goals of its inhabitants.¹²

SIPs have proven to be elusive, complex, and difficult documents to apply.¹³ In particular, it was frequently difficult to reach agreement on which SIP provisions applied to a given

8. Each state is required to submit to EPA for approval a SIP consisting of the laws, policy and strategy for timely achievement of the NAAQS. *See generally* CAA § 110, 42 U.S.C. § 7410 (1988 & Supp. II 1990).

9. For example, section 110 of the Act allows delegation of all or part of certain of the Act's programs, including some enforcement authorities, to states and localities. *See* CAA § 110, 42 U.S.C. § 7410(a) (Supp. II 1990). However, all programs are not delegable to the states and states have discretion to request partial delegation of programs. *See, e.g.*, CAA § 112(l)(1), 42 U.S.C. § 7412(l)(1) (Supp. II 1990).

10. CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1) (Supp. II 1990); *see also* Union Electric Co. v. EPA, 515 F.2d 206 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976); *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977); *Baughman v. Bradford Coal Co.*, 592 F.2d 215 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979).

11. Throughout this article, reference to "state" enforcement authorities includes any local enforcement authorities as well.

12. *See, e.g.*, *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 588 (5th Cir. 1981); *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987) (state agency's SIP interpretation inconsistent with Act not entitled to deference); *United States v. General Dynamics Corp.*, 755 F. Supp. 720 (N.D. Tex. 1991) (same); *United States v. General Motors Corp.*, 702 F. Supp. 133 (N.D. Tex. 1988) (upholding state interpretation of SIP and Act).

13. *See* 56 Fed. Reg. 21,712, 21,713 (May 10, 1991) (preamble to EPA proposed rules for CAA Operating Permit Program) [hereinafter Preamble]. For a more thorough examination of the difficulties inherent in the SIP system, *see* Williamson, *supra* note 6, 2089-94; William F. Pedersen, Jr., *Why the Clean Air Act Works Badly*, 129 U. PA. L. Rev. 1,059, 1,071-93 (1981).

process or facility. In the development of enforcement actions, EPA often found itself in the difficult position of advocating interpretations of the Act and SIPs which were at odds with a state's own interpretation of the Act and laws in its implementation plan.¹⁴ Understandably, courts were reluctant to upset the customary deference due a sovereign's interpretation of its own laws.¹⁵ Facility owners and operators found themselves faced with uncertain legal requirements compounded by the risk that reliance on state assurances might prove insufficient to discharge their duties under the Act and might subject them to additional federal liability. The uncertain application of SIP provisions increased litigation risks for EPA in enforcement actions, consumed scarce resources, and hampered the Agency's ability to generate and maintain the level of specific enforcement successes necessary to ensure a general deterrent effect on would-be violators.

In title V of the Amendments, Congress enacted an operating permit program that will unify all the applicable state and federal standards and limitations, including test methods, monitoring, recordkeeping and reporting requirements, applicable to each source in one document.¹⁶ The operating permit program holds the potential to greatly diminish the risk and uncertainty under the pre-1990 Act regime because EPA, states, and the regulated sources will have a forum to initially agree on the requirements applicable to each source. In addition, the increased precision in the definition of legal obligations will greatly aid enforcement entities who will rely on permits as the road maps of enforcement. However, to be successful the operating permit program must be truly comprehensive or many of the evils of interpretation under the pre-1990 Act may persist and continue to bedevil enforcement authorities. In this regard, the scope of the permit shield and

14. See cases cited *supra* note 12.

15. *Costle*, 650 F.2d at 588.

16. The pre-1990 Act did include a federally-mandated permit program that addressed preconstruction permitting under the prevention of significant deterioration (PSD) program in title I, part C, and title I, part D provisions of the Act concerning nonattainment area new source review (NNSR). Many states also independently operated their own permitting programs. See Preamble, *supra* note 13, at 21,713.

operational flexibility provisions in title V pose a serious threat to the enforcement benefits offered by the Amendments, especially if these provisions are not carefully interpreted and implemented with an eye toward clarity, certainty and predictability.

Title V of the 1990 Amendments requires the states to administer an operating permit program which meets certain minimum federal requirements.¹⁷ By regulation, as required by the Amendments,¹⁸ EPA has set out proposed minimum requirements for state programs¹⁹ which must be developed and submitted to EPA for federal approval by November 15, 1993.²⁰ In the event a state does not submit an approvable permit program in a timely fashion, EPA must develop and administer a program for the state.²¹ Title V requires that operating permit program submittals apply to all "major sources," sources subject to hazardous air pollutant or new source performance standards (NSPS), "affected sources" under title IV acid rain provisions and sources subject to new source review permitting requirements.²²

17. CAA § 502(d), 42 U.S.C. § 7661a(d) (Supp. II 1990).

18. *Id.*

19. Operating Permit Program, 56 Fed. Reg. 21,712 (May 10, 1991) (to be codified at 40 C.F.R. pt. 70) (proposed rule) (EPA proposed rules for Clean Air Act Operating Permit Program). During preparation of this article for publication, EPA promulgated the final operating permit program rules. Operating Permit Program, 57 Fed. Reg. 32,250 (July 21, 1992) (final rule).

20. CAA § 502(d), 42 U.S.C. § 7661a(d) (Supp. II 1990).

21. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3) (Supp. II 1990).

22. CAA § 502(a), 42 U.S.C. § 7661a(a) (Supp. II 1990); *see* 56 Fed. Reg. 21,712, 21,768, 21,770 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.2(r), 70.3(a)) (proposed rule). For purposes of the operating permit program, major source is defined to include any air pollution source under section 302(j) of the Act and any major source of hazardous pollutants under section 112 and any major source subject to new source review. 56 Fed. Reg. 21,712, 21,768-69 (May 10, 1991) (to be codified at 40 C.F.R. § 70.2(r)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,715-16. A major source of hazardous air pollutants is defined as a source that emits or has the potential to emit, in the aggregate, ten tons per year of any one hazardous pollutant, or 25 tons per year of any combination of such hazardous pollutants. CAA § 112 (a)(1), 42 U.S.C. § 7412(a)(1) (Supp. II 1990). Section 302(j) defines "major stationary source" to be "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." CAA § 302(j), 42 U.S.C. § 7602(j) (1988). However, under the amended Act sources in certain nonattainment areas will be subject to lower potential to emit thresholds depending

State program submittals must include the authority to issue permits up to five years in duration that assure compliance with each standard, regulation, or requirement under the Act and to terminate, modify or revoke, and reissue permits for cause.²³ In addition, states must have authority to enforce permits and to recover civil penalties of up to a maximum of not less than \$10,000 per day for each violation.²⁴ By regulation, EPA has proposed mandating that states have the following additional authority, derived by reference to the National Pollutant Discharge Elimination System program (NPDES):²⁵ to restrain a permit violator that poses imminent and substantial endangerment to the public health or welfare

on the severity of the area's nonattainment status under part D (nonattainment provisions) of title I. For example, in an extreme ozone nonattainment area (i.e. Los Angeles basin), the term "major stationary source" "includes (in addition to the sources described in section 302) any stationary source . . . that emits, or has the potential to emit, at least 10 tons per year of volatile organic compounds." CAA § 182(e), 42 U.S.C. § 7511a(e) (Supp. II 1990); *see, e.g.*, CAA § 182(d), 42 U.S.C. § 7511a(d) (Supp. II 1990) (in "severe" ozone nonattainment areas the major source limit is 25 tons per year); CAA § 182(c), 42 U.S.C. § 7511a(c) (Supp. II 1990) (in "serious" ozone nonattainment areas the limit is 50 tons per year); CAA § 189(b)(3), 42 U.S.C. § 7513a(b)(3) (Supp. II 1990) (in "serious" particulate matter (PM-10) nonattainment areas the limit is 70 tons per year); *see also* 56 Fed. Reg. 21,712, 21,769 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.2(r)(3)(i), (y)) (proposed rule) (definition of major source in nonattainment areas and definition of "potential to emit"); Novello, *supra* note 5, at 10,511, 10,514-15 (1991) (discussion of applicability and "major" source definition in proposed permits rule). EPA has proposed, at least initially, to defer application of the permit program for five years to non-major sources that would otherwise be subject to the permit program. For example, a non-major source subject to the NSPS would be exempted from the requirement to have a permit for five years. *See* 56 Fed. Reg. 21,712, 21,770 (May 10, 1991) (to be codified at 40 C.F.R. § 70.3(b)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,725-27. However, states may decide to include some or all non-major sources in their permit programs under the authority to add more stringent permitting requirements not inconsistent with the Act. CAA § 506(a), 42 U.S.C. § 7661e(a) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,767 (May 10, 1991) (to be codified at 40 C.F.R. § 70.1(d)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,726.

23. CAA § 502(b)(5), 42 U.S.C. § 7661a(b)(5) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,770-71 (May 10, 1991) (to be codified at 40 C.F.R. § 70.4(b)(3)(vi)) (proposed rule).

24. CAA § 502(b)(5)(E), 42 U.S.C. § 7661a(b)(5)(E) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,781 (May 10, 1991) (to be codified at 40 C.F.R. § 70.11(a)(3)(ii)) (proposed rule).

25. Preamble, *supra* note 13, at 21,755 (referencing 40 C.F.R. § 123.27 NPDES requirements).

or the environment; to enjoin violators; to seek civil penalties for violations of the permit, any fee or filing requirement, inspection, entry or monitoring condition; and to assess criminal fines up to a maximum of not less than \$10,000 for knowing violations of applicable standards and limitations, and for false statements.²⁶ The burden of proof under state law for permit violations shall be no greater than under the Act.²⁷ States are encouraged to adopt administrative penalty authority, but are not mandated to do so.²⁸

Initial applications for individual permits are required to be submitted within one year from the date a source becomes subject to a permit program approved or administered by EPA.²⁹ Sources that become subject to permit requirements after program approval will have up to one year to submit permit applications.³⁰ After the effective date of any approved title V permit program, it will be unlawful for any person subject to the permit requirements to operate without a permit or

26. 56 Fed. Reg. 21,712, 21,781 (May 10, 1991) (to be codified at 40 C.F.R. § 70.11(a)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,755.

27. 56 Fed. Reg. 21,712, 21,781 (May 10, 1991) (to be codified at 40 C.F.R. § 70.11(b)(2)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,755.

28. Preamble, *supra* note 13, at 21,755.

29. CAA § 503(a)(1), (c), 42 U.S.C. § 7661b(a)(1), (c) (Supp. II 1990). State failure to timely adopt a program requires EPA to administer a federal permit program, in which case, the one year period to submit applications will begin to run from the date EPA promulgates the federal program. CAA §§ 502(d)(3), (h), 503(c), 42 U.S.C. §§ 7661a(d)(3), (h), 7661b(c) (Supp. II 1990); *see* 56 Fed. Reg. 21,712, 21,780-81 (May 10, 1991) (to be codified at 40 C.F.R. § 70.10) (proposed rule); *see also* Preamble, *supra* note 13, at 21,764 (discussing future promulgation of the default federal permit program). States must submit proposed permit programs by November 15, 1993 at the latest. CAA § 502(d)(1), 42 U.S.C. § 7661a(d)(1) (Supp. II 1990). Within one year from program submittal (November 15, 1994 at the latest), EPA must wholly or partially approve the state program submittal. *Id.* If disapproved by EPA, the state has 180 days (or up to two years at EPA's discretion) after receipt of the notice to resubmit the program for review and EPA must act on the resubmission within one year. *Id.*; 56 Fed. Reg. 21,712, 21,772 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.4(e), (f)(1)) (proposed rule). Assuming these statutory deadlines will be complied with, initial source state permit applications could be required as late as mid-November 1997.

At the other extreme, assuming a June 15, 1992 promulgation date of the final permits rule, permit applications could be required as early as June of 1993. This scenario assumes early submission, quick review and approval of the state program submittal and short state permit application deadlines.

30. CAA § 503(a)(2), 42 U.S.C. § 7661b(a)(2) (Supp. II 1990).

in violation of any terms or conditions of the permit.³¹ For sources that become subject to a permit program, failure to submit a timely and complete permit application to the permitting authority will also be a violation of the Act.³² A timely and complete permit application is defined as one that the permitting authority determines contains all the necessary information³³ "needed to begin to process the application."³⁴

Other than routine background information, the proposal requires permit applications to include certain emissions-related information (e.g. fuel use); identification of control equipment and all applicable air pollution control requirements; description of the applicable test methods for determining compliance with each requirement; and descriptions of reasonably anticipated alternative operating scenarios.³⁵ To be complete, a source that is not in compliance at the time of permit application submission must include a compliance plan that contains a schedule of compliance, with enforceable milestones, that must be incorporated into the permit.³⁶ Additionally, the statute requires the permitting authority to promul-

31. CAA § 502(a), 42 U.S.C. § 7661a(a) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,775 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(a)(6)(i)) (proposed rule).

32. CAA §§ 503(c), (d), 113(b)(2), (d)(1)(B), 42 U.S.C. §§ 7661b(c), (d), 7413(b)(2), (d)(1)(B) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,773 (May 10, 1991) (to be codified at 40 C.F.R. § 70.5(a)) (proposed rule).

33. The information must be consistent with the permit contents requirements of CAA § 502(b), 42 U.S.C. § 7661a(b) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,773 (May 10, 1991) (to be codified at 40 C.F.R. § 70.5(c)) (proposed rule).

34. 56 Fed. Reg. 21,712, 21,768 (May 10, 1991) (to be codified at 40 C.F.R. § 70.2(h)) (proposed rule).

35. 56 Fed. Reg. 21,712, 21,773 (May 10, 1991) (to be codified at 40 C.F.R. § 70.5(b)) (proposed rule).

36. CAA § 504(a), 42 U.S.C. § 7661c(a) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,773 (May 10, 1991) (to be codified at 40 C.F.R. § 70.5(b)(7)(iii)) (proposed rule). The compliance plan language in section 504(a) of the Act does not explicitly apply only to sources not in compliance at the time of the permit application's submission. *Id.* EPA's decision to so limit the requirement has been controversial. See Novello, *supra* note 5, at 10,519 n.86. However, even for sources not in compliance, the proposal makes clear that the terms of the compliance schedule submitted in the compliance plan, including milestones, will be enforceable. 56 Fed. Reg. 21,712, 21,773 (May 10, 1991) (to be codified at 40 C.F.R. § 70.5(b)(7)(iii)) (proposed rule). The preamble discussion also notes that compliance plans will not immunize sources from enforcement for violations of previous or existing requirements. Preamble, *supra* note 13, at 21,734.

gate streamlined procedures for making expeditious completeness determinations.³⁷ EPA has interpreted this provision to require that a completeness determination be made within thirty days from submission of the application.³⁸ In the event the permitting authority fails to make a timely completeness determination, the application will be deemed complete upon the expiration of the thirty-day period.³⁹

Submission of a timely and complete permit application will provide a source with a limited "application shield" that protects it from enforcement (for operating the facility without a permit) during the period the permitting authority actually processes and writes the permit.⁴⁰ An application shield will persist until the permitting authority issues or is deemed to have issued a permit, provided the source timely submits any information required or requested by the permitting authority necessary to complete action on the permit application.⁴¹ Failure to submit the requested information in a timely manner⁴² terminates the application shield and will render the source in violation for operating without a permit.⁴³

In order to be approved, a title V operating permit application must contain source-specific terms and conditions sufficient to ensure compliance with all Act and implementation plan requirements, including emission limitations and standards, monitoring, recordkeeping, and reporting requirements.⁴⁴ For major sources, a permit must include all applicable requirements for all pollutants emitted by that source and

37. CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6) (Supp. II 1990).

38. 56 Fed. Reg. 21,712, 21,777 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(a)(4)) (proposed rule).

39. *Id.*

40. CAA § 503(d), 42 U.S.C. § 7661b(d) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,776-77 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(b)) (proposed rule).

41. CAA § 503(d), 42 U.S.C. § 7661b(d) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,777 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(b)(1)(i)) (proposed rule).

42. The proposed regulations define "timely" to mean compliance with "the deadline specified by the permitting authority." 56 Fed. Reg. 21,712, 21,777 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(b)(1)(i)) (proposed rule).

43. *Id.*; see also Preamble, *supra* note 13, at 21,735; see also *supra* note 31 and accompanying text.

44. CAA § 504(a), 42 U.S.C. § 7661c(a) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,774-75 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6) (proposed rule).

regulated by the Act, regardless of whether the source is "major" for that pollutant.⁴⁵ Major source permits must also incorporate all applicable requirements for all regulated emission units at the source.⁴⁶ Permits must mandate that any required monitoring information be submitted to the permitting authority at least semi-annually and all "deviations" from permit requirements must be clearly identified.⁴⁷ Permits must also set forth inspection and entry requirements⁴⁸ as well as monitoring and compliance certification requirements pursuant to regulation.⁴⁹ EPA has proposed that once a permit has been issued and has become final its terms may not be challenged in an enforcement proceeding.⁵⁰

The following discussion will address some implementation issues crucial to effective enforcement of the Act that are raised by the proposed operating permit program.

a. "State-Only" Requirements

The permit proposal states that "[a]ll applicable requirements under the Act" in a permit approved pursuant to 40 C.F.R. part 70 are federally enforceable,⁵¹ and that each per-

45. 56 Fed. Reg. 21,712, 21,770 (May 10, 1991) (to be codified at 40 C.F.R. § 70.3(c)(1)) (proposed rule), 21,774 (to be codified at 40 C.F.R. § 70.6(a)(1)) (proposed rule). For non-major sources required to obtain a permit, EPA interprets the Act to require the permit to address only those requirements which trigger the permit obligation. See 56 Fed. Reg. 21,712, 21,770 (May 10, 1991) (to be codified at 40 C.F.R. § 70.3(c)(2)) (proposed rule); see also Preamble, *supra* note 13, at 21,727; Novello, *supra* note 5, at 10,516.

46. 56 Fed. Reg. 21,712, 21,770, 21,774 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.3(c)(1), 70.6(a)(1)) (proposed rule).

47. CAA § 504(a), 42 U.S.C. § 7661c(a) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,774-75 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(a)(3)(iv)(A)) (proposed rule).

48. CAA § 504(c), 42 U.S.C. § 7661c(c) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,775 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(c)(3)) (proposed rule).

49. CAA §§ 114(a)(3), 504(c), 42 U.S.C. §§ 7414(a)(3), 7661c(c) (1988 & Supp. II 1990); 56 Fed. Reg. 21,712, 21,775 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(c)(2)) (proposed rule). Title VII of the Amendments added "enhanced" monitoring and compliance certification requirements, which differ from the title V requirements in some respects. See discussion *infra* parts II.B.1., 2 (enhanced monitoring and compliance certification subsections).

50. Preamble, *supra* note 13, at 21,760.

51. See 56 Fed. Reg. 21,712, 21,775 (May 10, 1991) (to be codified at 40 C.F.R. §

mit must include a statement that "[a]ny permit noncompliance constitutes a violation of the Act and is grounds for an enforcement action."⁵² In addition, EPA has determined that each permit must specifically designate, and segregate in the permit, the provisions of the permit that are *not* federally enforceable, either because they are not required by the Act or because they are "more stringent" than required by the Act.⁵³ The proposed rule and statutory provision imply that permit requirements will be presumed to be federally enforceable *unless* the permitting authority identifies the requirement as "state-only." However, in the preamble, EPA states to the contrary that permit requirements will be presumed to be not federally enforceable unless there is an affirmative showing that the requirement is mandated under the Act.⁵⁴ If the presumption against federal enforceability were to prevail in the final rule, a state issued permit that failed to segregate some or all state-only requirements would be presumed to be *not* federally enforceable unless, on a requirement-by-requirement basis, federal applicability could be shown. This state of af-

70.6(b)) (proposed rule). This language is based on section 502(a) which states in pertinent part:

After the effective date of any permit program approved or promulgated under this title, it shall be unlawful for any person to violate *any* requirement of a permit issued under this title, or to operate . . . a major source, or any other source (required to obtain a title V permit) . . . , except in compliance with a permit issued by a permitting authority under this title.

CAA § 502(a), 42 U.S.C. § 7661a(a) (Supp. II 1990) (emphasis added).

52. 56 Fed. Reg. 21,712, 21,775 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(a)(6)(i)) (proposed rule) (emphasis added).

53. 56 Fed. Reg. 21,712, 21,775 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(b)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,729-30. As an example of those so-called "state only" requirements, the preamble points to new state toxic air pollutant programs, many of which are likely to become effective several years before EPA completes promulgation of the maximum achievable control technology (MACT) standards required under title III of the Amendments. Preamble, *supra* note 13, at 21,729-30.

54. In the preamble, EPA states that it is proposing "that only those provisions of a permit identified as being required under the Act or necessary for its implementation will be federally enforceable. Each provision required or needed under the Act, will have to be clearly marked for EPA to consider it federally enforceable." Preamble, *supra* note 13, at 21,729. This appears to contradict the language in the proposed rule. *See* 56 Fed. Reg. 21,712, 21,775 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(b)) (proposed rule).

fairs would be virtually indistinguishable from pre-1990 Act SIP enforcement, messy and uncertain, a scenario the permit title was specifically designed to rectify.

As proposed, the requirement to identify and segregate so-called "state-only" requirements without clearly specifying a presumption of federal enforceability, creates considerable uncertainty as to which permit terms will be enforceable and in which court, state or federal. Unless this issue is clarified in the final permit rule, the "state-only" provisions will most assuredly result in protracted litigation, possibly returning regulated entities to the paralysis that existed prior to the Act's amendment.

b. Permit Shield

The application and interpretation of the permit shield provisions of section 504(f) of the Amended Act will be critically important to the enforcement of Act requirements for permitted sources. During consideration of the Amendments industry argued that good faith operation in compliance with an operating permit should entitle sources to a "safe harbor," free from government or citizen enforcement of requirements outside the confines of the permit.⁵⁵ The Amendments incorporated the safe harbor concept in the permit shield provisions of section 504(f).⁵⁶ Section 504(f) states that the permitting authority may provide in the permit that compliance with the permit is deemed compliance with other applicable provisions of the Act, provided (1) the permit includes such provisions, or (2) the permitting authority makes an explicit determination, referenced in the permit, that other provisions of the Act do not apply to the source.⁵⁷ The decision to apply

55. See Claudia Copeland, *Comprehensive Clean Air and Clean Water Permits: Is the Glass Still Just Half Full?*, 21 ENVTL L. 2135, 2161 n.120 (1991).

56. CAA § 504(f), 42 U.S.C. § 7661c(f) (Supp. II 1990).

57. The shield provision states in its entirety:

Compliance with a permit issued in accordance with this title shall be deemed compliance with section [502]. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this Act that relate to the permittee if—

the permit shield is discretionary with the permitting authority, though EPA can limit the breadth of the shield by rule.⁵⁸ EPA has proposed excluding application of the permit shield to: violations of the Act that occurred prior to or at the time of permit issuance; the acid rain program; and the information gathering authority under section 114 of the Act.⁵⁹ In addition, section 303 emergency order requirements are exempt by statute. As the preamble notes, omission (as opposed to misinterpretation) of an applicable requirement of the Act by mistake or otherwise, will not shield a source from enforcement liability.⁶⁰ The logic for this position is twofold. First, to be shielded under section 504(f) a requirement must be specifically referenced (i.e. not omitted) in the permit. Second, it would be unwise policy to encourage sources to be forgetful or less than comprehensive in their permit application submissions. In its proposal, EPA encourages states to fully employ the permit shield, though absent explicit notice, permits will be presumed to not provide a shield.⁶¹

How broadly the shield is interpreted is of critical importance to enforcement of the Act. A narrowly interpreted shield

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of [CAA § 303,] including the authority of the Administrator under that section. CAA § 504(f), 42 U.S.C. § 7661c(f) (Supp. II 1990).

According to the Statement of Senate Managers, this provision represented a compromise that "balances competing concerns in a fashion that protects both industry and the quality of our nation's air." Statement of Senate Managers, *supra* note 1, at S16,943. Congress was apparently concerned that decisions regarding application of the shield be conducted in the open, to preserve the public's right to know how sources are regulated. *Id.* See also Roady, *supra* note 1, at 10,189 n.89.

58. CAA § 504(f), 42 U.S.C. § 7661c(f) (Supp. II 1990).

59. 56 Fed. Reg. 21,712, 21,776 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(h)(3)) (proposed rule).

60. Preamble, *supra* note 13, at 21,744.

61. See Preamble, *supra* note 13, at 21,719, 21,744; see also 56 Fed. Reg. 21,712, 21,776 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(h)(2)) (proposed rule).

would apply only to the requirements of the Act that are explicitly addressed in the permit. Requirements not addressed in the permit that become applicable to the source after permit issuance would not be shielded and the source would still be obliged to comply or face possible enforcement action. A broad interpretation would shield a source from *any* requirement of any *provision* of the Act addressed in the permit. This would include new requirements under any provision that becomes applicable to a source after permit issuance, for the remainder of the permit term, if the general "provision" of the Act was simply addressed somewhere in the permit, even though the applicable requirement was not.⁶² Under a broad shield, similarly situated sources could have dramatically different compliance requirements and costs, due to luck or greater success in navigating the permitting process. EPA has proposed a broad shield interpretation that would exempt a source from compliance with the specific "requirements" of a general "provision" if the provision was already addressed in the permit.⁶³

62. This interpretation appears to conflict with the Act requirement that permits with a term of three years or more must be revised to incorporate requirements promulgated after issuance of the permit. CAA § 502(b)(9), 42 U.S.C. § 7661a(b)(9) (Supp. II 1990); *see also* 56 Fed. Reg. 21,712, 21,778 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(g)) (proposed rule).

63. *See* Preamble, *supra* note 13, at 21,744 (for example, "if the permit imposes the specific 'requirements' of an applicable MACT standard, or determines there are no such requirements under section 112, then the source is protected from application of the 'provisions' of section 112 for the duration of the permit term"). This decision has also been strongly criticized. *See* Novello, *supra* note 5, at 10,521. At least one commentator has cogently argued that a narrow interpretation is more consistent with the statute and Congressional intent. *See* Williamson, *supra* note 6, at 2112-19. Examination of the Senate's rejection of the Nickles-Heflin Amendment is instructive in this regard. The permit shield was "the major issue raised by [the Nickles-Heflin] amendment . . ." 136 CONG. REC. S3182 (daily ed. Mar. 26, 1990) (floor statement of Sen. Durenberger). According to Senator Nickles, the amendment proposed that a source's compliance with its permit constituted compliance with all Act "requirements addressed in the permit and existing at the time the permit was issued." 136 CONG. REC. S3166 (statement of Sen. Nickles) (daily ed. Mar. 26, 1990) (emphasis added); Nickles-Heflin Amendment, *supra* note 1, 136 CONG. REC. at S3213 (proposed shield provision, section 352(f)(1)(A)); *see also* 136 CONG. REC. S3171 (daily ed. Mar. 26, 1990) (colloquy between Sens. Baucus and Nickles concerning the breadth of the proposed shield). In addition, the shield would have precluded modification of the permit after issuance unless EPA determined there was a material mis-

Other than for requirements explicitly preempted from permit shield application, a permit shield can only be dissolved or altered by reopening the permit for cause, a cumbersome process accorded the same procedural process as initial permit issuance.⁶⁴ However, the permitting authority is mandated to reopen permits for cause when: (1) the remaining term of a permit exceeds three years and new requirements become applicable to the source; (2) the permitting authority or EPA determines that the permit contains a material mistake or; (3) EPA determines the permit must be revised "to assure compliance with the applicable requirements of the Act."⁶⁵

take, or "actual harm to public health" would result absent permit modification. *Id.* at S3171-72; Nickles-Hefflin Amendment, *supra* note 1, 136 CONG. REC. at S3212-13 (proposed sections 351(b)(5)(D), 352(f)(2) and 353(f)). Opposition to the broad permit shield proposal was central to the amendment's defeat. *See* 136 CONG. REC. S3234 (daily ed. Mar. 27, 1990) (statement of Sen. Baucus) ("This amendment shields way too much."); 136 CONG. REC. S3175 (daily ed. Mar. 26, 1990) (statement of Sen. Chafee in opposition to Nickles-Hefflin amendment and in favor of a "partial shield" modeled on the Clean Water Act); 136 CONG. REC. S3187 (daily ed. Mar. 26, 1990) (statements of Sen. Jeffords) ("I do not think we should allow sources to violate one provision of the [Act] simply because it holds a permit covering some other requirements."). In considering the Senate's deliberations, this history also argues in favor of the narrow interpretation of the permit shield.

64. *See* 56 Fed. Reg. 21,712, 21,778 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(g)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,744-45.

As noted above, section 504(f) of the CAA prohibits application of the shield to actions by EPA pursuant to section 303. However, under the existing proposal there has been no explicit recognition of the emergency chemical accident prevention order authority under section 112(r)(9). Unless the permitting authority provides otherwise, sources will surely argue that the permit shield protects them from compliance with orders issued under section 112(r)(9). We argue below that the section 112(r)(9) order authority will rarely be used. *See* discussion *infra* part II.A.4.b. (order authority for prevention of chemical accidents subsection). This will most surely be the case if, in order to issue a section 112(r)(9) order, the permitting authority must first reopen the permit for cause — an implausible, unworkable scenario. *See* 56 Fed. Reg. 21,712, 21,776-78 (May 10, 1991) (to be codified 40 C.F.R. § 70.7) (proposed rule); *see also* Preamble, *supra* note 13, at 21,741.

65. CAA §§ 502(b)(5)(D), (b)(9), 504(a), 42 U.S.C. §§ 7661a(b)(5)(D), (b)(9), 7661c(a) (Supp. II 1990); *see* 56 Fed. Reg. 21,712, 21,778 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(g)(i)-(iv)) (proposed rule). EPA does not explain the circumstances under which a permit would have to be reopened for cause "to assure compliance with applicable requirements of the Act." However, as discussed in the next section of this article, EPA appears to interpret similar language in section 504(a) to require that permits only meet this requirement at the time of issuance or renewal.

c. Operational Flexibility

More than any other aspect of the revised Act, the concept of operational flexibility presents the greatest potential threat to the enforceability gains offered by the Amendments. Fundamentally, permits are designed to create certainty and enforceability in the discharge of Act obligations. However, to remain profitable and competitive, industry must be adaptable to shifting needs and markets and not unduly hampered by permit constraints. The Act attempts to resolve the inherent tension between the goals of the permit program and the needs of industry in the proposed permit rule. The proposed permit rule offers a number of approaches to strike a balance and allow flexible source operation including, operational flexibility notice pursuant to section 502(b)(10) of the Act, permitting in the alternative, minor "fast track" permit amendment and "off-permit" activity. Each approach is designed to minimize or eliminate the procedural delay attendant to the formal permit revision process, which can take up to 18 months.⁶⁶ EPA and state interpretation of the parameters of operational flexibility will delimit the extent to which permits truly reflect the comprehensive statement of source duties and obligations under the Act; actions that will determine the degree to which the promise of certainty and enforceability can be delivered by the permit program. Given the stakes of the debate, it is not surprising that no other aspect of the Amendments relating to enforcement has received such intense interest and public scrutiny.⁶⁷ In the absence of clear direction in

Accordingly, unless the permitting authority specified otherwise, regulated operational changes at a facility would not necessarily require the permit to be reopened for cause, and permits would not be required to reflect current source operating practices until completion of the permit renewal process. See Novello, *supra* note 5, at 10,521.

66. See 56 Fed. Reg. 21,712, 21,777 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.7(a)(2), (d)(3)) (proposed rule).

67. See, e.g., *Chafee Voices Concern About CAA Permit Plan Allowing Excess Emissions*, INSIDE EPA (May 3, 1991) at 8; *Environmentalists Protest CAA Permit Regulation, Question Process*, INSIDE EPA (May 3, 1991) at 10; *Waxman Lambastes EPA CAA Permit Proposal, Targets White House Influence*, INSIDE EPA (May 3, 1991) at 7; *Waxman Pursues Problems With CAA Permit Proposal In Follow-Up To Hearing*, INSIDE EPA (May 24, 1991) at 13; *States Say They'll Veto Minor Permit*

the final permit rule, considerations of operational flexibility in general, and section 502(b)(10) in particular, may well prove to be the Trojan Horse in the fight for clean air.

Section 502(b)(10) of the Act sets out that the permitting authority must allow operating changes within a permitted facility without the need for a formal permit revision, provided the changes do not constitute a modification under title I of the Act⁶⁸ and "do not exceed the emissions allowable under the permit."⁶⁹ Prior to its effective date, the source is required to give the permitting authority and EPA seven days written notification of the change.⁷⁰ EPA has proposed that the notice shall "describe the proposed changes, including changes in emissions, and any requirements that would be applicable as a

Changes Under EPA's CAA Proposal, INSIDE EPA (Jun. 7, 1991) at 13; *OGC Memo Suggests CAA Permit Amendment Shielding Some Changes Legally Weak*, INSIDE EPA (Oct. 4, 1991) at 1; *EPA Paper Suggests More Reviews For CAA Minor Permit Changes*, INSIDE EPA (Oct. 11, 1991) at 15; *EPA Sends CAA Permit Plan To OMB With Beefed Up Public Review Requirements*, INSIDE EPA (Oct. 25, 1991) at 6; *EPA Draft CAA Permit Reg Sets Expanded Review For Even Minor Changes*, INSIDE EPA (Nov. 8, 1991) at 1; *EPA Begins Battle To Defend CAA Permit Reg Against White House Critics*, INSIDE EPA (Nov. 15, 1991) at 3; *Waxman Says Competitiveness Council Guilty of 'Wantonly Illegal Activities' On EPA Rules*, 22 Env't Rep. Current Developments (BNA) (Nov. 22, 1991) at 1,787; *EPA, White House CAA 'Minor Permit Amendment' Talks Halt As DOJ Reviews Issue*, INSIDE EPA (Nov. 22, 1991) at 7; *White House, EPA, Continue To Work To Reach Agreement On Air Permit Rule*, 22 Env't Rep. Current Developments (BNA) (Jan. 24, 1992) at 2,172; *White House Competitiveness Council To Craft Options For CAA Permit Rule*, INSIDE EPA (Apr. 3, 1992) at 1; *War Over Clean Air Regs Gathers Momentum*, NAT. L. J., Apr. 13, 1992, at 5; *Bush Curbs Clean Air Provision*, WASHINGTON POST, May 17, 1992, A-1, col. 1.

68. For a discussion of the various definitions of "modification" under different programs, see Preamble, *supra* note 13, at 21,746-47 n.6; see also Williamson, *supra* note 6, at 2107-08 n.77.

69. Section 502(b)(10) states:

Provisions to allow changes within a permitted facility (or one operating pursuant to section 503(d)) without requiring a permit revision, if the changes are not modifications under any provision of title I and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions[]): *Provided*, That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.

CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10) (Supp. II 1990) (a footnote explains that "[a] closing parenthesis probably should precede the colon").

70. CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10) (Supp. II 1990).

result of the change.”⁷¹ Section 502(b)(10) operational flexibility will be an option where the proposed change would not be prohibited by the permit and would also not result in exceedance of allowable emissions under the permit.⁷² Though a source’s activities would still be subject to any applicable Act requirements, the proposal notes that the permit shield would not apply.⁷³ Notwithstanding that a section 502(b)(10) operational flexibility change is fundamentally not a permit “revision,” EPA asked for comment on whether administrative amendment of the permit should be required after the change takes effect.⁷⁴ Though the proposal is silent on the issue, this might allow arguments to be made that the permit shield should apply since the permit would now “address” the changed requirements.

EPA has also proposed a “fast track” minor permit revision scheme to implement operational flexibility changes.⁷⁵ Under the proposed rule, the source must give the permitting authority at least seven days notice as required by the statute, and submit a notification of the proposed change that “shall describe the proposed changes, including changes in emissions, any requirements that would be applicable as a result of the changes, and the revised permit language under which the source proposes to operate.”⁷⁶ Minor permit amendments must “compl[y] with all applicable requirements of the Act relevant to the source.”⁷⁷ EPA proposes to allow the proposed change to go into effect after seven days unless the permitting authority objects, at which time the permitting authority may require the proposed change to be reviewed under the proce-

71. 56 Fed. Reg. 21,712, 21,776 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(d)(3)(ii)) (proposed rule).

72. *Id.*

73. Preamble, *supra* note 13, at 21,746 (discussion of operational flexibility).

74. *Id.*

75. 56 Fed. Reg. 21,712, 21,777 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(d)(3)(v)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,748.

76. 56 Fed. Reg. 21,712, 21,777-78 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(f)(2)) (proposed rule).

77. 56 Fed. Reg. 21,712, 21,777 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(f)(1)(ii)) (proposed rule).

dures for full permit modifications.⁷⁸ Minor permit amendments will be eligible for permit shield protection.⁷⁹

EPA has also proposed that operational flexibility be allowed by permitting in the alternative.⁸⁰ In essence, permitting in the alternative allows a permit to state a menu of options, each of which includes the necessary terms and conditions sufficient for the option to be approved as a stand alone permit requirement. Among other requirements, each option on the menu must include sufficient monitoring and recordkeeping to assure compliance and enforceability. At any given time, the source must be operating in compliance with any one of the permitted scenarios, but any change between menu options requires no approval by the permitting authority.⁸¹ Permitting in the alternative has the virtue of being clear in its delineation of source obligations and enforceable, while allowing the source to exercise considerable flexibility. Provisions created in this manner also benefit from the opportunity to have the permit shield apply.

In the permit proposal, EPA has also suggested that sources should be allowed to operate outside the confines of the permit terms and conditions in certain circumstances. The argument for this position derives from a deceptively simple proposition: since the nature of a permit under the Act is to allow any activity it does not explicitly prohibit, a source should not need to revise its permit in any fashion when its operational changes are not otherwise regulated by the Act or permit.⁸² Elaborating on this theme, the preamble to the proposed permit rule states that "a permit change is *not* affirmatively required to authorize every change in practices which are otherwise legal under the SIP or federal law merely be-

78. 56 Fed. Reg. 21,712, 21,777-78 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(d), (f)(2)(iii)) (proposed rule).

79. Preamble, *supra* note 13, at 21,744.

80. 56 Fed. Reg. 21,712, 21,776 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(d)(3)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,747-48.

81. 56 Fed. Reg. 21,712, 21,776 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(d)) (proposed rule).

82. Preamble, *supra* note 13, at 21,718 (discussing permit content), 21,746 (discussing operational flexibility and permit revisions).

cause an existing permit does not address the practice.”⁸³ Thus, a source may operate its facility without specific authorization in the permit (“off-permit”), provided that the permit, SIP or Act do not expressly prohibit the activity.⁸⁴ Apparently EPA interprets the requirement in section 504 that permits include “such . . . conditions as are necessary to assure compliance with the applicable requirements of the Act”⁸⁵ as only applicable to permit issuance and renewal.

In effect, the proposal appears to suggest that after a permit has been issued a source may elect to operate “off-permit” any time it wishes unless the Act or SIP explicitly requires incorporation of the changes into the permit. In other words, in many cases the issue of whether a permit must be amended during its term is discretionary for both the source and the state. EPA notes that any such operation would be subject to the applicable Act requirements and enforcement, but states that the permit shield could not apply since the activity would not be covered by the permit.⁸⁶ Under this interpretation, a source would have the option of operating “off-permit” and re-subjecting itself, EPA and the permitting authority, to many of the problems inherent under the pre-1990 Act, a result the permit program and the Amendments were explicitly designed to ameliorate. Consequently, the more widespread the practice of off-permit activity, the less effective the permits program will become. Indeed, it has been noted elsewhere that the current proposal may actually encourage sources to maximize off-permit activity.⁸⁷

As proposed, EPA’s interpretation of the operational flexibility opportunities in the Act present a number of areas ripe for misunderstanding and abuse. One overriding concern relates to the requirements for testing (especially gap-filling), monitoring and recordkeeping. Operational flexibility provisions will enjoy wide use if sources believe they can employ

83. Preamble, *supra* note 13, at 21,746.

84. 56 Fed. Reg. 21,712, 21,776 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(d)(3)(iv)) (proposed rule); *see also* Preamble, *supra* note 13, at 21,746.

85. CAA § 504(a), 42 U.S.C. § 7661c(a) (Supp. II 1990).

86. CAA § 504(f), 42 U.S.C. § 7661c(f) (Supp. II 1990).

87. *See* Novello, *supra* note 5, at 10,523.

them to avoid these requirements. Although the proposed minor permit amendment and operational flexibility provisions note that proposed changes must comply with all relevant requirements of the Act, the notice requirements do not explicitly require monitoring, recordkeeping, and adequate test methods sufficient to assure compliance with the underlying emissions limitations, as required by section 504(c) and elsewhere in the Act.⁸⁸ Furthermore, the proposal allows a source to avoid the full permit revision process, requiring public comment and thorough review by the permitting authority, unless it makes a "major modification," or increases emissions above allowable levels.⁸⁹ But a major modification is an emissions related concept; it is not usually triggered when compliance methods and testing procedures are modified. Thus, unless EPA or the state permitting authorities prohibit such changes, or define "major modification" for purposes of the permit program to include any changes to compliance and testing requirements, there will be ample opportunity for sources to rewrite or interpret compliance terms more to their liking, resulting in overly permissive or potentially unenforceable permit conditions.⁹⁰

As noted in the preamble, because historically SIPs have not always been explicit about compliance and testing requirements, permitting authorities will now be required to fill in gaps (e.g., add averaging times or test methods when they are absent) in order to insure the enforceability of each individual permit.⁹¹ It takes a great leap of faith to believe per-

88. 56 Fed. Reg. 21,712, 21,776-77 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.6(d)(3)(iii), 70.7(f)(1)(ii)) (proposed rule); CAA § 504(c), 42 U.S.C. § 7661c(c) (Supp. II 1990).

89. See *supra* note 68.

90. The proposed rule does, however, require that relaxations of monitoring and reporting requirements or milestones in required compliance schedules (for noncomplying sources) be reviewed as full permit modifications. 56 Fed. Reg. 21,712, 21,777 (May 10, 1991) (to be codified at 40 C.F.R. § 70.7(d)(2)) (proposed rule).

91. Preamble, *supra* note 13, at 21,713, 21,733 (discussing the background and purpose of proposed 40 C.F.R. pt. 70 and how absent or inadequate test methods must be rectified by the permitting authority). In addition to gap filling required by title V, the approach being considered for the enhanced monitoring and compliance certification requirements pursuant to title VII will also require case-by-case determi-

mitting authorities will be able to make these difficult determinations within the seven day notice period, or that sources themselves will routinely impose upon themselves fully enforceable and potentially costly testing and monitoring requirements in the absence of any enforceable duty to do so. To forestall this outcome, state permitting authorities could refuse to allow operational flexibility notices or minor permit amendment proposals to go forward without full review as permit modifications when presented with vague or questionable testing, monitoring, recordkeeping and reporting requirements.

In the proposed permit rule, EPA requested comment on all of its operational flexibility proposals and the issue has become the focal point of discussions between the EPA and Administration officials during inter-agency review of the final regulations.⁹² One hopes the final product will clarify the limits of operational flexibility and the permit shield and provide sufficient guidance to all parties as to how compliance should be determined, monitored and reported. Otherwise, the permit program could become fundamentally flawed, riven with loopholes, and the source of renewed conflict, uncertainty and stagnation in the effort to ensure clean air.

2. New and Modified Administrative Authorities

A critical obstacle to the Agency's effective enforcement of the pre-1990 Act concerned the lack of administrative penalty authority. Under the pre-1990 Act statutory scheme section 120 noncompliance penalty order authority was the only administrative penalty order authority available to EPA. It was complex, resource intensive and failed to promote flexible, cost-effective enforcement.⁹³ Section 120 authorized recoup-

nations by the permitting authority, which are not easily susceptible to summary treatment. See discussion *infra* part II.B.1. (enhanced monitoring and compliance certification subsection).

92. See Preamble, *supra* note 13, at 21,718; see also *supra* note 67.

93. Section 120 requires use of a formula for determining economic benefit; the formula is so complex that the provision allows EPA to hire a contractor to make the determination. CAA § 120(c), (d), 42 U.S.C. § 7420(c), (d) (1988). For example, once the source has come into compliance and has paid the assessed penalty, EPA is re-

ment of the economic value the source gained through non-compliance ("economic benefit"),⁹⁴ but since the pre-1990 Act penalties only ran from the date of the notice of noncompliance, section 120 actions could not recoup penalties for past violations even where the full economic benefit of noncompliance extended to the period before notice of noncompliance.⁹⁵ Penalties under section 120 were intended to level the playing field for violators vis-a-vis their competitors — competitors who had absorbed compliance costs into operating budgets, product prices, and bottom lines. Because the penalties failed to account for the seriousness (or "gravity") of the violation, section 120 penalties alone failed to meet either the general or specific goals of deterrence outlined in EPA penalty policies.⁹⁶ In addition, the section 120 noncompliance penalty scheme failed to provide for injunctive-type relief to deter future violations or require compliance schedules and remediation of any environmental harm inflicted. In theory, section 113(a) administrative compliance orders could have provided the needed injunctive-type relief absent in the section 120 order context, but the effective thirty-day limitation on the duration of section 113(a) administrative orders proved to be an unworkably short time-frame for EPA supervised compliance orders.⁹⁷ Burdened with these flaws, the use of section 120 fell

quired to review the source's actual expenditures and, if necessary, provide reimbursement for any overpayment. CAA § 120(d)(4), 42 U.S.C. § 7420(d)(4) (1988). See *Duquesne Light Co. v. EPA*, 698 F.2d 456, 463-65 (D.C. Cir. 1983), for a general discussion of the exhaustive and complex requirements of section 120. See also 40 C.F.R. pt. 66 for the regulations governing section 120 penalty assessments.

94. CAA § 120(d)(2)(A), (a), 42 U.S.C. § 7420(d)(2)(A), (a) (1988 & Supp. II 1990).

95. *Id.*; see also *Duquesne Light Co. v. EPA*, 698 F.2d 456, 464 (D.C. Cir. 1983); *American Cyanamid v. EPA*, 810 F.2d 493, 495-96 (5th Cir. 1987).

96. See, e.g., EPA, *Policy on Civil Penalties*, (EPA General Enforcement Policy #GM-21) (Feb. 16, 1984) at 3.

97. The thirty day limitation applied primarily to orders issued for SIP violations. In order to avoid possible judicial challenge, EPA determined that it should effectively limit administrative orders concerning SIP violations to thirty days because section 110(i) of the pre-1990 Act prohibited issuance, *inter alia*, of administrative orders by EPA or the states which modified any stationary source requirements of the SIP. CAA § 110(i), 42 U.S.C. § 7410(i) (1988) (amended 1990). Since section 113(d) delayed compliance orders were specifically allowed to modify SIPs under section 110(i), and section 113(a) orders were not, EPA determined that the statutory

into disfavor.⁹⁸

Due to these shortcomings EPA directed virtually all significant enforcement action into the civil judicial arena, which in turn created a host of other problems. Civil judicial cases require EPA to enlist the Department of Justice (DOJ) to prosecute the enforcement actions, which increased management involvement and transaction costs. Additionally, the high cost of litigation drained limited enforcement resources and restricted the breadth of EPA enforcement initiatives to the most high profile violations. Over time, an added downside to the focus on civil judicial enforcement actions emerged. DOJ appeared reluctant to bring enforcement actions for purely "procedural" violations (e.g., testing, monitoring, reporting, and recordkeeping violations). The argument was made that unless the violations were connected with exceedances of emissions standards, where the public health was arguably threatened, judges would be unsympathetic. Given the lack of an appropriate alternative administrative forum, EPA found it increasingly difficult as a practical matter to pursue, publicize, and deter wholly "procedural" violations. Similar arguments dampened enthusiasm for prosecution of cases for past penalties, where a source had already come into compliance and court-ordered injunctive relief was not needed. The situation was particularly difficult for EPA, in light of the critical importance to the Agency of testing, monitoring, recordkeeping, and reporting requirements to its ability to carry out its mission. It became clear that the pre-1990 Act simply lacked the flexible authorities necessary to punish and deter civil violators broadly and swiftly.

scheme could be construed as limiting the duration of section 113(a) orders. See EPA, *Duration of Section 113(a) Orders*, (Apr. 30, 1982). EPA also determined that orders addressing NSPS and National Emissions Standards for Hazardous Air Pollutants (NESHAP) violations could be issued for longer duration but only if the failure to come into compliance arose from circumstances beyond the effective control of the source (e.g. force majeure). *Id.* at 2.

98. For example, during fiscal year 1991, non-compliance penalties were not sought at all by EPA under section 120. EPA, *Enforcement Accomplishment Report*, (April 1992) at Appendix entitled "National Penalty Policy Report," Table 4 "Summary of Civil Penalties by program in FY 1991," at 9.

a. Administrative Compliance Orders

The 1990 Amendments generally address the above-mentioned enforcement concerns by providing EPA with the flexibility to pursue violators for large and small transgressions. Under the amended Act, the duration of administrative compliance orders has been expanded to a maximum of one year.⁹⁹ This will allow EPA to use compliance orders to address a wide variety of violations. In addition, the amendments to section 113(a) considerably broaden the scope of activity subject to administrative treatment by EPA. EPA may now issue administrative compliance orders whenever it determines that a person has violated or is in violation of any requirement or prohibition of a SIP, a SIP during a period of federally assumed enforcement, title I (attainment and maintenance of air quality standards), title IV (acid deposition), title V (operating permits), title VI (stratospheric ozone depletion)¹⁰⁰ or section 303 of title III (emergency orders).¹⁰¹ Applicable violations now include, but are not limited to, any requirement or prohibition of any rule, plan, order, waiver, permit, or permit fee approved under the aforementioned provisions or titles.¹⁰²

As was the case under the pre-1990 Act, except for orders concerning violations of hazardous air pollutant requirements or prohibitions, administrative compliance orders issued pursuant to section 113(a) do not take effect until the order recipient has had an opportunity to confer with EPA concerning the violation.¹⁰³ Additional pre-1990 Act requirements applicable to compliance orders remained in place. A copy of the compliance order must be given to the applicable state air pollution control agency and the order must state with reasonable specificity the nature of the violation and provide for compliance "as expeditiously as practicable" based on the se-

99. In addition, the order is not renewable. CAA § 113(a)(4), 42 U.S.C. § 7413(a)(4) (Supp. II 1990).

100. CAA § 113(a)(3)(A), 42 U.S.C. § 7413(a)(3)(A) (Supp. II 1990).

101. CAA § 303, 42 U.S.C. § 7603 (Supp. II 1990).

102. CAA § 113(a)(3), 42 U.S.C. § 7413(a)(3) (Supp. II 1990).

103. CAA § 113(a)(4), 42 U.S.C. § 7413(a)(4) (Supp. II 1990).

riousness of the violation and good faith efforts to comply.¹⁰⁴ Orders directed at corporations must be issued to appropriate corporate officers.¹⁰⁵ Further, the Amendments explicitly clarify that no order issued under section 113(a) shall preclude additional state or federal civil or criminal enforcement or a source's duty to comply with the provisions of the Act, a permit, or a SIP.¹⁰⁶ The Amendments also subject violators of all the substantive provisions in section 113(a) to the new administrative penalty order authority.

b. Administrative Penalty Orders

New section 113(d) governs the issuance of administrative penalty orders and it allows the assessment of civil penalties up to \$25,000 per day of violation, limited to actions where the total penalty sought does not exceed \$200,000.¹⁰⁷ Administrative penalty authority is restricted to matters where the first date of alleged violation occurred no more than twelve months prior to initiation of the administrative action.¹⁰⁸ In appropriate cases the Administrator and the Attorney General may jointly determine to enlarge the time period and the maximum penalty amount, though the decision is not judicially reviewable.¹⁰⁹

104. *Id.*

105. *Id.*

106. CAA § 113(a)(4), (a)(5), 42 U.S.C. § 7413(a)(4), (a)(5) (Supp. II 1990).

107. CAA § 113(d)(1)(C), 42 U.S.C. § 7413(d)(1)(C) (Supp. II 1990). *See also* CAA § 113(d), 42 U.S.C. § 7413(d) (1988) (amended 1990) (repealed provision concerning delayed compliance orders). *See infra* part II.C.1 (statutory maximum liability subsection) for discussion of the meaning of "per day of violation."

108. CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1) (Supp. II 1990). The statute and the legislative history fail to clarify what Congress meant by "initiation" of the action. Clearly, at the outside, filing of an administrative complaint pursuant to the Consolidated Rules of Practice would qualify as "initiation" of the action. *See* 40 C.F.R. § 22.13 (1991).

109. CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1) (Supp. II 1990). Neither the Act nor the legislative history give any clear indication how this authority should be exercised. The section-by-section analysis of S. 1490, the Administration's Senate Bill, suggests the use of this provision "to increase the penalty limit for certain cases or categories of cases" and notes that such agreements would be "especially appropriate for categories of cases which routinely involve multiple violations, each of which may have minor penalties but which total more than \$200,000." Section-by-Section Analy-

Recipients of administrative penalty orders must be given notice and an opportunity to be heard on the record in accordance with the Administrative Procedures Act (APA).¹¹⁰ Failure to pay a final administrative penalty order subjects the nonpaying party to a collection suit in federal district court for the penalty amount, with interest.¹¹¹ The costs, attorneys fees, and the "enforcement expenses" incurred by the United States in pursuit of the collection action "shall" be assessed against nonpaying parties, and the district court is precluded from reviewing the amount, validity, and appropriateness of the penalty order in the action.¹¹² In addition to any penalty and interest collected in the suit, parties that fail to pay a penalty order assessment shall be required to pay a quarterly nonpayment penalty equal to ten percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued as of the beginning of each quarter.¹¹³

EPA has issued guidance setting out its view of the appropriate circumstances for use of the administrative penalty order authority.¹¹⁴ In general, the factors to be considered include the statutory limitations, the need for court-supervised injunctive relief, evidence of criminal violation, the extent of the need for post-filing discovery, and the novelty of legal is-

sis of the "Clean Air Act Amendments of 1989," 135 CONG. REC. S9651, S9665 (daily ed. Aug. 3, 1989) (submitted into the record by Sen. Chafee). Could this authority be exercised on a case-by-case basis? For example, could an administrative complaint be amended to request greater penalties if more serious violations are discovered during the action? Alternatively, would enlargement be appropriate, for example, if in five years inflation has made virtually all proposed penalties too insignificant for administrative penalty orders to be effective? Congress did, however, express concern that a record be kept of the basis and reasons for such enlargements for future Congressional review. See H.R. REP. No. 490, *supra* note 1, at 393.

110. CAA § 113(d)(2)(A), 42 U.S.C. § 7413(d)(2)(A) (Supp. II 1990); *see also* Administrative Procedure Act (APA), 5 U.S.C. §§ 554, 556 (1988). EPA has recently completed amendment of the Consolidated Rules of Practice setting out these hearing requirements. *See* Rules of Practice Governing the Administrative Assessment of Civil Penalties Under the Clean Air Act, 57 Fed. Reg. 4316 (Feb. 4, 1992) (amending the Consolidated Rules of Practice, 40 C.F.R. §§ 22.01, 22.34, 22.43).

111. CAA § 113(d)(5), 42 U.S.C. § 7413(d)(5) (Supp. II 1990).

112. *Id.*

113. *Id.*

114. EPA, *Guidance on Choosing the Appropriate Forum in Clean Air Act Stationary Source Civil Enforcement Actions*, (Oct. 29, 1991).

sues.¹¹⁵ EPA intends to issue section 113(a) compliance orders in conjunction with penalty orders to provide any needed injunctive relief.¹¹⁶ A critical factor in the forum selection decision-making is whether the compliance order is capable of delivering the remedy EPA desires, including any injunctive-type relief. Drawn-out compliance milestones, the need for construction of capital-intensive pollution control equipment, and a generally uncooperative attitude toward achieving compliance, all militate against use of the administrative forum.¹¹⁷ EPA has also indicated that the penalty amount pled in administrative actions will be equal to the "preliminary deterrence amount" as defined in EPA civil penalty guidance.¹¹⁸ Given the possibility of statutory maximum penalties in the judicial forum, and the potential for more costly procedures, alleged violators may find the administrative forum a more hospitable venue for resolution of enforcement actions.

3. Field Citations

In furtherance of Congress' efforts to streamline enforcement of the Act, reduce costs, and provide EPA enhanced flexibility, a novel field citation program was created to allow EPA to issue "tickets" for some violations.¹¹⁹ Once regulations have been promulgated, EPA may assess civil penalties not to exceed \$5,000 "per day of violation"¹²⁰ for "appropriate minor

115. *Id.*

116. *Id.* at 3.

117. *Id.* at 3-4.

118. EPA, *Clean Air Act Stationary Source Civil Penalty Policy* at 1-2 (Oct. 25, 1991) [hereinafter *Penalty Policy*]. The preliminary deterrence amount equals the sum of the economic benefit of noncompliance plus an additional penalty amount to account for the seriousness of the violation (gravity component). *Id.* at 4. Based on the degree of a violator's cooperation, an administrative complaint may actually plead an amount that includes a deduction of up to 10% of the gravity component of the penalty calculation. *Id.* at 1. On May 22, 1992, as part of a coordinated enforcement initiative, EPA announced the arrival of the new administrative penalty order authority by filing 50 cases assessing penalties of more than \$4 million in 26 states and Puerto Rico. *Fifty Clean Air Act Enforcement Actions Taken*, DAILY ENVTL. REP. (BNA) at 4 (May 21, 1992).

119. CAA § 113(d)(3), 42 U.S.C. § 7413(d)(3) (Supp. II 1990).

120. *Id.* The "per day of violation" language lacks clarity. See discussion *infra* part II.C.1. (statutory maximum liability subsection).

violations.”¹²¹ Payment of a civil penalty assessed by a field citation appears to preclude the imposition of further penalties for the same violation on the day for which the citation was issued, though payment does not preclude the assessment of additional penalties or bar other actions to enforce a violation if it continues beyond the period covered by the field citation.¹²² Although those persons who are issued a field citation are entitled to notice and a reasonable opportunity to be heard and present evidence, the hearing is not subject to the provisions of the APA.¹²³ EPA is currently drafting regulations establishing the parameters of the field citation program

121. CAA § 113(d)(3), 42 U.S.C. § 7413(d)(3) (Supp. II 1990). The term “minor violations” is not defined in the Act. The Senate viewed minor violations as “violations discovered during the course of an inspection . . . [or] violations of routine reporting and record-keeping requirements.” See S. REP. No. 228, *supra* note 1, at 365, reprinted in 1990 U.S.C.A.N. at 3748. See also H.R. REP. No. 490, *supra* note 1, at 393-94 (field citations limited to appropriate “minor violations” and expressed concern that parties not be required to travel to Washington, D.C. to receive a hearing).

122. Section 113(d)(3) provides that “[p]ayment of a civil penalty required by a field citation shall not be a defense to further enforcement by the United States or a State to correct a violation, or to assess the statutory maximum penalty pursuant to other authorities in the Act, *if the violation continues*.” CAA § 113(d)(3), 42 U.S.C. § 7413(d)(3) (Supp. II 1990) (emphasis added). The meaning and relevance, if any, of this provision is unclear and is discussed nowhere in the legislative history. If the violation were to continue, the statute appears to mandate that payment of the field citation should have no preclusive effect on further statutory maximum penalties, either for the violation on the day the field citation was issued or thereafter. If so, an administrative penalty order or civil judicial action could be pursued under section 113(b). CAA § 113(b), 42 U.S.C. § 7413(b) (Supp. II 1990). For purposes of penalty assessment under section 113(e)(1), the field citation penalty could be a mere offset factor under the category “payment by the violator of penalties previously assessed for the same violation.” CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (Supp. II 1990). See discussion *infra* parts II.C.2.a., b., c. (penalty assessment criteria section and subsections). If the cited violation does *not* continue, the statutory language would appear to suggest that the assessment of additional penalties for the same violation on the date of the citation is precluded by the payment of the field citation levy. However, the “if the violation continues” language may merely reflect inadvertent drafting inconsistencies to which little meaning can be ascribed. See EPA, *Guidance on Effect of Clean Water Amendment Civil Penalty Assessment Language*, (Aug. 28, 1987) (interpreting similar CWA language). An additional question concerns what effect the payment of a field citation will have on determinations of the duration of the violation under section 113(e). Would the existence of a field citation constitute any “credible evidence” under section 113(e)(1) or operate to defeat the presumption of continuing violation under section 113(e)(2)? These issues appear open to debate.

123. CAA § 113(d)(3), 42 U.S.C. § 7413(d)(3) (Supp. II 1990).

and the hearing procedures.¹²⁴ The specter of inspectors issuing broadly worded field citations for major violations of the Act that have potential preclusive effect on other enforcement actions, combined with due regard for the maintenance of good state relations, should drive EPA to substantially limit the scope and nature of the field citation authority delegated to field inspectors.

4. Emergency Order Authority

a. Section 303 Emergency Order Authority

Pre-1990 Act section 303 emergency order authority was hobbled by overly-restrictive terms and procedural requirements that precluded its effective use in the abatement of air pollution emergencies. The orders were only effective for a maximum period of twenty-four hours,¹²⁵ and could not be issued by EPA until after state and local authorities had been contacted and had "not acted to abate such [endangering pollution] sources."¹²⁶ Additionally, the orders were limited to circumstances posing imminent and substantial endangerment to the health of *persons*. Protection of human health, welfare or the environment were not factors meriting consideration.¹²⁷ Furthermore, in order for a source to incur civil liability, non-compliance with a section 303 order had to be willful. The maximum fine was set at \$5,000 per day of violation, considerably lower than the \$25,000 maximum per day fine for most other violations, and there were no criminal sanctions for

124. See *Field Citation Rule for Air Act Violations Will Be Proposed in June*, EPA Official Says, 22 Env't Rep. Current Dev. (BNA) 2517 (stating that the proposed rule is slated for release in June of 1992 and the final rule in May of 1993). The House bill sent to the conference committee appeared to allow for de novo review of field citations in federal court. House Bill as Passed, *supra* note 1, § 601, 136 CONG. REC. H3234-35. The final law, however, requires judicial review to be on the record and based on the substantial evidence standard of review. CAA § 113(d)(4), 42 U.S.C. § 7413(d)(4) (Supp. II 1990).

125. CAA § 303(a), 42 U.S.C. § 7603(a) (1988) (amended 1990). Upon commencement of an enforcement action the order automatically became effective up to 48 hours (or longer if ordered by the court). *Id.*

126. CAA § 303(a), 42 U.S.C. § 7603(a) (1988) (amended 1990).

127. *Id.*

knowing noncompliance with a section 303 order.¹²⁸ As a result of these infirmities, EPA rarely issued section 303 orders.¹²⁹

The Amendments remedied the deficiencies in the existing section 303 order authority and brought the Act into conformity with the emergency authorities in other major environmental laws.¹³⁰ In addition as discussed in the next section below, Congress created an entirely new, though somewhat redundant, emergency order authority for the prevention of accidental releases of certain extremely hazardous substances.¹³¹

Amended section 303 allows EPA, upon a finding that a source of pollution is causing imminent and substantial endangerment to the health of persons, human welfare, or the environment, to seek a restraining order in United States district court, or when such a suit would be impracticable under the circumstances, to issue administrative orders for a period of up to sixty days.¹³² Prior to taking any action pursuant to section 303, EPA must consult with state and local authorities

128. CAA § 303(b), 42 U.S.C. § 7603(b) (1988) (amended 1990). In a clear example of an irrational system of priorities and incentives under the pre-1990 Act, failure to comply with a section 303 emergency order premised on an actual finding of imminent and substantial endangerment to human health was sanctioned less severely than, for example, failure to comply with an information request under section 114, which rarely was the direct cause of increased air pollution or adverse public health effects. Compare CAA § 113(b)(4), 42 U.S.C. § 7413(b)(4) (1988) (amended 1990) with CAA § 303(b), 42 U.S.C. § 7603(b) (1988) (amended 1990).

129. Apparently, a section 303 order has only been issued once, in Birmingham, Alabama in 1971. See H.R. REP. No. 294, 95th Cong., 1st Sess. 327-28 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1406-07.

130. Cf. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 106, 42 U.S.C. § 9606 (1988); Resource Conservation and Recovery Act (RCRA) § 7003, 42 U.S.C. § 6973 (1988); see *Clean Air Act; Enforcement Authority Guidance (Guidance on Using the Order Authority Under Section 112(r)(9) of the Clean Air Act, as Amended, and on Coordinated Use With Other Order and Enforcement Authorities)*, 56 Fed. Reg. 24,393 (May 30, 1991) (discussing emergency order authorities in other major environmental statutes); S. REP. No. 228, *supra* note 1, at 370-71, reprinted in 1990 U.S.C.C.A.N. at 3753-54.

131. CAA §§ 112(r)(9), 42 U.S.C. §§ 7412(r)(9), (Supp. II 1990).

132. CAA § 303, 42 U.S.C. § 7603 (Supp. II 1990). The 60-day order limitation is automatically extended 14 days if EPA files suit in district court to enforce the order within the 60 day period. In addition, courts are authorized to extend the period indefinitely. *Id.*

and ascertain the accuracy of the information upon which the action is based.¹³³ The amended Act makes it a felony to knowingly fail to comply with a section 303 order and civil violators will now be subject to the \$25,000 per day statutory maximum civil penalties under section 113(b).¹³⁴ Congress repealed paragraph (b) that set out the difficult to prove "willful" standard of liability and feeble penalties for failure to comply with section 303 orders. Congress also deleted the provision requiring EPA to defer action until it determined that state and local authorities had not acted to abate the danger.¹³⁵

The changes made to section 303 order authority are sure to invigorate its use as an enforcement option in the future. Where EPA was powerless under the pre-1990 Act, the extension of section 303 to the protection of human welfare and the environment empowers EPA to act to abate threats to wildlife habitats, ecosystems, buildings, and other structures. By deleting the "unrealistically short"¹³⁶ time limits on the duration of section 303 orders and the open-ended requirement to defer to state action, section 303 orders become viable options for EPA. Increased civil and criminal liability for violations of section 303 orders will help EPA leverage swift, concerted remedial results. In contrast to EPA's experience under the pre-1990 Act, mere reference to section 303 order authority will likely prove to be an effective incentive to focus parties in negotiations, leverage quick compliance, and remedy dangerous environmental conditions. As is already the case in enforcement of other media statutes, section 303 order authority is likely to become a key tool in EPA's integrated enforcement arsenal in the future.

133. CAA § 303, 42 U.S.C. § 7603 (Supp. II 1990).

134. CAA §§ 113(b), 303, 42 U.S.C. §§ 7413(b), 7603 (Supp. II 1990). The Senate Bill as Passed would have mandated only misdemeanor incarceration up to one year. Senate Bill as Passed, *supra* note 1, § 605(b)(3), 136 CONG. REC. at S4438.

135. Compare CAA § 303(b), 42 U.S.C. § 7603(b) (1988) (amended 1990) with CAA § 303, 42 U.S.C. § 7603 (Supp. II 1990). The House Bill as Passed would have retained the requirement to defer to state abatement actions, but allowed section 303 actions where the state action was not adequate to abate the threat. House Bill as Passed, *supra* note 1, 136 CONG. REC. at H3235.

136. S. REP. No. 228, *supra* note 1, at 370, reprinted in 1990 U.S.C.C.A.N. at 3753.

b. Order Authority for Prevention of Chemical Accidents

In conjunction with an ambitious program to address chemical accidents, Congress added a new section 112(r) to the hazardous air pollutant section of the Act entitled "Prevention of Accidental Releases."¹³⁷ Section 112(r) requires EPA to generate by rule a list¹³⁸ and threshold quantities¹³⁹ of at least 100 substances "which, in the case of an accidental release, are known to cause or may reasonably be anticipated to cause, death, injury, or serious adverse effects to human health or the environment."¹⁴⁰ Facilities that possess more than the threshold amount of a listed substance are required by the Amendments to conduct a hazard assessment of potential accidental releases and implement a risk management plan to detect and prevent or minimize accidental releases of the listed extremely hazardous substances and to develop prompt emergency response programs for such accidental releases.¹⁴¹

137. CAA § 112(r), 42 U.S.C. § 7412(r) (Supp. II 1990).

138. CAA § 112(r)(3), 42 U.S.C. § 7412(r)(3) (Supp. II 1990).

139. CAA § 112(r)(5), 42 U.S.C. § 7412(r)(5) (Supp. II 1990).

140. CAA § 112(r)(3), 42 U.S.C. § 7412(r)(3) (Supp. II 1990). The same section of the statute also defines the standard for listing the substances as those "which pose the greatest risk of causing death, injury, or serious adverse effects to human health or the environment . . ." *Id.* (emphasis added).

141. CAA § 112(r)(7)(B)(ii), 42 U.S.C. § 7412(r)(7)(B)(ii) (Supp. II 1990). In addition, the Amendments impose an enforceable general duty on owners and operators of stationary sources involved with extremely hazardous substances to identify accidental release hazards, to design and maintain safe facilities and to minimize the consequences of accidental releases. CAA § 112(r)(1), 42 U.S.C. § 7412(r)(1) (Supp. II 1990). This so-called "general duty" clause is modeled on a similar general duty clause in the Occupational Safety and Health Act. 29 U.S.C. § 654 (1988); see also S. REP. NO. 228, *supra* note 1, at 206, reprinted in 1990 U.S.C.C.A.N. at 3591. Looking to the effect the National Transportation Safety Board has had on transportation safety and accident investigation, Congress added a section that establishes the Chemical Safety and Hazard Investigation Board to investigate chemical accidents, conduct studies of accidental releases and accident prevention, and to recommend regulatory changes to EPA. CAA § 112(r)(6), 42 U.S.C. § 7412(r)(6) (Supp. II 1990); see also S. REP. NO. 228, *supra* note 1, at 205-208, 228, reprinted in 1990 U.S.C.C.A.N. at 3590-93, 3612. Congress intended the "Board, through its investigations and reports, . . . to drive the regulatory agenda in [the chemical accident prevention] field." S. REP. NO. 228, *supra* note 1, at 208, reprinted in 1990 U.S.C.C.A.N. at 3593. However, due to Bush Administration concerns about the constitutionality of procedures for appointing Board members (which have apparently been resolved), the Board has not

To specifically address the prevention of accidental releases, Congress also supplemented the emergency order authority of section 303 with a new order authority. Section 112(r)(9) provides EPA with authority to prevent or abate an actual or threatened accidental release of a regulated substance (listed pursuant to section 112(r)(3)), or other "extremely hazardous" substances.¹⁴² Upon a determination by

yet been appointed, but \$5 million funding to establish the Board has been included in the Administration's fiscal year 1993 budget request. See Statement by President Bush Upon Signing the Clean Air Act Amendments of 1990, reprinted in 1990 U.S.C.A.N. 3887-1, 3887-2; *Administration in Major Switch Acts to Implement CAA Chemical Accident Board*, INSIDE EPA, July 19, 1991, at 1; see also Executive Office of the President, BUDGET OF THE U.S. GOVERNMENT FY 1993, H.R. Doc. No. 178, 102 Cong., 2d Sess. A-933. In any event, it seems improbable that the Board will be functioning in time to provide any input into the development of the accident prevention rules currently being drafted by EPA, as envisioned by Congress and expressed in the Amendments. See CAA § 112(r)(6)(H), 42 U.S.C. § 7412(r)(6)(H) (Supp. II 1990) (calling for Board pre-promulgation recommendations to EPA on hazard assessments, the list of extremely hazardous substances and risk management plans) and CAA § 112(r)(6)(K), 42 U.S.C. § 7412(r)(6)(K) (Supp. II 1990) (calling for a Board report, to be completed by Nov. 15, 1992, recommending regulatory proposals to EPA for consideration in its development of risk management plan regulations).

142. On its face, section 112(r)(9) covers actual or threatened "accidental release[s]" of a regulated substance. An "accidental release" is defined to mean "an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source." CAA § 112(r)(2)(A), 42 U.S.C. § 7412(r)(2)(A) (Supp. II 1990). A "regulated substance" is defined as "a substance listed under [§ 112(r)](3)." *Id.* In addition, section 112(r)(1) states that the objective of subsection (r) is to "prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to § [112(r)](3) or any other extremely hazardous substance." CAA § 112(r)(1), 42 U.S.C. § 7412(r)(1) (Supp. II 1990) (emphasis added). Given the broad remedial purpose of subsection (r) and the ambiguity of the statutory language, EPA has indicated in guidance that it will interpret section 112(r)(9) to apply to both threatened or actual accidental releases of substances listed pursuant to section 112(r)(3) and other additional "extremely hazardous substances." See *Clean Air Act: Enforcement Authority Guidance*, 56 Fed. Reg. 24,393, 24,394 (May 30, 1991) (Guidance on Using the Order Authority Under Section 112(r)(9) of the Clean Air Act, as Amended, and on Coordinated Use With Other Order and Enforcement Authorities) [hereinafter *Order Authority Guidance*]. Neither the Amendments nor EPA define "extremely hazardous substance" for purposes of accidental release prevention, though the Senate report on S. 1630 notes that, in addition to substances listed by EPA, the term "extremely hazardous substances" was intended to include the approximately 360 substances listed under Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. § 11001-11050 (1988 & Supp. 1990). See S. REP. NO. 228, *supra* note 1, at 211, reprinted in

the Agency that "there may be an imminent and substantial endangerment to the human health or welfare or the environment because of an actual or threatened accidental release of a regulated substance . . ." the United States district court is given the jurisdiction to grant "such relief as the public interest and the equities of the case may require" in the district in which the threatened or actual release occurs.¹⁴³ In addition, after notice has been given to the affected state, EPA is authorized to "take other action under this paragraph including, but not limited to, issuing such orders as may be necessary to protect human health."¹⁴⁴ Further, section 112(r)(9)(A) requires EPA to take action under section 303 whenever it is "adequate to protect human health"¹⁴⁵ and the environ-

1990 U.S.C.C.A.N. at 3596.

143. CAA § 112(r)(9)(A), 42 U.S.C. § 7412(r)(9)(A) (Supp. II 1990).

144. *Id.* The limitation of these orders to the protection of "human health" marks an unusual departure from other major emergency order provisions. Does this mean this authority cannot be used to issue orders necessary to protect "human welfare" or "the environment," where human health is not endangered? For example, would a section 112(r)(9) order be available to EPA where there is a threatened release of an extremely hazardous substance at an unmanned remotely operated pumping station which is located in an area otherwise uninhabited by humans, upwind from a wildlife reserve harboring endangered species? Since a section 303 order would clearly be available under EPA interpretations, and since section 112(r)(9) cannot be invoked when section 303 is available, this question appears academic. Nevertheless, the limitation of this provision to "orders . . . necessary to protect human health" serves to highlight the limited utility of this authority in abatement of actual emergencies. *Id.*

145. Note that the statutory language omits reference to circumstances where the sole imminent and substantial endangerment is to the human "welfare." Therefore, EPA might argue that no deference is required to section 303 when the "human welfare" is exclusively threatened. Nevertheless, as discussed below, this application of the statute seems unlikely. One might ask whether there would be any advantage in such an approach. Section 303 places a 60 day limit on the term of an emergency order, requires EPA to consult with state authorities prior to acting and requires confirmation of the accuracy of the information underlying its decision to act. In addition, section 303 allows for the issuance of an administrative order only after a determination that a civil judicial action is not practicable. Section 112(r)(9), on the other hand, places no explicit limit on the duration of an abatement order and only requires EPA to notify the state of its intended administrative action and requires no consultation with state authorities or information confirmation. Taken to its extreme, if the "human welfare" was imminently and substantially endangered by a listed substance or any other extremely hazardous substance, EPA could forgo section 303 and issue a section 112(r)(9) order containing no time limitation, without any consultation with state authorities and without any attempt to invoke judicial authority. Never-

ment.”¹⁴⁶ Administrative orders issued pursuant to section 112(r)(9) are enforced in the appropriate United States district court as if issued pursuant to section 303.¹⁴⁷ Noncompliance with a section 112(r)(9) order subjects the violator to the full \$25,000 statutory maximum civil liability under section 113(b) as well as section 113(c) criminal liability.¹⁴⁸ Unlike section 303 emergency order provisions, the statute places no explicit limits on the scope and duration of the section 112(r)(9) order authority.

Given the requirement that section 303 relief must be unavailable before section 112(r)(9) authority may be used, and since EPA construes section 303 emergency order authority to apply to threatened or accidental releases to air,¹⁴⁹ section 112(r)(9) is arguably duplicative and will not likely be invoked independently by EPA.¹⁵⁰ In practice, it is difficult to imagine a set of circumstances that could not be addressed under the sweeping authority delineated in amended section 303. Section 303 applies to “a pollution source or combination of sources (including moving sources) [that] is presenting an imminent and substantial endangerment to public health or welfare, or the environment”¹⁵¹

Although there are no judicial interpretations of section 303, EPA has interpreted section 303 to apply to any air pol-

theless, the likelihood of such a scenario seems remote since in practice none of the limitations in section 303 are likely to provide any real obstacle to the Agency's issuance of administrative orders (the sixty day limitation on section 303 orders can be extended by court order and state consultation and information confirmation are hardly burdensome).

146. CAA § 112(r)(9)(A), 42 U.S.C. § 7412(r)(9)(A) (Supp. II 1990).

147. CAA § 112(r)(9)(B), 42 U.S.C. § 7412(r)(9)(B) (Supp. II 1990).

148. CAA § 113(b)(2), (c)(1), 42 U.S.C. § 7413(b)(2), (c)(1) (Supp. II 1990).

149. See EPA, *Guidance on Use of Section 303 of the Clean Air Act* 2-3 (Sept. 15, 1983) [hereinafter *303 Guidance*].

150. Indeed, there is some question whether a source that has a shield provision in its permit could be subject to a section 112(r)(9) order since the permit program proposal does not exempt section 112(r)(9) orders from the shield. See 56 Fed. Reg. 21,712, 21,776 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.6(h)(3)(i), (iv)) (proposed rule) (section 303 emergency orders and section 114 information gathering authority are exempted from any permit shield). See discussion *supra* part II.A.1.b. (permit shield subsection).

151. CAA § 303, 42 U.S.C. § 7603 (Supp. II 1990).

lution¹⁵² emission that is presenting an imminent and substantial endangerment to public health, or welfare, or the environment,¹⁵³ including threatened releases as well as actual accidental releases by any pollution source.¹⁵⁴ Thus, where section 112(r)(9) is limited to substances listed pursuant to section 112(r)(3) or other extremely hazardous substances, section 303 relief can be obtained for endangerment caused by emissions or threatened emissions of substances listed pursuant to section 112(r)(3), other extremely hazardous substances, or any other air pollution, even emissions of "criteria" pollutants (for which primary and secondary NAAQS have been set).¹⁵⁵ For example, amended section 303 authority could in theory be invoked by the Agency to abate threats to health and welfare caused by legal emissions of smoke and particulate matter from wood stoves and fireplaces in a mountain valley choking on the pollutants.

Viewed in context with section 303, it seems that Congress did not really intend section 112(r)(9) order authority to be of substantial use. While section 112(r)(9) provides the appearance of direct congressional action to address threatened accidental releases of extremely hazardous substances, given that EPA is constrained to use its expanded section 303 authority in the first instance, section 112(r)(9) will in all likelihood be of little practical import. Nevertheless, in the unlikely event that courts limit section 303 to actual, ongoing releases of pollution to the air, excluding threatened releases, section 112(r)(9) would undoubtedly acquire greater relevance.

5. New Source Review

Under the pre-1990 Act, section 113(a)(5) entitled EPA to issue orders prohibiting the construction or modification of

152. "[A]ir pollutant" is defined in the Act to mean "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air" CAA § 302(g), 42 U.S.C. § 7602(g) (Supp. II 1990).

153. *303 Guidance*, *supra* note 149, at 1-2.

154. *Id.* at 2-3. See also Order Authority Guidance, *supra* note 142, at 24,394-95.

155. *303 Guidance*, *supra* note 149, at 1-2.

any stationary source in any area covered by an applicable implementation plan when EPA had found that the state was not acting in compliance with the part D provisions of the Act concerning nonattainment area new source review (NNSR).¹⁵⁶ The order could only take effect after the person to whom it was issued had an opportunity to confer with EPA concerning the alleged violation.¹⁵⁷ Once it was issued, the order was not subject to judicial review until EPA initiated a judicial action in federal court to enforce the order under section 113(b)(5) at which time the validity of the order could be reviewed and civil penalties assessed.¹⁵⁸

The pre-1990 Act had no comparable provision in section 113(a) to address a state's failure to adhere to part C provisions requiring new source review under the Prevention of Significant Deterioration (PSD) program applicable to areas in attainment with the NAAQS.¹⁵⁹ Instead, the PSD program was addressed exclusively by section 167 of the pre-1990 Act,¹⁶⁰ which permitted EPA or the state to issue an order or seek an injunction to halt "construction" of a major emitting facility¹⁶¹ that failed to adhere to PSD permitting requirements in an area covered by the PSD program.¹⁶² Section 167 orders could not be directly enforced under section 113, but in some cases EPA could bring a separate action under section 113(b)(2) alleging violations of the applicable SIP.¹⁶³

Congress amended section 167 order authority to explicitly include the prevention of the "construction or modification" of facilities that fail to comply with PSD permitting re-

156. CAA § 113(a)(5), 42 U.S.C. § 7413(a)(5) (1988) (amended 1990).

157. CAA § 113(a)(4), 42 U.S.C. § 7413(a)(4) (1988) (amended 1990).

158. CAA § 307, 42 U.S.C. § 7607 (1988) (amended 1990); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1977); *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765 (2d Cir. 1988).

159. CAA §§ 160-169a, 42 U.S.C. §§ 7470-7491 (1988) (amended 1990).

160. CAA § 167, 42 U.S.C. § 7477 (1988) (amended 1990).

161. *See* CAA § 169(1), 42 U.S.C. § 7479(1) (1988) (amended 1990) (defining "major emitting facility").

162. CAA § 167, 42 U.S.C. § 7477 (1988) (amended 1990).

163. CAA § 113(b)(2), 42 U.S.C. § 7431(b)(2) (1988) (amended 1990); *Solar Turbines, Inc. v. Seif*, 688 F. Supp. 1012, 1015 (M.D. Pa. 1988) (administrative order not self-enforcing), *aff'd* 879 F.2d 1073 (3d Cir. 1989).

quirements¹⁶⁴ and section 113(b) was modified to allow for the direct enforcement of section 167 orders.¹⁶⁵ Addressing inconsistencies in treatment of PSD and NNSR violations, the Amendments streamlined the existing section 113(a)(5) authority to allow EPA to issue orders in areas where EPA finds a source has failed to comply with the NNSR and PSD program requirements concerning the construction of new, and the modification of existing, units.¹⁶⁶ In addition to retaining the existing civil judicial authority to seek penalties and injunctive relief under section 113(b), the statute authorizes issuance of administrative penalty orders.¹⁶⁷ Furthermore, the Amendments clarified that like other administrative orders under section 113(a), order issuance will not bar criminal prosecution.¹⁶⁸

The new options for enforcing PSD orders and the addition of the power to issue administrative penalty orders for new source violations may increase the incentive for violators to comply with cease construction orders rather than risk los-

164. CAA § 167, 42 U.S.C. § 7477 (Supp. II 1990) (emphasis added). The bill passed by the Senate included language that would have codified EPA's interpretation that section 167 prohibits "operation" as well as construction and modification, and a provision allowing for an informal hearing prior to effectuation of the order. See Senate Bill as Passed, *supra* note 1, § 609, 136 CONG. REC. at S4439. Both of these provisions were not adopted. See Statement of Senate Managers, *supra* note 1, at S16,953. However, the Statement of Senate Managers clarified that although "operation" was not adopted as proposed in the Senate Bill, Congress intended "to preserve the current interpretation of the EPA that it can prohibit the operation of a source upon discovering that such source is operating in violation of new source requirements." *Id.* at S16,951. The Statement also noted the importance of such enforcement actions and encouraged EPA to continue to exercise this authority judiciously.

165. CAA § 113(b)(2), 42 U.S.C. § 7413(b)(2) (Supp. II 1990).

166. CAA § 113(a)(5), 42 U.S.C. § 7413(a)(5) (Supp. II 1990). The Amendments also eliminated references to section 129(a)(1) of the Clean Air Act Amendments of 1977 (concerning enforcement of pre-1977 Act preconstruction review requirements in 40 C.F.R. pt. 51) and to pre-1990 Act section 110(a)(2)(I) (concerning SIP plan submittal requirements for Part D programs).

167. CAA § 113(a)(5)(B), 42 U.S.C. § 7413(a)(5)(B) (Supp. II 1990).

168. CAA § 113(a)(5), 42 U.S.C. § 7413(a)(5) (Supp. II 1990). Nor will the issuance of an order under this section prevent the state or EPA from assessing penalties, or interfere with their authority to enforce other provisions of the Act, or relieve any person from other requirements under the Act. CAA § 113(a)(4), 42 U.S.C. § 7413(a)(4) (Supp. II 1990).

ing a challenge in an enforcement action and incurring liability for potentially significant penalties. Moreover, section 167 orders will not fall into disuse since, unlike section 113(a) orders, they take effect immediately, eliminating the need to wait for the violator to confer with EPA prior to the order's effect.

6. Notices of Violation

In order to enforce SIP violations, the pre-1990 Act required EPA to notify the state and the person in violation and provided that "[i]f such violation extends beyond the [thirtieth] day after the date of the . . . notification," EPA could issue an administrative compliance order, section 120 penalty order, or bring a civil judicial action in accordance with section 113(b).¹⁶⁹ EPA was empowered to bring a SIP enforcement action whenever such person "violates" an administrative compliance order issued under section 113(a) or "violates" a SIP either during any period of federally assumed enforcement or "more than [thirty] days after having been notified by [EPA] . . . of a finding that such person *is violating* such requirement."¹⁷⁰ The statement of the thirty-day notice provision in the present tense elicited differing interpretations. Some courts held that to be actionable a SIP violation had to continue beyond the thirty-day period, interpreting the statute to create, in effect, a thirty-day grace period.¹⁷¹ Although EPA interpreted this provision solely as a notice provision, it was obligated in the face of such bad precedent and uncertain litigation prospects to focus on violations that con-

169. CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1) (1988) (amended 1990).

170. CAA § 113(b)(2)(B), 42 U.S.C. § 7413(b)(2)(B) (1988) (amended 1990) (emphasis added).

171. *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1127-29 (D. Colo. 1987) (alleged violation must persist 30 days); *United States v. Ford Motor Co.*, 736 F. Supp. 1539, 1546 (W.D. Mo. 1990); *United States v. SCM Corp.*, 667 F. Supp. 1110, 1121-23 (D. Md. 1987) ("A violating source can avoid civil penalties if it ceases violation within 30 days of the NOV."). However, courts have found subject matter jurisdiction for enforcement if the same violation was repeated any time after the 30 day period had run. See e.g., *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1155-56 (D. Colo. 1988).

tinued past the end of the thirty-day period. The existence of the "cure" period and judicially imposed constraints on the use of otherwise admissible evidence to prove continuing thirty-day violations¹⁷² contributed to the diminished viability of SIP enforcement.¹⁷³

The Amendments remedy these deficiencies by codifying EPA's longstanding interpretation that the notice provision was only intended to give the states the opportunity to enforce SIP violations in the first instance, rather than to provide violators a thirty-day grace period or to bar enforcement of noncontinuous violations.¹⁷⁴ Congress amended section 113(a)(1) to clarify that "any time after the expiration of thirty days following the date on which such notice of violation is issued," EPA may enforce the violation "without regard to the period of violation,"¹⁷⁵ and section 113(b) was

172. See discussion *infra* part II.C.2.b. (duration of violation subsection).

173. Another more serious impediment to SIP enforcement concerned a number of court interpretations holding that EPA's failure to timely act on SIP revisions barred or limited certain enforcement actions. See, e.g., *Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983) (penalties held in abeyance until completion of final action on the SIP by EPA); *American Cyanamid v. EPA*, 810 F.2d 493 (5th Cir. 1987) (precluding assessment of penalties for the period after the SIP was required to have been acted on by EPA); see also EPA, *Revised Guidance on Enforcement of State Implementation Plan Violations Involving Proposed SIP Revisions*, (Aug. 29, 1989). In *General Motors v. United States*, 110 S. Ct. 2528, 2533 (1990), the Supreme Court ended this dispute, and obviated the need for a legislative fix in the Amendments, by upholding EPA's interpretation that existing SIP provisions remained valid and enforceable until a revision was approved by EPA.

174. The Senate report reads as follows:

Section 113(a)(1) [and 113(b)(2)], as amended, clarifies and confirms that the 30-day notice provision is intended solely to allow the State an opportunity to take appropriate action. The notice does not, and never was, intended to require that EPA show the source to have been in continuous violation for 30 days. . . . The 30-day notice is not a shield to protect sources, but rather ensures that the States will have an opportunity to exercise their enforcement prerogatives under the Act prior to initiation of a Federal enforcement action.

S. REP. NO. 228, *supra* note 1, at 361-62, reprinted in 1990 U.S.C.C.A.N. at 3744-45. The Senate Report also cites favorably to *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1156 (D. Colo. 1988) (rejecting the argument that the 30-day notice provision relieves defendants of liability for penalties while the 30-day clock is running); see also H.R. REP. NO. 490 pt. 1, *supra* note 1, at 391 (30-day notice only intended to give states time to exercise enforcement prerogatives).

175. CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1) (Supp. II 1990). The actionable pe-

amended to clarify that a violation is actionable whenever a person "*has violated, or is in violation of*" any requirement or prohibition of a SIP.¹⁷⁶ Further, § 113(b)(1) was amended to clarify that an action "*shall be commenced . . . more than [thirty] days following the date of [EPA's] notification under [section 113(a)(1)] that such person has violated, or is in violation of*" a SIP requirement or prohibition.¹⁷⁷

At least one court has already interpreted these changes and the legislative history to hold that the thirty-day notice provision clarified but did not substantively change a source's obligations under the Act.¹⁷⁸ The Act as amended ensures that SIP violators will no longer be able to hide behind the thirty-day notice provision since liability will attach for each day of violation, whether before or after the date of the notice of violation and regardless of the violation's duration. As a result of these changes and others that increase EPA's enforcement options, SIP enforcement should enjoy a vigorous revival.

7. Pre-enforcement Review of Notices of Violation, Administrative Orders and Information Requests

Section 307(b) of the pre-1990 Act provided for judicial review in the United States circuit courts of appeals for "any final action" of the Administrator under the Act¹⁷⁹ and further provided that any final action that could be reviewed thereunder was barred from judicial review in a civil or crimi-

riod of violation is, of course, subject to the statute of limitations. 28 U.S.C. § 2462 (1988) (general federal five year statute of limitation for fines, forfeitures and civil penalties).

176. CAA § 113(b)(1), 42 U.S.C. § 7413(b)(1) (Supp. II 1990) (emphasis added).

177. *Id.* (emphasis added).

178. *United States v. LTV Steel Co.*, No. 91-1067, slip op. (W.D. Pa. Nov. 6, 1991). LTV moved to dismiss the case alleging lack of subject matter jurisdiction, claiming the amendments to the 30-day notice provision imposed new substantive requirements that obligated EPA to issue an additional notice of violation after the effective date of the 1990 Amendments. Based upon an examination of the legislative history and due deference to the Agency's interpretation of the statute, the court rejected LTV's claims that the changes were substantive and denied LTV's motion to dismiss. *Id.* at 7-8.

179. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (1988) (amended 1990).

nal proceeding for enforcement.¹⁸⁰ However, the pre-1990 Act failed to define "final action" and the law was unclear which actions were exempt from pre-enforcement review.¹⁸¹ Courts rendered divergent opinions on the matter.¹⁸² From the Agency's perspective, interpretations that would allow pre-enforcement review of administrative orders and other EPA investigative activities threatened to delay enforcement actions indefinitely in a quagmire of hearings and legal proceedings while the threat to public health and the environment remained unabated.

Seeking to clarify the matter, both House and Senate bills originally introduced during the 101st Congress included separate sections to clarify that pre-enforcement review was not available for administrative notices or orders, subpoenas, or actions for information, entry and inspection pursuant to section 114.¹⁸³ After both chambers reported bills out of committee, only the Senate version still retained the separate section barring pre-enforcement review.¹⁸⁴ However, neither of

180. CAA § 307(b)(2), 42 U.S.C. § 7607(b)(2) (1988) (amended 1990).

181. Pre-Act section 307(b)(1) did however enumerate some specific actions (e.g. delayed compliance orders under section 113(d)(1)(D) and noncompliance penalty orders under section 113(d)(1)(E)) that were considered "final actions" subject to judicial review. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (1988) (amended 1990).

182. See, e.g., *Solar Turbines, Inc. v. Seif*, 688 F. Supp. 1012 (M.D. Pa. 1988) (issuance of a section 165(a) administrative order is "final action"); *Asbestec Constr. Services, Inc. v. EPA*, 849 F.2d 765 (2d Cir. 1988) (issuance of a section 113(a) administrative compliance order does not constitute "final action"); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1977) (same); *Union Elec. Co. v. EPA*, 593 F.2d 299 (8th Cir. 1979) (notice of violation is not final action), *cert. denied*, 444 U.S. 839 (1979); *West Penn Power Co. v. Train*, 522 F.2d 302, 311 (3d Cir. 1975), *cert. denied*, 426 U.S. 947 (1976) (same); *Conoco Inc. v. Gardebring*, 503 F. Supp. 49 (N.D. Ill. 1980) (notice of violation is final action); *Dow Chemical Corp. v. EPA*, 635 F. Supp. 126, 130-31 (M.D. La. 1986) (section 114 request is not final action), *aff'd on other grounds*, 832 F.2d 319 (5th Cir. 1986).

183. The bills broadly referred to this issue as "Reviewability of Administrative Orders." See House Bill as Introduced, *supra* note 1, § 602; Senate Bill as Introduced, *supra* note 1, § 302, 135 CONG. REC. S11,157. In addition, both bills encompassed section 303 emergency orders, and actions under sections 206(c) and 208, concerning mobile source information collection.

184. Compare Senate Report Bill, *supra* note 1, § 602, 136 CONG. REC. at S75 with House Report Bill, *supra* note 1, §§ 601-611, reprinted in H.R. REP. No. 490, *supra* note 1, at 131-38. The Senate Report contains a detailed discussion of the rationale for precluding pre-enforcement review of orders or notices issued under sec-

the two bills ultimately sent to the conference committee included the separate provisions.¹⁸⁵ Nevertheless, in the Senate, the issue became one of heated debate¹⁸⁶ when Senator Nickles introduced an amendment pertaining to permits and enforcement, that among its other features, explicitly allowed APA-type pre-enforcement review of administrative orders.¹⁸⁷ Opposition to the pre-enforcement judicial review provisions in the Nickles amendment contributed to its defeat by a close vote.¹⁸⁸

tion 113 and other enumerated provisions of the Act. See S. REP. NO. 228, *supra* note 1, at 366-67, reprinted in 1990 U.S.C.C.A.N. at 3749-50.

185. However, as discussed below, the Senate Bill as Passed included language to amend sections 113(a)(4) and 167 to allow a non-APA type hearing within thirty days of the issuance of an administrative compliance or section 167 order. Senate Bill as Passed, *supra* note 1, §§ 601(e), 609(b), 136 CONG. REC. at S4436, S4439.

186. One senator described the Nickles Amendment as a "killer amendment," 136 CONG. REC. S3182 (daily ed. Mar. 26, 1990) (floor statements of Sen. Durenberger), and another senator described it as a "gutting amendment." 136 CONG. REC. S3234 (daily ed. Mar. 27, 1990) (floor statements of Sen. Baucus).

187. See Nickles-Heflin Amendment, *supra* note 1, at S3215-16 (proposing substitution of new enforcement and permit titles). Permit modifications, extension of the shield to all Act violations, curtailed citizen suit provisions, and cost-benefit analysis requirements were among the most hotly contested issues in the proposed Nickles-Heflin amendment. See *supra* note 63 and accompanying text. Section 601(e) of the Nickles-Heflin amendment made issuance of section 113(a) administrative orders subject to the following proposed sections of the Act (also proposed by the Nickles-Heflin Amendment): section 113(d)(2) (providing APA hearings); section 113(d)(4) (granting authority to seek judicial review); and section 113(d)(5) (penalty assessment enforcement). See Nickles-Heflin Amendments, *supra* note 1, at S3215-16. In addition, however, consistent with the Administration's bill, the Nickles-Heflin Amendment also explicitly precluded pre-enforcement review of: section 113 notices of violation; section 120 findings of violation; section 303 emergency orders; administrative subpoenas under section 307(a); and actions under section 114. See Nickles-Heflin Amendments § 602(a), (b), *supra* note 1, at S3217. Senator Heflin, a co-sponsor of the Nickles-Heflin Amendment, noted that the Mitchell-Dole substitute amendment No. 1293 would "significantly expand EPA[s] power to issue various types of administrative orders." He further stated: "We are in agreement on the need to expand EPA's administrative order authority. Where we disagree is on the kind of administrative hearing a person is entitled to before one of these orders goes into effect." 136 CONG. REC. S3169 (daily ed. Mar. 26, 1990) (floor statements of Sen. Heflin in support of Nickles-Heflin Amendment).

188. See 136 CONG. REC. S3238-40 (daily ed. Mar. 27, 1990) (statement of Senate Majority Leader Mitchell opposing the Nickles-Heflin Amendment); 136 CONG. REC. S3173-74 (daily ed. Mar. 26, 1990) (floor statement of Sen. Lieberman opposing Nickles-Heflin Amendment and supporting no pre-enforcement review of administrative orders); 136 CONG. REC. S3176, S3185, S3235 (daily ed. Mar. 26, 1990) (Sen. Chafee's

As considered by the conference committee, the House bill was silent on pre-enforcement review in general. In moderation of the Senate's earlier position that broadly barred pre-enforcement review, the Senate bill sent to the conference allowed informal non-APA type hearings for administrative and section 167 orders.¹⁸⁹ Nevertheless, the conferees deferred to the House bill that had no provision for pre-enforcement review of administrative orders.¹⁹⁰ The Statement of Senate Managers explained the *absence* of a pre-enforcement review bar in the final conference bill. The statement referred to the earlier discussion in the Senate Report that favored no pre-enforcement review and stated that, with respect to administrative orders, the issue had been properly resolved by the courts that had precluded pre-enforcement review and that therefore "no new statutory language addressing the issue [was] necessary."¹⁹¹ Thus, the legislative history confirms that

floor comments opposing pre-enforcement review provisions in the Nickles-Hefflin amendment); 136 CONG. REC. S3185, S3187-88 (daily ed. Mar. 26, 1990) (Sen. Baucus floor comments opposing pre-enforcement review provisions in Nickles-Hefflin Amendment); 136 CONG. REC. S3236-37 (daily ed. Mar. 27, 1990) (same); 136 CONG. REC. S3241 (daily ed. Mar. 27, 1990) (rejecting the Nickles-Hefflin Amendment by a vote of 50 to 47).

189. The language in the original Senate bill submitted by the Bush Administration barring pre-enforcement review was changed at the insistence of the Administration itself. For one explanation of the reasons for this change of position, see 136 CONG. REC. 3181-82 (Mar. 26, 1990) (floor statements of Sen. Durenberger). The Mitchell-Dole substitute amendment included language that explicitly allowed for pre-enforcement review of administrative orders. See Mitchell-Dole substitute, *supra* note 1, at 601(e), 136 CONG. REC. at S2090; see also *supra* note 185. The Senate Bill as Passed was silent on pre-enforcement review of emergency orders, subpoenas, notices of violations and information requests.

190. See Statement of Senate Managers, *supra* note 1, at S16,950-51, S16,953.

191. See Statement of Senate Managers, *supra* note 1, at S16,953 (discussed under the heading referencing section 706, entitled "Judicial Review Pending Reconsideration of Regulation"). This was a curious statement since the Senate had agreed earlier to add provisions imposing an opportunity for limited pre-enforcement review. In addition, concerning administrative orders under section 113(a), the Statement of Senate Managers clarifies that by adopting the House version the conferees agreed to "leave[] intact current law which has been interpreted correctly as barring pre-enforcement review of administrative compliance orders." *Id.* at S16,951. In *Lloyd A. Fry Roofing v. EPA*, 554 F.2d 885, 890 (8th Cir. 1977), the court examined the legislative history of the 1970 Clean Air Act (which is virtually indistinguishable in form from the history of the 1990 Amendments on this topic) to determine whether, absent an express provision in the Act barring pre-enforcement review, the Agency could

Congress intended pre-enforcement review to remain unavailable for administrative compliance and section 167 orders. However, as concerns section 114 information requests, section 307(a) subpoenas, notices of violation and section 303 emergency orders that Congress considered expressly exempting from pre-enforcement review, the legislative history is less conclusive though it is clear that Congress expressed no desire to impose any pre-enforcement review limits on these authorities.¹⁹²

8. Restricted Definitions of "Operator" and "Person"

The Amendments limited the civil liability of low level employees by altering the definition of "operator" to exclude "any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer."¹⁹³ This provision will prohibit civil actions against low-level employees in their individual capacity, but will have no effect on actions against corporations, other

overcome the "strong presumption favoring such review." The court concluded that since pre-enforcement judicial review is "wholly inconsistent" with enforcement mechanisms established in the Act, Congress must have intended to preclude pre-enforcement judicial review of compliance orders. *Id.* at 891. The Statement of Senate Managers concerning the 1990 Amendments suggests Congress intended courts to reach the same conclusion.

192. Further indication of congressional intent can be found in the adoption of the "sufficient cause" defense in section 113(e)(1) of the Amended Act, which suggests that information requests under section 114 and administrative subpoenas under section 307(a) were intended to be reviewed only in enforcement actions. *See* discussion *infra* part II.B.4. (sufficient cause subsection). The Amendments also clarified that under section 307(b) of the Amended Act a petition for EPA reconsideration of a final rule or final action does not postpone the effectiveness of the rule or action, or render either non-final for purposes of judicial review. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (Supp. II 1990). In addition, a petition for reconsideration will not toll the sixty-day period for filing an appeal in the appropriate court. *Id.* This amendment overrules *West Penn Power Co. v. EPA*, 860 F.2d 581 (3d Cir. 1988), insofar as the court held that a pending petition for reconsideration rendered the challenged Agency action non-final for purposes of judicial review. *See* S. REP. No. 228, *supra* note 1, at 372, *reprinted in* 1990 U.S.C.C.A.N. at 3755. This change will help to eliminate unnecessary procedural delay.

193. CAA § 113(h), 42 U.S.C. § 7413(h) (Supp. II 1990).

business entities, or senior corporate personnel who are the typical targets of civil enforcement actions. Drawing the distinction between "senior management" and "technician[s]" will involve fact-specific determinations most likely to occur in criminal law proceedings, since it is exceedingly rare for EPA in a civil action to sue corporate personnel in their capacity as individuals.¹⁹⁴

9. De Minimis Violations / Prosecutorial Discretion

Prior to its amendment, section 113(b) of the pre-1990 Act stated that EPA "shall, in the case of any person which is the owner or operator of a major stationary source, . . . commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty . . . , or both, whenever" certain conditions were met.¹⁹⁵ As was the case with other major environmental statutes, parties argued that the statute imposed a non-discretionary duty on EPA to prosecute all violations meeting the specified conditions. These arguments have met with varying degrees of success and resulted in some ambiguity and uncertainty for EPA.¹⁹⁶

Congress settled the question for civil judicial violations by amending section 113(b) to state that EPA "shall, as appropriate" file civil actions against violators.¹⁹⁷ In so doing, Congress appears to have intended to extend the grant of prosecutorial discretion to all de minimis civil and criminal violations addressed by section 113.¹⁹⁸ Given the clear state-

194. See discussion *infra* part III.D.1. (shifting scienter and the new definition of "person" subsection).

195. CAA § 113(b), 42 U.S.C. § 7413(b) (1988) (amended 1990) (emphasis added).

196. See, e.g., *City of Seabrook v. Costle*, 659 F.2d 1371, 1374 n.3 (5th Cir. 1981) (interpreting the "shall" in CAA section 113(a)(1) as discretionary); *Dubois v. Thomas*, 820 F.2d 943, 948-49 (8th Cir. 1987) (construing "shall" in Clean Water Act section 309(a)(1) as discretionary); *Sierra Club v. Train*, 557 F.2d 485, 490-91 (5th Cir. 1977) (same). But see *Save the Valley v. Ruckleshaus*, 565 F. Supp. 709, 710 (D.D.C. 1983) (interpreting "shall" in CAA section 167 as non-discretionary); *Green v. Costle*, 577 F. Supp. 1225, 1228-30 (D.D.C. 1983) (construing "shall" as mandatory in section 309(a)(3) of the Clean Water Act).

197. CAA § 113(b), 42 U.S.C. § 7413(b) (Supp. II 1990).

198. The House bill also would have created a new section 113(a)(6) which would

ment of congressional intent in the legislative history, and the longstanding rule that agency exercises of enforcement discretion are generally judicially non-reviewable,¹⁹⁹ the courts should give effect to the expressed congressional intent even in the absence of the enactment of clear discretionary language throughout all relevant sections of the Amendments.

B. Information Gathering Authority

Pre-1990 Act limits on information gathering and investigative authority constrained enforcement. In particular, regulated sources were under no obligation to demonstrate their compliance status to either EPA or the states on a continuing basis.²⁰⁰ Nor, in most cases, were sources required to submit monitoring data to EPA on an ongoing basis. Rather, EPA carried the burden of determining a source's compliance status through on-site inspections or the issuance of source-specific investigatory letters requiring the collection and submission of emissions data pursuant to section 114 of the Act.²⁰¹

have exempted section 113 from application to de minimis violations as determined by the Administrator. See House Bill as Passed, *supra* note 1, § 601, 136 CONG. REC. at H3233. The Senate bill contained no comparable provision and the conference committee decided to delete the House clause and achieve the same result through statements in the legislative history. See H.R. CONF. REP. NO. 952, 101st Cong., 2d Sess. 347 (1990), reprinted in 1990 U.S.C.C.A.N. at 3879 ("It is the conferees' intention to provide the Administrator with prosecutorial discretion to decide not to seek sanctions under section 113 for de minimis or technical violations in civil and criminal matters."); see also Statement of Senate Managers, *supra* note 1, at S16,951. Nevertheless, other provisions of the amended Act continue to employ the word "shall." See, e.g., CAA § 113(d)(5), 42 U.S.C. § 7413(d)(5) (Supp. II 1990) (penalty order enforcement) and CAA § 120(a)(2), 42 U.S.C. § 7420(a)(2) (Supp. II 1990) (noncompliance penalties). By its emphasis on "de minimis and technical" violations, the conference committee report appears to imply that the Agency does not have the authority to decline prosecution in cases of substantial, nontechnical violations. Perhaps Congress avoided the proposed House de minimis language to preclude renewed arguments that exercises of enforcement discretion should be subject to judicial review.

199. See generally KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 229 (1979). See also *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (decision not to prosecute or enforce civilly or criminally is generally within agency's absolute discretion).

200. See *United States v. SCM Corp.*, 667 F. Supp. 1110, 1124 (D. Md. 1987).

201. CAA § 114(a)(1), 42 U.S.C. § 7414(a)(1) (1988) (amended 1990); and see S. REP. NO. 228, *supra* note 1, at 368, reprinted in 1990 U.S.C.C.A.N. at 3751; see also *CED's v. EPA*, 745 F.2d 1092, 1098-99 (7th Cir. 1984) (upholding EPA's assertion of broad authority to require emission testing and monitoring under section 114), *cert.*

Only pursuant to a neutral inspection scheme, or on the basis of any information available suggesting noncompliance, could EPA compel sources to conduct tests, perform specified monitoring and demonstrate compliance.²⁰²

While neutral inspection schemes have their place in enforcement, inspections are costly and their hit-or-miss, random effectiveness can be a poor use of agency resources. Without accurate, representative and timely monitoring data upon which to rely, it was difficult to target the most egregious violators and greatest threats to public health and safety for inspection and remedial action. Effective targeting of specific facilities for investigations, like good detective work, required EPA to scour all sources for clues of noncompliance, act on hunches and rely on public tips. The system was cumbersome and very inefficient — a cat and mouse game that put a premium on sources obscuring their emissions profiles from EPA and the public.²⁰³

In addition, except in cases where the information request or inspection turned up “smoking gun” evidence of violations, section 114 was not entirely effective for investigating

denied, 471 U.S. 1015 (1985).

202. *Cf. Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). In *Barlow's*, the Court upheld the issuance of a warrant for inspection of a work place by OSHA when consent to enter was not voluntarily given by the owner. The Court set out two requirements for issuance of the warrant: probable cause that a violation had occurred or issuance of the inspection request pursuant to a neutral inspection scheme. EPA has stated that its policy is to apply this case to inspections under the Act. See EPA, *The Clean Air Act Compliance/Enforcement Guidance Manual* 3-15 to 3-16 (revised July 27, 1987); EPA, *Regional Office Criteria for Neutral Inspections of Stationary Sources — Amended Guidance* (May 13, 1981) (outlining EPA's criteria for selection of stationary sources for routine compliance inspections pursuant to the *Barlow's* decision). See also *Public Serv. Co. v. EPA*, 509 F. Supp. 720, 722-23 (S.D. Ind. 1981) (upholding section 114 warrants against constitutional challenges), *aff'd*, 682 F.2d 626 (7th Cir.), *cert. denied*, 459 U.S. 1127 (1982); see generally John A. Hamill, *EPA Entry and Post-Entry Rights With and Without Warrants*, 4 NAT'L ENVTL. ENF. J. 3 (May 1989).

203. In addition to other formidable obstacles, such as the inability to sue for past violations of the Act, citizen suit enforcement was greatly impeded by the lack of public access to useful emissions information. This article will not discuss the substantial impact of the Amendments on citizen enforcement of the Act. For a discussion of citizen suit enforcement, see David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 ENVTL. L. 2233 (1991).

past violations. The formality of section 114 letters gave sources the opportunity to close corporate ranks, tailor pre-emptive defenses and deny EPA access to critical information. For example, since the pre-1990 Act lacked authority to subpoena witnesses at the investigative stage to testify about past operating and recording practices, EPA had no other truly effective means to verify the critical facts prior to case filing. Though judicial actions provided federal rules of discovery, the inability to accurately determine the nature of the source's past operation effectively ensured that many cases would never be filed at all. Moreover, discovery might occur too late to uncover fresh memories, key witnesses and critical evidence.

In what could prove to be one of the most far reaching changes to the pre-1990 Act structure of enforcement, Congress created new enhanced monitoring and compliance certification procedures that shift the burden to each regulated source to demonstrate continuing compliance to state and federal authorities on a routine basis. As its model for shifting the burden to sources to demonstrate compliance, Congress looked to the similar approach embodied in the NPDES program of the Clean Water Act (CWA), which effectuates burden shifting through its discharge monitoring reporting requirements.²⁰⁴

Congress clarified that the Agency has the discretion to require a source (or groups or classes of sources) or any person who may have necessary information, to collect information on a "one-time, periodic, or ongoing basis," thereby eliminating possible arguments that section 114 authority was limited to one-time, case-specific applications to persons who owned or operated stationary sources. The Amendments also clarified that in addition to testing, monitoring and reporting concerning direct emissions of pollutants, EPA can require monitoring and recordkeeping of control equipment parameters (e.g., incinerator combustion temperature, pressure drop across a

204. S. REP. NO. 228, *supra* note 1, at 368, *reprinted in* 1990 U.S.C.C.A.N. at 3751; and *see, e.g.*, 40 C.F.R. § 122.41 (1991) (discharge monitoring reporting requirements).

bag house), production variables or other indirect data when direct monitoring is impractical.²⁰⁵ This authority will be of considerable assistance to EPA in developing acceptable surrogate instrument or parameter monitoring techniques to be used for compliance certification determinations where direct emission monitoring or sampling or continuous emission monitoring technology is unavailable, too costly, or otherwise impractical. Further, in addition to the existing section 114 authority, the Amendments add provisions clarifying that EPA can prescribe auditing procedures in addition to monitoring methods,²⁰⁶ prescribe sampling procedures and specified periods for emissions sampling,²⁰⁷ and require the submission of compliance certifications on a case-by-case basis.²⁰⁸ These changes arm EPA with potent and clear authority to accurately and routinely determine any source's compliance status and to generate the information necessary for sound rule development²⁰⁹ and virtually guarantee that EPA enforcement actions will be easier to develop and prove.

205. CAA § 114(a)(1)(E), 42 U.S.C. § 7414(a)(1)(E) (Supp. II 1990).

206. CAA § 114(a)(1)(C), 42 U.S.C. § 7414(a)(1)(C) (Supp. II 1990). As the Agency and States move towards market-based pollution allowance trading regimes, which rely heavily on source monitoring, record-keeping, and reporting to accurately quantify emissions, the ability to require source self-audits will become paramount to enforcement and compliance monitoring. See *New Rules Harness Power of Free Markets to Curb Air Pollution*, WALL ST. J., Apr. 14, 1992, at A1 (discussing new CAA market based programs).

207. CAA § 114(a)(1)(D), 42 U.S.C. § 7414(a)(1)(D) (Supp. II 1990).

208. CAA § 114(a)(1)(F), 42 U.S.C. § 7414(a)(1)(F) (Supp. II 1990). The Amendments also eliminated *some* references to the Administrator in the masculine form. Compare CAA § 114(a)(1)(E), 42 U.S.C. § 7414(a)(1)(E) (1988) (amended 1990) with CAA § 114(a)(1)(G), 42 U.S.C. § 7414(a)(1)(G) (Supp. II 1990). Indicative of the seat of the pants, eleventh hour decision-making that characterized passage of the Amendments, the language in section 114 concerning section 129 was amended in two separate places resulting in two different versions of the language. Compare Clean Air Act Amendments of 1990, Pub. L. No. 101-549 § 302(c), 104 Stat. 2399, 2574 (1990) (conforming amendments) with Clean Air Act Amendments of 1990, Pub. L. No. 101-549 § 702(a)(1), (2), 104 Stat. 2399, 2680 (1990).

209. Amended section 114(a) allows information gathering in furtherance of development of SIPs, new source performance standards (NSPS), section 112 (MACT) emissions standards and solid waste combustion regulations. CAA § 114(a), 42 U.S.C. § 7414(a) (Supp. II 1990).

1. Enhanced Monitoring and Compliance Certification

New section 114(a)(3) requires the Administrator to promulgate regulations by November 15, 1992, to require any person who owns or operates a major stationary source to perform "enhanced monitoring and . . . [submit] compliance certifications."²¹⁰ In addition, under the title V permit program provisions, each permit is required to set forth, *inter alia*, compliance certification requirements sufficient to assure compliance with the terms and conditions of the permit.²¹¹ Provisions in title V also state that the permit program implementation regulations must require each permit to mandate at a minimum, annual compliance certifications and prompt reporting of any deviations from permit requirements to the permitting authority.²¹² Compliance certifications and enhanced monitoring data will be available to the public under section 114(c) and sections 502(b)(8) and 503(e), applicable to sources subject to operating permit requirements.²¹³

The amended Act sets out minimum requirements for compliance certifications, which EPA can supplement by regulation.²¹⁴ The certification must include: (1) an identification of each requirement for which compliance is being certified;²¹⁵

210. CAA § 114(a)(3), 42 U.S.C. § 7414(a)(3) (Supp. II 1990). EPA currently has a working-group formed to complete this task. BNA, *Outlook for Pending Rulemaking*, at 1991 (Nov. 1991).

211. CAA § 504(c), 42 U.S.C. § 7661c(c) (Supp. II 1990).

212. CAA §§ 114(c), 502(b)(2), 503(b)(2), 42 U.S.C. §§ 7414(c), 7661a(b)(2), 7661b(b)(2) (Supp. II 1990).

213. Section 503(e) of the CAA states that section 114(c) trade secret protection is available to information submitted in the permitting process. CAA § 503(e), 42 U.S.C. § 7661b(e) (Supp. II 1990). However, section 114(c) trade secret protection does not extend to "emission data." CAA § 114(c), 42 U.S.C. § 7414(c) (1988); 40 C.F.R. § 2.301(e) (1991). "Emission data" is defined broadly by EPA. 40 C.F.R. § 2.301(a)(2) (1991); *see also* RSR Corp. v. EPA, 588 F. Supp. 1251 (N.D. Tex. 1984) (EPA's determination that documents were "emission data" not entitled to confidential treatment was arbitrary and capricious). As noted above, section 114(a) was amended to allow EPA to require indirect data and equipment parameter monitoring in certain cases. CAA § 114(a)(1)(E), 42 U.S.C. § 7414(a)(1)(E) (Supp. II 1990). Unless courts were to determine that this information did not qualify as "emission" data, trade secret status would not apply to any monitoring data required to be submitted to state or federal authorities pursuant to title V or section 114.

214. CAA § 114(a)(3), 42 U.S.C. § 7414(a)(3) (Supp. II 1990).

215. CAA § 114(a)(3)(A), 42 U.S.C. § 7414(a)(3)(A) (Supp. II 1990).

(2) the compliance status;²¹⁶ (3) the method used for determining the compliance status of the source with the requirement;²¹⁷ and (4) whether compliance is continuous or intermittent.²¹⁸ Furthermore, the statute clarifies that submission of a compliance certification in no way limits EPA's authority to investigate or otherwise implement the Act.²¹⁹

It is important to note here that the source is required to engage in an analysis of its past operating practices and form a conclusion as to its compliance status. Thus, EPA, the states, and the public will be provided direct and regular access to a stream of information that will identify violators, provide useful evidence for proving violations, and deliver sound information upon which to target further enforcement and regulatory activity.²²⁰ The value and reliability of the data for civil purposes is enhanced by the imposition of felony criminal liability for false reporting, knowing omissions, and misleading statements.²²¹

Although the statute does not define what is meant by "enhanced" monitoring, the legislative history suggests that Congress intended that the "enhanced" monitoring data required by section 114(a)(3) should form the basis for compliance certifications. The House committee report stated that the new provision "clarifies and confirms that EPA has authority under section 114(a) to require enhanced monitoring and to require such monitoring *in* compliance certifications."²²² In conformity with this view, in its preliminary public pronouncements on the enhanced monitoring and compliance certification rulemaking, EPA has interpreted section 114(a)(3) as permitting the use of "enhanced" monitoring information as the basis for compliance certifications.²²³

216. CAA § 114(a)(3)(C), 42 U.S.C. § 7414(a)(3)(C) (Supp. II 1990).

217. CAA § 114(a)(3)(B), 42 U.S.C. § 7414(a)(3)(B) (Supp. II 1990).

218. CAA § 114(a)(3)(D), 42 U.S.C. § 7414(a)(3)(D) (Supp. II 1990).

219. CAA § 114(a)(3), 42 U.S.C. § 7414(a)(3) (Supp. II 1990).

220. See Buente, *supra* note 203, at 2243-45.

221. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2) (Supp. II 1990).

222. H.R. REP. NO. 490, *supra* note 1, at 394 (emphasis added).

223. See *infra* note 228 and accompanying text (discussion of PUBLIC DOCUMENT).

Throughout the debate of the Amendments in the 101st Congress, the legislative proposals concerning compliance certifications and enhanced monitoring remained virtually unchanged from the bill originally submitted by the Administration. However, the House bill sent to the conference committee contained a provision that exempted from disclosure in compliance certifications, any information "subject to applicable law concerning self-incrimination."²²⁴ The Senate bill contained no comparable provision, but the committee report stated its understanding that compliance certifications could be used as evidence in civil and criminal actions.²²⁵ Nevertheless, the conferees deleted the language concerning self-incrimination from the final conference agreement.²²⁶ Thus,

224. House Bill as Passed, *supra* note 1, § 602(b), 136 CONG. REC. at H3235.

225. See S. REP. NO. 228, *supra* note 1, at 368-69, reprinted in 1990 U.S.C.A.N. at 3751-52 ("[C]ompliance certifications and emission data submitted pursuant to this authority will facilitate enforcement, due in part to the fact that such data and certifications can be used as evidence. Sources are subject to criminal sanctions for any false statements, omissions, and misrepresentations contained in their submissions.").

226. CAA § 113(a)(3), 42 U.S.C. § 7413(a)(3) (Supp. II 1990). Congress is presumed to have known that it was unnecessary to write explicit statutory language for the Fifth Amendment to apply in either criminal or civil proceedings. See, e.g., *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (privilege applies in civil and criminal proceedings); *Kastigar v. United States*, 406 U.S. 441 (1972) (privilege applies to any proceeding civil or criminal, administrative or judicial, investigatory or adjudicatory); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (elected representatives are presumed to know the law). Possibly this explains why the conference committee deleted the language from the final agreement. However, the House language concerning self-incrimination may have been an attempt to cast doubt on the procedural protections Congress intended to apply to compliance certifications admitting *civil* violations, which ordinarily are not entitled to protection by the self-incrimination clause of the Fifth Amendment. See *United States v. Ward*, 448 U.S. 242, 248 (1980). Such an ambiguity might have opened the provision to arguments under the "applicable law" that Congress intended the privilege against self-incrimination to apply in proceedings for civil penalties based on claims the Act was unduly punitive or "quasi-criminal" in nature. See *id.* at 248-49 (first, courts must determine whether the legislature intended the penalty to be civil or criminal in nature; second, if the penalty was intended to be civil, courts must determine if the statutory scheme was so punitive either in purpose or effect so as to negate that intention); *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956). Although in *Ward* a similar argument was addressed and rejected under self-reporting provisions of the Clean Water Act, the argument clearly is not frivolous. See *Ward*, 448 U.S. at 254; see also *United States v. Nevada Power Co.*, No. 87-861, slip op. 6-8 (D. Nev. May 31, 1990) (applying *Ward* factors to dismiss affirmative defenses that penalty scheme in section 113(b) of the Clean Air Act vio-

compliance certifications that show periods of noncompliance can be expected to be relied upon by EPA and state enforcement authorities as evidence to be used against them in civil enforcement actions.²²⁷

The enhanced monitoring and compliance certification provisions will subject industry air pollution practices to heightened scrutiny by EPA, state, and citizen enforcers. Better quality, more frequently reported data concerning industry compliance will allow facility owners and operators to be held more accountable for noncompliant activity and will increase the likelihood that enforcement will be more swift and more certain.

2. Enhanced Monitoring and Compliance Certification Rulemaking Status

In August of 1991, EPA distributed a Public Document stating its preliminary positions and interpretations of the enhanced monitoring and compliance certification (EM/CC) provisions in the Act.²²⁸ EPA prepared the document in conjunc-

lated defendant's Fifth and Sixth Amendment rights). Thus, the language in the House bill concerning self-incrimination appears to have had the potential to emasculate the compliance certification requirements. Removal of the self-incrimination language from the final law would appear to reinforce the view that compliance certifications may effectuate the burden shifting "similar to the reporting requirements" of the NPDES program. See S. REP. NO. 228, *supra* note 1, at 368, *reprinted in* 1990 U.S.C.C.A.N. at 3751.

227. Indeed, source self-certification of non-compliance under the Act is similar to the discharge monitoring reporting requirements under the Clean Water Act, which have been held to constitute admissions sufficient to support liability on summary judgment. See, e.g., *Student Pub. Interest Research Group v. Monsanto*, 600 F. Supp. 1479, 1485 (D.N.J. 1985); *Student Pub. Interest Research Group v. Fritzche, Dodge & Olcott*, 579 F. Supp. 1528, 1538 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985); *Student Pub. Interest Research Group v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1400 (D.N.J. 1985).

228. Enhanced Monitoring and Compliance Certification Rulemaking, 56 Fed. Reg. 37,700 (Aug. 8, 1991) (notice of document availability and announcement of a public meeting on August 22, 1991); EPA PUBLIC INFORMATION DOCUMENT: ENHANCED MONITORING AND COMPLIANCE CERTIFICATION, Air Docket No. A-91-52, 2 (August 1991) [hereinafter PUBLIC DOCUMENT]; see also, *EPA Floats Plan To Require Rigorous Monitoring For All Major CAA Sources*, INSIDE EPA, Aug. 16, 1991, at 1; *Utilities Fear Enhanced CAA Monitoring Data Could Overstate Violations*, INSIDE EPA, Aug. 30, 1991, at 7. EPA included a disclaimer in the document that "the current

tion with its mandate to promulgate rules to provide guidance and implementation of EM/CC requirements, and to further a more public approach to major rulemaking piloted by the Office of Air and Radiation involving "roundtable" public participation prior to the proposal of regulations.²²⁹

The Public Document noted that the proposed operating permit program includes elements relating to title V monitoring and compliance certification²³⁰ and proposed to implement the title VII provisions through the operating permit program. The operating permit program requires, at a minimum, submission of an annual compliance certification, submission of monitoring reports every six months and prompt notification to the permitting authority of any "deviations" from the terms and conditions of the permit.²³¹ Certifications and all

approach is still a preliminary conceptual position that does not reflect a final EPA position" and the Agency requested comment on its suggested approach. See PUBLIC DOCUMENT, *supra*, at 2.

229. See Novello, *supra* note 5, at 10,514, n. 30; see also Reilly May Seek Agencywide Use of CAA Consensus-Building Approach, INSIDE EPA, Nov. 1, 1991, at 3-4; Some In Industry Accuse EPA Air Chief of Unethical 'Dealing' on CAA Regs, INSIDE EPA, Dec. 20, 1991, at 3-4; Air Chief Defends Consensus Rulemaking Against Industry Attacks, INSIDE EPA, Dec. 20, 1991, at 4.

230. See Operating Permit Program, 56 Fed. Reg. 21,712, 21,774-76 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.6(a)(3), 70.6(b), 70.6(c)(1)-(2), 70.6(c)(6) and 70.6(c)(6)(iii)) (proposed rule). The preamble states that:

Certifications . . . must include any periods of noncompliance, reasons for the noncompliance, how noncompliance was corrected, and how it will be prevented in the future. . . . The compliance certification must document not only the current compliance status at the time of preparation of the report, but also whether compliance over the reporting period was continuous or intermittent (i.e. whether there were periods of noncompliance).

Preamble, *supra* note 13, at 21,736-37. Notwithstanding this language in the preamble, the rule itself appears to condone the use of initial compliance determination methods (sometimes referred to as compliance "snapshots"), as opposed to methods capable of determining continuing compliance. See 56 Fed. Reg. 21,776 (May 10, 1991) (to be codified at 40 C.F.R. § 70.6(c)(6)(iii)(D)) (proposed rule). On the other hand, the title VII rule as initially conceived by the EPA workgroup, would impose a monitoring system selection criteria "that will ensure that a monitoring method is used that is sufficiently reliable and timely to show whether an affected unit is operating in compliance with the applicable emissions limit or standard." No particular type of monitoring system will be required, "so long as the selected system provides a reasonable assurance that any period of noncompliance with the applicable emissions limit will be identified." PUBLIC DOCUMENT, *supra* note 228, at 4.

231. PUBLIC DOCUMENT, *supra* note 228, at 2-3. The concept of a "deviation" is

reports must be signed by a responsible corporate official who shall certify its truth, accuracy and completeness.²³² Upon promulgation, the EM/CC rules will become "applicable requirements" under the Act, necessitating that the permitting authority include them as enforceable terms and conditions in each source's operating permit.²³³

The EM/CC rules propose to require sources to base compliance certifications on enhanced monitoring data generated by a system proposed by the source and selected by the permitting authority during the permitting process.²³⁴ Selection of the appropriate monitoring system, although flexible, will require that the monitoring method selected provide sufficient timely and reliable data to assure that the source is operating in compliance and that the monitoring system is capable of reasonably assuring that all periods of noncompliance will be identified.²³⁵ According to the Public Document, the rule might also require that the selected enhanced monitoring system be subject to certain performance specifications, calibration requirements and quality assurance procedures.²³⁶ Semi-annual enhanced monitoring reports, modelled on excess emission reports currently required under the NSPS, *inter alia*, will include the number and duration of deviations from the enhanced monitoring standard employed, the reasons for the deviations, if any, preventive or corrective measures taken, an accounting of monitoring down time and the total operating time of the emissions unit during the reporting pe-

intended to include any excess emissions or deviation from an established limit. This includes measurements that fall below a minimum standard (e.g., an incinerator combustion temperature limit) as well as failure to keep records of activities required by work practice rules (e.g., recording leak detection and repair activity required by the benzene NESHAP, 40 C.F.R. pt. 60 subpart J). In addition, the EPA will have to define what is meant by "prompt" reporting of deviations since Congress was silent on the issue.

232. 56 Fed. Reg. 21,712, 21,774, 21,775 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.5(b)(10), 70.6(c)(2)) (proposed rule).

233. CAA § 504(a), 42 U.S.C. § 7661c(a) (Supp. II 1990); 56 Fed. Reg. 21,712, 21,774-76 (May 10, 1991) (to be codified at 40 C.F.R. §§ 70.6(a)(3), 70.6(c)(1)-(2), 70.6(c)(6)) (proposed rule).

234. See PUBLIC DOCUMENT, *supra* note 228, at 3-4.

235. See PUBLIC DOCUMENT, *supra* note 228, at 4.

236. See PUBLIC DOCUMENT, *supra* note 228, at 5.

riod.²³⁷ The Public Document takes the position that all deviations from the enhanced monitoring system requirements must be reported regardless of whether the source believes a violation has occurred so that independent determinations can be made by appropriate authorities and the propriety of corrective actions can be assessed.²³⁸ Additionally, EPA has suggested that sources found in noncompliance will thereafter be required to submit quarterly monitoring reports documenting deviations from the applicable requirements of the Act as expressed in the operating permit.²³⁹

Under this proposal, enhanced monitoring and compliance certifications would apply to every major stationary source that is subject to the operating permit requirements.²⁴⁰ Under the proposed operating permit rule, a permit for a major source must address all applicable requirements for all regulated emissions units, regardless of whether each emission unit emits a pollutant for which the source is a major source.²⁴¹ But under EPA's preliminary approach, the title VII EM/CC regulations will only apply to emission units at the source for which the source is classified as "major."²⁴² In this paradigm, a "major" source for purposes of the permitting program will have to implement monitoring and certify compliance covering all regulated emissions units pursuant to 40 C.F.R. part 70 and title V, but will only be required to perform "enhanced" monitoring and compliance certification pursuant to section 114(a)(3) for each emission unit concerning the pollutants for which it is major. Therefore, unfortunately, there is the potential, if not the likelihood, that sources will have at least two distinct compliance certification

237. See PUBLIC DOCUMENT, *supra* note 228, at 3; see also 40 C.F.R. § 60.7(c) (excess emission reports).

238. See PUBLIC DOCUMENT, *supra* note 228, at 4.

239. See PUBLIC DOCUMENT, *supra* note 228, at 1.

240. 56 Fed. Reg. 21,712, 21,768-69 (May 10, 1991) (to be codified at 40 C.F.R. § 70.2(r)) (proposed rule); see also CAA §§ 501(2), 502(a), 42 U.S.C. §§ 7661(2), 7661a(a) (Supp. II 1990). See *supra* note 22 for a discussion of "major source" for purposes of the operating permit program.

241. 56 Fed. Reg. 21,712, 21,770 (May 10, 1991) (to be codified at 40 C.F.R. § 70.3(c)(1)) (proposed rule); see also Novello, *supra* note 5, at 10,516.

242. PUBLIC DOCUMENT, *supra* note 228, at 2.

and monitoring requirements that will have to be complied with independently.

3. Subpoena Authority

Section 307(a)(1) of the pre-1990 Act permitted the Administrator to "issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and [to] administer oaths" in a very limited range of circumstances.²⁴³ Administrative subpoenas could only be issued in proceedings related to presidential determinations of regional or national air quality emergencies; manufacturer requests for waivers of carbon monoxide emissions standards for new light duty vehicles; information requests for the Administrator's report to Congress on the progress of implementation of new motor vehicle engine standards for light duty vehicles; and information requests in support of determinations concerning fuel additive regulations.²⁴⁴ EPA was not authorized to use administrative subpoenas in enforcement actions.²⁴⁵

Consonant with the overall thrust of the Amendments, which shift the emphasis in air enforcement from federal courts to the presumptively more expeditious and cost-effective administrative forum,²⁴⁶ Congress was intent on updating the subpoena authority to reflect recent experience under the Toxic Substances Control Act²⁴⁷ and the Comprehensive Environmental Response, Compensation and Liability Act.²⁴⁸ Under these laws subpoenas have proven to be broad, power-

243. CAA § 307(a)(1), 42 U.S.C. § 7607(a)(1) (1988) (amended 1990).

244. *Id.*

245. Indeed, the lack of subpoena authority in the Act posed such a problem for air enforcement that EPA occasionally utilized TSCA's broadly worded subpoena provision to develop cases. *See* TSCA § 111(c), 15 U.S.C. § 2610(c) (1988). A similar use of the TSCA subpoena authority was memorialized and upheld in *EPA v. Alyesko Pipeline Serv. Co.*, 836 F.2d 443 (9th Cir. 1988) (use of TSCA subpoena for CWA investigation).

246. *See* S. REP. NO. 228, *supra* note 1, at 361-62, *reprinted in* 1990 U.S.C.C.A.N. at 3744-45.

247. TSCA § 11(c), 15 U.S.C. § 2610(c) (1988).

248. CERCLA § 109(a)(5), 42 U.S.C. § 9609(a)(5) (1988). *See* S. REP. NO. 228, *supra* note 1, at 369-70, *reprinted in* 1990 U.S.C.C.A.N. at 3752-53.

ful, and persuasive enforcement tools.²⁴⁹

The Amendments greatly expand the scope of matters subject to subpoena authority. Specific references to manufacturer requests for waivers of emissions standards were deleted²⁵⁰ and the authority was broadened to inquiries in connection with "any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the Act"²⁵¹ The expanded scope of authority also includes, but is not limited to; federal enforcement proceedings; requests for information; record-keeping; inspections; monitoring and entry to facilities; non-compliance penalty proceedings; solid waste incineration rule making; new source review orders; mobile source enforcement proceedings; emergency orders and federal procurement requirements.²⁵²

The transformed subpoena authority has the potential to significantly bolster air enforcement case development. For example, in investigations of building renovations regulated by the asbestos NESHAP²⁵³ it is frequently not possible for EPA to determine whether a source has violated the requirement that all asbestos containing material be kept adequately wet during removal unless the inspector visits a site and actually views the dry removal. Subpoenas could be used to question employees under oath about the removal procedures followed during a particular suspect renovation. This might help EPA to discourage the practice of some asbestos contractors who deny EPA inspectors entry to the site for an inspection during business hours, necessitating that EPA go through the time-consuming process of obtaining a warrant for entry. Contractors know that by the time EPA returns with the warrant,

249. See, e.g., *EPA v. Aleyska Pipeline Serv. Co.*, 836 F.2d 443 (9th Cir. 1988); see also John A. Hamill, *EPA Administrative Investigative Tools: An Inside Perspective*, 4 J. ENVTL. L. & LIT. 85 (1989).

250. Pub. L. No. 101-549, § 703, 104 Stat. 2933, 2681 (1990).

251. CAA § 307(a)(1), 42 U.S.C. § 7607(a)(1) (Supp. II 1990).

252. *Id.* Earlier versions of the legislation contained, in addition to the enumerated sections ultimately adopted, the catchall phrase "or to otherwise carry out the provisions of the Act." See, e.g., House Bill as Introduced, *supra* note 1, § 605; Senate Report Bill, *supra* note 1, § 605, 136 CONG. REC. at S76.

253. 40 C.F.R. pt. 61, subpart M (1991).

the demolition can be halted or completed and solid evidence of violations can be made unavailable, since information requests under section 114 can only recover "records" or documents which are frequently not material to proving dry stripping violations. In the future, EPA could issue the subpoena at the time of the original entry refusal, returnable shortly thereafter. This will allow EPA to gather fresh testimony of recollections of the removal operation from those actually involved. EPA could also issue subpoenas to plant operators to have them explain discrepancies in monitoring reports, accidental releases, or bypasses of control equipment.

Although as of June 1992, EPA has issued only one investigative subpoena under the Act,²⁵⁴ the authority is likely to be used aggressively in appropriate circumstances in the future. Already, the availability of subpoenas has proven to be persuasive in encouraging source owners, operators and employees to voluntarily discuss unexplained, potentially violative conduct, where in the past EPA was without recourse.

4. "Sufficient Cause" Defenses

Courts have imposed civil penalty liability on owners and operators that fail to respond to EPA's information requests under the Act and other statutes.²⁵⁵ In conjunction with expansion of the subpoena authority under section 307(a) and the information collection and compliance certification authority under section 114, Congress also created a defense to the assessment of penalties for violating these sections when "sufficient cause" could be shown for failure to comply.²⁵⁶

254. EPA Region V has recently issued the first subpoena under the Amended Act in an asbestos NESHAP demolition case similar to the circumstances posed above. EPA Press Release, *EPA Uses New Air Act for First Time to Subpoena Asbestos Information* (June 12, 1992).

255. See, e.g., *United States v. Hugo Key & Son, Inc.*, 731 F. Supp. 1135 (D.R.I. 1989) (CAA); *United States v. Charles George Trucking Co.*, 624 F. Supp. 1185 (D. Mass. 1986), *aff'd*, 823 F.2d 685 (1st Cir. 1987) (RCRA); *United States v. Liviola*, 605 F. Supp. 96 (N.D. Ohio 1985) (RCRA and CERCLA); see generally Hamill, *supra* note 249.

256. CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (Supp. II 1990). Amended section 113(e)(1) states: "The court shall not assess penalties for noncompliance with administrative subpoenas under section 307(a), or actions under section 114 of this Act

Neither the statute nor the legislative history offer any clarification of what constitutes "sufficient cause." Applying Fourth Amendment principles of reasonableness as well as Fifth Amendment due process requirements, courts have construed that potential targets may not avoid EPA's information requests unless they have an "objectively reasonable justification for refusing to respond."²⁵⁷ It seems reasonable to conclude that the sufficient cause defense to EPA's information gathering authority under the Act will be construed similarly. Thus, a targeted source might legitimately avoid responding to an information request as well as avoid penalties if the source can show the inquiry is beyond EPA's delegated authority or is otherwise unlawful. For example, the sufficient cause defense finds potential application in the area of trade secret protection. Under sections 307(a) and 114 any trade secret information submitted is entitled to confidential treatment by EPA.²⁵⁸ In addition, any information submitted under either section is generally available to the public.²⁵⁹ Thus, one might conclude that "sufficient cause" to violate would exist where the information requested under sections 114 or 307(a) included trade secrets and the Agency prospectively determined to disclose the information to the public in

where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action." *Id.* The location of this provision in the penalty assessment section of the Amended Act and its characterization as a "defense" suggests that Congress did not intend to allow issues of sufficient cause to be raised outside the context of an enforcement action, since an enforcement action is the only method for EPA to obtain civil penalties or for a source to raise any "defense." This provision is consistent with the view that information requests and subpoenas in general are not final actions and therefore are not subject to pre-enforcement judicial review. *See also infra* note 261 and *supra* section II.A.7 (pre-enforcement review of notices of violation, administrative orders and information requests subsection).

257. *U.S. v. Charles George Trucking Co.*, 823 F.2d 685, 691 (1st Cir. 1987) (construing RCRA) (additional cases cited therein); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 388-92 (8th Cir. 1987) (construing CERCLA); *see also* *See v. Seattle*, 387 U.S. 541 (1967) (Fourth Amendment reasonableness standard applies to review of administrative subpoenas); *supra* notes 201-02 (concerning entry and inspection authorities).

258. CAA §§ 307(a), 114(c), 42 U.S.C. §§ 7607(a), 7414(c) (1988 & Supp. II 1990); 40 C.F.R. § 2.301 (1991).

259. CAA § 114(c), 42 U.S.C. § 7414(c) (1988); 40 C.F.R. § 2.301(f) (1991).

contravention of established administrative procedures.²⁶⁰

Perhaps Congress created the defense because it was concerned that the increased liability and stringency in penalty assessment under the Act would chill persons from asserting legitimate objections to overly intrusive and unreasonable information requests. If this was the goal, the defense may provide only limited comfort from the reach of those sweeping authorities. Since it is doubtful that either section 114 information requests or section 307(a) subpoenas are subject to pre-enforcement review,²⁶¹ the aggrieved person will have to approach EPA informally with a justification for its failure to comply or wait for EPA to bring an enforcement action to raise the "sufficient cause" defense. This will still be a high-risk gamble since under the new section 113(e) (concerning burden shifting for penalty assessments), once EPA proves its *prima facie* case for failure to comply with the information request or subpoena, for purposes of determining the number of days of violation, noncompliance will be considered continuous. Sources will face the possibility of substantial penalties should the court reject application of the "sufficient cause" defense, but in appropriate cases judges will, of course, have ample discretion to reduce or eliminate penalties altogether.

5. Use of Independent Contractors for Inspections

Under the pre-1990 Act, EPA's authority to use contrac-

260. The existence of trade secret status does not entitle a party to refuse to submit the information to EPA, rather it only provides protection from public release of the information. CAA § 114(c), 42 U.S.C. § 7414(c) (1988); 40 C.F.R. § 2.301(e) (1991). Upon submission of information to EPA, administrative remedies are available to contest EPA confidentiality determinations. *See generally* 40 C.F.R. pt. 2, subpart B (1991). Nevertheless, where a person has reason to believe EPA intended to release information claimed confidential without complying with the procedural requirements, a source would arguably be justified in not complying with the information request.

261. *Cf. Wearly v. F.T.C.*, 616 F.2d 662 (3d Cir. 1980) (court dismissed action to review trade secret status of information subpoenaed by FTC because action not ripe until subpoena was enforced). *See also Dow Chemical v. EPA*, 635 F. Supp. 126 (M.D. La. 1986) (section 114 information request not subject to pre-enforcement review), *aff'd on other grounds*, 832 F.2d 319 (5th Cir. 1986); *see discussion supra* part II.A.7 (pre-enforcement review of notices of violation, administrative orders and information requests subsection).

tors to perform inspections was hotly contested. Circuit courts of appeals split on the issue of whether the term "authorized representative" (in pre-1990 Act section 114(a)(2)) included persons employed by EPA on a contract basis for the purpose of performing inspections and on-site emissions sampling.²⁶² A dual state of affairs persisted as EPA, standing by its interpretation, continued to affirm its power to use contract inspectors in every jurisdiction, except in the sixth and tenth circuits which had struck down the practice.²⁶³ EPA guidance sets out a strategy for pursuing favorable judicial resolution of the matter in the courts.²⁶⁴ During consideration of the Amendments, Congress was unable to reach a consensus on whether the practice should be condoned and, as a result, the Supreme Court may ultimately be called upon to decide the issue.

Seeking to confirm EPA's position, the Administration's bill included a provision amending section 114(a)(2) to clarify that EPA was empowered to use contractors to enter and inspect facilities for compliance with the Act.²⁶⁵ In support of its proposal, the Senate Report pointed to EPA's limited inspec-

262. See *Stauffer Chem. Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1981) (disallowing contractor inspections); accord *United States v. Stauffer Chem. Co.*, 684 F.2d 1174 (6th Cir. 1982), *aff'd on other grounds*, 464 U.S. 165 (1984). But see *Bunker Hill Co. v. EPA*, 658 F.2d 1280 (9th Cir. 1981) (upholding EPA's use of contractor inspectors); accord *Aluminum Co. of America v. EPA*, 663 F.2d 499 (4th Cir. 1981). See also *In re Litton Indus. Automation Systems, Inc.*, No. TSCA I-89-1042 (Oct. 25, 1990) (allowing contractor inspections under TSCA § 11, 42 U.S.C. § 2610 (1988)).

263. See EPA, *Use of Contractors to Conduct Clean Air Act Inspections After the Supreme Court's Decision in United States v. Stauffer Chemical Co.*, at 3-4 (Feb. 22, 1984).

264. *Id.*; see also EPA, *The Clean Air Act Compliance and Enforcement Manual*, at 3-7 to 3-8 (July 22, 1987).

265. House Bill as Introduced, *supra* note 1, § 604(a). According to the Senate Report, the provision was modelled on CWA § 308(a)(4)(B), 33 U.S.C. § 1318(a)(4)(B) (1988) (stating that EPA or its "authorized representative (including an authorized contractor acting as a representative of [EPA])" may conduct inspections). See S. REP. No. 228, *supra* note 1, at 369, reprinted in 1990 U.S.C.C.A.N. at 3752. The Senate Bill as Passed, would have amended section 114(a)(2) to read as follows, adding the information contained in the parenthetical: "the Administrator or his authorized representative, (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials" may enter and inspect facilities in accordance with section 114. Senate Bill as Passed, *supra* note 1, § 603, 136 CONG. REC. at S4438.

tion resources and the Agency's frequent need for specialists knowledgeable of unique industrial processes.²⁶⁶ In contrast, the House Committee on Energy and Commerce reported the Administration's bill, H.R. 3030, out of committee after explicitly deleting the provision approving the use of contract inspectors and declined to confirm the position that under the pre-1990 Act, EPA possessed the authority to use contractors for inspections.²⁶⁷ The committee was apparently concerned about conflicts of interest and the potential for compromise of trade secrets and other confidential information. The committee made it clear that, in its view, "only Federal employees and officials should carry out [inspection] activities."²⁶⁸ The final conference agreement failed to adopt the Senate language and is silent on the contractor inspection issue, as is the conference report.²⁶⁹ Representative Dingell, a House manager of the Amendments and a member of the House-Senate conference committee, apparently believed the silence should be interpreted as a prohibition on EPA's use of contract inspectors.²⁷⁰ In contrast, the Statement of Senate Managers suggests that the absence of any explicit congressional language clarifying the issue means EPA should interpret the silence to allow the continued use of contractors for inspections.²⁷¹

EPA's 1984 contractor inspection policy remains in effect and the Agency has made no public indication that it intends to disavow the use of contract inspectors. Indeed, to the con-

266. S. REP. NO. 228, *supra* note 1, at 369, *reprinted in* 1990 U.S.C.C.A.N. at 3752.

267. See H.R. REP. NO. 490, *supra* note 1, at 395-96.

268. H.R. REP. NO. 490, *supra* note 1, at 396. The Senate version also addressed the trade secret concern by reaffirming that their misappropriation was criminally actionable. See Senate Report Bill, *supra* note 1, § 604(b), 136 CONG. REC. at S76; S. REP. NO. 228, *supra* note 1, at 369, *reprinted in* 1990 U.S.C.C.A.N. at 3752 (discussing proposed amendment to section 114(c) subjecting contractors to criminal liability under 18 U.S.C. § 1905 for unauthorized disclosure of trade secrets).

269. See H.R. CONF. REP. NO. 952, 101st Cong., 2d Sess. 347 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3879-80.

270. See 136 CONG. REC. E3714 (daily ed. Nov. 2, 1990) (extension of remarks made on Oct. 26, 1990 by Rep. Dingell) ("Congress did not authorize the use of contractors for enforcement . . .").

271. Statement of Senate Managers, *supra* note 1, at S16,952-53 (discussed under "contractor listings" section).

trary, in its proposed operating permits regulation, EPA has explicitly required each permit to include, in addition to inspection and entry requirements, a provision allowing the use of an authorized representative of the permitting authority, defined as "including an authorized contractor acting as a representative of the Administrator," to conduct inspections.²⁷² Predictably, in light of the heated debate surrounding the issue, this provision has been criticized.²⁷³ In the end, resolution of this issue will likely be decided by the courts without the benefit of clear guidance in the legislative history.

C. Liability, Penalties and Sanctions

The Amendments effectuated a number of important changes in the provisions concerning liability, penalties and sanctions. Among the pre-1990 Act's shortcomings was enforcement authorization for only a select number of specified provisions of the Act.²⁷⁴ In addition, ambiguities in the drafting of the Act and years of implementation and litigation revealed that many of the Act's key provisions relating to liability and penalties were susceptible to conflicting interpretations. Adverse Clean Water Act case law had cast doubt on EPA's longstanding interpretation that the statutory maximum penalties under the Clean Air Act applied to each violation, regardless of the number of violations on one day, and to each day of multi-day averaging periods.²⁷⁵ Other case law questioned the type of proof necessary for EPA to prove continuing violations and the manner in which courts should determine penalty assessment.²⁷⁶

272. 56 Fed. Reg. 21,712, 21,775 (May 10, 1991) (to be codified 40 C.F.R. § 70.6(c)(3)) (proposed rule).

273. See Novello, *supra* note 5, at 10,520 n.95.

274. For example, pre-1990 Act section 113(b)(3) only allowed EPA to initiate a civil action for violations of sections 111(e) (NSPS), 112(c) (NESHAPs), 119(g) (concerning pre-1977 Act suspension conditions in fuel-shortage related temporary compliance date extensions), 113(d)(5) (concerning coal conversion sources), 119 (primary nonferrous smelter orders), 323 (relating to the cost of certain vapor recovery equipment) or any regulation under Part B of the Act (relating to ozone). See CAA § 113(b)(3), 42 U.S.C. § 7413(b)(3) (1988) (amended 1990).

275. See *infra* notes 280-81 and 312 and accompanying text.

276. See *infra* notes 294, 306-08 and accompanying text.

The Amendments redress most of the infirmities in the pre-1990 Act concerning liability, penalties and sanctions. Importantly, the Amendments subject sources to enforcement for violation of "any" "requirement or prohibition" of all titles of the Act, except title II concerning mobile sources.²⁷⁷ Liability now clearly attaches for violations "including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under the Act" and for payment of any fees owed to the United States.²⁷⁸ Additionally, as discussed below, the Amendments clarified that in judicial cases the statutory maximum penalty applies to each violation irrespective of the number of violations on one day. Once EPA proves its *prima facie* case, in many cases continuing violations can be presumed. The duration of violations can be established by any credible evidence and the criteria for penalty assessment has been clarified. Further, the Amendments strengthen the federal procurement bar applicable to criminal and civil violators of the Act. However, the Amendments also create some unfortunate new potential ambiguities concerning the maximum liability exposure to which a source is subject under the administrative penalty order and field citation authorities.

1. Statutory Maximum Liability

Under the pre-1990 Act civil penalties were authorized up to amounts of "not more than \$25,000 per day of violation."²⁷⁹ EPA interpreted this language to mean \$25,000 per day for each violation.²⁸⁰ However, EPA was vulnerable to the argu-

277. CAA § 113(b), 42 U.S.C. § 7413(b) (Supp. II 1990). The "amendments fill an important gap in the Act, which currently does not subject the violators of any [sic] significant regulations and orders to criminal and civil sanctions." S. REP. NO. 228, *supra* note 1, at 361, reprinted in 1990 U.S.C.C.A.N. 3744. Title II of the Act, concerning mobile sources, has its own enforcement provisions. See CAA § 205, 42 U.S.C. § 7524 (Supp. II 1990).

278. CAA § 113(b)(2), 42 U.S.C. § 7413(b)(2) (Supp. II 1990).

279. CAA § 113(b), 42 U.S.C. § 7413(b) (1988) (amended 1990).

280. See EPA, *Clean Air Act Stationary Source Civil Penalty Policy*, at 6-7 (Sept. 12, 1984) (per day of each violation interpretation implicit in discussion of litigation practicalities); EPA, *Clean Air Act Stationary Source Civil Penalty Policy*, at 7 (Mar. 25, 1987) (same); see also, e.g., *United States v. SCM Corp.*, 667 F. Supp.

ment that the "per day of violation" language imposed a \$25,000 daily cap on penalties regardless of the number of separate violations that occurred during a single day.²⁸¹ To forestall this outcome, clarification of statutory maximum liability was a key goal of the Amendments.

Concerning civil judicial actions, the Amendments codified EPA's interpretation and amended the maximum liability language in the statute to "\$25,000 per day for *each* violation."²⁸² However, as concerns administrative penalty authority and field citations, Congress may have unwittingly resurrected the pre-1990 ambiguity by again stating maximum liability in terms of "per day of violation." The legislative history of the administrative penalty and field citation provisions does not show whether Congress intended the provisions to be interpreted differently from the section 113(b) civil judicial language, as clarified by the Amendments, and opens these provisions to challenge.

The legislative proposals introduced in each chamber concerning civil penalty liability and the statutory maximum days of violation were directed at clarifying existing authority concerning the "per day of violation" language in the pre-1990 Act.²⁸³ Concerning administrative penalty orders, field cita-

1110, 1125-26 (D. Md. 1987) (EPA sought more than \$25,000 for several violations on the same day); United States' Memorandum in Opposition to SCM's Motion in Limine and SCM's Motion to Conform the Relief Sought by Plaintiff, at 4, United States v. SCM Corp., No. R-85-9 (D. Md. Sept. 15, 1986) (quoting the complaint requesting penalties of "not more than \$25,000 per day of each violation"): Reporter's Transcript of Proceedings, at 19-25, United States v. Kaiser Steel Corp., No. 82-2623-IH (C.D. Cal. Jan. 26, 1984) (bench ruling announcing decision against Kaiser, upholding government position that statutory maximum penalties under CAA section 113(b) are properly construed to be per day for each violation, and imposing statutory maximum penalties for each of 33 violations).

281. This argument was successfully made to restrict EPA's interpretation of similar language in the CWA. See *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 611 F. Supp. 1542, 1554-56 (D.C. Va. 1985) (interpreting "\$10,000 per day of such violation" in CWA to mean a maximum \$10,000 per day liability, regardless of the number of violations), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated and remanded on other grounds*, 484 U.S. 49 (1987).

282. CAA § 113(b), 42 U.S.C. § 7413(b) (Supp. II 1990) (emphasis added).

283. Integral to that effort was the proposal to create a new "Penalty Assessment Criteria" section to further clarify penalty liability. CAA § 113(e), 42 U.S.C. § 7413(e) (Supp. II 1990). As stated by the Senate committee considering the Administration's

tions and penalty assessment criteria, the Senate and House bills introduced in the 101st Congress were identical in clarifying that in each case violations were per day for "each violation."²⁸⁴ In the House, the bill was subsequently modified (without any explanation) which resulted in, *inter alia*, deletion of the word "each" from all relevant sections of the bill.²⁸⁵ This version of the House bill was approved and sent to the conference committee.²⁸⁶

In the Senate, subsequent to the committee report of the bill, the field citation and penalty assessment criteria were amended. For field citations the maximum penalty was changed to "not to exceed \$5,000 *per inspection*" and total penalties were capped at \$25,000 per facility over a six month period.²⁸⁷ Otherwise, the "per day for *each* violation" language

proposal, the goal was for administrative penalty assessments "to be calculated using the same criteria specified in section 113(e) for use in section 113(b) court actions." S. REP. NO. 228, *supra* note 1, at 364, *reprinted in* 1990 U.S.C.C.A.N. at 3747. Throughout the legislative process, the Senate consistently advocated application of the same statutory maximum and penalty assessment criteria to both administrative penalties and judicial penalties assessed under section 113(b).

284. See House Bill as Introduced, *supra* note 1, § 601(l), (m); Senate Bill as Introduced, *supra* note 1, § 301(h), (i), 135 CONG. REC. at S11,157. After mark up by the Senate committee, the bill retained the same "each violation" language. Although the bill was not changed, the Senate Report explained that "[a]s a complimentary power to the Act's current civil penalty authority, new section 113(d) authorizes assessments of civil administrative penalties up to the same statutory maximum contained in section 113(b) for civil judicial penalties (\$25,000 per day for *each* violation)." S. REP. NO. 228, *supra* note 1, at 364-65, *reprinted in* 1990 U.S.C.C.A.N. at 3747-48 (the report also stated that "the amendment sets a cap of \$200,000 on administrative assessments for any *one* violation.") (emphasis added).

285. See House Report Bill, *supra* note 1, § 601, *reprinted in* H.R. REP. NO. 490 *supra* note 1, at 134-5 (penalty orders: "per day of violation"), 135 (field citation: "per day of violation") and 136 (penalty assessment criteria: "each day of violation"). The penalty assessment criteria section continued to apply to all civil subsections of section 113, including section 113(d). *Id.* § 601, *reprinted in* H.R. REP. NO. 490 at 136. Neither the motivation nor the rationale for these changes is discussed in the House Report. See *id.*, *reprinted in* H.R. REP. NO. 490 at 393-94.

286. House Bill as Passed, *supra* note 1, § 601, 136 CONG. REC. at H3233-35.

287. Senate Bill as Passed, *supra* note 1, § 601(i), 136 CONG. REC. at S4437 (emphasis added). Consistent with these changes, the penalty assessment criteria was also altered so that the duration of the violation section (section 113(e)(2)) no longer applied to field citations. *Id.* § 601(j), 136 CONG. REC. at S4437. Presumably this was necessary since maximum penalties were limited on the basis of each "inspection," not per day of violation. There does not appear to be any explanation for these

was retained. This version of the Senate bill went to the conference committee.

The conference agreement adopted the House "per day of violation" version of the field citation program.²⁸⁸ Concerning administrative penalty orders, language identical to the House "per day of violation" formulation was agreed upon, however, according to the Statement of Senate Managers, the adopted language was meant to give effect to the proposed *Senate* version of the law²⁸⁹ which had provided that maximum penalties were "per day for *each* violation." The legislative history provides no indication whether the omission of "each" was intentional or inadvertent, though according to the Statement of Senate Managers, the final language was intended to "*clarif[y]* that the penalties can amount to as much as \$25,000 per day of violation"²⁹⁰

Inevitably, arguments will be made that Congress considered and rejected maximum penalties per day for *each* violation for the field citation and administrative penalty programs. Viewing the legislative history as a whole, however, a more compelling argument can be made that Congress' expansive clarification in section 113(b) applies of equal force to the "per day of violation" language in section 113(d). Congress clearly expressed its intention in the Amendments to "clarify" that the "per day of violation" language in pre-1990 Act section 113(b) should be interpreted broadly to mean "per day of each violation."²⁹¹ The mere reiteration of the "per day of vio-

changes in the legislative history.

288. CAA § 113(d)(3), 42 U.S.C. § 7413(d)(3) (Supp. II 1990); *see also* Statement of Senate Managers, *supra* note 1, at S16,951-52. Arguably, this constituted an expansion of the more limited "per inspection" language in the Senate bill.

289. Statement of Senate Managers, *supra* note 1, at S16,951-52.

290. Statement of Senate Managers, *supra* note 1, at S16,952 (emphasis added). Concerning the duration of the violation penalty assessment criteria, the conference agreement adopted the language of the House bill (which stated that a "penalty may be assessed for each day of violation") and the Senate language excluding field citations from consideration under section 113(e)(2). *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 701, 104 Stat. 2679 (1990). But once again, according to the Statement of Senate Managers, the final language of both provisions was derived from the *Senate* bill. *See* Statement of Senate Managers, *supra* note 1, at S16,952.

291. *See* S. REP. No. 228, *supra* note 1, at 359, 364, *reprinted in* 1990 U.S.C.A.N. at 3742, 3747; H.R. REP. No. 490, *supra* note 1, at 390-91.

lation" language in the administrative penalty order and field citation sections of the statute, without any congressional explanation, does not support the inference that Congress intended the phrase to have a *more restrictive* meaning. Moreover, congressional "clarification" of the perceived ambiguity ratified long standing EPA policy and practice. If Congress had intended a more restrictive meaning it could have amended the language accordingly or, at least, discussed its intention to limit liability in the legislative history. During consideration of the Amendments the only intention Congress expressed on this topic was to expansively interpret the per day of violation language to apply to "each violation." Congressional silence should not be interpreted to overcome an expressed contrary congressional intention in the statutory scheme and legislative history.²⁹² Nevertheless, in light of the

292. Generally, courts must give effect to congressional intent where Congress has "directly spoken" to the question at issue. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-3 (1984). To determine whether Congress has directly spoken, courts must examine "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988). Courts must employ "traditional tools of statutory construction," to divine congressional intent. *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987)). Courts should also be reluctant to draw inferences from congressional inaction, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 220 (1983), and cognizant that congressional silence or "'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent." *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989) (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) and citing *Drummond Coal Co. v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984) (unexplained omission of one word from conference bill is unreliable indicator of congressional intent)).

While it is well settled that courts are to give effect to the "plain meaning" of a statute, there has been little consensus on the role of legislative history in discerning plain meaning. See generally 2A JABEZ G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 46.01 (Norman J. Singer ed., 5th ed. 1992); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1989) (examining judicial use of legislative history). Nevertheless, it has been said that "[l]anguage never seems plain enough in its meaning to forestall the hunt for enlightenment in the legislative . . . context," and courts routinely consult legislative history for such wisdom. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. REV. 195, 216 (1983). In the Amendments it seems clear that Congress "spoke" in both the statutory scheme and legislative history as a whole in support of statutory maximum penalties for each day of each violation, expressing a will worthy of judicial deference.

drafting ambiguity created by the inconsistent penalty liability language in the Amendments, court resolution of the issue may become necessary.

2. Penalty Assessment Criteria

Penalty assessment determinations under the pre-1990 Act required courts, in addition to "other factors," to take into consideration three specific criteria: (1) the size of the business; (2) the economic impact of the penalty on the business; and (3) the seriousness of the violation.²⁹³ Unfortunately, these vague criteria made it difficult for the courts to consistently apply the section 113(b) penalty factors.²⁹⁴ The Amendments attempted to provide better guidance by clarifying and expanding the penalty assessment criteria.

a. Penalty Assessment Factors

The Amendments created a new section 113(e) entitled "Penalty Assessment Criteria." In addition to clarifying and harmonizing various conflicting judicial interpretations, the Amendments added four new penalty assessment factors to be considered by the courts²⁹⁵ in fixing a penalty, all of which were already addressed to some degree by the EPA's Civil

293. CAA § 113(b), 42 U.S.C. § 7413(b) (1988) (amended 1990).

294. *See, e.g.*, *United States v. Louisiana Pacific Co.*, 682 F. Supp. 1141, 1163-66 (D. Colo. 1988) (court assessed \$65,000 for more than 30 days of knowing PSD violations, without determining the statutory maximum penalty; section 113(b) factors need not be treated equally or given equal weight); *United States v. SCM Corp.*, 667 F. Supp. 1110, 1125-28 (D. Md. 1987) (\$350,000 penalty assessed for 30 days of violations; statutory maximum determined; section 113(b) factors addressed); *United States v. Arkwright*, 697 F. Supp. 1229 (D.N.H. 1988) (court interpreted its discretion under section 113(b) to allow it to disregard six and one-half months of violations for penalty calculation purposes); *United States v. Chevron U.S.A., Inc.*, 639 F. Supp. 770, 779-80 (W.D. Tex. 1985) (assessing a penalty of over \$6 million for over 1000 violations: no statutory maximum determination; section 113(b) factors addressed); *cf. United States v. Mac's Muffler Shop, Inc.*, C85-138R, slip op. at 15, 17 (N.D. Ga. Nov. 4, 1983) (analogizing section 205 of the Act to section 113 and applying common law rule of remedies to determine penalty assessment).

295. The penalty assessment factors, including assessments for continuing violations as discussed below, also apply to penalty assessments in citizen suits brought under section 304(a) of the Act and administrative actions under section 113(d). CAA § 113(e)(1), (2), 42 U.S.C. § 7413(e)(1), (2) (Supp. II 1990).

Penalty Policy (e.g. economic benefit of noncompliance and good faith efforts to comply).²⁹⁶ The four new factors are: (1) the violator's full compliance history and good faith efforts to comply; (2) the duration of the violation as established by any credible evidence (including evidence other than the applicable test method);²⁹⁷ (3) previous payment by the violator of penalties assessed for the same violation; and (4) the economic benefit of noncompliance.²⁹⁸ With these additions, penalty assessment requirements under the CAA will be virtually identical to requirements in the CWA as amended in 1987.²⁹⁹ Indeed, the Statement of Senate Managers makes it clear that the Act's penalty assessment criteria "are intended to be applied in the same manner under this Act as the similar criteria

296. See *supra* note 280 (citations to stationary source civil penalty policies).

297. The CWA has no comparable provision. The new Act provision concerning the duration of violation will be discussed in more detail in the next section.

298. CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (Supp. II 1990). Adoption of the penalty assessment factors by Congress was not contentious and except for minor changes in syntax, the final law contained language identical to the provisions proposed by the Administration and approved by both House and Senate committees. The one key distinction was that the Conference Committee adopted the House version which applied the penalty assessment factors to courts *and* the Administrator — and thereby to decisions of Administrative Law Judges — where the Senate bill only applied them to the courts. Compare House Bill as Passed, *supra* note 1, § 601, 136 CONG. REC. at H3235 with Senate Bill as Passed, *supra* note 1, § 601(j), 136 CONG. REC. at S4437; see also Statement of Senate Managers, *supra* note 1, at S16,952. Congress was particularly concerned that when determining penalty assessments the courts and the Administrator consider the economic benefit the violator derived from noncompliance. See *id.* at S16,952 ("Violators should not be able to obtain an economic benefit vis-a-vis their competitors as a result of their noncompliance with environmental laws. The determination of economic benefit or other factors will not require an elaborate or burdensome evidentiary showing. Reasonable approximations of economic [sic] benefit will suffice."). This language sets out a virtually identical congressional intention as expressed in the legislative history of the 1987 amendments to the CWA. See S. REP. No. 50, 99th Cong., 1st Sess. 25 (1985).

299. See Water Quality Act of 1987, Pub. L. No. 100-4, § 313(c), 101 Stat. 7, 45 (1987). Compare CWA § 309(d), 33 U.S.C. § 1319(d) (1988) with CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (Supp. II 1990). As noted above, and further discussed below, one critical distinction between the two laws is that the amended CAA contains the duration of the violation assessment requirement. The addition of this provision, in conjunction with the presumption and burden shift factor set out in section 113(e)(2), will likely result in increased penalty assessments. Another distinction is that the CWA does not contain a provision explicitly accounting for previous payments for the same penalties.

that were added to the Clean Water Act in 1987.”³⁰⁰

Under the Clean Water Act, courts have begun to establish a body of penalty assessment case law for wastewater discharges that has added greater predictability to the penalty assessment phase of CWA cases.³⁰¹ In the leading case under the Clean Water Act, *Atlantic States Legal Foundation v. Tyson Foods*, the appeals court reversed and remanded the district court’s decision to award no penalties based solely on the violator’s good faith efforts to comply with the law.³⁰² The circuit court stated that on remand the district court should first determine the maximum statutory fine for which Tyson could be held liable, and then “if [the court chose] not to impose the maximum, it must reduce the fine in accordance with the factors set out in [CWA] section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions.”³⁰³ This interpretation of the statute has been followed in other CWA cases,³⁰⁴ and to date, at least one court has already explicitly applied the *Tyson* penalty assessment analysis to the amended CAA for penalty assessment purposes.³⁰⁵ Should this

300. Statement of Senate Managers, *supra* note 1, at S16,952.

301. CWA § 309(d), 33 U.S.C. § 1319(d) (1988).

302. 897 F.2d 1128 (11th Cir. 1990). Although decided earlier than *Tyson*, the *SCM* court also appears to have followed a similar approach. *United States v. SCM Corp.*, 667 F. Supp. 1110, 1126 (D. Md. 1987).

303. 897 F.2d at 1142.

304. *United States v. Roll Coater, Inc.*, 21 Env’tl. L. Rep. (Env’tl. L. Inst.) 21,073, 21,074 (S.D. Ind. 1991) (“In determining the appropriate penalty, first, the statutory maximum penalty must be determined. Second, the Court reduces the penalty in accordance with factors indicated by Congress.”). A consistent result was reached in *Public Interest Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 80-81 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991), where the court agreed with the district court’s assessment of statutory maximum penalties reduced by amounts derived by applying the penalty assessment factors mandated by the CWA section 309(d), but ruled erroneous the district court’s \$1,000,000 penalty reduction on the basis of the purported nonfeasance of EPA and the state. The court ruled the reduction erroneous because state and EPA nonfeasance was not an enumerated factor for which a penalty reduction could be given under the statute and, given earlier rulings by the district court, the court could not even imply that the district court relied on the “as justice may require” criterion in the statute. *Id.* The court remanded for a determination of the penalty without any reduction. *Id.*

305. In *United States v. Mactal Constr. Co.*, No. 89-2372, slip op. at 5 (D. Kan. Mar. 31, 1992), the court followed the *Tyson* and *Powell Duffryn* finding that “the

doctrine take hold in future air cases, the penalties assessed in judicial and administrative actions could become more predictable and uniform, resulting in larger penalties and an enhanced deterrence message to would-be violators.

b. Duration of Violation

Proving the duration of violations under the pre-1990 Act was sometimes a difficult task, especially since one court concluded that once EPA had proved its *prima facie* case it could not shift the burden of showing continuous compliance to the defendant. In *United States v. SCM Corp.*,³⁰⁶ the court held that to prove continuing violations EPA must affirmatively prove each day of violation through the use of potentially expensive reference test methods.³⁰⁷ Another court excluded proof of otherwise relevant evidence of continuous violations derived from continuous emissions monitors and expert testi-

point of departure for imposing a civil penalty under the Act is the statutory maximum." The court also held that each of the section 113(e) factors must be examined to determine if mitigation of the maximum penalty is warranted. *Id.* at 5-6. However, going beyond *Tyson* and *Powell Duffryn*, the court held that Congress intended the economic benefit of the violation to be "the floor below which the maximum penalty should not be mitigated." *Id.* at 8. In its examination of the section 113(e) factor concerning the economic impact of the penalty on the violator, the court found Mactal had demonstrated an inability to pay the maximum penalty. *Id.* at 7. Accordingly, the court reduced the statutory maximum fine to \$126,000, the entire economic benefit of the violation. *Id.* Recently, the Court of Appeals for the Ninth Circuit issued an unpublished opinion in which it reversed and remanded a district court's \$3.02 million CAA civil penalty assessment on summary judgment, holding that the district court erroneously concluded there were no material facts in issue as to three of the penalty assessment factors. *United States v. Vista Paint Corp.*, No. 92-55160 (9th Cir. Sept. 24, 1992). The court did not reach the question of whether the Clean Water Act penalty assessment analysis should be applied to the CAA, although the district court's determination had implicitly followed *Tyson* and *Powell Duffryn*. See *United States v. Vista Paint Corp.*, No. CV 90-6449-R (C.D. Cal. Feb. 11, 1992) (amended order) at 16 (penalty assessment began with the calculation of statutory maximum penalty and was reduced based on section 113(e) factors).

306. 667 F. Supp. 1110 (D. Md. 1987). The court reached its result even though it concluded "there is little doubt that had stack tests been performed with greater regularity . . . , a substantial number of additional violations might have been identified." *Id.* The court did, however, leave open the possibility of inferential proof of additional days of violation if testing on a routine and periodic basis showed a pattern of emissions at a facility. *Id.*

307. *Id.* at 1124-25.

mony.³⁰⁸ These restricted readings of the Act hampered EPA's ability to prove certain continuous violations, or even ongoing sporadic violations, and precluded the assessment of penalties for each day of violation. The practical effect was to downgrade the seriousness of such violations and EPA's ability to demand full accountability for noncompliant activity.

Congress decisively resolved this issue by establishing a novel and explicit statutory scheme setting forth the bases for determinations of the duration of violations for penalty assessment purposes.³⁰⁹ The penalty assessment criteria now clarify that, at least for penalty assessment purposes, the duration of the violation can be "established by any credible evidence (including evidence other than the applicable test method)."³¹⁰ Congress also clarified that "[a] penalty may be assessed for each day of violation,"³¹¹ apparently intending this provision to apply to a penalty assessment for each day of a multi-day averaging period.³¹² In addition, section 113(e) added two new defenses to civil penalties for justifiable violations of section 114 information requests and section 307(a)

308. *United States v. Kaiser Steel Corp.*, No. 82-2623-IH (C.D. Cal. Jan. 17, 1984) (the court excluded circumstantial, non-reference test method evidence from use in determining the length of violation).

309. See CAA § 113(e)(2), 42 U.S.C. § 7413(e)(2) (Supp. II 1990).

310. CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (Supp. II 1990). As the legislative history makes clear, this statutory language was aimed to legislatively overturn *United States v. Kaiser Steel Corp.*, No. 82-2623-IH (C.D. Cal. Jan. 17, 1984), as concerned exclusion of relevant evidence of violation for penalty assessment purposes; see also S. REP. NO. 228, *supra* note 1, at 366, reprinted in 1990 U.S.C.C.A.N. at 3749. Unlike the Senate Report Bill, the Senate Bill as Passed concerning section 113(e)(1) did not include the word "any" before "credible evidence." Senate Bill as Passed, *supra* note 1, § 601(j), 136 CONG. REC. at S4437. However, on this issue the conference committee adopted the House version of section 113(e)(1), which like the Senate Report Bill, contained the words "any credible evidence." See Statement of Senate Managers, *supra* note 1, at S16,952; see also House Bill as Passed, *supra* note 1, § 601, 136 CONG. REC. at H3235.

311. CAA § 113(e)(2), 42 U.S.C. § 7413(e)(2) (Supp. II 1990).

312. See S. REP. NO. 228, *supra* note 1, at 366, reprinted in 1990 U.S.C.C.A.N. at 3749 (citing with approval *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 791 F.2d 304 (4th Cir. 1986), *vacated and remanded on other grounds*, 484 U.S. 49 (1987)). In *Gwaltney*, under the pre-1987 CWA, the court held that a violation of a monthly averaging period should be deemed to be a violation of each day in that month. 791 F.2d 304, 314 (4th Cir. 1986); accord *Tyson*, 897 F.2d 1128, 1139 (11th Cir. 1990) (construing post-1987 CWA).

administrative subpoenas.³¹³

c. Presumption of Continuing Violation

New section 113(e)(2) spells out how the number of days of violation should be determined for penalty assessment purposes.³¹⁴ Where the applicable agency has notified³¹⁵ the source that it is in violation, and makes out a *prima facie* showing that the violation is “likely to have recurred or continued past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved”³¹⁶ The intent of this provision is to shift the burden of proving continuing compliance to the violating source.³¹⁷ In addition, once the burden has shifted to the source, the source must rebut the presumption of continuous noncompliance by showing intermittent days of compliance or that the violation was not continuing in nature by a preponderance of the evidence.³¹⁸

Thus, under the new penalty assessment criteria, where a source has not been given notice of its violation, EPA can rely on any credible and relevant evidence to establish the dura-

313. CAA § 113(e), 42 U.S.C. § 7413(e) (Supp. II 1990); see also discussion *supra* part II.B.4 (“sufficient cause” defenses subsection).

314. Section 113(e)(2) applies to civil actions (section 113(b)), noncompliance penalties (section 120), administrative penalty actions (section 113(d)(1)), citizen suit penalties (section 304(a)), and all civil penalty assessments except field citations (section 113(d)(3)). CAA § 113(e)(2), 42 U.S.C. § 7413(e)(2) (Supp. II 1990).

315. The House bill did not require any notice, it merely set out that violations were presumed to be continuous from the first provable date of violation. House Bill as Passed, *supra* note 1, § 601, 136 CONG. REC. at H3235. Since the statute does not define what type of notice (e.g. written, oral, etc.) is sufficient for purposes of invoking section 113(e)(2), the issue is also likely to require judicial resolution. However, EPA is likely to rely on written notices of violation whenever possible.

316. CAA § 113(e)(2), 42 U.S.C. § 7413(e)(2) (Supp. II 1990).

317. See S. REP. NO. 228, *supra* note 1, at 366, reprinted in 1990 U.S.C.C.A.N. at 3749 (the burden shift is “appropriate because the source is in a better position than EPA to establish its compliance status.”).

318. CAA § 113(e)(2), 42 U.S.C. § 7413(e)(2) (Supp. II 1990). One of the stated purposes of enactment of this provision was to overrule *SCM* on the burden shifting issue. See S. REP. NO. 228, *supra* note 1, at 366, reprinted in 1990 U.S.C.C.A.N. at 3749.

tion of violation. Additionally, where a source has been given notice of the violation and EPA proves a prima facie case of a likely continuing violation, the burden shifts to the source to prove the date of compliance up to which the violation will be deemed continuous. Under either scenario EPA now has succinct, powerful authority to hold violators accountable for lengthy periods of noncompliance where in the past decisional law rendered EPA's authority equivocal at best. Another collateral effect of these changes is that the Act will place a much higher premium on source maintenance of sufficient monitoring and reporting procedures to help them marshal the proof to rebut the presumption of continuous violations, and evade assessment of potentially serious penalties for periods of presumptive noncompliance. This provision is far-reaching and unprecedented in environmental law. It is certain to result in far stiffer penalties than was the case under the pre-1990 Act and it creates another strong disincentive to pursue unmeritorious cases to judicial conclusion.

3. Federal Procurement Bar — Contractor Listing

Pursuant to section 306 of the pre-1990 Act, EPA has administered a contractor listing program that bars certain violators of the Act from receiving federal contract monies.³¹⁹ The congressional goal of the program is to prohibit the use of federal procurement funds to subsidize violators of the Act or allow violating companies to realize a competitive advantage based on the cost-savings realized by the violative conduct.³²⁰ Pre-1990 Act section 306(a) prohibited violators of certain enumerated criminal provisions of the Act³²¹ from receiving

319. The regulations governing the contractor listing program are found at 40 C.F.R. pt. 15 (1991). The contractor listing program also applies to violations of the CWA. 40 C.F.R. § 15.1 (1991).

320. Edward E. Reich, *Contractor Listing: Powerful Sanction for Encouraging Environmental Compliance*, 6 NAT'L ENVTL. ENF. J. 5, 5-6 (Nov. 1991).

321. Section 306(a) of the pre-1990 Act required mandatory listing for criminal violations of section 113(c)(1). CAA § 306(a), 42 U.S.C. § 7606(a) (1988) (amended 1990). Pre-1990 Act section 113(c)(1) made it a crime to knowingly violate a SIP requirement, nonferrous smelter orders, delayed compliance and administrative compliance orders issued under section 113(a), knowing violations of the NSPS and

federal contracts, grants, or loans to be performed at a facility that was the locus of violative conduct.³²² Upon conviction, a violating facility was automatically disqualified from future procurement activities with all federal agencies and placed on a list which was periodically transmitted to the General Services Administration to provide notice of the disqualification.³²³ EPA views this program, referred to as "mandatory" listing,³²⁴ as a collateral consequence of the criminal conviction.³²⁵ Pursuant to pre-1990 Act section 306(c) and an executive order, EPA also instituted a "discretionary" listing program that permits EPA to list a facility that is involved in "continuing and recurring" civil violations of the Act.³²⁶ The pre-1990 Act listing authority extended only to the individual facility involved in the violation.³²⁷

NESHAP requirements, certain noncompliance penalty provisions and ozone requirements. See CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1) (1988) (amended 1990). Criminal violations for knowing false statements, recordkeeping and reporting, prohibited by section 113(c)(2), were not bases for listing under the pre-1990 Act's section 306(a). See CAA § 306(a), 42 U.S.C. § 7606(a) (1988) (amended 1990).

322. CAA § 306(a), 42 U.S.C. § 7606(a) (1988) (amended 1990).

323. 40 C.F.R. §§ 15.2 (scope), 15.4 (definition of "List of Violating Facilities"), 15.31 (government-wide agency regulations) and 15.40 (transmittal of the list to GSA) (1991).

324. 40 C.F.R. § 15.10 (1991).

325. See Jonathan S. Cole, *EPA's Contractor Listing Program: A List You Do Not Want to Make*, 2 FED. FACILITIES ENVT'L. J. 129, 131 (1991).

326. CAA § 306(c), 42 U.S.C. § 7606(c) (1988); 40 C.F.R. § 15.11 (1991). Executive Order 11602 established the authority for the discretionary listing program under section 306(c) of the Act. See Executive Order 11602, 36 Fed. Reg. 12,475 (July 1, 1971). Subsequently, a superseding executive order was issued to accommodate enactment of the CWA listing authority. CWA § 508, 33 U.S.C. § 1368 (1988); see Executive Order 11738, 38 Fed. Reg. 25,161 (Sept. 12, 1973). Courts have upheld EPA's discretionary listing regulations and authority as a proper exercise of its remedial power. *United States v. United States Steel*, 10 Env't. Rep. Cas. (BNA) 1751, 1752 (N.D. Ill. 1977); see also *United States v. Interlake, Inc.*, 432 F. Supp. 987 (N.D. Ill. 1977); *United States v. Del Monte*, 9 Env't. Rep. Cas. (BNA) 1495, 1496 (D.P.R. 1976). See also *In re Big Apple Wrecking Co.*, EPA Contractor Listing Docket No. 88-D-02 (Aug. 5, 1991) (construing "continuing and recurring" violation language in 40 C.F.R. pt. 15).

327. CAA § 306(a), 42 U.S.C. § 7606(a) (1988) (amended 1990); see also 40 C.F.R. § 15.2(a) (1991). The definition of "facility" at 40 C.F.R. § 15.4 has been interpreted broadly by EPA. See *Determination Regarding Exxon Co., U.S.A.'s Petition for Determination of Independent Facilities*, EPA Listing Docket No. 02-91-L034 (Sept. 30, 1991) at 11-13; *In re Big Apple Wrecking Co.*, EPA Contractor Listing

The Amendments strengthen the pre-1990 Act contractor listing program and expand EPA's mandatory listing authority by allowing EPA to "extend [the federal contract] prohibition to other facilities owned and operated by the convicted person."³²⁸ In addition, the conviction of any crime under section 113 of the Act, without restriction, will now result in automatic listing of the facility involved in the violation.³²⁹ In light of this strong congressional reaffirmation of the listing authority, EPA's commitment to reinvigorate criminal enforcement of the Act,³³⁰ and recent policy pronouncements by the Agency,³³¹ the consequences of these changes to section 306 could prove to be far reaching. Indeed, EPA has expressed its intention to utilize the listing option more aggressively in the future.³³²

Under the pre-1990 Act, criminal prosecutions for violations of the Act were virtually nonexistent.³³³ This was due in part to the limited range of substantive crimes that gave rise to the prohibition. Also, many of the violations carried only misdemeanor status, which have difficulty commanding limited criminal enforcement resources. If current EPA trends towards increased criminal enforcement continue as expected, an increasing number of companies will find themselves sub-

Docket No. 88-D-02 (Aug. 5, 1991).

328. CAA § 306(a), 42 U.S.C. § 7606(a) (Supp. II 1990).

329. The Amendments expanded the listing prohibition to all crimes under section 113(c) (including criminal false statements, record keeping and reporting), by striking the reference to section 113(c)(1). See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 705(1), 104 Stat. 2399, 2682 (1990) (codified at 42 U.S.C. § 7606 (Supp. II 1990)) (emphasis added). The final House bill included language extending listing to mobile sources, but the references to mobile sources were removed in conference. See House Bill as Passed, *supra* note 1, § 606(1), 136 CONG. REC. at H3235.

330. See Strock, *EPA Enforcement Priorities*, *supra* note 4, at 12; see Pollution Prosecution Act of 1990, Pub. L. No. 101-593, § 202, 104 Stat. 2962-63 (1990) (EPA authorized to hire 200 new criminal inspectors by 1995).

331. See EPA Policy Regarding the Role of Corporate Attitude, Policies, Practices, and Procedures, in *Determining Whether to Remove a Facility From The EPA List of Violating Facilities Following a Criminal Conviction* [hereinafter *Corporate Attitude Policy*], 56 Fed. Reg. 64,785 (Dec. 12, 1991). See Reich, *supra* note 320, at 5.

332. See Reich, *supra* note 320, at 7; see also Strock, *Stationary Source Enforcement*, *supra* note 4, at 259 and Cole, *supra* note 325, at 129, 135.

333. See discussion *infra* Part III (criminal enforcement).

ject to criminal prosecution and the prospect that a plea agreement will not relieve the facility involved in the violation from automatic prohibition from future receipt of federal procurement and nonprocurement monies.³³⁴

In the past, parties charged with several crimes under the Act had the option of negotiating pleas to counts that did not invoke mandatory listing.³³⁵ With the removal of the restriction on the type of violations that result in listing under the Act, parties considering a plea for Clean Air Act crimes have lost that potentially invaluable option.³³⁶ EPA has also recently indicated that neither mandatory listing nor the timing of removal from the List of Violating Facilities (the "List") are an appropriate subject of criminal plea negotiations.³³⁷ Under current regulations, a facility that has been placed on the List for a criminal conviction remains there until the Assistant Administrator for Enforcement "certifies that the condition giving rise to mandatory listing has been corrected."³³⁸

Recent policy pronouncements by EPA clarify that since the determination to remove a facility from the List resides with the Assistant Administrator for Enforcement, the decision cannot be made by the United States Attorney in a criminal plea bargain.³³⁹ The Agency has stated that,

[n]o binding agreement as to the timing or result of any request for removal from the EPA List of Violating Facilities may be a part of plea negotiations or a plea agreement. Mandatory contractor listing is thus not a permissible subject of so-called 'global settlements' that purport to settle all criminal and civil liability resulting from cer-

334. Cole, *supra* note 325, at 129 n.1.

335. For example, pleas to criminal violations of section 113(c)(2) of the pre-1990 Act did not result in listing.

336. However, in cases where crimes are charged under multiple environmental statutes, for example RCRA and the CAA, defendants might still seek to avoid mandatory listing by negotiating pleas to the other statutes for which listing is not a sanction.

337. See Cole, *supra* note 325, at 131, 131 n.11; Reich, *supra* note 320, at 6.

338. 40 C.F.R. § 15.20 (1991).

339. Reich, *supra* note 320, at 6.

tain environmental violations.³⁴⁰

This means that defendants cannot enter a guilty plea to a mandatory listing crime and avoid the listing sanction through simultaneous "de-listing." The loss of the so-called "global settlement" option in connection with the expanded scope of crimes subject to listing under section 306 of the Act assures that an increasing number of companies found guilty of environmental crimes will wind up on the List of Violating Facilities in the future.³⁴¹

Under the pre-1990 Act, arguments were made that the "condition" that gave rise to the listing was the criminal violation itself. Therefore, once the violation stopped, the condition had, by definition, been corrected and the listed facility was entitled to immediate removal from the List.³⁴² EPA broadly construed the "condition giving rise to" the conviction language to go beyond the acts causing the criminal violation itself.³⁴³ EPA looks to the over-arching causes of the violation, including corporate policies, practices, and procedures that foster disregard for environmental laws.³⁴⁴ Consistent with EPA's broad interpretation, Congress amended the Act

340. Reich, *supra* note 320, at 6.

341. As of February 7, 1992, there were fifty-two facilities on the EPA's List of Violating Facilities. Seven of the facilities were listed for violations of section 113(c)(1) of the Act, the remainder were for violations of section 309(c) of the Clean Water Act. See *EPA List of Violating Facilities*, (Mar. 27, 1992). The lists are also incorporated into GSA, *Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs* (Feb. 7, 1992).

342. See *In re Valmont Indus. Valley, Neb. Facility*, EPA Listing Docket No. 07-89-L068, at 9 (Jan. 12, 1990) (CWA listing action).

343. 40 C.F.R. § 15.20 (1991) (removal of a Mandatory Listing). See, e.g., *In re Valmont Indus. Valley, Neb. Facility*, EPA Listing Docket No. 07-89-L068, (Jan. 12, 1990) at 9-12.

344. The so-called "corporate attitude" policy has recently been codified by EPA in guidance. See *Corporate Attitude Policy*, *supra* note 331. In *In re Exxon Corp.*, EPA Listing Docket No. 02-91-L034, at 9 (Feb. 4, 1992), EPA applied the corporate policy statement to a removal petition by Exxon for a listing that resulted from Exxon's conviction for Clean Water Act criminal violations when it negligently released over half a million gallons of heating oil into the Arthur Kill estuary in New Jersey. EPA applied the corporate attitude policy and construed the "condition giving rise to the violation" to include failure to adequately train and supervise its managers and operators and to properly supervise operations. *Id.* at 10.

to clarify that for convictions pursuant to section 113(c)(2) which concern, *inter alia*, knowing false statements, failure to submit required reports or notices, and tampering with monitoring equipment, the condition giving rise to the conviction shall be considered to include any substantive underlying violation as well.³⁴⁵ Consequently, the source will not only have to correct the falsehood, but must also demonstrate compliance with the applicable underlying requirement before removal from the List will be granted.³⁴⁶ Listed sources can expect intense scrutiny of their environmental practices, policies, and procedures before removal from the List will be granted.³⁴⁷

In addition to the expanded scope of criminal violations leading to mandatory listing, the Amendments allow EPA to extend the listing to additional facilities of the convicted person.³⁴⁸ The Senate report suggests that authority to extend the listing prohibition to other facilities was necessitated by the practice of corporations dissolving existing business entities and forming new ones to avoid the listing sanction.³⁴⁹ Additionally, the Senate report stated that EPA should have discretion in certain cases, to extend the listing prohibition to additional facilities and, if necessary, to the whole company (e.g. asbestos demolition and renovation operations that move

345. CAA § 306(a), 42 U.S.C. § 7606(a) (Supp. II 1990).

346. See S. REP. No. 228, *supra* note 1, at 371-72, *reprinted in* 1990 U.S.C.C.A.N. at 3754-55. The report stated:

[T]he bill also clarifies that after a conviction under section 113(c)(4) . . . two separate actions will be required of the convicted party. First, the false statements must be corrected. Second, the convicted party must obtain a certification by the Administrator that any substantive violation underlying the false statement has been corrected. For example, where the convicted person submitted monitoring information that falsely represented a source to be in compliance with the [NSPS], he must not only correct the information but also obtain a certification from the Administrator that the source is, in fact, in compliance before he can be removed from [the List].

Id. at 3754. The report references language in Senate Report Bill section 113(c)(4) concerning knowing false statements which was ultimately incorporated in section 113(c)(2) of the Amended Act. Senate Report Bill, *supra* note 1, § 601(g), 136 CONG. REC. S74.

347. See *Corporate Attitude Policy*, *supra* note 331, at 64,785 n.2.

348. CAA § 306(a), 42 U.S.C. § 7606(a) (Supp. II 1990).

349. S. REP. No. 228, *supra* note 1, at 371, *reprinted in* 1990 U.S.C.C.A.N. at 3754.

operations from building to building), where the definition of facility is "problematic."³⁵⁰ EPA will set the parameters for the use of this new authority in revisions to the contractor listing regulations.

4. Citizen Awards

Authorities in every jurisdiction have always relied on the assistance of citizen complaints and tips from concerned corporate insiders to enforce the nation's laws. Seeking to encourage and reward the important and unique role individuals

350. S. REP. No. 228, *supra* note 1, at 371-72, reprinted in 1990 U.S.C.C.A.N. at 3754-55. The Report also stated:

This amendment clarifies that in such situations EPA can define the facility to be the office of the convicted company. In this fashion, all the company's operations will be affected by the listing. Discretionary rather than mandatory listing of additional facilities provides the flexibility necessary for the EPA to consider variations in the structure of violating industries.

Id. Presumably, as the Senate Report implicitly recognizes, EPA will have to implement the authority to list additional facilities through the discretionary listing program. See also H.R. REP. No. 490, *supra* note 1, at 395.

The recognition in the Amendment that listing additional facilities can be appropriate completes a Congressional debate on this issue begun when section 306(a) was originally promulgated in 1970. As originally proposed in Senate Bill 4358, section 306(a) authorized the listing of "facilities" involved in a conviction of knowing violations of a broad range of Act requirements including emissions standards and civil failure to comply with federal court orders. S. 4358, 91st Cong., 2d Sess. 85-6 (1970) (emphasis added), reprinted in Senate Committee on Public Works, 93d Cong. 2d Sess., A Legislative History of the Clean Air Amendments of 1970, at 531, 615-16 (1974). The report accompanying the Senate bill stated that section 306 "would be limited, whenever feasible and reasonable, to contracts affecting only the facility not in compliance, rather than an entire corporate entity or operating division." S. REP. No. 1196, 91st Cong., 2d Sess. 39 (1970), reprinted in Senate Committee on Public Works, 93d Cong. 2d Sess., A Legislative History of the Clean Air Amendments of 1970, at 439 (1974). At that time the Senate report also expressed concern that a facility subject to the proposed section 306(a) federal financial assistance ban not be permitted to circumvent the prohibition's effect by so-called contract shifting, that is, shifting production from a listed facility to an unaffected facility of the same company in order to avoid the listing sanction. The House bill had no corresponding provisions. After conference, the final law contained the pre-1990 Act language that limited the prohibition to knowing violations of section 113(c)(1) and the single facility involved in the violation. See Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12, 84 Stat. 1676, 1707 (1970). Congress had scaled back the Senate version by limiting the sanction to knowing criminal violations and single facilities. With the 1990 Amendments, the original Senate approach, advocated some two decades earlier, appears to have finally prevailed.

can play in uncovering unlawful activity, United States laws have a long history of citizen awards provisions. As far back as the Rivers and Harbors Appropriation Act of 1899,³⁵¹ and as recently as the Shore Protection Act of 1988,³⁵² environmental laws have financially rewarded the public for providing material information leading to criminal convictions or civil judgments.³⁵³ Drawing on this venerable tradition, Congress added a citizen awards provision to the Act.³⁵⁴

Under this "bounty hunter" provision, as it has been called, EPA may pay an award up to \$10,000 to any person "who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty" for a violation of virtually any provision of the Act relating to stationary sources.³⁵⁵ Officers and employees of federal, state, and local governments are ineligible for awards if the information or service provided derived from their official duties. Though the Administration's bill as introduced appeared to be self-funding,³⁵⁶ the language was changed so that funds must come from annual appropriations.³⁵⁷ In these tight budg-

351. 33 U.S.C. § 411 (1988).

352. Shore Protection Act § 4109, 33 U.S.C. § 2609(d) (1988).

353. See, e.g., Endangered Species Act 11(d), 16 U.S.C. § 1540(d) (1988); Lacey Act, 16 U.S.C. § 3375(d) (1988); CERCLA § 106(d), 42 U.S.C. § 9609(d) (1988).

354. CAA § 113(f), 42 U.S.C. § 7413(f) (Supp. II 1990). The bill approved by the full House referred to this section as the "Rewards" provision. House Bill as Passed, *supra* note 1, § 601, 136 CONG. REC. at H3235.

355. CAA § 113(f), 42 U.S.C. § 7413(f) (Supp. II 1990). The awards provision applies to violations of every title of the Act except title II pertaining to mobile sources. The Senate bill would have allowed awards for assistance leading to any civil judgment (as opposed to one for a "civil penalty") and for any violation of the act, including mobile source violations. Senate Bill as Passed, *supra* note 1, § 601(j), 136 CONG. REC. at S4437. The conference committee adopted the House version. See Senate Managers Statement, *supra* note 1, at S16,952.

356. Apparently, the Administration intended to rely on the citizen suit penalty fund to finance informer awards. See House Bill as Introduced, *supra* note 1, §§ 601(m), 610(b); Administration's Senate Bill, *supra* note 1, §§ 601(m), 610(b); Section-by-Section Analysis of the "Clean Air Act Amendments of 1989," 135 CONG. REC. S9651, S9665 (daily ed. Aug. 3, 1989) (analysis of Administration's Senate Bill). The Administration's bill was based on provisions in the Lacey Act Amendments of 1981, which allows penalty funds upon receipt to be deposited in the Treasury and directly drawn out for citizen awards at a later date by the Secretary of the Interior. See Lacey Act, 16 U.S.C. § 3375(d) (1988).

357. CAA § 113(f), 42 U.S.C. § 7413(f) (Supp. II 1990).

etary times, award monies are not likely to flow so freely as to create a cottage industry of private attorneys general.³⁵⁸ Nevertheless, judicious issuance of cash awards, though largely symbolic, may raise public participation in air enforcement and will help the Agency increase the visibility, and perhaps public appreciation, of the Agency's air enforcement efforts. EPA is currently writing regulations defining the eligibility criteria for the awards.³⁵⁹

III. Amendments to the Criminal Enforcement Provisions

A. Background

In the decade prior to passage of the 1990 Amendments, Congress greatly enhanced two of the most important federal environmental statutes when it upgraded criminal penalties in the Resource Conservation Recovery Act³⁶⁰ and the Clean Water Act³⁶¹ from misdemeanors to felonies.³⁶² Yet, the third major component of federal environmental protection, namely the Clean Air Act, had not seen any significant changes since 1970.³⁶³

Meanwhile, criminal prosecution had been acknowledged as an effective means to deter and punish those who would knowingly foul the Nation's natural resources. And the types of environmental criminal defendants have expanded. Midnight dumpers and fly-by-night companies are no longer the sole target of these efforts.³⁶⁴ Today, more sophisticated violators are targeted as both state and federal authorities find

358. Indeed, the 1992 fiscal year budget includes no appropriations for the awards. It is unclear whether the Administration's fiscal year 1993 budget proposal includes such funding. See EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. Gov. FY 1993, H.R. Doc. No. 178, 102 Cong., 2d Sess. A-865-76.

359. EPA SemiAnnual Regulatory Agenda, 57 Fed. Reg. 17,378, 17,429 (Apr. 28, 1992).

360. RCRA §§ 1002-11,009, 42 U.S.C. §§ 6901-6992k (1988).

361. CWA §§ 101-606, 33 U.S.C. §§ 1251-1386 (1988).

362. See RCRA § 3008(d), (e), 42 U.S.C. § 6928(d), (e) (1988); CWA § 309(c)(2)-(4), 33 U.S.C. § 1319(c)(2)-(4) (1988).

363. CAA §§ 101-403, 42 U.S.C. §§ 7401-7642 (1988) (amended 1990).

364. Robert Abrams, *The Maturing Discipline of Environmental Prosecution*, 16 COLUM. J. ENVTL. L. 279, 288 (1991).

that criminal enforcement can sometimes better “focus” corporate attention on environmental compliance if individual managers understand that they place their personal wealth and liberty at risk for knowing violations of the law.³⁶⁵

So far, this has not been an empty threat. While environmental prosecution is still far from routine, the strengthening of environmental criminal provisions has been followed quickly by growing numbers of investigations, prosecutions, and convictions.³⁶⁶

Given that context, the Clean Air Act Amendments of 1990 offer a mixed bag of good and bad news for environmental prosecution. Without question, some changes in the Act will immediately improve enforcement efforts to reduce air pollutants. Other changes promise expanded enforcement once regulations for new titles are promulgated, new programs are implemented, and the regulated community has reasonable time to adjust to new obligations. On balance, however, the amended criminal provisions raise as many new legal and conceptual hurdles to enforcement as they do solutions to pre-existing weaknesses in the Act.

B. New Felony Penalties for Clean Air Act Crimes

As in the pre-1990 version of the Act, the criminal enforcement provisions are found at Section 113(c).³⁶⁷ Under the old version of that subsection, criminal enforcement was limited to knowing violations of only a few substantive provisions. At least in theory, old subsection 113(c) could be used to prosecute: knowing violations of state implementation plans (SIP); or the knowing violation of a New Source Performance Standard (NSPS); or violations of any of the National Emissions Standards for Hazardous Air Pollutants

365. *Id.*; see also U.S. Attorney General Richard Thornburgh, Address at 1991 Department of Justice Environmental Law Enforcement Conference, (Jan 8, 1991).

366. *Criminal Enforcement: 1990 Record Year for Criminal Enforcement of Environmental Violators*, *Justice Announces*, 21 *Envtl. Rep. (BNA)* 1397 (Nov. 23, 1990).

367. CAA § 113(c), 42 U.S.C. § 7413(c) (Supp. II 1990).

(NESHAP).³⁶⁸ The section also made it a crime to knowingly make any false statement or to tamper with monitoring equipment installed pursuant to the Act.³⁶⁹

In practice, however, the old criminal provisions were hardly enforced. Between fiscal years 1983 and 1992, only 68 defendants were charged with violating the Clean Air Act, as compared to 317 defendants who faced criminal prosecution under RCRA, and 205 defendants charged under the CWA.³⁷⁰ Those violations that could be criminally prosecuted carried lenient penalties when compared to other federal environmental statutes. For example, conviction for knowingly violating a SIP or any emissions standard was a misdemeanor punishable by a maximum of a year imprisonment and/or fines ranging between \$25,000 to \$50,000 per day of violation.³⁷¹ The knowing submission of a false statement or tampering with monitoring equipment was also a misdemeanor, punishable by imprisonment for no more than six months and a fine of not more than \$10,000.³⁷²

One immediate improvement in the enforcement potential of the Act is the upgrading of these violations from misdemeanors to felonies. A defendant who knowingly violates a SIP requirement, an existing emissions standard, or any of the new titles created by the 1990 Amendments, now faces imprisonment for up to five years.³⁷³ Excluding the crime of knowing endangerment,³⁷⁴ criminal fines are no longer provided for in the Act itself. Rather, the Act incorporates the general criminal fines provisions of Title 18 of the United States Code.³⁷⁵

368. CAA § 113(c), 42 U.S.C. § 7413(c) (1988) (amended 1990).

369. *Id.*

370. National Enforcement Investigations Center, U.S.E.P.A., *Summary of Criminal Prosecutions Resulting From Environmental Investigations*, (May 31, 1992).

371. CAA § 113(c), 42 U.S.C. § 7413(c) (1988) (amended 1990).

372. *Id.*

373. CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1) (Supp. II 1990). As with other environmental statutes, actual sentencing of an individual defendant is controlled by Chapter 2 Part Q of the United States Sentencing Commissions Guidelines. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2Q1.1 (Nov. 1991).

374. CAA § 113(c)(5), 42 U.S.C. § 7413(c)(5) (1988) (amended 1990).

375. *See* 18 U.S.C. § 3571 (1988).

Consequently, individuals found guilty of committing felonies under the Act, excepting the felony of knowing endangerment, now face fines up to \$250,000 per conviction, or twice the gross pecuniary gain derived from the violation.³⁷⁶ Organizational defendants³⁷⁷ convicted of these same felonies now face fines up to \$500,000 or twice the pecuniary gain derived.³⁷⁸ Similarly, convictions for knowingly filing false statements, failing to file a required statement, or tampering with monitoring equipment, are now punishable as felonies and carry prison terms of up to two years.³⁷⁹ Fines for both individual and corporate defendants convicted of violating these provisions are provided under Title 18.³⁸⁰

C. Expansion of Provisions Covered by Criminal Enforcement

As discussed earlier, the 1990 Amendments create a host of new titles and programs that must now await implementation by EPA. Many of these new programs are years away from being enforced in practice. However, several pre-existing programs should see immediate expansion of enforcement options under the Amended Act.

1. PSD Preconstruction Requirements

The goals of the Act are not only to protect, but also to enhance the quality of the Nation's air.³⁸¹ Under both the old and new versions of the Act, state implementation plans must contain emissions limits and other measures necessary to pre-

376. 18 U.S.C. § 3571(b)(3), (d) (1988).

377. For purposes of any of the violations set forth in section 113(c)(1), (2), (3) and (4), organizational defendants include corporations, partnerships, associations, States, municipalities, or political subdivisions of a State, and any agency, department or instrumentality of the United States. CAA §§ 113(c)(6), 302(e), 42 U.S.C. §§ 7413(c)(6), 7602(e) (1988 & Supp. II 1990). It should be noted, however, that all governmental entities are excluded from the definition of criminally liable "organization" under the knowing endangerment provisions. *Id.* § 113(c)(5)(E).

378. 18 U.S.C. § 3571(c)(3), (d) (1988).

379. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2) (Supp. II 1990).

380. 18 U.S.C. § 3571 (1988).

381. CAA § 101(b), 42 U.S.C. § 7401(b) (1988).

vent the significant deterioration of air quality in those Air Quality Control Regions identified by the EPA as having air quality levels that are better than any national primary or secondary standard for sulfur dioxide or particulate matter.³⁸²

Each so-called PSD region in the country fits into one of three classes in which the allowable amounts of additional sulfur dioxide and particulate matter air pollution are strictly limited.³⁸³ Section 165 prohibits the construction or modification of any "major emitting facility"³⁸⁴ in any PSD region unless certain preconstruction requirements are met. Such facilities must also apply for a permit that sets forth emissions limits for the facility.³⁸⁵ The Administrator must, and the

382. Compare CAA § 161, 42 U.S.C. § 7471 (1988) and CAA § 161, 42 U.S.C. § 7471 (Supp. II 1990).

383. Under Section 162, all international parks, and national parks and wilderness areas exceeding certain acreage sizes, are designated Class I areas. CAA § 162, 42 U.S.C. § 7472 (1988 & Supp. II 1990). These PSD areas are deemed to be in the need of the greatest protection, and consequently, only the smallest increases in particulate matter and sulfur dioxide pollution are allowed. CAA §§ 162, 163, 42 U.S.C. §§ 7472, 7473 (1988 & Supp. II 1990). All other PSD regions are designated Class II areas, where slightly greater increases are allowed. States, or Indian governing bodies, may re-designate Class II areas to Class I, thereby imposing stricter standards on those PSD regions. Conversely, a state seeking to promote economic development in a Class II PSD region may re-designate such an area Class III, so that even greater increases in particulate matter and sulfur dioxide pollution may be allowed, although still in lower percentages than in non-PSD regions. CAA § 164, 42 U.S.C. § 7474 (1988 & Supp. II 1990).

384. For purposes of preconstruction requirements, the CAA defines "major emitting facility" to include any one of 28 listed stationary sources that "emit, or have the potential to emit, one hundred tons per year or more of any air pollutant," or any other source that has "the potential to emit two hundred and fifty tons per year or more of any air pollutant." CAA § 169(1), 42 U.S.C. § 7479(1) (Supp. II 1990) (emphasis added). One of the confusing aspects of the Clean Air Act, both in its pre-1990 and post-1990 versions, is that it frequently uses similar language to define different types of sources that are in turn regulated under different provisions of the Act. Thus, "major emitting facility" for purposes of PSD requirement, differs substantially from a "major stationary source" which may be required to adhere to other requirements provided elsewhere in the Act. Compare CAA § 302(j), 42 U.S.C. § 7602(j) (1988) (general definition of major emitting source) with CAA § 169(1), 42 U.S.C. § 7479(1) (Supp. II 1990) (definition of major emitting source for PSD areas).

385. A central feature of the permit application and review process is that the owner or operator of a "major emitting source" demonstrate that emissions "will not cause, or contribute to," air pollution in excess of any maximum allowable increase in sulfur dioxide or particulate matter set forth in the PSD region in which the facility is located; any NAAQS "in any air quality region"; or any other applicable emissions

state may, issue an order or seek injunctive relief preventing the construction of a facility in a PSD region if the facility fails to meet preconstruction requirements.³⁸⁶

The pre-1990 Act provided misdemeanor penalties for filing false monitoring and reporting data, or any false statement in any application or other document filed with EPA, such as a permit application.³⁸⁷ However, the Act contained no direct criminal penalties for the violation of the preconstruction requirements. Under the 1990 Amendments, it is now a felony to knowingly violate either the PSD permitting requirements or an administrative order finding a violation of a preconstruction requirement.³⁸⁸

This is a major improvement in the Act since it affords criminal enforcement protection to those comparatively pristine regions of the country where air quality may be in the greatest need of preservation. Yet it would be disingenuous, or naive, to suggest that every operator of a "major emitting source" in technical violation of a preconstruction requirement now faces criminal prosecution. In civil cases, a violation may be found if EPA shows by a preponderance of the evidence that the defendant's facility constitutes a "major emitting source" and that PSD requirements have not been met.³⁸⁹ The burden then shifts to the civil defendant to show that its facility "will not cause or contribute to" air pollution in violation of section 165.³⁹⁰ Such determinations are highly complex and subject to wide variances of interpretation of raw scientific data.³⁹¹ To sustain a criminal conviction for PSD violations, the burden must rest entirely on the government to prove beyond a reasonable doubt that the source will cause or contribute to an otherwise prohibited increase in pollution.³⁹²

standard. CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3) (1988).

386. CAA § 167, 42 U.S.C. § 7477 (Supp. II 1990).

387. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2) (1988) (amended 1990).

388. CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1) (Supp. II 1990).

389. CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3) (1988).

390. *Id.*

391. For an excellent illustration of the difficulties of ascertaining a facility's emissions potential, see *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1143-55 (D. Col. 1988).

392. See *supra* notes 384, 385.

Given the highly technical nature of such determinations, the trial of such violators would likely include conflicting expert testimony on the issue of whether the operation of a source in a PSD region would emit otherwise prohibited levels of pollutants, as well as the effect of such operations on surrounding air quality regions.³⁹³ Such a trial could be a prosecutor's nightmare. It would mean having to prove to a jury that a defendant is guilty of knowingly violating the PSD requirements beyond a reasonable doubt by relying on expert opinion that, almost by definition, must be susceptible to some doubt. Therefore, the criminal enforcement of PSD requirements seems destined for sparing use in only the most egregious of circumstances — for example, where an owner or operator of a "major emitting source" has failed to apply for a preconstruction permit or where the pollution generated by a plant is so obviously in violation of PSD requirements as to reduce the possibility of a swearing match of experts at trial.

2. The Asbestos NESHAP

The 1990 Amendments broke a decades-long stalemate during which EPA found it administratively and politically impossible to promulgate National Emissions Standards for Hazardous Air Pollutants (NESHAPs) for all but a handful of known hazardous air pollutants.³⁹⁴ Since 1970, the Clean Air Act has authorized EPA to develop NESHAPs for any air pollutant that "may reasonably be anticipated to result in an increase in mortality or . . . in serious, irreversible, or incapacitating reversible illness."³⁹⁵ Yet after twenty years, EPA had promulgated NESHAPs for only eight substances.³⁹⁶

The 1990 Amendments simply list 189 substances that Congress has accepted as posing a threat to human health and

393. See FED. R. EVID. 702; *Louisiana-Pacific Corp.*, 682 F. Supp. at 1143-55.

394. Robert L. Munroe, *The Clean Air Act Amendments of 1990: Will Hazardous Air Pollutants Finally Be Regulated?*, 5 ADMIN. L. REV. 161, 165-67 (1991).

395. CAA § 112(a)(1), 42 U.S.C. § 7412(a)(1) (1988) (amended 1990).

396. 40 C.F.R. pt. 61 (1991) (national emission standards for hazardous air pollutants).

the environment.³⁹⁷ With this congressionally-mandated list in place, EPA must now promulgate emission standards for each substance in accordance with a ten-year schedule set forth in the Act.³⁹⁸ Standards will become effective upon promulgation.³⁹⁹ Those who knowingly violate the standards will immediately become subject to the criminal enforcement provisions of section 113(c)(1).⁴⁰⁰

While the criminal enforcement of these new standards may be years away, pre-existing NESHAPs will remain in effect and become immediately enforceable under the new felony provisions of section 113(c)(1).⁴⁰¹ This should improve the enforcement of one of the most commonly violated NESHAPs — those standards controlling the handling of asbestos that is removed from renovated or demolished structures.⁴⁰²

Asbestos was one of the first substances to be designated a hazardous air pollutant by EPA.⁴⁰³ Air-borne, friable asbestos⁴⁰⁴ is a well-documented carcinogen. It also has been linked to a debilitating lung disease called asbestosis as well as a potentially fatal condition known as mesothelioma, which is the gradual thickening and constriction of the pleural sack that surrounds the lungs.⁴⁰⁵ Asbestos-containing insulation is commonly found in many older buildings, from which fibers may be emitted during renovations or demolitions. One source estimates the number of such operations in the United States at thirty thousand per year.⁴⁰⁶ Therefore, the new felony provisions for knowing violations of the asbestos NESHAPs, cou-

397. CAA § 112(b), 42 U.S.C. § 7412(b) (Supp. II 1990).

398. CAA § 112(e), 42 U.S.C. § 7412(e) (Supp. II 1990).

399. CAA § 112(d)(10), 42 U.S.C. § 7412(d)(10) (Supp. II 1990).

400. CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1) (Supp. II 1990).

401. CAA § 112(q)(1), 42 U.S.C. § 7412(q)(1) (Supp. II 1990).

402. 40 C.F.R. §§ 61.141-61.156 (1991).

403. List of Hazardous Air Pollutants, 36 Fed. Reg. 5931 (Mar. 31, 1971). Congress too has previously found that "medical science has not established any minimum level of exposure to asbestos fibers which is considered to be safe to individuals exposed to the fibers." See Asbestos School Hazard Abatement Act of 1984 § 2, 20 U.S.C. § 3601(a)(3) (1988).

404. Friable asbestos is defined as asbestos that can be crumbled by hand when dry. 40 C.F.R. § 61.141 (1991).

405. *Id.*

406. W.H. RODGERS, ENVIRONMENTAL LAW, § 3.11, at 278 (1977).

pled with EPA's subpoena authority under section 307(a)(1),⁴⁰⁷ should make enforcement of this standard more effective.

Enforcement of asbestos NESHAP standards has also been strengthened by technical amendments that should clarify the proof necessary to show a violation of a work practice standard. Under the Clean Air Act, EPA is authorized to promulgate work practice rules governing the handling of hazardous air pollutants where the Agency has determined that it is not feasible "to prescribe or enforce an emissions standard" based on the numeric measurements of emissions.⁴⁰⁸ EPA determined that such work practice rules should be promulgated for friable asbestos emitted during building renovations or demolitions.⁴⁰⁹

Since their promulgation, the work practice standards have undergone various challenges and revisions as defendants, the courts and Congress attempted to fashion emissions standards for a kind of pollutant where emissions are virtually impossible to detect. In *Adamo Wrecking Co. v. United States*,⁴¹⁰ the Supreme Court held that the 1970 version of the CAA did not authorize EPA to promulgate work practice standards in lieu of emissions standards.⁴¹¹ In the Clean Air Act Amendments of 1977, Congress amended section 112 by adding subsection (e) which expressly authorized the development of non-numeric emissions controls whenever it was not feasible to enforce numerical standards based on quantifiable emissions.⁴¹² In the following year, Congress further amended sections 111 and 112 to provide that any "design, equipment, work practice, or operational standard . . . shall be treated as"

407. CAA § 307(a)(1), 42 U.S.C. § 9607(a)(1) (Supp. II 1990); see also discussion *supra* parts II.B.3., 4. (subpoena power subsection and "sufficient cause" defenses subsection).

408. CAA § 112(h), 42 U.S.C. § 7412(h) (Supp. II 1990).

409. 40 C.F.R. §§ 61.140-61.156 (1991).

410. 434 U.S. 275 (1978).

411. The Court found that the term "emissions standard" as used in section 112 meant a standard that set forth a quantitative level of permissible emissions. See *Adamo*, 434 U.S. at 286; see, e.g., 40 C.F.R. § 61.32 (1991) ("emissions . . . shall not exceed 10 grams of beryllium over a 24-hour period . . .").

412. CAA § 112(e), 42 U.S.C. § 7412(e) (Supp. II 1990).

a standard of performance or an emission standard, for all purposes under the Act.⁴¹³

Despite these amendments, violators continued to argue that an actual emission is a necessary element of the government's proof in finding that a violation has occurred.⁴¹⁴ The 1990 Amendments further clarify the enforceability of such work practice rules. The most significant clarification is the change in the definition of emissions standards, which finally includes a specific reference to "any design, equipment, work practice or operational standard promulgated" under the Act.⁴¹⁵

3. False Statements

The 1990 Clean Air Act also includes several technical amendments to the false reporting provisions of section 113(c)(2). Under the pre-1990 Act, the false statements provision was silent on whether it was a crime to knowingly omit or conceal some reportable fact to be made to EPA.⁴¹⁶ The current version of the subsection now expressly states that a knowing omission, concealment of fact, failure to file a required report, as well as the knowing submission of a false statement, constitutes a felony.⁴¹⁷

One of the most hotly contested areas of environmental criminal law is the scienter element of knowledge found in virtually every environmental statute. The majority view is that knowledge requires proof that a defendant generally intended to commit certain acts, but not that the accused possessed specific intent to violate a particular regulatory require-

413. CAA §§ 111(h)(5), 112 (e)(5), 42 U.S.C. §§ 7411(h)(5), 7412(e)(5) (Supp. II 1990).

414. Thus far, courts have rejected these arguments. See *United States v. Seal-tite Corp.*, 739 F. Supp. 464, 468 (E.D. Ark. 1990); *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990); *United States v. Tzvah Urban Renewal Corp.*, 696 F. Supp. 1013, 1021 (D.N.J. 1988); *United States v. Ben's Truck & Equip., Inc.*, 1986 WL 15,402 (E.D. Cal. May 12, 1986).

415. CAA § 112(e)(5), 42 U.S.C. § 7412(e)(5) (Supp. II 1990).

416. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2) (1988) (amended 1990).

417. CAA § 113(c)(2)(A), 42 U.S.C. § 7413(c)(2)(A) (Supp. II 1990).

ment.⁴¹⁸ Most courts have found this no more radical than a restatement of the axiom that "ignorance of the law is no excuse,"⁴¹⁹ particularly in highly regulated industries where there is a logical presumption that individuals and companies know they must operate within a multi-faceted regulatory scheme.⁴²⁰ Others have argued that applying principles of general intent to environmental crimes somehow changes traditional *mens rea* requirements.⁴²¹

Given these sharp disagreements, any clarification in the Act is useful. The statute's plain statement that a knowing omission or concealment of fact is the equivalent of a false statement provides clearer notice to defendants, and eliminates a conceptual hole that had previously been left for juries to fill.

The false statement provision also now expressly includes a materiality requirement that was omitted, although implicitly required, under the previous versions of the Act.⁴²² Presumably, the question of materiality under the Clean Air Act will be for the court to decide, rather than an element of the charge presented for the jury's consideration,⁴²³ as is the case under the general false statements provisions of section 1001 of Title 18 of the United States Code.

418. The term "knowingly" is not defined under the Clean Air Act. However, the Act has been held to only require knowledge of the operative facts that constitute the crime, not specific knowledge of the statute or of the hazards posed by emissions. *United States v. Buckley*, 934 F.2d 84, 87-88 (6th Cir. 1991). Likewise, the term "knowingly" currently found in almost every environmental criminal statute has been held to require general rather than specific intent. *See United States v. Sellers*, 926 F.2d 410, 415 (5th Cir. 1991); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990); *United States v. Hofin*, 880 F.2d 1033, 1037 (9th Cir. 1989); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 669 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985); *but c.f.* *United States v. Speech*, 968 F.2d 795 (9th Cir. 1992); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986). A thorough discussion of the element of knowledge in the context of environmental crimes is beyond the scope of this article. *But see* discussion *infra* part III.D.1. (shifting scienter and the new definition of "person" subsection).

419. OLIVER WENDELL HOLMES, *THE COMMON LAW* 47-8 (1881).

420. *See supra* note 418.

421. *See* R. Christopher Locke, *Environmental Crimes: The Absence of "Intent" and Complexities of Compliance*, 16 COLUM. J. ENVTL. L. 311, 320-21 (1991).

422. CAA § 113(c)(2)(A), 42 U.S.C. § 7413(c)(2)(A) (Supp. II 1990).

423. *See Kungys v. United States*, 485 U.S. 759, 772 (1988).

With certain important exceptions discussed below,⁴²⁴ these changes in no way disturb the general intent principles applicable to determining whether a person "knowingly" filed a false statement. As with other environmental statutes, the intent element of this crime would appear satisfied if the government proves beyond a reasonable doubt that the defendant knew the statement was false and yet filed the statement with knowledge of the falsity, not as a result of mistake or accident.⁴²⁵ With the exception of two cases in which proof of knowledge of a specific regulatory requirement would be required even if only by circumstantial evidence,⁴²⁶ most courts have held that specific intent is not an element of an environmental crime. Thus, the government need not prove, for instance, that a defendant first consulted a regulation and then knowingly omitted relevant facts from a statement filed pursuant to that regulation. Instead, the knowing omission, concealment, or alteration of the facts alone, assuming they are material, will be sufficient to sustain the element of knowledge.

D. Continued Weaknesses and New Enforcement Problems

1. Shifting Scierter and the New Definition of "Person"

One of the ironies of the 1990 Clean Air Act Amendments is that despite Congress' and the Administration's stated desire to improve that Act's enforcement potential, the new Act imposes on the government, in certain cases, a burden of proof that is much tougher than what has been required under any other federal environmental statute. The principal mechanism for altering the Act's scierter element lies in the new section 113(h) definition of "person."⁴²⁷

For purposes of determining criminal liability under the new negligent endangerment provision of section 113(c)(4),

424. See *supra* notes 418-21 and accompanying text.

425. See *supra* note 418 and accompanying text.

426. See *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984).

427. CAA § 113(h), 42 U.S.C. § 7413(h) (Supp. II 1990). See *supra* note 193 and accompanying text (discussion of the new definition of "operator" in the civil enforcement section).

the new definition of "person" excludes "an employee who is carrying out his normal activities *and* who is not part of senior management personnel or a corporate officer" unless the violation is "knowing and willful."⁴²⁸ As for all other criminal provisions set forth in the amended section 113(c), including the new knowing endangerment provision, the definition of a criminally liable person excludes "an employee who is carrying out his normal activities and who is acting under orders from the employer" unless the employee's conduct in committing the violation was "knowing and willful."⁴²⁹

The new definitions do not so much define what constitutes a "person" under the Act as they do create different scienter requirements for potential defendants depending upon their employment responsibilities within an organization. Under the new definition, in order to convict certain employees, the government will apparently need to present evidence not only that the employee acted with knowledge, but that he or she willfully violated a specific requirement of the Act.

There is some legislative history suggesting that something less than specific intent to violate a requirement of the Act would be sufficient to convict. The Statement of Senate Managers, which was hastily drafted before the final vote on the 1990 Amendments, states in part: "A person who knows that he is being ordered to commit an act that violates the law cannot avoid criminal liability for such act by hiding behind such 'orders.'"⁴³⁰ The statement goes on to declare that the reference to the knowing and willful standard, "does not require proof by the Government that the defendant knew he was violating the Clean Air Act per se. It is sufficient for the Government to prove the defendant's knowledge that he was committing an unlawful act."⁴³¹ The statement makes little sense given commonly accepted definitions of wilfulness or the context in which environmental crimes occur.

The Supreme Court has explained that the element of

428. CAA § 113(h), 42 U.S.C. § 7413(h) (Supp. II 1990) (emphasis added).

429. CAA § 113(h), 42 U.S.C. § 7413(h) (Supp. II 1990).

430. Statement of Senate Managers, *supra* note 1, at S16,952.

431. *Id.*

wilfulness stands as an exception to the common law rule that ignorance of the law is no excuse.⁴³² The purpose of requiring the government to prove a defendant's specific intent to violate a legal requirement is to protect individuals from being prosecuted for innocent violations of highly complex statutes.⁴³³ Thus in statutorily created offenses, an act is done willfully if "done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with the bad purpose either to disobey or disregard the law."⁴³⁴ Recently, in *Cheek v. United States*,⁴³⁵ the Supreme Court held that willfulness requires the government to negate a defendant's claim of good faith belief that his violation was merely the result of a misunderstanding of the law.⁴³⁶ Moreover, the reasonableness of the claim, the Court held is solely for the jury to decide.⁴³⁷ While *Cheek* involved a prosecution under the tax code, there is no reason to conclude that its interpretation of wilfulness does not apply to cases brought under the CAA.

Notwithstanding the Statement of Senate Managers, one must ask how it may be proved beyond a reasonable doubt that an employee acted with the "intent to do something which the law forbids" if not by reference to that employee's knowledge or ignorance of specific requirements of the Clean Air Act? For example, if an employee is truly ignorant of the EPA's emissions standards for asbestos, let us say, even if he is cognizant as many people are of the general dangers of exposure to asbestos fibers, how can that employee be found to have acted willfully without proof of his knowledge of specific requirements and prohibitions governing the handling of asbestos as provided by the Act and implementing regulations?

432. *United States v. Murdock*, 290 U.S. 389, 396 (1933); *Cheek v. United States*, 111 S. Ct. 604, 609 (1991).

433. *Id.*

434. *Pomponio v. United States*, 429 U.S. 10, 11 (1976); *see also United States v. Bishop*, 412 U.S. 346, 360 (1973) (holding that willfulness in the context of the federal tax statute means "a voluntary intentional violation of a known legal duty . . . [in other words] bad faith or evil intent.").

435. 111 S. Ct. 604 (1991).

436. *Id.* at 609-611.

437. *Id.*

And how might the government negate a good faith claim of ignorance, if not by some proof that the employee knew he was violating the Clean Air Act *per se*?

Since it will be the rare case in which the government will be able to show that a factory hand or line-employee had previously consulted the Act or the Code of Federal Regulations, the new definition of "person" may impose an almost insurmountable burden of proof necessary to convict employees who either acted on orders or — with respect to the crime of negligent endangerment — were not senior management personnel. This shifting of the level of intent necessary to convict, based upon an individual's position within an organizational hierarchy, is unprecedented in environmental criminal law.

Aside from excluding a certain group of potential defendants from prosecution, the definition will almost certainly have other effects in the enforcement of the Clean Air Act. For instance, the higher burden of proof necessary to convict certain workers was severely criticized by the Department of Justice on the grounds that it would remove any incentive for the employee to cooperate with government investigations.⁴³⁸ Since the employee may be the only individual who can identify the "senior management" officers responsible for the negligent endangerment of others, the virtual insulation afforded workers may also benefit all individuals in the upper rungs of the organizational ladder.

The new definition of "person" may have an even broader impact on the enforcement of the remaining criminal provisions of sections 113(c)(1), (2), (3) and (5). For purposes of those provisions, the definition requires proof of knowing and willful conduct if the person is an employee carrying out nor-

438. See Roady, *supra* note 1, at 10,202. New citizen awards or "bounty hunter" provisions may pay individuals who come forward with information regarding violations of the Act. See discussion *supra* part II.C.4. But the effectiveness of such incentives remains to be seen where employees must rely on the violating employer for their livelihood long after the government's investigation has ended. The Act does prohibit the discharge or discrimination of employees on the basis of their cooperation in enforcement proceedings. CAA § 322, 42 U.S.C. § 7622 (1988).

mal activities and acting under orders from an employer.⁴³⁹ The absence of any reference to management, or senior management personnel with respect to these crimes, seems to suggest that even a defendant who held some position of management in a company and was responsible for the substantive violation, might only be convicted upon proof of willfulness so long as he was carrying out normal activities under orders from a superior.

The new definition of "person" may increase the scienter element from knowledge to willfulness for a much broader group of defendants than just the production floor workers. Such a construction may also encourage mid or lower-level managers to remain ignorant of specific Clean Air Act requirements or may discourage worker education and training lest the government be able to prove at some future date that they acted "with intent to do something which the law forbids."⁴⁴⁰ And it may encourage individuals to shift the blame for known violations to upper levels of a corporation's bureaucracy, where the specific policy decisions that led to the violation may be so diffuse as to leave only the corporate entity legally responsible.⁴⁴¹ Clearly, such an outcome would run contrary to the growing awareness of the need to hold individual managers and decision-makers personally responsible for known environmental violations.⁴⁴²

The new definition will also slow enforcement by creating numerous and difficult questions of law and fact as defendants, regardless of their level of responsibility in a corporation or other entity, seek to argue that they fall within that class of defendants for which the government must prove willfulness

439. CAA § 113(h), 42 U.S.C. § 7413(h) (Supp. II 1990).

440. See CAA § 113(h), 42 U.S.C. § 7413(h) (Supp. II 1990); see discussion *supra* part II.A.8. (restricted definitions of "operator" and "person" subsection).

441. A culpable mental state may be imputed to a corporation through the "collective knowledge" of its employees or agents acquired during the course of their employment even when the pertinent facts are never brought in aggregate form to the attention of someone who would fully comprehend their significance. See, e.g., *United States v. Bank of New England*, 821 F.2d 844, 865 (1st Cir. 1987); *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448 (9th Cir. 1986); *Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951).

442. See *supra* notes 364-65.

in order to sustain a conviction. For example, the courts will have to construe, without statutory aid, the meaning of the phrase "normal activities."⁴⁴³ Would such activities include unlawful, but regularly ordered by-passes of statutorily mandated control measures? Or does the phrase "normal activities" presume only conduct which is lawful under the requirements of the Act?

Similarly, while the term "corporate officer" may be well fixed by an entity's articles of incorporation or by reference to state law, section 113(h) does not define "senior management personnel" for purposes of determining who may be liable for negligent endangerment.⁴⁴⁴ In some organizations, such distinctions may be either obvious or impossible to discern. Is the son or daughter of the sole shareholder in a closely held corporation "senior management personnel" by virtue of his or her familial ties and periodic assistance in running the business? And what of a defendant who is a manager in a national corporation consisting of numerous departments, divisions, regional offices, and even parent companies? Under the present draft of section 113(h), both the prosecutor, defendants, and courts are left without any guidance whatsoever to decide how far down in the organization's structure the label "senior management" will attach.

2. The Thirty-Day Notice Requirement

As discussed earlier, the pre-1990 Act required EPA to notify violators of state implementation plans (SIPs) at least thirty days prior to the commencement of enforcement proceedings.⁴⁴⁵ This requirement had been interpreted to afford a violator a thirty-day grace period, during which violations could not be prosecuted civilly or, by inference, criminally.⁴⁴⁶ The 1990 Amendments clarify this; section 113(a)(1) now spe-

443. See *supra* notes 364-65.

444. CAA § 113(h), 42 U.S.C. § 7413(h) (Supp. II 1990).

445. CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1) (1988) (amended 1990); see discussion *supra* part II.A.6. (notice of violation subsection).

446. *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1127-29 (D. Colo. 1987); see also *supra* note 171.

cifically allows the Administrator to commence an action "at any time" after the thirty days has run, and "without regard to the period of the violation" so long as the action is commenced within the five-year statute of limitations period set forth in 28 U.S.C. section 2462.⁴⁴⁷ The legislative history accompanying the 1990 Act also makes clear that the notice provision does not require that a violation be continuous for more than thirty days — a position that had been repeatedly raised as a defense to SIP enforcement actions.⁴⁴⁸ These clarifications in the Amended Act should reinvigorate EPA's civil enforcement of SIP violations.⁴⁴⁹

The clarifications should also help in the revival of criminal enforcement of SIP violators — although here the thirty day notice provision will continue to form a procedural hurdle for prosecutors. Under the 1990 Act, a criminal enforcement "action," (presumably the filing of an information or indictment), cannot commence unless the defendant has persisted in the proscribed conduct "more than [thirty] days after having been notified . . . under subsection (a)(1)" by the Administrator that the emissions source is violating a SIP requirement or prohibition.⁴⁵⁰ What this means is that the Act, by its own terms, restricts criminal prosecution of SIP violators to only those defendants who have already been warned by the EPA that they are violating a SIP requirement, perhaps incident to a civil enforcement action, and yet who persisted in the violation despite the warning. Given this prerequisite, only the most egregious SIP violators can expect to face criminal prosecution. On the other hand, a defendant's continued practice despite EPA's notice of violation should strengthen the government's proof that the defendant's conduct was a knowing violation of the Act.⁴⁵¹

While the changes in the thirty-day notice provision should clarify, and thereby strengthen criminal enforcement

447. CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1) (Supp. II 1990).

448. See *supra* note 174 and accompanying text.

449. See discussion *supra* part II.A.6. (notice of violation subsection).

450. CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1) (Supp. II 1990).

451. See *supra* note 421-22 and accompanying text.

options for SIP violations, these changes also contain an unfortunate reference to the new permitting program. It can be argued that the nature of SIPs, and consequently their violations, warrant the "first bite" offered violators by virtue of the thirty-day notice requirement. SIPs are notoriously convoluted documents, applicable to non-specific sources, not readily accessible to the public or even the regulated community.⁴⁵² In fact, it was this feature of SIPs that prompted the Administration and Congress to create the new permit title in the 1990 Amendments, which will hopefully clarify an emission source's responsibilities in a single, site-specific document.⁴⁵³ In the absence of permits, the thirty-day notice requirement of section 113(a)(1), and its incorporation into the criminal provisions of section 113(c), provides a mechanism in which an emissions source has a period of time in which to correct violations of SIP requirements that a source may not have been aware of.

The problem with the amended version of section 113(a)(1) is that it now refers to violations of a permit as well as a SIP violation.⁴⁵⁴ Although no similar notice requirement is incorporated into that portion of section 113(c)(1) dealing with knowing violations of a permit,⁴⁵⁵ prosecutors might reasonably anticipate defense motions arguing that the thirty-day notice must precede the commencement of a criminal enforcement action based on a permit violation. Whether courts will find such arguments meritorious or mere attempts to "bootstrap" one subsection's requirements into another, remains to be seen. The legislative history is silent on the rationale for adding a reference to permits in the thirty-day notice requirement. Yet the reference in section 113(a)(1), and

452. See Roady, *supra* note 1, at 10,182.

453. *Id.*

454. CAA § 113(c)(5), 42 U.S.C. § 7413(a)(1) (Supp. II 1990).

455. Section 113(c)(1) sets forth a list of substantive sections of the Act which may be prosecuted if knowingly violated. That portion of the list dealing with knowing violations of SIP requirements includes a clause indicating that prosecutions for such violations must be preceded by the 30-day notice requirements of section 113(a)(1), whereas no similar parenthetical limitation appears to apply to remaining titles included in section 113(c)(1). See CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1) (Supp. II 1990).

the absence of any clarifying language as to its applicability to section 113(c)(1), seems an unfortunate and unnecessary impediment to the criminal enforcement of the permits program, thus far hailed as the 1990 Amendment's most important new provisions.

3. The Endangerment Provisions

Following provisions already in existence in the Clean Water Act and RCRA,⁴⁵⁶ Congress added a knowing endangerment provision to the Clean Air Act that carries felony penalties for certain releases of hazardous air pollutants, or air toxins, when the release poses a substantial threat of harm to others.⁴⁵⁷ The 1990 Amendments also add an entirely new "negligent endangerment" provision, which carries misdemeanor penalties for similarly threatening releases of air toxins, when done with negligence.⁴⁵⁸ With the exception of the varying scienter elements of knowing or negligent conduct specified in subsections 113(c)(4) and (5), or the varying scienter element of knowing and willful conduct discussed above in the new definition of criminally liable "person," the elements for both endangerment provisions are identical.

To begin with, both provisions apply to the release of any one of the 189 hazardous air pollutants listed in section 112 of the 1990 Amendments,⁴⁵⁹ or any extremely hazardous substance listed pursuant to section 306(a)(2) of CERCLA.⁴⁶⁰ Any person who knowingly releases into the ambient air any of the listed pollutants, and who knows at the time of the release that he or she places another person in imminent danger of death or serious bodily injury, is guilty of a felony, punishable by imprisonment of up to fifteen years.⁴⁶¹ Organizational defendants, which for purposes of knowing endangerment ex-

456. See CWA § 319(c)(3), 33 U.S.C. § 1319(c)(3) (1988); RCRA § 3008(e), 42 U.S.C. § 6928(e) (1988).

457. CAA § 113(c)(5), 42 U.S.C. § 7413(c)(5) (Supp. II 1990).

458. CAA § 113(c)(4), 42 U.S.C. § 7413(c)(4) (Supp. II 1990).

459. CAA § 112(b), 42 U.S.C. § 7412(b) (Supp. II 1990).

460. CERCLA § 306(a)(2), 42 U.S.C. § 9656(a)(2) (1988).

461. CAA § 113(c)(5), 42 U.S.C. § 7413(c)(5) (Supp. II 1990).

cludes government entities,⁴⁶² may be fined upon conviction not more than one million dollars for each violation. Fines for individual defendants convicted of knowing endangerment are controlled by the fines provisions of Title 18 of the United States Code.⁴⁶³

As is the case under the Clean Water Act and RCRA's knowing endangerment provisions, a person acts with the requisite degree of knowledge if he possesses "actual awareness or actual belief" that he places another in imminent danger of death or serious bodily injury.⁴⁶⁴ Thus, although knowledge may not be imputed to an individual defendant based merely upon his position of authority in an organization,⁴⁶⁵ circumstantial evidence may be used to prove awareness or belief.⁴⁶⁶

Beyond the requirement of actual belief or awareness, the "imminent danger" element found in the Clean Water Act has recently been interpreted as requiring the government to prove that the defendant was subjectively aware of a "high probability" that his conduct would cause death or serious bodily injury to another.⁴⁶⁷ In other words, the defendant must know that the discharge or release will actually place another person in imminent danger, "and not merely that such a result is a 'potential' consequence of the defendant's act."⁴⁶⁸ Under RCRA, the Tenth Circuit Court of Appeals defined imminent danger as "the existence of a condition or combination of conditions which could reasonably be expected to cause death or serious bodily injury unless the condition was remedied."⁴⁶⁹ At the same time, it must be stressed that the crime is in the creation of a "substantial risk"; therefore, actual

462. CAA § 113(c)(5)(E), 42 U.S.C. § 7413(c)(5)(E) (Supp. II 1990).

463. CAA § 113(c)(5)(E), 42 U.S.C. § 7413(c)(5)(E) (Supp. II 1990).

464. CAA § 113(c)(5)(B)(i), 42 U.S.C. § 7413(c)(5)(B)(i) (Supp. II 1990). *See also* CWA § 309, 33 U.S.C. § 1319(c)(3)(B) (1988); RCRA § 3009(f), 42 U.S.C. § 6928(f) (1988).

465. With respect to other violations under the Act, criminal culpability may rest upon theories of imputed knowledge such as the corporate officer doctrine. *See* CAA § 113(c)(6), 42 U.S.C. § 7413(c)(6) (Supp. II 1990).

466. CAA § 113(c)(6), 42 U.S.C. § 7413(c)(6) (Supp. II 1990).

467. *United States v. Villegas*, 784 F. Supp. 6, 13 (E.D.N.Y. 1991).

468. *Id.* at 23.

469. *United States v. Protex Indus., Inc.*, 874 F.2d 740, 744 (10th Cir. 1989).

harm or death is not an element of the offense.⁴⁷⁰

Despite similarities with pre-existing endangerment provisions, the crime of knowing endangerment under the Clean Air Act is substantially different than those found in the Clean Water Act or RCRA. Moreover, the differences pose serious enforcement hurdles for prosecutors and limit the protection that might otherwise have been afforded the public.

As already discussed above, the term "person" should be read in conjunction with the scienter element of knowledge provided in subsection 113(c)(5)(A).⁴⁷¹ Consequently, in addition to the need to prove actual awareness or belief of the danger posed by certain conduct, it is likely that the government will have to prove in many circumstances that the defendant acted with willful disregard of the Act's requirements.⁴⁷² This requirement would, in only a slightly varying form, also be imposed under the new negligent endangerment provision, where the defendant asserts that his conduct was performed under orders from senior management personnel, of which he is not a member.⁴⁷³

In addition to the higher burden of proof for certain classes of defendants, the Clean Air Act's knowing and negligent endangerment provisions both include a restriction for which no equivalent may be found in either RCRA or the Clean Water Act. Both the knowing and negligent endangerment provisions of the CAA Amendments make reference only to releases of toxic air pollutants into the "ambient air."⁴⁷⁴ At present, EPA defines "ambient air" to encompass only "that portion of the atmosphere, external to buildings, to which the general public has access."⁴⁷⁵

In the context of defining a reportable release into the

470. *Id.*; CAA § 113(c)(5), 42 U.S.C. § 7413(c)(5) (Supp. II 1990).

471. See discussion *supra* part III.D.1. (shifting scienter and the new definition of person subsection).

472. See discussion *supra* part III.D.1. (shifting scienter and the new definition of person subsection).

473. See discussion *supra* part III.D.1. (shifting scienter and the new definition of person subsection).

474. CAA § 113(c)(4), (5)(A), 42 U.S.C. § 7413(c)(4), (5)(A) (Supp. II 1990).

475. 40 C.F.R. § 50.1(e) (1991).

"environment" under CERCLA,⁴⁷⁶ EPA has stated that the term "ambient air" refers only to "air that is over and around the grounds of a facility."⁴⁷⁷ Several judicial decisions have concluded that the releases of hazardous wastes into the air within a building or other structure is not actionable under CERCLA because such areas do not constitute "ambient air."⁴⁷⁸ It has even been more recently held that the mere potential exposure of a pollutant to the outside air, as through the stockpiling of materials inside a structure that is not entirely enclosed, may not constitute a release into the "ambient air" unless there is proof of actual movement or emission into the air outside the structure.⁴⁷⁹

Applying this definition to the endangerment provisions then leads to the conclusion that only releases to the outside air, which pose substantial risk of harm to others, would be prosecutable under subsections 113(c)(4) or (5)(A). Ironically, it may be the very emission within a plant or other building that poses the greatest danger of injury to workers and others inside.⁴⁸⁰ In fact, it may be the very lack of adequate ventilation and resulting concentration of toxic levels of vapors within that creates a substantial risk of death or serious bodily injury.

The endangerment provisions of both the Clean Water Act and RCRA have been hailed as providing valuable protection to workers, otherwise unprotected by existing federal health and safety laws.⁴⁸¹ These provisions have filled a large gap in the Occupational Safety and Health Act (OSHA), which provides only limited federal protection following an

476. CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (1988).

477. 50 Fed. Reg. 13,456, 13,462 (April 4, 1985).

478. 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1360 n.9 (9th Cir. 1990); First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 866-67 (4th Cir. 1989).

479. Fertilizer Institute v. EPA, 935 F.2d 1303 (D.C. Cir. 1991).

480. United States v. Protex Indus., Inc., 874 F.2d 740, 744 (10th Cir. 1989).

481. Robert G. Schwartz, Jr., *Criminalizing Occupational Safety Violations: The Use of "Knowing Endangerment" Statutes to Punish Employers Who Maintain Toxic Working Conditions*, 14 HARV. ENVTL. L. REV. 487, 489-92 (1990); see also Clive Morrick, *The Prosecutor and the Workplace: Killing Two Birds with One Stone*, NAT'L. ENVTL. ENF. J., March 1989, 9, 11.

actual injury or death.⁴⁸² The 1990 Clean Air Act implicitly recognizes this additional benefit to workers by making it an affirmative defense to the charge of knowing endangerment if the defendant can show that the danger and conduct "were reasonably foreseeable hazards of . . . an occupation, a business, or a profession" freely consented to by the person endangered.⁴⁸³

Unfortunately, the "ambient air" release requirement in both the knowing and negligent endangerment provisions has the practical effect of denying this protection to those workers or even the general public, whose exposure to air toxins occurs while inside a plant, an office building or other structure. Neither RCRA nor the Clean Water Act's endangerment statutes operate under similar limitations. On the other hand, releases that pose a substantial risk to workers out on a loading dock, parking lot, or other un-enclosed space, would be prosecutable under the negligent or knowing endangerment provisions of the Clean Air Act even though such individuals may be working only a few feet away from colleagues inside. Given the absence of a congressional statement explaining the rationale behind such a distinction, one is only left with the conclusion that the reference to "ambient air" was a gratuitous and unfortunate drafting error that should be corrected by Congress at the earliest possible date.⁴⁸⁴

IV. Conclusion

On balance, the Clean Air Act Amendments of 1990 pro-

482. See OSHA, 29 U.S.C. § 666(e) (1988); Schwartz, Jr., *supra* note 481, at 489-492.

483. CAA § 113(c)(5)(C), 42 U.S.C. § 7413(c)(5)(C) (Supp. II 1990).

484. The conclusion that this was an unintended drafting error does not seem unreasonable in view of other errors found in the statute. For instance, the 1990 Amendments contain no short title provisions, which is common in most federal statutes. More embarrassing are the duplicate provisions for knowing failure to pay a fee required by the Act. Both sections 113(c)(1) and (c)(3) provide that anyone who knowingly fails to pay a required fee (other than a fee owed under the mobile source title) is guilty of a felony. CAA § 113(c)(1), (3), 42 U.S.C. § 7413(c)(1), (3) (Supp. II 1990). Although the two paragraphs proscribe identical conduct, they impose entirely different penalties. Section 113(c)(1) carries a maximum prison term of up to 5 years, whereas section 113(c)(3) provides a prison term of only 2 years upon conviction.

vide the potential for vastly improving federal control and abatement of air pollution in the United States. Much of the Act represents a radical departure from the traditional command and control approach of government regulation. Thus, the new permit program attempts to strike a balance between setting clear-cut duties upon emissions sources, while at the same time allowing for operational flexibility so that businesses can remain competitive. EPA's new administrative authorities, particularly the field citation program, should enhance enforcement without further clogging an already overburdened federal judiciary. EPA should be able to function as a "cop on the beat," enforcing well known industry norms, deterring serious violations, and issuing tickets for minor infractions. Finally, the market-based sulphur dioxide reduction program may very well constitute a watershed in government efforts to protect the environment. At the heart of this program lies the recognition that the air we breath is a natural resource, a commodity no different than oil or ore that industrial markets — both producers and consumers — should pay for and use profitably, rather than destroy indiscriminately.

Less than two years after passage of the Amendments, the 1990 Act is still in its infancy. A host of implementing regulations are only now winding their way through the administrative process. If the past is any measure, we can expect in the near future several rounds of legal challenges and judicial interpretations before the Act's final contours emerge. In the meantime, it is already clear that the enforcement provisions of the Act — one of the chief problems with the predecessor statute — contain various weaknesses even as they seemingly expand enforcement options.

It remains to be seen, for instance, whether the rules implementing operational flexibility strike a true balance between environmental protection and economic vitality, or whether the program will be left an empty shell. The sulphur dioxide allowance program is simply so new and experimental that it is impossible to even begin to evaluate how it might actually work in the market.

As for criminal enforcement, while the Act's penalties for

knowing violations have finally come into line with other federal laws, the Amendments also add disturbing new twists by shifting the criminal intent level necessary to convict according to the defendant's position with an organization. As other federal environmental statutes come up for re-authorization, it would seem wise for Congress to first study the effect of the shifting scienter provisions before replicating them elsewhere. Congress should at least study whether these provisions merely shield from prosecution those line employees who are powerless to stop environmental misconduct by their employers, or whether these provisions encourage individuals to remain ignorant of environmental regulations, and escape personal responsibility for wrongdoing by diffusing and shifting blame for violations onto anonymous corporate bureaucracies.

Given the massive scope of the Clean Air Act it should not come as a surprise that the final product is as chock full of possible problems as it is solutions. Only time will tell whether these flaws are minor or not. What is clear, and what both the Administration and Congress repeatedly recognized as they drafted the Clean Air Act Amendments of 1990, is that wonderfully-sounding provisions to protect the environment will, as with other regulatory efforts, stand for little if not backed by strict and workable enforcement provisions. Given that recognition, neither Congress nor the President should wait another thirteen years before returning to the Act and correct flaws as they become apparent.