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ENFORCEMENT OF THE CLEAN AIR AMENDMENTS OF 1970

I. Introduction

On December 31, 1970, the 1970 Amendments to the Clean Air Act¹ were signed into law.² Many people had felt that the Air Quality Act of 1967 was not effective enough to deal with the growing air pollution problem.³ The House report accompanying the 1970 Amendments reflected the same concern.⁴ The Amendments were designed to remedy some of the deficiencies of the 1967 Act.

The purpose of this note is to examine generally the enforcement provisions of the Amendments as they apply to existing stationary sources (primarily smokestacks). Particular attention will be paid to the plan for implementation developed by the State of Indiana pursuant to the 1970 Amendments, in that it serves as an example of the problems involved with enforcement of the Amendments' strictures. Additionally, the problems of local variances and citizen suits will be examined separately.

II. Indiana Implementation Plan

Section 109(a)(1) of the 1970 Amendments requires the Administrator of the Federal Environmental Protection Agency (hereinafter referred to as the EPA) to establish national primary and secondary ambient air quality standards by January 31, 1971, covering each air pollutant for which air quality criteria had been issued under the 1967 Act.⁵ Ambient air standards are those against which general overall air quality in a particular area is measured, as opposed to emission standards which specify the maximum allowable air pollution from any one point source (smokestack) of emissions. Section 109(b) defines primary standards as those standards necessary to protect the public health,⁶ while secondary standards are those standards necessary to protect the public welfare.⁷ Pursuant to this provision, on January 25, 1971, the EPA proposed nationwide ambient air standards for the following: particulate matter, the oxides of sulfur (SO_x), carbon monoxide (CO), photochemical oxidants, hydrocarbons, and nitrogen oxides (NO_x).⁸ These standards were amended on March 24, 1971,⁹ and formally promulgated on April 28, 1971.¹⁰ The ambient air standards were

1 42 U.S.C. §§ 1857-58 (1970).

2 116 CONG. REC. 44641 (1970).

3 See, e.g., Note, *The Clean Air Amendments of 1970: Better Automotive Ideas From Congress*, 12 B.C. IND. & COM. L.REV. 571, 579 (1971). See also 116 CONG. REC. 19202 (1970) (remarks of Representative Farbstein), and O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROB. 275, 277 (1968).

4 3 U.S. CODE CONG. & AD. NEWS 5356 (1970) (quoting H.R. REP. No. 1146, 91st Cong., 2d Sess. (1970)).

5 42 U.S.C. § 1857c-4(a)(1)(A) (1970).

6 *Id.* § 1857c-4(b)(1).

7 *Id.* § 1857c-4(b)(2).

8 36 Fed. Reg. 1502 (1971).

9 *Id.* at 5867.

10 *Id.* at 8186.

national in character such that each state was required to achieve the same overall air quality.

Under section 110(a)(1) of the Amendments each state was to submit by the end of January, 1972, a plan providing for implementation, maintenance, and enforcement of each primary and secondary standard within that state.¹¹ The states were allowed to request from the EPA an extension of eighteen months (until the end of June, 1973) for submission of a plan to implement the secondary standards.¹² This in effect forced each state to set emission standards, which, when applied to every existing point source within the state, would have the effect of improving that state's air quality to the degree necessary to satisfy at least the primary ambient air standards. These primary standards were to be met by 1975.¹³ As to the attainment of secondary standards, the Amendments merely required that they be met within a "reasonable time."¹⁴

Generally, each state developed a plan which set emission standards on a region-to-region basis, since an area with a heavy concentration of industrial activity would need more stringent emission standards to achieve the established ambient air requirements than would an area with a lower density of industrial activity. The Administrator of the EPA was then required to approve or disapprove each plan or portions thereof within four months of the date required for submission by the states.¹⁵ In addition, section 111(b)(1)(B) required the Administrator to establish *emission* standards for all new stationary sources so significantly contributing to air pollution as to endanger the public health and welfare.¹⁶ These standards, which apply generally to all such new sources in every state, were promulgated on December 16, 1971.¹⁷

Pursuant to these requirements, Indiana submitted its plan for implementation, The State of Indiana Air Pollution Control Implementation Plan (hereinafter referred to as Indiana Plan), on January 31, 1972,¹⁸ and, with the exception of some provisions, the EPA approved the Indiana Plan on May 26, 1972.¹⁹ On July 13 of that year, pursuant to section 110(c)(2)²⁰ of the Amendments, the Administrator of the EPA proposed additional provisions to the Indiana Plan where it had been found deficient.²¹ At that point, the Indiana Plan was complete and enforceable with regard to the primary standards. Indiana has not yet (as of January, 1973) submitted a complete plan for the achievement of the secondary ambient air standards.

11 42 U.S.C. § 1857c-5(a)(1) (1970).

12 *Id.* § 1857c-5(b).

13 *Id.* § 1857c-5(a)(2)(A)(i). *See* n. 108, *infra*.

14 *Id.* § 1857c-5(a)(2)(A)(ii).

15 *Id.* § 1857c-5(a)(2).

16 *Id.* § 1857c-6(b)(1)(B).

17 36 Fed. Reg. 24876 (1971).

18 37 Fed. Reg. 10863 (1972).

19 *Id.* at 10863-65.

20 42 U.S.C. § 1857c-5(c)(2) (1970).

21 37 Fed. Reg. 15100-02 (1972). *See* text accompanying n. 107 *infra*, for a discussion of one of the more important EPA-proposed provisions concerning public availability of emission data.

III. Federal Enforcement

Section 107(a) of the 1970 Amendments states that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State"²² It has been suggested that the primary purpose of federal enforcement is only to prod state and local control agencies into taking action.²³ This may in fact be the case in that as of January, 1973, only two thirty-day notices²⁴ (the first step in federal enforcement) had been issued by the EPA, one on March 8, 1972, to Delmarva Power and Light Company, located in Delaware City, Delaware,²⁵ and one on May 28, 1972, to Allied Chemical Company of Claymont, Delaware.²⁶ Other than these orders, federal action under the 1970 Amendments in relation to stationary sources has been essentially limited to the establishment of standards and the approval or disapproval of state implementation plans.

Despite the contrary implication, however, the federal government through the EPA does have significant enforcement powers. Under section 113(a)(1) of the 1970 Amendments, where the EPA finds a person violating any provision of an applicable state implementation plan, it notifies both that person and the state of its finding.²⁷ If such a violation continues for thirty days after notice is given, the EPA can issue a compliance order or bring a civil action for a permanent or temporary injunction.²⁸ However, according to section 113(a)(4), if such an order is issued, it cannot take effect until there has been a conference between the EPA and the alleged polluter concerning the violation.²⁹ Section 113(b)(1) provides that if the EPA does issue an order and such an order is violated, the EPA can again commence a civil action for a permanent or temporary injunction, this time, however, without the thirty-day notice requirement.³⁰

Under section 113(a)(2) of the 1970 Amendments, if the EPA finds that a state has failed to enforce its implementation plan effectively, as evidenced by widespread violations, the federal agency shall notify the state of such a finding.³¹ If the state's failure to enforce continues for thirty days after such notice, the EPA shall give public notice of the existence of a "period of federally assumed enforcement."³² Such a period continues until the state satisfies the federal agency that it will enforce its own plan.³³ During such a period the EPA can enforce that state's plan by issuing compliance orders or by bringing civil actions.³⁴ The notion of creating a "period of federally assumed enforcement"

22 42 U.S.C. § 1857c-2(a) (1970).

23 J. DAVIES, *THE POLITICS OF POLLUTION* 186 (1970).

24 See text accompanying n. 27, *infra*.

25 4 CCH CLEAN AIR & WATER NEWS 141 (1972).

26 *Id.* at 333.

27 42 U.S.C. § 1857c-8(a)(1) (1970).

28 *Id.*

29 *Id.* § 1857c-8(a)(4).

30 *Id.* § 1857c-8(b)(1).

31 *Id.* § 1857c-8(a)(2).

32 *Id.*

33 *Id.*

34 *Id.*

seems consistent with the suggested philosophy of the Clean Air Amendments. They are designed to prod state and local governments into action.³⁵ While the EPA has the power to enforce any requirement of an applicable state plan against any person without calling for a "period of federally assumed enforcement," it calls for such a period to rouse state and local action. The period may appear to be repetitive in that it provides the EPA with no additional significant powers. Construed in light of the underlying philosophy of the Act, however, this alternative appears both useful and proper.

Section 113(c)(1) of the 1970 Amendments empowers the EPA to bring criminal prosecutions against persons who, after the first thirty days of federally assumed enforcement, knowingly violate any requirement of an applicable implementation plan³⁶ or knowingly fail to comply with an order issued by the EPA.³⁷

The EPA also has broad discretionary powers under section 114(a)(1) of the 1970 Amendments to require the owner or operator of any emission source to maintain records of emissions, to make reports, to install and use monitoring equipment, and to sample emissions.³⁸ Section 114(a)(2) gives the EPA an explicit right of entry to premises where any emission source is located or where required records are maintained.³⁹ Under 114(a)(2), the EPA also has the right to have access to and copy required records, inspect any required monitoring equipment, and sample any emissions which the owner or operator is required to sample.⁴⁰

These federal powers raise two problems: 1) the EPA's power to require maintenance of records, the making of reports, the installation of sampling equipment and the sampling of emissions is completely discretionary, meaning that if the EPA does not order the keeping of such records and reports, a private citizen bringing an action under section 304⁴¹ of the Act may have to do his own costly testing of emission sources; 2) the disclosure requirements and the right of entry may raise some fourth and fifth amendment problems. The second problem deserves further comment.

The fifth amendment privilege against self-incrimination may be raised, because in a criminal action the EPA may want to introduce as evidence records which the owner or operator was required to maintain. Since most polluters are corporations, however, and since the Supreme Court has consistently held that a corporation has no fifth amendment privilege against self-incrimination, such a claim should not be very significant.⁴² Also likely to be raised is the fourth amendment protection against unreasonable searches and seizures. While an individual could suppress evidence obtained during an unreasonable search or

35 See text accompanying n. 23, *supra*.

36 42 U.S.C. § 1857c-8(c)(1)(A) (1970).

37 *Id.* § 1857c-8(c)(1)(B).

38 *Id.* § 1857c-9(a)(1).

39 *Id.* § 1857c-9(a)(2)(A).

40 *Id.* § 1857c-9(a)(2)(B).

41 *Id.* § 1857h-2. See text accompanying n. 77, *infra*.

42 See, e.g., *Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1967) and *United States v. Kordel*, 397 U.S. 1 (1970).

seizure, a corporation generally cannot.⁴³ As such, the fourth amendment poses few, if any, problems in the enforcement of the 1970 Amendments.

A final means of federal enforcement remains. Section 115 of the 1970 Amendments retains most of the lengthy conference procedure which requires participation by the EPA, the air pollution agencies of the states and municipalities involved, and any interstate air pollution control agency involved as provided for in the 1967 Act.⁴⁴ This lengthy procedure has been sufficiently outlined elsewhere⁴⁵ and will not be discussed in detail here. It was successful in only one reported case,⁴⁶ and even there abatement was achieved only after fifteen years of attempts to stop the pollution.⁴⁷ However, section 115(b)(4) of the 1970 Amendments provides that a conference may not be called with respect to an air pollutant for which a national primary or secondary ambient air quality standard is in effect,⁴⁸ indicating that the conference procedure will be used only infrequently in the enforcement by federal authorities of the 1970 Amendments.

IV. State and Local Enforcement in Indiana

The Indiana Air Pollution Control Board (hereinafter referred to as the APC Board) was established in 1961 by the Indiana Air Pollution Control Law⁴⁹ and is the principal agency charged with enforcing the Indiana Plan.⁵⁰

The APC Board has the general power and authority to:

- (1) Make investigations, consider complaints and hold hearings.
- (2) Enter such order or determination as may be necessary to effectuate the purposes of [the Indiana Air Pollution Control] Act. . . .
- (3) Adopt and promulgate reasonable rules. . . .
- (4) Bring appropriate action to enforce its final orders or determinations. . . .⁵¹

The Indiana Plan indicates that the primary responsibility for control is at the state, not local, level.⁵² It states as a general policy that "[w]hile local enforcement activity is to be encouraged, such authority should be concurrent with, and not in lieu of, state authority."⁵³ Consistent with this policy, the Indiana

43 See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). In the two decades since that decision, the Supreme Court has not altered its position. See generally K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 3.03, at 56 (3d ed. 1972).

44 42 U.S.C. § 1857d (1970).

45 See, e.g., Note, *The Federal Air Pollution Program*, 1968 WASH. U.L.Q. 283, 304-07.

46 *United States v. Bishop Processing Co.*, 423 F.2d 469 (4th Cir. 1970), cert. denied, 398 U.S. 904 (1970), aff'g 287 F. Supp. 624 (D.C. Md. 1968).

47 This particular series of events is fully described in J. ESPOSITO, *THE VANISHING AIR* 114-17 (1970).

48 42 U.S.C. § 1857d(b)(4) (1971).

49 IND. ANN. STAT. §§ 35-4601 to -4610 (Supp., 1972), amending IND. ANN. STAT. §§ 35-4601 to -4608 (1969).

50 See generally, 2 STATE OF INDIANA AIR POLLUTION CONTROL IMPLEMENTATION PLAN § 7, at 7-1 to 7-8 (1972) [hereinafter cited as INDIANA PLAN].

51 *Id.* § 7.6, at 7-4. These powers are all included in the Indiana Air Pollution Control Law.

52 *Id.* § 7.6, at 7-5.

53 *Id.*

Plan provides: "Local political subdivisions only have such powers as granted by statute, and state agencies such as the APC Board retain superior jurisdiction notwithstanding local programs."⁵⁴

In addition to its superior position, the APC Board has broad emergency powers.⁵⁵ Since the emergency situation is the exception rather than the rule,⁵⁶ however, it will not be discussed here, although in certain circumstances it could be an extremely important power.

Since, as has been mentioned above, most enforcement will take place on the state level, adequate funding of the APC Board is essential to enforcement of the 1970 Amendments. The Indiana Plan states that up to the date of the submission of the plan, the APC Board was "limited by financial and manpower resources."⁵⁷ It goes on to note that the "manpower model predicts the need for a 130 man-year effort by the local agencies and a 124 man-year effort by the state agency, or a total effort of 254 man-years. . . . These manpower estimates . . . seem somewhat excessive in practice. . . . The modified estimates predict the need for a total of 168 man-years of effort for the entire state by 1975."⁵⁸ Considering this sizable increase from 71.5 man-years in 1971⁵⁹ and assuming expertise and good faith on the part of the APC Board in developing these figures, it must be concluded that air pollution control success depends largely upon sufficient funding by the state and its appropriate political subdivisions, which in turn depends largely upon continued public interest in air pollution control. At this point in time it is very difficult to prejudge the success or failure of the manpower estimates. One rather explicit note of pessimism, however, is contained in the plan itself: "The estimated funding requirements are reasonably close to the projected budgets of the state and most of the local agencies. *Notable exceptions occur in the State budget for [fiscal year] 1973. . . .*"⁶⁰ Indiana could very likely have difficulty in enforcing the plan if the above statement is intended as an advance apology for not only 1973, but also for later years. Insufficient funding will lead to decreased manpower, with the likely net effect of decreased enforcement efforts.

Another indication of ineffective state enforcement, or at least an indication of lack of foresight, is that Indiana plans the establishment of only one stack sampling team, with the intention to expand to two or three teams in 1973.⁶¹ This note will not attempt to go into the details of stack sampling⁶² other than to say that it can be very costly and time-consuming, and that even three stack sampling teams seem to be inadequate.

54 *Id.* § 7.8, at 7-8.

55 IND. ANN. STAT. § 35-4605 (Supp., 1972).

56 For example, the EPA has declared only one emergency since the statute was enacted (that was in Birmingham, Alabama). 3 CCH CLEAN AIR & WATER NEWS 736-37 (1971). Such emergency powers are likely to be used by the EPA or the APC Board only when enforcement is otherwise non-existent or, as happened in Birmingham, an atmospheric inversion causes a bona fide air pollution emergency.

57 1 INDIANA PLAN § 5.1.1, at 5-1 (1972).

58 *Id.* § 5.2.2, at 5-3. A man-year is a unit of measurement, being the work of one man for one year.

59 *See id.* Table 5-1, at 5-6, and Table 5-3, at 5-10.

60 *Id.* § 5.3, at 5-3 (emphasis added).

61 *Id.* § 6.2(d), at 6-3.

62 *See generally* 2 A. STERN, AIR POLLUTION at 495-528 (2d ed. 1968).

Although subordinate to the state's powers, enforcement at the local level likely will not be insignificant, especially where a state has not taken any action. Therefore, local enforcement powers should be examined in at least general terms. At the time the Indiana Plan was written, three Indiana counties (Lake, St. Joseph, and Vigo), and seven cities (Anderson, East Chicago, Evansville, Gary, Hammond, Indianapolis, and Michigan City) had air pollution ordinances.⁶³ All the ordinances are substantially alike in their provisions. Section 102 of the Lake County Air Quality Control Ordinance is typical of the other ordinances and presents a general summary of the provisions contained in all:

Purpose. This ordinance is designed to control air pollution by establishing the Division of Air Pollution Control within the Lake County Health Department and prescribing the duties of the Administrator of Air Pollution Control, empowering investigation and abatement by the Administrator of violations of this ordinance, providing for an air pollution control advisory board, providing for an air pollution control appeal board, providing for registration of air pollution sources, providing for inspections and tests of process, fuel-burning, refuse-burning, and control equipment, establishing limitations upon the emission of air pollutants, declaring emissions which do not meet such limitations to be unlawful and a public nuisance, prohibiting certain acts causing air pollution, providing for fines and penalties for the violation of the provisions of this ordinance, and providing for just and adequate means by which the provisions of this ordinance may be executed.⁶⁴

V. Variances

The enforcement scheme of the Indiana Plan in conjunction with the federal Clean Air Amendments appears to provide a satisfactory means of air quality control. The power and ability of the local, state, and federal governments to promulgate and enforce regulations and standards appears quite comprehensive. Thus, an adequate air pollution abatement program seems presently to exist. However, the existence of a necessary evil, the variance, carries with it the potential of making enforcement much more difficult. Some form of variance from established standards is necessary due to the myriad possibilities in which grave injustice could result were a particular emission source forced to shut down. Despite good faith efforts to comply, a polluter unable to meet the applicable standard could be forced to leave great numbers of people unemployed. For this reason, a certain amount of divergence from established standards is allowed depending on the circumstances. A problem arises, however, because of the great potential for abuse. Some writers see little difficulty with the variance procedure.⁶⁵ But it would be naive to assume good faith in every case and to ignore the reality of external pressure exerted on variance-granting boards in the state, especially at the local level. The attitude preferred from a conservationist's point of view is that of the Illinois Environmental Protection Agency,

63 2 INDIANA PLAN § 7.8, at 7-9 (1972).

64 *Id.* at B7-2 to -3.

65 See Note, *State Regulation of Air Pollution*, 1968 WASH.U.L.Q. 249, 257.

which states that "if a variance were granted every time it cost money to comply with the pollution laws, nearly everyone would qualify."⁶⁶

A second problem, ancillary to the pressure factor, is the wording of the variance statutes and regulations. For example, one study of twenty-six implementation plans prepared in compliance with the 1970 Amendments showed that nineteen of those plans allowed variances on such loosely defined grounds as hardship and technical or economic infeasibility, without regard to whether the granting of a particular variance would prevent the reaching of national air standards or not.⁶⁷ The St. Joseph County (Indiana) Air Pollution Control Ordinance provides a good example:

SECTION 7.1—*Variance* Where emission sources in existence prior to the effective date of this ordinance do not comply with the emission limitation standards of Article V, a program to comply with such standards shall be developed and presented to the Health Officer by the owner or operator of the equipment, device or premises causing the emission. Such program shall be submitted upon the request of and within the time limit as shall be fixed by the Health Officer . . . [and] the owner and operator of such equipment . . . shall not be in violation of this ordinance so long as such program is followed. In evaluating such program, the Health Officer shall take into consideration the following:

- (a) efficiency of any existing control equipment . . . ;
- (b) temporary or interim control measures . . . ;
- (c) the effect the emission has on pollution generally . . . ;
- (d) the degree of control in relation to other similar sources which produce pollution; and
- (e) the age and prospective life of the source in question.

Reports indicating the progress . . . shall be submitted [semi-annually] to the Health Officer by the owner or operator. . . . If progress under the program is deemed by the Health Officer to be in violation of such program, the Health Officer may suspend the program and issue a violation notice and order. Such variances shall be for a period of time not in excess of three (3) years.

SECTION 7.2—*Special Variances* The Health Officer shall have authority to grant special variances. . . . Such special variances shall be for a period of time not in excess of one (1) year. The only reason for granting such special variances is the following:

- (a) the emissions occurring or proposed to occur do not endanger or tend to endanger human health or safety, and
- (b) compliance with this ordinance would produce serious hardship without equal or greater benefits to the public.⁶⁸

The power to grant a variance, in particular a "special variance," in the hands of a health officer subjected to industry pressure could be quite deleterious to the entire plan for the region, especially because the ordinance says nothing that

66 *Environmental Protection Agency v. Lindgren Foundry Co.*, EPA No. 70-1, at 5 (Ill. 1970) as cited in Comment, *The Illinois Environmental Protection Act—A Comprehensive Program for Pollution Control*, 66 *Nw. U.L. Rev.* 345, 361 (1971).

67 *Hearings on Implementation of the Clean Air Act Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 2d Sess., Ser. H31, pt. 1, at 45 (1972) [hereinafter cited as *1972 Hearings*].

68 2 INDIANA PLAN D7-23 to -24 (1972).

would prevent year after year renewal of such variances. What adds to this problem is the questionable status of checks on the variance-granting power. A citizen or citizens' group could sue to enjoin the variance, but only if they could demonstrate standing on their part and abuse of discretion on the part of the health officer. Quite likely, as long as the emissions considered alone did not endanger "human health or safety," citizen plaintiffs would be heavily burdened in establishing abuse of discretion in the granting of a special variance. This could even mean that where an aggregate of several emissions, all from sources holding special variances, was a threat to human health or safety, but no one source by itself constituted such a threat, proof of abuse of discretion on the part of the health officer would still be difficult. The official, by meeting the ordinance requirements in granting a number of special variances would not be acting improperly because nowhere do the requirements for the granting of a special variance make any reference to consideration of the effect the emission has on pollution generally.

It is not entirely clear whether the state APC Board has the power to overrule a local variance, although there are certainly arguments supporting that position. The Indiana Air Pollution Control Law, section 4(A)(2), empowers the APC Board to act "[i]f the control board shall find that the *condition of air pollution exists* . . . [in which case it may take] such action as is indicated by the circumstances to cause the abatement of such condition."⁶⁹ Further, section 5 gives the Governor the power to proclaim the existence of an air pollution emergency and to "order all persons causing or contributing to the air pollution to reduce or discontinue immediately the emission of air contaminants."⁷⁰ While such emergency proclamation seems quite extreme, the APC Board, nonetheless, appears to have a statutory power to correct abuses in the granting of variances by simply determining under section 4(A)(2) that a "condition of air pollution" (a term not defined in the statute) exists. On the other hand, the holder of the variance could use the language of section 8(e) to argue that the state board has no jurisdiction:

When an air quality jurisdiction, or administrator thereof, fails to enforce the local ordinance which affords protection to the public equal to that provided by state law, the control board . . . may take such appropriate action as may be necessary to enforce applicable provisions of state law.⁷¹

The alleged polluter could claim that the local ordinance was in fact being enforced since the variance procedure is explicit in the ordinance. However, this argument would likely fail because the language seems clearly to add to the powers conferred upon the APC Board in section 4, and not to limit those powers in any way.

Another possible way of negating the effect of the variance improvidently

⁶⁹ IND. ANN. STAT. § 35-4604(A)(2) (1969). This statute is included in the implementation plan at 2 INDIANA PLAN A7-5 (1972) (emphasis added).

⁷⁰ IND. ANN. STAT. § 35-4605 (1969), as amended, IND. ANN. STAT. § 35-4605 (Supp., 1972).

⁷¹ *Id.* § 35-4608(e).

granted would be a civil action for nuisance.⁷² Despite compliance with the local ordinance through the variance procedure, it is not clear that the nuisance action is precluded. On this matter, Prosser has written:

In general, it may be said that there is a [legislative] power to authorize minor interferences with the convenience of property owners, but not major ones, unless the land is condemned and compensation given under the law of eminent domain.⁷³

In such a context a variance seems clearly an authorized interference, and not merely a failure to prohibit. This indicates a strong possibility of maintaining the nuisance action in such a situation, assuming, of course, that the other elements of nuisance can be proved.

There is language in section 110(f)(1) of the 1970 Amendments which has led some to believe that the EPA must approve all variances.⁷⁴ That language is:

Prior to the date on which any stationary source . . . is required to comply with any *requirement of an applicable implementation plan* the Governor . . . may apply to the Administrator to postpone the applicability of such requirement to such source . . . for not more than one year.⁷⁵

The legislative history indicates that section 110 allows a governor to apply for a one-year extension of the "period for attaining a *standard*."⁷⁶ The final language of section 110(f), however, clearly appears to specify that the governor is required to apply to the Administrator for a time extension for compliance by a particular emission source only if that source would otherwise be in violation of an applicable implementation plan requirement. In obtaining the variance, the emission source has clearly complied with the implementation plan as the variance procedures are explicitly set out in the plan. Hence, in such a situation, it does not appear that any approval from the Administrator of the EPA would be required.

Nonetheless, in summary, it can be said that despite the fact that variance procedures certainly have the potential of creating problems, there are a few possible alternative routes by which the emission standard could still be enforceable against a particular source notwithstanding the variance: citizens alleging abuse of discretion could sue to enjoin the variance; the state APC Board arguably has the power to overrule a local variance; citizens could sue the polluter on a general nuisance theory; and, as will be described next, citizens could bring suit against the polluter using the citizen suit provision of the 1970 Amendments.

VI. Citizen Suits

Perhaps the most important provision of the 1970 Amendments is section 304, the citizen suit provision, which reads:

72 See text accompanying n. 77 and following, *infra*, for further discussion of citizen suits.

73 W. PROSSER, *THE LAW OF TORTS* § 91, at 607 (4th ed. 1971) (footnote omitted).

74 1972 *Hearings* pt. 1, at 45-46.

75 42 U.S.C. § 1857c-5(f)(1) (1970) (emphasis added).

76 H.R. REP. NO. 1783, 91st Cong., 2d Sess. 45 (1970) (emphasis added).

- [A]ny person may commence a civil suit on his own behalf—
- (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
- (2) against the Administrator

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order. . . .⁷⁷

Section 304 further requires that such plaintiffs give sixty days' notice of the violation and intention to file suit to the Administrator, state, and alleged violator,⁷⁸ but if the Administrator or state has already commenced a civil suit or does so within that sixty-day period that citizen cannot bring such an action.⁷⁹ Even then, however, the citizen can intervene as a matter of right in any action which has been brought in a federal (but not state) court.⁸⁰

On the part of industry, especially, there is great opposition to citizen suits, and the following comment seems fairly typical of industry's attitude: "By encouraging private and class suits against industry, government control agencies have opened up a Pandora's box of problems for industry."⁸¹ On the other hand, substantial rationale for such suits has been expressed by Senator Muskie in Senate hearings preceding the adoption of the 1970 Amendments: "I know one of the things industries don't like is this public participation. I would like to give it the blessing of national legislation by writing it into the law."⁸²

One drawback of section 304 is that it does not specifically allow suits for damages in the federal courts. Some have taken this to mean that citizen suits are limited in the federal courts to actions for injunctive relief.⁸³ In speeches on the floor of the Senate, both Senator Muskie, who introduced the 1970 Amendments, and Senator Hart expressed their intentions that the Amendments not allow for damage suits.⁸⁴ Whether or not damages can be sought in federal court, section 304(e) also provides that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief. . . ."⁸⁵ This language can be interpreted as both permitting and denying suits for damages in federal courts. The argument against such suits is simply that Congress has provided for injunctive relief in the federal courts, and that section 304(e) is Congress' way of saying that it intended that damage suits be tried in

77 42 U.S.C. § 1857h-2(a) (1970).

78 *Id.* § 1857h-2(b)(1)(A).

79 *Id.* § 1857h-2(b)(1)(B).

80 *Id.*

81 Farrell, *Let the Polluter Beware*, 75 CASE & COM., No. 5, 3, at 5 (1970). Mr. Farrell is Vice President and General Counsel of Standard Oil Company (Indiana).

82 *Hearings on S. 3229, S. 3466, and S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess., pt. 1, at 152 (1970) [hereinafter cited as 1970 Hearings].

83 Note, *The Clean Air Amendments of 1970: Better Automotive Ideas From Congress*, 12 B.C. IND. & COM. L. REV. 571, 614 (1971).

84 116 CONG. REC. 33102 (1970) (remarks of Senator Muskie); *id.* at 33104 (remarks of Senator Hart).

85 42 U.S.C. § 1857h-2(e) (1970).

state courts. On the other hand, since section 304(e) contains the language "under *any* statute or *common law*"⁸⁶ an argument could be made that under a recent Supreme Court case, *Illinois v. City of Milwaukee*,⁸⁷ federal common law could be applicable, thereby keeping the action in federal court. In *Milwaukee*, the Court said that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law. . . ."⁸⁸ The Court went on to say:

It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. While federal law governs, consideration of state standards may be relevant.⁸⁹

It could be, and certainly will be, argued that this language applies to air pollution as well as water pollution and that the joinder of a damage claim based on federal common law as to nuisance caused by air pollution with an injunctive action (or by itself) is wholly proper under *Milwaukee*.

There are two other substantial arguments supporting federal jurisdiction over both the injunctive relief action and the damage action. One is the pendent jurisdiction doctrine, the other is one based on public policy considerations.

"Pendent jurisdiction" means that the original jurisdiction resting under a federal claim extends to any non-federal claim against the same defendant.⁹⁰ In *United Mine Workers of America v. Gibbs*,⁹¹ the Court laid down the conditions that must be met before pendent jurisdiction will attach:

The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.⁹²

The court also warned that pendent jurisdiction was strictly a doctrine of discretion.⁹³

Under *United Mine Workers*, then, a plaintiff could try to join his federal injunctive relief action with his state action for damages based on nuisance, and argue that: (1) the federal court had subject matter jurisdiction by virtue of section 304; (2) that the federal and state claims derive from a common nucleus of operative fact (in fact, from the same facts); and, (3) that the court should exercise its discretion and hear both actions.

Another line of argument for asking a federal court to grant damages comes

86 *Id.* (emphasis added).

87 406 U.S. 91 (1972).

88 *Id.* at 103 (footnote omitted).

89 *Id.* at 107 (footnote omitted).

90 BLACK'S LAW DICTIONARY 1290 (4th ed. rev. 1968).

91 383 U.S. 715 (1966).

92 *Id.* at 725 (footnote and citation omitted).

93 *Id.* at 726.

from the language used in *Bell v. Hood*.⁹⁴ In that case the Supreme Court held that federal tribunals should "adjust their remedies so as to grant the necessary relief"⁹⁵ where federally secured rights are invaded. The Court further held that:

[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.⁹⁶

The Court has reaffirmed this recently in *Bivens v. Six Unknown Fed. Narcotics Agents*.⁹⁷ Both *Bell* and *Bivens* involved damage actions following illegal searches and seizures. However, in a 1964 case⁹⁸ the Court went beyond the illegal search and seizure situation and extended this rationale to a civil action based on violations of the Securities Exchange Act, indicating the Court's willingness to give the doctrine a broad application.

To maintain a claim for damages in a federal court under the *Bell* rationale, it would be necessary to argue that section 304 proclaims that freedom from air pollution is a "federally secured right" by the fact that a citizen can enforce it; further, that this right has been invaded and violated by the alleged polluter; and finally, that money damages, in addition to an injunction, are necessary to "make good the wrong done."

There are several other interesting aspects of section 304. While the other enforcement sections talk in terms of "violation of any requirement of an applicable implementation plan,"⁹⁹ section 304 requires only an allegation that a person is in violation of an *emission standard*.¹⁰⁰ Later in the same section this language is defined:

[T]he term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard . . . which is in effect under this chapter . . . or under an applicable implementation plan.¹⁰¹

The language opens up several possibilities. Two are especially important. If a person is suing for injunctive relief only, and not damages, then it appears that he need only show a violation of the standard, and need not prove nuisance or harm, real or potential, at all. The second important, perhaps vital, aspect of this language relates to the variance problem discussed earlier.¹⁰² It would be arguable that a citizen could bring suit, show that the emission standard was violated, and win at least injunctive relief (and possibly damages also under a

94 327 U.S. 678 (1946).

95 *Id.* at 684.

96 *Id.* (footnote omitted).

97 403 U.S. 388, 396 (1971).

98 *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

99 *See, e.g.*, section 113(a)(1), 42 U.S.C. § 1857c-3(a)(1) (1970).

100 42 U.S.C. § 1857h-2(a)(1)(A) (1970). *See* text accompanying n. 77, *supra*.

101 42 U.S.C. § 1857h-2(f) (1970). Particular attention must be paid to the disjunctive language: "timetable . . . [or] emission limitation, [or] . . . standard of performance or emission standard."

102 *See* text accompanying n. 67, *supra*.

nuisance action) even if the alleged violator had obtained a variance from the local governmental unit. The defense, quite obviously, would be that the defendant had justifiably relied on the variance, and that, although he was technically in violation of the promulgated emission standard, the standard was different for him because of the variance. However, both the general rule previously discussed concerning nuisance ("there is a [legislative] power to authorize minor interferences with the convenience of property owners, but not major ones")¹⁰³ and the specific disjunctive language of section 304 considerably weaken that defense. A very strict reading of section 304 clearly suggests that, notwithstanding the variance, a citizen could sue a polluter on the grounds that an emission limitation was being violated.

Perhaps the most noteworthy feature of section 304 is that a federal court is authorized, in its discretion, to award costs of litigation, including attorney and expert witness fees, to any party.¹⁰⁴ This should have two primary effects. First, it encourages bona fide citizen suits by offering at least the prospect of recovering costs, if not damages. Expenses in this type of litigation can be prohibitively high. One estimate has been made that the cost of such a suit could exceed \$500,000.¹⁰⁵ Second, it discourages frivolous suits, as costs could be awarded to a successful defendant in such a case. One feature of the 1970 Amendments that could easily decrease the cost of bringing a citizen suit is the fact that if the Administrator exercises his section 114 powers¹⁰⁶ by ordering an owner or operator of a source to maintain records and make reports, these records are then available to the public for inspection.¹⁰⁷ This will be helpful, of course, only if the Administrator does exercise his discretion to make such an order, and the would-be plaintiff believes the data to be correct.

VII. Conclusion

Although the 1970 Amendments are now well over two years old, their major impact may not be felt until well into 1975, the year by which the states are required to have met the national primary ambient air quality standards as promulgated by the EPA.¹⁰⁸ To better effectuate and implement the congressional desire for cleaner air as expressed in the 1970 Amendments, Congress and the EPA should consider two further steps.

First, the EPA, under its powers to require revisions in state implementa-

103 W. PROSSER, *THE LAW OF TORTS* § 91, at 607 (4th ed. 1971). See text at n. 73, *supra*.

104 42 U.S.C. § 1857h-2(d) (1970).

105 1970 *Hearings* pt. 4, at 1199.

106 42 U.S.C. § 1857c-9(a)(1) (1970). See text accompanying n. 38, *supra*.

107 See, e.g., 37 Fed. Reg. 15100 (1972) (requiring the public availability of emission data recorded from sources in Indiana).

108 Section 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970), requires that the state implementation plan provide for the attainment of primary standards within three years of the approval by the EPA of that plan. Indiana's plan for implementation was approved in most major aspects on May 31, 1972, thus making Indiana's target date May 31, 1975. 37 Fed. Reg. 10863 (1972). Section 110(a)(2)(A)(ii), 42 U.S.C. § 1857c-5(a)(2)(A)(ii), requires that the secondary standards be attained only in a "reasonable time."

tion plans as provided by section 110(a)(2)(H)(ii) of the 1970 Amendments¹⁰⁹ should make a careful re-examination of the various state and local provisions allowing for variances. Where the Administrator perceives a potential capacity for abuse, he should require the states to revise their plans so that they will be able to prevent any abuse.

Second, Congress should carefully consider whether or not enforcement could be better insured by explicitly amending the citizen suit provision in order to allow actions in federal courts for damages against violators. Of course, this consideration could be rendered moot if the courts do allow such actions for damages as the cases come before them.

In taking these two steps, the Congress can better effectuate its manifest desire to clean up the air and at the same time remove some of the ambiguities in the present law.

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¹⁰⁹ 42 U.S.C. § 1857c-5(a)(2)(H)(ii) (1970).