Restricted Judicial Review Provisions of the Clean Air Act – Denial of Due Process or Indispensable to Efficient Administration

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RESTRICTED JUDICIAL REVIEW PROVISIONS OF THE CLEAN AIR ACT — DENIAL OF DUE PROCESS OR INDISPENSABLE TO EFFICIENT ADMINISTRATION?

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I. INTRODUCTION

Congress enacted the Clean Air Act of 1970¹ in the wake of growing national concern over the quality of our country’s air resources.² Since its enactment, the Act has created a great deal of controversy between business and environmental groups. Arguably, the legislation may impose regulations which are difficult or even impossible to meet or which, if complied with, would seriously curtail or even stop economic growth. Yet, the fact that significant air pollution still exists may indicate that the Environmental Protection Agency

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¹ The Clean Air Act of 1970, formerly at 42 U.S.C. §§1857 et seq. (1976), was amended, effective August 7, 1977, and is now the Clean Air Amendments of 1977, codified at 42 U.S.C. §§7401 et seq. The Supreme Court decision in Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978), cites to the provisions of the Act prior to their recodification at 42 U.S.C. §§7401 et seq. Therefore, reference in this article to specific provisions of the Clean Air Act will be provided to the appropriate citation both before and after the 1977 Amendments.

² See e.g., H.R. REP. No. 1146, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 5356. The Clean Air Act is a complex piece of legislation designed predominantly “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” Section 101 of the Clean Air Act, 42 U.S.C. §1857 (1976) transferred to 42 U.S.C. §7401. The legislative history reveals the sense of urgency with which the Clean Air Act was enacted. The House Report on the Clean Air Act points out that pollution control, since the enactment of the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, had been inadequate. Congress, therefore, was urged to adopt new legislation which would make possible a more expeditious imposition of emission standards and provide more effective enforcement of these standards by state and federal agencies. The House Report explained that the purpose of such legislation was to “speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the nation is wholesome once again.” H.R. REP. No. 1146, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 5356.
(EPA) has moved too slowly in enforcing the Act’s mandate to control air pollution.

In 1978 the Supreme Court addressed certain aspects of the controversy surrounding the Clean Air Act in *Adamo Wrecking Co. v. United States*, a case involving a small wrecking company’s alleged failure to comply with EPA regulations controlling the emission of asbestos. One question before the Court concerned whether a defendant in a criminal proceeding to enforce a regulation promulgated under the Act may challenge the validity of the regulation itself. The ability of a defendant to mount such a challenge would gravely affect the enforcement of the Act since any enforcement brought by the EPA would automatically widen from an investigation of the defendant’s actions to an investigation of EPA’s actions in issuing the regulation.

This article will examine the due process implications of the criminal sanctions under the Clean Air Act. The first section discusses the provisions of the Clean Air Act relating to the promulgation, judicial review, and enforcement of emission standards. The second section examines the Supreme Court’s opinion in *Adamo* and its relationship to another case interpreting a statute with judicial review provisions similar to those in the Clean Air Act. The final portion of the article presents the due process issues involved in denying a defendant the ability to assert certain defenses in an enforcement proceeding, and suggests possible changes in the Act’s review procedures in order to protect a defendant’s due process rights.

II. ENFORCEMENT AND JUDICIAL REVIEW PROCEDURES UNDER THE CLEAN AIR ACT

To accomplish the Clean Air Act’s stated purpose of improving the quality of the air in the United States, Congress empowered the EPA to investigate the sources of air pollution and to promulgate regulations designed to abate or eliminate them. Moreover, Congress authorized the EPA to institute administrative or judicial enforcement proceedings against violators. However, Congress also subjected EPA’s authority to issue regulations to judicial review by the courts. This elaborate legislative scheme seeks to balance the needs for pollution control against the economic needs of the nation.

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A. Promulgation of Standards

The Administrator of the EPA has authority to promulgate standards to attain the safest level for emission of hazardous air pollutants and to attain national primary and secondary ambient air quality levels. Section 112 of the Act authorizes the Administrator to control the emission of hazardous air pollutants on a national level. The Administrator has initial responsibility for publishing a list which includes each hazardous pollutant for which he intends to establish an emission standard. Within 180 days after inclusion of a pollutant on the list, the Administrator must publish proposed regulations establishing emission standards together with a notice of a public hearing to be held within thirty days. Not later than 180 days after the publication of the list, the Administrator must prescribe emission standards at the level which, in his judgment, protects the public health "unless he finds, on the basis of information presented at such hearings, that a pollutant clearly is not a hazardous air pollutant." Any standards established pursuant to this section become effective upon promulgation. After the effective date of any emission standard, new and stationary sources are subject to the prohibitions.

The Clean Air Amendments of 1977 added a new subsection to

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7 Id.
8 Id. at subsection (b).
9 Id.
10 Id.
11 Id.
12 Section 112(c), 42 U.S.C. §1857c-7(c)(1976) transferred to 42 U.S.C. §7412(c). The term "new source" means "a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source." Section 112(a), 42 U.S.C. §1857c-7(a) (1976) transferred to 42 U.S.C. §7412(a). The term "stationary source" means "any building, structure, facility, or installation which emits or may emit any air pollutant." Section 111(a)(3), 42 U.S.C. §1857c-6(a)(3)(1976) transferred to 42 U.S.C. §7411(a)(3). Therefore, no person may construct a new source which will emit a hazardous air pollutant in excess of these standards. Existing sources are similarly forbidden from emitting a pollutant in excess of any standards. However, the standards do not apply to these stationary sources until ninety days after their effective date. The President has authority to exempt any source from compliance with Section 112 if it is determined that the technology needed to implement such standards is not available and the operation of the source is required for reasons of national security. Section 112(c), 42 U.S.C. §1857c-7(c)(1976) transferred to 42 U.S.C. §7412(c).
13 Clean Air Amendments of 1977, Pub. L. No. 95-95, §110, 91 Stat. 685 (codified at 42
Section 112 relating to the use of procedural and operational standards for hazardous pollutants when, in the judgment of the Administrator, it is not feasible to prescribe or enforce emission standards in particular situations. 14 Such a standard, when promulgated, must include any requirements necessary to assure the proper operation and maintenance of the pollution control procedure or equipment. Whenever it becomes feasible to promulgate and enforce one of these operational standards in terms of an emission standard, the standard must be changed to an emission standard. It should be noted that subsection (c), which outlines prohibited acts under Section 112, does not discuss violations or work practice or operational standards; rather, it prohibits only violations of emission standards. 15

The procedure followed by the Administrator in promulgating national primary and secondary ambient air quality standards is somewhat different from that set forth for the promulgation of hazardous pollutants. 16 First, the Administrator must issue a list of air pollutants which, in his judgment, cause or contribute to air pollution and which may endanger the public health or welfare. 17 The Administrator then issues air quality criteria for each air pollutant on the list. 18 These criteria must reflect the latest scientific knowledge in indicating the identifiable effects of such a pollutant on the public health and welfare which may be expected from the presence of this pollutant in the air, in varying quantities. 19 Concurrent with the issuance of these criteria, the Administrator, after consultation with appropriate advisory committees and federal agencies, issues information concerning air pollution control techniques for each of these pollutants. 20

The Administrator publishes proposed national primary and secondary air quality standards simultaneously with the issuance of these criteria and information. 21 After a reasonable time for inter-

U.S.C. §§7401 et seq.).
14 Id. §110.
15 Id.
18 Id.
19 Id.
20 Id. §108(c).
ested persons to offer written comments, but in no case later than ninety days after the initial publication of the proposed standards, the Administrator promulgates the proposed standards. These may include any modifications he deems appropriate.\textsuperscript{22}

These promulgated standards are instrumental in the formation by each state of its implementation plan. Each state is charged with the responsibility of formulating a plan consistent with these standards and with other specified requirements.\textsuperscript{23} The Administrator must approve such a plan if it meets all the requirements and if the plan was adopted by the state after reasonable notice and hearing.\textsuperscript{24}

Thus, the Administrator promulgates standards for hazardous pollutants as well as for nonhazardous pollutants after providing notice and an opportunity for a hearing. Yet, the scope of the hearings held for hazardous and nonhazardous pollutants differs. In the promulgation of standards to control the emission of hazardous pollutants, the hearing concerns only the question of whether the particular pollutant for which a standard is being developed is, in fact, hazardous. On the other hand, the hearings held during the formulation of the primary and secondary ambient air quality standards are not similarly restricted in scope, so that comments may be submitted on any question raised during the development of those standards.

\textbf{B. Judicial Review of Standards}

Judicial review of the action of the Administrator in promulgating standards for hazardous and nonhazardous pollutants is addressed in Section 307(b) of the Clean Air Act.\textsuperscript{25} Prior to the enactment of \textsuperscript{22}Id.

\textsuperscript{23} Section 110, 42 U.S.C. §1857c-5(1976) \textit{transferred} to 42 U.S.C. §7410, sets out the requirements for each state implementation plan as well as the Administrator's responsibilities in approving and publishing such plans.

\textsuperscript{24} Id.


This section reads, in relevant part:

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112 [42 USC § 7412], any standard of performance or requirement under section 111 [42 USC § 7411], \ldots or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) [42 USC §§ 7410, 7411(d)], \ldots under section 112(c) [42
that Act, the nation’s pollution control laws seemed to encourage administrative delay before initiating court action. Moreover, once the parties entered court, the statutes provided several opportunities to prolong the judicial proceedings almost to the point of a de novo review of the issues previously decided on the administrative level. Through Section 307(b) of the Clean Air Act, Congress attempted to restructure the existing review procedure to make it

USC § 7412(c)], under section 113(d) [42 USC § 7413(d)], . . . or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. The Clean Air Amendments of 1977 altered this subsection, originally enacted in 1970, 42 U.S.C. §1857h-5(b)(1976), by adding, among other things, a provision respecting requirements under sections 111 and 112, 42 U.S.C. §§7411 and 7412, and by increasing from thirty days to sixty days the period during which the petition must be filed. 26 The enforcement procedures of the 1963 Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392, are found in §5, 77 Stat. at 396. First, a conference of governmental units and air pollution control agencies having jurisdiction over the alleged polluter was to be held. The recommendations of this conference were then to be issued. If no abatement had occurred within six months after the issuance of the conference recommendation, a public hearing was to be held. On the basis of evidence presented at such a hearing, the federal government could request the Attorney General to bring a civil suit to secure abatement of the pollution. The enforcement procedures of the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, are found in §108, 81 Stat. at 491. This Act used the air quality standards approach later adopted in the Clean Air Act of 1970. Under the Air Quality Act of 1967, each state had to establish its own air quality standards and a plan for their implementation. Failure to meet the air quality standards of a particular region resulted in notification to the affected state and the polluter. If such failure did not cease 180 days from the date of such notification, the Attorney General could have been requested to bring a suit on behalf of the United States to secure abatement. 27 28 See, e.g., 1963 Clean Air Act, Pub. L. No. 88-206, §5(g), 77 Stat. 398, “The court, giving due consideration to the practicability of complying with such standards . . . and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgment. . . ” See also, Air Quality Act of 1967, Pub. L. No. 90-148, §108(c), 81 Stat. 493, “The court, giving due consideration to the practicability and to the technological and economic feasibility of complying with such standards, shall have jurisdiction to enter such judgment. . . ”
genuinely effective. 28

28 The language of Section 307(b) made its first appearance in the conference committee bill, but with little explanation as to its purpose. See, H.R. Rep. No. 1783, 91st Cong., 2d Sess. 35, 57 (1970). The language of Section 307(b) of the Clean Air Act, however, is almost identical to the review provision of the Federal Water Pollution Control Act (FWPCA). 33 U.S.C. §§1252 et seq. (1976) at §1369(b). Subsection (b)(1) of the FWPCA refers to obtaining review of the Administrator's action in specific circumstances in the appropriate court of appeals. Application for such review must be made within ninety days of the Administrator's action. Subsection (b)(2) of the FWPCA is worded identically to Section 307(b)(2) of the Clean Air Act. Since the legislative history of the FWPCA is more revealing than that of Section 307(b) of the Clean Air Act, an examination of the history of the FWPCA is helpful in indicating Congressional intent in changing the judicial review scheme of federal air pollution legislation.


With respect to the exclusivity of the judicial review procedure, the Senate noted that the courts have held that, even in matters committed to agency discretion, preclusion of judicial review is not to be lightly inferred. See S. Rep. No. 414, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 3668. This Report notes:

Since precluding review does not appear to be warranted or desirable, the bill would specifically provide for such review within controlled time periods. Of course, the person regulated would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone.

Id. at 3750.

Therefore, the section, as adopted by both houses, not only explicitly precluded judicial review except within a specified time period, but also forbade review of any action which could have been reviewed in the court of appeals in an enforcement proceeding at the district court level. The Conference Report states:

The conferees intend that this provision limit the availability of judicial review of a standard or requirement where judicial review was available at the time the standard or requirement was established. The conferees do not intend to, in any way, affect the right of a party for which judicial review was not available.


Presumably, the same necessity for efficient and uniform decision-making that prompted
Under Section 307(b)(1), a party challenging emission standards must file a petition seeking review in the court of appeals. Regulations or orders of national applicability are challenged in the Court of Appeals for the District of Columbia, while regulations or orders of a local or regional nature are challenged in the court of appeals for the appropriate circuit. However, regardless of which court the action is brought in, the party seeking review must do so within sixty days after the Administrator makes the determination or promulgates the regulation at issue. Waiver of this sixty day time limit is possible only if the petition for review rests solely on grounds arising after the sixtieth day, in which case a petition for review must be filed within sixty days after the new grounds arise.

Section 307(b)(2) provides that any action which could have been challenged in the courts of appeals under Section 307(b)(1) may not be raised as a defense in any civil or criminal enforcement proceeding. Besides having Section 307(b)(1) limit the time for obtaining judicial review of some issues prior to an enforcement proceeding, Congress also foreclosed prospective defendants from raising these same issues in an enforcement action. Thus, a business emitting a hazardous pollutant which fails to bring an action in the court of appeals challenging the regulation controlling that pollutant will be precluded from raising the validity of the regulation in an enforcement proceeding.

In sum, Section 307(b) of the Act limits the opportunities for judicial review of actions of the Administrator. The restrictions under this section foreclose judicial review in the courts of appeals sixty days after the Administrator's action, and preclude considera-

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the Congress to enact the review provision of the FWPCA was the impetus behind the enactment of the Section 307(b) review provision in the Clean Air Act.

29 The judicial review provision of the Clean Air Act was first interpreted in Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3rd.Cir.1972), cert. denied 409 U.S. 1125 (1973). In this case the issue was whether an interested party could seek pre-enforcement review in the federal district court under the Declaratory Judgment Act, 28 U.S.C. §§2201,1337 (1970), and the Administrative Procedure Act, 5 U.S.C. §§701, 702 (1970). The court held that Section 307 of the Clean Air Act provided the exclusive means of pre-enforcement review of EPA regulations.

31 Id.
32 Id.
33 Id.
tion in the district courts at any time, whether in civil or criminal enforcement proceedings.

C. **Enforcement Procedures**

Section 113 contains the major provision outlining federal enforcement procedures applicable to violations of state implementation plans and standards for hazardous emissions. This section provides both civil and criminal sanctions.

The Administrator has authority, under this section, to issue a compliance order or to bring a civil action seeking an injunction or civil penalty under several circumstances, notably for the violation of any applicable state implementation plan or for a violation of a standard for hazardous emissions. Any order issued for any viola-

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28 Section 113, 42 U.S.C. §1857c-8 (1976) transferred to 42 U.S.C. §7413. It should be noted that Section 113 is not the only enforcement mechanism in the Clean Air Act. Other sections of the Clean Air Act do provide for the imposition of penalties, under limited circumstances (e.g., civil penalties may be imposed for the violation of a primary nonferrous smelter order (Section 120); an order or injunction may issue for non-conformity with provisions relating to prevention of significant deterioration of air quality (Section 167); and, civil penalties may be imposed for a violation with respect to a provision for controlling motor vehicle emissions (Section 205)).

29 Section 113 (a), 42 U.S.C. §1857c-8(a)(1976) transferred to 42 U.S.C. §7413(a). Under this subsection, the Administrator has the same power with respect to violations of the sections relating to new source performance standards, and inspections, monitoring, and entry.

The enforcement procedure of Section 113(b), 42 U.S.C. §1857c-8(b) (1976) transferred to 42 U.S.C. §7413(b), also mandates that the Administrator bring a civil action if the violation of any of several provisions is committed by a “major stationary source” as defined by the the Clean Air Act. Section 302, 42 U.S.C. §1857h (1976) transferred to 42 U.S.C. §7602, defines the terms “major stationary source” and “major emitting facility” to mean “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 . . . .” The Administrator is permitted to bring an action for any of these same violations when they are committed by a person who is not the owner or operator of such a major stationary source. Section 113(b), 42 U.S.C. §1857c-8(b)(1976) transferred to 42 U.S.C. §7413(b).

The prohibitions for which the Administrator must bring an action in some cases and may bring an action in other situations are set forth in Section 113(b), 42 U.S.C. §1857c-8(b)(1976) transferred to 42 U.S.C. §7413(b), which reads, in pertinent part:

The Administrator shall, in the case of any person which is the owner or operator of a major stationary source . . . commence a civil action . . . whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection (a); or

(2) violates any requirement of an applicable implement plan (A) during any period of federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of a finding that such person is violating such requirement; or

(3) violates section 111(e), 112(c) [42 USC § 7411(e) or 7412(c)], section 119(g) (as
tion, except one issued for a violation of a standard for a hazardous pollutant, does not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. The civil action may be commenced for a permanent or temporary injunction, or to recover a civil penalty of not more than $25,000 per day of violation, or both. Criminal sanctions of not more than $25,000 per day of violation, or of imprisonment for not more than one year, or both, are mandatorily imposed on any person who knowingly violates one of the conditions raised in this subsection.

in effect before the date of the enactment of the Clean Air Act Amendments of 1977 [enacted Aug. 7, 1977], subsection (d)(5) (relating to coal conversion), section 324 (relating to cost of certain vapor recovery) [42 USC § 7624], section 119 (relating to smelter orders), [42 USC § 7419] or any regulation under part B (relating to ozone) [42 USC §§ 7450 et seq.]; or
(4) fails or refuses to comply with any requirement of section 114 [42 USC § 7414] or subsection (d) of this section; or
(5) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) has been made.

The Administrator may commence a civil action for recovery of any noncompliance penalty under section 120 [42 USC § 7420] or for recovery of any nonpayment penalty for which any person is liable under section 120 [42 USC § 7420] or for both. Any action under this subsection may be brought in the district court of the United States for the district in which the violation occurred or in which the defendant resides or has his principal place of business, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty and to collect any noncompliance penalty (and nonpayment penalty) owed under section 120 [42 USC § 7420]. In determining the amount of any civil penalty to be assessed under this subsection, the court shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.


Section 113(c)(1), 42 U.S.C. §1857c-8(c)(1)(1976) transferred to 42 U.S.C. §7413(c)(1), reads:

Any person who knowingly—

(A) violates any requirement of an applicable implement plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or
(B) violates or fails or refuses to comply with any order under section 119 [42 USC § 7419] or under subsection (a) or (d) of this section, or
(C) violates section 111(e) [42 USC § 7411(e)], section 112(c) [42 USC § 7412(c)], or
The Administrator has broad authority to impose civil sanctions for violations of various provisions of the Act. For violations other than those involving standards for hazardous pollutants, the alleged violator may confer with the Administrator prior to the issuance of an order against the violator. An order issued for a violation of a hazardous pollutant, on the other hand, takes effect upon issuance. Furthermore, the Administrator has authority to impose criminal sanctions under the Act for any knowing violation of certain conditions.

III. Adamo Wrecking Co. v. United States

The recent case of Adamo Wrecking Co. v. United States addressed the application of the judicial review procedure of the Clean Air Act to a defendant in a criminal enforcement action brought for a violation of an emission standard issued under that same Act. The facts of the Adamo case are relatively simple. Adamo, a small wrecking company in Michigan, was indicted for failing to comply with the regulation issued pursuant to Section 112(c)(1)(B) of the Act setting an emission standard for asbestos during building demolition. Specifically, the government charged the defendant with knowingly failing to wet and remove asbestos material from a building before undertaking its demolition, thereby causing the emission of asbestos. From such a seemingly innocuous incident emerged a

(D) violates any requirement of section 119(g) (as in effect before the date of the enactment of this Act [enacted Aug. 7, 1977]), subsection (b)(7) or (d)(5) of section 120 (relating to noncompliance penalties) [42 USC § 7420(b)(71, (d)(5))], or any requirement of part B (relating to ozone) [42 USC §§ 7450 et seq.] shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.


Id.


Count one of the indictment is set out in United States v. Adamo Wrecking Co., 545 F.2d 1, 3 (6th Cir. 1976).
major test of the criminal sanctions available under the Clean Air Act.

A. Proceedings in the District Court

The charge that Adamo Wrecking Company criminally violated Section 112(c)(1)(B) of the Clean Air Act subjected it to the possibility of a fine, or imprisonment, or both, under Section 113(c)(1)(C). Adamo claimed that it could not be charged with such a violation since the asbestos emission standard was not, in fact, an emission standard, but rather was a work requirement. Adamo defined emission standard as a quantitative level of pollutants attainable by the use of various procedures. Under this definition, an emission standard addresses solely the level of pollutants, and does not encompass the procedures to be used to achieve that level. Therefore, failure to adhere to the procedure of removing and wetting the asbestos prior to demolition would not constitute a violation of an emission standard within the meaning of Section 112 and so not give rise to a criminal penalty under Section 113.

The government claimed that Section 307(b) of the Act deprived a federal district court of jurisdiction to address Adamo’s attack on the regulation. However, the United States District Court for the Eastern District of Michigan found that it had jurisdiction to consider the validity of the regulation. Reasoning that the word “promulgating” in Section 307(b)(1) refers more to procedure than to substance, the court held that the statute permitted an attack on the validity of the standard while, at the same time, it barred an attack on the procedure leading to enactment of the standard. The court then dismissed the criminal indictment against Adamo after having invalidated the asbestos emission standard.

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4 This action was brought prior to the enactment of the Clean Air Amendments of 1977. Under the Amendments, the Administrator is allowed to issue standards in the form of work procedures or requirements if it is not feasible to issue the preferred emission standard. Section 112(e), 42 U.S.C. §7412(e). However, violations of the work requirements or procedures have not been listed as prohibited acts under Section 112(c), 42 U.S.C. §7412(c), presumably due to an oversight on the part of Congress. See also text at notes 13-15, supra.


4 Section 307(b), 42 U.S.C. §1857h-5(b)(1976) transferred to 42 U.S.C. §7607(b). The relevant portions of this Section are set forth at note 25, supra.


Id.
B. The Court of Appeals

The Court of Appeals of the Sixth Circuit disagreed with the district court's conclusion. Instead, the Sixth Circuit found that the clear meaning of Section 307(b) deprived the district court of jurisdiction to decide the validity of the regulation. The court stated that, under Section 307(b)(1), Adamo could have challenged the emission standard in the court of appeals within sixty days after its promulgation if it had chosen to do so; therefore, according to Section 307(b)(2), Adamo was precluded from raising the validity of the standard as a defense in its criminal trial. The appeals court pointed out that the Supreme Court had upheld the same type of exclusive review provision in the face of a due process attack in Yakus v. United States.

Yakus involved a criminal conviction under the Emergency Price Control Act for wilfully selling wholesale cuts of beef at prices above the maximum price prescribed by the regulations of the Office of Price Administration. In that Act, enacted to control the effects of war-time inflation, Congress had established a review procedure for pricing regulations. Judicial review of such regulations was available only if an appeal were filed with the Price Administrator within sixty days of their promulgation. Those challenging the regulations could take subsequent appeals to the Emergency Court of Appeals. Since no appeal had been taken of the regulation under which Yakus was convicted, the statute barred him from raising the question of its validity in his criminal prosecution.

Yakus claimed on appeal that, if the review procedure of the

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52 Id.
53 Id. at 6.
54 Id.
55 321 U.S. 414 (1944). The defendant, charged with a violation of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, as amended by the Inflation Control Act of 1942, ch. 578, 56 Stat. 765, for the wilfull sale of beef at prices above the maximum price prescribed in the regulation promulgated pursuant to that Act, was unable to raise the validity of that regulation in an enforcement proceeding in a federal district court.
57 "Petitioners have not contended that they were unaware of the Regulation and the jury found that they knowingly violated it within eight days after its issue." Yakus v. United States, 321 U.S. 414, 435 (1944).
59 Id. §203.
60 Id. §204.
statute were interpreted to preclude a defendant from challenging the validity of a regulation, then such an interpretation would not meet due process requirements. This due process issue involved three distinct arguments. The first argument claimed that the review procedure failed to ensure due process because the sixty-day time period allowed for the filing of a protest with the Price Administrator was insufficient. The second argument asserted that the statute's prohibition barring the entry of an interlocutory injunction to stay enforcement of the price regulation before a final adjudication as to its validity violated due process. The final argument claimed that the prohibition against raising the issue of the validity of a particular regulation during a criminal enforcement proceeding violated due process since it did not prevent the conviction of a defendant for violating a regulation before the determination of its validity.

In its opinion, the Supreme Court first noted that the country's entry into World War II presented a grave danger of war-time inflation, forcing Congress to act expeditiously to develop prompt and

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41 Yakus v. United States, 321 U.S. 414, 418 (1944). Yakus also claimed that such an exclusive review procedure contravenes the Sixth Amendment and that the Act involves an unconstitutional delegation of legislative power to the Price Administrator.


43 Id.

44 Id.
consistent means for minimizing price disparities. The procedure the Congress enacted, the Court reasoned, satisfied this purpose. Second, the Court addressed its jurisdiction to determine the validity of the price control regulation. Initially, it noted that Yakus had failed to demonstrate that he had exhausted the administrative remedies available under the statute, or that the remedies would have been inadequate had he proceeded through the administrative process. Then, proceeding to a consideration of the review provisions of the Emergency Price Control Act, the Court concluded that Congress intended these provisions to be exclusive. By authorizing the district court to entertain challenges only of the validity of the Act itself and not of its particular regulations, Congress "gave clear indication that the validity of the Administrator's regulations or orders should not be subject to attack in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute." This procedure, the Court found, did not violate due process since the administrative procedure contained adequate safeguards. Consequently, the Court upheld the judicial review proce-

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45 Id. at 431-34.
46 Id.
47 Id. at 434.
48 Ch. 26, §§203 and 204, 56 Stat. 31 (1942). The administrative and judicial review procedures in the Emergency Price Control Act and the Clean Air Act are similar. The Office of Price Administration was charged with implementing and enforcing the Emergency Price Control Act. That Act provides a procedure for the issuance, reconsideration, and judicial review of the regulations and orders of the Price Administrator. Effective price control in a war economy cannot be detained pending formal hearings at the initial promulgation stage. Therefore, Congress omitted these hearings prior to the issuance by the Price Administrator of regulations or orders. Any person subject to regulations or orders issued under the Act may, within sixty days after the issuance of such order or regulation, file a protest with the Administrator pursuant to §203. The next step in the process for an individual aggrieved by a denial of his protest is that of judicial review, provisions for which are found in §204, which creates the Emergency Court of Appeals and gives it exclusive jurisdiction, subject to writ of certiorari from the Supreme Court, to determine the validity of these regulations or orders. A complaint filed with the Emergency Court of Appeals must be submitted within thirty days after a protest denial. The Act does not give the Emergency Court authority to issue temporary injunctions to stay the effectiveness of its judgments pending review in the Supreme Court. To do otherwise would be to prevent expeditious administrative action which would be in contradiction with the intent of the statute. It should be noted that, although this provision prohibits any court other than the Emergency Court from addressing the validity of any regulation or order issued under the Emergency Price Control Act, it does not preclude review of the constitutionality of the Act itself by any court in an enforcement proceeding.
50 Id. at 433.
dure enacted by the Emergency Price Control Act, and affirmed the conviction of Yakus.

The Sixth Circuit Court of Appeals found the Yakus case controlling in its consideration of Adamo. In both cases, defendants sought to utilize criminal enforcement proceedings in order to challenge the validity of a regulation promulgated under an act limiting the time period and forum for such judicial review. Consequently, based on the holding in Yakus, the Court of Appeals remanded the Adamo case to the district court solely to determine whether Adamo had violated the regulation in question, omitting any consideration of the regulation’s validity.\textsuperscript{71}

\section*{C. Supreme Court Opinion}

The Supreme Court reversed the decision of the Court of Appeals.\textsuperscript{72} The Court held that Adamo could defend itself in the criminal enforcement proceeding on the ground that the emission standard which Adamo allegedly violated was not an emission standard within the meaning given that term by Congress, but rather was a work practice regulation.\textsuperscript{73} The Court questioned the Administrator’s authority, by merely designating a particular regulation an emission standard, to conclusively end any further discussion of the standard’s validity in a criminal enforcement proceeding.\textsuperscript{74} After noting the variety of sanctions available under the Clean Air Act whose applicability depends upon the particular provision or regulation violated, the Court reasoned that Congress intended that only particular groups of violators - in this case, those who violated emission standards for hazardous pollutants - would be subject to severe criminal penalties and precluded from asserting certain defenses.\textsuperscript{75} The stringency of the criminal sanction available for the violation of an emission standard reinforced the view that Congress had a particular type of regulation in mind when it used that term. Thus, although Section 307(b)(2) may preclude judicial review of the va-

\begin{footnotesize}
\textsuperscript{71} United States v. Adamo Wrecking Co., 545 F.2d 1 (6th.Cir.1976).
\textsuperscript{72} Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978). Chief Justice Burger and Justices White, Marshall and Powell joined in the majority opinion by Justice Rehnquist. Justice Powell, in his concurring opinion, joined in the Court’s opinion with the understanding that it implied no view as to the constitutionality of the judicial review provision of the Clean Air Act in the context of a criminal prosecution.
\textsuperscript{73} Id. at 289.
\textsuperscript{74} Id. at 284.
\textsuperscript{75} Id. at 282.
\end{footnotesize}
lidity of a particular standard, it cannot relieve the Administrator from the burden of proving that the regulation allegedly violated is, in fact, an emission standard.

The majority also noted that, under the review scheme as interpreted by the government, small businesses would be forced both to peruse the Federal Register daily for proposed regulations applicable to their businesses and to be ready to immediately challenge any of these regulations in the Court of Appeals for the District of Columbia. Moreover, mere publication of a regulation in the Federal Register may constitute inadequate notice to a party who may later become a defendant in a criminal enforcement proceeding. Such considerations warrant giving a defendant at least a limited opportunity to challenge a regulation when criminally charged with its violation.

However, the Court cautioned that the scope of a federal district court’s review of a regulation’s validity involves only the narrow question of whether the regulation on its face constitutes an emission standard within the broad definitional limits set by Congress. Under this holding, Section 307(b)(2) still precludes district courts from reviewing the administrative procedures used in the promulgation of the regulation. Questions concerning whether the regulation is arbitrary, capricious, or supported by the record remain beyond the scope of review.

After determining that the district court had jurisdiction to address Adamos’s attack on the validity of the asbestos emission regulation, the Court confirmed the district court’s conclusion that the regulation did not, as the government asserted, constitute an emission standard. While acknowledging that, ordinarily, deference to the agency interpretation is appropriate, the Court referred to the Clean Air Amendments of 1977 as lending support to its conclu-

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76 The severity of the scheme is accentuated by the fact that persons subject to the Act, including innumerable small businesses, may protect themselves against arbitrary administrative action only by daily perusal of proposed emission standards in the Federal Register and by immediate initiation of litigation in the District of Columbia to protect their interests.

77 Id. at 289 (Powell, J., concurring).
78 Id. at 285.
79 Id.
80 Id. at 288.
81 The Clean Air Amendments of 1977 added subsection (e) to Section 112, 42 U.S.C. §7412(e). See also text at notes 13-15, supra.
sion. Those Amendments permit the Administrator of EPA to promulgate operational standards if it is not feasible to promulgate or enforce emission standards. Obviously, this implies that Congress intended emission standards to entail numerical limitations rather than work procedures. Consequently, the Supreme Court invalidated the asbestos emission standard and reinstated the district court's dismissal of the criminal indictment.

In dissent, Justice Stewart criticized the Court's analysis as contrary to legislative intent. Despite the unambiguous wording of Section 307(b) precluding judicial review of the validity of emission standards, the majority nevertheless held that a district court may inquire into whether the Administrator of EPA has acted beyond his statutory authority in promulgating the regulation. According to Justice Stewart, such in inquiry into the scope of the Administrator's authority encompasses a large part of what the judicial review of agency action entails. Since Section 307(b) expressly forbids trial courts from conducting such a review, the majority's holding would seemingly destroy the unified, expedited process Congress established under the Clean Air Act.

The narrow holding of the Adamo opinion does not even reach the Yakus constitutional issue concerning whether the judicial review requirements of Section 307(b) violate due process by precluding a defendant from questioning the validity of a regulation in a criminal enforcement proceeding. The defendant in Adamo apparently did not raise the constitutionality of the judicial review provision as a defense, focusing instead on the definition of the term emission standard. One justice suggested that Adamo may have thought the Yakus decision precluded further discussion of the due process issue.

However, the Yakus case is distinguishable from Adamo on several grounds. First, Congress enacted the Emergency Price Control Act during war-time. The necessity for its stringent review proce-
dure arose due to the overriding public interest in preventing inflation during World War II. Such a national emergency as war is readily distinguishable from the problems of air pollution; although of significant national concern, the pollution problem certainly does not pose the same threat to the immediate well-being of the nation. Second, the defendant in Yakus had actual knowledge of the applicable regulation in sufficient time to challenge its appropriateness, although he chose not to do so. However, in Adamo, the defendant did not have actual knowledge of the regulation until more than ten months after the regulation's promulgation. Third, the Emergency Price Control Act in Yakus named the Emergency Court of Appeals as the only forum in which any actions taken by the Price Administrator could be challenged. On the other hand, the Clean Air Act permits the validity of regulations to be challenged in any court of appeals which possesses the proper jurisdiction.

Thus, the Yakus holding does not automatically preclude discussion of whether the judicial review provisions of Section 307(b) comport with the constitutional requirements of due process when applied to a defendant in a criminal enforcement proceeding. The majority opinion and the dissenting opinion by Justice Stewart, both of which address the scope of judicial review under Section 307(b), raise an issue which deserves further consideration. Therefore, an investigation of due process considerations under the Clean Air Act is appropriate.

IV. DUE PROCESS CONSIDERATIONS UNDER THE CLEAN AIR ACT

A. Judicial Response: Procedural Due Process

Although the exclusive review provision found in the Clean Air Act serves an important public interest, its interpretation cannot infringe the due process rights of an individual defendant. Section

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**Footnotes:**

60 See text at note 65, supra.
61 See note 57, supra.
62 The regulation Adamo was charged with violating was promulgated April 6, 1973, 38 Fed. Reg. 8826. The indictment against Adamo alleged a violation occurring on or about February 19, 1974. United States v. Adamo Wrecking Co., 545 F.2d 1, 3 (6th Cir. 1976). Adamo was unable to challenge the regulation within the sixty day time limit since it was not notified of the regulation's existence until approximately ten months after its promulgation.
64 "In order to protect public health effectively Congress provided that such [state imple-
307(b) does present potential impediments for the criminal defendant in contesting an enforcement prosecution under the Act, and, therefore, may violate due process.

The Fifth Amendment to the United States Constitution provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." By providing a limitation on government action, whether arbitrary or legitimate, procedural due process seeks to protect individual freedom. The evolutionary process of developing procedural safeguards and defining the interests protected by the Due Process Clause has utilized broad general principles concerning fundamental fairness. Currently, the Supreme Court employs a due process standard that is "flexible and calls for such procedural protections as the situation demands." Analysis basically focuses on four distinct factors: (1) the nature
of the private interest; (2) the government’s interest, including its actual duty in executing the procedure and the burden that an alternative procedural requirement would impose; (3) the risk that an erroneous deprivation of the private interest may arise due to the procedures employed; and, (4) the probable value, if any, of other procedural safeguards. By balancing these factors in the light of each individual case, the Court determines whether a given procedure satisfies the requirements of procedural due process.

1. The Private Interest

The first factor used in this balancing test concerns the nature of the private interest involved. Certainly each defendant in a criminal enforcement proceeding under Section 307(b) of the Clean Air Act has a substantial private interest at stake. Not only is an accused subject to deprivation of life and liberty due to the possibility of imprisonment for up to one year, but also is subject to the deprivation of property through the imposition of a fine of up to $25,000 per day per violation.

2. The Governmental Interest

The second factor in the Supreme Court’s due process balancing test concerns the public or governmental interest furthered by the procedure in question, including the actual duty which the government fulfills by executing the procedure and the burden which the adoption of an alternate procedure would entail. As enunciated in the Clean Air Act, the government has a duty “to protect and enhance the quality of the Nation’s air resources so as to promote the public and welfare and the productive capacity of its population . . . .” Fulfilling this duty necessarily involves the enforcement of the regulations and procedures promulgated under the Clean Air Act. Furthermore, these regulations and procedures indicate the Congressional intent to provide for efficient and uniform decision-

procedural due process test by focusing on the governmental and private interests involved, as well as on the “fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards.” Id. at 343. For purposes of analysis, the third factor in the Mathews test is broken down into two components: the reliability of existing procedures and the probable value of other safeguards.

Id. at 385.


making, a requirement necessary to prevent further environmental degradation and enhance air resources on a national scale.¹⁰⁴

3. The Risk of an Erroneous Deprivation

The third factor used in establishing minimum due process safeguards addresses the risk of an erroneous deprivation of the private interest at stake. One fundamental tenet of due process developed in order to prevent just such a deprivation requires that there be notice and an opportunity for a hearing prior to any significant governmental deprivation.¹⁰⁵ For example, procedural due process requires that an accused have a right to defend him/herself against the government's accusations in a fair trial,¹⁰⁶ including the opportunity for an open hearing in one's own defense, and the opportunity to cross-examine witnesses, offer testimony, and be represented by counsel.¹⁰⁷ Yet, not all deprivations require the full panoply of due process safeguards. For example, welfare recipients may be denied benefits in administrative rather than judicial proceedings, provided they have notice and an opportunity to be heard.¹⁰⁸ Thus, the procedures mandated by due process will vary from case to case.

In addition, due process requires merely that the necessary procedures be provided at some stage of the proceedings leading to the ultimate deprivation of a private interest.¹⁰⁹ The legislature may constitutionally limit the scope of review at successive stages, thereby forcing a party to exhaust his remedies before proceeding further with his complaint.

Arguably, Congress has the authority to limit the opportunity to challenge regulations under the Clean Air Act to that permitted by the procedure set out in Section 307(b), which restricts both the time period and forum for such challenges. Indeed, the district courts have indicated their intention to adhere to the restrictive review procedure of Section 307(b) by refusing to accept jurisdiction...

¹⁰⁴ See note 28, supra. See generally, Section II(B), supra.
¹⁰⁵ "Due process requires . . . that there shall be notice and opportunity for hearing given the parties . . . [these conditions] . . . seem to be universally prescribed in all systems of law established by civilized countries." Twining v. New Jersey, 211 U.S. 78, 110-11 (1908). See also, In Re Oliver, 333 U.S. 257 (1948). The right is also present in civil proceedings. See, Mathews v. Eldridge, 424 U.S. 319 (1976).
¹⁰⁷ See In Re Oliver, 333 U.S. 257 (1948).
¹⁰⁹ Id.
to address claims which appropriately should have been raised in the courts of appeals. This posture indicates the courts' willingness to force the exhaustion of all available remedies set forth in Section 307(b). However, such a holding does not necessarily answer the question whether forcing the exhaustion of remedies violates procedural due process in the context of a criminal proceeding. In that situation, a defendant would be unable to secure review of administrative action in a district court if such action could properly have been challenged in the court of appeals.

Only one appellate court has ruled on this issue with respect to the Clean Air Act. In Getty Oil Company v. Ruckelshaus, the defendant oil company applied for an injunction and a temporary restraining order in the district court to stay the effect of a compliance order issued by the EPA Administrator. The Third Circuit Court of Appeals determined that it lacked jurisdiction to hear the complaint, since Section 307(b) precludes such pre-enforcement review where the oil company had failed to make timely appeal to the Court of Appeals challenging the Administrator's approval of the state implementation plan under which the order was issued. After explaining the complicated procedural history preceding the institution of the suit, the court stated that the oil company's failure to make a timely appeal did not arise due to any lack of sufficient notice or hearing. Rather, the court noted that, since the company "chose" to seek a restraining order in the state court rather than bring an action in the court of appeals challenging the state plan, the company's constitutional right to the opportunity for a due process hearing prior to the imposition of criminal sanctions had been satisfied. Thus, the defendant's knowledge of its remedies and its conscious choice not to rely upon them satisfied procedural due process requirements.

120 Id. at 355.
121 Id. at 356-59.
122 Id. at 357. See also, Appalachian Power Co. v. EPA, 477 F.2d 495 (4th.Cir.1973) (Assuming state hearings were adequate and that the Administrator reviewed those hearings prior to approving the state implementation plan, then the Administrator's procedure of not affording a hearing on his part prior to approval of the state plans does not offend due process).
However, the Getty Oil case does not conclusively determine whether requiring criminal defendants to exhaust their procedural remedies may be consistent with due process in all enforcement proceedings. The appeals court particularly noted that the oil company had ample notice of the review procedures and voluntarily chose to disregard them in place of a state remedy. Thus, under Getty Oil a criminal defendant may properly be precluded from later asserting a remedy which he had previously failed to exhaust only if two factors are present: (a) the defendant had prior, actual knowledge of the available remedy and (b) the defendant voluntarily waived his opportunity to exercise it.

In the Adamo case, the defendant lacked prior, actual knowledge of the existence of the regulation which it was charged with violating and, consequently, failed to raise an appropriate challenge in the court of appeals pursuant to Section 307(b). Therefore, since Adamo lacked actual knowledge, it should not be precluded from challenging the regulation in its later criminal prosecution.

Because Adamo did not have prior knowledge of its available remedies under Section 307(b), it could not have voluntarily waived them. However, if it had known of their existence, failure to challenge the asbestos regulation in the court of appeals would probably have constituted a waiver of that remedy. Yet such a conclusion is not necessarily compelled. Although the Supreme Court has rec-

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118 Id. at 356-57.
119 See text at note 92, supra.
119 In 1977, the Second Circuit Court of Appeals characterized the failure to exhaust available remedies by not petitioning for review within the specified time period as a waiver of the defendant's right. Friends of the Earth v. Carey, 552 F.2d 25 (2d.Cir.1977), cert. denied sub nom. Beame v. Friends of the Earth, 434 U.S. 902 (1977). The court was addressing a citizen suit brought under the Clean Air Act to enforce the metropolitan control plan of New York City. The court held that the City was precluded in an enforcement proceeding from raising the issue of whether enforcement of the plan violated its Tenth Amendment rights by interfering with its governmental functions since such an issue was reviewable under Section 307(b)(1). The court reasoned that, "since the City could have advanced its present contentions by way of a petition for review of the Administrator's approval of the [New York state implementation] Plan in 1973 and chose instead voluntarily to commit itself to enforcement of the Plan, we hold that the City has waived its right to assert these contentions . . . in an enforcement proceeding . . . ." Id. at 35. The court stressed in its opinion that the waiver by the City was voluntary and made knowingly. Id. See also, Granite City Steel Co. v. EPA, 501 F.2d 925 (7th.Cir.1974). The steel company's petition for review of an EPA regulation promulgating interim compliance schedules to further the state implementation plan was dismissed. "The Company deliberately bypassed a change to litigate the reasonableness of the endpoint. In these circumstances any harshness is irrelevant . . . ." Id. at 927.
ognized that due process protections may be waived under some circumstances, a waiver will not be presumed. The court must be satisfied that the waiver was made knowingly and voluntarily, with an awareness of the future consequences. Moreover, if new information has appeared since the lapse of the sixty day period allowed by Section 307(b) for initiating suits to contest Clean Air Act regulations, the courts will not hold later challenges to be time-barred. Therefore, failure to initiate proceedings during the allotted time may not absolutely be deemed a waiver and bar later judicial review.

The ability of criminal defendants to seek review of administrative actions without having first complied with a statutorily-mandated review procedure has arisen in other situations. One example of a judicial review procedure which requires the prior exhaustion of all available remedies is found in the processes under the Selective Service Acts. In Falbo v. United States, the Supreme Court upheld the procedure in the Selective Training and Service Act of 1940 requiring compliance with the administrative process before seeking judicial review. To allow preinduction judicial review, the Court reasoned, would permit litigious interruption of a “mobilization system which Congress established by the Act

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120 In addressing the applicability of a waiver of a jury trial, the Court required that “courts indulge every reasonable presumption against waiver.” Aetna Insurance Company v. Kennedy, 301 U.S. 389, 393 (1937).
121 “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” Brady v. United States, 397 U.S. 742, 748 (1970). This standard has been presumed to be the same for noncriminal as well as criminal proceedings. D.H. Overmyer Co., Inc. v. Frick Co., 405 U.S. 174, 185 (1972).
122 Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C.Cir. 1975). It should be noted that the Clean Air Amendments of 1977 extend the time period in which to file for review in the courts of appeals from thirty to sixty days. See note 25, supra.
124 320 U.S. 549 (1944).
125 Ch. 720, 54 Stat. 885.
126 Falbo v. United States, 320 U.S. 549 (1944). Falbo was charged with wilfully failing to obey an order to report for work of national importance after his local draft board had classified him a conscientious objector. He argued that refusal to obey the order was not a crime since the order itself was based on an erroneous classification and was, therefore, mistaken. The Supreme Court affirmed Falbo’s conviction, noting that he had failed to exhaust his remedies by failing to report for the last step in the induction process and, therefore, was not entitled to review.
[and which] is designed to operate as one continuous process for the selection of men for national service." The Court similarly denied preinduction judicial review under the Military Selective Service Act of 1967.

Although the judicial review procedure under the Selective Service Acts is analogous to that under the Clean Air Act, the judicial interpretation of those draft procedures do not necessarily control in the pollution control context. First, under the Selective Service Acts, the inductee always has the opportunity to raise his objections as a defense in a criminal enforcement proceeding. However, under the Clean Air Act, a defendant may not raise defenses in an enforcement proceeding, but may only object to administrative regulations by filing a petition for review in the court of appeals. Second, the individual inductee has actual knowledge of the review procedure since the entire induction process deals with him personally and on an individual basis. On the other hand, a potential defendant in an enforcement proceeding under the Clean Air Act receives no personal notification of the promulgation of a particular regulation, and indeed, may be totally unaware of its existence until the commencement of a criminal enforcement proceeding. Given these differences, the affirmance of the exhaustion of remedies doctrine in the selective service area does not necessarily require the same conclusion for proceedings under the Clean Air Act.

In sum, due process requires the provision of an opportunity for notice and a hearing in order to prevent the erroneous deprivation of a private interest. However, the legislature need not permit the assertion of the full panoply of due process procedures at each stage of a proceeding, but can require a party to exhaust his remedies at each successive stage. Yet a party will not be required to exhaust his remedies if he did not have prior actual knowledge of their existence or did not waive his opportunity to exercise them. Under the

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127 Id. at 552.
130 See Section II(B), supra.
132 See, e.g., Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) and the discussion of the notice issue at note 92, supra.
Clean Air Act, a defendant in a criminal enforcement proceeding may not question the validity of a regulation if he did not institute proceedings challenging its validity within sixty days after its promulgation. Although such a procedure may comport with due process as applied to defendants with actual knowledge of the promulgation of a regulation who waived their opportunity for judicial review, it cannot bar such defendants as Adamo, who lacked actual knowledge and who did not waive their due process rights, from challenging the validity of the regulation in criminal enforcement proceedings.

4. Other Procedural Safeguards

The fourth factor utilized by the Supreme Court in its due process balancing test assesses the probable value of any alternative procedural safeguards which may exist. However, the availability and usefulness of other procedural safeguards under the Clean Air Act depend upon what type of administrative action is being challenged. For example, the procedure involved in promulgating emission standards for hazardous pollutants differs from that for promulgating national primary and secondary ambient air quality standards. Therefore, general statements about the viability of any given alternative procedures are difficult to make.

In developing standards to control hazardous pollutants, the Administrator must hold a public hearing, presumably to allow interested parties the opportunity to challenge the appropriateness of the proposed regulation or even the need for any type of regulation at all. However, the Administrator's duty at such hearings is narrowly limited only to the issue of whether a particular pollutant is a hazardous pollutant; his sole function is to prescribe appropriate standards "unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant." Indeed, the hearing does not even address the appropriateness of the level or the method of control prescribed by the regulation, and the Administrator need not base his decision regarding such matters on any evidence submitted at the hearings.

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133 See Section II(A), supra.
135 Id.
136 Id.
sequently, a public hearing with the Administrator fails to provide adequate procedural safeguards to an interested party challenging a regulation to control hazardous pollutants.

On the other hand, the procedure used in promulgating national primary and secondary ambient air quality standards may provide the requisite procedural safeguards. The procedure requires the Administrator to offer a reasonable time for interested persons to submit written comments on the published information concerning proposed standards. After finalization of the standards, the states utilize them in formulating implementation plans, during the formation of which there is also public notice and a hearing. These state hearings and notice procedures provide an adequate opportunity for interested persons to offer their views and question the validity of the Administrator's standards. Therefore, even though Section 307(b) forecloses a challenge to the Administrator's action in a criminal enforcement proceeding, the state hearings may provide a potential defendant with an ample opportunity to raise such a challenge prior to the enforcement proceeding.

Thus, adequate alternative procedural safeguards are not always available to potential polluters. In situations involving hazardous pollutants, for example, a business emitting hazardous pollutants is unable to offer its views on the proposed standards for such pollutants prior to their promulgation. A business emitting nonhazardous pollutants, on the other hand, does have the opportunity to question the appropriateness of the proposed standards for those pollutants. However, a question still remains in this situation concerning whether the opportunity to voice objections to the promulgation of standards for such nonhazardous pollutants is adequate to assure due process.

Applying the four factors utilized in the Supreme Court's balancing test to the due process issue in Adamo, the individual's interest in challenging the validity of a regulation during a criminal enforcement proceeding arguably outweighs the government's interest in efficient enforcement of the pollution control laws. Clearly, the governmental interest in controlling air pollution throughout the nation is significant. However, the risk of an erroneous deprivation in a

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criminal enforcement proceeding is similarly significant since Section 307(b)(2) precludes the defendant from raising all available defenses. Furthermore, alternate methods of assuring due process protection are not always provided in the administrative procedure. When these conclusions are balanced against the fundamental right of an accused to be afforded due process protection in a criminal proceeding, the individual right, at least arguably, outweighs any interest of the government. If this analysis were accepted, then Section 307(b)(2) of the Clean Air Act, which precludes raising certain defenses in criminal enforcement proceedings, would be struck down by the courts as violative of due process.

However, if the governmental interest were held to be of paramount concern, the balance would tip in favor of the government's regulatory scheme. Furthermore, if a defendant were presumed to have knowledge of the review procedure, the failure to exhaust administrative remedies would not be characterized as an inadvertent waiver of due process protections, and the existing procedures would be adequate to assure due process. Nevertheless, even if these procedures were not held to be violative of due process, they do impose harsh results on a criminal defendant who is unable to raise in the district court certain challenges which could have been raised in the court of appeals. To alleviate the unfairness of this situation, legislative change in the procedure may be appropriate.

**B. Legislative Response: Statutory Changes**

In 1944, the Congress chose to amend the Emergency Price Control Act in order to lessen the stringency of its restrictions despite the Supreme Court's *Yakus* decision holding that its exclusive review provision was not violative of due process. Amendments to

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132 Ch. 26, 56 Stat. 23 (1942).


While the constitutionality of the exclusive jurisdiction provisions of the Statute have been upheld by the Supreme Court (Yakus v. United States), the committee is of the opinion that these provisions should be relaxed to the fullest extent consistent with the effective administration and enforcement of the Act.

H.R. Rep. No. 1593, 78th Cong., 2d Sess. 6 (1944). See also, the Report of the Special Committee on Administrative Law, reprinted in 68 REPORTS OF THE AMERICAN BAR ASSOCIATION 249 (1943) for a brief discussion of some of the crucial elements of the review procedure and protection of the Emergency Price Control Act. The Special Committee posits that the statutory scheme for such review may be only an illusion. *Id.* at 251.
the Clean Air Act similar to those added to the Emergency Price Control Act may prove effective in avoiding any harshness in the review procedures of that Act.

Congress changed the Emergency Price Control Act in order to permit a person subject to a regulation or order to challenge its validity "at any time" instead of only "within a period of sixty days" after its issuance. Moreover, Congress permitted a stay of enforcement proceedings while the validity of the regulation was being tested. In fact, the only restraint imposed on the defendant's ability to challenge the validity of a regulation was the requirement that there be sufficient reason for the defendant's failure to make the challenge within sixty days after its promulgation. These amendments effectively preserved Congress' basic intent to provide uniform decision-making in the special Emergency Court of Appeals, while also allowing the defendant an opportunity to challenge the validity of a regulation or order at any time, even during an enforcement proceeding. The fact that Congress altered the review provisions as the war was drawing to a close, even when the same provisions had been upheld by the Supreme Court, indicates that Congress was concerned that the review procedure satisfy the due process rights of aggrieved individuals during peacetime.

Congress should amend the Clean Air Act in order to preserve its goal of providing efficient and uniform judicial decision-making while, at the same time, relieving an accused of the inability to raise all defenses in a criminal enforcement proceeding. Two changes in Section 307 of the Act are needed. First, Section 307(b)(1) should be amended to allow challenges of administrative actions to be made either (a) within sixty days after the implementation of such actions, or (b) at any time, provided there is a reasonable excuse for not bringing a challenge within the sixty day time limitation. Con-

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142 Id. at §107(b), 58 Stat. at 639. This section allows the defendant to apply to the court in which the proceeding is pending for leave to file a complaint against the Price Administrator in the Emergency Court of Appeals setting forth objections to the validity of any provisions which the defendant has allegedly violated. The court, in which the proceeding is pending, shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203(a).

Id.
sequently, a person unaware of the existence of a regulation within sixty days after its promulgation may still be able to challenge its validity. Moreover, a petition challenging the regulation's validity would still be filed in the appropriate court of appeals, thereby preserving uniformity in the development of the case law interpreting the Clean Air Act.

The second change needed in Section 307 concerns the granting of stays. Where a statutory timetable exists, courts have been reluctant to stay proceedings solely on the future possibility of harm to the parties seeking the stay; moreover, the Clean Air Act explicitly forbids issuing stays during proceedings to impose noncompliance penalties. Incorporating the concept of granting stays into Section

\[\text{\textsuperscript{143}}\] Whether an individual's lack of awareness of a particular regulation's promulgation may constitute a "reasonable excuse" would, of course, be subject to the court of appeals' determination on a case by case basis. For example, a small business or an individual may have a reasonable excuse for not knowing of the regulation's existence while, on the other hand, a large business, with staff attorneys specifically hired to address environmental issues affecting the business, may not have such a reasonable excuse.

\[\text{\textsuperscript{144}}\] See e.g., Ohio Environmental Council v. United States District Court, Etc., 565 F.2d 393 (6th Cir. 1977). In this case an environmental organization petitioned the Court of Appeals for the Sixth Circuit to issue a writ of mandamus directing the district court to order the utility company to comply with the state implementation plan. The district court had previously stayed the EPA's enforcement proceeding against the utility company until that company had the opportunity to contest the EPA's approval of the state implementation plan under Section 307(b)(1). 42 U.S.C. §1857h-5(b)(1)(1976) transferred to 42 U.S.C. §7607(b)(1). While the court of appeals recognized that each court had the power to stay proceedings at its own discretion even if its jurisdiction is limited by Section 307(b)(2), 42 U.S.C. §1857h-5(b)(2) (1976) transferred to 42 U.S.C. §7607(b)(2), it also cautioned that a court, in issuing such a stay, "should be particularly hesitant when, as here, the stay will disrupt a statutory or administrative timetable." Id. at 396. Furthermore, the court noted that the party seeking the stay has the burden of demonstrating that neither the party nor the public will suffer harm from such an order and that there is a pressing need for the delay. The court found that the utility company had failed to meet its burden and had failed to bring an action under Section 307(b)(1) challenging the plan within the time allowed. The district court had no reason for granting the stay other than the possibility that sometime in the future there may be a review proceeding. Therefore, the court held the granting of the stay to be an abuse of discretion. The court refused to address the utility company's argument that enforcement would deny it a due process hearing because, even if a Section 307(b)(1) hearing was unavailable, there was no showing that the company had no other opportunity to voice its objections to the emission limitations such as the requirements under Section 110(a)(1), 42 U.S.C. §1857c-5(a)(1)(1976) transferred to 42 U.S.C. §7410(a)(1), with respect to proper notice and hearing in the formulation of the state implementation plan.

\[\text{\textsuperscript{141}}\] Section 307(g), 42 U.S.C. §1857h-5(g)(1976) transferred to 42 U.S.C. §7607(g), reads:
307 would reduce the harshness of the present scheme. The stay of an enforcement proceeding would be granted in order to permit the accused to petition the court of appeals for review of the agency action, and would remain in effect until the court of appeals makes its determination. That determination would, of course, bind the district court in the enforcement proceeding. Although granting stays could slow the administrative process under the Clean Air Act, a short delay would not unduly disrupt the regulatory and enforcement scheme. Moreover, district courts would grant stays only in limited circumstances after a proper showing of necessity.

In sum, these two changes in Section 307 of the Clean Air Act would protect an accused’s due process rights while at the same time allowing judicial review to occur in the courts of appeals. According to these proposed changes, a business or individual with no actual knowledge of the enforcement and review procedures of the Clean Air Act or the content of the Federal Register would not be deprived of an opportunity to challenge the validity of an administrative action. After receiving notice of a criminal charge and violation, a defendant would be able to request the district court hearing the enforcement proceeding to stay the litigation until the court of appeals properly determines the validity of the administrative action in question. This request would be granted only if there were sufficient reason for the defendant’s failure to challenge the action within the sixty day time limit. The business would then file a petition for review in the appropriate court of appeals challenging the validity of the administrative action. The decision rendered by the court of appeals would bind the district court. Thus, while a defendant would still be precluded from raising certain defenses in the district court under Section 307(b)(2), the defendant would nevertheless be able to raise those same defenses in the court of appeals.

V. Conclusion

The exclusive judicial review procedure found in the Clean Air Act requires that challenges to many administrative actions be brought in the court of appeals within sixty days after the date of the action. After the expiration of sixty days, any challenge which

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In any action respecting the promulgation of regulations under section 120 [42 U.S.C. §7420] of this title or the administration or enforcement of section 120 [42 U.S.C. § 7420] of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.
could have been made under this provision may not be raised in any subsequent proceeding or in a different forum. Therefore, the review procedure effectively precludes defendants from raising all available defenses in a criminal prosecution in the district court which could have been raised in the court of appeals during the permitted time period.

The procedures of the Clean Air Act relating to the promulgation, judicial review, and enforcement of hazardous emission standards as well as of primary and secondary ambient air quality standards indicate the congressional intent to preserve the nation’s air quality through expeditious and uniform decision-making. A question raised by these procedures concerns whether they comport with minimal due process requirements. The Supreme Court, in Adamo, did not address whether these provisions violate due process when applied to a criminal defendant in an enforcement proceeding. In the future, however, these procedures may be struck down by the courts if it is determined that the accused is denied fundamental due process rights. Furthermore, the legislature may alleviate any unfairness in these procedures by amending the judicial review provision of the Clean Air Act. Preserving the individual’s fundamental rights in a criminal enforcement proceeding amply justifies amending the Clean Air Act, particularly when such amendments do not detract from the purpose and function of the Act itself.