

LIMITED OVERSIGHT: THE ROLE OF THE FEDERAL COURTS VIS-À-VIS THE ENVIRONMENTAL PROTECTION AGENCY IN AIR POLLUTION CONTROL UNDER THE CLEAN AIR ACT

DAVID T. BUENTE, JR., WILLIAM E. GERARD, JOEL F. VISSER*

I. INTRODUCTION

In creating the modern environmental regulatory state, Congress assigned the primary responsibility for implementation of the statutes to federal and state regulators.¹ Environmental statutory schemes tend to provide only broad guidelines, and executive agencies such as the U.S. Environmental Protection Agency (EPA) are expected to fill in the gaps through rulemakings, permit issuance, and enforcement actions. Given their technical expertise, the agencies are supposed to be well equipped to create detailed regulations that implement Congress's goal of a clean and healthy environment. This delegation of authority is significant because, in most cases, EPA and state regulators are given freedom to choose the content of environmental regulations. In the context of the Clean Air Act, the subject of this article, they choose what pollutants will be regulated, which sources of pollutants will be among the regulated entities, what standards will be imposed upon those regulated entities, the deadline by which those standards will be met, and, finally, whether or not the regulations will be enforced.²

In light of this broad delegation of authority, Congress plays a surprisingly small role in overseeing the content of EPA's regulations.

* David T. Buente, Partner, Sidley Austin LLP; William E. Gerard, Associate, Sidley Austin LLP; Joel F. Visser, Associate, Sidley Austin LLP.

1. Including some local and tribal authorities.

2. *See, e.g.*, *Massachusetts v. U.S. Evtl. Prot. Agency*, 549 U.S. 497, 533 (2007) (acknowledging that EPA was not required to regulate a pollutant unless it first made an endangerment finding); *id.* ("EPA no doubt has significant latitude as to the manner, timing, content and coordination of its regulations with those of other agencies."); *id.* at 527 ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. That discretion is at its height when an agency decides not to bring an enforcement action." (citation omitted)).

Congress rarely takes legislative action in response to perceived inadequacies in EPA's regulatory approach. Instead, its oversight actions are largely limited to appropriations legislation and oversight hearings, which create no binding legal authority.³ The role of federal oversight of EPA and other executive agencies has fallen on the judiciary. Under the Clean Air Act, federal courts are given authority to hear petitions challenging final agency actions such as rulemakings, petitions asserting that EPA has failed to undertake nondiscretionary duties such as regular review of National Ambient Air Quality Standards (NAAQS), and civil and criminal enforcement matters. Thus, with respect to virtually every aspect of agency action (or inaction) there is at least an opportunity to challenge EPA's regulatory decisions in federal court.

Although it is often taken for granted that the federal judiciary plays a substantial role in shaping environmental law, a closer examination reveals considerable variability based on the type of action that is before the court. Specifically, this article examines the significance of the federal judiciary's role in shaping environmental law by comparing the relative power of EPA and the courts under the various provisions for judicial oversight. The article finds that a federal court's power is at its apex when engaging in statutory interpretation of specific provisions of the Clean Air Act during challenges to final agency action under section 307.⁴ From this high point, the federal judiciary's power is diminished as the standards of review become more deferential, the content of the courts' decisions becomes less substantive, and EPA retains additional authority to resolve disputes without judicial intervention.

In order to assess the judiciary's role in shaping environmental law, this article focuses on EPA action (or inaction) under the Clean Air Act. Under the Clean Air Act, EPA and the federal courts can interact in two primary ways: through suits challenging EPA's regulatory approach and through EPA enforcement actions alleging violations of the Act. With respect to each type of interaction, this article will articulate the legal basis for the judiciary's oversight role, a description of the content of those interactions, and, finally, an analysis of the significance of the federal judiciary's role in shaping

3. See generally Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 51 ADMIN. L. REV. 199 (1998) (describing procedures for congressional oversight of agency action).

4. Clean Air Act § 307, 42 U.S.C. § 7607 (2006). Section 307 of the Clean Air Act authorizes judicial review of final agency actions. See *infra* section II.

the content of the Clean Air Act. Sections II and III of the article will address judicial review of citizens' suit petitions challenging final EPA action under section 307(b)⁵ and allegations that EPA has failed to act to regulate under section 304(a)(2).⁶ Section IV will address the federal judiciary's role in enforcement of the Clean Air Act.

II. CHALLENGES TO FINAL AGENCY ACTION: SECTION 307

Challenges to final EPA action under section 307 of the Clean Air Act are not only the most common suits involving EPA under this act,⁷ they also provide the courts with the greatest ability to influence future EPA action through statutory construction. Section 307 petitions often involve both questions of statutory interpretation, which are reviewed under the *Chevron* doctrine,⁸ and questions of the propriety of EPA's final action based on the administrative record, which are reviewed under an arbitrary and capricious standard. The courts' power is greatest with respect to EPA during a *Chevron* step-one analysis, where the courts engage in de novo review of the statutory provisions that EPA is required to implement. If the review process continues to *Chevron* step two and arbitrary and capricious review, the courts' relative power wanes as review standards become more deferential and case-specific. In addition, threshold considerations such as justiciability and waiver somewhat constrain the availability of section 307 challenges to litigants.

This section will first describe the types of interactions that occur between EPA and the courts in section 307 challenges and then assess the significance of these interactions.

A. Statutory Background

Pursuant to section 307(b) of the Clean Air Act, judicial review of final agency actions under a number of Clean Air Act provisions is available only in the federal courts of appeals.⁹ Final actions that are

5. 42 U.S.C. § 7607(b).

6. *Id.* §7604(a)(2).

7. See Stephen M. Johnson, *Ossification's Demise?: An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767, 771 (2008) (finding that 75% of “economically significant” rules issued by EPA between 2001 and 2005 were challenged after issuance).

8. *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

9. 42 U.S.C. § 7607(b)(1). A similar judicial review process is provided in a number of other statutory schemes administered by EPA. See, e.g., Clean Water Act, 33 U.S.C. § 1369(b) (2006); Toxic Substances Control Act, 15 U.S.C. § 2618(a)(1)(A) (2006). In the event that a statutory scheme lacks express judicial review provisions, the Administrative Procedure Act (APA) provides a cause of action for review of “final agency action for which there is no other

national in scope must be brought in the U.S. Court of Appeals for the District of Columbia, while final actions involving local or regional standards must be brought in the court of appeals with jurisdiction over the locality or region.¹⁰ Once EPA has published notice of a final action in the Federal Register, a party has sixty days within which to file a petition for review.¹¹ Petitions for review are of special significance to regulated entities because they may be barred from challenging the substance of the final agency action during enforcement proceedings.¹² Finally, a party challenging a final agency action must also satisfy a number of threshold issues before its challenge will be heard on the merits. These include justiciability issues and waiver.¹³

B. Threshold Issues

A petitioner challenging a final EPA action under section 307 must satisfy several threshold criteria before proceeding to the merits.

adequate remedy,” 5 U.S.C. § 704 (2006), with jurisdiction supplied by the federal question statute, 28 U.S.C. § 1331 (2006).

10. 42 U.S.C. § 7607(b)(1).

11. *Id.* Filing a request for reconsideration with EPA does not serve to toll the 60-day statute of limitations. *Id.* However, a petition may be filed more than 60 days after publication if it is based on “grounds arising after such sixtieth day,” in which case the petition must be filed within 60 days after such grounds arise. *Id.* In addition, a final action may be challenged after a subsequent rulemaking if EPA “reopens” the issue. *Sierra Club v. U.S. Env’tl. Prot. Agency*, 551 F.3d 1019, 1024 (D.C. Cir. 2008) (“[T]he time for seeking review starts anew where the agency reopens an issue ‘by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the regulation in its final form.’” (citations omitted)).

12. 42 U.S.C. § 7607(b)(2) (“Action of the Administrator with respect to which review could have been obtained under [Section 307(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement.”). However, a defendant in an enforcement action is not completely foreclosed from challenging EPA’s application of a rule during enforcement. *See United States v. Cinergy Corp.*, 458 F.3d 705, 707–08 (7th Cir. 2006) (allowing defendant to challenge the meaning of a regulation during enforcement action); *see also Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007) (“[N]o precise line runs between a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals’s view of the statute, and a determination that the regulation as written is invalid.”).

13. 42 U.S.C. § 7607(d)(7)(B) (“Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.”); *Mossville Env’tl. Action Now v. U.S. Env’tl. Prot. Agency*, 370 F.3d 1232, 1238–40 (D.C. Cir. 2004) (stating that the waiver rule is “strictly enforced” and holding that letters submitted to EPA lacked the specificity needed to satisfy the rule). However, a petitioner is not precluded from objecting to an aspect of the agency’s decision which could not have been addressed during the public comment period. 42 U.S.C. § 7607(d)(7)(B).

These threshold criteria are nevertheless an important part of the review process. First, they are frequently litigated¹⁴ and therefore represent a significant investment of time and resources for both EPA and the courts. Second, they are of great importance to EPA because they insulate it from challenges by plaintiffs that did not participate in the rulemaking process or otherwise lack a sufficient interest in EPA's action. If EPA were unable to resolve these challenges on the basis of threshold criteria, they might otherwise impede its ability to effectively administer the Clean Air Act. This section will briefly describe the role of justiciability, the statute of limitations, and waiver in section 307 cases.

A petitioner seeking review under section 307 must have standing to challenge a final agency action.¹⁵ Due to the direct effect that EPA actions typically have on state and local governments and regulated entities, actions brought by these entities are rarely vulnerable to standing challenges.¹⁶ Instead, standing challenges are generally directed toward environmental non-governmental organizations (NGOs) and similarly situated plaintiffs, who may be affected more tangentially by EPA actions.¹⁷

Second, a petitioner seeking to challenge a final EPA action must do so within sixty days after notice of the action is published in the Federal Register.¹⁸ Perhaps due to the straightforward nature of this requirement, it is rarely litigated directly. Instead, the issue is litigated in the context of the "reopening doctrine." Under this doctrine, an otherwise time-barred claim can be maintained if, in a subsequent agency action, EPA "reopened" the issue by considering

14. See, e.g., Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758-60 (1999) (identifying thirty-three circuit court cases from 1992 to 1998 deciding whether an environmental plaintiff had standing to challenge EPA action).

15. In order to establish constitutional standing under Article III, a plaintiff must meet injury, causation, and redressability requirements. *North Carolina v. U.S. Env'tl. Prot. Agency*, 587 F.3d 422, 425 (D.C. Cir. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

16. To the extent that government entities urge EPA to take more aggressive regulatory action, they act in a similar manner to environmental proponents and may be subjected to standing arguments. See, e.g., *Massachusetts v. U.S. Env'tl. Prot. Agency*, 415 F.3d 50, 54-56 (D.C. Cir. 2005) (addressing whether states had standing to challenge EPA's determination that it lacked authority to regulate greenhouse gases as pollutants), *rev'd* 549 U.S. 487 (2007). However, standing challenges may be less significant for states under the CAA, because they are entitled to "special solicitude in [the court's] standing analysis." *Massachusetts v. U.S. Env'tl. Prot. Agency*, 549 U.S. at 520.

17. See, e.g., *Lujan*, 504 U.S. at 562-63.

18. 42 U.S.C. § 7607(b)(1).

it anew.¹⁹ In *Sierra Club v. EPA*, the court agreed that “the text of the general duty rule itself did not change” in a subsequent rulemaking²⁰ but found that other changes in the regulatory scheme “constructively reopened” its assessment of the general duty rule which was timely challenged.²¹

Finally, a petitioner may not ordinarily challenge an aspect of a final EPA action for the first time in the courts of appeals. Unless the petitioner brought the issue to EPA’s attention during the notice and comment period, the challenge is deemed waived.²² This issue—sometimes known as issue exhaustion²³—is typically litigated in one of two ways. The first involves a situation where the petitioner did comment on a proposed rule, but EPA asserts that the comment lacked the requisite specificity to put it on notice of the petitioner’s objection.²⁴ The second situation involves changes made by EPA after the close of the public comment period.²⁵ Because a petitioner has no opportunity to comment on the changes prior to EPA’s final action, such challenges are not deemed waived.²⁶

While stopping short of the merits, these threshold issues produce real conflicts which require resolution by the courts of appeals. The conflicts are high-stakes because a successful outcome may shield EPA’s final action from review and prevent any meaningful oversight by the courts. In addition, these issues allow the courts to undertake a detailed review of EPA’s decision-making

19. 551 F.3d 1019, 1024 (D.C. Cir. 2008) (“[T]he time for seeking review starts anew where the agency reopens an issue ‘by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the regulation in its final form.’” (citations omitted)), *cert. denied sub nom.* Am. Chemistry Council v. Sierra Club, 130 S. Ct. 1735 (2010).

20. *Id.* at 1025.

21. *Id.* at 1026 (“Shifting from a regulatory scheme based on a mandatory SSM plan that was part of a source’s Title V permit, which is subject to prior approval with public involvement, see 42 U.S.C. § 7661a(b)(6), to a regulatory scheme with a non-mandatory plan providing for no such approval or involvement but only after-the-fact reporting changed the calculus for petitioners in seeking judicial review, *id.*, and thereby constructively reopened consideration of the exemption from section 112 emission standards during SSM events.”).

22. 42 U.S.C. § 7607(d)(7)(B).

23. See, e.g., William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 11 (2000).

24. Mossville Envtl. Action Now v. U.S. Envtl. Prot. Agency, 370 F.3d 1232, 1239–40 (D.C. Cir. 2005) (finding that petitioner’s letters challenging MACT floors did not imply a challenge to EPA’s failure to set beyond-the-floor MACT standards as well).

25. See, e.g., Envtl. Def. v. U.S. Envtl. Prot. Agency, 509 F.3d 553, 561 (D.C. Cir. 2007).

26. 42 U.S.C. § 7607(d)(7)(B). However, the petitioner must still seek redress from EPA prior to filing suit by filing a petition for reconsideration with the agency. *Id.*

process to determine whether a merits-based review is warranted. Even if this review is not substantive, it is still invasive and may serve to alter EPA's future decision-making processes.

C. Merits-Based Analysis

Once a petitioner has satisfied all of the threshold requirements, the court can consider the merits of the final agency action. Typically this involves a multi-step analysis of EPA's statutory authority to take the final action, followed by a case-specific analysis of EPA's decision-making process. A court's statutory interpretation is guided by the familiar two-step *Chevron* doctrine.²⁷ Under this doctrine, [i]f the intent of Congress is clear, that is the end of the matter, for the courts as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.²⁸

If the court concludes that EPA's interpretation of the statute at issue is reasonable, it will then review the administrative record to determine whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁹ The following sections will describe in more detail the resolution of each of these issues in the courts.

1. *Chevron* Step One

Chevron step one issues are frequently litigated during challenges to final agency action.³⁰ Under this step, the court conducts an independent analysis of the relevant statute to determine whether its meaning is clear.³¹ Because this step does not require any deference to EPA's preferred interpretation, it is a favorite of petitions challenging EPA actions, regardless of the identity or

27. *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

28. *Id.* at 842–43.

29. 5 U.S.C. § 706(2)(A) (2006).

30. For example, Schroeder & Glicksman's survey of rulemaking challenges in the Courts of Appeals identified 111 challenges to EPA rulemaking between 1990 and 1999, of which 83 raised a *Chevron* issue. Christopher Schroeder & Robert L. Glicksman, *Chevron, State Farm, and EPA in the Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. 10,371, 10,377 (2001).

31. See, e.g., *Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, 489 F.3d 1364, 1371 (D.C. Cir. 2007).

ideology of the petitioner.³² By contrast, EPA prefers to argue that any given statute is ambiguous because statutory ambiguity allows for increased agency discretion.³³ Moreover, because *Chevron* step one includes a threshold question regarding Congressional intent, it must be addressed—at least implicitly—in every case, unless there is clear precedent addressing the interpretation of the statute at issue.³⁴

Given EPA's preference for asserting that the statutes it administers are ambiguous, it is not surprising that EPA fares poorly on cases resolved under *Chevron* step one. In fact, a study of challenges to EPA rulemaking in the courts of appeals in the 1990s found that, when an issue was decided on the basis of *Chevron* step one, EPA lost fifty-nine percent of the time.³⁵ A review of challenges to final actions of the Bush Administration EPA confirms this finding. For example, the Bush Administration EPA issued a series of rules regarding Maximum Achievable Control Technology (MACT) standards under Clean Air Act section 112, and every challenge resolved under *Chevron* step one resulted in the court vacating EPA's rule.³⁶ However, only considering cases resolved under *Chevron* step one skews the results against EPA because it ignores challenges which are ultimately resolved at later stages, but which proceed through an implicit³⁷ or explicit³⁸ finding that a statute was ambiguous under step one.

32. See, e.g., *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 489 F.3d 1250, 1257–61 (D.C. Cir. 2007) (environmental NGO challenging EPA definition of “commercial or industrial waste”); *New York v. U.S. Env'tl. Prot. Agency*, 413 F.3d 3, 38–40 (D.C. Cir. 2005) (government and environmental NGOs challenging EPA's “Clean Units” exception); *North Carolina v. U.S. Env'tl. Prot. Agency*, 531 F.3d 896, 921–22 (D.C. Cir.2008) (regulated entity challenging EPA rule regarding CAA Title IV allowances).

33. Even if EPA were convinced that it had correctly interpreted a clear statute, it would have little incentive to make an argument under *Chevron* step one. To the extent that its interpretation is correct under *Chevron* step one, it would also be reasonable under *Chevron* step two. By arguing under *Chevron* step two, the EPA retains the discretion to change course and adopt a different interpretation in the future.

34. See, e.g., *Sierra Club v. U.S. Env'tl. Prot. Agency*, 353 F.3d 976, 982 (D.C. Cir. 2004) (“In *National Lime*, this court confirmed that ‘EPA may use a surrogate to regulate pollutants if it is reasonable to do so.’”).

35. Schroeder & Glicksman, *supra* note 30, at 10,377.

36. See *Sierra Club v. U.S. Env'tl. Prot. Agency*, 479 F.3d 875 (D.C. Cir. 2007); *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 489 F.3d 1250 (D.C. Cir. 2007); *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 489 F.3d 1364 (D.C. Cir. 2007); *Sierra Club v. U.S. Env'tl. Prot. Agency*, 551 F.3d 1019 (D.C. Cir. 2008).

37. See, e.g., *Sierra Club*, 353 F.3d at 982 (implying that an ambiguity in the statute permitted EPA to use a surrogate to regulate hazardous pollutants).

2. *Chevron* Step Two

If a court finds a statute ambiguous under *Chevron* step one, it must defer to any reasonable EPA interpretation under *Chevron* step two. Indeed, “[t]he agency’s interpretation need not be the only permissible reading of the statute, nor the interpretation that the court might have originally given the statute.”³⁹ Given the deferential review standard under *Chevron* step two, it is not surprising that EPA is often successful when cases are resolved on this issue. In fact, prior studies have found EPA success rates of around ninety percent for *Chevron* step two cases.⁴⁰ Moreover, the court’s deference under *Chevron* step two extends not only to EPA’s *initially* selected interpretation, but also to subsequent decisions to change its preferred interpretation.⁴¹ Thus, a finding of ambiguity gives EPA continuing flexibility to determine how to implement statutory provisions.

However, EPA’s discretion is not unbounded, and courts may vacate any EPA action based on an unreasonable interpretation of an otherwise ambiguous statute. For example, in *North Carolina v. EPA*, the D.C. Circuit addressed a challenge to the Clean Air Interstate Rule which permitted the trading of emissions credits for sulfur dioxide and nitrogen oxides.⁴² Although the court found the relevant statute ambiguous, it vacated the rule because it conflicted with another provision requiring the elimination of emissions from sources contributing to nonattainment in downwind states.⁴³ Thus, even an ambiguous statute may include sufficient limits to bind the range of EPA discretion. To the extent that EPA abuses its discretion by exceeding those limits, the court can vacate the rule.

3. Arbitrary and Capricious Review

If the court finds that EPA has selected a proper interpretation of the statute, it must still determine whether EPA properly applied

38. See, e.g., *Natural Res. Def. Council v. U.S. Env’tl. Prot. Agency*, 529 F.3d 1077, 1081–83 (D.C. Cir. 2008) (rejecting petitioner’s claim that CAA section 112 clearly required a residual risk standard of 1 in 1,000,000 before finding that EPA’s interpretation was reasonable).

39. *New Jersey v. U.S. Env’tl. Prot. Agency*, 517 F.3d 574, 581 (D.C. Cir. 2008).

40. See, e.g., *Schroeder & Glicksman*, *supra* note 30, at 10,377 (92% success rate for EPA in rulemaking challenges in courts of appeals decided on *Chevron* step two in the 1990s and a 89% success rate in the 1980s).

41. See, e.g., *New York v. U.S. Env’tl. Prot. Agency*, 413 F.3d 3, 22–27 (D.C. Cir. 2005) (upholding EPA’s decision to alter its definition of emissions increases for New Source Review).

42. 531 F.3d 896 (D.C. Cir. 2008).

43. *Id.* at 908.

that interpretation when taking final action.⁴⁴ As opposed to the *Chevron* analysis, which primarily involves pure questions of law, arbitrary and capricious review is fact-intensive and is based on the administrative record that formed the basis of EPA's decision.⁴⁵ Still, the standard of review is deferential, and the courts may not substitute their own judgment for that of the agency.⁴⁶ So long as there is evidence in the administrative record to support EPA's decision, it will be upheld, even if there is also sufficient evidence to support a different result.⁴⁷

Although arbitrary and capricious review involves a deferential standard, EPA does not enjoy as great a degree of success in the federal courts under this standard as it does under *Chevron* step two.⁴⁸ The reason becomes clearer when the bases for petitioners' challenges are considered in more detail. When a petitioner challenges the quality of the data relied upon by EPA or suggests that other data is more persuasive, courts are likely to defer to EPA's expertise and uphold the final agency action. For example, in *New York v. EPA*, the D.C. Circuit stated "the court must defer to EPA's assessment of the environmental benefits of [Plantwide Applicability Limitations], which is based on the agency's expert evaluation of technical data from the pilot projects."⁴⁹ In contrast, petitioners tend to succeed when they can identify data gaps or missing steps in EPA's logic that preclude meaningful review of EPA's decision-making

44. *New York*, 413 F.3d at 22–31 (reviewing EPA's decision under an arbitrary and capricious standard after finding EPA's interpretation permissible under *Chevron*).

45. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision."). See also *Am. Farm Bureau Fed'n v. U.S. Env'tl. Prot. Agency*, 559 F.3d 512, 520 (D.C. Cir. 2009) ("[S]ubstantive review under CAA mirrors that under APA.") (citing *Chem. Mfrs. Ass'n v. U.S. Env'tl. Prot. Agency*, 28 F.3d 1259, 1263 (D.C. Cir.1994)).

46. *New York*, 413 F.3d at 38.

47. *Id.* at 31 ("Nor does the fact that 'the evidence in the record may also support other conclusions . . . prevent us from concluding that [the agency's] decisions were rational and supported by the record.'" (quoting *Lead Indus. Ass'n v. U.S. Env'tl. Prot. Agency*, 647 F.2d 1130, 1160 (D.C. Cir. 1980) (omission in original)).

48. The Schroeder and Glicksman study found that, among challenges to rulemaking in the U.S. courts of appeals that were decided under *Chevron* and reached step two, EPA enjoyed a 92% success rate in the 1990s and a 89% success rate in the 1980s. Schroeder & Glicksman, *supra* note 30, at 10,377. By contrast, EPA's success rate in cases where U.S. courts of appeals reviewed agency scientific judgment based on the arbitrary and capricious standard was 78% in the 1990s and 85% in 1986 through 1987. *Id.* at 10,392.

49. 413 F.3d at 38.

process.⁵⁰ However, a petitioner's success is relative because, under an arbitrary and capricious review, the court does not typically express any opinion regarding the substance of EPA's decision but instead remands for a better explanation.⁵¹ EPA is not typically prevented from taking the same action at a later date, after supplementing the administrative record to provide better support.⁵²

D. Analysis

EPA's final actions under the Clean Air Act are commonly challenged in section 307 actions.⁵³ However, this is not surprising due to the significance of the issues underlying the suits and EPA's position with respect to the petitioners. First, section 307 challenges involve final agency actions, which have broad, real-world impacts. As a result, the stakes are generally high for all interested parties. Second, EPA, along with other government entities, is often essentially caught in the middle between regulated entities and environmental NGOs. Given the fundamental disagreements between these groups, virtually any action by EPA is likely to upset one, if not both, of them.⁵⁴ In this context, it may be a greater surprise

50. See, e.g., *Mossville Env'tl. Action Now v. U.S. Env'tl. Prot. Agency*, 370 F.3d 1232, 1245 (D.C. Cir. 2005) ("While EPA may be able to know that a correlation exists between one known pollutant and some other unknown pollutants, it has not memorialized that knowledge in such a fashion that commenters, interested members of the public, regulated entities, and most importantly, a reviewing court, can assess. We cannot review under any standard the adequacy of the EPA's correlation determination if we do not know what correlation the EPA found to exist.").

51. See, e.g., *Arteva Specialties S.A.R.L. v. U.S. Env'tl. Prot. Agency*, 323 F.3d 1088, 1092 (D.C. Cir. 2003) (asserting an inability to evaluate EPA's decision due to lack of evidence in the administrative record).

52. See, e.g., *Env'tl. Def. v. U.S. Env'tl. Prot. Agency*, 489 F.3d 1320, 1134–35 (D.C. Cir. 2007) (affirming EPA's PSD rules for nitrogen oxides after remanding the same rule 17 years earlier).

53. For example EPA faced eight separate challenges to Maximum Achievable Control Technology standards issued by the Bush Administration. *Arteva Specialties S.A.R.L.*, 323 F.3d at 1088; *Sierra Club v. U.S. Env'tl. Prot. Agency*, 353 F.3d 976 (D.C. Cir. 2004); *Mossville Env'tl. Action Now*, 370 F.3d at 1232; *Sierra Club v. U.S. Env'tl. Prot. Agency*, 479 F.3d 875 (D.C. Cir. 2007); *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 489 F.3d 1250 (D.C. Cir. 2007); *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 489 F.3d 1364 (D.C. Cir. 2007); *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 529 F.3d 1077 (D.C. Cir. 2008); *Sierra Club v. U.S. Env'tl. Prot. Agency*, 551 F.3d 1019 (D.C. Cir. 2008).

54. Indeed, a review of Section 307 petitions against the Bush Administration EPA shows a fairly balanced mix of petitioners from environmental, industry, and government sectors. While more petitions were filed by environmental groups than industry representatives, some of this difference may be attributable to the EPA's policy choices. Some cases even involve simultaneous challenges by environmental and industry organizations. See, e.g., *Natural Res.*

when EPA is able to take a final action *without* being challenged under section 307.

Under section 307, courts remain limited in the remedies that they can provide to successful petitioners. A court can vacate all or parts of an EPA action and can remand an action to EPA for further support on the record.⁵⁵ However, it may not impose a different action of its own choosing.⁵⁶ Nonetheless, federal courts can have a significant effect on subsequent EPA action by constraining the substantive and procedural options available to decision makers.

A federal court's relative power with respect to EPA is at its apex when the court considers petitions within a *Chevron* step one analysis. At this stage, a court has the authority to determine *de novo* both the content of Congress's intent and the meaning of the various provisions of the Clean Air Act. As a result, it may reject EPA's preferred interpretation and dictate the procedures that EPA must follow when taking subsequent action. In the context of MACT standards under section 112 of the Clean Air Act, the D.C. Circuit has rejected EPA interpretations by (1) prohibiting the agency from considering technical feasibility with respect to retrofitting existing sources within a sector;⁵⁷ (2) requiring EPA to set emissions standards reductions for all sectors, regardless of the practices of the best performers;⁵⁸ (3) requiring EPA to regulate incinerators that produced thermal energy as a combustion byproduct;⁵⁹ (4) prohibiting EPA from creating sub-categories of sources for the purpose of excluding them from regulation;⁶⁰ and (5) requiring the agency to apply continuous MACT standards to all sources, even during

Def. Council v. U.S. Evtl. Prot. Agency, 571 F.3d 1245 (D.C. Cir. 2009) (EPA's 8-hour ozone NAAQS challenged by NRDC and numerous states).

55. See, e.g., North Carolina v. U.S. Evtl. Prot. Agency, 531 F.3d 896 (D.C. Cir. 2008) (vacating entire rule); New York v. U.S. Evtl. Prot. Agency, 413 F.3d 3 (D.C. Cir. 2005) (vacating in part); *Mossville Evtl. Action Now*, 370 F.3d at 1232 (remanding for further support).

56. See 5 U.S.C. § 706(2) (2006) (limiting judicial remedies to "setting aside" agency actions, findings, and conclusion). See also *Ethyl Corp. v. Evtl. Prot. Agency*, 51 F.3d 1053, 1064 (D.C. Cir. 1995) (noting that the Clean Air Act's review provisions are the same as those in the Administrative Procedure Act).

57. See *Sierra Club*, 479 F.3d at 880-81.

58. *Id.* at 883.

59. *Natural Res. Def. Council v. U.S. Evtl. Prot. Agency*, 489 F.3d 1250, 1257-61 (D.C. Cir. 2007).

60. *Natural Res. Def. Council v. U.S. Evtl. Prot. Agency*, 489 F.3d 1364, 1371-73 (D.C. Cir. 2007).

startup, shutdown, and malfunctions.⁶¹ In each case, the court not only rejected EPA's final action, but also placed strict guidelines on all future EPA action under the same statutory provision. Thus, *Chevron* step-one decisions have both substantive and long-ranging impacts on the agency.

In contrast, a court's relative power with respect to EPA is greatly diminished in a *Chevron* step two analysis. As a practical matter, the difference can be seen in cases where EPA and the courts disagree with respect to a statute's meaning. Under *Chevron* step one, a court can, in essence, impose its own preferred interpretation by finding that Congress's intent is clear. But under *Chevron* step two, the court must defer to any reasonable agency interpretation, even if it is not "the interpretation that the court might have originally given the statute."⁶² This does not mean that under *Chevron* step two, a federal court has no power vis-à-vis the EPA; it merely means that a court acts on the margins in shaping EPA's statutory obligations.⁶³ For example, in *North Carolina v. EPA*, the court found EPA's interpretation unreasonable because it conflicted with another provision of the Clean Air Act.⁶⁴ While the court foreclosed EPA's preferred interpretation, it still provided EPA with the discretion by vacating the rule and allowing EPA to reinterpret the statute on its own.⁶⁵ Thus, it is not surprising that EPA typically argues for statutory ambiguity under *Chevron* step one, since it has a high success rate at *Chevron* step two and, even in defeat, retains significant discretion in how to apply the Clean Air Act in future final actions.

A federal court's review of agency action under an arbitrary and capricious standard demonstrates a further limitation of the federal judiciary's relative power with respect to EPA. First, the court's review under an arbitrary and capricious standard tends to be a fact-driven analysis based on the administrative record.⁶⁶ While EPA may be able to glean lessons from the court's analysis, the detailed nature

61. See *Sierra Club v. U.S. Envtl. Prot. Agency*, 551 F.3d 1019, 1028 (D.C. Cir. 2008).

62. *New Jersey v. U.S. Envtl. Prot. Agency*, 517 F.3d 574, 581 (D.C. Cir. 2008).

63. Some observers have argued that federal courts exercise some inherent flexibility in applying *Chevron*. See, e.g., Jonathon T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 87-89 (2000). If so, the federal courts retain the choice to resolve an issue on step one, where the court's power is greatest, or to move to step two.

64. *North Carolina v. U.S. Envtl. Prot. Agency*, 531 F.3d 896, 908-11 (D.C. Cir. 2008).

65. *Id.* at 929-30 (vacating permit without dictating proper interpretation of the statute).

66. See, e.g., *Bluewater Network v. U.S. Envtl. Prot. Agency*, 370 F.3d 1, 15 (D.C. Cir. 2004).

of the opinions may constrain their impact on future agency decision-making. Second, when faced with substantive questions, such as the weight and credibility of different data and technical reports, courts tend to take a deferential view that respects EPA's technical expertise in environmental fields.⁶⁷ While courts are more likely to remand final actions after identifying gaps in the administrative record, these decisions tend to focus only on process rather than substance.⁶⁸ Typically, in such a circumstance, the court will state explicitly that it is not expressing any judgment on the merits of the final EPA action and that EPA is free to take the same action again after supplementing the record.⁶⁹ While this outcome will impact EPA's procedure upon remand, that may be the extent of a decision's impact.

Another facet of the federal judiciary's relative power relates to EPA's ability to avoid judicial involvement. First, EPA is a defendant in section 307 cases and therefore has no discretion to choose whether or not to involve the courts. And even in the context of threshold issues, which must be met before a case can be heard on the merits, the court, and not EPA, remains the final authority in determining whether threshold criteria are met.⁷⁰ Further, there is a dearth of case law addressing settlements or consent decrees in section 307 challenges, suggesting that such resolutions are rare. However, this is not surprising given the nature of the litigants. As described above, EPA is essentially caught in the middle between environmental groups and regulated entities. As a result, a potential settlement may well result in a new lawsuit from the other side.

In sum, the federal courts have significant power relative to EPA in section 307 challenges. Not only are the challenges numerous, involving virtually every significant final action taken by EPA, they are also substantively important, often addressing key issues of

67. See, e.g., *New York v. U.S. Env'tl. Prot. Agency*, 413 F.3d 3, 38 (D.C. Cir. 2005) (explaining that the court must defer to EPA's assessment that is based on the agency's expert evaluation of technical data).

68. See, e.g., *Mossville Env'tl. Action Now v. U.S. Env'tl. Prot. Agency*, 370 F.3d 1232, 1243 (D.C. Cir. 2005) (remanding rule to EPA for a more adequate explanation rather than addressing substance of plaintiff's claim when EPA failed to include sufficient evidence in the record).

69. See, e.g., *Env'tl. Def. v. U.S. Env'tl. Prot. Agency*, 489 F.3d 1320, 1335 (D.C. Cir. 2007) (upholding provisions in 2005 EPA implementing PSD for NO_x which were identical or nearly identical to provision in 1988 rule which court found deficient because for the 2005 rule, EPA provided support and scientific bases which the court had found missing in earlier rule).

70. See *supra* Part II.B.

statutory construction. Although a court's role diminishes through the course of the review process, moving from *Chevron* review to the arbitrary and capricious standard, as a whole it is quite strong.

III. SUITS ALLEGING EPA FAILURE TO ACT

Unlike section 307 challenges, which require a court to address the propriety of final action taken by EPA, section 304⁷¹ challenges assert that EPA has failed to take any action at all, despite a non-discretionary duty to do so. Because no action has been taken, there is typically far less in the way of agency conclusions and fact-finding for a court to review and fewer, narrower remedies are available.⁷² From a substantive perspective, the courts' interaction with EPA during a section 304 challenge is limited to determining (1) whether EPA has a nondiscretionary duty to act; (2) whether EPA has taken sufficient steps to satisfy that duty; and (3) when EPA must take the omitted action if it is found liable.⁷³ In addition, district courts hearing these actions must address a variety of peripheral issues, which may not address the merits of a claim but are nonetheless important to the litigants. These issues include discovery requests, motions to intervene, and requests for attorneys' fees.⁷⁴ Finally, given the courts' limited substantive authority under section 304, EPA has considerable discretion to take cases away from courts by admitting liability, reaching a settlement with the petitioner, or simply taking action to moot the suit.⁷⁵

A. Statutory Background

Section 304 of the Clean Air Act permits citizens' suits against the EPA "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary."⁷⁶ This section also authorizes suits to compel "agency

71. Clean Air Act § 304, 42 U.S.C. § 7604 (2006).

72. See *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 90 (D.D.C. 2001) ("Under the CAA, the Court can only order EPA to take nondiscretionary actions required by the statute itself.").

73. See *infra* Sections III.B, C, and D.

74. See *supra* Part III.E.

75. See *supra* Part III.F.

76. 42 U.S.C. § 7604(a)(2). A similar judicial review process is provided in a number of other statutory schemes administered by EPA. See, e.g., Clean Water Act, 33 U.S.C. § 1365(a) (2006); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (2006); Toxic Substances Control Act, 15 U.S.C. § 2619(a) (2006). In the event that a statutory scheme lacks judicial review provisions, the APA provides a means to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (2006).

action unreasonably delayed.”⁷⁷ Unlike challenges to final agency action which are filed in the courts of appeals, citizens’ suits based on a failure to act must be filed in United States district courts.⁷⁸ Before filing a suit alleging a failure to act, a petitioner must give EPA notice of its intent to sue and then wait sixty days to permit EPA to take corrective action.⁷⁹ This requirement is jurisdictional in nature, and the action will be dismissed if the party fails to give EPA sufficient pre-suit notice.⁸⁰

B. Jurisdiction of the District Courts

As courts of limited jurisdiction, federal district courts lack authority to hear a case without a specific grant of jurisdiction. Unless Congress has waived the government’s sovereign immunity, courts lack subject matter jurisdiction to hear cases against the federal government, including EPA.⁸¹ Section 304 provides a limited waiver of sovereign immunity for acts and duties “which [are] not discretionary with the Administrator.”⁸² Therefore, a court’s first task is to determine whether the alleged inaction involves a nondiscretionary duty imposed by the Clean Air Act. This is an issue of pure statutory interpretation, and because section 304 describes the district courts’ jurisdiction rather than EPA’s duties under the Clean Air Act, the courts need not defer to EPA when determining whether a duty is nondiscretionary.⁸³

77. 42 U.S.C. § 7604(a). When the petition seeks to compel agency action which would be subject to review under section 307, it must be filed in a district court within the circuit in which review of the final agency action would occur. *Id.* Failure to file in a proper district court may not be fatal, as the court has discretion to transfer the action to a district court with proper venue. 28 U.S.C. § 1406(a) (2006). *See also* *Sierra Club v. Johnson*, 623 F. Supp. 2d 31, 38 (D.D.C. 2009).

78. 42 U.S.C. § 7604(a).

79. *Id.* § 7604(b)(2).

80. *City of Highland Park v. Train*, 519 F.2d 681, 690–91 (7th Cir. 1975). However, such a requirement is not as onerous as it may seem because there is no time limit in which a party must file. 42 U.S.C. § 7604(a). If an initial action is procedurally ineffective, the party may simply provide notice and, after 60 days, file suit again if EPA has not begun to take action.

81. *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 547 (D.D.C. 2005).

82. 42 U.S.C. § 7604(a)(2) (2006).

83. *Leavitt*, 355 F. Supp. 2d at 548 (“[T]he court owes no deference to an agency’s interpretation of a statute that defines this Court’s subject matter jurisdiction.”). In *Sierra Club v. Leavitt*, the court found that Section 304 provided jurisdiction with respect to non-discretionary actions required by EPA regulations as well as non-discretionary actions required by statute. *Id.* at 553-557.

Given the fact that section 304 challenges permit a court to curtail EPA discretion by requiring it to act,⁸⁴ one would expect EPA to challenge courts' subject matter jurisdiction with some frequency. That is, when faced with a section 304 challenge, EPA's best defense would be that its obligations were actually discretionary. Regardless of the deference EPA may be afforded with respect to substantive issues, a successful outcome on jurisdictional grounds would end the suit completely and give EPA freedom to act only if and when it chooses.

However, in the past decade there have only been a handful of opinions addressing the nondiscretionary nature of EPA's duties under the Clean Air Act. Indeed, the only subject matter jurisdiction issues that were litigated addressed whether a date certain is required for a nondiscretionary duty,⁸⁵ whether section 304 extends to agency-issued regulations or only to statutory requirements,⁸⁶ and whether a statutory duty to act was implicitly repealed by a subsequent statute.⁸⁷ This suggests either that most significant statutory requirements under the Clean Air Act have become well defined or that citizens' suits are only brought with respect to the most clear cases of nondiscretionary duties.

C. Was There a Failure to Act?

The second substantive issue that a district court must address is whether EPA has failed to act. However, this issue is rarely litigated. Unlike the jurisdictional issue above, determination of what constitutes sufficient action involves a degree of deference to EPA.⁸⁸ The issue typically arises when EPA has taken some action with respect to a nondiscretionary duty, but the plaintiffs challenge its sufficiency. For example, in *Sierra Club v. Johnson*, plaintiffs alleged that, after receiving a Title V permit application from a waste incinerator, EPA had failed to issue or deny the permit.⁸⁹ EPA asserted that it had taken sufficient action by "initiating the process to

84. 42 U.S.C. § 7604(a).

85. *Sierra Club v. Johnson*, 500 F. Supp. 2d 936, 937 (N.D. Ill. 2007).

86. *Leavitt*, 355 F. Supp. 2d at 556.

87. *Env'tl. Def. v. U.S. Env'tl. Prot. Agency*, No. 06-4273, 2007 WL 127998, at *3-4 (N.D. Cal. Jan. 12, 2007).

88. *Izaak Walton League of Am. v. Johnson*, 400 F. Supp. 2d 38, 43 (D.D.C. 2005) ("[W]hile a healthy respect may be given to an agency's position on whether its actions are 'final,' the court must ultimately satisfy for itself that the agency's actions are or are not indeed 'final.'").

89. *Johnson*, 500 F. Supp. 2d at 938.

issue or deny a Title V permit” for the applicant.⁹⁰ The district court rejected EPA’s assertion, finding that EPA’s nondiscretionary duty required it to actually grant or deny the permit.⁹¹ Thus, the district court engages in limited statutory interpretation by determining what is required for final agency action with respect to a nondiscretionary duty.

When EPA has taken some action, the interplay between sections 307 and 304 becomes an important issue in determining when and where a petitioner can file a citizens’ suit against EPA. As described above, courts of appeals have exclusive jurisdiction over suits challenging the substance of a final agency action, and such suits must be brought within sixty days of the final action taking place.⁹² Thus, if EPA is successful in asserting that its actions were sufficient to constitute final agency action, a plaintiff is without remedy in district court, and a subsequent challenge in the court of appeals may well be time-barred.⁹³ However, if EPA’s actions are not sufficient to constitute a final agency action, a plaintiff can not only bring a successful suit under section 304, but will also have an opportunity to bring a subsequent section 307 challenge if it is dissatisfied with EPA’s final action. In addition, if a final agency action is vacated by a court of appeals under section 307, EPA will again be subject to suits under section 304 if it fails to respond to the court’s remand.⁹⁴

D. Remedy—Timing for Final Agency Action

In cases directly addressing the merits of section 304 challenges alleging EPA inaction, one of the most commonly litigated issues is

90. *Id.* at 939.

91. *Id.* at 940 (“Until the Title V permit is issued or denied, there is a case or controversy.”).

92. *See supra* Part II.A.

93. *See, e.g., Izaak Walton League*, 400 F. Supp. 2d at 43. After plaintiffs filed suit alleging that EPA failed to promulgate emissions standards for coal- and oil-fired electric utility steam generating units, EPA issued a final rule delisting the units as a hazardous source category which mooted the case. *Id.* at 41–42. The district court said that it lacked authority to determine whether EPA had followed the proper procedures in delisting the units because it would constitute review of a final agency action which was reserved for the courts of appeal. *Id.* at 43–44. While the court suggested that plaintiffs could challenge EPA’s action in the courts of appeals, *id.* at 44, it is questionable because the district court issued its decision nearly seven months after EPA delisted the source and well in excess of the 60 day limit on challenging final agency actions. *Id.*

94. *Sierra Club v. Johnson*, 373 F. Supp. 2d 30, 32–33 (D.D.C. 2005) (“EPA’s duty to act is still (or again) unfulfilled, because the Court of Appeals’ order vacating EPA’s conditional approval of the pre-2001 SIPs . . . operated to restore the status quo ante.”).

the remedy—the date by which EPA must take final action. In fact, it is extremely common for EPA to admit liability for failure to act.⁹⁵ These cases entail disagreements between plaintiffs, who seek quick agency action, and EPA, which claims that it cannot take effective action for months or even years.⁹⁶ Courts are placed in a delicate position when devising an appropriate remedy under section 304. On one hand, these cases often entail statutory deadlines that have been missed by years, if not decades,⁹⁷ making plaintiffs' requests for prompt action reasonable. But on the other hand, sound and effective regulations take time to develop, especially when EPA's limited resources are considered. Setting too short a time period can either result in ineffective regulations or missed deadlines and additional judicial involvement.⁹⁸ District courts often use the parties' proposals as starting points and try to find a middle ground that ensures quick action yet respects EPA's valid need for sufficient time to issue regulations.⁹⁹

Despite their appearance as significant controls over EPA, injunctions directing EPA to act by a date certain are not necessarily successful in achieving the desired result. The record is replete with cases involving multiple rounds of litigation under section 304, suggesting that an injunction to act at a later date may be insufficient to compel agency action if failure to meet the deadline merely results in another injunction with a later deadline. EPA's rulemaking process with respect to section 112(g) Maximum Achievable Control Technology ("MACT") regulations for several sources of industrial

95. See, e.g., *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52 (D.D.C. 2006) ("There is no question as to liability; EPA does not contest its failure to discharge its duty under the statute."); *Cmtys. for a Better Env't v. U.S. Env'tl. Prot. Agency*, No. 07-3678, at *2 (N.D. Cal. May 5, 2008); *Mo. Coal. for the Env't v. U.S. Env'tl. Prot. Agency*, No. 04-CV-660, 2005 WL 2234579, at *1 (E.D. Mo. Sept. 14, 2005); *Med. Advocates for Healthy Air v. Whitman*, No. 02-05102, 2003 WL 926997, at *2 (N.D. Cal. Mar. 6, 2003) ("EPA does not dispute that it has a mandatory duty to promulgate a FIP . . .").

96. See, e.g., *Johnson*, 444 F. Supp. 2d. at 55 (describing EPA assertion that it needed additional time to ensure regulations will withstand judicial review); *Med. Advocates for Healthy Air*, 2003 WL 926997, at *2 (describing EPA assertion that it needs additional time due to "complexity of the issue and the quantity of data that must be gathered").

97. See, e.g., *Mo. Coal. for the Env't*, 2005 WL 2234579, at *1-2 (noting that EPA had never reviewed the lead NAAQS despite a nondiscretionary duty to do so 22 years prior to the decision).

98. Challenges to EPA's Boiler MACT rulemaking, which are discussed below, provide an excellent case in point.

99. See, e.g., *Mo. Coal. for the Env't*, 2005 WL 2234579, at *3 (granting EPA 3.5 years to complete review of lead NAAQS after plaintiff and defendant asked for 1.5 and 4.5 years respectively).

boilers (“Boiler MACT”) provides an excellent case study. Sierra Club initiated litigation by filing seven section 304 complaints against EPA in 2001.¹⁰⁰ The parties subsequently agreed to a consent decree in 2003, which set a new schedule for EPA compliance with various statutory deadlines.¹⁰¹ The parties were unable to reach agreement on other deadlines, which were subsequently set by the court.¹⁰² EPA then filed several unopposed motions for extensions of the deadlines, which were granted.¹⁰³ However, EPA still failed to meet the deadlines, and Sierra Club finally opposed EPA’s request for further extensions of up to fifteen months.¹⁰⁴ After reviewing the extensive delays in the case and apparently expressing increased frustration with EPA’s failure to comply with its deadlines, the court granted EPA only one additional month’s extension.¹⁰⁵ Although EPA responded to the court’s decision by promulgating final MACT rules,¹⁰⁶ it simultaneously issued a notice stating its intent to reconsider the rules.¹⁰⁷ Regardless of the merits of EPA’s claims that it needed additional time, the long and repetitive history of this case demonstrates that injunctions directing EPA to act by a future deadline can be of limited utility. Faced with EPA’s subsequent failure to act, the courts may believe they have little recourse but to set another compliance date and hope that EPA will cooperate.

E. Peripheral Issues

In addition to the merits-based decisions discussed above, it is also common for district courts to address a number of peripheral issues which do not relate directly to the substance of the parties’ claims. Among the peripheral issues are discovery motions, motions to intervene, and petitions for attorneys’ fees. Perhaps the most important issue is petitions for attorneys’ fees. Section 304(d) permits such fees to be awarded “whenever the court deems such an award is appropriate.”¹⁰⁸ Courts interpreting the attorneys’ fees provisions of

100. *Johnson*, 444 F. Supp. 2d at 51.

101. *Id.*

102. *Id.* at 61.

103. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *4 (D.D.C. Jan. 20, 2011).

104. *Id.* at *1.

105. *Id.* at *14.

106. 76 Fed. Reg. 15,608 (Mar. 21, 2011).

107. 76 Fed. Reg. 15,266 (Mar. 21, 2011). In addition, EPA stayed the effective date of the rule, pending the completion of its reconsideration. 76 Fed. Reg. 28,662, 28,663 (May 18, 2011).

108. 42 U.S.C. § 7604(d) (2006).

the Clean Air Act continue to endorse a catalyst theory of identifying prevailing parties¹⁰⁹ in section 304 cases, so plaintiffs may be entitled to attorneys' fees even if a settlement or consent decree prevents a judgment on the merits.¹¹⁰

Despite its peripheral nature, the courts' willingness to award attorneys' fees, especially in the context of the catalyst theory, may play a significant role in the frequency with which section 304 claims are brought. Given the typically lengthy delay in obtaining final agency action and the uncertainty as to whether that action will be favorable, potential petitioners might be wary of investing heavily in section 304 cases. However, the promise of attorneys' fees, coupled with the probability of recovery provided by the catalyst theory, may encourage otherwise wary petitioners to take on particularly strong cases. And for frequent section 304 plaintiffs such as Sierra Club, the availability of attorneys' fees may provide a constant source of litigation funds, which enable a steady stream of citizens' suits against EPA. Thus, a court's position with respect to attorneys' fees may well ensure a continued relationship with EPA.

F. Ending the Case or Controversy

While the courts' approach to attorneys' fees under section 304 may encourage additional interaction with EPA, EPA also has the ability to take cases away from the courts. First, EPA can render a case or controversy moot at any time by simply completing the action that was allegedly lacking.¹¹¹ Because a section 304 case alleges only a failure to act—and does not include any allegation regarding the

109. *Sierra Club v. U.S. Env'tl. Prot. Agency*, 322 F.3d 718, 725 (D.C. Cir. 2003) (“Although *Buckhannon* rejected the catalyst theory, the statute at issue there authorizes fee awards only to ‘prevailing part[ies].’ By comparison, *Ruckelshaus*’s footnote eight analysis directly applies to the issue here, as it interprets section 307(f) to authorize fee awards for ‘suits that forced defendants to abandon illegal conduct, although without a formal court order.’ [*Ruckelshaus v. Sierra Club*,] 463 U.S. [680.] 686 n.8 [(1983).]”). The Supreme Court in *Ruckelshaus* further clarified that “whatever general standard may apply under § 304(f), a similar standard applies under § 304(d).” *Id.* at 691.

110. As described below, settlement agreements and consent decrees are common in section 304 actions. It is possible that the availability of attorneys' fees creates an incentive for EPA to settle Section 304 cases, either to limit such fees or to exclude them as a condition of the agreement.

111. *Izaak Walton League of Am. v. Johnson*, 400 F. Supp. 2d 38, 41 (D.D.C. 2005) (declaring plaintiffs' claims moot when EPA took final action nearly a year after plaintiffs filed suit).

substance of that act—action by EPA ends the case, regardless of whether the plaintiff supports the final result.¹¹²

Even in cases where EPA would be unable to take a final action before the conclusion of a case, it can either enter into a settlement agreement or a consent decree, which largely takes the case out of the court's hands.¹¹³ Given EPA's apparent willingness to admit liability for failure to act,¹¹⁴ it seems that the critical issue in settling cases without judicial involvement is the issue of timing. So long as the parties can agree to a timeframe on which EPA must act, there is no reason not to enter into a settlement. Moreover, a settlement agreement or consent decree may give plaintiffs more leverage with respect to the content of the future agency action—something that a district court simply cannot offer them.¹¹⁵ In light of the benefits that can potentially accrue to both EPA and petitioners by settling a section 304 case, it is not surprising that such settlements present a viable alternative to judicial resolution.¹¹⁶ Indeed, after the parties have reached an agreement, it is common for a court to become involved only as a result of would-be intervenors' objections or petitions for attorneys' fees.¹¹⁷

G. Analysis

When compared to section 307 petitions, section 304 petitions appear to be somewhat rare.¹¹⁸ Thus, in a purely numerical sense, the

112. *Id.* at 43 (“While jurisdiction to determine the finality of the EPA’s action clearly lies with the court and has been exercised here, any consideration of the propriety of an agency’s action necessarily goes to the merits of those actions. The merits of those actions are exclusively reserved under the CAA for the courts of appeals.”).

113. *Am. Nurses Ass’n v. Jackson*, No. 08-2198, 2010 WL 1506913, at *1 (D.D.C. April 15, 2010) (“A consent decree is not a court ‘order,’ and by entering this consent decree the Court is only accepting the parties’ agreement to settle, not adjudicating whether EPA’s legal position is correct.”).

114. *See supra* note 95 and accompanying text.

115. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 60 (D.D.C. 2006) (“Under the CAA, the Court can only order EPA to take nondiscretionary actions required by the statute itself. . . . Notably, the CAA does not allow district courts to address the content of EPA’s conduct, issue substantive determinations of its own, or grant other forms of declaratory relief.”).

116. For example, as described in Section III.D, *supra*, timing is one of the most contentious issues in § 304 actions and, if agreement is possible, both sides may prefer a negotiated timeline for rulemaking than a schedule dictated by a court.

117. *See, e.g., Env’tl. Def. v. Leavitt*, 329 F. Supp. 2d 55 (2004) (D.D.C. 2004) (intervenor’s objections); *Desert Rock Energy Co. v. U.S. Env’tl. Prot. Agency*, No. 08-872, 2009 WL 3247312 (S.D. Tex. Sept. 29, 2009) (petition for attorneys’ fees).

118. Although we are unaware of any comprehensive analyses of the number of petitions filed under sections 307 and 304 our own research of petitions in response actions (or inaction)

courts have less impact on EPA in this area. Several factors may contribute to this difference. First, the stakes in section 304 challenges are not as high for petitioners because, by definition, EPA's failure to act cannot establish substantive rules that are binding on regulated entities and affect the public as a whole. Second, many of the required actions, such as responses to permit applications, may impact fewer people and therefore create a smaller pool of potential petitioners. Finally, as described more fully below, EPA can resolve section 304 challenges prior to court intervention, and many potential challenges may simply be resolved before the court has an opportunity to act. While the availability of attorneys' fees creates an incentive to bring section 304 petitions, that factor may not be enough to encourage litigation except in the most significant of cases.

When compared to section 307, a court's relative power in section 304 cases is also greatly diminished with respect to substance and remedies. As one court noted, "the [Clean Air Act] does not allow district courts to address the content of EPA's conduct, issue substantive determinations of its own, or grant other forms of declaratory relief . . . [u]nder 42 U.S.C. § 7607(b) such substantive judicial relief is expressly reserved for the appropriate court of appeals."¹¹⁹ Instead, a district court "can only order EPA to take nondiscretionary actions required by the statute itself."¹²⁰ Aside from the rare jurisdictional questions, which require the court to determine whether a duty is nondiscretionary or whether EPA has failed to take sufficient action, the majority of merits-based decisions involve fact-specific inquiries into the appropriate timing for subsequent agency action. Other peripheral issues, such as motions for discovery, motions to intervene, and petitions for attorneys' fees may impact the EPA in terms of time and resources but have little effect on the shape of subsequent regulations. Even the injunctive power to compel the courts to act at a later date is limited because there is little a court can do to ensure that EPA complies with the remedy, short of exercising the contempt power.¹²¹

Finally, a court's power is limited by the fact that EPA can take cases away from it through settlement or simply by taking action. As

of the EPA during the Bush Administration (2001-2009) revealed a significantly greater number of petitions filed under section 307.

119. *Johnson*, 444 F. Supp. 2d at 60.

120. *Id.*

121. Indeed, an effort to punish EPA through sanctions could be counterproductive as it would create further strain on EPA's resources and limit its ability to issue new regulations.

in section 307 cases, EPA is a defendant in section 304 cases and is forced to participate in the action. However, in section 304 cases, it is common for EPA to resolve the dispute without judicial involvement through a stipulated dismissal or consent decree.¹²² As a result, there is no guarantee that a court will resolve a petition once it is filed. But even when one side favors delay, it simply may not be credible to assert that EPA has no obligation to act. As a result, there are fewer barriers to settlement and a smaller likelihood that a court will be called upon to resolve substantive issues related to the suit.

IV. CLEAN AIR ACT ENFORCEMENT

In the realm of Clean Air Act enforcement, the pattern described above, with respect to challenges to agency action and agency inaction, is inverted. EPA chooses the means of enforcement and initiates that process against another (usually private) entity¹²³—in contrast to suits challenging EPA action or inaction, where the initial choice to appear in court is not in EPA's hands. In addition, EPA is not the only entity which may enforce the strictures and implementing regulations of the Clean Air Act. Broadly speaking, the Act authorizes three categories of entities to enforce its strictures: (1) the federal government, through EPA and/or the Department of Justice and its instrumentalities; (2) state and local governments with programs and authority delegated to them by EPA; and (3) the public, through citizens' suits.¹²⁴ However, it is primarily EPA and the Department of Justice—or their state, local, or tribal enforcement counterparts—that initiate enforcement and thereby retain substantial discretion as to the form of the enforcement.¹²⁵ As with challenges to agency action and inaction, the role of the federal judiciary in enforcing the regulatory regime created by the Clean Air Act varies. The role of a court is at its apex in this area when enforcement is pursued by EPA and the Department of Justice via a

122. See, e.g., *Leavitt*, 329 F. Supp. 2d at 55; *Am. Nurses Ass'n v. Jackson*, No. 08-2198, 2010 WL 1506913 (D.D.C. Apr. 15, 2010).

123. See 42 U.S.C. § 7413(a)(1) (2006) (CAA grants EPA choice of enforcement mechanisms against “any person” for violations of applicable plans or permits); *id.* § 7413(a)(3) (EPA has choice of enforcement mechanisms for violations of other CAA requirements); see also *id.* § 7413(a)(2) (in case of state failure to adequately enforce plan or permit, EPA is given choice of means to enforce “such plan or permit. . . against any person”); *id.* § 7413(a)(5).

124. See 42 U.S.C. § 7413 (EPA); *id.* §§ 7413(a)(3)(D), (c) (U.S. Department of Justice); *id.* § 7416 (state enforcement); *id.* § 7604 (authorization for citizens' suits).

125. See *infra* Section IV.E (discussing primacy of federal and state enforcement under the CAA).

civil suit or criminal indictment or is pursued by citizens via the citizens' suit provision.¹²⁶

Even then, however, the federal judiciary's reach is narrowed substantially, as a practical matter, due to several factors. The first is the predominance of administrative enforcement. EPA statistics reveal that the bulk of federal and state environmental enforcement is accomplished through administrative procedures and settlements, as opposed to civil or criminal judicial suits or dispositions on the merits. The second factor is the predominance of settlement in resolving enforcement suits. This is reflected, in part, in statistics which show that few civil suits result in judicial resolution. The third factor is the states' large role in enforcement. Far more Clean Air Act civil enforcement is conducted by state, rather than federal, agencies. The final factor is the ability of federal or state enforcement (or even some violators) to preempt citizens' suits.

A. Federal Enforcement—Administrative and Judicial Options

The federal government has a number of enforcement tools under the Act, including administrative compliance orders, administrative penalty orders, civil judicial enforcement actions, and criminal actions. Under Clean Air Act ("CAA") section 113(a)(1), "[w]henever . . . [EPA] finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit," the agency is authorized to undertake enforcement.¹²⁷ The agency first must issue a notice of violation (NOV) to the alleged violator, copying the relevant state, local, or tribal authority if applicable.¹²⁸ Thirty days after issuance of the NOV, EPA is authorized to take one of several enforcement actions.¹²⁹

1. Administrative Compliance Order

First, the agency may issue an administrative compliance order or corrective action order—"an order requiring such person to comply with the requirements or prohibitions of such plan or

126. See *infra* Section IV.C (contrasting the role of the judiciary in original enforcement actions brought in federal courts with the more limited judicial role in judicial review of administrative actions).

127. 42 U.S.C. § 7413(a)(1).

128. *Id.*

129. *Id.*

permit.”¹³⁰ Such compliance orders expressly do not preclude further state or federal administrative or judicial enforcement for the alleged noncompliance.¹³¹ The administrative compliance order acts as an injunction, which, although not directly imposing penalties, can be the basis for a later EPA administrative penalty or civil suit to enforce compliance—and seek penalties for noncompliance—with its terms.¹³²

A variation on the administrative compliance order is authorized, as part of the emergency response provisions, where EPA makes a determination that pollution emissions or releases are causing imminent and substantial endangerment to the health of persons, human welfare, or the environment, and where a civil suit is impracticable.¹³³ Similar, but broader, remedies are authorized in response to releases and threatened releases of listed hazardous substances.¹³⁴

2. Administrative Penalty Order

Second, separately or in combination¹³⁵ with an administrative compliance order, EPA may pursue an administrative penalty order for penalties up to a statutory limit—which is \$25,000¹³⁶ per day per violation for most violations.¹³⁷ Absent a joint determination between the Department of Justice and the EPA,¹³⁸ total penalties under such an order may not exceed \$200,000 and may only apply where the first alleged violation occurred within the previous twelve months.¹³⁹

130. *Id.* § 7413(a)(1)(A).

131. *Id.* § 7413(a)(4), (5).

132. *See id.* §§ 7413(a)(1)(A), (a)(2)(A), (a)(3)(B), (5)(A) (authorizing EPA to issue orders requiring compliance with requirements and prohibitions of CAA and related federal and state laws); *id.* § 7413(a)(3)(A), (C) (authorizing administrative penalty orders and civil actions to redress violations of, *inter alia*, orders issued under authority of this subchapter of CAA). *See also id.* § 7413(d)(1)(B) (administrative penalty order authorized for violation of orders issued under authority of CAA).

133. *Id.* § 7603.

134. *See id.* § 7412(r)(9).

135. *See* 40 C.F.R. §§ 22.1 (2010).

136. *See* 28 U.S.C. § 2461 note (2006); 40 C.F.R. § 19.4 (2010). This and other maximum penalty figures discussed in this article represent the statutory maxima. However, these penalty limits have been adjusted upward by regulation, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, to account for inflation.

137. 42 U.S.C. § 7413(a)(1)(B), (d); *see also id.* § 7524(a), (c).

138. *See* 28 U.S.C. § 2462. Although this twelve month requirement may be waived, administrative penalty actions likely must still be initiated within five years of when the underlying violation first accrued, possibly unless it is a continuing violation.

139. 42 U.S.C. § 7413(d)(1).

Subjects of such a penalty order must be given written notice in the form of an administrative complaint and are entitled to due process, if requested within thirty days of such notice, in the form of an administrative hearing on the record.¹⁴⁰ Administrative penalty orders are subject to the general administrative hearings procedures contained in EPA's Part 22 implementing regulations.¹⁴¹ Under those Part 22 regulations, the decision of the administrative law judge becomes a final order within forty-five days of initial decision, unless the subject of the penalty order appeals the order to EPA's Environmental Appeals Board or moves to reopen the matter.¹⁴²

3. Civil Action—Civil Judicial Enforcement

Third, EPA may ask the Department of Justice to bring a civil action in district court for permanent or temporary injunctive relief, or for civil penalties of \$25,000¹⁴³ per day per violation against owners and operators of stationary sources and other persons who have violated or are violating provisions of the Clean Air Act, its implementing regulations, or any applicable implementation plan.¹⁴⁴ Civil suits for injunctive relief or penalties is also authorized as part of an emergency response, when EPA makes a determination that the pollution is causing imminent and substantial endangerment to the health of persons, human welfare, or the environment,¹⁴⁵ and in response to releases or threatened releases of listed hazardous substances.¹⁴⁶

4. Criminal Judicial Enforcement

Fourth, the Department of Justice is also authorized to seek criminal penalties as part of a criminal enforcement suit in district court for knowing violations of Clean Air Act requirements, including applicable implementation plans and recordkeeping, monitoring, and reporting requirements; for negligent releases of listed hazardous substances which place another person in imminent danger of death

140. *Id.* § 7413(d)(2)(A); 40 C.F.R. § 22.21(b) (2010). *See also* 42 U.S.C. § 7524(c)(1).

141. 40 C.F.R. §§ 22.1–22.34 (2010).

142. *Id.* § 22.27(c)(1)–(4). Another form of an administrative penalty order contemplated by the Clean Air Act is the field citation, similar to other administrative penalty orders but limited to penalties of \$5,000 per day per violation and offering those subject to an order more limited due process rights. 42 U.S.C. § 7413(d)(3); *see also id.* at § 7524(c)(1) (Title II).

143. *See supra* note 136.

144. 42 U.S.C. § 7413(a)(1)(C), (b); *see also id.* § 7524(b).

145. *Id.* § 7603.

146. *Id.* § 7412(r)(9).

or serious bodily injury; and for knowing releases of such listed hazardous substances.¹⁴⁷ Criminal penalties may also be obtained by a criminal suit authorized under the emergency response provisions,¹⁴⁸ as well as under Title 18 of the U.S. Code for general crimes such as making false statements to federal officials, including EPA, or for conspiring to violate federal law, like the Clean Air Act.

5. Settlements

Fifth, EPA and/or the U.S. Department of Justice may also obtain compliance and penalties through settlement—typically in the form of a consent decree, consent agreement, or consent order.¹⁴⁹ Of course, settlement is not an exclusive remedy but rather a parallel procedure and potential alternative outcome with respect to any other enforcement mechanism, administrative or judicial. Settlement discussions may be conducted informally or as part of structured mediation or other alternative dispute resolution processes of varying structure and formality. However, there are formal requirements that apply to proposed settlements. The Clean Air Act requires that such settlements be noticed in the Federal Register and open for public comment at least thirty days prior to the date on which the settlement or consent decree is final.¹⁵⁰

Also, and in parallel with the statutory factors that Congress has provided to courts in setting penalties for violations of the Clean Air Act,¹⁵¹ EPA has provided guidance to its own staff as to the

147. *Id.* §§ 7413(a)(3)(D), (c) & 7412(r)(9).

148. *Id.* § 7603(b).

149. For example, EPA's Part 22 regulations provide guidance on settlement and its legal impact where administrative enforcement has already been initiated, and require that the terms of any such settlement be recorded in a consent agreement. *See* 40 C.F.R. § 22.18(b) (2010). When the settlement occurs after the filing of a civil enforcement suit, the terms of the settlement may be recorded in a consent decree or consent order. *See, e.g., List of Proposed Consent Decrees*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/enrd/Consent_Decrees.html (last updated Oct. 2011). *See also* Kevin A. Ewing & Jason B. Hutt, *Enforcement and Liability*, in ENVIRONMENTAL LAW HANDBOOK 71, 89–90, 95 (Christopher L. Bell et al. eds., 20th ed., 2009) (describing consent order as voluntary agreement between EPA and regulated entity and EPA's use of discretion to pursue enforcement against some alleged violators while settling with others).

150. 42 U.S.C. § 7413(g). *See also* 28 C.F.R. § 50.7 (2010) (Department of Justice regulation providing for a public comment on consent decrees).

151. 42 U.S.C. § 7413(e).

qualitative factors to consider in setting administrative penalties and in conducting settlement negotiations.¹⁵²

B. Federal Administrative Enforcement Dominates

Despite the mix of administrative and judicial enforcement tools available to EPA, the agency's enforcement figures demonstrate that the bulk of its enforcement is accomplished through administrative orders. Between fiscal year 2005 and fiscal year 2010, the final period for which statistics are currently available, EPA filed between 375 and 600 administrative penalty order complaints per year and achieved a similar range of final administrative penalty orders, relating exclusively to Clean Air Act enforcement.¹⁵³ On top of that, in the same period EPA issued between 109 and 187 administrative compliance orders per year solely for alleged Clean Air Act violations.¹⁵⁴

In that period, EPA enforcement of air-related violations through civil suit was nearly an order of magnitude smaller; in fact, in the same period, EPA issued only between sixty-four and eighty-six civil judicial referrals per year.¹⁵⁵ However, even those numbers substantially overstate the role of civil judicial enforcement in EPA's resolution of alleged Clean Air Act violations, as most such suits will ultimately be resolved by settlement before a final judgment of a court. This fact is reflected in the figures, smaller still, for civil judicial conclusions to EPA's air-related civil enforcement—between twenty

152. See, e.g., U.S. ENVTL. PROT. AGENCY, CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY (1991), available at <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf>.

153. See U.S. ENVTL. PROT. AGENCY, NATIONAL ENFORCEMENT TRENDS: ADMINISTRATIVE PENALTY ORDER COMPLAINTS, at E-1b (2011) [hereinafter NETS: ADMINISTRATIVE PENALTY ORDER COMPLAINTS], available at <http://www.epa.gov/compliance/resources/reports/nets/nets-e1-apocomplaints.pdf>. See also U.S. ENVTL. PROT. AGENCY, NATIONAL ENFORCEMENT TRENDS: FINAL ADMINISTRATIVE PENALTY ORDERS (FAPOS), at E-5b (2011) [hereinafter NETS: FAPOS], available at <http://www.epa.gov/compliance/resources/reports/nets/nets-e5-fapos.pdf>. These numbers exclude multi-program penalty orders—which, aside from unique circumstances in 2006, are made in small numbers, usually between 10 and 20 per year. See NETS: ADMINISTRATIVE PENALTY ORDER COMPLAINTS, *supra*, at E-1b (including metadata); NETS: FAPOS, *supra*, at E-5b (including metadata).

154. See U.S. ENVTL. PROT. AGENCY, NATIONAL ENFORCEMENT TRENDS: ADMINISTRATIVE COMPLIANCE ORDERS (ACOS), at E-4b (2011) [hereinafter NETS: ACOS], available at <http://www.epa.gov/compliance/resources/reports/nets/nets-e4-acos.pdf>.

155. See U.S. ENVTL. PROT. AGENCY, NATIONAL ENFORCEMENT TRENDS: CIVIL JUDICIAL REFERRALS, at E-2b (2011) [hereinafter NETS: CIVIL JUDICIAL REFERRALS], available at <http://www.epa.gov/compliance/resources/reports/nets/nets-e2-referrals.pdf>.

and thirty-nine suits per year from fiscal year 2005 to fiscal year 2010.¹⁵⁶ EPA does not provide criminal case statistics allocated by statute, but the global statistics it does provide confirm that criminal cases represent a fraction of the number of enforcement actions it takes, roughly equivalent to civil enforcement suits.¹⁵⁷

This may reflect the heavy burden associated with enforcement through litigation. These cases require an up-front investment in time and resources, which may render them less cost-effective overall than administrative remedies. Furthermore, while the heavy penalties associated with civil suits may induce compliance from an alleged violator, enforcement through federal litigation generally will take longer to resolve an alleged violation than will the “more streamlined” administrative enforcement process.¹⁵⁸ Further, EPA retains some flexibility if it elects to pursue initial violations administratively, as that does not close the door to a civil or criminal suit later on if violations are serious and ongoing. Consequently, it often may be prudent for EPA to begin with administrative tools and then proceed to a full-blown complaint in federal court for particularly serious cases where compliance is not forthcoming.

A corollary of this inference is that EPA’s selection of a judicial enforcement mechanism, civil or criminal, will indicate that EPA views the alleged violation or violations as relatively more severe compared to cases in which it chooses an administrative method. One conclusion, then, is that while most enforcement is conducted through administrative proceedings, the alleged violations which are enforced through the courts are the most serious ones, therefore lending the

156. See U.S. ENVTL. PROT. AGENCY, NATIONAL ENFORCEMENT TRENDS: CIVIL JUDICIAL CONCLUSIONS, at E-7b (2011) [hereinafter NETS: CIVIL JUDICIAL CONCLUSIONS], available at <http://www.epa.gov/compliance/resources/reports/nets/nets-e7-civjudconcl.pdf>.

157. For example, between 2005 and 2009, between 305 and 387 criminal environmental cases were opened and between 176 and 320 defendants were charged. See U.S. ENVTL. PROT. AGENCY, NATIONAL ENFORCEMENT TRENDS: CRIMINAL ENFORCEMENT FINES AND RESTITUTION, at E-3b (2011) [hereinafter NETS: CRIMINAL ENFORCEMENT], available at <http://www.epa.gov/compliance/resources/reports/nets/nets-e3-criminalpenandprogramact.pdf>. In that same period, EPA had between 259 and 286 civil judicial referrals per year. See NETS: CIVIL JUDICIAL REFERRALS, *supra* note 155, at E-2b.

158. In the Agency’s guidance as to the circumstances in which administrative enforcement or civil judicial enforcement should be chosen, EPA observes that “[t]he administrative forum will provide a more streamlined enforcement option, suitable for addressing many violations[.]” but that considerations such as a large penalty, severe or repeat violations, and/or need for ongoing supervision of an injunctive remedy would counsel in favor of judicial enforcement. U.S. Env’tl. Prot. Agency, EPA GUIDANCE ON CHOOSING THE APPROPRIATE FORUM IN CLEAN AIR ACT STATIONARY SOURCE CIVIL ENFORCEMENT ACTIONS (1991), available at <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/caaforum-guid.pdf>.

federal courts a substantial role in resolving the most egregious threats to human health and welfare, if a lesser role in enforcement generally.

Nevertheless, it is not clear that the cases presenting the most difficult questions of statutory interpretation or those for which EPA's factual support is the thinnest—that is, the cases offering federal courts the greatest opportunity to shape current and future enforcement—are those likely to be selected, at least initially, for judicial enforcement. Federal courts may still have an opportunity to review such cases on appeal of administrative enforcement orders, but, as discussed below, they must do so based on a deferential standard of review.

C. The Role of the Federal Courts in Federal Clean Air Act Enforcement

Aside from challenges to agency action, as discussed above, the federal judiciary's role in shaping the contours of the air pollution control legal regime is at its broadest in those instances where EPA seeks to enforce Clean Air Act requirements through a civil suit or criminal indictment in federal district court. The federal court, in such instances, assumes the traditional trial court role as finder of fact and interpreter of law.

With respect to administrative enforcement, the Clean Air Act also provides a role for federal courts, both to enforce compliance with administrative enforcement orders and to review the legality of such orders. Yet in these situations, the court's role is relatively narrow. Regarding enforcement of compliance with administrative orders, EPA may ask the Department of Justice to file a civil suit in a federal district to enforce the failure to pay or otherwise comply with an administrative penalty order.¹⁵⁹ However, the court in such a case has no jurisdiction to review “the validity, amount, and appropriateness of such order or assessment”¹⁶⁰ and therefore has no ability to substantively constrain EPA action. Moreover, the Clean Air Act provides a strong disincentive for noncompliance that would trigger such a civil enforcement suit, as the statute imposes on the alleged violator penalty interest—a quarterly nonpayment penalty of

159. 42 U.S.C. § 7413(d)(5) (2006); *see also id.* § 7524(c)(6).

160. *Id.* § 7413(d)(5).

ten percent of the outstanding penalty total—as well as attorneys’ fees and the litigation expenses of prosecuting the suit.¹⁶¹

With respect to the latter mechanism for federal court involvement in administrative enforcement, the subject of an administrative enforcement order generally may seek review of such action in federal district court.¹⁶² The Clean Air Act provides jurisdiction for a federal district court to review the merits of the administrative penalty order where the subject of that order files suit after meeting specified prerequisites, including filing within thirty days of the date on which the penalty order becomes final or a final decision is rendered after an administrative hearing.¹⁶³ A suit for federal district court review is available once the agency issues a final order after the conclusion of the administrative hearing process, including an appeal to the Environmental Appeals Board, if any.¹⁶⁴ However, as with enforcement of an administrative order, the court’s role in reviewing that order is limited and deferential to the agency. The Clean Air Act provides that the court may vacate or remand an order or assessment only where “there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion.”¹⁶⁵

D. Federalism and Enforcement

Although statistics, as discussed above, show that most federal enforcement is conducted through administrative means and that most civil suits which are filed do not terminate in judicial resolution, those figures do not present the full picture and may overstate the role of the federal courts in Clean Air Act enforcement. An examination of the federalism dimension to enforcement under the Act reveals that state enforcement is far more frequent than federal enforcement, although the proportions of state enforcement conducted through administrative mechanisms, settlement, or final

161. *Id.*

162. The availability of direct federal district court review of administrative compliance orders—as opposed to administrative penalty orders – is considerably murkier. *See generally* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2003). Consideration of this issue is outside the scope of this article.

163. 42 U.S.C. § 7413(d)(4); *see also id.* § 7524(c)(5).

164. 40 C.F.R. § 22.31(a) (2010).

165. 42 U.S.C. § 7413(d).

resolution in a state court, as opposed to resolution in a federal court, are unclear.

In line with the cooperative federalism embodied in the Act,¹⁶⁶ and given the substantial role of states and some local entities in issuing, monitoring, and managing Clean Air Act permits, it is perhaps unsurprising that the Act also grants these entities a significant role in enforcement.¹⁶⁷ Indeed, in the section describing the “Congressional findings and declaration of purpose” for the Clean Air Act, “Congress finds . . . that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.”¹⁶⁸ States, like EPA, may enforce the requirements of federal law and state implementation plans even for alleged violations occurring in state, local, and tribal jurisdictions with delegated permitting and enforcement authority,¹⁶⁹ and, in fact, states are required to possess authority under state law to enforce those requirements.¹⁷⁰

Indeed, according to statistics collected by EPA, the lion’s share of Clean Air Act enforcement is conducted on the state level. For example, EPA reports that, in 2009 (the most recent year for which data is currently available), states issued formal administrative or judicial enforcement actions against 2,183 facilities, while EPA itself issued such actions against only 170 facilities.¹⁷¹ Figures for 2008 are similar; in that year, states issued formal enforcement actions against 2031 facilities and EPA against 223 facilities.¹⁷² While these figures do not permit an apples-to-apples comparison to the federal administrative and judicial enforcement figures discussed above, they confirm the much larger role—relative to EPA—that state agencies take in Clean Air Act enforcement.

166. See, e.g., Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006).

167. See, e.g., 42 U.S.C. § 7416.

168. *Id.* § 7401(a)(3).

169. See *id.* § 7413(a).

170. In general, the Clean Air Act requires state enforcement authority under state law as a concomitant of the delegation of implementing authority in the form of a state implementation plan. See, e.g., *id.* §§ 7410, 7661a(b)(5)(e); 40 C.F.R. 70.11(a) (2010).

171. OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, 2009 STATE SUMMARY DATA FOR CLEAN AIR ACT COMBINED 8 (2010), available at <http://www.epa.gov/compliance/resources/reports/performance/caa/caa-combined-2009.pdf>.

172. OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, 2008 CAA TOTAL FACILITIES—COMPILATION OF EVALUATIONS, VIOLATIONS AND ENFORCEMENT REPORTED TO EPA DATABASES FOR CAA, available at <http://www.epa.gov/oecaerth/data/results/performance/caa/2008-caa-combined.pdf>.

The predominance of state enforcement likely impacts not only EPA's role in enforcement but also that of the federal courts. To begin with, while state action against an alleged violation does not always preclude simultaneous EPA enforcement,¹⁷³ simultaneous enforcement for the same violation is not likely to occur frequently. Thus, while the predominance of state enforcement may not always limit EPA's enforcement discretion as a legal matter, it may have that result as a practical matter.

The predominance of state enforcement likely also reduces the role of the federal courts in Clean Air Act enforcement. Their role is limited by two factors: (1) the availability of administrative remedies under state law and (2) the availability of state courts as alternate venue to federal courts with respect to enforcement suits. EPA's enforcement compliance results reports do not indicate what portion of state enforcement activity is administrative enforcement or what portion of state judicial enforcement is filed in state, rather than federal, courts. Nevertheless, it is likely that state administrative enforcement offers the same advantages, on average, over state judicial enforcement that are evident in the case of federal enforcement—greater speed, lower expense and other resource costs, and more flexibility. Thus, administrative enforcement is also likely to be a more popular choice for state enforcement. At the same time, where state enforcement takes the form of a judicial suit, there is likely to be a preference for state courts over federal district courts, given the greater flexibility and other advantages for resolution of state enforcement through those courts.¹⁷⁴ The availability of these

173. The language of Section 113 does not expressly bar EPA from initiating enforcement against a violator already subject to state enforcement, *see* 42 U.S.C. 7413(a), and there is case law support for the premise that a state consent order or pending state enforcement action may not bar EPA from initiating enforcement against the same violation. *See, e.g.*, *United States v. Ford Motor Co.*, 814 F.2d 1099, 1101 (6th Cir. 1987) (stating that state court order invalidating portions of approved state implementation plan does not preclude federal enforcement of same); *cf.* *United States v. Gen. Dynamics Corp.*, 755 F. Supp. 720, 722 (N.D. Tex. 1991) (conceding a federal agency should defer to a state's interpretation of an air pollution control plan, so long as such interpretation is consistent with the Clean Air Act); *United States v. AM Gen. Corp.*, 808 F. Supp. 1353, 1361 (N.D. Ind. 1992) (EPA not required to exhaust parallel state or administrative remedies prior to bringing federal enforcement suit). *But see* *Buckeye Power, Inc. v. U.S. Env'tl. Prot. Agency*, 481 F.2d 162 (6th Cir. 1973) (noting that judgment against violator would be *res judicata* in a later court proceeding against same violator for same violations, regardless of whether claim is first brought in state or federal court).

174. For example, one advantage is that state enforcement agencies are generally more readily able to combine federal and state law causes of action—e.g., Clean Air Act claims and state law claims—in state courts than in federal courts, as the latter but not the former are

mechanisms supports the inference that state enforcement is not primarily conducted by civil suit in federal court. This conclusion, when combined with EPA's statistics on the allocation of enforcement between itself and state agencies, confirms that only a fraction of all agency enforcement under the Clean Air Act is conducted through civil or criminal suits in federal courts, let alone is resolved in those courts.

E. Citizens' Suits

Administrative agencies are not the only entities with a role in pursuing enforcement of violations of the Clean Air Act. Rather, Congress provided an enforcement alternative to federal and state agencies in the form of citizens' enforcement suits. In addition to authorizing challenges to EPA's failure to act, as discussed above, section 304 provides jurisdiction in the federal district courts for civil suits against a person (including government entities) who (1) is currently in violation of "an emission standard or limitation" under the Act or an EPA or state order with respect to such a standard or limitation; (2) is alleged to have violated such an order, standard, or limitation in the past if there is evidence the violation has been repeated; (3) proposes to construct a new or modified stationary source without complying with the Prevention of Significant Deterioration (PSD) or Non-attainment New Source Review (NNSR) programs; (4) is currently in violation of the PSD or NNSR programs, including violations of permit conditions; or (5) has violated one of those programs, including violations of permit conditions, if there is evidence the violation has been repeated.¹⁷⁵ A citizens' suit thus puts enforcement in the hands of a federal court, in the same way as an EPA enforcement civil suit, giving federal courts relatively broad substantive power.

In creating the citizens' suit mechanism, however, Congress reaffirmed the primacy of EPA and state enforcement in two key ways. First, in the vast majority of circumstances, a person contemplating an enforcement suit under this provision must give written notice of the violation to EPA, to the relevant state authority, and to the violator at least sixty days prior to commencing suit.¹⁷⁶ During that period, a one-time violator—but not a repeat violator—

subject to the limits on supplemental jurisdiction which are imposed in 28 U.S.C. § 1367(a) (2006).

175. 42 U.S.C. § 7604(a).

176. *Id.* § 7604(b); *see also* 40 C.F.R. §§ 54.2–54.3 (2010).

may remove the predicate for the suit by coming into compliance.¹⁷⁷ More importantly, if EPA or the appropriate state agency commences a civil compliance suit in federal or state court and is “diligently prosecuting” that suit, a citizens’ suit to enforce the same violation is precluded.¹⁷⁸ As a result, EPA and the relevant state authority are able to preempt citizens’ suits and retain control of the contours of enforcement—although the would-be private litigant may still intervene as a matter of right in the EPA or state enforcement suit.¹⁷⁹

Nevertheless, the availability of the citizens’ suit mechanism has important repercussions for the respective roles of EPA and the federal courts in Clean Air Act enforcement. With respect to EPA, citizens’ suits may force EPA’s hand—EPA, or a state agency, can only preempt a citizens’ enforcement suit by filing its own civil suit.¹⁸⁰ As a result, the citizens’ suit provides another mechanism, along with an EPA civil or criminal suit, for a federal district court to take on the role of trial court in enforcement of the Clean Air Act.

F. Analysis

Overall, the enforcement arena is one in which EPA has relatively broad authority and federal courts a relatively narrow role. EPA has broad, if not unfettered, discretion in choosing the method of enforcement—be it administrative or judicial—and whether to terminate enforcement (through settlement) prior to a judicial resolution. Indeed, EPA very frequently chooses these paths—administrative enforcement and settlement—which limit the role of the federal judiciary in enforcing the Clean Air Act. That role is also limited by the predominance of state enforcement, although no quantitative breakdown of the share of state enforcement conducted administratively or judicially (in state rather than federal court) is available. Nevertheless, federal courts retain broad power with respect to EPA civil or criminal actions and citizens’ suits but that power is similarly limited by EPA’s preference for settling such cases.

177. See 42 U.S.C. § 7604(a)(1).

178. *Id.* § 7604(b)(1)(B).

179. See *id.*

180. See *id.* § 7604(b)(1)(B) (A citizens’ suit under Section 304 may not be commenced if EPA or a state “has commenced and is diligently prosecuting a civil [enforcement] action.”).

V. CONCLUSION

Taken as a whole, the federal judiciary does play a significant role in shaping the content of the Clean Air Act. However, the significance is anything but uniform. At one end of the spectrum are section 307 challenges to EPA's interpretation of statutory provisions. These cases address the content of the Clean Air Act and have significant and long-lasting effects on how EPA regulates. It is also an area where the courts, due to *Chevron* step one analysis, owe EPA no deference as they, rather than EPA, determine whether congressional intent is clear. Finally, the dearth of case law addressing settlements of section 307 cases suggest that EPA rarely takes these cases away from the court once a petition is filed.

In section 307 cases that require courts to move beyond *Chevron* step-one analysis, the quality and quantity of the court's authority over EPA diminishes. With respect to section 307 challenges, both *Chevron* step two and arbitrary and capricious review involve standards that are deferential to EPA. In addition, the fact-specific nature of arbitrary and capricious review limits the precedential value of judicial decisions at that stage. With respect to section 304 challenges, courts are empowered to provide injunctive relief that sets new deadlines for EPA to meet its statutory obligations. However, courts are not permitted to address the substance of statutory provisions, and EPA often preempts judicial resolution of these cases through settlement. In enforcement actions, courts are empowered to serve as the trier of fact and law with respect to alleged violations of the Clean Air Act. But despite the substantive nature of the judiciary's oversight role, EPA can short-circuit the court's influence by utilizing administrative enforcement actions or by settling cases that have been filed.

In sum, the federal judiciary plays an active, if not always substantive, role in shaping the content of the Clean Air Act, and presumably that of other statutory schemes. However, the significance of federal courts' involvement varies. While the long-term influence of any judicial decision is based to a large degree on the specific facts of the case, this analysis shows that the procedural posture and structural setting of the case can also play a role in determining the significance of the decision.