one year's environmental litigation
1977-78

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i. administrative law

There has been considerable judicial attention during the past year to questions of administrative law applicable to environmental protection programs.

The Supreme Court, for instance, in its Vermont Yankee Nuclear Power decision, has re-emphasized\(^1\) that, in rulemaking proceedings, "absent constitutional constraints or extremely compelling circumstances . . . agencies should be free to fashion their own rules of procedure."\(^2\) It accordingly reversed a decision of the Court of Appeals for the District of Columbia Circuit which had invalidated a rule adopted by the Nuclear Regulatory Commission (NRC) concerning the consideration to be given, in the licensing of nuclear reactors, to the environmental effects of nuclear waste disposal and fuel reprocessing. The Supreme Court assumed, although it was not certain from the opinion below, that the Court of Appeals had invalidated the rule because it considered the rule-making process procedurally defective, particularly for failure to provide challengers an opportunity for cross-examination. The Court emphasized that this rulemaking was governed, under the Administrative Procedure Act, by 5 U.S.C. § 553(c), which requires merely "an opportunity to participate . . . with or without opportunity for oral presentation"; that courts may not routinely\(^3\) require more than the minimum procedures specified in § 553; and that

3. The Court reaffirmed that in the case of certain possible "quasi-judicial" rulemaking determinations which may especially affect a small number of persons, additional procedures may be required on due process grounds, and hypothesized (without so deciding) that there might be occasion for judicial "correction," beyond the requirements of § 553, in the case of a "totally unjustified departure from well-settled agency procedures of long standing." Id., at 542, 11 ERC at 1447-48. Earlier in the opinion Justice Rehnquist stated, "This is not to say necessarily that there are no circumstances which
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nothing in the National Environmental Policy Act (NEPA) authorizes courts to require more from agencies in rulemaking procedures. While reversing on this ground, however, the Court made it clear that on remand the District of Columbia Circuit was still free to consider whether the challenged fuel cycle rule should be invalidated because of the inadequacy of the administrative record to support the NRC's findings. The Supreme Court cautioned, however, that the District of Columbia Circuit should not try to substitute its judgment for that of Congress on the basic policy issue of whether there should be a nuclear power program. It also emphasized that, while NEPA "does set forth significant substantive goals . . . its mandate to the agencies is essentially procedural."

The District of Columbia Circuit was not alone in expressing dissatisfaction with EPA's procedures. In July 1977 the Ninth Circuit in effect rebuked EPA for procedural deficiencies, in the Bunker Hill case, on two grounds. First, EPA had failed to reveal "several important documents in the record" until after it had promulgated its contested regulations (requiring certain air pollution emission controls). EPA claimed that in informal rulemaking it need "only place relevant documents in a public access file the existence and location of which is repeatedly published" and that "it is not necessary to affirmatively reveal each document to interested parties," relying for these propositions on a 1976 District of Columbia Circuit case, Ethyl Corp. v. EPA. The Ninth Circuit plainly indicated that it might differ from the majority in Ethyl, but avoided ruling on this proposition because the error, if any, had been subse-

would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by (§ 563). But such circumstances, if they exist, are extremely rare." Id. at 524; 11 ERC at 1440.
5. Id. at 589; 11 ERC at 1441.
6. 541 F.2d 1, 49 n.102 (D.C. Cir.), cert. denied, 428 U.S. 941 (1976). Also see Vermont Yankee, supra note 2, U.S. at 11 ERC at 1453.
sequently cured, and would be further cured on remand, and also because the facts posited in the *Ethyl* case were distinguishable. (There was no evidence that the Ethyl procedure had been followed in *Bunker Hill*, and petitioner in *Bunker Hill* further claimed that it "was affirmatively led to believe that all the documents upon which EPA intended to rely had been sent to it.") In any event the court strongly hinted that all material documents should have been made available to Bunker Hill in an orderly manner before the promulgation of the regulation and pointedly suggested the desirability of "[g]reater attention to the procedural rights of petitioner." In addition the court ordered a remand on the substantive issue before it, the technological feasibility of certain devices (sulfur burners) which EPA sought to require petitioner to use, and ordered that *Bunker Hill* have an opportunity on remand to cross-examine EPA's experts on the technological feasibility of those devices.

The precedential importance of this latter order may well have been undermined by the Supreme Court's subsequent *Vermont Yankee* decision, but it need not necessarily have been entirely destroyed, for at least two reasons. First, this may be one of those "compelling circumstances" cases, recognized as an exception in *Vermont Yankee*, e.g., where a specific rulemaking proceeding which affects only a small number of persons becomes sufficiently "quasi-adjudicatory" to require more than Section 553 procedures, on due process grounds, for the resolution of certain types of questions. Beyond this, Judge Sneed's opinion for the Ninth Circuit is a meticulous narrative of a record in which a battle of experts, waged by exchange of affidavits, never quite joins issue. It seems to the outsider that something more in the way of face-to-face give-and-take would be useful in order to clarify the opposing experts' respective positions. Perhaps cross examination would help. Perhaps other techniques, such as the opportunity for a roundtable panel discussion by the experts, would suffice, or even be superior. Whatever the additional technique, however, EPA is in the

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7. See id. 5 supra.
8. I.
9. See note 3 supra.
10. The Sixth Circuit has declined to follow the Ninth on the cross-examination issue. In a pre-*Vermont Yankee* opinion, Cleveland Electric Illuminating Co. v. EPA, 69 F.2d 728 (6th Cir. 1932). The court based its decision on the determination that the petitioners had had an ample opportunity to present their positions in the administrative proceedings, and left open the possibility that in a future case "remand for cross-examination about disputed facts will prove both logical and necessary." Id. at 730, 11 ERC at 1296.


Another variation, which retains cross-examination but in a less formal, and perhaps
position of knowing that its past procedures have appeared defective to eminent outside observers, and are likely to leave it with administrative records which are considered on review inadequate to sustain reasoned decisions. Even if Vermont Yankee means that the judiciary may not impose additional procedural techniques on the agency, it does not mean that the agency should not attempt to improve its techniques in the exercise of its own discretion. We may accordingly see an influence on EPA procedures from the kind of judicial criticism exemplified by Bunker Hill, whether or not Vermont Yankee precludes future orders in the exact terms expressed by the Ninth Circuit and apparently contemplated by the District of Columbia Circuit.

Two related questions have split the federal judicial circuits on the application of the Administrative Procedure Act to the processing of certain license applications. One is whether a hearing is required for such determinations with the procedural protections set out in 5 U.S.C. § 556. The other is whether the standard of review to be employed by a federal district court is the “substantial evidence” test of 5 U.S.C. § 706(2)(E), or the “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law” test of § 706(2)(A).

In February 1978, in Taylor v. Corps of Engineers, the Fifth Circuit adhered to its former position that, while such actions by the Corps of Engineers are “adjudicatory,” the § 556 procedures are not applicable. It reasoned that these procedures apply only when required by § 554, which applies only to hearings which are “required by statute to be determined on the record after an opportunity for an agency hearing”—and Section 10 of the Rivers and Harbors Act of 1899 has no such requirement. (Further, because the Fifth Circuit considered that there need be no § 556 hearing, it follows that the standard of review should be the “arbitrary, capricious . . .” test of § 706(2)(A) rather than the substantial evidence test of § 706(2)(E), inasmuch as the latter test by its terms applies only to “a case subject to section 556.”)

In contrast to Taylor, the First and Ninth Circuits have ruled

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less intimidating, atmosphere than that of a full hearing before an administrative judge, may be suggested by the procedures used for civil deposition. See generally, F. James and G. Hazard, Civil Procedure 179-85 (2d ed. 1977).

A preference for some use of judicial procedures in the resolution of technical disputes is not limited to this side of the Atlantic. See, e.g., ”Judge challenges academics over ways of resolving scientific issues in court” (relating to both “litigation and public inquiries”), The Times (London), July 24, 1978, p. 3, col. 3.


12. Appellants in Taylor won a remand, nevertheless, on other grounds; see note 19 infra and accompanying text.

13. Inland Steel Co. v. EPA, ______, F.2d ______, 11 ERC 1553 (1st Cir. 1973); Seacoast
during the past year, as the Seventh Circuit had in May 1977,\textsuperscript{14} that discharge permits under the Federal Water Pollution Control Act (FWPCA) are "orders" which require "adjudication," and that the adjudicatory hearing provisions of 5 U.S.C. §§ 554, 556 and 557 apply to the proceedings which lead to such permit, despite the fact that Sec. 402(a)(1) of the FWPCA, while requiring an "opportunity for public hearing," does not explicitly state that the hearing must be "on the record" (the triggering requirement in 5 U.S.C. § 554). As the First Circuit put it in Inland Steel, "We are willing to presume that, unless a statute otherwise specifies, an adjudicatory hearing [statutorily imposed] subject to judicial review must be on the record."\textsuperscript{15}

The Fifth Circuit also rejected another argument, which had been accepted last year by the Seventh Circuit in U.S. Steel v. Train.\textsuperscript{16} This argument refers to 5 U.S.C. § 558(c), which provides that "[w]hen application is made for a license required by law" the agency shall hold "proceedings required by sections 556 and 557 of this title." The Seventh Circuit deduced that applications for discharge permits under the Federal Water Pollution Control Act were governed by the APA § 556 hearing requirements, on the theory, inter alia,\textsuperscript{17} that the language quoted above from § 558(c) makes § 556 procedures applicable to all license proceedings. The Fifth Circuit, in Taylor, however, rejected this reading of § 558(c). "We read § 558," it said, "to mean that when an application for a license has been made, the agency shall conduct those proceedings which are required by § 556 (assuming § 556 otherwise applies), and if § 556 does not apply, then the agency shall set and complete whatever other proceedings are required by law or the Constitution."\textsuperscript{18} Accordingly—again—no right to cross examination in applications for Corps of Engineering permits in the view of the Fifth Circuit, and the standard of review is the "arbitrary, capricious—" test, not the "substantial evidence" test.

It may be noted that, despite the Fifth Circuit's rejection of the applicants' arguments discussed above, those applicants were

\textsuperscript{14} Anti-Pollution League v. Costle, 572 F.2d 672, 11 ERC 1368 (1st Cir. 1978); Marathon Oil Co. v. EPA, F.2d at (9th Cir. 1977).
\textsuperscript{15} United States Steel Corp. v. Train, 556 F.2d 822, 10 ERC 1001 (7th Cir., 1977).
\textsuperscript{16} F.2d at 11 ERC at 1361.
\textsuperscript{17} 556 F.2d 922, 10 ERC 1001 (1977).
\textsuperscript{18} The Seventh Circuit also considered APA § 556 to apply to FWPCA discharge permit applications because § 402 of the FWPCA requires an "opportunity for public hearing." The court assumed that the omission of the words "on the record," as used in APA § 554, was not significant, i.e., did not indicate that the hearings were not required to be on the record, because it "seems improbable that Congress would have contemplated that judicial review of ... [such] proceedings would be conducted without a written record." F.2d at , 10 ERC at 1007.
granted remands because of two other defects in Corps procedures: the Corps violated its own regulations in withholding from applicants objections filed by other government agencies, on which the Corps relied in its denial of the permits; and it breached a stipulation which it had made at an earlier stage in the controversy. Judge Fay's rebuke on behalf of the court is memorable:

...[I]t is exactly this kind of treatment by the Corps that causes total frustration in many of the people that are forced to deal with them... In our attempt to provide for the smooth operation of their application procedures, this Court has given to the Corps decision-making powers which almost go totally unchecked. This was done under the impression that the Corps would not abuse this freedom. The performance of the Corps in this particular application process reflects the type of abuse which was certainly not envisioned. ... Certainly, if this type of performance was to become of a routine nature, then it might be well to reconsider en banc some of our earlier decisions.\(^19\)

The Third Circuit\(^20\) has ruled on a number of challenges to certain EPA "interim final" water pollution control regulations in the iron and steel industry on grounds of alleged defects in the notice of proposed rulemaking, upholding some of those challenges, and rejecting others. In general, the challenges which were upheld dealt with claims that the notice was misleading as to which industries and which processes would be covered by the proposed regulations; the challenges which were rejected involved provisions in the terms of the final regulation which were markedly different from those proposed in the notice, but which were related to issues the existence of which was arguably adverted to, however misleadingly, in the notice.

ii. national environmental policy act\(^21\)

NEPA developments during the year have been particularly interesting in connection with the question of which impacts and alternatives must be considered in environmental impact statements. In *Vermont Yankee*,\(^22\) for instance, the Supreme Court dealt with two such problems: whether the court below was justified in requiring the Nuclear Regulatory Commission to consider the effects of waste disposal and fuel reprocessing before licensing the operation of the *Vermont Yankee* reactor; and whether the District

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\(^{19}\) __F.2d at 11 ERC at 1226.\(^{20}\) American Iron and Steel Industry v. EPA, __F.2d__ 10 ERC 1889 (3d Cir. 1977).\(^{21}\) 42 U.S.C. § 4331 et seq.\(^{22}\) Note 2 supra.
of Columbia Circuit erred in reversing the grant to Consumers Power Company of a construction permit (application for which had been pending since 1969!) because of the Commission’s failure to consider in 1972 the possibility of energy conservation as an alternative to the construction of two reactors in Michigan.

The Court did not technically pass on whether consideration of waste disposal and fuel reprocessing is required in reactor licensing proceedings, but merely rejected the applicant’s contention that the Commission lacks authority to consider these matters in such proceedings. In doing so, however, the Court stated—entirely plausibly—that it is “hard to argue that [radioactive] wastes do not constitute adverse environmental effects which cannot be avoided should the proposal be implemented” and that the environmental impact of such wastes is “analytically indistinguishable from the environmental effects of ‘the stack gases produced by a coal-burning plant.’”

As to the energy conservation question, the issues are muddied because, as the Court viewed it, intervenors had not effectively drawn to the attention of the hearing board any specific reasons to believe that the project was not needed.

Among a number of reasons for considering the Commission’s action not “arbitrary or capricious” in the pre-1973 oil embargo setting in which it took place, the Court stated:

... [A]s should be obvious even upon a moment’s reflection, the term “alternatives” is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bound by some notion of feasibility... Common sense also teaches us that the “detailed statement of alternatives” cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved...

... [T]he concept of “alternatives” is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood. ... While it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors... to structure their participation so

23. Because the Commission conceded that these matters should be considered, U.S. at ___, 46 U.S.L.W. at 4305 (1978).
25. Id., quoting with approval the court below.
that it is meaningful, so that it alerts the agency to the intervenors’ positions and intentions. This is especially true when the intervenors are requesting the agency to embark upon an exploration of uncharted territory, as was the question of energy conservation in the late ’60s and early ’70s. . . . [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that ought to be considered and then, after failing to do more to bring the matter to the agency’s attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters “forcefully presented.”

A number of cases have considered whether a variety of social consequences of governmental action, standing alone apart from traditional environmental effects, qualify as “environmental impact” or as “affecting the quality of the human environment” for purposes of Sec. 101(2)(C) of NEPA.

That certain such social effects will so qualify has been clear for six years, since Hanly v. Mitchell: “The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect urban environment. . . .”

Hanly dealt with the construction of a new government courthouse and related detention center in Foley Square, New York City. The sponsoring agencies of similar projects for the introduction or expansion of government activities frequently continue to deny the need for environmental impact statements.

Sometimes they lose, e.g., S.W. Neighborhood Assembly v. Eckard (lease of office building which might be used by 2300 employees; held, insufficient showing that impact of rush hour commuting on air pollution would be insignificant; court also adverted to possible significance of other “environmental values”: need for roadbuilding, safety threat from increased traffic, need for secondary community development, impact on housing, community services, and economic condition of area; and consequences to neighborhood of possible government abandonment of the building at end of lease).

Sometimes the sponsoring agencies win, on a number of the-ories, e.g., Maryland National Planning Commission v. Martin

28. 460 F.2d 640, 4 ERC 1152 (2d Cir. 1972). (Also see Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378, 7 ERC 1957 (2d Cir. 1975)).
29. Id. at ___, 4 ERC at ___.
(consolidation of government mapping facilities in the Maryland suburbs of Washington; the move of 750 navy and merchant marine mappers to join 2300-2400 army and air force mappers, at a site which has in the past employed 3,444 persons; no buildings to be constructed, enlarged or demolished; "consolidation... appears comparable to the hiring of additional personnel at a Government facility operating at less than peak employment levels.")

While in *Maryland National Planning Commission* an environmental impact statement was denied on grounds of lack of substantiality of impact, the *environmentalism* of the suggested impacts was not rejected by the court. In a number of other cases, however, typically (but not necessarily) involving the closing of facilities, rather than their opening, another doctrine has been reiterated:\(^{32}\) that social and economic effects do not qualify as "environmental," or at least do not do so in the absence of what the court thinks of as "ecological" effects.

Whether the distinction is entirely clear may well be doubted. Is traffic congestion, for instance, "ecological"? What about noise? Air pollution? Would such congestion adversely affect "the quality of the human environment"\(^ {33}\) apart from noise or air pollution? In ways different from—or similar to—crime in the streets? Or housing abandonment?

In any event, despite some authority tending to the contrary (at least in emphasis)\(^ {34}\) the Fifth Circuit declared this year, in *Image of Greater San Antonio v. Brown*,\(^ {35}\) that socio-economic effects may be considered under NEPA only if the action in question will have "a primary effect on the natural environment."\(^ {36}\)

The case involved a reduction in force of 1200 civilian employees at Kelly Air Force Base. Perhaps this and the *Maryland National Planning Commission* case\(^ {37}\) do typify a general judicial attitude that fluctuations of employment level at government facilities, not involving the construction or demolition of physical accommodations for the employees, are not the kind of activity which

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33. NEPA Section 102(2)(C), 42 U.S.C. § 4332(2)(C).

34. E.g. (in addition to note 28 supra), McDowell v. Schlesinger, 404 F. Supp. 221 (W.D. Mo. 1975); Prince George's County, Maryland v. Holloway, 404 F. Supp. 1181, 8 ERC 1549 (D.D.C. 1975). Physical effects were apparently not absent in these cases, but the emphasis seems to be on economic and social effects.

35. 570 F.2d 517, 11 ERC 1529 (5th Cir. 1978).

36. Id. at _____, 11 ERC at 1532-33.

37. Note 29 supra and accompanying text.
Congress had in mind when it adopted NEPA. To go further, however, in attempting to classify social and economic effects as “primary” or “secondary” is not likely to be conclusively illuminating. In any event it is quite clear that “secondary” economic development stimulated by a project can be of enormous ecological significance as a link between a specific project and consequential physical damage to the environment, as in the celebrated case of the Miami Jetport;\(^{38}\) despite some loose language in the opinions,\(^{39}\) there is no reason to believe from any of the decisions discussed above that such “secondary” socio-economic phenomena may be ignored under Section 102 of NEPA.\(^{40}\)

The District of Columbia Circuit has, furthermore, upheld a district court order that the Office of Management and Budget develop procedures to identify types of budget and appropriations requests which would require environmental impact statements, but held that these would not include “routine” appropriations requests which do not significantly change the status quo, and refrained from specifying exactly how the process would work. It also reversed the district court’s determination that the Fish and Wildlife Service’s annual budget request for the National Wildlife Refuge System requires an EIS, in view of the existence of an adequate programmatic impact statement.\(^{41}\)

### iii. clean air act

The EPA’s role in approving or modifying state implementation plans under Sec. 110 of the Clean Air Act\(^ {42}\) has received additional attention during the year, with continued concern about the relevance, if any, of the alleged technological or economic infeasibility of proposed pollution control requirements.

It will be recalled that in 1976 in the Union Electric case\(^ {43}\) the Supreme Court had ruled that such infeasibility claims could not be considered by the EPA as a basis for rejecting a state implementation plan under § 110(a)(2) of the Act, although infeasibility contentions might be relevant in other contexts.\(^ {44}\)

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40. See, e.g., City of Davis v. Coleman, 521 F.2d 661, 8 ERC 1259 (9th Cir. 1975).
42. 42 U.S.C. § 7410.
44. The Supreme Court thought “the most important forum for consideration of infeasibility claims” might be the state agency formulating or granting variances from the implementation plan, or state courts reviewing such action, since the states “may select whatever mix of control devices” they desire so long as national standards are met. Furthermore technological infeasibility may be considered under section 110(a) of the
One such context, beyond those mentioned by the Supreme Court, appears to involve the mix between continuous emission reduction control techniques, on the one hand, and intermittent and dispersion techniques (such as production interruptions and tall stacks) on the other. In past years the Ninth Circuit, together with others, has ruled that continuous reduction techniques must be used to maximum extent possible in order to meet air quality standards, and that intermittent and dispersion techniques may be used to meet air quality standards only to the extent necessary because of the inadequacy of such maximum continuous reduction techniques. In *Bunker Hill* the Ninth Circuit has made clear its view that EPA may not compel a state to require a greater degree of continuous reduction than is economically and technologically feasible. At the same time the court held that, notwithstanding an earlier district court opinion to the contrary, EPA is not bound by the state's findings as to feasibility and may (indeed, presumably must) instead make its own determination about feasibility in this context approving an implementation plan that permits any use of intermittent and dispersion techniques instead of constant control systems to meet air quality standards.

One loose end left over from *Union Electric* is the question of the relevance of economic or technological feasibility to implementation plans drafted not by a state, but by EPA itself under its section 110(c) powers. The reasoning in *Union Electric* was that section 110(a)(2) did not authorize EPA to reject a state's plan which was "necessary" on grounds other than those specified in the section (Congress having opted for "technology forcing"), and that, further, the states were authorized to engage in their own technology forcing to achieve standards more stringent than fed-

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Act in connection with the limited two-year extension for a particular source which a Governor may request when submitting an implementation plan, or the one-year postponement which a Governor may request under Section 110(l) as "essential to national security or to the public health or welfare." Furthermore, claims of infeasibility would be relevant to compliance orders issued under section 113(a)(4) as alternatives to civil or criminal enforcement. 427 U.S. at 250-51.

45. Kennecott Copper Corp. v. Train, 556 F.2d 1149, 8 ERC 1487 (9th Cir. 1977), cert. denied, 425 U.S. 935 (1976).
47. Note 4 supra.
48. The court plainly considered economic feasibility in the same light as technological, but did not reach the economic issue in *Bunker Hill* because of its findings that EPA had arbitrarily rejected petitioner's arguments about the technological infeasibility of the control technology which EPA had proposed. *Id.* at note 32. For further elaboration of the Ninth Circuit's view, and EPA's attitude toward it, see notes 54-55 infra and accompanying text.
50. Note 41 supra, at note 7.
eral standards. The There is no corresponding explicit authorization for the federal government to pursue generally a higher degree of pollution control than that mandated by its own standards. Accordingly, there might be a question whether EPA would be authorized ordinarily to require a greater degree of "technology forcing" than that necessary to achieve its own standards, although this could be required for new sources under section 111. It is not apparent, however, why "technology forcing" (i.e., requiring a certain result whether or not its feasibility is demonstrable) would not be mandatory under an EPA-drafted implementation plan at least to the extent necessary to achieve, but not exceed federal air quality standards. The Sixth Circuit, in Cleveland Electric Illuminating Co. v. EPA, indicated "genuine doubt" that infeasibility arguments would be relevant in this context, but avoided a direct ruling on the ground that the SO2 control strategies at issue in that case, which are described as being designed to attain but not exceed national air quality standards, appeared to be feasible. The Ninth Circuit, in Bunker Hill and in Kennecott Copper Corporation v. Costle, seemed to assume that economic (as well as technological) feasibility would be equally relevant at least to the issue (discussed above) of the extent to which continuous emission controls should and could be required, regardless of whether the implementation plan was drafted by state or federal agencies.

Bunker Hill dealt with a federally drafted plan. Kennecott Copper involved a mixture of authorship, which the court did not treat as relevant. The implementation requirement at issue, an acid plant for reducing SO2 emissions, had originally been required in an EPA-drafted plan, which had been unsuccessfully challenged on other grounds in Kennecott I. Kennecott I had been decided on the related assumptions that EPA, on the basis of its own regula-

51. The states are authorized with certain exceptions to adopt more stringent standards and limitations by sec. 116 of the Act.
52. 42 U.S.C. § 7411.
53. F.2d , 11 ERC 1288 (6th Cir. 1978).
54. F.2d at , 11 ERC at 1300.
55. Note 4 supra.
56. F.2d , 11 ERC 1565 (9th Cir. 1978). This case is known as Kennecott II, as distinguished from an earlier round of the same litigation, Kennecott Copper Corp. v. Train, 526 F.2d 1149, 8 ERC 1497 (9th Cir. 1975), cert. denied, 425 U.S. 935 (1976) (Kennecott I).
57. In Kennecott I the Ninth Circuit had ruled, inter alia, that "air quality standards must be met by continuous emission reduction so far as possible," 526 F.2d at 1159-60, 8 ERC at 1505.
58. The principal holding of Kennecott I was that EPA could require a company not only to install an acid plant capable of reducing SO2 emissions by 60% (which was not contested in that case) but also to carry out a research program directed toward the development of constant control technology capable of reducing such emissions by 83%. See Kennecott II, F.2d at , 11 ERC at 1565.
tions, would not seek to impose an economically infeasible requirement for continuous emission control, and that the feasibility of the acid plant was not in question. But the company, which at all times complied and proposed to comply with national air quality standards, changed its mind about the economic feasibility of the acid plant, in the face of changes in economic conditions in which construction costs rose and the price of copper declined. It accordingly obtained a state revision of the implementation plan, which permitted a reduction of emissions based solely upon production curtailments, and the use of dispersion by tall stacks to meet national air quality standards. This revision purported to authorize the omission of the acid plant which EPA had demanded, and did not require the use of any other constant control technology, because the state determined that any constant control technology would be economically infeasible. The company sued with initial success in a federal district court to require the EPA to approve the state's revision, and to enjoin the EPA from enforcing the federally-drafted implementation plan (which provided for the disputed acid plant). On appeal the Ninth Circuit reversed, principally on the ground that the district court lacked jurisdiction under section 304 because the total responsibility of the EPA in its section 110(a)(3) review of a state's revision of an implementation plan "requires the fusion of technical knowledge and skill with judgment which is the hallmark of duties which are discretionary." While the court noted that "[e]ven the determination whether ambient air quality standards are being met is infused with discretion" (because of the judgment required as to methodology), it relied mainly on another principle: that one of the general requirements of the Act which must be met by an implementation plan revision is the requirement that it include constant control requirements to the maximum extent economically (as well as technically) feasible; that the determination of such economic feasibility is ultimately a federal responsibility, and cannot be made conclusively by a state; and that such determination necessarily involves "discretion." Whatever virtues there may be in providing for exclusive court of appeals review of EPA's actions in approving state revisions of

59. Id., F.2d at 11 ERC at 1596.
60. Id., F.2d at 11 ERC at ; see also the district court opinion, F. Supp. at 9 ERC at 1597.
61. F.2d at 11 ERC at 1586.
62. Id.
64. F.2d at 11 ERC at 1588.
65. Id. at note 1.
66. F.2d at 11 ERC at 1588-90.
implementation plans, two minor curiosities may be noted. First, the Ninth Circuit's treatment of the word "discretionary" in the context of section 304 of the Clean Air Act is markedly different from the prevailing view as to the interpretation of that word in the (clearly different) context of the Federal Tort Claims Act. In the latter context "discretionary" (which, if it applies to a governmental activity, leads to the retention of sovereign immunity) refers only to high-level policy-making, not merely to the need to exercise judgment. And, second, the Ninth Circuit refused in *Kennelec II* to interfere with EPA's exercise of discretion in evaluating the economic feasibility of a constant control device, in a case in which EPA stated that it was not evaluating such economic feasibility, because (unlike the Ninth Circuit) it considered that a requirement for some constant control in an implementation plan is mandatory whether economically feasible or not.

As to section 111 of the Act, the District of Columbia Circuit, in *Asarco, Inc. v. EPA*, has invalidated part of EPA's plan for dealing with New Source Performance Standards. The issue was the validity of the "bubble concept," under which a "source" would be considered a combination of facilities, such as an entire plant, instead of solely an individual piece of machinery, e.g., a single kiln. EPA had proposed to use the "bubble concept" in the application of new source standards to the modification (as distinguished from construction) of facilities, under regulations which would apply to a modification only if net emissions from a facility were increased.

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67. See 1977 amendment to section 307(b)(1) of the Clean Air Act, providing for exclusive court of appeals review of "any other final action of the Administrator under this Act" locally or regionally applicable. 42 U.S.C. § 7607(b)(1).

68. 28 U.S.C. § 2286.


70. It should be noted that, as a result of amendments enacted in 1977, the Clean Air Act now permits smelters to use dispersion techniques in certain circumstances to meet air quality standards (if they can demonstrate that the requirement of any level of constant control would necessitate their shutdown), through a Primary Non-Ferrous Smelter Order (new section 119 of the Act; and that otherwise dispersion techniques (except from so much of stack height as does not exceed "good engineering practice") are now generally considered to be prohibited in lieu of constant control except to the extent they were in use as of December 31, 1970 (new section 123 of the Act). 42 U.S.C. §§ 7419, 7423.


would increase as a result of the modification. This would have had
the effect of exempting the modification of facilities from the new
source performance standards whenever modifications could be
made without increasing net emissions from the entire plant. But
EPA also proposed not to apply the "bubble concept" to new (as
distinguished from modified) facilities. Asarco, Inc. contended on
appeal that the "bubble concept" should apply to both new and
modified facilities. The Sierra Club contended that the "bubble con-
cept" should apply to neither. The Sierra Club won. The court's
reasoning: that section 111 should be read together with the pur-
pose language in section 101(b)(1) to require the best technologi-
cally achievable emission limitation in the interest of enhancing air
quality, not merely maintaining it, in the case of the modification
of facilities as well as in the case of the construction of new
facilities.

Section 112 of the Act, dealing with Hazardous Materials
Emission Standards, received devastating Supreme Court atten-
tion this year. In Adamo Wrecking the Court held that EPA's
regulation requiring certain practices in the demolition of build-
ings designed to minimize the release of asbestos into the atmos-
phere did not constitute an "emission standard," which the Court
considers to mean a "quantitative level." The problem is that
asbestos does not lend itself technically to quantitative limits. The
Court pointed out that, since the demolition involved in Adamo
Wrecking, Congress has amended section 112(b) to permit the
Administrator to promulgate a "design, equipment, work practice,
or operational standard" when it is "not feasible to prescribe or
enforce an emission standard," under which new authority EPA's
demolition practices would now presumably qualify—but Congress
did not correspondingly amend section 112(c), which provides for
the enforcement of the Administrator's emission standards! So
now EPA may promulgate asbestos work practice regulations, but
no federal law requires anyone to obey those regulations.

Finally, under section 211 of the Act, dealing with "Regulation
of Fuels," the District of Columbia Circuit has ruled, in the Lubr-

73. 42 U.S.C. § 7401(b)(1). This purpose language was also used as authority for EPA's
non-degradation policy. Sierra Club v. Ruckelshaus, 344 F. Supp. 253, 4 ERC 1815
(D.D.C. 1972), aff'd per curiam, 4 ERC 1815 (D.C. Cir. 1972), aff'd by an equally divided
Court, sub nom. Fri v. Sierra Club, 412 U.S. 541, 5 ERC 1417 (1973). That policy is now,
since the 1977 amendments, covered in sections 180 et seq. of the Act, 42 U.S.C. §§ 7470 et seq.
76. See dissenting opinion of Justice Stevens in Adamo, ___ U.S. at ___, 11 ERC
at 1086.
77. Sec. 112(e) of the Clean Air Act, 42 U.S.C. § 7412(e).
78. 42 U.S.C. § 7545.
zol case,79 that motor oil and motor oil additives are not "fuel or fuel additives," and accordingly may not be regulated under that section.

iv. federal water pollution control act

The Sixth and Ninth Circuits have significantly limited EPA's authority to veto state effluent discharge permits under section 402 of the FMPCA80 (which establishes the National Pollutant Discharge Elimination System).

In Ford Motor Co. v. EPA81 the issue was whether a state might permit a company which was using "best practicable control technology," as required by section 301(b)(1)(A) of the FWPCA,82 but which needed to purify its effluent further in order to meet water quality standards (under section 303 of the Act,)83 to use dilution ("flow augmentation") instead of further treatment for this purpose. EPA tried to veto the state's modification of an NPDES permit on the ground that "[d]ilution should not be utilized unless additional treatment is unavailable or economically unreasonable,"84 on the authority of "the intent of the Federal 1972 Amendments and EPA Policy."85 The Sixth Circuit reversed because the veto "was not based on any published regulation or guideline or on any express statutory provision"86 and therefore fell outside EPA's authority under section 402(d)(2)(B)87 to object to a permit "as being outside the guidelines and requirements" of the Act. "Ad hoc national policy determinations," the court stated per Weick, J., "determined through internal policy memoranda standing alone without promulgating regulations or guidelines through public notice and/or an opportunity for public hearing, are not proper procedures for EPA to enforce the FWPCA."88 (Engel, J., dissented, on the ground that all discharges of pollutants are pro-

79. Lubrizol Corp. v. EPA. 562 F.2d 807, 10 ERC 1491 (D.C. Cir. 1977).
81. 567 F.2d 661, 11 ERC 1019 (6th Cir. 1977).
83. 33 U.S.C. § 1313.
84. _____ F.2d at _____, 11 ERC at 1022. (Note that the concession here to considerations of economic feasibility is not flatly inconsistent with the position taken by EPA for purposes of air pollution control in Kennecott II, text at note 69 supra, since here there was a minimum of control technology, whereas there it was proposed to use production limitations and tail stacks exclusively instead of any constant (technological) control; from the point of view of the company affected, however, the distinction may appear meaningless whenever the company is required to adopt any uneconomic techniques to meet ambient medium standards which could otherwise be met economically.)
85. Id.
86. _____ F.2d at _____, 11 ERC at 1018.
88. F.2. at __, 11 ERC at 1028.
hibited by section 301(a) of the Act except as authorized by the exceptions specified in that section, and that flow augmentation is not authorized in any of those exceptions.)

In State of Washington v. EPA the Ninth Circuit ruled that EPA may not veto a state NPDES permit issued (in that case to a wood pulp and paper mill) after the time EPA was supposed to have promulgated “guidelines” required under section 304, if EPA had failed to promulgate those guidelines at the time of the permit. The court also ruled, contrary to the Sixth Circuit in Ford, that the Administrator’s action under section 402 in vetoing a state’s permit does not constitute “action . . . (F) in issuing or denying a permit under section 402” for purposes of the section 503(b)(1) grant of review jurisdiction to the federal courts of appeal, and that the courts of appeal accordingly have no jurisdiction to review such EPA vetos. The court further ruled, however, that the federal district courts do have such review jurisdiction, on the ground that “final administrative action is presumed to be subject to judicial review at the instance of an aggrieved party and ‘will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.’”

The Third Circuit has continued to grapple with the water pollution problems of the iron and steel industry. In AISI II it retreated from the lonely position it had taken in AISI I, in which it had disapproved of single-number effluent limitation standards, and had required instead “ranges of limitations” based on certain “base-levels” (of minimum technology) and “ceilings” (of permissible pollution). Particularly in light of the Supreme Court’s opinion in du Pont, as well as the views of other circuits, all of which had upheld single-number limitations, the court in AISI II withdrew its earlier contrary mandate. Then, in AISI III, the court deferred to EPA’s analysis, despite vigorous challenge, on a number of is-

89. 33 U.S.C. § 1311(a).
90. 573 F.2d at 583, 11 ERC at 1027.
91. ______ F.2d ______, 11 ERC 1339 (9th Cir. 1979).
93. See note 81, supra.
97. The Second, Fourth, Seventh, Tenth and District of Columbia Circuits had ruled otherwise; see citations, ______ F.2d at ______, 10 ERC at 1331, at note 12. So had the Supreme Court; see note 97 infra.
98. American Iron and Steel Institute v. EPA, 528 F.2d 1027, 8 ERC 1321 (3d Cir. 1975).
sues, e.g., cost effectiveness, factors to be considered in classifying the industry by subcategories, and the agency's determination to require individual waste treatment facilities at each operating unit instead of permitting combined ("central") treatment of waste streams. It considered the record inadequate, however, on several other points, on which it remanded for further agency consideration: the relevance of plant age as it bears on the cost or feasibility of retrofitting plants, the effect of certain site-specific cost factors which had not been previously considered, the industry's ability to finance the investments which would be required by the regulations, and certain assumptions as to the amount of water loss which may be attributable to the regulations. The court also invalidated the agency's attempt to exempt plants in the Mahoning River Valley from the section 301 effluent limitations, but remanded for "appropriate reconsideration," hinting that there might be other techniques by which the same relief could be provided.

The Seventh Circuit in Inland Steel has upheld EPA's view that it may issue an NPDES permit subject to a string—a condition that the permit may be modified in the future to reflect any toxic pollutant standards subsequently adopted under section 307(a)—even though such a condition is not imposed on the permittee's competitors.

Three recent enforcement decisions are of interest. In U.S. v. Olivette it was held that, for purposes of a criminal prosecution under section 309(c)(2) for "knowingly making a false statement ... in any report ... required ... under this Act", the government need not prove "specific intent" (i.e., that the defendant knowingly violated the law or intended to violate the law). In an extraordinary case from Wisconsin, U.S. v. Moss-American, Inc., an action by the United States against a polluter for an injunction and damages was dismissed under the "inherent equitable powers" of the court because a government investigator admitted that he had faked material evidence. And in U.S. v. Eastern Associated Coal Corp. an action for a civil penalty under Sec. 309(d) of the Act was upheld against a polluter for a violation for which a compliance

101. F.2d at 10 ERC at 1709.
102. F.2d at 10 ERC at 1707.
103. Inland Steel Co. v. EPA, F.2d, 11 ERC 1253 (7th Cir. 1976).
104. This provision has now been substantially changed. See 33 U.S.C. § 1317.
107. 75 F.R.D. 214, 11 ERC 1470 (E.D. Wis. 1979).
order under section 309(a)\textsuperscript{110} had previously been issued (and obeyed).

In addition, it is now reported\textsuperscript{111} that the first jail sentence has been imposed for violation of the FWPCA: six months, plus a $20,000 fine, laid on the head of an industrial waste disposal firm, by a federal district court in Pennsylvania, for pouring industrial chemical wastes into the Delaware River. The defendant is said to have been cited for more than 100 state pollution violations over the past thirteen years, and to have received a jail sentence, now on appeal, under the Pennsylvania Clean Streams Law as well.

Finally, there have been a number of claims under section 311(i)\textsuperscript{112} by owners or operators of vessels or onshore facilities against the United States for reimbursement of cleanup expenses for discharges caused solely by act of God, act of war, government negligence, or act or omission of a third party. Two such claims involved the release by third-person vandals of oil from storage tanks on land acquired by claimant shortly before the spill. In one, \textit{Proctor Wholesale Co. v. U.S.},\textsuperscript{113} the claim for reimbursement was denied, on the ground that in the forty days after acquisition claimant had failed to exercise reasonable care in ascertaining the contents of the tanks and preventing access to them, and therefore the spill was not caused "solely" by the third parties. In \textit{Chicago, Milwaukee, St. Paul & P.R.R. Co. v. U.S.},\textsuperscript{114} on the other hand, recovery was allowed where, within ten days of claimants' purchase of the premises, burglars had dismantled sections of pipe (thereby causing the spill) in order to steal brass fittings, despite a protective fence, exterior lighting, and other reasonable precautions designed to prevent vandalism. Another loser was a pipeline company which claimed that the sole cause of its spill was a river bank cave-in; the Court of Claims concluded that claimant had been negligent in its inspections, and in its continued operation of the pipeline after the initial rupture.\textsuperscript{115}

\section*{v. fish and wildlife}

First, of course—the snail darter won.\textsuperscript{116} The Supreme Court upheld the Sixth Circuit’s injunction\textsuperscript{117} halting TVA’s Tellico Dam and Reservoir project under sections 7 and 9 of the Endangered Spe-

\textsuperscript{110} 33 U.S.C. § 1319(a).
\textsuperscript{111} 9 BNA Environ. Rptr. 405 (1978).
\textsuperscript{112} 33 U.S.C. § 1321(i).
\textsuperscript{113} ___ Ct. Cl. ____, 11 ERC 1383 (1978).
\textsuperscript{114} ___ Ct. Cl. ____, 575 F.2d 839, 11 ERC 1533 (1978).
\textsuperscript{117} See Hill v. Tennessee Valley Authority, 549 F.2d 1064, 9 ERC 1737 (6th Cir. 1977), in many ways a more enlightened opinion than the Supreme Court's.
cies Act of 1973, as amended, until Congress exempts Tellico from the Act, or the snail darter is removed from the list of endangered species, or its critical habitat is materially redefined. One remarkable aspect of the case is that the argument for reversal was made personally by the Attorney General although his position is apparently not shared by the executive branch agencies most closely concerned, the Department of the Interior (the endangered species' institutional champion) or TVA, whose new chairman has been testifying that accommodation with the snail darter may not be a bad thing after all.

Other significant decisions:

The attempted waiver by the National Marine Fisheries Service of a moratorium on the importation of baby fur seal skins (whenever the harvest would not exceed a limit which it was deemed the herd could sustain) was held to violate the Marine Mammal Protection Act, because the regulations (which would have permitted the importation of skins taken from seals of an average age of at least eight months) failed to exclude seals actually under the statutory threshold age of eight months, and because they would have permitted the importation of seals which were nursing, contrary to the Act, under an invalid distinction between "obligatory" nursing (which the agency contended would have ceased by the time of the contemplated slaughter) and "convenience" nursing, some of which may not have then ceased.

The District of Columbia Circuit reversed a district court order which would have required the Secretary of State to exercise in the International Whaling Commission national veto rights never before invoked by any nation, in order to maintain for Eskimos a subsistence hunting exemption from the IWC's ban on the hunting of the bowhead whale, leaving it open for the Secretary to seek instead reconsideration by the IWC of a special exemption for the Eskimos.

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119. See 9 BNA Envr. Aprt. 364-65 (1976), where Chairman S. David Freeman is reported to have stated that the land which was to have been flooded by the project may be worth more unflooded as farmland than as lake bottom, and furthermore that "something of a breakthrough" may now have been achieved on the feasibility of relocating the snail darter.
121. 16 U.S.C. § 1361 et seq.
vi. questions of federalism

In June 1977 the Second Circuit ruled that the Federal Aviation Act does not preempt airport operators (including local government agencies acting in the capacity of airport operators) from the "power to promulgate reasonable, nonarbitrary and nondiscriminatory regulations that establish acceptable noise levels for the airport and its immediate environs."123 Three months later the court ruled that the failure of the Port Authority of New York and New Jersey to promulgate reasonable noise regulations for supersonic transports, at the same time that the Authority refused to permit the British and French operators of the Concorde to demonstrate that this SST could meet the noise standard (112 PNdB) which had long been established for subsonic aircraft at the John F. Kennedy International Airport, was not "even-handed and nondiscriminatory,", and dissolved the Authority's ban on SST flights meeting the 112 PNdB standard.124 The court stated that this decision would not prevent the authority from imposing a more rigorous reasonable standard on SST's in the future if it could demonstrate that the subsonic standard is inadequate for supersonic planes. The opinion merely held that in the absence of a reasoned supersonic standard the subsonic standard was "the only possible standard against which the Port Authority can legally measure the permissible noise of supersonic aircraft at JFK."125

In Brown v. EPA126 the Ninth Circuit took up on remand from the Supreme Court127 the continued effort of EPA to require the states to establish inspection and maintenance programs for the control of automobile air pollution. EPA had previously attempted to require the states to promulgate regulations to establish these programs, but had informed the Supreme Court that it would modify its regulations so as to eliminate the requirement for such state promulgation. The Supreme Court had declined to render an advisory opinion on the EPA's planned modification of its regulations, and had instead remanded to the Ninth Circuit.128 It then appeared that all EPA was deleting was its requirement that California promulgate regulations; EPA would still, without mentioning regulations, attempt to require California to establish programs for inspection and maintenance. EPA's theory was that it was not in-

123. British Airways Board v. Port Authority, 558 F.2d 75, 10 ERC 1216, 1222 (2d Cir. 1977). Local governmental agencies in the vicinity of the airport are preempted from interfering with aircraft operations for noise control reasons in any capacity other than as airport operators. Id.
124. British Airways Board v. Port Authority, 554 F.2d 1092, 10 ERC 1753 (2d Cir. 1977).
125. 564 F.2d at 1013, 10 ERC at 1761.
126. __ F.2d ___, 11 ERC 1162 (9th Cir. 1977).
128. Id.
interfering with California's government functions, but merely regulating California's activity as a polluter, i.e., as operator of "indirect sources," viz., highways. The Ninth Circuit suggested that it had grave constitutional doubts, but ruled that it need not pass on them because it could dispose of the case on statutory grounds, namely that EPA lacks authority under the Clean Air Act to regulate "indirect sources."

The Supreme Court decided that the Ports and Waterways Safety Act of 1972 (the "PWSA"), which regulates in certain ways (including design requirements) shipping in United States coastal waters, preempted certain provisions of a State of Washington "Tanker Law." The preempted items purported to require takers of a certain size to use in coastal traffic pilots licensed by Washington (but the Court held that the states remain free to impose pilotage requirements on vessels when entering and leaving their ports—including, for purposes of the instant case, Puget Sound) and to require certain size limits and design characteristics in the vessels. On the other hand the Supreme Court upheld Washington's right to require tug escorts for vessels which meet federal but not state safety requirements in design. The Court found the tug escort requirement not preempted under the PWSA on the ground that it is not a design requirement and the cost of compliance is not so great as to constitute coercion to comply with state design standards; it found the requirement constitutionally permissible under the Commerce clause on the ground again that its cost (about one cent per barrel of oil for a 120,000 DWT tanker) is not coercive to comply with state design standards, nor sufficient, apparently, to cause a reduction in commerce to the affected area, and that there is no need for national uniformity as to the use or not of tug escorts.

The Commerce clause was held, however, to invalidate a New Jersey law which sought to prohibit the importation of out-of-state solid waste in order to conserve in-state land-fill sites. The Supreme Court agreed with the New Jersey Supreme Court that the New Jersey act was not preempted by the Federal Solid Waste Disposal Act. But the Court considered the New Jersey law an invalid "protectionist measure" because the state's objective, to slow the flow of waste materials to the State's remaining land fills, was sought to be accomplished by discriminating against out-of

129. 33 U.S.C. § 1221 et seq.
130. U.S. Const., art. I, § B. cl. 3.
133. 73 N.J. 552, 376 A.2d 888 (1977).
134. 42 U.S.C. § 6901 et seq.
state waste without "some reason, apart from [its] origin, to treat [it] differently from New Jersey waste." Alternatively, the New Jersey law was considered to give its own inhabitants impermissibly "a preferred right of access over consumers in other states to natural resources located within its borders." And, more routinely, a Minnesota law requiring a warning on certain spray-cans that chlorofluorocarbon propellants may harm health and the environment has been ruled invalid as preempted by a regulation of the Food and Drug Administration to the same effect, but with differences as to the placement of the warning and effective date.

vii. miscellaneous

a. aesthetics, zoning and historic preservations

In Penn Central Transportation Co. v. City of New York the Supreme Court upheld the New York Court of Appeals determination that the application of New York City's Landmark Preservation Law to Grand Central Terminal (through denial of permission to construct a 55-story tower in the airspace over the terminal) did not constitute a taking. Apart from the recognition of historic preservation as a permissible public objective, the opinions emphasize what was not taken. Penn Central could continue to operate the terminal as it always had, presumably earning a reasonable rate of return; Penn Central's other property in the vicinity benefited from the Landmark law's aesthetic protection of the neighborhood; and Penn Central was permitted to transfer to other sites its frozen development rights in the terminal airspace. The New York court similarly upheld statutes restricting the erection and maintenance of billboards, as did New Mexico.

The possibility of a more complex land use dilemma was illustrated by another New York case, Consolidated Edison Co. v. Hoffman. Environmentalists wanted an electric utility to change the cooling system of one of its nuclear reactors, Indian Point No. 2, from a "once-through" system, which uses high quantities of

135. ___ U.S. at ___, 11 ERC at 1774.
136. Id.
137. Cosmetic Tolley and Fragrances Assoc. v. Minnesota, ___ F.2d ___, 11 ERC 1696 (8th Cir. 1979).
water, to a “closed-cycle” system which would use less water and be less destructive of Hudson River fish and plant life. The Nuclear Regulatory Commission, agreeing, had imposed a 1979 termination date on the utility’s license for operating the “once-through” system. The “closed-cycle” system recommended would require, however, a 585-foot cooling tower, in an area zoned for industrial use, but with a 40-foot height limitation, and the local zoning board refused to grant a variance, on the ground of insufficient showing of “unnecessary hardship.” The lower courts reversed on the basis of federal preemption. The Court of Appeals declined to rule on the preemption issue, but sustained the reversal on narrower grounds: that the “unnecessary hardship” which a utility must show to get a variance should be related to its public responsibilities, and be based on a showing of “public necessity” that the variance be granted, as required for the utility to render safe and effective service to all its customers, with a demonstration of “compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternative sources of power... provided by other facilities.” The court further held that, where the intrusion on the community is minimal, the burden on the utility should be accordingly reduced, and that, in the circumstances of Consolidated Edison’s “striking and more than ample demonstration of hardship and need,” the zoning board’s denial of the variance was “arbitrary and capricious, and hence... an abuse of discretion.”

b. drinking water

In *Environmental Defense Fund v. Costle*143 the District of Columbia Circuit denied in large part challenges to EPA’s interim regulations under the Safe Drinking Water Act.144 It found that EPA’s decisions concerning the regulation of inorganics, e.g., the amount by which fluoride levels may exceed optimal caries protective levels, and the frequency of required monitoring of cadmium and lead, were within the limits of the agency’s discretion under the Act. As to the decision of EPA, however, not to control more than six organic contaminants, because of insufficient information, the court emphasized that incomplete state of knowledge is no excuse for failure to attempt to control contaminants, and remanded to EPA for a report as to whether new sources of data thought to have become available since the promulgation of the interim regulations permitted a re-evaluation of the agency’s ability to control additional organics.

143. 578 F.2d 337, 11 ERC 1209 (D.C. Cir. 1978).
the forum

c. noise
In Association of American Railroads v. Costle\textsuperscript{145} the District of Columbia Circuit reversed EPA’s noise emission regulations under section 17 of the Noise Control Act of 1972\textsuperscript{146} because they applied only to rail cars and locomotives and not to other “equipment and facilities” used in interstate railroad operations (such as horns, bells and whistles, repair and maintenance shops, terminals, marshalling yards, cranes, derricks, and other types of maintenance-of-way equipment, and tracks and rights-of-way).\textsuperscript{147}

d. nuclear power
The Supreme Court, in Duke Power Co. v. Environmental Study Group, Inc.,\textsuperscript{148} upheld without dissent the constitutionality of the Price-Anderson Act,\textsuperscript{149} which limits the liability of a nuclear reactor operator in any single “nuclear incident” to $560 million;\textsuperscript{150} requires the waiver of certain defenses;\textsuperscript{151} and further states that, in the event of a bigger accident, “Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude.\textsuperscript{152}

e. solid waste and sewage
The California Supreme Court upheld a municipal bottle deposit ordinance as a reasonable exercise of the police power.\textsuperscript{153}

The Fourth Circuit held on rehearing en banc, that oystering in Virginia waters is not a maritime activity; that accordingly pollution of oyster beds resulting from negligent operation of a sewage disposal system is not governed by maritime legal principles; and that under local law a municipality is immune from liability for such negligent damage.\textsuperscript{154}

\textsuperscript{145} F.2d \textsuperscript{146} 10 ERC 1529 (D.C. Cir. 1977).
\textsuperscript{146} 42 U.S.C. \textsuperscript{147} § 4916.
\textsuperscript{147} F.2d \textsuperscript{148} at 1534.
\textsuperscript{148} 10 ERC \textsuperscript{149} 46 U.S.L.W. 4845 (1978).
\textsuperscript{149} 42 U.S.C. \textsuperscript{150} § 2210.
\textsuperscript{150} This $560 million was originally (in 1957) derived from the maximum amount of liability insurance then commercially available, $60 million, plus a $500 million Federal Government indemnity. While the ceiling has stayed the same, its composition has since been changed to compromise the larger maximum amount now available from private insurance, $140 million, plus $315 million to be paid by contributions by the operators of all the private nuclear power plants in the country, and a $105 million Federal Indemnity. U.S. \textsuperscript{151} at 48 U.S.L.W. at 4846-47.
\textsuperscript{151} 42 U.S.C. \textsuperscript{152} § 2210(n)(1).
\textsuperscript{152} 42 U.S.C. \textsuperscript{153} § 2210(e).
\textsuperscript{153} Cal. \textsuperscript{154} 2d 11 ERC 1101 (1977).
\textsuperscript{154} Cal. Rptr. \textsuperscript{155} P.2d \textsuperscript{156} at 1030, 11 ERC 1197 (4th Cir. 1977).
And the District of Columbia Circuit affirmed an order of the Interstate Commerce Commission providing for additional motor carrier service, (authorized by "special certificates," to transport waste products for recycling in furtherance of "a recognized pollution control program," on the basis of "ample affirmative assurance" that the needed services would not be provided by existing carriers.

f. transportation

Perhaps the most disappointing decision of the year, in terms of failure of analysis, was *Monroe County Conservation Council v. Adams*. One of the issues was whether a federally-financed expressway loop around Rochester, N.Y., could be completed through a public park in light of the prohibition in section 4(f) of the Department of Transportation Act against such use of parkland "unless (1) there is no feasible and prudent alternative to the use of such land and (2) such program includes all possible planning to minimize harm to such park...." In the *Overton Park* case the Supreme Court ruled that the exception where there is no "prudent" alternative was not to permit a "wide-ranging balancing of competing interests... on an equal footing with preservation of parkland"; that "parkland was to be given paramount importance," and not sacrificed to roads "unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes"; that "the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems," where "there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems." The Second Circuit adverted superficially to, and dismissed, a number of alternatives to the use of the park, and alternative ways of designing roads through the park (e.g., by tunnelling), but with little in the way of reasoned reference to the Supreme Court's *Overton Park* criteria. For instance, one possible detour around the park would cost $43 million more and be 5.75 miles longer.

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156. ___ F.2d at 401, 10 ERC 1397.
157. ___ F.2d 11 ERC 1037 (2d Cir. 1977), cert. denied, ___ U.S. ___.
159. The prohibition applies to the use of "any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge," or "any land from an historic site," subject to certain requirements, not at issue in *Monroe County*, as to the significance of the land, *Id.*
160. *Id.*
162. 401 U.S. at 401, 2 ERC 1254-56.
Another would cost $29 million more and be 4.7 miles longer. The court did not explain precisely why it agreed that these alternatives were not "prudent." The costs are not exceptional; five years ago urban freeways commonly cost $10-$15 million per mile, so the costs are in no way "extraordinary" or "unique." The court did quote a study that concluded that such a route "would be so long and circuitous that it would not be utilized by motorists." Yet it would seem that at 55 miles per hour the added time necessary to cover 5.75 miles, or 4.7 miles, would be only 6.27 minutes, or 5.13 minutes respectively, which should raise an embarrassing question: if the relief to be offered to city traffic congestion by a circumferential project is so marginal that motorists would prefer the congestion to an additional five or six minutes on the circumferential highway, the feasibility of a no-build alternative would appear glaringly to require inquiry far more searching than that undertaken by the court. There may be more persuasive reasons in the record, but it is regrettable that the court did not rise to the standards of articulateness in its opinion which the judiciary customarily demands from administrative agencies in the enforcement of environmental programs.

163. F. 2d at , 11 ERC at 1039.
164. See, e.g., references in Gray, "Section 4(f) of the Department of Transportation Act," 32 Md. L. Rev. 327, 377 (1973). A 22-mile interstate system through Baltimore was then estimated to cost in the order of a $1 billion dollars. Id.
165. See note 163 supra and accompanying text.
166. F. 2d at , 11 ERC at 1099, note 5.
167. The court also discussed several alternatives for the design of the road through the park, involving tunnelling instead of surface construction. The tunnels would have involved additional costs of $39 million to $56 million. F. 2d at , 11 ERC at 1040. Since these alternatives would have required use of parkland, the applicable statutory criterion is the "all possible planning" test in section 4(f), not the "feasible and prudent alternative" language of that section. See text at note 157 supra. The Second Circuit, however, dismissed these alternatives with the unexplained statement, after describing these costs, that "for obvious reasons, they were not deemed to be prudent ones." There is, however, nothing "obvious" about the legal effect of these costs. See, e.g., Gray, "Section 4(f) of the Department of Transportation Act," 37 Md. L. Rev. 327, 376-379 (1973). In 1975, for instance, the Secretary of Transportation offered to help finance a tunnel for interstate highway I-40 through Overton Park, in Memphis, Tennessee, at a cost estimated between $50 million and $144 million (according to information provided by the Office of Environment and Safety, U.S. Department of Transportation, July 24, 1978). The original estimated cost of an untunnelled highway through that park was $3.5 million. See Gray, supra, 37 Md. L. Rev. at 378. The cases may be distinguished, perhaps, on the ground that the affected park values in Rochester are not great, as is indicated in a different context (relating to the adequacy of the environmental impact statement) in the Second Circuit's opinion, F. 2d at , 11 ERC at 1041. But the Section 4(f) requirements deserve principled analysis in terms of the language of Section 4(f). It can be said in defense of the Second Circuit that a case has been made for the application of the "reasonably prudent and prudent" test (to supplement the "all possible planning" test) to the use of parkland (as well as to the analysis of alternatives for avoiding such use); see Louisiana Environmental Society, Inc. v. Coleman, 37 F.2d 79, 9 ERC 1245 (5th Cir. 1976). Such departure from the applicable statutory language should, however, be attempted, if at all, only with some indication that it was done consciously; the Second Circuit's opinion unfortunately gives no such indication.
viii. settlements
Two mammoth struggles seem to have been resolved during the year. The Reserve Mining litigation\(^{168}\) has wound up with an on-land disposal site (at “Mile Post 7”) near Reserve Mining’s processing plant, the company’s preference among on-land sites; and the conditions of the permit are those preferred by the Minnesota Pollution Control Agency and the Department of Natural Resources, instead of certain less restrictive provisions preferred by Reserve Mining and initially ordered by a trial court.\(^{159}\)

And a very large settlement has been negotiated in the litigation against the Tennessee Valley Authority, which originally resisted efforts to require constant control technology to limit air pollution emissions from its coal-burning generating plants. The settlement requires the installation of scrubbers at four plants and precipitators at three, and the use of eastern coal throughout the system. TVA had been considering instead that it should merely substitute relatively cheap low-sulfur western coal for some of the eastern coal which it had been using. This was opposed, not only on economic and social grounds, but also because of environmental problems associated with the mining and transportation of western coal. The settlement also provides that, in lieu of some $260 million of civil penalties which have accrued,\(^{170}\) TVA devote a corresponding amount to the installation of control devices at one plant, namely some 600 megawatts of scrubbing capacity at its Cumberland Steam Plant, which will achieve levels of control for part of the output of that plant beyond those required at present by the state’s relatively weak emission limitation for that plant and otherwise provided for in the settlement. TVA would remain subject to fines for non-compliance after August 1979. Also at issue was the application of the 1977 Baker Amendment, new section 122 of the Clean Air Act, which would have authorized the state and EPA to permit one TVA plant, at Kingston, Tennessee, to rely on tall-stack dispersion; the litigants comprised for Kingston, permitting an emission limit about halfway between the plant’s actual present uncontrolled emissions, and the emission limits the state had sought to impose. Furthermore, an “implementation Committee” is to be set up, consisting of representatives of TVA, EPA,

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\(^{168}\) For background see Reserve Mining Co. v. EPA, 514 F.2d 492, 7 ERC 1618 (8th Cir. 1975) and Reserve Mining Co. v. Herbst, Minn., 266 N.W. 2d 868, 10 ERC 1114 (6th Cir. 1977).

\(^{169}\) See Reserve Mining Co. v. Minnesota Pollution Control Agency Minn. N.Y. 2d, 11 ERC 1588 (1978).

\(^{170}\) Calculated by EPA by reference to the economic value TVA has reaped from its failure to meet required emission limitations on time (i.e., the value of the use of the funds which were retained instead of invested).
the litigating state governments (Kentucky and Alabama), and the citizens' organizations which spearheaded the litigation, to monitor the performance of the agreement and attempt to work out any problems which arise. A total investment in the order of $500 million to $1 billion has been estimated as a result of this settlement, in order to reduce emissions of TVA's power plants by some 900,000 tons of sulfur dioxide and 85,000 tons of fly ash annually. The proposed settlement has the tentative approval of TVA's chairman, the only member of TVA's Board of Directors now in office. It must, however, await the appointment of at least one additional Board member for a quorum necessary for official approval.\textsuperscript{171}