Harrison v. PPG Industries: Proper Forum for Review of EPA Actions Under the Clean Air Act

In *Harrison v. PPG Industries, Inc.*,[1] the Supreme Court faced the issue of whether section 307(b)(1)[2] of the Clean Air Act ("Act")[3] authorizes direct review by United States courts of appeals of agency interpretations and applications of Environmental Protection Agency ("EPA") regulations.[4]

Section 307(b)(1) provides for direct appellate review of certain EPA actions of national or regional import taken under the Act. Those actions falling within section 307's ambit include EPA determinations made pursuant to one of eight individually listed sections of the Act[5] as well as "any other final action of the Administrator" taken under the Act.

Harrison has implications beyond the limited application of section 307 itself. By and large, federal statutes mandating direct appellate review in other major environmental areas lack all-encompassing provisions similar to "any other final action."[6]

1. 446 U.S. 578 (1980).
2. 42 U.S.C. § 7607(b)(1) (Supp. I 1977).
3. 42 U.S.C. §§ 7401-7642 (Supp. I 1977 & Supp. II 1978).
4. Section 307(b)(1) provides in part:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), any order under section 111(j), under section 112(c), under section 113(d), under section 119, or under section 120, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or *any other final action of the Administrator under this Act* (including any denial or disapproval by the Administrator under title I) which is local or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.

(Emphasis added).

5. These are §§ 110, 111(d), 111(j), 112(c), 113(d), 119, 120 [codified at 42 U.S.C. §§ 7410, 7411(d), 7411(j), 7412(c), 7413(d), 7419, 7420 (Supp. I 1977)], and 119(c)(2)(A), 119(c)(2)(B), 119(c)(2)(C) [repealed 1977]. *See* note 4 *supra*.

6. Neither the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. I 1977 & Supp. II 1978), nor the Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1976 & Supp. II 1978), contain comprehensive judicial review provisions

Nonetheless, in *Harrison* the Supreme Court faced a problem that has occurred across the spectrum of administrative law. Whether review of agency decisions should be sought in courts of appeal or district courts is becoming increasingly difficult to determine. There is a strong tendency for appellate courts "to refuse to review in absence of an administrative record, even when the statute clearly calls for review by courts of appeals."[7] This tendency makes it difficult for practitioners challenging agency decisions to determine where to seek judicial review. Consequently, *Harrison* presented the Court with an opportunity to simplify general administrative review by definitively stating when courts could elevate their own review needs over possibly conflicting legislative mandates.

Even limited to its effect on administration of the Clean Air Act, the issue in *Harrison* was more complex than it seemed on its face. Section 307(b)(1), in addition to calling for direct appellate review of certain EPA actions, mandates that suits challenging these actions be brought, in the proper court, within sixty days of publication of the action in the Federal Register.[8] If petitioners mistakenly file suit in a district court for review of a section 307 action or delay filing suit for over two months, they may be permanently foreclosed by the sixty-day limit from refiling in the proper court of appeals.[9] Consequently, a comprehensive interpretation of "any other final action" by the Court in *Harrison*, and a resulting broad application of section 307, would subject a large portion of EPA determinations to permanent foreclosure from judicial challenge. Such an interpretation could leave the EPA in the enviable position of being the final arbiter of the legality of a substantial number of its own decisions.

This comment critically examines the opinion of the Court in

similar to "any other final action." *See, e.g.*, 33 U.S.C. § 1369(b)(1) (1976), 42 U.S.C. § 4915 (1976). However the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976 & Supp. II 1978), does call for direct appellate review in the United States Court of Appeals for the District of Columbia of "actions[s] of the Administrator in promulgating any regulation, or requirement under this Act." 42 U.S.C. § 6976(1) (1976).

7. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.03.1 (Supp. 1980) [hereinafter cited as K. DAVIS].

8. "Any petition for review under this subsection shall be filed within sixty days from the date notice of such . . . action appears in the Federal Register." 42 U.S.C. § 7607(b)(1) (Supp. I 1977).

9. The Administrative Conference of the United States has recommended amending § 307 to allow transfer from the district court to the court of appeals when the claimant has chosen the wrong forum. 41 Fed. Reg. 56,767, 56,768 (1976).

Harrison, and weighs the comparative merits of the two dissents filed. The comment concludes that the dissent by Justice Stevens is the most persuasive for its analysis of the legislative history and of practical problems of appellate review.

I. HISTORY OF THE CASE

Section 307 has gone through a variety of transformations since its enactment. In its original version, section 307 provided for direct appellate review, in the appropriate circuit, of any locally or regionally applicable EPA action taken under one of seven expressly enumerated sections of the Act.[10] In the Clean Air Act Amendments of 1977[11] Congress added two more categories appropriate for direct appellate review: EPA determinations made pursuant to an eighth enumerated section of the Act,[12] and "any other final action of the Administrator under the Act." Three months later Congress enacted the Clean Air Act Technical and Conforming Amendments of 1977.[13] These amendments, while purportedly serving only to correct unclear phrases and technical errors,[14] enlarged to twelve the number of specific EPA actions subject to direct appellate review.[15]

In 1970, the year that Congress enacted the original version of the Clean Air Act, PPG Industries, Inc. ("PPG"), a chemical manufacturing concern, began preliminary construction of a power plant in Lake Charles, Louisiana.[16] The power plant was designed to meet PPG's energy requirements. It consisted of two gas-turbine generators and two "waste-heat" boilers.

PPG's combination of gas-turbine generators and waste-heat boilers took advantage of a fuel efficient technology known as cogeneration.[17] Cogeneration involves the burning of fossil fuel to power gas-turbine generators. The waste heat produced by the generators is combined with additional fossil fuel to fire the waste-heat boilers. In this manner, heat that normally would be discharged into the atmosphere is used instead to produce additional

10. These were §§ 110, 111, 112, 202, 211 and 231. Pub. L. No. 91-604, § 307(b)(1), 84 Stat. 1676 (1970).

11. Pub. L. No. 95-95, §§ 305(c), 305(h), 91 Stat. 685.

12. Section 120, 42 U.S.C. § 7420 (Supp. I 1977).

13. Pub. L. No. 95-190, §§ 14(a)(79), 14(a)(80), 91 Stat. 1393.

14. 123 CONG. REC. 36,252 (1977).

15. The technical amendments added §§ 111(j), 112(c), 113(d), and 119 [42 U.S.C. §§ 7411(j), 7412(c), 7413(d), 7419 (Supp. I 1977 & Supp. II 1978), respectively].

16. Harrison v. PPG Indus., Inc., 446 U.S. 578, 582 (1980).

17. *Id.*

power, thus conserving energy.

PPG designed and partially ordered its waste-heat boilers in 1970. The final purchase order, however, was not sent until 1974 and the assembly of the boilers did not begin until 1976.[18] Because of this order and construction lag, and because of cogeneration's unique use of fossil fuel, PPG believed its system was not subject to new source performance standards for fossil fuel-fired steam generators.[19]

The new source performance standards that concerned PPG were promulgated by the EPA in March, 1971,[20] in accordance with section 111[21] of the Act. Section 111 empowers the Administrator of the EPA to a) list categories of stationary sources that cause or contribute to air pollution reasonably anticipated to endanger public health or welfare, and b) promulgate standards of performance for "new sources" within these categories.[22] The Administrator included fossil fuel-fired steam generators, incinerators, and portland cement, nitric acid and sulfuric acid plants in his initial list of stationary sources.[23] At the same time the Administrator established emission limits for sulfur dioxide, particulate matter and nitrogen oxides emitted from any such facilities subsequently constructed.[24]

On October 5, 1976, the EPA Regional Director of Enforcement informed PPG that its waste-heat boilers qualified as both "fossil fuel-fired steam generators" and "new sources" within the meaning

18. *Id.*

19. PPG Indus., Inc. v. Harrison, 587 F.2d 237, 241 (5th Cir. 1979), *rev'd*, 446 U.S. 578 (1980).

20. 36 Fed. Reg. 5,931.

21. 42 U.S.C. § 7411 (Supp. I 1977 & Supp. II 1978).

22. "New source" was defined as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. § 7411(a)(2) (Supp. I 1977). The Administrator's regulations, in addition to defining "fossil fuel-fired steam generators," created a procedure under which the EPA determined what activities constituted "construction or modification" within the meaning of § 111. 40 C.F.R. § 60.5 (1981). § 60.5 (1981).

23. 36 Fed. Reg. 5,931 (1971). The regulations define fossil-fuel fired steam generators as "a furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer," 40 C.F.R. § 60.41(a) (1981), and fossil fuel as "natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such materials for the purpose of creating useful heat." *Id.* § 60.41(b).

24. 40 C.F.R. § 60.40-.85 (1981).

of the EPA regulations.[25] Pursuant to regulation,[26] PPG submitted a request for an official agency determination. In response, the Regional Administrator reiterated, in a series of correspondence, that PPG's waste-heat boilers were fossil fuel-fired steam generators and, as such, subject to new source emission standards.[27]

PPG sought review of the EPA's determination in the United States Court of Appeals for the Fifth Circuit, challenging the decision on two grounds.[28] First, PPG claimed that construction of the waste-heat boilers had commenced prior to publication of the emission limitations for fossil fuel-fired steam generators. Consequently, the boilers did not qualify as a new source and were not subject to the more stringent emission standards. Second, PPG insisted that its waste-heat boilers, for a variety of reasons, failed to fall within a reasonable definition of fossil fuel-fired steam generators.

While PPG instigated suit in an appellate court, it insisted that review properly belonged in the United States District Court for the Western District of Louisiana.[29] PPG argued that the Regional Administrator's interpretation of the EPA regulations did not fall within the meaning of "any other final action" as envisioned by Congress when it amended the Clean Air Act in 1977. Consequently, section 307(b)(1) did not apply and direct appellate review was inappropriate.

The court of appeals concurred with PPG's position and dismissed its claim for lack of jurisdiction.[30] In the Fifth Circuit's view, direct appellate review of informal agency interpretations was impossible. Given the lack of substantial records, such review would be cumbersome and time consuming. Accordingly, the court felt Congress could not have intended section 307 to apply to in-

25. PPG Indus., Inc. v. Harrison, 587 F.2d 237, 240 (5th Cir. 1979), *rev'd*, 446 U.S. 578 (1980).

26. "When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part." 40 C.F.R. § 60.5(a) (1981).

27. 446 U.S. at 583.

28. PPG Indus., Inc. v. Harrison, 587 F.2d 237, 238 (5th Cir. 1979), *rev'd*, 446 U.S. 578 (1980).

29. *Id.* PPG relied on 28 U.S.C. § 1331(a) (1976), which confers jurisdiction over final agency actions on federal district courts in the absence of contrary review statutes promulgated by Congress.

30. PPG Indus., Inc. v. Harrison, 587 F.2d 237, 238 (5th Cir. 1979), *rev'd*, 446 U.S. 578 (1980).

formal EPA interpretations. The EPA, however, disagreed with the Fifth Circuit's determination and petitioned for its review, and on October 9, 1979, the Supreme Court granted certiorari.[31]

II. THE SUPREME COURT DECISION

The EPA's petition for certiorari presented the Supreme Court with two major issues. First, was the EPA interpretation in question a "final" agency action appropriate for review in any court under the Administrative Procedure Act?[32] Second, given the finality of the EPA's interpretation, did it qualify as "any other final action of the Administrator" appropriate for direct review in a court of appeals under section 307 of the Act?

After examining the legislative history, matters of policy and aids to statutory interpretation, a seven-member majority concluded that the EPA's informal interpretation constituted both "final" action appropriate for judicial review and "other final action of the Administrator."[33] Accordingly, the Court held that the EPA's action was reviewable in the Fifth Circuit.

Separate dissents were filed by Justices Rehnquist[34] and Stevens,[35] both of whom felt, for differing reasons, that Congress could not have intended section 307 to apply to informal EPA interpretations. The dissenters wrote that review of such interpretations properly belonged in the federal district courts.

A. *Finality of Agency Action*

Prior to determining whether the EPA's interpretation constituted "any other final action" within the meaning of section 307, the Court had to decide whether the interpretation was "final" agency action appropriate for review in any court.[36] Both the ma-

31. 444 U.S. 823 (1979).

32. 5 U.S.C. §§ 551-559, 701-706 (1976 & Supp. II 1978). The propriety of review of the EPA interpretation under 28 U.S.C. § 1331(a) (1976) was also placed in issue. *See* note 29 *supra*.

33. Justices Powell and Blackmun concurred in the majority decision. Justice Powell wrote that the intent of Congress to substantially expand appellate court jurisdiction was clear. Nonetheless, he voiced concern over the constitutionality of the review preclusion provisions in § 307. 446 U.S. at 594. Justice Blackmun concurred with the Court's interpretation of § 307, characterizing it as "inescapable" given the "dearth of evidence to the contrary." Nevertheless, he found Congress's actions puzzling and invited it to set concrete limitations on the jurisdiction of courts of appeals. *Id.* at 595.

34. *Id.* at 595-602.

35. *Id.* at 602-07.

36. Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136, 148-49 (1967).

jority[37] and Justice Stevens[38] determined that the interpretation was "final" EPA action appropriate for review under section 10[39] of the Administrative Procedure Act.

The majority based its decision on two factors. First, short of enforcement action, the EPA had rendered its last word on the matter. Second, both parties to the action agreed that the EPA's action was final.

While the majority's ultimate determination was most likely correct, its reliance on the arguments of PPG and the EPA was inappropriate. Both PPG and the EPA benefited from a finding of finality. PPG desired review of the waste-heat boiler matter as soon as possible. Accordingly, it pressed the Court to find the Agency's action final and appropriate for judicial action. In a different manner, the EPA's interests were also served by a finding of finality. Under section 307(b)(1), "final" agency actions are foreclosed from review if not challenged within sixty days of publication. Consequently, broadening the variety of actions deemed "final" increases the number of actions foreclosed from challenge in an enforcement proceeding. Since both parties benefited from a finding of finality, reliance by the Court on their arguments was misplaced.

Justice Stevens also determined that the interpretation in question was a final agency action. However, his analysis[40] rested on a more elaborate three-pronged test of finality which was first enunciated in the preeminent case in the field, *Abbott Laboratories, Inc. v. Gardner*.[41]

In *Abbott Laboratories*, the Supreme Court upheld a challenge to an FDA drug labelling regulation.[42] The Court based its decision on the rule's fitness for judicial decision and the substantial hardship to the parties of withholding court consideration.

These considerations were formalized in the three-pronged finality test. First, the test required that the action involve an issue of law appropriate for immediate judicial review.[43] Second, the action could not be a tentative position of an agency head or the view of a

37. 446 U.S. at 586.
38. *Id.* at 603.
39. 5 U.S.C. § 704 (1976).
40. 446 U.S. at 603-04.
41. 387 U.S. 136 (1967).
42. *Cf.* National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971) (applying the *Abbott Laboratories* test to review of informal agency correspondence).
43. 387 U.S. at 149.

subordinate agency official.[44] Third, the parties seeking review of the action must have been confronted with a substantial hardship caused by a court's refusal to grant pre-enforcement review.[45] This test protected agency actions not yet fully formulated from premature judicial interference; prevented courts from "entangling themselves in abstract disagreements over administrative policies";[46] and delayed judicial interference until agency actions were "felt in a concrete way by the challenging parties."[47]

The EPA's interpretation and application of its section 111 regulations meets this test. First, the validity of the Administrator's determination that PPG's waste-heat boilers were new fossil fuel-fired steam generators did not turn on the future development of a specific fact situation. Consequently, the issues presented were as ready for judicial review as they were ever likely to be.

Second, the letters enunciating the EPA's official position were signed by the Regional Administrator.[48] The applicable regulation[49] does not indicate that interpretations made pursuant to it are in any way tentative, and the EPA never qualified its correspondence as interim. Moreover, the EPA expected PPG to conform to its determination[50] and PPG clearly accepted the EPA's letters as authoritative.[51] On its face the correspondence was the Agency's final word on the matter and not a mere step in a continuing decision-making process.[52]

Third, a delay in reviewing the EPA's interpretation would cause PPG to suffer substantial hardship. PPG risked sizable penalties if it failed to comply with the new source standards.[53] While no showing was made as to PPG's compliance costs, it would be unusual for a corporation to contest an EPA determination unless the capital expenditures necessary to meet emission limits were substantial.[54]

44. *Id.* at 151.
45. *Id.* at 152.
46. *Id.* at 148.
47. *Id.* at 148-49.
48. 446 U.S. at 604.
49. 40 C.F.R. § 60.5(a) (1981).
50. *Cf.* Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136, 151 (1967).
51. *Cf.* National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 702 (D.C. Cir. 1971).
52. *Cf.* Bethlehem Steel Corp. v. EPA, 536 F.2d 156, 161 (7th Cir. 1976).
53. 42 U.S.C. §§ 7413(b), 7413(c), 7470 (Supp. I 1977). Penalties of up to $25,000 per day, or imprisonment for not more than one year, can be imposed pursuant to §§ 7413(b) and 7413(c).
54. In a relatively recent case, West Penn Power Co. v. Train, 522 F.2d 302,

The EPA's interpretation clearly met all three prongs of the *Abbott Laboratories* finality test. Accordingly, the determination that PPG's waste-heat boilers were new fossil fuel-fired steam generators was "final" and, as such, appropriate for judicial review, was correct.

B. *Application of the Doctrine of Ejusdem Generis*

After determining that the EPA's interpretations of "new source" and "fossil fuel-fired steam generators" were final, the Court turned to the issue of the proper forum for review under section 307. Since the EPA's interpretation evidently was not made in accordance with one of section 307's twelve individually enumerated actions,[55] both PPG and the EPA based their positions on different interpretations of "any other final action." PPG claimed that "any other final action" included only those EPA actions taken after notice, hearing and compilation of reviewable record.[56] To support its view, PPG referred to the doctrine of ejusdem generis.

Under this doctrine, where general words follow the enumeration of a particular class of actions, the general words will be construed as applying only to actions in the same general class as those enumerated.[57] The actions expressly brought within the purview of section 307 are taken only after notice, an opportunity for a hearing, and compilation of a full and complete record. PPG argued, therefore, that "any other final action" should be limited in the same manner.[58] As a result section 307 would not encompass informal agency interpretations and such interpretations would not be subject to direct appellate review.

310-11 (3d Cir. 1975), *cert. denied*, 426 U.S. 947 (1976), the court took a slightly different tack when it refused to find an informal notice of the EPA "final." The informal notice was deemed tentative despite the financial dilemma confronting the petitioners which dwarfed any possible hardship faced by PPG in *Harrison*. While *West Penn* casts some doubt on the finality of the present EPA interpretation in *Harrison*, it is "seemingly out of line with the mainstream of ripeness law." K. DAVIS, *supra* note 7, at § 21.08.

55. The EPA promulgated the new source performance standards for fossil fuel-fired steam generators pursuant to § 111, which action fell as a result within § 307's enumerated list. However, the Administrator's interpretation in the case at bar was not taken pursuant to § 111. Instead, the Administrator applied § 111 standards pursuant to 40 C.F.R. § 60.5(a) (1981). That provision is not included among § 307's enumerated actions. Accordingly, if the Administrator's action was to fall within § 307's ambit, it had to qualify as "any other final action."

56. 446 U.S. at 587.

57. Campbell v. Board of Dental Examiners, 53 Cal. App. 3d 283, 285 n.2, 125 Cal. Rptr. 694, 696 n.2 (1975).

58. 446 U.S. at 587.

The Court felt PPG's reliance on ejusdem generis was misplaced in two respects. First, the doctrine itself failed to favor PPG's narrow interpretation of "any other final action." The flaw in PPG's reasoning related to section 112(c)[59] of the Act. Section 307 expressly brings section 112(c) within the ambit of actions appropriate for direct appellate review. However, section 112(c) does not require notice or the compilation of a record before action under it can be taken.[60] Since one of the enumerated actions did not require notice and a record, the general class encompassed by "any other final action" could not be limited in that manner.[61]

The second problem the Court saw with PPG's application of ejusdem generis went to the heart of the doctrine's general applicability. Ejusdem generis is considered an appropriate instrument of interpretation only when the meaning of a statutory term is uncertain.[62] The Court felt that by use of the phrase "any other final action" rather than "other final action," Congress had made its intent clear.[63] Section 307 was meant to cover all final EPA actions no matter how informal. Since the phrase was certain on its face, resort to ejusdem generis was completely unwarranted.

A brief look at the sequence of amendments to section 307 shows that the Court's first objection is unsupportable. When the general phrase "any other final action" was added in 1977, every specific action enumerated in section 307 did require notice, hearing and a full record.[64] Section 112(c) was not added until three months later when Congress passed the Clean Air Act Technical and Conforming Amendments of 1977.[65]

With respect to the Court's second objection, it seems that the majority, to some extent, misinterpreted a case enunciating the principle that ejusdem generis should apply only in light of a general phrase's "uncertainty." In *Gooch v. United States*,[66] the Supreme Court held that "[t]he rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. . . . [I]t may not be

59. 42 U.S.C. § 7412(c) (Supp. I 1977).

60. Additionally, in some instances action taken under §§ 111(j) and 119(a) does not require prior notice, hearing and compilation of a complete record.

61. 446 U.S. at 588.

62. United States v. Powell; 423 U.S. 87, 91 (1975).

63. 446 U.S. at 588-89.

64. These steps were required by 5 U.S.C. § 553 (1976).

65. Pub. L. No. 95-190, 91 Stat. 1393.

66. 297 U.S. 124 (1936).

used to defeat the obvious purpose of legislation."[67]

Before pronouncing the statutory phrase in question "certain," the *Gooch* court looked beyond the language itself by carefully examining the House and Senate Reports delineating the statute's substantial legislative history.[68] In contrast, the majority in *Harrison* ignored the ambiguities in section 307's legislative history. Based solely on what was, in effect, the "plain meaning" of the language itself, the Court declared "any other final action" to be "certain" and beyond the application of ejusdem generis.

Even if the Court correctly applied ejusdem generis, its initial reliance on legal maxims in interpreting section 307 seems to have been misplaced. Legal maxims, including both ejusdem generis and the plain meaning rule, are weak tools of statutory interpretation. It is inappropriate to rely primarily on maxims in interpreting legislation when both history and policy considerations shed substantial light on a phrase's meaning. Maxims should "be invoked, if at all, only after a full investigation of intent, with analysis of contexts, shows that their use is appropriate in the particular case. . . . [T]he maxims do not of themselves yield sound results."[69] Certainly the legislative history of section 307 and the policy considerations underlying choice of suitable forum for judicial review were not so sparse as to force the Court to base its decision, to such a major extent, on maxims of such questionable worth.

C. *Legislative History of Section 307(b)(1)*

After addressing the applicability of ejusdem generis the Court examined the relevant legislative history. The report[70] that discusses section 307 was bare and unenlightening. However, the Court felt that Congress's failure to comment on the meaning of "any other final action" did not support a conclusion that the phrase failed to expand appellate court jurisdiction.[71]

In his dissent, Justice Rehnquist agreed that the legislative history was, to a certain degree, unenlightening. Nevertheless, he felt Congress would not have created such a massive shift in jurisdiction totally without comment. Accordingly, Justice Rehnquist adopted PPG's view that "any other final action" included only ac-

67. *Id.* at 128.

68. *Id.* at 127-28.

69. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 362-63 (1976).

70. H.R. REP. NO. 294, 95th Cong., 1st Sess. (1977) [hereinafter cited as REPORT].

71. 446 U.S. at 587.

tions taken after notice, hearing, and compilation of a reviewable record.[72]

The history of the 1977 amendments to section 307 is found in the report[73] accompanying the House bill.[74] The report states that the section 307 amendment was "intended to clarify some questions relating to venue for review of rules or orders under the act."[75] The amendment appears to have been motivated by Congress's desire to clear up ambiguities of venue over EPA actions of national rather than regional consequence.[76]

While Congress failed to address directly any jurisdictional shifts that might result from the 1977 amendment, portions of the legislative history indicate that some shift must have been contemplated.[77]

PPG argued that "any other final action" failed to expand section 307 to cover informal agency actions. However, it is clear from the legislative record that "any other final action" does expand appellate court jurisdiction to some extent. The report lists examples of actions reviewable in the D.C. Circuit rather than the regional courts of appeals.[78] The actions include EPA determinations of national import taken under sections 117,[79] 206[80] and 208[81] of the Act.

While the report mentioned these actions to clear up venue ambiguities, their enumeration also throws light on the problem at hand. Sections 117, 206 and 208 are not included in section 307's list of reviewable actions. Consequently, "any other final action," in addition to clarifying proper venue over national regulations,

72. *Id.* at 601-02.

73. REPORT, *supra* note 70.

74. H.R. 6161, 95th Cong., 1st Sess. (1977).

75. REPORT, *supra* note 70, at 323.

76. The changes in § 307 were recommended by the Administrative Conference of the United States. 41 Fed. Reg. 56,767, 56,768 (1976).

77. REPORT, *supra* note 70, at 323-24. *See* 446 U.S. at 591 n.7.

78. REPORT, *supra* note 70, at 323-24.

79. 42 U.S.C. § 7417 (Supp. I 1977 & Supp. II 1978). Section 117 requires the Administrator to establish, from time to time, advisory committees to assist in the development and implementation of the purposes of the Clean Air Act.

80. 42 U.S.C. § 7525 (Supp. I 1977). Section 206 requires the Administrator to test motor vehicles and issue certificates of conformity upon such terms as he prescribes.

81. 42 U.S.C. § 7542 (Supp. I 1977). Section 208 requires the Administrator to make records gathered in accordance with the Act available to the public unless he determines that they are entitled to protection as trade secrets.

must have resulted in at least minor expansion of appellate court jurisdiction.[82]

While actions taken under sections 117, 206 and 208 are not enumerated in section 307, they do require notice, hearing and a full record.[83] The Court realized, therefore, that Congress's discussion of these actions did not settle whether or not "any other final action" covered informal EPA interpretations. However, the majority felt that, because of the phrase's plain meaning, "any other final action" did create a complete shift in jurisdiction to the appellate level of all EPA actions. The absence of congressionsal comment on this supposed shift did not, in the opinion of the Court, undermine its interpretation. While the increase in actions subject to direct appellate review was "no doubt substantial," the expansion was not so extensive as to have "ineluctably . . . provoked comment in Congress."[84] Moreover, the majority felt it was incongruous to require Congress to state in its deliberations that which was obvious on the statute's face.[85]

It is difficult to believe that Congress intended "any other final action" to significantly expand appellate court jurisdiction and at the same time failed to discuss such an expansion in the legislative history. The report[86] on the 1977 modifications goes on for over three hundred pages. In such an extensive report, it is highly unlikely that so massive a jurisdictional shift from the district courts to the courts of appeal would escape comment. Such a shift becomes even less likely in light of the inconsistency of review of informal agency actions with the traditional role of courts of appeal.[87] Given Congress's historical preference for relegating review of informal agency actions to district courts, it was errant of the majority to refuse to inquire into Congress's conspicuous silence.

While the majority's interpretation is at odds with the silence pervading the legislative history of section 307, Justice Rehnquist's view is contradicted by the existence of the Clean Air Act Techni-

82. Section 307 deals with nationally and regionally applicable regulations in an identical manner, and thus any expansion of the jurisdiction of the D.C. Circuit must be matched by a similar expansion of the jurisdiction of the regional courts of appeals.

83. *See* 5 U.S.C. § 553 (1976).

84. 446 U.S. at 592.

85. *Id.*

86. REPORT, *supra* note 70.

87. Save the Bay, Inc. v. Adm'r, EPA, 556 F.2d 1282, 1292 (5th Cir. 1977). *But see* K. DAVIS, *supra* note 7, at § 23.03-1, at 191.

cal Conforming Amendments of 1977. The technical modifications came three months after Congress added "any other final action" to the section and contained a number of additions to section 307's list of reviewable actions, specifically actions taken under sections 111(j),[88] 112(c),[89] 113(d)[90] and 119[91] of the Act.

Senator Muskie, in a statement explaining the technical amendments, stated that their purpose was not to re-open substantive issues.[92] Under Justice Rehnquist's view of "any other final action" the technical amendments would clearly create a substantive change in section 307, and, as a result, run afoul of the Senator's comments. Actions taken under section 112(c), and to a certain extent, those taken under sections 111(j) and 119, are not based on notice, a hearing and a full record. Consequently, such actions would substantively alter section 307's ambit.

When considered as a whole, the technical modifications of section 307 and the legislative history of the 1977 amendments contradict both the position taken by the majority and the contrary view espoused by Justice Rehnquist. As will be seen later,[93] Justice Stevens' interpretation solves many of these conflicts as well as certain practical problems accompanying direct appellate review.

D. *Practical Problems of Appellate Court Review of Informal EPA Actions*

After analyzing the meager legislative history of section 307, the Court turned to the practical problems that a broad reading of "any other final action" entails. PPG argued that district courts could best provide prompt pre-enforcement review of EPA actions.[94] Interpretations and applications of EPA regulations, typified by the exchange of correspondence between PPG and the Regional Administrator,[95] frequently rest on records too sparse to permit ade-

88. 42 U.S.C. § 7411(j) (Supp. I 1977 & Supp. II 1978).
89. 42 U.S.C. § 7412(c) (Supp. I 1977).
90. 42 U.S.C. § 7413(d) (Supp. I 1977).
91. 42 U.S.C. § 7419 (Supp. I 1977).
92. Senator Muskie, the driving force behind the Clean Air Act, explained the purpose of the technical amendments thus: "[i]t is not the purpose of these amendments to re-open substantive issues in the Clean Air Act. . . . Only those amendments that are necessary to correct technical errors or unclear phrases have been retained in the package of amendments that is now before the Senate." 123 CONG. REC. 36,252 (1977).
93. *See* text accompanying notes 103-12 *infra*.
94. 446 U.S. at 592.
95. *See* United States Steel Corp. v. EPA, 595 F.2d 207, 212 (5th Cir. 1979).

quate appellate examination.[96] Appellate courts lack the fact-finding mechanisms necessary to create records sufficient to permit review. Unlike district courts, which can rebuild records with the help of discovery tools, appellate courts would be forced to remand actions to the EPA for statements of reasons for the Agency's determinations. Such remands would consume an inordinate amount of time, and risk after-the-fact rationalization of agency decisions.[97] Consequently, direct appellate review would not advance rational and prompt pre-enforcement review.

Rather than address PPG's pragmatic argument, the Court merely sidestepped it. The majority reasoned that Congress, rather than the courts, must address the practical problems of direct appellate jurisdiction since it is Congress's task to determine the ideal forum for judicial review.[98]

The practical problems associated with barren records certainly would not justify a narrow interpretation of "any other final action" in the presence of factors clearly indicating that Congress intended the opposite. Once Congress has decided that, despite sparse records, certain actions will be directly reviewed at the appellate level, the courts have no authority to correct what they perceive to be Congress's erroneous policy decision.[99]

Absent persuasive indication of congressional intent, however, there is little reason to criticize courts that look to amenability of review when deciding whether to take jurisdiction over certain actions. Courts of appeals are justified in refusing to accept actions with meager administrative records when Congress has left unanswered the question of desirability of appellate review.[100]

The statutory language at issue in *Harrison* does not present a clear expression of congressional intent. In light of section 307's contradictory legislative history, "any other final action" must be viewed as a phrase subject to more than one possible meaning. Hence, it was begging the question for the Court to dismiss the practical problems of direct appellate review as not properly addressed to them.

96. Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 57 (1975).

97. Save the Bay, Inc. v. Adm'r, EPA, 556 F.2d 1282, 1292 (5th Cir. 1977).

98. 446 U.S. at 593.

99. *But see* K. DAVIS, *supra* note 7, at § 23.03-1 (noting trend of appellate courts to refuse to review in absence of administrative record, despite clear language of statute).

100. *Id.*

Once courts recognize their duty to decipher Congress's intent in light of the practical problems of review, the invalidity of the majority's interpretation becomes clear. In the past Congress has vested appellate courts with original review only where an administrative process that lends itself to production of a reviewable record has been involved.[101] In the absence of strong indications to the contrary it must be concluded that Congress drafted the 1977 amendments with the inherent limitations of the courts of appeals in mind. Consequently, Congress could not have intended "any other final action" to lead to a massive shift of jurisdiction over informal agency interpretations to the federal courts of appeals.[102]

E. *A Third Interpretation*

Both the practical difficulties of direct appellate review and the ambiguous legislative history of section 307 cast considerable doubt on the interpretations of "any other final action" advanced by PPG and the EPA. Justice Stevens, concluding that neither party was correct, enunciated a third interpretation in his dissent. In Justice Stevens' view, "any other final action" included all actions that Congress specifically authorized the Administrator to take under some section of the Clean Air Act.[103] The phrase did not encompass those actions the Administrator took solely pursuant to his inherent regulatory power. Since interpretations and applications of new source performance standards are taken pursuant to a regulatory scheme,[104] Justice Stevens concluded they did not come within the ambit of "any other final action."[105]

Before 1977, the EPA did not make it a practice to publish individual actions taken pursuant to its regulatory power.[106] Failure to publish can raise substantial doubts as to an interpretation's finality, since it highlights the tentative nature of the agency action.[107]

101. Save the Bay, Inc. v. Adm'r, EPA, 556 F.2d 1282, 1292 (5th Cir. 1977).

102. This conclusion is bolstered by the legislative history of the original Clean Air Act of 1970. Congress specifically addressed the need for a full and complete record when direct review was to be vested in the appellate courts. 116 CONG. REC. 33,117 (1970). Given this initial concern, it is unlikely that, seven years later, Congress was not influenced by the sparseness of records associated with certain EPA actions.

103. 446 U.S. at 578.

104. 40 C.F.R. § 60.5(a) (1981).

105. 446 U.S. at 606.

106. *Id.* at 605.

107. *See* text accompanying notes 41-47 *supra*.

Consequently, when Congress passed the 1977 amendments it had no reason to believe that EPA actions taken pursuant to its inherent regulatory power constituted "final" agency determinations. Since Congress would not have considered such actions to be final, it could not have intended the phrase "any other final action" to encompass them.[108]

Justice Stevens' approach, besides embracing the administrative practices common in 1977, also lessens the practical problems associated with direct appellate review of informal EPA interpretation. While certain informal EPA actions are expressly authorized by the Act,[109] the vast majority are taken pursuant solely to the EPA's inherent regulatory power. Under Justice Stevens' view, these latter actions do not constitute "final action." Consequently, the great bulk of EPA determinations that rest on records inadequate for appellate review would not fall within section 307's ambit.

While Justice Stevens' theory minimizes the practical problems of direct appellate review, it does not completely explain Congress's failure to address jurisdictional shifts in section 307's legislative history. If "any other final action" includes all formal and informal agency actions taken pursuant to express provisions of the Act, then the phrase must work some increase in appellate court jurisdiction. Nonetheless, the increase in the number of actions directly reviewable by the courts of appeal is small in comparison to the increase effected by the majority opinion. A minor increase could conceivably have escaped direct congressional scrutiny in 1977. Accordingly, Congress's silence as to jurisdictional shifts does not fatally undermine Justice Stevens' interpretation.

Moreover, under Justice Stevens' theory the problems caused by Senator Muskie's comments[110] completely disappear. The technical amendments, while somewhat redundant,[111] do not substantially

108. In addition, under § 307(b)(1) review is precluded if not sought within sixty days of publication of the action in the Federal Register. Since actions taken pursuant to regulations are not, as of 1977, published in the Federal Register, there is no benchmark to judge when their review is to be precluded. Consequently, it is difficult to conclude that Congress intended such actions to fall within the purview of section 307.

109. *See, e.g.*, 42 U.S.C. §§ 7411(j), 7412(c), 7419 (Supp. I 1977 & Supp. II 1978).

110. *See* note 92 and accompanying text *supra*.

111. These amendments were also redundant under the majority's interpretation and, to a lesser extent, even under the approach taken by Justice Rehnquist. However, in light of Senator Muskie's comments on the lack of substantive change wrought by these modifications, they must, to some extent, overlap with the earlier 1977 amendments.

change section 307. The version of section 307 created by the original 1977 amendment encompassed actions taken pursuant to express statutory power whether accompanied by records or not. The actions added by the technical modifications, while varying as to degree of formality, were all expressly authorized under the Act. Since the actions added were not those taken pursuant to inherent regulatory power, they did not alter the existing character of section 307.[112]

The interpretation of "any other final action" advanced by the majority runs afoul of the practical difficulties of direct appellate review of agency actions resting on sparse records. Justice Rehnquist's alternative, while avoiding these practical problems, directly contradicts the stated purpose of the technical and conforming amendments. Of the three theories enunciated in *Harrison*, Justice Stevens' stands alone in successfully avoiding the mechanical problems of direct appellate review and the difficulties wrought by section 307's ambiguous legislative history.

III. CONCLUSION

The Court's broad interpretation in *Harrison* of section 307 substantially altered a system of judicial review that had, up until that time, prevailed throughout administrative law. Traditionally, Congress vested courts of appeal with original review of agency actions only when such actions rested on substantial reviewable records. This tradition reflected Congress's recognition of the impracticability of direct appellate review of most informal agency actions. In interpreting "any other final action," the Court was obliged to follow Congress's historical preference in the absence of evidence clearly indicating that Congress intended the opposite.

Such contrary evidence was lacking in *Harrison*. Section 307's legislative history alternated between complete silence and contradiction. Ejusdem generis, to whatever extent its use was appropriate, failed to support a complete break with this tradition. The holding in *Harrison* that courts of appeal may directly review EPA interpretations and applications of its own regulations, was based on nothing more substantial than the long discredited plain meaning rule. The Court, in an admirable attempt to subordinate its

112. To whatever extent the doctrine of ejusdem generis is applicable, it also supports Justice Stevens' view. Each of § 307's individually enumerated actions are taken pursuant to express provisions in the Act. Accordingly, "any other final action" should be limited in the same manner.

own needs in favor of legislative will, failed to follow the true intent of Congress.

The Court reached its decision by ignoring more plausible interpretations advanced by Justices Rehnquist and Stevens. In particular, Justice Stevens' view that "any other final action" includes only actions for which the EPA Administrator had express statutory authority has substantial appeal. It resolves many of the practical problems associated with direct appellate review of informal agency actions. In addition, Justice Stevens' view may be reconciled with a viable theory of congressional intent in light of section 307's legislative history. Finally, unlike the approach taken by Justice Rehnquist, Justice Stevens' view does not contradict the stated purpose behind the technical and conforming amendments to Section 307.

In sum, considerations of policy, and reasonable inferences drawn from the silence in section 307's legislative history, show that the Court's failure to adopt Justice Stevens' interpretation of "any other final action" was erroneous.

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