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CLEAN AIR ACT PROCEEDINGS AFFECTING NATIONAL COAL MARKETS: AN EXAMINATION OF THE AUTHORITY OF THE PRESIDENT TO ALLOCATE MARKETS

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I. INTRODUCTION

Section 125¹ of the Clean Air Act, added by the Clean Air Act Amendments of 1977,² represents a classic case of legislation enacted in response to the emerging interplay of the national energy policy with the national environmental policy. Prior to the addition of section 125 to the 1977 amendment, serious concerns were voiced by some coal interests about the impact of federal air pollution regulations upon coal usage. To accommodate these concerns, Congress hurriedly enacted section 125 as a stopgap measure. Unfortunately, section 125 was formulated without a careful inquiry into the underlying problems which its sponsors intended it to resolve. As a result, it is impossible to predict whether the cure it proposes will not actually cause greater harm than the problem it sought to alleviate.

Briefly, section 125 is a complex statutory mechanism which empowers the federal government to dictate where the operators of major fuel burning facilities may purchase coal to fuel their plants. The responsibility for implementing and administering this scheme has been delegated to the Environmental Protection Agency (EPA). This has resulted in an expansion of the EPA's familiar role of overseeing and implementing national environmental policies into a new and unfamiliar role of market allo-

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Section 125 was added to the Clean Air Act as part of the 1977 amendments. Although this particular provision potentially could have as important an effect on the coal industry as any other legislation affecting the industry in recent years, no committee hearings were ever held on the proposal. Instead, it was proposed as a floor amendment during the debate on the amendments. The entire legislative history of the section consists of fourteen pages in the Congressional Record which contains the floor debate in the House and Senate.

The Senate adopted section 125 by a narrow forty-three to forty-two margin. A summary of the floor debate indicates that the section was opposed by the father of the Clean Air Act and floor manager of the 1977 Amendments, Senator Edmund S. Muskie of Maine. Senator Muskie’s opposition to the section was based on the belief that such legislation had no place in the Clean Air Act and represented an unsound policy of encouraging a balkanization of national coal markets. However, the supporters of the section prevailed, arguing the need to encourage the utilization of nearby Eastern coal resources for generating electricity rather than transporting coal from the Far West. Nevertheless, as discussed below, to date the section has only been invoked to prevent the utilization of Eastern low-sulfur fuel in nearby generating plants as a means of meeting new emission standards.

Subsequent to its adoption, the provisions of section 125 were again amended and modified by section 661 of the National

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3 The section’s prime sponsor was Senator Howard Metzenbaum of Ohio. Senator Metzenbaum was joined in his efforts by Senators Jennings Randolph of West Virginia, Birch Bayh of Indiana and Richard Schweicker of Pennsylvania.
6 Id. at S9450-52 (daily ed. June 10, 1977).
7 Id. at S9453 (daily ed. June 10, 1977). Recently, a number of Senators and Representatives who supported § 125 have indicated to the author that their intention was to encourage the use of Eastern coal rather than allow the importation of Western coal.
Energy Conservation Policy Act. This amendment, known as the Hansen amendment, modifies section 125 by removing the power of state governors to issue rules or orders. The amendment further modifies section 125 by requiring the President to make cer-

\* 42 U.S.C. § 6215 (Supp. II 1978). This amendment provides in part:

(a) Restrictions on issuance of orders or rules by Governor pursuant to section 7425 of this title. No Governor of a State may issue any order or rule pursuant to section 7425 of this title to any major fuel burning stationary source (or class or category thereof)—

(1) prohibiting such source from using fuels other than locally or regionally available coal or coal derivatives, or

(2) requiring such source to enter into a contract (or contracts) for supplies of locally or regionally available coal or coal derivatives.

(b) Petition to President

(1) The Governor of any State may petition the President to exercise the President's authorities pursuant to section 7425 of this title with respect to any major fuel burning stationary source located in such State.

(2) Any petition under paragraph (1) shall include documentation which could support a finding that significant local or regional economic disruption or unemployment would result from use by such source of—

(A) coal or coal derivatives other than locally or regionally available coal,

(B) petroleum products,

(C) natural gas, or

(D) any combination of fuels referred to in subparagraphs (A) through (C), to comply with the requirements of a State implementation plan pursuant to section 7410 of this title.

(c) Action to be taken by President

Within 90 days after the submission of a Governor's petition under subsection (b) of this section, the President shall either issue an order or rule pursuant to section 7425 of this title or deny such petition, stating in writing his reasons for such denial. In making his determination to issue such an order or rule pursuant to this subsection, the President must find that such order or rule would—

(1) be consistent with section 7425 of this title;

(2) result in no significant increase in the consumption of energy;

(3) not subject the ultimate consumer to significantly higher energy costs; and

(4) not violate any contractual relationship between such source and any supplier or transporter of fuel to such source.

* Id.
tain specific factual findings before issuing any rules or orders under section 125.\(^{10}\)

III. CURRENT PROCEEDINGS UNDER SECTION 125

The first proceedings undertaken pursuant to section 125 were initiated by Governor James Thompson of Illinois in conformance to the authority granted to state governors under section 125(a).\(^{11}\) The hearings were convened before a special hearing officer appointed by the Governor to determine whether or not significant economic disruption or unemployment would result from the utilization of Western low-sulfur coal at the Powerton Station operated by Commonwealth Edison.\(^{12}\) After extensive hearings, the special hearing examiner found that no economic disruption or unemployment would occur as a direct result of the use of such low sulfur coal at Powerton. However, he did find that such a fuel shift could have a "ripple effect" on other Illinois coal producers.\(^{13}\) Following this decision, Governor Thompson petitioned President Carter to act under the authority granted to him by section 125(a)\(^{14}\) and issue an order under section 125(b)\(^{15}\) prohibiting the use of the Western coal. On August

\(^{10}\) Id. See also notes 79-82 infra and accompanying text.

\(^{11}\) 42 U.S.C. § 7425(a) (Supp. I 1977). It should be noted that the Hansen amendment, 42 U.S.C. § 6215 (Supp. II 1978), did not remove the state governors authority to make such determinations.

\(^{12}\) Commonwealth Edison had announced its plan to comply with the Illinois sulfur dioxide emission limitations by using Western low-sulfur coal rather than by installing flue gas desulfurization equipment that may have allowed it to continue to use Illinois high-sulfur coal.

\(^{13}\) HEARING OFFICER'S FINAL REPORT TO THE GOVERNOR—OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS, In the matter of hearings held pursuant to Section 125 of the Federal Clean Air Act concerning Commonwealth Edison's Powerton Station.

\(^{14}\) 42 U.S.C. § 7425(a) (Supp. I 1977). This section also grants the President or his designee the power to determine, after notice and opportunity for a public hearing, whether action under § 125(b) is necessary to prevent or minimize significant local or regional economic disruption or unemployment from the use of Western coal.

\(^{15}\) Id. § 7425(b). This subsection provides:

(b) Use of locally or regionally available coal or coal derivatives to comply with implementation plan requirements

Upon a determination under subsection (a) of this section—

(1) such Governor, with the written consent of the President or his designee,
21, 1979 this petition was rejected, primarily for failure to state a
*prima facie* case for action under the statute and the Hansen
amendment.\(^\text{16}\)

The only other section 125 proceeding to date occurred in
Ohio. These proceedings have been far more extensive than those
in Illinois and after more than twelve months of hearings and re-
ports are still under way. The proceedings began when Senator
Howard Metzenbaum, Governor James Rhodes, the Ohio Mining
and Reclamation Association, and District Six of the United Mine
Workers of America each, within a three month span of time, re-
quested the EPA to determine whether to invoke section 125 to
prevent some Ohio generating stations from switching from Ohio
high-sulfur coal to Eastern low-sulfur coal as a means of compli-
ance with the EPA's October 1979 deadline concerning air pollu-
tion emission requirements. Pursuant to these requests a special
EPA hearing panel was established. This panel held public hear-
ings of a "town meeting" type on the subject in Cleveland and St.
Clairsville, Ohio in August 1978. Simultaneously with these hear-
ings, the EPA commissioned a number of special consultants to
study economic and engineering issues involved in the hearings.
In addition, the hearing record was kept open for the submission
of written comments by interested parties until October 16,
1978.\(^\text{17}\)

On December 20, 1978 the EPA simultaneously released two
of the consultants' studies and issued a "Proposed Determina-
tion" of economic disruption and unemployment in certain coun-

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\(^{16}\) Letter from Jack H. Watson, Jr., White House aide, to James Thompson,
Governor of Illinois (Aug. 21, 1979).

\(^{17}\) Despite the EPA's original Federal Register notice to the contrary, some of
the consultants' studies were not made available for public analysis or comment
ties in southeastern Ohio. Further public hearings of the same type were held in Columbus, Ohio on January 30, 1979 and additional written public comments were accepted by the EPA until March 28, 1979. Despite the fact that no "Final Determination" had been issued, and that several of the critical consultants' studies had yet to be completed or made available for public comment, the EPA announced the formation of a team of negotiators to meet with the Ohio electric utility companies to force "voluntary" utilization of Ohio high-sulfur coal, rather than implementing the previously announced plans to switch to Eastern low-sulfur coal. The negotiating team met with several, but not all, Ohio utilities, and then ceased contact in April 1979.

As a result of the EPA's failure to complete and publish several of the most important consultants' studies pertaining to the elements of a "Final Determination" and as a result of the extensive litigation surrounding the statute and the proceedings commenced thereunder, the current status of the Ohio section 125 proceedings is unsettled. On September 6, 1979 the EPA published a "Reproposed Determination" relating to the Ohio section 125 proceedings which would have terminated them because of a proposed finding that the alleged economic and unemployment effects were "not sufficiently significant to necessitate action under subsections 125(b) and (c)." However, this proposal was met with opposition from Ohio coal miners and operators and is itself now in limbo following even more public hearings and extended comment periods on the subject.

IV. LEGAL ANALYSIS OF THE STATUTORY SCHEME

A. Substantive Issues

A variety of important substantive and procedural questions concerning the operation of section 125 will have to be addressed and answered in the subsequent Ohio proceedings and other such proceedings initiated elsewhere. One of the most interesting questions which has yet to be thoroughly analyzed is the determination of who may initiate or request proceedings leading to the issuance of a section 125 rule or order. Under the existing statutory

provisions, the Governor of Illinois clearly was qualified to do so. In the Ohio proceedings, however, private parties simply notified the EPA of their desire that investigations and hearings leading to possible section 125 action be initiated. In that instance, the EPA actively cooperated with this request and may actually have encouraged it. In addition, the EPA took it upon itself to perform the investigations, rather than requiring the proponents of agency action to present proof to justify that action. The question remains, however, as to what discretion the EPA would have to refuse to act on a request for such hearings and investigations and whether such a refusal could be tested by court action or appealed.

A second area of uncertainty in a section 125(a) determination is the requirement of identification of the specific “major fuel burning stationary sources” which are alleged to be the cause of the economic disruption or unemployment and which would then be the subject of orders or rules issued pursuant to subsections (b) and (c) of section 125. Subsection (d) of that section identifies these sources as those having a design capacity of 250 million b.t.u.'s per hour and which are not in compliance with the requirements of an applicable implementation plan.

Although it has been assumed that the major targets of section 125 orders would be electric utility boilers, it is important to note that many nonutility industrial boilers are covered by this size classification. In the context of alleged market disruption, it will be important to determine whether or not section 125 orders or rules can be applied to some stationary sources within this category without applying to all of them equally. Since the prosperity of a particular local or regional coal market can rarely be

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21 Id. § 7425(d). Subsection (d) provides:
(d) Existing or new major fuel burning stationary sources
This section applies only to existing or new major fuel burning sta-
tionary sources—
(1) which have the design capacity to produce 250,000,000
Btu's per hour (or its equivalent), as determined by the Adminis-
trator, and
(2) which are not in compliance with the requirements of an
applicable implementation plan or which are prohibited from
burning oil or natural gas, or both, under any other authority of
law.
traced solely to any one source within the classification, the limits of any permissible discrimination among such sources will have to be carefully determined.

An additional difficulty in the identification of stationary sources subject to such orders or rules is the limitation to those not in compliance with an applicable implementation plan. Section 125(d) does not specify when such noncompliance is to be determined. It could be argued with equal merit that section 125(d) refers to noncompliance in 1977 (as of the date of the adoption of the legislation), or the date of petitions filed with the EPA, or the date of any hearings, or the date of any final order.

Possibly the single most important threshold question which must be addressed in the statutory scheme established in section 125 is the definition of "locally or regionally available coal." Even at this early stage in the history of section 125, this phrase has given rise to a bewildering variety of definitions and interpretations which vary substantially according to the perspective of the particular analyst. Subsection (h) of section 125 offers no real help in this respect even though it purports to define the phrase. It simply provides that the Administrator may define the phrase with respect to coal which in his judgment can "feasibly be mined or produced in the local or regional area (as determined by the Administrator) in which the major fuel burning stationary source is located." This circular definition is plainly of little value. The only assistance it offers is the indication that the site of the fuel burning source is the key to the definition of the locale or region from which the coal must be available.

A careful analysis of the Senate debate on section 125 might easily lead to the conclusion that the legislative intention as to the meaning of "regionally available coal" is related to the dichot-
omy between broad regional definitions of "Eastern" and "Western" coal alluded to earlier.26 The Senate debate is replete with references to coal from the far West as a threat to Eastern coal markets.27 A wide cross section of sponsors and supporters of section 125 in both the House of Representatives and the Senate, including the section's prime sponsor, Senator Howard Metzenbaum, have indicated that it was their intention to give this type of definition to "regionally available coal" and that the purpose of section 125 was not to subdivide the broad regional coal markets of the nation into balkanized subareas. In particular, these individuals have specifically advised the EPA in written comments that it was not their intention to limit the definition of "region" to a single state.

Standard linguistic analysis and common sense dictate that the term "regional" should be interpreted to apply to a large area, not a single state or part of a state. Furthermore, authoritative studies of coal markets by independent agencies of the federal government and other organizations have unanimously applied this term to a broad geographical area such as the "Appalachian Region." These studies, conducted by the Government Accounting Office,28 the Federal Trade Commission,29 the Justice Department,30 the Ford Foundation31 and similar organizations,32 all reject the notion of a region as proposed by the EPA and the Ohio mining industry. Furthermore, an economic analysis of actual sources of coal used by the Ohio utilities over the past few years negates a definition of region limited to anything less than the Appalachian region in its entirety.33

26 See note 7 supra.
33 Additional factual submissions and brief for the Cleveland Electric Illuminating Co., In the Matter of Proceedings under Section 125(a) instituted with the...

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In the face of such overwhelming data and opinion, proponents of the section 125 proceedings retreated to a theory that the definition of region is intended to preserve so-called “historic sources of supply” for generating stations. The gist of this argument seems to be that, despite the specific use of geographical terms such as “local” or “regional,” section 125(b) provides legal basis for requiring specific stationary sources to continue indefinitely their use of specific types of coal from specific areas based on past patterns of consumption. However, there is little or no support for this contention in the words of subsection (b) or the legislative history. Furthermore, this theory completely ignores the use of the word “available” in conjunction with the regional or local identification of the coal sources in the subsection. The concept of availability is important since it conveys the intention that coal which was available to a source, but not necessarily previously used for other reasons, would still satisfy the subsection (b) requirement of regional availability. Thus, the definition of regional availability must be based on geography and economics and not a spurious historical criterion.34

In addition, the consulting study prepared by I.C.F., Inc. for the EPA as part of the Ohio section 125 hearings is virtually useless with respect to any observations on the appropriate definition of “regionally available coal.”35 This is because the consultant was given instructions to limit its inquiry solely to the market for coal mined within the state of Ohio only and does not even consider high-sulfur producers in West Virginia or Kentucky, even though the EPA later indicated that it may include such production in a proposed definition of regionally available coal.36 In fact, the I.C.F. study is seriously deficient in attributing coal consumed by utilities located in the state of Michigan to the Ohio utility companies which are the parties to the proceeding.

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34 It is interesting to note that if the historic criterion argument is accepted by the courts and high-sulfur coal producers in Ohio do receive a guaranteed market equal to so-called current levels of consumption, they will receive a windfall as additional new plants begin their consumption of high-sulfur coal in addition to the guaranteed base consumption.

35 I.C.F., INC., DRAFT REPORT, POTENTIAL IMPACTS ON THE OHIO COAL MARKET: OHIO UTILITY COMPLIANCE WITH APPLICABLE AIR EMISSIONS LIMITATIONS, SECTION 125 STUDY, [hereinafter cited as DRAFT REPORT].

36 Id.
Finally, in the face of the very restrictive definition of "regional" being considered by the EPA, Congress is considering legislation that would amend section 125(h) to prevent the Administrator from defining a region for the purposes of section 125 in such a way as to exclude coal from any state contiguous to the state in which the major coal burning stationary source is located.\textsuperscript{37} Congressman Carl Perkins and other members of the House have clearly indicated in a brief \textit{amicus curiae}, which they submitted in \textit{McCoy-Elkhorn Coal Corp. v. United States Environmental Protection Agency},\textsuperscript{38} that the legislative history and their own specific intention negated any definition of the word "region" which would prevent the free flow of coal across state borders within the eastern portion of the country or the Appalachian region as a whole.

The second major threshold determination which must be made in order to substantiate the need for an order pursuant to section 125 is the existence or expectation of "significant local or regional economic disruption or unemployment."\textsuperscript{39} Nothing in section 125(a) or the limited legislative history indicates what the precise difference, if any, between economic disruption and unemployment is, nor has that issue been explored in either the Ohio or Illinois proceedings. However, for the purposes of most discussions, it has been assumed that these terms are nearly synonymous.

An important issue arising from this required finding in the limited investigations in the Ohio hearings is the definition of the area, locality or region within which such economic disruption or unemployment must be measured. Since the terminology used is identical to that in section 125(b) and discussed above with respect to the origin of the coal which may be used permissibly, it seems likely that any economic disruption or unemployment must be measured within the same locality or region used to determine "regionally available coal" under subsection (b). Nevertheless, in its Ohio economic consultants' studies, the EPA appears to have adopted a much more limited view of the area within which eco-

\textsuperscript{37} This legislation is being sponsored by Congressman Carl Perkins of Kentucky and members of the House of Representatives representing at least five other states.


nomic disruption and unemployment may be found.\textsuperscript{40} Thus, even though the EPA and its consultants appear to have defined the coal availability region under subsection (b) as the entire state of Ohio (plus, perhaps, adjoining high-sulfur coal producing regions in West Virginia and Kentucky), their definition of the region of economic impact under subsection (a) appears to be limited to a few sparsely populated counties in the coal fields of southeastern Ohio. No justification for the adoption of these varying definitions of "region" has ever been offered by the EPA.

In addition to the geographical dimension of the definition of economic disruption or unemployment under subsection (a), serious questions must be raised with respect to the requirement of "significant economic disruption or unemployment."\textsuperscript{41} First, the issue of what level or relative amount of disruption or unemployment is to be deemed "significant" must be resolved. This issue can only be answered by reference to the overall size of the region. That is, unemployment which might be deemed significant in the context of one small county would clearly not be significant in the context of a large state or multi-state region containing millions of people. In fact, the most recent "Reproposed Determination" by the EPA acknowledges that only 0.05% of the total Ohio labor force might be affected.\textsuperscript{42}

Further, the temporal dimension must be considered. That is, disruption or unemployment which lasts for a short or transient period may very well be considered much less significant than that which would last for a longer period of time. Thus, a determination of the length of time which any purported unemployment might last is crucial to an overall conclusion about whether significant disruption or unemployment is imminent as a result of a switch to low-sulfur fuel. This is particularly true in view of the coal industry's history of cyclical and often intermittent employment.

Another important issue in the determination of economic disruption or unemployment under subsection (a) is the question of whether such economic effect is to be measured on a net or

\textsuperscript{40} See DRAFT REPORT, supra note 35; TEMPLE, BARKER & SLOANE, INC., Ohio Section 125 Study: Regional Economic Impact Analysis (Dec. 14, 1978).

\textsuperscript{41} 42 U.S.C. § 7425(a) (Supp. I 1977) (emphasis added).

gros basis; that is, whether only effects in the coal mining and related areas are to be considered or whether the possible negative effects on employment elsewhere should be offsetting considerations. In the Ohio proceedings, much evidence has been produced to show that any order requiring the use of high-sulfur coal and the installation of scrubber equipment would have a more negative effect on prosperity and employment in the non-coal mining portion of the state of Ohio than a beneficial effect within the coal mining region. The EPA has not directly addressed this issue, but rather has contended that these negative employment effects in industries such as the steel, automotive or chemical industries simply will not occur. If the evidence to the contrary is given weight at all, a hard decision will have to be made by Congress or the courts as to whether the EPA is empowered simply to trade non-coal mining jobs (which would be lost through an increase in energy rates attributable to a section 125 order) for coal mining jobs which allegedly would be saved. This issue is particularly difficult in view of the fact that the non-mining jobs would probably be lost permanently, while the effects in the coal mining industry will probably be temporary. The economic effect on consumers, in the form of increased residential electric rates and increased cost of goods and services, will be considered later in this article under a discussion of the Hansen amendment.

An interesting technical issue which has arisen with respect to a few particular plants in the Ohio proceedings relates to the question of whether or not section 125 may be applied in the instance where a switch to low-sulfur fuel (even if such fuel is deemed nonregional) is undertaken for reasons other than compliance with an applicable state implementation plan. For example, at least one plant in Ohio has switched to low-sulfur fuel in order to prevent operating problems, such as slagging in its boilers, rather than to control sulfur dioxide emissions.** Because section 125 specifies that economic disruption or unemployment must be caused by the use of nonregional coal for the purpose of meeting the requirements of an implementation plan, it is not clear whether the use of such coal for some other purpose could trigger the application of the sanctions of section 125. Problems related to other chemical and physical characteristics, such as fly

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** This has occurred at the Dayton Power and Light Company's Stuart Plant.
ash problems, might fall in this category as well.

**B. Procedural Issues**

Aside from the complex substantive problems discussed above, section 125(a) presents a number of procedural questions which can have a serious impact on the rights of those subjected to such hearings. Because of the vague and subjective nature of many of the facets of the statutory scheme, the procedural framework of the section is critical.

Perhaps the single most important procedural issue is whether or not full adjudicatory hearings are required in the public hearing phase of section 125(a). The EPA has taken the position that full adjudicatory hearings are not required and has held what it has termed “town meeting” hearings governed by rulemaking procedures of section 553 of the Federal Administrative Procedure Act. Specifically, this has meant that statements of witnesses have not been made under oath, no cross-examination has been allowed, nor have the credentials or expertise of any of the witnesses been tested or even deemed relevant. Strong arguments have been presented to the EPA that full adversary adjudicatory hearings are the only way in which the substantial rights of the parties involved in the proceedings may be properly protected.

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44 The EPA is governed by the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59 (1976). Section 553 of the APA sets forth the procedure to be followed by an agency when its actions are characterized as rulemaking. However, when the agency action is characterized as adjudicatory in nature § 554 of the APA governs the proceeding. Before an action is taken under the provisions of § 125(a) of the Clean Air Act, there must be “notice and an opportunity for a public hearing.” This requirement is ambiguous as to whether the EPA is to proceed by rulemaking or adjudication. However, the United States Supreme Court in United States v. Florida East Coast Ry., 410 U.S. 224 (1973) found that while the precise words of § 554 are not an absolute prerequisite to its application, its provisions do not apply unless Congress has clearly indicated that the “hearing” required by the statute must be a trial-type hearing on the record. See also United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519 (D.C. Cir. 1978).

Apart from the APA, adjudicatory hearings may be constitutionally mandated where a single person or a group of individuals are exceptionally affected by an agency action and such action is based upon individual factual situations. Londoner v. Denver, 210 U.S. 373 (1908).


46 As noted in note 44 supra, § 125(a) is ambiguous as to what type of hearing
The thrust of these arguments is that: (1) because section 125(c) provides for relief which has a substantial retrospective impact on existing contracts between utilities and their suppliers, and (2) because action taken under section 125(b) or (c) must be specific as to each generating facility, any action taken under section 125(b) or (c) is "adjudicatory" rather than "rulemaking" in nature. In short, the argument is that proceedings under section 125 are "couched as rulemaking, general in scope and prospective in operation, but are in reality designed to have an individualized impact." Alternatively, it has been argued that even if the proceedings do constitute rulemaking rather than adjudication, the proceedings fall within the language of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* which states that under "extremely compelling circumstances" procedural safeguards beyond those required by the Administrative Procedure Act may be required as a matter of due process.

Not only has the EPA declined to provide the procedural due process safeguards of an adjudicatory hearing in a section 125(a) proceeding, but it has consistently carried out the hearings and accompanying studies in such a manner as to prevent timely and effective critique and rebuttal of some of the most significant findings. Furthermore, questions with respect to the chronological order in which the EPA has studied some of the critical issues have also been raised. As an example, EPA has made determina-

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is required. Arguably, the EPA has the discretion under subsection (a) to proceed either by rulemaking or adjudication. If this is true, then the choice of mode under which to proceed lies in the informed discretion of the EPA. See *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947).

"Rulemaking has often been referred to as a quasi-legislative action. That is, the agency is making policy-type decisions based upon legislative facts such as reports and studies. On the other hand, adjudication has been referred to as a quasi-judicial action because it is directed toward individual decisions based upon individual facts. A strong argument can be made that since most § 125 proceedings will be site-specific and dependent upon individualized facts, the EPA is operating as a quasi-judicial body and therefore should conduct its hearings to conform to this role. Buttressing this argument is the fact that most of the studies conducted by the EPA's consultants under § 125 have been highly site-specific with respect to alternative arrangements at the sources in question."


Id. at 543.
tions of economic disruption and unemployment as well as studies of coal sales without any initial determination of the definition or boundaries of the crucial "region" within which all of these effects are to be studied.

Assuming that the EPA reaches a final determination under section 125(a), the question of whether such a determination constitutes a final appealable order under section 307(b) of the 1977 Amendments\(^5\) will have to be answered. In the case of Cleveland Electric Illuminating Co. v. United States Environmental Protection Agency,\(^5\) which was filed in the United States District Court for the Northern District of Ohio, the defendant EPA argued that by reason of section 307(b) only the court of appeals has jurisdiction over any issues raised in connection with section 125 proceedings, and that judicial challenges in the court of appeals cannot be brought until all actions, including a presidential order under section 125(b)\(^5\) and the promulgation of new compliance schedules under section 125(c),\(^5\) have been taken.\(^5\) The EPA further argued that the section 125(b) and (c) orders are jurisdictional prerequisites for judicial review under section 307(b), and by operation of section 125(f)\(^6\) constitute revisions to the ap-

\(^{51}\) 42 U.S.C. § 7607(b) (Supp. I 1977). This subsection provides in part: "A petition for review of . . . any . . . final action of the Administrator under this chapter . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit."

\(^{52}\) No. C79-383 (N.D. Ohio, filed Feb. 28, 1979).


\(^{54}\) Id. § 7425(c).


\(^{56}\) 42 U.S.C. § 7425(f). Subsection (f) provides:

(f) Treatment of prohibitions, rules, or orders as requirements or parts of plans under other provisions

For purposes of sections 7413 and 7420 of this title a prohibition under subsection (b) of this section, and a corresponding rule or order under subsection (c) of this section, shall be treated as a requirement of section 7413 of this title. For purposes of any plan (or portion thereof) promulgated under section 7410(c) of this title, any rule or order under subsection (c) of this section, corresponding to a prohibition under subsection (b) of this section, shall be treated as a part of such plan. For purposes of section 7413 of this title, a prohibition under subsection (b) of this section, applicable to any source, and a corresponding rule or order under subsection (c) of this section, shall be treated as part of the applicable implementation plan for the State in which subject source is located.
plicable implementation plan, which can be considered only by
the court of appeals pursuant to section 307(b)(1).57

Another procedural issue arises from section 125 under sub-
section (a). Once a determination of significant economic disruption
or unemployment resulting from the use of other than locally
or regionally available coal is made pursuant to section 125(a),
the President may take action to prohibit using such fuel for the
purpose of complying with implementation plan requirements.58
The procedures which would apply to the issuance of such rule or
order are not clear, since this portion of section 125 has yet to be
effectuated. Should the President choose to proceed by order, the
question is raised again of what type proceeding—adjudicatory or
rulemaking—would be necessary. Since most such applications of
section 125 will be site-specific, a strong argument has been pro-
posed that full adjudicatory proceedings are a procedural require-
ment before imposing an order on a specific fuel-burning station-
ary source.59

Section 125(b) also includes a requirement that the President
take into account the final cost to the consumer of any such ac-
tion.60 This provision was obviously written into section 125
before the passage of the Hansen amendment,61 which requires a
specific finding by the President that his action "would not sub-
ject the ultimate consumer to significantly higher energy costs."62
The relationship between these two provisions is not yet clear.
Theoretically, under the original terms of 125(b), the President
could still issue an order even if he had determined there would
be higher consumer costs, as long as he had "taken them into ac-
count."63 However, the Hansen amendment provision appears to
be more absolute, indicating that the ultimate consumer must not
be subjected to significantly higher energy costs, regardless of

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59 See note 47 supra.
60 42 U.S.C. § 7425(b) (Supp. I 1977). Subsection (b) provides in pertinent parts: "In taking any action under this subsection, . . . the President . . . shall
take into account, the final cost to the consumer of such an action." (emphasis
added).
61 Id. § 6215 (Supp. II 1978).
62 Id.
63 Id. § 7425(b) (Supp. I 1977).
what other facts the President might believe to counterbalance these higher costs.

Once a prohibition of the use of nonregional or nonlocal coal has been made under section 125(b), the President must require operators of stationary sources to enter into long-term contracts for supplies of locally or regionally available coal and to enter into contracts to acquire additional means of emission limitation necessary to meet emission standards of the Clean Air Act while burning such coal. These remedies appear to be mandatory, and the question of what discretion the President has in fashioning an appropriate order to minimize or prevent economic disruption or unemployment is open at this time. For instance, since many operators of stationary sources do not utilize long-term contracts for their total coal supply, what discretion would such an order leave them as to the mix of long-term and spot purchase coal?

In addition, the question of what arrangements would satisfy the requirement to acquire “additional means of emission limitation” may become important. For example, it has been assumed that the only possible solution would be the use of flue-gas desulfurization equipment (commonly termed “scrubbers”). However, the possibility of the use of intermittent controls and other techniques might be possible, although a serious question would arise as to whether these techniques constitute means of emission limitation under the statute.

These technical questions under section 125(c) take on great urgency when it is considered that, at least in the Ohio situation, it was physically impossible to install and operate scrubbers by the compliance date set by the Clean Air Act for the limitation of sulfur dioxide emissions. That deadline was October 1979, and all parties conceded that a minimum of three additional years would be necessary for the construction of scrubbers. In addition, the EPA consultants have conceded that even given an unlimited time period, such additional means of emission control for the use of local or regional coal would be impossible to construct at all at certain small, constricted stationary source sites owned by some

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44 Id. § 7425(c)(1).
45 Id. § 7425(c)(2).
46 Id.
of the Ohio utilities. In these cases, the EPA consultants have further conceded that the use of low-sulfur coal (whether deemed to be regional or nonregional) is absolutely necessary in order to meet the EPA emission limitations. Given the mandatory nature of the directive of section 125(c), this physical impossibility could cause additional complications in any attempt to implement such an order.

Finally, the forum and procedure for appealing rules or orders issued pursuant to sections 125(b) and (c) are as unclear as the procedures relating to section 125(a). These uncertainties pose issues of constitutional magnitude, especially when a discretionary order of the President is involved. This is true since it has long been established that the President of the United States cannot be restrained from performing nonministerial duties, i.e., those duties which call for the exercise of discretion or judgment by the President. It is clear that the presidential action called for under section 125(b) is nonministerial since there is a good deal of discretion involved. This means that the President probably cannot be enjoined from issuing a rule or order under section 125(b).

Section 125(e) raises another procedural issue. This subsection provides that any action required to be taken by a major fuel burning source by reason of orders under sections 125(b) and (c) will not be deemed to constitute a modification for purposes of section 111(a)(2) and (4) of the Clean Air Act, unless otherwise specifically provided by rule by the Administrator for good cause. The effect of this provision is to prevent a major fuel burning source from having to comply with the new source performance standards in section 111 if it is ordered to use "locally or regionally available" coal and install scrubbers. This provision has not received much scrutiny in the context of the Illinois and Ohio proceedings.

67 ENGINEERING STUDY FOR OHIO COAL BURNING POWER PLANTS: FINAL REPORT 87-311 (March 1979).
68 Id.
71 Id. § 7425(a)(2), (4).
On the other hand, section 125(f)\textsuperscript{72} has received considerable attention in the pending proceedings. This is because it relates to the jurisdiction of any appeal from a prohibition order under subsection (b) and the promulgation of alternative compliance schedules under subsection (c). Section 125(f) provides that such prohibition orders and alternative compliance schedules shall be treated as a part of any implementation plan promulgated by a state, or by the Administrator of the EPA if he has promulgated an implementation plan for a state.\textsuperscript{73} As a result, any such prohibition rule or order would be deemed a revision of the implementation plan, reviewable exclusively and originally in the court of appeals pursuant to section 307(b)(1) of the Clean Air Act.\textsuperscript{74} Illustrative of this fact, the EPA in Cleveland Electric Illuminating Co. v. United States Environmental Protection Agency\textsuperscript{75} moved to dismiss Cleveland Electric’s pending claims on the ground that only the court of appeals would have jurisdiction of actions taken under section 125, by reason of the operation of sections 125(f) and 307(b).

As discussed above, the Hansen amendment modified the original provisions of section 125 by rescinding the power of state governors to issue any order or rule pursuant to section 125(b), instead relegating them to petitioning the President to exercise his authority under that subsection. After the anticlimatic result in the Illinois state proceedings, this is what Governor James Thompson of Illinois did—without success.\textsuperscript{76} Further, under the Hansen amendment the President must make four specific findings before he is empowered to issue rules or orders under subsection (b).\textsuperscript{77}

First, the President must find that such order or rule would be consistent with section 125.\textsuperscript{78} This requirement might support an argument that the Hansen amendment findings apply only to

\textsuperscript{72} Id. § 7425(f).
\textsuperscript{73} Id.
\textsuperscript{74} Id. § 7607(b).
\textsuperscript{75} No. C79-383 (N.D. Ohio, filed Feb. 28, 1979).
\textsuperscript{76} See supra note 16 and accompanying text.
\textsuperscript{77} The wording of the amendment is ambiguous as to whether the President must make such findings only as a part of a proceeding initiated by a state governor or whether it applies to all § 125 proceedings.
\textsuperscript{78} 42 U.S.C. § 6215 (Supp. II 1978).
orders or rules issued pursuant to a gubernatorial petition.

Second, the President must find that such order or rule would result in no significant increase in the consumption of energy. This particular requirement will focus attention on the so-called “power penalty” imposed by the installation of scrubbers on existing power plants. Scrubbers may utilize up to seven percent of the capacity of a generating station, and the question of whether or not their installation amounts to a significant increase in the consumption of energy has never been considered. There may also be other energy consumption factors to be considered in this regard.

Third, the President must find that a section 125 order or rule would not subject the ultimate consumer to significantly higher energy costs. This appears to be an absolute prohibition as compared to the original provision in section 125(b) requiring the President merely to take consumer costs into consideration prior to his action. Findings under this subsection will focus attention on the high cost of scrubber installation and operation and comparisons to the utilization of low-sulfur coal and its ultimate availability. A further question might well be raised as to the identity of the “ultimate consumer,” since this may be interpreted to include a reference not only to the users of electricity but to the consumers of those products which are produced through the use of electricity. Particularly in inflationary times, this could be a matter of major importance, and this issue has been specifically identified by the Council on Wage and Price Stability in its negative report on the Ohio proceedings.

Fourth, the President must find that such rule or order would not violate any contractual relationship between such source and any supplier or transporter of fuel to such source. The interpretation of this requirement will have significant impact on existing low-sulfur coal contracts. The time at which any such contractual relationship must be in effect has not yet been tested, although a reasonable interpretation would include any contractual relationship in effect at the time of such proposed

79 Id.
80 Id.
Presidential rule or order.

More significantly, the EPA has indicated informally that it does not believe that this provision would prevent an order from terminating a contract for the use of low-sulfur coal if such contract includes a force majeure provision which has any reference to governmental regulations or acts of administrative agencies. The EPA's theory is that if the parties have included such a provision, they have anticipated the possibility that a section 125(b) order could interfere with the execution of their obligations and therefore the contractual relationship is not violated by a section 125(b) order. Thus, it is possible that EPA may take the position that the Hansen amendment grandfather clause in no way limits its power to void existing low-sulfur coal contracts. In light of this position, a careful review of the terms of all existing contracts, and especially those now being negotiated, is recommended for all producers and their counsel.

V. CONSTITUTIONAL AND OTHER CHALLENGES TO SECTION 125

Because of its potentially sweeping impact on both the entire coal industry and the development of national energy policy, section 125 has been the subject of extensive controversy and emerging litigation. As of July 1980, two major challenges to the statute and the Ohio proceedings are pending in the federal court system. While it is possible that a number of the provisions outlined above may later give rise to similar challenges, these are the only two matters now pending, and they are summarized below.

On January 16, 1979, McCoy-Elkhorn Coal Corporation filed a complaint in the United States District Court, Eastern District of Kentucky, at Pikeville, against the EPA. McCoy-Elkhorn, a producer of low-sulfur coal located in eastern Kentucky, sued to challenge the constitutionality of section 125 contending that the "electric utilities located in Ohio constitute a natural market for McCoy-Elkhorn's coal," and that because the section 125 proceedings in Ohio could foreclose or substantially restrict that market, the section was unconstitutional.

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83 Id.
85 Id., Complaint.
McCoy-Elkhorn argued that section 125 constituted an unreasonable and unlawful exercise of federal power under the commerce clause, article I, section 8, clause 3 of the United States Constitution, because any order under section 125(b) would in effect "interfere with the functioning of interstate markets and protect special interests by precluding McCoy-Elkhorn from selling its Kentucky-produced low-sulfur coal in significant interstate markets and by impairing McCoy-Elkhorn's right to engage in the interstate sale of its Kentucky-produced coal to Ohio customers." CC McCoy-Elkhorn also alleged that section 125 was unlawful because it imposed an unreasonable and impermissible burden on interstate commerce by precluding private persons, such as the Ohio electric utilities, from availing themselves of coal sold in interstate commerce, and by prohibiting private persons, such as McCoy-Elkhorn's Ohio utility customers, from entering into contracts for the purchase of coal solely because it originates in a state other than Ohio.

Briefs amicus curiae were filed by four members of the United States House of Representatives to aid the court's understanding of the legislative history and intent of the provision. The position taken by the four members of Congress asserts the constitutionality of section 125, but cites its legislative history for the conclusion that the phrase "locally or regionally available coal" was never intended to preclude the use of Kentucky coal in Ohio.

The EPA, the state of Ohio and the United Mine Workers argued that the plaintiff did not present a case or controversy under article III, section 2 of the Constitution, but the court rejected that assertion, stating that no "reason is presented upon which this Court should limit Plaintiff's opportunity to litigate its claim since its attack goes only to statutory and not to administrative action concerns."

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86 Id.
87 Id.
88 Messrs. Carl Perkins of Kentucky, Thomas L. Ashley of Ohio, John P. Murtha of Pennsylvania and John Slack of West Virginia.
On May 7, 1979, the court issued its "Memorandum Opinion" sustaining the validity and constitutionality of section 125.\textsuperscript{91} The court read earlier Supreme Court cases as establishing the "power of Congress to regulate commerce . . . as awesome," and that any limitation of the commerce power must be found in the fifth amendment. Since section 125 was an economic legislative act, according to the district court, it carried a presumption of constitutionality which could only be overcome by a showing of arbitrariness or irrationality. The court could not find the requisite arbitrariness or irrationality. Indeed, it found that the enactment of the national Clean Air legislation clearly resulted in unbalancing the normal market competition between the Ohio high-sulfur coal industry and nearby low-sulfur coal producers. The Federally enhanced low-sulfur coal market is now the object of legislative discrimination in favor of the high-sulfur coal produced within a region putatively distressed. Section 125 is intended to provide a remedy, if warranted by the requisite factual justifications. There is a rational nexus between the depressed Ohio coal industry and the remedy sought to be provided by Section 125.\textsuperscript{92}

Even though section 125 might harm McCoy-Elkhorn, and others allied with it, the court ruled that their remedies lie with "the political process, not . . . the judiciary."\textsuperscript{93} The court reasoned that the commerce clause "empowers the Congress to provide protection to some local industries at the expense of other local industries."\textsuperscript{94} Consequently, the court upheld the facial constitutionality of section 125. Both parties appealed to the Sixth Circuit, where the case is pending after arguments.\textsuperscript{94.1}

In the other case pending challenging section 125, the Cleveland Electric Illuminating Company (CEI) filed a complaint in the United States District Court for the Northern District of Ohio, naming as defendants the United States Environmental

\textsuperscript{91} Id. at 1028.
\textsuperscript{92} Id. at 1029.
\textsuperscript{93} Id.
\textsuperscript{94} Id. (citing Secretary of Agriculture v. Central Roig Refining Corp., 338 U.S. 604 (1950)).
\textsuperscript{94.1} Ed. note. The Sixth Circuit, affirming the district court, recently upheld the validity of the provision against all of the constitutional challenges. McCoy-Elkhorn Coal Corp. v. United States EPA, No. 79-3326 (6th Cir. June 2, 1980); Coal Age, Sept. 1980, at 167, cols. 1, 2.
Protection Agency and certain individual officials of EPA. The complaint was a six-part attack on section 125, challenging both its facial validity and its application in the Ohio proceedings. The first claim of the complaint alleges numerous instances of bias and prejudice on the part of the defendants in conducting the section 125 proceedings in Ohio. The incidents are alleged to have occurred both before and during the proceedings, and are said to reflect a prejudgment by the defendants of crucial issues under section 125.

The second claim alleges improper ex parte contacts between special interest groups representing Ohio coal interests and officials of the EPA. The third claim contends that the section 125 hearings in Ohio should have been adjudicatory proceedings rather than informal rulemaking proceedings. The fifth claim alleges that the section 125 proceedings have impaired CEI's property rights under contracts and arrangements for purchasing coal from sources located outside Ohio. The fifth claim further alleges that the EPA has subjected CEI to inconsistent requirements by first requiring the utility to comply with sulfur dioxide emission limitations no later than October 1979, and then indicating that it is going to force CEI to miss the October 1979 deadline by requiring CEI to burn Ohio high-sulfur coal at several of its facilities.

The first, second, third and fifth claims of the complaint all contend that the matters complained of amount to violations of CEI's rights under the due process clause of the United States Constitution. The fourth claim takes a different approach, alleging that section 125, on its face and as applied by the EPA, exceeds the authority of Congress under the commerce clause because it seeks to erect impenetrable barriers against interstate competition with Ohio coal producers.

Finally, the sixth claim alleges that CEI's right to equal pro-
tection of the laws under the fifth amendment has been violated by the section 125 proceedings. This results from CEI being made part of a very small disfavored class of certain Ohio electric utilities that will be permitted to buy coal only from Ohio coal producers. This claim of a denial of equal protection is also based on the fact that CEI, unlike other electric utilities and other major fuel burning stationary sources, will not be permitted to comply with sulfur dioxide emission limitations by utilization of low-sulfur coal from nearby states.

CEI pressed its attack on section 125 by filing a motion for a preliminary injunction on March 13, 1979. This motion, read in conjunction with the complaint, seeks a preliminary and permanent injunction enjoining the EPA and the individual defendants from taking any further action under section 125 in Ohio because of the unconstitutionality of that statute. CEI requested in the alternative that any further proceedings under section 125 be enjoined until such time as the President appoints an unbiased hearing panel to conduct them.

In response to the complaint and the motion for a preliminary injunction, the Government filed a motion to dismiss based on several grounds. First, the Government asserted that CEI's claim of section 125's unconstitutionality does not present a justiciable case or controversy and is not ripe for adjudication. Next, they alleged that CEI itself lacks standing to assert the claim of unconstitutionality. In addition, the Government further contended that jurisdiction over any challenge of section 125 is vested by virtue of section 307(b) of the Clean Air Act in the Court of Appeals for the Sixth Circuit.

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102 Id.
103 Id.
104 Id.
107 Id.
108 Id.
110 Motion to Dismiss by the Defendant, Cleveland Electric Illuminating Co.
In response to CEI’s contention that it was entitled to adjudicatory hearings in the section 125 proceedings, the Government maintained that its informal meetings were all required by section 125(a). In addition, the Government argued that CEI’s challenge to the nature of the hearings was premature, because for so long as the matter was before the EPA, that agency might arrange for additional procedural safeguards to be used at later stages in the decision-making process.

The Government met CEI’s allegations of unfair bias and prejudice by contending that EPA officials are permitted to have “an underlying philosophy in approaching a specific case.” In addition, although the Government did not deny that ex parte contacts with representatives of the Ohio coal industry took place, the Government maintained that such communications nonetheless have not reduced the proceedings to a sham.

The Government’s motion dealt extensively with CEI’s contention that section 125 violated the commerce clause. In essence, the Government asserted that section 125 represents a valid exercise by Congress of its sweeping constitutional authority to regulate commerce. This argument is identical to the Government’s successful argument on the issue in the McCoy-Elkhorn case.

The motion to dismiss refuted CEI’s equal protection claim by asserting that the classifications made by section 125 are rationally related to a constitutional objective. It also responded to CEI’s due process claim for impairment of its property rights in contracts for the supply of coal and other goods by contending that CEI’s contract rights are subordinate to congressional au-


Id.
Id.
Id.
Id.
Id.
Id.
See supra notes 91-94.
Motion to Dismiss by the Defendant, Cleveland Electric Illuminating Co. v. United States Environmental Protection Agency, C79-383 (N.D. Ohio, motion filed 1979).
CEI rebutted the Government's motion to dismiss with a memorandum in opposition. On the question of the court's jurisdiction over the action, CEI asserted that the allegations of due process and commerce clause violations are sufficient to give the court general federal question jurisdiction. In addition, because section 125 is an act of Congress to regulate commerce, CEI maintained that the court also has jurisdiction pursuant to the provision of specific application in such cases.

On the issue of ripeness, CEI asserted that final administrative action is not a prerequisite to justiciability of an attack on administrative proceedings, but rather that a "pragmatic" approach to determining ripeness is appropriate in light of *Abbott Laboratories v. Gardner*. Applying Abbott's pragmatic approach toward ripeness, CEI contended that it would incur a hardship if review of the manner in which the administrative proceedings were conducted and the constitutionality of section 125 were postponed, and that in addition the improbability that later events would have any substantial impact on the nature of CEI's grievances demonstrated that CEI's claims were ripe for review. Similarly, on the standing issue, CEI asserted that the threatened or actual injury stemming from the application of an allegedly unconstitutional statute in an unconstitutional manner, which could result in massive capital expenditures by CEI, was sufficient to support its standing to maintain the action.

CEI denied that section 307(b)(1) of the Clean Air Act gave the court of appeals exclusive jurisdiction over the case, because that provision applies only when the EPA Administrator has taken a final administrative action. Therefore, since CEI did not have exclusive jurisdiction over the case, the court had jurisdiction over the action.

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118 Id.
119 Memorandum in Opposition to Defendant's Motion to Dismiss, Cleveland Electric Illuminating Co. v. United States Environmental Protection Agency, C79-383 (N.D. Ohio, filed May 10, 1979).
120 Id. (under 28 U.S.C. § 1331 (1976)).
121 Id. (under 28 U.S.C. § 1337 (1976)).
123 Memorandum in Opposition to Defendant's Motion to Dismiss, Cleveland Electric Illuminating Co. v. United States Environmental Protection Agency, C79-383 (N.D. Ohio, filed May 10, 1979).
124 Id.
not seek review of such a final action, it maintained that the court of appeals had no jurisdiction to redress the wrongs alleged in CEI's complaint. CEI further contended that the court need not await final administrative action prior to granting injunctive relief.\textsuperscript{125}

CEI also addressed the issues of bias and prejudice allegedly held by the EPA officials conducting the proceedings, asserting that the case law at a minimum requires the appearance of fairness.\textsuperscript{126} As to the \textit{ex parte} contacts, CEI contended that a district court need not await the completion of an administrative process before acting to remedy the impermissible impact of such communications.\textsuperscript{127}

The State of Ohio, the Governor of Ohio and the United Mine Workers of America, District Six, all have sought to intervene as defendant parties in this action. CEI has filed a memorandum opposing such intervention, but this matter has not yet been resolved by the district court.

\textbf{CONCLUSION}

This review of the short, but turbulent history of section 125 underscores the serious difficulties inherent in the attempted implementation of the statute as enacted. It seems clear that more careful legislative consideration of the original proposal through the hearing process would have resulted in a more enforceable and understandable policy.

The first set of problems posed by the current language stems from the difficulty of creating precise and useful definitions for the concepts espoused by the sponsors. As discussed previously, the underlying concept of "local or regional coal" is difficult at best and subject to interpretations which can actually be counterproductive. Furthermore, the introduction of the term

\textsuperscript{125} \textit{Id.} For support of this point CEI cited Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972), and Amos Treat & Co. v. Securities & Exchange Comm'n, 306 F.2d 260 (D.C. Cir. 1962).

\textsuperscript{126} \textit{See} American Cyanamid Co. v. Federal Trade Comm'n, 363 F.2d 757, 767 (6th Cir. 1966), and Texaco, Inc. v. Federal Trade Comm'n, 336 F.2d 754, 760 (D.C. Cir. 1964).

"significant unemployment" or "significant economic disruption" in a pollution control statute could only be expected to compound these difficulties.

A second set of serious problems is posed by the enforcement and prosecutorial mechanism established by the legislation. In particular, the role of the EPA as judge and prosecutor, even if marginally constitutional, creates a milieu for administrative schizophrenia. In addition, the difficulties in distinguishing between rulemaking and adjudication with respect to individual generating facilities will have substantial impact on the substantive rights of utilities and coal suppliers which may be subjected to sanctions.

As serious as the problems of practical nature exhibited by the current statute may be, it is the underlying policies embodied in section 125 which should receive most critical scrutiny in the immediate future. First, the idea of assigning to EPA the roles of economic referee, job allocator and energy coordinator must be questioned seriously. This seems to be a classic case of institutional miscasting. The EPA's ad hoc response in the current section 125 proceedings demonstrates the mistake of thrusting a pollution control agency into the role of economic regulator. Neither the EPA's institutional point of view nor technical resources are appropriate for this. Serious consideration should be given to reassigning this function to the Department of Energy, which has accumulated much more experience with such allocation functions and the balancing process which must accompany them.

Another policy problem of the current legislation is the attempt to resolve regional conflicts over energy sources without taking into account the overall national interest. Section 125 is but one of a proliferating number of attempts to resolve such discord. In the past few years individual states have attempted to impose taxes on either the importation or exportation of coal and natural gas, as well as on the sale of electricity generated from local coal.128 National patterns of energy production and con-

consumption must be evaluated to serve the overall national interest and cannot rationally be regulated for the long term by using concepts such as regional impacts.

Finally, careful economic analysis should be undertaken to determine the real costs and benefits of the section 125 scheme of imposing the high costs of peculiar pollution control methodology on particular groups of consumers and ratepayers. In the case of the Ohio proceedings under section 125, the additional, unnecessary costs of constructing and installing flue-gas desulfurization equipment to allow and encourage the use of high-sulfur Ohio coal would be borne primarily by those who would gain no benefit from the supposed increase in coal employment. This hidden transfer of costs and benefits is of questionable wisdom when considered from the point of view of the overall public interest.
