ENFORCEMENT OF THE CLEAN AIR AMENDMENTS OF 1970

The protection and enhancement of the quality of the nation's air resources is a primary goal of the federal Clean Air Act.[1] Due, however, to the Act's failure to foster aggressive state or federal programs,[2] progress toward achieving this goal was disappointingly slow before 1970.[3] Congress, spurred on by public environmental concern, attempted to correct

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1. 42 U.S.C. § 1857(b)(1) (1970). The Clean Air Act was originally enacted as the Air Pollution Act of 1955, ch. 360, 69 Stat. 322, *as amended*, Act of June 8, 1960, Pub. L. No. 86-493, 74 Stat. 162, *and* Act of Oct. 9, 1962, Pub. L. No. 87-761, 76 Stat. 760. This Act was superseded by the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392, *as amended*, Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, *and* Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

2. Under the Air Quality Act of 1967, Pub. L. No. 90-148, § 107(c), 81 Stat. 491, the federal government was required to publish criteria by which the states were to set air quality standards. The Act failed to provide the power to insure compliance with state standards; no time-tables for achievement existed; and the federal government's enforcement efforts were limited to interstate violations unless action on intrastate matters was expressly requested by the governor of that state, *id.* § 108(g)(2), 81 Stat. 496, or an emergency situation required federal involvement, *id.* § 108(k), 81 Stat. 497. When it could act, the federal enforcement process was a long and complex system of conferences and hearings through which, to date, only one case has been fully litigated. *See* United States v. Bishop Processing Co., 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970). *See generally* 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.03, at 2-87 to -94 (1973) [hereinafter cited as GRAD].

The weaknesses and enforcement problems of the Air Quality Act of 1967 were recognized by both houses of Congress. S. REP. No. 1196, 91st Cong., 2d Sess. 21 (1970) [hereinafter cited as S. REP. No. 1196]; H.R. REP. No. 1146, 91st Cong., 2d Sess. 5 (1970). Six factors were identified in the House Report as the basis of the "regrettably slow" progress under the Air Quality Act of 1967, including "cumbersome and time consuming procedures . . .[,] organizational problems on the federal level where air pollution control has not been accorded a sufficiently high priority, . . . and failure [of the federal agency] to demonstrate sufficient aggressiveness in implementing present law." *Id.* For a general discussion of the Clean Air Act see Trumbull, *Federal Control of Stationary Sources Air Pollution*, 2 ECOLOGY L.Q. 283 (1972).

3. "A review of achievements to date, however, make [sic] abundantly clear that the strategies which we have pursued . . . have been inadequate . . . and the methods employed in implementing those strategies often have been slow and less effective than they might have been." H.R. REP. No. 1146, 91st Cong., 2d Sess. 1 (1970). *See* S. REP. No. 1196, *supra* note 2, at 1-4; *Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate*

this weakness by enacting the Clean Air Amendments of 1970 (Clean Air Amendments).[4] These amendments were designed to increase dramatically direct federal involvement in air pollution control[5] and pressure the states to develop effective enforcement programs through the establishment of national air quality standards,[6] attainment deadlines,[7] and federal review of mandatory state implementation plans.[8] To insure the aggressiveness of this expanded federal role, the amendments establish strict guidelines for

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Comm. on Public Works, 91st Cong., 2d Sess., pt. 1, at 125-26 (1970) [hereinafter cited as *1970 Senate Hearings*] (remarks of Senator Randolph, Chairman, Senate Comm. on Public Works).

4. 42 U.S.C. §§ 1857-58a (1970), *as amended*, 42 U.S.C. §§ 1857b-1, 1857c-5, -8 to -10, 1857d-1, 1857f-1, -6e to -7, 1857h-5, 1857*l* (Supp. IV, 1974).

5. The Clean Air Amendments of 1970: (1) require EPA to establish national standards of performance for new stationary sources, which are to reflect the "degree of emission . . . reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated," *id.* § 1857c-6(a)(1) (1970); (2) require EPA to list and set separate national standards for hazardous air pollutants, *id.* § 1857c-7(b); (3) allow the Administrator to independently issue federal compliance orders or file suit, regardless of the intrastate characteristics of the violator, *id.* § 1857c-8(a)(1). Also, if the Administrator feels the state has failed to properly enforce its plan, he can intervene and enforce it. *Id.* § 1857c-8(a)(2); *cf.* Air Quality Act of 1967, Pub. L. No. 90-148, § 108 (c)(4), 81 Stat. 493.

6. The Administrator of EPA is required to establish *national primary* (to protect public health) and *secondary ambient air standards* (to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutants). 42 U.S.C. § 1857c-4 (1970). These represent minimum standards and states are free to establish stricter standards. *Id.* § 1857d-1, *as amended*, (Supp. IV, 1974). The establishment of national standards reflects "the insight that all air pollution affects interstate commerce and that the impact of emissions from stationary sources cannot be limited by local or state regulation alone." GRAD, *supra* note 2, § 2.03, at 2-77.

7. The Clean Air Amendments of 1970 provide that the primary standard should be attained as "expeditiously as practicable" but (subject to allowable variances) no later than three years from the date of approval of the implementation plan. 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970). The secondary standard is to be met in a "reasonable time." *Id.* § 1857c-5(a)(2)(A)(ii).

8. Each state is required to develop a plan for implementing both the national primary and secondary standards. *Id.* § 1857c-5(a)(1). This plan is to be reviewed by the Administrator, and approval is based on compliance with the guidelines outlined in the statute. *Id.* § 1857c-5(a)(2) (requiring that an implementation plan include emission limitations, monitoring systems, adequate provisions for intergovernmental cooperation, and periodic public reports). If a state fails to develop an implementation plan, the Administrator has the power to intervene, prescribe and enforce an implementation plan. *Id.* § 1857c-5(c), *as amended*, (Supp. IV, 1974).

administrative review of state implementation plans[9] and provide for citizens' suits.[10]

In *Natural Resources Defense Council, Inc. (NRDC) v. Environmental Protection Agency (EPA)*[11] petitioners brought suit[12] challenging the approval by the Administrator of the Environmental Protection Agency of Georgia's air pollution control implementation plan.[13] The Court of Appeals for the Fifth Circuit held that the Administrator of EPA exceeded his authority under the Clean Air Amendments of 1970 in approving provisions of the Georgia plan that: (1) guaranteed trade secret information connected with emission data would be kept confidential; (2) stipulated a pollution control strategy based solely on dispersal techniques; (3) allowed Georgia officials to consider economic impact and technical feasibility in developing and promulgating their implementation plan; and (4) allowed Georgia officials to grant variances from particular requirements of such a plan.[14] The Supreme

9. Congress specifically provided statutory guidelines at each critical point in the Administrator's promulgation of standards and review of state implementation plans. *Id.* §§ 1857c-4, -5(a)(2), (e), (f). Congress also provided for prompt judicial review (directly by the United States Court of Appeals) of these administrative decisions. *Id.* § 1857h-5(b)(1), *as amended*, (Supp IV, 1974). *See generally* GRAD, *supra* note 2, § 2.03, at 2-75. In establishing the above provisions, Congress rejected alternative bills which would have granted the Administrator much broader discretion. *See 1970 Senate Hearings, supra* note 3, at 24-46.

10. 42 U.S.C. § 1857h-2 (1970). This provision provides that "any person," without regard to amount in controversy or diversity requirements, may bring suit in federal district court against anyone, including the federal government, who is an alleged violator of emission standards or limitations, or against the Administrator of EPA for failure to perform his duties under the Act. *Id.* § 1857h-2(a). Sixty days notice to the appropriate state or federal agency is required before any action can be initiated. *Id.* § 1857b-2(b). This notice requirement has been viewed by some as an attempt to alert EPA to the existence of a problem and to allow it time to act before actual litigation has been initiated. *See* GRAD, *supra* note 2, § 2.03, at 2-137 to -140.

11. 489 F.2d 390 (5th Cir. 1974), *rev'd in part sub nom.* Train v. NRDC, 421 U.S. 60 (1975).

12. Pursuant to the Clean Air Amendments of 1970, 42 U.S.C. § 1857h-5(b)(1) (1970), conferring jurisdiction for direct suit in the appropriate court of appeals, suit was brought by the Natural Resources Defense Council, Inc. (NRDC), Save America's Vital Environment (SAVE), and two private citizens. 489 F.2d at 393.

13. The Administrator approved Georgia's implementation plan. 40 C.F.R. § 52.572 (1974). This plan is the Georgia Air Quality Control Act, GA. CODE ANN. §§ 88-901 to -917 (1971), *as amended*, §§ 88-903, -906, -906.1, -908, -909 (Supp. 1975).

14. 489 F.2d at 393-94.

Court, in *Train v. NRDC*,[15] reversed the Fifth Circuit on the issue of variances and held that states could grant variances if attainment and maintenance of the national ambient air quality standards are not threatened.[16]

The state statute before the Fifth Circuit was the Georgia Air Quality Control Act.[17] This statute required that "any information relating to secret processes [or] devices" obtained by the State in the course of its air pollution regulation shall be kept confidential.[18] The court of appeals found the broad nature of this provision to be in conflict with the federal requirement of full disclosure of emission data.[19] Full disclosure is critical to an effective public role in air pollution control,[20] which, in turn, is essential to aggressive enforcement of the federal law.[21] Both the courts

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15. 421 U.S. 60 (1975).

16. *Id.* at 98-99.

17. *See* note 13 *supra.*

18. GA. CODE ANN. § 88-908 (1971), *as amended,* (Supp. 1975). This provision also applies to secret methods of manufacture or production. Violation of this section is a misdemeanor, *id.* § 88-916, thus further pressuring state officials not to disclose such information.

19. 489 F.2d at 397-98. 42 U.S.C. §§ 1857c-5(a)(2)(F)(iii), (iv) (1970), provide for state assurances that "periodic reports on the nature and amounts of [stationary source] emissions" will be made and that these reports will "be available at reasonable times for public inspection."

20. Congress realized that the citizen suit provision, 42 U.S.C. § 1875h-2 (1970), (*see* note 10 *supra*) could be effective only through full disclosure of emission data. S. REP. No. 1196, *supra* note 2, at 38. Thus in the Act Congress provided for emission data disclosures, even when trade secrets might be affected. 42 U.S.C. § 1857c-9(c) (1970). *See also id.* §§ 1857f-6, 1857h-5.

In *NRDC v. EPA,* the Fifth Circuit concluded that although the Act's state implementation plan provision, 42 U.S.C. § 1857c-5 (1970), was not "similarly explicit where information supplied to state officials is concerned, . . . there [was] no reason to strike the balance differently in that context." 489 F.2d at 398. Trade secret provisions similar to the one in the Georgia statute raise the potential for extensive litigation over access to emission data, which could greatly increase litigation costs and cause delays, thereby deterring citizen suits. *Hearings on the Implementation of the Clean Air Act Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 92 Cong., 2d Sess., pt. 1, at 18 (1972) [hereinafter cited as *Implementation Hearings*] (remarks of Richard Ayres, NRDC).

21. "To assure that Federal and State agencies aggressively pursue their responsibilities and to supplement their capacities, the bill provides a right of citizen action to seek enforcement of the provisions of the act." S. REP. No.

and EPA itself recognize that provisions such as those in the Georgia statute are illegal obstacles in the path of public participation.[22]

Georgia's pollution control strategy relied on a "tall stack" form of *dispersion enhancement*.[23] Petitioners argued that this state plan conflicted with the Clean Air Amendments' requirement that *emission limitations* be the basis of any control strategy.[24] The Fifth Circuit concluded that emission limitation is the preferred method of control[25] and interpreted section 1857c-5(a)(2)(B), which specified the control strategy

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1196, *supra* note 2, at 3. *See generally* GRAD, *supra* note 2, § 2.03, at 2-133 to -140.

22. *See, e.g.*, NRDC v. EPA, 494 F.2d 519, 522 (2d Cir. 1974) (New York trade secret provision struck down for ambiguity and potential conflict with the Clean Air Amendments); NRDC v. EPA, 478 F.2d 875, 885-86 (1st Cir. 1973) (Rhode Island trade secret provision ruled invalid as a violation of the public disclosure principle of the Clean Air Amendments).

On the same day that the Administrator approved the Georgia trade secret provision, he rejected similar provisions in other states (without stating why the Georgia plan was distinct). 40 C.F.R. § 52.572 (1974). Moreover, in response to recent court decisions, EPA has reviewed all implementation plans, disapproved disclosure limitations within such plans that conflict with public availability of emission data as required by the Clean Air Amendments, 39 Fed. Reg. 34,533-39 (1974), and proposed new regulations to guarantee public access to emission data through a request process to the Regional EPA Administrator, *id.* 34,572-73 (1974).

23. 489 F.2d at 394 n.2. Under a "tall stack" dispersion approach the pollutants emitted into the air are controlled by the height of the stack. The taller the stack, the greater volume of pollutants allowed. The objective of this technique is not to reduce emissions, but to maintain an acceptable dilution level of pollutants in the atmosphere, the theory being that the taller the stack the greater the dilution.

24. Brief for Petitioner at 23-24, NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974). The Clean Air Amendments provide that a state implementation plan may not be approved unless "it includes emission limitations, schedules, timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls." 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

25. 489 F.2d at 406-08 (focusing on the overall purpose of the Clean Air Amendments). *See* United States v. Shirey, 359 U.S. 255, 260-61 (1959), for a guideline on statutory interpretation. Examining sections concerning new stationary source standards and extra-hazardous pollutants, the court concluded that they expressly require emission reductions or standards to be the primary method of control. 489 F.2d at 407. *See* 42 U.S.C. §§ 1857c-6(a)(1), -7(b)(1)(B) (1970). The court also found that when these and other provisions within the Clean Air Amendments referred to the control method employed within § 1857c-5 (state implementation plans), this method was characterized as *emission standards*. *See id.* § 1857c-6(d)(1). Furthermore, the court, noting that § 1857h-2(a)(1)(A) permits citizen suits against any person alleged to be in violation of "an emission

to be incorporated into state air quality implementation plans, to mean that compliance with national standards is first to be attempted through all available means of emission limitations before other methods are employed.[26] This interpretation does not restrict the state's freedom to choose between the various methods of emission limitations, nor does it prohibit the state from supplementing its primary control strategy with a non-reduction method. Non-reduction methodology, however, is improper as a primary control strategy unless it is the only means available to meet the national standards within the deadlines. Both the court's conclusion and its statutory interpretation are supported by the legislative history of the Clean Air Amendments[27] and, in part, by EPA's own regulations.[28]

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standard or limitation," stressed that if dispersion enhancement was a legal alternative to emission limitations in a state's control strategy, the state would be allowed to escape the safeguard of the citizen suit provision. This result contradicts the intent of Congress. 489 F.2d at 408.

26. 489 F.2d at 406-08.

27. Under the Air Quality Act of 1967, Pub. L. No. 90-148, § 107, 81 Stat. 485, 490-91, states were free to choose their own method of pollution control. In the Clean Air Amendments, however, Congress required state air pollution control through emission limitations and rejected two alternative bills which did not require such methods. *See* S. 3466, 91st Cong., 2d Sess. § 7 (1970), reprinted in *1970 Senate Hearings, supra* note 3, at 24, 37 ("emission standards, or *equivalent measures,* and such other measures as may be necessary to assure achieving or preserving such standards of ambient air quality within a reasonable time" (emphasis added)); H.R. 17255, 91st Cong., 2d Sess. § 4 (required that state plans be "consistent with the purposes of the Act insofar as it assures achieving such standards of air quality within a reasonable time"). This provision of the House Bill was deleted in conference, and the Senate version was adopted with minor changes. H.R. CONFERENCE REP. No. 1783, 91st Con., 2d Sess. 1, 45 (1970). *See* S. Rep. No. 1196, *supra* note 2, at 9-13. *Implementation Hearings, supra* note 20, at 11-18 (remarks of Senator Eagleton). *See also id.* at 265-70 (remarks of EPA Administrator Ruckelshaus that the primary objective of a pollution control strategy is emission reduction).

28. Regulations provide that a state plan "shall set forth a control strategy which shall provide for the degree of emission reduction necessary for attainment and maintenance of such national standard[s]." 40 C.F.R. § 51.12(a) (1974). It is evident, however, that this general statement is weakened by regulations dealing specifically with control strategy. Section 51.13(e)(2)(iii) (control strategy for sulfur oxides and particulate matter—primary pollutants of power plants) provides that the implementation plan shall "show that application of the control strategy will result in the degree of emission reduction indicated to be necessary . . . *as modified by appropriate consideration of factors set forth in subdivision (ii).*" *Id.* § 51.13(e)(2)(iii) (emphasis added). These factors

Moreover, the dispersion enhancement strategy proposed by the Georgia statute ignored the principle of non-degradation implicit in the federal law.[29] Non-degradation means that a state must not allow the present quality of the air to deteriorate, even if the air quality level is above the national standards set by the Clean Air Amendments.[30] Dispersion enhancement methods do not attempt to reduce pollution but rather seek to maintain a minimum dilution level by spreading the pollutants over a larger area.[31] Given the present saturation levels of the atmosphere and the inefficiency of dispersion methodology,[32] the Georgia

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include "topography, spatial distribution of emissions, [and] stack height." *Id.* § 51.13(e)(2)(ii). Therefore, while theoretically an emissions reduction is required by the regulations, it is quite possible that the practical result could be a control strategy consisting solely of dispersion enhancement techniques. *See* note 23 *supra.*

29. This principle is inferred from the Act's purpose to "*protect* and *enhance* the quality of the nation's air resources." 42 U.S.C. § 1857(b) (1970) (emphasis added). The policy of non-degradation has been recognized as an essential part of the Clean Air Act and Amendments by HEW, *1970 Senate Hearings, supra* note 3, at 131, 132-33 (remarks of HEW Secretary Finch), by Congress, S. REP. No. 1196, *supra* note 2, at 11, and by the courts, Fri v. Sierra Club, 412 U.S. 541 (1973), *aff'g by an equally divided court sub nom.* Ruckleshaus v. Sierra Club, 344 F. Supp. 253 (D.D.C. 1972). *See generally* Note, *The Clean Air Act and the Concept of Non-Degradation:* Sierra Club v. Ruckelshaus, 2 ECOLOGY L.Q. 801 (1972).

30. The concept of non-degradation is extremely controversial because of its direct and substantial effect on the future economic growth of any particular area. It is seen by some as an effective means of land use planning and by others as an unwarranted obstacle to economic growth. *See generally* Mandelker & Rothschild, *The Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970,* 3 ECOLOGY L.Q. 235 (1973). EPA has proposed non-degradation regulations which attempt to balance social and economic considerations with environmental concerns. The essence of the proposed regulations, which employ a three zone scheme, is that areas having clean air above the national standards can decide for themselves, based upon their own analysis of social and economic factors, how much deterioration they will allow, with the national standard setting the maximum. One immediate question raised by these proposed regulations is whether they are in conflict with the existing principle of non-degradation. *See* 39 Fed. Reg. 31,000, 31,004 (1974). These regulations were issued in final form in late 1974. *See* 39 Fed. Reg. 42,510-17 (1974).

31. *See* note 23 *supra.*

32. *1970 Senate Hearings, supra* note 3, at 88-112. Arguably, dispersion enhancement is no longer a viable pollution control method due to the increased contamination of the atmosphere which has reduced the absolute potential for dilution. One of the major air pollution problems today is non-visible small particles with high diffusion factors. Dispersal methods do not eliminate this form of pollution, but rather contribute to it. *Id. See also* Stumph & Duprey,

strategy may result in an increase in pollution not only in the local area but in adjacent regions as well, thus violating the principle of non-degradation.[33] Overall, dispersion enhancement techniques are questionable pollution control methods and should be used, as the court suggests, only as a last resort.[34]

In its third ruling, the Fifth Circuit held that the Administrator exceeded his powers in approving the Georgia statute[35] permitting consideration of economic and technical factors in its implementation plan.[36]

Trends in Air Pollution Control Legislation, in *1970 Senate Hearings, supra* note 3, at 396. This report discusses the inefficiency and limitations of dispersion enhancement and concludes that, given the number of variables involved in this approach (geographical factors, meteorological factors, air stream patterns, and production methods of individual polluters), its reliability is questionable. *Id.* at 411.

33. *See* Brief for Petitioners at 28-29, NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974), for estimates of potential increases in pollution levels.

34. 489 F.2d at 407-08, 410. EPA has proposed several amendments to the Clean Air Act which speak directly to the court's arguments. *See* 4 ENVIRONMENT RPTR. CURRENT DEV. 2004 (1974) (proposed legislation). The proposed amendments would: (1) delete all reference to "emission standards" in § 1857c-6 (new source standards) and § 1857c-7 (hazardous pollutants) which had the effect of implying that emission limitation was the preferred method, *id.* at 2005-06; (2) eliminate the non-degradation policy by inserting a clause into the Act's statement of purpose, which reads, "but nothing in this Act is intended to require or authorize the establishment by the Administrator of standards more stringent than primary and secondary ambient air quality standards," *id.* at 2010; (3) amend § 1857c-5 (state implementation plans) by adding the following clause: "Nothing in this section shall be construed to preclude use of alternative or intermittent control measures which the Administrator determines . . . will permit attainment and maintenance of the national ambient air quality standards," *id.* The effect of the proposed amendments would be to undercut drastically the legal argument against dispersion enhancement and to stimulate its use.

35. GA. CODE ANN. §§ 88-901 to -917 (1971), *as amended,* GA. CODE ANN. §§ 88-903, -906, -906.1, -908, -909 (Supp. 1975). The statute's statement of policy combines protection of the air with "providing for maximum employment and full industrial development of the State." *Id.* § 88-901 (1971). The Act allows the Georgia Department of Public Health to consider the economic feasibility of air cleaning devices, the effect of such devices on the efficiency of industrial operation, the economic and industrial development of the State, and other factors which the Department may find applicable. *Id.* § 88-906, *as amended,* (Supp. 1975).

36. The vice in section 88-906 is . . . [that] it is overinclusive. The provision does not distinguish between situations where cost and feasibility considerations compete with other considerations and those where they do not. It is, of course, appropriate . . . to take into account cost and feasibility factors in most circumstances; . . . doing so is proscribed only when those considerations are in conflict with considerations of public health.

The Clean Air Amendments represent an ordering of social priorities. Congress mandated that economic cost and technical feasibility are always to be subordinate to public health considerations and are not to be considered in meeting the deadline for attainment of the national primary standard.[37] While current economic events may require a re-examination of the existing priorities,[38] this should be made legislatively. The majority of courts which have ruled on this question have agreed

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489 F.2d at 412. *See also* Transcontinental Bus. Sys., Inc. v. CAB, 383 F.2d 466, 484 (5th Cir.), *cert. denied,* 390 U.S. 920 (1967) (discussing limits of administrative discretion).

37. NRDC v. EPA, 489 F.2d 390, 411-12 (5th Cir. 1974), *rev'd in part sub nom.* Train v. NRDC, 421 U.S. 60 (1975). This view was recognized by Senator Muskie when describing the philosophy of the 1970 amendment pending before Congress.

> The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met. I am convinced they can be met.

116 CONG. REC. 32,901-02 (1970) (remarks of Senator Muskie). *See also* S. REP. No. 1196, *supra* note 2, at 2-3. Congress decided to exclude economic considerations while the Administration had favored setting standards derived from the best available scientific knowledge. *1970 Senate Hearing, supra* note 3, at 132. "Economic feasibility was included in the House bill, it was hotly debated in conference and it was deleted." *Implementation Hearings, supra* note 20, at 19 (remarks of Senator Eagleton).

38. Pressure to alter these priorities began soon after the Amendments were passed. EPA, when it first proposed guidelines to assist states in developing implementation plans on June 28, 1971, stated that economic considerations were a "digression from the proper emphasis of the law." Yet when the final guidelines were issued, they contained language encouraging states to consider economic and cost benefit factors. The question of the inclusion of economic factors was a main issue throughout the implementation hearings. *See Implementation Hearings, supra* note 20, at 3-25. Rising concern over energy, its cost and availability has so dramatically added to this pressure that the effect on legislation can now be seen. In 1974 Congress passed, and the President signed into law, the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246 (codified in scattered sections of 15, 42 U.S.C.), which provides for mandatory and voluntary conversion from oil or gas to coal for large fuel operators. *Id.* § 2, 15 U.S.C. § 792 (Supp. IV, 1974). Through an amendment to the Clean Air Act, the new legislation temporarily suspends specific Clean Air Act requirements governing the use of coal, and allows *temporary* extensions for some operators, as long as in the end such action would not cause or contribute to the violation of the primary ambient air quality standards. *Id.* § 3, 42 U.S.C. § 1857c-10 (Supp. IV, 1974). *See also* 4 ENVIRONMENT REPTR. CURRENT DEV. 2004-10 (1974) for the proposed amendments to the Clean Air Act which speak to economic considerations.

that until Congress determines otherwise, economic considerations are improper factors in state implementation planning.[39]

The Georgia plan also authorized the state environmental agency to grant variances from the approved implementation plan when strict compliance with the latter would be inappropriate, unreasonable or unduly burdensome.[40] Petitioners asserted that the strict variance procedure provided in section 1857c-5(f) of the federal statute was to be the exclusive mechanism for granting variances.[41]

EPA disagreed and argued that section 1857c-5(f) was to apply only when a variance would prevent the attainment or maintenance of the national ambient air quality standards.[42] Implicit in EPA's argument is the premise that any variance which does not jeopardize the attainment of these standards is to be considered a revision, subject to the Administrator's approval under section 1857c-5(a)(3),[43] but not limited by the strict requirements of section 1857c-5(f).[44] Alternatively, EPA also argued that even if section 1857c-5(f) was an exclusive variance provision, it would only be exclusive in the post-attainment time period.[45]

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39. *E.g.*, Union Elec. Co. v. EPA, 515 F.2d 206 (8th Cir. 1975); NRDC v. EPA, 483 F.2d 690, 693-94 (8th Cir. 1973); NRDC v. EPA, 478 F.2d 875, 889 (1st Cir. 1973). *Compare* Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 359 (3d Cir. 1972), *cert denied*, 409 U.S. 1125 (1973), *with* Buckeye Power, Inc. v. EPA, 481 F.2d 162, 168-69 (6th Cir. 1973).

40. GA. CODE ANN. § 88-912 (1971).

41. Brief for Petitioners at 13-14, NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974). This section provides that a postponement of up to one year may be granted by the Administrator of EPA upon his finding that: (1) a good faith effort to comply has been made, (2) non-compliance is due to the unavailability of either the necessary technology or the requisite alternative methods, and (3) "the continued operation of such source is essential to the national security or to the public health or welfare." 42 U.S.C. § 1857c-5(f)(1) (1970). The Commerce Department has proposed an amendment to the variance provision which would allow the Administrator to grant a variance of up to three years and allow him to consider the added factors of fuel availability and economic impact of compliance. 5 ENVIRONMENT RPTR. CURRENT DEV. 1263, 1264 (1974).

42. 489 F.2d at 400.

43. Revisions (changes, alterations and improvements) to the implementation plans are covered by 42 U.S.C. § 1857c-5(a)(3) (1970), *as amended*, (Supp. IV, 1974). The Administrator incorporated his view of the revision into the EPA guidelines. *See* 40 C.F.R. §§ 51.6, 51.32 (1974).

44. *See* notes 37-38 and accompanying text *supra*.

45. Post-attainment refers to the period after the states meet the national primary standard. In most cases this will be in mid-1975 (or 1977 with the two year extension under 42 U.S.C. § 1857c-5(e)(1970)).

EPA contended that before the attainment deadlines states were free to grant variances by their own standards so long as the achievement of the national ambient air standards were not threatened. The Fifth Circuit, rejecting both of these arguments, held that section 1857c-5(f) was the exclusive mechanism for granting variances and that therefore the Georgia variance provision was invalid.[46]

A wide split among the circuits[47] has resulted from the dilemma over which federal provision controls the granting of variances and at what stage in the implementation process that provision applies. The First Circuit, adopting EPA's alternative argument, held that section 1857c-5(f) was exclusive only in the post-attainment time period.[48] The Ninth Circuit, however, rejected this distinction and ruled that a state could grant a variance at any time, providing the attainment and maintenance of the national ambient air quality standards were not threatened.[49] Both of these decisions were based on a perception of inherent flexibility[50]

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46. 489 F.2d at 401-03.

47. NRDC v. EPA, 507 F.2d 905 (9th Cir. 1974); NRDC v. EPA, 494 F.2d 519 (2d Cir. 1974); NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974); NRDC v. EPA, 483 F.2d 690 (8th Cir. 1973); NRDC v. EPA, 478 F.2d 875 (1st Cir. 1973).

48. NRDC v. EPA, 478 F.2d 875, 888 (1st Cir. 1973). *Accord*, NRDC v. EPA, 494 F.2d 519, 523-25 (2d Cir. 1974); NRDC v. EPA, 483 F.2d 690, 693-94 (8th Cir. 1973); *see* Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F. Supp. 1089, 1094 (D.D.C. 1974); Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co., 367 F. Supp. 1040, 1044 (D. Del. 1973). Upon investigation the First Circuit's pre/post distinction is found to be without legislative support. Neither the 1970 Amendments nor their legislative history make any reference to such a distinction. *See* 42 U.S.C. §§ 1857-58a (1970), *as amended*, (Supp. IV, 1974); S. REP. No. 1196, *supra* note 2; H.R. REP. No. 1146, 91st Cong., 2d Sess. (1970); *1970 Senate Hearings*, *supra* note 3. Moreover, the reasoning itself is faulty. The First Circuit stated that if the variance scheme allowed during pre-attainment period was also allowed during a post-attainment period, "endless delay" over whether the variance would interfere with the attainment of the national standard would result. 478 F.2d at 886. The court, however, provides no substantial assurances that the undesirable results it predicts would happen during the post-attainment period would not also occur in the more critical pre-attainment period. EPA's recently proposed regulations adopt the First Circuit's holding approving limited federal preemption. *See* 39 Fed. Reg. 34,572-74 (1974).

49. NRDC v. EPA, 507 F.2d 905, 912 (9th Cir. 1974).

50. These courts read the language of 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970), which says that states must meet the national air quality standards "as expeditiously as practicable" but no later than three years after their implementation plan has been approved, as indicative of Congressional intent to allow flexibility in the granting of variances. NRDC v. EPA, 507 F.2d 905, 912

within the Clean Air Amendments rather than on the specific statutory argument advanced by EPA. In fact, all five of the circuits which reviewed this question specifically rejected EPA's application of the revision section to the granting of variances.[51]

In *Train v. NRDC*,[52] the Supreme Court resolved this conflict, adopting EPA's interpretation that the revision mechanism of section 1857c-5(a)(3) controls the granting of variances. The Court stated that, "Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts."[53] While it is true that this issue does not admit an "easy answer,"[54] a thorough examination of the statute, its legislative history, and its control strategy demonstrates that the Supreme Court erred.

A basic theme underlying the Court's decision was that EPA should be accorded considerable discretion in construing a statute which falls within its expertise.[55] While this is true in general, the precise degree of such discretion is determined by the specific statute in question. In the case of the Clean Air Amendments the administrator's discretionary powers were severely limited. The Amendments were designed to correct the unaggressive nature of the federal agency itself.[56] To achieve this, Congress wrote stringent administrative standards and procedures into the Clean Air Amendments,[57] delegating great power to EPA to enforce the Amendments but little power to alter or defer from them.[58] Given

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(9th Cir. 1974); NRDC v. EPA, 478 F.2d 875, 887 (1st Cir. 1973). The problem with this reasoning is that the language stands for just the opposite proposition. Flexibility was expressly written out of this section of the statute. *See* notes 7, 27 *supra* & note 67 *infra*. *See also 1970 Senate Hearings*, pt. 4, *supra* note 3, at 1502 (remarks of Senator Eagleton).

51. *See* cases cited note 47 *supra*.

52. 421 U.S. 60 (1975), *rev'g in part* NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974).

53. *Id.* at 75.

54. *Id.*

55. *See* note 53 and accompanying text *supra*.

56. *See* notes 2-3 and accompanying text *supra*.

57. *See* notes 4-10 and accompanying text *supra*.

58. "The committee will be available to sit. The companies would be in a position to make their case. If Congress, which would have made the policy

these strict guidelines on administrative action, the Supreme Court erred in the excessive deference it gave to the agency's position in this case.

Even granting a reasonable degree of administrative discretion, the Supreme Court's adoption of EPA's construction of the Amendments is not supported by either the statute or its legislative history. In its holding the Supreme Court relied heavily upon a portion of the Senate Report which states: "If a Governor judges that any region . . . or portions thereof within his State will not meet the *national ambient air quality standards* within the time provided, [section 1857c-5(f)] would authorize him . . . to file a petition . . . for relief."[59] From this statement the Court reasoned that section 1857c-5(f) is applicable *only* when the national ambient air quality standards are threatened.[60] The weakness in the Court's reasoning is that it has examined this portion of the legislative history in a vacuum, ignoring the other relevant portions of the legislative history[61] and the "plain meaning" of the statute itself. Section 1857c-5(f) specifically states that it is applicable when "any stationary source" seeks a postponement from *"any requirement* of an applicable implementation plan."[62] Moreover, neither the wording nor the placement of the revision section implies that it is to be used in any manner

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in the first instance, is persuaded that the industry cannot do the job, Congress could change the policy." 116 CONG. REC. 32,905 (1970) (remarks of Senator Muskie). *See also* notes 9-10 and accompanying text *supra.*

59. S. REP. No. 1196, *supra* note 2, at 14-15 (emphasis added). The Court also felt that the relationship between § 1857c-5(f) and § 1857c-5(e) (extension of time for application of implementation plan itself, granted only at time of submission of such plans) supported its conclusion. 421 U.S. at 83-87.

60. 421 U.S. at 84.

61. *See 1970 Senate Hearings*, pt. 4, *supra* note 3, at 1502 (remarks of Senator Eagleton); notes 55-56 and accompanying text *supra.*

62. 42 U.S.C. § 1857c-5(f) (1970) (emphasis added). The Court's response to this language was that it "serves only to define the matters with respect to which the governor of a State *may* apply for a postponement. The language does not, as the Fifth Circuit would have it, state that all sources desirous of any form of relief *must* rely solely on the postponement provision." 421 U.S. at 88. Under the Court's interpretation, variances which do not threaten the national standards may be handled in either of two ways. A Governor may seek relief under the strict federal standards of § 1857c-5(f) or the relevant state statute can be applied. This is a strained construction of words which are plain in their meaning. First, it is inconsistent with the Amendments' control strategy, *see* notes 64-69 and accompanying text *infra.* Secondly, the word "may" in the statute refers to the Governor's power of discretion to seek a variance in the first place, not the level at which it is going to be sought. Finally, the statute says nothing about attainment and maintenance of national standards; it specifically states "any requirement." 42 U.S.C. § 1857c-5(f) (1970).

connected with the granting of variances.[63] On the contrary, the revision provision refers to changes in the implementation plan itself, not to variances by the individual polluters.

Most importantly, EPA's interpretation directly conflicts with the enforcement scheme devised by Congress. This scheme is designed to pressure states to establish their own aggressive enforcement programs,[64] rectifying the passive situation existing prior to the 1970 Amendments.[65] Mandatory state implementation plans[66] for meeting national standards in accordance with strict timetables[67] are critical components of this enforcement program. Requests for variances from enforcement plans and

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63. The revision section is placed immediately after, and refers to, the initial requirements for state implementation plans, § 1857c-(5)(a)(2), which are the standards by which any revision is to be judged. 42 U.S.C. § 1857c-5(a)(3)(1970). Moreover, the statute specified that the revision section supplements the implementation as a whole when the statute defines an applicable implementation plan as "the implementation, or most recent revision thereof." *Id.* § 1857c-5(d). For added support for this argument see Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F. Supp. 1089, 1094 (D.D.C. 1974); S. REP. No. 1196, *supra* note 2, at 14.

64. The Fifth Circuit recognized the purpose of this enforcement scheme: "[T]he plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need." NRDC v. EPA, 489 F.2d 390, 403 (5th Cir. 1974), *rev'd in part sub nom.* Train v. NRDC, 421 U.S. 60 (1975).

65. *See* notes 2-3 and accompanying text *supra.*

66. *See* S. REP. No. 1196, *supra* note 2, at 11-12; *Implementation Hearings, supra* note 20, at 226 (remarks of William Ruckelshaus, EPA Administrator). These sources stress the critical role the implementation plans play in the enforcement scheme.

67. *See* note 7 and accompanying text *supra.* Congress, in establishing firm deadlines rejected both the Administration's bill, S. 3466, 91st Cong., 2d Sess. (1970), *reprinted in 1970 Senate Hearings, supra* note 3, at 26-46, and the House's bill, H.R. 17255, 91st Cong., 2d Sess. (1970), which did not establish deadlines, but provided that the national standards were to be met within a "reasonable time." *See* note 27 *supra.* The importance of strict attainment of these deadlines is dramatically demonstrated in a draft of a report to the Federal Power Commission. FEDERAL POWER COMMISSION, POWER GENERATION: CONSERVATION, HEALTH, AND FUEL SUPPLY, A REPORT TO THE TASK FORCE ON CONSERVATION AND FUEL SUPPLY TECHNICAL ADVISORY COMM. ON CONSERVATION OF ENERGY (National Power Survey 1973). The report points out that failure to meet primary national standards for sulfur (the main pollutant of power plants) by the 1975 deadline would result in approximately 25,000 or more premature deaths in this country between 1975 and 1980.

deadlines are to be carefully scrutinized[68] and granted only as a "last alternative."[69]

Under EPA's interpretation, the essential purpose of this scheme—the achievement of "air quality standards protective of the health of persons"[70] within the assigned deadlines—is defeated because EPA has chosen not to recognize the cumulative effect of pollution. The granting of one variance may not lead to frustration of the national standards; the cumulative effect of several variances quite possibly could. Given the difficulty of tracing emissions to any one source when dealing with urban areas,[71] it is impossible to predict if and when a single variance will exceed the national standards. Thus, the end result will be that while no one source will have been found to frustrate the national standards, they will nevertheless have been frustrated.

In *NRDC v. EPA*[72] the court of appeals upheld the intricate enforcement scheme woven into the Clean Air Amendments when it held that: (1) public access to emission data cannot be blocked by state trade secret provisions; (2) dispersal techniques are inadequate primary control strategies as stipulated by the Clean Air Amendments; (3) economic impact and technical feasibility are improper considerations in formulating implementation plans; and (4) the federal variance procedure preempts any state procedure at all times. The Supreme Court reversed the Fifth Circuit on the issue of variances and ruled that under section 1857c-5(a)(3) a state may grant a variance by whatever standards it chooses, providing the national ambient air standards are not threatened.[73]

The significance of these holdings goes well beyond the individual merits of each issue. Implicit in the Clean Air Amendments is a dual

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68. *See* notes 8, 41 and accompanying text *supra*.

69. S. REP. No. 1196, *supra* note 2, at 15. The Senate Report provides that extensions are to be granted only if essential to the public interest and general welfare of the people in that region. *Id.* The report also states that the pressure of deadlines is to be met by federal participation in the form of staff and funds rather than by extensions of deadlines. *Id.* at 4.

70. *Id.* at 2.

71. *1970 Senate Hearings*, *supra* note 3, at 397; *see also* 39 Fed. Reg. 31,000, 31,003 (1974).

72. 489 F.2d 390 (5th Cir. 1974), *rev'd in part sub nom.* Train v. NRDC, 421 U.S. 60 (1975).

73. Train v. NRDC, 421 U.S. 60, 98-99 (1975).

delegation. Accompanying the immense power delegated to EPA was an equal degree of responsibility as to its use. The Fifth Circuit recognized this when it refused to allow EPA to foresake its responsibility. The Supreme Court, in reversing the Fifth Circuit on the issue of variances, did not.

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