THE CLEAN AIR ACT AND THE CONCEPT OF NON-DEGRADATION: SIERRA CLUB v. RUCKELSHAUS

Federal authority to abate and prevent air pollution is chiefly embodied in the Clean Air Act, strengthened in 1970 by several controversial amendments. As subsequent litigation has revealed, the statute has far more teeth and portends a much wider scope of federal regulatory and enforcement activity than originally believed. This Note analyzes the most significant action brought to date under the new Clean Air Act, Sierra Club v. Ruckelshaus. The ultimate judicial resolution of the question of whether or not the Act mandates a policy prohibiting deterioration of air quality in areas of relatively clean air will have a momentous impact on future economic development throughout the country. If non-degradation is determined not to be a basic requirement of the Act, existing preferences for location of new industries are likely to undergo a radical shift from highly-regulated urban centers to presently rural and suburban areas—with the concomitant result of exporting the air pollution problems of the cities to the rest of the nation. After discussing the initial district court decision this Note analyzes both the legal and political issues involved in the battle over non-degradation.

In May of 1972 the Sierra Club and other environmental groups filed the first major suit under the Clean Air Amendments of 1970 to the Air Quality Act of 1967, Sierra Club v. Ruckelshaus. Utilizing the new “citizen suit” provisions of the 1970 Amendments, they brought an action in the District Court for the District of Columbia against William D. Ruckelshaus, Administrator of the Environmental Protection Agency (EPA). The


plaintiffs have alleged that recent regulations promulgated by the Administrator will permit significant deterioration of the nation's clean air by allowing the Administrator to approve state anti-pollution programs which reduce air pollution in heavily polluted areas at the expense of relatively clean areas. The district court granted an injunction barring the approval of such state plans and ordering EPA to draft new regulations which would prohibit the Administrator from approving any state plan which allows significant deterioration of relatively clean air. This ruling was subsequently upheld by the Court of Appeals for the District of Columbia Circuit. EPA, represented in the litigation by the Department of Justice, petitioned the Supreme Court, which granted certiorari and stayed the district court order.

The Sierra Club and co-plaintiffs maintain that the challenged regulations violate the letter and spirit of the Clean Air Act and that both the language and the legislative history of the Act indicate a clear congressional commitment not only to the improvement of air quality in heavily polluted areas, but also to "non-degradation" of air quality in relatively less polluted regions. "Non-degradation" is a term of art which means simply that under no circumstances will the existing air quality in a given area be permitted to deteriorate. The 1970 Amendments require the Administrator to set national ambient air quality standards and to review, approve or reject, and supervise state implementation plans in order to reach and maintain those standards. In regions where the air is more polluted than the standards permit, there is no question that EPA officials are authorized to enforce anti-pollution measures. But in those areas where the air is still cleaner than the minimum quality figure set by the national standards, air quality could deteriorate to those standards unless either EPA or the states enforce a policy of non-degradation. In the absence of such a policy, no enforcement or prevention actions would be undertaken by either EPA or the states until the air purity of a particular region deteriorates to a level beneath the national ambient air quality standards.

The issue of non-degradation has both political and economic ramifications. All air pollution control ultimately involves land-use control.

5. See note 1 supra regarding terminology of the various acts.
6. Brief for the Sierra Club as Appellee at 14, 18, Sierra Club v. Ruckelshaus, — F.2d —, 4 ERC 1815 (D.C. Cir. 1972) [hereinafter cited as Sierra Club Brief].
7. There are two levels of national ambient air quality standards under the 1970 Amendments: primary, which protect public health, and secondary, which protect public welfare. See text accompanying notes 13-15 infra.
9. See Trumbull, supra note 1, at 303-05 for discussion of EPA's enforcement role.
10. Private nuisance actions and municipal zoning ordinances have long been concerned with remedies for and dispersal of noxious odors, fumes, and noises from production facilities. Today, every decision involving industrial site placement, highway and mass transit routes, and the zoning of multiple family housing developments has both air pollution and land-use ramifications. See generally INSTITUTE OF PUBLIC ADMINISTRATION, GOVERNMENTAL APPROACHES TO AIR POLLUTION CONTROL, ch. 4.
Non-degradation applies only to areas of relatively clean air, and thus involves land-use planning and control primarily in the suburban and rural parts of the country. Since it is in these areas that the greatest amount of growth and development is presently occurring, the controversy over non-degradation is particularly acute between those who wish to continue to profit from non-urban land and industrial development, and those who wish to stop, or, at a minimum, control such growth. A strictly enforced non-degradation policy would end or at least slow development as we now know it. Industry would be told not only how and where to build, but whether it could build at all. For example, even a single new factory in the pristine Arizona wilderness might degrade the quality of the local air, and could thus be barred from operating under a non-degradation policy. The real issue, therefore, is not whether we want clean air, but how clean do we want the air to be in a given area, and how much are we willing to change our current pattern of development to maintain that level of air quality? Are we willing to control or halt development of the suburban and rural portions of the country, and if so, who is to make the necessary decisions: industry itself, the states, or the federal government?

These political and economic issues have been mentioned only peripherally in the briefs and opinions in this case. The parties and the district court all have dealt primarily with a problem of statutory construction. The legal issue is whether or not the Clean Air Act requires the Administrator to enforce a program of non-degradation. The 1970 Amendments require each state to submit a plan for the implementation of national air quality standards to the Administrator. Each state implementation plan must meet certain requirements imposed by the Amendments. The statutory question is straightforward: Is non-degradation one of these requirements? The Sierra Club has asserted that it is, and the district court and court of appeals agreed. EPA has argued that non-degradation is not a statutory requirement and that the Administrator may therefore approve state implementation plans which permit degradation of the quality of relatively clean air.

After summarizing the issues decided by the district court, this Note will evaluate the conflicting positions of the parties regarding construction of the Clean Air Act. This will involve analysis of several of the Act's key provisions, its legislative history, and the contradictory administrative inter-

11. The political and economic issues are discussed briefly in the Sierra Club Brief, supra note 6, at 40-47, and in the Brief for Appellant Justice Department at 28-32, Sierra Club v. Ruckelshaus, — F.2d —, 4 ERC 1815 (D.C. Cir. 1972) [hereinafter cited as Justice Dep't Brief].

pretations issued by EPA. Finally, the Note will discuss the major political and economic implications of this controversy and assess the likelihood of effective enforcement of a non-degradation standard if the lower courts’ decisions are ultimately upheld.

I

THE STATUTORY CONTEXT AND THE DISTRICT COURT OPINION

Under the Clean Air Act, specifically the 1970 Amendments, EPA was required to publish national primary and secondary ambient air standards by January 30, 1971. The Act mandates primary standards “to protect the public health,” and secondary standards to “protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutants in the ambient air.” Secondary standards are designed to be more encompassing and stricter than the primary standards. The Act declares that the term “public welfare” includes effects on soil, water, crops, vegetation, man made materials, minerals, wildlife, weather visibility, and character, damage to and deterioration of property, hazards to transportation, as well as on economic values and on personal comfort and well-being.

On April 30, 1971, after a three-month wait for public comment, EPA promulgated primary and secondary standards. Each state then had nine months to develop and submit a plan for implementation, maintenance, and enforcement of the standards. After the states submitted their implementation plans, EPA had four months (until the end of May 1972) to approve or disapprove the plans, and six more months to modify portions of state...

14. Id. § 1857c-4(b)(1), (2).
15. Id. § 1857h(h).
16. Primary and secondary ambient air standards have been promulgated for sulfur oxides, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C.F.R. §§ 50.4-.11. The specific numerical standards set by EPA have been subject to strong industry attack. The secondary standard for sulfur oxide has been the subject of a significant amount of litigation since its announcement, with varied results. The Ninth Circuit recently dismissed without comment a suit by five Arizona copper companies, which claimed that the Arizona implementation plan’s treatment of sulfur dioxide emissions, rejected by EPA, satisfied the requirements of the Act; two similar suits initiated by three Arizona power companies and the State Board of Health, remain on its docket. See also Kennecott Copper Corp. v. EPA, — F.2d —, 3 ERC 1682 (D.C. Cir. 1972) (remanded for further EPA documentation of basis for sulfur oxide standard established); Anaconda Co. v. Ruckelshaus, — F. Supp. —, 4 ERC 1817 (D. Colo. 1972) (EPA directed to provide full evidentiary hearing for Anaconda’s challenge to EPA regulations concerning sulfur oxides in the Montana implementation plan); Getty Oil Co. v. Ruckelshaus, 342 F. Supp. 1006, 4 ERC 1141 (D. Del.), aff’d, 467 F.2d 349, 4 ERC 1567 (3d Cir.), cert. denied, — U.S. —, 4 ERC 2088 (1972) (challenge to sulfur oxide emission standard of Delaware implementation plan rejected).
plans which failed to meet the requirements of the Act or the regulations issued thereunder.\textsuperscript{18}

On May 24, six days before EPA was to act, the Sierra Club and co-plaintiffs filed suit against EPA Administrator Ruckelshaus in the United States District Court for the District of Columbia. Plaintiffs sought a declaratory judgment that section 51.12(b)\textsuperscript{19} of the EPA's implementing regulations was invalid in that it permitted the Administrator to approve state implementation plans which allowed significant deterioration of air quality in regions where the existing air quality exceeded EPA's secondary standards.\textsuperscript{20} Plaintiffs further asked that the court direct the Administrator not to approve any part of a state implementation plan which would allow significant deterioration in an area which was less polluted than the secondary air standards, or which failed to ensure maintenance of the current air quality.\textsuperscript{21}

---

\textsuperscript{18} Id. §§ 1857c-5(a)(2), (c). The time scheme contemplated by the Act has not been achieved, and EPA's overall administration of the provisions relating to state implementation plans has been less than adequate. As of November 1972, only 24 state implementation plans had been fully approved by EPA. Both the plans now accepted and those still being formulated have required the issuance of new regulations by EPA to correct deficiencies in the original state proposals. Recurrent problems have concerned requirements for reporting emissions data to EPA and the general public, obtaining source control compliance schedules, and providing procedures for controlling emergency episode actions and for preventing construction of new sources which would inhibit attainment of national standards. \textit{3 Env. Repr.—Curr. Dev.} 769 (1972).

The federal courts have found several EPA shortcomings regarding administration and interpretation of the Act. EPA disapproval of the California implementation plan was followed by the failure of EPA to prepare a substitute plan within the allotted six-month time period. A district court ordered EPA to prepare the plan by Jan. 15, 1973. \textit{Riverside v. Ruckelshaus, — F. Supp. —, 4 ERC 1728 (C.D. Cal. 1972).} EPA also failed to finalize proposed emission standards for three hazardous air pollutants—asbestos, beryllium, and mercury—by the June 7, 1972, deadline. In February 1973, the Administrator was directed to promulgate such standards within 60 days. \textit{EDF v. Ruckelshaus, — F. Supp. —, 4 ERC — (D.D.C. 1973).}

On May 31, 1972, EPA granted 17 heavily industrialized states a two-year delay for incorporating standards and control strategies for carbon monoxide and photochemical oxides into their state implementation plans. The agency felt that the "state of the art" of control of automobile emissions and the ability of the states to use exhaust control devices, traffic flow controls, or mass transit was not sufficiently developed to permit them to make the original 1975 deadline. This determination, while made in "good faith," was held to violate the "strict requirements" of the Clean Air Act in \textit{NRDC v. Ruckelshaus, — F.2d —, 4 ERC — (D.C. Cir. 1973).} The court ruled that the agency had interfered with the express congressional goal of attaining clean air by 1975 and that such an extension did not fall within the limited extensions permitted under the statute. The court ordered the respective states to submit new plans by April 15, 1973, to be approved or corrected by EPA by Aug. 15, 1973. No further extensions would be allowed unless EPA could indicate that technological compliance with the 1975 deadline would be "impossible."

\textsuperscript{19} 40 C.F.R. § 51.12(b) (1972). See note 32 infra.

\textsuperscript{20} Brief for Sierra Club as Plaintiff at 11, \textit{Sierra Club v. Ruckelshaus, 344 F. Supp. 253, 4 ERC 1205 (D.D.C. 1972).}

\textsuperscript{21} \textit{Id.} at 10-11.
On May 30, immediately following oral argument, the district court issued a preliminary injunction in which the Administrator was enjoined from approving any state implementation plan under 42 U.S.C. 1875c-5 unless he approves the State plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the administrator.

The preliminary injunction further ordered the Administrator to review all state plans within four months and to prepare and publish within six months regulations sufficient to correct any state implementation plans submitted to him which would permit significant deterioration of air quality in any portion of a state.

In a brief opinion the district court unequivocally adopted the Sierra Club’s interpretation of the Clean Air Act. The court first found that it had jurisdiction to entertain the suit. EPA had urged that the plaintiffs were required to wait until the Administrator approved the state plans lacking non-degradation provisions and then could appeal to the appropriate circuit court of appeals under the section of the Act that provides for judicial review of any “action by the Administrator in promulgating any national primary or secondary ambient air quality standards.” However, the court agreed with the Sierra Club that the citizen-suit section of the Act, which allows for suit by “any person” against the Administrator in a federal district court, was more appropriate. The court stated that the allegation of

22. Telephone interview with James R. Walpole, one of the Department of Justice attorneys representing EPA, October 20, 1972. Mr. Walpole drafted the district court brief for EPA. Walpole stated that the district court judge apparently had come to the session with the injunction already written.


24. Id.


26. The citizen-suit provision states in relevant part:

   (a) Except as [otherwise] provided . . . any person may commence a civil action on his own behalf—

   (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

   The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such an act or duty, as the case may be.


EPA contended that the action was governed by section 307 of the Act, which states that petitions for actions under certain specified sections of the Act—including promulgation of national standards—must be filed in the District of Columbia Circuit, and that “[a] petition for review of the Administrator’s action in approving or promulgating any implementation plan under section 1857c-5 . . . may be filed only in the United States Court of Appeals for the appropriate circuit.” Id. § 1857h-5(b)(1).

EPA noted language in the legislative history of the section which stated broadly that review of “administrative actions [which are] national in scope and require even and consistent national application . . . shall be in the [District of Columbia Circuit].”
the Sierra Club was "precisely the type of claim which Congress . . . intended interested citizens to raise in the district courts."\textsuperscript{27}

After establishing its jurisdiction, the court found that the language of the statute "would appear to declare Congress' intent to . . . prevent deterioration of . . . air quality, no matter how presently pure that quality in some sections of the country happens to be."\textsuperscript{28} The court then examined the legislative history of the Act. Culling examples directly from the Sierra Club's brief, the court concluded:

Having considered the stated purpose of the Clean Air Act of 1970, the legislative history of the Act and its predecessors, . . . it is our judgment that the Clean Air Act of 1970 is based in important part on a policy of non-degradation of existing clean air and that 40 C.F.R. 51.12(b), in permitting the states to submit plans which allow pollution levels of clean air to rise to the secondary standard level of pollution, is contrary to the legislative policy of the Act and is, therefore, invalid.\textsuperscript{29}

The court found additional support for this judgment in the history of the administrative interpretation of the act. It noted that in 1969, Department of Health, Education and Welfare (HEW)\textsuperscript{30} guidelines had included a policy of non-degradation, and that HEW Secretary Robert Finch and Undersecretary John Veneman had interpreted the 1967 Act and 1970 Amendments to include non-degradation.\textsuperscript{30a} However, the court pointed out that current administrative interpretations of the 1970 Amendments are contradictory: 40 C.F.R. § 50.2(c) (1972) seems to support the previous policy of non-degradation since it would prevent the promulgation of national primary and secondary standards which "allow significant deterioration of existing air quality."\textsuperscript{31} But 40 C.F.R. § 51.12(b) (1972) is the section which seems
to have guided the Administrator in his review of state implementation plans. That section requires only that in clean air areas state implementation plans prevent pollution from exceeding the secondary standards.\textsuperscript{32} The court observed:

The former regulation appears to reflect a policy of non-degradation of clean air but the latter mirrors the Administrator's doubts as to his authority to impose such a policy upon the states in their implementation plans. In our view, these regulations are irreconcilable and they demonstrate the weakness of the Administrator's position in this case.\textsuperscript{33}

Finally, the court found that the plaintiffs had met each of the four necessary criteria for injunctive relief: that once degradation was permitted, the injury suffered would be irreparable; that the issuance of a stay would cause no significant harm or inconvenience to the Administrator; that the plaintiffs made a strong showing that they would prevail on the merits; and that the public interest strongly supported the legislative policy of non-degradation in areas where clean air exists.\textsuperscript{34}

At the end of August, EPA filed an application to stay the final judgment on the grounds that "meeting a September 30 deadline [would] force the exclusion of several of the more sophisticated alternatives [methods of achieving non-degradation] from consideration."\textsuperscript{35} The court was apparently unmoved, and denied the application for a stay of judgment.\textsuperscript{36} On October 27, 1972, the Court of Appeals for the District of Columbia heard oral argument on the case. Six days later, in a brief memorandum ruling with no opinion, it affirmed the district court's decision.\textsuperscript{37} The affirmative order of the district court was, however, stayed by the Supreme Court on December 11, 1972, and certiorari was subsequently granted on January 15, 1973.\textsuperscript{38}

ambient air quality standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any State." 40 C.F.R. § 50.2(c) (1972).

32. The section is titled "Control strategy: General." Subsection (b) states:
In any region where measured or estimated ambient levels of a pollutant are below the levels specified by an applicable secondary standard, the plan shall set forth a control strategy which shall be adequate to prevent such ambient pollution levels from exceeding such secondary standard.

\textit{Id.} § 51.12(b).

33. 344 F. Supp. at 256, 4 ERC at 1207.
34. \textit{Id.} at 256-57, 4 ERC at 1207-08.
36. Application for Stay Denied, Civil No. 1031-72 (D.D.C., decided Sept. 19, 1972). By September 30, the four-month deadline set by the preliminary injunction for review of state plans had expired, and the Sierra Club informed the Administrator that he was in danger of being cited for contempt of the order. EPA assured the Sierra Club that it needed only a few extra days to complete the necessary modifications of state plans, so the Sierra Club wrote District Court Judge Pratt asking him to withhold the contempt citation. Telephone interview with Bruce Terris, attorney for the Sierra Club, Oct. 16, 1972.

EPA successfully argued that the issue of non-degradation under the Clean Air
II

CONSTRUCTION OF THE STATUTE: DOES “PROTECT AND ENHANCE” MEAN NON-DEGRADATION?

The main legal issue in Sierra Club v. Ruckelshaus is whether or not the Clean Air Act, as amended, mandates a policy of non-degradation. A statute is open to judicial construction only if it is ambiguous concerning the point in contention. Since the language of both the 1967 Act and the 1970 Amendments is equivocal on non-degradation, the parties to the action sought to resolve this issue by looking to the legislative intent. Three sources were consulted in trying to establish that intent: the purpose clause of the Clean Air Act, the implementation clauses of the Act, and the legislative history.

A. The Purpose Clause

If the purpose of a statute is clearly stated within it, that purpose controls interpretation of the statute as long as it is not incompatible with the rest of the statute. One purpose of the Air Quality Act of 1967 is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population,” and the Sierra Club has maintained that this language incorporated a non-degradation policy into the Clean Air Act. The Club has asserted that “protect” means that the “air would not be further harmed or injured by lowering its quality.” It is well established that statutes are to be interpreted according to their plain and ordinary meaning. The Sierra Club has pointed out that the dictionary definition of “protect” is “to keep from..."
harm, attack or injury; to guard.\textsuperscript{46} It has argued simply that the plain, common sense meaning of "protect and enhance" precludes deterioration of clean air; furthermore, "[a] statute called the 'Clean Air Act' cannot permit so much of the country's air to get dirtier."\textsuperscript{47} The district court agreed; referring to the phrase "protect and enhance," the court briefly stated:

This language would appear to declare Congress' attempt to improve the quality of the nation's air and to prevent deterioration of that air quality, no matter how presently pure that quality in some sections of the country happens to be.\textsuperscript{48}

This argument alone is unconvincing. The total impact of the Act is much greater if it includes a non-degradation policy than if it does not. A decision so central to the scope of an act should not hinge on a phrase as dependent on other factors for its meaning as "protect and enhance" appears to be. Although the Sierra Club's "common sense" argument is appealing in its simplicity, the word "protect" does not necessarily mean that all clean air must stay as clean as it is. Certainly Congress is not so unsophisticated that it cannot contemplate the possibility or necessity of trade-offs to achieve an overall goal of cleaner air. It may be, for example, that to make the most polluted air meet minimum quality standards, clean air elsewhere must become somewhat more polluted. Indeed, EPA has maintained that a program of non-degradation would cause pollution to rise in critical areas.\textsuperscript{49} It has argued that a policy of non-degradation would distort both the natural market distribution of available resources and the economics of urban life in such a way as to cause the level of pollution to rise in already heavily polluted areas; e.g., in a clean-air region a marginal increase in the level of pollution might do little harm to the public health and welfare, while in heavily polluted areas, even slight increases made necessary by non-degradation in clean-air regions would do significant damage. Thus, "unnecessary" purity would be maintained in some areas at the expense of anti-pollution efforts critical to the public health and welfare in urban and industrial areas.\textsuperscript{50} If there is merit in EPA's position, the mandate to "protect" could simply mean a duty to design the trade-off so as to render maximum overall protection of the public health and welfare, and one could argue that an EPA Administrator who promulgated non-degradation regula-

\textsuperscript{46} AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1051 (1969), cited by Sierra Club Brief, supra note 6, at 14.

\textsuperscript{47} Terris interview, supra note 36; cf. Sierra Club Brief, supra note 6, at 16. The Supreme Court has held that the title of a statute (e.g., the "Clean Air Act") can be referred to in determining its purpose. FTC v. Mandel Bros., Inc., 359 U.S. 385, 388 (1959). This Sierra Club argument is simple and appealing. As one EPA official put it: "It's a hard position to fight. They [the circuit court judges] just kept asking [during oral argument]: 'Well do you mean you're going to let clean air get dirty?'" Telephone interview with Robert Baum, Office of the General Counsel of EPA, Nov. 30, 1972.

\textsuperscript{48} 344 F. Supp. at 255, 4 ERC at 1206.

\textsuperscript{49} Justice Dep't Brief, supra note 11, at 29-30.

\textsuperscript{50} Id. at 29-32; Baum interview, supra note 47; Walpole interview, supra note 22.
tions had failed to "protect . . . the quality of the nation's air" in terms of the ultimate public health and welfare objective of the Act.

By themselves, therefore, the words "protect and enhance" are not proof of congressional intent to include a non-degradation policy in the statute. To establish that intent, one must go further and examine the words "protect and enhance" in light of the implementation sections of the Act and its overall legislative history.

B. The Implementation Clauses

1. Section 110: General Requirements for State Plans

Section 110 provides for submission of state implementation plans to the Administrator, who "shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing" and that the plan fulfills the eight requirements enumerated in the section. The first of the eight requirements is that the state plan provide for the attainment of the national primary standards "as expeditiously as practicable, but in no case later than three years" after their promulgation by EPA, and for implementation of national secondary standards within a "reasonable time." Since non-degradation is conspicuously absent from the listed requirements, EPA has argued that it is not required by the Act:

If a plan meets [section 110's eight] statutory requirements—not one of which is the requirement of preventing deterioration of air quality in already "clean air" areas—. . . the Administrator must approve the plan. Nowhere does the Act give him the authority to reject a plan for other reasons.

EPA has contended that "[s]urely, in an Act drawn with this care and detail had Congress intended the 'non-deterioration' interpretation of the district court, it would have specifically so provided in Section 110."

This argument does not resolve the question. It is probable that had Congress desired to incorporate an explicit non-degradation provision in the

52. Id. § 1857c-5.
53. Id. § 1857c-5(a)(2). Section 110 sets out the following eight criteria that a state plan must meet in order to be approved by the Administrator:
1. If meeting a national primary ambient air quality standard, it must provide a deadline of not more than three years; if achieving a secondary standard it must specify a "reasonable time;"
2. It must include emission limitations, schedules and timetables;
3. It must include provisions for monitoring data and making such data available to the Administrator;
4. It must include a procedure for review of location of new sources;
5. It must adequately provide for intergovernmental cooperation;
6. It must adequately provide for personnel, funding, installation and periodic reports;
7. It must provide for periodic inspection and testing of motor vehicles to enforce emission standards;
8. It must provide procedures for revision of the plan itself.
Id. § 1857c-5(a)(2)(A)-(H) (summarized).
54. Id. § 1857c-5(a)(2)(A).
55. Justice Dep't Brief, supra note 11, at 13.
56. Id. at 15.
Act, it would have chosen section 110 as the logical place to insert that provision. However, the central question remains unanswered: Did Congress feel that it had already written non-degradation into the Act when it used the words “protect and enhance” in the purpose clause of the Act?67 The absence of an explicit non-degradation provision in section 110 at best provides only slight support for EPA’s position.

EPA has also maintained that the purpose clause of the statute must be read in light of sections 10958 and 110. This point was poorly expressed in the EPA brief,59 but on examination of the language of the Act it is EPA’s most compelling argument, and certainly deserves more consideration than the district court gave it. The stated purpose of the Act is “to protect and enhance the quality of the nation’s air so as to promote the public health and welfare . . . .”60 EPA has pointed out that the latter part of this sentence dovetails perfectly with the language of section 109, which requires that national primary standards be sufficient to “protect the public health,”61 and that the national secondary standards be designed to “protect the public welfare.”62 Thus, EPA has concluded that compliance by the states with the requirements of section 110—thereby providing for achievement of the standards promulgated in accordance with section 109—is sufficient to carry out the stated purpose of the statute.

Sierra Club attorneys feel that EPA’s interpretation of section 110 is a mere “technicality.” Their main response is to reassert their “common sense” argument that the statute includes non-degradation as a primary goal.63 It may be, however, that to “protect” all the nation’s air, some air must be allowed to deteriorate. On a close reading of the purpose clause, one could construe the phrase “so as to protect the public health and welfare” as an invitation to turn to sections 109 and 110 to determine how the “protect and enhance” mandate is to be achieved. However, the other implementation clauses provide little documentation of the alleged congressional intent to restrict the broad language of the purpose clause to the requirements contained in section 110. In addition, it seems clear that several of the Senators primarily responsible for drafting the Clean Air Amendments of 1970 were convinced that the words “protect and enhance” meant non-degradation—and that the testimony of high ranking administration officials at congressional hearings helped solidify this opinion.64

2. **Section 116: State Option for Stricter Standards**

EPA has maintained that any danger of deterioration of clean air is

---

57. See text accompanying notes 108-13 infra.
59. See Justice Dep’t Brief, supra note 11, at 17-18.
61. Id. § 1857c-4(b)(1).
62. Id. § 1857c-4(b)(2).
63. See text accompanying notes 44-48 supra.
64. See parts IV, C & D infra.
NON-DEGRADATION

dealt with effectively by section 116 of the Act. Section 116 states that, subject to certain specific limitations concerning mobile sources, nothing in the Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard of limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan . . . such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan.

EPA has suggested that states with clean air may protect themselves under this section by opting for standards stricter than the national standards, and that if non-degradation becomes a criterion for approval of state implementation plans, the effect of Section 116 will be "largely illusory." This argument lacks internal logic, for even if a non-degradation requirement were to be imposed for EPA approval of state plans, section 116 would still be operative and useful. States with air cleaner than the secondary standards could set standards that would reduce air pollution even further. States with air not meeting the secondary standards could opt to reduce pollution even below those minimum standards, or to reduce it faster than the Act requires.

In addition, although the 1970 Amendments leave the primary task of enforcement to the states, the history of the Clean Air Act shows that Congress has become increasingly disillusioned with the efficacy of state action. The amendments to the Act represent a series of deliberate moves towards federal dominance of the standard-setting procedure. Under the Clean Air Act of 1963, the federal government could take the initiative only in interstate cases, and had virtually no role in setting air quality standards. Under the Air Quality Act of 1967 the federal government determined air quality regions and "air quality criteria" which defined the effects of certain pollutants on the "public health and welfare." These criteria only aided the states in setting their own air quality standards. Yet, even with this limitation, Senator Muskie saw the 1967 Act as an expansion of federal power: "The Federal role is expanded both as a supporter of State programs and, in the event the States fail to act, as an active participant in the development and implementation of air quality standards."

66. Id.
67. Justice Dep't Brief, supra note 11, at 14.
68. See Trumbull, supra note 1, at 296.
69. Clean Air Act of 1963 § 5(f), Pub. L. No. 88-206, § 5(f), 77 Stat. 392 (1963). In the case of intrastate problems the Secretary of HEW could take action only when requested by a state governor or by a state air pollution control agency with the concurrence of the governor. Id. § 5(f)(2).
70. See id. § 5.
72. 113 CONG. REC. 32,476 (1967).
Air Amendments of 1970 took the power of standard setting away from the states and gave it to EPA.\textsuperscript{73} Thus, as illustrated by the trend of the legislative history, it is not in the spirit of the 1970 Amendments to interpret section 116 as broadly as EPA has suggested—certainly not so broadly as to insulate from federal control such a major substantive policy as non-degradation. The real purpose of section 116 is to grant protection to those few states that may adopt stricter standards under their police power from attacks by affected industries based on a preemption rationale. \textsuperscript{74}

3. **Section 111: The "New Source" Stage—an Alternative Approach to Deterioration?**

The district court held that the policy of non-degradation should be implemented during EPA review and modification of state implementation

\textsuperscript{73} See text accompanying notes 13-15 supra. It is clear that most state governments are particularly susceptible to industry pressure and need more than the mere permissive support of section 116 if they are going to implement stricter standards. As Frank Josselson, Assistant Attorney General of the State of Ohio stated during recent hearings on the implementation of the 1970 Amendments:

As is commonly known, Ohio is a highly industrialized State with an industry-oriented legislature. There is a great amount of self-consciousness in the General Assembly of Ohio and the administrative agencies about environmental problems. They are considered esthetic problems, not directly related to public health and welfare. Environmental enforcement agents are regarded as dilettantes.

That is the impression that special interests in State government try to get across very hard and they are successful to some extent.

To counteract this industrial influence, we need a strong Federal presence in Ohio. It is fair to say on the basis of my experience in the general assembly and also in administrative agencies, that without a strong Federal presence with respect to environmental laws, we are just not going to have environmental problems solved.

Josselson also pointed out a problem of constitutional authority which arguably permits federal regulation of air quality to go further than analogous state regulation pursuant to the police power.

Under article I, section 7 of the U.S. Constitution, Congress has plenary power to regulate pollutants that travel interstate or that come from interstate industries, obtaining any level of air quality with respect to those pollutants that it wants. . . . The States, on the other hand, are required to legislate with regard to the public health, safety, and welfare, those are our constitutional limitations.

Unless the evidence is strong enough for me to go to court and show that our standard is necessary to protect the public health, safety, and welfare, it is unconstitutional.


\textsuperscript{74} The presence of section 116 should also dispel the qualms of state officials that since the federal standards are designed to protect the public health and welfare pursuant to section 109 of the Act, stricter state standards go beyond limits of the states' police powers. See note 73 supra. At the very least section 116 shows that, despite the mandate of section 109, the federal standards are not intended to define the public health and welfare in terms of the maximum protection which could be afforded them. Thus, insofar as the Act is concerned, stricter state standards can be consistent with the states' police powers.
plans, with the Administrator insuring that the plans meet the non-degradation objective. EPA has argued in response that Congress dealt with the problem of deterioration of clean air by enacting an alternative form of pollution control called “new source standards.” Section 111 of the Act provides for state regulation of stationary air pollution sources “the construction or modification of which is commenced after the publication of [the national primary and secondary standard] regulations.” The Administrator determines which new sources are to be so regulated: “He shall include a category of sources . . . if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.” The Administrator also sets emission standards for these new sources which reflect the best technology which has been “adequately demonstrated.”

EPA has alleged that if Congress dealt directly with the problem of deterioration of clean air, it did so when it drafted section 111:

Obviously the main thrust of this provision is directed to areas of already clean air because the national standards take care of the rest. This is a clear expression by Congress that the “new source” stage of the operation of the Act is the place to attach the deterioration problem and we submit it is the logical point.

The presence of this section, EPA has asserted, further proves that it is unnecessary to turn to the purpose clause to determine congressional intent concerning the problem of clean-air areas. EPA supports its view of the new source section of the Act with excerpts from the Senate Report on the Act and statements from debates on the Senate floor which do show that at least some Senators saw new source regulation as one way to prevent deterioration of clean air. The introduction to the Senate Report states that “[m]aintenance of existing high quality air is assured through provision for maximum control of new pollution sources.” Senator Muskie referred to the new source section on the Senate floor in these terms:

While we cleaned up existing pollution we were determined to guard against new problems. Those areas which have relative air quality better than the national standard should not find their air quality degraded by construction of new sources.

---

76. Id. § 1857c-6(a)(2).
77. Id. § 1857c-6(b)(1)(A).
78. Id. § 1857c-6(a)(1). To date, standards for five such sources have been set: fossil-fuel-fired steam generators, incinerators, Portland cement plants, and nitric and sulfuric acid plants. 36 Fed. Reg. 24,876 (Dec. 23, 1971). EPA recently announced that stationary source standards for 15 other basic industries would be announced in 1973. 3 ENV. RPTR.—CURR. DEV. 884 (1972). Although the lengthy delay in establishing standards has never been explained, representatives of various industries have been extremely critical of both the levels of standards and what they consider to be burdensome reporting requirements. Id. at 884, 912-13.
79. Justice Dep't Brief, supra note 11, at 24.
81. Justice Dep't Brief, supra note 11, at 25, citing S. REP. No. 91-1196, supra note 80, at 2.
EPA has argued that in areas of the country where the air quality is better than required by the national ambient air standards, only "new sources could cause significant deterioration;" thus Congress, in enacting the new source provision, "[c]ertainly . . . was thinking of the deterioration problem." 83

However, the new source approach to the protection of clean air contains at least two serious defects. First, clean air regions can deteriorate in quality despite a strictly administered new source program, and second, the current new source rules discourage rather than promote pollution control research by private industry.

a. Cumulative impact problems

As one EPA official stated, "[t]he new source rule has nothing to do with ambient standards for clean air." 84 Ambient air standards are concerned with the general quality of air in any specified region. Pollution is measured by periodic samplings of the ambient air at given points in the region. The standards set the maximum permitted concentrations of specific pollutants in the air of the region. For example, the national primary standard for sulfur dioxide sets a maximum permissible concentration of 80 micrograms per cubic meter of air. 85 This standard is not concerned with the amount of sulfur dioxide any one factory or other source emits; it is aimed only at controlling the purity of the ambient air. New source standards, on the other hand, take the opposite approach, regulating the quantity of pollutants any one plant may emit, as measured at each stack. 86

These two approaches to air pollution control are interrelated in several ways. First, the enforcement of the new source standards may aid in the maintenance of ambient air standards. New plants that meet the new source standards will add less to the region's general pollution level than would similar new plants that violate the new source standards. Also, in order to reach and maintain federal ambient air standards, state pollution control boards may have to use approaches similar to the new source standards to regulate emissions of individual sources. Many regions can improve the general quality of the air only by ordering particular plants to emit less.

But the two approaches are different in one respect that is crucial in clean air areas. Even a strict new source standard fails to regulate the cumulative impact of many new sources in a region. Even though each plant might meet the new source standards, collectively they would degrade the quality of the air. In the absence of a specific policy of non-degradation, the level of pollution in a clean air region would rise with the construction of each new source. No state enforcement actions would be initiated until the general level of air pollution in the region exceeded the secondary

83. Id. at 26.
84. Telephone interview with Morris Goldberg, official of the Air and Water Programs Division, Region 9 of EPA, Nov. 15, 1972.
86. 40 C.F.R. §§ 60.10–85 (1972).
ambient air standard. Moreover, the new source standards provision applies only to those industries designated by the Administrator. Construction of other industries may proceed without regard to the standards issued under the new source rule.

A policy of non-degradation would prevent such air quality deterioration. According to the district court, the Administrator may not approve state implementation plans which allow “significant deterioration” in the air of any air quality control region. Presumably “significant deterioration” could be defined in terms of a percentage increase of the concentration of pollutants, and would, in any case, be well below the level set by the secondary standards.

b. Discouragement of research and development

New source standards lack incentives to develop new pollution control techniques because the standards are determined according to the best techniques currently in use instead of by the best techniques available. The Act defines the term “standard of performance” as

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

According to EPA’s interpretation of the statute, the best technology which has been “adequately demonstrated” refers to systems which have been proven in factory operation. Such systems lag considerably behind expected technological advances. This is significant because administration of the new source provisions begins when a new plant or factory is still in the planning stages. The Senate Report accompanying the 1970 Amendments states that “[t]he provisions for new source standards are designed to insure that new stationary sources are designed, built, equipped, operated, and maintained so as to reduce emission to a minimum.” Although the new source section allows certification only when a facility begins to operate, the Senate Report encourages “preconstruction review of proposed plans for new facilities, since it would enable [the Administrator] (or states where certification authority is delegated) to render advice and assistance to affected parties . . .” Thus, EPA officials obtain data and give advice during the design and construction stages of a new source, yet

88. Preliminary Injunction, May 31, 1972, reprinted at Appendix to Justice Dep't Brief, supra note 23, at 34.
89. Telephone interview with James Moorman, Executive Director of the Sierra Club Legal Defense Fund, Inc., Nov. 16, 1972; Goldberg interview, supra note 84. However, EPA has already raised objections to specifying a numerical definition of “significant deterioration.” See text accompanying notes 189-92 infra.
91. Goldberg interview, supra note 84.
92. S. Rep. No. 91-1196, supra note 81, at 15 (emphasis supplied.)
93. Id. at 17.
they can only recommend pollution control systems which are in use at the
time. Under its interpretation of the Act EPA cannot force the new facil-
ity to anticipate systems which are in the planning stage or even systems
which are showing promising results in pilot projects. At the current rate
of expansion of pollution control technology, the system employed by a new
facility may be several years behind the most advanced pilot project by the
time the facility begins to operate.  

This situation discourages industry participation in developing new pol-
lution control techniques. As long as a new anti-pollution device remains
untested in actual operation, it is not considered "available" under the new
source standards. But if one company successfully tests an expensive new
device, it thereby becomes "available" and all other new plants being con-
structed which will emit the same pollutant must pay to install it. Indeed,
if the company which successfully tested the new device subsequently modi-
ifies its preexisting facilities, the new source rules will require installation of
the new device in the modified facilities. This discourages industry participa-
tion in the development and testing of new control devices. A policy
prohibiting degradation, on the other hand, will encourage industry to
find new anti-pollution devices. Faced with the problem of obtaining build-
ing permits in clean air areas, companies will contribute to and undertake the
research and development necessary to reduce pollution significantly.

Thus, the new source standards are not a substitute for a policy which
prohibits degradation of the ambient air. The new source approach allows
deterioration of clean air in areas which are less polluted than the secondary
standards; it fails to require incorporation of the latest technology; and it
discourages industry development of new anti-pollution systems.

C. Legislative History

To determine the purpose of a statute, it is proper to examine its
legislative history, including legislative debates, committee reports, and
statements of committee members. Recognizing the lack of explicit statu-
tory language to support its positions, the Sierra Club has relied heavily on

94. Goldberg interview, supra note 84.
95. Id.; telephone interview with Richard Ayres, attorney with the Natural
   Counsel denies that new source rules are too lenient. He claims that the standards
   adopted are taken directly from pilot programs, and are so strict that industry has sued
   on three of the five new performance standards claiming that they have not been
   "adequately demonstrated." Baum interview, supra note 47. Certainly the fact that
   industry has complained is not in and of itself proof that the new source standards are
   sufficiently strict. Furthermore, such suits are proof that industry regards the "ade-
   quately demonstrated" clause as the most effective way to attack new source standards.
96. Ayres interview, supra note 95. Goldberg interview, supra note 84.
97. Moorman interview, supra note 89.
100. United States ex rel. Chapman v. FPC, 345 U.S. 153 (1953), aff'g 191 F.2d
   796 (4th Cir. 1951).
the assertion that the legislative history of both the 1967 Air Quality Act and the 1970 Amendments supports the principle of non-degradation. This argument carried great weight with both the district court and the court of appeals. The district court quoted the legislative history in its memorandum opinion, and the circuit court judges seemed considerably impressed by it during oral argument.101

The legislative history does support the contention that the principle of non-degradation is implicit in the Clean Air Act. It resolves the vagueness of both the purpose clause and section 110. Although the history of the 1967 Act conveys an ambiguous picture of the legislative intent, the history of both the 1970 Amendments and the later Implementation Hearings clearly indicates that Congress confronted the complexities of air pollution control and undertook a program designed to prevent the deterioration of clean air.

1. The Air Quality Act of 1967

The Sierra Club has maintained that the Senate Report accompanying the Air Quality Act of 1967 "makes clear that the Act was designed to improve air quality throughout the country including areas with relatively clean air."102 To support its analysis, the Sierra Club cites language from general statements of the Report that "there will be no haven for polluters anywhere in the country."103 In fact, the legislative history of the 1967 Act offers little support for a non-degradation policy. It shows, rather, that the 1967 Act was intended to deal primarily with those areas which were critically polluted. Despite such phrases as "no haven for polluters," the Senate Report states this limitation clearly:

The fact that an area is not now a problem area will not mean that controls will never be required. When the air quality of any region deteriorates below the level required to protect public health and welfare, the Secretary is required to designate that region for the establishment of air quality standards . . . . It should be pointed out in this connection that the Public Health Service has expressed the view that every urban area of 50,000 or more population now has an air pollution problem.104

This section of the Senate Report not only calls into question the assertion that the 1967 Act was intended to prevent deterioration of clean air, but also indicates that Congress intended that the Act would apply principally to crisis areas, and not to clean air regions. In any event, execution of the 1967 Act never progressed to the point of confronting the issue of non-degradation: no air quality criteria were issued, no air quality regions were designated, and no control techniques were recommended.105

---

101. Walpole interview, supra note 22. Mr. Walpole witnessed the oral argument at the circuit court.
102. Sierra Club Brief, supra note 6, at 19.
103. Id. at 20, citing S. REP. NO. 90-403, 90th Cong., 1st Sess. 2 (1967).
105. Trumbull, supra note 1, at 288.
2. The Clean Air Amendments of 1970

The congressional reports accompanying the 1970 Amendments confirm a legislative intent to incorporate a policy of non-degradation into the Amendments. The Senate Report states:

In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. Given the various alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic controls—deterioration need not occur.106

Testimony which focused on the phrase “protect and enhance” reinforces the view that Congress equated those words with non-degradation. Both the Secretary and Undersecretary of HEW testified that they interpreted the words “protect and enhance” to mean non-degradation.107 A representative of a major chemical professional association told the House subcommittee that the language of the Amendments would constitute a policy of non-degradation and requested that that language be changed to remove non-degradation from the legislation. Congressman Rogers responded that non-degradation should remain in the proposed Amendments.108 “[T]he word ‘non-degradation’ is a term which carries the connotation that we are going to do something to ensure that the air quality remains clean. If we start with any clean areas,” he asserted, “and try to keep them clean, then we don’t have to go back like we are thinking of doing now to build support to clean up the environment.”109 Following Congressman Rogers’ advice, the subcommittee rejected the industry request to delete non-degradation. Further, a staff member of the subcommittee asked Dr. John T. Middleton, then Commissioner of the National Air Pollution Control Administration (later Deputy Administrator of EPA for Air Programs) if it would “be practical to require that a non-degradation plan be incorporated into every State’s implementation Plan?”110 Middleton replied:

Since the Clean Air Act states, in section 101, that it is a national policy to protect and enhance air quality, I think it would be very appropriate to have this policy reiterated in the other sections, where action is prescribed.

I am sort of against the word “nondegradation.” I think there is a more positive way to say it—protection and enhancement.111

Thus, though he would have preferred “reiteration” of the policy in later

106. S. REP. NO. 91-1196, supra note 81, at 11.
107. See text accompanying notes 123-24 infra.
109. Id. at 475.
110. Id. at 1517.
111. Id. (emphasis supplied). Middleton supported non-degradation later in his capacity as Deputy Administrator for Air Programs, but was apparently overruled by the Administrator and the Office of Management and Budget. See part II, D, 3 infra.
sections of the Clean Air Act, Middleton believed that the words "protect and enhance" were equivalent to, or even a semantic improvement on, an express mandate for a non-degradation policy.112

During the 1972 hearings on enforcement of the Clean Air Act, Richard Ayres of the Natural Resources Defense Council testified that the "Act doesn't require non-degradation, as you know, but the legislative history of the Clean Air Amendments is very strongly in favor of preserving above-standard air."113 Senator Thomas Eagleton who, as vice-chairman of the subcommittee, presided over the hearings, replied:

I don't agree with you when you say that non-degradation is not a part of the 1970 Clean Air Amendments. I think it very much is.

Section 101(b), subsection 1, reads as follows: "The purposes of this title are, number one, to protect and enhance the quality of the Nation's air resources . . . ." That is language that is . . . similar to language that existed in the previous 1967 Air Quality Act which was taken to mean non-degradation and that policy was frequently discussed in the deliberations on this bill.

. . . . Former Secretary of HEW Finch described the aforesaid language as meaning non-degradation and that was the policy he intended to pursue.

So I think non-degradation was in the 1970 law, very much is in the 1970 law and has to be part of the implementation plan submitted by a state.114 Ayres replied that he had been overcautious and stood corrected.115

EPA has argued that Congress never could have intended the serious economic ramifications of a non-degradation policy. However, statements by Senate and House sponsors of the 1970 Amendments, and the discussions during the 1972 Implementation Hearings show that, although Congress may not have comprehended the exact dimensions of a policy of non-degradation, it nevertheless appears to have been a general goal of the legislation. Senator Muskie, a principal sponsor of the 1970 Amendments, told the Senate that "clean air will not come cheap and it will not come easy."116 When the bill returned from conference, Senator Cooper added:

The bill . . . will place great burdens on industry, it will place great burdens on government, both at the State and Federal level, and it will place great burdens on the people generally for they will ultimately have to bear the expense and, for the first time, possibly experience inconvenience so that we might achieve clean and healthful air.117

Thus, despite the vague language of the statute, it appears that Congress understood "protect and enhance" to imply a non-degradation policy.118 It also appears that Congress was encouraged in that belief by the testi-

112. Senator Muskie, a sponsor of the bill, similarly testified that the bill did not allow pollution up to the level of the national standards. *House Air Pollution Control Hearings, supra* note 108, at 68.
113. *Implementation Hearings, supra* note 73, at 12.
114. *Id.* at 14-15.
115. *Id.* at 15.
117. *Id.* at 42,394.
118. Some reservations can be voiced concerning the merits of the legislative history of the 1970 Amendments. The history consists primarily of subcommittee hearings, and it may be that deliberate legislative use of the courts was intended by the
mony of high-ranking administration officials given in congressional hearings on the 1970 Amendments.

D. Conflicting Administrative Interpretation

The administrative interpretations of both the 1967 Air Quality Act and the 1970 Amendments significantly reinforce the impression conveyed by analysis of the legislative history that a policy of non-degradation is implied by the Clean Air Act. Indeed, some of the most striking statements favoring such an implication were made before Congressional committees, where administration officials charged with carrying out the mandate of the Act specifically espoused non-degradation. Prior to 1971, administrative guidelines clearly prohibited the deterioration of clean air, and high-ranking HEW officials explicitly inferred a mandate for non-degradation from the words “protect and enhance” during legislative hearings. However, in mid-1971 EPA completely changed its stance and claimed that a non-degradation policy was not required by the Act. This part will discuss the history of this change in the administration's position and will explore the contradiction and its significance.

1. The Air Quality Act of 1967

As previously noted, the legislative history of the 1967 Act is vague concerning the issue of non-degradation, and probably was never intended to deal with clean air areas at all. The administrative interpretation of the 1967 Act, however, clearly indicates a policy decision in favor of non-degradation. In 1969, the National Air Pollution Control Administration (NAPCA) of HEW, predecessor of EPA, promulgated Guidelines for the Development of Air Quality Standards and State Implementation Plans which prohibited “significant deterioration of an air quality region.” The Administrator of NAPCA's immediate parent agency, the Consumer Protection and Environmental Health Service, testified during the 1969 Hearings that the Clean Air Act “espouses a no-degradation policy.”

2. The Clean Air Amendments of 1970

Statements by HEW Secretary Robert Finch and Undersecretary John Veneman indicated an intent by administrative officials to continue an en-
forcement policy of non-degradation under the 1970 Amendments. Testifying before a Senate subcommittee in 1970, Veneman read a statement made by Finch reiterating HEW's intent to prohibit significant deterioration of air quality:

One of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources." Accordingly, it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision of the Act. We shall continue to expect States to maintain air of good quality where it now exists.123

Veneman himself added, "[w]e do not intend to condone 'backsliding'. [Relatively clean areas] would be required to stay there and not pollute the air even further, even though they may be below national standards."124

These statements, taken with those of Senators Muskie, Cooper, Eagleton, and others, indicate a clear understanding between Congress and HEW that the words "protect and enhance" implied a non-degradation policy; that by leaving this phrase in the 1970 amended version, Congress intended that this non-degradation policy remain part of the Act. Pursuant to this understanding, when the Administrator of EPA promulgated national primary and secondary ambient air quality standards, he added section 50.2(c) which specifically provides for non-degradation: "The promulgation of national primary and secondary ambient air quality standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any state."125

3. EPA Changes its Position

Several months after issuing section 50.2(c) EPA promulgated a regulation which appears to contradict that provision. Included in the "Plan Content Requirements" of EPA's Clean Air Act regulations is section 51.12 (b), which states:

In any region where measures of estimate ambient levels of pollutants are below the levels specified by an applicable secondary standard, the plan shall set forth a control strategy which shall be adequate to prevent such ambient pollution levels from exceeding such secondary standards.126

Thus, while section 50.2(c) embraces non-degradation in theory, section 51.12 allows the Administrator to approve state implementation plans which lack non-degradation provisions. Under section 51.12 the Administrator can approve a state plan which would allow clean air to deteriorate until the level of pollution reached the secondary standards. It is this contradiction that the district court called "irreconcilable."127

123. Hearings on Air Pollution Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. 132-33 (1970) [hereinafter cited as Senate Air Pollution Hearings].
124. Id. at 143.
127. 344 F. Supp. at 255, 4 ERC at 1207.
EPA asserts that section 50.2(c) has been misconstrued. Robert Baum of the General Counsel's office (and unhappy author of the section) explained that it was a reaction to a longstanding hesitation he and others in EPA and HEW had concerning the concept of national standards:

HEW made a study on the relative merits of national ambient air standards. We knew that one problem would be that everyone would pollute up to those standards. That's why we didn't put national standards in the 1967 Act. Section 50.2(c) is just an attempt to put people on notice that they can't use the very promulgation of national standards as an excuse to violate stricter state or local standards and then say "the federal standards gave us the right." This argument is defective for two reasons. First, the so called "stricter" state and local standards are rarely enforced even where they exist. As mentioned above, the legislative history of the Act illustrates an increasing unwillingness on the part of Congress to entrust standard setting to the states. Baum himself recognized that states are unable to do the job. Second, and most important, Baum's statement contradicts a basic EPA argument. In its brief, EPA argued that enforcement of the secondary standards without a non-degradation standard would cause no "deterioration in any realistic sense." Yet in the remarks above, Baum recognized the danger of "polluting up" to the secondary standards. He apparently felt that the problem was serious enough that he opposed inclusion of national standards in the 1967 Act. The problem of "polluting up" to the national standards in clean air areas is precisely what non-degradation is designed to cure.

Another tack taken by EPA has been that no inconsistency exists between sections 50.2(c) and 51.12. This argument proceeds along the following lines. In the 1970 Amendments, the criteria for secondary standards were strengthened to protect the public from any "known or anticipated adverse effects" of air pollution. Secondary standards are designed to "protect the public welfare," and Congress expanded the definition of public welfare to include (but not be limited to):

- effects on soil, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation as well as effects on economic values and on personal comfort and well-being.

Thus, EPA claims, secondary standards are sufficiently strict that a state plan which meets secondary standards does not allow "significant deterioration in any realistic sense."

---

128. Baum interview, supra note 47.
129. Telephone interview with Jerry Opatz, official of the Water Quality Standards Division, Region 9 of EPA, Nov. 14, 1972; Ayres interview, supra note 95; Goldberg, interview, supra note 84.
130. Baum interview, supra note 47.
131. Justice Dep't Brief, supra note 11, at 22.
134. Id. § 1857(h).
135. Justice Dep't Brief, supra note 11, at 22.
However, if mere promulgation and enforcement of secondary standards prevented "significant deterioration in any realistic sense," EPA would already be in compliance with the court order, and would not be appealing the decision. Over 80 percent of the nation's air is cleaner than the current secondary standards. For many of these clean air areas, an increase in air pollution up to the level set by the secondary standards would constitute significant deterioration. The Administrator of the Division of Environmental Sciences of the Montana State Department of Health and Environmental Sciences expounded on this point at the Senate hearings on enforcement of the 1970 Amendments:

The thrust of this whole philosophy is that the Nation must become uniformly dirty. I would suppose in places such as Chicago and New York or Gary, Indiana, perhaps where the air quality is consistently worse than the standards, that to be as dirty as the air quality standards would be an improvement. In Montana to be as dirty as the air quality standards is to acknowledge that existing air quality must become worse.

Furthermore, the long-term effect of low level pollution is not fully understood, and it is suspected that even small amounts of pollution can do serious harm to the human and animal population, as well as to trees, crops and soil. Thus, by advancing the argument that "enforcement of secondary standards insures that no significant deterioration" will occur, EPA has actually rejected a true non-degradation policy.

4. Political Emasculation of the Act

Why did EPA change its position on non-degradation? Various explanations have been offered. It has been suggested that representatives of the executive branch never were serious about inferring and enforcing a policy of non-degradation. Testimony by Finch and Veneman in 1970 was given at a time when there was no administrative or legal machinery capable of enforcing any federal ambient air standards, much less a policy of non-degradation. But statements by EPA and HEW officials convinced at least those

137. Implementation Hearings, supra note 73, at 178.
138. In the testimony of Dr. Ivan Bennet, Deputy Director of the Office of Science and Technology, it was emphasized that "long-term effects of exposure to low concentrations [of pollutants] . . . is not known." Hearings on S. 780 and Related Matters Pertinent to Prevention and Control of Air Pollution Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 90th Cong., 1st Sess. 793 (1967). See generally Testimony of Dr. John R. Goldsmith of the Environmental Hazards Unit of the California Department of Public Health and Dr. G. Hoyt Whipple of the University of Michigan, in Hearings on Air Quality Criteria Before the Subcomm. on Air and Water Pollution of the Senate Public Works Comm., 90th Cong., 2d Sess. 554, 598 (1968); Statements of Senator Muskie and Dr. John Middleton, Commissioner of the National Air Pollution Control Administration, in Senate Air Pollution Hearings, supra note 123, at 74, 1489-90; Brodine, Point of Damage, ENVIRONMENT, May 1972, at 2; Likens, Borman, & Johnson, Acid Rain, ENVIRONMENT, March 1972, at 22.
139. See Trumbull, supra note 1, at 286-96. See also text accompanying note 105 supra.
present at early congressional hearings that the words "protect and enhance" in the purpose clauses of the Clean Air Act meant non-degradation.  

It is possible that EPA and HEW officials made those statements precisely with the hope that Congress would not feel the need to write non-degradation specifically into the Amendments.  

The *Implementation Hearings* on the 1970 Amendments also yielded evidence that the Nixon Administration tampered with the Clean Air Act regulations to weaken their effect. Much of the testimony centered on the period between June 28 and August 14, 1971. On June 28, Dr. John T. Middleton, Deputy Assistant Administrator for Air Programs, sent the Administrator a new version of the Requirements for Preparation, Adoption, and Submission of [State Implementation] Plans and an accompanying memorandum. EPA never publicized the memorandum but a disenchanted EPA official "leaked" it to the Natural Resources Defense Council (NRDC) which introduced it during the 1972 Hearings. The memorandum stated in part:

Environmental groups, in particular urged that EPA establish a non-deterioration policy applicable to clean air areas . . . . Accordingly, the regulations have been modified to include the following statement, which is similar to the one that appeared in the Federal Register setting forth the national standards:

"Approval of a plan shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any state."

On August 14, the final Requirements for Preparation, Adoption and Submission of Implementation Plans were published. This version omitted the section proposed by Dr. Middleton, and substituted the stipulation that nothing in the guidelines should be construed to "encourage a state to prepare, adopt or submit a plan which does not provide for the protection and enhancement of air quality so as to promote the public health and welfare and productive capacity." This regulation only repeats the wording of the disputed purpose clause and conspicuously omits any provision for non-degradation. Senator Eagleton, who chaired the subcommittee hearings, reacted strongly to this change, complaining that the final guide-

---

140. See text accompanying notes 123-25 supra. During the 1972 *Implementation Hearings*, Senator Muskie cited and relied on previous administrative testimony favoring a policy of non-degradation in his comments on the Clean Air Act. *Implementation Hearings*, supra note 73, at 15.  

141. Ayres interview, supra note 95.  

142. See *Implementation Hearings*, supra note 73, at 3-25, 37-38, 225-51.  

143. *Id.* at 47.  

144. N. Pine, Congressional Oversight: The Forgotten Power 81-96 (1972) (research paper under the auspices of the Ralph Nader Congress Project) (copy on file with the *Ecology Law Quarterly*). The memorandum was subsequently produced by Administrator Ruckleshaus during the hearings. See *Implementation Hearings*, supra note 73, at 9, 47-48.  

145. 40 C.F.R. § 50.2(c) (1972), quoted in note 31 supra.  

146. *Implementation Hearings*, supra note 73, at 47.  

147. 36 Fed. Reg. 15,489 (1971) (codified at 40 C.F.R. § 51.12(b) (1972)).  

148. *Id.* at 15,487 (codified at 40 C.F.R. § 51.2(a) (1972) ).
lines had undercut the impact of the 1970 Amendments: "I deem the ultimate guidelines to be significantly weaker than those seriously recommended by Dr. Middleton. I think they are weaker in the area of non-degradation."

What happened between Dr. Middleton's June 28th memorandum and the publication of the final guidelines on August 14? Middleton strongly supported the June 28th regulations, recommended they be signed, and stated that early promulgation of the regulation was "essential." External input in the form of comments from the "interested public," i.e., industry and environmental groups, had been received during the official comment period which opened on April 7 and closed on May 15. In his June 28th memorandum to Ruckelshaus, Middleton stated that the guidelines proposed therein reflected the comments of "more than 400 interested persons and organizations." Thus the June 28th proposals reflected the opinion of EPA's technical staff and took into account their evaluation of all outside comment.

One suggestion as to the source of the altered guidelines came from NRDC's Richard Ayres, who testified that the White House Office of Management and Budget (OMB) intervened at the last moment to review the June 28th guidelines. Ayres charged that the OMB review was destructive in a number of ways in addition to its elimination of the reference to non-degradation. First, the substituted guidelines were overly permissive and slowed state compliance with the requirements of the Act. Second, a further significant change occurred during the period between June 28 and August 14 in the reintroduction of economic balancing and cost-effectiveness language. Although economic balancing is probably inevitable at some stage of the pollution control process, express language such as "economic feasibility or reasonableness" has a tendency to dilute the effectiveness of control programs and to handicap enforcement efforts. Thus, while the 1967

149. Implementation Hearings, supra note 73, at 323.
150. Id. at 47.
151. The proposed regulations were published on April 7, and a comment period of 21 days was set. 36 Fed. Reg. 6680 (1971).
152. Implementation Hearings, supra note 73, at 47.
153. Id. at 3-47.
154. At the time of the Implementation Hearings, nine states had submitted implementation plans which set no date for attainment of primary and secondary air quality standards, and six others had indicated only a general time period. Fifteen of the state plans claimed that it would be impossible to meet the deadline for one or more of the standards, but only seven asked for the official two-year extension and most of those set either vague compliance dates or none at all. Ayres charged that EPA and OMB were responsible for this failure to provide for timely attainment of ambient air standards because the final guidelines were weak and unclear on the issue of deadlines. Ayres also alleged that EPA guidelines were the cause of the failure of most state plans to provide for maintenance of standards once they are achieved, through control of the future increase of emissions. In addition, he pointed out that the OMB review itself hampered state efforts to produce coherent plans; of the original nine months given states to develop implementation plans, over one third were consumed by EPA and OMB review of the guidelines. Id. at 30-33.
Act and the House Report on the 1970 Amendments referred to air quality standards not only in terms of "public health and welfare," but also with phrases concerning "economic feasibility" and "cost-effectiveness analyses," the Senate-House conference eliminated all such language with the sole exception of the new source provision.\textsuperscript{155}

It is clear that at least until June 28, EPA also felt that economic feasibility language should be excluded. In a document issued to help states prepare and evaluate their own anti-pollution programs and legislation, EPA asserted that

such factors as . . . interference with . . . the rightful conduct of business, . . . the social and economic value of the air pollution source; . . . and the economic reasonableness of reducing or eliminating the emission . . . [are] inappropriate for an air pollution control law. Such a catalogue of considerations represents an unaccountable digression from the proper emphasis of the law. The thrust of the law should be protection of public health and welfare, first and foremost. In some instances, for example, air pollution can so endanger public health that abatement is necessary even if no practical and economic method of control is available. Considering the hazard to public health and welfare presented by pollution such a recital in the law cannot be permitted to prevail over actions necessary to protect the public. Such an unfortunate enumeration places a cloud on the entire system of the powers to prevent and control air pollution under the laws.\textsuperscript{156}

In addition, neither the original regulations as proposed on April 7, 1971, nor, despite industry complaint,\textsuperscript{157} the revised regulations of June 28, contained any reference to economic considerations.

The August 14 final version, however, contains provisions which invite economic balancing. Section 420.2 states:

Nothing in this part shall be construed in any manner:

\begin{itemize}
  \item (b) To encourage a State to adopt any particular control strategy without taking into consideration the cost-effectiveness of such control strategy in relation to that of alternative control strategies.
\end{itemize}

\begin{itemize}
  \item (d) To encourage a State to prepare, adopt, or submit a plan without taking into consideration the social and economic impact of the control strategy
\end{itemize}

\textsuperscript{155} H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 23 (1971). The new source provision referred to the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving reduction) the Administrator determines has been adequately demonstrated.

\textsuperscript{156} 42 U.S.C. § 1857c-6(a)(1) (1970). Even this reference to cost, however, is less compromising than the language of the House Report: "The Secretary shall from time to time by regulation, giving appropriate consideration to technological and economic feasibility, establish standards . . . ." H.R. Rep. No. 91-1146, supra, at 35.

\textsuperscript{157} Implementation Hearings, supra note 73, at 34 (testimony of Richard Ayres), citing Air Pollution Control Office, EPA, Necessary Legislative Considerations for Coordinating Local, State, and Federal Air Pollution Control Programs (March 1971).
Industry has seized on those guidelines to request that state implementation plans be weakened. The NRDC introduced evidence of such industry action during the Implementation Hearings.\(^{159}\) The Director of the Kentucky Air Pollution Control Commission wrote the Senate committee that the TVA, in opposing proposed secondary standards "made liberal use of the debilitating language retained in Section 420.2 of the regulations" at public hearings conducted in Tennessee, Kentucky, and Alabama.\(^{160}\) Thus, the OMB's review of the guidelines weakened the impact of the ambient air standards not only by eliminating non-degradation but also by encouraging states to introduce cost-effectiveness into their implementation plans.

Ayres further testified that OMB intervention set a dangerous precedent by taking account of the demands of a few powerful interested parties while totally denying participation to the public and by imposing OMB's will on those who are solely empowered by law and qualified by expertise to carry out the Clean Air Amendments.\(^{161}\)

He asserted that this type of OMB review was going to continue during the entire process of approval of state implementation plans. Ayres introduced into the record of the hearing a flow chart illustrating the state implementation plan review procedure, which revealed that after review and modification by EPA, each state plan is sent to OMB for "approval," where it remains for 22 days before publication.\(^{162}\)

Ruckelshaus responded to Ayres' charges in later testimony during the Enforcement Hearings.\(^{163}\) He asserted that the flow chart was erroneous and did not reflect the policy of the agency.\(^{164}\) In response to questioning by Senator Eagleton, he asserted that OMB was "nothing more than a conduit to insure that other Federal agencies who want to comment on any regulation that we might issue are given that right to comment."\(^{165}\) Eagleton pointed out that the official comment period had ended before the OMB review and that such review was "outside the scope of the traditional and accepted rulemaking process."\(^{166}\) Senator Eagleton was assured that the substantial changes in the guidelines reflected only the Administrator's own opinion. However, it is difficult to believe that Ruckelshaus would overrule his own

---

159. Implementation Hearings, supra note 73, at 66. See generally id. at 65-92.
160. Id. at 92.
161. Id. at 4.
162. See id. opposite 9 for a reproduction of the chart.
163. Id. at 236-39, 323-28.
164. Id. at 236.
165. Id. at 243.
166. Id. Moreover, of the 439 sets of comments EPA received during the official comment period only five were from federal agencies and only one of those proposed substantive changes. Id. at 27, 47. Thus either other federal agencies preferred to negotiate privately with OMB rather than participate in the public comment period, or OMB itself originated the changes.
staff on such an important issue without outside pressure, and it is probable that such pressure was exerted by OMB.

Environmental groups account for this political intervention in two ways: First, they suggest that industry interests whose objections to non-degradation were unsuccessful when routed through legal channels (i.e., the official comment period) found a more effective means in indirect pressure through OMB. OMB itself has a reputation for lending a sympathetic ear to business interests. Second, one of the major economic stakes in the battle over non-degradation is cheap power. A strictly enforced program of non-degradation would halt the construction of fossil-fuel-burning power plants such as the recently completed Four Corners plant in the Southwest, and generally frustrate the tactic of exporting urban pollution through the placement of new pollution sources, such as power plants, in outlying clean air areas. The Sierra Club charges that the White House approves of this tactic and considers it necessary to meet current and future power requirements. Certainly, OMB intervention would explain the ambiguous and contradictory stances taken by EPA during the last two years.

III

PROSPECTS FOR EFFECTIVE ENFORCEMENT

EPA Administrator Ruckelshaus stated in November 1972 that the "agency is now proceeding toward resolution of the technical issues involved [in enforcing the court's non-degradation order] on a priority basis..." But EPA accepted the court's order under protest and has obtained certiorari and a stay of the appellate court order from the Supreme Court. EPA remains convinced that a non-degradation requirement cannot be found in any of the language of the Clean Air Act. Robert Baum specifically told the technical division of EPA that the Act did not give the division authority to institute a program of non-degradation:

> I felt that the mere words "protect and enhance" would not serve to defend us against a suit by a state whose implementation plan had met all the requirements of section 110 and yet had been disapproved by the Administrator for allowing degradation of clean air.

EPA officials also oppose non-degradation for policy reasons because they maintain it would be impossible to administer the requirement. In its application for a stay of the district court's order, EPA asserted that "[n]on-

---

168. N. Pine, supra note 144.
169. Moorman interview, supra note 89.
170. See text accompanying notes 33, 120-27 supra.
171. San Francisco Chronicle, Nov. 9, 1972, at 6, col. 7.
173. Baum interview, supra note 47.
174. Id. Baum remarked: "Neither we nor the states have the resources to administer a whole second Clean Air Act [i.e., non-degradation]." Id.
degradation is essentially a long-range problem extending over a period of many years with potentially significant socio-economic impacts, and it requires the time to do a comprehensive analysis and arrive at the best possible solution.\textsuperscript{175} In addition, EPA officials are convinced that a strict program of non-degradation is not politically viable and that if such a program were instituted, political pressure would soon demand its abolition.\textsuperscript{176}

Given this attitude, would EPA make realistic efforts to enforce the district court order with respect to non-degradation if it is affirmed by the Supreme Court? It is instructive in this regard to note the fate of the Federal Water Pollution Control Act.\textsuperscript{177} The purpose clause enacted by the Water Quality Act of 1965 is very similar to the "protect and enhance" clause of the Clean Air Act: "The purpose of this chapter is to enhance the quality of the Nation's waters."

\textsuperscript{175} Defendant's Application to Stay Final Judgment at 3, Sierra Club v. Ruckelshaus, Civil No. 1031-72 (D.D.C., filed Aug. 30, 1972). EPA has consistently maintained throughout the litigation that it has inadequate staff resources and technical competence to develop and administer a program of non-degradation. It complained that its compliance with the initial district court order was delayed because much of the staff experienced with state implementation plans were dispersed to the regional offices after completion of the initial review of state plans. The remaining experienced staff have been forced to work on the non-degradation report while completing the review of a larger number of State modifications to plans and proposing and promulgating federal regulations where state plans are still deficient.

\textsuperscript{176} Statements of EPA officials reflect some of the "we're-at-the-mercy-of-cynical-politicians" sentiment so often expressed by frustrated administrative functionaries. Robert Baum reflected somewhat bitterly:

You know Muskie gave a press conference and said "What the district court held was what I meant by 'protect and enhance.'" I should have put a ceiling on all clean air areas the same day, and then a week later let Muskie stand up in Congress and say "That's what I meant" when they can't build an oil refinery in Maine.

Baum interview, supra note 47.


The 1965 Act provided for the establishment of water quality standards for interstate waters. In the absence of state action, such standards were to be adopted by the Secretary of HEW (later the Secretary of the Interior, and now the Administrator of EPA) under procedures set forth in the Water Pollution Control Act. Pub. L. No. 89-234, § 5(a), 79 Stat. 903 (1965), as amended Pub. L. No. 92-500, §§ 303(a)-(c), 86 Stat. 816 (formerly codified at 33 U.S.C. § 1160(c) (1970)). The 1972 Amendments contain a purpose clause which is similar to the "protect and enhance" language of the prior version of the Act: "The objective of this act is to restore and maintain the chemical, physical and biological integrity of the nation's waters." Pub. L. No. 92-500, § 101(a), 86 Stat. 816 (emphasis supplied). The passage of the 1972 Amendments does not affect the following discussion in the text of administrative interpretation of non-degradation under the 1965 version of the Water Pollution Control Act.
and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.\textsuperscript{178} This language has resulted in an official administrative policy of non-degradation. During the hearings on enforcement of the Clean Air Act, Senator Eagleton made the following comparison between the Clean Air Act and the Water Pollution Control Act:

The purposes of [the Clean Air Act] are, number one, to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. That is language that is similar to, almost identical to language in the Water Pollution Control Act . . . which was taken to mean non-degradation, and that policy was frequently discussed in the deliberations on this bill.\textsuperscript{179}

Under the 1965 version of the Water Pollution Control Act each state was required to adopt water quality criteria applicable to all interstate waters within its borders.\textsuperscript{180} If those criteria were approved by the Administrator of EPA, they became the standards for those waters.\textsuperscript{181} Such "standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter."\textsuperscript{182} Those administering the Water Pollution Control Act\textsuperscript{183} have officially taken this language to require non-degradation. The May 1966 guidelines for establishing water quality standards took an unequivocal stance on this point:

Water quality standards should be designed to "enhance the quality of water." If it is impossible to provide for prompt improvement in water quality at the time initial standards are set, the standards should be designed to prevent any increase in pollution. \textit{In no case, will standards providing for less than existing water quality be acceptable.}\textsuperscript{184}

This pamphlet has been updated, and plans developed pursuant to the Water Pollution Control Act in all fifty states now contain non-degradation clauses as required by EPA.\textsuperscript{185}

There is an escape clause, however. The guidelines as finally approved by EPA for all states provide for an exception to the policy of non-degradation. California's guidelines are typical:


\textsuperscript{179} \textit{Implementation Hearings}, supra note 73, at 281.


\textsuperscript{181} Id.

\textsuperscript{182} \textit{Id.}, \textit{as amended} at § 303(c)(2) (formerly codified at 33 U.S.C. § 1160(c)(3) ).

\textsuperscript{183} See note 30 supra.


\textsuperscript{185} EPA \textit{WATER QUALITY STANDARDS DIGEST—A COMPILATION OF FEDERAL STATE STANDARDS ON ANTI DEGRADATION} (Aug. 1972).
Whenever the existing quality of water is better than the quality established in policies as of the date on which policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with the maximum benefit to the people of the State . . . .

EPA's administration of this option has been broad. One EPA official explained that states weigh the economic factors involved. If it appears that a plant would have to move or that no plant could be built, then the non-degradation requirement has been waived. EPA had administered the exception to kill the rule.

EPA will probably treat non-degradation in the Clean Air Act in the same manner. Commenting on the district court decision, Baum stated: "We all thought that if non-degradation did exist in the Clean Air Act it was a policy thing just as in the Water Quality Act [of 1965] and there everybody ignored it." EPA might attempt to dilute the impact of an adverse Supreme Court decision by treading heavily on the word "significant" in the district court order. One EPA official predicts that in order to constitute "significant deterioration," the pollution level in a clean air area would have to approach the maximum set by the national secondary standards. Thus, through conservative administration, the impact of a judicially mandated non-degradation standard could be considerably reduced.

EPA could also attempt to borrow the "best available technology" language from the new source section of the Act. Robert Baum stated, "[T]here is definitely some room in the word significant, but there is room elsewhere." At first, Baum hesitated to discuss what "elsewhere" meant, but later he explained: "There are some indications of what Congress meant by non-degradation." We think there are places in the record which link up non-degradation with the new source rule . . . . That is the direction we’re going to go." As discussed previously, the new source regulations are an inadequate guarantee against deterioration of air quality in clean air areas and discourage industry cooperation in the development of new pollution control technology. Unfortunately, Baum seems to indicate that this is the tactic EPA will probably fall back on if the Supreme Court affirms the court of

186. Id. at 7 (emphasis supplied).
187. Opatz interview, supra note 129.
188. Baum interview, supra note 47.
189. See text accompanying note 23 supra. Richard Ayres of NRDC, who has closely followed the 1970 Amendments from the initial hearings through the present litigation, considers it almost certain that EPA will attempt to use the word "significant" or a perversion of the new source provisions to dilute the effect of the court order: "Every sign from EPA is extreme intransigence." Ayres interview, supra note 95. See also text accompanying notes 196-200 infra.
190. Goldberg interview, supra note 84.
191. Ayres interview, supra note 95.
192. Baum was referring to the few quotes from the Senate Report accompanying the 1970 Amendments and remarks by Senator Muskie discussed previously in the new source section of this Note. See text accompanying notes 81-83 supra.
193. Baum interview, supra note 47. See note 189 supra.
194. See text accompanying notes 84-96 supra.
appeals. It is essentially the tack taken by EPA in administering the Water Quality Act. New plants would be required to use the best available technology to reduce pollution, but except in extreme cases, EPA would not deny construction permits or force plants to relocate.

There is some merit to EPA's substantive objections to a rigid definition of non-degradation. First, if the relationship between urban and non-urban pollution does indicate a pure tradeoff, a small increase in pollution in a highly polluted urban area could be more detrimental to the public health than a corresponding increase in a rural area. EPA argues that funds and manpower should be concentrated in fighting pollution in urban areas where pollution presents the greatest current threat to health. Second, an inflexible percentage definition of non-degradation could skew priorities in regional development. As EPA's Baum stated: "It may be much more in the national interest to develop certain resources, and we don't think that all land use planning should be based on air pollution." The future of a given region should not depend exclusively on the current purity of its air. This is exactly the state of affairs that could prevail if EPA were to define non-degradation in terms of a maximum allowable percentage increase in pollution.

These objections can be met, however, through the use of flexible standards. Pollution tradeoffs between urban and rural areas may be necessary, but they can be controlled through the use of a sliding scale of non-degradation limitations, or a region-by-region determination of what constitutes "significant deterioration." A sliding scale would increase the permissible percentage increase in pollution in very clean areas and decrease the permissible increase as the level of pollutants in the ambient air neared the level set by the secondary standards. Region-by-region determinations could take into account the present purity of the air, conflicting environmental considerations, and to a limited extent, special economic considerations. Such control strategies are within the realm of administrative possibility, and serve as simplified examples of the many ways EPA could draft

195. See text accompanying notes 177-88 supra.
196. Baum interview, supra note 47.
197. For example, posit region A in the State of Washington and region B in rural Ohio. The air in A is pristine (pollution near zero), and the air in B is cleaner than the national secondary standard, but still somewhat polluted. Suppose that non-degradation were defined as allowing a maximum of 5% increase over current levels of pollution. As long as growth causes some pollution, the 5% standard would leave almost no room for development in A (5% of nothing is nothing), while in B 5% of existing pollution might allow for significant development. However, B may be unsuited for development, while A is perfectly located from the view of land-use criteria other than air pollution for an industrial park or a new residential development.
198. However, it should be noted that there are two problems inherent in this approach. One of the advantages of uniform national standards is ease of administration. Region-by-region determinations increase both the administrative burden and the probability that by the time such determinations are complete, the economic and environmental situation may have changed. In addition, formal introduction of even limited economic considerations increases vulnerability to industry pressure. See Crocker, On Air Pollution Control Instruments, 5 Loyola of L.A. L. Rev. 280, 282-84 (1972).
flexible regulations which allow needed dispersal of industry and new construction, but which retain the economic lever of a non-degradation standard.

The problems of administration, however serious, are outweighed by the evils of the alternative: enforcement of the ambient air standards without a non-degradation policy invites polluters to relocate in clean air areas. In addition, both the watering down of the state plan guidelines and EPA's proposed additional alternative to required non-degradation—the use of new source standards—indicate a willingness to indulge industry complaints concerning the economic burden of pollution control. A policy of non-degradation based on flexible criteria will make such indirect lobbying by industry less fruitful, give EPA a necessary tool to fight inflated claims of the cost of pollution control, and prevent wholesale exportation of pollution from urban to rural areas of the nation.

Any action by the EPA which falls short of a reasonable numerical definition of "significant" will probably provoke new actions by environmental groups against the Administrator. An EPA official involved with the administration of water quality standards admits that "narrative statements about non-degradation are difficult to enforce. You almost have to have numerical criteria." Robert Baum stated that "we may well be forced into [a percentage definition]. I have a hunch what we will do will not satisfy the Sierra Club." Thus another round of court battles may be in the offing before the issue of non-degradation in the Clean Air Act is settled.

CONCLUSION

The Air Quality Act of 1967 as amended by the Clean Air Amendments of 1970 supports a policy of non-degradation. The language of the statute is equivocal, but the legislative history as reinforced by previous administrative interpretation clearly supports the construction given the statute by the district and appellate courts in Sierra Club v. Ruckelshaus. This decision is a fortunate one for the anti-pollution effort, since some form of non-degradation is necessary to accomplish the goals of the Clean Air Amendments. The new source approach emphasized by EPA would fail to control the total amount of pollution in any region, and is a poor instrument for much-needed federal participation in land-use planning and industrial site location. It is also particularly susceptible to dilution by industry through cost-benefit arguments, and it fails to encourage industrial cooperation in the development of pollution control technology.

199. Whether this is because EPA is joining the long list of captive regulatory bodies or because of OMB intervention on behalf of industry, it is inconsistent with the language and legislative intent of the 1970 Amendments.

200. Goldberg interview, supra note 84.

201. Baum interview, supra note 47.

The Executive Director of the Sierra Club Legal Defense Fund believes that "the EPA will almost certainly be forced to define 'significant' in terms of percentage degradation." Moorman interview, supra note 89.
Moreover, EPA's reliance on state action is misplaced. The agency admits that the states lack the necessary resources to enforce strict standards, and state and local governments are particularly susceptible to industry pressure. In addition, both state and local governments lack the technical and administrative resources to enforce strict air quality standards. EPA, possibly at OMB's insistence, raises the spectre of a total halt to industrial development if a non-degradation standard is enforced. These fears are exaggerated; an acceptable non-degradation formula can be developed. What is certain is that affirmance of the lower court decisions in the case will accelerate the research and administrative action necessary to produce that formula. A Supreme Court affirmance would also give EPA the scope of authority it needs to guide and enforce the type of long-range, comprehensive land-use planning necessary if the nation's clean air regions are to be adequately protected.

Marc Bramer Mihaly.