Note—Clean Air Amendments of 1970—A State Cannot Authorize a Variance From a National Primary Ambient Air Quality Standard—"Tall Stack" Control Strategy Is Not Acceptable Control Strategy Until All Available Emission Limitation Techniques Have Been Employed. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 489 F.2d 390 (5th Cir. 1974).

[*Editor's Note: Immediately prior to publication, the United States Supreme Court rendered an opinion reversing in part this decision of the Fifth Circuit. Train v. National Resources Defense Council, 43 U.S.L.W. 4467 (U.S. Apr. 16, 1975).*].

In *Natural Resources Defense Council Inc. v. Environmental Protection Agency*,[1] the Fifth Circuit reviewed four issues relating to the Clean Air Amendments of 1970[2] (the 1970 Amendments). A discussion of two of those issues will be presented in this note.[3] The first issue discussed concerns the Georgia Air Quality Act[4] and its

1. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390 (5th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

2. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), *amending* Air Quality Act of 1967 §§ 1857-57*l* (1967), *as amended* Clean Air Amendments of 1970, 42 U.S.C. § 1857-58a (1970). The 1970 Amendments were enacted because the progress under the 1967 legislation had been "regrettably slow." 3 U.S. CODE CONG. & AD. NEWS 91st Cong., 2d Sess. 5356, 5360 (1970). The House Report cited six factors contributing to this situation: (1) cumbersome and time consuming procedures; (2) inadequate funding; (3) scarcity of skilled personnel to enforce and control measures; (4) inadequacy of test and control technologies; (5) organizational problems at the federal level; and (6) failure of the National Air Pollution Control Administration to demonstrate aggressiveness in implementing the law. The 1970 Amendments were designed to ameliorate these deficiencies. H. R. REP. No. 91-1146 91ST CONG., 2d SESS. (1970), *reprinted in* 3 U.S. CODE CONG. & AD. NEWS 5356 (1970).

3. One of the issues decided by the Fifth Circuit and not treated in the note concerned a provision in the Georgia implementation plan that the state agency responsible for maintenance of the plan would protect the confidentiality of any trade secrets. The petitioners argued that the provision authorized the agency to withhold emission data and that such action violated the 1970 Amendments. The court agreed with the petitioners. One of the key elements of the 1970 Amendments was the role that the public was to play in enforcement of the act. The public required emission data to prosecute violations of the 1970 Amendments. The court also reasoned that the 1970 Amendments required that "all" emission data be released and that precluded the suppression of "some" data.

Another issue related to the provision in the Georgia code which permitted the Department of Public Health to consider economic feasibility of pollution control in their enforcement of the implementation plan. The petitioners argued that Congress intended that public health would take precedence over economic considerations. The court agreed. The Fifth Circuit supported its position with legislative history and pointed out hat the Georgia plan suffered from over-inclusiveness. It is permissible to consider economic feasibility in most situations; it is not permissible when there are competing factors of public health. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390 (5th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

4. Air Quality Control Act, GA. CODE ANN. § 88-901 to 88-917 (1971).

provision empowering the Department of Public Health of Georgia to grant variances from the effective date of air quality control requirements.[5] The second issue discussed is the validity of the "tall stack" control strategy provided in the Georgia implementation plan.[6]

I. VARIANCES

The 1970 Amendments required the Administrator of the Environmental Protection Agency (EPA)[7] to promulgate national primary ambient air quality standards[8] for any pollutant which affects the public health.[9] These standards designate the maximum concentrations of these hazardous pollutants that will be tolerated in the air.[10] Once these primary ambient air quality standards were established and published, each state was required to submit a plan which provided "for implementation, maintenance, and enforcement of such primary standards."[11] Among the requirements of a state plan was that it include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment [of primary standards]"[12] not later than 3 years after the approval of the state plan.[13] The 1970 Amendments do provide, however, for a 2-year extension under some circumstances.[14]

---

5. *Id.* § 88-912.

6. GA. REGS. 270-5-24-.02(g) and 270-5-24-.02(2)-(m), as cited by the court in Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 404 (5th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

7. Reorg. Plan No. 3 of 1970, 40 C.F.R. § 1.1 1973, transferred to the administrator of the "Environmental Protection Agency the functions vested by law in the Secretary of Health, Education, and Welfare or in the Department of Health, Education, and Welfare which are administered through the Environmental Health Service, including the functions exercised by the National Air Pollution Control Administration, and the Bureau of Solid Waste Management, Bureau of Water Hygiene, and Bureau of Radiological Health, . . ."

42 U.S.C. § 4342 (1970). The EPA was established as a national agency to formulate and recommend national policies to improve the quality of the environment and to appraise the Federal Government programs in light of the national policy as formulated in the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970).

8. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-4 (1970).

9. *Id.* § 1857c-3(a)(1)(A).

10. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 394 (5th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

11. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5(a)(1) (1970).

12. *Id.* § 1857c-5(a)(2)(B).

13. *Id.* § 1857c-5(a)(2)(A)(i).

14. The period may be extended for not more than 2 years under certain circumstances relating to technological feasibility. *Id.* § 1857c-5(e)(2).

Georgia enacted the Air Quality Control Act[15] which empowered various agencies of the state to comply with the 1970 Amendments. The Georgia Act provided that the Department of Public Health of Georgia could grant a variance from the state implementation plan.[16] A variance is a postponement of the effective date of any requirement of a state plan applicable to a particular party after the plan has been approved by the Administrator of the EPA.[17] The Georgia statute was approved by the Administrator of the EPA.[18]

The Natural Resources Defense Council and others,[19] arguing that the exclusive method of obtaining a variance was within the provisions of the 1970 Amendments, sought a review of the Georgia statute.[20] The Fifth Circuit ordered the Administrator of the EPA to disapprove the variance provision of the Georgia statute.[21] The court held that a state's adoption of a supplemental variance provision is inconsistent with the 1970 Amendments.[22]

The Fifth Circuit contrasted the language of the Georgia variance provision with the language of the 1970 Amendments and determined that the 1970 Amendments were "far more restrictive"[23] than the Georgia variance provision. For example, the Georgia plan would permit the Department of Public Health to grant a variance "if [the Department of Public Health] finds special circumstances

15. Air Quality Control Act, GA. CODE ANN. §§88-901 to 88-917 (1971).

16. *Id.* § 88-912.

17. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 401 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

18. The Air Quality Control Act preceded the Georgia implementation plan. The general scope of the Air Quality Control Act is to empower agencies within the state to "safeguard the public health, safety and welfare of the people of the state consistent with providing for maximum employment and full industrial development of the state." GA. CODE ANN. § 88-901 (1971). It is assumed in this note that the various agencies empowered with the above mentioned task were responsible for the drafting of the Georgia implementation plan. The issue of whether or not the EPA possessed authority to approve or disapprove state statutes was decided in Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 478 F.2d 875, 887-88 (1st Cir. 1973). It was there stated, "We hold that these statutory provisions [Clean Air Amendments of 1970, 42 U.S.C. §§ 1857c-5(a)(2), 1857c-5(c) (1970)] not only empower, but also require the administrator to disapprove state statutes and regulations, or portions thereof, which are not in accordance with the requirements of the Clean Air Amendments."

19. Natural Resources Defense Council, Inc. v. Environmental Protection Agency , 489 F.2d 390 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742). The Project on Clean Air, Save America's Vital Environment, Inc., Janey Weber and Susanne Allstrom joined as petitioners.

20. *Id.* at 399.

21. *Id.* at 403.

22. *Id.*

23. *Id.* at 400.

which would render strict compliance unreasonable, unduly burdensome, or impractical."[24] The 1970 Amendments permit a variance for 1 year and only when the governor of the state applies to the Administrator of the EPA.[25] Even then the Administrator of the EPA must determine (1) that "good faith efforts"[26] to comply with the plan have been made, (2) that "necessary technology or other alternative methods of control are not available,"[27] (3) that "any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on the public,"[28] and (4) that the "continued operation of such source is essential to national security or to the public health and welfare."[29]

The EPA advanced three arguments in support of its approval of the Georgia Act. The first was that the 1970 Amendments applied only to sources[30] large enough to threaten attainment of primary ambient air quality standards.[31] The Fifth Circuit, noting that the language of the 1970 Amendments spoke of "any stationary source"[32] and "any requirement of an applicable implementation plan,"[33] rejected the argument. The court inferred that the term "any source" precludes the idea that only large sources were governed by the postponement provision and that the reference to "any requirement of an applicable implementation plan" precluded the possibility that the provision applied only to postponements which prevented attainment of a primary ambient air quality standard.[34]

The second argument in support of the Georgia plan also was rejected by the Fifth Circuit. The EPA argued that the 1970 Amendments contained a revision authority[35] and that variances could be

24. GA. CODE ANN. § 88-912 (1971).

25. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5(f)(1) (1970).

26. *Id.* § 1857c-5(f)(1)(A).

27. *Id.* § 1857c-5(f)(1)(B).

28. *Id.* § 1857c-5(f)(1)(C).

29. *Id.* § 1857c-5(f)(1)(D).

30. The term "source" is used to indicate a source of pollution. The source of pollution might be a stationary source such as a manufacturing plant or a mobile source such as an automobile. This note deals only with stationary sources.

31. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 400 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

32. *Id.* at 401.

33. *Id.*

34. *See id.*

35. *Id.* The revision authority, § 1857c-5(a)(3), provides that "The Administrator shall approve any revision of an implementation plan applicable to any air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."

granted by the state under that provision.[36] The Fifth Circuit equated a variance to a postponement and then distinguished between a postponement and a revision. "A revision is a change in a generally applicable requirement,"[37] whereas a postponement or variance is a "change in the applicable requirement to a particular party."[38] The Fifth Circuit explained that revisions would be applicable to the broad requirements of an implementation plan.[39] In contrast, a postponement would be applicable when the delay sought was on behalf of a particular source.[40] The court noted that the 1970 Amendments distinguished between a postponement and a revision and concluded that Congress chose the postponement provision[41] with its four strict requirements[42] to insure that postponements (variances) would be the exception and not the rule.[43] Accordingly, the Fifth Circuit determined that the Georgia provision would be "wholly inadequate to fulfill the part Congress planned for the federal postponement provision."[44]

The final argument advanced by the EPA was that the states should be permitted to grant variances prior to the date that initial primary ambient air quality standards are to be met.[45] The EPA argued that Congress intended the pre-attainment period to be flexible and that, consistent with this posture of flexibility, a state should be permitted to adjust requirements until the primary ambient air quality standards must be attained.[46] This final argument of the EPA also was rejected.[47] The court explained that the reasoning of the EPA contained a crucial ambiquity.[48] It is true that Congress may not have expected immediate achievement of the primary ambient air quality standards. This position is supported because Congress provided a 3-year attainment period followed by a possible

36. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 401 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 401, 402.

42. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5(f) (1970).

43. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 401-02 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

44. *Id.* at 402.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 403.

2-year extension.[49] It does not necessarily follow, however, that Congress intended to permit variances from emission standards as set out in state implementation plans.[50] The Fifth Circuit stated that the overall strategy of the 1970 Amendments was "to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need."[51]

The Fifth Circuit's decision on the variance issue is important because it is inconsistent with the opinion of the First Circuit[52] on the very same issue. The First Circuit dealt with variance provisions in the Massachusetts[53] and Rhode Island[54] implementation plans. It determined that Congress had established two time periods in the 1970 Amendments, the period required to attain the primary standards[55] and a maintenance period.[56] Because Congress had made possible a 2-year extension of the first period,[57] the court concluded that Congress "did not expect immediate achievement of standards."[58] The First Circuit determined that there was merit in the practice of permitting a state to adopt a strict limitation standard initially with the possibility of granting a variance later if "practicability warrants."[59] The court hypothesized that if a state established an emission standard which a particular source could not meet, and if the postponement provision of the 1970 Amendments were followed, then the source could obtain only a 1-year postponement. Such a restricted postponement would be contrary to the policy of flexibility intended by Congress and evidenced by the language of the 1970 Amendments.[60] The First Circuit decided that the Administrator's authority to approve a state plan containing a variance

49. *Id.*

50. *Id.*

51. *Id.*

52. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 478 F.2d 875 (1st Cir. 1973). The Second Circuit (Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 494 F.2d 519, 523 (2d Cir. 1974), and the Eighth Circuit, Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 483 F.2d 690, 694 (8th Cir. 1973)) adopted the reasoning of the First Circuit by reference.

53. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 478 F.2d 875, 890 (1st Cir. 1973).

54. *Id.* at 880.

55. *Id.* at 885.

56. *Id.*

57. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5(e)(1) (1970).

58. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 478 F.2d 875, 887 (1st Cir. 1973).

59. *Id.*

60. *See id.*

provision was a "necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period."[61] The court did require, however, that in any variance scheme in a state plan, the variance must cease before the statutory 3-year compliance date[62] and that the administrator of the EPA must specifically approve the variance.[63]

To varying degrees both the Fifth Circuit and the First Circuit relied upon the legislative history of the 1970 Amendments to determine what Congress intended in the way of a variance provision. Among the legislative history are Congressional Hearings,[64] discussion on the Senate floor prior to the passage of the bill, and Senate Oversight Hearings[65] subsequent to the passage of the 1970 Amendments.

The legislative history of the 1970 Amendments supports the position of the Fifth Circuit; the exclusive mechanism for granting a variance lies within the Amendments. For example, the senators who sponsored the bill and the majority of those who debated it on the floor indicated that the 1970 Amendments would be a strong measure which would overcome the deficiencies of earlier air pollution control legislation.[66] Those senators expressed a sense of urgency and concern because the matter at hand gravely affected the public health.[67] They emphasized, contrary to the position taken by the First Circuit, that the time for flexibility had passed.[68]

When Senator Edmund Muskie was explaining the key provisions of the 1970 Amendments to the members of the Senate, he pointed out that a governor could "apply for a 'postponement' of the deadline if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan."[69] This language indicates that Senator Muskie understood the postponement provision within the 1970 Amendments to apply to indi-

---

61. *Id.*

62. *Id.*

63. *Id.*

64. *Senate Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works United States Senate*, 91st Cong., 2d Sess., pt. 1, at 133, 143 (1970).

65. *Hearings on Implementation of the Clean Air Act [sic] Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92nd Cong., 2d Sess., ser. 92-H31, pt. 1 (1972).

66. 116 CONG. REC. 33118 (1970) (remarks of Senator McIntyre).

67. *Id.* at 32919 (remarks of Senator Spong), 33076 (remarks of Senator Gurney).

68. *Id.* at 33118 (remarks of Senator McIntyre). "It is a tough bill but there is no more room for laxity." "Flexibility has run its course. Now we must act."

69. *Id.* at 42384 (remarks of Senator Muskie).

vidual sources and would preclude a state from arbitrarily granting a variance from an applicable deadline without the approval of the Administrator of the EPA.

Additional support can be found in the introductory statements of the Senate Oversight Hearings[70] which were conducted because the Senate subcommittee had received information critical of the EPA "and especially [because the subcommittee had received] reports that some states [had] weakened their existing air pollution control standards in order to bring them in line with new federal standards issued by the EPA."[71] This language infers that if the states, through their implementation plans, had made commitments which were more strict than that required by the 1970 Amendments, they would be held to those commitments and would be permitted to relax requirements of the state plan only as provided by the 1970 Amendments.

The view adopted by the Fifth Circuit is supported not only by the legislative history but also by the plain language of the 1970 Amendments. The states are given 9 months to devise an implementation plan;[72] within this period, the state may consider within what time limit (up to 3 years)[73] it will attain the primary ambient air quality standards. The 2-year extension period applicable to attainment of the primary ambient air quality standards is granted upon application by a state governor[74] and will be granted by the Administrator[75] only within the strict guidelines of the extension provision.[76] The 1970 Amendments make further provisions for "postponements"[77] prior to the date that "any stationary source"[78] is to comply with "any requirement of an applicable implementation plan."[79] Taken as a whole, and the legislation must be read as a whole,[80] the 1970 Amendments provide for extension of the attainment period for primary ambient air quality standards[81] and provide

70. *Hearings on Implementation of the Clean Air Act [sic] Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92nd Cong., 2d Sess., ser. 92-H31, pt. 1 (1972).

71. *Id.* pt. 1, at 2.

72. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5(a)(1) (1970).

73. *Id.* § 1857c-5(a)(2)(A)(i).

74. *Id.* § 1857c-5(e)(1).

75. *Id.*

76. *Id.* §§ 1857c-5(e)(1), 1857c-5(e)(2).

77. *Id.* § 1857c-5(f)(1).

78. *Id.*

79. *Id.*

80. *See* United States v. Heirs of Boisdoré, 49 U.S. (8 How.) 113, 122 (1850).

81. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5(e) (1970).

also for postponement for particular sources to comply with emission standards in the state plan.[82] The legislative history and the plain meaning of the words in the 1970 Amendments urge the conclusion reached by the Fifth Circuit; it is inconsistent for a state implementation plan to provide a variance provision which supplements the postponement provision of the 1970 Amendments.

II. TALL STACKS

The second issue confronting the Fifth Circuit was the interpretation of the language in the 1970 Amendments that a state implementation plan include emission limitations, schedules, and time tables for compliance with such limitations and "such other measures as may be necessary."[83] Emission limitations is a term used to denote any type of control that reduces emissions of pollutants into the air.[84] The Georgia plan provided for "tall stack"[85] control strategy of certain hazardous pollutants such as sulphur oxides. The tall stack approach is a form of dispersion enhancement technique. Dispersion enhancement techniques are techniques that reduce the concentration of pollutants in the vicinity of the source, not by limiting their emission, but by altering the conditions under which they are emitted.[86] The tall stack is an historic device which was first used to provide a natural draft for the combustion processes.[87] The tall stack has taken on an additional function; it is used today to convey waste gases containing either toxic or particulate matter high into the atmosphere to be dispersed by the wind, to the end that concentrations of pollutants at or near the base of the stack will be within permissible levels.[88]

In addition to the tall stacks strategy, the Georgia plan contained a limitation on the sulphur content of fuel used by every source in the state.[89] The Administrator of the EPA "hinted"[90] but

82. *Id.* § 1857c-5(f).

83. *Id.* § 1857c-5(a)(2)(B).

84. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 394 n.2 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

85. *Id.* at 403.

86. *Id.*

87. H. LUND, INDUSTRIAL POLLUTION CONTROL HANDBOOK 7-16 (1971).

88. *Id.*

89. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 409 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

90. *Id.* at 410. The court gave no explanation as to the "hint" the EPA suggested. The court infers that the EPA postulated without substantial evidence that control of sulphur

had not actually determined that the limitation of sulphur content in fuel was an "emission limitation"[91] that would satisfy the 1970 Amendments.[92] The Fifth Circuit ordered the Administrator to make an explicit determination of whether or not the emission limitation provision of the Georgia plan standing alone was sufficient and to file a statement of his findings with the court as promptly as possible.[93] The court held that a tall stack control strategy could not be used as a substitute for emission limitations.[94]

The interpretation of the language "such other measures as may be necessary"[95] was central to the tall stack issue.[96] An EPA Staff Paper[97] had developed two interpretations of the language in question. The first interpretation was denominated the "broad approach."[98] The broad approach interprets the language of the 1970 Amendments as focusing on the means employed to attain primary ambient air quality standards.[99] The broad approach construes the language as directed toward the method of attainment— emission limitations—rather than toward the attainment of the primary ambient air quality standard itself.[100] The second interpretation, the "narrow approach,"[101] views the language, "such other measures as may be necessary," as focusing on the objective itself, the attainment of the primary standard.[102] Under the narrow approach the language is construed to mean that Congress intended to suggest emission limitations as one possible method of attaining the pri-

---

oxide emission would be obtained by limiting the amount of sulphur content in the fuel. This inference is supported by the order of the court that the administrator make an "explicit determination" on this question and file his findings with the court. There is no indication at this time of further action by the EPA.

91. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

92. *Id.*

93. *See* Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 411 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

94. *See Id.* at 410.

95. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

96. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 406 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

97. Environmental Protection Agency, Staff Paper—*Intermittent Control Systems,* 119 CONG. REC. 10948, 10955-56 (daily ed. June 12, 1973).

98. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 406 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

mary ambient air quality standards but did not limit the state to emission limitations control strategy only.[103]

The Fifth Circuit adopted the broad approach.[104] This interpretation was favored because there was a marked preference for emission standards[105] within the language of the 1970 Amendments.[106] The court cited several provisions of the 1970 Amendments which demonstrated either a general preference for emission standards or an understanding on the part of Congress that implementation plans would consist primarily of emission standards.[107] The court was supported further in its choice of the broad approach by the nondegradation policy of the 1970 Amendments.[108] The nondegradation policy requires that in any area where the air quality exceeds the primary ambient air quality standard, that air quality will not be significantly deteriorated.[109] The Fifth Circuit recognized that nondegradation was not a specific provision of the 1970 Amendments but that it was an important goal of that legislation.[110] The nondegradation policy and tall stack strategy are mutually exclu-

---

103. *Id.*

104. *Id.*

105. *Id.* at 394 n.2. Emission standards are "standards setting specific quantitative limits on the amounts given individual sources may emit into the air." Emission standards are included within the meaning of emission limitations.

The Fifth Circuit expressed the view that their decision to adopt the broad approach was supported by principles of equity. If the emission limitations were not found to be the preferred method for controlling hazardous pollutants an inequitable situation would exist. New sources, which are governed by the federal government under the 1970 Amendments, would be required to employ emission standards on all pollutants (Clean Air Amendments of 1970, 42 U.S.C. § 1857c-6(a)-(b) (1970)). This would include those that affect only the welfare and aesthetic quality of the ambient air in addition to hazardous pollutants. At the same time existing sources might be using dispersion enhancement techniques to control a pollutant hazardous to health. The resultant inequity would be that an existing source could control a hazardous pollutant with dispersion enhancement techniques, while a new source would be required to control a non-hazardous pollutant by an emission reduction technique or "best available technology." *See* Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 407 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

106. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 406 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

107. *Id.*

108. *Id.* at 408.

109. *Senate Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works United States Senate,* 91st Cong., 2d Sess., pt. 1 at 133, 143 (1970).

110. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 408 (5th Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3696 (U.S. May 20, 1974) (no. 73-1742).

sive concepts[111] because the nondegradation policy requires emission reduction, and the tall stack doesn't reduce the emission of pollutants; it simply reduces concentration of pollutants near the stack by spreading them over a wide area. Tall stacks would degrade that air to which the pollutants are dispersed[112] and would not be acceptable in light of the nondegradation policy.[113]

Although the court determined that tall stacks would not be an acceptable substitute for emission reductions, the EPA's primary argument was that even if emission limitations were required to attain the primary ambient air quality standards, the Georgia plan was acceptable.[114] The Georgia plan limited the emission of sulphur oxides by requiring low sulphur content fuel,[115] and this requirement was applicable to every source in Georgia.[116] The argument advanced asserts that by limiting the amount of sulphur in the fuel, emission of sulphur oxides is necessarily limited.[117] The Fifth Circuit differed with the EPA's understanding of the broad approach.[118] The broad approach is not satisfied simply because the plan will attain the primary ambient air quality standard with a combination of emission limitation and dispersion enhancement techniques.[119] The broad approach permits the use of dispersion enhancement techniques only when emission reduction techniques are unavailable or infeasible.[120] Tall stack strategy can be employed only under one of two circumstances: The emission limitation standard included in the plan, standing alone, must be capable of attaining the primary ambient air quality standard,[121] or it must be demonstrated both that attainment of the primary ambient air quality standard is "unachievable or infeasible"[122] and that all available emission limitation techniques have been employed to their maximum capability.[123] No evidence was before the court to indicate that either of

111. *Id.* at 404 n.35.
112. *Id.* at 409.
113. *Id.*
114. *Id.* at 310.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* The Fifth Circuit was of the opinion that even though the Georgia plan required limitation of the sulphur content of fuel, the plan relied on tall stack control strategy as a substitute "for control of sulphur oxides." *See* n.51 at 410.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

these two conditions existed.[124] Decision on the disposition of the Georgia tall stack strategy was postponed until such evidence was produced.[125]

As the Fifth Circuit indicated,[126] there is abundant evidence that nondegradation is a policy of the 1970 Amendments. The court noted that this policy was recognized by the United States Supreme Court in *Sierra Club v. Ruckelshaus*[127] when it affirmed, without opinion, the holding of the District Court of the District of Columbia. The district court held that nondegradation is a policy of the 1970 Amendments and supported its holding with an extensive discussion of the legislative history of the 1970 Amendments.[128] The legislative history supports the decision that nondegradation is a policy of the 1970 Amendments. For example, Robert Finch, Secretary of Health, Education, and Welfare, testified in the Senate Hearings prevenient to the passage of the 1970 Amendments that "significant deterioration"[129] of the environment would be in conflict with the 1970 Amendments. Another example is that found in the Oversight Hearings[130] when a witness stated that nondegradation was not a part of the 1970 Amendments. Senator Thomas F. Eagleton disagreed and emphatically stated that nondegradation was a part of the 1970 Amendments.[131]

---

124. *Id.*

125. *Id.* at 411.

126. *Id.* at 408.

127. Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd per curiam by an equally divided court sub nom.*, Fri v. Ruckelshaus, 412 U.S. 541 (1973).

128. *Id.* at 255.

129. *Senate Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works United States Senate*, 91st Cong., 2d Sess., pt. 1 at 133, 143 (1970).

There are some new developments on the issue of "significant deterioration." The EPA has proposed regulations which will permit the states, subject to review by the EPA, to determine what constitutes "significant deterioration." The EPA proposal establishes three classes of geographic areas. Class I areas are areas where practically any change in the air quality would be significant. Class II areas are areas where deterioration accompanying moderately well controlled growth would be insignificant deterioration. Class III areas are areas where deterioration would be permitted up to the national ambient air quality standard. The EPA would initially classify all states as Class II areas. States would then be free to redesignate any area as Class I or Class III after holding at least one public hearing. 39 Fed. Reg. 31000, 31003 (1974).

The Sierra Club has promised that this proposed regulation will be challenged in court. Washington Post, Aug. 17, 1974 at A3, col. 8.

130. *Hearings on Implementation of the Clean Air Act [sic] Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92nd Cong., 2d Sess., ser. 92-H31, pt. 1 at 14 (1972) (remarks of Senator Eagleton).

131. *Id.* at 15. "I think nondegradation was in the 1970 law, very much in the 1970 law and has to be a part of the implementation plan submitted by a state."

If the Fifth Circuit had adopted the narrow approach propounded by the EPA Staff Paper,[132] it would have made possible relocation of industry into areas where the quality of air exceeded that required by the primary ambient air quality standards. Relocation would have been possible, absent a nondegradation policy, because industry could move into areas of high quality air and degrade the air so long as the primary ambient air quality standards were not violated. The use of tall stacks would then be acceptable because their nature is to disperse pollutants and to maintain low concentrations near the source.[133] This would have conflicted with the announced policy of the drafters of the 1970 Amendments that "polluter havens"[134] would not exist. They eliminated this possibility by requiring a standard of performance possible through the use of the "best available technology"[135] for all new sources. Tall stacks are not the best available technology and would not be adequate[136] to reduce emissions to the level possible with the "best system of emission reductions."[137] One commentator has said, "The tall stack, therefore, might better be called a ground level pollution control device rather than an air pollution control device since it does not reduce by a gram the amount of effluent which is being poured into the atmosphere."[138]

III. CONCLUSION

The intent and spirit of the 1970 Amendments are reflected in the holdings of the Fifth Circuit on the two issues of variances and tall stack control strategy. In the interest of public health, Congress passed legislation requiring that hazardous pollutants in the am-

132. Environmental Protection Agency, Staff Paper—*Intermittent Control Systems,* 119 CONG. REC. 10948 (daily ed. June 12, 1973).

133. *See* H. LUND, INDUSTRIAL POLLUTION CONTROL HANDBOOK 7-16 (1971).

134. *Senate Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works United States Senate,* 91st Cong., 2d Sess., pt. 1 at 135 (1970).

135. Clean Air Amendments of 1970, 42 U.S.C. § 1857c-6(a)(1) (1970). The term "best available technology" does not appear in the 1970 Amendments. The Amendments require the "best system of emission reductions." The language "best available technology" has been used by commentators and may relate to the language in the Senate version of the proposed 1970 Amendments. The language in that proposal demands "latest available pollution control techniques." *See Senate Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works United States Senate,* 91st Cong., 2d Sess., pt. 1 at 63 (1970).

136. R. ROSS, AIR POLLUTION AND INDUSTRY 425 (1972).

137. CLEAN AIR AMENDMENTS OF 1970, 42 U.S.C. § 1857c-6(a)(1) (1970).

138. R. ROSS, AIR POLLUTION AND INDUSTRY 424 (1972).

bient air be reduced to levels prescribed in the primary ambient air quality standards.[139]

Congress not only prescribed that maximum tolerable levels of pollution would be established, it also prescribed when these levels would be attained—as expeditiously as practicable or within three years with a possible 2-year extension period.[140] Congress required each state to devise a plan whereby the quality of the air prescribed by the federal government would be attained in the respective state.[141] Congress was very careful to provide a method for obtaining a variance from these plans, and the Fifth Circuit was correct in its prohibition against divers variance provisions.[143] The evil of permitting implementation of the Georgia plan as approved by the EPA is that, given a variance-granting power, state governments would be under continuous pressure from special interest groups to grant variances until the statutory deadline for compliance with the primary ambient air quality standards arrives. At that point the ultimate evil exists; the sources that obtained variances will not have taken adequate measures to reduce emissions and additional time will be required for installation of emission reduction systems, subsequent emission reductions, and a natural flushing or purging of existing pollutants. Even if such state-granted variances did not prevent attainment of the primary standards within the given time, it would prevent attainment as "expeditiously as practicable." These pressures upon states were removed by requiring variances to be granted by the Administrator of the EPA, and the Fifth Circuit must have recognized that fact, although it was not expressly stated in its opinion.

Furthermore, Congress intended that where air quality exceeded that required by primary ambient air quality standards, it would not be significantly deteriorated even if such deterioration would not violate the primary ambient air quality standards. The House Report on the 1970 Amendments[144] states that "effective pollution control requires both reduction of present pollution and prevention of new significant pollution."[145] The Fifth Circuit reflected

139. CLEAN AIR AMENDMENTS OF 1970, 42 U.S.C. § 1857c-5 (1970).

140. *Id.* § 1857c-5(a)(2)(A)(l).

141. *Id.* § 1857c-5(a)(1).

142. *Id.* § 1857c-5(f).

143. At this time no action has been taken on the petition for cert. The Supreme Court should grant cert. and affirm the decision of the Fifth Circuit.

144. H. R. REP. No. 91-1146, 91st Cong., 2d Sess. (1970), *reprinted in* 3 U.S. CODE CONG. & AD. NEWS 5356 (1970).

145. H. R. REP. No. 91-1146, 91st Cong., 2d Sess. (1970), *reprinted in* 3 U.S. CODE CONG. & AD. NEWS 5356 (1970).

these principles in its prohibition against dispersion enhancement techniques and more particularly by prohibiting the use of tall stacks as a substitute for emission reduction techniques. By prohibiting tall stacks the court enhances both aspects of the policy; present pollution is reduced because as effluents settle out of the air they are not replaced by new emissions, and in areas where air quality is presently acceptable, new sources cannot enter those areas and degrade the air by dispersing their emissions over a wide area.

Jim Duvall

Note—The Courts Have the Authority to Review Substantive Decisions of Administrative Agencies Under the National Environmental Policy Act. *Environmental Defense Fund, Inc. v. Corps of Engineers,* 492 F.2d 1123 (5th Cir. 1974).

In 1962 the Army Corps of Engineers recommended to Congress construction of the Tennessee-Tombigbee Waterway. After passage of the National Environmental Policy Act of 1969 (NEPA),[1] the Corps re-evaluated the project in accordance with the procedural mandates of section 102 of the Act[2] and again recommended construction. The Environmental Defense Fund (EDF), contending that the Corps had not fully complied with the substantive and procedural requirements of NEPA, opposed the construction of the Waterway.[3] The district court found that the Corps had complied with the procedural requirements of the Act;[4] the court ruled, however, that it lacked the authority to rule on the substantive merits of a Corps of Engineers decision.[5] When the EDF appealed, the Fifth Circuit held that the Administrative Procedure Act (APA)[6] gives courts the authority to review substantive agency decisions made under NEPA.[7]

1. 42 U.S.C. § 4321 *et seq.* (1970).

2. *Id.* at § 4332. Section 4332 sets forth the procedure to be followed "to the fullest extent possible" by administrative agencies considering a project which could have an impact on the environment.

3. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 348 F. Supp. 916 (N.D. Miss. 1972).

4. *Id.*

5. *Id.* at 925.

6. 5 U.S.C. § 701 *et seq.* (1970).

7. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123, 1139 (5th Cir. Apr.,1974). Although the court held that agency decisions are reviewable, the court found that the final decision in this case was made by Congress. Congressional decisions are not subject to judicial scrutiny under APA. *Id.* at 1140.