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BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1665

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Regulations of the Environmental Protection Agency

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BRIEF FOR PETITIONERS

STATEMENT OF ISSUES PRESENTED

This case brings into question the following specific issues:

1. Whether the regulations here under review are permitted by the Clean Air Act when:

(A) the clear language of the Clean Air Act requires the Administrator of EPA to approve any state implementation plan that meets the specified criteria of Section 110 of the Act, none of which refer to the establishment of air quality standards more stringent than the national primary and secondary standards;

(B) the legislative history of the Clean Air Act, when read in its entirety, reveals that Congress did not intend for EPA to establish air quality standards more stringent than the primary and secondary standards;

(C) the regulations establish air quality standards that are more stringent than the national primary and secondary stand-

ards and that bear no rational relationship to the protection of public health and welfare; and

(D) Congress has provided EPA no standards to guide the Agency in the promulgation of air quality standards more stringent than the primary and secondary standards.

2. Whether the regulations are arbitrary and capricious and should be set aside when:

(A) the regulations impose arbitrary pollutant increment ceilings that bear no rational relationship to the protection of the public health and welfare; and

(B) the application of the regulations and their enforcement are dependent upon meteorological data that are largely non-existent and modeling technology that is inaccurate and unworkable.

3. Whether by imposing federal non-degradation standards on the states, EPA has infringed the constitutional sovereignty of the individual states with regard to the traditionally local functions of land use planning and control.

REFERENCE TO PARTIES AND RULINGS

The Petitioners on whose behalf this brief is submitted are the American Petroleum Institute, a trade association of energy resource companies in the United States, the members of which will be adversely affected by implementation of the regulations here under review; and the Standard Oil Company (Ohio), Atlantic Richfield Company, Continental Oil Company, Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc. and Union Oil Company of California, each of which is or plans to be a processor of one or more energy resource products such as petroleum products, coal, shale oil and uranium. All of the petitioners are adversely affected by the regulations.

The Respondent is the Environmental Protection Agency, the agency of the Federal Government that promulgated the regulations here under review.

This case has not previously been before this Court.

STATEMENT OF THE CASE

1. The Procedural Setting of the Case

This case involves the review of the so-called "significant deterioration" regulations promulgated by the Environmental Protection Agency (EPA) on November 27, 1974. 39 Fed. Reg. 42509 *et seq.* (Dec. 5, 1974).

The regulations were issued in response to an order of the United States District Court for the District of Columbia entered on May 30, 1972, in the case of *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253 (D. D. C. 1972). Prior to that time, the Administrator of EPA had announced that pursuant to the mandatory language of Section 110(a)(2) of the Clean Air Act,[1] any state implementation plan satisfying the eight criteria specified for such plans under that section would be approved by the Agency. On May 24, 1972, the Sierra Club and other environmental organizations brought suit against the Administrator in the District Court for the District of Columbia under Section 304(a)(2) of the Clean Air Act,[2] alleging that in addition to the eight criteria of Section 110, state implementation plans were required to contain further provisions that would prevent degradation of existing air quality in areas where air quality is better than that required by the national primary and secondary standards. Six days after the suit was filed, without taking any evidence on the subject and despite the contrary language of Section 110,[3] the District Court issued a preliminary injunction from the bench requiring the Administrator (i) to disapprove all state implementation plans that failed to prevent significant deterioration of existing air quality, and (ii) to promulgate regulatory revisions for the state plans to prevent such deterioration.

A panel of the Court of Appeals for the District of Columbia Circuit affirmed the District Court order *per curiam, Sierra Club* v. *Ruckelshaus,* D. C. Cir. No. 72-1528 (Nov. 1, 1972), and because of an equally divided vote by the Supreme Court, *sub nom. Fri.* v. *Sierra Club*, 412 U.S. 541 (1973), the District Court decision was allowed to stand.

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[1] 42 U.S.C. § 1857c-5.

[2] 42 U.S.C. § 1857h-2.

[3] See discussion on pp. 13-14, 15-16, *infra.*

The Administrator disapproved all state implementation plans on November 7, 1972,[4] concluding that none of the plans contained significant deterioration provisions sufficient under the District Court's order. 37 Fed. Reg. 23836 (Nov. 9, 1972). On July 16, 1973, the Agency published four alternative proposals for the significant deterioration regulations. 39 Fed. Reg. 18986. Public hearings on the proposals were held in Washington, D. C., Atlanta, Dallas, Denver and San Francisco, and the Agency received more than three hundred written comments. Thereafter, EPA reproposed another set of regulations on August 27, 1974, 39 Fed. Reg. 31000, and the final regulations that are the subject of this action were promulgated on November 27, 1974, 39 Fed. Reg. 42510 (Dec. 5, 1974). Subsequently, clarifying amendments to the regulations were adopted on June 5, 1975. 40 Fed. Reg. 25004, *et seq.* (June 12, 1975).

The American Petroleum Institute and the nine agency resource companies (the Petitioners) on whose behalf this brief is submitted filed a petition to review the regulations with the Court of Appeals for the Sixth Circuit on January 2, 1975, and by order of June 16, 1975, that Court transferred the action to the Court of Appeals for the District of Columbia Circuit. All petitions to review the regulations now pending in this Court have been consolidated.*

2. The Content of the Regulations

The regulations revise, purportedly pursuant to Section 110(c) of the Clean Air Act,[5] all of the plans that have been adopted by the states under that section for the implementation, maintenance and enforcement of the national primary and secondary ambient air quality standards prescribed by the Administrator of EPA under Section 109.[6] The regulations go beyond the primary and secondary

* In response to this Court's consolidation order, Petitioners herein, through conferences with other petitioners, have attempted to avoid the advancement of repetitive arguments. To that end, Petitioners hereby support, and frequently cite hereinafter, the arguments being made on behalf of the petitioners in actions numbered 75-1368, 75-1369, 75-1371, 75-1372, 75-1575, 75-1666, 75-1667, 75-1763 and 75-1764.

[4] That disapproval did not affect other provisions of the plans the Administrator had determined were in compliance with the Act.

[5] 42 U.S.C. § 1857c-5(c).

[6] 42 U.S.C. § 1857c-4.

standards, however, by imposing restrictions and procedures intended to prevent the "significant deterioration" of air quality in those areas of a state where air quality is already better than that required by the national standards.

The regulations prescribe three classifications for areas with air quality better than the national standards.[7] For Class I and Class II, increment ceilings above 1974 background levels are prescribed for increases in sulfur dioxide and suspended particulates, as follows:[8]

Pollutant	*Class I ug/m³*	*Class II ug/m³*
Particulate matter:		
Annual geometric mean	5	10
24-hour maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hour maximum	5	100
3-hour maximum	25	700

For areas designated Class III increases in particulates and sulfur dioxide will be permitted up to the national standards.[9]

The preamble to the regulations (39 Fed. Reg. 42510) explains that Class I is intended to apply to areas in which "practically any change in existing air quality would be considered significant"; Class II to areas where changes "normally accompanying moderate well-controlled growth" would be considered insignificant; and Class III to areas where "deterioration of air quality up to the national standards would be considered insignificant."

The regulations took effect on January 6, 1975, and as of that date all areas in the Nation not meeting the national standards were initially designated Class II.[10] The regulations authorize the

[7] The regulations were amended June 5, 1975 to provide that each state may notify the Administrator of EPA at any time as to those areas that do not satisfy the national standards, and that therefore are exempt from the "significant deterioration" regulations. 40 CFR § 52.21(c)(1), 40 Fed. Reg. 25006. The remaining areas of the Nation that are subject to the regulations are sometimes referred to in this brief as "clean air areas."

[8] 40 C.F.R. § 52.21(c)(2)(i); 39 Fed. Reg. 42515.

[9] 40 C.F.R. § 52.21(c)(2)(ii); 39 Fed. Reg. 42515.

[10] 40 C.F.R. § 52.21(c)(3); 39 Fed. Reg. 42515.

states to submit proposals to the Administrator for the redesignation of an area to another class, based upon the area's anticipated growth, the social, environmental and economic effects of the redesignation, and the impacts the redesignation would have upon regional and national interests.[11]

Where federal lands are involved, such as national parks, national monuments, national wilderness and primitive areas and national forests, the Federal Land Manager responsible for the area may apply for redesignation, but only to a more restrictive classification.[12]

A proposal for redesignation is required to be approved by the Administrator except where the prescribed procedures have not been followed, or where the Administrator determines that the relevant considerations were arbitrarily and capriciously disregarded.[13]

The regulations also provide for a preconstruction review applicable to eighteen specified types of stationary sources of sulfur oxides or particulate matter.[14] This review applies to the new construction or modification of such a source that had not begun construction prior to June 1, 1975, and requires a determination by

[11] 40 C.F.R. § 52.21(c)(3)(ii); 39 Fed. Reg. 42515. In proposing a redesignation, the state must provide for at least one public hearing on the subject, notify any other states that might be affected, and make available for public inspection a statement of the reasons supporting redesignation. *Id.*

[12] 40 C.F.R. § 52.21(c)(3)(iv). With respect to federal lands within its boundaries, a state may apply for redesignation to any class, provided the Federal Land Manager has been consulted and the redesignation will be consistent with adjacent land. 40 C.F.R. § 52.21(c)(3)(iii). Similarly, the governing body of an independent Indian reservation may request redesignation of lands subject to its jurisdiction to any of the classes. 40 C.F.R. § 52.21(c)(3)(5).

[13] 40 C.F.R. § 52.21(c)(3)(iv).

[14] 40 C.F.R. § 52.21(d); 39 Fed. Reg. 42516. The eighteen sources specified are (i) fossil-fuel steam electric plants; (ii) coal cleaning plants; (iii) kraft pulp mills; (iv) portland cement plants; (v) primary zinc smelters; (vi) iron and steel mills; (vii) primary aluminum ore reduction plants; (viii) primary copper smelters; (ix) municipal incinerators; (x) sulfuric acid plants; (xi) petroleum refineries; (xii) lime plants; (xiii) phosphate rock processing plants; (xiv) by-product coke oven batteries; (xv) sulfur recovery plants; (xvi) carbon black plants; (xvii) primary led smelters; (xviii) fuel conversion plants. 40 C.F.R. § 52.21(d)(1); 39 Fed. Reg. 42516. EPA has proposed the addition of ferro-alloy production facilities to this list. 40 Fed. Reg. 24534 (June 9, 1975).

the Administrator[15] that the new emissions from that source, together with emissions from all other sources (commercial, residential, industrial) "will not violate the air quality increments applicable in the area where the source will be located nor the air quality increments applicable in any other areas."[16] In addition, any such source will be required to meet an emission limit, to be specified by the Administrator, which would result from application of the "best available control technology" for sulfur dioxide and particulate matter.[17]

3. The Adverse Impact of the Regulations Upon the Public Health and Welfare and the Productive Capacity of the Nation

If allowed to stand, EPA's significant deterioration regulations could virtually destroy this country's goal of energy self-sufficiency, aggravate the already overcrowded and polluted conditions of our urban centers, and deprive our rural and economically depressed regions of any opportunity for economic growth.

EPA acknowledged the seriousness of the potential effects of its regulations, saying in the Agency's initial proposal:

> "A national policy of preventing significant deterioration, however defined and implemented, will have a substantial impact on the nature, extent and location of future industrial, commercial, and residential development throughout the United States. *It could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods.*" 38 Fed. Reg. 18986 (July 16, 1974) (emphasis added.)

Other government agencies have expressed similar concern. The Department of Health, Education and Welfare, for example, objected during the comment period:

> "Insofar as non-deterioration freezes development patterns, it would tend to perpetuate the incidence of air pollution

[15] The Administrator is authorized to delegate new source review responsibilities to appropriate state or local agencies and to Federal Land Managers where federal lands are involved. 40 C.F.R. § 52.21(f); 39 Fed. Reg. 42517.

[16] 40 C.F.R. § 52.21(d)(2)(i); 39 Fed. Reg. 42517.

[17] 40 C.F.R. § 52.21(d)(2)(ii).

in urban areas. The clearer sky in a rural region might be saved only at the cost of what could eventually have been a clearer sky in or near an urban region, a sky viewed by many times more people.[18]

* * *

"The health impacts of non-deterioration regulations would probably be adverse. . . . The latter standards might well create adverse health effects should cities be delayed in their efforts to achieve the national ambient standards.[19]

The Secretary of Housing and Urban Development, as well, has emphasized the *severe urban housing problems* that would be caused by significant deterioration regulations, as follows:

> "In our view, the adoption of any of the plans would result in the virtual cessation of community development activities which would be expected to provide for the future increase in population. Since there is a finite capacity within the urban areas to take this additional population increase, especially in view of the limitation imposed on urban areas by the national secondary ambient air quality standards, *the proposed rule would result in an intolerable situation—more people, but no place for them to reside."*[20] (Emphasis added.)

The Department of the Interior has stressed its concern that the regulations would restrict fuel and mineral development activities, urging that "the benefits of nondeterioration would be more than offset by its costs."[21]

The potentially restrictive effects of the regulations on energy resource development have been documented in a report entitled "A Summary of Reserve and Resource Data on Coal, Uranium, and Oil Shale in the States of Michigan, Ohio, Kentucky, Tennessee, West Virginia, North Dakota, South Dakota, Montana, Wyoming,

[18] Rec. E-1, HEW, Prevention of Significant Air Quality Deterioration, Social Welfare and Health Implications, Oct. 1973, pp. 6-7 (A. at 565-66).

[19] *Id.* at 3-4 (A. at 562-63).

[20] Rec. E-18, Letter to EPA from James T. Lynn, HUD, November 13, 1973, p. 1.

[21] Interior, "Effect of Proposed Nondeterioration Regulations on Fuels and Minerals Mining and Processing," p. 3 (A. at 1096). Specifically, Interior noted: "Some of the social impacts would include the national security implications of increased reliance on foreign sources of energy and minerals, and the income and employment effects of higher prices and reduced economic development." *Id.*

Colorado and Utah." That report, hereafter referred to as the Anderson Report, is contained in the Supplemental Addendum to this brief.

The Anderson Report reveals that, assuming that certain aesthetic and recreational areas such as national parks, monuments, and wilderness and primitive areas (and possibly national forests) would be reclassified under Class I,[22] development within neighboring Class II and Class III areas would be severely restricted.[23]

The authors of the report selected eleven states in which the major portions of the Nation's resources of coal, oil shale, and uranium are found. For each of these states, the best available public data were collected and located on maps. The authors then located on each state's map the boundaries of areas likely to be designated as Class I, such as national parks, monuments and forests, and national wilderness and primitive areas. Finally, by means of colored shadings on the maps, the authors depicted the inhibition or "shadow" zones caused by the Class I areas, using a 50 mile radius from the perimeter of each Class I area as a conservative measure of the inhibition shadow.[24]

The findings of the report are startling, and are best illustrated by the two regional maps that have been reproduced in the Ad-

[22] The preamble to the regulations states, "[T]here are some areas, such as national parks, where any deterioration would probably be viewed as significant." 39 Fed. Reg. 42510. EPA has also explained, "Zone I would normally be applied to those ultraclean areas such as national and state forests and parks." 38 Fed. Reg. 18993. Further, the regulations authorize Federal Land Managers to propose reclassification of the areas subject to their jurisdiction only to a more restrictive classification. 40 C.F.R. § 52.21(c)(3)(iv); 39 Fed. Reg. 42515.

[23] The preamble to the regulations explains (39 Fed. Reg. 42512): "Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. . . . Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. . . . Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment."

[24] EPA has suggested that for most areas of the Nation, a Class I inhibition could stretch 60 to 100 miles into a neighboring Class II or III area. 39 Fed. Reg. 42513 (A. at 32).

dendum attached to this brief at Add. 33 and Add. 35. The report demonstrates that in the State of Kentucky, for example which contains 9.5% of the total U. S. resources of bituminous coal, new processing of more than 25 billion tons of coal (approximately 98% of the total coal reserve area in the State) could be prohibited by the significant deterioration regulations. Anderson Report pp. 19, 22. West Virginia, which holds approximately 14.7% of all U. S. Bituminous coal, could suffer an inhibition affecting more than 34 billion tons or 86% of the State's coal area. *Id.* at 29, 30.

In the West, with its extensive deposits of oil shale and uranium in addition to coal, the inhibitive effects of the regulations would be even more severe. As illustrated by the map reproduced at Add. 35, the mineral fuels resources of the states of Montana, Wyoming, Colorado, and Utah would be virtually blanketed by the shadow zones cast from the pristine Class I areas. The inhibition zones would affect nearly 61 billion tons of coal in Montana and 34 billion tons in Wyoming, Anderson Report, pp. 41, 44, 45, 48; over 5 billion tons of uranium ore in Wyoming, Colorado and Utah, *Id.* at 45, 50, 55; and 100% of the extractable shale oil deposits in Colorado and Utah (representing a potential of more than 390 billion barrels), *Id.* at 50, 55.

In addition to the implications of the regulations for our national energy supplies, the inhibitive effects of the Class I and shadow zones raise serious concern for the economic survival of the rural areas of the Nation. This concern has been stressed by the Department of Health, Education and Welfare as follows:

> "[W]hatever national growth might be possible under non-deterioration regulations might be distorted by industries' difficulties in tapping new labor supplies and by low-income persons' lack of access to new job opportunities. The greatest economic growth would be likely to occur in the wealthiest communities, and growth trends in the South and other developing areas might be halted. Existing geographic disparities in income would widen, with the losers on the margin predominantly the poor."[25]

[25] Rec. E-1, HEW, Oct. 1973, p. 176 (A. at 575).

In short, the adverse effects from implementation of EPA's significant deterioration regulations could be enormous. Against this background stands the central question whether the regulations are nevertheless required by the Clean Air Act.

SUMMARY OF ARGUMENT

Under the clear and specific language of the Clean Air Act, the Administrator of EPA is *required* to approve any state implementation plan that meets the eight criteria specified for such plans under Section 110 of the Act. Those criteria are addressed exclusively to the attainment of the national primary and secondary standards promulgated by EPA under Section 109 of the Act, and contain no requirement that state implementation plans also impose more stringent standards, such as EPA's significant deterioration regulations, in areas that already satisfy the primary and secondary standards. To read such a requirement into the Clean Air Act is inconsistent with the precise language of the Act and its legislative history, and with the recent decision of the United States Supreme Court in *Train* v. *NRDC*.

Moreover, a reading of a requirement for EPA's significant deterioration regulations into the Clean Air Act raises serious constitutional questions with reference to the legislative power of Congress and its exercise of that power. First, Congress could not have required the adoption of regulations such as the significant deterioration regulations that bear no rational relationship to the protection of health and welfare. Second, Congress provided no standards in the Clean Air Act to guide EPA in the promulgation of significant deterioration regulations.

The regulations should also be set aside because they are arbitrary and capricious. The regulations impose arbitrary numerical restrictions on pollutant concentrations in ambient air that have no basis in medical or scientific fact; they require the use of a modeling technology that has not been developed to a reasonable degree of accuracy; and they would result in adverse economic, health and social effects that far outweigh any limited environmental objectives that may be obtained.

Further, the regulations amend all state implementation plans and require the states to enforce federal standards that will es-

sentially control such traditional state functions as zoning and land use planning. As such, the regulations impair the constitutional sovereignty of the states protected under the Tenth Amendment.

ARGUMENT

I. The Significant Deterioration Regulations Issued By EPA Exceed The Agency's Authority Under The Clean Air Act Of 1970

The significant deterioration regulations have no statutory basis in the operative sections of the Clean Air Act; rather, they have been issued solely as a result of an unduly expansive reading of the general purpose clause of the Act.[26] by the U. S. District Court for the District of Columbia in *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253 (D.D.C. 1972).[27] Petitioners will show that *Sierra Club* established no binding precedent for application to this case, and that under a proper analysis of the law, the significant deterioration regulations are not authorized by the Clean Air Act.

A. The Decision in Sierra Club v. Ruckelshaus Did Not Conclusively Determine the Law Applicable to This Case, Particularly in View of the Subsequent Decision of the United States Supreme Court in Train v. NRDC

As noted at the outset (p. 3), the 1972 decision of the District Court in *Sierra Club* was entered in the procedural context of a motion for a preliminary injunction against the Administrator's approval of state implementation plans. The subsequent division in vote by the United States Supreme Court did not establish the principles of law applicable to the case.

When the Supreme Court is equally divided on a case, the lower court decision is allowed to stand because of practical considerations only; the decision is not affirmed as a correct interpretation of the law. As recently explained by the Second Circuit:

> "Rather than stand a case on dead center an equally divided Supreme Court, as the only sensible alternative, leaves in effect the decision of the court below, which is affirmed *ex necessitate*. However, the lower court's decision does not thereby become the decision of the Supreme Court. . . ." *United States ex rel. Radich* v. *Criminal Court of the City of New York,* 459 F.2d 745, 750 (2d Cir. 1972), *cert. denied,* 409 U.S. 1115 (1973).

Where an equally divided vote results in such affirmance, "The principle of law presented by the case is left unsettled," *Laird* v. *Tatum,* 409 U.S. 824, 837 (1974) (memorandum by Rehnquist, J.); "the judgment is without force as precedent," *Ohio ex rel. Eaton* v. *Price,* 364 U.S. 263, 264 (1960).[28]

Most importantly, an issue basic to the decision of the District Court in *Sierra Club* has since been decided by the Supreme Court directly contrary to the District Court's holding. In *Sierra Club,* the Government had argued that if a state implementation plan met the eight criteria specified by Section 110(a)(2),[29] none of which imposes a standard more stringent than the national primary and secondary standards, the Administrator is required to approve the plan. Defendant's Memorandum In Opposition to Plaintiff's Motion for Preliminary Injunction pp. 4-5, *Sierra Club* v. *Ruckelshaus,* Civ. Action No. 1031-72 (D.D.C. 1972). The District Court disagreed, searching beyond the criteria of Section 110 for the requirement (nowhere specifically stated in the Clean Air Act) that state implementation plans must also provide against the significant deterioration of clean air areas.

In the recent case of *Train* v. *NRDC,* 43 U.S.L.W. 4467 (U.S., April 16, 1975), however, the Supreme Court held (in a 7 to 1 decision) that Section 110(a)(2) *"quite clearly mandates approval of any plan which satisfies its minimum conditions" Id.* at 4470, n. 11 (emphasis added). Speaking for the majority, Justice Rehnquist said:

> "Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also

[26] Clean Air Act § 101(b), 42 U.S.C. § 1857.

[27] *Aff'd. mem.,* D. C. Cir. No. 72-1528 (Nov. 1, 1972), *aff'd. sub. nom. by an equally divided court, Fri* v. *Sierra Club,* 412 U.S. 541 (1973)

[28] *Accord,* United States v. Pink, 315 U.S. 203, 216 (1942); Hertz v. Woodman, 218 U.S. 205, 213-14 (1910); Etting v. Bank of United States, 24 U.S. (11 Wheat.) 59, 76 (1826).

[29] See discussion pages 15-16, *infra.*

> satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards." *Id.* at 4472-73. (emphasis in original.)

As to any requirements over and above the national primary and secondary standards and the criteria specified in Section 110, the Court held:

> "[S]o long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments." *Id.* at 4476.

Train v. *NRDC* thus emphasizes the importance of construing the Clean Air Act strictly in accordance with its literal language, and the significance of that holding for this case cannot be ignored. The previous decision in *Sierra Club* is clearly inconsistent with this more recent interpretation of the Clean Air Act by the United States Supreme Court, and should have no binding effect on this case.

B. The Clear Statutory Language of the Clean Air Act of 1970 Prescribes A Rational, Systematic Plan for the Control of Air Pollution That Does Not Contemplate the Significant Deterioration Regulations Issued by EPA

By means of the Clean Air Act, Congress has fashioned an orderly, systematic plan for the control of air pollution in the United States. The plan begins with the requirement in Section 108[30] that the Adminsitrator of EPA issue "air quality criteria" for each air pollutant that, in his judgment, has an "adverse effect on public health and welfare." Such criteria are to be based on the "latest scientific knowledge" as to the "identifiable effects on public health and welfare" from the presence of such pollutants in the air, and are to contain information on the technology available to control such pollutants.

[30] 42 U.S.C. § 1857c-3.

The next step in the statutory plan is for the Administrator to prescribe national *primary* (health) and *secondary* (welfare) ambient air quality standards under Section 109[31] for each air pollutant listed in the Section 108 criteria. The statute specifically requires the primary standards to be sufficient to protect the public health, "allowing an adequate margin of safety." The secondary standards are required "to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Every conceivable adverse effect is to be accounted for in the secondary standards, as the Act specifically defines effects on welfare as including:

> "effects on soils, water, crops, vegetation, manmade 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."[32]

Both the primary and secondary standards may be revised from time to time as new knowledge on effects is developed.

The statutory plan then calls for each state to develop and submit to EPA for approval a plan for the implementation, maintenance an enforcement of the national primary and secondary air quality standards within the state. Clean Air Act § 110.[33] If the state plan satisfies eight criteria specified in the Section,[34] all of which relate

[31] 42 U.S.C. § 1857c-4.

[32] Section 302(h), 42 U.S.C. § 1857h(h). This language was expressly intended to extend to "welfare effects and aesthetics in their *broadest* definition." Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 7 (1970) (emphasis added). In proposing the significant deterioration regulations, EPA cited the protection of aesthetic, scenic and recreational values as the objective of the regulations. Rec. 1, 38 Fed. Reg. 18987 (July 16, 1973) (A. at 3). Given the broad definition of "welfare" in § 302(h), it is clear that Congress intended those factors to be protected under the secondary standards.

[33] 42 U.S.C. § 1857c-5.

[34] The state plan must (1) achieve the primary standards in no less than three years, and the secondary standards "within a reasonable time"; (2) contain measures (emission limitations, land-use and transportation controls) adequate to achieve and maintain the primary and secondary standards; (3) provide for monitoring and the collection of data; (4) provide for preconstruction review of new sources to assure the primary and secondary standards will not be violated; (5) provide for intergovernmental cooperation in the attainment and maintenance of primary and secondary standards; (6) provide necessary staffing and funding to administer the plan; (7) provide for

to the achievement and maintenance of primary and secondary standards, the Administrator is required—"the Administrator *shall*" —to approve the plan. As recently stated by the Supreme Court, Section 110 "quite clearly mandates approval of any plan which satisfies its minimum conditions." *Train* v. *NRDC,* 43 U.S.L.W. 4467, 4470 n. 11 (U.S., April 16, 1975).[35]

Congress also carefully planned for the control of pollution that might result from industrial growth. Accordingly, Section 111[36] of the Clean Air Act requires the Administrator to establish performance standards applicable to new or modified stationary sources that may contribute significantly to air pollution. Such standards, known as "new source performance standards," require the "best system of emission reduction" available,[37] and are applicable even in those areas of the Nation where the ambient air quality is better than that required under the national primary and secondary standards.[38] As such, the new source performance standards are in effect even where there are no adverse effects on public health or welfare.

By means of the foregoing carefully drafted sections (§§ 108, 109, 110, 111), Congress has prescribed a detailed scheme for the protection of health and welfare from air pollution—a scheme utilizing the latest scientific knowledge of the effects of air pollution, a scheme that assures an adequate margin of safety for the protection of public health, a scheme that protects against all known or anticipated adverse effects on every conceivable aspect of public welfare, and a scheme that requires use of the best emission control technology available for new and modified sources of potential

periodic testing of motor vehicles; and (8) provide procedures for revisions to account for changes in the primary and secondary standards. 42 U.S.C. § 1857c-5(a)(2). The criteria contain no reference to goals more stringent than the primary and secondary standards.

[35] See discussion pages 13-14 *supra.*

[36] 42 U.S.C. § 1857c-6.

[37] Clean Air Act § 111(a)(1), 42 U.S.C. § 1857c-6(a)(1).

[38] Section 111 requires that new source performance standards be prescribed for all categories of stationary sources that the Administrator determines may contribute significantly to air pollution that causes or contributes to the endangerment of public health or welfare, regardless of where individual plants within those categories are located.

pollution. A more comprehensive and administratively workable statutory program is difficult to imagine.[39]

In contrast to the logical structure of the operative sections of the Clean Air Act discussed above stands the decision of the D. C. District Court in *Sierra Club.* Citing no language in the operative sections of the Act, the court looked only to the "purpose" clause in Section 101 of the Act,[40] which states in relevant part:

> "The purposes of this Title are—(1) 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." Clean Air Act § 101(b), 42 U.S.C. § 1857 (b)(1).

The court incredibly concluded that this simple statement of purpose contemplates "a policy of non-degradation of existing clean air," and that such a policy requires going beyond the primary and secondary air quality standards and the new source performance standards in "clean air" areas. According to the court, if the EPA were to approve state implementation plans that permitted even minimal deterioration of air quality up to the level of the national secondary standards, the Agency would be in violation of the Act. 344 F. Supp. at 256.

When viewed in the context of the operative provisions of the Act, the *Sierra Club* decision produces absurd results. If the primary and secondary ambient air quality standards have been properly set under Section 109,[41] then the decision forces the Agency to

[39] By EPA's own account, the application of these sections, together with other regulatory actions taken under the Clean Air Act (including restrictions on sulfur content of fossil fuel, emission standards for new motor vehicles) have already had the effect "of attaining or maintaining air quality significantly better than the national secondary standards in many places." 38 Fed. Reg. 18986-87 (July 16, 1973). *Accord,* EPA Annual Report to Congress, "Progress in the Prevention and Control of Air Pollution in 1974," pp. 79-85.

[40] Section 101, in stating the findings and purposes, is the preamble to the Clean Air Act and does not of itself enlarge or confer powers. *See* Yazoo & M.V.R.R. v. Thomas, 132 U.S. 174, 188 (1889), and the persuasive argument to this effect advanced in the brief of petitioners in actions numbered 75-1763 and 75-1764.

[41] The right to challenge the sufficiency of the primary and secondary air quality standards as well as the new source performance standards is specifically provided under § 307(b)(1) of the Clean Air Act. 42 U.S.C. § 1857h-5(b)(1).

promulgate a tertiary standard nowhere mentioned in the Act; to require even more than "an adequate margin of safety . . . to protect the public health";[42] to regulate against concentration levels that have no "known or anticipated adverse effects" on public welfare;[43] in short, to abandon the "latest scientific knowledge . . . of all identifiable effects on public health or welfare,"[44] and to attempt to regulate the unknown and the unanticipated.

The holding in *Sierra Club* is even logically inconsistent with the terms of the Section 101(b) purpose clause itself. The court's focus was limited to the words "to protect and enhance the quality of the Nation's air resources." 344 F. Supp. at 255. But the sentence does not end there; it goes on to state the reason for the protection and enhancement of air quality—i.e., "to promote the *public health* and *welfare* and the *productive capacity* of its population." (Emphasis added.) When read in its entirety, the purpose clause dovetails logically with the health and welfare language of the operative sections of the Act (§§ 108, 109, 110 and 111) and requires regulation consistent with the latest scientific knowledge as to the identifiable effects of pollution levels on public health and welfare. To suggest that the Agency is required to focus on the scientifically unknown or unanticipated has no basis in any of the language of the Act. Moreover, as indicated in the studies and comments cited on pages 8-10 *supra,* the *Sierra Club* holding ignores the equally important purpose of the Clean Air Act, as stated in Section 101(b), to promote the *productive capacity* of the Nation's population—a goal that is severely inhibited by the EPA regulations.

Finally, the incongruity between the statutory language of the Clean Air Act and the District Court's holding in *Sierra Club* is revealed in the context of the Administrator's authority to revise state implementation plans. The District Court's order directed the Administrator to promulgate regulatory revisions of state implementation plans pursuant to Section 110(c) of the Act. That section authorizes the Administrator to promulgate "an implementation plan or a portion thereof, for a State" only under three specified conditions: (1) If the state fails to submit its own plan for attainment of national primary and secondary ambient air quality standards, (2) if the state plan or any portion thereof fails to be in accord with the stated requirements of Section 110, or (3) if the state fails to revise its plan when necessary to meet the then current national primary and secondary ambient air quality standards.[45] In issuing the significant deterioration regulations, however, the Administrator was unable to state under which of the three limited conditions he had acted, obviously because his actions were not authorized under any of the three—a further indication that Congress never intended regulations of this nature.

[42] Clean Air Act § 109(b)(1), 42 U.S.C. § 1857c-4(b)(1).
[43] *Id.* § 109(b)(2), 42 U.S.C. § 1857c-4(b)(2).
[44] *Id.* § 108(a)(2), 42 U.S.C. § 1857c-3(a)(2).

C. The Legislative History of the Clean Air Act Reveals That Congress Never Intended for EPA to Promulgate Air Quality Standards More Stringent Than the Primary and Secondary Standards

Going outside the literal language of the Clean Air Act, the District Court in *Sierra Club* cited bits and pieces of the legislative history of the Act and its predecessor, the Air Quality Act of 1967, 81 Stat. 485, as well as a prior administrative interpretation of the 1967 Act to support its conclusion. Legislative history is of little, if any, importance where the statutory language is clear. Assuming for purposes of argument only that the language of the Clean Air Act is ambiguous on the subject, however, a review of the entire legislative history confirms that Congress did not intend a tertiary standard more stringent than the national primary and secondary standards.

a. *The 1967 Act*

To begin with, the phrase "protect and enhance" originated in the Air Quality Act of 1967, Pub. L. No. 90-148, § 101(b)(1), 81 Stat. 485.[46] That Act placed responsibility for the development of ambient air quality standards with the states, not EPA, but like

[45] 42 U.S.C. § 1857c-5(c). Petitioners adopt the arguments advanced in the briefs of petitioners in actions numbered 75-1368, 75-1369, 75-1372, and 75-1666 regarding the failure of EPA to meet other procedural requirements of Section 110(c), particularly the public hearing requirements.

[46] This section of the 1967 Act amended the Clean Air Act of 1963, Pub. L. No. 88-206, § 1(b), 77 Stat. 392, which used the word "protect" alone, not the word "enhance."

the 1970 Act its focus was on the *known* effects of pollution levels on public health and welfare. The intent of Congress on this issue is made clear by the following from the House Committee report that accompanied the bill:

> "The most important objective of the bill is to insure that air pollution problems will, in the future, be controlled in a systematic way. To this end, the bill contains provisions intended to insure that control action will be taken in accordance with the regional nature of the air pollution problems and that *sources of air pollution will be controlled to the extent consistent with available knowledge of the adverse effects of pollutants on health and welfare and with available control technology.*" H. Rep. No. 728, 90th Cong., 1st Sess. (1967), U.S. Code, Cong. & Admin. News 1949 (1967) (emphasis added).

Also similar to the 1970 Act, the 1967 law required the ambient air quality standards to be keyed to "criteria" to be developed by the Secretary of HEW. In explaining the nature and the purpose of the "criteria," the House Committee emphasized the definable and known effects of air pollution on public health and welfare, saying:

> "The issuance of such criteria is among the prerequisites for the development of air quality standards by the States. It is essential, then, that there be no confusion about the purpose of air quality criteria. . . . They describe the effects that can be expected to occur whenever and wherever the ambient level of a pollutant *reaches or exceeds* a specific figure for a specific time period. Thus, *they define the health and welfare considerations that must be taken into account in the development of standards and regulations.*" H. Rep. No. 728, 90th Cong., 1st Sess. (1967), U.S. Code, Cong. & Admin. News 1951 (1967) (emphasis added).

It is thus clear that under the 1967 Act the air quality standards and the criteria upon which they were to be based were to be addressed to *known effects* of pollutants on health and welfare, and that a pollutant was not to be subject to control until it "reaches or exceeds"[47] a level *known* to have adverse effects.[48] State implementation plans, in turn, were required to insure that the air quality standards would be met within a reasonable time,[49] *nothing more.* In short, nothing in the language of the 1967 Act or its legislative history supports a policy of no significant deterioration in clean air areas found by the District Court in *Sierra Club*.[50]

[47] H. Rep. No. 728, 90th Cong., 1st Sess. (1967), quoted above in the text.

[48] *Accord,* floor statement by Senator Muskie (117 Cong. Rec. 19172 (1967)):

> "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, enforceable by the Federal Government if the States fail to act."

[49] Air Quality Act of 1967, Pub. L. No. 90-148, § 108(c)(1), 81 Stat. 491.

[50] The District Court relied upon an administrative interpretation of the 1967 Act by the National Air Pollution Control Administration within the Department of HEW. 344 F. Supp. at 255-56. It is significant, however, that the interpretation cited was never implemented by HEW and indeed it was never even proposed as a federal regulation.

b. *The 1970 Act*

A review of the legislative history of the 1970 Act also discounts any theory that Congress intended a policy of no significant deterioration in addition to the primary and secondary standards under Section 109, or the new source performance standards under Section 111. This is clearly evident in the discussion of the outer-limits of scientific knowledge and the relation of such knowledge to the protection of the public health and welfare. Acknowledging the then existing limits of scientific knowledge, the Senate Public Works Committee observed, nevertheless:

> "The Committee is aware that there are many gaps in the available scientific knowledge of the welfare and other environmental effects of air pollution agents. . . . [T]he Committee expects that the Department will intensify research on environmental and other economic effects of air pollution. A great deal of basic research will be needed to determine the long-term air quality goals which are required to protect the public health and welfare from any potential effects of air pollution. *In the meantime, the Secretary will be expected to establish such national goals on the basis of the best information available to him.*" Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970) (emphasis added).

In the view of the Senate Committee, then, the problem of inadequate scientific knowledge was to be approached in terms of an emphasis on intensified research into the health and welfare effects of air pollution,[51] not by means of some arbitrarily restrictive standards having no scientific basis.

Further, any suggestion that a no significant deterioration policy is necessary to protect the health of those persons particularly vulnerable to the effects of air pollution ignores Congress' expressed intent as to the primary standards. With specific reference to the most sensitive members of the public (as well as the need to protect against uncertain health hazards), the Senate Committee stressed the requirement for *safety margins* in the primary standards, and said:

> "In setting such air quality standards the Secretary should consider and incorporate not only the results of research summarized in air quality criteria documents, but also the need for margins of safety. Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified.
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> * * *
>
> "Ambient air quality is sufficient to protect the health of such [sensitive] persons whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air. *An ambient air quality standard, therefore, should be the maximum permissible ambient air level of an air pollution agent or class of such agents (related to a period of time) which will protect the health of any group of the population.*" Sen. Rep. No. 1196, 91st Cong., 2d Sess. 9-10 (1970) (emphasis added).

To assert that some additional or extraneous standards, such as EPA's significant deterioration regulations, is needed to protect the health of those particularly vulnerable to the effects of pollution is thus to misread the very purpose intended for primary standards. If adverse effects are found at air quality levels better than the present standards, the Clean Air Act specifically requires those

[51] Under 103(f)(1) of the Act, the Administrator is expressly directed to conduct "an accelerated research program" to improve knowledge of the contribution of air pollution to adverse health and welfare effects. 42 U.S.C. § 1857b(f)(1). Under the District Court's holding in *Sierra Club*, this research program would be pointless.

standards, as well as the secondary standards, to be revised and made as stringent as necessary to protect public health and welfare.[52] In expressly providing for judicial review of the primary, secondary and new source performance standards, Congress has made EPA strictly accountable for the development of standards consistent with the Act.[53]

The District Court cited only one excerpt from the Congressional reports to support its conclusion that a non-degradation policy was intended for the clean air areas. That excerpt, from the Senate report, reads:

> "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." Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970).

Although *not* quoted by the District Court, the Senate report further states:

> "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." *Id.*

When carefully analyzed in its entirety, the foregoing language supports not a tertiary standard of non-degradation, but the belief that air quality *need* not deteriorate given the anticipated effects the primary and secondary standards will have when complemented by the new source performance standards of Section 111 and other operative sections of the Act. The phrases—"the maximum extent practicable" and "except under circumstances where there is no available alternative"—for example, clearly discount any absolute policy of no degradation. Further, the reference to "the best available control technology, industrial processes, and operating practices," is a direct reference to the new source performance standards

[52] Section 109(b)(1) and (2), 42 U.S.C. § 1857c-4(b)(1) and (2).

[53] Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1).

as contemplated under Section 113 of the Senate bill[54] (Section 111 as enacted). Similarly, the reference to "care in the selection of sites for new sources, land use planning and traffic controls," was derived directly from Section 111(a)(2)(D) of the Senate bill (Section 110(a)(2) as enacted), which was addressed exclusively to the implementation, maintenance and enforcement of the primary and secondary standards.[55]

In short, the excerpt from the Senate report relied upon by the District Court does nothing more than emphasize the important role of the various control options, principally the new source performance standards, in the clean air areas. This is borne out by other portions of the Senate report as follows:

> "Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources."[56]
>
> "The overriding purpose of this section would be to prevent new air pollution problems, and toward that end, maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective and, in the long run, the least expensive approach."[57]

The floor debates, as well, stressed the central role of the new source performance standards in protecting air quality in the clean air regions. As explained by Senator Randolph, Chairman of the Senate Committee on Public Works:

> "The overriding purpose of performance standards for new stationary sources is to prevent the occurrence of new air pollution problems. These standards will insure that when an industry moves into any area with low pollution levels, that this new facility does not appreciably degrade the existing air quality." 116 Cong. Rec. 33075 (1970).

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[54] "Such standards shall reflect the greatest degree of emission control which the Secretary determines to be achievable through the application of the latest available control technology, processes, operating methods, or other alternatives." S. 4358 § 113(b)(2). Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 91 (1970). As enacted, Section 111 requires "the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 1857c-6(a)(1).

[55] Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 87 (1970).

[56] *Id.* at 2.

[57] *Id.* at 16.

The District Court also relied upon an administrative interpretation of the 1967 Act, as presented to the 1970 Congress in committee testimony by HEW Secretary Finch, to support the Court's conclusion that the 1970 Act contemplated a policy of non-degradation in clean air areas. 344 F. Supp. at 255. The Court's interpretation was in error, as the full testimony (the Court cited only a part) makes clear that the agency was advocating the use of the best emission control technology available, ultimately enacted in Section 111 of the 1970 Act, as the key to protection of clean air regions. In the words of Secretary Finch:

> "In the years ahead, however, many potentially significant new stationary sources of air pollution will come into being as a result of the Nation's growing demands for electric power, manufactured goods, and other necessities and amenities of modern life. Large stationary sources, such an electric generating plants, iron and steel mills, and petroleum refineries frequently have adverse effects not only on public health and welfare in their own communities but also on air quality over broad geographic areas. This problem is one that demands national attention. If we are ever to begin preventing air pollution, instead of just attacking it after the fact, then *we must at least insure that major new stationary sources, wherever they are located, are designed and equipped to reduce emissions to the minimum level consistent with available technology.* The application of national emission standards would also tend to minimize the competitive advantage of locating a new facility in an area where emission standards are less rigorous than in other areas. This would eliminate 'polluter havens.'" A Legislative History of the Clean Air Amendments of 1970, 93d Cong., 2d Sess., Vol. 2, at 975 (Jan. 1974) (emphasis added.)

The one provision of the Senate bill that arguably might have *required* state implementation plans to impose a tertiary standard more severe than the primary and secondary standards was deliberately deleted by the Conference bill. Section 111(a)(1) of the Senate bill, in stating the requirement for public hearings on state implementation plans, had provided:

> "Unless a separate public hearing is provided, *each State shall consider* adoption of ambient air quality standards which

> are *more restrictive* than the national ambient air quality standards at the hearing required by this paragraph."[58]

In the Conference bill as enacted, however, this sentence was changed to read as follows:

> "Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph" [*i.e.*, the hearing on the plan to achieve the primary standard].[59]

The change in language was made deliberately to tie the state implementation plans to the *primary* and *secondary* standards, the Conference report explaining:

> "The Senate bill required that each State consider adoption of more stringent air quality standards than the national standards at its public hearing on the proposed implementation plan, unless a separate hearing was held for that purpose.
>
> * * *
>
> "* * * The Senate amendment was modified to provide for primary and secondary standards, the former relating to public health and the latter to public welfare."[60]

The deliberate omission of a *requirement* that the states adopt more stringent standards is further revealed by an examination of Section 116[61] of the Act. That section preserves the right of the states to adopt their own air quality standards, provided they are at least as stringent as the national standards. Under Section 116, then, a state desiring to adopt standards more stringent than the

[58] S. 4358, § 111(a)(1), Sen. Rep. No. 91-1196, 91st Cong. 2d Sess. 87 (1970).

[59] Section 110(a)(1), 42 U.S.C. § 1857c-5(a)(1).

[60] Conf. Rep. No. 91-1783, 91st Cong., 2d sess. 44 (1970). That the Conference Committee contemplated land use restrictions only where necessary to achieve the primary and secondary standards was made clear in the summary of the Conference agreement presented by Senator Muskie on the Senate floor: "Implementation of standards will require changes in public policy: land use policies must be developed to prevent location of facilities which are not compatible with implementation of national standards. States must review the location of every new stationary source before construction to assure no interference with attainment of the standards." A Legislative History of the Clean Air Amendments of 1970, 93rd Cong., 2d Sess. Vol. 1, at 132 (Jan., 1974).

[61] 42 U.S.C. § 1857d-1.

national primary and secondary standards is *permitted* to do so, but it is *not required* to do so. As a permissive statute, Section 116 makes sense in the context of the operative sections of the Clean Air Act discussed above. If the Act is construed to *mandate* more stringent standards, however, Section 116 is rendered absolutely meaningless and a frivolous legislative act.

As a final refuge for support, the District Court referred to the "strong disagreement" expressed by Congressman Rogers and Senator Eagleton during the Clean Air Act oversight hearings in 1972 with the EPA Administrator's then current interpretation that the 1970 Act did not require a policy of non-degradation in state implementation plans. 344 F. Supp. at 256. Besides being a "hazardous basis for inferring the intent of [an] earlier Congress,"[62] the post-enactment views of intent by Congressman Rogers and Senator Eagleton were not shared by other members of Congress. As stated by Senator Baker during the 1972 oversight hearings:

> "I was on the subcommittee in 1967 when we came to terms with this and in 1970 with the clean air amendments and I stand subject to correction by the staff and other members if I am in error, but it is my recollection and it is my interpretation of the statute as passed that nondegradation is a term that was never embodied nor imbeded in the statute itself."[63]

Given the serious social and economic consequences engendered by a rule of non-degradation,[64] the absence of explicit discussion of the subject in any of the 1970 committee reports and floor debates or in the language of the statute itself lends credence to Senator Baker's view that a policy of non-degradation was not intended.[65]

[62] Portland Cement Ass'n v. Ruckelshaus, 158 U.S. App. D. C. 375, 382, 486 F.2d 375, 382 (D. C. Cir. 1973).

[63] Implementation of the Clean Air Act Amendments of 1970—Part 1, Hearings Before the Subcommittee on Air and Water Pollution, Senate Committee on Public Works, 92d Cong., 2d Sess., at 275 (1972).

[64] See discussion pp. 7-10 *supra* and the brief of petitioners in action numbered 75-1372 detailing the further adverse impact on this Nation's productive capacity.

[65] *Cf.* Buckeye Power, Inc. v. EPA, 481 F.2d 162, 168 (6th Cir. 1973): "If Congress intended such a far-reaching result in the 1970 Amendments to the Act, it certainly would have mentioned such an intention in the body of the amendments."

In sum, a policy of non-degradation that would require state implementation plans to achieve air quality standards better than the national primary and secondary standards not only is not expressed in the clear language of the Clean Air Act, but has no basis in its legislative history. Regulations imposing such a policy upon state implementation plans are without statutory authority and are contrary to the legislative intent.[66]

D. Acting Within Constitutional Limits, Congress Could Not Have Required the Promulgation of Regulations That Bear No Rational Relationship to the Protection of Public Health and Welfare

The power of Congress to authorize an administrative agency to regulate air pollution is limited by the constitutional requirement that the regulation bear a rational relationship to the end to be achieved—that is, the regulation must be rationally related to the protection of health and welfare. As was stated by the Supreme Court in *Nebbia* v. *New York,* 291 U.S. 502, 525 (1934):

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that *the means selected shall have a real and substantial relation to the object sought to be attained.*" (Emphasis added.)[67]

[66] Implementation of the regulations would also contradict other legislative policy judgments made by Congress in 1970. In the Agricultural Act of 1970 for example, Congress provided: "The Congress commits itself to a sound balance between rural and urban America. The Congress considers this balance so essential to the peace, prosperity, and welfare of all our citizens that the highest priority must be given to the revitalization and development of rural areas." 42 U.S.C. § 3122(a). See also H. Rep. No. 92-835 on Rural Development Act of 1972, 92d Cong., 2d Sess., U.S. Code, Cong. & Admin. News 3147 (1972).

[67] In one of its landmark decisions on the exercise of governmental power, the Supreme Court said: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate,* which are *plainly adapted to that end,* which are not prohibited, but consist with the letter, and spirit of the constitution, are constitutional." M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 422 (1819).

While the demands of due process may be minimal, they nevertheless are demands to be observed. In *Weaver* v. *Palmer Bros. Co.,* 270 U.S. 402 (1926), for example, the Supreme Court struck down on due process grounds a statute prohibiting the use of secondhand shoddy in mattresses, finding that the prohibition was not rationally related to the protection of health.[68]

In issuing its significant deterioration regulations, EPA has not attempted to relate the increment standards prescribed to effects on health and welfare,[69] notwithstanding that the expressed purpose of the Clean Air Act, Section 101(b), relied upon by the District Court in *Sierra Club,* requires regulations that "promote the public health and welfare." To the contrary, in its first proposal of the regulations the Agency acknowledged the difficulty in establishing such a relationship, saying:

> "Pending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, *significant deterioration must necessarily be defined without a direct quantitative relationship to specific, adverse effects on public health and welfare.*" 38 Fed. Reg. 18987 (July 16, 1973).

Thus by EPA's own admission it is not known whether the increment ceilings prescribed by the regulations bear a substantial relationship to the health and welfare objectives of the Clean Air Act. As to the suggestion that adverse effects occur below the national standards, EPA has said:

> "EPA is aware that sulfur dioxide has or may have effects on other sectors of the public welfare, such as materials, visibility,

[68] Similarly, Standard Oil Co. v. City of Gadsden, 263 F. Supp. 502 (N. D. Ala. 1967), ruled unconstitutional an ordinance limiting the size of underground gasoline storage tanks because size of the tanks has no relation to public safety; and Merced Dredging Co. v. Merced County, 67 F. Supp. 598 (S. D. Calif. 1946), held unconstitutional a requirement for resoiling of dredged areas because resoiling would have no effect on mosquito control, the stated purpose for the requirement.

[69] Indeed, a special task force within EPA assigned to assess the no significant deterioration regulations concluded: "[B]arring unknown or inconsequential health risks, emission standards more stringent than the secondary standards would produce no direct health benefits. They would, however, entail certain health risks." Rec. 23, EPA Memorandum "Findings of Task Force on Significant Deterioration," Dec. 20, 1973, at G-36 (A. at 257).

soils and water. To some extent, the primary standards for sulfur dioxide and the remaining secondary standard mitigate such effects. Sufficient data are not now available, however, to establish a quantitative relationship between specific sulfur dioxide concentrations and such effects. *Furthermore, it is not clear that any such effects, to the extent that they may occur at concentrations below the current national standards, are adverse to the public welfare.*" 38 Fed. Reg. 25678 (Sept. 14, 1973) (emphasis added.)[70]

In short, the policy of non-degradation read into the Clean Air Act by the District Court in *Sierra Club* can bear no relationship to the health and welfare goals of the Clean Air Act, and it would have been constitutionally impermissible for Congress to have imposed such a requirement.

E. The Absence of Standards in the Clean Air Act to Guide EPA in the Promulgation of the Regulations Further Proves That Congress Did Not Intend A Policy of Non-degradation

While purporting to find a policy of non-degradation in the purpose clause of the Clean Air Act, the District Court in *Sierra Club* was unable to point to any guideposts within the statute that would help EPA formulate regulations on the subject. The court simply ordered the promulgation of regulations by EPA requiring provisions in state implementation plans that will prevent significant deterioration, with no suggestion as to what is to be considered significant deterioration and what is not.

The dilemma the court's order posed for the EPA was best

[70] With specific reference to evidence of minor leaf spotting from exposure to So_2, the Administrator has concluded: "After consultation with other agencies and individuals, including the United States Department of Agriculture, the Administrator has determined that, in his judgment, standards developed solely to protect against minor visible injury are not necessarily requisite to protect the public welfare from adverse effects." 38 Fed. Reg. 25680 (Sept. 14, 1974). Furthermore, there is substantial evidence that certain increases in sulfur dioxide concentrations act as beneficial nutrients for vegetation. Rec. A-146, T. W. Barrett, Air Quality Standards for the Protection of Vegetation From Injury From Sulfur Dioxide in the Air, pp. 3-4 (A. at 288-89); Rec. B-164, Ohio Edison Co., Sept. 26, 1974, p. 4, attaching findings by Ohio EPA Hearing Panel on beneficial effects of So_2. (A. at 490, 512).

expressed by the then Acting Administrator, John Quarles, at the outset of the Agency's hearings on the subject, as follows:

> "In approaching this responsibility, we must exercise broad discretion since *there is no guidance in the statute, virtually none in its legislative history, and the Courts have not discussed the meaning of their mandate to prevent 'significant deterioration.'* "[71] (Emphasis added.)

Mr. Quarles' expression of frustration echoed that of former Administrator Ruckelshaus, who, in testimony during the Clean Air Act Oversight Hearings in 1972, explained that he had not adopted a non-degradation policy for state implementation plans because "I don't know what it means."[72]

(1) *If the Clean Air Act Is Construed to Require Significant Deterioration Regulations, Then the Lack of Standards Renders the Delegation of Authority to EPA for Such Regulations Unconstitutional*

If the statute is to be construed as requiring a rule of no significant deterioration unrelated to the health and welfare goals of the primary and secondary standards, then serious questions exist as to the constitutionality of such a broad delegation of legislative power to an administrative agency with no statutory standards to guide the Agency in its deliberations.

The necessity for standards as guidelines for agency action has been stressed repeatedly by the Supreme Court. In *Yakus* v. *United States*, 321 U.S. 414 (1944), for example, Mr. Justice Stone said:

[71] Rec. 4, Transcript of Hearings, Washington, D. C. August 27, 1973, p. 8 (A. at 43). Similarly, in announcing promulgation of the regulations on November 27, 1974, EPA Administrator Train observed: "Unfortunately, the judicial directive to EPA to prevent significant deterioration was little more specific than the Act itself. Accordingly, we have found ourselves in the difficult position of fashioning regulations that may have major impacts on the future of the Nation, without the reasonably detailed guidance that would have been desirable." Statement of EPA Administrator Russell E. Train, Nov. 27, 1974 on Final "Significant Deterioration" Regulations.

[72] Implementation of the Clean Air Act Amendments of 1970—Part 1, Hearings Before Subcommittee on Air and Water Pollution, Senate Committee on Public Works, 92d Cong., 2d Sess., at 272 (Feb. 18, 1972).

> "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . . . *These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective.*" 321 U.S. at 424-25 (emphasis added.)

More recently, the functional value of the rule requiring standards has been emphasized as follows:

> "[T]he delegation of . . . unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. . . . The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. *First,* it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second,* it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged." *Arizona* v. *California,* 373 U.S. 546, 626 (1963) (Harlan, Stewart and Douglas, J.J., dissenting in part) (emphasis in original.)

The rule requiring standards in legislative delegations of authority to administrative agencies is a fixture of historical precedent (*e.g., Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935)), and it continues to have viability. As recently observed by Judge J. Skelly Wright of this Court:

> ". . . I think the reported demise of the delegation doctrine is a bit premature. . . . There must be some limit on the extent to which Congress can transfer its own powers to other bodies without guidance as to how these powers should be exercised.
>
> "No judge of any federal court has specifically disavowed the delegation doctrine in its entirety, and numerous decisions

> can be cited which reaffirm it as at least a theoretical check on standardless shifts of power.[73] * * *
>
> "* * * *I think the delegation doctrine retains an important potential as a check on the exercise of unbounded, standardless discretion by administrative agencies. At its core, the doctrine is based on the notion that agency action must occur within the context of a rule of law previously formulated by a legislative body. That concept is as important now as it was a century and a half ago when it was first propounded.*" Wright, Book Review, 81 Yale L. J. 575, 582-84 (1972) (emphasis added).[74]

Indeed, the Supreme Court recently cited *Schechter* as revered authority in holding that an FCC tax on cable television systems exceeded the authority granted to the Agency by Congress, *National Cable Television Ass'n* v. *United States,* 415 U.S. 336, 342 (1974).

(2) *The Absence of Standards Renders Meaningful Judicial Review Impossible*

Assuming that the Clean Air Act does, in fact, require "no significant deterioration" regulations, the regulations as issued by EPA are virtually unreviewable by this Court. The lack of standards in the statute or its legislative history as to the intended meaning of "significant deterioration" or the factors to be considered by the EPA precludes this Court from determining whether the Agency has complied with the legislative intent. The right to judicial review prescribed by Section 307 would be meaningless, as effective judicial review requires "that the legislature articulate intelligible standards to govern agency action." *City of Chicago* v. *F.P.C.,* 147 U.S. App. D. C. 312, 323, 458 F.2d 731, 742 (D. C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972).[75]

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[73] Citing Arizona v. California, 373 U.S. 546, 593 (1963); Lichter v. United States, 334 U.S. 742 (1948); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948); Yakus v. United States, 321 U.S. 414 (1944).

[74] *See,* Jaffe, Judicial Control of Administrative Agencies 71 (1965).

[75] *Accord,* Merrill, *Standards—A Safeguard for the Exercise of Delegated Power,* 47 Neb. L. Rev. 469, 478 (1968): "We who believe in the 'rule of law' probably find the most satisfying proof of the usefulness of standards in the aid, the almost indispensable aid, which they afford the courts in the review of agency action. Legislative mandates which lack them in sufficiently meaningful form should be invalid by virtue of that deficiency."

The absence of standards for purposes of any "significant deterioration" regulation contrasts sharply with the precision of standards articulated by Congress for the development of air quality criteria in Section 108, the promulgation of primary and secondary air quality standards under Section 109, the criteria for approval of state implementation plans under Section 110,[76] and in the other operative sections of the Act. Indeed, the First Circuit Court of Appeals recently upheld the delegation to the EPA of the power to prescribe a regional air quality control plan for the achievement of the national primary standards, on the ground that:

> "[T]here are many benchmarks to guide the Agency and the courts in determining whether or not EPA is exceeding its powers, *not the least of which is that the rationality of the means can be tested against goals capable of fairly precise definition in the language of science." South Terminal Corp.* v. *EPA,* 504 F.2d 646, 677 (1st Cir. 1974) (emphasis added.)

In the case of a policy of non-degradation of clean air, however, which bears no relation to the *known* effects on health and welfare, not even scientific knowledge is useful as a guideline.

That Congress would have evidenced such meticulous concern for standards to guide the Agency in the development of one set of rules but not for another, particularly where the latter apply to the Nation's major industrial facilities and thus have drastic impact on the country's future growth and development of its natural resources,[77] is incomprehensible. In truth, no effort was made in the Clean Air Act to specify standards for the regulations here under review simply because Congress never intended that any regulations be promulgated for a non-existent "no significant deterioration" requirement in the Act.

II. The Regulations Are Arbitrary And Capricious And Do Not Reflect Reasoned Decision-Making

If it were to be assumed that Congress intended to impose a tertiary standard for air quality more restrictive than the national primary and secondary standards, then the regulations issued by EPA pursuant to that intent are clearly arbitrary and capricious

[76] See n. 34, *supra.*

[77] See discussion pp. 8-10, *supra.*

and fail to reflect the reasoned decision-making required of administrative agencies by numerous decisions of this Court.[78]

A. The Regulations Impose Restrictions on Pollutant Concentrations In Ambient Air That Are Totally Arbitrary and Have No Medical of Scientific Basis

As noted earlier in this brief,[79] the increment ceilings prescribed by EPA's regulations bear no relationship to the known effects of pollutants on public health and welfare. The increment ceilings were first suggested by EPA in its initial proposed rule-making of July 16, 1973;[80] they were repeated in the second proposal of August 27, 1974, with minor modification;[81] and they were finally adopted in the December 5, 1974 regulations without further change.[82] Why the EPA chose the particular increment ceilings prescribed is unknown, as the Agency has made no attempt to explain their basis.

One of the more frequent criticisms of the proposed regulations during the hearings and the comment period was the inherent arbitrariness of the increment ceilings. As one commentator observed during the Denver hearings:

> "In none of these proposals is a basis given for the numerical value presented. In none is an argument given as to why the value proposed is the best or right value. Rather, the numbers simply appear. It seems likely that all of these numerical standard proposals were made by having some in-

[78] Portland Cement Ass'n. v. Ruckelshaus, 158 U.S. App. D. C. 375, 402, 486 F.2d 375, 402 (D. C. Cir. 1973); Wellford v. Ruckelshaus, 142 U.S. App. D. C. 88, 101, 439 F.2d 598, 601 (D. C. Cir. 1971); City of Chicago v. FPC, 147 U.S. App. D. C. 312, 325, 458 F.2d 731, 744 (D. C. Cir. 1971); Columbia Broadcasting System, Inc. v. FCC, 147 U.S. App. D. C 175, 182, 454 F.2d 1018, 1025 (D. C. Cir. 1971); Greater Boston Television Corp. v. FCC, 143 U.S. App. D. C. 383, 393, 444 F.2d 841, 851 (D. C. Cir. 1970).

[79] See discussion pp. 28-30, *supra.*

[80] 38 Fed. Reg. 18996, 18999 (July 16, 1973), Plan I and Plan IV. The first proposal did not provide for a Class III area designation.

[81] 39 Fed. Reg. 31007 (Aug. 27, 1974). The second proposal incorporated the Class III area designation, and it changed the three hour ceiling for sulfur dioxide in Class II from 300ug/m^3 to 700ug/m^3.

[82] 40 C.F.R. § 52.21(c)(2), 39 Fed. Reg. 42515 (Dec. 5, 1974).

dividual or group decide, based solely on intuition, what a reasonable number should be."[83]

Criticisms of the regulations on this point came from government officials as well, as for example the statement from the Secretary of Housing and Urban Development that, "We are particularly concerned by the lack of data to support the choice of any specified incremental increases to be allowed."[84] Indeed, three federal agencies, the Department of Commerce, the Federal Energy Administration, and the Treasury Department specifically suggested that the increment ceilings for Class II areas be doubled because of the restrictive effect of EPA's ceilings on needed construction of new coal-fired power plants and other development.[85]

Concern for the absence of any other basis for the increment ceilings was expressed even by the EPA staff. In questioning a witness at the Washington hearings, Mr. Robert Baum, EPA Hearing Officer, said:

> "We have had many groups on both sides come in and say, 'We support the Sierra Club' and the other side come in and say, 'We don't like the whole idea.' Our problem is that we are going to have to put some figures into the Federal Register which are going to govern the things that are going to happen in this country for a long time. I am not saying that we should not do anything that is going to change the way of life. But we should know before we do that what change it is going to effect, and then allow some discussion of whether or not that change is a good one. And that is the problem we have been facing all the way through this.
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> * * *
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> ". . . *[I]t is this agency that has the responsibility of filling in those blanks and explaining to people what they have done. At this point, we don't know what any of those numbers mean.*"[86] (Emphasis added.)

[83] Rec. 8, Transcript of Denver, Colo. Hearings, Sept. 5, 1973 at p. 324 (Testimony of Noel de Nevers, consulting engineer) (A. at 89). See also Rec. B-149, American Petroleum Inst., et al., Sept. 25, 1974, p. 2; Rec. B-100 Texaco Inc., Sept. 23, 1974, p. 2 (A. at 425); Rec. A-103, Cincinnati Gas & Elec. Co., Sept. 27, 1973, p. 48; Rec. A-84, Monsanto Co., Sept. 24, 1973, p. 2 (A. at 271).

[84] Rec. E-18, Letter to EPA from James T. Lynn, Nov. 13, 1973, p. 2 (A. at 595).

[85] Rec. 2, 39 Fed. Reg. 31002 (Aug. 27, 1974) (A. at 20).

The courts, too, have stressed the necessity for administrative agencies to explain the factual basis for their regulations. The Supreme Court, in its most recent decision on the subject, advised that under the "arbitrary and capricious" standard, "the agency must articulate a 'rational connection' between the facts found and the choice made." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System,* 419 U.S. 281, 285 (1974).[87]

The EPA in particular has been charged with a special obligation to explain the basis for its actions. In *Environmental Defense Fund, Inc.* v. *EPA,* 150 U.S. App. D. C. 348, 361, 465 F.2d 528, 541 (D. C. Cir. 1972), this Court said:

> "The EPA is charged with profoundly important tasks; reclamation and preservation of our environment is a national priority of the first rank. It is not an agency in the doldrums of the routine or familiar. *The importance and difficulty of subject matter entail special responsibilities when the EPA undertakes to explain and defend its actions in court.*" (Emphasis added.)

Where the EPA has failed to provide a basis for its regulations, the regulations have been set aside or remanded for further consideration. Thus, in *Kennecott Copper Corp.* v. *EPA,* 149 U.S. App. D. C. 231, 462 F.2d 846 (D. C. Cir. 1972), the Agency's secondary ambient air quality standard for sulfur dioxide was remanded for an explanation from the Administrator of the factual basis for the numerical standard prescribed, the Court observing that "the provision for statutory judicial review contemplates some disclosure of the basis of the agency's action." 149 U.S. App. D. C. at 234, 462 F.2d at 849. Similarly, in *South Terminal Corp.* v. *EPA,* 504 F.2d 646, 655 (1st Cir. 1974), portions of EPA's transportation

[86] Rec. 4, Transcript of Hearings, Washington, D. C., Aug. 29, 1973, pp. 488-89 (A. at 57-58).

[87] Accord, Temple Univ. v. Associated Hosp. Serv., 361 F. Supp. 263, 270 (E.D. Pa. 1973):

> "[A]n arbitrary decision is one lacking in rational basis because there is no evidence upon which the decision may be logically based."

control plan for Massachusetts were set aside because they were not "founded on supportable data and methodology."[88]

On the question of "significant deterioration," the EPA has simply picked numbers out of the air to serve as increment ceilings for particulates and sulfur dioxide. Whether the numbers have any rational basis is unknown, as the Agency has failed to explain their selection. Under the circumstances, EPA's regulations are a classic example of arbitrary and capricious rule-making and should be set aside.

B. Adequate Data and Modeling Technology Do Not Exist to Make the Regulations Workable

Under EPA's regulations, the mechanism for enforcing the increment ceilings applicable to Class I, Class II and Class III areas is the preconstruction review prescribed by Section 52.21(d) for "new" and "modified" sources as defined. That is, before any new plant of the type specified,[89] or any modification of such a plant can begin construction, a determination must first be made by the enforcing agency[90] as to whether emissions from that plant, together with emissions from all other sources (commercial, residential, industrial), will cause the relevant increment ceilings for *any area* affected to be exceeded. Such a determination is not only difficult, it is impossible to achieve with any reasonable degree of accuracy, and must rely on predictive modeling techniques that are virtually unworkable for many areas of the Nation.

EPA's initial proposal contemplated the measurement of a baseline for ambient concentrations of sulfur dioxides and particulates as of a given point in time (1972 as initially proposed),[91] with subsequent monitoring to check increments of such pollutants above the baseline level. EPA subsequently rejected such a plan as unworkable, noting the absence of adequate air quality data, particularly in clean air areas, and the inability of monitoring technology to measure the low increment levels prescribed by the regulations. As the Agency explained:

> "[T]he precision of the current methods is not adequate to reliably distinguish between readings approaching the small increments proposed. . . . Extensive modification of existing methods, or development of new measurement technology, would be required in order to precisely measure the increments as proposed. . . .
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> * * *
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> "Normal random variations in pollutant concentration in clean areas, especially for particulate matter, are often of greater magnitude than the incremental increases proposed for use under the original Air Quality Increment Plan. For example, the 1968 maximum concentration at the Grand Canyon for particulates was 126 ug/m^3 and the annual average was 31 ug/m^3. In 1969 the maximum concentration was 32 ug/m^3 and the annual average was 17 ug/m^3. These differences were caused by random variations due primarily to normal meteorological factors, and exceed the allowable air quality increments proposed in the original Air Quality Increment Plan.
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> * * *
>
> "Based on these factors concerning the reliability of available field instrumentation and the normal variability of air quality data, it is the Administrator's judgment that a measured incremental increase in concentration over a measured baseline normally cannot be used as the criterion in assessing the significance of a new facility's impact on air quality." 39 Fed. Reg. 31003.[92]

As an alternative approach, EPA says diffusion modeling should be used as a means to enforce the increment ceilings within the

[88] See also Pennsylvania v. EPA, 500 F.2d 246, 251 (3d Cir. 1974); Texas v. EPA, 499 F.2d 289, 309 (5th Cir. 1974).

[89] See n. 14, *supra*.

[90] The regulations authorize the EPA Administrator to delegate new sources review responsibilities to appropriate state or local agencies, and to Federal Land Managers where federal lands are involved. 40 C.F.R. § 52.21(f), 39 Fed. Reg. 42517 (Dec. 5, 1974).

[91] 38 Fed. Reg. 18989-90 (July 16, 1973) (A. at 5-6).

[92] The Record is replete with evidence to support the Administrator's conclusion. *See* Rec. B-160, Texas Air Control Bd., Sept. 26, 1974, p. 3; Rec. B-150, Shell Oil Co., September 25, 1974, pp. 2-4 (A. at 468-70); Rec. A-226, The Oil Shale Corp., Oct. 12, 1973, p. 5 (A. at 303); Rec. A-258, Utah International, Inc., Oct. 12, 1973, p. 2; Dames & Moore, Oct. 5, 1973, p. 20; Rec. 4, Transcript of Hearings, Wash. D. C., Aug. 28, 1973, G. P. Ferreri, Maryland Bureau of Air Quality Control, pp. 280-81 (A. at 55-56); Rec. 8, Transcript of Hearings, Denver, Colo., Sept. 6, 1973, L. W. Crow, meteorologist, pp. 482-84 (A. 90-92).

context of the preconstruction review.[93] Under such an approach, a computer would predict the increment increases in sulfur dioxide and particulates that would result from the new or modified plant and other sources having a change in impact on the area since the year 1974. With such modeling, precise measurements of air quality are not required either for the baseline period or for subsequent periods, as the *prediction* of results based on selected assumptions is deemed sufficient.

Unfortunately, without baseline data the state of the art in diffusion modeling is extremely limited, and the predictions afforded by modeling are often far from accurate. In a recent study (hereafter referred to as the SAI Study)[94] assessing the accuracy of existing models in predicting air quality for purposes of the significant deterioration regulations, an independent consulting firm concluded:

> "While considerable time and funding has been devoted to the adaptation of known theories and the development of new models that are suitable for such applications, it is generally accepted that existing models do not possess sufficient accuracy that they may be judged 'reliable.' This lack of confidence in the predictive capability of models clearly calls into question the use of model predictions as a key component of the total information that forms the basis for crucial decisions."[95]

In commenting on the proposed regulations, the U.S. Department of the Interior strongly objected to the use of diffusion modeling in enforcing the regulations because of the high degree of error. With particular reference to the effect of such error on the energy requirements of Appalachia, the Department said:

> "[A]ir quality prediction models may err by a factor of four in estimating the 24-hour average, which appears to be the

[93] 39 Fed. Reg. 31003 (Aug. 27, 1974) (A. at 21).

[94] This study, by Systems Application, Inc., is contained in a report submitted to API by Greenfield, Attaway & Tyler, Inc., entitled "An Examination of the Accuracy and Adequacy of Air Quality Models and Monitoring Data for Use in Assessing the Impact of EPA Significant Deterioration Regulations on Energy Development" (Aug. 8, 1975). The entire report is contained in the Supplemental Addendum submitted with this brief.

[95] SAI Study at II-1.

> most restrictive standard. This uncertainty has significant implications."[96]

The accuracy of diffusion modeling is materially affected by the factual accuracy of the assumptions upon which the modeling is based. In areas where meteorological data are sketchy or nonexistent, as is generally true of the "clean air" regions of rural and wilderness areas, diffusion modeling will have extremely limited value. In the areas of rugged terrain in particular, even the Sierra Club's experts agree that accurate modeling would be impossible, yet it is precisely these areas where the future development of this Nation's energy resources is anticipated. According to Dr. Michael Williams, who testified on behalf of the Sierra Club at the Denver hearings, "There are no universally accepted models to deal with the situation of high terrain at present."[97]

The problem with modeling inaccuracy will be further aggravated by the varying lead times required by different industries for the planning and construction of their plants. In the case of a petroleum refinery, for example, which typically requires from three to ten years from planning to completion, a model prediction of pollutant increments in the area ten years in the future when the refinery is in operation cannot take into account other new sources that may impact upon the area in the meantime, but which were not anticipated at the time construction of the refinery was begun. Unless

[96] Attachment to letter from Secretary of the Interior, Oct. 15, 1973, p. 4 (A. at 1097). Numerous objections to the inaccuracy of modeling are found in the Record. *See, e.g.*, Rec. A-50, Sierra Research Corp., Sept. 10, 1973, p. 4 of Attachment (A. at 265); Rec. A-275, Bethlehem Steel Corp., Oct. 15, 1973, p. 3 (A. at 389); Rec. B-108, Armco Environmental Engineering, Sept. 24, 1974, p. 1; Rec. B-105, Salt River Project, Sept. 24, 1974, p. 2 of Attachment (A. at 442).

[97] Rec. 8, Transcript of Hearings, Denver, Colo., Sept. 5, 1973, p. 165 (A. at 165). *Accord*, Rec. A-143, Standard Oil Co. of Calif., Oct. 5, 1974, p. 3 (A. at 276); Rec. A-146, Utah Power & Light, Oct. 5, 1973, Attachment prepared by North American Weather Consultants, p. 5 (A. at 285). In reviewing implementation plans for Arizona, New Merico and Utah, EPA acknowledged (38 Fed. Reg. 7554, March 28, 1973): "It is recognized that available diffusion models, when used to make . . . estimates for rugged terrain situations . . . may be subject to error in their ability to predict ground level concentrations. There is a substantial difference in the predictions obtained from different models."

construction of intervening area and point sources is prohibited,[98] modeling performed on behalf of a long range project may bear no no semblance to reality when the project is completed.

At best, diffusion modeling serves as a *theoretical* approximation of future ambient concentrations based upon a myriad of factual assumptions, many of which have little basis in recorded data. The inadequacies of such modeling for purposes of the significant deterioration regulations were admitted by EPA in the second proposed rule-making:

> "Current diffusion modeling techniques, when uncalibrated and used in the absence of baseline air quality data, can exhibit random errors as high as a factor of two for short term concentrations and a factor of 1.5 for annual averages when compared with known concentrations of pollutants. It should be noted that in assessing most average concentrations, particularly those resulting from multiple sources, significantly better accuracy can be obtained. However, this is not the type of application normally associated with the significant deterioration concept which calls for pre-construction review of individual new sources."[99]

An EPA background paper upon which the above statement was based reveals even less confidence in the reliability of modeling in the "clean air" areas covered by the regulations:

> "Such validation studies as have been conducted show that in the urban areas studied, the models were able to predict the hourly average air quality increment due to additional point sources to within a factor of two (*i.e.*, a predicted increment of 10 ug/m^3, would have 'a range of truth' of from 5 to 20 ug/m^3) at least half the time. Predicted annual average increments ranged within a factor of 1.5 of the observed average increment at least half the time.
>
> "It should be emphasized, however, that this data relates primarily to the prediction of air quality in urban areas where, due to high density and multiplicity of sources, the concentration levels may be relatively high and comparable to the NAAQS. *For the much cleaner air that will frequently be of concern in many questions relating to the non-degradation of air quality, modelling will be required at much lower levels of pollutant concentration. These levels may be of magnitude even less than the errors that may be expected in current modelling procedures, and that arise from the vagaries of weather and uncertainties of terrain and pollutant emissions.*
>
> *"The application to non-degradation issues of the available models that have been previously developed specifically for urban environments would, therefore, frequently be on weaker grounds and with reduced confidence in the quantitative precision of the estimates."*[100] (Emphasis added.)

[98] Several comments in the record objected that the proposed regulations would work on the principle of "first come, first served," a rule that would be inconsistent with the long range best interests of the Nation. *See, e.g.*, Rec. A-227, Duke Power Co., Oct. 12, 1973, Attachment, p. 5; Rec. A-187, Rochester Gas & Elec. Corp., October 10, 1973, p. 3 (A. at 296).

[99] 39 Fed. Reg. 31003 (August 27, 1974).

EPA freely acknowledges that existing modeling techniques do not "correspond to actual conditions in the ambient air."[101] Indeed, the recent SAI study of modeling accuracy indicates that existing models may be alarmingly poor indicators of actual environmental impact. In assessing a Gaussian model which is in most common use today, the study concluded:

> "If a Gaussian model predicts that the magnitude of a concentration increase in a particular area is small as compared with an allowable increment, then the chances are quite good that the upper bound on the increment will not be violated, as the model tends to overpredict. If more than one-half the allowable increment is 'used up' in the process, however, then the possibility of violation is increased because of the factor of two uncertainty. On the other hand, if a Gaussian prediction suggests that an allowable increment will be exceeded with the addition of a new source, there is a reasonable probability that this violation may not occur as frequently as projected, particularly if the predicted exceedance is less than twice the increment."[102]

[100] EPA Doc., "Scientific Factors Bearing on Regulatory Policies to Assure Non-Degradation of Air Quality," pp. F-8, -9.

[101] 39 Fed. Reg. 31003 (August 27, 1974). In a report to the EPA Assistant Administrator for Air and Water Programs, an EPA working group assigned to assess regulatory alternatives for a rule of no significant deterioration concluded: "It is also the opinion of the working group that current diffusion modeling techniques are not sufficient to predict the air quality impact of a source with the required degree of precision." Memorandum from J. Padgett to R. L. Sansom, "Report of Conclusions Reached by Working Group," at 2 (A. at .....).

[102] SAI Study, p. V-30.

The effects of the modeling uncertainties are dramatically illustrated in a series of maps on pages VI-89 through VI-99 of the SAI Study. Using three separate locations as likely sites for future energy development projects (an oil shale processing facility in Piceance Basin of western Colorado; a coal gasification plant in Campbell County, Wyoming; and a coal gasification plant in Harlan, Kentucky), SAI modeled the range of increment ceiling violations from pollutant distributions under worst-case conditions. The uncertainty ranges in the model used (Gaussian) are indicated on the maps by a shaded zone generating from the hypothetical pollutant source, the outer perimeter of the zone representing the upper bound of uncertainty, and the inner perimeter representing the lower bound of uncertainty. For the convenience of the Court, one of the maps has been reproduced in the Addendum attached to this brief at Add. 37. In the case of each map, the range between the upper and lower bounds of predictability is considerable, the map at Add. 37, for example, illustrating a difference of nearly 90 miles in the case of the Wyoming plant where the lower bound is at point zero—the plant site. In view of these results, SAI concluded:

> "Clearly, the uncertainty ranges associated with the critical downwind distances can be considerable. The ratio of the upper to the lower bound (again, conservatively estimated) is typically 3 to 5 but can be much greater. More importantly, an uncertainty range of 50 kilometers or more is not uncommon, and some are of the order of one-hundred kilometers. In our view, the magnitude of these uncertainties—and not the magnitude of the expected value of the critical downwind distances—is the most important information to emerge from this modeling exercise. *These uncertainties overwhelmingly dominate the predicted results, thus undermining the value of the predictions.*"[103] (Emphasis added.)

In order to achieve our Nation's goal of energy self-sufficiency, irrevocable decisions involving investments of billions of dollars will be required of private industry over the next decade. To expect those decisions to be determined on the basis of diffusion modeling, a technology now shown to have an uncertainty factor of five or

[103] *Id.* at VI-88.

more, is patently absurd. The irrationality of these regulations—indeed further proof they were never intended by Congress—reaches its zenith when it is realized that the regulations are *silent* as to what occurs once a new and approved multimillion dollar facility is constructed and it is then discovered that its emissions exceed the allowable increment levels, either because the original diffusion model had incomplete data or emissions from other new sources not subject to preconstruction review exceeded predictions.[104]

As recently noted by the Court of Appeals for the Third Circuit, "the Administrator should evaluate the *workability* of the proposed limitations" for state implementation plans. *St. Joe Minerals Corp.* v. *EPA,* 508 F.2d 743, 748 (3d Cir. 1975) (emphasis added).[105] By EPA's own admission, the technology simply does not exist to make the significant deterioration regulations workable in the real, factual world, and it can be no substitute to ground the controls in hypothetical speculation and mathematical wizardry. To do so is plainly arbitrary and capricious.

III. The Regulations Impair The Sovereign Power Of The States To Determine Land Use Policies And Controls

In signing the significant deterioration regulations, the Administrator of EPA has imposed severe limitations upon the future use and development of vast areas of our Nation. The individual states will no longer have primal authority with respect to their own land use policies and controls, but will be bound by the restrictions of a federal rule imposed uniformly without regard to the particular needs and desires of the states. Moreover, the states may be required to assume responsibility for enforcement of the regulations,[106] as if they were agents of the Federal Government.

[104] Little comfort can be found in the statement in EPA's technical document that after a facility was "given permission to construct based upon a diffusion model, it would be very inequitable to require the source to shut down because the EPA or State approved model was inaccurate." Rec. 9, EPA Technical Support Doc. (Jan. 1975), at 30 (A. at 126).

[105] *Accord,* Buckeye Power, Inc. v. EPA, 481 F.2d 162, 168-69 (6th Cir. 1973) (holding that technological feasibility is a relevant consideration under the Clean Air Act); Appalachian Power Co. v. EPA, 477 F.2d 495, 503 (4th Cir. 1973); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973).

[106] 40 C.F.R. § 52.21(f), 39 Fed. Reg. 42517, authorizes the Administrator to delegate new source review responsibilities to state or local agencies.

In recent testimony before the Senate Commerce Committee, U.S. Attorney General Edward Levi questioned the constitutionality of certain developments in the implementation of the Clean Air Act. The Attorney General's comments were made in testimony relating to a no-fault insurance bill about which the Department of Justice had earlier expressed constitutional reservations because the bill "employ[s] a regulatory scheme that requires the states to devote their funds and personnel, and to create agencies and facilities to administer a federal law, regardless of local feeling." Hearing, National Standards No-Fault Motor Vehicle Insurance Act, Sen. Committee on Commerce, 94th Cong., 1st Sess., at 497 (1974) (hereafter referred to as "Commerce Hearings").

Alluding to the Department of Justice's earlier remarks quoted above, the Attorney General suggested that the Clean Air Act is subject to similar constitutional problems, citing the recent decision in *Pennsylvania* v. *EPA,* 500 F.2d 246, 262 (3d Cir. 1974), where the Third Circuit expressed "a legitimate concern for possible intrusions upon the proper functioning of our federalist system as a result of future developments in the implementation of the Clean Air Act." More recently, such concerns have led the Ninth Circuit to rule that the Clean Air Act does not authorize the imposition of sanctions against states that decline to enforce EPA prescribed implementation plans, that Court agreeing that "the Commerce Power does not extend to requiring a state to undertake such governmental tasks as might be assigned to it by Congress, or its proper delegatē," and suggesting that "a Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress." *Brown* v. *EPA,* Civ. No. 73-3306, et seq. (9th Cir. Aug. 15, 1975), Slip op. at 21 and 23.

The constitutional concern expressed by the Attorney General and the Third and Ninth Circuits is grounded in the Tenth Amendment to the United States constitution, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In the recent case of *Fry* v. *United States,* 43 U.S.L.W. 4651 (U.S. May 27, 1975), the Supreme Court characterized the Tenth Amendment as "not without significance," and explained:

> "The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 43 U.S.L.W. at 4652 n. 7.

In even stronger defense of the sovereignty of the states, Justice Rhenquist said:

> "Both Amendments [Tenth and Eleventh] are simply examples of the understanding of those who drafted and ratified the constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation." 43 U.S.L.W. at 4655 (dissenting op.).

In the case of the significant deterioration regulations, EPA, by administrative fiat, has imposed arbitrary air quality increment ceilings that are now the law of every state, ceilings which EPA can require the States to enforce without regard to possibly countervailing social and economic factors peculiar to the locality involved.[107] The constitutional federalism embodied in the Tenth Amendment is severely strained by such federal rulemaking, particularly where it affects such inherently state functions as zoning and land use planning.[108]

Furthermore, EPA's action violates the fundamental premise of the Clean Air Act, as expressed by Congress, that the prevention

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[107] Although the regulations in theory authorize the States to seek reclassification of an area to a more liberal increment ceiling zone, in practice reclassification will be largely precluded by the shadow effects of Class I areas, particularly in those states with large areas under federal or Indian management. See discussion pages 8-10.

[108] EPA itself recognized that its regulations were, in effect, "zoning" when it changed the area terminology of the regulations from "zoning" to "classification" so as "to avoid confusion with conventional zoning concepts," although noting that conventional zoning may only deal with a portion of a county whereas EPA's regulations may affect a "larger area" like several counties. 39 Fed. Reg. 81004 (Aug. 27, 1974).

and control of air pollution at its source is the *primary responsibility of states and local governments,* (§ 101(a)(3)), a premise which contemplates that:

> "state and local governments retain responsibility for the basic design and implementation of air pollution strategies. . . ." *Pennsylvania* v. *EPA,* 500 F.2d 246, 262 (3d Cir., 1974).

Where the quality of the air is better than that required under the national primary and secondary standards, Congress clearly intended for the states to exercise their own discretion, independent of federal dictates. Section 116 of the Act expresses this intent, *authorizing* any state or political subdivision to adopt standards more stringent than the national standards, *but not requiring it to to do so.*

By forcing prescribed rules on the states with regard to land use controls in areas where air quality exceeds the national standards, EPA has usurped an inherently local function reserved to the states under both the Constitution and the Clean Air Act. Attorney General Levi has warned that the issue of constitutional Federalism is not a frivolous one; "it is close to the protection of diversity, creativity and freedom within our system." Commerce Hearings at 500. Unless the EPA significant deterioration regulations are set aside, these values so vital to the sovereign integrity of every state in the Union will be placed in jeopardy.[109]

[109] Petitioners adopt the additional Fifth and Tenth Amendment arguments advanced by petitioners in actions numbered 75-1368, 75-1369 and 75-1666.

CONCLUSION

For the foregoing reasons, Petitioners submit that the significant deterioration regulations issued by EPA are unlawful, and respectfully request that the regulations be set aside.

Respectfully submitted,

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ADDENDUM

RELEVANT PORTIONS OF THE CLEAN AIR ACT

§§ 101, 103(f), 108, 109, 110, 111, 116, 302, 304, 307(b)

Findings and Purposes

Sec. 101(a) The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, state, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) 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;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Research, Investigation, Training, and Other Activities

Sec. 103.

(f)(1) In carrying out research pursuant to this Act, the Ad-

ministrator shall give special emphasis to research on the short- and long-term effects of air pollutants on public health and welfare. In the furtherance of such research, he shall conduct an accelerated research program

(A) to improve knowledge of the contribution of air pollutants to the occurrence of adverse effects of health, including, but not limited to, behavioral, physiological, toxicological, and biochemical effects; and

(B) to improve knowledge of the short- and long-term effects of air pollutants on welfare.

(2) In carrying out the provisions of this subsection the Administrator may

(A) conduct epidemiological studies of the effects of air pollutants on mortality and morbidity;

(B) conduct clinical and laboratory studies on the immunologic, biochemical, physiological, and toxicological effects including carcinogenic, teratogenic, and mutagenic effects of air pollutants;

(C) utilize, on a reimbursable basis, the facilities of existing Federal scientific laboratories and research centers;

(D) utilize the authority contained in paragraphs (1) through (4) of subsection (b); and

(E) consult with other appropriate Federal agencies to assure that research or studies conducted pursuant to this subsection will be coordinated with research and studies of such other Federal agencies.

(3) In entering into contracts under this subsection, the Administrator is authorized to contract for a term not to exceed 10 years in duration. For the purposes of this paragraph, there are authorized to be appropriated $15,000,000. Such amounts as are appropriated shall remain available until expended and shall be in addition to any other appropriations under this Act.

Air Quality Criteria and Control Techniques

Sec. 108. (a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) (1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of pre-

vention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1), which shall be comprised of technically qualified individuals, representatives of State and local governments, industry, and the academic community. Each such committee shall submit as appropriate, to the Administrator information related to that required by paragraph (1).

(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

National Ambient Air Quality Standards

Sec. 109. (a)(1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards

for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Implementation Plans

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under Section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (c)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment

by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standards or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an 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.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Ad-

ministrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources) and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

[PL 93-319, June 24, 1974]

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise

an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (II).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2) (A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not

condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

[PL 93-319, June 24, 1974]

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a) (2) (A) (i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1) (A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1) (A) as the Administrator determines to be reasonable under the circumstances.

(f) (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to

which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirements before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearings, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and

(D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceding under this subsection.

Standards of Performance for New Stationary Sources

Sec. 111. (a) For purposes of this section:

(1) The term 'standard of performance' means 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.

(2) The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term 'existing source' means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories

of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purposes of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110

under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Retention of State Authority

Sec. 116. Except as otherwise provided in sections 119(c), (e) and (f), 209.211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or 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 or under section 111 or 112, 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 or section.

[PL 93-319, June 24, 1974]

Definitions

Sec. 302. When used in this Act—

(a) The term 'Administrator' means the Administrator of the Environmental Protection Agency.

(b) The term 'air pollution control agency' means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this Act;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(c) The term 'interstate air pollution control agency' means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term 'State' means a State, the District of Columbia, the Commonwealth of Puero Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term 'person' includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term 'municipality' means a city, town, borough, county, parish, district or other public body created by or pursuant to State law.

(g) The term 'air pollutant' means an air pollution agent or combination of such agents.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade 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.

Citizen Suits

Sec. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator of a State with respect to such a standard or limitation, or

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

The district courts shall have jurisdiction, without regard to the amount in controversy of 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 act or duty, as the case may be.

(b) No action may be commenced—

(1) under subsection (a) (1)

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violation of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that

such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c)(1)(B) or an order issued by the Administrator pursuant to section 113(a). Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitatios or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term 'emission standard or limitation under this Act' means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan.

General Provision Relating to Administrative Proceedings and Judicial Review

Sec. 307

(b) (1) A petition for review of action of the Administrator in

promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

[PL 93-319, June 24, 1974]

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

EPA REGULATIONS ENTITLED "PREVENTION OF SIGNIFICANT AIR QUALITY DETERIORATION"

40 C.F.R. §§ 52.01(d) and (f), 52.21

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:

§ 52.01 *Definitions.*

* * *

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

* * *

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which, is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60 of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) The process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

2. Section 52.21 is revised by designating the first paragraph (a) and adding paragraphs (b), (c), (d), (e), and (f) to read as follows:

§ 52.21 *Significant deterioration of air quality.*

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Accordingly, all State plans are disapproved to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States where air quality is better than the secondary standards. The disapproval applies to all States listed in Subparts B through DDD of this part. Nothing in this section shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) The phrase "baseline air quality concentration" refers to both sulfur dioxide and particulate matter and means the sum of ambient concentration levels existing during 1974 and those additional concentrations estimated to result from sources granted approval (pursuant to approved new source review procedures in the plan) for construction or modification but not yet operating prior

to January 1, 1975. These concentrations shall be established for all time periods covered by the increments set forth under paragraph (c)(2)(i) of this section and may be measured or estimated. In the case of the maximum three-hour and twenty-four-hour concentrations, only the second highest concentrations should be considered.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection, or installation of an affected facility.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) This paragraph applies to all States listed in Subpart B through DDD of this part, all lands owned by the Federal Government, and Indian Reservations, except those counties or other functionally equivalent areas that pervasively exceed any national ambient air quality standards for sulfur oxides or total suspended particulates and then only with respect to such pollutants. States shall notify the Administrator by June 1, 1975, of those areas which are above the national air quality standards and therefore are exempt from the requirements of this paragraph.

(2) (i) For purpose of this paragraph, areas designated as Class I or Class II shall be limited to the following increases in pollutant concentrations over the baseline air quality concentration:

Area designations

Pollutant	Class I (g/m)	Class II (g/m)
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(3) (i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(*a*) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(*b*) Other States which may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

(*c*) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(*d*) The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

(*a*) The redesignation is consistent with adjacent State and privately owned land, and

(*b*) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(*a*) The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(*a*) The Indian Governing Body follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(*a*) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (*1*) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been complied with, (*2*) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph, (*3*) that the State has not requested delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

(*b*) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (2) that the Federal Land Manager has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*c*) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (2) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*d*) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(*e*) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances con-

siderations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests.

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) This paragraph applies to any new or modified stationary source of a type identified below which will be located in any State listed in Subpart B through DDD of this part, which source has not commenced construction or expansion prior to June 1, 1975. A source which is modified, but does not increase the amount of a pollutant other than sulfur oxides or particulate matter, or is modified to utilize an alternative fuel, or higher sulfur content fuel shall not be subject to this paragraph.

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.
(ii) Coal Cleaning Plants.
(iii) Kraft Pulp Mills.
(iv) Portland Cement Plants.
(v) Primary Zinc Smelters.
(vi) Iron and Steel Mills.
(vii) Primary Aluminum Ore Reduction Plants.
(viii) Primary Copper Smelters.
(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.
(x) Sulfuric Acid Plants.
(xi) Petroleum Refineries.
(xii) Lime Plants.
(xiii) Phosphate Rock Processing Plants.
(xiv) By-Product Coke Oven Batteries.
(xv) Sulfur Recovery Plants.
(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.
(xviii) Fund Conversion Plants.

(2) No owner or operator shall commence construction or modification of a source subject to this paragraph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source, in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in the area where the source will be located nor the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this paragraph; reduction in emissions from existing sources which contributed to the baseline air quality; and general commercial, residential, industrial, and other sources of emissions growth not included in the definition of baseline air quality which has occurred since January 1, 1975.

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2)(ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by subparagraph (2) of this paragraph, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the nature and extent of general commercial, residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since the effective date of this paragraph.

(4) (i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(iii) Whenever any new or modified source is subject to action by a Federal agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act to the maximum feasible and reasonable.

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed

source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1) (i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e) (1) (ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall:

(*a*) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

(*b*) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials submitted by the owner or operator, a copy of the Administrator's preliminary determination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(*c*) Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed, of the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: State and local air pollution control agencies, the chief executive of the city and county; any comprehensive regional land use planning agency; and any State, Federal Land

Manager, or Indian Governing Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e)(1) (ii), (iv), or (v) of this section or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months, or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State, and Federal regulations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accordance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

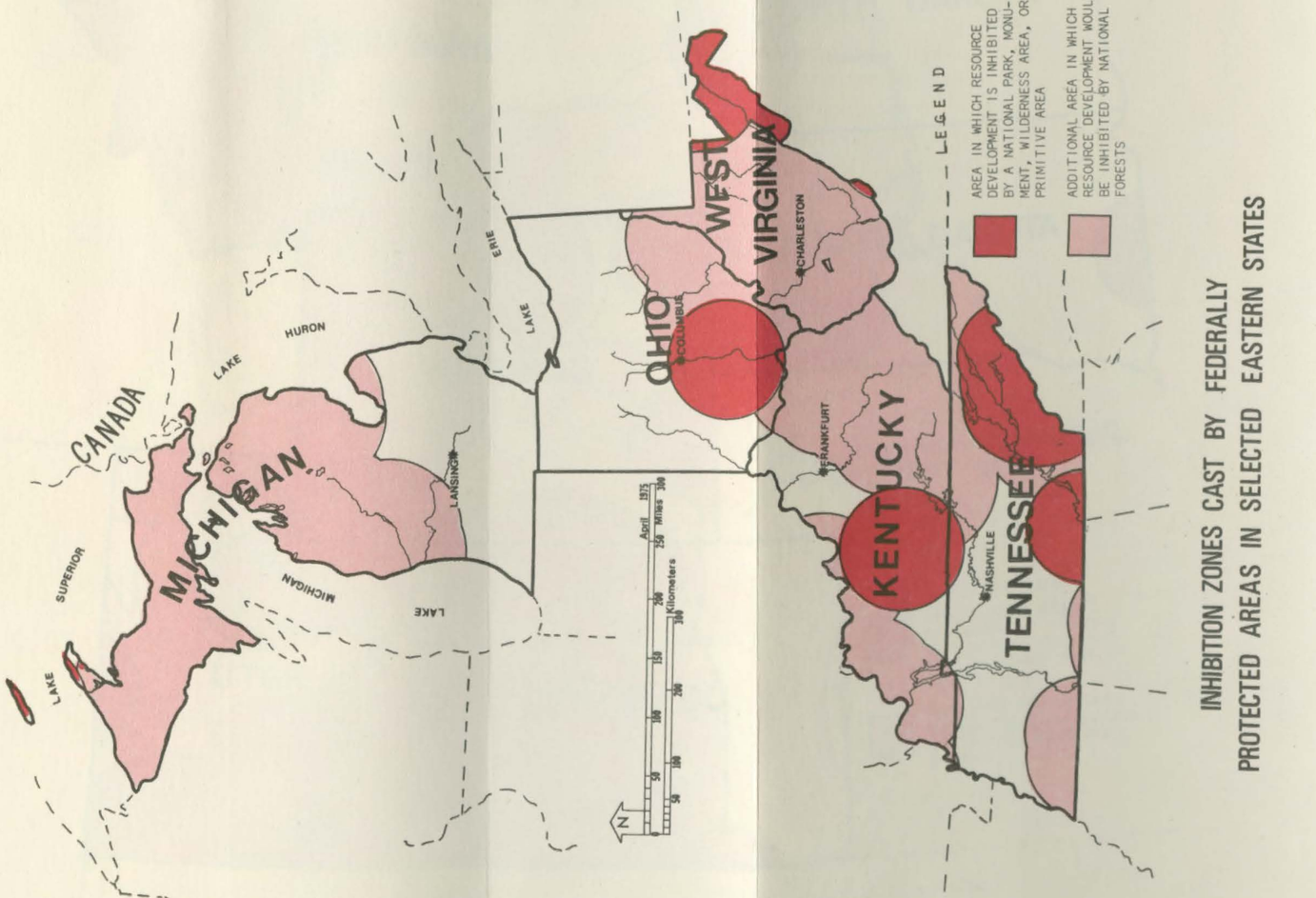
(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropritte State or local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for land use planning, such Agency shall consult with the appropriate State and local land use planning agency prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e)(1)(ii)(*c*) of this section shall be sent to the Administrator through the appropriate regional office.

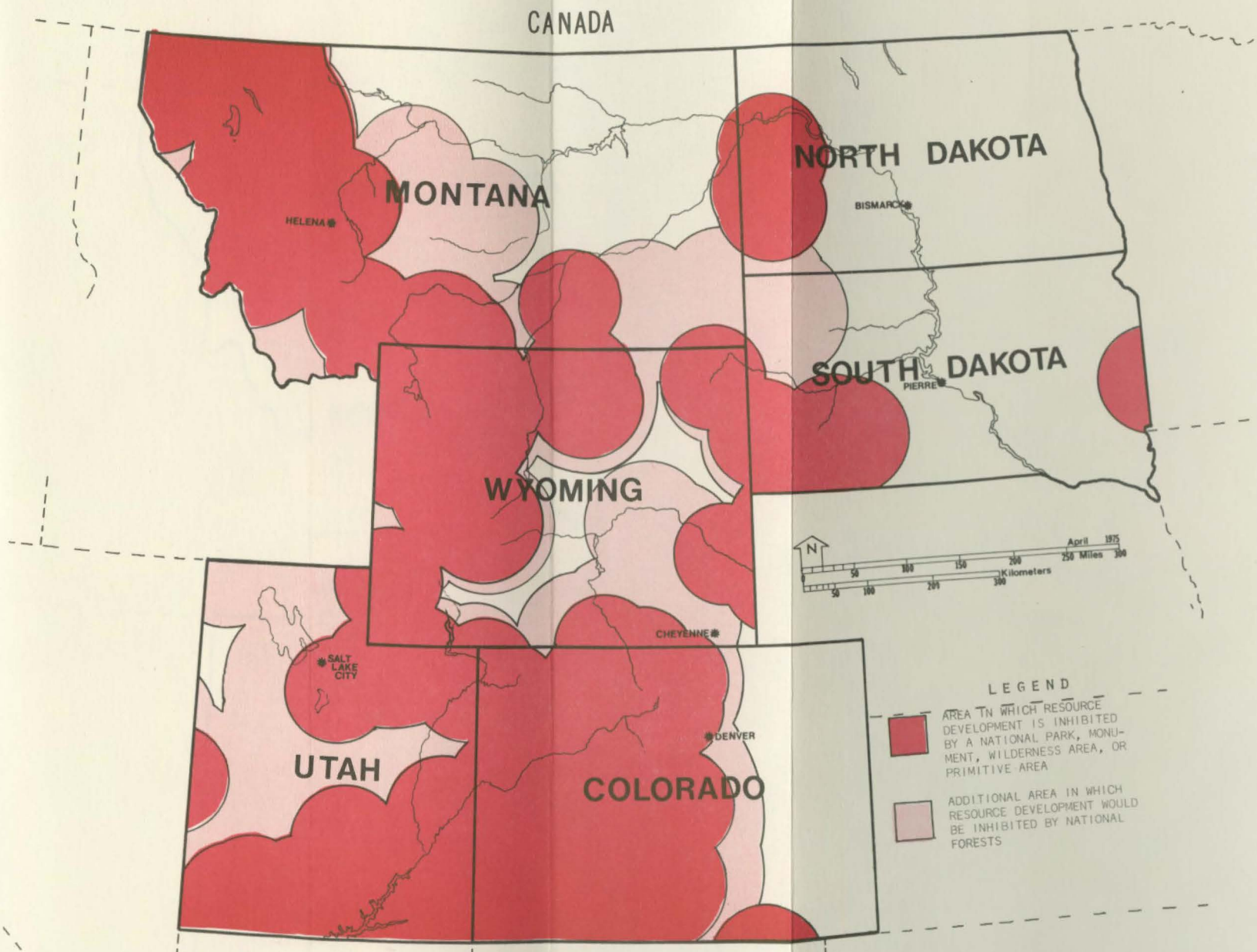
(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to

be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land under other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.



INHIBITION ZONES CAST BY FEDERALLY PROTECTED AREAS IN SELECTED EASTERN STATES



INHIBITION ZONES CAST BY FEDERALLY PROTECTED AREAS IN SELECTED WESTERN STATES

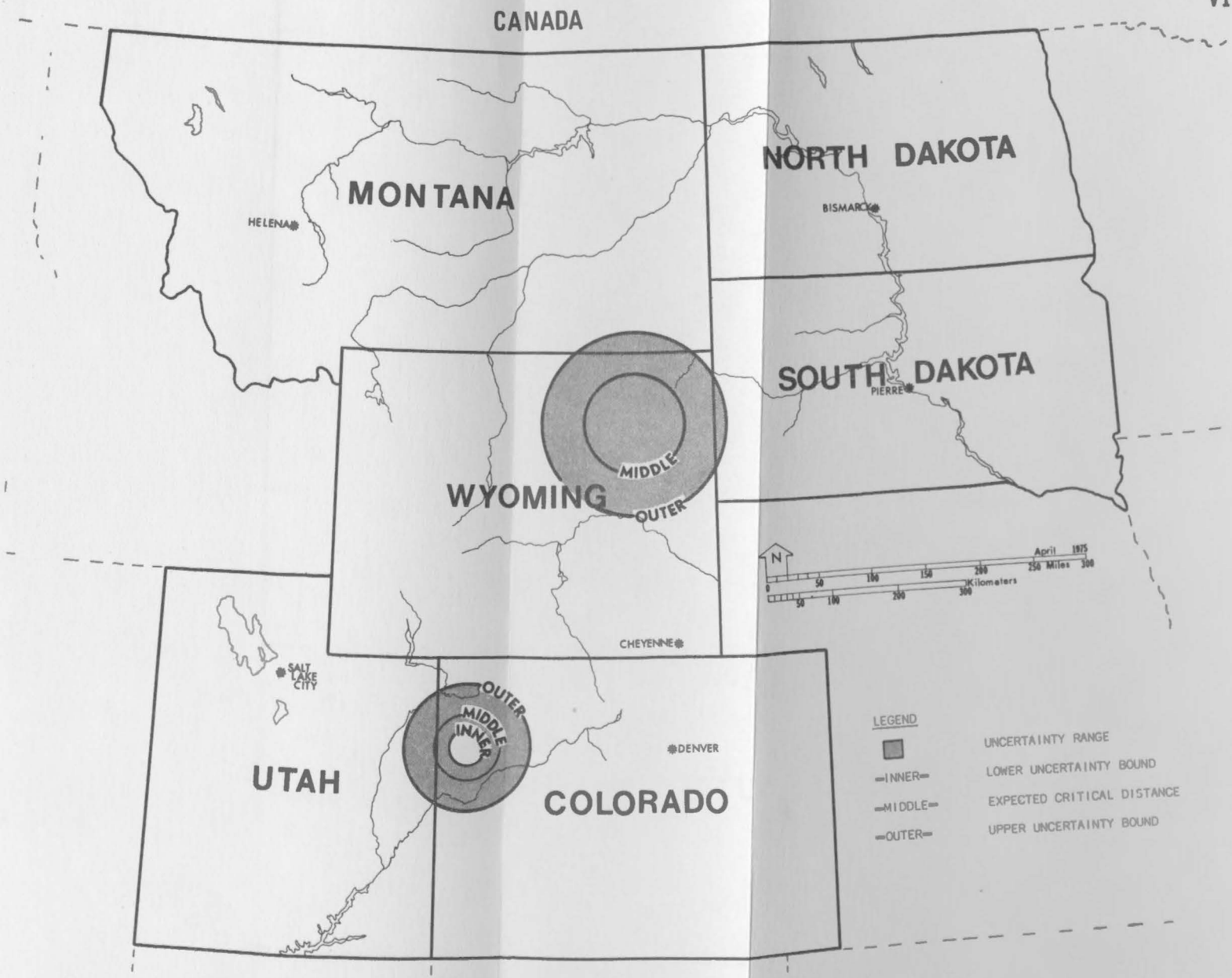


FIGURE VI-22. CRITICAL DISTANCE CIRCLES FOR CAMPBELL COUNTY, WYOMING--24-HOUR SO_2 , CLASS I INCREMENTS--AND PICEANCE BASIN--PROJECT INDEPENDENCE, 24-HOUR SO_2, CLASS I INCREMENTS

REPLY BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1665

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Regulations of the Environmental Protection Agency

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1665

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

And Other Consolidated Cases, Nos. 74-2063, 74-2079, 75-1368, 75-1369, 75-1370, 75-1371, 75-1372, 75-1575, 75-1663, 75-1664, 75-1665, 75-1666, 75-1763, and 75-1764

On Petition for Review of Regulations of the Environmental Protection Agency

REPLY BRIEF FOR PETITIONERS

This reply brief addresses the briefs submitted on behalf of EPA and the Sierra Club in response to the arguments raised by the Petitioners in their opening brief.[1] As supplemented by the discussion contained herein, Petitioners stand on the arguments advanced in their opening brief for setting aside EPA's significant deterioration regulations.

[1] The Petitioners herein are the American Petroleum Institute, Standard Oil Company (Ohio), Atlantic Richfield Company, Continental Oil Company, Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California.

ARGUMENT

I. The Clean Air Act Does Not Authorize EPA's Significant Deterioration Regulations

In their opening brief (pp. 12-28),[2] Petitioners have carefully reviewed the language and statutory structure of the Clean Air Act of 1970 (the "Act"), together with its legislative history, and have demonstrated that the significant deterioration regulations promulgated by EPA exceed the agency's authority under the Act.

In response, EPA now contends (EPA Br. at 13) that the absence of any explicit authorization in the Act for the regulations is "unimportant" in view of the general purpose of the Act to "protect and enhance" the quality of the Nation's air. According to EPA, the Administrator's general authority to adopt "such regulations as are necessary to carry out his functions under the Act," 42 U.S.C. § 1857g(a), is sufficient authority for the regulations in question. In effect, the agency now concedes Petitioner's contention in their opening brief (pp. 18-19) that the Administrator is wholly without his asserted authority to issue these regulations under Section 110(c).[3] In its groping for another legislative peg, EPA argues instead that it has a blank check under a grant of general power in the Act to regulate in any manner anything it deems necessary to protect environmental quality, a construction of EPA's power that undoubtedly would shock most members of Congress. If these two general legislative statements, *i.e.,* Sections 101(b)(1) and 301(a), provide all the authority EPA needs to protect the Nation's air quality, one wonders why Congress even bothered to specify in such great detail the regulatory powers of EPA in the operative sections of the Act.

This construction by EPA is even more incredible when it is realized that Congress in section after section of the Act stated

[2] Page references to the briefs are to the page numbers of the typewritten copies of the briefs that have been filed with the Court. When printed briefs are filed, the page references to Petitioners' opening brief will be revised accordingly. Unless otherwise specified, references to the Sierra Club's brief are in all cases references to the brief filed by the Sierra Club with this Court on November 5, 1975.

[3] 42 U.S.C. § 1857c-5(c).

precisely how regulations implementing the primary and secondary ambient air standards were to be developed, reviewed, promulgated and enforced. Yet, there is not a single sentence in the Act mentioning "no significant deterioration," much less how EPA is to regulate it, even though according to the Administrator these regulations are to apply to the 80% of the country which has air quality better than the primary and secondary standards for one of the pollutants regulated.[4] Had Congress intended the regulation by EPA of air quality in areas of this country four times the size of that affected by the primary and secondary standards, it would seem Congress would have given consideration somewhere in the Act to how such regulations were to be developed, reviewed, promulgated and enforced.

The central issue in this case remains whether Congress in the Act specified a policy of non-degradation as one of the requirements that must be satisfied by a state implementation plan as a condition for approval by EPA. The *only* section of the Act that addresses the preconditions for state implementation plans is Section 110. In clear and precise language, that section specifies eight distinct requirements—all related to the achievement and maintenance of the primary and secondary standards of Section 109, *none requiring goals more stringent than the Section 109 standards.*[5]

The Sierra Club insists (Sierra Club Br. at 3) that Petitioners' argument as to the conclusiveness of Section 110 cannot be raised at this point, as the district court and this Court "already weighed" the argument in *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253

[4] Transcript, p. 24, EPA press conference, November 27, 1974.

[5] Contrary to the assertion by the Sierra Club (Sierra Club Br. at 18), Section 110 is *not* confined to "the problem of existing pollution." Section 110 specifically requires "maintenance" of ambient standards by requiring measures such as land-use controls and a procedure "for review (prior to construction or modification) of the location of new sources," including "adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance . . . of a national ambient air quality primary or secondary standard." Hence, it is obvious that Congress intended clearly that State plans assure that the primary and secondary air quality standards would not be exceeded by providing that new source emissions and locations should be carefully regulated.

(D. D. C.), *aff'd. mem.* D. C. Cir. No. 72-1528 (Nov. 1, 1972), and decided against it.[6] Whatever the holding in *Sierra Club,*[7] the fact remains that the United States Supreme Court has since determined that Section 110 "quite clearly mandates" approval of a state plan that "satisfied *its* minimum conditions." *Train* v. *NRDC,* 421 U.S. 60, 71 n.11 (1975).

EPA intimates that the Supreme Court's holding in *Train* merely suggests that Section 110 may have been "an inappropriate vehicle" for the promulgation of the regulations (EPA Br. at 13), and the Sierra Club argues that because the precise issue of nondegradation was not before the Court in *Train,* the holding there has no application for this case.[8] What EPA and the Sierra Club fail to recognize, however, is that the fundamental issue in *Train* was precisely the same as the fundamental issue here—whether state implementation plans need to satisfy requirements other than those specified in Section 110. On that basic issue, the Supreme Court ruled that a state implementation plan is subject *only* to the requirements of Section 110, and no others. As Justice Rehnquist said for the majority:

[6] Sierra Club repeatedly suggests that Petitioners are here "renewing" an argument which they lost in the previous *Sierra Club* litigation. *E.g.,* Sierra Club Br. at 6-7. Incredibly, the Sierra Club cites (Sierra Club Br. at 19) a host of industry *amici* briefs filed in the Supreme Court and then states, "It is clear that *both this Court* and the Supreme Court were amply presented with the views of these petitioners . . . ." (Emphasis added.) The records of that case reveal that the only *amicus* brief filed in this Court was by the State of Arizona. Neither API nor any of the companies represented on this brief were parties to the *Sierra Club* case, and this § 307(b)(1) judicial review proceeding is the only opportunity Petitioners have had to present their arguments as affected parties. Nor can it be suggested that the interests of Petitioners were adequately represented by EPA in *Sierra Club,* as the Supreme Court has ruled that even where the same object is sought by a suit, the right of private citizens to represent their own concerns cannot be subsumed by the Government. *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972).

[7] As discussed in Petitioners' opening brief (pp. 12-14), the subsequent equally divided vote in the Supreme Court left unsettled the principle of law applicable to this case.

[8] Curiously, Sierra Club is content to dismiss *Train* on the ground that significant deterioration was not in issue there, but has no hesitancy in citing dicta from other circuit court opinions that supposedly support its position. See Sierra Club Br. at 2, n.1.

> "Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements." *Train* v. *NRDC,* 421 U.S. at 79 (emphasis in original.)

As to EPA's authority to impose provisions on state plans other than those required by Section 110, the Court held:

> "[T]he Agency may devise and promulgate a specific plan of its own *only if a State fails to submit an implementation plan which satisfies those standards.*" Id. at 70 (emphasis added.)

In *Train,* then, the Supreme Court has ruled definitively with respect to the conditions under which the Administrator *must* approve state implementation plans, and the clear and direct language of the opinion permits no narrowing of its effect. As "no significant deterioration" is not a requirement of Section 110, a fact which both EPA and the Sierra Club ultimately concede (EPA Br. at 13; Sierra Club Br. at 17-21), it simply cannot be imposed upon state implementation plans by brute force or tortured statutory construction, as attempted by EPA.

On pages 19-28 of their opening brief, Petitioners have thoroughly reviewed the legislative history of the Air Quality Act of 1967 and the 1970 Clean Air Act Amendments, and have demonstrated that throughout Congress' deliberations on those acts the focus was on regulation of the known effects of air pollution through achievement of the national primary and secondary standards. Further, Petitioners have shown that the new source performance standards required by Section 111, 42 U.S.C. § 1857c-6, were intended as the key to the protection of clean air regions, not the establishment of tertiary standards, nowhere mentioned in the Act, that arbitrarily restrict ambient air concentrations below the secondary standards, and that have no rational relationship to identifiable adverse effects on health and welfare.[9]

[9] Every reference by the Sierra Club to the legislative history leading to enactment of the 1970 Act (Sierra Club Br. at 8-15) is consistent with Petitioners' argument that the § 111 new source performance standards were intended as the protective tool for clean air areas. See Petitioners' opening brief at 23-28.

In response, EPA has referred to the current proposals in Congress to amend the Clean Air Act, so as to prescribe specific provisions for implementation plans intended to prevent significant deterioration. According to EPA, such proposals "show Congressional intent that the Clean Air Act does require that significant deterioration be prevented." EPA Br. at 14, n. 18. The issue in this case, of course, is not the intent of Congress with respect to possible amendments to the Act, but rather the intent of the law as it presently is written. As this Court recently noted:

> "[D]ebate of a later Congress . . . [has] been described by the Supreme Court as offering a hazardous basis for inferring the intent of the earlier Congress." *Portland Cement Ass'n* v. *Ruckelshaus,* 158 U.S. App. D. C. 375, 382, 486 F.2d 375, 382 (D. C. Cir. 1973).

Indeed, the fact that certain members of Congress may now be considering the incorporation of an explicit non-degradation policy into the Act by amendment indicates, if anything, the total absence of such a policy from the Act without such an amendment.

In short, no viable argument has been provided for disregarding the Supreme Court's explicit holding that state implementation plans satisfying each of the specific criteria listed in Section 110 must be approved by EPA. *Train* v. *NRDC, supra.* As Section 110 is devoid of any reference to tertiary air quality standards more stringent than the primary and secondary standards and limits EPA's authority to revise state implementation plans under only three conditions (none of which are here present), EPA's efforts to impose such standards by means of the significant deterioration regulations are without statutory authority.

II. The Regulations Lack Any Rational Connection To The Protection Of Health And Welfare

Petitioners have in their opening brief shown that the significant deterioration regulations promulgated by EPA bear no rational relationship to the overriding purpose of the Clean Air Act, the protection of health and welfare, and that Congress constitutionally

could not have required the agency to issue rules lacking such a relationship. Petitioners' Opening Br. at 28-30. In response, both EPA and the Sierra Club postulate that adverse effects do occur below the national primary and secondary standards and that increment ceilings below the national standards, although arbitrarily set without reference to any particular health or welfare effects, necessarily relate to the health and welfare goals of the Clean Air Act. EPA Br. at 18; Sierra Club Br. at 33-34.

The EPA and Sierra Club arguments mischaracterize the fundamental purpose of the national primary and secondary standards required under Section 109 of the Act. Congress was rightly concerned with the difficulty of quantifying pollutant effects, and as is evident by the clear language of Section 109, intended the national standards to protect not only against the known adverse effects on welfare, but against the "anticipated" effects as well. § 109(b)(2), 42 U.S.C. § 1857c-4. To protect against what EPA terms the "unquantified adverse effects" or what the Sierra Club describes as the "unknown but possible harm," Congress specifically required the incorporation of "margins of safety" into the primary standards. § 109(b)(1), 42 U.S.C. § 1857c-4. With respect to these uncertain health hazards, the Senate report that accompanied the 1970 Act clearly emphasized the importance of margins of safety:

> "In setting such air quality standards the Secretary should consider and incorporate not only the results of research summarized in air quality criteria documents, but also the need for margins of safety. *Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified.* Sen. Rep. No. 1196, 91st Cong., 2d Sess. 9-10 (1970) (emphasis added).

The Sierra Club grossly misstates the purpose and effect of the regulatory structure of the Clean Air Act, suggesting that the primary and secondary standards allow and encourage uniform national pollution up to levels at which the public is harmed by quantified, not to mention less definite, pollutant effects. Sierra Club Br. at 70. But the Sierra Club has stood the law on its head,

as the language of the Act explicitly provides that the Section 109 standards are to be set at levels where harm to health and welfare *will not occur*. If adverse effects are anticipated to occur below the existing standards, then the Clean Air Act clearly requires that the standards be made more restrictive.

Moreover, the views expressed in the briefs from EPA and the Sierra Club as to the inadequacy of the primary and secondary standards are not shared by EPA's Administrator, Russell Train. In a recent letter to Senator Muskie, Mr. Train advised:

> "There has been no new evidence to indicate that total suspended particulates, as a conglomerate, have any pronounced effect on public welfare below the levels of the existing secondary standards." Letter from Russell Train to Sen. Edmund Muskie, Oct. 10, 1975, reported in 6 BNA, Environ. Rep. at 1212 (1975).

As to the adequacy of the national standards for sulfur dioxide, Mr. Train reported:

> "The secondary standard for sulfur dioxide is set at 1300 ug/m^3, maximum three hour concentration, not to be exceeded more than once a year. This standard was set at the level necessary to protect sensitive species of plants such as maple trees, spinach, and sweet potatoes. Damage to those species has been noted at concentration levels of 2620 to 10,480 ug/m^3 over periods of ½ hour. No other welfare effects have been noted at concentrations lower than those causing damage to sensitive plants."

Mr. Train concluded his report to the Senator by recognizing that the national standards are not static but require continual reassessment,[10] saying:

> "In summary, as more data concerning long term accumulations become available, the secondary standards may need to be reevaluated to determine that they truly are protective of the public welfare."

[10] One of EPA's principal advisory committees, the National Air Quality Criteria Advisory Committee, recently reported that it was undertaking a review of the Section 109 air quality standards. In the words of one committee member, the committee will act as a "watchdog group" to assure the adequacy of the national standards. 6 BNA Environ. Rep. at 933 (1975).

By insisting that some tertiary standard is necessary for the protection of health and welfare, the Sierra Club ignores the basic objective of the primary and secondary standards and the mechanism for their adjustment. If it is truly anticipated that a substance in the ambient air will adversely affect the health and welfare of the public, then the primary and secondary standards should be made more restrictive.[11] To require more than is necessary for the protection of health and welfare, simply for the sake of further regulation, is to exceed the constitutional limits on federal power imposed by the Fifth Amendment.

III. EPA Has Failed To Demonstrate That The Technology Exists To Make The Regulations Workable

In their opening brief (pp. 38-45), Petitioners challenged the regulations as unworkable, on the ground that the principal mechanism for enforcing the increment ceilings prescribed by the regulations, diffusion modeling, cannot predict compliance with any reasonable degree of accuracy. As was pointed out, existing modeling techniques are particularly defective when used in areas of severe terrain and where meteorological data are sketchy or nonexistent as is true with most "clean air" areas.

In response, EPA argues (EPA brief at 29) that the inaccuracies attendant with diffusion modeling are unimportant, as the incre-

[11] The Sierra Club's Addendum contains a number of false statements concerning effects below the national standards. Marx, for example, is cited (p. 9, n.15) as demonstrating the synergistic effect of SO_X in combination with particulates. In fact, the Marx study does not discuss SO_X and particulates. Similarly, Applegate & Durrant (p. 9, n.16) are cited as finding damage to plants at SO_2 levels of only .001 ppm. In fact the lowest SO_2 values reported were .02-.03 ppm. The Addendum also states (p. 2) that SO_2 has been shown to cause respiratory constriction at only 0.1 ppm. In fact, the reference cited (Anderson, et al.) considered SO_2 levels of 1, 5 and 25 ppm., nothing lower, and concluded not that the secondary standard should be "reduced sharply" as the Sierra Club suggests, but that low level effects cannot be precluded.

If the Sierra Club has evidence that "there are in fact serious deleterious effects to health and welfare at pollution levels substantially below the level of the national standards" (Sierra Club Br. at 29), it should be bringing an action against EPA for failure to carry out its non-discretionary duties mandated under Sections 108 and 109.

ment ceilings prescribed by the regulations are intended only to serve as "benchmarks" to guide the states in making redesignations. As such, EPA says, it is not even necessary that the modeling techniques used be "sufficiently accurate." These two assertions are ridiculous and fly in the face of the fact that increment ceilings are absolute numbers, designed to place precise limits on the amount of growth in any given air shed and, unless a proposed plant can establish by the very imprecise art of modeling that it will not exceed the applicable ceiling, that plant cannot be built. EPA itself admits this (EPA Br. at 29-30) when it later erroneously contends that existing modeling techniques give "consistent and reproducible results" which enable a state to "know *exactly* what increase in emissions would be permitted." (Emphasis added.) This is a blatant distortion, as models are "reproducible" only to the extent that, using the same model and the same data or assumptions, the same results can be obtained time after time. Models are "consistent" only to the extent that another person using that same model and the same data or assumptions can obtain the same result. The wide variety of modeling techniques, as fully demonstrated in the Supplemental Addendum to Petitioners' opening brief, yield widely different results, particularly in determining the distances upwind that a source must be located in order to avoid exceeding the minute and unmeasurable increments permitted in a Class I area.

EPA then attempts to comfort Petitioners by assuring them that a modeling prediction of compliance, "based on the *best* modeling techniques," will be respected even if it is later determined that the modeling was wrong and that the allowable increment has been exceeded. EPA Br. at 31. Not only is one left to speculate as to what the "best" model will be, who will make that determination, and what will result if that decision is disputed, but EPA asserts that it is unconcerned with what the actual effect on air quality is; all that matters is what the computer says the effect will be. This was explicitly stated earlier by EPA when in its technical document supporting these regulations the agency said that actual air quality data was unnecessary after a plant had been approved for construction as the assessment of air quality would "be accomplished

through an accounting procedure whereby atmospheric modeling of individual sources will be used to keep track of the available (or 'unused') increment . . . ."[12]

For EPA to say that it matters not what the actual data shows but rather what a "black box" says it is, illustrates the whole irrationality of these regulations. Unfortunately, hard, expensive decisions—decisions which may determine the life style and future course of our Nation as we struggle to obtain energy self-sufficiency —will depend upon the "benchmarks" EPA has prescribed. If EPA has its way, mathematical wizardry, not facts, will dictate critical land use decisions for generations to come. To expect decisions of such magnitude to be determined on the basis of purely hypothetical constructs known to have uncertainty factors of five or more, is truly absurd.[13]

The Sierra Club criticizes the Petitioners' use of a consultant's study analyzing the deficiencies of diffusion modeling, on the ground that the study itself utilized diffusion modeling to predict whether certain selected sources would violate the increment ceilings. Sierra Club Br. at 72. In no better way than by attempting a modeling analysis required by EPA could the Petitioners demonstrate the vagueness and uncertainty inherent in the regulatory methodology. Moreover, the Sierra Club fails to mention that the various modeling tests showed broad ranges of uncertainty, some of more than one hundred kilometers, and that the consultants therefore concluded:

> "In our view, the magnitude of these uncertainties—and not the magnitude of the critical downwind distances—is the most important information to emerge from this modeling exercise. *These uncertainties overwhelmingly dominate the predicted results, thus undermining the value of the predic-*

[12] Rec. 9, Technical Support Doc. (Jan. 1975) at 29-30 (A. at 125-26).

[13] Mr. Justice Douglas in his last opinion aptly commented upon the potential dangers of regulatory excess when he said, "A certain danger lurks in the ability of an agency to perfunctorily mold its regulations to conform to its instant needs. * * * [T]he entire federal bureaucracy is vested with a discretionary power against the abuse of which the public needs protection." *Public Service Co.* v. *Porter,* No. 7-5 (Sup. Ct. November 11, 1975) (concurring opinion) slip op. at 1-2.

tions." Supplemental Addendum to Opening Brief of Petitioners, at VI-88 (emphasis added).

It can be no answer to suggest that EPA has used the best technology available (Sierra Club Br. at 74), or that without the ability to rely upon diffusion modeling, the "entire air quality management approach of Section 110" would fail (EPA Br. at 31). It is generally recognized that for purposes of testing compliance with the national primary and secondary standards (where higher concentrations of pollutants and a multiplicity of sources are involved), diffusion modeling may be accepted as relatively accurate.[14] At the minute concentration levels, however, particularly in rugged and rural areas where required data are not available, diffusion modeling simply cannot do the job. EPA has candidly admitted as much, explaining in a reference document cited in the Technical Support Document:

> "The application to non-degradation issues of the available models that have been previously developed for urban environments would, therefore, frequently be on weaker grounds and with reduced confidence in the quantitative precision of the estimates." Scientific Factors Bearing on Regulatory Policies to Assure Non-Degradation of Air Quality, p. F-9.[15]

The point is that just as EPA cannot require people to walk eighteen feet above the ground, so EPA cannot require compliance with the significant deterioration regulations if it is technologically impossible to do so.[16]

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[14] EPA, "Scientific Factors Bearing on Regulatory Policies to Assure Non-Degradation of Air Quality," pp. F-8-9; Petitioners' Opening Brief at 42-43.

[15] Curiously, the quoted sentence, which appeared in the "Scientific Factors" document which was supplied to counsel for Petitioners pursuant to a Freedom of Information Act request, has been eliminated from the "Scientific Factors" document now on file in the agency's public information office.

[16] In construing another major environmental law, the National Environmental Policy Act, this Court said "The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible . . . ." *NRDC* v. *Morton,* 148 U.S. App. D. C. 5, 15, 458 F.2d 827, 837 (D. C. Cir. 1972). Indeed, the legal maxim "lex non cogit ad impossibilia" (the law does not compel that which is impossible of performance) appears apt.

IV. The Clean Air Act Contains No Standards To Guide EPA In The Promulgation Of Significant Deterioration Regulations

As a further indication of the lack of statutory authority for the significant deterioration regulations, Petitioners' opening breif (pp. 30-34) noted the total absence of standards in the Clean Air Act to guide EPA in the implementation of a no significant deterioration requirement. EPA and the Sierra Club contend, however, that "protect and enhance," as those words appear in the purpose clause of Section 101(b), 42 U.S.C. § 1857, are sufficient statutory guides for the regulations. EPA Br. at 71-72; Sierra Club Br. at 41-44.

EPA's argument belies that agency's own efforts in recent months to obtain guidance on the subject from Congress. In a report, dated October, 1975, submitted jointly to Congress with the Federal Energy Administration, EPA requested "explicit guidance" as to what a federal significant deterioration plan should entail. EPA/FEA, "An Analysis of the Impact on the Electric Utility Industry of Alternative Approaches to Significant Deterioration," at 1 (Oct. 1975).[17] In seeking such guidance, EPA recommended an in-depth analysis of the energy impacts of a no significant deterioration rule, saying:

> "Based on the results of this preliminary assessment of alternative deterioration proposals, it appears that additional work would be useful to further refine the analysis. The principal areas of possible future work are summarized below:

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[17] The EPA/FEA report and its maps are also extremely relevant in assessing the potential impact these regulations will have on detering domestic energy production, confirming the work done earlier by Dr. John Anderson (contained in Petitioners' Supplemental Addendum to its opening brief), and clearly showing that Petitioners' assessment was not a "mere assumption" (EPA Br. at 71-72) or a "simplistic approach" (Sierra Club Br. at 79). For example, assuming (i) the meeting of new source performance standards under § 111 of the Act, (ii) the enforcement of the EPA incremental ceilings for possible Class I areas (including wildlife refuges and certain other smaller federal lands not included in the Anderson report), and (iii) most significantly, a 60 mile "buffer" zone (Anderson assumed only 50 miles) surrounding a Class I area in order to insure that those incremental levels would not be exceeded from an outside source, EPA concluded that 75% of the country would not permit the construction of even a single 1000 mw coal-fired electric utility plant. EPA/FEA Report at 22.

1. The economic impact of alternative approaches to significant deterioration on the electric utility industry and on the consumers of electricity should be ascertained.

* * *

2. The analysis should be expanded to include the impact of alternative significant deterioration approaches on other major energy facilities such as:

—Petroleum refineries

—Synthetic fuel plants (i.e., gasification, liquefaction)

—Oil shale facilities.

3. The implications of a significant deterioration requirement on national and regional projections for coal and nuclear electric facilities should be explored." *Id.* at 44.

As the EPA/FEA report aptly demonstrates, a simple "protect and enhance" directive from Congress is woefully inadequate as a guide to EPA in dealing with the broad ramifications of a no significant deterioration policy.

The Sierra Club, too, is inconsistent in its argument that more specific standards for EPA action are not necessary under the Clean Air Act. On page 18 of its brief, the Sierra Club attempts to rationalize the contrast between the vague "protect and enhance" language in Section 101(b) on the one hand, and the detailed, step-by-step requirements for EPA action specified in the operative sections of the Clean Air Act, such as Section 110, on the other. According to the Sierra Club, *"basic constitutional considerations* required the Congress to set out carefully the sorts of restrictions it mandated" because of the "heavy impact" state implementation plans would have upon existing sources. (Emphasis added.) Incredibly, the Sierra Club then suggests that the same constitutional considerations do not apply to the requirement of significant deterioration regulations, presmuably because a "heavy impact" is not involved in the regulation of new sources. Most observers, including the departments of Health, Education and Welfare, Interior, and Housing and Urban Development firmly disagree. See Petitioners' Opening Br. at 7-10. Indeed, even the Sierra Club in its Suggestion of Appropriateness of Hearing En Banc, filed in

this Court on the same day as its brief, stated that "The impact [of these regulations] will truly be nationwide" and that the issues raised "will have a major impact on the health and welfare of the people of this country."[18]

The impact of the significant deterioration regulations will indeed be enormous,[19] and the constitutional considerations requiring explicit guidance to EPA in regulating new sources in the clean air areas of the Nation can be no less than those applicable to existing sources.[20] Because Congress did not provide such guidance in the Clean Air Act Amendments of 1970, it is clear that significant deterioration regulations were never intended.

V. Recent Court Decisions Nullifying EPA Requirements With Respect To State Implementation Plans Confirm Petitioner's Position That The Regulations Violate The Tenth Amendment To The Constitution

Petitioners have argued that EPA's significant deterioration regulations have severely strained the constitutional federalism guaranteed by the Tenth Amendment and impair the sovereign integrity of each state to function independently of federal control.

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[18] Moreover, the Sierra Club seems to have forgotten its earlier suggestion appearing on page 11 of the September 5, 1975 brief that the regulations will have "enormous environmental and economic importance to the entire country."

[19] EPA and the Sierra Club contend that it is premature for Petitioners to complain of adverse impacts of the regulations until Class I redesignations are made. To the contrary, the potential impacts of the regulations relate to the authority and constitutional validity of the regulations as issued, and unless such arguments are raised in this action, they could well be barred in any subsequent proceeding. § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1). Moreover, the mere possibility of a redesignation to Class I renders impossible the long-range construction and technological decisions now being faced by many industries.

[20] "[T]he broad statutory language would give EPA virtually unfettered discretion to make legislative policy judgments which have serious social and economic effects. While such discretion may give EPA room to make creative regulatory solutions to environmental problems, it allows 'essentially lawless' decisions on environmental policy issues that vitally affect the public interest." Note, *Review of EPA's Significant Deterioration Regulations: An Example of the Difficulties of the Agency-Court Partnership in Environmental Law,* 61 Va. L. Rev. 1115, 1185 (1975).

Petitioners' Opening Br. at 45-48. Three recent landmark decisions, including one by this Court, confirm Petitioners' position in that regard.

In *Brown* v. *EPA,* 8 ERC 1053 (9th Cir. 1975), the Ninth Circuit held that sanctions could not be applied against states that decline to enforce state implementation plans that have been prescribed by EPA. In interpreting the constitutional limits on federal power, the Court held that the Federal Government could not tell a state how to exercise its police powers in the regulation of economic activities. The Court agreed with the State's contention that "the Commerce Power does not extend to requiring a state to undertake such *governmental* tasks as might be assigned to it by Congress, or its proper delegate." 8 ERC at 1061 (emphasis in original). In the Ninth Circuit's words:

> "A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress." 8 ERC at 1062.

Similarly, the Fourth Circuit recently held that EPA could not impose conditions on the Maryland state implementation plan that would require that state to create provisions for automobile inspection, emission control retrofit, and bikeway systems. *Maryland* v. *EPA,* 8 ERC 1105 (4th Cir. 1975). In agreeing with Maryland's objections to EPA's intrusions upon state sovereignty, the Fourth Circuit said:

> "[W]hile it is true that some, or even many, of the attributes of state sovereignty have been diminished by the exercise by Congress of the broad rights accorded the nation under the commerce clause, it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass or not to pass laws." 8 ERC at 1112.

The most recent decision on this subject was rendered by this Court in *District of Columbia* v. *Train,* Nos. 74-1013, et al. (D. C. Cir. Oct. 28, 1975). Consistent with the decisions in *Brown* and *Maryland,* this Court held that EPA's transportation control regulations to be incorporated into the implementation plans for the

National Capital Interstate Air Qualiy Control Region could not require the affected states to administer and enforce inspection and retrofit programs. The Court reviewed the agency's rule-making authority under the Commerce Clause, and concluded:

> "[W]e draw the line and hold that the Administrator, in the exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the Administrator. For example, the attempt to require the state to 'establish' each of the retrofit programs and to 'evaluate and approve devices for use in this program,' . . . is an impermissible encroachment on state sovereignty and goes beyond 'regulation' by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation.
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> * * *
>
> "In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles." Slip Op. at 291-92.

EPA and the Sierra Club each attempt to distinguish these recent cases by suggesting that with regard to the significant deterioration regulations, the states are not required to do anything. EPA Br. at 70-71; Sierra Club Br. at 40-41. A careful examination of the regulations, however, reveals otherwise. The regulations clearly contemplate that new source review responsibilities will be delegated to state or local agencies. 40 C.F.R. § 52.21(f). While the Sierra Club argues that any such delegation need not be accepted by a state (Sierra Club Br. at 41, n.52), the fact is that a state has no practical choice but to accept enforcement responsibilities if it ever expects land areas within its borders to be eligible for redesignation as Class I or Class III zones. Section 52.21(c)(vi)(a) of the regulations expressly provides that the Administrator will not approve a requested redesignation in any case where "the State has not requested delegation of responsibility for carrying out the new source review requirements." Moreover, as a note in

EPA's brief explains, the administrator may permit a redesignation where a state lacks legal authority to accept the delegation *provided* the state "performs the administrative and technical functions of new source review." EPA Br. at 10, n.14. Thus, unless a State wants to have all its lands remain in a Class II zone, as a condition for redesignation it must accept these regulatory burdens, which in the words of this Court contravenes the Tenth Amendment "because they require the states to administer and enforce federal regulatory programs and thus exceed constitutional power under the commerce clause." *District of Columbia* v. *Train, supra,* slip op. at 294.

Furthermore, the suggestion that the states need not do anything under the entire regulatory scheme is, to say the least, an extreme over-simplification. In EPA's own words, "such social and economic considerations as where to locate housing for increased population, where to locate the polluting facilities especially power plants, that are needed to supply increased population, and how employment opportunities should be distributed" require the balancing of local interests that can only be done at the state and local level. Sierra Club Br. at 24. Unless the states are to capitulate completely to the federal government the performance of such traditional local functions, the states must undertake to enforce the significant deterioration regulations through acceptance of the new source review responsibilities.

In a very real sense, then, these regulations "commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program." *Distict of Columbia* v. *Train, supra,* slip op. at 291-92. A more blatant infringement on state sovereignty can hardly be imagined.

CONCLUSION

For the reasons set forth above and in their opening brief, Petitioners respectfully request that the significant deterioration regulations promulgated by EPA be set aside as unlawful.

Respectfully submitted,

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