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Variance Procedures Under the Clean Air Act: the Need for Flexibility

COMMENT

VARIANCE PROCEDURES UNDER THE CLEAN AIR ACT: THE NEED FOR FLEXIBILITY

The failure of previous legislative efforts to alleviate the dangers to the public health and welfare associated with expanding levels of air pollution[1] prompted the Clean Air Act Amendments of 1970.[2] One of the most striking and significant characteristics of the amended Act is the enhanced status given federal authority in the effort to abate air pollution. Although the states retain a considerable degree of responsibility for the control of pollutants at their source,[3] the role of the federal government, particularly with respect to overseeing, and, where

1. *See* H.R. REP. No. 91-1146, 91st Cong., 2d Sess. 1, 5 (1970); S. REP. No. 91-1196, 91st Cong., 2d Sess. 1-4 (1970). The Air Pollution Control Act, ch. 360, 69 Stat. 322 (1955), was the first effort by Congress to control air pollution. Its most significant aspect was provision of assistance to state programs in the form of federal research. This Act was significantly modified by the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963), amended in 1965, Pub. L. No. 89-272, 79 Stat. 992, and by the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967). For a discussion of some of the inadequacies of the Air Quality Act of 1967, see Greco, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 12 B.C. IND. & COM. L. REV. 571, 581, 589 (1971); O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROB. 275 (1969); Schroeder, *Pollution in Perspective: A Survey of the Federal Effort and the Case Approach*, 4 NAT. RESOURCES LAW. 381, 388-89 (1971).

2. 42 U.S.C. §§ 1857-1858a (1970). Some of the more important aspects of the amendments are discussed in Note, *Clean Air Amendments of 1970: A Congressional Cosmetic*, 61 GEO. L.J. 153 (1972) [hereinafter cited as *Congressional Cosmetic*].

3. *See* Clean Air Act §§ 101(a)(3), 110, 42 U.S.C. §§ 1857(a)(3), 1857c-5 (1970). Section 101(a)(3), enacted as part of the Clean Air Act of 1963, states that "the prevention and control of air pollution *at its source* is the *primary* responsibility of States and local governments . . . ." 42 U.S.C. § 1857(a)(3) (1970) (emphasis supplied). The continued validity of referring to the states' responsibility as "primary" appears questionable in light of the 1970 amendments. Although the states retain the initial responsibility for regulating emissions to the extent necessary to ensure attainment of national ambient air quality standards, the amendments have increased federal initial responsibility and eroded the corresponding state responsibility where emissions of hazardous substances or emissions from new sources, motor vehicles, or aircraft are involved; there also was a marked increase in the ultimate authority of the federal government. *See* Clean Air Act §§ 111, 112, 202(a), 209(a), 231(a)(1), 233, 42 U.S.C. §§ 1857c-6, 1857c-7, 1857f-1, 1857f-6a, 1857f-9, 1857f-11 (1970); Frizzell, *The Federal Government and Environmental Litigation*, 61 KY. L.J. 1, 17 (1972); Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. IND. & COM. L. REV. 637 (1973); *Congressional Cosmetic*, *supra* note 2, at 153.

necessary, enforcing, state regulation of pollution sources, was increased substantially.[4]

The presence of overlapping state and federal authority should provide a more powerful deterrent to violations of the Act. Certain provisions of the amended Act, however, raise questions concerning the proper interaction of state and federal authority, particularly in the area of adoption and enforcement of state implementation plans. Prior to the recent decision of the Court of Appeals for the First Circuit in *Natural Resources Defense Council, Inc. v. EPA*,[5] neither the extent of a state's power to grant a variance permitting a source of pollution to exceed the emission limitations contained in that state's implementation plan nor the responsibility of the federal government with respect to state variance machinery had been subjected to judicial scrutiny.

In *Natural Resources Defense Council*, approval by the Administrator of the Environmental Protection Agency (EPA) of the implementation plans of Rhode Island and Massachusetts was challenged. The plans permitted state agencies to grant variances from the emission limitations imposed by such plans after the date established by the Act for attainment of national ambient air quality standards. The court held the Administrator's approval of the plans unwarranted, stating that after the attainment deadline, the variance machinery provided by section 110(f) of the Act is the exclusive remedy for a pollution source unable to comply with its emission limitations.

Essential to an evaluation of the court's decision, which restricted the permissibility of state variances to the preattainment period, is consideration of the competing interests involved in the granting of variances. Absent an adequate remedy, such as a variance, industries unable to lower their emission levels sufficiently may be forced to close down; widespread plant closings can significantly affect the economy and result in substantial unemployment. On the other hand, permissive variance procedures could completely emasculate the substantive provisions of the Act and frustrate its purpose of protecting the public health and

4. Transfer of authority for establishment of ambient air quality standards to the federal government and provisions in the amended Act requiring federal approval of state implementation plans have substantially increased federal supervisory functions. *See* notes 6-10 *infra* & accompanying text. Moreover, federal sanctions (including substantial fines) may now be levied for any violation of a state plan without a prior request for federal action by the state. *Compare* Air Quality Act of 1967, Pub. L. No. 90-148, § 108(c)(4), 81 Stat. 485 (1967), *with* Clean Air Act § 113, 42 U.S.C. § 1857c-8 (1970).

5. 478 F.2d 875 (1st Cir. 1973).

welfare from the dangers of air pollution. Discerning the manner in which the amended Act attempted to resolve these conflicting interests requires careful analysis of the statute and its legislative history. Concurrently, attention must be afforded the ramifications which it may be expected will follow from a given interpretation.

The amended Act directs the Administrator of the EPA to promulgate national primary and secondary ambient air quality standards for the major air pollutants.[6] Primary standards define the maximum permissible level of each pollutant compatible with the public health;[7] secondary standards are designed "to protect the public welfare from any known or anticipated adverse effects associated with the presence of [a particular] air pollutant in the ambient air." [8] Upon establishment of national standards, each state must adopt and submit to the EPA a plan providing for the "implementation, maintenance and enforcement" of the standards for each air quality region within the state.[9] To ensure that state implementation plans offer viable methods of attaining the national standards, approval by the EPA Administrator is contingent upon his determination that they satisfy the criteria enumerated in section 110(a)(2) of the Act.[10]

An acceptable plan must include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance" of primary and secondary standards.[11] This provision clearly delegates the responsibility for the development of a system of emission controls to the states; however, nothing therein or in any other section of the Act specifies how the states are to determine the emission limits for any pollution source. Attainment of national standards necessitates decisions concerning the degree of regulation of the various types of pollution sources, and Congress apparently recognized the familiarity of the states with the problems confronting individual industries within their borders. Consequently, formulation of exact emission standards for individual polluters was left to the states.[12]

6. *See* Clean Air Act § 109(a)(1)(A), 42 U.S.C. § 1857c-4(a)(1)(A) (1970).

7. *Id.* § 109(b)(1), 42 U.S.C. § 1857c-4(b)(1) (1970).

8. *Id.* § 109(b)(2), 42 U.S.C. § 1857c-4(b)(2) (1970).

9. *Id.* § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970).

10. 42 U.S.C. § 1857c-5(a)(2) (1970).

11. Clean Air Act § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

12. *See Hearings on Air Pollution Control and Solid Wastes Recycling Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st & 2d Sess., pt. 1, at 281 (1970) (statement of

Section 110(a)(2)(A) requires each implementation plan to provide for the attainment of primary standards "as expeditiously as practicable, but . . . in no case later than three years from the date of approval of such plan";[13] various provisions of the Act have been interpreted as mandating compliance with national primary standards by May 31, 1975.[14] Secondary standards must be achieved within a reasonable time after attainment of primary standards.[15] Although the Administrator is authorized to prevent violations "of any requirement of an applicable

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John G. Veneman, Under Secretary of Health, Education and Welfare): "In general, existing stationary sources of air pollution are so numerous and diverse that the problems they pose can most efficiently be attacked by State and local agencies. Even with air quality standards being set nationally, dealing with existing stationary sources would necessarily vary from one State to another and, within States, from one area to another." *See also* Duquesne Light Co. v. EPA, 481 F.2d 1, 3-4 (3d Cir. 1973). Regulations promulgated by the EPA provide that the states may consider the social and economic impact of their actions when adopting their control strategies. 40 C.F.R. § 51.2(d) (1973).

13. Clean Air Act § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970). An acceptable plan must also establish procedures for monitoring pollution sources and for reviewing the proposed location of new sources, include provisions for inter-governmental cooperation and assurances that the state will have adequate personnel, funding, and authority to carry out the plan, and provide for inspection and testing of motor vehicles as well as means to revise the plan. *Id.* § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970).

14. *See* Natural Resources Defense Council, Inc. v. EPA, 475 F.2d 968, 970 (D.C. Cir. 1973). Although the Act does not explicitly define a deadline for attainment, that date may be determined by adding periods allotted various stages in implementing its provisions. Under section 109(a)(1)(A), the Administrator had 30 days after December 31, 1970, (date of enactment of the amendments to the Act) to issue proposed regulations prescribing the national ambient standards "for each air pollutant for which air quality criteria had been issued prior to such date." 42 U.S.C. § 1857c-4(a)(1)(A) (1970). *See* Clean Air Act § 108(a)(1), 42 U.S.C. § 1857c-3(a)(1) (1970). Within 90 days of the issuance of proposed national standards, the Administrator was to promulgate such standards. *Id.* § 109(a)(1)(B), 42 U.S.C. § 1857c-4(a)(1)(B) (1970). Thus, the national standards were to be established, at the latest, by April 30, 1971. The states had nine months from this date to submit their implementation plans to the Administrator, that is, by January 31, 1972. *Id.* § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970). Since the Administrator had four months to approve or reject the plans, it was possible that all plans would have been accepted by May 31, 1972. *Id.* § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970). Each state must attain the levels specified in its implementation plan within three years of approval thereof, thus establishing May 31, 1975, as the mandatory date for compliance with the national primary standards. *Id.* § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970). Since, however, the Administrator rejected several plans, necessitating a delay of several months for approval of revisions, some plans provide for the attainment of national standards as late as July 1, 1975. *See, e.g.*, Michigan Plan, 40 C.F.R. § 52.117 (1973).

15. Clean Air Act § 110(a)(2)(A)(ii), 42 U.S.C. § 1857c-5(a)(2)(A)(ii) (1970).

implementation plan," [16] the states have concurrent powers of enforcement over those polluters covered by their plans.[17]

Two provisions of the Act expressly permitting extensions were intended to mitigate somewhat the exigencies of compliance with the May 31, 1975, deadline for national ambient air quality standards. Section 110(e),[18] which permits the Administrator to grant an extension upon application by the governor of a state at the time of submission of the state's implementation plan, is no longer a factor, since all plans have been submitted for purposes of this section. The proper interpretation of section 110(f),[19] the only remaining express source of a variance from the attainment deadline,[20] was a major issue confronting the court in *Natural Resources Defense Council.*[21]

Designed to provide relief for pollution sources for which compliance with emission levels as set forth in implementation plans appears impossible, section 110(f) of the amended Act provides, in pertinent part:

> 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.[22]

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16. *Id.* § 113, 42 U.S.C. § 1857c-8 (1970). Under this section, however, the enforcement powers of the federal government as to existing sources may not be exercised unless the state of such source is notified and fails to initiate action within 30 days.

17. An acceptable plan must contain provisions demonstrating that the state has the power to enforce the regulations and standards contained therein. 40 C.F.R. § 51.11(a)(2) (1973). *See* Clean Air Act § 114(b), 42 U.S.C. § 1857c-9(b) (1970).

18. 42 U.S.C. § 1857c-5(e) (1970).

19. 42 U.S.C. § 1857c-5(f) (1970).

20. It should be noted that the two extension procedures are not mutually exclusive. Thus, a one year extension under section 110(f) could be granted to a polluter which previously has received a two year extension under section 110(e). This possible combination of postponements could defer the mandatory compliance date for a qualifying source to May 31, 1978. Greco, *supra* note 1, at 588.

21. The reasoning employed by the Court of Appeals for the First Circuit was adopted in a similar challenge in the Eighth Circuit to the approval of the Iowa implementation plan. Natural Resources Defense Council, Inc. v. EPA, 483 F.2d 690 (8th Cir. 1973). Attacks upon state variance provisions are pending in other circuits. Natural Resources Defense Council, Inc. v. EPA, No. 72-2402 (5th Cir.) (Georgia plan); Natural Resources Defense Council, Inc. v. EPA, Nos. 72-2145, 72-2147 (9th Cir.) (Arizona and Washington plans).

22. 42 U.S.C. § 1857c-5(f) (1970). The criteria which must be met before a section 110(f) variance will be granted are discussed in the text accompanying note 49 *infra.*

In *Natural Resources Defense Council*, plaintiff, arguing that section 110(f) provides the exclusive variance mechanism once an implementation plan is submitted, contended that the Administrator erred in approving the Massachusetts and Rhode Island implementation plans insofar as those plans permitted the states to grant variances. In response, the EPA asserted that section 110(f) was designed to be exclusive only where a modification of an implementation plan would prevent the attainment or maintenance of a national ambient standard.[23] In support of its construction of the section, EPA argued that its regulations, by requiring that any variance granted by a state be treated as a "revision" to a plan,[24] eliminated any danger of frustration of the Act which might result from indiscriminate granting of variances by the states. Under these regulations, state variances have no effect upon the enforcement powers of the federal government until it is determined by the Administrator[25] that the postponement of compliance with emission

23. The EPA contended: "In maintaining that interim changes to an implementation plan can be made only through Section 110(f), petitioners ignore both the existence of the revision procedure of Section 110(a)(3) and the legislative history of Section 110(f) itself." Brief for Respondent at 9, Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875 (1st Cir. 1973) (footnotes omitted).

24. These regulations provide:

> A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section [110(f)] unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under § 51.6.

40 C.F.R. § 51.32(f) (1973). In a supplemental brief the Administrator argued that section 110(a)(3) provided the statutory authority for treating state variances as revisions of an implementation plan under his regulations and that EPA approval of such revisions is expressly conditioned upon a finding that the attainment or maintenance of a national standard would not be adversely affected. Supplemental Brief for Respondent at 2-7, Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875 (1st Cir. 1973). On the other hand, the Natural Resources Defense Council contended that revisions may be granted only if they meet the requirements of section 110(a)(2)(H), 42 U.S.C. § 1857c-5(a)(2)(H) (1970). Consolidated Reply Brief for Petitioners at 4, Natural Resources Defense Council, Inc. v. EPA, *supra*. Under this section, it was argued, revisions are permitted only to make a plan more *restrictive* "to take account of new limitations and improved control method[s] . . . ." *Id.* The petitioners maintained that § 110(a)(3) only provides the procedure to be employed in revising a plan and that it has no bearing upon the types of alterations which are permitted. *Id.* at 5. For a thorough discussion of these arguments that appears, in essence, to concur in the EPA construction, see Luneburg, *supra* note 3, at 649-59.

25. *See* 40 C.F.R. § 51.8 (1973); Getty Oil Co. v. Ruckelshaus, 342 F. Supp. 1006 (D. Del.), *remanded with directions to dismiss*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

limitations would not interfere with the timely attainment or maintenance of a national standard.[26]

The issue at the heart of the parties' conflicting interpretations was in what instances section 110(f) provides the exclusive procedure by which a pollution source may obtain a variance. NRDC contended that the precise criteria of that section must be met to receive *any* postponement of compliance with emission limitations set forth in an implementation plan; EPA maintained that section 110(f) is exclusive only if national ambient standards would be affected adversely by the postponement sought. Implicit in the latter interpretation is recognition that state variance machinery different from that delineated in section 110(f) may be utilized in instances in which the attainment or maintenance of a national standard is not jeopardized.

Rejecting the contentions of both parties and adopting an interpretation of its own, the Court of Appeals for the First Circuit held that section 110(f) is "the only recourse provided those seeking postponements of a state's emission limitations after the mandatory deadline" of mid-1975,[27] but that during the preattainment period, "the Administrator has discretion—as he does not have after the mandatory dates—to permit state and local deferral mechanisms not inconsistent with national objectives." [28] It was observed that "a state's implementation plan must . . . provide for two periods of time: an earlier period during which attainment of primary standards is to be achieved . . . and a later period after which standards, having been attained, are to be maintained . . . ." [29]

The determination that the Act established two distinct periods, a distinction the court then relied upon in deciding the applicability of

26. *See* note 24 *supra.*

27. 478 F.2d at 886. The court, however, recognized an exception in situations involving "mechanical breakdowns and acts of God." It was held that a state implementation plan could include extension procedures for such circumstances if they provide for "specific time periods measured in weeks or a few months, and . . . contain standards and controls precluding abuse." *Id.*

The Administrator subsequently promulgated the following regulation:

> Notwithstanding the limitations of paragraph (b)(1)(ii) of this section, a variance may be granted which provides for compliance beyond the statutory attainment date for a national standard where compliance is not possible because of breakdowns or malfunctions of equipment, acts of God, or other unavoidable occurrences. However, such variance may not extend for more than three (3) months unless the procedures and conditions set forth in section 110(f) of the Act are met.

40 C.F.R. § 52.1131(b)(2) (1973).

28. 478 F.2d at 887.

29. *Id.* at 885.

section 110(f), was based upon provisions of the Act requiring implementation plans to provide for attainment of primary standards "as expeditiously as practicable, but . . . in no case later than three years" of EPA approval[30] and to include "emission limitations . . . and such other measures as may be necessary to *insure attainment and maintenance* of such . . . standard[s]." [31] Although the requirement that a state plan provide for compliance within three years necessarily implies that periods of time exist on either side of the deadline date, neither section 110(f) nor any other provision of the Act makes an express distinction between variance procedures before and after such date. Moreover, nothing contained in the legislative history indicates that the Administrator's power with respect to variances is to be determined by reference to a pre- or postattainment period.[32]

It may be, as the court stated, that Congress did not intend "altogether to preclude the Administrator from approving plans containing reasonable state deferral mechanisms during the preliminary period" [33] and that the Administrator's power to approve such deferral mechanisms stems from the need for statutory flexibility. The disturbing aspect of the decision, however, is that the statutory flexibility found necessary in the preattainment period was held not to exist after the deadline for attainment of national standards. In support of its finding with respect to the latter period, the court stated:

> Congress's intention to restrict individual exemptions is further reflected in its enactment of [section 110(f)]. That section with its precise standards, its limitation of postponements to not more than one year, and its provision for judicial review, would be meaningless if much less restricted state variance machinery, nowhere authorized by the federal statute, were simultaneously to exist. We think Congress meant [section 110(f)] to be the exclusive mechanism for hardship relief after the mandatory attainment dates.[34]

30. Clean Air Act § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970).

31. *Id.* § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970) (emphasis supplied).

32. *See* H.R. REP. No. 91-1146, 91st Cong., 2d Sess. (1970); S. REP. No. 91-1196, 91st Cong., 2d Sess. (1970). *See also Hearings on Implementation of the Clean Air Act Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 92d Cong., 2d Sess. (1972) [hereinafter cited as *Oversight Hearings*].

33. 478 F.2d at 887.

34. *Id.* at 886.

It appears that the court construed the plain language of the statute as evidence of a congressional desire to preclude flexibility during the postattainment period.[35] It was reasoned that "[h]ad Congress meant [section 110(f)] to be followed only if a polluter, besides violating objective state requirements, was shown to be preventing maintenance of a national standard, *it would have said so*." [36] Since, however, the language of section 110(f) makes no distinction whatsoever between preattainment and postattainment periods, it is more reasonable to conclude that Congress either intended section 110(f) to be exclusive in all cases or contemplated the use of other variance mechanisms at any time if the purposes of the Act were not frustrated.

The court's attempt to employ legislative history to buttress its conclusions with respect to the postattainment period also is subject to criticism. It was asserted:

> It is plain from the legislative history that the expeditious imposition of "specific emission standards" and their "effective enforcement" were primary goals of the Clean Air Amendments [citing House report]. The Congressional intent could too easily be frustrated by the existence of open-ended exceptions. Sources of pollutants should either meet the standard of the law, or be closed down [citing Senate report].[37]

The language in the House report upon which the court relied appears in the section of that report entitled "Need for Legislation." [38] Although not technically designated as a "primary goal" of the Act,[39] the need for expeditious enforcement may be conceded to have been a factor motivating the amendment of the Act in 1970.[40] The House report justifiably recognizes that effective emission standards for individual

35. It may be argued, however, that the wording of the statute evokes precisely the opposite construction. Luneburg, for example, makes a cogent argument that section 110(f) is intended to apply only where a variance would prevent attainment of national primary air quality standards by the mandatory deadline. This interpretation stems from the highly restrictive aspect of the substantive requirements of that section and the presumed inability of most sources to sustain their burden of proof thereunder. *See* Luneburg, *supra* note 3, at 652-56.

36. 478 F.2d at 886 (emphasis supplied).

37. *Id.* at 885-86.

38. H.R. REP. No. 91-1146, 91st Cong., 2d Sess. 1, 5 (1970).

39. It appears that the primary goal in the Act's amendment was "to provide for a more effective program to improve the quality of the Nation's air." CONF. REP. No. 91-1783, 91st Cong., 2d Sess. 1 (1970).

40. *See, e.g.*, S. REP. 91-1196, 91st Cong., 2d Sess. 3 (1970); H.R. REP. No. 91-1146, 91st Cong., 2d Sess. 1, 5 (1970); Greco, *supra* note 1, at 581.

sources of pollution are necessary to guarantee attainment of national standards. That report does not, however, state that such individual standards may not be relaxed if a variance would not increase the aggregate level of emissions within a region to a point above the national standard and if both state and federal authorities agree such a relaxation is warranted.

Similarly, the Senate report does not support the court's determination that section 110(f) specifies the exclusive mechanism for variances in the postattainment period. The court failed to consider what "standard" that report stated a pollution source must meet or close down. The full relevant passage of the Senate report is as follows:

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as *the basis of ambient air standards*. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.
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> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down . . . .[41]

It appears the report was referring to the necessity of compliance with national ambient standards, rather than individual emission standards. Nothing therein is inconsistent with the proposition that variances from emission standards should be permitted unless national standards would be imperiled.

The final argument advanced by the court as to the exclusivity of section 110(f) during the postattainment period stresses the difficulty of factually determining which variances will not affect national standards:

> Had Congress meant [section 110(f)] to be followed only if a polluter, besides violating objective state requirements, was shown to be preventing maintenance of a national standard, it would have said so. To allow a polluter to raise and perhaps litigate that issue is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards?[42]

41. S. REP. No. 91-1196, 91st Cong., 2d Sess. 2-3 (1970) (emphasis supplied).
42. 478 F.2d at 886.

It is submitted that the court's concern with the possibility of protracted delay in determining whether the granting of a variance would jeopardize maintenance of national standards is not justified. Admittedly, the hearings on a proposed variance and subsequent appeals may be time consuming; however, the polluter remains subject to enforcement actions until he proves that the variance would not adversely affect maintenance of national standards.[43]

Furthermore, it is difficult to imagine a more cumbersome and time-consuming variance mechanism than that under section 110(f), which, under the court's holding, provides the exclusive procedure after the attainment date. Before the Administrator may rule on the substantive merits of any claim under that section, a pollution source seeking an extension must convince the governor of the state in which the source is located to request the EPA to grant the extension.[44] Upon receipt of such request, the determination of the EPA to grant or deny the variance must be made "on the record after notice to interested persons and opportunity for hearing." [45] Regulations recently adopted by the EPA require that a formal adjudicatory hearing be held before an administrative tribunal with a right of appeal to the Administrator and then to the courts.[46] These substantial procedural requirements, although providing safeguards, necessarily involve considerable time and expense. It is submitted that they should not be required unless the maintenance of national standards would be jeopardized by the grant of the variance;[47]

43. As illustrated in Getty Oil Co. v. Ruckelshaus, 342 F. Supp. 1006 (D. Del.), *remanded with directions to dismiss*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), where the federal government enforced an applicable portion of the state's implementation plan during Getty's attempt to obtain a variance at the state level, a request for a variance will not prevent state *or* federal enforcement until it is approved by *both* governmental entities. Moreover, any concern with the difficulty of determining whether the individual variance-seeker is the one preventing the maintenance of national standards is alleviated by placing the burden of proof on this issue on the polluter; if it fails to meet its burden, the variance request will be denied. *See* 342 F. Supp. at 1011; 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.03, at 2-76 (1973).

44. Clean Air Act § 110(f)(1), 42 U.S.C. § 1857c-5(f)(1) (1970). *See* note 22 *supra* & accompanying text.

45. *Id.* § 110(f)(2)(A), 42 U.S.C. § 1857c-5(f)(2)(A) (1970). *See* 1 F. GRAD, *supra* note 43, § 2.03, at 2-75.

46. 40 C.F.R. § 51.33 (1973).

47. As one commentator has perceptively noted:

> The substantial procedural safeguards that surround the Administrator's determination to postpone the application of an implementation plan to any stationary source or class of moving sources demonstrates that such a postponement is to be regarded as an exceptional measure and that the Ad-

where no such acute question is posed, the states should be free to utilize less stringent variance procedures.

The procedural complexities involved in obtaining a section 110(f) variance are exacerbated by the substantive criteria imposed by that section. An extension beyond the attainment deadline for a pollution source to meet the requirements of an implementation plan[48] may be granted under section 110(f) only if it is demonstrated that:

> (A) good faith efforts have been made to comply with such requirement 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

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ministrator's authority in granting such postponements is to be narrowly construed.

1 F. GRAD, *supra* note 43, § 2.03, at 2-75.

The argument that section 110(f) should not be construed as the exclusive variance mechanism gains support from the testimony of Mr. Richard Ayres, an attorney for the Natural Resources Defense Council, before a Senate committee reviewing the effectiveness of the 1970 amendments. Mr. Ayres stated:

> To prevent State agencies from granting easy variances, the Clean Air Amendments relied on two safeguards—the federal EPA and citizen pressure. Under § 110(f) of the Act, any variance which would prevent attainment or maintenance of a national standard must go through elaborate justification and EPA approval. And under § 110(a)(3), any variance request must be approved by the federal Administrator after being subjected to public hearings.

Oversight Hearings, *supra* note 32, pt. 1, at 45 (footnote omitted).

In stating that the amendments were designed to prevent the states from granting "easy variances" instead of *any* variances, Mr. Ayres was interpreting the Act in a manner inconsistent with the construction advocated by NRDC in its challenge to the Administrator's approval of the Massachusetts and Rhode Island plans. Furthermore, it appears that this statement indicates that Mr. Ayres construed "the elaborate justification" mandated by section 110(f) to be necessary *only* where the variance would prevent attainment or maintenance of national standards, which was the position advanced by the Administrator during the First Circuit case.

48. Since the Act's inception, confusion has surrounded the number of one year extensions available to any one pollution source. *See Discussion of Air Quality Control*, 5 NAT. RESOURCES LAW. 193, 202 (1972). It is arguable that since the House-Senate Conference Committee deleted language from the original Senate version of section 111 expressly authorizing consecutive one year extensions, each pollution source should be permitted a single one year extension. *See* Greco, *supra* note 1, at 588.

(D) the continued operation of such source is essential to national security or to the public health or welfare . . . .[49]

Although the first three of these criteria do not appear unreasonable, the requirement that the source be "essential to national security or to the public health or welfare" would seem to remove the availability of the section from a large number of industrial concerns, even upon a broad construction of the phrase "public health or welfare." Under an interpretation that section 110(f) is an exclusive remedy, numerous firms, unable to meet emission limitations, could be forced to close, notwithstanding that their continued operation would not adversely affect attainment or maintenance in their region of national standards. Such a result appears unduly harsh, particularly in the absence of an explicit manifestation of congressional intent on the question.

The political ramifications associated with accession by a governor to a request under section 110(f) raise further considerations as to whether that section should be construed as an exclusive remedy. Substantial pressures from environmentalist organizations likely will be attendant upon any such request, even if the variance at issue would not adversely affect attainment or maintenance of national standards. A more reasonable construction of the statute would preserve the possibility of alternative variance procedures where national standards are not jeopardized.

Significantly, the national ambient air quality standards established under the Clean Air Act are only necessary minimums;[50] the states are in no way discouraged from setting stricter standards within their regions. Section 116 requires only that a "State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent" than those required in implementation plans to attain and maintain national standards.[51] In fact, it has been recognized that the

49. 42 U.S.C. § 1857c-5(f)(1) (1970).

50. This congressional policy is reflected by the statutory provisions for revisions, which may be made whenever the present national standards prove inadequate, Clean Air Act §§ 109(b), 110(a)(2)(H), 42 U.S.C. §§ 1857c-4(b), 1857c-5(a)(2)(H) (1970), and by the policy of "non-degradation" followed in regions where air quality is substantially above the national standard. Such regions may not permit deterioration in the quality of the air without approval of the Administrator. *See* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd*, 4 BNA E.R.C. 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court sub nom.* Fri v. Sierra Club, 93 S. Ct. 2770 (1973).

51. 42 U.S.C. § 1857d-1 (1970).

Act and the regulations thereunder implicitly encourage the states to adopt stricter standards.[52]

The holding of the Court of Appeals for the First Circuit in *Natural Resources Defense Council*, however, would seem to fashion a compelling argument against state adoption of regional emission limitations stricter than those required for attainment and maintenance of national standards. If a state were to provide in its implementation plan for maximum emission levels for individual polluters more stringent than those required to meet national standards, a pollution source, under the interpretation of the First Circuit, would find that the only means by which it could obtain a variance would be through the restrictive provisions of section 110(f), even though such source has been able to lower its emissions sufficiently to ensure that the region will be in compliance with national standards.

A postdeadline revision procedure such as that struck down by the Court of Appeals for the First Circuit could prevent this anomalous result. An ambitious state would have the opportunity to seek higher levels of air quality than those required by the federal program without the fear of severely penalizing certain of its industries should they fall short of compliance with its stricter standards; thus, one bar to greater state initiative would be removed.[53] Concern about overly permissive variance procedures would be alleviated by continued EPA supervision to ensure that minimum standards of air quality are met. Flexibility is essential to efficient administration of a national program of such scale as that to improve the quality of the ambient air. It is submitted that restrictive interpretation of variance procedures under the Clean Air Act unduly interferes with such flexibility.

52. Natural Resources Defense Council spokesman Richard Ayres specifically referred to the right of states to adopt more stringent standards at the 1972 Oversight Hearings: "It is clear in the act itself that States are not only free but encouraged to set tighter standards and reach these standards at an earlier date than required by Federal law. A good many States have done it." *Oversight Hearings*, *supra* note 32, pt. 1, at 17. Indeed, many states have required secondary standards to be attained at the same time as primary standards. *See, e.g.*, 40 C.F.R. § 52.575 (1973) (metropolitan Atlanta).

53. Although the initial opportunity for states to establish air quality standards more stringent than national standards has passed, the opportunity for revisions by the states remains and will present itself again whenever the Administrator revises the national standards.