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LAND USE CONTROLS UNDER THE CLEAN AIR ACT

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The Clean Air Act,¹ first enacted in 1963² and amended substantially in 1970,³ had as its goal "to protect and enhance the quality of the Nation's air resources . . . to promote the public health and welfare and the productive capacity of its population."⁴ The Act was not passed in order to require states and the federal government to adopt land use controls, but rather to force states and the federal government to improve the quality of the air which we breathe. If that improved air quality can be attained and maintained without imposing any form of land use restrictions, then the objective of the Act is accomplished.

The nearly five years of experience in trying to meet the national air standards since passage of the 1970 amendments have demonstrated strongly, however, that air quality management is all but impossible without an accompanying system of effective and coherent land use controls. Imposing severe emission limitations on existing factories or restricting current automobile traffic does little good if we permit the continuation of the haphazard growth and urban sprawl patterns that engendered such pollution in the first place.

This article will examine the ways in which the Clean Air Act implicitly requires both states and the federal government to make

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¹ 42 U.S.C. § 1857 *et seq.* (1970).

² Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392, *as amended*, 42 U.S.C. § 1857 (1970).

³ Act of Dec. 31, 1970, Pub. L. No. 91-604, 84 Stat. 1676.

⁴ Clean Air Act § 101(b)(1), 42 U.S.C. § 1857(b)(1) (1970). For a non-technical overview of the scientific problems involved in controlling and correcting air pollution see 2 V. YANNAKONE, B. COHEN & S. DAVISON, *ENVIRONMENTAL RIGHTS AND REMEDIES* §§ 9:1-:9 (1972).

land use decisions. Executive and judicial interpretations of the Act have made clear that the Act permits the imposition of land use controls at both a regulatory level—telling someone whether he may or may not use his land for a particular purpose—and at a planning level—forcing the development of comprehensive plans to govern an area's growth and development.

The Clean Air Act, however, is most emphatically *not* a land use statute. It is not a substitute for either federal land use legislation or for state and local land use plans. The Clean Air Act's primary—indeed, only—aim is improved air quality. Land use policy decisions made under the authority of the Clean Air Act which have as their primary purpose something other than improved air quality, such as encouraging economic development of depressed areas, may be justifiable from a public policy standpoint but are of dubious legality under this Act.

STATUTORY SCHEME

The Act as it now stands represents the culmination of some twenty years of federal involvement in an effort to achieve improved air quality.⁵ The consistent theme of that federal involvement has been a congressional insistence that air quality is primarily a province of state and local governments.⁶ Congress has

⁵ The first federal statute concerning air pollution was the Air Pollution Control Act enacted in 1955. Act of July 14, 1955, Pub. L. No. 159, 69 Stat. 322. It authorized the expenditure of \$5 million per year for five years for air pollution control research. *Id.* § 5(a). In 1960, the Surgeon General was authorized to study and report his findings on the effects of motor vehicle pollution on public health. Act of June 8, 1960, Pub. L. No. 86-493, 74 Stat. 162. The Clean Air Act in 1963 authorized the first federal enforcement and abatement efforts in the field of air pollution control. Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392. This Act was amended in 1965 to establish national motor vehicle emission standards. Act of Oct. 20, 1965, Pub. L. No. 89-272, 79 Stat. 992. In the following year, it was amended to provide additional grant moneys to state and regional air pollution control agencies. Act of Oct. 15, 1966, Pub. L. No. 89-675, 80 Stat. 954. With the enactment of the Air Quality Act of 1967, substantial amendments were made. Act of Nov. 21, 1967, Pub. L. No. 90-148, 81 Stat. 485. These amendments provided the establishment of regional air quality control programs. *Id.* § 107(a)(2), 81 Stat. 490-91. Also at that time the control of new motor vehicle emissions was exclusively placed under federal regulation. *Id.* §§ 201-12, 81 Stat. 499-503. The Clean Air Act Amendments of 1970 are so comprehensive that, in effect, a new Clean Air Act was created to replace all prior federal enactments. See Act of Dec. 31, 1970, Pub. L. No. 91-604, 84 Stat. 1676.

See generally Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. IND. & COM. L. REV. 637 (1973); Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 HASTINGS L.J. 661 (1971); Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic*, 61 GEO. L.J. 153 (1972).

⁶ See Stevens, *supra* note 5, at 669-70; Note, *supra* note 5, at 153-59. The current statute still provides "that the prevention and control of air pollution at its source is the primary

recognized reluctantly, however, that states have failed to take effective control measures. Consequently, federal involvement has increased continually to the point that, with the 1970 amendments to the Act, the federal government, in the form of the Environmental Protection Agency (EPA), must step in if states do not exercise their own authority.

Under the Clean Air Act, improved air quality is measured through attainment and maintenance of national primary and secondary ambient air quality standards. The Act defines primary standards as those necessary to protect public health.⁷ Secondary standards are those necessary to protect the public welfare.⁸ The Act required both to be promulgated for each air pollutant which has an adverse effect "on public health or welfare," and which is caused by "numerous or diverse mobile or stationary sources."⁹ EPA has established primary and secondary standards for carbon monoxide, hydrocarbons, nitrogen dioxide, particulate matter, photochemical oxidants, and sulfur oxides.¹⁰

The vehicle for achieving these standards is the state implementation plan.¹¹ Each state was required to submit a plan which will achieve the primary standards for all air quality control regions (AQCRs)¹² in that state "as expeditiously as practicable"

responsibility of States and local governments." Clean Air Act § 101(a)(3), 42 U.S.C. § 1857(a)(3) (1970).

⁷ Clean Air Act § 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). The statute defines the matters to be considered in determining "welfare" as including, but 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.

Id. § 302(h), 42 U.S.C. § 1857h(h).

⁹ *Id.* §§ 108(a)(1)(A), (B), 42 U.S.C. §§ 1857c-3(a)(1)(A), (B).

¹⁰ 40 C.F.R. §§ 50.4-.11 (1974).

¹¹ See Clean Air Act § 110, 42 U.S.C. § 1857c-5 (1970). The federal government, however, has preempted all states except California in implementing ambient standards for new mobile sources through its new car emission standards. See *id.* § 209, 42 U.S.C. § 1857f-6a. See also Stevens, *supra* note 5, at 674-76. Thus, automobile manufacturers are relieved of the burden of complying with potentially numerous and conflicting state standards.

¹² Clean Air Act § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970). Air quality control regions are designated by the Administrator "after consultation with appropriate State and local authorities." *Id.* § 107(c), 42 U.S.C. § 1857c-2(c). Delineation of such regions is based on those factors which bear significantly "on the implementation of air quality standards." S. REP. No. 91-1196, 91st Cong., 2d Sess. 8 (1970) [hereinafter cited as S. REP. 91-1196]. These factors include not only administrative practicability, but also the need to encompass in a single area significant "urban-industrial concentrations," existing air quality levels, and other characteristics affecting pollution such as meteorology and topography. *Id.*

but in no case later than May 31, 1975.¹³ The plan must provide for attainment of the secondary standards in each AQCR within a "reasonable time."¹⁴ EPA may extend the deadline for achieving primary standards in an AQCR up to an additional two years,¹⁵ which currently means that the deadline cannot be extended beyond 1977. Any state governor may petition EPA for up to a one-year postponement of the standards for particular, individual sources.¹⁶ The two-year extension and the one-year postponement

Regions may be interstate or intrastate. Clean Air Act § 107(c), 42 U.S.C. § 1857c-2(c) (1970). Thus, for example, Connecticut has four regions: New Jersey-New York-Connecticut (interstate); Hartford-New Haven-Springfield (interstate); Northwestern (intrastate); and Eastern (intrastate). 37 Fed. Reg. 10856 (1972). In providing for such designations, the Act recognizes that parts of a single state may call for substantially different control strategies, and, conversely, that more than one state may be included in one region by reason of urban concentration, topography and other factors. See S. REP. 91-1196, *supra* at 8.

¹³ See Clean Air Act § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970). The Administrator had to approve state plans for implementation of national ambient air quality standards by May 31, 1972. 37 Fed. Reg. 10842 (1972). Since the Act requires attainment of primary standards within three years of such approval, May 31, 1975 is the final date by which ambient air quality standards are to be achieved.

¹⁴ Clean Air Act § 110(a)(2)(A)(ii), 42 U.S.C. § 1857c-5(a)(2)(A)(ii) (1970).

¹⁵ *Id.* § 110(e)(1), 42 U.S.C. § 1857c-5(e)(1). This extension section provides:

(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) of this section 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.

Id. § 110(e), 42 U.S.C. § 1857c-5(e).

¹⁶ *Id.* § 110(f)(1), 42 U.S.C. § 1857c-5(f)(1). The postponement provisions of the Act state in pertinent part:

(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 requirement before such date,

provide the only leeway under the Act for attaining the primary standards. The present Act is implacable in its requirement that the primary standards be achieved by 1977.

The implementation plans give the states the first opportunity and the primary responsibility for controlling the sources of air pollution. If a state does not submit a plan, however, or if it prepares a plan that EPA finds inadequate, in whole or in part, EPA must promulgate an implementation plan for the state.¹⁷ EPA also has significant authority to enforce provisions of an implementation plan.¹⁸ Hence, if a state fails to act or acts inadequately, either from a deliberate decision to abdicate its responsibility or because of insufficient expertise or resources, EPA is required to assume the responsibility of administering the Act's requirements. EPA has demonstrated its willingness to act in the place of recalcitrant states.¹⁹

Another significant area of federal authority under the Act required EPA to establish standards of performance for selected categories of new sources of air pollution.²⁰ Standards may be promulgated for any category of sources that "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare."²¹ To date, standards of performance have been issued to cover twelve categories of sources.²² National uniform standards are provided so that a new

(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.

Id.

¹⁷ *Id.* § 110(c), 42 U.S.C. § 1857c-5(c).

¹⁸ *Id.* § 113, 42 U.S.C. § 1857c-8.

¹⁹ Probably the most controversial area where EPA has acted is in promulgating transportation control plans. *See, e.g.,* South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974); Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974); Texas v. EPA, 499 F.2d 289 (5th Cir. 1974). For a discussion regarding the use of transportation controls see notes 76-88 *infra* and accompanying text.

²⁰ Clean Air Act § 111(b), 42 U.S.C. § 1857c-6(b) (1970).

²¹ *Id.* § 111(b)(1)(A), 42 U.S.C. § 1857c-6(b)(1)(A).

²² 40 C.F.R. §§ 60.1-154 (1974). Standards have been issued for fossil fuel-fired steam generators, incinerators, Portland cement plants, nitric acid plants, sulfuric acid plants, asphalt concrete plants, petroleum refineries, petroleum storage tanks, secondary lead smelters, secondary brass and bronze ingot production plants, sewage treatment plant incinerators, and iron and steel plants equipped with basic oxygen furnaces. *Id.*

plant cannot locate in a clean area and pollute without limit rather than being in an already developed area where the increment in emissions might seem more severe. The land use significance of these standards, however, lies not in determining where a new plant will be built, but if it will be built at all, because any new plant included within the listed categories must meet the established standards of performance, or the plant cannot be constructed.²³

"Land use" is mentioned only once in the Clean Air Act. The Act requires an implementation plan to provide

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.²⁴

Although the Act's legislative history makes clear that Congress foresaw that carrying out the Act's requirements would necessitate reforms in traditional patterns of land use,²⁵ it indicates

²³ In an August 1974 policy statement concerning its air pollution control program, EPA noted that if no technological solution can be found to reduce source emissions, [t]he ultimate solution . . . resides in land use limitations. The legislation [the Clean Air Act] does envision the reduction or discontinuation of activities (in extreme cases, leading to plant closures) in cases that no alternative exists for meeting emissions reductions.

ENVIRONMENTAL PROTECTION AGENCY, AIR PROGRAM POLICY STATEMENT: A STATUS REPORT AND DISCUSSION OF FUTURE PROGRAM CONSIDERATIONS INVOLVED IN IMPLEMENTING THE CLEAN AIR ACT 11 (1974) [hereinafter cited as AIR PROGRAM POLICY STATEMENT].

²⁴ Clean Air Act § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970) (emphasis added).

²⁵ The Senate report on the Act explicitly declared: "Land use policies must be developed to prevent location of facilities which are not compatible with implementation of national standards." S. REP. 91-1196, *supra* note 12, at 2. The same point was made during the Senate debate prior to passage of the Act. See 116 CONG. REC. 42384 (1970) (exhibit inserted in the record by Senator Muskie).

The "land-use" language of section 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970), existed only in the Senate version of the Act; the House did not include it. See H.R. REP. NO. 91-1783, 91st Cong., 2d Sess. 45 (1970). The Senate version prevailed in conference, however, and the provision became law.

Three reasons have been given for the inclusion of land use controls in the air pollution statute:

1. Almost all current air pollution control regulations have been adopted in reaction to intolerable pollutant concentrations already existing in the atmosphere. Almost by definition, land use and transportation controls imply advance planning which could minimize the possibility that such concentrations will occur in the future.
2. Under certain circumstances, source emission controls may not have been developed to the degree necessary for the achievement and maintenance of air quality standards. When these circumstances apply, land use and transportation controls can augment source control methods or equipment.
3. Just as it is important to reduce atmospheric concentrations to tolerable levels in polluted areas, it is also important to protect the air in areas which are already

neither the extent to which attainment of the Act's standards must be achieved solely by reliance on direct emission controls nor the extent to which land use controls may be employed.²⁶

The Senate report on the Act does recognize the importance of land use controls in air quality management:

These should insure that any existing or future stationary source of air pollution will be located, designed, constructed, equipped, and operated . . . so as not to interfere with the implementation, maintenance, and enforcement of any applicable air quality standard or goal.

The Committee acknowledges that this would require each region to make difficult judgments about the siting of facilities which may emit pollution agents, including decisions to prohibit the location of new sources which, although in compliance with [emission limitations of an implementation plan], would contribute to a violation of a regional air quality standard. These factors would necessitate long-term decisions about the character of the growth and development of such region.²⁷

Land use controls, then, were viewed by Congress as an acceptable method by which states could achieve the air quality requirements. EPA, however, at first failed to perceive the extent to which land use controls would become an immediate, necessary factor in air quality management.

EPA AND LAND USE DECISIONS

In reviewing the initial implementation plans submitted by the states, EPA had considered neither transportation controls nor air quality maintenance measures to be immediate prerequisites for approval of the plans.²⁸ Noting that techniques for predicting future air quality are non-existent, EPA permitted states to postpone submission of maintenance provisions. The Agency recog-

clean. Land use and transportation controls provide a means by which this protection can be accomplished.

Johnson, *The Transportation and Land Use Elements in State Air Quality Implementation Plans*, in *THE RELATIONSHIP OF LAND USE AND TRANSPORTATION PLANNING TO AIR QUALITY MANAGEMENT* 13-14 (G. Hagevik ed. 1972) [hereinafter cited as *LAND USE AND AIR QUALITY*].

²⁶ The Senate report addressed this issue in an oblique and incomplete manner. It states in pertinent part: "In addition to direct emission controls, other potential parts of an implementation plan include land use and air and surface transportation controls." S. REP. 91-1196, *supra* note 12, at 12. By stating that land use controls were to be used "in addition" to direct emission limitations, the report seems to suggest that land use controls were to be employed only if sole reliance on direct emission controls was inadequate to achieve the standards.

²⁷ *Id.* at 12-13.

²⁸ See 37 Fed. Reg. 10842-44 (1972).

nized, however, that the Act requires the states at some point to anticipate "the degree of emission reduction necessary to offset the probable impact of projected growth of population, industrial activity, motor vehicle traffic, or other factors."²⁹ But since the federal government was subject to similar prediction limitations as were the states, EPA declined to step in and propose maintenance strategies for the states.³⁰

Although the plans were not disapproved for lack of maintenance strategies, EPA warned that the states were still obliged to avoid "construction, modification, or operation of any stationary source at any location where its emissions will prevent the attainment or maintenance of a national standard."³¹ EPA indicated that the impact of growth would also be minimized by the Agency's new source performance standards.³²

As with maintenance measures, EPA did not require the states to immediately formulate transportation control strategies as part of their implementation plans and, in permitting states to defer action, observed that "States have had practically no experience with transportation control measures as a means of dealing with air quality problems."³³

Judicial Impetus—The Natural Resources Case

The Natural Resources Defense Council challenged EPA's action in delaying submission of maintenance and transportation control measures. In *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*,³⁴ a decision that more than any other thrust EPA and the states into land use decisions, the Court of Appeals for the District of Columbia ruled that EPA had exceeded

²⁹ *Id.* at 10843.

³⁰ *See id.* The Agency, deferring to the interest in local self-government, stated further that

State and local governments clearly should not lightly be deprived of the opportunity to plan and control growth in a manner best suited to the needs and preferences of individual communities and their inhabitants

Id.

³¹ *Id.*

³² *Id.* *See* Clean Air Act § 111, 42 U.S.C. § 1857c-6 (1970).

Although EPA did not require air quality maintenance plans, it summarized the importance of such programs:

States should be aware that failure to provide for maintenance of the national standards could necessitate restraints on population and industrial growth and/or further restrictions on emissions from existing sources of air pollution.

³⁷ Fed. Reg. 10843.

³³ 37 Fed. Reg. 10844.

³⁴ 475 F.2d 968 (D.C. Cir. 1973).

its authority in granting states additional time in which to prepare transportation control measures.³⁵ The court also ruled that the Agency did not comply with the requirements of the Act in extending the deadline for attainment of primary standards from 1975 to 1977.³⁶

The court directed the rescission of both extensions and ordered EPA to require all states to submit, by April 15, 1973, implementation plans that would comply fully with all facets of the Act.³⁷ The plans for reaching the primary standard had to provide for attainment "as expeditiously as practicable *but in no case later than May 31, 1975.*"³⁸ They had to contain

"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."³⁹

States whose air quality situations were such as to require the use of transportation controls had to prepare such control plans promptly. If the states failed to act, under the court's order, EPA had to be prepared to step in. All of this had to be accomplished with the understanding that the primary standards, by and large, had to be achieved by 1975.⁴⁰

³⁵ *Id.* at 970.

³⁶ *Id.* The court demanded strict adherence to the provisions of Clean Air Act § 110(e), 42 U.S.C. § 1857c-5(e) (1970), by the Administrator in granting extensions for reaching the primary standards:

He must first have before him a plan which provides for attainment of the national ambient air quality primary standard by May 31, 1975.

He must determine, on the basis of a submission by the governor of the state, that one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan for the reasons set out in Section 110(e)(1)(A).

He must determine that the state has considered and applied as a part of its plan reasonably available alternative means of attaining the primary standard and has justifiably concluded that attainment of the primary standard by May 31, 1975 cannot be achieved.

He must determine that the state plan provides for application, by May 31, 1975, of the requirements of the plan which implement the primary standard to all emission sources other than the sources (or classes) which he has determined are unable to comply.

Finally, he must determine that the state plan provides for such interim measures of control of the sources (or classes) which he has determined are unable to comply with the implementation plan as are reasonable under the circumstances. 475 F.2d at 971. For the text of the pertinent statutory section see note 15 *supra*.

³⁷ 475 F.2d at 970.

³⁸ *Id.* at 970-71 (emphasis in original).

³⁹ *Id.* at 971 (quoting from Clean Air Act § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970)).

⁴⁰ See 475 F.2d at 971.

The court noted that some uncertainty existed in the record as to whether EPA actually had determined if the state plans provided for maintenance of the air standards once attained. It directed the Agency to conduct such a review and to disapprove any plans that did not properly call for maintenance provisions. If a state did not formulate its own measures for maintenance, then EPA was required to promulgate such measures.⁴¹

The measures called for in *Natural Resources* were vast, and EPA officials later acknowledged that the case was a turning point in the Agency's consideration of land use. Robert Baum, then EPA deputy assistant administrator for enforcement, said that prior to *Natural Resources* the Agency really had not focused its efforts on the land use implications involved in the Act. The decision brought those implications into perspective. He stated that the Agency did not seek to appeal this case simply because EPA recognized that the maintenance and land use provisions were implicit in the Act and had to be carried out.⁴²

Natural Resources thus reaffirmed the Act's basic intent to achieve air quality standards and to maintain improved air quality. The decision did not, however, answer the question of how large a part land use and transportation controls should, or must, play in a state's overall strategy for achieving and maintaining the standards.

Land Use and Other Approaches to Air Quality Control— Ramifications

The Act merely requires states to include in their implementation plans emission limitations "and such other measures as may be necessary . . . including, but not limited to, land-use and transportation controls."⁴³ Does this mean that a state must place primary reliance on direct emission limitations and should resort to land use and transportation controls only when sole reliance on direct

⁴¹ *Id.* at 971-72.

⁴² Address by Robert Baum, EPA-American Bar Association Forum on "Approaching Clean Air Act Deadlines," Nov. 7, 1974.

⁴³ Clean Air Act § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

Various commentators have suggested incorporating land use and transportation techniques into air pollution control. See Croke, Croke & Kennedy, *The Impact of Urban Growth and Development on the Achievement of Air Quality Standards*, in LAND USE AND AIR QUALITY, *supra* note 25, at 206; Pelle, *Survey of Land Use Planning Tools for Dealing With Air Pollution*, in LAND USE AND AIR QUALITY, *supra* note 25, at 194; Venezia, *The Relation of Land Use and Transportation Planning to Air Quality Management*, in LAND USE AND AIR QUALITY, *supra* note 25, at 20. For a legal analysis of air pollution and land use controls see Mandelker & Rothschild, *The Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970*, 3 ECOLOGY L.Q. 235 (1973).

emission reduction is not sufficient to achieve the national standard? Or must a state include land use and transportation control measures even though direct emission controls are sufficient? Are direct emission limitations preferred as a control technique regardless of cost, since the statute specifically mentions those limitations and then goes on to add "and such other measures as may be necessary"?

A further snarl in the question of whether and, if so, how much land use and transportation controls are a requisite part of the Act is added in considering how much should be spent in achieving the primary standards by 1975 rather than 1977, the Act's absolute attainment date. *Natural Resources* made clear that EPA could not grant the 1977 extensions unless a state could satisfy the requirements of section 110(e) of the Act, including a showing that the state has considered and applied all "reasonably available alternative means" of achieving the standard by 1975.⁴⁴ To what extent are stringent land use and transportation controls considered "reasonably available alternative means"?

The question of land use and transportation control measures as compulsory components of a state's implementation plan was considered by the Third Circuit in *Delaware Citizens for Clean Air, Inc. v. Administrator, Environmental Protection Agency*.⁴⁵ The court ruled that it was "unable to hold" that Delaware's failure to include land use and transportation controls in its plan violated the Act.⁴⁶ The court noted that EPA itself interpreted this provision to require transportation and land use controls only if other, direct emission limitation techniques would not suffice to attain the air quality standards. The court "defer[red] to the expertise of the agency" and adopted this interpretation.⁴⁷ Since Delaware apparently would be able to achieve the standards without relying on transportation or land use measures, the court ruled, its implementation plan need not include such provisions.⁴⁸

In a footnote, however, the court stated that the Act requires transportation and land use measures if necessary to preserve the maintenance of air quality standards.⁴⁹ Noting that EPA had withdrawn approval from all maintenance provisions pursuant to the order in *Natural Resources*, the court did not rule on whether the

⁴⁴ 475 F.2d at 971. See note 36 *supra* and accompanying text.

⁴⁵ 480 F.2d 972 (3d Cir. 1973).

⁴⁶ *Id.* at 978.

⁴⁷ *Id.* n.21. As to the apparent legislative intent on this issue see note 26 *supra*.

⁴⁸ 480 F.2d at 978.

⁴⁹ *Id.* n.21.

controls actually were required to ensure maintenance of the air standards in Delaware.⁵⁰ The court acknowledged that "[i]t is arguable that land-use and transportation controls are mandated by the statute both for attainment and for maintenance," but it declined to adopt a position contrary to that of the "agency charged with administration of the statute."⁵¹

The Fifth Circuit considered more directly and at greater length the question of whether "such other measures" as land use and transportation controls need be used only after all possible emission reduction has been achieved from direct emission limitations, or whether land use measures may be used in place of direct emission reduction techniques.⁵² The court noted two approaches to the issue: the first, so-called "broad approach," considers the Act in its entirety and concludes that direct emission reduction is clearly the preferred control method under the Act; the second, or "narrow approach," allows any means to be employed to reach the Act's principal objective, the attainment and maintenance of the ambient air standards.⁵³

⁵⁰ *Id.* at 975.

⁵¹ *Id.* at 978 n.21.

⁵² *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 403-11 (5th Cir. 1974), *rev'd on other grounds sub nom. Train v. Natural Resources Defense Council, Inc.*, 95 S. Ct. 1470 (1975).

⁵³ *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 406 (5th Cir. 1974), *rev'd on other grounds sub nom. Train v. Natural Resources Defense Council, Inc.*, 95 S. Ct. 1470 (1975).

The court relied extensively on an EPA staff paper:

"It should be clear . . . that the intent of Congress in the Clean Air Act is that the State Implementation Plans must include emission limitations. It is also clear that the words 'and such other measures as may be necessary' exclude the interpretation that emission reduction is the only acceptable means of meeting [national ambient air quality standards]. Between these two boundaries to interpretation there is a broad, unexplored territory.

....
"There are two basic approaches to this legally unexplored territory. The first approach, which may be called the broad approach, views the [Act] in its entirety When [section 1857c-5(a)(2)(B)] is read in . . . light [of other provisions of the Act] emission reduction is clearly the preferred control method, and 'such other measures' are allowed only if emission reduction sufficient to meet [the national standards] in the time specified (3 years) if[s] unavailable or infeasible—or, in the words of the Act, only if they are 'necessary.'

"The second interpretation, which may be called the narrow approach, focuses on the objective of [section 1857c-5(a)(2)(B)] rather than the means of attaining that objective. The principal objective of [a state implementation plan] is that it meet primary and secondary standards by the appropriate deadline. Several means have been *suggested*, including emission limitation, land use, and transportation controls, but Congress was careful to add 'such other measures' and 'but not limited to.'

Thus, *any* means may be employed provided the ends are attained."

489 F.2d at 406 (quoting from MONITORING AND DATA ANALYSIS DIVISION, OFFICE OF AIR QUALITY PLANNING AND STANDARDS, OFFICE OF AIR AND WATER POLLUTION, EPA, STAFF

The court chose the broad approach. Direct emission reduction methods must be employed first, and must be used to attain as great a reduction in emissions as is possible. Quoting an EPA staff paper, the court stated that "such other measures" as transportation and land use controls may be used "only if they are 'necessary'"; that is, only if direct emission limitations are unavailable or infeasible to attain the standards.⁵⁴

The court based its conclusion on two factors. First, it held that Congress intended the Act "to require maximum use of emission standards."⁵⁵ The court pointed out that citizen suits are permitted against those persons " 'alleged to be in violation of . . . an *emission standard or limitation* under this act.' "⁵⁶ This provision constituted "powerful evidence that Congress intended that the requirements of implementation plans would whenever possible be emission limitations."⁵⁷

The court's second justification was based on the Act's policy of "nondegradation"—preventing significant deterioration of clean air regions.⁵⁸ However, this must be considered in light of the fact that the "other measures" of control at issue in the case were not transportation or land use controls but instead were dispersion enhancement techniques—the use of tall stacks to scatter the emissions over a wide area, as opposed to the use of direct controls at the stacks. Dispersion techniques do not control emissions but merely disperse them somewhere else where the air inevitably will be degraded.⁵⁹ The court emphasized that "[t]he only techniques

PAPER—INTERMITTENT CONTROL SYSTEMS (April 1973), reprinted in 119 CONG. REC. 19197 (1973)) (emphasis in original) (brackets by the court) [hereinafter cited as EPA STAFF PAPER].

⁵⁴ Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390, 406 (5th Cir. 1974), *rev'd on other grounds sub nom.* Train v. Natural Resources Defense Council, Inc., 95 S. Ct. 1470 (1975) (quoting from EPA STAFF PAPER, *supra* note 53, at 19197).

⁵⁵ Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390, 406 (5th Cir. 1974), *rev'd on other grounds sub nom.* Train v. Natural Resources Defense Council, Inc., 95 S. Ct. 1470 (1975).

⁵⁶ Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390, 407 (5th Cir. 1974), *rev'd on other grounds sub nom.* Train v. Natural Resources Defense Council, Inc., 95 S. Ct. 1470 (1975) (quoting from Clean Air Act § 304(a)(1), 42 U.S.C. § 1857h-2(a)(1) (1970)) (emphasis by the court).

⁵⁷ Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390, 407-08 (5th Cir. 1974), *rev'd on other grounds sub nom.* Train v. Natural Resources Defense Council, Inc., 95 S. Ct. 1470 (1975).

⁵⁸ Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390, 408 (5th Cir. 1974), *rev'd on other grounds sub nom.* Train v. Natural Resources Defense Council, Inc., 95 S. Ct. 1470 (1975). For a discussion of the concept of nondegradation see notes 142-94 *infra* and accompanying text.

⁵⁹ Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390, 393, 408-09 (5th Cir.

fully capable of guaranteeing nondegradation are emission limitation techniques."⁶⁰

In *Texas v. Environmental Protection Agency*,⁶¹ the Fifth Circuit reiterated its holding that direct emission controls are the primary tools for achieving emission reduction.⁶² Dealing with an argument concerning the Agency's margin of error in calculating how much emission reduction was needed in areas of Texas in order to meet the standards, the court said:

[W]e deal with this issue only with regard to control of emissions sources and not as it relates to transportation and land-use controls. Thus we have had no occasion to consider the effect of a margin of error on controls which, after all, are *unlike emission source controls in that they may be imposed only "as may be necessary."*⁶³

Faced with the prospect of meeting the primary air standards by 1975, or at the very latest by 1977 if an extension is granted, a state, under the rationale of the Fifth Circuit and, to a lesser extent, the Third Circuit, must first employ direct emission limitations. If such controls are sufficient to attain and maintain the standards, then the use of transportation and land use controls is obviated.

For many states, however, the use of direct emission techniques alone is not enough to meet and maintain the standards by 1975. In some areas, direct emission controls might be sufficient to attain the standards by 1977, especially in view of expected technological advances. To what extent are states required to impose transportation and land use controls in order to attain the standards by 1975 rather than by 1977?

Section 110(e) of the Act makes clear—as reaffirmed by the District of Columbia Circuit in *Natural Resources*—that EPA can grant the two year extension only if

1974), *rev'd on other grounds sub nom.* *Train v. Natural Resources Defense Council, Inc.*, 95 S. Ct. 1470 (1975).

The purpose of dispersion techniques is to transfer pollutants from high-concentration areas to lower concentration areas. 489 F.2d at 394 n.2. There are two major dispersion techniques. The first coordinates the level of industrial operation with meteorological conditions—operations are increased when meteorological conditions are favorable to dispersal and decreased when they are not. The second dispersion technique calls for the construction of higher smokestacks on the theory that dispersal is enhanced in proportion to the altitude at which emission takes place. *Id.*

⁶⁰ *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 409 (5th Cir. 1974), *rev'd on other grounds sub nom.* *Train v. Natural Resources Defense Council, Inc.*, 95 S. Ct. 1470 (1975).

⁶¹ 499 F.2d 289 (5th Cir. 1974).

⁶² *See id.* at 311.

⁶³ *Id.* at 320 (quoting from Clean Air Act § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970)) (emphasis added).

[t]he 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 [by May 31, 1975] cannot be achieved.⁶⁴

The Second Circuit has held that transportation and land use controls are among the “reasonably available alternative means” that must be considered by states prior to obtaining an extension.⁶⁵ This must also be done by EPA if it is promulgating a plan in the place of a disapproved state plan. But to what length must states go, in terms of costs as well as technical and social feasibility, in imposing land use and transportation controls in order to meet the standards by 1975 rather than 1977?

The test of the “reasonableness” of alternative strategies was recognized by the Second Circuit as “contemplat[ing] a weighing of slight impact against probable costs.”⁶⁶ The Fifth Circuit was in substantial agreement when it reviewed EPA’s denial of a Texas application for an extension to 1977. It acknowledged that cost may not be a consideration in mapping strategies to meet the standards by 1977.⁶⁷ But in reviewing a possible “speed-up of less than one year” to reach the standards by 1975,⁶⁸ the court held that “the starting point must not be simply whether an interim [alternative] measure is physically available. Rather, it must be cost of each regulation.”⁶⁹ Moreover, not only must the actual cost of a measure be considered, the court said, but also the cost must be applied against “the fact that the reductions obtained by these expenditures are needed only for a short period of time.”⁷⁰ These factors must go into an analysis of whether an alternative is “reasonably available.”

A determination as to what constitutes “reasonably available

⁶⁴ Clean Air Act § 110(e)(1)(B), 42 U.S.C. § 1857c-5(e)(1)(B) (1970) (emphasis added). See also notes 15 & 36 *supra*.

⁶⁵ *Natural Resources Defense Council, Inc. v. EPA*, 494 F.2d 519, 524 (2d Cir. 1974).

⁶⁶ *Id.* at 525.

⁶⁷ 499 F.2d at 318. The court remarked:

Although it is expensive, and although its effect is needed only for a short period of time after May 31, 1977, the statute’s command is absolute that all necessary measures be taken to attain the air standards by that date. Therefore, this court cannot disturb the agency’s promulgation of the regulation.

Id. (footnote omitted).

See also *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 411-13 (5th Cir. 1974), *rev’d on other grounds sub nom. Train v. Natural Resources Defense Council, Inc.*, 95 S. Ct. 1470 (1975); S. REP. 91-1196, *supra* note 12, at 2.

⁶⁸ 499 F.2d at 315.

⁶⁹ *Id.* at 314. In arriving at its conclusion as to reasonableness, the court took judicial notice of the effects of inflation and current shortage of capital on the ability to make the major investment required in the absence of an extension. *Id.* at 315.

⁷⁰ *Id.* at 314.

alternative means" is primarily in the hands of the state and EPA. If challenged, the state and EPA need not prove that they considered every possible alternative that is reasonably available. That would require EPA to "disprov[e] a thousand negatives to prove a single positive."⁷¹ Instead, a petitioner has the preliminary burden of showing that a reasonably available alternative exists that was not considered by the state or by EPA.⁷²

This burden was met by an environmental group in *Friends of the Earth v. Environmental Protection Agency*.⁷³ The Second Circuit ruled that EPA, in approving a two-year extension for New York, had failed to explain adequately why a complete ban on taxicab cruising in New York City was rejected as a reasonably available alternative. The court stated that "[t]he reason a total ban was not instituted was taxi industry pressure."⁷⁴ It emphasized that "the Clean Air Act does not contemplate allowing extension in achieving the standards merely because reasonably available means are unacceptable to any special group."⁷⁵

TRANSPORTATION CONTROLS

Perhaps the most controversial and well-known aspect of EPA's implementation of the Act has been the forced development by states and EPA of transportation control plans. Not all states need to develop such plans; the others need them only for selected, highly urbanized areas.⁷⁶ The "transportation control plan" is sim-

⁷¹ *Natural Resources Defense Council, Inc. v. EPA*, 494 F.2d 519, 525 (2d Cir. 1974).

⁷² *Id.*

⁷³ 499 F.2d 1118 (2d Cir. 1974).

⁷⁴ *Id.* at 1127.

⁷⁵ *Id.*

⁷⁶ The following states contain urban areas requiring the imposition of transportation controls: Alaska (Fairbanks), Arizona (Phoenix, Tucson), California (Fresno, Los Angeles, Sacramento, San Diego, San Francisco), Colorado (Denver), District of Columbia (Washington metropolitan area), Indiana (Indianapolis), Illinois (Chicago), Maryland (Baltimore, Washington metropolitan area), Massachusetts (Boston, Springfield), Minnesota (Minneapolis), New Jersey (New York City metropolitan area and Philadelphia metropolitan area), New York (New York City, Rochester), Ohio (Cincinnati), Oregon (Portland), Pennsylvania (Philadelphia, Pittsburgh), Texas (Dallas, Ft. Worth, Galveston, Houston, San Antonio), Utah (Salt Lake City), Virginia (Washington metropolitan area), and Washington (Seattle, Spokane). See AIR PROGRAM POLICY STATEMENT, *supra* note 23, at 14-15.

On April 15, 1975, EPA issued a timetable for the enforcement of the transportation control plan for New York City. This is the first instance of EPA's requiring a city to adhere to a detailed schedule for attaining the standards. *New York Times*, April 16, 1975, at 1, col. 2 (N.J. ed.). This order will require three annual inspections of taxicabs, increased towing of illegally parked cars, establishing bus lanes, programs to train mechanics to repair new emission control devices, and a ten percent reduction in vehicle miles travelled. *Id.* at 17, cols. 1-4.

ply that part of a state's overall implementation plan which concentrates upon reducing the amount of motor vehicle related pollutants in the air, *i.e.*, carbon monoxide, photochemical oxidants, and hydrocarbons.⁷⁷

EPA's decision to grant states additional time in which to prepare transportation control plans, the decision that was struck down in *Natural Resources*, was based on the view that states lacked the expertise to develop such plans immediately. Since *Natural Resources*, EPA and the states have been embroiled in a constant turmoil to develop workable plans that will achieve the Act's objectives and at the same time will be acceptable economically and socially. While recognizing that additional stationary source controls may be necessary to reduce hydrocarbon emissions,⁷⁸ EPA noted that the strategies that make up a state's transportation control plan have basically had two thrusts: to control emissions from older automobiles through the retrofit of control devices and the use of inspection and maintenance programs; and to reduce the number of vehicle miles traveled (VMT), thereby reducing the opportunities for automobiles to emit pollutants.⁷⁹

The VMT reduction program is aimed not at directly controlling automobile emissions, but at controlling the burgeoning use of the automobile, and as such has an obvious land use impact. These programs include incentives and disincentives for the use of certain types of transportation. Examples of VMT reduction programs are

⁷⁷ 38 Fed. Reg. 30626 (1973). The importance of transportation controls and its relationship to land use regulations and planning for air quality has been described as an "implicit one":

Often the discussion as to whether land use affects transportation or vice versa is as fruitless as discussing the age old problem of which came first: the chicken or the egg. What we have here is a cycle of cause and effect. Land development causes a need for transportation, and the transportation opens up more land for development causing a need for land use planning. Unfortunately, land use planning has been relegated to an after-the-fact role, *i.e.*, it is being determined by transportation patterns, rather than transportation being an integral part of land use planning.

Katz, Arrow & Neberger, *Citizen Participation in Air Quality Management: Some Strategies for Environmental Groups and Private Citizens Attempting to Influence Highway and Land Use Planning*, in LAND USE AND AIR QUALITY, *supra* note 25, at 115. See also Bracken, *Transportation Controls Under the Clean Air Act: A Legal Analysis*, 15 B.C. IND. & COM. L. REV. 749 (1974).

⁷⁸ See 38 Fed. Reg. 30628 (1973).

⁷⁹ See *id.* In proposing the regulations, EPA defined a "retrofit measure" as the addition of any device, system, modification, or adjustment made on a motor vehicle after its initial manufacture to achieve a reduction in emissions. The retrofit packages considered included: vacuum spark advance disconnect (VSAD) with lean idle; air bleed to the intake system; exhaust gas recirculation; oxidation catalyst for both medium- and heavy-duty vehicles.

Id. at 30631.

encouraging or requiring the use of car pools, imposing a surcharge on parking during the peak commuting hours, and the extreme alternative of rationing the gasoline available, an alternative that apparently has been rejected, at least for the moment, as socially unacceptable and practicably unenforceable. These programs also call for selected new parking facilities to be reviewed and approved before construction.⁸⁰ Those urban areas with really severe problems must comply with even more restrictive parking management regulations, to be discussed below. Adoption of these measures has the potential of forcing a shift of economic activity from the metropolitan centers to the fringe and rural areas, especially if mass transit facilities are lacking.

A study conducted by a California state task force estimated that the transportation control plan promulgated for the state by EPA would cause complete paralysis of commerce in the Los Angeles area and a concomitant "social and economic disruption of staggering proportions," due to the fact that adequate mass transit does not now exist and will not be developed by 1977.⁸¹ The task force predicted that 80 percent of workers in the state's South Coast Basin would have no way of getting to work if the transportation controls took effect, and 70 percent of San Francisco area workers would be deprived of access to their jobs.⁸² The transportation controls could result in federal control over approximately \$1.5 billion of the state's development as well as in the possible loss of 153,000 jobs yearly when combined with related parking management and complex source regulations.⁸³

Even though California's motor vehicle emissions and smog problem—resulting from the state's heavy dependencies on automobiles, the sprawl of its developed areas, and its climate—causes its transportation control plan to be the most restrictive promulgated, the potential implications of transportation controls, as suggested by the California study, are sobering. A large number of the plans that were either submitted by the states and approved by

⁸⁰ *Id.* at 30629-30, 30632. After considering gasoline sales restrictions, the Administrator concluded that "[t]he possibilities of evasion, the likelihood of noncompliance, and the difficulty of enforcement are too great to make this measure practicable." *Id.* at 30632. See also *Friends of the Earth v. EPA*, 499 F.2d 1118, 1127 (2d Cir. 1974) (sustaining Agency's determination not to require gasoline rationing in the New York metropolitan area).

⁸¹ STATE GOV'T TASK FORCE, CAL. DEP'T OF COMMERCE, THE CLEAN AIR ACT: JOB IMPACT AND PROPOSED AMENDMENTS 1 (Oct. 18, 1974).

⁸² *Id.*

⁸³ *Id.* For a discussion of parking management and complex sources see notes 89-133 *infra* and accompanying text.

EPA or promulgated directly by the federal agency have been challenged in court.⁸⁴ The four circuit courts that have so far considered the issue of transportation controls, however, have been emphatic in holding that EPA, faced with meeting the Act's non-negotiable 1977 deadline, has authority to promulgate almost any control measure that can be shown to be necessary for the achievement and maintenance of the standards.⁸⁵

An additional impetus to the use of transportation controls has been judicial acceptance of EPA authority to make state and local governments enforce those controls. From the outset, EPA acknowledged that the number of individual motor vehicles involved in a transportation control program would be impossible to control federally.⁸⁶ Instead, it reasoned that the state's maintenance of a highway and road system was not unlike its operation of "a direct stationary pollution source such as a municipal incinerator."⁸⁷

⁸⁴ Four decisions concerning transportation control plans have been issued: *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974); *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974); *Friends of the Earth v. EPA*, 499 F.2d 1118 (2d Cir. 1974); *Texas v. EPA*, 499 F.2d 289 (5th Cir. 1974). Transportation control plans await court decision in such states as Alaska, Arizona, California, Colorado, the District of Columbia, Maryland, New Jersey, Pennsylvania, and Washington. 5 ENVIRONMENT REP.—CURRENT DEV. 885 (1974).

⁸⁵ EPA's ability to see its transportation control measures upheld is enhanced by the four circuit courts' adoption of the "arbitrary, capricious, or abuse of discretion" standard of review originally promulgated by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). See *South Terminal Corp. v. EPA*, 504 F.2d 646, 655 (1st Cir. 1974); *Pennsylvania v. EPA*, 500 F.2d 246, 250 (3d Cir. 1974); *Friends of the Earth v. EPA*, 499 F.2d 1118, 1123 (2d Cir. 1974); *Texas v. EPA*, 499 F.2d 289, 296-97 (5th Cir. 1974). Under the arbitrary and capricious test, a court must uphold agency decisions which are supported by adequate data and documentation. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra* at 416.

Given this standard of review, courts have consistently upheld the authority of EPA to impose transportation controls. The First Circuit has stated that such controls could extend to the regulation of parking facilities and off-street parking space if the need for such measures were adequately demonstrated. *South Terminal Corp. v. EPA*, 504 F.2d 646, 668-69 (1st Cir. 1974).

The argument that some aspects of transportation control plans impinge more heavily upon some segments of society than upon others has been rejected by the First and Third Circuits. In *South Terminal*, the First Circuit held such an argument "legally unpersuasive so long as the strategy that was adopted is rationally related to the Agency's aims." *Id.* at 673. Similarly, the Third Circuit, in *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974), ruled that EPA's showing that an air bleed retrofit program for older automobiles was "a practicable and efficient method for reducing carbon monoxide emissions" outweighed the fact that the program's cost "would fall heavily on the poor." *Id.* at 253 (footnote omitted).

⁸⁶ See 38 Fed. Reg. 30633 (1973).

⁸⁷ *Id.* at 30632. EPA noted that

[b]y building and maintaining roads and highways, by licensing vehicles and operators, by providing a system of traffic laws, and in many other ways, government has encouraged the growth of automobile use to its present levels.

Id.

Thus, EPA emphasized that the enforcement procedures of the Act would be applied against any state that failed to carry out or enforce provisions of its transportation control plan, even if that plan were promulgated by EPA rather than the state.⁸⁸

MAINTENANCE OF AIR STANDARDS

Regulation of Complex Sources of Air Pollution

The decision of the Court of Appeals for the District of Columbia in *Natural Resources* necessitated EPA's review of all state implementation plans to determine if those plans provided properly for maintenance of the attained air standards. On March 8, 1973, EPA published its disapproval of all state plans,⁸⁹ finding that "no State plan contained adequate growth projections for any significant period of time into the future."⁹⁰ This finding was not surprising, because EPA itself had given little more than cursory thought to the problems of maintenance before the *Natural Resources* decision.

The finding that none of the plans satisfied the maintenance requirements of the Clean Air Act left EPA in the position of having to give states additional guidance on how to maintain air quality. The Agency noted that several mechanisms already available would serve to a limited extent to mitigate the impact of overall community growth on air quality maintenance.⁹¹ These mechanisms were: the then existing provisions of the EPA regulations on preparation of implementation plans, which required each state to have procedures to review and, if necessary, to prevent the construction of new stationary sources;⁹² the applicability of the federal new source performance standards to new stationary sources;⁹³ and the use of federal emission standards for the control of pollutants from new motor vehicles.⁹⁴

⁸⁸ *Id.* at 30633. Pennsylvania argued before the Third Circuit that this assertion of authority unconstitutionally "exceed[ed] the federal commerce power." *Pennsylvania v. EPA*, 500 F.2d 246, 256 (3d Cir. 1974). This argument was rejected decisively by the court. *Id.* at 263. It was the opinion of the court that "Congress clearly contemplated that states could be required to implement a transportation control plan." *Id.* at 259. The court ruled that the state's operation of a road transportation system has a definite effect on interstate commerce and thus properly brought EPA's action within the ambit of the federal commerce power. *Id.* at 261-63.

⁸⁹ 38 Fed. Reg. 6279 (1973).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 40 C.F.R. § 51.18 (1974).

⁹³ *Id.* § 60.1.

⁹⁴ *Id.* § 85.

Although these procedures gave a push in the right direction, EPA determined that they alone were not sufficient to guarantee maintenance, particularly with respect to the motor vehicle-related pollutants. Accordingly, EPA determined that the new source review procedure should require review not only of traditional stationary sources, but also review of what were termed "complex" or "indirect" sources of air pollution.⁹⁵

"Indirect" or "complex" sources are facilities which may not themselves emit significant pollutants but which attract increased automobile traffic and which generate increased automobile emissions. Highways, parking facilities, commercial and industrial developments such as shopping centers, sports complexes, office buildings, apartment buildings, and educational facilities are all "complex" sources of air pollutants.⁹⁶ Restrictions on the use of land for such facilities may be necessary to maintain air quality standards.

EPA Complex Source Guidelines

On June 11, 1973, EPA promulgated guidelines designed to assist states in preparing measures to review proposed indirect sources. These guidelines were in the form of amendments to the existing EPA regulations governing preparation of implementation plans.⁹⁷

EPA specifically told each state that it must obtain the legal authority to

[r]equire owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such stationary sources; also authority for the State to make such data available to the public as reported and as correlated with any applicable emission standards or limitations.⁹⁸

The more extensive amendment set out procedures a state should follow in conducting its "indirect" source review.⁹⁹ The states were advised that their implementation plans should designate one state agency to conduct the review and decide if construction of a source will be permitted. This agency need not be the state or local air pollution agency, but if it is not, the designated

⁹⁵ 38 Fed. Reg. 6279 (1973).

⁹⁶ *Id.* at 6279-80.

⁹⁷ 38 Fed. Reg. 15834 (1973). The guidelines proposed amendments to 40 C.F.R. §§ 51.11 & 51.18 (1974).

⁹⁸ 40 C.F.R. § 51.11(a)(6) (1974).

⁹⁹ *Id.* § 51.18.

agency must consult with the air pollution agency before carrying out its decision.¹⁰⁰

States had to endow their designated agencies with the authority to prevent construction or modification of any source that is found to be a potential cause of violation of the standards. The states must require the owners or operators of an "indirect" source to submit information on its emissions or on emissions caused by related motor vehicle activity, as well as information concerning the source's "location, design, construction, and operation."¹⁰¹

EPA Complex Source Regulations

Using these guidelines, the states were required to submit their indirect source review procedures to EPA by August 15, 1973 for the Agency's approval. For those states that submitted nothing or whose procedures were judged inadequate, the Agency, on October 30, 1973, proposed its own "complex" source regulations that have resulted in federal regulation of certain siting decisions.¹⁰²

In proposing the regulations, EPA recognized that even review of complex sources may not be enough to maintain air quality in a continuing pattern of urban growth. The Agency emphasized that indirect or complex source review is merely "one element in an overall strategy of air quality maintenance."¹⁰³ These strategies must also "includ[e] new stationary source review, new source performance standards, the Federal motor vehicle control program, and the comprehensive growth plans which the states must develop."¹⁰⁴ These "comprehensive growth plans," to be discussed in more detail below, constitute what might be the Act's most significant land use *planning*, as opposed to land use *control*, mechanism.

Under the regulations, promulgated in final form on February 14, 1974,¹⁰⁵ certain "indirect" sources are subject to review, either by EPA or by the state if it submits an acceptable review procedure. The size of sources subject to review is different for a non-urban area than it is for an urban region. Rural, non-urban areas generally have "lower 'background' levels" of air pollutants and thus

¹⁰⁰ *Id.* § 51.18(e).

¹⁰¹ *Id.* § 51.18(a)-(c).

¹⁰² 38 Fed. Reg. 29893-94 (1973).

¹⁰³ 39 Fed. Reg. 7271 (1974).

¹⁰⁴ *Id.*

¹⁰⁵ 39 Fed. Reg. 7276 (1974).

present a less severe maintenance problem, and EPA concluded that "it is not necessary to review the same size source in non-urban areas as in urban areas."¹⁰⁶

The distinction between urban and non-urban areas is based upon the "Standard Metropolitan Statistical Area" (SMSA), as determined by the Bureau of the Budget.¹⁰⁷ The following indirect sources in an SMSA must be reviewed for their impact on air quality:

(a) Any new parking facility, or other new indirect source with an associated parking area, which has a parking capacity of 1,000 cars or more; or

(b) Any modified parking facility, or any modification of an associated parking area, which increases parking capacity by 500 cars or more; or

(c) Any new highway section with an anticipated average annual daily traffic volume of 20,000 or more vehicles per day within ten years of construction; or

(d) Any modified highway section which will increase average annual daily traffic volumes by 10,000 or more vehicles per day within ten years after modification.¹⁰⁸

For those sources located outside an SMSA, review is required of any new parking facility which has a parking capacity of more than 2,000 vehicles, and of any modification to a parking facility which increases its capacity by more than 1,000 cars.¹⁰⁹

Any airport, regardless of whether or not it is located within an SMSA, is subject to review if it is a new airport that will serve more than 1.6 million passengers per year or that will have 50,000 or more operations per year by regularly scheduled airlines within ten years. Modifications to airports that will result in similar activity also must be reviewed.¹¹⁰

Any source that falls within those specifications is subject to review by EPA. No construction or modification of such sources may begin without approval.¹¹¹ Although the "indirect" sources

¹⁰⁶ *Id.* at 7272.

¹⁰⁷ See 40 C.F.R. § 52.22(b)(ix) (1974).

¹⁰⁸ *Id.* § 52.22(b)(2)(i).

¹⁰⁹ *Id.* § 52.22(b)(2)(ii).

¹¹⁰ *Id.* § 52.22(b)(2)(iii).

¹¹¹ *Id.* § 52.22(b)(3). The regulations were to take effect January 1, 1975. *Id.* However, EPA suspended the regulations in response to public misunderstanding and as a result of a rider to the 1975 EPA appropriations bill. 5 ENVIRONMENT REP.—CURRENT DEV. 1341 (1974). The appropriations bill prohibits the Agency's use of "any program to tax, limit, or otherwise regulate parking facilities." Pub. L. No. 93-563, § 510, 93d Cong., 2d Sess. (1974). See also note 122 *infra*.

EPA interprets this bill to prohibit EPA, but not the states, from conducting indirect

were originally designated for review because of their impact on the motor vehicle related pollutants (carbon monoxide, hydrocarbons, nitrogen dioxide, and photochemical oxidants), the regulations require review of the sources only for their impact on levels of carbon monoxide.¹¹² Only with carbon monoxide, EPA said, can the impact of a single source be gauged with any sort of accuracy.¹¹³

Every source that falls within the criteria, then, must apply for approval. Unless EPA or the state determine that the source will not cause the amount of carbon monoxide in the ambient air to exceed the national standard, then permission for that source to be built or modified cannot be given.

The potential impact on development is profound since indirect sources are the tendency under present growth patterns.¹¹⁴

source review for any facilities except highway or airports, at least until June 30, 1975 when the appropriation expires. 5 ENVIRONMENT REP.—CURRENT DEV. 1683 (1975). The Agency is currently involved in amending the regulations to include additional items for review. If this rulemaking is furnished by July 1, 1975, then the review procedure will apply to construction of new indirect sources begun after January 1, 1976. *Id.*

The Natural Resources Defense Council has applied to the District of Columbia Court of Appeals for an order compelling EPA to promulgate final regulations to be effective July 1. It contends that EPA delay will result in increased pollution from sources built during the suspension of the regulations. *Id.*

EPA has responded that it is under no legal obligation to have the final regulations promulgated by July 1. *Id.* at 1793. The Agency contends that regardless of the timetable set by Congress in the 1970 amendments, Congress itself has prevented the use of indirect source review concerning parking facilities at least until July 1, 1975. EPA states that after that time it should be within the Agency's discretion to determine when indirect source controls become applicable. *Id.*

The controversy over indirect source review and other land use and transportation controls has been heightened by EPA's delaying automobile emission limits. The Agency granted a one-year suspension of the 1977 emission standards. 40 Fed. Reg. 11900-01 (1975). The International Council of Shopping Centers has opposed the extension as requiring "draconian" enforcement of land use and transportation controls against indirect sources. 5 ENVIRONMENT REP.—CURRENT DEV. 1608 (1975). This burden, it contends, should properly be placed on the automotive industry. The Council supports an amendment to the Clean Air Act which would permit land use and transportation controls to be applied to indirect sources only if ambient air standards have not been achieved after auto emission standards have been met. *Id.* See H.R. 2766, 94th Cong., 1st Sess. (1975).

¹¹² Compare 38 Fed. Reg. 6279 (1973) with 40 C.F.R. § 52.22(b)(3)(iv) (1974).

Analysis of photochemical oxidant and nitrogen dioxide emissions is required only for highways and airports. 40 C.F.R. § 52.22(b)(3)(iv) (1974). See also 39 Fed. Reg. 7272 (1974).

¹¹³ See 39 Fed. Reg. 7272 (1974); 38 Fed. Reg. 29894 (1973).

¹¹⁴ The multiplier effect of indirect sources on development has been graphically pointed out:

There is pollution generated by fixed or stationary sources—factories, shopping centers, houses, etc.—and pollution generated by mobile sources—vehicular traffic—that moves to and from these fixed sources. The concept of indirect source recognizes a nexus between the location of certain fixed sources and the generation of increased mobile and stationary source activity. Thus, a sports arena, for in-

The regulations have not been tested judicially, but court challenges are expected. One obvious problem stems from the incremental effect of a great many sources attracting motor vehicles. The first twenty or so to be approved may not cause a violation of the standards, although air quality may worsen in the locality. The twenty-first applicant, however, may find that the traffic encouraged by his source may tip the balance and cause a violation. Is his application to be denied while the other twenty are granted? Is a "first come, first served" approach reflective of equal protection? The EPA regulations do not address this question, although it is certain such situations will arise.

EPA, in issuing the regulations, discounted their effect on economic development and growth. The Agency disagreed with some comments that the regulations would only encourage the development of many small facilities not covered by the criteria, thus increasing the propensity toward "urban sprawl."¹¹⁵

If economic considerations favor large-scale development, EPA said, then the developers of such projects will not restrict the size of their operations merely to avoid the indirect source review. The review should be conducted early in a project's planning and design stages so that sources "will usually be able to make necessary design modifications so that a large indirect source can receive formal approval."¹¹⁶

It must be stressed that the indirect source review regulations, although they may result in restrictions on the uses of land, are by no means a comprehensive land use planning measure. EPA emphasized that the primary objective of the regulations was "to ensure that proposed projects are designed and located in a manner consistent with air quality requirements."¹¹⁷ The final determination on whether to approve construction or modification of a

stance, is a fixed source and itself might not produce significant amounts of air pollutants. However, the decision to construct this hypothetical indirect source at a particular location leads to related activities that themselves might produce significant amounts of air pollution. First, the sports arena concentrates people for events, and they arrive by automobile or other transportation devices that generate air pollution. Also, a local support economy grows adjacent to or near the sports arena. Restaurants, taverns, filling stations and parking lots are built because of the economic advantages created by local concentrations of potential customers. The end result is that the seemingly isolated decision to locate a single indirect source has a potentially adverse local and perhaps regional multiplier effect on air quality far beyond the direct effect of the pollutants emitted solely by the equipment within the sports arena.

Batchelder, *Land Use/Transportation Controls for Air Quality*, 6 URB. LAW. 235, 243-44 (1974).

¹¹⁵ 39 Fed. Reg. 7272 (1974).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

source under these regulations must be grounded only upon air quality considerations. In the indirect source review, economic or social considerations are irrelevant. This restricted viewpoint is compatible with the Clean Air Act's restricted objective of improving air quality.¹¹⁸

The indirect source review, then, is not in itself a means to provide comprehensive and planned controls for the use of land. A determination as to whether or not a source will cause the air quality standards to be violated "is only one necessary step among many other land-use measures already generally established,"¹¹⁹ such as zoning approval, issuance of building permits, or the granting of sewer permits. EPA's objective is the incorporation of indirect source review of pollutants "into comprehensive State and local land use planning processes so that social, economic, and air quality factors can be considered in an integrated manner."¹²⁰

PARKING MANAGEMENT REGULATIONS

For those areas of the country that have a serious problem with automobile pollution, EPA has devised an amalgam "parking management plan" combining several aspects of transportation control and indirect source review. The parking supply regulations, applicable to approximately fifteen major metropolitan areas,¹²¹ are transportation controls because they are designed to

¹¹⁸ Other governmental regulatory actions more typically considered land use controls have equally narrow viewpoints. A zoning decision, for example, is made in terms of precisely defined uses. Considerations of air quality are as out of place in that context as are zoning criteria in an indirect source review.

The EPA has not completely ignored the economic impact of indirect source regulations. A report made on the economic and land use consequences of proposed indirect source regulations was compiled for EPA by Harbridge House, Inc., an independent consultant, and has been incorporated into the EPA draft guidelines. 5 ENVIRONMENT REP.—CURRENT DEV. 1680-81 (1975). According to Harbridge House, this report "is the 'first time' EPA has tried 'to take a hard look at the cost impact' before carrying out a regulation." *Id.* at 1681.

The report, however, has been criticized by industry for underestimating the economic impact of the regulations by failing to consider fully the effect that delay has on beginning construction and the consequences that a permit denial will have vis-à-vis increasing " 'risk of doing business' " expenses which must be recouped by returns on approved projects. *Id.* at 1680. The report was also criticized by the Council on Environmental Quality. Although the report acknowledged that the regulations have incentive against the construction of regional shopping centers, it fails to evaluate the impact that alternative construction plans will have on air quality. *Id.* The Natural Resources Defense Council took the position that the report overestimated costs. Future expenses would be decreased since "developers would take the regulations into account." *Id.*

¹¹⁹ 39 Fed. Reg. 7274 (1974).

¹²⁰ *Id.*

¹²¹ The regulations will affect the following areas: Alaska (Fairbanks), Arizona

cut down on vehicle miles traveled and to reduce motor vehicle related pollutants; they are indirect source regulations because they involve review of new or modified parking facilities for excessive increase of motor vehicle activity with increased emission of such pollutants.

Under the parking management regulations, which are scheduled to take effect after June 30, 1975,¹²² the affected urban areas would have to conduct a preconstruction review of all new facilities having a parking capacity of 250 or more vehicles.¹²³ This limit is more stringent than that of the indirect source regulations, which apply throughout the nation and which call for preconstruction review of facilities with 1,000 or more spaces if located in an SMSA, or 2,000 or more spaces if located outside an SMSA.¹²⁴ Parking facilities located in the fifteen urban areas subject to parking management are specifically exempted from complying with the indirect source regulations, but other sources, such as airports and highways within the urban area must comply with the indirect source review process.¹²⁵

The parking supply regulations also are more stringent than the indirect source regulations because they include provisions for reviewing not only the carbon monoxide impact of new sources, as is the case under indirect source review, but include provisions for "a review of the impact of the proposed facility on areawide oxidant levels."¹²⁶

In its proposed parking management regulations, EPA suggested two approaches for achieving the goals of parking management. Under the first, a facility-by-facility review, either the local government or EPA would review each proposed parking facility. It would not be approved unless it could be shown that the facility would not interfere with the area's strategy to reduce vehi-

(Phoenix, Tucson), California (Fresno and San Joaquin Valley, Los Angeles, Sacramento Valley, San Diego, and San Francisco), District of Columbia Interstate Area (Washington, D.C., Maryland and Virginia suburbs), Maryland (Baltimore, D.C. suburbs), Massachusetts (Boston), New Jersey (New York City suburbs, Philadelphia suburbs), Pennsylvania (Philadelphia, Pittsburgh), Texas (Houston), and Virginia (D.C. suburbs). *See id.* at 30440.

¹²² *Id.* at 36870. The use of parking management techniques has been placed in jeopardy by a rider to the 1975 EPA appropriations. Pub. L. No. 93-563, § 510, 93d Cong., 2d Sess. (1974) prohibits the Agency from "administer[ing] any program to tax, limit, or otherwise regulate parking facilities." This provision also affects indirect source review. *See* note 111 *supra*. It is not clear, however, whether the limitation continues beyond the current fiscal year despite the expiration of the appropriation. *See* 5 ENVIRONMENT REP.—CURRENT DEV. 1295 (1974).

¹²³ 39 Fed. Reg. 30442 (1974).

¹²⁴ *See* notes 108-09 *supra* and accompanying text.

¹²⁵ 39 Fed. Reg. 30442 (1974).

¹²⁶ *See id.* *See also* notes 112-13 *supra* and accompanying text.

cle miles traveled and that it would not prevent attainment and maintenance of the carbon monoxide standard.¹²⁷ The second approach, which EPA encourages, and one which is designed to coordinate parking supply requirements with other land use considerations, is the preparation of a parking management plan, which EPA emphasizes can be done only by state and local governments, not the federal government.¹²⁸ EPA expects that a facility-by-facility approach will be adopted on an interim basis until a parking management plan can be prepared.¹²⁹

A parking management plan, according to EPA, is the "comprehensive plan for the control of the development of future parking facilities . . . in relationship to existing parking resources and the present and projected transportation system."¹³⁰ The plan would set out a long-range scheme for the placement of new parking facilities, a scheme that would be compatible with the area's plans for mass transit and land use development. The plan must provide for control of the construction of new parking facilities so as to minimize vehicle miles traveled and to prevent new facilities from violating the national air standards.¹³¹

Adoption of a parking management plan would not preclude a source-by-source review of new parking facilities, but it would provide grounds for approval or disapproval of such facilities. More flexibility is possible, because a facility which might not meet the specific standards of the facility-by-facility review but which nevertheless would enhance an area's overall parking control strategy, such as a parking facility located next to a mass transit facility, could be approved under a parking management plan. Local zoning considerations and mass transit expectations could be incorporated within a parking management plan but could not be considered in a facility-by-facility review. Adoption of a parking management plan would allow "tradeoffs";¹³² for example, a facility which would replace existing parking spaces but in a new location could be approved. Finally, EPA considers it "definitely" preferable to the use of the facility-by-facility approach because it requires the participation of local officials and will therefore "more successfully reflect the needs and concerns of the community."¹³³

¹²⁷ 39 Fed. Reg. 30442-43 (1974).

¹²⁸ *Id.* at 30442.

¹²⁹ *Id.* at 30443.

¹³⁰ *Id.* at 30463.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

AIR QUALITY MAINTENANCE AREAS

In carrying out the mandate of *Natural Resources* that all state plans be reviewed to ensure that they provide for maintenance of air standards, EPA's first thought was to effectuate more comprehensive procedures to review new and modified stationary sources. Thus, the first efforts in the area of air quality maintenance were towards the promulgation and adoption by the states of the complex source review procedures discussed previously.

Even when first proposing those complex source review procedures, however, EPA recognized that they might not be enough:

Though not required by the proposed amendments . . . greater State and local attention to the regional air quality impact of growth clearly would be desirable in the long run. State and local agencies are encouraged to initiate efforts to make a careful analysis of projected growth of population, industrial activity, and use of motor vehicles and estimate how such growth is likely to affect air quality. Such efforts are of particular importance in air quality control regions where transportation control programs already are required to insure attainment of the national standards for motor vehicle-related air pollutants.¹³⁴

Two months later, however, that "encouragement" had become a requirement. EPA acknowledged that a source-by-source analysis required by the complex source review regulations simply did not allow evaluation, on a regional basis, of the effects on growth and development on air quality.¹³⁵ The Agency therefore required states, as part of their implementation plans, to locate the regions "which, due to current air quality and/or projected growth rate, may have the potential for exceeding any national standard within the subsequent 10-year period."¹³⁶

For each such designated air quality maintenance area (AQMA), the state is required to present an analysis of the effect of air standards of anticipated expansion and development during the ten-year period and a plan to keep any national standard from being surpassed during that period.¹³⁷ Such plans must include any "control strategy revisions and/or other measures to insure that projected growth and development will be compatible with maintenance of the national standards" during the specified

¹³⁴ 38 Fed. Reg. 9600 (1973).

¹³⁵ *Id.* at 15834.

¹³⁶ 40 C.F.R. § 51.12(e) (1974).

¹³⁷ *Id.* § 51.12(g)(1)-(2).

period.¹³⁸ Each plan must be reviewed at five-year intervals, and revised if necessary.¹³⁹

In guidelines issued to the states on designation of the AQ-MAs, EPA indicated that the states must consider for designation, at a minimum, all standard metropolitan statistical areas (SMSA).¹⁴⁰ EPA initially did not feel that the rural, non-urbanized, non-SMSA areas needed to be designated as AQMAs, because properly administered new source review procedures would be adequate to ensure maintenance.

EPA later noted, however, that two types of non-urban areas, principally in the western states, have the potential for violating the air standards: (1) an area, normally industrial in character, which has current air quality problems but which is not located within an SMSA; and (2) an area which has been designated "for future development of natural resources."¹⁴¹ EPA directed its review procedures at SMSAs because of their "proven growth potential," but the Agency said that designation of such non-SMSA areas as AQ-MAs "is totally within the scope of the maintenance requirement of the Act."¹⁴²

The AQMA requirement is thus a forced land use planning measure. A requirement that states project their increased growth and development over a ten-year period gives states the opportunity as well as the incentive to plan that growth and development. The AQMA procedure is unlike the complex source review procedure in that it is not directed solely towards air quality:

The principal objective of designation of AQMAs and subsequent analysis and development of plans to maintain ambient air quality standards is to provide a mechanism for management of general overall urban growth as related to air quality, *with due consideration of other aspects of community growth*.¹⁴³

This increased flexibility is possible precisely because the AQMA requirement is a planning, not a regulatory, measure. Using the AQMA, a state can plan and balance its growth and development in line with air quality considerations. Proper planning should enable the state to maintain both a desired rate of growth and a desired air quality. Unlike the situation where a community makes a conscious choice to sacrifice air quality for

¹³⁸ *Id.* § 51.12(g)(2).

¹³⁹ *Id.* § 51.12(h).

¹⁴⁰ See 39 Fed. Reg. 25331 (1974).

¹⁴¹ *Id.* at 25332.

¹⁴² *Id.*

¹⁴³ *Id.* at 25331 (emphasis added).

growth or development—a choice which could not be made except in contravention of the Clean Air Act—the AQMA provision permits both through the planning process, thus satisfying the Act's demands as well as social and economic needs.

“SIGNIFICANT DETERIORATION”

The previously discussed areas where the Clean Air Act impinges on land use or forces land use planning—such as the control of complex sources or the designation of air quality maintenance areas—involve using the Act as authority to improve the quality of the nation's air, and then to maintain that improved quality. Those requirements are necessitated by decades of unplanned and thoughtless growth and development that created the air pollution problem.

The issue generally referred to as “significant deterioration” or “nondegradation” involves those areas of the country that presently possess clean air, or at least possess air quality that is better than the national standards. Those who argue that the Act requires states to prevent “significant deterioration” of air quality assert that the concept is needed to ensure that those clean air areas remain clean, and that the areas of the country that now have “dirty” air do not, in an effort to improve their air quality, push all polluters into the clean air areas, resulting in an even distribution of polluted air across the entire country.¹⁴⁴

Prevention of significant deterioration poses one of the major issues in the interrelationship of land use controls and air quality management. It calls for comprehensive planning of the use of land to coordinate economic and social growth without adverse environmental ramifications.

The conflict over whether state implementation plans must provide for the protection of clean air areas was brought to a climax by the Sierra Club. In May of 1972, EPA Administrator William D. Ruckelshaus indicated his intention to approve state plans without such a protective provision by promulgating a regulation on the preparation of plans requiring only that

¹⁴⁴ See Brief for Respondents at 93, *Fri v. Sierra Club*, 412 U.S. 541 (1973), *aff'd by an equally divided Court sub nom. Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972) [hereinafter cited as Brief for Respondents].

For an extended discussion of the *Sierra Club* decision and the policy of nondegradation see Note, *The Clean Air Act and the Concept of Non-Degradation: Sierra Club v. Ruckelshaus*, 2 *ECOLOGY L.Q.* 801 (1972).

[i]n any region where measured or estimated ambient levels of a pollutant are below the levels specified by an applicable secondary standard, the plan shall set forth a control strategy which shall be adequate to prevent such ambient pollution levels from exceeding such secondary standard.¹⁴⁵

In testimony before a congressional subcommittee, Ruckelshaus had said EPA lacked the authority to require a significant deterioration clause in the plans.¹⁴⁶

The Sierra Club filed suit against EPA in the United States District Court for the District of Columbia, seeking a declaratory judgment that the regulation was invalid as well as a preliminary injunction barring EPA approval of the plans without significant deterioration provisions. The hearing on the Club's motion for a preliminary injunction was conducted before Judge John H. Pratt with some sense of urgency, because EPA approval of the plans was scheduled for the next day, May 31.¹⁴⁷ After hearing arguments, Judge Pratt granted the plaintiff's motion, and on June 2, in *Sierra Club v. Ruckelshaus*,¹⁴⁸ issued a written opinion.

In view of the fact that he had before him only a motion for preliminary injunctive relief, Judge Pratt's opinion was confined to the question of whether the Club was likely to prevail on the merits of its charge. In light of the case's later history, it is noteworthy to recall that this decision was issued only in the context of preliminary injunctive relief.

Judge Pratt based his interpretation of the Act on three points: the plain language of the statute, its legislative history, and administrative interpretation. He quoted section 101(b), which states the Act's purpose:

"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."¹⁴⁹

The court stated that this language, on its face, demonstrates the

¹⁴⁵ 40 C.F.R. § 51.12(b) (1972). See also 37 Fed. Reg. 10842 (1972).

¹⁴⁶ *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 254 (D.D.C. 1972), *aff'd by an equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973) (citing unpublished transcript of *Hearings Before the Subcomm. on Public Health and the Environment of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. 351-52 (1972)).

¹⁴⁷ *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 254 (D.D.C. 1972), *aff'd by an equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

¹⁴⁸ 344 F. Supp. 253, 253-54 (D.D.C. 1972), *aff'd by an equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

¹⁴⁹ 344 F. Supp. at 255 (quoting from Clean Air Act § 101(b)(1), 42 U.S.C. § 1857(b)(1) (1970)).

congressional intent to improve national air quality "and to prevent deterioration of that air quality, no matter how presently pure that quality in some sections of the country happens to be."¹⁵⁰

Citing the Act's legislative history in support of his interpretation, Judge Pratt noted that the Act's predecessor had also contained the "'protect and enhance'" terminology,¹⁵¹ and that the Senate report on the former statute clearly indicated that "all areas of the country" were to be covered.¹⁵² Judge Pratt also reviewed the hearings and reports on the Act considering degradation. But his argument was weakened by the fact that one important word in the Senate report was misquoted—as "shall" instead of "should"—and by his failure to quote the entire relevant portion of the report.¹⁵³

Administrative guidelines issued under the Act's predecessor statute had explicitly recognized the prevention of "significant deterioration of air quality" as part of the statute's purpose.¹⁵⁴ Pointing to this prior administrative interpretation and to an EPA regulation, apparently contradictory to the one challenged in *Sierra Club*, providing that national air standards shall not permit "significant deterioration of existing air quality," Judge Pratt found an agency policy of nondegradation inconsistent with Ruckleshaus' asserted lack of authority.¹⁵⁵

The court concluded that the Act "is based in important part

¹⁵⁰ 344 F. Supp. at 255.

¹⁵¹ *Id.* (quoting from Clean Air Act § 101(b)(1), 42 U.S.C. § 1857(b)(1) (1970)) (citing the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485).

¹⁵² 344 F. Supp. at 255 (citing S. REP. NO. 403, 90th Cong., 1st Sess. 2-3 (1967)).

¹⁵³ 344 F. Supp. at 255. Pratt cited the report as stating:

"In areas where current air pollution levels are already equal to or better than the air quality goals, the Secretary *shall* not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality."

Id. (quoting S. REP. 91-1196, *supra* note 12, at 11) (emphasis added). It actually reads as follows:

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

S. REP. 91-1196, *supra* (emphasis added).

¹⁵⁴ U.S. DEP'T OF HEW, GUIDELINES FOR THE DEVELOPMENT OF AIR QUALITY STANDARDS AND IMPLEMENTATION PLANS § 1.51, at 7 (1969).

¹⁵⁵ 344 F. Supp. at 256 (quoting from 40 C.F.R. § 50.2(c) (1972)).

on a policy of non-degradation of existing clean air" and that the challenged regulation was invalid because it was "contrary to the legislative policy of the Act."¹⁵⁶ The court's holding supported the Sierra Club's interpretation of the Act, but its effect was only that the Club had set out a claim upon which injunctive relief could be granted. It went on to find that the Club had satisfied the four criteria necessary for injunctive relief and prohibited EPA from approving any state plan that would allow significant deterioration of existing air quality.¹⁵⁷ The phrase "significant deterioration" was not defined by Judge Pratt, nor does the phrase appear in the Act itself.

Following Judge Pratt's order, both the Government and the Sierra Club filed a stipulation with the Court of Appeals for the District of Columbia, agreeing to treat the preliminary injunction as a final, permanent injunction for purposes of appeal.¹⁵⁸ On November 2, 1972, the appeals court, without issuing an opinion of its own, affirmed the district court.¹⁵⁹ During oral argument, Judge Carl McGowan stated "that 'if there is any serious doubt about what Congress meant, the least damage is done by following the course taken by the lower court.'"¹⁶⁰ If the Act was interpreted by the court as allowing deterioration in clean air regions and that interpretation were later overruled by Congress, then the clean air quality of those regions could never be cured.¹⁶¹

The Supreme Court granted certiorari on January 15, 1973.¹⁶² The argument before the Court focused on two issues: first, the proper extent of court review of an order granting only preliminary injunctive relief, an issue which was briefed by neither party but raised by the Court itself during oral argument; and second, whether Congress intended a policy of nondegradation in view of the economic and social ramifications of such a policy.¹⁶³

The Government emphasized that the "protect and enhance" language of the Act was not sufficient to require a policy of non-degradation.¹⁶⁴ It argued that "significant deterioration" is not one

¹⁵⁶ 344 F. Supp. at 256.

¹⁵⁷ *Id.* at 256-57.

¹⁵⁸ See Brief for Respondents, *supra* note 144, at 8.

¹⁵⁹ 3 ENVIRONMENT REP.—CURRENT DEV. 800 (1972).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 409 U.S. 1124 (1973).

¹⁶³ 3 ENVIRONMENT REP.—CURRENT DEV. 1522-23 (1973).

¹⁶⁴ Brief for the Petitioner at 10, *Fri v. Sierra Club*, 412 U.S. 541 (1973), *aff'd by an equally divided Court sub nom. Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972) [hereinafter cited as Brief for the Petitioner].

of the eight prerequisites listed for approval of an implementation plan.¹⁶⁵ The new source performance standards would preclude any industry attempts to avoid the stringent pollution requirements of industrialized areas by simply moving into clean air areas.¹⁶⁶

The Sierra Club maintained that the policy issues inherent in the nondegradation decision were not before the Court and that the only issue was one of statutory construction.¹⁶⁷ Nevertheless, the Club insisted that such a prohibition against significant deterioration would not prevent all development of rural areas, but

[e]ven if the burden from prohibiting significant deterioration were more severe, it is clear that Congress intended that this burden be sustained in order to protect and improve air quality.¹⁶⁸

On June 11, 1973, an equally divided Court upheld Judge Pratt's decision.¹⁶⁹ The Court split four-four, with Justice Lewis F. Powell, Jr., abstaining. A tie vote among the justices results in an automatic affirmance of the lower court decision, although no opinion is issued and no legal precedent is established.¹⁷⁰

Thus, a federal district court order issued on a motion for preliminary injunctive relief became, by virtue of a per curiam affirmance by the court of appeals and a divided Supreme Court, the definitive court ruling on perhaps the most significant land use question involved under the Act.

Faced with complying with Judge Pratt's order, EPA proposed for comment four alternative plans for avoiding "significant deterioration" of air quality.¹⁷¹ Each proposal approached the concept of significant deterioration in a different way.

The four alternatives were: (1) the air quality increment plan, which would permit a single maximum increase of air pollutants above 1972 concentrations;¹⁷² (2) the emission limitation plan, which would place a ceiling on emissions;¹⁷³ (3) the local definition plan, which would require states to determine, on a case-by-case basis, if any proposed new source would cause significant deterioration;¹⁷⁴ and (4) the area classification plan, which would necessi-

¹⁶⁵ See Brief for the Petitioner, *supra* note 164, at 11-12.

¹⁶⁶ *Id.* at 12-13.

¹⁶⁷ Brief for Respondents, *supra* note 144, at 71-73.

¹⁶⁸ *Id.* at 14.

¹⁶⁹ 412 U.S. 541 (1973).

¹⁷⁰ See *United States v. Pink*, 315 U.S. 203, 216 (1942).

¹⁷¹ 38 Fed. Reg. 18986 (1973).

¹⁷² *Id.* at 18990-91.

¹⁷³ *Id.* at 18991-92.

¹⁷⁴ *Id.* at 18992.

tate state identification of each area in its territory as within zones of allowable deterioration.¹⁷⁵

In August of 1974, the regulations were repropoed,¹⁷⁶ focusing on the area classification plan. Under this plan, states must designate all areas within their borders as one of three classifications: Class I, which would consist of those "areas in which practically any change in air quality would be considered significant," and therefore not allowable; Class II, where degradation "normally accompanying moderate well-controlled growth would be considered insignificant"; and Class III, consisting of "those areas in which deterioration up to the national standards would be considered insignificant."¹⁷⁷

Under the regulations, which were promulgated in final form by EPA on November 27,¹⁷⁸ all areas in all states are immediately designated as Class II.¹⁷⁹ The Agency emphasizes, however, that this initial Class II designation stands for merely a "tentative determination."¹⁸⁰ States are encouraged to redesignate an area as soon as possible after a public hearing and consideration of all relevant factors. The redesignations are subject to EPA approval.¹⁸¹

The regulations stress that, although their purpose is to prevent "significant deterioration" of air quality, other land use planning considerations must also receive attention in determining designations and in carrying out the requirements accompanying each designation.¹⁸² The Agency designed the regulation

to inject consideration of air quality as one of many constraints on land use decisions, but not to mandate land use decisions based solely on air quality. In this regard, the "significance" of

¹⁷⁵ *Id.* at 18992-93.

¹⁷⁶ 39 Fed. Reg. 31000 (1974).

¹⁷⁷ *Id.* at 31003.

¹⁷⁸ *Id.* at 42514.

¹⁷⁹ *Id.* at 42515.

¹⁸⁰ *Id.* at 31004.

¹⁸¹ *Id.* EPA indicates that such approvals will be given except in four cases: (1) if the required redesignation procedures were not complied with; (2) if inaccurate technical data were the basis for the redesignation; (3) if the state's redesignation agency "has arbitrarily and capriciously disregarded relevant environmental, social or economic considerations"; or (4) if a state will not effectuate the new source review procedures called for in preventing the various amounts of deterioration. *Id.*

¹⁸² *Id.* at 31001. In the preamble accompanying the proposed regulations, EPA stated: Development of land use plans in which air quality represents a single overriding criterion is not, in the Administrator's judgment, a desirable course of action for most areas.

Id.

any air quality deterioration is defined in terms of the proper and desired use of an area as well as the magnitude of pollutant concentrations. The intent is not to restrict or prohibit economic growth, but rather to ensure that desirable growth is planned and managed in a manner which will minimize adverse impacts on the environment.¹⁸³

This emphasis on coordinating planning, with concern for air quality being just one among several questions that must be considered in a siting decision, also is reflected in the regulations' requirement concerning the state agency that will make the area designations. The governor of the state is to select the state agency which will have that authority. If that agency is not the state air pollution control agency, then it must consult with the air agency before making any designations. Furthermore, if the agency lacks "continuing responsibilities for land use planning, it must consult with the appropriate state and/or local land use planning agencies" that do have such responsibilities.¹⁸⁴

The regulations also encourage coordination in carrying out other requirements of the Clean Air Act and other environmental statutes.¹⁸⁵ Furthermore, many areas characterized as Class III may possibly exceed the national standards during the 1975-1985 time period, and will thus also be air quality maintenance areas, and therefore "coordination between implementation of these significant deterioration regulations and the Air Quality Maintenance Plan effort will be particularly important."¹⁸⁶

"Significant deterioration" is defined by the regulations only as to particulate matter and sulfur dioxide emissions, and the allowable increase in each is set out numerically only for Class I and Class II areas.¹⁸⁷ The other major pollutants are not covered by the significant deterioration regulations.¹⁸⁸ The regulations set a pre-

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 31001-02. Two federal environmental statutes specifically mentioned by EPA are the area-wide waste treatment provisions of the Federal Water Pollution Control Act and the environmental impact statement requirements of the National Environmental Policy Act. *Id.* at 31002. See 33 U.S.C. § 1288 (Supp. III 1974); 42 U.S.C. § 4332(2)(C) (1970).

¹⁸⁶ 39 Fed. Reg. 31002 (1974).

¹⁸⁷ *Id.* at 42515.

¹⁸⁸ EPA received "[s]ubstantial public comment" urging the inclusion of other pollutants. Nevertheless, the Agency declined to promulgate significant deterioration regulations for carbon monoxide, hydrocarbons and nitrogen oxides for four main reasons: (1) federal automotive regulations were expected to achieve significant reduction of those pollutants; (2) technology for other than automobile emissions was not available to obtain area-wide reductions; (3) carbon monoxide had no "esthetic impact"; and (4) the creation of smog as a result of these pollutants occurs only after a comparatively lengthy period of time during which

cise limit as to the amount of deterioration from the current ambient air quality—measured in terms of grams per cubic meter of air—that would be permitted.¹⁸⁹ Thus, areas of differing air quality could, if the state desired, be designated as Class I or Class II, and the amount of deterioration permitted in air quality would be specifically limited.

Class III areas, or areas in which extensive industrial or other development is desired, are not confined to a precise numerical equivalent of significant deterioration. For these areas, the regulations indicate that any deterioration, so long as the national standards are not violated, is *per se* insignificant.¹⁹⁰

The major focus of the regulations, then, is to force states to make a conscious decision, with sufficient public comment and input, as to where growth is going to occur. The designations need not reflect current land use patterns, but rather should encompass the state's planned and projected use of the land. An area which currently is heavily industrialized, for example, but in which the state desires to limit growth, could be designated as Class I, whereas a currently pristine area could be designated as Class III, if a state wishes to attract and encourage development and growth there.

The class designations are in no sense purely an air quality index; rather, they represent an inventory of the state's uses of land. Maintaining a desired air quality is only one of many considerations which a state may take into account in designating an area as Class I, II, or III. EPA rejected a "significant deterioration" proposal made by the Sierra Club precisely because it

would force the use of air pollution considerations as the single overriding factor in land use decisions, with no provisions allowed for other environmental, social, or economic considerations.¹⁹¹

the motor vehicle emission limitations should reduce the level of concentration of the automotive-related pollutants. *Id.* at 31006.

¹⁸⁹ *Id.* at 42515.

¹⁹⁰ *Id.* at 31004. While Class III areas are apparently exempted from the impact of the significant deterioration regulations, EPA reminded the states of their obligation to abide by the general policy of nondegradation:

In these areas, the existing procedures for attainment and maintenance of national standards are intended to prevent "significant" deterioration. Since sources in Class III areas are not subject to review under these regulations, States should take care in their redesignation procedures to ensure that Class III areas are sized and situated in such a manner so as to prevent carryover into adjoining areas which are intended to be restricted to Class I or Class II increments.

Id.

¹⁹¹ *Id.* at 31006.

EPA asserted that this balancing approach—considering social and economic as well as air quality factors—was necessary to fulfill the mandate of the Act

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.”¹⁹²

Whether it fulfills the mandate of Judge Pratt’s order is a different question. Judge Pratt said that the Act does not permit “states to submit [implementation] plans which allow pollution levels of clean air to rise to the secondary standard level of pollution.”¹⁹³ Clearly, the EPA regulations allow the state to permit just that in areas designated as Class III.

The Sierra Club has taken EPA back to court, charging that the premise of Judge Pratt’s order has been violated.¹⁹⁴ Another possibility is that in the interim some circuit court will rule on the substantive question of whether the Act does in fact require prevention of significant deterioration. Such a ruling is not precluded by the Supreme Court’s four-four affirmance of *Sierra Club v. Ruckelshaus*, since such tie votes merely affirm the lower court decision and establish no precedent.¹⁹⁵ Still another possibility is congressional enactment of an amendment to the Act that would make clear that prevention of significant deterioration is not required.¹⁹⁶ Plainly then, even in the face of the recently promul-

¹⁹² *Id.* at 31000 (quoting from Clean Air Act § 101(b)(1), 42 U.S.C. § 1857(b)(1) (1970)) (emphasis by EPA).

¹⁹³ 344 F. Supp. at 256.

¹⁹⁴ *Sierra Club v. EPA*, Civil No. 74-2079 (D.C. Cir., filed Dec. 5, 1974). At least fourteen other lawsuits have been filed in various circuits challenging the significant deterioration regulations. See *City of Highland Park v. Train*, Civil No. 75-1006 (7th Cir., filed Jan. 6, 1975); *Pacific Coal Gasification Co. v. EPA*, Civil No. 75-1006 (10th Cir., filed Jan. 2, 1975); *American Petroleum Institute v. EPA*, Civil No. 75-1001 (6th Cir., filed Jan. 2, 1975); *Alabama Power Co. v. Train*, Civil No. 74-4234 (5th Cir., filed Dec. 30, 1974); *Cincinnati Gas & Elec. Co. v. EPA*, Civil No. 74-2359 (6th Cir., filed Dec. 27, 1974); *Buckeye Power, Inc. v. EPA*, Civil No. 74-2358 (6th Cir., filed Dec. 27, 1974); *Indiana-Kentucky Elec. Corp. v. EPA*, Civil No. 74-2055 (7th Cir., filed Dec. 27, 1974); *Salt River Project Agricultural Improvement & Power Dist. v. EPA*, Civil No. 74-3501 (9th Cir., filed Dec. 26, 1974); *Montana Power Co. v. EPA*, Civil No. 74-3460 (9th Cir., filed Dec. 26, 1974); *New Mexico v. EPA*, Civil No. 74-1871 (10th Cir., filed Dec. 26, 1974); *Utah Power & Light Co. v. EPA*, Civil No. 74-1869 (10th Cir., filed Dec. 23, 1974); *Public Serv. Co. v. EPA*, Civil No. 74-1866 (10th Cir., filed Dec. 20, 1974); *Kennecott Copper Corp. v. EPA*, Civil No. 74-3447 (9th Cir., filed Dec. 19, 1974); *Dayton Power & Light Co. v. EPA*, Civil No. 74-2297 (6th Cir., filed Nov. 27, 1974). These cases may all be consolidated in the District of Columbia Circuit.

¹⁹⁵ See note 170 *supra* and accompanying text.

¹⁹⁶ On April 2, 1974, S. 3287, 93d Cong., 2d Sess. (1974) was introduced to amend the Clean Air Act. One provision would amend section 101(b)(1), 42 U.S.C. § 1857(b)(1) (1970) to provide:

gated regulations, significant deterioration and its status under the Act remains a clouded issue.

CONCLUSION

The opening premise of this article was that the Clean Air Act is an air quality statute, not a land use planning statute. The questionable legal status under the Act of permitting states to consider motives other than improved air quality in implementing the "significant deterioration" regulations indicates all too clearly that the Act is not an adequate substitute for specific land use legislation and regulation. A statute whose only goal is the improvement of air quality cannot, and should not, serve as a stopgap land use planning measure under which all of society's interests and needs can be met. Using the Clean Air Act in such a manner thwarts not only improved land use but hinders improved air quality by allowing consideration of non-environmental issues.

Nevertheless, in the absence of any overall land use legislation, states that currently lack a coherent planning organization could seize on many of the regulations engendered by the Clean Air Act as an initial step toward land use planning. Certainly, the steps required of a state, under the air quality maintenance area regulations and the significant deterioration regulations, compel in the name of improved air quality data-gathering which can then be applied to overall planning. States must predict areas of increased growth and must identify areas where they desire growth and where they wish the environment to remain pristine.

The AQMA regulations and the significant deterioration classifications are methods by which a state can use a required air quality control mechanism as a tool to improve its overall planning. The complex source and transportation control procedures, however, constitute regulatory controls on the uses of land which may conflict with other elements of a state's land use intentions. A shopping center or parking facility, for example, may be perfectly

to protect and enhance the quality of the Nation's air resources by establishing, achieving, and maintaining national ambient air quality standards, standards of performance for new stationary sources, and national emission standards for hazardous air pollutants so as to promote the public health and welfare and the productive capacity of the Nation, but nothing in this Act is intended to require or authorize the establishment by the Administrator of standards more stringent than primary and secondary ambient air quality standards . . .

S. 3287, 93d Cong., 2d Sess.—(1974). The fate of these proposed amendments may be determined by the 94th Congress.

compatible with an area's growth plan but may have to be turned down because of possible violation of the national air standards. EPA feels such denials will be rare because modifications in design will enable a proposed structure to be approved. That may be true, but an inherent tension exists between regulations under the Act—which are promulgated from the standpoint of improving air quality—and comprehensive, overall land use planning—which must consider and meld various factors, including among them air quality, to arrive at a desired pattern for the use of land. This conflict will increase as states and localities begin to carry out the requirements of other environmental statutes, such as the 1972 Federal Water Pollution Control Act.¹⁹⁷ Furthermore, it accentuates the need for planning and legislation that will encompass all of these varying and conflicting requirements.

The Clean Air Act, then, can be used as a springboard to land use planning; but it cannot substitute for that planning itself. If a state has a planning procedure in existence, the Clean Air Act's importance lies in its interjection of air quality as a consideration equal with economic and social development in planning the uses of land. The Act can be utilized to improve overall planning as well as air quality. To achieve this desired end, however, states must view the Act's requirements from a positive rather than an obstructionist or lackadaisical view. Treating the complex source regulations or the transportation controls as something to be avoided or as something that is purely the domain of the federal government will only hinder achievement and maintenance of the Act's primary goal—air quality—as well as stultify its tertiary benefits to land use planning.

¹⁹⁷ 33 U.S.C. § 1251 *et seq.* (Supp. III 1974).