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TRAIN V. NATURAL RESOURCES DEFENSE COUNCIL: THE GENESIS OF A NEW ERA OF FEDERAL-STATE RELATIONSHIPS IN AIR POLLUTION CONTROL

MICHAEL L. HARDY*

I. INTRODUCTION

As required by the 1970 amendments to the Federal Clean Air Act,1 the states devised and implemented comprehensive regulatory strategies2 designed to achieve and maintain the national air quality goals set by the Federal Environmental Protection Agency (EPA).3 In order to attain these goals by mid-1975,4 the implementation plans were to impose limits on the amount of pollutants various categories of sources could emit and time schedules for compliance with these emission limitations.5 Recognizing that, in some cases, total compliance might be impossible, unnecessary or unduly burdensome, a number of states adopted variance procedures enabling them to grant exemptions or deferrals to individual sources.6 Initially, the EPA did not consider these mechanisms to be beyond state authority under the Act.7 In 1974, however, the EPA reversed itself by promulgating regulations disapproving those portions of each state's strategy authorizing the granting of exemptions or deferrals once the deadline for attainment of the national air quality standards had passed.8 Thus, once the "attainment dates" had been

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4 Clean Air Act § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i) (Supp. 1975). This section provides that the national primary ambient air quality standards are to be attained "as expeditiously as practicable but . . . in no case later than three years from" the date a state's control strategy obtains federal approval. Thus, in most cases the attainment dates were to fall in late spring or early summer, 1975.
5 Clean Air Act § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (Supp. 1975). Each plan was to include "emission limitations, schedules and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such . . . standard. . . ."
7 See, e.g., 37 Fed. Reg. 10872-73 and 10891 (1972), for the EPA's approval of the Massachusetts and Rhode Island implementation plans respectively. The issue of whether states could provide for and exercise such authority were not addressed in the approvals. Note that in 1973 the EPA amended these approvals to disallow those portions of the Massachusetts and Rhode Island plans which permitted variances. 40 C.F.R. §§ 52.1131, .2079 (1974).
8 39 Fed. Reg. 34535 (1974). 40 C.F.R. § 52.26 was added which provides that "all state plans are disapproved to the extent that their enabling authority and regulations permit the deferral of compliance . . . beyond the statutory attainment dates specified
reached, each source was to be in full compliance, and the states had no power to permit source-specific ameliorative relief regardless of the difficulties imposed in conforming to the regulations.

Just as the deadlines were about to pass in most states, the Supreme Court, in a seven-to-one decision, held that the Act empowered the states to grant source-specific exemptions or deferrals even after the national goals were to have been achieved. The Court concluded that the states were at liberty to adopt whatever mix of control measures they deemed best suited to their particular situations and that the use of variances was a valid method for developing the most practical and desirable means for achieving and maintaining the national goals.

The sole issue before the Court was one of statutory construction. In addition to examining the anatomy of the statute itself, the Court analyzed the entire legislative scheme for the control of air pollution. The scope of its inquiry was expanded to include the federal-state relationship under the Act. Unless Congress responds with further amendments, this decision will most probably broaden state authority over air pollution control.

The purpose of this article is to analyze the Supreme Court's decision and to assess its impact on the federal-state relationship under the Clean Air Act. In order to understand the implications of the Court's decision, it is first necessary to examine briefly the federal-state relationship envisioned by Congress in the legislative history surrounding the 1970 amendments and then consider the decisions of various courts interpreting that relationship.

II. THE FEDERAL-STATE RELATIONSHIP UNDER THE 1970 AMENDMENTS

The 1970 amendments to the Clean Air Act came at a time of public clamor for an intensive federal commitment to improving the quality of the nation's air. They reflected congressional disappointment with the meager results of earlier efforts obtained through reliance on the initiative in the Clean Air Act.” The Administrator of the EPA took this action to conform the EPA regulations to the following decisions: Natural Resources Defense Council, Inc. v. EPA, 494 F.2d 219 (2d Cir. 1974); Natural Resources Defense Council, Inc. v. EPA, 483 F.2d 690 (8th Cir. 1973); and Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875 (1st Cir. 1973). In these cases the Natural Resources Defense Council petitioned for review of the implementation plans of Iowa, New York, Massachusetts, and Rhode Island.


See discussion in text accompanying notes 69-91 infra.
of the states. It was time to "speed up, expand and intensify the war against air pollution." The earliest federal air pollution legislation assigned primary responsibility to the states for setting and enforcing air quality standards within their jurisdictions. The role of the federal government was limited to supporting and undertaking research and providing technical assistance to state and local governments. In 1963, the federal power to abate interstate pollution in certain circumstances was granted. Certain powers of enforcement and supervision were allotted the federal government in 1967, however, the legislation essentially preserved the states' prevention and control functions. Although subject to federal supervision, the states retained the authority to establish air quality standards and to provide when and in what manner they were to be attained. Thus, with each subsequent enactment Congress slightly increased the power of the federal government.

By 1970, Congress was forced to recognize that the states were not effectively utilizing the authority reserved to them under the Act. Only ten states had approved air quality standards, and not one had endorsed a plan designed to effectuate the standards. Without such plans enforcement was impossible. Among the reasons cited for the states' failure to act aggressively was the fear that local industry might move to more lenient jurisdictions. Congress also acknowledged that the procedures for establishment of pollution standards, organizational difficulties at the federal level and weak federal enforcement authority contributed to the problem.

Seeking to avoid some of the problems with the existing laws, Congress recast the federal and state roles, greatly increasing federal power in the 1970 amendments. The states were required to meet federally mandated air quality standards within a statutorily specified period of time. Although much of the states' authority had been shifted to the

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19 See Greco, The Clean Air Act Amendments of 1970: Better Automotive Ideas from Congress, 1 Environmental Affairs 354, 388-90 (1971); Strelow, supra note 10, at 589: "In large measure the federal orientation of the 1970 law arose from the general recognition that state and local governments had failed acceptable progress towards cleaner air."
federal government, the states were by no means completely displaced. Explicitly reserved to the states was primary responsibility for controlling emissions at their sources.22

Thus, the 1970 amendments set up a federal-state partnership charging the federal government23 with the responsibility of setting air quality standards applicable throughout the country, and directing the states to achieve these standards within their jurisdictions. The amendments differed fundamentally from earlier federal legislation which had relegated the federal government to, in practical effect, supervisory participation only, a role which was dependent upon the initiative of the states.24

A. The Role of the States in the Accomplishment of the Federal Goals

The amendments provided the states with no detailed guidelines for attaining national air quality standards but merely directed the states to submit to the Administrator of the EPA a plan to "implement, attain and maintain" the federally adopted standards within nine months of the promulgation of such standards by the EPA.25 The implementation plans were to include "emission limitations, schedules, and timetables for compliance with such limitations," and such other means necessary to attain and maintain the standards.26 The national primary ambient air

22 Clean Air Act § 107(a), 42 U.S.C. § 1857c-2(a) (Supp. 1975): "Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such state . . . ."

23 The federal agency charged with the responsibility of setting the national air quality standards is the EPA. Created pursuant to suggestions of President Nixon's Advisory Council on Executive Organization, this agency acquired the regulatory authority that various other federal agencies had under federal air pollution legislation. See generally McCloskey, Reorganizing the Federal Environmental Effort, 11 Duquesne L. Rev. 478, 485 (1973).

24 According to one commentator, the purpose of the amendments was more than to effect a realignment of federal and state roles. The amendments also were to force a departure from the approach of earlier federal legislation that was thought to have resulted in the establishment of air pollution standards "commensurate with existing technology feasibility" to a "policy which forces technology to catch up with the . . . standards . . . ." Greco, supra note 19, at 391. Supportive of this view are two statements made by Senator Muskie during Senate debate:

The first responsibility of Congress is not . . . to be limited by what appears to be technologically infeasible . . . . This may mean that people and industries will be asked to do what seems impossible . . . . 116 Cong. Rec. 6091 (1970).

[P]redictions of technological infeasibility were not considered sufficient to compromise the public health. 116 Cong. Rec. 20598 (1970).

According to other commentators, Congress also apparently attempted to limit the influence of the mechanisms of the marketplace had on standard-setting. See generally Netschert, Economic Trade-Offs in Air Pollution Abatement, 1 Environmental Affairs 204 (1971); Krier, The Pollution Problem and Legal Institutions: A Conceptual Overview, 18 U.C.L.A. L. Rev. 429, 459-67 (1971). As discussed infra, several federal courts concurred with these two propositions and, in so doing, essentially undercut the authority of the states in air pollution control.


quality standards\textsuperscript{27} were to be achieved “as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan. . . .”\textsuperscript{28} The Administrator was required to approve implementation plans meeting the statutory criteria and to promulgate substitutes for those he found deficient.\textsuperscript{29}

Although the 1970 amendments shifted the burden of establishing air quality standards to the federal government, it was generally thought that they did not usurp a state’s right to choose the control tactics to be utilized as long as its methods would collectively achieve the national goals in a timely fashion.\textsuperscript{30} The provisions authorizing the states to formulate implementation plans were thought to be in furtherance of a congressional recognition that the states should have the opportunity to accommodate particular situations within their jurisdictions. Yet, because the states had only nine months in which to complete the difficult task of devising a comprehensive plan, they were unable to fully exercise their authority under the Act. Rather than developing regulations responsive to particular economic and social considerations, not only were the regulations relatively simplistic, but they were often universal in their application to broad categories of sources, rather than source-specific.\textsuperscript{31}

A number of states included variance procedures in their implementation plans so that defects and lack of specificity in the plans caused by haste in their preparation could be remedied.\textsuperscript{32} According to one com-

\textsuperscript{27}Actually the 1970 amendments prescribe two ambient air quality standards. The first standard is that which is necessary to protect the “public health,” and is called the primary ambient air quality standard. The second (and more stringent) standard, called the “secondary standard,” is that which is necessary to protect the “public welfare.” Clean Air Act § 109(a)(1), (2), 42 U.S.C. § 1857c-4(a)(1), (2) (Supp. 1975).


\textsuperscript{29}Clean Air Act §§ 110(a)(2), (c)(1), 42 U.S.C. §§ 1857c-5(a)(2) and (c)(1) (Supp. 1975). See generally text accompanying notes 83 through 92, infra for a discussion of whether the EPA must consider economic reasonableness and technical feasibility when approving state implementation plans.

\textsuperscript{30}It was felt that the states would consider local factors such as meteorological conditions, topographical context, and economic and social demands. See Note, Clean Air Act Amendments of 1970: A Congressional Cosmetic, 61 GEO. L.J. 153, 157 (1970). One commentator said:


\textsuperscript{31}Ohio, for example, adopted regulations for the control of sulfur dioxide emissions based on the degree of emission reduction necessary to achieve the national goals in the worst region in the state. The limitation derived was then to be applied to all sources in the state, even those located in areas outside of the worst region. This theoretically could lead to substantial “over-kill” because, as applied to sources outside the worst region, the degree of reduction mandated by the regulations would exceed that which would have been necessary to attain the national standards.

\textsuperscript{32}See, e.g., ARIZ. REV. STAT. ANN. § 36-1712 (Supp. 1973); GA. CODE ANN. § 88-912

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mentator, an attorney formerly with the EPA, it was thought that the 1970 amendments were not intended to prevent the states from providing for this ameliorative relief from the requirements of their implementation plans, including emission limitations, so long as the national goals would not be jeopardized.33

B. The Role of the States as Interpreted by the Federal Courts of Appeals Prior to Train

The Natural Resources Defense Council (NRDC) challenged EPA approval of several implementation plans containing variance procedures.34 The approved state criteria for obtaining variances were less stringent than those required for obtaining postponements under the Act.35 Since the NRDC maintained that the postponement provisions of the Act provided the exclusive variance procedure, any plan granting exemptions or deferrals based on less rigorous standards would be contrary to the Act and thus should not have been approved. The EPA took the position that because the Act permitted states to revise their plans even after EPA approval, variance procedures comparable to those required by the revision section would be acceptable.

This difference of opinion was not without practical importance to the states or to major air pollution sources. It reached the broad issue of whether Congress intended the states to retain any significant degree of control over the manner in which they attained and maintained the national standards after their plans had been submitted for federal approval. Of more immediate importance to the operator of a particular source, the issue concerned his exposure to citizens' suits37 and federal enforcement procedures,38 which would be invoked for failure to comply with

34 The published approvals did not, however, specifically mention the variances. E.g., 37 Fed. Reg. 10872-73 and 10891 (1972). The variances were later disapproved. 40 C.F.R. §§ 52.1131, .2079 (1974).
35 Postponements are devices by which a source can obtain a one year deferral of compliance with the requirements of an implementation plan. Applications for postponements must be made by the governor of a state prior to the deadline for compliance and will be granted if (a) good faith efforts to comply have been made, (b) compliance is technologically possible, (c) interim control measures are possible, and (d) "the continued operation of such source is essential to national security or to the public health or welfare." Clean Air Act § 110(f)(1), 42 U.S.C. § 1857c-5(f)(1) (Supp. 1975).
36 The states may revise their implementation plans subject to EPA approval. The revisions should be endorsed if the revised plans meet the requirements for approval of the original plans. Clean Air Act § 110(a)(3), 42 U.S.C. § 1857c-5(a)(3) (Supp. 1975).
37 Any person may bring a civil suit on his own behalf against any party violating an emission standard or limitation or any EPA or state order pursuant thereto in the appropriate federal district court. Clean Air Act § 304, 42 U.S.C. § 1857h-2 (Supp. 1975).
38 The Administrator of the EPA may issue orders or bring civil actions to enforce applicable implementation plans. Clean Air Act § 113, 42 U.S.C. § 1857c-8 (Supp. 1975).
an implementation plan as initially adopted. If the variances were proper, the sources obtaining variances pursuant to such plans would be immune from both. If, however, the NRDC was correct, the only way in which sources unable to comply with the implementation plans could avoid citizens' suits and federal enforcement would be by procuring a postponement. Most sources would not qualify for such relief, and would thus be without the protection they had hoped for under the state plans.

The first court to consider the issue raised by the challenge of the NRDC was the First Circuit. 39 Relying almost exclusively on its interpretation of legislative history and with little analysis of the statute itself, the court concluded that the existence of broad discretion to exempt polluters from emission limitations and timetables after the date for attainment of the national air quality standards was "inconsistent with the federal statute" and its stated objectives of imposing and effectively enforcing "specific emission standards." 40 The court reasoned that "Congressional intent could too easily be frustrated by the existence of open-ended exceptions. Sources of pollution should either meet the standards of law, or be closed down." 41

The court held that the stringent postponement provisions were to be the exclusive mechanism for hardship relief after the attainment dates. 42 Prior to those dates, however, state variance procedures were permissible. According to the court, they constituted "a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period . . . ," so long as full compliance with the emission limitations within the mandatory time period would not be jeopardized thereby. 43 The court supported the distinction between pre and post-attainment variances by inferring congressional intent, pointing out the "three year grace period" between the approval of the plan and the attainment date. 44

The First Circuit also concluded that "enforcement" and "abatement" order procedures, 45 permitting a state to take into account economic and

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40 Id. at 885.
41 Id. at 886. One commentator has concluded that the passages from the legislative history cited by the First Circuit do not support the inferences drawn by the court. Note, Variance Procedures Under the Clean Air Act: The Need for Flexibility, 15 WM. & MARY L. REV. 324, 332-33 (1973).
42 478 F.2d at 886.
43 Id. at 887.
44 Id.
45 Abatement and enforcement orders permit the states to tailor source-specific control measures on the basis of economic and technological considerations in the same fashion authorized by variance procedures. E.g., OHIO REV. CODE ANN. § 3704.03(S) (Page Supp. 1974); R.I. GEN. LAWS ANN. § 23-25-5(h) (1968).
social factors and technical feasibility when seeking to enforce compliance, like variance procedures, circumvented the provisions of the Act.46

Approximately three months later, the Eighth Circuit adopted the First Circuit's analysis and reversed the Administrator's approval of the Iowa provisions for variance and abatement orders47 allowing consideration of economic and technological factors after the attainment date had passed.48

In early 1974, the Fifth Circuit had occasion to review the Administrator's approval of those portions of the Georgia implementation plan49 which allowed Georgia officials to grant variances and directed them to take into account economic impact and technological feasibility in the discharge of their duties. In a lengthy opinion reviewing the Act and its legislative history, the court concluded that variance provisions and the statutory authority directing consideration of economic and technological feasibility were improper.50

The court's holding, however, went far beyond the decisions of the First and Eighth Circuits because it also concluded that authority to issue variances prior to the attainment date was inconsistent with the Act.51

The court reasoned that the stringent postponement provisions preempted state variance procedures:

In a statute that constituted a "challenge to do what seem[ed] impossible", seeking to "forc[e] technology to catch up with the newly promulgated standards", it was essential to include a device to ensure that ambitious commitments made at the planning stage could not readily be abandoned when the time came to meet those commitments, and to assume the costs and burdens they entail.52

Believing that Congress sought to compel unwaivering commitments to enforcement of the strict controls necessary to achieve clean air, the court concluded that Congress intended to make departures from implementation plans unusual and difficult to obtain. The court considered Congress' imposition of rigorous substantive and procedural prerequisites for postponements such as requiring that applications be made by the governor and limiting their applicability to situations where the means for compliance were unavailable and continued operation of the source was

46 478 F.2d at 889.
During the post-attainment period, the Rhode Island Director must be guided by the objective requirements of the state's implementation plan. He may not exercise discretion based on economic and social factors and notions of technical feasibility. Id.

48 Natural Resources Defense Council, Inc. v. EPA, 483 F.2d 690, 694 (8th Cir. 1973).
51 Id.
52 Id. at 401.
essential to national security. Any state procedure less stringent than the postponement provisions, according to the court, would frustrate the purpose of the 1970 amendments and was therefore invalid.

A month after the Fifth Circuit rendered its opinion, the Second Circuit adopted the distinction between pre and post-attainment variances set forth in the holdings of the First and Eighth Circuits and partially rejected the holding of the Fifth Circuit. Shortly thereafter, the EPA acceded to these holdings and promulgated regulations that adopted the pre and post-attainment distinction created by the First Circuit, and utilized a portion of the Fifth Circuit's decision disallowing consideration of availability of technology, source hardship or economic burden as a basis for providing a compliance date postponement beyond the attainment date. According to the EPA:

The new language has been added as a means of discouraging source-initiated state court litigation over the reasonableness of enforcement orders . . . without such qualifying language, it is feared that some sources might choose to litigate properly constructed compliance schedules . . . on the grounds that a later compliance date is warranted because of hardship, economic burden, or technological difficulties.

Almost two months after the EPA had promulgated these regulations, the NRDC (and the EPA) suffered defeat. The Ninth Circuit rejected the First Circuit's distinction between pre and post-attainment variances, and concluded that the relevant distinction is the impact of the variance on the attainment and maintenance of the national air quality standards. If the variance would not prevent the timely attainment or subsequent maintenance of the national air quality standards, the Ninth Circuit reasoned, it was permissible both before and after the attainment date. After reviewing the legislative history the court concluded that Congress meant to allow consideration of economic and technological feasibility when the attainment of the national standards by the deadline would not be threatened. States were not to be totally committed to their initial plans "without any flexibility whatsoever." The court also

53 Id. at 402.
54 Natural Resources Defense Council, Inc. v. EPA, 494 F.2d 519, 523 (2d Cir. 1974).
57 Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905 (9th Cir. 1974).
58 Id. at 912-13.
59 Id. at 913-14.

As long as a possible variance from a state plan will not preclude the attainment or maintenance of such standards, we discern no legislative intent to commit a state, in toto, to its initial plan, without any flexibility whatsoever. We do not believe . . . that the Act forestalls consideration of economic and technological feasibility when a variance that will not interfere with national ambient air quality standards is contemplated. Id.
pointed out that no variances would be effective until sanctioned by the EPA. 60

III. STATE FLEXIBILITY AFTER THE ATTAINMENT DATES

As a result of the decisions of the First, Eighth, Fifth, and Second Circuits, and the EPA regulations conforming to them, no state had authority to revise the substantive content of its implementation plan for any individual source after the attainment dates had been reached. Such revisions were available only for actions tantamount to changes in generally applicable requirements. 61 Thus, even if a state were to discover, after it had promulgated its implementation plan, that a requirement of its plan was unnecessary or unreasonable in its application to a particular source, it was nevertheless required to compel compliance therewith, regardless of the economic and social burdens imposed on the source. If the source were a power plant, the state could do nothing to alleviate the burden the rate-payers would be required to bear; or, if the source were a marginally profitable industrial operation, the state could not take action to protect the employees from the possibility of a shutdown.

Had the states been permitted to grant source-specific relief taking into account facts such as economic impact or local hardship, and had such actions been treated as effective revisions of their plans, the states would have been able to improve upon decisions reached as a result of the time pressure under which they developed the original plans. Since, the states could not revise their plans for the benefit of specific sources and accordingly lacked the authority to insulate sources from citizens' suits and federal enforcement, the arena for such policy decisions became the federal courts or the regional offices of the EPA.

IV. THE FEDERAL ROLE AFTER THE ATTAINMENT DATES

Recognizing that there would be a large number of sources unable to achieve compliance by the mid-1975 deadlines and that few states intended to seek postponements to obtain temporary relief for these sources, the EPA announced that it would utilize its enforcement authority to secure compliance. 62 The EPA did not, however, want to assume exclusive authority or responsibility for assuring that sources achieve compliance.

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60 Id. at 915. See also Metropolitan Coalition for Clean Air v. District of Columbia, 511 F.2d 809 (D.C. Cir. 1975).


[The enforcement authority] is not intended to discredit use of the . . . postponement procedure for obtaining post deadline compliance date extensions . . . . By contrast the stated purpose of these regulations is not to provide plan protection to sources in violation, but rather to assure that such sources achieve compliance, albeit after the deadlines have passed. Id.
after the attainment dates had passed. Therefore, the EPA promulgated proposed regulations to guide the states in their enforcement efforts. The proposed regulations delineate specifically what EPA considers to be effective enforcement after a deadline, so that any state will know whether the action it is taking would be consistent with that which the Administrator would take in the same situation, and so that the source may gain some assurance that its conscientious compliance efforts, in response to a State issued enforcement order, will be relatively free from federal challenge.\textsuperscript{63}

The proposed regulations require the EPA to issue post-attainment date enforcement schedules\textsuperscript{64} after affording the public the opportunity to comment thereon.\textsuperscript{65} These timetables should mandate compliance "as expeditiously as practicable,"\textsuperscript{66} setting forth appropriate increments of progress\textsuperscript{67} and suitable interim control measures.\textsuperscript{68}

If a state were to establish programs conforming to the EPA's proposed rules, it would be able to do what the decisions of the First, Eighth, Fifth and Second Circuits said was impossible — that is, to grant extensions to almost any source without meeting the rigid requirements of the postponement provisions. Such procedures, however, would not insulate the source from citizens' suits, as the postponement provisions would, but perhaps would assure that source some freedom from independent federal action.

V. THE VALIDITY OF STATE VARIANCE MECHANISMS AS INTERPRETED BY THE SUPREME COURT

Differing with the Fifth Circuit's conclusion that states lacked authority to issue pre-attainment date variances for individual source relief except through the stringent and generally difficult-to-obtain postponement provisions, the EPA prosecuted an appeal to the United States Supreme Court.\textsuperscript{69} In view of the EPA's adoption of regulations precluding post-attainment date variances, the scope of the EPA's appeal "on its facts . . . [was] . . . limited to the validity of the Georgia variance provision insofar as it authorized variance before Georgia's attainment date, which . . . [was] . . . in July, 1975."\textsuperscript{70}

The Court, however, did not confine its inquiry or its holding to the limited question presented. It pointed out that

\textsuperscript{63} Id.
\textsuperscript{64} 40 Fed. Reg. 14881 (1975). (Proposed 40 C.F.R. § 65.3.)
\textsuperscript{65} Id. (Proposed 40 C.F.R. § 65.4.)
\textsuperscript{66} Id. (Proposed 40 C.F.R. § 65.3(a)(1).)
\textsuperscript{67} Id. (Proposed 40 C.F.R. § 65.3(a)(2).)
\textsuperscript{68} Id. (Proposed 40 C.F.R. § 65.3(a)(3).)
\textsuperscript{70} Id. at \_ S. Ct. (1975).
[t]he Agency nonetheless has not abandoned its original view that the revision section authorizes variances which do not interfere with the attainment or maintenance of national ambient air standards. Moreover, the Agency is candid in admitting that should we base our decision on its interpretation of [the revision section], the decision would support the approval of the implementation plans which would provide for variances effective after the attainment date.71

After extensively analyzing the language of the 1970 amendments and carefully examining legislative history, the Supreme Court concluded that the Fifth Circuit erred in holding that postponements were the exclusive means by which individual sources could obtain relief from state implementation plans.

Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts.72

A fair reading of this language would indicate that the Court did not disapprove, as a matter of law, the construction of the various circuits. It seemed merely to hold that the circuits erred when they substituted their interpretation of the Act for the reasonable one of the EPA. Thus, on its face, the Court's holding rested on the basic canon of administrative law that a reviewing court may not substitute its judgment concerning an interpretation of a statute for that of an agency charged with its administration if the agency's interpretation is sufficiently reasonable.

A reading of the opinion as a whole suggests, however, that this was not the basis of the decision. As the Court admitted, the issue of statutory construction

reaches the broader issue whether Congress intended the states to retain any significant degree of control of the manner in which they attain and maintain the national standards. . . .73

The Court defined state authority under the Act to include use of the revision mechanism to grant source-specific variances which do not compromise the basic statutory mandate that, with carefully circumscribed exceptions, the national primary ambient air standards be attained in not more than three years, and maintained thereafter.74

Postponements were distinguished from revisions. Whereas revisions do not affect the achievement of the national goals,75 postponements are a

71 Id.
72 Id. at __, 95 S. Ct. at 1479-80.
73 Id. at __, 95 S. Ct. at 1481.
74 Id. at __, 95 S. Ct. at 1491.
75 Id.
“safety valve by which may be accorded, under certain carefully specified circumstances, exceptions to the national standards themselves.”

The form of the source-specific relief, suggested the Court, need not be limited to deferrals or modifications. Outright exemptions seem to be equally valid. The controlling criterion is whether the variance will affect attainment and maintenance of the national goals. No state variance action, however, is self-executing. It must be submitted to and approved by the EPA, subject to the same general requirements applicable to the original implementation plans. Thus, the EPA is relegated to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations necessary to the achievement of the national standards.

Therefore, according to the Court, the states did in fact retain a great deal of flexibility to “fine-tune” their implementation plans in their specific application to individual sources, with the only limitation being that such “fine-tuning” not compromise the timely attainment and subsequent maintenance of the national primary standards. Accordingly, the states could refine their control programs in response to local situations in a way and at a level of specificity that was realistically unavailable to them when they had to rush to meet the nine month deadline for submission of the plans.

In sum, as a result of the Court’s decision, the states retain authority to grant source-specific variances from their federally approved implementation plans, both before and after their specified attainment dates, so long as the variances do not jeopardize the timely attainment of the pertinent national standards or interfere with their subsequent maintenance. Until the variance is granted by the state and federally approved as a plan revision the source must comply with the requirements of the implementation plan and is exposed to citizens’ suits and federal enforcement proceedings seeking compliance with the plan. If the requisites for a variance cannot be met the state can only apply to the EPA for a one year deferral of the date by which total compliance is required of a particular source. During the pendency of these postponements, the

76 Id. at ___, 95 S. Ct. at 1482.
77 Id. at ___, 95 S. Ct. at 1486-87. “In the implementation plan context, normal usage would suggest that . . . a revision is a change in a plan which deletes or modifies the requirement.” Id.
78 Id.
79 Id. at ___, 95 S. Ct. at 1482.
80 The EPA has published notice of an interim variance policy that will conform existing regulations to the Court’s holding in Train. 40 Fed. Reg. 22587 (1975). Variances will be granted only in clear cases upon the state’s submission of current ambient data and a modeling calculation designed to show that the individual source involved will not interfere with attainment of the pertinent national ambient air quality standard by its attainment date in the appropriate air quality control region . . . [and that] . . . during the period of the variance the source will not interfere with maintenance of such standard. Id.
81 The issue of whether more than one postponement can be granted to a particular source has not yet been decided. Train v. Natural Resources Defense Council, Inc., ___ U.S. ___, 95 S. Ct. 1470, 1485 n.21 (1975).
source would be free from the possibility of citizens' suits and federal enforcement actions. If, however, a source could not satisfy the stringent criteria of the postponement provisions and could not establish its qualifications for a variance, then it would be subject to the proposed federal enforcement policy, including final compliance with the substantive contents of the implementation plan as expeditiously as practicable, appropriate increments of progress, interim control measures, and possibly, punitive sanctions.82

A. Ramifications of the Court's Decision

The Train decision may be an important indicator of how the Supreme Court will eventually resolve the conflict among the circuits regarding whether economic and technological features should be considered when a state implementation plan is approved.83 The Administrator has claimed, in several cases, that he need not take into account these considerations with regard to specific sources when evaluating state plans. The Third and Fourth Circuits have held otherwise.84 Two other circuits have noted that these considerations are more appropriately left to, or may be raised in, enforcement proceedings.85 The Eighth Circuit has gone so far as to state that the Administrator is precluded from disapproving plans on the basis of economic unreasonableness or technological infeasibility;86 such factors are political questions to be weighed by the states when determining the control measures to be used.87 In the Eighth Circuit's opinion, the EPA is limited to deciding whether the chosen control measures will meet the national standards by the dead-

83 Judicial review of the Administrator's approval of state implementation plans may be had pursuant to the Clean Air Act, § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (Supp. 1975).
84 Duquesne Light Co. v. EPA, No. 72-542 (3d Cir., Aug. 21, 1975); St. Joe Minerals Corp. v. EPA, 509 F.2d 743 (3d Cir. 1975); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973).
85 Indiana & Michigan Elec. Co. v. EPA, 509 F.2d 839 (7th Cir. 1975); Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973).
87 It is clear that Congress intended to preclude economic and technological factors from the Administrator's consideration of whether to approve an implementation plan. Even if these grounds are considered by the Administrator, the mandatory and directory language of [§ 1857c-5(a)(2)] would preclude using such grounds as a basis for setting aside his action on a petition for review . . . [of his approval].

As each state was free, within the federal standards, to adopt its own plan for meeting the challenge of reducing air pollution, it is appropriate that the decisions as to what would be required in terms of economic cost and technological innovation were left to the states. These decisions were left by the Congress to the states and are not to be reviewed by means of a . . . [petition for review of the approval].

87 Id. at 219.
It is not our role to sit as a super-legislature balancing the necessity of compliance with the clean air standards against competing economic and technological considerations. Id.
The Supreme Court in *Train* did not have the same question before it as did the circuits, and thus, its position may be unclear as to whether a source can seek to compel a state to exercise its discretion and grant relief. Yet in view of the Court's strong language relative to the states' broad discretion and the EPA's limited standards, it may well be that the Supreme Court would hold that air pollution sources do not have recourse to the EPA and the courts if a state chooses not to grant the ameliorative relief requested.89

For air pollution sources, however, this judicial affirmance of the states' significant policymaking role in air pollution control may well represent a two-edged sword. On one hand, the states have flexibility to tailor source-specific ameliorative relief. On the other, if a state chooses not to exercise this discretion, the source may have no recourse to the EPA or to the federal courts to compel the granting of such relief.

If a source cannot convince the appropriate state to make a revision of its plan, and if the implementation plan has been federally approved, the only avenue for relief would appear to be review in the federal courts of appeals on any grounds arising after the expiration of the time for review of the initial implementation plan's approval.90 Whether such relief is available for reasons of technological infeasibility or economic unreasonableness is not firmly established, for the same reasons discussed above with respect to the split in circuits relative to the considerations for approval of an implementation plan. The Eighth Circuit, the only circuit to have this specific section before it, believes that such relief is available only upon discovery of new information relating to the protection of health and welfare, and not to new information relating to technological innovation or lack thereof, or to cost increases not foreseen at the time of the Administrator's approval of the implementation plan and thus not asserted in a petition for review within 30 days.91

VI. CONCLUSION

The Supreme Court's decision may well mark the beginning of a new era of federal-state relationships, defining for the states a greater flexibility, free of federal interference, in devising and developing their policy

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88 It should be noted that the measures chosen by the states must include those types of controls enumerated in the Act. In Big Rivers Elec. Corp. v. EPA, Nos. 74-2015 and 74-2020 (6th Cir., Sept. 4, 1975), the court upheld the Administrator's disapproval of the Kentucky implementation plan which utilized alternate control strategies rather than emission limitations.


choices as to the means of achieving within their jurisdictions the attainment and maintenance of the national air quality goals. This decision should represent a good working solution to the problem that has resulted from the emphasis on federal activity under the 1970 amendments—that is, how to achieve optimum interaction among the various levels of government so that each plays an important role in controlling air pollution. As one commentator has perceived, state and local officials have begun to resist the expansion of the EPA into the role that was thought left to the states, the control of air pollution at its sources in a way that is responsive to local needs and circumstances.

A number of state and local officials . . . feel that the Clean Air Act has created too great a federal "big brother" phenomenon and that communities should be given more latitude to decide how and when to achieve more broadly stated federal goals. There is a growing recognition that if regulations impacting heavily on people's lifestyles are developed far away from the "grass roots," the public will neither support nor accept them.92

Thus, the Supreme Court's decision reverses a trend, commencing with the early circuit decisions, that tended to centralize policy roles in the Federal EPA. But in affirming great latitude in the states in the selection of the means for the control of air pollution and in relegating the federal government to a secondary role as to the selection of those means, the Court may have effectively limited air pollution sources to the states for relief, without any basis for appeal to the EPA or to the federal courts if the states choose not to exercise the great latitude they now have to refine their control measures in their specific application.

92 Strelow, supra note 10, at 391.