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THE CLEAN AIR ACT AND SIGNIFICANT DETERIORATION OF AIR QUALITY: THE CONTINUING CONTROVERSY

James I. Hamby*

INTRODUCTION

The Clean Air Act of 1970 is the latest in a series of Federal enactments designed to meet this nation's air pollution problem. The Act retained the broad purposes of its predecessors and set

* Staff Member, ENVIRONMENTAL AFFAIRS.


For purposes of this discussion the Clean Air Act of 1970 will be referred to by its full name as just noted, by "Clean Air Act" or "the Act" when appropriate. Any other statutes will be referred to by their full titles.


For a brief summary of the aforementioned legislation, see Non-Degradation—Clean Air Act and Amendments Held To Mandate A Policy Prohibiting Significant Deterioration of the Air Quality in Areas of Relatively Clean Air, 2 FORDHAM URBAN L.J. 136 (1973) (hereinafter cited as Clean Air Act Held Prohibiting Significant Deterioration); for a more detailed study of the Air Quality Act of 1967, see Trumbull, Federal Control of Stationary Source Air Pollution, supra note 1.

3 Supra note 2. Each of the three major pieces of air pollution legislation enacted since The Air Pollution Control Act of 1955 has included four broad purposes. The substance of the four purposes has remained unchanged; the language has been, with minor exceptions, identical. Those purposes, according to 42 U.S.C. § 1857(b) (1)-(4) of the Clean Air Act, are as follows:

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
forth significant new provisions for the achievement of those purposes.

Primary responsibility was placed upon each state for assuring air quality within its own boundaries. The Administrator of the Environmental Protection Agency (EPA) was to issue national primary and secondary ambient air quality standards establishing the maximum acceptable concentrations of pollutants for the ambient air. Each state was to submit to the Administrator for his approval a plan providing for the implementation, maintenance, and enforcement of such primary and secondary standards. The Administrator's approval was conditioned upon eight detailed requirements. Following consultation with appropriate state and local officials, the Administrator was to designate air quality control regions for the purpose of developing and carrying out the requirements of state plans and to assist in the control of pollution problems overlapping state boundaries. States were allowed to adopt air quality stan-

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

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


National primary ambient air quality standards are standards "the attainment and maintenance of which in the judgment of the Administrator . . . are requisite to protect the public health." Id. §1857c-4(b)(1).

A national secondary ambient air quality standard "shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Id. §1857c-4(b)(2).

"'Ambient air' means that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. §50.1(e) (1971).


Id. §1857c-5(a)(2). A State plan, in order to meet the Administrator's approval, must:

(1) provide a deadline of not more than three years if meeting a national primary ambient air quality standard; specify a "reasonable time" if complying with a secondary standard;

(2) include emission limitations, schedules, and timetables for compliance;

(3) include provisions for the monitoring, compilation, and analysis of ambient air quality data and for the dissemination of such data;

(4) include a procedure for review of new source locations;

(5) contain adequate provision for intergovernmental co-operation;

(6) provide adequately for personnel, funding, installation of monitoring equipment, and periodic reports;

(7) provide for periodic inspection and testing of motor vehicles to enforce emission standards;

(8) provide procedures for review of the plan itself.

Id. §1857c-5(a)(2)(A)-(H) (summary).

10 Id. §1857c-2.
The Clean Air Act of 1970 clearly required a state with heavily polluted air to adopt a plan for improving its ambient air quality “up” to the level of the national standards. However, an important question arose as to whether a state whose air quality was higher than the national ambient standards might adopt a plan that permitted its air to deteriorate “down” to the level of those standards.

Before the EPA Administrator could approve any state plan submitted pursuant to the Clean Air Act of 1970, Sierra Club v. Ruckelshaus was filed in the United States District Court for the District of Columbia. Plaintiff Sierra Club originally sought a temporary restraining order enjoining the EPA Administrator from approving any portion of a state air pollution plan which would allow degradation of existing air, even if the quality of the air was higher than levels allowable by the national standards.

EPA Administrator William D. Ruckelshaus believed that he had no authority to require state implementation plans to prevent degradation of existing air quality to the level mandated by national standards. To support his position he cited EPA Regulations on...
the Requirements for Preparation, Adoption and Submittal of Implementation Plans which provided that:

In any region where measured or estimated ambient levels of a pollutant are below the levels specified by an applicable secondary standard, the State implementation plan shall set forth a control strategy which shall be adequate to prevent such ambient pollution levels from exceeding such secondary standards.19

The Sierra Club, however, claimed that the Administrator had not only the authority but also the duty to prevent degradation of existing air.20 It sought a declaratory judgment that section 51.12(b), in allowing "significant deterioration" of air quality, violated the purposes of the Clean Air Act of 1970 and was, therefore, invalid.21

The district court agreed with the Sierra Club. It declared that the Clean Air Act's mandate "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"22 indicated a Congressional intent to improve the nation's air quality and prevent its degradation regardless of how clean the air might be in different parts of the country.23 The decision in Sierra Club was also based upon a consideration of the Act's legislative history and administrative interpretation, portions of which were highlighted by two apparently "self-contradictory" and "irreconcilable"24 regulations25 which, according to the court, pointed out the weakness of the EPA's position. The court concluded that the Clean Air Act of 1970 was based primarily on a policy of non-degradation and that section 51.12(b) violated this policy and was, therefore, invalid.26

Acting on this conclusion, the district court issued a preliminary injunction enjoining the EPA Administrator from approving any state implementation plan under 42 U.S.C. § 1857c-527

19 Id. at 256. The original text of §51.12(b) did not include the language "State implementation" in the section's last clause. 40 C.F.R. §51.12(b) (1971).
20 344 F. Supp. at 254.
23 344 F. Supp. at 255.
24 Id. at 256.
25 See text at note 19, supra. 40 C.F.R. §50.2(c) (1970) provides:
The promulgation of national primary and secondary air quality standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any State.
26 344 F. Supp. at 256.
27 Section 1857c-5 sets forth the requirements which each State implementation plan must meet in order to gain the Administrator's approval. See note 9, supra.
unless he approves the State plan subject to subsequent review by him to ensure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the administrator28 (emphasis added).

The preliminary injunction further directed the Administrator to promulgate within six months regulations prescribing steps to be taken by states to prevent significant deterioration in existing air quality.29 Subsequently, the District of Columbia Court of Appeals affirmed Sierra Club per curiam30 and the United States Supreme Court, in Fri v. Sierra Club,31 affirmed the Court of Appeals by an equally divided court, Justice Powell abstaining.32

The non-degradation issue remains in a state of confusion. The question of whether the Clean Air Act of 1970 actually embodies a policy of non-degradation has not been squarely faced.33 Yet, the


For the sake of simplification, the phrase "not permit significant deterioration" or language similar thereto will be referred to as "no significant deterioration." See note 46, infra.

29 Nondegradation Hearings, supra note 28, at 5.


31 412 U.S. 541 (1973). William D. Ruckelshaus, Administrator of the EPA at the time Sierra Club was filed in the district court, resigned before the appeal to the Supreme Court. Robert W. Fri became Acting Administrator, thereby replacing Ruckelshaus as petitioner.

For a summary of the oral arguments of Sierra Club and the Justice Department in Fri, see Bolbach, supra note 1, at 22-23.

32 A decision by an equally divided Supreme Court binds the parties involved as if it were unanimous. It does not mean, however, that the pertinent legal principle has been accepted by the Court. The Court has emphasized that "the lack of agreement by a majority of the Court on principles of law involved prevents it from being an authoritative determination for other cases." United States v. Pink, 315 U.S. 203, 216 (1942).


33 See notes 30-32, supra and accompanying text. Two decisions have touched tangentially on the issue. In Natural Resources Defense Council v. Environmental Protection Agency, 489 F.2d 390 (5th Cir. 1974), a case concerning the Georgia implementation plan, the Court of Appeals for the Fifth Circuit recognized non-degradation as "an important goal of the [Clean Air] Act" (id., at 408), and used non-degradation as one basis for its holding that dispersion enhancement techniques were not an acceptable means of attaining air standards. (The Supreme Court, in Train v. Natural Resources Defense Council, Inc., 95 S. Ct. 1470 (1975), reversed the judgment by the Fifth Circuit and remanded the case. The Court did not discuss non-degradation.)

In City of Highland Park v. Train, 374 F. Supp. 758 (N.D. Ill. 1974), the district court, hearing a suit to force the EPA to promulgate the NSD regulations immediately, refused to issue injunctive relief, stating that "it has not been conclusively determined that the Clean Air Act requires prevention of significant deterioration of air quality." Id. at 774. The Act "strongly indicates," said the court, that NSD provisions must be included only "as may be
court order in *Sierra Club* directed the EPA to formulate regulations effectuating such a policy. The EPA has never completely accepted the district court's conclusion.\(^\text{34}\) Not surprisingly, the EPA's final regulations on "no significant deterioration,"\(^\text{35}\) issued November 27, 1974, were criticized by both environmentalists and industrialists\(^\text{36}\) and subjected to immediate legal attack.\(^\text{37}\) Finally, legislators have entered the controversy, as a result of which various proposals on non-degradation are pending in both branches of Congress.\(^\text{38}\)

This discussion will briefly explore a number of the above and related issues. The *Sierra Club* decision will be analyzed in an attempt to define accurately the scope of its mandate and the EPA regulations will be examined to determine whether they sufficiently carry out that mandate. Distinct from the issue of whether the EPA regulations comport with the *Sierra Club* order is the question of whether the reasoning of that order is sound. Thus, the language of the Clean Air Act will be examined to determine whether it provides a true and accurate legal foundation for the *Sierra Club* decision. Finally, pending legislation will be explored for proposals which may afford constructive solutions to the problems associated with *Sierra Club* and the regulations which it mandated.

\(^{34}\) Id. (The Court of Appeals for the Seventh Circuit, on June 10, 1975, affirmed the lower court, dismissing the suit on procedural grounds. *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975)).


\(^{37}\) Environmentalists have criticized the regulations as rife with loopholes and in violation of the *Sierra Club* mandate. Representatives of industry have invoked the specter of economic stagnation and urged that the regulations be relaxed if not completely eliminated.

For a brief summary of industry's reaction to *Fri v. Sierra Club* and counterarguments by Laurence I. Moss, President of Sierra Club, and its legal counsel Bruce J. Terris, see 4 BNA ENV. REP.-CURR. DEV. 211-12, 527-28 (1973). For a brief summary of Sierra Club's opposition to the EPA's initially proposed NSD regulations, see *id.* at 732. HEW Secretary Casper Weinberger's views on the possibility of unequal economic burdens being imposed by the regulations and additional comments on the proposed regulations by spokesmen from state, county, and city governments and agencies and environmental, industrial, and scientific organizations are found at *id.* at 1207-08, 5 BNA ENV. REP.-CURR. DEV. 2043-44 (1975) and 6 BNA ENV. REP.-CURR. DEV. 246-47, 697-98 (1975).

\(^{38}\) Petitions for review of the EPA regulations were filed in the Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits. All petitions for review of the EPA's significant deterioration regulations were transferred June 16, 1975, by the Court of Appeals for the Sixth Circuit to the Court of Appeals for the District of Columbia. *Dayton Power and Light Company v. Environmental Protection Agency*, 520 F.2d 703 (6th Cir. 1975).

\(^{\text{infra}}\) See text at notes 160-85, *infra*. 
I. SIERRA CLUB V. RUCKELSHAUS: WHAT DID IT REALLY SAY?

On its face, the scope of the Sierra Club order is confusing. This uncertainty stems not only from the court's failure to define "significant deterioration," but also its imprecise use of the terms "non-degradation" and "no significant deterioration." Common sense says that "non-degradation" means "no degradation," or "no deterioration"; further, that "no significant deterioration" does not mean "non-degradation" or "no deterioration," but some allowable measure of deterioration, or degradation, between zero and whatever is defined as "significant." Thus, the concepts of "non-degradation" and "no significant deterioration" are not semantically synonymous.

This clear distinction is not maintained in Sierra Club. While the court's opinion concludes that the issue is one of "non-degradation," the injunction orders regulations to prevent "significant deterioration." The court gives no express guidance as to how it intended either term to be defined. "Significant deterioration" is mentioned only three times, and two are quotations from agency regulations. At no point does the court explain the reasoning by which it equates "non-degradation" and "no significant deterioration." That it does so, however, is the only apparent way to reconcile the plain language of the district court opinion and the preliminary injunction.

Commentators on the Sierra Club decision and related issues have not reached consensus on the meaning of these critical terms. Three writers declare that non-degradation is a term of art meaning simply that existing air quality will not be allowed to deteriorate, and yet appear to accept without question the district court's couching its injunctive order in terms of "no significant deterioration." They do not explain how they or the district court reconciled the apparent definitional differences.

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39 See text at note 26, supra.
40 See text at notes 28-29, supra.
41 344 F. Supp. at 255-56.
42 See Clean Air Act and Nondegradation, supra note 16, at 802; Clean Air Act Held Prohibiting Significant Deterioration, supra note 2, at 142 & n.32; King, Federal Land Use Controls For Clean Air, 3 Env. AFF. 507, 509 (1974) (hereinafter cited as Federal Land Use Controls).
43 One author hints at a recognition of the inherent inconsistency of the two terms and the attendant conceptual problem. "Non-degradation is to be implemented by the technique of preventing significant deterioration. A 'no significant deterioration' standard implies some flexibility because presumably some deterioration is acceptable until it reaches significant proportions." Federal Land Use Controls, supra note 42, at 509-10 (emphasis added).
A recent comment comes closest to clarifying the definitional confusion and identifying the general grounds on which the district court decision rested:

The district court decision mandated neither enhancement of air quality in clean air areas nor zero pollution increase. As the Sierra Club has acknowledged, "Fri v. Sierra Club was not a non-degradation case. The district court explicitly ordered that only significant deterioration of air quality is prohibited. This obviously means that some non-significant deterioration is allowed." Therefore even though zero pollution or zero pollution increase (absolute non-degradation) might best protect against unknown or unquantified health and welfare effects, the court has not ordered that result; rather, it has authorized some allowable degradation relative to existing air quality. Between the limit of absolute nondegradation at one end and the secondary standards at the other there is room for considerable disagreement.

Under this view of the decision, the court is seen as equating “non-degradation” and “no significant deterioration.” “Non-degradation” is not a term of art meaning “no deterioration,” but a term of art meaning “no significant deterioration” (NSD), however that concept may happen to be defined. In the absence of further clarification this explanation of the court’s use of the terms is persuasive.

Assuming that the district court did not conceive of “non-degradation” in its absolute sense but rather as allowing some measure of deterioration less than “significant,” one must still ask whether the court afforded any indication as to its own interpretation of NSD. Neither the district court opinion nor the injunction defines “significant deterioration,” and, as noted, the continuum between absolute non-degradation and the national secondary standards is a long one.

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Another commentator notes that “non-degradation” and “prevention of significant deterioration” are equivalent. She does not explain whether she believes the district court equated the terms and, if so, why, or whether she alone considered them equivalent for the purposes of her comment. Nondegradation Controversy, supra note 16, at 314-15 & n.7.

44 Nondegradation Hearings, supra note 28, at 4-5.
45 Clear Day, supra note 32, at 752.
46 For purposes of simplicity and consistency, the concepts of “non-degradation,” “significant deterioration,” and “prevention of significant deterioration” will be merged into the phrase “no significant deterioration” (NSD). Thus, it will be forthwith assumed that Sierra Club concluded that the Clean Air Act of 1970 embodied a policy of NSD and that the ensuing injunction ordered regulations embodying a policy of NSD.
47 For a view of the problems involved in defining “significant deterioration,” see Introduction to 1973 Proposed Regulations, supra note 34, at 18987-88.
48 See text at note 45, supra.
The court began by commenting on the Clean Air Act’s foremost purpose, which is “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.” 49 “On its face,” the court noted,

this language would appear to declare Congress’ intent to improve the quality of the nation’s air and to prevent deterioration of that air quality, no matter how presently pure that quality in some sections of the country happens to be 50 (emphasis added).

The latter interpretation of the statutory language is narrow. 51 While accurately characterizing the “protect and enhance” language of section 1857(b)(1) 52 as directing prevention and improvement, 53 the court limits the scope of that directive by the phrase “no matter how presently pure that quality . . . happens to be.” 54 This language implies that air quality alone, and nothing more, is to be considered in defining NSD. Section 1857(b)(1), however, might sustain a broader interpretation of NSD, one which considers the quality of existing air within a larger context of social and economic factors. 55 The narrower meaning assigned by the court more nearly embraces an interpretation of NSD as pure non-degradation.

The district court continues its strict reading of section 1857(b)(1) in its treatment of the National Air Pollution Control Administration’s (NAPCA) guidelines. 56 The NAPCA was responsible for the effectuation of the directives of the Air Quality Act of 1967. 57 Since a purpose of that act was substantively identical with the language

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344 F. Supp. at 255.

51 This discussion defines a “narrow” or “strict” interpretation of NSD as one which would confine the limits of “significant deterioration” as closely as possible to the standard of pure non-degradation or no deterioration. The consideration of any factors other than existing air quality and the most efficient means of emission controls which would allow the quality of the air to be degraded any further toward the secondary standards would be considered a broad or less strict interpretation of the scope of NSD.


53 See text at note 50, supra.

54 Id.

55 See text at notes 133-40, infra.

56 The two EPA regulations which highlighted for the district court the weakness of the EPA position are immaterial here. 40 C.F.R. § 50.2(c) (1970); id. § 51.12(b) (1971). Their significance in the district court opinion goes to the question of the existence of NSD in the Clean Air Act. The two regulations do not bear directly upon a consideration of NSD’s scope.

For a discussion of the apparently conflicting administrative interpretation of non-degradation as represented by §§51.12(b) and 50.2(c), see Clean Air Act and Nondegradation, supra note 16, at 822-25.

57 Supra note 2.
of section 1857(b)(1), the NAPCA’s administrative guidelines were considered by the court to be helpful in determining the meaning of the language of that section.

The administrative guidelines promulgated by the NAPCA provided:

[A]n explicit purpose of the Act is to protect and enhance the quality of the Nation’s air resources. Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in a substantial portion of an air quality region clearly would conflict with this expressed purpose of the law (emphasis added).

The guidelines, according to the district court, “point up the significance of the ‘protect and enhance’ language.” Thus, the court’s purpose in alluding to the guidelines was merely to highlight a phrase which it had already read narrowly as embodying a Congressional intent “to improve the quality of the nation’s air and to prevent deterioration of that air quality, no matter how . . . pure . . .” (emphasis added).

The NAPCA guidelines introduce the concept of “significant deterioration” into the district court opinion for the first time. The briefest analysis of the phrase “significant deterioration” would have revealed the wide range of possible definitions of the concept. The court, however, neither attempted to highlight the presence of the idea of “significant deterioration” nor ascribe to it any particular meaning. No attempt was made to distinguish “significant deterioration” from the idea of “no deterioration” on which the opinion began. Instead, the district court allowed the NAPCA guidelines to stand alone, uninterpreted. This silence, together with the court’s purpose in citing the guidelines, further supports a reading of Sierra Club as a narrow definition of NSD.

After examining section 1857(b)(1) and the NAPCA guidelines, the court turned its attention to portions of the Clean Air Act’s legislative history, first noting the Congressional testimony of Secretary of HEW Robert Finch and Under Secretary of HEW John

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58 Supra note 3.
60 344 F. Supp. at 255.
61 Id.
62 See text at note 59, supra.
63 Id.
64 See text at note 50, supra.
65 See text at note 60, supra.
Veneman. Both, according to the court, testified that neither the Air Quality Act of 1967,66 nor the proposed Clean Air Act of 1970,67 would permit the quality of the air to be “degraded.”68 Again, the court did not use the flexible language “significant deterioration,” but the more precise, definite, and narrow “degraded.”

Finch, however, never did use the word “degrade” in his testimony. The Secretary opposed “significant deterioration of air quality in any area,” adding that “[w]e shall continue to expect States to maintain air of good quality where it now exists”69 (emphasis added). This language is open to a much broader reading than that given to it by the district court. The maintenance of air of “good” quality is not inconsistent with a definition of NSD in which certain very high levels of air quality are partially sacrificed for the achievement of other goals—e.g., some manner and degree of economic growth. The district court’s characterization of Finch as opposing actions which would allow existing air quality to be “degraded” is a severe reading of his testimony, and may be read as an effort by the court to restrict the definition of NSD.

The court next turned to the Senate Report accompanying the bill which became the Clean Air Act of 1970,70 quoting the pertinent part as follows:

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 quality71 (emphasis added).

Notwithstanding the qualifying phrase “to the maximum extent practicable,”72 the thrust of this passage is one of strict non-degradation. “Continued maintenance” is consistent with the “pro-

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68 344 F. Supp. at 255.
69 Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works, U.S. Senate, 91st Cong., 2d Sess., 132-33 (1970). Veneman, too, used the language “significant deterioration,” adding, however, that “HEW will not condone 'backsliding.' If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air even further, even though they may be below national standards.” Id. at 143.
71 344 F. Supp. at 255. The district court, in fact, misquoted the Senate Report. This misquotation is noted in Bolbach, supra note 1, at 22. The Senate Report actually said “the Secretary should.” The court also failed to cite the entire passage. If read in its entirety the section takes on a broader scope than that given it by the district court.
72 See text at notes 153-56, infra.
tect and enhance" language which was the object of the court's attention at the outset of its discussion of the merits. Moreover, "continued maintenance" upholds the court's interpretation of Congressional intent as being "to improve the quality of the nation's air and to prevent deterioration of that air quality, no matter how . . . pure that quality . . . happens to be." Thus, in this portion of the court's analysis, as well as in its treatment of section 1857(b)(1) and the NAPCA guidelines, the court appears to restrict the parameters of NSD as closely as possible to absolute non-degradation.

The court closed its examination by concluding that the Clean Air Act of 1970 is based in important part on a policy of non-degradation of existing clean air and that section 51.12(b), in permitting the states to submit plans which allow pollution levels of clean air to rise to the secondary standard level of pollution, is contrary to the legislative policy of the Act and is, therefore, invalid.

This language carries the force of pure non-degradation. The conclusion is not expressed in terms of degrees of deterioration, but as "non-degradation of existing clean air." The court's standard of compliance with its narrow interpretation of NSD is measured by the quality of existing air "no matter how presently pure that quality . . . happens to be," consistent with the technological requirements of the Clean Air Act itself.

II. EPA's Regulations To Prevent Significant Deterioration: Compliance With The Sierra Club Mandate?

On July 16, 1973, pursuant to the district court's injunctive order, the EPA published notice of proposed rulemaking, therein setting forth four alternative plans to prevent significant deterioration of air quality. Public hearings were held in various locations

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73 See text at notes 22-23 and 49-50, supra.
74 344 F. Supp. at 255.
75 Id. at 256.
76 Id.
77 Id. at 255.
79 See text at notes 28-29, supra.
80 The Air Quality Increment Plan defined "significant deterioration" as "a constant increment in air quality applicable nationwide," Introduction to 1973 Proposed Regulations, supra note 34, at 18988, and was based upon the premise that "significant" deterioration can be defined as a finite increment in air quality, and that the resulting quantitative definition is appropriate for all sections of the country regardless of socio-economic conditions, and regardless of the current levels of air quality (so long as national ambient air quality standards or other limitations are not exceeded). Id. at 18990.
and hundreds of written comments were submitted on the proposed regulations. On August 27, 1974, reproposed regulations, embodying a modification of the initially proposed Area Classification Plan, were issued.

The EPA issued final regulations November 27, 1974. These regulations established three "zones" into which all areas were to be divided. Class I applied to areas in which nearly any deterioration of air quality would be considered significant; Class II applied to areas in which deterioration normally accompanying "moderate well-controlled growth" would be considered insignificant; and Class III applied to those areas in which deterioration up to the national standards would be considered insignificant. Areas designated as Class I, II, or III were to be limited to absolute increases.

The Emission Limitation Plan defined "significant deterioration" as "the greater of either a percentage increase in emissions or an emission increment." Id. at 18988; the Local Definition Plan defined "significant deterioration" case-by-case, requiring state decision-making with public participation on whether deterioration resulting from particular sources would be considered "significant." Id. at 18988, 18990; the Area Classification Plan originally defined "significant deterioration" as "one of two air quality increments depending upon land use projections by the State" (Id. at 18988), and required each state to identify each of its geographic areas as one of two "zones" of allowable deterioration. Id. at 18992.

For a thorough discussion of these original plans, see Nondegradation Controversy, supra note 16, at 324-33.

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For a thorough discussion of these original plans, see Nondegradation Controversy, supra note 16, at 324-33.


1974 Final Regulations, supra note 35.

These "zones" were finally called "classes" to avoid any confusion with traditional concepts of zoning law.

Introduction to 1974 Final Regulations, supra note 81, at 42510.

Allowable pollutant increases were established as follows:

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<tr>
<th>Pollutant</th>
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<th>Class II*</th>
<th>Class III*** (sec. stand.)</th>
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<td>Sulfur dioxide:</td>
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<tr>
<td>Annual arith. mean</td>
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<td>3-hour maximum</td>
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in pollutant concentrations over the baseline air quality concentrations.\textsuperscript{88}

All areas were to be initially designated Class II.\textsuperscript{89} Those areas could be redesignated to any other classification upon meeting numerous provisions, central to which are public hearings reflecting consideration of (1) growth anticipated in the area; (2) the social, environmental, and economic effects of the redesignation upon the area itself as well as upon other areas and states; and (3) any impacts of the proposed redesignation upon regional or national interests.\textsuperscript{90}

The regulations provided for review of the impact of new or modified stationary sources.\textsuperscript{91} No construction or modification of eighteen sources\textsuperscript{92} would be permitted to commence unless the Administrator determined, according to certain informational requirements,\textsuperscript{93} that (1) the effect on air quality concentration of the source would not exceed air quality increments applicable in the area of the source\textsuperscript{94} or in other areas\textsuperscript{95} and (2) the source would comply with an

\textsuperscript{88} "Baseline air quality concentration" refers to particulate matter and sulfur dioxide. It means "the sum of ambient concentration levels existing during 1974 and those additional concentrations estimated to result from sources granted approval . . . for construction or modification but not yet operating prior to January 1, 1975." Id. §52.21(b)(1) (1974).

\textsuperscript{89} Id. §52.21(c)(3)(i).

\textsuperscript{90} Id. §52.21(c)(3)(ii)(d).

\textsuperscript{91} Id. §52.01(d) provides that the phrases "modification" or "modified source" mean: any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard had been promulgated . . . or which results in the emission of any such pollutant not previously emitted, except that:

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

2. the following shall not be considered a change in method of operation:

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

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material . . . .


\textsuperscript{92} The eighteen categories of sources are: (1) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input; (2) Coal Cleaning Plants; (3) Kraft Pulp Mills; (4) Portland Cement Plants; (5) Primary Zinc Smelters; (6) Iron and Steel Mills; (7) Primary Aluminum Ore Reduction Plants; (8) Primary Copper Smelters; (9) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day; (10) Sulfuric Acid Plants; (11) Petroleum Refineries; (12) Lime Plants; (13) Phosphate Rock Processing Plants; (14) By-Product Coke Oven Plants; (15) Sulfur Recovery Plants; (16) Carbon Black Plants (furnace process); (17) Primary Lead Smelters; (18) Fuel Conversion Plants. Id. §52.21(d)(1).

\textsuperscript{93} Id. §52.21(d)(3).

\textsuperscript{94} Supra note 92.

\textsuperscript{95} 40 C.F.R. §52.21(d)(2)(i) (1974).
emission limit representing the level of emission reduction which
would be achieved by the application of best available control tech­
nology (BACT)94 for particulate matter or sulfur dioxide. The re­
quirements would apply to any new or modified stationary source
falling within one of the eighteen categories97 which had not com­
enced construction or expansion prior to January 1, 1975.98

The widespread and continuing controversy of NSD99 raises the
question of whether the current NSD regulations carry out the
Sierra Club mandate. In order for the EPA regulations to comply
with the district court’s strict interpretation of NSD,100 they must:
(1) use existing air quality as the paramount determinant in the
definition of “significant deterioration;” and (2) provide for a level
of air quality deterioration consistent with the strictest application
of pollution technology as required by the Clean Air Act.101 The
regulations do not meet these two tests.102

Russell E. Train, the EPA Administrator, acknowledged the con­
sideration of social and economic factors in his agency’s formulation
of the regulations.103 As noted,104 the district court did not indicate
that social and economic factors might be an element of NSD pol­
icy. Thus, the conceptual bases of the regulations violate the Sierra
Club mandate. More specifically, a closer look at the regulations
points up five weaknesses which collectively constitute non­
compliance with the district court order.105

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94 The term “best available technology” means any emission control device or technique
capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60
(Standards of Performance for New Stationary Sources). A case-by-case basis, considering
six factors (Id. §52.01(f)(1)-(6)), is to be used where no standard has been proposed or
promulgated under Part 60. Id. §52.01(f).
97 Supra note 92.
98 40 C.F.R. §52.21(d) (1974). The EPA, on June 12, 1975, adopted minor amendments to
the regulations to prevent significant deterioration. In the regulations promulgated in Decem­
ber, 1974, 1974 Final Regulations, supra note 35, all state implementation plans were disap­
proved with respect to significant deterioration in a general disapproval statement. In the new
amendment, a specific disapproval was incorporated in the applicable subpart for each state
and the general disapproval statement was modified accordingly. 40 Fed. Reg. 25004 (1975).
99 See text at notes 33-38, supra.
100 See text at notes 48-76, supra.
101 42 U.S.C. §1857 et seq. (1970); see text at notes 77-78, supra.
102 Clear Day has also explored the question of compliance of the EPA regulations with the
order in Sierra Club. Supra note 32, 741-62. It is based, however, upon the regulations
reproposed on August 17, 1974. 1974 Reproposed Regulations, supra note 83. Therefore, up­
dating is necessary to determine whether weaknesses apparent in those regulations were
eliminated in the final regulations. 1974 Final Regulations, supra note 35.
103 For another detailed critique, see Guilbert, Up in Smoke: EPA’s Significant Deterioration
Regulations Deteriorate Significantly. 4 ELR 50033 (1975).
104 Introduction to 1974 Final Regulations, supra note 81, at 42510.
105 See text at notes 51-55, 59-61, and 71-73, supra.
106 An additional weakness concerns the year in which existing air quality should be mea-
The first weakness in the regulations is the failure to regulate four of the six pollutants for which primary and secondary ambient standards have been promulgated. Provision for such regulation was made in the initially proposed regulations, but subsequently withdrawn. Further, these four pollutants need not be subject to "best available control technology," a provision also included in the initial regulations.

These omissions violate not only the implicit mandate of Sierra Club, but also the express language of the district court's preliminary injunction which prohibited "significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards . . ." (emphasis added). "Existing air" is an encompassing phrase, thereby reasonably foreclosing exclusion from regulation any element of that air. Furthermore, such language would imply that, "at a minimum, any pollutant for which a secondary standard has been set should be regulated."

EPA justifies the omission on two grounds. First, EPA contends that these four elements are primarily auto-related and current and future pollution control technology will prevent significant deterioration. This argument, however, is grounded on two questionable assumptions. It assumes, first of all, that auto-related emissions will be controlled by the application of new technology at a rate faster than the rate at which the number of vehicles will increase in a given area. In areas in which this assumption is false, significant deterioration may occur. Second, the argument as-

suere to form a baseline against which air pollution increases should be measured. The EPA regulations established 1974 as the base year, 40 C.F.R. §52.21(b)(1) (1974), a change from the originally proposed baseline year of 1972. 1972 was the year of the district court opinion and also the year in which the state implementation plans were to have been approved. Since the district court injunction ordered that NSD be applied to "existing" air quality, such alteration appears, on its face, to be in violation of that order. However, the issue is beset by a number of important practical problems which render that judgment open to question. See Clear Day, supra note 32, at 760-62.

104 40 C.F.R. §§50.4-50.11 (1971) establishes primary and secondary standards for particulate matter, carbon monoxide, photochemical oxidants, and nitrogen dioxide, in addition to total suspended particulates and sulfur dioxide which are covered by the 1974 regulations.


108 Supra note 96.

109 1973 Proposed Regulations, supra note 107, at 18997.

110 Nondegradation Hearings, supra note 28, at 5.

111 Clear Day, supra note 32, at 750 & n. 56; see also, note 106, supra.

112 Supra note 106.

113 Introduction to 1973 Proposed Regulations, supra note 34, at 18988.

114 Clear Day, supra note 32, at 750.
sumes that vehicles are the only sources of the excluded pollutants. In fact, stationary sources do emit some of these pollutants. These facts open the possibility of deterioration up to secondary standards.\footnote{Clear Day suggests two possible ways to eliminate this loophole: (1) establishment of a maximum allowable increment for vehicular-related emissions; (2) at the very least, a test of the EPA emission reduction hypothesis by state monitoring, thereby establishing a basis for an appropriate NSD standard. \textit{Id.} at 751 \& n. 60.}

The other EPA justification for the exclusion of the four pollutants from regulation is that existing analytical procedures are inadequate to determine the impact of individual sources on air quality concentrations of nitrogen oxides, hydrocarbons, and photochemical oxidants. This argument fails because the EPA has indicated that there is a technique, the areawide proportional model, for relating emissions to air quality.\footnote{Introduction to 1974 Final Regulations, \textit{supra} note 81, at 42511. The proportional model requires that air quality data be available. The EPA asserts that "[v]ast numbers of additional monitors will be necessary to precisely define existing air quality." The EPA, thus, does not say that monitoring of the excluded pollutants cannot be done. Rather, it, in effect, says that such an effort will be too expensive.}

A second deficiency in the scheme of NSD regulations is the omission of "hazardous air pollutants," covered by section 1857c-7 of the Clean Air Act of 1970.\footnote{42 U.S.C. \$1857c-7 (1970).} A "hazardous air pollutant" is one "to which no ambient air quality standard is applicable and which . . . may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating irreversible, illness."\footnote{Id. \$1857c-7(a)(1).} In the context of an act whose purpose is "to promote the public health"\footnote{Id. \$1857(b)(1).} and an injunction ordering prevention of "significant deterioration of existing air quality,"\footnote{Nondegredation Hearings, \textit{supra} note 28, at 5.} a regulation which does not control pollutants which may promote an increase in mortality or serious illness clearly violates those purposes.

Third, the regulations assume that no possibility for significant deterioration of existing air quality lies from sources outside the eighteen categories subject to preconstruction review,\footnote{Supra note 92. Clear Day notes the above weakness in the regulations. \textit{Clear Day, supra} note 32, at 752. It goes on to note several more gaps which have been either ameliorated or completely eliminated by the final regulations. The new source review provisions of the reproposed regulations applied to any new or "expanded stationary source." 1974 Reproposed Regulations, \textit{supra} note 83 at 31008. Such source was defined as "any source which intends to increase production through a major capital expenditure." \textit{Id.} at 31007. Thus, existing sources could increase pollution in clean areas by gradually increasing plant}
"indirect sources."\textsuperscript{122} The distinctions drawn by the regulations between the eighteen categories of "stationary sources"\textsuperscript{123} and "indirect sources" are questionable. Certain members of this latter category—especially airports, educational facilities, and certain industrial facilities—may, arguably, contribute to the accumulation of significant levels of pollutants. Whether a facility is stationary or mobile, direct or indirect, should be immaterial. If sources emit pollutants for which national standards have been established and which are capable of being measured,\textsuperscript{124} the Sierra Club mandate requires their inclusion in any NSD regulations. Thus, omission of indirect sources from control by the regulations opens the door to possible significant deterioration of existing air quality.

Fourth, the regulations provide that all areas are to be designated Class II as of the effective date of the regulations.\textsuperscript{125} As the EPA Administrator points out, in some areas, such as national parks, any deterioration of air quality would be considered significant.\textsuperscript{126} To designate such areas as Class II not only violates the EPA's own

- size or changing production techniques, which alterations a state may have deemed less than a "large capital expenditure." The final regulations, however, replaced "expanded source" with "modified source," meaning "any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated . . ." 40 C.F.R. § 52.01(d) (1974) (emphasis added).

Clear Day also asserted that the reproposed regulations would permit pollution to the secondary standards by allowing states to redesignate any clean air areas as Class III, that new sources in Class I and Class II areas were not subject to preconstruction review. Clear Day, supra note 32, at 753. The final regulations, however, provide preconstruction review of any new or modified stationary source. 40 C.F.R. §52.21(d)(1) (1974).

Finally, Clear Day criticized the almost complete lack of specific guidelines providing for redesignating the Administrators that the body responsible for the redesignation decision did not arbitrarily and capriciously disregard relevant environmental, social or economic factors. 1974 Reproposed Regulations, supra note 83, at 31007. The final regulations tightened the review framework, requiring the redesignation procedure to include consideration of "(1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and states, and (3) any impacts of such proposed redesignation upon regional or national interests." 40 C.F.R. §52.21(c)(3)(ii)(d) (1974) (emphasis added).

\textsuperscript{122} An "indirect source" is a "facility, building, structure, or installation which attracts or may attract mobile source activity that results in emissions . . . for which there is a national standard." 40 C.F.R. §52.22(b)(1)(i) (1974).

These indirect sources include, but are not limited to: "(a) Highways and roads; (b) Parking facilities; (c) Retail, commercial, and industrial facilities; (d) Recreation, amusement, sports, and entertainment facilities; (e) Airports; (f) Office and Government buildings; (h) Education facilities." Id. §52.22(b)(1)(i)(a)-(h).

\textsuperscript{123} Supra note 92.

\textsuperscript{124} See note 116, supra, and accompanying text for a discussion of the measurability of the four pollutants.

\textsuperscript{125} 40 C.F.R. §52.21(c)(3)(i) (1974).

\textsuperscript{126} Introduction to 1974 Final Regulations, supra note 81, at 42510.
definition of a Class I area\textsuperscript{127} but immediately exposes such pristine areas to the less stringent air quality standards which allow "moderate well-controlled growth."\textsuperscript{128} Public apathy, concerted efforts of developers, and the sometimes tortuous mazes of the bureaucratic process might make it extremely difficult to redesignate a Class II area to Class I.

In light of the Administrator's statement above, the only alternative consistent with the Sierra Club mandate would be to require areas such as national parks, national seashores, and national forest and wilderness areas to be initially designated as Class I. Such a requirement would protect these areas with the more stringent requirements of Class I and shift the burden of redesignation to those whose activities would cause the subsequent air quality deterioration.\textsuperscript{129}

Fifth, the regulations allow exemptions to the area classification requirements. Section 52.21(c)(1) provides that "counties or other functionally equivalent areas that pervasively exceed any national ambient air quality standards for sulfur dioxide or total suspended particulates" will be excepted from any area classification. Such a scheme will allow deterioration of air quality up to the national secondary standards in those areas and expressly violates the Sierra Club injunction which applies to the air in "any portion of any State. . . ."\textsuperscript{130}

The EPA's significant deterioration regulations fail to adhere to the standards implicitly required by Sierra Club (maintenance of existing air quality and utilization of the strictest technological requirements of the Clean Air Act\textsuperscript{131}).

III. REGULATIONS FOR SIGNIFICANT DETERIORATION: ARE THEY GOOD POLICY?

Whether or not the EPA regulations governing NSD carry out the Sierra Club mandate, an additional question is whether NSD's statutory foundation, the Clean Air Act of 1970, supports that strict mandate.

The Clean Air Act of 1970 and its legislative and administrative history certainly support Sierra Club's conclusion that the Act embodies a policy of NSD.\textsuperscript{132} They do not, however, support the district

\textsuperscript{127} See text at note 86, supra.
\textsuperscript{128} Introduction to 1974 Final Regulations, supra note 81, at 42510.
\textsuperscript{129} See text at note 189, infra.
\textsuperscript{130} See text at note 28, supra.
\textsuperscript{131} See text at notes 77-78 and 101-102, supra.
\textsuperscript{132} For purposes of this discussion, it has been assumed that the Clean Air Act does embody
court's strict interpretation of that policy. The scope of NSD, on the contrary, is broader and intended to include in its definition various social and economic factors, as well as existing air quality. These conclusions are supported by the language of the statute itself, the Senate and House reports accompanying the final version of the proposed act and a small portion of the Act's legislative history.

Standing alone, the "protect and enhance" language of the Act's purpose clause, from which the district court derived a large share of its interpretation of NSD's scope, directs that no deterioration of air quality occur. But the purpose clause must be read as a whole. To read "protect and enhance" as isolated from the remainder of the clause in which it is set is to misconstrue the purpose of that clause. The principal object of the "protect and enhance" language is the "Nation's air resources." Had the framers of the Clean Air Act concluded the purpose clause with this latter phrase, section 1857(b)(1) would have embodied precisely that scope which was ascribed to it by the district court in Sierra Club. Existing air quality—i.e., the "Nation's air resources"—would have been meant to be the sole determinant. The "protect and enhance" language would have been meant to be narrowly confined by the measure of that air quality limited only by available pollution technology.

The statute's draftsmen, however, said more. Their purpose was broader, for section 1857(b)(1) also contains a secondary object: the promotion of the "public health and welfare and the productive capacity of the population." "Public welfare" and "productive capacity" are broad and flexible concepts which necessarily include considerations such as employment, housing and residential patterns, technological and industrial development, transportation and various other related social and economic factors which contribute to the general well-being of the country and its people. Thus, these factors become a part of a policy of NSD and must be taken into consideration in the formulation of that policy, thereby necessarily broadening the scope of NSD beyond the narrow interpretation given by Sierra Club.

NSD. The Federal District Court, the D.C. Court of Appeals, and the Supreme Court have so held, although the evenly divided Supreme Court affirmation carries no precedential value. See note 32, supra. Additionally, the existence or non-existence of NSD is a matter which has elicited detailed attention elsewhere; see Nondegradation Controversy, supra note 16; Clean Air Act and Nondegradation, supra note 16; Clean Air Act Held Prohibiting Significant Deterioration, supra note 2.

134 Id.
135 See text at notes 22-23 and 50, supra.
137 See text at notes 48-76, supra.
"Protect and enhance," then, is to be interpreted in a broader fashion to mean not that all clean air everywhere must stay as clean or cleaner than it is, but that the quality of the "Nation's air resources" generally is to be protected from "significant deterioration" and improved where it does not meet national standards. Such interpretation does not mean that air in clean areas must be allowed to deteriorate to secondary standards. It may mean, however, as suggested by one writer,\textsuperscript{138} that bringing the most polluted air up to minimum national standards will necessitate a partial deterioration of some cleaner air. It may mean, for example, that where in clean air areas a choice must be made between maintaining pristine air and allowing a partial deterioration of air quality to accommodate construction of an industrial establishment which will contribute to regional or local economic growth and stability, the promotion of public welfare and productive capacity will necessitate a certain level of air quality deterioration. As the above-noted writer has stated:

[The mandate to 'protect' could simply mean a duty to design . . . tradeoffs so as to render maximum overall protection of the public health and welfare, and one could argue that an EPA Administrator who promulgated non-degradation regulations had failed to 'protect . . . the quality of the nation's air' in terms of the ultimate public health and welfare objective of the Act.]

A narrow interpretation of the purpose clause will necessarily restrict limited and legitimate growth objectives of clean air areas,\textsuperscript{140} thereby violating the Act’s objective in promoting the "productive capacity" of the population. Thus, the purpose clause of the Clean Air Act appears to have envisioned a broader definition of NSD than that adopted by the district court in Sierra Club.

Statutes must also be read in their entirety and, in that regard, subsequent sections of the Clean Air Act are compatible with the

\textsuperscript{138} Clean Air Act and Nondegradation, supra note 16, at 810.

\textsuperscript{139} Id. at 810-11. There the writer was marshalling hypothetical support for the EPA contention that the Clean Air Act did not embody a policy of NSD. Here the presence of that policy is not being challenged; rather it is contended that the NSD policy which the Act does embrace is broader than the reading in Sierra Club. See also note 132, supra.

\textsuperscript{140} James E. Krier notes what he calls a "suspicious asymmetry lurking in the tighter-but-not-looser approach" of federal air pollution law.

The approach recognizes that states have a legitimate interest in setting tighter standards to, say, protect health at the cost of growth; but it denies that states have an equally legitimate interest in setting looser standards to, say, promote growth at the cost of health. Krier, The Irrational National Air Quality Standards: Macro- and Micro-Mistake, 22 U.C.L.A. L. Rev. 323, 328 (1974) (hereinafter cited as Irrational National Air Quality Standards).
broader scope of NSD established in section 1857(b)(1). The language of the last phrase of section 1857(b)(1)—"so as to promote the public health and welfare. . . ."—dovetails with the language of section 1857c-4 requiring that national ambient secondary standards be designed to "protect the public welfare." This identity of expression reflects a similarity of purpose and establishes the national secondary standards as the outer limits of the broad policy of NSD set forth in section 1857(b)(1).

Section 1857d-1, which affords each state or political subdivision thereof the right to enact air quality standards stricter than the national standards, specifically authorizes adoption of "any standard of limitation respecting emissions. . . or any requirement respecting control or abatement of air pollution," as long as any such standard or limitation is at least as stringent as any such standard or limitation in effect under that state's applicable implementation plan (emphasis added).

In authorizing states to set air quality standards higher than the secondary standards, section 1857d-1 clearly embodies a policy of NSD. But the section does not uphold an interpretation of NSD as narrow as that in Sierra Club. To allow the adoption of any emission or abatement standard between zero pollution and the secondary standards is consistent with section 1857(b)(1)'s broader secondary objectives as well as its primary purpose—clean air. The section recognizes the legitimate interest of and need for state and local governmental units to consider various social and economic factors that must be considered if the public welfare and productive capacity of their citizenry is to be promoted.

Section 1857c-5 authorizes the postponement of applicable emission requirements for stationary or moving sources the continued operation of which is "essential to national security or to the public health or welfare." Section 1857c-10 authorizes a temporary suspension of fuel or emission limitations if the Administrator deems such action necessary in dealing with an energy shortage. These sections constitute an explicit recognition by the statute's framers that factors other than existing air quality and technological consid-

142 Id. §1857c-4(b)(2).
143 See text at note 45, supra.
144 Implementation plans are, of course, subject to the limitation of the national standards. See 42 U.S.C. §1857c-5.
145 See text at notes 133-40, supra.
147 Id. §1857c-10(b)(1)(A).
erations are to be weighed in determining that point on the continuum between absolute non-degradation and the secondary standards where deterioration becomes "significant."

Language in the final House and Senate versions of the Clean Air Act and in reports accompanying those bills also consistently upheld the broader definition of NSD found in the statute itself. Section 108(c)(1) of the final House version of the Act provided that:

A State may adopt an ambient air quality standard applicable to such State or any portion thereof for any pollutant if the Secretary agrees that such State standard is more stringent than the national ambient air quality standard for such pollutant (emphasis added).

The directive embodied in the section was discretionary. A state was given wide authority to determine, according to its own needs, the degree of deterioration that it would allow. The section did not require higher state standards to be set as closely as possible to the levels of existing air quality, as the Sierra Club district court interpreted the purpose clause of the Act. It required only that the standards be higher than the national standards and air quality deterioration be limited to those higher state standards. Section 111(a)(1) of the final Senate bill reflected the House version, providing that each State shall consider adoption of ambient air quality standards which are more restrictive than the national standards.

In the most quoted portion of the Senate Report, it is provided that:

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 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 (emphasis added).

Unlike its treatment in the Sierra Club opinion, this passage is here quoted correctly and in full relevant portion. The language is cer-
tainly a call to limit deterioration of air quality in clean air areas, but it does not mandate the narrow interpretation placed upon it by *Sierra Club*.

"[T]o the maximum extent practicable" and "except under circumstances where there is no available alternative" are the phrases which qualify the recommendation of the passage. The scope of these phrases merits examination. The hearings on non-degradation provide a perspective on the former phrase. Senator James A. McClure (R-Id), discussing with Sierra Club President Laurence I. Moss the definition of "significant deterioration" in the context of the above-quoted passage, said that he understood Moss to say that "this [significant deterioration] is not an arbitrary, inflexible standard against which everything is measured. It has some variables involved." Moss replied that he thought a concept of NSD involved judgment and application of good sense. McClure agreed, remarking that he had emphatically noted the language "to the maximum extent practicable" in the Senate Report. Thus, the President of the organization which was the moving force behind the challenge to the EPA's regulations implicitly approved the proposition that NSD is flexible and meant to include variables other than limited considerations of air quality and pollution technology.

The language "except under circumstances where there is no available alternative" appears, in light of the subsequent allusion to BACT, industrial processes, and operating practices, to more narrowly restrict acceptable levels of air quality deterioration to the limits of pollution technology, a reading more closely coinciding with the district court's opinion. The same list of available pollution control alternatives, however, refers also to site selection, land use planning, and traffic controls. These variables are not strictly tech-

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153 Nondegradation Hearings, supra note 28.

154 *Id.*

155 This passage from the Senate Report has received recent judicial gloss. *National Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 507 F.2d 905 (9th Cir. 1975), the court held, *inter alia*, that the EPA's approval of state plan provisions relating to granting of minor variances which would not affect the attainment or maintenance of national ambient air standards was proper. In reaching its decision the court acknowledged the policy of NSD mandated by the Clean Air Act, noting that by means of the language "to the maximum extent practicable" in the Senate Report a "measure of flexibility was written into the Act. . . ." *Id.* at 914.

The holding in *NRDC v. EPA* was narrower than the parameters of NSD argued here. The case, however, turned on narrower technological considerations, thereby reasonably contributing to the restricted scope of the decision. The holding indicates, nonetheless, a judicial willingness to interpret NSD more broadly than *Sierra Club*.

156 See text at notes 132-47, supra.

157 *Supra* note 96.
nological. They involve social and economic variables the considera-
tion of which must necessarily broaden the scope of the qualifying
phrase "except under circumstances where there is no available
alternative."

In addition to the flexible qualifying phrase, the Administrator's
authority, as expressed by the Senate Report, would be discretion­
ary. That an implementation plan which does not provide to the
highest degree for the maintenance of clean air quality should not
be approved does not mean that such a plan can not be approved.
That the deterioration of air quality should not be permitted to
deteriorate, except where there is no other alternative, does not
mean it can not be allowed to deteriorate. The discretionary nature
of the Administrator's authority empowers him to consider factors
other than just existing air quality and the technical requirements
of the Act. Had the Senate intended to draw the definition as nar­
rowly as possible, it would reasonably have used the language
"shall" in place of "should." Thus, the NSD policy embodied by the
passage from the Senate Report was broader, more flexible, and
intended to consider more variables than the narrowly drawn inter­
pretation of NSD in Sierra Club.

The legislative history and the language of the Clean Air Act
itself indicates a statutory basis, not for a narrow and restrictive
policy of NSD, but a broad and flexible policy which will consider
not only environmental and technological factors, but additional
social and economic variables necessary to effectively carry out im­
portant secondary purposes of the Act.

IV. CURRENT LEGISLATION: THE EFFECT ON NSD

The outcome of the NSD controversy is uncertain. It may develop
in one of a number of ways. Inasmuch as the issues presented by
Sierra Club have not been squarely faced by the courts, subsequent NSD suits may overturn the district court decision and forge
new legal parameters. Alternatively, courts may interpret Sierra
Club as upholding the current EPA regulations; or the regulations
may be altered to comply with what this writer believes to be the
strict mandate set forth in the Sierra Club decision. Transcending
each of these possibilities are wide-ranging policy questions the

158 See note 33, supra.

159 A national policy of preventing significant deterioration, however defined and imple­
mented, will have a substantial impact upon the nature, extent, and location of future
industrial, commercial, and residential development throughout the United States. It
could affect the utilization of the Nation's mineral resources, the availability of employ-
resolution of which may lie outside the function and expertise of the judicial system.

While current suits await resolution in the courts, support has grown for a Congressional re-examination of the non-degradation issue. This attitude has taken the form of four current proposals on NSD pending in Congress.

On November 12, 1974, the Department of Commerce submitted to the Office of Management and Budget a lengthy list of proposed amendments to the Clean Air Act, a number of which will have a significant impact on the NSD policy. The chief Commerce Department proposal is that the purpose clause of the Clean Air Act be revised to specifically prohibit anything in that act to require establishment of air quality limits more stringent than the national primary and secondary standards.

Additionally, the proposals would (1) amend section 101(b), current bearer of the much interpreted "protect and enhance" mandate, to provide for a mandatory consideration of economic, energy, and social costs and benefits, as well as environmental costs and benefits; and (2) revise section 109 to require that the EPA Administrator "consider" such economic and energy costs in establishing primary air standards and to "balance" those costs in establishing secondary standards.

On January 30, 1975, the President submitted to Congress the Clean Air Act Amendments of 1975. Section 601 of these proposed
amendments would accomplish the same purpose as the principal Commerce Department proposals—no required establishment of air quality standards more stringent than the national standards. 169

The proposed amendments submitted by the Commerce Department and the President appear at first to offer constructive revisions to currently formulated NSD policy. The Commerce Department proposals expressly mandate a consideration of social and economic factors. 170 In fact, however, the two proposals narrowly define the ability of the EPA Administrator to set more stringent air quality standards, 171 thereby effectively eliminating NSD as mandated by Sierra Club 172 and embodied in the Clean Air Act. 173 Moreover, by introducing economic and energy cost balancing and consideration into a determination of national primary and secondary standards, the Commerce Department proposals raise the possibility that such standards may actually be lowered, thereby threatening a fundamental basis of the Clean Air Act itself.

Concurrent Senate and House proposals, on the other hand, sustain the fundamental strength of the Clean Air Act while providing additions to the NSD policy which eliminate some of its current defects. 174 The Senate Public Works Subcommittee on Environmental Pollution has endorsed the NSD policy and initially adopted provisions which are more stringent than the EPA’s NSD rules. 175 The Senate panel’s proposals would eliminate the Class III designation which under current EPA rules allows deterioration of air quality up to the national secondary standards. The definitions of Class I and Class II designations would remain similar to the current EPA regulations. 176 The Subcommittee also wants to establish certain

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169 H.R. 2633, 94th Cong., 1st Sess. (1975) is to amend section 101(b)(1) of the Clean Air Act to read as follows:

(1) 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.


171 The Commerce Department’s proposed limitation on establishment of air quality standards more stringent than national standards is couched in discretionary terms; the President’s proposal would appear to be a strict mandate.

172 See text at notes 26 and 28, supra.

173 See text at notes 133-47, supra.

174 See text at notes 99-130, supra.


176 40 C.F.R. §52 (1974). A proposal by Senator James L. Buckley (R-NY) to permit vari-
automatic Class I designations. Under that scheme, national and international parks and wilderness and wildlife refuge areas would be automatically and permanently designated as Class I areas. Wild and scenic rivers and national monuments, seashores, and recreation areas initially would be designated Class I, but could be redesignated Class II with the approval of the Federal Land Manager.\footnote{177} Finally, the subcommittee’s proposed NSD section will regulate pollutants other than sulfur dioxide and total suspended particulates\footnote{178} and, eventually, pollutants currently unregulated by the Act. The panel has also taken under consideration measures for settling interstate disputes.\footnote{179}

On September 5, 1975, the House Interstate and Foreign Commerce Subcommittee on Health and Environment approved NSD proposals which would, like the Senate proposals,\footnote{180} establish certain automatic Class I designations.\footnote{181} The subcommittee would urge states to give special consideration to classifying as Class I all areas of special environmental concern,\footnote{182} and prohibit the designation of certain areas as Class III.\footnote{183}

The House proposals provide for designation and redesignation by state or local governments with the approval of the state legislature and by local governmental units representing a majority of people in the area affected after a public hearing and description, analysis and examination by redesignating authorities of all health, environmental, economic, social, and energy effects of the proposed classification. The House policy also called for limiting not only sulfur

\footnote{178} See text at notes 106-16, supra. Until incremental limits can be established on these additional pollutants, sources emitting them will be subject to BACT. Supra note 96.
\footnote{179} On November 3, 1975, the Public Works subcommittee reported to the full Senate Public Works Committee a package of proposed Clean Air Act amendments which included the measures discussed above (see text at notes 175-78, supra) and insertion of express language of non-degradation into section 110(a), 42 U.S.C. §1857c-5 (1970). Subcommittee chairman Edmund S. Muskie (D-Maine) said that though the package is “not a final product,” it is “as good a working draft for the full committee as we might produce.”
\footnote{180} See text at note 177, supra.
\footnote{181} These areas would include national parks, national wilderness areas, international parks, national wildlife refuges, national monuments, and national preserves which exceed 1000 acres. 6 BNA Environ. Rep.—Curr. Dev. 819 (1975).
\footnote{182} Id. National forests, national recreation areas, national lakeshores and seashores are examples of such areas.
\footnote{183} Id. These areas include wild and scenic rivers, national lakeshores and seashores, and national forests which exceed 1000 acres.
dioxide and total suspended particulates but also all other pollutants covered by the national standards,\textsuperscript{184} permitting, however, states to fulfill the NSD requirements for other pollutants without the classification plan if the EPA Administrator determines that the sections' essential goals are met in other ways.\textsuperscript{185}

These Congressional proposals are, by and large, positive additions to efforts to resolve the NSD controversy.\textsuperscript{188} The proposals to limit \textit{all} nationally regulated pollutants will remedy the defect existing in the current regulations; \textit{i.e.}, the failure to monitor certain emissions.\textsuperscript{187} The combined House and Senate measures for automatic Class I designation would provide greater protection for wilderness areas, thus bringing the regulations into closer compliance with the \textit{Sierra Club} mandate as well as the EPA's own definition of a Class I area.\textsuperscript{188}

While both House and Senate provisions for initially designating wild and scenic rivers, national monuments, seashores, and recreation areas as Class I are environmentally sound, the Senate version provides greater protection for these areas. The House proposal merely urges states to \textit{consider} the designation of such areas as Class I. The Senate measure mandates that these areas be initially placed within the more protected Class I designation. It retains, however, the possibility of redesignating these areas as Class II. Thus, the Senate provisions embody a needed procedural flexibility while shifting the burden of redesignation to those who are more likely to cause pollution in the area in question, thereby eliminating another weakness in the EPA regulations.\textsuperscript{189} Together with the House suggestion that certain areas be prohibited from consideration as Class III, these proposed revisions herald a salutary balance of environmental protection and flexibility. Further, express House provisions mandating close examination of health, environmental, social, and energy ramifications of the proposed redesignation continues to assure a balanced consideration of all of a region's needs.\textsuperscript{190}

\textsuperscript{184} \textit{Supra} note 106.
\textsuperscript{186} As might be expected, however, both Senate and House proposals have elicited spirited public debate. For a brief consideration of the positions taken by various interest groups, see 6 BNA \textit{Env. Rep.---Curr. Dev.} 1259-61, 1447-48 (1975).
\textsuperscript{187} See notes 106-107, \textit{supra}, and accompanying text.
\textsuperscript{188} See text at notes 125-29, \textit{supra}.
\textsuperscript{189} See text at note 129, \textit{supra}.
\textsuperscript{190} The final regulations were salutary in their inclusion of these considerations in the redesignation process.

The most obvious weakness in the Senate and House proposals is the Senate's elimination
CONCLUSION

The passage of pending Congressional legislation on NSD will not eliminate the controversy. The failure of the Congress to address the issue of the appropriateness of national as opposed to regional or local NSD standards for pollutants in light of regional differences in condition and attitude is disquieting. Perhaps, however, the promulgation of variable standards would bring with it problems, administrative and otherwise, which would outweigh the intended benefits. Beyond this, the current regulations have been criticized for not providing incentives to develop more effective pollution control techniques. Whatever the answers to these questions may be, this discussion has suggested that, unlike the strict mandate of Sierra Club, the proper framework within which these issues should be resolved is one broad enough to encompass the breadth and variety of interests and concerns which a policy of NSD must necessarily affect.

of Class III designations. Industry spokesmen and environmentalists will naturally differ over the implications of such a proposal on future growth. See notes 36 and 186, supra. The fact remains that given the diverse considerations necessary to formulate meaningful and equitable NSD standards—e.g., the possible tradeoffs of clean air for a certain degree of growth in different areas—the continued inclusion of the Class III designation provides a desirable degree of flexibility.

Environmental Research & Technology, Inc. of Concord, Massachusetts has released results of a study of the implication of the non-degradation rules on the State of Maine. The report states, inter alia, that the rules would be more restrictive on proposed developments in regions with heavy concentrations of preservation areas and public parks. Since Maine fits both of these descriptions, the proposed rules would have a more restrictive effect in Maine than in many other states. 6 BNA ENV. REP.—CURR. DEV. 811-12 (1975).

This conclusion alone is not sufficient reason to weaken or eliminate the House and Senate proposals concerning the designation of wilderness and national park areas. However, the possibility of exploring variable NSD standards should be considered. This solution has, in fact, been proposed. See Clean Air Act and Nondegradation, supra note 16, at 834-35, for a brief discussion of issues centering around a "sliding scale of non-degradation limitations," or a region-by-region determination of what constitutes "significant deterioration."

For a brief treatment of problems associated with interstate competition for new industry fostered by state determinations of "significant deterioration," see Clear Day, supra note 32, at 757-60; see also, Congressional Cosmetic, supra note 1, at 161-62, for discussion of a comprehensive national emissions limitation scheme as a possible strategy to be employed in conjunction with the current scheme of ambient control to eliminate the threat of unfair competitive advantage among the states.

For a brief discussion of strategies to meet this problem, see Clean Air Act and Nondegradation, supra note 16, at 817.

For an interesting discussion of a method of combining complex source regulations and an NSD strategy into an effective tool for land use planning, see Air Zoning, 4 ECOLOGY L.Q. 781 (1975). A strategy suggested by California Institute of Technology's Environmental Quality Laboratory for promoting integration of administrative implementation and political leadership in air quality programs is discussed in Chernow, Implementing the Clean Air Act in Los Angeles: The Duty to Achieve the Impossible, 4 ECOLOGY L.Q. 537, 575-76 (1975).

Supra note 159.