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I. INTRODUCTION

The 1970 Amendments to the Clean Air Act[1] restructured existing state and federal programs for achieving clean air.[2] The Amendments emphasized attaining air quality levels that would protect public health and welfare, regardless of the availability of technology capable of achieving these air quality levels. If necessary, technology would have to improve. Strict timetables included in the Amendments were designed to ensure rapid progress towards a goal of clean air. There was a spirit of accelerated movement towards this goal.

Today the idealism of 1970 has given way to a spirit of delay. No longer is rapid achievement of an air quality that does not pose a threat to public health and welfare the most important goal. Other factors have been allowed to encroach upon the strict statutory timetables. A recent example of federal statutory retreat from these deadlines is the Energy Supply and Environmental Coordination Act of 1974.[3] This new statute will allow the Environmental Protection Agency (EPA) to issue suspensions of emissions limitations (applicable to stationary pollution sources) or to grant extensions of emission limitation deadlines whenever the Federal Energy Administrator orders power plants to switch to coal as a fuel source. The statute also provides for deferral of interim emissions standards for automobiles from 1975 to 1976.

Another method of avoiding the deadlines created by the Amendments has involved administrative and judicial retreat from strict compliance with the statutory standards for revisions and postponements. The propriety of this method of deadline avoidance is the subject of this article.

Soon after passage of the Clean Air Act Amendments, the EPA promulgated regulations which interpreted them as allowing state-granted deferrals of compliance deadlines for certain sources. These

deferrals were to be considered as "revisions" under the Amendments, and were permissible as long as they did not interfere with attainment or maintenance of the national ambient air quality standards within the time specified in the state implementation plans. If attainment or maintenance of these standards was threatened, a postponement as provided by the Amendments was the exclusive form of relief.[4] Nevertheless, the EPA approved state implementation plans permitting deferrals inconsistent with its own regulations.[5]

Five Circuits have heard challenges to EPA approval of such provisions to date.[6] The First Circuit, in *Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency*[7] (hereinafter referred to as *Project on Clean Air*), held that state-granted deferrals were permissible as hardship relief for pollution sources prior to the "mandatory attainment date," provided that they were treated as statutory "revisions" and the revisions did not interfere with achieving national ambient air quality standards on or before the applicable attainment date. After the "mandatory attainment date" a postponement as provided by statute was to be the exclusive form of relief for pollution sources. By contrast, the Fifth Circuit, in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*,[8] held that the statutory postponement provision was the exclusive form of hardship relief for pollution sources in *all* time periods and that the statute was not intended to grant states the flexibility envisioned by the First Circuit. The First Circuit's opinion has been followed by the Second[9] and Eighth[10] Circuits. The Ninth Circuit, in *Natural Resources Defense Council v. Environmental Protection Agency*,[11] adopted the EPA interpretation. Two District Courts have agreed with parts of the First Circuit decision and apparently accepted the EPA interpretation.[12] To date no other court has followed or agreed with the Fifth Circuit's decision. An EPA petition for certiorari was granted by the Supreme Court to review that portion of the Fifth Circuit decision dealing with state-granted deferrals.[13] Recently, the EPA amended its regulations to be in accord with the holdings of the First, Second and Eighth Circuits.[14]

The EPA, First Circuit, and Fifth Circuit interpretations of the Amendments are the only ones relevant to the propriety of state-granted deferrals under the Clean Air Act Amendments. The issue addressed by these interpretations and this article is the proper role of the revision-postponement distinction in the Amendments. The problem can be stated more specifically as a question: Can a provision of a compliance schedule found in a state implementation plan

be deferred under any circumstances without resort to the statutory postponement provision found in the Amendments?

The proper resolution of this question is important for a number of reasons. The Amendments establish an integrated national scheme for control of air pollution, affecting all states and sources, to be administered by a federal agency. Presently the states in the Fifth and Ninth Circuits must apply an interpretation of the statute unlike that applied anywhere else in the country. This creates all of the problems associated with a lack of uniformity in the law. Geography determines the interpretation to be given to a federal law and the EPA must administer the law differently in different parts of the country, thus increasing administrative complexity.

Even if uniformity is achieved, the Supreme Court's decision as to which interpretation is correct may have an important effect upon pollution sources and their control. Under the Fifth Circuit interpretation, a source unable to meet the time requirements of a state compliance schedule must meet the strict terms of the statutory postponement provision. Failing that, it must limit operation or shut down. By contrast, both the original EPA interpretation and the First Circuit opinion allow for the possibility of other forms of relief. Each of the three interpretations also imposes different burdens on the EPA administrative structure, since any allowance of state-granted deferral must be reviewed by it. A review mechanism must be set up to handle these revision requests, and it is at best undesirable that the criteria to be applied in such review should depend upon which Circuit Court's opinion must be accommodated in each case. Consequently, some differences in effect on air quality may be expected to result.

This is not a transient issue. Some national ambient air quality standards (primary and secondary) do not have to be met until 1977.[15] Thus, a Supreme Court ruling will determine the direction of developments at least for the next two years. However, the question will not become moot in 1977. Upon revision of the national ambient air quality standards (as required by law)[16] the time limit for attainment of the *new* national ambient air quality standards will run all over again.[17]

The resolution of the revision - postponement distinction has been hampered by the complex nature of the statute and by the lack of clear, precise handling of this issue by the courts. The courts have not used uniform terminology when discussing their decisions.[18] Ostensibly the same concept has been described by different words in different parts of the same opinion.[19] It has often been unclear which air quality standard or which deadline is being discussed.[20] The reasoning has also lacked clarity. Arguments or interpretations have

been dismissed in a few words despite their apparent relevance.[21] These shortcomings have not been present to the same degree in all opinions, but each failing has contributed to the confusion which now surrounds the process of revising or postponing emissions standards under the Amendments.

This article seeks to clarify the confusion by reviewing the three interpretations and the recent EPA reaction to them. Several arguments posed by commentators will also be reviewed. Not least important, special emphasis will be placed upon providing a clear analysis of the Amendments.

II. The Statutory Scheme

Under the Amendments each state is given primary responsibility for its own air quality.[22] The EPA Administrator is given the responsibility for setting national primary and secondary ambient air quality standards,[23] but states are not bound by these air quality standards; they may adopt more stringent ones if they so desire.[24] Each state is then required to adopt an implementation plan which includes provisions for attainment, maintenance, and enforcement of the national standards.[25] Finally, each plan must be approved by the EPA.[26]

Primary ambient air quality standards set limits for pollutants in the ambient air[27] above which adverse effects on public health have been found.[28] Secondary, more stringent, standards set limits for pollutants in the ambient air above which adverse effects on public welfare are known or anticipated.[29] The standards, primary and secondary, are to be based on air quality criteria reflecting the latest scientific knowledge indicating the kind and extent of all identifiable effects on public health and welfare which may be expected from the presence of pollutants in the ambient air.[30]

Timetables were established for setting up this new administrative mechanism and achieving the national ambient air quality standards. The EPA Administrator had 120 days from the effective date of the Amendments in which to establish the national standards.[31] They were promulgated April 30, 1971.[32] The states then had nine months to adopt implementation plans and submit them to the EPA for approval.[33] The plans were due on January 30, 1972. Forty states met the deadline and the others submitted their plans a short time thereafter.[34] All implementation plans were required to provide for achieving the national primary standards as expeditiously as practicable, but in no case later than three years from the date of the plan's approval.[35] Implementation plans were required to provide for achieving the national secondary standards within a reasonable time.[36] Finally, the Administrator was given four months

from the date required for submission of the plans to either approve or disapprove the plans in whole or in part.[37] These actions were announced May 31, 1972.[38]

Although the Amendments seek to achieve national ambient air quality standards by imposing limitations upon the emissions from specific pollution sources,[39] a recurring problem is presented by the difficulty of relating an individual source's emissions to the ambient air quality of a region. Another difficulty is caused by the complex wording of the Amendments. Part of the implementation plan consists of a "control strategy" for air quality control regions within a state. This control strategy contains the "compliance schedules" which set the level of emissions permissible from each source and the date by which such level of emissions must be reached. These levels of emissions for particular sources, found in the state compliance schedules, are variously referred to as "emissions limitations" or "emissions standards."

The word "standards" is used in the Amendments in three different senses, which must be carefully distinguished: (1) the "emissions standards" (applicable to levels of emission from sources and found in the state implementation plan), (2) the national primary and secondary ambient air quality standards (applicable to the ambient air quality in an air quality control region and found in the regulations promulgated by the EPA Administrator), and, if desired by a state, (3) the stricter ambient air quality standards set under authority of §1857d-1 (applicable to the ambient air quality in an air quality control region and found in the state implementation plan).

There are also three deadlines of importance which must be carefully distinguished. These are: (1) the deadlines for source compliance with the applicable emissions limitations (found in the state implementation plan), (2) the state-set deadlines for attainment of national primary and secondary ambient air quality standards (found in the state implementation plan), and (3) the statutory deadline for attaining the national primary and secondary ambient air quality standards (found in the Amendments).

Failure to keep these definitions and deadlines distinct has aggravated the confusion surrounding those sections of the Amendments which provide for extensions, postponements, and revisions. Under certain circumstances the Administrator may grant an extension of up to two years for attainment of any national primary standard at the time he approves the state implementation plan.[40] If difficulties in meeting standards are foreseen when the implementation plan is adopted, this section of the Amendments provides a means of obtaining extra time to overcome such difficulties.

In addition, state implementation plans may be modified, under certain circumstances, by means of revisions. The major provision is found in §1857c-5(a)(2)(H). To be approved, the implementation plan must provide for revision of itself

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

§1857c-5(a)(3) provides that the Administrator shall approve all revisions of an applicable implementation plan if they meet the requirements of §1857c-5(a)(2) and were adopted after reasonable notice and public hearings.

After the implementation plan has been adopted, sources may delay emissions limitations deadlines by obtaining a postponement. Postponements are provided for in §1857c-5(f). In relevant part, this section provides:

> (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that -
>
> (A) good faith efforts have been made to comply with such requirement before such date,
>
> (B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,
>
> (C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and
>
> (D) the continued operation of such source is essential to national security or to the public health or welfare,
>
> then the Administrator shall grant a postponement of such requirement.

§1857c-5(f)(2)(B) provides for judicial review of any determination made under this paragraph. Postponements, however, are only a limited form of relief since they expire after one year and four specific criteria must be met before they will be granted.

One additional section is relevant to the subject of this article. §1857d-1 permits states to adopt stricter standards than those set by the Administrator, but also provides that "if an emission standard or limitation is in effect under an applicable implementation plan . . . [a] State . . . may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan. . ."

III. The Original EPA Interpretation

The EPA provided the initial interpretation of the preceding sections of the Amendments.[41] The position adopted was that deadlines applicable to sources could be deferred, or postponed, under certain circumstances without resort to (and, therefore, without the restrictions imposed by) the statutory mechanism provided in §1857c-5(f).[42] The pertinent limitation to this interpretation was that the requested deferral could not prevent attainment or maintenance of a national standard within the time specified in the implementation plan. There were some further safeguards. Such deferrals were to be considered *revisions* of the implementation plan and approval by the EPA Administrator was required. The revisions would not become part of the implementation plan until approved, and approval was conditioned upon meeting the requirements of the Amendments for the original approval of an implementation plan.[43]

The first observation that can be made about this interpretation is that it is not suggested by the statutory wording. The EPA carved out a set of circumstances under which a deferral will not be called a postponement. But any officially-approved delay in compliance with deadlines would seem to be a postponement and the statute provides a mechanism for obtaining postponements, a mechanism apparently intended to be exclusive.

Another interpretation seems to be more in agreement with the statutory wording; namely, that a revision of a requirement applicable to a particular source can only be approved if it will improve the implementation plan.[44] A change in a requirement applicable to a particular source which weakens the plan may only be obtained by receiving a postponement as provided by statute.[45]

There are only two ways in which a change in a requirement applicable to a particular source can weaken an implementation plan. The change can postpone compliance with a deadline or make the emission limitation less stringent. The latter method is arguably prohibited by the Amendments. §1857d-1 prohibits a state from adopting or enforcing "any emission standard or limitation which is less stringent than the standard or limitation [in effect under the

applicable implementation plan]." The applicable implementation plan is the one approved by the Administrator under §1857c-5(a)(2).[46] Thus, this section seems to prevent a state from weakening requirements applicable to sources after they have been approved by the EPA Administrator.

The other method of weakening an implementation plan, postponement, is found in §1857c-5(f), as cited *supra*. The wording of the provision does not suggest that it is other than exclusive, yet the EPA took the position that this section leaves room for revisions which defer source compliance when deferral does not interfere with attainment or maintenance of national ambient air quality standards.

This construction of the statute appears faulty, because there is in the Amendments no indication of Congressional intent that revisions should provide an alternative means of deferral. §1857c-5(e) (extension granted when the implementation plan is adopted) and §1857c-5(f) (deferral granted after the plan is adopted) are the two ways provided by the statute by which a source may obtain more time to comply with the requirements of the implementation plan. If revisions were intended to be an additional means of delaying a compliance date, they would presumably have been provided for in a hypothetical "§1857c-5(g)" immediately following the other two statutory means of delay. Revisions, however, were provided for in §1857c-5(a), demonstrating a probable lack of intent that they be such a form of relief.

Therefore, the statutory wording permits, if it does not require, the conclusion that §1857c-5(f) is the exclusive mechanism provided by the Amendments for weakening an implementation plan by obtaining hardship relief for a pollution source. Because of §1857d-1, the requirement applicable to the source could not be made less stringent but it may be deferred by obtaining a postponement under § 1875c-5(f).

Several other challenges to the EPA interpretation have been raised. It has been argued that revisions were intended only to improve implementation plans, since the revisions provided for in §1857c-5(a)(2)(H) serve only that function.[47] Revisions to take account of the availability of improved or faster methods of achieving national ambient air quality standards, or to correct an implementation plan inadequate to achieve the standards, clearly would improve an implementation plan. A revision taking account of a change in national standards would also improve the implementation plan since a weaker national standard (if a national ambient air quality standard may be weakened) would render a revision of the implementation plan unnecessary.

On the other hand, §1857c-5(a)(2) contains provisions that *must* appear in a state's implementation plan before it can be approved. There is no prohibition against inclusion of other provisions. Therefore, although §1857c-5(a)(2)(H) only lists revisions which will improve an implementation plan, there are probably other permissible grounds for revisions.

As promulgated, the original EPA interpretation did not seem to be in strict accord with the statutory wording.[48] The EPA apparently would have allowed a permanent deferral of an emission limitation if doing so would not affect attainment or maintenance of a national ambient air quality standard. However, a permanent deferral is clearly equivalent to the adoption of a less stringent emission standard.[49] This would be in direct contravention of §1857d-1 which prohibits a state from adopting an emission standard or limitation less stringent than the one in effect under the approved implementation plan. The EPA interpretation should, therefore, be construed to prohibit at least permanent deferrals.

A law review article, written by an EPA attorney (Mr. Luneburg) expressing his own views, marshalled several arguments in support of the EPA's interpretation.[50] The author took the position that the Amendments contemplated that a state could modify its implementation plan in any way it chose - relaxing or strengthening it on a temporary or permanent basis - as long as the modified plan met the requirements for approval of the original implementation plan.

Support for this position was based upon two major points. First, the overriding Congressional goal of the Amendments was to achieve, within the statutory time span, a level of air quality that would not harm public health or welfare. Second, the administrative scheme for achieving this air quality should not be overly harsh on sources which were attempting to comply but were unable to do so for a variety of reasons. The EPA interpretation was consistent with this Congressional goal and avoided harsh effects on sources insofar as possible. Thus, the author characterized the EPA interpretation as the most reasonable interpretation of the Amendments.

Luneburg's comment regarding Congressional goals is justified.[51] The amelioration of possible harsh effects on sources, however, was provided for in §1857c-5(f). This section is the only clear statutory provision providing a means of deferring compliance deadlines after an implementation plan has been adopted. To obtain such a statutory postponement four specific criteria must be satisfied.[52] The inability to comply with the compliance deadline must be caused by an *unavailability* of control methods; prohibitive cost is not a sufficient excuse. The continued operation of the source must be

essential to national security or public health or welfare. Two other showings must also be made: good faith efforts to comply and alternative procedures in use to reduce the impact of the source on public health. Luneburg argued that it would be unreasonable to interpret §1857c-5(f) as being the exclusive form of hardship relief for a pollution source since it is so harsh that most sources could never meet its terms. Many sources might be denied relief because of inability to satisfy the four criteria, even if deferral in their cases would not hinder attainment or maintenance of national ambient air quality standards. He concluded by citing legislative history for the proposition that §1857c-5(f) was meant to apply only if deferral would prevent attainment or maintenance of a primary standard within three years.

The harsh effects of restricting hardship relief to the §1857c-5(f) mechanism is the best argument in favor of the EPA interpretation. Many sources might otherwise be denied relief even though granting a deferral would not jeopardize achievement of the Congressional goal. There are, however, two countervailing factors which undermine the arguments in favor of the EPA interpretation. The interpretation imposes administrative burdens on the EPA which may have been foreseen by Congress and specifically avoided by providing §1857c-5(f) as the exclusive means of hardship relief in the Amendments. Secondly, the legislative history of §1857c-5(f) is not as clear as Luneburg has suggested. While the history and purpose can be said to be compatible with Luneburg's position, they are equally compatible with the exclusivity of the postponement provision as a means of hardship relief for sources. Legislative history and purpose are not determinative of the issue in this instance.

The unreasonableness of interpreting §1857c-5(f) as the exclusive form of hardship relief for pollution sources can be demonstrated if the statute is looked at from the point of view of the sources. But such an interpretation is entirely reasonable if the administrative problems caused by alternative means of relief are considered. Determinations of the effect of a deferral on attainment or maintenance of national standards is time consuming and difficult. At least one commentator has pointed out that it is virtually impossible to relate, with any certainty, emissions from a single source to ambient air quality in a region.[53] Final responsibility for such a determination, and the attendant workload, would fall on the EPA—not on the polluter involved. Interpreting §1857c-5(f) to be the exclusive remedy would avoid this problem entirely. Making deferrals easier to obtain could also be expected to increase the number of deferral requests, and consequently the administrative burden. Exclusive use of §1857c-5(f) would minimize this problem.[54]

Such a result (avoiding as much administrative difficulty as possible) may have been specifically intended by Congress. Under previous law there had been an administrative hesitancy to act[55] and Congress was aware that the threat of air pollution required swift action.[56] The Amendments were to provide effective national control[57] and the complexities of the problem necessitated a complex administrative structure. Any unnecessary complications, however, should be avoided if at all possible.

While as noted above the Congressional goal is compatible with Luneburg's position, the legislative history of §1857c-5(f) which he cited does not support his interpretation. Luneburg's argument relied on §111(f) of the Senate bill sent to the Conference Committee,[58] the only provision like §1857c-5(f) that could be found in the drafts of the Amendments. The Senate Report explanation of §111(f) noted that compliance with a national ambient air quality standard deadline might not be possible and that in such a situation, §111(f) could be used to obtain relief from expiration of the deadline.[59] This report cannot refer to §1857c-5(f), however, because the two sections refer to different deadlines. §111(f) spoke of relief for a *region* from expiration of the time for achieving *national ambient air quality standards*. §1857c-5(f) speaks only of relief for a *source* from *any plan requirement*. With this in mind, Luneburg's interpretation loses much of its initial plausibility.

One commentator, writing after the First Circuit's decision in *Project on Clean Air*[60] rejected the pre-attainment/post-attainment distinction found in that decision and argued that the flexibility found in the pre-attainment period should apply in the post-attainment period as well.[61] It was argued that exclusive use of §1857c-5(f) would cause numerous firms to close because of their inability to come within its terms even though their continued operation would not affect attainment or maintenance of national ambient air quality standards. Such a result would be unduly harsh, particularly in the absence of an explicit manifestation of Congressional intent. Therefore, the argument concludes, §1857c-5(f) should apply only when attainment or maintenance of national ambient air quality standards would be jeopardized. This is the same argument that Luneburg raised in support of the EPA interpretation. As pointed out above, this argument can be used to support the propriety of deferral by revision.

However, the argument that permitting no alternative to §1857c-5(f) postponement would be unduly harsh on pollution sources does not answer the contention that this potentially coercive effect is apparently what Congress intended, judging from the wording and

structure of the statute. Those arguing in support of the EPA interpretation have generally ignored the arguments which support an interpretation of the Amendments favoring deferral only by postponement. Their position implies greater concern for the hardships of polluters than for a drastic increase in the EPA's workload. A well reasoned argument for the EPA interpretation should include an explanation of the reasons for rejection of contrary interpretations despite the weight of the arguments in favor of these other interpretations. Thus far only the Ninth Circuit[62] has come close to offering such an explanation.

IV. Cases Adopting the EPA Interpretation

To date only two cases have arisen in which the validity of a deferral actually granted by a state to a source was challenged. All other cases have dealt with challenges to EPA approval of state implementation plans containing provisions permitting such deferrals. In the first of these two cases, *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.*,[63] the court held that it lacked jurisdiction to consider a challenge to the appropriateness of the state-granted deferral and so the court's statements about this question were merely dicta. Nevertheless the decision merits some attention.

In *Stauffer* a one year deferral of the applicability of an emission limitation was approved by the EPA Administrator because it would not interfere with maintenance of a national primary standard. The petitioner challenged the deferral, arguing that it should be classified as a postponement (and therefore subject to the §1857c-5(f) procedure), rather than a revision. The respondent argued that it was a pre-attainment revision and cited *Project on Clean Air*[64] as precedent.[65] The court's dicta in the *Stauffer* opinion seemed to favor the EPA interpretation of the Amendments.

The court expressed only one reason for preferring the EPA interpretation: its concern that exclusive use of §1857c-5(f) would discourage states from setting ambitious compliance schedules. The reality of this danger is unclear, as will be shown below, when the impact of adoption of one of the three interpretations of the Amendments is considered.

Although only one consideration prompted the court to reach its position on this complex problem, the opinion was clearly written. The court discussed both primary and secondary ambient air quality standards. It also made clear which attainment date it was talking about. Revisions (deferrals) would not be allowed to interfere with attainment of a national ambient air quality standard by the date specified in the state implementation plan.

One writer claims[66] that the second case dealing with the validity of a deferral already granted to a source, *Metropolitan Washington Coalition for Clean Air v. District of Columbia*,[67] reached much the same conclusion as the *Stauffer* court.[68] In the *Metropolitan Washington* case the deferral (revision) was upheld despite the plaintiff's argument that the EPA interpretation made §1857c-5(f) meaningless.[69] A careful reading of the opinion in light of the facts of the case, however, discloses that the court did not agree entirely with the EPA interpretation but dealt only with deferral by revision under certain circumstances.

In *Metropolitan Washington*, the Mayor-Commissioner of the District of Columbia sought a variance (deferral) for a municipal incinerator. Under the applicable implementation plan the incinerator was supposed to discontinue operation on July 4, 1973. The variance (deferral) was sought because meeting the deadline would cause "an immediate crisis" in the city's waste management program. "Severe adverse effects on the health and welfare of the citizens of the District of Columbia" were also predicted. The variance (deferral) was granted, allowing continued operation for less than one year, to June 30, 1974.

The court recognized that both statutory wording and policy considerations supported the plaintiff's arguments,[70] but avoided consideration of either of these issues, focusing instead on the rejection of the plaintiff's arguments by the First and Eighth Circuits.[71] The *Metropolitan Washington* court failed to point out that neither of the cited cases discussed either this particular statutory wording or policy consideration. The facts before it seemed to be the decisive element in the case for the court. In light of the cases cited, the silence of the legislative history, "*and the context of this case*"[72] [emphasis added], the court agreed that the Administrator had authority to treat *certain* deferrals as revisions rather than postponements. In an addendum to the decision filed when plaintiff's motion to alter or amend judgment was denied, the court again spoke of the circumstances of the case. After considering the Fifth Circuit's *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*[73] decision for the first time, the court decided that, "[i]n light of the fact that the District of Columbia Circuit has not yet spoken on the controlling question of law which is open to substantial dispute, and in light of the *severe consequences* of an injunction herein . . ."[74] [emphasis added], the motion would be denied.

The emphasized words in the conclusions of both the main opinion and the addendum above emphasize the important role that the

consequences of an injunction played in the court's decision. The court approved the use of revisions as a means for granting deferrals under *certain* circumstances. The facts of the case were held to be such appropriate circumstances. Since no other circumstances under which deferral by revision might be permissible were considered, the holding of the case must be limited to its facts.

On those facts, it seems that §1857c-5(f) could have provided appropriate relief without resort to a revision. A delay of less than one year was requested and it was alleged that continued operation was essential to public health and welfare. The only remaining requirements of §1857c-5(f) left to be met were good faith efforts to comply, interim measures to reduce the impact of the pollution source on health, and the absence of available technology or alternate methods of control. Arguably, the *Metropolitan Washington* case presented a fact situation tailor-made for a §1857c-5(f) postponement.

The decision emphasizes that lack of an alternative to postponement may have harsh consequences on public health. By the time the court's decision was reached, a §1857c-5(f) postponement was unavailable because the time for application for a postponement had passed. The decision seems to be precedent for the proposition that deferral by revision is available when a postponement is unavailable only because the time for application for a postponement has passed. The court did not specifically so hold but support for such a proposition can be found in the emphasis on circumstances and the necessary limitation of the holding of the case to its facts. The court's opinion notes that certain deferrals may be treated as revisions. Such a statement seems initially to indicate an adoption of the EPA interpretation. Only after careful reading of the decision and the reasons the court gave for its holding does the proposition of law for which this case stands become clear. The court did *not* go so far as to adopt the EPA interpretation. However, the failure of the court to clearly state exactly what it was deciding only increases the confusion surrounding the revision-postponement provisions in the Amendments.

The facts of the case also point out a potential problem caused by allowing deferrals through the use of revisions. The deferral in *Metropolitan Washington* took effect in July 1973 and at the date of decision in February 1974 the EPA Administrator had still not approved it.[75] A similar fact pattern was presented in *Stauffer*, where the variance took effect in January and was not approved until May.[76] The EPA Administrator claimed in *Project on Clean Air*[77] that he could control improper deferrals since all deferrals were

to be treated as revisions and were subject to EPA approval.[78] The facts of *Metropolitan Washington* and *Stauffer* show that the EPA Administrator does not have the control he claimed to have. Two commentators have said that the source is subject to an enforcement action until the revision is approved[79] and *Stauffer* said that there could be a suit for damages, or injunctive relief should damages be denied.[80] Even so, allowing deferrals to go into effect prior to EPA approval of them seems to violate the spirit of the Amendments. The propriety of such a procedure is doubtful and should be scrutinized carefully.

The most recent case dealing with the revision-postponement distinction arose in the Ninth Circuit. *Natural Resources Defense Council v. Environmental Protection Agency*[81] involved a petition for review of EPA approval of those portions of the Arizona implementation plan permitting deferrals without resort to a §1857c-5(f) postponement. The petitioners argued that §1857c-5(f) should provide the only means of hardship relief while the respondent argued for adoption of the First Circuit interpretation.[82] The court accepted neither approach, and adopted the original EPA interpretation instead. Deferrals not threatening attainment or maintenance of national ambient air quality standards could be treated as revisions instead of as §1857c-5(f) postponements.[83]

The court based its decision on legislative history and Congressional intent. §111(f) of the Senate bill sent to the Conference Committee was discussed along with the Senate report concerning that provision.[84] The court felt that §111(f), and thus §1857c-5(f) as well, was intended to encompass only those modifications of an implementation plan which would inhibit attainment or maintenance of national ambient air quality standards in a region. With §1857c-5(f) limited to deferrals threatening attainment or maintenance of national standards, the court turned to consideration of deferrals that did not create such a threat. No legislative intent could be found to commit a state to its initial implementation plan without any flexibility. Furthermore, the wording "as expeditiously as *practicable*" in §1857c-5(a)(2)(A)(i) and the " . . . Act's exhortation to the states to promulgate implementation plans even stricter than that required to attain national ambient air standards . . ."[85] found in §1857d-1 indicated that such flexibility was to exist. The interpretation adopted was said to be a "necessary adjunct to the statutory scheme."[86]

The First Circuit interpretation[87] was rejected because there was no statutory basis for treating deferrals not threatening attainment or maintenance of national ambient air quality standards differ-

ently in the pre-attainment and post-attainment peroids. The court therefore concluded that deferrals should be treated the same in both time periods. The Fifth Circuit conception of the statutory wording as "unambiguous"[88] was rejected, thus creating the need to consult legislative history and purpose. §1857c-5(f) was conceded to be unambiguous by itself, but when it was juxtaposed against the "expeditiously as practicable" language of §1857c-5(a)(2)(A)(i) and the lack of a definition of "revisions", ambiguity arose.

The Ninth Circuit did avoid many of the shortcomings of previous cases. It discussed the precedents and explained the reasons for its departure from them. The reasoning was clear and the decision did not seem to create problems that would lead to future litigation. The court's reasoning, despite its clarity of explanation, is, however, subject to criticism.

It is not at all obvious that the statutory wording is so lacking in clarity that a court must resort to the legislative history. As pointed out above, a reading of the statute seems to clearly direct that all deferrals be treated as §1857c-5(f) postponements. Even assuming that the legislative history should be considered, the court's reading of §111(f) seems incorrect. As noted previously, that section spoke of relief for a region from deadlines for achieving national ambient standards. §1857c-5(f), on the other hand, speaks of relief for a source from any implementation plan requirement. Thus the legislative history does not speak on the subject of the original EPA interpretation. This considerably weakens the force of the court's arguments in support of the EPA interpretation, and greatly weakens the precedential value of the decision.

V. The First Circuit Interpretation

The First Circuit Court of Appeals was the first court directly confronted with the revision-postponement distinction. *Project on Clean Air*[89] involved a petition for review of the EPA Administrator's approval of the Rhode Island and Massachusetts implementation plans. These plans contained provisions allowing deferrals of compliance schedule requirements applicable to pollution sources without resort to §1857c-5(f). The petitioner argued that §1857c-5(f) should be the exclusive means of hardship relief for a pollution source. The EPA argued for acceptance of its interpretation of the Amendments.

The court adopted neither approach, holding that the implementation plans were improperly approved. In so doing, the court propounded a new interpretation of the Amendments. A pre-

attainment period and a post-attainment period were found in the statute, derived from §1857c-5(a)(2)(B) which speaks of attainment and maintenance of national ambient air quality standards. According to the court, the cut-off date was the "mandatory attainment date" for achieving national standards. Prior to that date, the EPA Administrator could allow states to grant variances (deferrals by revision) that did not interfere with achievement or maintenance of national standards. After that date, §1857c-5(f) was to be the only means of hardship relief for a source.

The existence of two time periods in the statute is clear. There is a time period before the deadline and a time period after it. But nowhere can support be found for giving a different role to §1857c-5(f) in each period. The statute does not provide for different treatments of revisions or deferrals depending on when they are applied for.[90] Likewise, nothing in the legislative history supports the distinction adopted by the court.[91] In fact, the two Congressional reports cited by the court to support the exclusive use of §1857c-5(f) in the post-attainment period[92] should apply with the same force to the pre-attainment period. Either the flexibility during the pre-attainment period should always exist or else the exclusivity of §1857c-5(f) during the post-attainment period should always exist. The court's only explanation for making the distinction was that it was a "necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period."[93] In partial support of this conclusion the court considered the §1857c-5(a)(2)(A) provision for reaching national primary ambient air quality standards as expeditiously as practicable. Admittedly, the standards were not to be achieved immediately. Nor was there any requirement that emissions limitations be met immediately. While these provisions allow a state to *adopt* an implementation plan providing for a gradual attainment of *ambient air quality standards*, they do not demonstrate an intention that applicability of *emissions limitations*, once set, could be deferred. §1857c-5(f) specifically restricts such deferrals but the court ignored this section in its consideration of the pre-attainment period.

The court quoted H.R. Rep. No. 91-1146 on the Congressional goal of expeditious imposition of emissions limitations and their effective enforcement. The Report's tone of urgency does not support a finding of flexibility. Neither does S. Rep. No. 91-1196, also cited by the court, to the effect that sources should meet the standard or close down.[94] In the Senate debates, Senator McIntyre observed that the time for flexibility had passed and action was required.[95] In short, the statutory scheme hardly seems to anticipate

"greater flexibility in the pre-attainment period."

The First Circuit also noted that if no flexibility were allowed, states would adopt more lenient compliance schedule deadlines to accommodate those sources unable to meet stricter deadlines. This may be true. While the statute may have been intended to force technology to catch up with standards,[96] the states will not be inclined to motivate technology to develop at a faster rate than the law requires unless some flexibility in granting deferrals is allowed. The court assumed that if flexibility were not provided, sources would pressure states to adopt the weakest possible compliance schedules. Although this assumption is plausible, the court's remedy did little to encourage sources to accede to stricter compliance schedules in exchange for a possibility of deferral if they were unable to meet an approaching deadline. Deferral is not automatic. The deferral may not threaten attainment or maintenance of national standards and the EPA Administrator must approve the deferral before it is permissible. Also, according to the court's decision, the deferral must end on or before the applicable attainment date. Even assuming that a source felt entitled to a deferral, there would still be administrative red tape, a risk that the deferral would not be granted or approved, and any deferral which was granted might be limited. Thus, even under the First Circuit's interpretation, sources could be expected to pressure states to adopt more lenient compliance schedules. While the court may have correctly foreseen the problem, the interpretation adopted seems unlikely to resolve it.

In discussing the pre-attainment period, the court ignored the clear wording of §1857c-5(f); in discussing the post-attainment period, it largely ignored the respondent's arguments. The latter section of the opinion seemed to be addressed to the implementation plans which had been approved. The court said that open-ended exemptions in the post-attainment period might interfere with maintenance of an ambient air quality standard, but the EPA contended that under 40 C.F.R. §51.32(f) it would only allow deferrals that did not threaten maintenance of such standards.[97] The court said that §1857c-5(f) would be meaningless if a less restrictive deferral mechanism existed side by side with it, but under 40 C.F.R. §51.32(f) the EPA could have invoked §1857c-5(f) any time attainment or maintenance of an ambient air quality standard was threatened.

After determining that §1857c-5(f) was to provide the exclusive form of hardship relief in the post-attainment period, the court

quickly dismissed the Administrator's arguments. It stated that the Administrator's arguments would effectively substitute a less rigorous procedure for the one Congress enacted, and if the EPA interpretation was the one intended, Congress would have said so. Ironically, the rest of the opinion was based upon the distinction between pre- and post-attainment time periods, as to which Congress was equally silent.

Since the court's arguments rejecting the EPA interpretation of §1857c-5(f) in the post-attainment period were not even directed at the merits of the EPA interpretation, they are not necessarily persuasive reasons for rejecting the EPA arguments. The court relied mainly on two quotations from Congressional reports[98] which may be directed against the EPA interpretation. However, only one of these quotations is at all indicative that §1857c-5(f) should be the exclusive means for hardship deferrals during the post-attainment time period. While H.R. Rep. No. 91-1146 supports exclusivity of §1857c-5(f), the material cited from S. Rep. No. 91-1196 does not even refer to emissions limitations, which is what §1857c-5(f) covers. The quoted portion of the Senate report comes from a paragraph speaking of ambient air quality standards, not emissions standards. Thus it cannot be considered to show Senate intent with respect to emissions standards.[99] Furthermore, the Senate hearings showed great concern for public health and welfare (and therefore attainment and maintenance of national primary and secondary standards) but did not discuss polluters whose short deferral of emissions limitations would not jeopardize health and welfare (or attainment and maintenance of national primary and secondary standards).[100]

Not only was the court's interpretation of the Amendments unsupported by its reasoning, but its failure to use uniform terminology made the meaning of the decision unclear. Despite citing the wording of §1857c-5(a)(2)(B) referring to attainment and maintenance of primary *and secondary* standards, the court's discussion and arguments only refer to *primary* standards. The remedy ordered by the court then speaks of "compliance dates for attainment of national primary and secondary standards."[101] This confusion makes it uncertain whether the court's interpretation of the Amendments refers only to primary standards, or to both primary and secondary standards. Was the "mandatory compliance date" the date for compliance with primary standards or was there a pre-attainment and post-attainment period for both primary and secondary standards? The EPA Administrator has interpreted the opinion to deal *only* with primary standards despite the wording of the remedy.[102]

The decision also is unclear as to the cut-off date ending the pre-attainment period and beginning the post-attainment period. Was this the State-set attainment date or the statutory "latest date for compliance?" The court at various times in the opinion alternatively referred to this date as the "mandatory attainment date,"[103] the "mandatory compliance date,"[104] and the "federal compliance dates for attainment of national primary and secondary standards."[105] Resolution of this question was particularly important in this case, since, at the time of the decision, Rhode Island had set an attainment date which was earlier than the three year statutory limit.[106]

The court also failed to comment on the effect of a two-year §1857c-5(e) extension for attainment of primary standards. Such an extension might be interpreted to have no effect on the expiration of the pre-attainment period; on the other hand, it could be understood to extend the pre-attainment period despite passage of over three years (the statutory limit for achieving national primary ambient air quality standards). The court should have addressed this issue since Massachusetts had received a two-year extension for some pollutants under §1857c-5(e).[107]

Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency,[108] decided by the Eighth Circuit, added nothing to the resolution of the problem. In that case the court discussed and quoted from the First Circuit decision and then adopted the remedy word for word. The only statement contributed by the Eighth Circuit was, "we think it proper that provisions of the Iowa plan be in specific accord with federal statutory requirements. Accordingly, we adopt the remedy outlined in the First Circuit opinion . . ."[109] Apparently the court felt that because the arguments advanced by the petitioner and respondent were exactly the same in the two cases, it could follow the First Circuit decision without addressing the arguments presented or redressing the ambiguities inherent in the First Circuit's decision.

The Eighth Circuit did face a problem not found in the First Circuit case. At the time of the decision, some regions in Iowa had met the national primary standards for some pollutants but had not yet met the national secondary standards for those pollutants.[110] When a primary standard has been attained prior to the "mandatory attainment date" does the pre-attainment period end or continue? However, the court did not deal with this issue.

In *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*,[111] decided by the Second Circuit, the facts and arguments were the same as those in the First and

Eighth Circuit cases. As in the Eighth Circuit, the case was disposed of quickly. "We agree with the holdings in the First and Eighth Circuits. . . . We do not agree with the contrary Fifth Circuit holding on this issue."[112] No explanation of the reasons for this choice between Circuits was given even though the addendum to the *Metropolitan Washington* decision, filed the day before, had found the question open to substantial dispute.

The Second Circuit's decision only spoke of primary standards. The First Circuit opinion at least appeared to refer to primary and secondary standards, as noted above. The Second Circuit also stated that the mandatory deadline ending the pre-attainment period was May 31, 1975. The court did not explain why this was so but a look at the implementation plan attainment dates for ambient air quality standards in New York provides some possible answers.[113] Either one of two dates could arguably have been chosen as the deadline for attaining the primary standards: May 31, 1975 (three years from the implementation plan's approval); or May 31, 1977 (incorporating a two year §1857c-5(e) extension). Thus the court must have concluded that the mandatory attainment date is unaffected by the granting of a §1857c-5(e) extension. It is impossible to tell whether the mandatory attainment date referred to by the court was the one set by the implementation plan or the statutory three year limit, since in this case they coincided.

Adoption of the First Circuit interpretation will not bring certainty into this area of the law. Several issues remain to be resolved in the courts. These issues include (1) What is the date which ends the pre-attainment period? This issue in turn raises two further questions: (a) does the pre-attainment period refer only to the interval before primary standards are attained, or does it include the entire period prior to attainment of both primary and secondary standards? (b) what is the "mandatory compliance date?" Is it the implementation plan date, the federal statutory latest date, or the actual date on which standards are attained if this comes first? (2) What is the effect of a §1857c-5(e) extension on the time period in which revisions (deferrals) may be granted? (3) Is a state revision (deferral) legally effective before it is approved by the EPA Administrator? None of these issues were identified by the courts but they were present in the decisions which adopted the First Circuit interpretation.

Indeed, the only appealing aspect of the First Circuit interpretation is that it has been adopted by three Circuits. This weight of

authority should not be misleading. The interpretation adopted was not supported by the court's reasoning and many questions were left unanswered by the decision. Having failed to resolve (or even acknowledge) these questions, the three Circuits may well be haunted by their reappearance in future suits. Furthermore, the Second and Eighth Circuits offered no explanation for their adoption of the First Circuit interpretation. It is not unfair to say that no adequate reasons have ever been offered by any court for its adoption.

VI. The Fifth Circuit Interpretation

The Fifth Circuit took a different approach in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*[114] when faced with a challenge to approval of the Georgia implementation plan. Even though it faced the same facts and arguments that the First, Second and Eighth Circuits had faced, the court held that §1857c-5(f) provided the only method of deferring the applicability of any requirement to a source.

The Fifth Circuit began its opinion by pointing out that nothing in §1857c-5(f) limited that section to deferrals threatening attainment of a national ambient air quality standard. Relying on the words "any source" and "any requirement" in §1857c-5(f), which the court characterized as "unambiguous," it stated that §1857c-5(f) postponements were intended to be changes in application of a requirement to a particular party. §1857c-5(a)(3) revisions were meant to be changes in generally applicable requirements. Revisions under §1857c-5(a)(2)(H) may change a requirement applicable to a particular party by making the requirement more stringent. It would be ridiculous to try to make such a change under the section for postponements. Therefore, revisions are not limited to changes in generally applicable requirements. Nevertheless, the interpretation adopted by the court is the one implied by the statutory wording as was pointed out in the beginning of the discussion of the original EPA interpretation (Section III *supra*).

Finding support for its interpretation of the Amendments in the statutory scheme, the court observed that the statute forces technology to catch up with promulgated ambient air quality standards. §1857c-5(f) was the mechanism used to ensure that ambitious commitments made at the planning stage could not be easily abandoned as deadlines approached. According to the Fifth Circuit, Congress wished departures from earlier commitments to be unusual and difficult to obtain. Using any other deferral procedure would not permit §1857c-5(f) to fulfill its Congressionally intended role.

As pointed out in the discussion of the EPA interpretation, legislative history and purpose are not dispositive of this problem; at most, the history shows compatibility of the interpretation with Congressional goals. During the Senate debates Senator Montoya observed that the postponement provision recognizes that performance may be impossible, but the safeguards imposed upon the postponement-granting process ensure that it will be used sparingly and only as necessary to provide an incentive for maximum effort to seek clean air.[115] This statement was not cited by the court but it supports the court's conception of the statutory scheme. However, as noted previously, the major concern of Congress was in protecting public health and welfare. Such a concern is perfectly compatible with deferrals which do not interfere with attainment or maintenance of national ambient air quality standards which have been set up to protect health and welfare.[116] Thus both the EPA and Fifth Circuit interpretations may be said to be compatible with one or another Congressional goal.

Disagreeing with the First Circuit's finding of pre-attainment period flexibility, the Fifth Circuit observed that nothing in the statute provided support for the other court's conclusion. The Fifth Circuit did not discuss the argument that exclusive use of §1857c-5(f) as hardship relief for sources would bring about lenient compliance schedules, because the Fifth Circuit's decision was based primarily on what it considered to be clear statutory wording.

With the exception of that portion of the opinion which labelled all changes in requirements applicable to a particular party as postponements, the Fifth Circuit's opinion is well reasoned and its conclusions adequately supported. No issues are left over to be decided in later cases as was true in those cases which adopted the First Circuit's interpretation.

One commentator, after a cursory review of the First, Eighth and Fifth Circuit decisions, characterized the Fifth Circuit opinion as being more in line with the intent of Congress.[117] This commentator presented only one major argument in support of his contention. He argued that emissions from multiple sources are practically untraceable and it is virtually impossible to relate emissions from a single source to air quality in a region with any certainty. Furthermore, few sources individually endanger public health. It is the multiplied effect of combined emissions from many sources that creates a polluted atmosphere. Assuming that Congress was well aware of the truth of these statements, he concluded that §1857c-5(f) was intended to be the exclusive method of postponing any requirement of a state implementation plan. This argument is well taken and

provides support for the Fifth Circuit position although it does not seem to be an adequate enough basis for an authoritative position.

VII. Recent EPA Action

Believing that the Fifth Circuit's decision was wrong, the EPA asked the Supreme Court to review the pertinent part of that decision. On June 10, 1974 the Supreme Court, with Justice Douglas dissenting, granted a stay of the Fifth Circuit's order relating to that section of its opinion pending disposition of the petition for certiorari.[118] On October 15, 1974 certiorari was granted.[119] Hopefully the Supreme Court will consider all of the issues and clarify the confusing aspects of the prior decisions.[120]

On September 26, 1974 the EPA amended its regulations and proposed new provisions for all state implementation plans in order to be consistent with the decisions of the First, Second and Eighth Circuits.[121] The new regulations[122] allow deferral of a compliance schedule deadline, but not beyond the applicable attainment date specified in the implementation plan. When there are different primary and secondary ambient air quality attainment dates, the applicable date is determined on the basis of whether the implementation plan requirement being deferred is necessary for attainment of primary or secondary ambient air quality standards. Where there has been a §1857c-5(e) extension beyond July 31, 1975, compliance may be deferred up to the end of the extension only for those sources for which the extension was granted. The proposed provisions for all state implementation plans are in accordance with the revised regulations and would provide all state implementation plans with uniform deferral provisions.[123]

The text accompanying the amended regulations helps to resolve some of the issues left untouched by the Circuit court decisions. The text notes that the First, Second and Eighth Circuits seemed to discuss only primary standards but that the new regulations apply to both primary and secondary standards.[124] The text also clarifies the applicable attainment date and the effect of a §1857c-5(e) extension.

The new EPA regulations are not in total accord with the First, Second and Eighth Circuit decisions. The new regulations[125] permit deferrals to sources granted §1857c-5(e) extensions up until the extended date for attainment of primary standards. However, as pointed out previously, the Second Circuit called May 31, 1975 the mandatory deadline, notwithstanding §1857c-5(e) extensions effective until May 31, 1977 for certain primary standards.[126]

The EPA text also states that the First, Second and Eighth Circuits *all* held that "source compliance dates could be deferred through . . . [revision] only *up to* the attainment date for meeting the *primary* ambient air quality standards" [emphasis added].[127] The new EPA regulations call the *implementation plan dates* the applicable ones and allow revisions until this date.

The First, Second and Eighth Circuit decisions were not completely uniform. Although the Second Circuit discussion referred only to primary standards, the First Circuit remedy spoke of the "federal compliance dates for attainment of national primary and secondary standards."[128] However, the First Circuit opinion for the most part discussed only primary ambient air quality standards. Therefore it is unclear whether all of the decisions did indeed only refer to primary ambient air quality standard dates as the EPA language quoted above suggests.

Another discrepancy between the three Circuits cited by the EPA was with respect to the date ending the pre-attainment period. This date was variously described as the "mandatory deadline,"[129] the "mandatory compliance date,"[130] the "mandatory attainment date,"[131] and the "federal compliance dates for attainment of national primary and secondary standards."[132] This final description seems to refer to the statutory latest compliance dates but the EPA Administrator has chosen to use the implementation plan attainment dates. Although not completely in accord with the descriptions used in the cases, the implementation plan dates do not substitute an entirely different standard because the implementation plan dates would probably be used as evidence of the reasonable time necessary to attain secondary standards under the Amendments, and the EPA allows revision of primary standard attainment dates set prior to the expiration of the statutory maximum of three years for attainment of national primary standards.[133]

The three cases cited did *not* allow deferrals up to the attainment dates. The First and Second Circuits held that deferrals "not inconsistent with national objectives" would be allowed[134] and the Eighth Circuit followed the First Circuit in all respects. By this language the First Circuit meant that a deferral could not "threaten attainment of full compliance within the mandatory time period."[135] Thus, the EPA statement concerning the holdings of these cases is incorrect. These decisions did not allow deferrals up to the attainment dates. The new EPA regulations, however, are based on this misreading of the decision. The new regulations allow state revision without resort to §1857c-5(f) when "compliance is not deferred beyond the applicable attainment date." This substitutes an entirely different and weaker standard for the one adopted in the decisions.

Under the new EPA regulations deferrals can be allowed which interfere with attainment of an ambient air quality standard as long as the deferral ends on or before the applicable attainment date. Not only do these new regulations substitute a different standard, they also seem to emasculate §1857c-5(f). Implementation plans must provide for attainment and maintenance of national ambient air quality standards under §1857c-5(a)(2)(B). Presumably, once attainment is achieved no new emission limitation deadlines must be met to ensure maintenance. Thus there may be few if any emissions deadlines in the post-attainment period. Under the new EPA regulations, §1857c-5(f) cannot apply prior to the arrival of a national ambient air quality deadline but most of the emission limitation deadlines to which §1857c-5(f) applies, if not all of them, are in the pre-attainment period. Therefore §1857c-5(f) is only of use if a deferral is to extend into, or begin during, the post-attainment period. This problem did not arise in the First Circuit decision since deferral by revision was not allowed if attainment or maintenance of national standards was threatened.

These new EPA regulations also run afoul of the clear Congressional intention that national ambient air quality standards be attained within the time limits provided in the statute unless specific statutory exemptions are met.[136] The new regulations require that deferrals end on or before the applicable attainment date but do not require that national ambient air quality standards be attained within the statutory time limit. Apparently even the EPA has fallen prey to the confusion surrounding the Amendments.

VIII. Impact of the Three Interpretations

No court has carefully considered the differing effects of the three different interpretations of the Amendments. Vague statements have been made about harshness on sources or adoption of more lenient compliance schedules. A well reasoned choice between the interpretations should involve a more thorough consideration of the consequences which the various interpretations would have on sources, air quality, and the EPA administrative structure.

Under the Fifth Circuit interpretation of the Amendments, a pollution source has three alternatives as its state implementation plan compliance deadline approaches. It can either come into compliance with the implementation plan, meet the requirements for a §1857c-5(f) postponement, or close down. It might be expected that sources will exert pressure when compliance schedules are drawn up to make them as lenient as possible so as to avoid, insofar as possible, the harsh effect of this interpretation. The result will probably

be that compliance schedules will be sufficient to satisfy the federal law but not much better. Compliance schedules and national ambient air quality standards will be met on time. The EPA administrative structure will remain complex and constantly busy but will not be bothered by reviewing state-granted deferrals by revision.

Under the First Circuit interpretation of the Amendments, a pollution source has four possible alternatives as its compliance schedule deadline approaches. In addition to those permitted by the Fifth Circuit, it may request a deferral by revision, if the applicable attainment date has not been reached and if attainment and maintenance of national ambient air quality standards will not be threatened. Such a deferral would expire not later than the attainment date. Sources can still be expected to exert pressure when compliance schedules are drawn up, since receiving an EPA approved revision will be time-consuming, will not be assured, and the original implementation plan requirement will *still* have to be met on or before the original attainment date. Moreover, revisions can be requested only when: (1) a compliance schedule requirement must be met before the applicable attainment date for national ambient air quality standards, (2) the original compliance schedule requirement will be met on or before the applicable attainment date for national standards, and (3) the revision (deferral) will not affect attainment or maintenance of a national standard. Since, to a polluter, the advantage of this supposedly more flexible procedure is limited, compliance schedules will probably not be any more ambitious than under the Fifth Circuit interpretation. Thus the ambient air quality which the compliance schedules are designed to achieve will probably be very similar in both Circuits. Compliance schedules will not be met on time in their entirety but national ambient air quality standards will be met within the time provided by the Amendments, albeit somewhat slower in the First, Second and Eighth Circuits because some deferrals will be allowed. The EPA administrative structure will be made more complex and kept busier under this interpretation. A method of dealing with compliance schedule revisions (deferrals) must be provided and all of the revision requests must be considered. This would not be true under the Fifth Circuit interpretation.

Under the original EPA interpretation of the Amendments, a pollution source still has only four possible alternatives as its compliance schedule deadline approaches. However, these alternatives are less restricted than under the First Circuit interpretation, because the source may request an open-ended revision (deferral) if such revision will not affect attainment or maintenance of national am-

bient air quality standards. Although receiving an EPA approved revision will still be time consuming and not guaranteed, from a source's point of view this is the most advantageous interpretation. A revision can be granted whenever attainment and maintenance of national ambient air quality standards will not be affected. Although this more liberal deferral policy is advantageous to sources, it is unclear whether the possibility of qualifying for a future deferral will prompt sources to accept more ambitious compliance schedules than they would under the Fifth and First Circuit interpretations. National standards will be met at about the same time as under the First Circuit interpretation, but the ambient air quality that the compliance schedule was designed to achieve may not be attained until much later. Since there would be many more revisions requests under this interpretation, the EPA administrative structure would be heavily burdened.

All three interpretations will ensure *achievement* of national ambient air quality standards within the time period provided by the Amendments. It is unclear, however, what the effect of the interpretation adopted will be on the *level* of ambient air quality achieved. This will depend on the strictness or leniency of the compliance schedules. However, it is difficult to predict the effect that adoption of one of the three interpretations will have on this variable. The Fifth Circuit interpretation is most demanding on sources. Presumably if that interpretation is adopted sources will attempt to pressure the states to set lenient compliance schedules. It cannot be said with any certainty that the advantages of the First Circuit and original EPA interpretations to sources will induce them to accept stricter compliance schedules. Even if stricter compliance schedules are adopted, the granting of deferrals may result in slower achievement of national standards or a lower air quality level than under the Fifth Circuit interpretation. At best, the impact the interpretation adopted will have on ambient air quality is speculative.

IX. Conclusion

The complex nature of the Amendments' provisions demands that any attempt to explain the revision - postponement distinction in the Amendments address *all* of the arguments and carefully explain the reasons for adopting one interpretation and rejecting the others. Special care should be used to adopt a uniform terminology and explain exactly what is being decided. No court has undertaken such an analysis. Commentators have not dealt extensively with this issue and those who did consider it did not have the benefit of all of the decisions and arguments considered here. Hopefully the

Supreme Court's decision will add clarity and precision to the debate as well as uniformity among the Circuits.

FOOTNOTES

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[1] 42 U.S.C. §1857 *et. seq.* (1970). Hereinafter called the "Amendments." All statutory references are to these Amendments unless specifically stated otherwise.

[2] Luneburg & Roselle, *Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. IND. & COM. L. REV. 667, at 667 (1974).

[3] P.L. No. 93-319 (June 22, 1974).

[4] 40 C.F.R. §51.32(f) (1973).

[5] *See*, for example, the statutes under consideration in Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875 (1st Cir. 1973).

[6] Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875 (1st Cir. 1973); Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 494 F.2d 519 (2d Cir. 1974); Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390 (5th Cir. 1974); Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 483 F.2d 690 (8th Cir. 1973); Natural Resources Defense Council v. Environmental Protection Agency, 7 E.R.C. 1181 (9th Cir. 1974).

[7] 478 F.2d 875 (1st Cir. 1973).

[8] 489 F.2d 390 (5th Cir. 1974).

[9] Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 494 F.2d 519 (2d Cir. 1974).

[10] Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 483 F.2d 690 (8th Cir. 1973).

[11] 7 E.R.C. 1181 (9th Cir. 1974).

[12] Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F.Supp. 1089 (D.D.C. 1974); Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 367 F.Supp. 1040 (D.Del. 1973).

[13] Train v. Natural Resources Defense Council, Inc., 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974). Oral argument was held January 15, 1975. 43 U.S.L.W. 3402 (U.S. Jan. 15, 1975).

[14] 39 Fed. Reg. 34533 (1974).

[15] *See*, for example, the New York attainment dates, 40 C.F.R. §52.1682 (1973).

[16] Under 42 U.S.C. §1857c-4(b) (1970).

[17] 42 U.S.C. §1857c-5(a)(2)(A) (1970). To date the original national ambient air quality standards have not been revised. They can be found in 40 C.F.R. §§50.4 - 50.11 (1973).

[18] *See*, for example, the discussion in Section V, *infra*, concerning the cut-off date ending the pre-attainment period as defined by the First Circuit in Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875 (1st Cir. 1973).

[19] *Id.*

[20] *See* the discussion in Section V, *infra*, concerning the applicability of the First, Second and Eighth Circuit holdings to primary and/or secondary ambient air quality standards.

[21] *See* the discussion in Section V, *infra*, concerning the treatment given the respondent's arguments by the First Circuit in Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875 (1st Cir. 1973).

[22] 42 U.S.C. §1857c-2(a) (1970).

[23] 42 U.S.C. §1857c-4 (1970).

[24] 42 U.S.C. §1857d-1 (1970).

[25] 42 U.S.C. §1857c-5(a)(1) (1970).

[26] 42 U.S.C. §1857c-5(a) (1970).

[27] Ambient air is defined as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. §50.1(e) (1973).

[28] 42 U.S.C. §1857c-4(b)(1) (1970).

[29] 42 U.S.C. §1857c-4(b)(2) (1970). Effects on public welfare are defined as including but not restricted to "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U.S.C. §1857h(h) (1970).

[30] 42 U.S.C. §1857c-3(a)(2) (1970).

[31] 42 U.S.C. §1857c-4(a)(1) (1970).

[32] 36 Fed. Reg. 8187 (1971). They can also be found in 40 C.F.R. §§50.4 - 50.11 (1973).

[33] 42 U.S.C. §1857c-5(a)(1) (1970).

[34] Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390, 396 (5th Cir. 1974).

[35] 42 U.S.C. §1857c-5(a)(2)(A)(i) (1970).

[36] 42 U.S.C. §1857c-5(a)(2)(A)(ii) (1970).

[37] 42 U.S.C. §1857c-5(a)(2) (1970).

[38] 37 Fed. Reg. 10842 (1972). Provisions of the implementation plans may be found in 40 C.F.R. §52 subparts B to DDD (1973).

[39] 42 U.S.C. §1857c-5(a)(2)(B) (1970) provides that emissions limitations and other means are to be used. H.R. REP. No. 91-1146, 91st Cong., 2d Sess. (1970) stated that expeditious imposition of specific emissions standards and their effective enforcement were primary goals of the Amendments. U.S. CODE CONG. & ADMIN. NEWS 5356, 5360 (1970). A commentator has stated that at the heart of the Amendments were emission controls. Luneburg & Roselle, *supra* n. 2, at 670.

[40] 42 U.S.C. §1857c-5(e) (1970).

[41] 40 C.F.R. §51 (1973).

[42] 40 C.F.R. §51.32(f) (1973) stated the relevant circumstances which, if present, would avoid resort to a postponement as provided by the Amendments. The June 19, 1973 amendment of §51.32(f) found in 38 Fed. Reg. 15958 (1973) did not affect the parts of the regulation relevant to the discussion here. Thus §51.32(f), even in its amended form, shows the original EPA interpretation with respect to the problem at issue in this article.

[43] 40 C.F.R. §§ 51.6 and 51.8 (1973).

[44] "Improve" is used here as meaning providing for faster compliance with national ambient air quality standards or achievement of stricter ambient air quality standards. Thus, improvement is used from the standpoint of the environment. "Weaken" is used as the opposite of "improve."

[45] The petitioners in all of the Circuit Court decisions, cited *supra* n. 6, had this interpretation in mind when they argued that §1857c-5(f) (the postponement provision) was the exclusive means of hardship relief for a source.

[46] 42 U.S.C. §1857c-5(d) (1970).

[47] This was essentially the plaintiff's argument in Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F.Supp. 1089 (D.D.C. 1974).

[48] The Fifth Circuit rejected the EPA interpretation in Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 489 F.2d 390 (5th Cir. 1974). *See* discussion *infra*.

[49] The effect of a permanent deferral is to set an emissions goal which permits greater emissions than the goal permanently deferred would have allowed. Allowing greater emissions on a permanent basis is not a true deferral or postponement, but is rather the substitution of a less stringent emissions limitation.

[50] Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. IND. & COM. L. REV. 637, 649-58 (1973).

[51] The national ambient air quality standards were to be set at levels that protected public health and welfare. 42 U.S.C. §1857c-4(b) (1970). The reports of both the House of Representatives and the Senate on the Amendments stated that the effects of air pollution on health and welfare were to be major concerns. H.R. REP. No. 91-1146, 91st Cong., 2d Sess. (1970) found in U.S. CODE CONG. & ADMIN. NEWS 5356, 5360 (1970); S. REP. No. 91-1196, 91st Cong., 2d Sess. 2 & 10 (1970). The Senate debates showed unanimous concern about the harmful effects of air pollution and a belief that something had to be done. 116 CONG. REC. 32900-32928 & 33073-33121 (1970). *See* in particular the statements of Senator Muskie, at 32901-2, and Senator Spong, at 32920. Other commentators have also noted the Congressional concern with public health and welfare. *See, Variance Procedures Under the Clean Air Act: The Need for Flexibility*, 15 WM. & MARY L. REV. 324, at 324 (1973); *1970 Clean Air Amendments: Use and Abuse of the State Implementation Plan*, 26 BAYLOR L. REV. 232, 242 (1974). Protection of public health and welfare can truly be said to be the goal of the 1970 Amendments.

[52] *See* 42 U.S.C. §1857c-5(f)(1) (1970).

[53] *1970 Clean Air Amendments: Use and Abuse of the State Implementation Plan*, 26 BAYLOR L. REV. 232, 236-7 (1974).

[54] The EPA brief submitted to the Supreme Court in Train v. Natural Resources Defense Council, Inc., *supra* n. 13, argued that the Fifth Circuit interpretation also created administrative problems since hearings would have to be held on all postponement requests. 5 BNA ENV. REP. 1392 (1975). The Natural Resources Defense Council position in oral argument was that allowing an alternative to deferral by postponement would create more administrative problems than exclusive use of §1857c-5(f) would. 5 BNA ENV. REP. 1431 (1975). This article adopts the latter argument.

[55] Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic*, 61 GEO. L.J. 153, 154-6 (1972).

[56] Luneburg & Roselle, *supra* n. 2, at 668.

[57] 61 GEO. L.J., *supra* n. 55, at 159.

[58] S. 4358 found in S. REP. No. 91-1196, 91st Cong., 2d Sess. 89-90 (1970).

[59] S. REP. No. 91-1196, 91st Cong., 2d Sess. 14-15 (1970).

[60] 478 F.2d 875 (1st Cir. 1973). *See* Section V, *infra*.

[61] *Variance Procedures Under the Clean Air Act: The Need for Flexibility*, 15 WM. & MARY L. REV. 324 (1973).

[62] *See* discussion in Section IV, *infra*.

[63] 367 F.Supp. 1040 (D.Del. 1973). Decided Dec. 12, 1973.

[64] 478 F.2d 875 (1st Cir. 1973).

[65] *See* Section V, *infra*.

[66] Bolbach, *The Courts & The Clean Air Act*, Monograph #19 BNA ENV. REP. 20 (1974).

[67] 373 F.Supp. 1089 (D.D.C. 1974). Decided Feb. 20, 1974, motion to alter or amend judgment denied March 12, 1974.

[68] Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 367 F.Supp. 1040 (D.Del. 1973).

[69] The plaintiff did not cite the Fifth Circuit decision holding that §1857c-5(f) was to be the exclusive means of deferral (see Section VI) but the court did refer to this decision when it denied the plaintiff's motion to alter or amend judgment.

[70] The statutory wording referred to was that of §1857c-5(f) (the postponement provision) which speaks of "any source" and "any requirement." The policy consideration referred to was that temporary relaxation of an implementation plan is not the best way to ensure the adoption of meaningful plans and the ultimate achievement of goals.

[71] *See* discussion of these decisions in Section V, *infra*.

[72] Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F.Supp. 1089, 1094 (D.D.C. 1974).

[73] 489 F.2d 390 (5th Cir. 1974).

[74] Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F.Supp. 1089, 1096 (D.D.C. 1974).

[75] *Id.* at 1094 n. 22.

[76] Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 367 F.Supp. 1040, 1042-3 (D.Del. 1973).

[77] 478 F.2d 875 (1st Cir. 1973).

[78] *Id.* at 886.

[79] 15 WM. & MARY L. REV., *supra* n. 61, at 329-30 & 334; Luneburg, *supra* n. 50, at 657-58.

[80] Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 367 F.Supp. 1040, 1047 (D.Del. 1973).

[81] 7 E.R.C. 1181 (9th Cir. 1974). Decided November 11, 1974.

[82] The case was decided after the EPA amended its regulations in order to be consistent with the First, Second and Eighth Circuit decisions. A discussion of the new regulations can be found in Section VII, *infra*. The First Circuit interpretation is discussed in Section V, *infra*.

[83] This was not the only important holding of the case. The court held that Natural Resources Defense Council had no standing to sue (the presence of other parties who did have standing prevented the suit from ending with this holding). The decision as to standing may have far reaching effects on future environmental litigation. For its effects on the subject of this article *see* n. 120, *infra*.

[84] The argument was the same as that used by Luneburg in his support of the original EPA interpretation. *See* text accompanying nn. 58 & 59, *supra*.

[85] Natural Resources Defense Council v. Environmental Protection Agency, 7 E.R.C. 1181, 1186 (9th Cir. 1974).

[86] *Id.* at 1187 n. 16.

[87] Discussed in Section V, *infra*.

[88] The Fifth Circuit interpretation is discussed in Section VI, *infra*.

[89] 478 F.2d 875 (1st Cir. 1973). Decided May 2, 1973.

[90] 15 WM. & MARY L. REV., *supra* n. 61, at 331; Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F.Supp. 1089, 1094 n. 20 (D.D.C. 1974); Natural Resources Defense Council v. Environmental Protection Agency, 7 E.R.C. 1181, 1184.

[91] 15 WM. & MARY L. REV., *supra* n. 61 at 331.

[92] The court cited H.R. REP. No. 91-1146, 91st Cong., 2d Sess. (1970) stating that expeditious imposition of specific emissions standards and their effective enforcement was a primary goal of the Amendments (Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875, 885 (1st Cir. 1973)) and S. REP. No. 91-1196, 91st Cong., 2d Sess. (1970) stating that sources should meet the standard or close down (Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875, 886 (1st Cir. 1973)).

[93] Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875, 887 (1st Cir. 1973).

[94] *See, supra* n. 92.

[95] 116 CONG. REC. 33118 (1970).

[96] *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 12 B.C. IND. & COM. L. REV. 571, 581 (1971); also in 1 ENV. AFF. 384, 391 (1971).

[97] Natural Resources Defense Council v. Environmental Protection Agency, 7 E.R.C. 1181, 1187 (9th Cir. 1974) disagreed with Project on Clean Air for the same reason.

[98] *See, supra* n. 92.

[99] This argument comes from 15 WM. & MARY L. REV., *supra* n. 61, at 333.

[100] 116 CONG. REC. 32900-32928 and 33073-33121 (1970). *See also*, n. 51 *supra*.

[101] Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875, 888 (1st Cir. 1973).

[102] 39 Fed. Reg. 34533 (1974).

[103] Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875, 886 (1st Cir. 1973).

[104] *Id.*

[105] *Id.* at 888.

[106] *See* 38 Fed. Reg. 16351 (1973).

[107] *See* 40 C.F.R. §52.1127 (1973).

[108] 483 F.2d 690 (8th Cir. 1973). Decided July 27, 1973.

[109] *Id.* at 694.

[110] 40 C.F.R. §52.827 (1973).

[111] 494 F.2d 519 (2d Cir. 1974). Decided March 13, 1974.

[112] *Id.* at 523. The Fifth Circuit interpretation is discussed in Section VI, *infra*.

[113] Found in 40 C.F.R. §52 subpart HH (1973).

[114] 489 F.2d 390 (5th Cir. 1974). Decided Feb. 8, 1974.

[115] 116 CONG. REC. 33117 (1970).

[116] *See* Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 367 F.Supp. 1040 (D.Del. 1973) for an example of a deferral not interfering with attainment or maintenance of national ambient air quality standards.

[117] 26 BAYLOR L. REV., *supra* n. 53, at 236 and discussion at 235-238.

[118] Train v. Natural Resources Defense Council, ____ U.S. ____, 94 S.Ct. 3065 (1974).

[119] Train v. Natural Resources Defense Council, Inc., 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974).

[120] Oral argument was held January 15, 1975. Train v. Natural Resources Defense Council, Inc., 43 U.S.L.W. 3402 (U.S. Jan. 15, 1975). Some of the questions addressed to counsel were related to the standing of the Natural Resources Defense Council to challenge EPA approval of the Georgia implementation plan. This suggests that the Supreme Court may avoid clarifying the statute by finding a lack of standing as did Natural Resources Defense Council v. Environmental Protection Agency, 7 E.R.C. 1181 (9th Cir. 1974).

[121] 39 Fed. Reg. 34533 (1974) and 39 Fed. Reg. 34572 (1974).

[122] 39 Fed. Reg. 34535 (1974).

[123] 39 Fed. Reg. 34572 (1974).

[124] 39 Fed. Reg. 34533 (1974).

[125] 40 C.F.R. §51.32(f) as promulgated in 39 Fed. Reg. 34535 (1974).

[126] *See* n. 113, *supra*, and accompanying text.

[127] 39 Fed. Reg. 34533 (1974).

[128] Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875, 888 (1st Cir. 1973).

[129] Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 494 F.2d 519, 523 (2d Cir. 1974).

[130] Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875, 886 (1st Cir. 1973).

[131] *Id.*

[132] *Id.* at 888, and quoted by Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 483 F.2d 690, 694 (8th Cir. 1973).

[133] For an example of revision of an implementation plan attainment date *see*, Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 367 F.Supp. 1040, 1043 (D.Del. 1973).

[134] Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875, 887 (1st Cir. 1973); Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 494 F.2d 519, 523 (2d Cir. 1974).

[135] Natural Resources Defense Council, Inc., Project on Clean Air v. Environmental Protection Agency, 478 F.2d 875, 887 (1st Cir. 1973).

[136] *See* the inclusion in §1857c-5(a)(2)(A) of time limits for the achievement of air quality standards necessary to protect public health and welfare.